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It Takes Three, Baby: The Lack of Standard, Legal Definitions of “Best Interest of the Child” and the Right to Contract for Lesbian Potential Parents

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Abstract

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In order to consider the plausibility of contracts regarding AI, this article will first review various options and legal ramifications for choices regarding AI and then focus on the effect of inconsistent application of the Uniform Parentage Act among states that have chosen to adopt any legislation. This legal conundrum creates major obstacles for lesbian couples in procreation and in legal protection for children and often denies lesbian Americans the right to equal enforcement of contracts. This article will then consider how the current standard of “best interest of the child” is being used in the absence of the UPA standards and, in some respects, to prevent model UPA legislation from being used to grant sole custody to a lesbian birth mother and to prevent the termination of parentage rights of sperm donors. Of particular interest in this article is discrimination against lesbians seeking legal assistance in the enforcement of contracts to formalize parenting rights and responsibilities for children resulting from artificial insemination. This article will then suggest alternatives for this affected group in an attempt to clarify the issues and mitigate some of the impact of the lack of legislation, inconsistent and incomplete laws, and, in some cases, outright prejudicial rulings.

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I. Introduction

In the growing field of legislation regarding same-sex couples, one area that is receiving increasing attention involves same-sex parenting. Often same-sex couples are parents because one person in the couple has a child from a previous heterosexual relationship. With the proliferation of Artificial Insemination technologies, however, same-sex couples are increasingly having children without heterosexual intercourse. With the uncertainty of the law in most jurisdictions, same-sex couples that want to have children must navigate far more complex legal and practical matters than their heterosexual counterparts. The issue of AI is further complicated because it is actually at an intersection between often incomplete state legislation and the judicially determined custody standard of “best interests of the child,” neither of which provides sufficient legal protection to lesbian potential mothers.

In the states that have addressed AI issues through legislation, few have considered the impact of the law on “unwed” mothers or, in this case, same-sex couples.

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4 Hereafter referred to as “AI.”
5 See infra at nn. 60 to 70 and accompanying text for a discussion of the failure to address non-married heterosexual mothers. The Uniform Parentage Act of 1973 appeared to require by its terms that donors would only be released from the status of “natural father” if he provided the sample “to a licensed physician for use in artificial insemination of a married woman other than the donor’s wife . . .,” thus failing to address any possibilities of insemination in an unmarried woman or a lesbian couple. UNIF. PARENTAGE ACT § 5(b) (1973) (hereinafter “1973 UPA”). States adopting the 1973 version of the UPA in some form include: Alabama, ALA. CODE §§26-17-1 to 26-17-22 (1984); California, CAL. FAM. CODE
However, many states have failed to address these issues in any respect, and, in this absence, have caused particular difficulties for same-sex couples. This article primarily discusses AI contracts in light of these laws and the failure of legislation to protect same-sex couples and their potential children during the process of artificial insemination.6

In order to consider the plausibility of contracts regarding AI, this article will first review various options and legal ramifications for choices regarding AI and then focus on the effect of inconsistent application of the Uniform Parentage Act among states that have chosen to adopt any legislation. This legal conundrum creates major obstacles for lesbian couples in procreation and in legal protection for children and often denies lesbian Americans the right to equal enforcement of contracts. This article will then consider how the current standard of “best interest of the child” is being used in the absence of the UPA standards and, in some respects, to prevent model UPA legislation from being used to grant sole custody to a lesbian birth mother and to prevent the

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6 This article primarily discusses artificial insemination contracts and the laws affecting lesbians and gay men in their attempts to have children. An interesting distinction is that, in those respects, this article is discussing contracts affecting “potential” children and the components needed to make those children. States have, in some cases, attempted to define when an “actual” child exists. For example, in Mississippi, a wrongful death action may be brought on behalf of a mother and an “unborn quick child.” “A ‘quick child’ is defined as a child that has developed so that it moves within the mother’s womb.” 66 Fed. Credit Union v. Tucker, 853 So. 2d 104 (Miss. 2003) (quoting Black’s Law Dictionary (1968)). The confusion is, of course, that that child is still a “potential” child until it is born, or has that been changed by state statute?
termination of parentage rights of sperm donors. Of particular interest in this article is
discrimination against lesbians seeking legal assistance in the enforcement of contracts to
formalize parenting rights and responsibilities for children resulting from artificial
insemination. This article will then suggest alternatives for this affected group in an
attempt to clarify the issues and mitigate some of the impact of the lack of legislation,
inconsistent and incomplete laws, and, in some cases, outright prejudicial rulings.

