TWO FATHERS, ONE DAD: ALLOCATING THE PATERNAL OBLIGATIONS BETWEEN THE MEN INVOLVED IN THE ARTIFICIAL INSEMINATION PROCESS

by
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This Article deals with the allocation of paternity between the men involved in the artificial insemination process. The Article explores the manner in which the courts determine the identity of the father of a child conceived by artificial insemination. If a man is financially responsible for a child during his lifetime, that child is usually classified as his heir if he dies intestate. Once an artificially conceived child is permitted to inherit from his or her father, the issue that must be resolved is: from which "father" does the child have the legal right to inherit? There are two possible answers to this question. The child may have the right to inherit from the husband of his or her mother or from the man who donated the sperm that resulted in his or her conception.

The current paternal statutory scheme is inadequate to address the legal consequences resulting from the existence of artificially created children because it focuses too much on protecting the reproductive rights of the men involved in the process and ignores the needs of the children that are conceived. Instead of focusing exclusively upon the man's right to choose whether or not to be a parent, the state legislatures should take steps to ensure that the artificially conceived child has at least two adults who are legally responsible to provide financial support for the child. That goal can be achieved by expanding the definition of "father" to include men who are not linked to the child by biology or adoption. I propose that fatherhood should be redefined to promote the best interests of the artificially conceived child.

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I. INTRODUCTION

According to one court, "'fatherhood' or 'paternity' is a legally, socially, and politically defined relationship, not a biological fact."[1] A father is the man who supplies the genetic material used to create the child. A dad is the man who teaches the child to ride a bike. As a consequence of the advances in reproductive technology, the same man may not play both of those roles. Nonetheless, the law's failure to keep up with those advances may result in neither man playing the role. This Article deals with the allocation of paternity between the men involved in the artificial insemination process. The objective should be to allocate paternity in a manner that resolves the "legally fatherless child" problem.

In 2005, a Tennessee Supreme Court justice stated, "We now live in an era where a child may have as many as five different 'parents.' These include a sperm donor, an egg donor, a surrogate or gestational host, and two nonbiologically related individuals who intend to raise the child."[2] The court opined that the state's parentage statutes were ineffective because the legislature did not "contemplate many of the scenarios now made possible by recent developments in reproductive technology."[3]

Further medical advances have been made since 2005. Hence, it may now be possible for at least six persons to owe parental obligations to one child.[4] Consider the following scenario. Married couple A and B contract with C to conceive a child using assisted reproduction technology. Neither A nor B is able to contribute genetic material for the procedure, so C is impregnated with sperm donated by D, a family friend of A and B, and eggs donated by E. C's husband, F, consents to the procedure. A and B are the intended parents, so they may be considered the legal parents

[1] Anonymous v. Anonymous, 1991 WL 57753, at *2 (N.Y. Sup. Ct. Jan. 18, 1991).
[2] *In re* C.K.G., 173 S.W.3d 714, 721 (Tenn. 2005).
[3] *Id.*
[4] Howard Fink & June Carbone, *Between Private Ordering and Public Fiat: A New Paradigm for Family Law Decision-making*, 5 J.L. & FAM. STUD. 1, 37–38 (2003); *see also* Richard F. Storrow, *Parenthood by Pure Intention: Assisted Reproduction and the Functional Approach to Parentage*, 53 HASTINGS L.J. 597, 602 (2002) (opining that a child conceived using assisted reproductive technology may have as many as eight recognized parents); Colette Archer, Comment, *Scrambled Eggs: Defining Parenthood and Inheritance Rights of Children Born of Reproductive Technology*, 3 LOY. J. PUB. INT. L. 152, 164 (2002).

of the child.[5] E's egg contributed to the conception of the child. Thus, she is the child's biological parent.[6] C is the child's gestational mother, so she may be recognized as the child's legal parent.[7] The child was conceived during C's marriage to F and F consented to the procedure. Hence, F may be recognized as the child's legal father.[8] Finally, as a known sperm donor who contributed to the creation of the child, D is the child's biological father and may also be deemed the child's legal father.[9] Courts faced with these types of scenarios have used their best efforts to resolve the cases before them and implored the legislatures to act. In particular, one court stated, "We urge the . . . legislature to enact laws that are responsive to these problems in order to safeguard the interests of children born as a result of assisted reproductive technology."[10] Legislatures have been slow to respond to the judicial plea for guidance.

When the statutory system allocating paternal responsibility was created, a family consisted of a man, a woman, and their children.[11] Sexual intercourse and adoption were the main methods of creating a family. Procreation is no longer the exclusive domain of the traditional family.[12] The current paternal statutory scheme is inadequate to address the legal consequences resulting from the existence of artificially conceived children because it focuses too much on protecting the reproductive rights of the men involved in the process and ignores the needs of the children who are conceived. Under the majority of state artificial insemination statutes, the question asked is: Has the man consented to be a legal parent by written agreement or by his actions?

[5] "'*Intended parents*' means a man and a woman, married to each other, who enter into an agreement with a surrogate under the terms of which they will be the parents of any child born to the surrogate through assisted conception regardless of the genetic relationships between the intended parents, the surrogate, and the child." VA. CODE ANN. § 20-156 (2008).

[6] *See In re* Marriage of Moschetta, 30 Cal. Rptr. 2d 893, 894 (Cal. Ct. App. 1994) (stating that the traditional surrogate is the child's genetic mother).

[7] "'Gestational mother' means the woman who gives birth to a child, regardless of her genetic relationship to the child." § 20-156; *See also In re* C.K.G., 173 S.W.3d at 730 (holding the gestational carrier to be the legal mother of the artificially conceived child).

[8] *See In re* K.M.H., 169 P.3d 1025, 1033 (Kan. 2007).

[9] *See* Mintz v. Zoernig, 198 P.3d 861, 864 (N.M. Ct. App. 2008).

[10] *In re* Parentage of M.J., 787 N.E.2d 144, 150 (Ill. 2003); *See also In re C.K.G.*, 173 S.W.3d at 731.

[11] *See* Barbara J. Cox, *Alternative Families: Obtaining Traditional Family Benefits Through Litigation, Legislation and Collective Bargaining*, 15 WIS. WOMEN'S L.J. 93, 93–97 (2000) (discussing the protected legal status of the traditional nuclear family).

[12] *See In re* Roberto d.B., 923 A.2d 115, 122 (Md. 2007) ("What had not been fathomed exists today. The methods by which people can produce children have changed; the option of having children is now available, using these methods, to people who, otherwise, would not be able to have children.").

The question that should be asked is: Is it in the best interest of the child that the man be considered the legal parent?[13]

Instead of focusing exclusively upon the man's right to choose whether or not to be a parent, the state legislatures should take steps to ensure that the artificially conceived child has at least two adults who are legally responsible to provide financial support for the child. This approach will promote our current public policy of protecting the interests of children. That public policy concern has led to legislative action which includes establishing mechanisms for non-marital children to inherit from their fathers[14] and giving preference to children over parents under the intestacy system.[15] In order to accomplish that goal, state legislatures should recognize more than one class of fathers and allocate paternal responsibility based upon the best interests of the artificially conceived child.

Thirty-four states have statutes addressing the legal status of children conceived with the use of assisted reproductive technology.[16] Most of the statutes deal exclusively with artificial insemination.[17] That means that sixteen state legislatures have not taken any action to address the legal issues resulting from the existence of artificially conceived children. The statutes that exist establish the parental rights of the inseminated woman's husband and the parental status of the non-spousal sperm donor. The legislatures that have enacted those statutes have created a regime that is based upon an outdated view of the American family. For example, the statutes were enacted to address situations occurring in marriages, but do not address single parents. Only the drafters of the Uniform Parentage Act (UPA)[18] and the legislators from the states of Texas and Wyoming have attempted to acknowledge the experiences of persons who are not husband and wife.[19] Most state legislatures have ignored the fact that unmarried women are choosing to be artificially

[13] *See* Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 CARDOZO L. REV. 1747, 1749 (1993) (advocating that a family law focus upon the interests of children instead of solely emphasizing the rights of parents).

[14] *See* Karen A. Hauser, Comment, *Inheritance Rights for Extramarital Children: New Science Plus Old Intermediate Scrutiny Add Up to the Need for Change*, 65 U. CIN. L. REV. 891, 931 (1997).

[15] *See* Margaret M. Mahoney, *Stepfamilies in the Law of Intestate Succession and Wills*, 22 U.C. DAVIS L. REV. 917, 920 (1989).

[16] The components of those statutes will be discussed later in the Article.

[17] Helen M. Alvaré, *The Case for Regulating Collaborative Reproduction: A Children's Rights Perspective*, 40 HARV. J. ON LEGIS. 1, 26–27 (2003).

[18] UNIF. PARENTAGE ACT (amended 2002), 9B U.L.A. 4 (Supp. 2009).

[19] *See* TEX. FAM. CODE ANN. § 160.7031(a) (Vernon 2008) ("If an unmarried man, with the intent to be the father of a resulting child, provides sperm to a licensed physician and consents to the use of that sperm for assisted reproduction by an unmarried woman, he is the father of a resulting child."). The Wyoming statute applies to married and unmarried persons. The consent must be signed by the woman and the man who plans to parent the child. WYO. STAT. ANN. § 14-2-904(a) (2009).

inseminated without the benefit of marriage or that same-sex couples are choosing to use artificial insemination to create their families.[20] Even the states that have been progressive enough to recognize same sex marriages or civil unions have not included unmarried women in the scope of their artificial insemination statutes.[21]

In order for a child to inherit under the intestacy statute, there must be a legally recognized parent-child relationship.[22] Most of the litigation surrounding this issue focuses upon the child's ability to inherit from his or her father's estate. Thus, this Article deals solely with the paternal obligations of the men involved in the artificial insemination procedure. In particular, the Article examines the circumstances under which the man has a duty to financially support the artificially conceived child. Once the law recognizes the existence of a father-child relationship for child support purposes, the child is given the opportunity to inherit from his or her father. Therefore, it is possible to speculate about the impact the existence of artificially conceived children will have on the intestacy system.

Children born during the marriage are considered legitimate because they are of the marriage. As a result, those children do not have to establish the existence of a father-child relationship to inherit from their fathers.[23] In situations where the child's conception results from sexual intercourse between a man and a woman, the child's legal status with regards to inheritance is easily determined. Things become more complicated when a child is conceived using reproductive technology like artificial insemination. Nonetheless, if the child is born during the marriage, even if there is no biological connection to the inseminated

[20] Fink & Carbone, *supra* note 4, at 54–55.

[21] Currently, same-sex couples are given marital rights or similar rights in California, Hawaii, Massachusetts and Vermont. ABA Section of Family Law, *A White Paper: An Analysis of the Law Regarding Same-Sex Marriage, Civil Unions, and Domestic Partnerships*, 38 FAM L.Q. 339, 347 (2004). With regards to those states' treatment of artificial insemination, see CAL. FAM. CODE § 7613(a)–(b) (West Supp. 2004); and MASS. GEN. LAWS ANN. ch. 46, § 4B (West 2009). Hawaii has not enacted a statute dealing with the parental obligations of the men involved in the artificial insemination process. Although Vermont does not have an artificial insemination statute, the Vermont Supreme Court's reasoning in *Miller-Jenkins v. Miller-Jenkins*, indicates that the Court would apply such a statute to same-sex couples who had entered into a civil union. 912 A.2d 951 (Vt. 2006).

[22] *See* CAL. FAM. CODE § 7601 (West 2004) ("'Parent and child relationship' . . . means the legal relationship existing between a child and the child's natural or adoptive parents incident to which the law confers or imposes rights, privileges, duties, and obligations. The term includes the mother and child relationship and the father and child relationship."); *see also* Sol Lovas, *When is a Family Not a Family? Inheritance and the Taxation of Inheritance Within the Non-Traditional Family*, 24 IDAHO L. REV. 353, 381 (1988).

[23] Paula Roberts, *Truth and Consequences: Part II. Questioning the Paternity of Marital Children*, 37 FAM. L.Q. 55, 55–56 (2003).

woman's husband, the court may still obligate the husband to provide support for the child.[24]

The majority of state legislatures have not enacted statutes that deal specifically with the inheritance rights of artificially conceived children.[25] This Article addresses the obligations of the men involved in the conception of children conceived by the use of assisted reproduction[26] or assisted conception.[27] The legal issues that arise as a consequence of surrogacy or gestational agreements are beyond the scope of this Article.[28] Therefore, the issues addressed in this Article are limited to those impacting children conceived as a result of artificial insemination as it is defined in several state statutes.[29]

Part II of this Article includes a brief discussion of the artificial insemination process. If a man is financially responsible for a child during his lifetime, that child is usually classified as his heir if he dies intestate. Once an artificially conceived child is permitted to inherit from his or her father, the issue that must be resolved is: From which "father" does the child have the legal right to inherit? There are two possible answers to this question. The child may have the right to inherit from the

[24] *See* Laura G. v. Peter G., 830 N.Y.S.2d 496, 500 (N.Y. Sup. Ct. 2007).

[25] *See* ARK. CODE ANN. § 28-9-209(c) (2004) ("Any child conceived following artificial insemination of a married woman with the consent of her husband shall be treated as their child for all purposes of intestate succession. Consent of the husband is presumed unless the contrary is shown by clear and convincing evidence."); CONN. GEN. STAT. ANN. § 45a-777(a) (West 2004) ("A child born as a result of A.I.D. may inherit the estate of his mother and her consenting spouse . . . and he shall not inherit the estate from his natural father or his relatives."); GA. CODE ANN. § 53-2-5 (West 2003) ("An individual conceived by artificial insemination and presumed legitimate . . . shall be considered a child of the parents and entitled to inherit under the laws of intestacy from the parents and from relatives of the parents, and the parents and relatives of the parents shall likewise be entitled to inherit as heirs from and through such individual.").

[26] "'Assisted reproduction' means a method of causing pregnancy other than sexual intercourse. The term includes: a. Intrauterine insemination; b. Donation of eggs; c. Donation of embryos; d. In vitro fertilization and transfer of embryos; and e. Intracytoplasmic sperm injection." N.D. CENT. CODE § 14-20-02 (Supp. 2009).

[27] UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT § 1(1), 9C U.L.A. 368 (2001) ("'Assisted conception' means a pregnancy resulting from (i) fertilizing an egg of a woman with sperm of a man by means other than sexual intercourse or (ii) implanting an embryo, but the term does not include the pregnancy of a wife resulting from fertilizing her egg with sperm of her husband.").

[28] This Article is limited to artificial insemination because the state statutes dealing with the relevant paternal obligations deal solely with artificial insemination and not other forms of assisted reproduction. *See In re* Parentage of J.M.K., 119 P.3d 840, 849 (Wash. 2005) (holding that artificial insemination statute did not apply to situations involving in vitro fertilization).

[29] "'Artificial insemination' means introduction of semen of a donor . . . into a woman's vagina, cervical canal or uterus through the use of instruments or other artificial means." IDAHO CODE ANN. § 39-5401 (2002). *See also* OHIO REV. CODE ANN. § 3111.88 (West 2005); Justyn Lezin, *(Mis)Conceptions: Unjust Limitations on Legally Unmarried Women's Access to Reproductive Technology and Their Use of Known Donors*, 14 HASTINGS WOMEN'S L.J. 185, 190 (2003).

husband of his or her mother or from the man who donated the sperm that resulted in his or her conception. During a marriage, if a woman is artificially inseminated with her husband's sperm, the resulting child is treated as if it was conceived by sexual intercourse.[30] Thus, the inheritance issue is easily resolved.

Relying upon a review of the relevant state statutes, in Part III, I analyze the circumstances under which a married man may be obligated to support an artificially conceived child to whom he has no biological connection. Part IV focuses upon the legal obligations placed upon non-spousal sperm donors.[31] Part V attempts to identify the deficiencies in the current state statutory system. Part VI consists of an analysis of the UPA's approach. Part VII offers some suggestions for improving the capacity of the current legal regime to deal with the paternal obligations of the men involved in the artificial insemination process. In the final part of this Article, Part IX, I lay out my proposal for redefining fatherhood to promote the best interests of artificially conceived children.

II. THE PROCESS OF ARTIFICIAL INSEMINATION

In order to comprehend the premise of this Article, it is not necessary to have a thorough understanding of the science behind the artificial insemination process. Therefore, I will only briefly discuss the process. The artificial insemination process was originally performed on domestic animals.[32] This is not surprising because most medical procedures are perfected by using animals as test subjects. Consequently artificial insemination is the oldest and most commonly used form of assisted reproduction.[33]

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[30] Daryl L. Gordon-Ceresky, Note, *Artificial Insemination: Its Effect on Paternity and Inheritance Rights*, 9 CONN. PROB. L.J. 245, 246 (1995).

[31] In most jurisdictions, husbands are not considered donors for purposes of artificial insemination. *See, e.g.*, N.D. CENT. CODE § 14-20-02-8(a) (Supp. 2009) ("'Donor' means an individual who produces eggs or sperm used for assisted reproduction, whether or not for consideration. The term does not include: a. A husband who provides sperm, or a wife who provides eggs, to be used for assisted reproduction by the wife . . . ."); *See also* OHIO REV. CODE ANN. § 3111.88(B) (West 2005) ("'Donor' means a man who supplies semen for a non-spousal artificial insemination.").

[32] Martin Richards, *Genes, Genealogies and Paternity: Making Babies in the Twenty-first Century*, *in* FREEDOM AND RESPONSIBILITY IN REPRODUCTIVE CHOICE 53, 55 (JR Spencer & Antje du Bois-Pedain eds., 2006). Some states still have statutes regulating the use of artificial insemination in animals. *See, e.g.*, IDAHO CODE ANN. § 25-803 (2000) ("It is unlawful for any person to practice artificial insemination of domestic animals unless he shall first obtain a license so to do as provided in this act. Provided, no license shall be required of or by any person to perform artificial insemination upon his own domestic animals.").

[33] Elizabeth A. Bryant, Comment, In the Interest of R.C., Minor Child*: The Colorado Artificial Insemination by Donor Statute and the Non-Traditional Family*, 67 DEN. U. L. REV. 79, 79 (1990).

Procreation usually occurs when a woman's egg is fertilized by sperm inserted in her body through sexual intercourse. That process is called natural insemination. A woman is artificially inseminated whenever sperm is inserted into her body using something other than a penis.[34] There are numerous reasons why a woman might choose to reproduce using artificial insemination. For example, when her male companion is infertile or impotent, a woman will not be able to become pregnant through natural insemination. Hence, to achieve her goal of conception, the woman may decide to try artificial insemination. Moreover, in some cases, artificial insemination is used when a woman in a same-sex relationship desires to get pregnant.[35]

The artificial insemination process involves the injection of sperm near the woman's cervix.[36] The procedure may be done by a licensed physician in a medical facility or by a woman at home with a turkey baster.[37] Medically, there are three main types of artificial insemination.[38] The classification of the type of artificial insemination involved depends upon the source of the sperm inserted into the woman.[39] If the woman's husband contributes the sperm that are implanted, the process is called homologous insemination.[40] That type of insemination may also be referred to as artificial insemination by husband (AIH).[41] Initially, this was the only type of artificial insemination performed by doctors.[42] This type of artificial insemination is not the focus of this Article.

