

A Tale of Three Women: A Survey of the Rights and Responsibilities of Unmarried Women Who Conceive by Alternative Insemination and a Model for Legislative Reform

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Courts in a number of jurisdictions have recently confronted questions of legal parentage concerning children conceived by alternative insemination. Typically, the biological mother is contesting the right of either the sperm donor or a non-biological co-parent to custody or visitation. This Note surveys the current state of the law and demonstrates a lack of protection for the rights of unmarried biological mothers and their co-parents. This Note then proposes a new paradigm for establishing the parties' rights and obligations, one that reflects the parties' pre-insemination, mutual intent regarding parenting responsibilities and encourages legal acknowledgement of and protection for the families people are creating with the help of AI.

I. INTRODUCTION

"The law, wherein, as in a magic mirror, we see reflected, not only our own lives, but the lives of all men that have been!"

Oliver Wendell Holmes¹

This is a legal parable of three women, each of whom decides to start a family by Alternative Insemination² ("AI"). The first woman is married, but

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¹ *The Law*, in SPEECHES 17 (1913).

² This Note deliberately uses the term "alternative insemination" instead of "artificial insemination" for two reasons. First, "[a]rtificial insemination [is not] artificial from the point of view of reproduction" HAYDEN CURRY & DENIS CLIFFORD, A LEGAL GUIDE FOR LESBIAN AND GAY COUPLES 7:9 (Robin Leonard ed., 5th ed., 1990). In addition, "alternative" has a more positive connotation than "artificial." "Artificial" as used in conjunction with "insemination" is the "introduction of semen into the uterus or oviduct by other than natural means." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 106 (1983) (emphasis added). In contrast, "alternative" means "offering or expressing a choice." *Id.* at 78. As used in this Note, "alternative insemination" means the introduction of semen into a woman's vagina, cervical canal, or uterus through the use of instru-

because of infertility, she must use AI to conceive. She and her husband intend to have the child and raise it as their own. The second woman also wants a family, but because she is unmarried, she chooses to use AI to start her family. She might intend to parent alone, or co-parent with another. The third woman is the lesbian partner of an unmarried woman who intends to conceive by AI so that the two may start a family. Once each woman has decided to use AI to conceive, she will begin to walk a common path on which she will face a number of choices, choices common to all AI users. On this path she will have to decide whether to self-inseminate at home or have a doctor perform the insemination and whether to choose a known or an anonymous sperm donor. The paths of the three women will take drastically different turns, however, if the sperm donor asserts paternity rights, because the outcome of such a suit is tied to the comparative social status of the parties.

This Note examines the current state of the law regarding AI and unmarried women and proposes a legislative framework within which the courts may adjudicate the rights of all the parties: the woman, her intended co-parent if she has one, the donor, and the child.³ Some may find it unacceptable from the start that unmarried heterosexual women and lesbians are using AI to have children. The purpose of this Note is not to question whether people should be creating families in this way, because they will continue to do so regardless of what others think; the purpose is to provide a framework within which to address the resulting legal disputes that will arise absent legislative reform. These non-traditional families, created through AI, are treated as families by their extended families and friends. The question is whether they will receive legal recognition of the established reality of their lives. "[U]nless we start to make family law connect with how people really live, the law is either largely irrelevant or merely ideology: [mere] statements of the kinds of human arrangements the lawmakers do and do not endorse."⁴ This Note attempts to expand the magic mirror of the law to enable it to reflect the lives and families of unmarried women who choose motherhood through AI.

Part II demonstrates the need for legislation governing the rights of unmarried women who use AI. A review of existing AI statutes and case law demonstrates that unmarried women who conceive through alternative insemination generally have been unable to protect their familial expectations against a donor's assertion of parental rights. Part III makes several recommendations for comprehensive legislative reform and establishes an overall legislative policy.⁵ Under the proposed legislation, the parties' mutually formed pre-insemination intent controls the determination of legal parent-

ments or other means as an alternative to sexual intercourse. This seemingly minor distinction provides the foundation for a paradigm that creates legal consequences for the woman using AI, the semen donor, the child, and the woman's partner, if she has one.

³ When this Note refers to "the parties" to AI, it treats the woman and her intended co-parent if she has one, as one party, and the donor as another party.

⁴ Martha Minow, *Redefining Families: Who's In and Who's Out?*, 62 U. COLO. L. REV. 269, 271 (1991).

⁵ This Note focuses on protecting the rights and familial expectations of each woman using AI because a survey of state cases has not uncovered any cases where an unmarried woman who conceived through AI alleged paternal obligations against the donor that were inconsistent with his expectations.

age.⁶ Part IV incorporates the recommendations in Part III in specific statutory provisions and demonstrates how each regulates the rights of the parties involved and resolves situations left ambiguous or untreated by existing law.

A Note To Medical Providers

Through modern reproductive technology you can help people make a miracle by assisting them in creating a child and a family. But because the law in this area lags behind medical science, the family that your technology promises may face years of instability created by conflicting claims of legal parentage and ultimately, that promised family may be reconfigured by the law. This gap between science and law can frustrate the familial expectations of an unmarried woman who conceives by AI, her intended co-parent, and the donor. Many states neglect to address the rights and responsibilities of the parties to AI when the donee is an unmarried woman.⁷ Of those that do, many require the woman to have a doctor perform the procedure as a condition of statutory protection or criminalize AI when it is not performed by authorized medical providers.⁸ By reporting and analyzing the legal risks of AI when used by an unmarried woman, this Note should help you to understand the possible implications of refusing to perform AI on an unmarried woman and how the law may limit the miracle that medical science offers her.

II. THE CASE FOR COMPREHENSIVE LEGISLATIVE REFORM

There is a compelling need for legislation governing the rights of all the parties to AI, particularly when the mother is unmarried. Statistics demonstrate that women are capitalizing on the availability of AI.⁹ In addition, recent court cases document the need for legislation to govern the rights and obligations of all of the parties when (1) the donee is unmarried and the donor is known; (2) the donee is unmarried and the donor is unknown; and (3)

⁶ The arguments in this Note may also apply to surrogacy arrangements. In fact, in May, 1993, to resolve a dispute between biological parents and a surrogate over legal parentage, the California Supreme Court held that the parties' intent was the controlling factor in deciding the case. *Johnson v. Calvert*, 851 P.2d 776, 782 (Cal.), cert. denied, 114 S. Ct. 206 (1993). This Note does not attempt to address surrogacy, however, because it is fundamentally different from AI in at least three ways. First, the AI donor donates genetic material only. A "surrogate mother" donates not only her genetic material, but the use of her body as well. BLACK'S LAW DICTIONARY 1445 (6th ed. 1990) (defining "surrogate mother"). The surrogate may also be a "gestational surrogate," contributing no genetic material to the child, but gestating a zygote created from the egg and sperm of others. See 1993 FLA. LAWS ch. 237. Second, the AI donor can, and often does, donate anonymously. This is not the case with surrogacy. Finally, the sperm that the AI donor surrenders to the donee is not comparable to the surrogate mother's surrender of an infant.

⁷ See *infra* note 29 and accompanying text.

⁸ ALA. CODE § 26-17-21 (1992); ALASKA STAT. § 25.20.045 (1991); ARK. CODE ANN. § 9-10-202 (Michie 1993); CAL. CIV. CODE § 7005 (West 1983); COLO. REV. STAT. ANN. § 19-4-106 (West 1986 & Supp. 1993); IDAHO CODE § 39-5402 (1993); ILL. ANN. STAT. ch. 750, para. 40 (Smith-Hurd 1993); MINN. STAT. ANN. § 257.56 (West 1992); MO. ANN. STAT. § 193.085 (Vernon Supp. 1993); MONT. CODE ANN. § 40-6-106 (1993); NEV. REV. STAT. § 126.061 (1991); N.J. STAT. ANN. § 9:17-44 (West 1993); N.M. STAT. ANN. § 40-11-6 (Michie 1989); N.Y. DOM. REL. LAW § 73 (Consol. 1979); OHIO REV. CODE ANN. § 3111.32 (Anderson 1989); OR. REV. STAT. § 109.239 (1991); WASH. REV. CODE ANN. § 26.26.050 (West 1986); WIS. STAT. ANN. § 891.40 (West Supp. 1993); WYO. STAT. § 14-2-103 (1986).

⁹ See *infra* notes 10-16 and accompanying text.

the donee is unmarried and the decision to conceive through AI would not have been made but for the involvement of an intended co-parent.

A. THE ACTUAL PRACTICE OF AI DEMONSTRATES THE NEED FOR LEGISLATIVE REFORM

A significant number of women are turning to alternative insemination to conceive. Consequently, AI is a growing, \$164 million industry with 11,000 private physicians and 400 sperm banks.¹⁰ There are no federal regulations governing AI or requiring record-keeping,¹¹ so estimating the number of women using AI, whether single or married, is haphazard at best. The available studies indicate, however, that the use of AI is increasing. In 1985, at least 20,000 women used AI in the United States¹² and approximately 1,500 of these women were unmarried.¹³ By 1987, an Office of Technology Assessments survey ("OTA survey") of doctors and sperm banks showed that 80,000 women in the United States used donor semen for AI, resulting in about 30,000 conceptions.¹⁴ Of these 80,000 women, approximately 8600 were unmarried,¹⁵ and approximately 1700 of the 8600 were lesbians.¹⁶

These statistics are a starting point for proving that unmarried women are using AI, but they probably under-represent unmarried women because no record-keeping device exists to track women who self-inseminate.¹⁷ Moreover, unmarried women and lesbians are more likely to eschew the estab-

¹⁰ Judith Gaines, *A Scandal of Artificial Insemination*, N.Y. TIMES, Oct. 7, 1990, § 6, at 23.

¹¹ See 50% Success Rate in \$1 Billion Infertility Fight, N.Y. TIMES, May 18, 1988, at A25. One example of the result of this lack of regulation is the criminal justice system's treatment of a physician who may have fathered more than 70 children by using his own semen for inseminating his patients. Because his practice violated no AI regulations, he was tried and convicted of fraud and perjury charges. Robert F. Howe, *Fertility Doctor Convicted in Bogus-Pregnancy Scheme*, BOSTON GLOBE, Mar. 5, 1992, at 1.