II. Legal Consequences of AI Choices

Numerous advances in reproductive technology have taken place in recent years.
AI\(^7\) has been around since as early as the late 18\(^{th}\) century when a Scottish surgeon, Dr.
John Hunter, conducted the first known artificial insemination,\(^8\) and the procedure is now quite common in the United States.\(^9\)

Women wishing to become pregnant outside of heterosexual relationships have used many methods of procreation. While women may have numerous options in the

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\(^7\) This article primarily mentions “artificial insemination,” also referred to as “alternative insemination.” However, there are many other types of fertilization that also fall under the discussions in this paper. Often the policy discussions or legal distinctions between different forms of insemination are made clear in the text of the paper, but the term AI is used in many cases where no legal distinction would likely be made. Technically, as one writer describes, “[i]n vitro fertilization takes place within the body of a woman. Artificial insemination is a form of in vitro fertilization similar to natural reproduction except that the fertilization is not the direct result of sexual intercourse.” Michael Hopkins, *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, 221 (2006) (hereinafter “*What is Sauce for the Gander*”) (citing Hutton Brown et al., *Legal Rights and Issues Surrounding Conception, Pregnancy and Birth*, 39 VAND. L. REV. 587, 607-608 (1986)).

During artificial insemination, sperm is deposited by a plastic syringe into the opening of a woman’s uterus shortly after she has ovulated. By contrast, in vitro fertilization takes place outside of the body, where one or more ova are removed from the woman by a surgical technique and are placed in a dish where processed sperm are mixed with the ova. If fertilization occurs, the ovum undergoes division, and then within two to three days is placed in a woman’s uterine cavity. *What is Sauce for the Gander, supra*, at 221. (citations omitted).


\(^9\) See, infra, at n.23.
types of AI they choose, the absence of legislation forces women to contemplate the
various methods of insemination from a number of perspectives: convenience, legal,
financial, and medical. While in most jurisdictions these choices are not legislatively
addressed at all, the method of insemination and choice of sperm can have significant
impact on the legal consequences of these choices. Often, women make these choices to
mitigate the effects of this lack of legislation.

A. Methods of Insemination

Typically, a woman will obtain sperm from a sperm bank or a private donor.\(^\text{10}\) However, many women choose various AI methods based on several factors. Some
make choices on the basis of convenience, some for legal reasons, some for financial
reasons and some for medical reasons. On one extreme of the spectrum, for example, one
recent story in *The New York Times Magazine* discussed a Minnesota lesbian couple who
wished to have children and requested that one of their best gay friends (also in a
relationship) provide the needed sperm. The sperm was donated without the assistance of
artificial insemination through intercourse.\(^\text{11}\) While this method is obviously the least
expensive, it is fraught with potential legal complications. Namely, regardless of
intentions, courts will likely read the sexual intercourse as evidence of intent to create
paternity, and therefore, hold the “donor” responsible for paternity and likewise entitled
to some type of child custody.\(^\text{12}\)


\(^{11}\) Gay Donor or Gay Dad?, *NEW YORK TIMES MAGAZINE*, Nov. 19, 2006, at 66 (according to the donor, 
“using syringes and cups seemed inorganic and inefficient. Sperm would lose its potency during each
transfer. ‘I wanted the numbers . . . .’”).