More and more women are choosing to be inseminated with sperm donated by men with whom they do not have a relationship. The procedure involving the use of donor sperm is heterologous

[34] Machelle M. Seibel, *Understanding the Medical Procedures and Terminology Surrounding Reproductive Technology, in* ADOPTION AND REPRODUCTIVE TECHNOLOGY LAW IN MASSACHUSETTS 411, 415 (Susan L. Crockin ed., 2000).

[35] CHARLES P. KINDREGAN, JR. & MAUREEN MCBRIEN, ASSISTED REPRODUCTIVE TECHNOLOGY: A LAWYER'S GUIDE TO EMERGING LAW AND SCIENCE § 2.3, at 33–34 (2006) (listing key reasons women choose to get artificially inseminated).

[36] John A. Gibbons, Comment, *Who's Your Daddy?: A Constitutional Analysis of Post-Mortem Insemination*, 14 J. CONTEMP. HEALTH L. & POL'Y 187, 192 (1997).

[37] Marla J. Hollandsworth, *Gay Men Creating Families Through Surro-Gay Arrangements: A Paradigm for Reproductive Freedom*, 3 AM. U. J. GENDER & L. 183, 204 (1995).

[38] Sheri Gilbert, Note, *Fatherhood from the Grave: An Analysis of Postmortem Insemination*, 22 HOFSTRA L. REV. 521, 526–27 (1993).

[39] Barbara K. Padgett, Note, *Illegitimate Children Conceived by Artificial Insemination: Does Some State Legislation Deny Them Equal Protection Under the Fourteenth Amendment?*, 32 U. LOUISVILLE J. FAM. L. 511, 516–17 (1993).

[40] Cindy L. Steeb, Note, *A Child Conceived After His Father's Death?: Posthumous Reproduction and Inheritance Rights. An Analysis of Ohio Statutes,* 48 CLEV. ST. L. REV. 137, 140 (2000).

[41] *Id.*

[42] Inseminating a woman with the sperm of a man who was not her husband was highly controversial. Sandi Varnado, Comment, *Who's Your Daddy?: A Legitimate Question Given Louisiana's Lack of Legislation Governing Assisted Reproductive Technology*, 66 LA. L. REV. 609, 615–16 (2006).

insemination or artificial insemination by donor (AID).[43] In some cases, a doctor may inseminate a woman with a mixture consisting of a combination of her husband's sperm and sperm from a donor. That process is called confused artificial insemination.[44] The focus of this Article is upon the paternal obligations of the men involved in the artificial insemination process when the woman is inseminated with donor sperm. The next Part explores the parental responsibility of the inseminated woman's husband.

III. PATERNAL OBLIGATIONS OF THE HUSBANDS

This Part deals with non-spousal insemination[45] situations where a married woman is inseminated with sperm donated by a man who is not her husband.[46] The legal issue becomes: is the child the legitimate heir of the woman's husband? If the child is classified as legitimate, the child has the right to inherit from the man who was married to the child's mother at the time of the artificial insemination. Under the common law, the child would be in the class of heirs if the child was conceived during the marriage.[47] The states that have enacted statutes addressing the status of children conceived by artificial insemination have taken different routes to arrive at the same answer—the child is the legitimate child of the woman's husband. Thus, the child has the right to inherit from and through that man.[48]

A. The Husband Agrees to Be the Father

In most jurisdictions, if the husband does not consent in writing to the artificial insemination of his wife, he is not responsible for providing financial support to the resulting child.[49] Hence, it follows that the child

[43] Karin Mika & Bonnie Hurst, *One Way to Be Born? Legislative Inaction and the Posthumous Child*, 79 MARQ. L. REV. 993, 997 (1996).

[44] Janet J. Berry, *Life After Death: Preservation of the Immortal Seed*, 72 TUL. L. REV. 231, 236 (1997).

[45] "'Non-spousal artificial insemination' means an artificial insemination of a woman with the semen of a man who is not her husband." OHIO REV. CODE ANN. § 3111.88(C) (West 2005).

[46] This is referred to as heterologous artificial insemination (A.I.D.). Padgett, *supra* note 39, at 516.

[47] *See* GDK v. State Dep't of Family Servs., 92 P.3d 834, 835 (Wyo. 2004); ALA. CODE § 26-17-204(a) (LexisNexis Supp. 2008) ("A man is presumed to be the father of a child if: (1) he and the mother of the child are married to each other and the child is born during the marriage . . . .").

[48] Once the father-child relationship is recognized, the child has the right to inherit under the intestacy system. Peter Wendel, *Inheritance Rights and the Step-Partner Adoption Paradigm: Shades of the Discrimination Against Illegitimate Children*, 34 HOFSTRA L. REV. 351, 358 & n.32 (2005).

[49] *E.g.*, K.S. v. G.S., 440 A.2d 64, 66 (N.J. Super. Ct. Ch. Div. 1981). *See also In re* Marriage of Witbeck-Wildhagen, 667 N.E.2d 122, 126 (Ill. App. Ct. 1996) (holding

would not be entitled to inherit from the nonconsenting husband. A few states require that the writing indicating the man's consent be executed and acknowledged.[50] Nonetheless, some courts have stated that consent is not limited to written consent. Thus, a man may become responsible for the artificially conceived child as a result of his actions.[51] Further, some state statutes mandate that the husband consent to the artificial insemination without specifically requiring that the consent be in writing.[52] Under the Arkansas statute, if the husband does not submit convincing evidence indicating otherwise, he is presumed to have consented to the insemination of his wife.[53] The UPA and at least one state permit a husband to avoid responsibility for the child by withdrawing his consent.[54] The husband has the burden of proving that he withdrew his consent.[55] The husband's legal duty to support the child may also be eliminated by dissolution of the marriage[56] or the death of the husband prior to the child's conception.[57] If the woman is able to show that her husband consented in some manner to her being artificially inseminated, he will be legally recognized as the father of the artificially created child.

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that it is against public policy to require a man to provide financial support for a child his wife conceives by artificial insemination without his consent).

[50] *See* 750 ILL. COMP. STAT. ANN. 40/3 (West 2009); KAN. STAT. ANN. § 23-130 (2007); N.Y. DOM. REL. LAW § 73(2) (McKinney Supp. 2009); OKLA. STAT. ANN. tit. 10, § 553 (West 2007).

[51] *See, e.g.*, *In re* Baby Doe, 353 S.E.2d 877, 879 (S.C. 1987) ("Husband's consent to his wife's impregnation by artificial insemination may be express, or it may be implied from conduct which evidences knowledge of the procedure and failure to object." (citing R.S. v. R.S., 670 P.2d 923 (Kan. Ct. App. 1983))). *See also* Karen De Haan, Note, *Whose Child Am I? A Look at How Consent Affects a Husband's Obligation to Support a Child Conceived Through Heterologous Artificial Insemination*, 37 BRANDEIS L.J. 809, 812–14 (1999).

[52] *See* TENN. CODE ANN. § 68-3-306 (2006); MICH. COMP. LAWS SERV. § 333.2824(6) (LexisNexis 2005); MASS. GEN. LAWS ANN. ch. 46, § 4B (West 2009).

[53] ARK. CODE ANN. § 28-9-209 (2004).

[54] *See* UNIF. PARENTAGE ACT (amended 2002) § 706(b), 9B U.L.A. 65 (Supp. 2009) ("The consent of a former spouse to assisted reproduction may be withdrawn by that individual in a record at any time before placement of . . . sperm . . . ."). *See also* COLO. REV. STAT. § 19-4-106(7)(b) (2008).

[55] *See* Jackson v. Jackson, 739 N.E.2d 1203, 1213 (Ohio Ct. App. 2000).

[56] *See* UNIF. PARENTAGE ACT (amended 2002) § 706(a), 9B U.L.A. 65 (Supp. 2009) ("If a marriage is dissolved before placement of . . . sperm . . ., the former spouse is not a parent of the resulting child unless the former spouse consented in a record that if assisted reproduction were to occur after a divorce, the former spouse would be a parent of the child."). *See also* COLO. REV. STAT. § 19-4-106(7)(a) (2008); VA. CODE ANN. § 20-158(C) (2008).

[57] UNIF. PARENTAGE ACT (amended 2002) § 707, 9B U.L.A. 66 (Supp. 2009) ("If a spouse dies before placement of eggs, sperm, or embryos, the deceased spouse is not a parent of the resulting child unless the deceased spouse consented in a record that if assisted reproduction were to occur after death, the deceased spouse would be a parent of the child.").

1. Written Consent

As a matter of public policy, the state of Connecticut has declared that if a woman has a child during wedlock, that child is legitimate.[58] According to the statute, the public policy considerations are relevant to situations involving children born as a result of artificial insemination.[59] To that end, the Connecticut legislature enacted a statute specifically stating that children conceived by artificial insemination should be legally treated as if they had been naturally conceived. Therefore, the artificially conceived child is the legitimate child of the husband of the inseminated woman as long as the husband consented to the procedure.[60] The procedure must be performed by a licensed physician[61] who must acquire the husband's written consent.[62] Once written proof of the husband's consent has been filed with the probate court,[63] the artificially conceived child has the legal right to inherit from his or her mother's husband's estate, even though a biological connection does not exists between the child and the husband.[64]

Connecticut is not alone in its treatment of artificially conceived children. A significant number of other states also mandate that the procedure be performed by or under the supervision of a licensed physician[65] and that the husband consent in writing to the artificial

[58] CONN. GEN. STAT. ANN. § 45a-771(a) (West 2004) ("It is declared that the public policy of this state has been an adherence to the doctrine that every child born to a married woman during wedlock is legitimate.").

[59] *Id.* § 45a-771(b).

[60] *Id.* § 45a-774 ("Any child or children born as a result of A.I.D. shall be deemed to acquire, in all respects, the status of a naturally conceived legitimate child of the husband and wife who consented to and requested the use of A.I.D.").

[61] *Id.* § 45a-772(a).

[62] *Id.* § 45a-772(b) ("A.I.D. shall not be performed unless the physician receives in writing the request and consent of the husband and wife desiring the utilization of A.I.D. for the purpose of conceiving a child or children.").

[63] *Id.* § 45a-773(a).

[64] *Id.* § 45a-777(a); Gordon-Ceresky, *supra* note 30, at 267–70.

[65] ARK. CODE ANN. § 9-10-202(a) (2008) ("Artificial insemination of a woman shall only be performed under the supervision of a physician licensed under the Arkansas Medical Practices Act."); IDAHO CODE ANN. § 39-5402 (2002) ("Only physicians licensed under chapter 18, title 54, Idaho Code, and persons under their supervision may select artificial insemination donors and perform artificial insemination."); OHIO REV. CODE ANN. § 3111.90 (West 2005) ("A non-spousal artificial insemination shall be performed by a physician or a person who is under the supervision and control of a physician."); OKLA. STAT. ANN. tit. 10, § 551 (West 2007) ("The technique of heterologous artificial insemination may be performed in this state by persons duly authorized to practice medicine at the request and with the consent in writing of the husband and wife desiring the utilization of such technique for the purpose of conceiving a child or children."); *Id.* § 553 ("No person shall perform the technique of heterologous artificial insemination unless currently licensed to practice medicine in this state, and then only at the request and with the written consent of the husband and wife desiring the utilization of such technique."); OR. REV. STAT. § 677.360 (2007) ("Only physicians licensed under ORS chapter 677 and persons under their supervision may select artificial insemination donors and perform artificial insemination."); WIS. STAT. ANN. § 891.40(1) (West 2009) ("If,

insemination of his wife[66] in order for the resulting child to be considered legitimate.[67] Even in states that do not require the artificial

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 of the mother at the time of the conception of the child shall be the natural father of a child conceived. The husband's consent must be in writing and signed by him and his wife.").

[66] ARK. CODE ANN. § 9-10-202(b) ("Prior to conducting the artificial insemination, the supervising physician shall obtain from the woman and her husband or the donor of the semen a written statement attesting to the agreement to the artificial insemination, and the physician shall certify their signatures and the date of the insemination."); IDAHO CODE ANN. § 39-5403(1) ("Artificial insemination shall not be performed upon a woman without her prior written request and consent and the prior written request and consent of her husband."); OHIO REV. CODE ANN. § 3111.92 ("The non-spousal artificial insemination of a married woman may occur only if both she and her husband sign a written consent to the artificial insemination . . . ."); *Id.* § 3111.93 (setting out content of required writing); OR. REV. STAT. § 677.365(1) ("Artificial insemination shall not be performed upon a woman without her prior written request and consent and, if she is married, the prior written request and consent of her husband."); UTAH CODE ANN. § 78B-15-704(1) (2008) ("A consent to assisted reproduction by a married woman must be in a record signed by the woman and her husband. This requirement does not apply to the donation of eggs for assisted reproduction by another woman."); WYO. STAT. ANN. § 14-2-904(a) (2009) ("Consent by a woman and a man who intends to be the parent of a child born to the woman by assisted reproduction shall be in a record signed by the woman and the man.").

[67] ALA. CODE § 26-17-702 (LexisNexis Supp. 2008); ALASKA STAT. § 25.20.045 (2008) ("A child, born to a married woman by means of artificial insemination performed by a licensed physician and consented to in writing by both spouses, is considered for all purposes the natural and legitimate child of both spouses."); ARK. CODE ANN. § 9-10-201(a) ("Any child born to a married woman by means of artificial insemination shall be deemed the legitimate natural child of the woman and the woman's husband if the husband consents in writing to the artificial insemination."); CAL. FAM. CODE § 7613(a) (West Supp. 2009) ("If, under the supervision of a licensed physician and surgeon 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."); COLO. REV. STAT. § 19-4-106 (2008) ("If, under the supervision of a licensed physician and with the consent of her husband, a wife consents to assisted reproduction with sperm 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."); IDAHO CODE ANN. § 39-5405(3) ("The relationship, rights and obligation between a child born as a result of artificial insemination and the mother's husband shall be the same for all legal intents and purposes as if the child had been naturally and legitimately conceived by the mother and the mother's husband, if the husband consented to the performance of artificial insemination."); 750 ILL. COMP. STAT. ANN. 40/2 (West 2009) ("Any child or children born as the result of heterologous artificial insemination shall be considered at law in all respects the same as a naturally conceived legitimate child of the husband and wife so requesting and consenting to the use of such technique."); *Id.* § 40/3 ("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 shall be treated in law as if he were the natural father of a child thereby conceived."); MO. ANN. STAT. § 210.824(1) (West 2004) ("If, under the supervision of a licensed

insemination to be performed by a licensed physician or medical personnel, the child is classified as legitimate if the inseminated woman's husband consented to the procedure.[68] Using slightly different

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."); MONT. CODE ANN. § 40-6-106(1) (2009) ("If, under the supervision of a licensed physician and with the consent of the woman's husband, a wife is inseminated artificially with semen donated by a person who is not the husband, the husband is treated in law as if the husband were the natural father of a child conceived by artificial insemination."); N.J. STAT. ANN. § 9:17-44(b) (West 2002) ("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 shall be in writing and signed by him and his wife."); N.M. STAT. § 40-11-6A (2006) ("If, under the supervision of a licensed physician and with the consent of her husband, a woman is inseminated artificially with semen donated by a man not her husband, the husband is treated as if he were the natural father of the child thereby conceived so long as the husband's consent is in writing, signed by him and his wife."); N.Y. DOM. REL. LAW § 73(1) (McKinney Supp. 2009) ("Any child born to a married woman by means of artificial insemination performed by persons duly authorized to practice medicine and with the consent in writing of the woman and her husband, shall be deemed the legitimate, birth child of the husband and his wife for all purposes."); OHIO REV. CODE ANN. § 3111.95(A) (West 2005) ("If a married woman is the subject of a non-spousal artificial insemination and if her husband consented to the artificial insemination, the husband shall be treated in law and regarded as the natural father of a child conceived as a result of the artificial insemination, and a child so conceived shall be treated in law and regarded as the natural child of the husband."); OKLA. STAT. tit. 10, §§ 552, 554; OR. REV. STAT. § 109.243; TENN. CODE ANN. § 68-3-306 (2006); TEX. FAM. CODE ANN. § 160.703 (Vernon 2008).

[68] *See, e.g.*, KAN. STAT. ANN. § 23-128 (2007) ("The technique of heterologous artificial insemination may be performed in this state at the request and with the consent in writing of the husband and wife desiring the utilization of such technique for the purpose of conceiving a child or children."); *Id.* § 23-129 ("Any child or children heretofore or hereafter born as the result of heterologous artificial insemination shall be considered at law in all respects the same as a naturally conceived child of the husband and wife so requesting and consenting to the use of such technique."); MASS. GEN. LAWS ANN. ch. 46, § 4B (West 2009) ("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."); MICH. COMP. LAWS SERV. § 333.2824(6) (LexisNexis 2005) ("A child conceived by a married woman with consent of her husband following the utilization of assisted reproductive technology is considered to be the legitimate child of the husband and wife."); N.C. GEN. STAT. § 49A-1 (2007) ("Any child or children born as the result of heterologous artificial insemination shall be considered at law in all respects the same as a naturally conceived legitimate child of the husband and wife requesting and consenting in writing to the use of such technique."); TENN. CODE ANN. § 68-3-306 ("A child born to a married woman as a result of artificial insemination, with consent of the married woman's husband, is deemed to be the legitimate child of the husband and wife."); UTAH CODE ANN. § 78B-15-703 ("If a husband provides sperm for, or consents to, assisted reproduction by his wife . . . he is the father of a resulting child born to his wife."); WYO. STAT. ANN. § 14-2-903 ("A man who provides sperm for, or consents to, assisted reproduction by a woman . . . with the intent to be the parent of her child, is the parent of the resulting child.").

terminology, the Minnesota statute declares the husband of the inseminated woman to be the biological father of children artificially conceived by his wife with his written consent.[69] The classification as biological children gives the artificially conceived children the right to inherit from their mother's husband. Some statutes require more than just consent. For example, in order to satisfy the statutory conditions of at least seven states, the husband and wife must request the artificial insemination and consent to the procedure.[70]

When construing the statutory consent requirement, New Mexico courts have given the statute a liberal reading. *Lane v. Lane* is illustrative of that approach.[71] The case involved the following facts: In December of 1984, the husband and wife got married. Prior to the marriage, the husband had undergone a vasectomy. The wife's plan for more children was thwarted when the husband refused to have his vasectomy reversed. In an effort to save the marriage, the husband and wife agreed to have the wife artificially inseminated with anonymous donor sperm.[72] The husband never signed a form consenting to the artificial insemination of his wife. Nevertheless, the husband was an active participant in the process. He drove his wife to her medical appointments and participated in birthing classes. The husband was also in the delivery room when the baby was born.[73] After the birth of the child, the husband and wife agreed to keep the circumstances of the child's birth a secret. Thus, they informed their family and friends that the husband was the child's natural father. Additionally, the couple had the husband listed on the birth certificate as the child's father.[74]

In May 1991, the husband filed for divorce. In his petition, the husband claimed that the child was a child of the marriage. In her answer, although she requested sole legal and physical custody of the child, the wife agreed that the child was a child of the marriage.[75] Later in the process, the wife amended her answer and asserted that her estranged husband was not the natural or legal father of the child because the child had been conceived by artificial insemination.[76]

The district court awarded the husband and wife joint custody of the child. The wife appealed the decision.[77] Her principle argument was that, because the husband had not consented in writing to the artificial insemination, he was not the legal father of the resulting child.