¹² Note, *Reproductive Technology and the Procreation Rights of the Unmarried*, 98 HARV. L. REV. 669, 669 & n.1. (1985).

¹³ See Carol A. Donovan, *The Uniform Parentage Act and Nonmarital Motherhood-by-Choice*, 11 N.Y.U. REV. L. & SOC. CHANGE 193, 195 (1982-83).

¹⁴ See OFFICE OF TECHNOLOGY ASSESSMENT, *ARTIFICIAL INSEMINATION PRACTICE IN THE UNITED STATES* 8 (1987) [hereinafter OTA SURVEY].

¹⁵ See *id.* at 23.

¹⁶ See *id.* Support services for lesbians considering AI are increasing.

Although no one knows how many lesbian women are having babies, experts cite a number of indications of a [lesbian baby] boom. Hundreds of women are attending a growing number of workshops for lesbians thinking of having children. Informal networks have sprung up, enabling lesbians to find sperm donors. Lawyers are formulating custody agreements to try to insure legal rights for lesbian mothers, their female partners and the fathers of their children. Support groups and social organizations are sponsoring picnics, parties and other events to keep lesbians with children from feeling isolated.

Gina Kolata, *Lesbian Partners Find the Means to Be Parents*, N.Y. TIMES, Jan. 30, 1989, at A13.

¹⁷ Self-insemination without the involvement of a physician is a simple procedure. *Jhordan C. v. Mary K.*, 224 Cal. Rptr. 530, 535 (Ct. App. 1986) ("It is true that nothing inherent in artificial insemination requires the involvement of a physician. Artificial insemination is, as demonstrated here, a simple procedure easily performed by a woman in her own home."); *In re R.C.*, 775 P.2d 27, 36 (Colo. 1989) (Kirshbaum, J., specially concurring) (noting that "the act of artificial insemination itself does not require medical expertise"). See CHERI PIES, *CONSIDERING PARENTHOOD: A WORKBOOK FOR LESBIANS* 167 (1985) for an example of instructions on how to self-inseminate at home.

lished medical profession because they face discrimination by doctors based on marital status or sexual orientation, and, thus, are unlikely to be represented in the statistics.¹⁸ The OTA survey asked doctors how many women they rejected for AI and their reasons for rejection. Responding doctors rejected one of five patients who requested AI.¹⁹ "The most common reason[] [for rejection was] that the patient [was] unsuitable for nonmedical reasons: she [was] unmarried (52 percent), psychologically immature (22 percent), homosexual (15 percent), or welfare-dependent (15 percent)."²⁰ Only a few facilities have explicit policies barring such discrimination.²¹ In fact, a large number of lesbians who conceive through AI self-inseminate with sperm from a known donor.²²

Alternative insemination has also made its appearance repeatedly in popular culture. Several situation comedies, including *Designing Women*, *Empty Nest*, *Golden Girls*, *Murphy Brown*, and *Roc*, have used AI themes, and typically, the proposed mother was unmarried.²³ In addition, the television news show *20/20* has aired a segment on lesbians, which included families created with the help of AI.²⁴ And at least two contemporary films have had AI themes or raised AI as a method of conception.²⁵

Statistics, recent court cases,²⁶ and popular culture all demonstrate that a significant number of unmarried women are turning to AI to achieve motherhood. Because existing law leaves the rights and responsibilities of the unmarried AI user ambiguous, legislation should be enacted to clarify the legal ramifications of AI.

¹⁸ OTA SURVEY, *supra* note 14, at 27.

¹⁹ *Id.*

²⁰ *Id.*

²¹ For example, the Sperm Bank of Northern California is "a feminist-run facility known as one of the minority of sperm banks in the United States committed to providing artificial insemination services to any healthy woman or couple regardless of marital status, sexual preference, age, race, or religion. The most notable fact about the Sperm Bank of Northern California is its commitment to providing services to single and lesbian women." *Id.* at 65. This facility reports that approximately 40 percent of its clients identify themselves as lesbians. Kolata, *supra* note 16.

²² Jean Latz Griffin, *The Gay Baby Boom: Homosexual Couples Challenge Traditions As They Create New Families*, CHI. TRIB., Sept. 3, 1992, § 5, at 1.

²³ *Designing Women: Maybe Baby* (CBS television broadcast, Feb. 11, 1991) (Mary Jo, a single woman, tries to persuade an ex-boyfriend to be a sperm donor so she can conceive via AI); *Designing Women: Picking a Winner* (CBS television broadcast, Oct. 14, 1991) (Mary Jo visited a sperm bank and conceived using AI, but miscarried); *Empty Nest: Food For Thought* (NBC television broadcast, Oct. 12, 1991) (Barbara considered becoming a single mother using AI); *Golden Girls* (NBC television broadcast) (Blanche's daughter, Rebecca, successfully used AI to become a single mother); *Murphy Brown: Baby Love* (CBS television broadcast, Dec. 12, 1988) (before the now infamous birth of Murphy's son, Murphy and Frank considered conceiving using AI and then co-parenting the child); *Roc* (FOX television broadcast, Oct. 10, 1992) (characters considered using AI to conceive).

²⁴ *20/20: Women Who Love Women* (ABC television broadcast, Oct. 23, 1992).

²⁵ *MADE IN AMERICA* (Warner Brothers 1993) (the story of a young woman who discovers she was conceived through AI and the resulting comical turmoil for her mother and the man whom the girl identifies as her donor father); *LOOK WHO'S TALKING* (Tri-Star Pictures 1987) (mother said she conceived through AI when she did not want to tell people who the father of her baby was).

²⁶ See *infra* notes 57-71, 74-79, 89-94 and accompanying text.

B. THE FAMILIAL EXPECTATIONS OF UNMARRIED WOMEN WHO CONCEIVE BY AI ARE NEITHER DEFINED NOR ADEQUATELY PROTECTED BY EXISTING LAW

In response to the growing use of AI, the National Conference of Commissioners on Uniform State Laws has drafted two uniform laws,²⁷ and thirty-four states have passed laws establishing at least some rights and responsibilities of the parties to AI.²⁸ Sixteen states have statutorily established the rights and responsibilities of the AI donor and donee only when the donee is married.²⁹ The AI statutes in the remaining eighteen states purport to establish the rights and responsibilities of the AI donor and donee, even if the donee is unmarried, by declaring that except in specified circumstances, the donor is not the father of the child conceived by AI if the donor is not married to the donee.³⁰ Case law demonstrates, however, that none of these legislative schemes adequately protects the rights or defines the responsibilities of unmarried women who use AI.

1. Legislation Protects the Familial Expectations of Married Women Who Conceive By AI

The inadequacies of existing statutes' protection of the right of unmarried women to self-determine their families is highlighted best by comparing the law's treatment of unmarried women to the law's treatment of married women when a donor asserts paternity. When a woman using AI is married, the donor asserting paternity is essentially an unwed father seeking custody

²⁷ UNIF. PARENTAGE ACT § 5, 9B U.L.A. 301 (West 1987 & Supp. 1993) [hereinafter UPA] and UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT, 9B U.L.A. 135 (Supp. 1988) [hereinafter USCACA].

²⁸ ALA. CODE § 26-17-21 (1992); ALASKA STAT. § 25.20.045 (1991); ARIZ. REV. STAT. ANN. § 12-2451 (1982 & Supp. 1993); ARK. CODE ANN. §§ 9-10-201 to 202 (Michie 1993); CAL. CIV. CODE § 7005 (West 1983); COLO. REV. STAT. ANN. § 19-4-106 (West 1986 & Supp. 1993); CONN. GEN. STAT. ANN. §§ 45a-774 to 779 (West 1993); FLA. STAT. ANN. § 742.11 (West 1986 & Supp. 1993); GA. CODE ANN. § 19-7-21 (Michie 1991); IDAHO CODE § 39-5401 to 5408 (1993); ILL. ANN. STAT. ch. 750, para. 40 (Smith-Hurd 1993); KAN. STAT. ANN. §§ 23-128 to 130 (1988); MD. EST. & TRUSTS CODE ANN. § 1-206 (1991); MASS. GEN. LAWS ANN. ch. 46, § 4B (West Supp. 1993); MICH. COMP. LAWS ANN. § 333.2824(6) (West 1992) and MICH. COMP. LAWS ANN. § 700.111 (West 1980); MINN. STAT. ANN. § 257.56 (West 1992); MO. ANN. STAT. § 193.085 (Vernon Supp. 1993); MONT. CODE ANN. § 40-6-106 (1993); NEV. REV. STAT. § 126.061 (1991); N.H. REV. STAT. ANN. § 168-B: 1-32 (Supp. 1993); N.J. STAT. ANN. § 9:17-44 (West 1993); N.M. STAT. ANN. § 40-11-6 (Michie 1989); N.Y. DOM. REL. LAW § 73 (Consol. 1979); N.C. GEN. STAT. § 49A-1 (Michie 1984 & Supp. 1992); N.D. CENT. CODE §§ 14-18-01 to 07 (1981); OHIO REV. CODE ANN. §§ 3111.30 to 3111.38 (Anderson 1989); OKLA. STAT. ANN. tit. 10, §§ 551-55 (West 1987 & Supp. 1994); OR. REV. STAT. §§ 109.239 to 109.247 (1991); TENN. CODE ANN. § 68-3-306 (1992); TEX. FAM. CODE ANN. § 12.03 (West 1986 & Supp. 1994); VA. CODE ANN. §§ 20-156 to 165 (Michie Supp. 1993); WASH. REV. CODE ANN. § 26.26.050 (West 1986); WIS. STAT. ANN. § 891.40 (West Supp. 1993); WYO. STAT. § 14-2-103 (1986).

²⁹ Alabama, Alaska, Arizona, Florida, Georgia, Kansas, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nevada, New York, North Carolina, and Tennessee. See statutes cited *supra* note 28.

³⁰ Arkansas, California, Colorado, Connecticut, Idaho, Illinois, New Hampshire, New Jersey, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, Texas, Virginia, Washington, Wisconsin, and Wyoming. See statutes cited *supra* note 28.

or visitation of his child. In such a scenario, a donor paternity action will fail because the married woman has two statutory shields against such a suit.