\(^{12}\) Neither the 1973 and 2000 versions of the UPA would be applicable to protect the co-parents from a
paternity suit by the donor in a “non-assisted” or “natural” insemination. See 1973 UPA § 5(b) (“The
donor of semen provided to a licensed physician for use in artificial insemination . . . .”) and 2000 UPA
§701 (“This [article] does not apply to the birth of a child conceived by means of sexual intercourse . . . .”).
Another option is self-insemination or insemination by a partner or friend using either fresh or frozen sperm.\textsuperscript{13} The issue here is that many women may prefer the comfort of home, and, as the process, while not complicated, is quite personal and invasive, many women may appreciate a more familiar surrounding.\textsuperscript{14} This method goes against a primary condition of the 1973 UPA requiring physician intervention and may create legal issues when parties attempt to terminate any possible parentage rights of the donor.\textsuperscript{15}

Other women opt for quite an alternative, using sperm ordered by mail through a sperm bank or fresh sperm from a known or anonymous donor but delivered to a doctor, rather than the patient. The woman is then inseminated in a medical setting by the physician. Despite the fact that this option may not be preferable for financial or emotional reasons, many women choose this more formal approach in an attempt to follow even the most stringent requirements of the 1973 UPA, hoping that the intentions of a more formal procedure will more likely be upheld in a court if a paternity battle

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\textsuperscript{13} Donor insemination or AI is a process where sperm is injected into the reproductive tract of a woman to cause pregnancy. \textit{Who's Your Daddy}, supra, at 616 (citing Kathryn Venturatos Lorio, \textit{Alternative Means of Reproduction: Virgin Territory for Legislation}, 44 LA. L. REV. 1641, 1643 (1984)).

\textsuperscript{14} See \textit{Jhordan C. v. Mary K.}, 224 Cal. Rptr. 530, 535 (Cal. Ct. App. 1986) (“A requirement of physician involvement, as Mary argues, might offend a woman’s sense of privacy and reproductive autonomy, might result in burdensome costs to some women, and might interfere with a woman’s desire to conduct the procedures in a comfortable environment such as her own home or to choose the donor herself.”) (citing Kern & Ridolfi, \textit{The Fourteenth Amendment’s Protection of a Woman’s Right to be a Single Parent through Artificial Insemination by Donor}, 7 WOMEN’S RIGHTS L. RPTR. 251, 256 (1982) (hereinafter Kern & Ridolfi)).

\textsuperscript{15} See 1973 UPA § 5(a) (requiring AI to be performed “under the supervision of a licensed physician . . . .”). See also, \textit{Jhordan C.}, 224 Cal. Rptr. at 535 (finding that “[t]he existence of sound justification for physician involvement further supports a determination the Legislature intended to require it. . . .” and holding that insemination without physician involvement renders the act inapplicable where no physician is involved).
ensues.\textsuperscript{16} Even some UPA states grant known donors the right to forfeit parental rights and responsibilities only if the procedures are strictly followed.\textsuperscript{17} Although this option may seem to provide the most legal protection for lesbians seeking maternity, it is actually often prohibited by hospital or clinic policy.\textsuperscript{18} Many hospitals or clinics have strict policies against aiding “unwed” women with fertility.\textsuperscript{19}

B. Choice of Source for Semen

Just as women have choices for the method of insemination, they also have choices for the source of semen. Frozen sperm can be provided by commercial sperm banks, or fresh sperm can be acquired through local donors. Frozen sperm from a sperm bank is typically for compensation to the donor who may be anonymous or willing to be known when the potential child is 18, but allows potential contact with the donor if the child wishes to learn more about his/her heritage.\textsuperscript{20} Women may choose the frozen sperm option in an attempt to eliminate the possibility of paternity mainly through the anonymity provided by sperm banks.\textsuperscript{21} However, current psychology would argue that

\textsuperscript{16} See Ferguson v. McKiernan, 940 A.2d 1236 (Penn. 2007) (upholding a contract for sperm donation and denying child support request by the mother in jurisdiction absent a version of the UPA. The court noted: “[i]ndeed, the parties could have done little more than they did to imbue the transaction with the hallmarks of institutional, non-sexual conception by sperm donation and IVF. They negotiated an agreement outside the context of a romantic relationship; they agreed to terms; they sought clinical assistance to effectuate IVF and implantation of the consequent embryos, taking sexual intercourse out of the equation; they attempted to hide Sperm Donor’s paternity from medical personnel, friends and family; and for approximately five years following the birth of the twins both parties behaved in every regard consistently with the intentions they expressed at the outset of their arrangement . . . .” Id. at 1246-47).