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[69] MINN. STAT. ANN. § 257.56 (West 2003).

[70] *See* CONN. GEN. STAT. ANN. § 45a-772(b) (West 2004); IDAHO CODE ANN. § 39-5403(1); 750 ILL. COMP. STAT. ANN. 40/2; KAN. STAT. ANN. § 23-128; N.C. GEN. STAT. § 49A-1; OKLA. STAT. ANN. tit. 10, § 552; OR. REV. STAT. ANN. § 677.365(1).

[71] 912 P.2d 290 (N.M. Ct. App. 1996).

[72] *Id.* at 292.

[73] *Id.*

[74] *Id.*

[75] *Id.*

[76] *Id.* at 293.

[77] *Id.* at 292.

Therefore, as a non-parent, he was not entitled to receive joint custody of the child.[78] The issue on appeal was whether, under the state's artificial insemination statute, the existence of a written document was necessary for the husband to be treated as the artificially conceived child's natural father.[79]

The court acknowledged that the plain language of the statute required the husband to give written consent to the artificial insemination in order to be recognized as the legal father of the child.[80] However, the court reasoned that strict compliance with the language of the statute was not necessary as long as the mandates of the statute were followed sufficiently to carry out the legislative intent and to achieve the purposes of the statute.[81] Thus, the court determined that the extraordinary facts of the case justified the application of the substantial compliance doctrine.[82]

In order to evaluate the facts using the substantial compliance doctrine, the court articulated two relevant purposes for requiring that the husband's consent to the artificial insemination of his wife be in writing. According to the court, the first purpose of the writing requirement was evidentiary. The court reasoned that, by requiring written consent, the statute would reduce disagreements over whether or not the husband had in fact consented to the artificial insemination of his wife. If there were any doubts, the writing could be presented to end the debate.[83] The second purpose identified by the court was cautionary. Consenting to the artificial insemination would expose the husband to numerous parental obligations with regard to the resulting child. Therefore, the legislature wanted to make sure that the husband took time to think before agreeing to be a parent to the artificially conceived child. The writing requirement gave the husband more time to contemplate the consequences of putting his signature on the agreement.[84]

The court concluded that in order to comply with the spirit of the statute, there had to be some type of writing.[85] However, the statute did not specify the timing of the consent or the content of the writing. Consequently, the court opined that the purposes of the statute could be fulfilled if the writing indicated "(1) the husband knows of the conception by artificial insemination, (2) the husband agrees that the

[78] *Id.* at 294.
[79] *Id.* at 292.
[80] *Id.* at 294.
[81] *Id.* at 295.
[82] The court stated, "Under [the substantial compliance] doctrine, 'a court should determine whether the statute has been followed sufficiently so as to carry out the intent for which the statute was adopted and accomplishes the reasonable objectives of the statute.'" *Id.* (quoting Vaughn v. United Nuclear Corp., 650 P.2d 3, 7 (N.M. Ct. App.)).
[83] *Id.* at 295.
[84] *Id.*
[85] *Id.*

husband will be treated as the lawful father of the child so conceived, and (3) the wife agrees that the husband will be treated as the lawful father of the child."[86] The court also decided that the consent could be given before the procedure, after the procedure, or after the birth of the child.[87]

Relying upon the aforementioned factors, the court held that the husband had substantially complied with the statute.[88] The court reasoned that the pleadings filed in the divorce action satisfied the writing requirement. In his signed petition, the husband claimed responsibility for the child, and in her signed answer, the wife agreed. The husband's willingness to be a parent to the artificially conceived child indicated that he consented to the procedure.[89] As a result of the court's application of the substantial compliance doctrine, it carried out the parties' original intent with regards to paternity. In addition, the court's action was in the child's best interests because it preserved the father-child relationship that had been established. In this case, a broad reading of the written consent requirement benefitted the child. Other states have achieved similar results by removing the requirement that the man's consent be in writing.

2. Other Forms of Consent

In order for the child to be recognized as legitimate, most states require that the husband's consent to the artificial insemination of his wife be in writing; however, a few states have taken a different approach. For instance, the Maryland statute contains a presumption that the husband consented to the insemination of his wife.[90] Since the husband is presumed to have consented to the procedure, the resulting child is his legitimate child. In the state of Utah, the lack of the husband's written consent does not eliminate the possibility that he will be considered the legal father of a child born to his inseminated wife. If, after the birth of the child, the husband acts like a father by openly treating the child as his own, he will be determined to be the legal father.[91] As a result, the artificially conceived child will be able to inherit from his or her mother's husband. Several state statutes mandate that a husband consent to the artificial insemination of his wife to be considered the legal parent of the resulting child without specifically stating that the consent has to be in writing.[92] Courts have to decide what steps the husband must take to comply with those statutes. That approach gives the courts a great deal of

[86] *Id.*

[87] *Id.*

[88] *Id.* at 296.

[89] *Id.*

[90] MD. CODE ANN., EST. & TRUSTS § 1-206(b) (LexisNexis 2001); *See also* K.S. v. G.S., 440 A.2d 64, 67 (N.J. Super. Ct. Ch. Div. 1981).

[91] UTAH CODE ANN. § 78B-15-704(2) (2008).

[92] LA. CIV. CODE ANN. art. 188 (2007); MASS. GEN. LAWS ANN. ch. 46, § 4B (West 2009); MICH. COMP. LAWS SERV. § 333.2824(6) (LexisNexis 2005); *and* TENN. CODE ANN. § 68-3-306 (2006).

flexibility. On the other hand, some statutory schemes give the courts no discretion because the husband's paternity is established by presumption.

B. The Husband is Presumed to Be the Father

Some states take a slightly different approach in determining the legitimacy of artificially conceived children. Instead of declaring the children legitimate, the states make it impossible or very difficult for the husbands of artificially inseminated women to challenge the paternity of the resulting children. Consequently, the child is deemed legitimate by default. This is the approach that was taken by the Uniform Status of Children of Assisted Conception Act.[93] The presumption of paternity may be rebuttable or irrebuttable.

1. Irrebuttable Presumption of Paternity

Florida is an example of a state that does not permit the husband of an artificially inseminated woman to challenge his paternity after he consents to the procedure. According to the Florida statute dealing with the issue, if a woman is artificially inseminated during the course of her marriage with the written consent of her husband, the husband is irrebuttably presumed to be the father of any child that results from the procedure.[94] Georgia has a statute with similar language.[95] Since the child is presumed to be a child of the marriage and the husband is prevented from challenging that presumption, the child is legitimate. As a result, the child has the right to inherit from the estate of his or her mother's husband.[96]

2. Rebuttable Presumption of Paternity

Other states that have handled the issue in this manner have not totally precluded the woman's husband from disputing the paternity of the artificially conceived child. For instance, Delaware permits, but limits, attempts by husbands of artificially inseminated women to disprove

[93] UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT § 3, 9C U.L.A. 370 (2001); *See also id.* § 3 cmt., 9C U.L.A. 370–71 ("The presumptive paternity of the husband of a married woman who bears a child through assisted conception reflects a concern for the best interests of the children of assisted conception. Any uncertainty concerning the identity of the father of such a child ought to be shouldered by the married woman's husband rather than the child. Thus, the husband (not someone acting on his behalf such as a guardian, administrator or executor) has the obligation to file an action aimed at denying paternity through lack of consent to the assisted conception rather than the child or mother having an obligation to prove the husband's paternity.").

[94] FLA. STAT. ANN. § 742.11(1) (West 2005). *See also K.S.*, 440 A.2d at 68.

[95] GA. CODE ANN. § 19-7-21 (2004).

[96] GA. CODE ANN. § 53-2-5 (1997) ("An individual conceived by artificial insemination and presumed legitimate in accordance with Code Section 19-7-21 shall be considered a child of the parents and entitled to inherit under the laws of intestacy from the parents and from relatives of the parents, and the parents and relatives of the parents shall likewise be entitled to inherit as heirs from and through such individual.").

paternity. Under the Delaware statute, the husband can only challenge his paternity of the child if he brings the action within two years of learning of the birth of the child and the court determines that he did not consent to the procedure prior to or after the child's birth.[97] Texas has a similar statute, but the husband has four years to bring the action.[98] However, the time restraints on the husband filing a paternity action are removed if the court finds that the following conditions are met: (1) the husband's sperm was not used in the process or he did not consent to his wife being inseminated, (2) the husband and the inseminated woman did not live together between the probable time of the insemination and the filing of the action, and (3) the husband failed to openly hold the child out as his child.[99] The UPA's approach is a hybrid of the Texas and Delaware statutes.[100]

In the state of Louisiana, if the husband of a woman who conceives by artificial insemination consents to the procedure, he is presumed to be the legal father of the resulting child. Hence, he is prohibited from disclaiming the child.[101] Nonetheless, if the husband did not consent to the insemination he is permitted to file an action for disavowal of paternity. The action must be filed within one year after the husband discovered or should have discovered that his wife gave birth to a child by artificial means.[102] However, if the husband and wife did not live together during the three hundred days prior to the child's birth, the statute of limitations for the filing of the disavowal action does not begin to run

[97] DEL. CODE ANN. tit. 13, § 8-705(a) (Supp. 2008). *Accord* UTAH CODE ANN. § 78B-15-705(1) (2008); WYO. STAT. ANN. § 14-2-905(a) (2009).

[98] TEX. FAM. CODE ANN. § 160.705(a) (Vernon 2008) ("Except as otherwise provided by Subsection (b), the husband of a wife who gives birth to a child by means of assisted reproduction may not challenge his paternity of the child unless: (1) before the fourth anniversary of the date of learning of the birth of the child he commences a proceeding to adjudicate his paternity; and (2) the court finds that he did not consent to the assisted reproduction before or after the birth of the child.").

[99] *Id. Accord* DEL. CODE ANN. tit. 13, § 8-705(b) (Supp. 2008); UTAH CODE ANN. § 78B-15-705(2) (2008); WYO. STAT. ANN. § 14-2-905(b) (2009).

[100] UNIF. PARENTAGE ACT (amended 2002) § 705, 9B U.L.A. 64 (Supp. 2009) ("Except as otherwise provided in subsection (b), the husband of a wife who gives birth to a child by means of assisted reproduction may not challenge his paternity of the child unless: (1) within two years after learning of the birth of the child he commences a proceeding to adjudicate his paternity; and (2) the court finds that he did not consent to the assisted reproduction, before or after birth of the child. (b) A proceeding to adjudicate paternity may be maintained at any time if the court determines that: (1) the husband did not provide sperm for, or before or after the birth of the child consent to, assisted reproduction by his wife; (2) the husband and the mother of the child have not cohabited since the probable time of assisted reproduction; and (3) the husband never openly held out the child as his own. (c) The limitation provided in this section applies to a marriage declared invalid after assisted reproduction.").

[101] LA. CIV. CODE ANN. art. 188 (2007).

[102] *Id.* at art. 189.

until the husband receives written notification that an interested party has claimed that he is the artificially conceived child's father.[103]

In New Hampshire, a man is legally recognized as the presumptive father of a child that is born under any of the following circumstances: (1) during his marriage, (2) within 300 days after the dissolution of his marriage, or (3) within 300 days after he and his wife have been deemed legally separated by a court.[104] Based upon the presumption, the man's name is listed on the child's birth record.[105] This presumption can only be rebutted by clear and convincing evidence.[106] Nothing in this provision indicates that artificially inseminated children are not covered by this presumption. In fact, the statute provides that the presumption cannot be rebutted by showing that the child was conceived by artificial means as long as the husband agreed to the artificial insemination of his wife.[107] If the man is unable to successfully rebut the presumption of paternity, the law recognizes the existence of a father-child relationship. Once a father-child relationship is created, the child is considered to be legitimate.[108] As a legitimate child, the artificially conceived child is entitled to inherit from his or her mother's husband who dies intestate.[109]

It is difficult for a man to rebut the presumption of a father-child relationship between himself and a child his wife gives birth to as a result of artificial insemination. Moreover, as a result of that presumption, the man owes numerous legal duties to the artificially conceived child. Consequently, New Hampshire's legislature established a statutory scheme with several safeguards to ensure that the rights of the husband of an artificially inseminated woman are protected. The legislature sought to make sure that the husband gave informed consent for his wife to be artificially inseminated.[110] First, prior to the performance of the procedure, the woman and her husband must both receive counseling.[111] Furthermore, unlike in most jurisdictions, the husband has to do more than just give written consent to have his wife artificially inseminated. In order to be responsible for the resulting child, the husband has to agree in writing to accept the "legal rights and responsibilities of parenthood."[112] By his agreement, the husband is stating a willingness to be legally responsible for any children that result from the artificial

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[103] *Id.*

[104] N.H. REV. STAT. ANN. § 168-B:3(I)(a) (LexisNexis 2001).

[105] N.H. REV. STAT. ANN. § 5-C:30(I) (LexisNexis 2008).

[106] N.H. REV. STAT. ANN. § 168-B:3(II) (LexisNexis 2001).

[107] *Id.*

[108] *Id.* § 168-B:7.

[109] *Id.* § 168-B:9(I)(a).

[110] "'Informed consent' occurs when a competent person, while exercising care for his or her own welfare, makes a voluntary decision about whether or not to participate in a proposed medical procedure or contractual arrangement that is based on a full awareness of the relevant facts." *Id.* § 168-B:1(VI).

[111] *Id.* § 168-B:13(IV).

[112] *Id.* § 168-B:13(IV)(c).

insemination of his wife with the sperm of another man.[113] Even if the procedure is conducted without the required counseling or agreement by the husband, he may still be conclusively presumed to have consented to the procedure if he does not object in a timely manner. Specifically, the husband must bring an action to dispute paternity within 30 days after he learns or should have learned of the child's birth.[114] The lack of an artificial insemination statute does not prevent a woman's husband from being financially responsible for the child.

C. Common Law Principle

In states that have not enacted statutes specifically addressing the legal issues arising from the existence of artificially conceived children, the courts must rely upon family law principles to determine the paternal obligations of the husband of the inseminated woman. Even in states that have statutes, the common law principles are relevant in situations where the statutes are not applicable.[115]

The underlying principle influencing the courts' decisions is the best interest of the artificially conceived child.[116] Since it is usually in the best interest of the child to have financial support from at least two parents, the courts have found ways to make the husband of the child's biological mother legally responsible for the child's financial support. The primary methods available to the courts are (1) the estoppel doctrine, (2) the paternity presumption, and (3) the best interest paternity presumption.

1. Estoppel

Courts have relied on the estoppel doctrine to hold the husband of an artificially inseminated woman responsible for the resulting child in cases where the man claims that he should not have to support a child who is not biologically connected to him.[117] The court took that approach in *Levin v. Levin*.[118] Since Donald Levin was sterile, he agreed to permit his wife, Barbara, to be artificially inseminated with sperm from an anonymous donor. After the resulting child was born, Barbara and Donald were named as the parents on the birth certificate. In 1987, when the child was ten years old, the couple divorced.[119]

In the divorce decree, Donald was ordered to pay child support because the child was determined to be a child of the marriage. Donald filed a motion in 1992 to be relieved from his child support obligation. In

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[113] *Id.* § 168-B:13(IV).

[114] *Id.* § 168-B:3(II).

[115] Bridget R. Penick, Note, *Give the Child a Legal Father: A Plea for Iowa to Adopt a Statute Regulating Artificial Insemination by Anonymous Donor*, 83 IOWA L. REV. 633, 658–61 (1998).

[116] *In re* Parentage of Robinson, 890 A.2d 1036, 1040 (N.J. Super. Ct. Ch. Div. 2005). *See also* C.M. v. C.C., 377 A.2d 821, 825 (N.J. Juv. & Dom. Rel. Ct. 1977).

[117] *See In re* Marriage of L.M.S., 312 N.W.2d 853, 855 (Wis. Ct. App. 1981).

[118] Levin v. Levin, 645 N.E.2d 601, 605 (Ind. 1994).

[119] *Id.* at 603.

response, Barbara filed a motion to have Donald's child support obligation increased.[120] Donald argued that he should not have to financially support the child because he did not have a personal relationship with the child and he was not the biological father.[121]

The Indiana Court of Appeals held that Donald was estopped from refusing to pay child support. That holding was affirmed by the Indiana Supreme Court.[122] The Supreme Court reasoned that the estoppel doctrine was applicable because it is an appropriate remedy when "one party through his course of conduct knowingly misleads or induces another party to believe and act upon his conduct in good faith without knowledge of the facts."[123] Applying that reasoning to the facts, the court found that Donald encouraged Barbara to be inseminated and to have the child.

The court focused upon Donald's action prior to and after the child's birth to conclude that it was reasonable for Barbara to expect him to financially support the child. Prior to the child's conception, Donald agreed, both orally and in writing, to Barbara being artificially inseminated.[124] After the child was born, Donald functioned as the child's father for fifteen years. In addition, Donald never objected to the child being named as a child of the marriage in the divorce decree.[125] Based upon those facts, the court concluded that Barbara acted in good faith when she bore the child in reliance on Donald's promise to be responsible for the child. Therefore, Donald was estopped from seeking to be relieved of his parental obligations to the child.[126] The courts' willingness to apply the estoppel doctrine to prevent a woman's husband from being relieved of parental obligations and from being denied parental rights may stem from the existence of the marital presumption.