The first protection married women generally have is a statutory termination of the AI donor's rights and obligations to the child. Of the states that have enacted AI legislation, *all* provide that if the husband of a married woman consents to the insemination, the law will treat the husband as if he were the biological father.³¹ Even if the method by which the husband gave consent does not adhere to the statutory specifications, a court will still probably find that the husband is the father under the AI statute.³² Moreover, if the AI occurs in a state with a statute modelled after the UPA, the donor's paternity rights are terminated automatically, even if the married woman's husband does not consent to her use of AI.³³

Even if a state has no AI statute or the AI statute does not apply, a donor paternity suit against a married woman probably still will fail because there is a strong presumption of legitimacy when a child is born to a married woman.³⁴ In other words, the law creates a presumption, which in some cases may not be rebutted, that a child born to a married woman is the child of her husband.³⁵

³¹ See statutes cited *supra* note 28. See, e.g., MASS. GEN. LAWS ANN. ch. 46, § 4B (West Supp. 1990) ("Any child born to a married woman as a result of artificial insemination with the consent of her husband shall be considered the legitimate child of the mother and such husband.").

³² See, e.g., R.S. v. R.S., 670 P.2d 923, 928 (Kan. App. 1983) (holding that even though the statute required the husband's *written* consent as a condition precedent to AI, a husband who consents orally "is estopped to deny that he is the father of the child, and he has impliedly agreed to support the child and act as its father"); K.B. v. N.B., 811 S.W.2d 634, 636-39 (Tex. Ct. App. 1991) (holding that a husband who did not provide the statutorily required consent to his wife's insemination may still be financially responsible for the child where the husband ratified the parent-child relationship through his knowledge that the wife was using AI and the husband publicly acknowledged the child).

³³ The UPA provides, in relevant part:

(a) If, under the supervision of a licensed physician and with the consent of her husband, a *wife* is inseminated artificially with semen donated by a man not her husband, the husband is treated in law as if he were the natural father of a child thereby conceived. The husband's consent must be in writing and signed by him and his wife. The physician shall certify their signatures and the date of the insemination, and file the husband's consent with the [State Department of Health], where it shall be kept confidential and in a sealed file. However, the physician's failure to do so does not affect the father and child relationship. All papers and records pertaining to the insemination, whether part of the permanent record of a court or of a file held by the supervising physician or elsewhere, are subject to inspection only upon an order of the court for good cause shown.

(b) The donor of semen provided to a licensed physician *for use in artificial insemination of a married woman* other than the donor's wife is treated in law as if he were not the natural father of a child thereby conceived.

UPA § 5, 9B U.L.A. 301 (emphasis added). The effect of the UPA is to legitimate a child conceived by AI by treating the consenting husband as if he were the natural father. The negative implication of section (b) is that even when a married woman's husband did not consent to her use of AI, the donor will not be subject to parental obligations or entitled to parental benefits.

³⁴ See generally Brenda J. Runner, Note, *Protecting a Husband's Parental Rights When His Wife Disputes the Presumption of Legitimacy*, 28 J. FAM. L. 115 (1989-90).

³⁵ HARRY D. KRAUSE, CHILD SUPPORT IN AMERICA 105 (1981). See, e.g., UPA § 4, 9B U.L.A. 298; CAL. EVID. CODE § 621 (West 1966 & Supp. 1993). See also Runner, *supra* note 34, at 116

The Supreme Court's ruling in *Michael H. v. Gerald D.*³⁶ demonstrates the tenacity of this presumption of legitimacy. Michael H. fathered a child through an adulterous affair with a woman married to Gerald D.³⁷ The mother was married to Gerald D. both when she conceived the child and when she gave birth.³⁸ Moreover, the mother lived with Michael for several months, allowing him to establish a relationship with the child, even while she remained married to Gerald.³⁹ At the time of the paternity suit, California law presumed that a child born to a woman living with her husband was the child of the wife and husband and permitted only the husband and wife to rebut the presumption.⁴⁰ The Court upheld the state law and affirmed the lower court's denial of custody and visitation to Michael, despite his biological connection to the child and clear evidence of a father-child relationship.⁴¹ The Court noted that "[w]here . . . the child is born into an extant marital family, the natural father's unique opportunity conflicts with the similarly unique opportunity of the husband of the marriage; and it is not unconstitutional for the State to give categorical preference to the latter."⁴²

While the result of *Michael H.* can be negated by state law, the Court's decision exemplifies the judiciary's eternal search for one father and one mother for each child. This search for "The Father" is premised on a judicial belief that "[i]t is in the child's best interests to have two parents whenever possible."⁴³ But courts do not want more than two parents. In *Michael H.*, the plurality rejected the child's assertion that she be able to maintain filial relationships with both her biological father and her mother's husband, her legal father. The plurality's response was that: "California law, like nature itself, makes no provision for dual fatherhood."⁴⁴

In our tale of three women, the married woman will be able to protect the integrity of her family unit from the threat of a donor's paternity suit.

("One of the strongest presumptions in law is that a child born to a married woman is the legitimate child of her husband.").

³⁶ 491 U.S. 110 (1989) (plurality opinion).

³⁷ *Id.* at 113.

³⁸ *Id.*

³⁹ *Id.* at 113-14. The plurality began its opinion with the following statement: "The facts of this case are, we must hope, extraordinary." *Id.* at 113. This statement seems to indicate a moral judgment on the part of the Court, which does not bode well for unmarried women who use AI and are contesting donor paternity actions. Given the parental possibilities that current reproductive technologies permit, the Court has not even scratched the surface of the possible "factually extraordinary" parental combinations and permutations. For example, in *Johnson v. Calvert*, 851 P.2d 776 (Cal.), *cert. denied*, 114 S. Ct. 206 (1993), a husband and wife provided the genetic material for a child and another woman, a "biological stranger" to the child, gestated the fetus after in vitro fertilization. 851 P.2d at 778. Under California law then, two women had claims as the "natural mother" of the child, one as the biological mother and one as the birth mother. *Id.* at 781.

⁴⁰ *Michael H.*, 491 U.S. at 113.

⁴¹ *Id.* at 132.

⁴² *Id.* at 129.

⁴³ *C.M. v. C.C.*, 377 A.2d 821, 825 (N.J. Super. 1977); *see also Caban v. Mohammed*, 441 U.S. 380, 391 (1979) ("We do not question that the best interests of [illegitimate] children often may require their adoption into new families who will give them the stability of a normal, two-parent home.") (emphasis added).

⁴⁴ *Michael H.*, 491 U.S. at 118.

2. Existing Laws Do Not Adequately Protect The Familial Expectations of Unmarried Women Who Conceive By AI

Married women using AI are protected from donor paternity suits by generally applicable paternity presumptions supplemented by AI statutes and the courts' search for one mother and one father. This search, however, dooms the unmarried woman's prospects for familial self-determination if a donor brings a paternity action. Absent applicable AI legislation, the known donor is simply an unwed father and his paternity action will be governed by general paternity laws. Even if an AI statute governs the paternity suit, case law demonstrates that the courts will interpret the statute in such a way as to facilitate the judicial search for one mother and one father.

Before turning specifically to AI cases, the reader must understand the case law governing paternity suits by unwed fathers against unwed mothers when the parents conceived the child through intercourse. State paternity laws generally determine a child's legal parents, but are circumscribed by the protection of the Federal Constitution.⁴⁵ The unwed father's constitutional rights change dramatically if the mother is not married. If the mother is not married, "[w]hen an unwed father demonstrates a full commitment to the responsibilities of parenthood by 'com[ing] forward to participate in the rearing of his child,' his interest in personal contact with his child acquires substantial protection under the Due Process Clause. . . . [T]he mere existence of a biological link does not merit equivalent constitutional protection."⁴⁶ The trend in these unwed father cases is to hold that there is constitutional protection for a father in his relationship with his child where the father "grasps that opportunity and accepts some measure of responsibility for that child's future."⁴⁷ Whether a man can claim the legal status of fatherhood rests within his control—he must manifest his intent to be a father.⁴⁸ Courts do not in any way consider the mother's desires. If the mother in *Michael H.* had not been married, she could not have successfully defended against a paternity challenge by the child's biological father.

a. *In the Absence of An AI Statute the Familial Expectations of Unmarried Women Who Conceive By AI Are Generally Unprotected*

In the only known donor/unmarried woman case that has arisen in a jurisdiction with no AI statute, the court awarded the donor visitation.⁴⁹ In *C.M. v. C.C.*,⁵⁰ a donor brought a paternity action against an unmarried woman. The mother, C.C., "strenuously opposed" the biological father's request for visitation.⁵¹ The donor testified that the parties had conceived the child with the intention of marrying.⁵² The court granted the donor visitation, noting that "there was no one else who was in a position to take upon

⁴⁵ *Lehr v. Robertson*, 463 U.S. 248, 256-57 (1983).

⁴⁶ *Id.* at 261 (citations omitted).

⁴⁷ *Id.* at 262.

⁴⁸ *See id.*

⁴⁹ *C.M. v. C.C.*, 377 A.2d 821 (Juv. & Dom. Rel. Ct. 1977).

⁵⁰ *Id.*

⁵¹ *Id.* at 822.

⁵² *Id.* at 821.

himself the responsibilities of fatherhood when the child was conceived."⁵³ In this case, the court assumed it was in the best interest of the child to have a father and a mother.⁵⁴ Assuming the court believed the donor's testimony about the parties' intentions, it could have grounded its decision on the intent of the parties — C.C. and C.M. were engaged at the time of AI and presumably intended to raise the child together. Instead, the court only focused on C.M.'s willingness to take on the responsibilities of fatherhood.