\textsuperscript{17} For a discussion of court opinions regarding the failure to follow strict UPA requirements, see infra nn. 45 to 82 and accompanying text.

\textsuperscript{18} For example, in Ferguson, 940 A.2d 1236, the court noted that “there appears to be no dispute that Dr. Dobson will assist in IVF only for women in stable marriages.” Id. at 1240.

\textsuperscript{19} See Id. and 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, 208 (2003) (hereinafter “(Mis)Conceptions”).

\textsuperscript{20} See California Cryobank at www.cryobankdonors.com (“Donors will be reimbursed $75 per specimen and up to $1,100 a month by donating 3 times a week. We periodically offer incentives such as movie tickets or gift certificates for extra time and effort expended by participating donors.”)

\textsuperscript{21} Most authorities believe that sperm provided by anonymous donors through commercial sperm banks carries little risk of donor paternity cases. (Mis)Conceptions, supra, at 194 and Kyle C. Velte, Egging on
children born from anonymous donors potentially experience a void and longing for information about the unknown donor.\textsuperscript{22} Numerous stories of children born from anonymous sperm donations abound, arguing for more careful attention to the possible effects of this paternal anonymity.\textsuperscript{23}

For this reason, sperm banks now offer sperm from donors who are willing to be known when the child turns 18.\textsuperscript{24} Many women find the sperm bank option preferable because of the potential for elimination of paternity until the child is 18.\textsuperscript{25} Sperm banks offer the extra layer of legal protection in that the child would have difficulty finding the donor and obtaining jurisdiction over the donor because states provide anonymous donors legal protection.\textsuperscript{26}

Fresh sperm is typically provided by a known donor, although efforts may be made to protect the donor’s anonymity.\textsuperscript{27} Although known fresh donor insemination is the most legally complicated method, pregnancy rates are significantly higher with fresh


\textsuperscript{22} See David Plotz, \textit{Who’s Your Daddy?}, \textit{INTERNATIONAL HERALD TRIBUNE}, May 20, 2005 for a discussion of the call to open records. \textit{See also} Amy Harmon, \textit{Are You My Sperm Donor? Few U.S. Clinics Will Say}, \textit{INTERNATIONAL HERALD TRIBUNE}, January 20, 2006 (also discussing that willing to be known donors are often paid additional compensation).

\textsuperscript{23} This issue has, in fact, garnered so much attention that even Oprah recently hosted children of sperm donors, inviting them to discuss their psychological need for knowledge of the donor. \textit{The Oprah Winfrey Show, The Ultimate Reunion:When Dad is a Sperm Donor} (Feb. 8, 2008) (estimating that more than 1,000,000 children have been born through AI procedures).

\textsuperscript{24} See www.cryobankdonors.com. Interestingly, a donor is paid more for “willing to be known” donations than for “anonymous” donations. www.cryobankdonors.com. \textit{See also} (Mis)Conceptions, supra, at n. 1.


\textsuperscript{26} See www.cryobankdonors.com/newdonors/index.cfm?ID=5 (including the donor and recipient contract language and referencing the California statutes).