2. Marital Presumption of Paternity (Traditional and Best Interests)

In cases where an artificial insemination statute is not involved, artificial insemination is treated as just another way for a woman to get pregnant. The focus is upon the timing of the child's conception or birth, and not upon the method used to create the child. Therefore, if a woman conceives or gives birth to a child while she is married, her husband is presumed to be the father of the child.[127] This long-standing common law principle has been codified in most jurisdictions.[128] The purposes of the presumption include protecting the marriage and the

[120] *Id.*
[121] *Id.* at 603–04.
[122] *Id.*
[123] *Id.* at 604.
[124] *Id.*
[125] *Id.* at 604–05.
[126] *Id.* at 605.
[127] *See* Thompson v. Hoover, No. 2004 CV 4632 CU, 2005 WL 4676373, at *18 (Pa. Ct. Com. Pl. Dec. 22, 2005); E.W. v. T.S., 916 A.2d 1197, 1201 (Pa. Super. Ct. 2007).
[128] *See, e.g.,* HAW. REV. STAT. ANN. § 584-4(a)(1) (LexisNexis 2006).

welfare of the child.[129] The presumption may be rebutted by clear and convincing evidence that the man was not in a position to contribute to the child's conception.[130] However, the courts have been reluctant to permit a man to rebut the presumption if the marriage is still intact.[131] Therefore, in some states, the biological father is not permitted to rebut the presumption that the woman's husband is the father of a child born during the marriage.[132]

Some jurisdictions have applied the best interests of the child standard when determining whether the marital presumption should dictate an adjudication of paternity.[133] Hence, a person will only be permitted to rebut the presumption of paternity if it would be in the best interests of the child to do so.[134] The person seeking to rebut the presumption of paternity must prove that the woman's husband could not be the child's biological father. Historically, the presumption was rebutted by evidence indicating that the husband was impotent, sterile, or not in a position to have sex with the woman during the time the child was conceived.[135] Currently, the primary way to rebut the presumption of the husband's paternity is to have blood tests conducted.[136] Nonetheless, if the court concludes that rebutting the presumption is not in the child's best interests, the statutes in some jurisdictions give the court the authority to refuse to order blood tests.[137] Although non-marital children

[129] Jacqulyn A. West, Comment, *Maintaining the Legal Fiction: Application of the Presumption of Paternity and Paternity by Estoppel in Pennsylvania*, 42 DUQ. L. REV. 577, 579–80 (2004); Megan Pendleton, Note, *Intestate Inheritance Claims: Determining a Child's Right to Inherit When Biological and Presumptive Paternity Overlap*, 29 CARDOZO L. REV. 2823, 2824–25 (2008).

[130] Green v. Good, 704 A.2d 682, 684 (Pa. Super. Ct. 1998).

[131] *See, e.g.*, Brinkley v. King, 701 A.2d 176, 180–81 (Pa. 1997).

[132] *See, e.g.*, ALA. CODE § 26-17-607(a) (LexisNexis Supp. 2008) ("Except as otherwise provided in subsection (b), a presumed father may bring an action to disprove paternity at any time. If the presumed father persists in his status as the legal father of a child, neither the mother nor any other individual may maintain an action to disprove paternity."). *Contra* WIS. STAT. ANN. § 767.80(d) (West 2009) (allowing the man claiming to be the child's biological father to bring an action to rebut the presumption of paternity).

[133] *See, e.g.*, *In re* Paternity of Adam, 903 P.2d 207, 210–11 (Mont. 1995).

[134] *See, e.g.*, Ban v. Quigley, 812 P.2d 1014, 1018 (Ariz. Ct. App. 1990) ("Prior to ordering a blood test to determine whether the presumed parent is the biological parent, the district court must consider the best interests of the child, including physical, mental, and emotional needs. The shifting of paternity from the presumed father to the biological father could easily be detrimental to the emotional and physical well-being of any child. Although someone may suffer, it should never be the child, who is totally innocent and who has no control over or conception of the environment into which he or she has been placed.").

[135] Kohler v. Bleem, 654 A.2d 569, 572 (Pa. Super. Ct. 1995).

[136] *See In re* S.C.V., 750 S.W.2d 762, 765 (Tex. 1988) (blood tests admissible to establish non-paternity); Walker v. Covington, 731 N.Y.S.2d 485, 487 (N.Y. App. Div. 2001).

[137] *See, e.g.*, WIS. STAT. ANN. § 767.855 (West 2009) ("[A]t any time in an action to establish the paternity of a child . . . the court . . . may, with respect to a male, refuse to order genetic tests, if genetic tests have not yet been taken, and dismiss the action

are currently permitted to inherit from their fathers, those children still bear more of a burden than marital children.[138] Consequently, it makes sense for courts to be hesitant to relieve a woman's husband of his parental status. The treatment of the husband may depend upon the status of the sperm donor involved in the process. The parental rights of sperm donors are addressed in the next Part.

IV. PATERNAL OBLIGATIONS OF NON-SPOUSAL SPERM DONORS

In the 1993 movie *Made in America*, Whoopi Goldberg played Sarah Matthews, a professional woman who conceived her daughter, Zora, through the use of artificial insemination.[139] After Zora discovered that Sarah's deceased husband was not her birth father, she decided to find the man who donated the sperm that resulted in her conception. Zora's quest to locate her father and to develop a relationship with him made for an entertaining movie. The sperm donor, Hal Jackson, played by Ted Danson, welcomed Zora with opened arms.[140] Hal was a successful used car salesman who made television commercials. The movie raised interesting legal questions about Hal's financial obligations to Zora. Hal was a single man with a good source of income and appeared to have no close relatives.[141] In the event that Hal died intestate, was Zora legally entitled to his entire estate? Since Hal was a non-spousal sperm donor, under the statutory schemes in most jurisdictions, the answer to the question would be no.

Some couples who have the potential to be good parents are unable to conceive. The creation of new reproductive technology has given those couples hope.[142] In particular, sperm donation has given countless couples, especially same-sex couples, the opportunity to procreate.[143] Many young men view sperm donation as a benign act similar to giving blood. Most do not think about the fact that their sperm could be used to successfully conceive a child or several children. They certainly do not

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if the court . . . determines that a judicial determination of whether the male is the father of the child is not in the best interests of the child.").

[138] Paula A. Monopoli, *Nonmarital Children and Post-Death Parentage: A Different Path for Inheritance Law?*, 48 SANTA CLARA L. REV. 857, 859 (2008).

[139] MADE IN AMERICA (Warner Bros. 1993).

[140] *Id.*

[141] Under the basic intestacy system in the majority of U.S. jurisdictions, an unmarried man's children inherit his estate. This is the case even if the child is born out of wedlock. *See* Jennifer R. Boone Hargis, *Solving Injustice in Inheritance Laws Through Judicial Discretion: Common Sense Solutions from Common Law Tradition*, 2 WASH. U. GLOBAL STUD. L. REV. 447, 449–50 (2003); *see also* Helene S. Shapo, *Matters of Life and Death*: *Inheritance Consequences of Reproductive Technologies*, 25 HOFSTRA L. REV. 1091, 1098–99 (1997).

[142] Anna L. Benjamin, Note, *The Implications of Using the Medical Expense Deduction of I.R.C. § 213 to Subsidize Assisted Reproductive Technology*, 79 NOTRE DAME L. REV. 1117, 1119 (2004).

[143] John A. Robertson, *Gay and Lesbian Access to Assisted Reproductive Technology*, 55 CASE W. RES. L. REV. 323, 349 (2004).

consider the possibility that they could be obligated to help financially support the children.[144] Should that be a possibility? Should a sperm donor be involuntarily converted into a father?

States have taken a few different approaches with regards to the legal obligations that a non-spousal sperm donor has to a child who is conceived as the result of artificial insemination. The approach taken by the UPA[145] and most states is to declare that the sperm donor is not a parent to the child.[146] If the donor is not a parent, he is not obligated to support the child. Therefore, the child is not the man's legal heir under the intestacy system. Some states have handled the issue by ignoring the fact that the sperm donor is the paternal parent of the artificially conceived child. In those jurisdictions, the man who donated the sperm is not treated as the resulting child's natural father, so he has no legal obligation to provide financial support for the child.[147] Other states have sought to resolve the issue by identifying the rights of the child in relation to the sperm donor. Under the laws of those states, an artificially conceived child has no right to support from the man who donated the sperm that resulted in his or her conception.[148] In a few states, the non-spousal sperm donor may have some legal rights with regards to the artificially conceived child.[149] Finally, some states do not have a statute specifically addressing the parental status of a sperm donor.[150]

A. Sperm Donor May Not Be Acknowledged as the Father

In order for a child to inherit from the estate of a man, that man must be classified as the child's parent. In most jurisdictions, sperm donors are not given parental status.[151] Consequently, the child who is conceived as the result of artificial insemination is not eligible to inherit

[144] The UPA and the majority of state artificial insemination statutes specifically exclude a sperm donor from parental obligations in certain circumstances. *See* Lori B. Andrews & Lisa Douglass, *Alternative Reproduction*, 65 S. CAL. L. REV. 623, 660 (1991); *see also* Hollandsworth, *supra* note 37, at 207–10.

[145] UNIF. PARENTAGE ACT § 702 (amended 2002), 9B U.L.A. 355 (2001).

[146] *E.g.*, WYO. STAT. ANN. § 14-2-902 (2009).

[147] *E.g.*, MONT. CODE ANN. § 40-6-106 (2009).

[148] *E.g.*, OR. REV. STAT. § 109.239(2) (2007) ("A child born as a result of the artificial insemination shall have no right, obligation or interest with respect to such donor.").

[149] *E.g.*, N.M. STAT. § 40-11-6(B) (2006).

[150] For example, the Michigan Legislature has dealt with the legal consequences of the existence of artificially conceived children by passing a statute stating in relevant part: "A child conceived by a married woman with consent of her husband following the utilization of assisted reproductive technology is considered to be the legitimate child of the husband and wife." MICH. COMP. LAWS SERV. § 333.2824(6) (LexisNexis 2005). The statutory provision leads one to conclude that a sperm donor has no obligation to a child conceived using his sperm if the woman is married. Nonetheless, the legislature has not yet addressed the situation where an unmarried woman conceives a child using donated sperm.

[151] *E.g.*, COLO. REV. STAT. § 19-4-106(2) (2008); TEX. FAM. CODE ANN. § 160.702 (Vernon 2008); UTAH CODE ANN. § 78B-15-702 (2008).

from the estate of the man who gave him or her half of his chromosomes. Although the sperm donor may be a biological parent of the child he helped conceive, several state legislatures have enacted statutes stripping him of that status. By not acknowledging the sperm donor's position as the male parent of the child, the statutes relieve him of any parental duties to the child.[152] Florida takes a unique approach when dealing with the parental status of the sperm donor. The statute recognizes that the sperm donor has some parental rights. However, the statute requires the donor to surrender all rights to the child produced as a result of his donation.[153]

In order to encourage sperm donations, states must take steps to ensure that a man is not legally responsible for a child conceived using his sperm.[154] This is important because the majority of sperm donors are young men who are not ready to have families. They are usually donating sperm to make extra money. Sperm donors probably treat donating sperm for money just like they treat donating blood for money.[155] Consequently, state legislatures have made it clear that donating sperm does not make the man an instant father. The state of Wisconsin enacted the following statutory language: "The donor of semen provided to a licensed physician for use in artificial insemination of a woman other than the donor's wife is not the natural father of a child conceived, bears no liability for the support of the child and has no parental rights with regard to the child."[156]

The above language indicates that a non-spouse who donates sperm to inseminate a woman does not have a duty to take care of the artificially conceived child.[157] This lack of responsibility is present in situations involving the insemination of married and unmarried women. Since the non-spousal sperm donor has no legal obligation to support the artificially conceived child, the child is not entitled to inherit from his estate. A sperm donor is not just relieved of financial responsibility for the artificially conceived child; state statutory schemes also eliminate any relationship between the donor and the child.[158]

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[152] The donor is not the child's natural father. ALA. CODE § 26-17-702 (LexisNexis Supp. 2008); CAL. FAM. CODE § 7613(b) (West Supp. 2009), *cited in* Steven S. v. Deborah D., 25 Cal. Rptr. 3d 482, 487 (Cal. Ct. App. 2005); 750 ILL. COMP. STAT. 40/3(b) (West 2009); MO. ANN. STAT. § 210.824(2) (West 2004). The donor is not the child's biological father. MINN. STAT. ANN. § 257.56(2) (West 2003).

[153] FLA. STAT. ANN. § 742.14 (West 2005); *see also* Lamaritata v. Lucas, 823 So. 2d 316, 319 (Fla. Dist. Ct. App. 2002).

[154] June Carbone & Paige Gottheim, *Markets, Subsidies, Regulation, and Trust: Building Ethical Understandings into the Market for Fertility Services*, 9 J. GENDER RACE & JUST. 509, 535–36 (2006).

[155] Anne Reichman Schiff, *Frustrated Intentions and Binding Biology: Seeking AID in the Law*, 44 DUKE L.J. 524, 562 (1994).

[156] WIS. STAT. ANN. § 891.40(2) (West 2009).

[157] *Id.*

[158] OKLA. STAT. ANN. tit. 10, § 555 (West 2007) ("An oocyte donor shall have no right, obligations or interest with respect to a child born as a result of a heterologous

The nonparental status of a sperm donor is important for two reasons. First, it encourages sperm donation and protects a sperm donor from being financially responsible for a large number of children. This protection is crucial because a popular sperm donor could potentially father dozens of children.[159] Second, by not recognizing the sperm donor as a parent, the law permits couples to use donor sperm without worrying about having to deal with a man who comes forward and claims to be the biological father of the child.[160] Nonetheless, the laws in some jurisdictions give the non-spousal sperm donor the opportunity to parent the artificially conceived child.

B. Sperm Donor May Be Acknowledged as the Father

1. Sperm Donor Agrees in Writing

Under the laws of some states, it is possible for the sperm donor to become financially responsible for the artificially conceived child. For example, in New Hampshire, a sperm donor can agree in writing to be liable for the support of the child.[161] If the procedure is performed by a licensed physician, the Kansas and the New Mexico statutes release a non-spousal sperm donor from all parental duties with regards to the artificially conceived child. Nonetheless, the sperm donor and the inseminated woman can make a written agreement obligating the non-spousal sperm donor to act as the birth or natural father of any children that are conceived as a result of the procedure.[162] New Jersey has a statute containing language similar to that used in the Kansas and New Mexico statutes.[163]

2. Sperm Donor Agrees by Statutory Noncompliance

As indicated above, in order to receive the protection of the artificial insemination statute in several states, the sperm donor must deposit his

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oocyte donation from such donor. A child born as a result of a heterologous oocyte donation shall have no right, obligation or interest with respect to the person who donated the oocyte which resulted in the birth of the child.").

[159] Betsy Streisand, *Who's Your Daddy?: Sperm Donors Rely on Anonymity. Now Donor Offspring (and Their Moms) are Breaking Down the Walls of Privacy*, U.S. NEWS & WORLD REP., Feb. 5, 2006, *available at* http://health.usnews.com/usnews/health/articles/060213/13donor.htm ("'I could fill a banquet hall with my children,' says one donor from Southern California, who, like many medical students in the '60s and '70s, donated sperm to help cover living expenses.").

[160] Kristin E. Koehler, Comment, *Artificial Insemination: In the Child's Best Interest?*, 5 ALB. L.J. SCI. & TECH. 321, 332 (1996).

[161] N.H. REV. STAT. ANN. § 168-B:11 (LexisNexis 2001).

[162] KAN. STAT. ANN. § 38-1114(f) (2000); N.M. STAT. § 40-11-6 (2006).

[163] N.J. STAT. ANN. § 9:17-44(b) (West 2002) ("Unless the donor of semen and the woman have entered into a written contract to the contrary, 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 father of a child thereby conceived and shall have no rights or duties stemming from the conception of a child.").

sperm with a licensed physician.[164] Consequently, if the woman conceives as a result of self-insemination, the sperm donor may be recognized as the child's legal father.[165] Because the process of artificial insemination is not a procedure that requires any type of medical expertise, it is not difficult to imagine a situation where a woman is inseminated at home using a turkey baster.[166] In that circumstance, the woman will usually know the donor so a licensed physician will not be involved in the procedure. In almost half of the states with such statutes, since the sperm donor is the biological father and he did not comply with the statute, he may be held to be legally responsible for paying child support.[167]

3. States Without Statutes

A number of states have not enacted statutes that deal with the parental status of sperm donors. In those states, the courts have dealt with the issue on a case-by-case basis, relying on common law principles and statutes that were created when a family still consisted of one man, one woman, and their children. It is like trying to put a square peg into a round hole. It just does not fit. The outcomes have often been inconsistent with societal values and sound public policy.

For example, the state of Pennsylvania has not adopted the UPA and it does not have an independent statute that identifies the legal rights and obligations of a sperm donor.[168] In a recent case, the court was called upon to determine whether a sperm donor was obligated to pay child support.[169] The case resulted from an attempt by two women to create a family. Jennifer L. Schultz and Jodilynn Jacob solidified their relationship by participating in a commitment ceremony and establishing a civil union. Then the women decided to start a family together. To that end, Jennifer asked her friend Carl Frampton to donate sperm to be used in the artificial insemination of Jodilynn. Jodilynn conceived two children using Carl's sperm. After the women separated, the court awarded physical custody of the two children to Jodilynn. At that time, Jennifer

[164] *See In re* K.M.H., 169 P.3d 1025, 1042 (Kan. 2007). The court in *In re K.M.H.* held that the failure of the sperm donor to deposit his sperm with a licensed physician did not take the transaction outside of the artificial insemination statute as long as a licensed physician actually performed the procedure. *Id.* In the case, the man delivered his sperm directly to the woman and she took it to a licensed physician who performed the artificial insemination. *Id.*

[165] *See, e.g*, Jhordan C. v. Mary K., 224 Cal. Rptr. 530, 535 (Cal. Ct. App. 1986).

[166] John C. Sheldon, *Surrogate Mothers, Gestational Carriers, and a Pragmatic Adaptation of the Uniform Parentage Act of 2000*, 53 ME. L. REV. 523, 532–33 (2001).

[167] Allison J. Stone, Comment, *"Sisters Are Doin' It for Themselves!" Why the Parental Rights of Registered Domestic Partners Must Trump the Parental Rights of Their Known Sperm Donors in California*, 41 U.S.F. L. REV. 505, 510 (2007).

[168] The Associated Press, *Pa. Sperm Donor to Lesbian Couple Ordered to Pay Child Support*, PITTSBURGH TRIB.-REV., May 10, 2007, *available at* http://www.pittsburghlive.com/x/pittsburghtrib/news/cityregion/s_506968.html.