Given the search for one father and one mother, if the unmarried woman in our parable uses sperm donated by a known donor in a jurisdiction without an AI statute and the donor brings a paternity action, the donor's petition will generally be granted on the basis of generally applicable paternity laws. Consequently, our unmarried woman might attempt conception in a state that has an AI statute to ensure that her familial expectations are protected.

b. Existing AI Laws Do Not Protect the Familial Expectations of Unmarried Women Who Conceive By AI

The unmarried AI user in our parable may find that while an applicable AI statute appears to offer her familial expectations protection, the protection of the statute is illusory because of the judiciary's search for one mother and one father. If the donor asserts that the parties intended to co-parent but facially the AI statute would abrogate that intent, the courts hold that the parties' intentions control.⁵⁵ If, however, the parties agreed before conception that they would not co-parent and the donor asserts paternity rights, the courts will disregard the parties' intent unless extraordinary circumstances exist.⁵⁶

The first case to arise in a state with an AI statute, *Jhordan C. v. Mary K.*,⁵⁷ arose in California. Mary K., an unmarried woman, self-inseminated with the semen of a known donor, but without the supervision of a physician.⁵⁸ Jhordan C., the donor, brought an action to establish paternity and visitation rights.⁵⁹ California's AI statute is a modified version of the UPA.⁶⁰ The California AI statute provides, in pertinent part, that: "The donor of semen provided to a licensed physician for use in artificial insemination of a woman other than the donor's wife is treated in law as if he were not the natural father of a child thereby conceived."⁶¹ The California Court of Appeals held that the AI statute provides an unmarried woman with a "vehicle for obtaining semen for artificial insemination without fear that the donor may claim

⁵³ *Id.* at 824.

⁵⁴ *C.M. v. C.C.*, 377 A.2d 821 (Juv. & Dom. Rel. Ct. 1977). The court imposing a traditional family does not necessarily serve the best interests of the child. See Andrea Charlow, *Awarding Custody: The Best Interests of the Child and Other Fictions*, 5 YALE L. & POL'Y REV. 267, 269, 273-74 (1987). Studies show that the greatest detriment to a child's emotional health is parental conflict. *Id.* at 280.

⁵⁵ See *infra* notes 65-79 and accompanying text.

⁵⁶ See *infra* notes 80-83, 89-94 and accompanying text.

⁵⁷ 224 Cal. Rptr. 530 (Ct. App. 1986).

⁵⁸ *Id.* at 532.

⁵⁹ *Id.* at 533.

⁶⁰ The California statute modifies the UPA, *supra* note 33, by eliminating the word "married" before "woman" in section b. See CAL. CIV. CODE § 7005 (West 1983).

⁶¹ CAL. CIV. CODE § 7005(b) (West 1983).

paternity"—the physician.⁶² Consequently, because Mary K. failed to follow the prerequisite of employment of a licensed physician, the statutory protection did not attach to preclude the sperm donor from successfully bringing a paternity action under generally applicable paternity statutes.⁶³

As it turns out, the unmarried woman who relied on the dicta in *Jhordan C.* by using a doctor to secure sperm might not receive the protection of the AI statute that the California Court of Appeals promised. In the second case to arise in a state with an AI statute (identical to the one at issue in *Jhordan C.*),⁶⁴ the unmarried woman's compliance with the mandate of the statute did not shield her from the possibility of a successful paternity suit. In *In re R.C.*,⁶⁵ an unmarried woman used sperm from a known donor and inseminated by the statutorily designated "vehicle for obtaining semen for artificial insemination"—the physician.⁶⁶ In his paternity suit, the donor alleged that "he donated the semen only because [the mother] promised that [he] would be treated as the father of any child conceived by the artificial insemination."⁶⁷ Despite the plain language of the statute, the court found the provision, as applied to rights of known donors and unmarried women, ambiguous. The court interpreted the omission of the word "married" from section 19-4-106(2) to permit unmarried women to share in the protection of the statute,⁶⁸ but then noted that the omission did not specify the "rights and obligations of a known donor who provides his semen to a licensed physician for use in artificially inseminating an unmarried woman."⁶⁹ Consequently, the court found that despite facially applicable language, the legislature did not intend the statute to apply when a known donor provides his semen to a licensed physician for the insemination of an unmarried woman when the parties agreed to co-parent.⁷⁰ The court remanded the action for a factual finding as to whether the parties had made a parenting agreement; if there was an agreement that the donor's parental rights would not be extinguished, the donor could maintain a paternity action.⁷¹ Apparently the court found that this legislative scheme protected unmarried women from paternity suits by unknown donors, men who probably never sue, even if they could find out who used their sperm.

So, in our parable, the legally sophisticated unmarried woman attempting to conceive using AI might consider moving to a state with a statute that is more explicit in its treatment of donors and hope to find the apparent protection of the statute. She would find a mixed blessing in Oregon. Oregon's AI statute requires that a licensed physician perform the AI,⁷² and that "[i]f the

⁶² *Jhordan C. v. Mary K.*, 224 Cal. Rptr. 530, 534 (Ct. App. 1986).

⁶³ *Id.* at 531.

⁶⁴ Compare COLO. REV. STAT. ANN. § 19-4-106 (West 1986 & Supp. 1993) with CAL. CIV. CODE § 7005 (West 1983).

⁶⁵ 775 P.2d 27 (Colo. 1989).

⁶⁶ *Id.* at 28.

⁶⁷ *Id.*

⁶⁸ *Id.* at 35.

⁶⁹ *Id.*

⁷⁰ *In re R.C.*, 775 P.2d 27, 35 (Colo. 1989).

⁷¹ *Id.*

⁷² OR. REV. STAT. § 677.360 (1991).

donor of semen used in artificial insemination is not the mother's husband . . . (1) [s]uch donor shall have no right, obligation or interest with respect to a child born as a result of the artificial insemination"⁷³ In *McIntyre v. Crouch*,⁷⁴ a known donor provided semen for an unmarried woman to use for alternative insemination and she self-inseminated without the aid of a physician.⁷⁵ The court held that the woman's failure to use a physician, as required by the statute, merely meant the woman was guilty of a misdemeanor and did not deprive her of the protection of the statute.⁷⁶ The court found, however, that the statute, as applied to this donor, violated the Due Process Clause of the Fourteenth Amendment "if he [could] establish that he and [the recipient] agreed that he should have the rights and responsibilities of fatherhood and in reliance thereon he donated his semen."⁷⁷ Drawing an analogy to the Supreme Court's unwed father/unwed mother cases, the court noted that by the act of donating semen for insemination and making himself known to the recipient, the donor "does not, in the language of *Lehr*, 'grasp the opportunity to accept some measure of responsibility for the child's future.'"⁷⁸ The Oregon Supreme Court remanded the case for a determination of whether an agreement was in existence, and if so, what the nature of the agreement was.⁷⁹ The petitioning father needs to show more than biological contribution, but the court was silent as to what standards the lower court should apply on remand.

Considering the emphasis that the Colorado and Oregon courts placed on the parties' intent, the unmarried woman in our parable might memorialize in writing the parties' intent to co-parent, or not to co-parent, a child conceived through AI. Her attempt would probably be futile because of the judicial search for one mother and one father. In an unpublished North Carolina case, a lesbian used sperm from a known donor.⁸⁰ North Carolina's AI statute addresses only the rights of married women who conceive via AI.⁸¹ Before conception, the parties signed an agreement that gave the mother sole custody of any resulting child.⁸² In the subsequent donor paternity action, the court ruled in favor of the donor, finding that he was the child's legal father.⁸³

Continuing her quest for familial self-determination, the unmarried woman in our parable might attempt to conceive in a state that has adopted the USCACA.⁸⁴ According to section 4(a) of the USCACA, a "donor"⁸⁵ is not the

⁷³ OR. REV. STAT. § 109.239(1) (1991).

⁷⁴ 780 P.2d 239 (Or. App.), *rev. denied*, 784 P.2d 1100 (Or. 1989), *cert. denied*, 495 U.S. 905 (1990).

⁷⁵ *McIntyre*, 780 P.2d at 241.

⁷⁶ *Id.*

⁷⁷ *Id.* at 244.

⁷⁸ *Id.* at 245 n.5.

⁷⁹ *Id.* at 245.

⁸⁰ *The South in Brief*, ATLANTA J. & CONST., Aug. 17, 1992, at A3.

⁸¹ N.C. GEN. STAT. § 49A-1 (Michie 1984).

⁸² *The South in Brief*, *supra* note 80, at A3.

⁸³ *Id.*

⁸⁴ North Dakota and Virginia are the only two states to have adopted the USCACA. 9B U.L.A. 135; *see* statutes, *supra* note 28.

⁸⁵ " 'Donor' means an individual [other than a surrogate] who produces egg or sperm used

parent of a child conceived through assisted conception.”⁸⁶ The provision explicitly treats married and unmarried women alike. The Comment explains that “under Section 4(a) non-parenthood is . . . provided for those donors who provide sperm for assisted conception by unmarried women. In that relatively rare situation, the child would have no legally recognized father.”⁸⁷ This uniform treatment of married and unmarried women aids an unmarried woman’s attempts to protect her single biological parent family because it explicitly counters the judicial tendency to match a father and a mother. Moreover, the USCACA does not require the donor to provide the sperm to a physician to relieve the donor of the obligation of parenthood and to protect the recipient.⁸⁸ The protection of the USCACA is untried, however, because it has yet to be judicially interpreted. While the unmarried woman may think she has found a legal haven, case law suggests that she has not. A court might find persuasive any of the cases previously discussed and find for the donor asserting paternity.

In only one case has an unmarried woman who conceived using AI successfully defended against a donor paternity action. In *Thomas S. v. Robin Y.*,⁸⁹ the court applied the doctrine of equitable estoppel to bar a donor’s assertion of paternity rights against an unmarried woman and dismissed the donor’s suit.⁹⁰ This case provides very little hope for the unmarried woman in our parable, however, because of its extraordinary facts. The donor did not bring his paternity suit until the child, Ry, was ten years old.⁹¹ At that age, the court was able to make detailed findings regarding the psychological impact of the suit on Ry, particularly since Ry’s biological mother had created a family for Ry with another woman and a sibling.⁹² Moreover, the parties agreed before conception “on the principles which they intended would govern their future relationship,” specifically that Thomas S. would have no parental rights or obligations.⁹³ The court found that because Robin Y. would not have chosen Thomas S. as the sperm donor if he had not represented to her that he was not interested in parental rights, Thomas S. was equitably estopped from asserting paternity and it dismissed his suit.⁹⁴

In our tale of three women, the unmarried woman conceiving through AI can best fulfill her familial expectations by using an anonymous donor. If, however, she does want to use a known donor, she should carefully research the laws of her state regarding AI and follow any applicable provisions to the letter. If the statute requires her to use a physician to inseminate, she must find a physician who will not reject her because she is unmarried or a lesbian.

for assisted conception, whether or not payment is made for the egg or sperm used, but does not include a woman who gives birth to a resulting child.” USCACA § 1(2), 9B U.L.A. 138.