\textsuperscript{27} A seemingly controversial website was opened in the United Kingdom offering anonymous fresh sperm donations. The site, www.mannotincluded.com is apparently out of operation at this time. \textit{See Fresh Sperm for Sale}, House of Commons, Science & Tech. Committee at http://www.tellparlaiment.net/scitech/node/view/23.
sperm than with frozen sperm, and the cost is most often significantly lower.\textsuperscript{28} And, perhaps more importantly, the donor is a known commodity, his personality and family history can be more thoroughly investigated, and there may be a comfort for the potential mother in receiving sperm from a known donor.\textsuperscript{29} However, receiving fresh sperm from a local, known donor insemination in a state without legislation to protect the parties creates the most tenuous legal grounds for the mother in preventing the donor from asserting rights as the father.\textsuperscript{30}

The current status of legislation regarding sperm donations from known donors varies by state and, therefore, highlights the need for more uniform laws regarding artificial insemination.\textsuperscript{31} These various methods of delivery and choices of procurement


\textsuperscript{29} See, for example, \textit{Ferguson}, 940 A.2d at 1239 n.4 (“In testimony uncontradicted by Mother, Sperm Donor stated that Mother preferred him to an anonymous sperm donor because ‘[s]he knew my background. She just knew my makeup, and just said that she preferred to have that anonymous donor known to her.’”). \textit{See also} \textit{Jhordan C.}, 224 Cal. Rptr. at 535 n.7 (“One article on the subject of artificial insemination notes that many women prefer to choose a known donor because this ‘eliminates potential difficulties in gaining access to medical information, permits the prospective mother to make the choice of donor herself, and allows the child access to paternal roots.’” \textit{Id}) (quoting Kern & Ridolfi at 256). \textit{See also Egging on Lesbian Maternity, supra, at n.18 at n.56 and see} \textit{The Donor Sibling Registry, www.donorsiblingregistry.com.}

\textsuperscript{30} See infra at Section III.

\textsuperscript{31} See \textit{In Interest of R.C.}, 775 P.2d 27 (Colo. 1989).

Whether section 5 of the model UPA was intended to extinguish parental rights of semen donors known to the woman is the subject of some debate. \textit{Compare Smith, The Razor’s Edge of Human Bonding: Artificial Fathers and Surrogate Mothers, 5 W. NEW ENG. L. REV.} 639, 652 (1983) (“obvious” purpose of section 5 is “to protect anonymous [semen] donors from all legal responsibility for those children fathered as a consequence of their donation of semen”) \textit{and Note, Contracts to Bear a Child, 66 CALIF. L. REV.} 611, 614 (1978) (purpose of section 5 “is clearly to protect anonymous donors from legal responsibility for any children fathered by the use of their semen”) \textit{with Kern & Ridolfi, The Fourteenth Amendment’s Protection of a Woman’s Right To Be a Single Parent Through Artificial Insemination By Donor, 7 WOMEN’S RTS. L. REP.} 251, 256 (1982) (although purpose is to protect anonymous semen donors from support obligations, section 5 “could also be raised by a mother seeking protection from a paternity suit by a donor” even when the donor was known to the mother)

\textit{Id.}
of semen illustrate the complexity of the legal issues related to AI procedures. Each choice raises new and difficult legal questions.\textsuperscript{32}

\textbf{III. Summary of Legal Framework}

While artificial insemination is not prohibited by law, many states have no legislation regulating either the donation of sperm or eggs and have no avenues to protect contracts between a potential mother and a sperm donor. In fact, most states with laws regarding artificial insemination presume that this technology will be reserved for heterosexual, married couples who are infertile.\textsuperscript{33} There is a void in legislation for artificial insemination when the woman is “unmarried” or lesbian.\textsuperscript{34}

\textbf{B. Attempt at Clarification and Uniformity: The UPA}

\textit{1. 1973 UPA}

The Uniform Parentage Act is the most comprehensive set of laws proposed regarding the delineation of rights in AI cases. The Act was first proposed in 1973 by the National Conference of Commissioners on Uniform State Laws;\textsuperscript{35} it proposes that states adopt a uniform approach to AI cases as follows:

\begin{quote}
One court summed up the spectrum as follows: [T]wo potential cases at the extremes of an increasingly complicated continuum present themselves: dissolution of a relationship (or a mere sexual encounter) that produces a child via intercourse, which requires both parents to provide support; and an anonymous sperm donation, absent sex, resulting in the birth of a child. These opposed extremes produce two distinct views that we believe to be self-evident. In the case of traditional sexual reproduction, there simply is no question that the parties to any resultant conception and birth may not contract between themselves to deny the child the support he or she requires. . . . In the institutional sperm donation case, however, there appears to be a growing consensus that clinical, institutional sperm donation neither imposes obligation nor confers privileges upon the sperm donor. Between these poles lies a spectrum of arrangements that exhibit characteristics of each extreme to varying degrees-informal agreements between friends to conceive a child via sexual intercourse; non clinical non-sexual insemination; and so on.
\end{quote}

\textit{Ferguson}, 940 A.2d at 1246.