[169] Jacob v. Shultz-Jacob, 923 A.2d 473 (Pa. Super. Ct. 2007); *see also* Jason Miller, *Sperm Donor Indispensable Party to Support Proceeding*, LAW. J. (Allegheny County Bar Ass'n, Pittsburgh, Pa.) June 22, 2007, at 2.

received partial physical custody and Carl was awarded partial physical custody of the children for one weekend each month.[170]

Jodilynn filed a successful child support action against Jennifer.[171] In response, Jennifer claimed that Carl should also be obligated to pay child support. Thus, she sought to join him as an indispensable party. After the trial court denied her joinder motion, Jennifer appealed.[172] The trial court reasoned that, as a sperm donor, Carl was not legally obligated to pay child support and therefor was not an indispensable party.[173]

Relying on the principles of equitable estoppel, the court found that fairness dictated that Carl have a duty to provide financial support for the children since he was their biological father.[174] The court's decision to obligate Carl to pay child support was influenced by the fact that Carl acted like a parent. The court considered the following actions to be legally relevant: (1) Carl voluntarily provided financial support to the children; (2) Carl was present when at least one of the children was born; (3) Carl was awarded partial physical custody of the children; and (4) Carl permitted the children to call him "Papa."[175] The court reasoned that, since Carl acted as if he were a parent, he should be estopped from denying his parental obligations, including the duty to pay child support.[176]

The result of this case was unique because the court held three adults liable for the financial support of the two artificially conceived children. It was one of the first published cases in which a court required a sperm donor to financially support a child conceived using his genetic material. The court noted that, in reaching its decision, it was more motivated by promoting the best interests of the children than by protecting the legal rights of the parents. Nevertheless, the court stated, "We recognize this is a matter which is better addressed by the legislature rather than the courts."[177] As of the time of the publication of this Article, the Pennsylvania legislature still had not enacted a statute responding to the court's concerns. Carl died of a heart attack while the case was pending.[178] Thus, the probate system was implicated.

The outcome of the case indicates the need for legislation to clarify the obligations of the men involved in the artificial insemination process. There are several troubling aspects of the case. First, the court's decision did not carry out the expectations of the parties involved in the transaction. At the time he agreed to act as a sperm donor, since he was doing a favor for a friend, Carl had no intention of being a legal parent

[170] *Jacob*, 923 A.2d at 476.
[171] *Id.*
[172] *Id.*
[173] *Id.* at 480.
[174] *Id.*
[175] *Id.* at 481.
[176] *Id.*
[177] *Id.* at 482.
[178] The Associated Press, *supra* note 168.

to any resulting children. The women were in a long-term committed relationship and intended to raise any children as a couple. In an effort to provide financial support for the children, the court ignored the reproductive freedom of the adults involved in the process. The sperm donor was repaid for his generous gift by being forced to be a legal parent to the children. The parental rights of the women were decreased by the court giving the children a third parent. This is a dangerous precedent because it has the potential of negatively impacting same-sex couples who typically turn to male friends or relatives for sperm.[179] It can be argued that the reproductive rights of the adults were sacrificed to promote the best interests of the children.[180] These interests should be balanced; one interest should not supplant the other. However, since the children are the most innocent parties involved in the scenario, the scale should tip in their favor.

Second, the court appeared to penalize the man because he had a relationship with the children and was responsible enough to help out financially. These are not behaviors that society wants to discourage. It makes sense that Carl would have a relationship with the children because he was a friend of the family. He probably considered himself to be an uncle, not a parent. Nothing in the facts indicates that Carl was even the children's godfather. The women might have encouraged Carl to take an active part in the children's lives because there was no other close male figure in the picture. The court should not have interpreted Carl's desire to have a relationship with the children as consent to be a parent.

Finally, the biggest impact of the case may be to discourage the use of known sperm donors. If an unknown donor had been involved in this case, the outcome probably would have been different. There are many good reasons to use known sperm donors.[181] A woman may be more comfortable using the sperm of a man she knows because she has been able to observe his behavior and ascertain his character. Further, the use of a known sperm donor makes it easier for the child to obtain his or her medical history.[182] In light of the cost of the artificial insemination

[179] Alexa E. King, *Solomon Revisited: Assigning Parenthood in the Context of Collaborative Reproduction*, 5 UCLA WOMEN'S L.J. 329, 351 (1995).

[180] *In re* Marriage of Witbeck-Wildhagen, 667 N.E.2d 122, 126 (Ill. App. Ct. 1996) ("Just as a woman has a constitutionally protected right not to bear a child, a man has the right not to be deemed the parent of a child that he played *no* part in conceiving.") (citation omitted).

[181] Lezin, *supra* note 29, at 208–09; *see also* Megan D. McIntyre, Comment, *The Potential for Products Liability Actions when Artificial Insemination by an Anonymous Donor Produces Children with Genetic Defects*, 98 DICK. L. REV. 519, 522–24 (1994) (evaluating the negative aspects of relying on anonymous sperm donors).

[182] *See* Pino D'Orazio, Note, *Half of the Family Tree: A Call for Access to a Full Genetic History for Children Born by Artificial Insemination,* 2 J. HEALTH & BIOMEDICAL L. 249, 253–55 (2006) (discussing the reasons why it is important for an artificially conceived child to know the full genetic and medical history of the donor who supplied the sperm).

process, it is more affordable to use a known sperm donor. The use of a known donor eliminates the cost of the sperm and makes the use of a physician optional. Consequently, infertile low- and moderate-income women will have the opportunity to conceive. The outcome of this case indicates why state legislatures should enact laws that protect the rights of all parties, including the children, involved in the artificial insemination process.

V. MISSING COMPONENTS

The statutory scheme presently in place to address the paternal obligations of the men involved in the artificial insemination process may create more problems than it solves.

A. Marital Status of the Woman

A crucial deficiency of the current statutory regime is the failure to recognize situations involving unmarried women.[183] The majority of the statutes refer exclusively to legally married couples.[184] Only two states have followed the UPA's approach and made their statutes applicable to cases involving unmarried persons.[185] Thus, the current statutory regime ignores the fact that unmarried women are utilizing reproductive technology.[186] The limited scope of the statutes has adversely impacted women involved in same-sex relationships.[187] In some cases, the women have been left without a remedy. In other cases, the courts have been forced to use creative means to ensure that the women can avail themselves of the statutory protection.[188] The following discussion of a Massachusetts case will illustrate the necessity to amend the state statutes

[183] Brad Sears, Recent Development, *Winning Arguments/Losing Themselves: The (Dys)Functional Approach in* Thomas S. vs. Robin Y.*,* 29 HARV. C.R.-C.L. L. REV. 559, 562–63 (1994); *but see In re* Adoption of Michael, 636 N.Y.S.2d 608 (N.Y. Sur. Ct. 1996) (holding that an unmarried woman inseminated using the sperm of an anonymous donor was entitled to the protection of the artificial insemination statute even though the statute referred to "married" women).

[184] Katharine T. Bartlett, *Re-Expressing Parenthood*, 98 YALE L.J. 293, 307 (1988); *see also In re* Marriage of Simmons, 825 N.E.2d 303, 306–11 (Ill. App. Ct. 2005) (refusing to apply artificial insemination statute to situation involving a transsexual male who was born female and married a woman who conceived through artificial insemination).

[185] The Wyoming statute applies to married and unmarried persons. The consent must be signed by the woman and the man who plans to parent the child. WYO. STAT. ANN. § 14-2-904(a) (2009).

[186] Padgett *supra* note 39 at 518.

[187] Michael L. Hopkins, Comment, "*What is Sauce for the Gander is Sauce for the Goose:" Enforcing Child Support on Former Same-Sex Partners Who Create a Child Through Artificial Insemination*, 25 ST. LOUIS U. PUB. L. REV. 219, 222 (2006).

[188] *See In re* Parentage of Robinson, 890 A.2d 1036, 1041 (N.J. Super. Ct. Ch. Div. 2005) (applying artificial insemination statute to same-sex couple who got married in Canada by focusing upon the commitment made by the couple instead of upon their gender).

to apply to situations involving unmarried women in same-sex or heterosexual relationships.

Two women lived together as a couple.[189] After they took part in a commitment ceremony, the women merged their financial resources.[190] In addition, the women named each other as beneficiaries on their life insurance policies and retirement plans. One woman wanted to have a child and the other one did not want to parent a child. Nonetheless, the woman eventually reluctantly agreed to raise a child with her partner.[191] The couple chose to have a child through the use of artificial insemination. To that end, the couple went to a clinic and picked out a donor. At the clinic, they both signed a consent form. In addition, the couple raised the money to pay for the procedure by combining their money.[192] Through the use of artificial insemination, the woman conceived a child in December of 1999. In May 2000, the couple separated. At that time, the partner of the inseminated woman promised to provide financial support for the child.[193]

The couple's son was born on July 1, 2000.[194] After the baby's birth, the former partner of the child's mother again promised to help financially support the child. She visited the hospital several times and helped to name the baby.[195] As a result of being born prematurely, the baby had several medical problems. Thus, the biological mother requested that her former partner pay child support. In response, the former partner notified the child's biological mother that she did not want to have anything to do with her or the child.[196]

The biological mother filed a law suit seeking child support payments from her former partner.[197] In her law suit, the woman made two arguments. First, she argued that, since her former partner had orally promised to financially support the child, she should be estopped from reneging on her promise. The woman wanted the court to treat the oral promise like an implied contract to pay child support and to hold her former partner liable for breach of contract.[198] Secondly, the woman contended that the court should use its equitable power to order her former partner to pay child support.[199]

The court found that the former partner had entered into an implied contract to parent the artificially conceived child.[200] Nonetheless,

[189] T.F. v. B.L., 813 N.E.2d 1244, 1246–47 (Mass. 2004).
[190] *Id.* at 1247.
[191] *Id.*
[192] *Id.*
[193] *Id.* at 1247–48.
[194] *Id.* at 1248.
[195] *Id.*
[196] *Id.*
[197] *Id.*
[198] *Id.*
[199] *Id.*
[200] *Id.* at 1249.

the court concluded that the enforcement of the contract would be against public policy.[201] The court also opined that the former partner had not made an independent promise to pay child support. The court implied that if such a promise was made, it may have been enforceable.[202]

With regards to the equity issue, the court acknowledged that the legislature had given it equitable powers to protect the best interests of the child. However, the court noted that the equitable powers could only be used to enforce legal obligations, not to create legal obligations. Therefore, if the former domestic partner was not legally obligated to pay child support, the court could not compel her to do so.[203] In order for the domestic partner to have a duty to pay child support, she had to be recognized as a parent. The woman had no biological connection to the child. Consequently, the court analyzed whether or not she was the child's legal parent. As a part of that analysis, the court turned to the state's artificial insemination statute.[204] The court concluded that the statue did not provide a remedy for the biological mother because it was solely intended to apply to a situation involving a woman and her spouse.[205] In support of its decision not to hold the former domestic partner liable for child support, the court stated, "the Legislature has not addressed the situation . . . where a non-marital cohabitant consents to such a procedure."[206]

The statue at issue in this case is similar to statutes in the majority of jurisdictions. Hence, the result in this case indicates why the current statutory scheme does not effectively protect the best interests of the artificially created child. It is clear that if the case had involved a married man and woman, the man would have been obligated to pay child support. However, since the child was born into a family consisting of an unmarried couple, the court could not use its equitable powers to provide a remedy for the child. As a result, artificially conceived children who are born to same-sex couples or unmarried heterosexual couples are disadvantaged because of the marital status of their parents. In the past, the U.S. Supreme Court invalidated statutes that treated non-marital children in a similar fashion.[207]

When two adults unite and agree to conceive a child by artificial insemination they should both be financially responsible for the child. The marital status of the two adults should not impact the child's ability to receive child support. Once the child is born, it is in the child's best interests to receive financial support from at least two persons. One of the adults should not be excused from paying child support because the

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[201] *Id.* at 1250.

[202] *Id.* at 1252.

[203] *Id.*

[204] *Id.* at 1252–53.

[205] *Id.* at 1253.

[206] *Id.*

[207] Mary Patricia Byrn, *From Right to Wrong: A Critique of the 2000 Uniform Parentage Act*, 16 UCLA WOMEN'S L.J. 163, 203 (2007).

child was not born into a traditional family. This is consistent with the public policy that one parent cannot contract away a child's right to child support because the right to child support is the right of the child and not of the parent.[208]

B. Changed Circumstances

Only a few state legislatures have made provisions for changed circumstances.[209] The majority of artificial insemination statutes do not allow for the possibility that after the man consents to the process the couple's situation might change. There are several legitimate reasons why a man may have a change of heart. The artificial insemination process can be stressful and heartbreaking. It usually takes several attempts before a woman is successfully inseminated.[210] Even after a successful insemination, there is still a chance that the pregnancy may end prematurely. At some stage of the process, the man may decide that he can no longer endure the pain of the process. Moreover, during the artificial insemination process, the relationship between the man and the woman may deteriorate so much that the man decides that it would not be fair to bring a child into the relationship. Furthermore, the man may lose his job or suffer some other hardship that impairs his ability to financially support a child. If the child has not yet been conceived, the man should have the right to withdraw his consent to the procedure.

In some cases, the man may consent to the artificial insemination of his wife, and die before the child is conceived.[211] After the man has consented and before the child is conceived, the couple may divorce. Courts presented with these situations have to determine the impact the changed circumstances have on the man's paternity.[212] Unfortunately, the legislatures in the majority of states have failed to give the courts guidance on this issue. A majority of statutes regulating the artificial insemination process do not account for changed circumstances. Thus, a

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[208] *See* Bassett v. Saunders, 835 So. 2d 1198, 1201 (Fla. Dist. Ct. App. 2002) ("The rights of support and meaningful relationship belong to the child, not the parent; therefore, neither parent can bargain away those rights . . . ."); *See also* Ferguson v. McKiernan, 855 A.2d 121 (Pa. Super. Ct. 2004) (refusing to enforce oral agreement between mother and sperm donor father in which man agreed to donate sperm so woman could conceive a child using artificial insemination if the woman promised to release him from all responsibility with regards to the resulting child).

[209] *See, e.g.*, N.D. CENT. CODE § 14-20-65 (Supp. 2009) ("If an individual who consented in a record to be a parent by assisted reproduction dies before placement of eggs, sperm, or embryos, the deceased individual is not a parent of the resulting child unless the deceased spouse consented in a record that if assisted reproduction were to occur after death, the deceased individual would be a parent of the child.").

[210] *See* BabyCenter, *Fertility Treatment: Artificial Insemination (IUI)*, Sept. 2006, http://www.babycenter.com/0_fertility-treatment-artificial-insemination-iui_4092.bc ("[M]ost women undergo three to six cycles of artificial insemination before getting pregnant or trying another treatment.").

[211] N.D. CENT. CODE § 14-20-65.

[212] *See, e.g.*, K.S. v. G.S., 440 A.2d 64, 68 (N.J. Super. Ct. Ch. Div. 1981).

plain reading of a typical artificial insemination statute indicates that once the man consents to the artificial insemination of his wife, he is bound by that consent indefinitely. Thus, the man is legally responsible for the resulting child. The end result of that statutory deficiency is litigation that often negatively impacts the artificially created child.

If the man changes his mind or the couple's circumstances change prior to conception of the child, there should be a mechanism in place to permit the man to withdraw his consent. Courts have recognized a man's right to prevent his ex-wife from using his genetic material to procreate.[213] The reasoning of those courts indicates that a man should have the right to change his mind about parenting another man's child. Artificial insemination statutes should contain provisions that set out the steps a man must take to withdraw his consent to the artificial insemination of his wife prior to the conception of the child. If the man complies with the statute, he should be relieved of paternal responsibility for the child. This may discourage a woman from conceiving a child she is financially unable to support.

C. Physician Requirement

Under the majority of state statutes, the husband of the woman who is artificially inseminated is only obligated to support the resulting child if he consents to the procedure.[214] Additionally, a non-spousal sperm donor is relieved of responsibility for the child.[215] In both circumstances, the statutory mandates only apply if the procedure comes within the scope of the statutes. Thus, the couple's failure to comply with the statute results in the application of the common law presumption and the man is presumed to be the father of the child if the child is born during the marriage.[216] In the same vein, as previously mentioned, if the sperm donor fails to comply with the statutory requirements, he may be found to be legally responsible for the support of the child.[217] In almost half of the states, the statutory requirements do not apply unless a licensed physician is involved in the process. Some statutes state that the procedure can only be performed by a licensed physician.[218]

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[213] *See, e.g.*, *In re* Estate of Kievernagel, 83 Cal. Rptr. 3d 311, 312 (Cal. Ct. App. 2008).

[214] *See supra* Part III.A.

[215] *See supra* Part IV.A.

[216] Jana Singer, *Marriage, Biology, and Paternity: The Case for Revitalizing the Marital Presumption*, 65 MD. L. REV. 246, 248 (2006).

[217] Meghan Anderson, Note, K.M. v. E. G.*: Blurring the Lines of Parentage in the Modern Courts*, 75 U. CIN. L. REV. 275, 283–84 (2006).

[218] *See, e.g.*, CONN. GEN. STAT. ANN. § 45a-772(a) (West 2004) ("A.I.D., may be performed in this state only by persons certified to practice medicine in this state . . . ."); *See also* ARK. CODE ANN. § 9-10-202(a) (2008) ("Artificial insemination of a woman shall only be performed under the supervision of a physician licensed under the Arkansas Medical Practices Act."); *see also* Kathryn Venturatos Lorio, *Alternative Means of Reproduction: Virgin Territory for Legislation*, 44 LA. L. REV. 1641, 1649 (1984).

The requirement of a licensed physician is an unnecessary burden on infertile couples. Artificial insemination is not a medical procedure that can only be safely performed by a licensed physician.[219] Therefore, the statutory mandate with regards to the involvement of a licensed physician is superfluous. Moreover, the requirement that a licensed physician perform the procedure makes the process cost prohibitive to some couples.[220] In response, low- or moderate-income women have an incentive to self-inseminate using sperm donated by men they know.[221] If those men are not statutorily protected from paternal obligations, they may be reluctant to participate in the process. As a consequence, many women may be denied the opportunity to have children. The physician requirement may also negatively impact low and moderate income couples who try to decrease costs by performing the procedure at home using known sperm donors. In order to reduce the likelihood of this happening, the legislatures should amend the statutes to remove the physician requirement.

A primary justification for the physician requirement is evidentiary.[222] The lack of an independent third party, like a physician, to testify makes it difficult for a court to determine whether the child was conceived by artificial insemination or sexual intercourse. If the child was conceived by sexual intercourse, the man should not be permitted to disregard his paternal obligations. Thus, it is important for the court to have proof that the child was conceived by artificial insemination. The statutory requirement of the involvement of a licensed physician will enable the court to resolve "he said, she said" situations.