⁸⁶ USCACA § 4(a), 9B U.L.A. at 140.

⁸⁷ USCACA § 4 cmt., 9B U.L.A. at 140.

⁸⁸ *Id.* (requiring the involvement of a licensed physician “is not realistic in light of present practices in the field of artificial insemination.”).

⁸⁹ 599 N.Y.S.2d 377 (Fam. Ct. 1993).

⁹⁰ *Id.* at 381-82. The conception took place in California, but the parties did not use a licensed physician, so California’s AI statute did not terminate Thomas S.’s rights. *Id.* at 378 n.4.

⁹¹ *Id.* at 378-79.

⁹² *Id.* at 380.

⁹³ *Thomas S.*, 599 N.Y.S.2d at 378.

⁹⁴ *Id.* at 382.

If she uses a known donor, she and the donor should memorialize in writing their intent regarding parenting rights, even though a court may not ultimately abide by it. Finally, given existing statutory and case law, our unmarried woman who uses a known donor should hope the donor does not assert his paternity rights, because even if she used this donor based on his representation that he did not want to co-parent, the courts probably will not uphold her attempt to define her family.

3. Existing AI Legislation Does Not Adequately Protect the Relationships Between Non-biological Co-Parents and the Children Born of AI

The decision of an unmarried woman to start a family by AI may be made with the understanding that a partner will co-parent. While this may be the case with either a male or female partner, it has increasingly become common for lesbian women.⁹⁵ Thus, the third woman in our parable is the lesbian partner of an unmarried woman who conceives by AI. She will be a non-biological, psychological mother to this child born by AI.

The two mothers may create "a legal family unit identical to the actual family set-up" through second parent adoption, whereby a non-biological parent can legally adopt the child without terminating the biological parent's rights.⁹⁶ Adoption by the second, non-biological, parent entitles a child to a number of legal benefits from the second parent, including the right to financial support, the right to inherit through intestate succession, entitlement to death benefits, and access to medical benefits through the adoptive parent's employer.⁹⁷ By making the non-biological parent a legal parent, second parent adoption also provides a legal guarantee of a continued relationship with the child in the event that the relationship between the two parents ends⁹⁸ or the biological mother dies.⁹⁹ Courts have granted second mother adoptions in Alaska,¹⁰⁰ California,¹⁰¹ Massachusetts,¹⁰² Minnesota,¹⁰³ New York,¹⁰⁴

⁹⁵ See *In re Adoption of Tammy*, 619 N.E.2d 315, 316 (Mass. 1993); *Adoptions of B.L.V.B. & E.L.V.B.*, 628 A.2d 1271, 1272 (Vt. 1993); *In re Evan*, 583 N.Y.S.2d 997, 998 (Sur. Ct. 1992); *In re Adoption of T.*, 17 FAM. L. REP. (BNA) 1523 (D.C. Sup. Ct. Fam. Div. Aug. 30, 1991); *In re Roberta Achtenberg*, No. AD 18490, slip op. (Cal. Super. Ct. Apr. 18, 1989); *In re Child #1 & Child #2*, No. 89-5-00067-7, slip op. (Wash. Super. Ct. Nov. 16, 1989); *In re Adoption of a Minor Child*, No. 1JU-86-73 P/A, slip op. (Alaska Super. Ct. Feb. 6, 1987).

⁹⁶ *In re Evan*, 583 N.Y.S.2d at 1000.

⁹⁷ *Id.* at 998-99.

⁹⁸ *In re Adoption of Tammy*, 619 N.E.2d at 316.

⁹⁹ If the death of a parent leaves the child with no legally recognized parent, a court is not bound by the deceased parent's choice of legal guardian. The court will consider the best interests of the child when confronted with conflicting custody claims. *In re Pearlman*, 15 FAM. L. REP. (BNA) 1355 (Fla. Cir. Ct. Mar. 31, 1989). While the court is making its determination, the child remains in an unstable living situation and may be separated from the only living person the child has known as a parent. See, e.g., *id.* (non-biological mother, who made decision with biological mother to conceive via AI, won a four-year custody dispute with child's maternal grandparents following the death of the biological mother; the child was separated from her non-biological mother during the litigation and told the court "for Christmas I don't really want a present. All I want is to live with Neenie" — her non-biological mother).

¹⁰⁰ See, e.g., *In re Adoption of a Minor Child*, No. 1JU-86-73 P/A, slip op. (Alaska Super. Ct. Feb. 6, 1987).

¹⁰¹ See, e.g., *In re Roberta Achtenberg*, No. AD 18490, slip op. (Cal. Super. Ct. Apr. 18, 1989).

¹⁰² See, e.g., *In re Adoption of Tammy*, 619 N.E.2d at 315.

Vermont,¹⁰⁵ Washington,¹⁰⁶ and the District of Columbia.¹⁰⁷ In other words, if the co-parents come to court while they share common expectations of parenting roles, the courts have validated their intent. In each of these cases, however, the biological father was either an unknown sperm donor, a known donor who had relinquished his paternal rights, or a biological father who had never grasped the opportunity of a relationship with the child.¹⁰⁸

If the two mothers do not seek legal recognition of their relationship or a court denies that recognition, the non-biological mother has little legal recourse if the biological mother terminates the non-biological mother's relationship with the child, even if that termination is against the child's best interests.¹⁰⁹ When a non-biological mother, even one who participated in the decision of the biological mother to conceive by AI, sues for visitation, she has not fared well in the courts. A court may rule that because she is not the child's biological or adoptive mother or was not in a legally recognized marriage with the biological mother, she is a "biological stranger to the child," and does not have standing to assert a right to custody or visitation.¹¹⁰ Even if the non-biological mother passes the standing hurdle, the fact is, she is still challenging the decision of a biological parent regarding the child and courts generally defer to the biological parent.¹¹¹ The courts in *Nancy S.*, *Curiale*, and *Alison D.* rejected the non-biological mother's custody and visitation claims without considering the best interests of the children and despite the clear pre-conception intent of the parties to co-parent.¹¹² In each case, the

¹⁰³ See, e.g., *D.C. Judge Grants Two Parent Adoption for Lesbian Couple*, LESBIAN/GAY LAW NOTES 63 (Oct. 1991).

¹⁰⁴ See, e.g., *In re Evan*, 583 N.Y.S.2d 997, 997 (Sur. Ct. 1992).

¹⁰⁵ See, e.g., *Adoptions of B.L.V.B. & E.L.V.B.*, 628 A.2d 1271 (Vt. 1993).

¹⁰⁶ See, e.g., *In re Child #1 & Child #2*, No. 89-5-00067-7, slip op. (Wash. Super. Ct. Nov. 16, 1989).

¹⁰⁷ See, e.g., *In re Adoption of T.*, 17 FAM. L. REP. (BNA) 1523 (D.C. Sup. Ct. Fam. Div. Aug. 30, 1991).

¹⁰⁸ See *In re Adoption of a Minor Child*, No. 1JU-86-73 P/A, slip op. (Alaska Super. Ct. Feb. 6, 1987); *In re Roberta Achtenberg*, No. AD 18490, slip op. (Cal. Super. Ct. Apr. 18, 1989); *In re Adoption of T.*, 17 FAM. L. REP. (BNA) 1523; *In re Adoption of Tammy*, 619 N.E.2d 315, 316 (Mass. 1993); *In re Evan*, 583 N.Y.S.2d 997, 998 (Sur. Ct. 1992); *Adoptions of B.L.V.D. & E.L.V.D.*, 628 A.2d 1271, 1272 (Vt. 1993); *In re Child #1 & Child #2*, No. 89-5-00067-7, slip op. (Wash. Super. Nov. 16, 1989).

¹⁰⁹ *In re Evan*, 583 N.Y.S.2d at 999.

¹¹⁰ *Alison D. v. Virginia M.*, 572 N.E.2d 27, 28 (N.Y. 1991); see also *Curiale v. Reagan*, 272 Cal. Rptr. 520, 522 (Ct. App. 1990). But see *Nancy S. v. Michele G.*, 279 Cal. Rptr. 212, 215 n.2 (Ct. App. 1991); *A.C. v. C.B.*, 829 P.2d 660, 665 (N.M. App. 1992). In *A.C. v. C.B.*, the court determined petitioner had "made a colorable claim of standing" to assert her claim, and remanded the suit for proceedings not inconsistent with the appellate proceeding. 829 P.2d at 665.

¹¹¹ *Curiale*, 272 Cal. Rptr. at 522 (observing that "there is no statutory or decisional authority to grant [the non-biological mother] rights of custody and/or visitation over the objections of the child's natural parent"); *Alison D.*, 572 N.E.2d at 29 ("It has long been recognized that, as between a parent and a third person, parental custody of a child may not be displaced absent grievous cause or necessity.") (quoting *In re Ronald FF. v. Cindy GG.*, 511 N.E.2d 75, 77 (N.Y. 1987)).

¹¹² See *Nancy S.*, 279 Cal. Rptr. 212 (holding that lesbian partner who joined in partner's decision to have a child by AI, who was listed on the birth certificate as the father and was referred to by both children as "Mom," was not a parent within the meaning of the UPA was not entitled to custody, and was entitled to visitation only upon natural mother's consent); *Curiale*, 272 Cal. Rptr. 520 (holding that lesbian partner of woman who conceived by AI during the relationship did not have colorable claim of right to custody); *Alison D.*, 572 N.E.2d 27 (holding that

courts deferred to the legislature's judgment about the definition of "parent" and standing.¹¹³

In contrast, the one case that has arisen in the context of the biological mother seeking support from the non-biological co-parent found that the non-biological co-parent was a parent to the children. In the case of *Karin T. v. Michael T.*,¹¹⁴ the court used a theory of equitable estoppel to hold a woman with no biological connection to the two children conceived through AI responsible for their support.¹¹⁵ Michael passed as a man and married Karin and twice consented, as her "husband," to AI.¹¹⁶ The court found she was a parent to the two resulting children even though she had no biological connection to them.¹¹⁷ The court reasoned that "parent" was not defined by statute and that Black's Law Dictionary defined the term as "one who procreates, begets or brings forth offspring."¹¹⁸ By consenting to Karin's insemination, Michael was found to have "brought forth these offspring as if done biologically."¹¹⁹ Applying this "but for" test, the court found that Michael was a parent.¹²⁰

No existing AI legislation recognizes the rights of non-biological co-parents of unmarried women. In some jurisdictions, case law permits the non-biological mother to attain legal acknowledgement and protection for her existing relationship with the child; in others, she will have to be a test case. If she does not or cannot become an adoptive mother, however, it is clear that courts, even when faced with clear intent to co-parent, can decide that she has no legal right to visit the children who would not have been born but for her involvement in the decision to use AI. In our parable, the unmarried woman cannot protect her familial expectations against the claims of a known donor, but she can evade her responsibilities to non-biological partners if she so chooses and the co-parent may end up being a "legal stranger" to the children with whom she has functionally and emotionally acted as a parent.