It is clear that an independent third party should be involved in the process in order to avoid fraud and other deceptions. Nonetheless, there is no compelling reason why that person has to be a licensed physician or anyone else with a medical background. In the alternative, the statutes could contain a presumption that if a child was conceived without the involvement of a licensed physician, the child was conceived by sexual intercourse. The statutes could mandate that in order to rebut the presumption and take advantage of the statutory protections, the man must prove by clear and convincing evidence that the child was conceived by artificial insemination. This approach would lessen the incidents of fraud and reduce the costs involved in the artificial insemination process.

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[219] Elizabeth Ann Pitrolo, Comment, *The Birds, the Bees, and the Deep Freeze: Is There International Consensus in the Debate over Assisted Reproductive Technologies?* 19 HOUS. J. INT'L L. 147, 151 (1996) (citing LORI B. ANDREWS, NEW CONCEPTIONS 179–80 (1984)).

[220] Marc E. Elovitz, *Reforming the Law to Respect Families Created by Lesbian and Gay People*, 3 J.L. & POL'Y 431, 442 n.49 (1995); *see also* Catherine DeLair, *Ethical, Moral, Economic and Legal Barriers to Assisted Reproductive Technologies Employed by Gay Men and Lesbian Women*, 4 DEPAUL J. HEALTH CARE L. 147, 163–64 (2000).

[221] *See* King, *supra* note 179, at 351 (listing some of the reasons why women choose to use known sperm donors).

[222] *See* Jhordan C. v. Mary K., 224 Cal. Rptr. 530, 534–35 (Cal. Ct. App. 1986) (stating two justifications for the physician requirement).

VI. UNIFORM PARENTAGE ACT'S APPROACH

A. Advantages

The approach taken by the drafters of the UPA is more reflective of our current societal norms and expectations. For example, the UPA applies to unmarried women and affords them the protections of the statute.[223] The inclusion of unmarried women enables courts to protect more artificially conceived children. In addition, the scope of the UPA is broad enough to be applied to cases involving same-sex couples. This fact is critical because the use of artificial insemination by women in same-sex relationships has increased.[224] Hence, the children created within those unions need to have the opportunity to receive financial support from more than one adult. The UPA's approach permits the courts to overlook the marital status of the adults and to focus upon the children's need for support.

Another positive aspect of the UPA's approach is the recognition that the actions of the man should be evaluated prior to and after the birth of the artificially conceived child. According to the provisions of the UPA, if the man consents to the artificial insemination of the woman, he is the legal father of the resulting child.[225] This is consistent with the approach taken by several state statutes. Nonetheless, the UPA goes a step further and considers the man's conduct after the birth of the artificially conceived child. Under the UPA, if the man acts like a father to the child after the child's birth, he is presumed to have consented to the child's conception. Thus, he is legally recognized as the child's father.[226]

The UPA's approach recognizes that a man may change his mind after he sees the child, and decide that he wants to be the child's parent. It also acknowledges the existence of a functional or psychological father.[227] Further, it protects the child from being financially abandoned by the man if the relationship between the man and the woman deteriorates. In that circumstance, the man may use his lack of consent to avoid financially supporting the child. The UPA's presumption, like the common law estoppel doctrine, prevents a man from simply walking away

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[223] UNIF. PARENTAGE ACT (amended 2002), 9B U.L.A. 4 (Supp. 2009). The language of the UPA repeatedly refers to a "man" and a "woman." *See, e.g.*, *Id.* § 704, 9B U.L.A. 63.

[224] Kathy T. Graham, *Same-Sex Couples: Their Rights as Parents, and Their Children's Rights as Children*, 48 SANTA CLARA L. REV. 999, 1019 (2008).

[225] UNIF. PARENTAGE ACT § 703, 9B U.L.A. 63.

[226] *Id.* § 704, 9B U.L.A. 63.

[227] Nancy D. Polikoff, *The Deliberate Construction of Families Without Fathers: Is It an Option for Lesbian and Heterosexual Mothers?* 36 SANTA CLARA L. REV. 375, 387–88 (1996) (discussing functional parents); *see also* Kirsten Korn, Comment, *The Struggle for the Child: Preserving the Family in Adoption Disputes Between Biological Parents and Third Parties*, 72 N.C. L. REV. 1279, 1310–11 (1994) (discussing psychological parent doctrine).

from his responsibilities after he has acted like a parent. This approach can be justified using the same reasoning that prevents a person from returning a child after the adoption is final.[228]

The UPA's approach attempts to fairly balance the man's reproductive rights against the child's right to financial support. The U.S. Supreme Court has recognized a person's right to procreate.[229] In the same vein, a person has a right not to procreate.[230] To prevent a man from becoming a parent involuntarily, the UPA gives him a reasonable time to challenge paternity as long as certain factors are in place.[231] That approach protects a man from being forced to be a parent to a child that he did not conceive using his genetic material and a child that he did not consent to have conceived. The primary advantage of this approach is that it will deter women from using deception to get a man to financially support a child.[232]

Finally, the UPA's approach is flexible. It addresses contingencies that are ignored by the majority of state statutes. The drafters of the UPA appear to have anticipated some of the scenarios that could occur in a real life situation. First, the UPA's approach recognizes that a man may change his mind after he consents to the artificial insemination of the woman. Consequently, the UPA's approach gives the man the opportunity to withdraw his consent.[233] The woman should have the right to continue the process, but she should not be able to obligate the man to be recognized as the resulting child's legal father. Under the UPA's approach, the man's consent is also eliminated by divorce[234] or death.[235] Both of those situations will adversely impact the child. Therefore, if the child has not yet been conceived, the change of circumstances should impact the man's paternal obligations. After the man consents to the artificial insemination of the woman, if their circumstances change, they should be given the opportunity to rethink their decision to conceive a child using artificial insemination.

B. Disadvantages

A major shortcoming of the UPA is that it does not specifically mention same-sex couples in its provisions. Although application of the statute is not limited to married couples, the language of the statute

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[228] *See* Kelly Bennison, Comment, *No Deposit No Return: The Adoption Dilemma*, 16 NOVA L. REV. 909, 916 (1992).

[229] Kimberly Berg, Note, *Special Respect: For Embryos and Progenitors*, 74 GEO. WASH. L. REV. 506, 508–09 (2006).

[230] Joseph Russell Falasco, *Frozen Embryos and Gamete Providers' Rights: A Suggested Model for Embryo Disposition*, 45 JURIMETRICS J. 273, 276–79 (2005).

[231] UNIF. PARENTAGE ACT § 705 (a)–(b), 9B U.L.A. 64.

[232] *See In re* Marriage of Witbeck-Wildhagen, 667 N.E.2d 122, 123 (Ill. App. Ct. 1996).

[233] UNIF. PARENTAGE ACT § 706(b), 9B U.L.A. 65.

[234] *Id.* § 706(a), 9B U.L.A. 65.

[235] *Id.* § 707, 9B U.L.A. 66.

states that it applies to situations involving men and women.[236] Thus, in some cases, the interests of children born to same-sex couples will not be protected. For example, if an unmarried woman is in a relationship with an unmarried man and he consents to the artificial insemination of the woman, he is financially responsible for the child. On the other hand, nothing in the UPA indicates that a woman who consents to the artificial insemination of her female partner will be held to the same standard. In order to offer protection to the maximum number of children, the UPA should be amended to apply to any two consenting adults who agree to conceive a child together using artificial insemination.

The UPA states that the sperm donor can never be the parent of the artificially conceived child.[237] Courts may be reluctant to hold that a biological parent does not have parental rights.[238] Thus, a better approach may be the one taken by the Florida legislature. Under that statute, the state recognizes the parental rights of the sperm donor, but requires him to waive those rights prior to donating sperm.[239] This amendment will remove all possibility of a sperm donor petitioning the court for the right to be a part of the life of the artificially conceived child. Hence, the couple will have the opportunity to raise the child without outside interference. Additionally, it will save the child from being involved in a custody battle.

According to the UPA, the man must consent to the artificial insemination and intend to parent the child.[240] The disadvantage of this approach is that it puts the burden on the woman to prove that the man should be financially responsible for the child. If the man consents to the artificial insemination of the woman, his intent to parent should be presumed. Equity mandates that he should have to prove that he never intended to be a parent to the artificially conceived child. The better approach would be to amend the language of the UPA to make consent alone enough. When a man consents to the artificial insemination of a woman with whom he has a relationship, the expectation is that he intends to take paternal responsibility for the child. The UPA should not contain a loophole that permits the man to escape his child support obligations. The next Part makes suggestions on ways the current system can be modified to promote the best interests of the artificially conceived child.

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[236] *Id.* § 704(a)–(b), 9B U.L.A. 63.

[237] *Id.* § 702, 9B U.L.A. 355 (2001) ("A donor is not a parent of a child conceived by means of assisted reproduction.").

[238] *See* Welborn v. Doe, 394 S.E.2d 732, 733–34 (Va. Ct. App. 1990) (holding that the Virginia statute did not terminate the sperm donor's parental rights).

[239] FLA. STAT. ANN. § 742.14 (West 2005) ("The donor of any egg, sperm, or preembryo . . . shall relinquish all maternal or paternal rights and obligations with respect to the donation or the resulting children."); *see also* Budnick v. Silverman, 805 So. 2d 1112, 1114 (Fla. Dist. Ct. App. 2002) ("[T]he donor is legally bound to give away any rights as a parent.").

[240] UNIF. PARENTAGE ACT § 703 (amended 2002), 9B U.L.A. 63 (Supp. 2009).

VII. RECOMMENDATIONS FOR IMPROVEMENT

All states should enact statutes that allocate the paternal obligations of both the husbands of artificially inseminated women and the sperm donors. Those statutes should attempt to balance the reproductive rights of the men involved in the process and the best interests of the children created as a consequence of the process. Further, in passing statutes, the legislators should seek to achieve specific goals.

A. Regulating the Paternity of Husbands

A paternity adjudication results in a great deal of emotional and financial responsibility.[241] Parents are responsible for caring for their children from birth until the age of majority.[242] If the child is born with a physical, mental, or developmental disability, the parental obligation may last for the life of the child.[243] Thus, it is crucial that the husbands of women who conceive through artificial insemination using donor sperm are not forced to be fathers to children without their consent. In order to achieve that goal, statutes must be enacted stating that the husband is not legally responsible for the child unless he gave written consent prior to the insemination of his wife. Because circumstances change, the husband should be permitted to withdraw his consent prior to the child's conception. The husband should have the burden of proving that he withdrew his consent before the child was conceived.[244] In the alternate, the legislature should make the consent good for only a certain length of time. After that time period expires, the husband should be given the option of renewing his consent. If the husband fails to renew his consent within a reasonable period of time after the expiration of his initial consent, he should not be recognized as the legal father of the artificially conceived child.

B. Regulating the Paternity of Sperm Donors

The primary goal of any statutory scheme dealing with assisted reproduction should be to insure that infertile couples in committed

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[241] N.A.H. v. S.L.S., 9 P.3d 354, 359 (Colo. 2000) ("The determination of parenthood includes the right to parenting time; the right to direct the child's activities; the right to make decisions regarding the control, education, and health of the child; and the right to the child's services and earnings. Legal fatherhood imposes significant obligations as well, including the obligation of support and the obligation to teach moral standards, religious beliefs, and good citizenship." (citation omitted) (citing Michael H. v. Gerald D., 491 U.S. 110, 118–19 (1989))).

[242] Ralph C. Brashier, *Protecting the Child From Disinheritance: Must Louisiana Stand Alone?*, 57 LA. L. REV. 1, 4–5 (1996).

[243] Sande L. Buhai, *Parental Support of Adult Children with Disabilities*, 91 MINN. L. REV. 710, 723–24 (2007).

[244] This is the approach the Court adopted in K.S. v. G.S., 440 A.2d 64, 68 (N.J. Super. Ct. Ch. Div. 1981).

relationships are able to obtain sperm without worrying about the donor asserting his parental rights. Consequently, couples should be defined broadly to include persons who are married, in civil unions, or domestic partnerships.[245] This broad definition will insure that persons in same-sex relationships are protected.[246] The rights of the husband or partner of the inseminated woman should be paramount to those of the man donating the sperm. To achieve that goal in these types of situations, the sperm donor should never be considered to be a parent. Since the sperm donor is never legally recognized as the parent, he does not have to waive his parental rights and the woman's husband or partner does not have to adopt the child. This is the law under the UPA and in the majority of states that have implemented statutes addressing the issue.[247]

An equally important goal of the statutory regime should be to permit unmarried women to control their reproduction by being able to obtain sperm without worrying about the donor interfering with their parental rights.[248] In order to accomplish that goal, at the time of donation, the sperm donor should be required to sign a written document waiving his parental rights and agreeing that he is not the father of any children conceived using his sperm.[249] However, with the permission of the woman, the donor should be permitted to reinstate his parental rights prior to the birth of the child. This requirement will also insure that sperm donors are able to donate without fear of being liable for child support and other parental obligations. This requirement should apply to known and unknown donors. Unlike in the situation dealing with persons in married or committed relationships, the sperm donor should be recognized as having parental rights that he can waive. The justification for the difference in treatment is to encourage co-parenting situations if the parties think that is appropriate. For example, an unmarried woman and an unmarried man may want to raise a child

[245] I have excluded unmarried cohabitants from this protection because they have the option of entering into marriage.

[246] Currently, in the majority of states, same-sex couples are not able to avail themselves of the safeguards included in the artificial insemination statutes. Kira Horstmeyer, Note, *Putting Your Eggs in Someone Else's Basket: Inserting Uniformity into the Uniform Parentage Act's Treatment of Assisted Reproductio*n, 64 WASH. & LEE L. REV. 671, 675 (2007).

[247] *See In re* K.M.H., 169 P.3d 1025, 1033 (Kan. 2007).

[248] The current statutory regime does not afford the unmarried woman much protection. *See* Vickie L. Henry, Note, *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*, 19 AM. J.L. & MED. 285, 294 (1993) (asserting that existing laws do not protect the familial expectations of unmarried women who conceive using artificial insemination).

[249] *See* Leckie v. Voorhies, 875 P.2d 521, 522 (Or. Ct. App. 1994) (enforcing sperm donor's written waiver of his parental rights to a child conceived by artificial insemination).

jointly even though they are not in a relationship.[250] In the cases involving married persons and persons in committed relationships, the child will already have two persons filling the parental roles. Thus, in order to avoid confusion, the law should not give the sperm donor any opportunity to claim his parental rights. The most effective way to eliminate that possibility is to strip him of all parental rights. In situations involving unmarried people, legislatures should leave open the possibility of joint parenting by giving the parties the option of leaving the donor's parental rights in place.

A final goal with regard to sperm donors should be to insure that known sperm donors who do not deposit their sperm with a licensed physician or in a medical facility are protected from child support and other parental obligations. That goal may be attained by establishing a two-prong system. If the recipient of the sperm is married, the donor will never be considered to be the father. If the recipient of the sperm is unmarried, there is a rebuttable presumption that the sperm donor is not the parent of the child. That presumption may be rebutted by showing that the sperm donor agreed to be a parent to the artificially conceived child.

C. Protecting the Children

The goal of applying the "best interests" of the child standard should be to ensure that the child is emotionally and physically healthy, that the child is financially supported, and that the child is in a stable environment. In order to accomplish that goal, the courts should make sure that the artificially conceived child is financially supported by at least two parents.[251] Nonetheless, in order to live a quality life, the child needs more than economic support. When possible, the courts should take the steps necessary to preserve the pattern of interaction between the child and the parents after the relationship between the parents has deteriorated. One way to achieve these goals is to expand the definition of fatherhood so that the court can apply different standards to determine the paternity of the men involved in the process.[252] The issue of redefining fatherhood is addressed in the next Part.

[250] Some single lesbian women are choosing to co-parent with single gay men. *E.g.*, Catherine Hall, *My Future Family*, THE GUARDIAN, Feb. 7, 2009, http://www.guardian.co.uk/lifeandstyle/2009/feb/07/family4.

[251] Marsha Garrison, *Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage*, 113 HARV. L. REV. 835, 894–95 (2000).

[252] Chris W. Altenbernd, *Quasi-Marital Children: The Common Law's Failure in* Privette *and* Daniel *Calls for Statutory Reform*, 26 FLA. ST. U. L. REV. 219, 225–27 (1999) (discussing several different definitions of "father").

VIII. MY PROPOSAL (STANDARDS TO APPLY IN ALLOCATING PATERNAL OBLIGATIONS)

State legislatures should modify the current statutes addressing the rights and responsibilities of the men involved in the artificial insemination process in order to more accurately accommodate the current state of the family.[253] Legislators cannot anticipate and cover all contingencies. Consequently, courts should be given the flexibility to determine paternity by relying upon various standards consistent with family law principles derived from existing statutes and case law. The overriding objective should be to promote the best interests of the child conceived by artificial insemination.[254] It is usually in the best interests of a child and society to have at least two adults financially responsible for the child's support.[255] This is true even if the adults have agreed not to live together. In addition, it is in the child's best interests for the court to recognize and respect the relationships that the child has established with the adults in his or her life.

Under the present system, there is a possibility that an artificially conceived child may be deemed legally fatherless. For example, if a husband does not consent to the artificial insemination of his wife, he is not legally recognized as the father of the resulting child.[256] Based upon the same statutory regime, the sperm donor is not classified as the legal father. Thus, in a situation involving a nonconsenting husband, the artificially conceived child does not have a legal father. Courts cannot force the adults in the relationship to stay together for the children. Nevertheless, the courts can take steps to ensure that children conceived using artificial insemination have at least two legal parents. In the context of paternity, that goal can be achieved by permitting courts to broaden the definition of fatherhood by applying multi-factor tests for determining paternity instead of relying on bright line rules. Some current statutes, cases, and legal scholarship acknowledge that there are several different ways for a man to be identified as a legal father.[257] When allocating paternity, courts should use those methods to ensure that the artificially conceived child will have a legal father.

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[253] *Contra* Annette Ruth Appell, *Virtual Mothers and the Meaning of Parenthood*, 34 U. MICH. J.L. REFORM 683 (2001) (defending the traditional parent rights doctrine and definition of parenthood).

[254] *See* Sarah McGinnis, Comment, *You Are Not the Father: How State Paternity Laws Protect (and Fail to Protect) the Best Interests of Children*, 16 AM. U. J. GENDER SOC. POL'Y & L. 311, 325–30 (2007) (contending that giving the court too much discretion in paternity determinations may not be in the best interests of children).

[255] *See* C.M. v. C.C., 377 A.2d 821, 825 (N.J. Juv. & Dom. Rel. Ct. 1977) ("It is in a child's best interests to have two parents whenever possible.").

[256] Gordon-Ceresky, *supra* note 30, at 256.