III. RECOMMENDATIONS FOR COMPREHENSIVE LEGISLATIVE REGULATION OF THE RIGHTS AND RESPONSIBILITIES OF THE PARTIES TO AI WHEN THE DONEE IS UNMARRIED

To be comprehensive, AI legislation should establish the rights and responsibilities of all of the parties to the AI decision and procedure because all are potential litigants. Two groups of unmarried women use AI—women who intend to form a single parent family and women who intend to co-parent with another. This co-parent may be a lesbian partner, a male partner, or the donor.

woman who planned the conception of the child with biological mother, shared all expenses and support, and gave her name to the child as his middle name, was "a biological stranger" to the child and had no visitation rights against biological mother).

¹¹³ *Nancy S.*, 279 Cal. Rptr. at 219; *Curiale*, 272 Cal. Rptr. at 522; *Alison D.*, 572 N.E.2d at 29.

¹¹⁴ 484 N.Y.S.2d 780 (1985).

¹¹⁵ *Id.* at 784.

¹¹⁶ *Id.* at 781-82.

¹¹⁷ *Id.* at 784.

¹¹⁸ *Id.* (quoting BLACK'S LAW DICTIONARY 1003 (5th ed. 1979)).

¹¹⁹ *Karin T.*, 484 N.Y.S.2d at 784.

¹²⁰ *Id.*

A. COMPREHENSIVE AI LEGISLATION SHOULD PERMIT AN UNMARRIED WOMAN TO USE A KNOWN SPERM DONOR WITHOUT JEOPARDIZING HER ABILITY TO SELF-DETERMINE HER FAMILY

An unmarried woman using AI can protect herself from a possible paternity suit by using an anonymous donor. Nonetheless, there are several reasons why a woman might want to use a known donor. An unmarried woman may wish to use a known donor so that she may have ready access to the donor's medical background.¹²¹ In addition, she may wish to use a known donor to more easily retain the possibility of using the same donor to aid in more than one conception, ensuring that her children are full biological siblings. Finally, if she knows the identity of the donor, then her children may meet him at some point in the future to answer any curiosity they might have.¹²² Consequently, comprehensive AI legislation should anticipate that unmarried women may inseminate with sperm from a known donor and provide accordingly.

B. COVERAGE BY THE AI STATUTE SHOULD NOT BE CONDITIONED ON INVOLVEMENT OF A PHYSICIAN

There are valid reasons both for and against requiring that AI only be performed by a physician or under a physician's supervision. The arguments against using a physician in the process are that "it might offend a woman's sense of privacy and reproductive autonomy, might result in burdensome costs to some women, and might interfere with a woman's desire to conduct the procedure in a comfortable environment such as her own home or to choose the donor herself."¹²³ On the other hand, there are countervailing policy reasons to encourage the use of physicians in the alternative insemination process. First, a physician can procure a complete medical history from the donor and screen for hereditary diseases.¹²⁴ Second, the involvement of an objective third party "can serve to create a formal, documented structure for the donor-recipient relationship, without which . . . misunderstandings between the parties regarding the nature of their relationship and the donor's relationship to the child [will] be more likely to occur."¹²⁵

While it may be better policy to encourage the use of a physician, the involvement of a physician does not change the intent of the parties. Legislatures do not have the ability to weigh these concerns for every woman and thus, the choice should be left to the individual.

¹²¹ Many women who decide to get pregnant through artificial insemination are surprised to learn that while they can find out the eye color, body type and intelligence of a donor, they can't find out anything about his medical history. A majority of the physicians who took part in the Office of Technology Assessment study said they would never allow a recipient to review the medical records of a donor, even if all the information about the man's identity had been removed.

Gaines, *supra* note 10, at 20.

¹²² See, e.g., *Thomas S. v. Robin Y.*, 599 N.Y.S.2d 377, 378 (Fam. Ct. 1993).

¹²³ *Jhordan C. v. Mary K.*, 224 Cal. Rptr. 530, 535 (Ct. App. 1986) (arguments of defendant-mother).

¹²⁴ *Id.* at 534.

¹²⁵ *Id.* at 535.

C. THE LEGAL PARENTS OF A CHILD CONCEIVED THROUGH AI SHOULD, IF POSSIBLE, BE DETERMINED BEFORE CONCEPTION

An AI statute best serves all of the parties if it allows parentage to be established before conception. Pre-conception determination of legal parentage protects the privacy of the unmarried woman and her family and avoids leaving them in an unstable situation while litigation is pending.¹²⁶ Moreover, a pre-conception determination of parentage is preferable because it serves the best interests of the child if the mother dies during childbirth or if the child is born handicapped because it will free the child from the possibility of spending years in legal limbo while courts decide who is entitled to or is required to assume custody. Finally, pre-conception determination of the donor's status toward the child avoids complicating the adoption process, allowing a non-biological co-parent to adopt without the donor's consent.

D. THE AI DONOR AND DONEE'S PRE-INSEMINATION, MUTUAL INTENT, SHOULD CONTROL LEGAL PARENTAGE

A significant shortcoming of existing AI statutes, the UPA and the US-CACA included, is that they all make blanket provisions determining legal parentage without considering the intent of the parties. While such provisions appear to determine legal parentage with finality, case law demonstrates that such provisions ultimately leave the unmarried AI donee vulnerable to a paternity suit.¹²⁷ Moreover, this indiscriminately imposed legislative solution that a donor will not be treated as the natural father of a child conceived through AI regardless of the intention of the parties is arbitrary and thus, undesirable. The parties together, not the Legislature, and not the sperm donor alone, are in the best position to determine the contours of a family for the child conceived through AI.

According to the United States Supreme Court cases adjudicating the rights of unwed fathers to assert paternity when the method of conception was sexual intercourse and the mother is unmarried,¹²⁸ only the parenting intentions of the unwed father are relevant to his paternity action; the familial expectations of the mother are ignored. Under that line of cases, the appropriate inquiry focuses on whether the unwed father "grasps that opportunity [to develop a relationship with his offspring] and accepts some measure of responsibility for the child's future."¹²⁹ The Court, in these cases, did not even acknowledge the existence of the unwed mother, let alone her intentions or desires. Significantly, in *Michael H.*, where the mother was married to another man, the Court did consider the context in which the unwed father was grasping his opportunity to parent, but only because the rights of the mother's husband were jeopardized by the paternity action.¹³⁰ The plurality rejected Justice Brennan's contention that the relationship between the child

¹²⁶ See *Johnson v. Calvert*, 851 P.2d 776, 782 n.10 (Cal.), cert. denied, 114 S. Ct. 206 (1993).

¹²⁷ See *supra* notes 65-79 and accompanying text.

¹²⁸ See *supra* notes 46-47 and accompanying text; see generally *Lehr v. Robertson*, 463 U.S. 248 (1983); *Caban v. Mohammed*, 441 U.S. 380 (1979); *Quilloin v. Walcott*, 434 U.S. 246 (1978); *Stanley v. Illinois*, 405 U.S. 645 (1972).

¹²⁹ *Lehr*, 463 U.S. at 262.

¹³⁰ *Michael H. v. Gerald D.*, 491 U.S. 110, 124 n.4 (1989).

and unwed father should be examined in isolation.¹³¹ The plurality countered that it "cannot imagine what compels this strange procedure of looking at the act which is assertedly the subject of a liberty interest in isolation from its effect upon other people."¹³² Given the fact that the Court did not overrule the *Lehr* line of cases, the Court apparently used "people" to refer to the mother's husband, Gerald D., and not to refer to or include the mother.

The paradigm established by the unwed father cases is inapposite in the AI context, however, because conception through AI is fundamentally distinct from conception through intercourse. Conception through AI is *always* a methodical, deliberate, calculated act that can separate biological parenthood from social parenthood. The intentional, pre-planned aspect of conception by AI merits statutory consideration of intent. As explained at the outset of this Note, the woman must decide how to inseminate and by whom. When an unmarried woman decides by whom to inseminate, she relies on the outward manifestations of the potential donee. Similarly, the donor acts in reliance on the donee's outward manifestations regarding his parental role, or lack thereof, when he agrees to donate sperm. Each induces the reliance of the other by their mutually agreed upon decision regarding co-parenting. If the potential AI participants disagree before insemination regarding the respective parenting roles each would like to play, they can go their separate ways. The stakes of a contest over legal parentage are incalculable. The donor-father may lose his chance to legally father a child and be involved in that child's life and the donee-mother may be forced to co-parent with another and thereby lose the very advantage that conception by AI offers her—the ability to parent without the involvement of the biological father.

Instead of giving one party the ability to control legal parentage, comprehensive AI legislation should enforce the parties' mutually agreed upon intent regarding legal parentage. Once insemination occurs, the parties should be equitably estopped from denying their mutual pre-conception intent. Courts have already used equitable estoppel in domestic cases and paternity disputes. For example, courts have equitably estopped a mother from denying her husband's paternity upon divorce when she had previously fostered a parent-child relationship between her husband and the children.¹³³ "Courts have also estopped a husband, former husband or adjudicated father from challenging paternity to avoid a support obligation, under circumstances where the child's emotional well-being would be undermined . . ."¹³⁴ Effectuating the pre-insemination joint intent of the parties facilitates pre-conception determination of parentage without imposing an arbitrary legislative solution on the parties.

¹³¹ *Id.* at 124.

¹³² *Id.* at n.4.

¹³³ See *Thomas S. v. Robin Y.*, 599 N.Y.S.2d 377, 381 (Fam. Ct. 1993).

¹³⁴ *Id.*; see also *R.S. v. R.S.*, 670 P.2d 923, 924, 928 (Kan. Ct. App. 1983); *K.B. v. N.B.*, 811 S.W.2d 634, 636-39 (Tex. Ct. App. 1991).

E. THE STANDARD OF PROOF OF PRE-INSEMINATION MUTUAL INTENT TO CO-PARENT OR ALLOW VISITATION SHOULD INCLUDE A WRITING REQUIREMENT

A donor seeking paternity rights or a donee alleging obligations of paternity should be required to have written proof of the parties pre-insemination intent regarding parentage. If the plaintiff cannot offer written proof of the parties' intent, the suit should be dismissed for failure to state a claim upon which relief can be granted. Only in this way can the AI legislation effectively achieve the desirable goal of pre-insemination determination of legal parentage. If the requisite proof is less than a writing, any suit over parentage will not be judicially resolvable without adjudication on the merits because the person asserting paternity need only allege the existence of an agreement to co-parent to establish a genuine issue of material fact and require trial.¹³⁵ Litigation over paternity may take several years and delay adoption by another. Consequently, proof of pre-insemination mutual intent to co-parent or allow visitation should include a writing requirement.

An AI statute could codify either a presumption that a known donor and an unmarried woman intend to co-parent or a presumption that they do not. This Note argues that the presumption should be that the parties do not intend to co-parent a child conceived by AI. Conception through AI offers an unmarried woman the opportunity to raise a child without the involvement of the biological father. Consequently, when an unmarried woman uses AI to conceive a child, it is more reasonable to presume that she does not intend to co-parent with the donor.

F. REQUIRING A DONOR TO OFFER A WRITTEN AGREEMENT TO CO-PARENT OR ALLOW VISITATION SHOULD BE CONSTITUTIONAL

In *Lehr v. Robertson*,¹³⁶ the Supreme Court evaluated a New York statute to determine "whether [the state] has adequately protected [an unwed father's] opportunity to form [a parent-child] relationship."¹³⁷ The statute at issue required the unwed father to record his name in the State's "putative father registry," to entitle him to notice of any adoption proceeding regarding his child.¹³⁸ *Lehr* did not so register and his child was adopted by her stepfather, though *Lehr* was never informed of the proceeding.¹³⁹ The Court held that the statute did not deprive the unwed father of Due Process.¹⁴⁰ The Court noted that the unwed father's right to receive notice of any adoption proceeding was completely within his control.¹⁴¹ In addition, even if the biological father's failure to register as a putative father was through ignorance of the law, this was not sufficient reason to strike the law.¹⁴² The Court went on to note that the legislative scheme was not arbitrary; "a more open-ended

¹³⁵ See FED. R. CIV. P. 56.

¹³⁶ 463 U.S. 248 (1983).

¹³⁷ *Id.* at 262-63.

¹³⁸ *Id.* at 250-51.

¹³⁹ *Id.* at 251.

¹⁴⁰ *Id.* at 256-65.

¹⁴¹ *Lehr*, 463 U.S. at 264.

¹⁴² *Id.*

notice requirement would merely complicate the adoption process, threaten the privacy interests of unwed mothers, create the risk of unnecessary controversy, and impair the desired finality of adoption decrees."¹⁴³

A statutory scheme that conditions a donor's ability to assert parentage on his proof of a written agreement to co-parent or allow visitation should adequately protect the donor's rights pursuant to the Due Process Clause of the Fourteenth Amendment. The writing requirement would provide the donor/unwed father with the opportunity to preserve his parental status. In the words of *Lehr*, by executing a writing memorializing the parties' mutual intention to co-parent, the unwed donor has "grasp[ed] the opportunity to accept some measure of responsibility for the child's future."¹⁴⁴ But failure to execute the writing is evidence that the father failed to grasp the opportunity to parent. This opportunity would be within the donor's control because he could condition his donation upon execution of the agreement. In addition, the state generally has a "legitimate and compelling interest in the regulation of artificial insemination and its social and economic incidents."¹⁴⁵ Conceivable purposes include: "(1) to allow married couples to have children, even though the husband is infertile, impotent or ill; (2) to allow an unmarried woman to conceive and bear a child without sexual intercourse; (3) to resolve potential disputes about parental rights and responsibilities: that is, (a) the mother's husband, if he consents, is the father of the child and (b) an unmarried mother is freed of any claims by the donor of parental rights; (4) to encourage men to donate semen by protecting them against any claims by the mother or the child; and (5) to legitimate the child and give it rights against the mother's husband, if he consents to the insemination."¹⁴⁶ In addition, by establishing the donor's legal status in relation to the child, the state can facilitate adoption of the child by a person with whom the biological mother does intend to co-parent.

G. AI LEGISLATION SHOULD PROVIDE A MECHANISM TO LEGALLY RECOGNIZE CO-PARENTS SHORT OF FORMAL ADOPTION

Formal adoption provides the most legally secure protection for a co-parent's relationship with a child conceived through AI. The institution of formal adoption proceedings for each child, however, may be prohibitively burdensome to the biological mother and the co-parent. First, they must either institute adoption proceedings each time they have a child or go without legal recognition until they have conceived all the children they wish before instituting adoption proceedings. Second, because a person seeking to adopt must prove the adoption is in the best interests of the child,¹⁴⁷ adoption proceedings can consume a significant amount of court resources.¹⁴⁸ Moreover, regardless of whether the parties seek and attain legal acknowledg-

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 262.

¹⁴⁵ *McIntyre v. Crouch*, 780 P.2d 239, 247 (Or. App.) (Richardson, J., dissenting), *rev. denied*, 784 P.2d 1100 (Or. 1989), *cert. denied*, 495 U.S. 905 (1990).

¹⁴⁶ 780 P.2d at 243.

¹⁴⁷ See *In re Adoption of Tammy*, 619 N.E.2d 315, 316 (Mass. 1993).

¹⁴⁸ See, e.g., *id.* at 316 (noting that "[o]ver a dozen witnesses, including mental health professionals, teachers, colleagues, neighbors, blood relatives and a priest and nun, testified to the fact

ment of the co-parent's relationship with the children, the parent-child relationship will exist. Consequently, comprehensive AI legislation should provide a mechanism to memorialize and honor the parties' intent to co-parent.

IV. MODEL LEGISLATION GOVERNING THE RIGHTS AND OBLIGATIONS OF UNMARRIED WOMEN WHO CONCEIVE VIA ALTERNATIVE INSEMINATION; KNOWN DONORS; UNKNOWN DONORS; AND UNMARRIED CO-PARENTS

This legislation will provide the legal apparatus to allow an unmarried woman who conceives by AI, her co-parent if she has one, and the donor, to formalize and preserve their parenting intentions. The goal is to settle the legal parentage of any resulting child and to the extent possible, elevate the substance of the parties' intent over the form of their actions.

§ 1. DEFINITIONS

(a) Alternative Insemination: the introduction of semen into a woman's vagina, cervical canal or uterus through the use of instruments or other means as an alternative to sexual intercourse.

(b) Donor: man, unrelated by marriage to the donee, who contributes sperm for use in alternative insemination. An individual is a donor whether or not he is known to the donee and whether or not a physician is employed in the alternative insemination process.

(c) Donee: woman who uses the donor's sperm in alternative insemination.

(d) Co-parent: any person with whom the donee formed a pre-insemination intent to jointly parent a child conceived through AI.

Comment

This definition of "alternative insemination" was derived from definitions found in existing state statutes¹⁴⁹ combined with the philosophy that this method of conception is not "artificial," but rather, is an alternative to conception via sexual intercourse.

The definition of "donor" should sweep away legal fictions and focus on the mutual intent of the parties regarding parental rights and roles, including the intent of co-parents. Whether the woman has a doctor perform the insemination or performs self-insemination and whether the donor is known to the woman are all irrelevant considerations as to whether or not the parties formed a pre-conception agreement to co-parent or allow visitation.¹⁵⁰ Thus, the definition shifts the focus of a proceeding to determine parental rights

that . . . [the biological mother, co-parent, and Tammy] form a healthy, happy, and stable family unit").

¹⁴⁹ See, e.g., IDAHO CODE § 39-5401 (1993) (AI means the "introduction of semen of a donor . . . into a woman's vagina, cervical canal or uterus through the use of instruments or other artificial means."); N.H. REV. STAT. ANN. § 168-B: 1 (Supp. 1993) ("AI" means the "introduction of semen into a woman's vagina, cervical canal or uterus through extracorporeal or noncoital means").

¹⁵⁰ See *McIntyre*, 780 P.2d at 243.

from the technical details of conception to what the parties jointly agreed to do.

This definition of "co-parent" acknowledges that the donee may be creating a family with someone other than the biological father. The definition limits "who may claim status as a co-parent to one who procreates, begets, or brings forth offspring"¹⁵¹ by limiting co-parent to one with whom the donee formed a pre-insemination intent to co-parent. This limit protects a biological parent from judicial interpretation of this legislation to permit any person to assert an interest in a child.¹⁵²

§ 2. UNMARRIED WOMAN; ANONYMOUS DONOR

If the donor of semen used in AI is not the mother's husband and is unknown to the woman:

(a) such donor shall have no right, obligation or interest with respect to a child born as a result of the AI; and

(b) a child born as a result of AI shall have no right, obligation or interest with respect to such donor.¹⁵³

Comment

The purposes of this section are to allow an unmarried woman to conceive a child without sexual intercourse while protecting her from a paternity suit and to encourage sperm donation by protecting men from claims for support from either the mother or the child. "[A]nonymous donors are not likely to donate semen if they can later be found liable for support obligations, and women are not likely to use donated semen from an anonymous source if they can later be forced to defend a custody suit and possibly share parental rights and duties with a stranger."¹⁵⁴

The result of this section is to give effect to the intent of the parties participating in AI when the donor is unknown. By donating sperm anonymously, the biological father displays an intent to have no role in the upbringing of any conceived children. Similarly, a woman using sperm from an unknown donor does not intend to co-parent with the biological father. When an unmarried donee inseminates with sperm from an anonymous donor, the resulting child will have no legally recognized father.