[257] *See, e.g.,* Nancy E. Dowd, *Multiple Parents/Multiple Fathers*, 9 J.L. & FAM. STUD. 231, 235–37 (2007) (advocating for a broad definition of fatherhood, including social fatherhood).

I do not seek to join the ranks of those scholars and commentators advocating for co-parenting or nonexclusive parenting.[258] My focus is upon ensuring that the artificially conceived child has two legally recognized parents. I am unwilling to throw out the two-parent model of parenting.[259] I am proposing that the definition of paternity be expanded to include a man who may not be genetically related to the artificially conceived child.[260] Hence, I propose that biology not be the sole indicator of paternity. Courts should apply a series of tests or standards when adjudicating paternity. If the man's paternity can be established under one or more of those tests or standards, he should be recognized as the child's legal father. As a consequence, that man should be financially obligated to support the child and should be entitled to all of the benefits of the father-child relationship. This approach is not radical because courts have engaged in a similar analysis in order to decide maternity in cases involving children created as the result of surrogacy arrangements.[261]

My proposal is limited to situations involving children created by artificial insemination. Under the current statutory regime in most states, the artificial insemination statutes do not apply unless the procedure is performed by a licensed physician. On the contrary, for the provisions of my proposal to apply to the situation, the procedure does not have to be performed by a licensed physician or an independent third party.[262] One of the key justifications for the licensed physician requirement is the need to insure that the child was conceived by artificial insemination instead of by sexual intercourse.[263] My proposal starts with the presumption that the child was conceived by artificial insemination. The person challenging the application of the proposal has the burden of proving that the child was conceived by natural insemination. My

[258] *See, e.g.*, Singer, *supra* note 216, at 268–70; Melanie B. Jacobs, *My Two Dads: Disaggregating Biological and Social Paternity*, 38 ARIZ. ST. L.J. 809, 811 (2006); Donald C. Hubin, *Daddy Dilemmas: Untangling the Puzzles of Paternity*, 13 CORNELL J.L. & PUB. POL'Y 29, 79 (2003); Kris Franklin, Note, "*A Family Like Any Other Family:" Alternative Methods of Defining Family in Law*, 18 N.Y.U. REV. L. & SOC. CHANGE 1027, 1048–49, 1074 (1991).

[259] *But see*, Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives when the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879, 948 (1984).

[260] Carmel B. Sella, *When a Mother Is a Legal Stranger to Her Child: The Law's Challenge to the Lesbian Nonbiological Mother*, 1 UCLA WOMEN'S L.J. 135, 142–46 (1991); *see also* Maggie Manternach, Note, *Where Is My Other Mommy?: Applying the Presumed Father Provision of the Uniform Parentage Act to Recognize the Rights of Lesbian Mothers and Their Children*, 9 J. GENDER RACE & JUST. 385, 407–08 (2005).

[261] Emily Stark, Comment, *Born to No Mother:* In Re Roberto D.B. *and Equal Protection for Gestational Surrogates Rebutting Maternity*, 16 AM. U. J. GENDER SOC. POL'Y & L. 283, 293–307 (2008) (evaluating different tests courts have relied upon to determine the legal mother of a child born as the result of a surrogate arrangement).

[262] Most of the artificial insemination statutes contain a physician requirement. *See supra* Part V.C.

[263] *See* Jhordan C. v. Mary K., 224 Cal. Rptr. 530, 534–35 (Cal. Ct. App. 1986).

proposal is based upon some of the theories put forth by the courts and other legal scholars.[264] The premise of my proposal is that, in order to promote the best interests of the artificially conceived child, the courts should recognize the relationship the child has established with the man, and enforce the paternal agreements made between the artificially inseminated woman and the man. The key components of my proposal are as follows.

A. The Paternity of the Husband of the Artificially Inseminated Woman

Courts are frequently asked to adjudicate paternity in these types of cases in three contexts. In the first scenario, the husband does not want to be recognized as the father of the artificially conceived child.[265] Scenario two cases are litigated because the inseminated wife challenges her husband's claim of parenthood.[266] The possibility also exists for a third scenario in which both the artificially inseminated wife and her husband object to the husband being adjudicated as the father of the child. The recommendations in this Section apply to all three scenarios. The enumerated classifications were derived using cases, statutes, and theories put forth by other legal scholars. In some instances, the definitions of certain terms have been modified.

1. Scenario One Cases

In some cases, the husband attempts to disclaim responsibility for the artificially conceived child. Since he does not have a genetic connection to the child, the man may feel that he should not have to provide support for the child. These cases typically arise because the husband and the artificially inseminated woman have separated or divorced.[267] In deciding whether or not to classify the husband as the child's legal father, courts should determine if he consented to the child's conception. If the man consented by action or deed, he should be legally obligated to provide financial support for the child, and the child should be considered to be his legal heir. In the alternative, the court should presume that, since he was married to the child's mother at the time the child was conceived, the man is the child's legal father.

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[264] *See* Shoshana L. Gillers, Note, *A Labor Theory of Legal Parenthood*, 110 YALE L.J. 691, 691, 706–09 (2001); Atkinson v. Atkinson, 408 N.W.2d 516, 519 (Mich. Ct. App. 1987) (applying the equitable parent doctrine); Nancy E. Dowd, *Parentage at Birth: Birthfathers and Social Fatherhood*, 14 WM. & MARY BILL RTS. J. 909, 913 (2006); June Carbone, *The Legal Definition of Parenthood: Uncertainty at the Core of Family Identity*, 65 LA. L. REV. 1295, 1297 (2005).

[265] *See, e.g., In re* Baby Doe, 353 S.E.2d 877, 878 (S.C. 1987); *In re* Marriage of Witbeck-Wildhagen, 667 N.E.2d 122, 123 (Ill. App. Ct. 1996).

[266] *See, e.g.,* Lane v. Lane, 912 P.2d 290, 293 (N.M. Ct. App. 1996); State *ex rel.* H. v. P., 457 N.Y.S.2d 488, 489 (N.Y. App. Div. 1982).

[267] *See, e.g., In re* Baby Doe, 353 S.E.2d at 877; Laura G. v. Peter G., 830 N.Y.S.2d 496, 497 (N.Y. Sup. Ct. 2007).

a. Paternity by Consent

If the woman's husband consents to her artificial insemination, he should be adjudicated the father of the resulting child. Thus, he should not be permitted to object to the court designating him as the father of the child. Consent should be broadly interpreted to include written, implied, and oral consent. In order for the husband's consent to be legally recognized, he must give informed consent.[268] The person seeking to prove non-written consent must do so by submitting clear and convincing evidence of that fact. Once the husband gives written consent, that consent should be effective for one year. Prior to the expiration of that time period, the husband should not be permitted to unilaterally withdraw his consent. At the end of the one year period, the written consent must be renewed within a reasonable period of time based upon the particular circumstances of the case. If the consent is not renewed within that time period, the husband should be deemed to not have consented to the artificial insemination of his wife.

b. Paternity by Presumption

This long-standing legal doctrine usually applies when the issue deals with paternity.[269] Under the traditional version of the doctrine, a husband was presumed to be the biological father of his wife's children as long as they were born during the course of the marriage.[270] Initially, strict evidentiary requirements prevented the presumption from being rebutted because the courts wanted to preserve the sanctity of marriage and to protect children from being classified as non-marital children.[271] Eventually, the courts permitted interested parties, including the husband, the wife, and the child(ren) to rebut the presumption of the husband's paternity.[272] In some cases, the man claiming to be the child's biological father was permitted to successfully rebut the presumption. The presumption may be rebutted by showing that the husband is not

[268] This means that the husband must be told that, if he consents to the artificial insemination, he will be legally responsible for the child.

[269] Theresa Glennon, *Somebody's Child: Evaluating the Erosion of the Marital Presumption of Paternity*, 102 W. VA. L. REV. 547, 562 (2000).

[270] Mary Louise Fellows, *A Feminist Interpretation of the Law of Legitimacy*, 7 TEX. J. WOMEN & L. 195, 195–96 (1998).

[271] Lord Mansfield's Rule barred either spouse from testifying that a child born during the marriage was illegitimate. *See* Hubin, *supra* note 258, at 47–48; Pendleton, *supra* note 129, at 2824–25. In order to rebut the presumption, the person had to prove that the husband was physically unable to procreate or that the husband was not in a position to have sex with his wife during the time the child was conceived. Jacinta M. Testa, Comment, *Finishing Off Forced Fatherhood: Does It Really Matter if Blood or DNA Evidence Can Rebut the Presumption of Paternity?*, 108 PENN. ST. L. REV. 1295, 1298 (2004).

[272] Sunny J. Jansma, Note, *Family Law—Presumption of Paternity—Denying a Biological Father Standing to Establish His Paternity of a Child Who Has a Presumed Father, Under Texas Family Code Sections 11.03(a)(7) and 12.06(a), Violates the Texas Due Course of Law Guarantee*, 25 ST. MARY'S L.J. 821, 825–26 (1994).

the biological father of the child.[273] In light of the advances in DNA testing, it is relatively easy to prove or disprove the husband's paternity.[274]

In cases dealing with children conceived by artificial insemination, there is no need to do DNA testing because the wife and the husband readily admit that he does not have a biological connection to the child. In response to this dilemma, some courts have adopted the best interests marital presumption doctrine. Under that doctrine, like the traditional approach, the woman's husband is presumed to be the father of all children conceived by her during their marriage. The main difference is that the presumption can be rebutted only if it is in the child's best interests to discover that someone other than the husband is the child's biological father.[275]

The nonconsenting husband of the artificially inseminated woman should be classified as the presumptive father of the child as long as the child was conceived during the marriage. The husband should only be permitted to rebut the presumption of his paternity if it is in the best interests of the child to permit it. Allowing the rebuttal should only be considered to be in the child's best interests if there is another man who may legally be recognized as the father and that man is willing to act as a father to the child. In deciding whether or not to permit the presumption to be rebutted, the court should consider several factors, including the child's relationship with the presumptive father and the child's relationship with the man who is willing to parent if the presumption of paternity is rebutted.

The only persons who should be allowed to rebut the presumption of the husband's paternity should be the child's biological mother, an independent representative of the child, the mother's husband, or the man seeking to be recognized as the legal parent. Since the nonconsenting husband would not have a biological connection to the child, this presumption standard is different from the traditional marital presumption. As stated earlier, under that presumption, the man only had to provide proof that he was not the biological father of the child and he was released from all parental obligations to the child.[276] In cases involving artificially conceived children, in order to rebut the presumption, the husband should have to present evidence indicating

[273] The marital presumption of paternity was upheld by the U.S. Supreme Court in *Michael H. v. Gerald D.*, 491 U.S. 110 (1989). At that time, the Court rejected the notion that a child could have two legal fathers. *Id.* at 118.

[274] Roberts, *supra* note 23, at 56–57.

[275] *See* Debi McRae, *Evaluating the Effectiveness of the Best Interests Marital Presumption of Paternity*: *It Is Actually in the Best Interests of Children to Divorce the Current Application of the Best Interests Marital Presumption of Paternity*, 5 WHITTIER J. CHILD & FAM. ADVOC. 345, 347–49 (2006) (discussing the evolution of the "Best Interests Marital Presumption of Paternity" and arguing that it is always in the best interests to rebut the presumption).

[276] Pendleton, *supra* note 129, at 2830–34.

that he did not consent to the creation of the child or indicating that he did not intend to parent the child.

In order to promote the best interests of the child, the courts should make it difficult for the husband of the artificially inseminated woman to dispute his paternity. This Section examines just two standards, paternity by consent and paternity by presumption, the courts can apply to achieve that goal. The court should be just as diligent when the artificially inseminated woman tries to object to her husband being adjudicated as the legal father of her child.

2. Scenario Two Cases

The cases in which artificially inseminated women oppose their husbands being declared the legal fathers of their children often involve custody and visitation issues.[277] In that type of case, the man usually asks the court for either joint custody of the artificially conceived child or for liberal visitation.[278] The man is perfectly willing to provide financial support for the child. Nonetheless, the woman would prefer that the man not be permitted to have contact with the child. In order to accomplish that objective, the woman may focus upon the fact that the man is not genetically related to the child. The woman may employ that tactic because the rights of a legal parent frequently supersede the rights of a person who is a legal stranger to the child.[279] Since, in most of these types of cases, the woman has permitted the man to establish a relationship with the child, the court should evaluate the nature of that relationship to determine if it is in the child's best interests to recognize it.

a. Paternity by Equity

One of the first courts to recognize paternity by equity was the Michigan Court of Appeals.[280] In the case before that court, the husband wanted to be adjudicated the father of a child born during his marriage to a woman who claimed that he was not the child's biological father.[281] The Court relied upon the equitable parent doctrine to conclude that the man should be treated as the child's natural father.[282] Under the doctrine, a man may be treated as the legal father of a child born during his marriage if the following conditions exist:

> (1) [T]he husband and the child mutually acknowledge a relationship as father and child, or the mother of the child has cooperated in the development of such a relationship over a period

[277] *See, e.g.*, Lane v. Lane, 912 P.2d 290, 293 (N.M. Ct. App. 1996).

[278] *See, e.g.*, State *ex rel.* H. v. P., 457 N.Y.S.2d 488, 489 (N.Y. App. Div. 1982).

[279] John DeWitt Gregory, *Whose Child Is It, Anyway*: *The Demise of Family Autonomy and Parental Authority*, 33 FAM. L.Q. 833, 837 (1999).

[280] Atkinson v. Atkinson, 408 N.W.2d 516, 519 (Mich. Ct. App. 1987); *see also* Carolee Kvoriak Lezuch, Comment, *Michigan's Doctrine of Equitable Parenthood: A Doctrine Best Forgotten*, 45 WAYNE L. REV. 1529, 1529–30 (1999) (advocating the abolishment of the doctrine of equitable parenthood).

[281] *Atkinson*, 408 N.W.2d at 517.

[282] *Id.* at 519.

> of time prior to the filing of the complaint for divorce, (2) the husband desires to have the rights afforded to a parent, and (3) the husband is willing to take on the responsibility of paying child support.[283]

Once the court declares a man to be an equitable parent, the man is treated just like a natural parent. As a consequence, he has the same parental rights and responsibilities as any other parent.[284] The application of the doctrine has been limited to situations involving married persons.[285]

In situations involving artificially conceived children, the courts should evaluate the husband's actions after the birth of the child to determine if equity mandates that he be adjudicated the parent of the child. The wife should not be permitted to deny her husband's paternity after she has encouraged him to establish a relationship with the child. That outcome would not be fair to the husband or the child. Further, if the woman did not object to her husband creating a relationship with the child, fairness dictates that the court legitimize that relationship by adjudicating the husband to be the child's legal father. As a result, if an informal father-child relationship has been created, the court should recognize that relationship in order to promote the child's best interests and to be fair to the man.

b. Paternity by Psychology[286]

One of the main advocates for recognition of a psychological parent is Professor Katharine T. Bartlett. Professor Bartlett defines the psychological parent in the context of a nonexclusive parenting situation.[287] She opines that the job of raising children should not be left to the exclusive domain of one man and one woman. Thus, she acknowledges that a child may have more than two adults acting as parents. Nonetheless, Professor Bartlett concedes that the legal parent should have the responsibility and the authority to make decisions regarding the child. As a consequence, Professor Bartlett appears to limit her psychological parent theory to situations involving visitation.[288]

According to Professor Bartlett, a psychological parent is an adult who assists in the provision of necessities that would typically be supplied by the child's nuclear family.[289] These needs may be physical, emotional and or social. Professor Bartlett has suggested the use of a three-part test

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[283] *Id.*

[284] *E.g.*, York v. Morofsky, 571 N.W.2d 524, 526 (Mich. Ct. App. 1997).

[285] Van v. Zahorik, 597 N.W.2d 15, 23 (Mich. 1999).

[286] *See* OR. REV. STAT. § 109.119 (2007) (statute acknowledges that child-parent relationship may be created by establishing emotional ties with a non-biological child); *See also In re* Marriage of Sorensen, 906 P.2d 838, 840–41 (Or. Ct. App. 1995) (recognizing the stepmother as the child's psychological parent over the objection of the biological parent).

[287] Bartlett, *supra* note 259, at 946–48.

[288] *See id.*

[289] *Id.* at 946.

to identify a potential psychological parent.[290] In order to be classified as a psychological parent, the adult must satisfy three conditions. First, the adult must be in physical possession of the child for at least six months prior to seeking parental status.[291] Second, when seeking parental status, the adult must be motivated by a desire to take care of the child and the child must consider that adult to be his or her parent.[292] Finally, the adult seeking parental status has the burden of proving that his or her relationship with the child was the result of the legal parent's consent or a court order.[293]

I am proposing a slight variation on Professor Bartlett's psychological parent theory. In particular, I would eliminate the third condition of her test. The mother of the artificially conceived child should not have the power to dictate the conditions under which her husband can have a relationship with a child that she conceives during their marriage. Professor Bartlett was envisioning that her theory would be applied outside of the context of a marital relationship. Thus, in that context, it would make sense to permit the legal parent to control the contact that other adults have with the child. With regards to situations involving the parental rights of the husband of an artificially inseminated woman, the woman's wishes should not supplant the man's rights or the child's welfare.

The husband of an artificially inseminated woman should be classified as the psychological father of the resulting child if he resides with the child or has contact with the child for a reasonable period of time given the nature of the relationship that he maintains with the child's mother. I am reluctant to require the man to have to be in physical possession of the child for at least six months because it gives the inseminated woman too much control over the situation. If the woman and man separate or divorce when the child is only five months old, he may not be able to satisfy Professor Bartlett's test. Rendering a child legally fatherless because the mother successfully prevents her estranged husband from having contact with the child is not in the child's best interests. Instead of time limits, the focus should be on the emotional ties between the man and the artificially conceived child.[294] If those ties are strong, the man should be determined to be the child's legal father.

3. Scenario Three Cases

A possibility always exists that the artificially inseminated woman and her husband may agree that the husband should not be recognized as the resulting child's legal father. The court should not honor this type of agreement unless it is in the best interests of the child to do so. In

[290] *Id.* at 946–47.
[291] *Id.* at 946.
[292] *Id.* at 947.
[293] *Id.*
[294] *See* OR REV. STAT. § 109.119 (2007) (statute acknowledges that child-parent relationship may be created by establishing emotional ties with non-biological child).

deciding whether or not to designate the woman's husband as the child's father, the court should examine the parties' actions prior to and after the conception and birth of the child. If the circumstances indicate that the husband anticipated being the child's father or that he actually served in that capacity, the court should allocate paternal obligations to the inseminated woman's husband.

a. Paternity by Estoppel

Paternity by estoppel has been recognized by the courts and endorsed by legal scholars.[295] As indicated in Part II, courts have relied on estoppel to place parental responsibility on nonconsenting husbands in cases involving children conceived using artificial insemination.[296] Basically, when a husband acts in such a way as to lead his wife to believe that he is in agreement with her being artificially inseminated and that he plans to parent the child, he is estopped from claiming that he did not consent.[297] Hence, he is the legal father of the resulting child. The parent by estoppel doctrine has been articulated in several different ways.[298] The approach of the court that heard *Brown v. Brown* is illustrative of one application of the doctrine.[299]

In *Brown,* a husband who did not give written consent to his wife's artificial insemination was held to be the father of the resulting child based upon the estoppel doctrine.[300] The court based its decision on the fact that the typical elements of equitable estoppel—representation, reliance, and detriment—were present.[301] After reviewing the facts, the court concluded that, since the husband knew that his wife was being artificially inseminated and did nothing to discourage her from

[295] This approach has been advocated by Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459, 491–502 (1990).