§ 3. UNMARRIED WOMAN; KNOWN DONOR

(a) If the donor of semen used in AI is not the donee's husband and is known to the donee:

(1) such donor shall have no right, obligation or interest with respect to a child born as a result of the AI unless a written agreement

¹⁵¹ See BLACK'S LAW DICTIONARY 712 (5th ed. 1979) (defining "parent").

¹⁵² *Nancy S. v. Michele G.*, 279 Cal. Rptr. 212, 219 (Ct. App. 1991) (explaining that expanding the definition of parent to lesbian partner of biological mother "could expose other natural parents to litigation brought by child-care providers of long standing relatives, successive sets of stepparents or other close friends of family").

¹⁵³ See OR. REV. STAT. § 109.239 (1991).

¹⁵⁴ *In re R.C.*, 775 P.2d 27, 33 (Colo. 1989).

of intent to co-parent, signed by the donor and donee, was filed with the Alternative Insemination Registry; and

(2) a child born as a result of AI shall have no right, obligation or interest with respect to such donor, unless a written agreement of intent to co-parent, signed by the donor and donee, was filed with the Alternative Insemination Registry.

(b) If the donor of semen used in AI is not the donee's husband and is known to the donee, such donor shall have no right to visitation with a child born as a result of the AI unless written agreement to allow visitation, signed by the donor and donee, was filed with the Alternative Insemination Registry.

Comment

The purposes of this section are to allow a woman to inseminate by a known donor while protecting the parties' intention to have rights and obligations end at insemination or to have them continue through an arrangement to co-parent or to allow visitation and to encourage men to be known donors. Neither party may succeed in asserting paternity merely by offering proof of unilateral actions or intent. By requiring that affirmative proof of the parties' mutual intentions regarding parenting be filed with the Alternative Insemination Registry, this section clarifies when a child born through AI is free for adoption by a non-donor co-parent. The practical effect of this section is that, in the absence of a written agreement between the donor and donee to co-parent, the child will have no legally recognized father unless the child is adopted by a male co-parent.

The protection of this section is conditioned on conception through alternative insemination. It does not require a licensed physician to perform or supervise the procedure; it merely requires proof that the means of conception was not sexual intercourse.

§ 4. RESPONSIBILITIES OF HEALTH CARE PROFESSIONALS IN COUNSELING PATIENTS REGARDING AI

(a) AI need not, but may be, performed by a licensed physician. It may also be performed under the supervision and control of a physician who is available for consultation and direction.¹⁵⁵

(b) If a physician is involved in the insemination process, the physician shall:

(1) provide to the donor and donee a brief summary of the paternity consequences of AI as set forth in §§ 2 and 3 of this code;

(2) obtain the written consent to AI of the known donor and the donee on a form the physician shall provide. The written consent shall contain a statement from the donor and donee regarding intent, or lack of intent, to jointly co-parent any resulting child or to allow visitation.

(3) upon request, provide the donee with the following information to the extent the physician has knowledge of it:

(A) the medical history of the donor, including, but not limited to,

¹⁵⁵ See, e.g., OHIO REV. CODE ANN. § 3111.32 (Anderson 1989).

any available genetic history of the donor and persons related to him by consanguinity;

(B) the race, eye and hair color, age, height, and weight of the donor;

(C) any other information that the donor has indicated may be disclosed.

(c) A male doctor shall not serve as the donor for patients he inseminates.

Comment

The purpose of this section is to leave to the donee the choice of whether to have a physician perform the insemination or to self-inseminate. Imposing an obligation on physicians to educate their patients before performing a medical procedure is not a significant change in their current responsibility to patients. Fourteen states currently require that a doctor perform AI or implicitly assume the insemination will be performed by a doctor.¹⁵⁶

§ 5. AGREEMENTS TO CO-PARENT AND THE CREATION OF PARENTAL RIGHTS AND ADOPTION BY CO-PARENT WITHOUT TERMINATION OF BIOLOGICAL MOTHER'S RIGHTS

(a) A non-biological co-parent may claim the rights and responsibilities of parenthood either through adoption pursuant to subsection (b) or in a proceeding seeking court-ordered custody or visitation pursuant to subsection (c).

(b) A person who is unrelated to a child conceived through AI may, with the biological mother's consent, legally adopt the child without terminating the biological mother's parental rights.

(c) If a co-parent has not established legal parenthood through an adoption proceeding, he or she has standing to vindicate his or her parental rights through a legal suit for custody or visitation. To succeed in a petition for custody or visitation, the petitioner must prove:

(1) that he or she was a co-parent to the child(ren) by proving that a written agreement between the donee and the petitioner to co-parent was filed with the Alternative Insemination Registry;

(2) that since the child(ren)'s birth, the petitioner has functioned as a parent to the child(ren); and

(3) that such custody or visitation is in the child(ren)'s best interest.

¹⁵⁶ See ALA. CODE § 26-17-21 (1992); ALASKA STAT. § 25.20.045 (1991); ARK. CODE ANN. § 9-10-202 (Michie 1993); CAL. CIV. CODE § 7005 (West 1983); COLO. REV. STAT. § 19-4-106 (West 1986 & Supp. 1993); GA. CODE ANN. § 19-7-21 (Michie 1991); IDAHO CODE § 39-5402 (1993); ILL. ANN. STAT. ch. 750, para. 40 (Smith-Hurd 1993); MINN. STAT. ANN. § 257.56 (West 1992); MO. ANN. STAT. § 193.085 (Vernon Supp. 1993); MONT. CODE ANN. § 40-6-106 (1993); NEV. REV. STAT. § 126.061 (1991); N.J. STAT. ANN. § 9:17-44 (West 1993); N.M. STAT. ANN. § 40-11-6 (Michie 1989); N.Y. DOM. REL. LAW § 73 (Consol. 1979); OHIO REV. CODE ANN. § 3111.32 (Anderson 1989); OKLA. STAT. ANN. tit. 10 § 551-55 (West 1987 & Supp. 1994); OR. REV. STAT. § 109.239 (1991); WASH. REV. CODE ANN. § 26.26.050 (West 1986); WIS. STAT. ANN. § 891.40 (West Supp. 1993); WYO. STAT. § 14-2-103 (1986).

(d) A co-parent's sexual orientation in and of itself is not relevant to entitlement to custody or visitation.

Comment

This section attempts to protect the person who accompanies the unmarried donee through the AI process in the role of a co-parent. Subsection (b) allows a co-parent to adopt a child conceived through AI. While the same result is being reached in a case by case approach, this provision formalizes the procedure and removes uncertainty about the outcome of such a petition.

Subsection (c) offers protection to the relationship a co-parent has with a child in the event that the biological mother dies or attempts to end contact between the co-parent and child, even in the absence of legal adoption. It does so because even if the co-parent never adopted the child, the co-parent did function as a psychological parent to the child and an award of custody or visitation may be in the child's best interest. Through this subsection, courts have legislative authorization to reach the merits of these custody contests between a biological parent and a co-parent. Without express authority to adjudicate these disputes, the courts have treated non-biological co-parents differently, depending on whether the co-parent was seeking custody or the biological parent was seeking support. In either scenario, but for the consent to co-parent by the non-biological partner, the children involved would not have been conceived. The context in which a custody dispute arises does not change the parties' original pre-insemination intent. Just as the mutual pre-conception intent of the donor and biological mother should govern a parentage dispute, the mutual pre-conception intent of the biological mother and any co-parent should govern the outcome of a visitation suit, provided they have taken the step to record this intention.

§ 6. ALTERNATIVE INSEMINATION AGENCY

An Alternative Insemination Agency is hereby established. The Agency shall compile statistics on the use of AI and record agreements between the donor and donee regarding intent to co-parent or allow visitation and agreements between the donee and another person to co-parent.

Comment

The purpose of this subsection is to provide a procedurally simple method for the parties to AI to record their mutual intentions regarding parenting. In the event of litigation over parentage, this record will provide evidence essential to a court's determination of the issues.

§ 7. JURISDICTION

The rights and obligations of the parties will be governed by [state] law when the conception occurred within [state]. If conception occurred outside [state] and the birth occurred in [state], the law of the state of conception will govern.

Comment

In order to finalize family relationships, the rights of the parties should not depend on where the child(ren) are born or the parties' legal residence at the time a paternity suit is brought. Thus, this provision deems the law of the state in which conception occurred the controlling law.

V. CONCLUSION

As the law in most states currently stands, courts are using traditional presumptions about family and parenthood to decide cases in which technology has arguably altered the underlying assumptions. It is true that in the past, nature provided a child with one "natural" mother and one "natural" father. But science has tinkered with nature, separating biological parenthood from legal parenthood, and society is more accepting of "family" as a term to describe "[a] group of people who love and care for each other."¹⁵⁷ Whether a person is married or unmarried, heterosexual or gay or lesbian, the importance of family is universal. Reproductive technologies like AI allow those of us who live "alternative lifestyles" to create families.

Because people are creating families using AI, it is time to enact laws which actually do clarify their rights and responsibilities. Until we do so, the law is largely irrelevant to the children and families AI makes possible because the law does not adequately "define, declare and protect the rights of children raised in these families."¹⁵⁸ The mutually formed pre-conception intent of the parties to AI is the most suitable organizing principle for legislative reform because it offers the chance for all of the parties to self-determine their family while satisfying Due Process and without being arbitrary. It is time for legislative reform of AI statutes to expand the magic mirror of the law so that it may reflect the lives of all people, including the lives of unmarried women who choose motherhood through AI.

¹⁵⁷ Jean Seligman, *Variations on a Theme*, NEWSWEEK, Sp. Ed., Winter/Spring 1990, at 38 (reporting the results of a study in which adults were asked to select a definition of family; only 22% chose a legalistic definition of family—"a group of people related by blood, marriage or adoption—while nearly 75 percent chose the functional definition of "family.").

¹⁵⁸ Adoptions of B.L.V.B. and E.L.V.B., 628 A.2d 1271, 1276 (Vt. 1993).

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