[296] *E.g.*, Laura G. v. Peter G., 830 N.Y.S.2d 496, 502 (N.Y. Sup. Ct. 2007).

[297] *Id.*

[298] Caroline P. Blair, Note, *It's More Than a One-Night Stand: Why a Promise to Parent Should Obligate a Former Lesbian Partner to Pay Child Support in the Absence of a Statutory Requirement*, 39 SUFFOLK U. L. REV. 465, 481–82 (2006); *see also* Hopkins, *supra* note 187, at 234.

[299] 125 S.W.3d 840 (Ark. Ct. App. 2003).

[300] During the marriage, the wife, Kathy Brown, was artificially inseminated with donor sperm and gave birth to twins. She conceded that the husband, Hugh Brown, did not give written consent to the artificial insemination. *Id.* at 841–43. However, Kathy contended that, based upon Hugh's actions before and after the child's birth, he should not be permitted to deny his paternity. *Id.* at 842–43.

[301] *Id.* at 843. ("(1) the party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting estoppel has a right to believe the other party so intended; (3) the party asserting estoppel must be ignorant of the facts; (4) the party asserting estoppel must rely on the other's conduct to his detriment." (citing Office of Child Support Enforcement v. King, 100 S.W.3d 95 (Ark. Ct. App 2003))).

undergoing the procedure, he should be prevented from denying his paternity of the two children.[302]

Another demonstration of the application of the estoppel doctrine is the approach suggested by the American Law Institute (ALI).[303] In the context of determining parentage for child support purposes, the ALI recommended the adoption of the parent by estoppel doctrine.[304] When implementing the doctrine, the ALI suggests considering several factors to decide whether or not the person should be considered a parent by estoppel. First, the court should attempt to discover if the person agreed to support the child. This agreement may be explicit or implicit.[305] This condition is similar to the written and implied consent components included in the various artificial insemination statutes.[306] Second, the court should determine if the child was born during the marriage or cohabitation of the person to be estopped and the person asserting estoppel.[307] If the child was not born to married or cohabitating parties, the child must have been conceived in accordance with an agreement between the parties promising to parent the child.[308]

Courts applying this standard should examine the actions of the nonconsenting husband prior to the conception and birth of the child. If the husband acted in such a way that a reasonable person would conclude that he consented to the artificial insemination and intended to parent the resulting child, he should be estopped from denying

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[302] The court stated, "(1) appellant knew the facts, *i.e.*, he knew that appellee was having the artificial-insemination procedure performed; (2) appellant acted as if he agreed to the procedure, accepted the children as his own, and showed every intention to support them, *i.e.*, leading appellee to believe that he so intended; (3) appellee was ignorant of the facts asserted by appellant at the hearing, *i.e.*, that he did not know she was having the procedure and did not plan to treat the children as his own; and (4) appellee relied to her detriment on appellant's conduct, *i.e.*, she proceeded with the artificial insemination, fully expecting appellant to support the children as his own." *Id.* at 844.

[303] THE AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION (2000) [hereinafter PRINCIPLES].

[304] PRINCIPLES, *supra* note 303, § 2.03(1); Louise McGuire, Comment, *Parental Rights of Gay and Lesbian Couples: Will Legalizing Same-Sex Marriage Make a Difference?*, 43 DUQ. L. REV. 273, 277–78 (2005).

[305] PRINCIPLES, *supra* note 303, § 3.03(1)(a); Grace Ganz Blumberg, *Legal Recognition of Same-Sex Conjugal Relationships: The 2003 California Domestic Partner Rights and Responsibilities Act in Comparative Civil Rights and Family Law Perspective,* 51 UCLA L. REV. 1555, 1604 (2004).

[306] Bridget R. Penick, Note, *Give the Child a Legal Father: A Plea for Iowa to Adopt a Statute Regulating Artificial Insemination by Anonymous Donor*, 83 IOWA L. REV. 633, 651–54 (1998).

[307] PRINCIPLES, *supra* note 303, § 3.03(1)(b).

[308] PRINCIPLES, *supra* note 303, § 2.03; Leslie Bender, *"To Err Is Human" ART Mix-Ups: A Labor-Based, Relational Proposal*, 9 J. GENDER RACE & JUST. 443, 470 (2006); *see also* Deborah L. Forman, *Same-Sex Partners: Strangers, Third Parties, or Parents? The Changing Legal Landscape and the Struggle for Parental Equality,* 40 FAM. L.Q. 23, 42 (2006).

paternity.[309] Likewise, under those circumstances, the biological mother of the child should be estopped from claiming that her nonconsenting husband is not the father of her artificially conceived child.[310] The court should apply the traditional estoppel principles—representation, reliance, and detriment.[311] Paternity by estoppel should result if the husband, through word or deed, represented the intent to parent the artificially conceived child, the woman permitted herself to be inseminated in reasonable reliance upon that representation, and the woman and or child will be harmed if the husband is not adjudicated the father of the child. The person seeking to establish paternity by estoppel should have the burden of proving these elements.

b. Paternity by Function

The functional parent is similar to the psychological parent.[312] The focus is upon the actions the person takes after the birth of the child.[313] This theory of parentage has been put forth by Professor Nancy Polikoff. According to Professor Polikoff, in order for a person to be classified as a functional parent, the child's legally recognized parent must create a relationship between the child and that person.[314] In addition, the legal parent must intend that relationship to be parental in nature. Finally, the person must maintain a functional parental relationship with the child.[315]

When evaluating paternity under this standard, courts should focus upon the husband's actions after the birth of the artificially conceived child. If the nonconsenting husband acts as a father to the child, his paternity should be established by function.[316] To function as a parent, the nonconsenting husband should have to reside in the home with the child for a reasonable period of time,[317] provide financial support for the child, and hold the child out as his child. In essence, the man has to function as a father by establishing some type of relationship with the

[309] R.S. v. R.S., 670 P.2d 923, 925, 928 (Kan. Ct. App. 1983); Gursky v. Gursky, 242 N.Y.S.2d 406, 412 (N.Y. Sup. Ct. 1963).

[310] *See* State *ex rel.* H. v. P., 457 N.Y.S.2d 488, 493 (N.Y. App. Div. 1982) (holding that wife was estopped from denying husband's paternity).

[311] Hopkins *supra* note 187, at 233–34.

[312] *See* Bartlett, *supra* note 259, at 946–48.

[313] *See In re* Marriage of Sorensen, 906 P.2d 838, 841 (Or. Ct. App. 1995) (recognizing the stepmother as the child's psychological parent over the objection of the biological parent).

[314] Polikoff, *supra* note 227, at 387–88 (presenting the concept of a "functional parent" and calling for statutory reform to protect families with same-sex parents); *and* Polikoff, *supra* note 295, at 464, 477.

[315] Polikoff, *supra* note 227, at 387–88; *see also* Craig W. Christensen, *Legal Ordering of Family Values: The Case of Gay and Lesbian Families*, 18 CARDOZO L. REV. 1299, 1391–93 (1997).

[316] Laura T. Kessler, *Community Parenting*, 24 WASH. U. J.L. & POL'Y 47, 63–65 (2007).

[317] The court should be permitted to decide what is a reasonable period of time on a case-by-case basis.

child.[318] The UPA presumptive parent provision could serve as a model for this standard.[319]

B. The Paternity of the Sperm Donor

With regards to sperm donors, the court should recognize three classes of sperm donors and treat them differently with regards to allocating paternal obligations. Those suggested classes are discussed in this Section.

1. Class One—The Sperm Donor (Known or Unknown) and the Married or Committed Woman[320]

If a married or committed woman is artificially inseminated with sperm supplied by a sperm donor who is not her husband, the sperm donor should not be recognized as the father of the child. The sperm donor's parental rights should be automatically terminated the moment that he donates his sperm. Nevertheless, if a known sperm donor is involved, the courts should enforce an agreement between the woman and the sperm donor providing that, if the woman's husband or partner predeceases the birth of the child, the sperm donor may be legally recognized as the father of the child. In the absence of such an agreement, the sperm donor should not be recognized as the legal father of the child.

2. Class Two—The Sperm Donor (Unknown) and the Unmarried or Uncommitted Woman

In order to protect the single woman who wants to raise her artificially conceived child alone, the sperm donor should not be recognized as the legal father of the child. This will also encourage men to donate sperm without fear of being forced into parenthood. Again, the sperm donor's rights should be automatically terminated the moment that he donates his sperm. The single woman should only be permitted to be artificially inseminated in a medical facility or by a

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[318] Marc R. Poirier, *Piecemeal and Wholesale Approaches Towards Marriage Equality in New Jersey: Is* Lewis v. Harris *a Dead End or Just a Detour*?, 59 RUTGERS L. REV. 291, 315 (2007).

[319] UNIF. PARENTAGE ACT (1973) 4(a), 9B U.L.A. 393 (2001) ("A man is presumed to be the natural father of a child if: . . . (4) while the child is under the age of majority, he receives the child into his home and openly holds out the child as his natural child . . . .").

[320] A committed woman is a woman who is in a civil union or a domestic partnership. *See* David S. Buckel, *Government Affixes a Label of Inferiority on Same-Sex Couples When It Imposes Civil Unions & Denies Access to Marriage*, 16 STAN. L. & POL'Y REV. 73, 75–76 (2005) (discussing the creation of civil unions). *See also* Lynn D. Wardle, *Counting the Costs of Civil Unions*: *Some Potential Detrimental Effects on Family Law*, 11 WIDENER J. PUB. L. 401, 403–07 (2002) (discussing the different methods of creating domestic partnerships). A committed woman may also be a woman who is in a long-term relationship that is "characterized by an emotional and financial commitment and interdependence." Braschi v. Stahl Assocs. Co., 545 N.E.2d 49, 54 (N.Y. 1989).

licensed physician if she appoints a guardian for the child to serve as the parent in the event that something happens to her (i.e., she dies in child birth). This requirement will ensure that at least one person is available to care for the child. The single woman should also be required to make financial provisions for the child prior to being artificially inseminated.[321] A key criticism of this requirement may be that the law does not compel single women who naturally conceive children to arrange alternate care in case of their demise. In response to that criticism, I would point out that a man who naturally conceives a child with a single woman is not relieved of his paternal duties.[322] As a result, if the woman dies during child birth, the man is still legally required to support the child.

In exchange for having the right to exclude the biological father from the child's life, the single woman who conceives using donor sperm should be required to make the appropriate financial arrangements for the support of the child. The Nadya Suleman situation exhibits why this type of condition needs to be put in place.[323] The guardian should not have any rights or responsibilities with regards to the child during the mother's lifetime. The guardian should serve as an honorary parent and act as a safety net for the child.[324] In order to obtain full legal parenthood, the guardian would have to adopt the child if the woman dies or becomes incapacitated.

3. Class Three—The Sperm Donor (Known) and the Unmarried or Uncommitted Woman

The courts should apply different standards to decide if the known donor should be treated as the child's legal father.

a. Paternity by Contract

When a single woman is artificially inseminated with sperm donated by a man she knows, the man may have contact with the child.[325] Hence,

[321] Hopefully, this will discourage situations like the case where a single woman used in vitro fertilization to create eight children although she already had six artificially created children. *See* John Rogers, *California Octuplets Become Longest-Living Set in United States* (Feb. 2, 2009), *available at* http://aol.mediresource.com/channel_health_news_details.asp?news_id=17174.

[322] Mary A. Totz, Comment, *What's Good for the Goose is Good for the Gander: Toward Recognition of Men's Reproductive Rights*, 15 N. ILL. U. L. REV. 141, 158 (1994).

[323] After giving birth to fourteen children using assisted reproduction, single mother Suleman struggled to financially provide for her children. Suleman set up a website where she asks the public for financial contributions. *See* Nadya Suleman Family Website, http://www.nadyasulemanfamily.net. *See also* Mike Celizic, *Octuplet Mom Defends Her "Unconventional" Choices*, TODAYSHOW.COM, Feb 6, 2009, http://www.msnbc.msn.com/id/29038814 (reporting from NBC interview predicting that the hospital care for the octuplets could cost between $1.5 and $3 million of public money).

[324] This is similar to the honorary trust some states permit persons to establish to ensure that there is someone to take care of their pets after they die. Adam J. Hirsch, *Bequests for Purposes: A Unified Theory*, 56 WASH. & LEE L. REV. 33, 98 (1999).

[325] *See, e.g.*, *In re* R.C., 775 P.2d 27 (Colo. 1989); *see also* Jacob v. Shultz-Jacob, 923 A.2d 473 (Pa. Super. Ct. 2007).

situations involving known sperm donors should be treated differently from those involving anonymous sperm donors. To that end, courts should enforce written agreements between the parties with regards to the man's paternity.[326] Hence, if the known sperm donor signs an agreement stating that he plans to parent the child, he should be recognized as the legal father of the child.[327] The agreement to parent should be signed prior to the conception of the child, and it should be signed by the artificially inseminated woman and the known sperm donor.

b. Paternity by Intent

The focus should be upon the person's behavior prior to the conception or birth of the child. Courts have taken this approach when determining maternity in surrogate cases.[328] The inquiry is whether the man acted in such a way to indicate that he intended to parent the child.[329] Professor Marjorie Maguire Shultz states that legal parenthood should be determined by evaluating the intentions of the parties. Specifically, Professor Shultz opines, "intentions that are voluntarily chosen, deliberate, express and bargained-for ought presumptively to determine legal parenthood."[330]

If prior to the conception or birth of the child, the sperm donor took affirmative steps to indicate that he intended to parent the child, his paternity should be recognized. In order to be classified as an intended parent, the sperm donor should have to do more than just donate his sperm to contribute to the child's conception. He should have to take steps that a parent would take in preparation for the conception or birth of a child. Those actions may include paying some of the costs of the artificial insemination process, taking the woman to the facility to be inseminated, and helping to choose the baby's name. Moreover, if a reasonable person would interpret the donor's actions as those of an intended parent, the court should attribute constructive notice of that fact to the artificially inseminated woman. Therefore, the court should respect the donor's intentions and recognize him as the child's legal father.

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[326] *See In re* R.C., 775 P.2d at 35 (stating that the court will recognize an agreement between a known sperm donor and an unmarried woman that the donor will be treated as the father of the artificially conceived child).

[327] *See* N.H. REV. STAT. ANN. § 168-B:11 (LexisNexis 2001) ("A sperm donor may be liable for support only if he signs an agreement with the other parties to that effect."); *see also* C.O. v. W.S., 639 N.E.2d 523, 525 (Ohio Ct. Com. Pl. 1994).

[328] *See, e.g.*, Johnson v. Calvert, 851 P.2d 776, 782 (Cal. 1993) (holding that the natural mother was the woman who intended to have the child conceived and who intended to parent the child).

[329] Melanie B. Jacobs, *Applying Intent-Based Parentage Principles to Nonlegal Lesbian Coparents*, 25 N. ILL. U. L. REV. 433, 438–39 (2005).

[330] Marjorie Maguire Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297, 323–27 (1990).

c. Paternity by Biology[331]

Since the known sperm donor supplies the genetic material that results in the child's creation, there should be a rebuttable presumption that he is the legal father of the child. In order to rebut the presumption, the woman or the sperm donor should have to prove that the sperm donor never intended to parent the child. One way for the woman to meet this burden of proof is to present evidence that the donor, by word or deed, waived his parental rights to the child. The court should only allow the presumption to be rebutted if it is in the best interests of the child to so permit. It should only be considered to be in the child's best interests if there is another person legally obligated or willing to parent the child. Another way to satisfy the best interests of the child standard should be for the woman to show that she is financially capable of providing for the child.

d. Paternity by Function

Like the situations involving the paternity of the husband of an artificially inseminated woman, the court should review the actions the donor took after the child's conception and birth. If the known sperm donor acted as a father to the child, with the permission of the artificially inseminated woman, his paternity should be legally recognized.[332] Nevertheless, since the parties are not married or in a committed relationship, the courts should strictly apply the functional parent doctrine. Therefore, a man should not be deemed to be the father just because he forms a relationship with the child. In some cases, a single woman might permit the sperm donor to play a role in the child's life because she wants her child to have a father figure. Her actions should not result in the sperm donor being established as her child's legal parent. In order to obtain parental status, the sperm donor should take on all the attributes of fatherhood, including providing regular financial support, visiting the child on a regular basis, and making decisions with regards to the child's upbringing. The activities must all be done with the consent of the artificially inseminated woman.

IX. CONCLUSION

The use of assisted reproductive technology, especially artificial insemination, has increased. Traditionally, childless couples who could not conceive chose to use assisted reproduction in order to create their families. In most cases, women were artificially inseminated with their husbands' sperm. The rise of male infertility has led more women to use

[331] A biological or genetic parent has been defined as "[a] person who shares a genetic connection to a child. They are the contributor of genetic material that creates a child." J.F. v. D.B., No. 15061-2003, 2004 WL 1570142, at *9 (Pa. Ct. Com. Pl. Apr. 2, 2004).

[332] This is the approach taken by the Court in *In re R.C.*, 775 P.2d 27, 35 (Colo. 1989).

donor sperm to conceive. Thus, there are now two men involved in the artificial insemination process. Recently, more and more single women have relied upon artificial insemination and other methods of assisted reproduction to conceive children. Those women frequently conceive using donor sperm.

The majority of states have statutes that allocate the paternal obligations of the inseminated woman's husband and of the sperm donor. Nonetheless, those statutes have not offered sufficient guidance to the courts. Moreover, in the states that do not have statutes, the outcomes of cases involving the paternity of artificially conceived children have been inconsistent. Legislatures should pass laws that give courts the flexibility to adjudicate the paternity of the inseminated women's husbands and the sperm donors based upon the unique facts of the individual cases. In its quest to designate a legal father for the artificially conceived child the courts should be guided by the best interests of the child standard. Relying on that standard, the courts should make sure that the artificially conceived child has at least two legal parents.