\textit{33 See} discussion of the UPA, \textit{infra}, at Section III, A.

\textit{34 See infra} at n.35 through n.38 and accompanying text.

\textit{35 Hereinafter referred to as “NCCUSL.”}
Section 5. [Artificial Insemination.]

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

(b) The donor of semen provided to a licensed physician for use in artificial insemination of a married woman other than the donor's wife is

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36 At least one jurisdiction has determined that the term father or husband shall be interpreted as gender neutral. See Parentage Issues Challenging California’s Judicial System, Legitimate Parents, Construing California’s Uniform Parentage Act to Protect Children Born into Nontraditional Families, 6 J. CENTER FOR FAMILIES, CHILD & CYTS. 139, 153 (2005) (“The rule that a husband is the lawful parent based on his consent to the artificial insemination of his wife by an anonymous sperm donor also applies to same-sex and unmarried parents.”) (citing Elisa B. v. Superior Court, 117 P.3d 660 (Cal. 2005); K.M. v. E.G., 117 P.3d 673, 679 (Cal. 2005); and Kristine H. v. Lisa R., 117 P.3d 690, 691 (Cal. 2005)).

37 Several states address these issues by omitting the term “married” from this section of the UPA See Hecht v. Superior Court, 20 Cal. Rptr. 2d 275, 865-86 (Cal. App. 1993) (“We agree with the reasoning in JhordanC; had the legislature intended to express a public polity against procreative rights of unmarried women or against artificial insemination of unmarried women, it would not have excluded the word ‘married’ from section 7005, subdivision (b), Colorado, Washington, Wisconsin and Wyoming have also eliminated the word ‘married’ from subsection (b) in the adoption of the UPA.” (citations omitted).
treated in law as if he were not the natural father of a child thereby conceived.  

2.  2000 UPA

In 2000, the NCCUSL unanimously approved a revised and much simplified version of the UPA, including a major revision of the portions of the sections dealing with AI rights. The relevant sections of the revised 2000 version of the UPA include:

SECTION 701. SCOPE OF ARTICLE. This [article] does not apply to the birth of a child conceived by means of sexual intercourse [or as the result of a gestational agreement as provided in [Article] 8].  

SECTION 702. PARENTAL STATUS OF DONOR. A donor is not a parent of a child conceived by means of assisted reproduction.

SECTION 703. PATERNITY OF CHILD OF ASSISTED REPRODUCTION. A man who provides sperm for, or consents to,

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38 1973 UPA, §5. Various versions of the 1973 UPA were adopted in some form or another by 19 states as of the year 2000. See Prefatory Note, 2000 UPA.

39 2000 UPA (referring to Gestational Agreements).

40 “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;

(B) a woman who gives birth to a child by means of assisted reproduction [, except as otherwise provided in [Article] 8]; or

(C) a parent under Article 7 [or an intended parent under Article 8].” 2000 UPA, § 103 (8).

41 The Comment to Section 702 of the 2000 UPA makes clear that this simplified version is intended to clear up some of the ambiguities and difficulties that have arisen over the 1973 restrictive procedures as they affected unmarried women, or as is more to the point in this paper, lesbians who by state law may not be married. “The new Act does not continue the requirement that the donor provide the sperm to a licensed physician. Further, this section of the new UPA does not limit a donor’s statutory exemption from becoming a legal parent of a child resulting from ART to a situation in which the donor provides sperm for assisted reproduction by a married woman. This requirement is not realistic in light of present ART practices and the constitutional protections of the procreative rights of unmarried as well as married women. Consequently, this section shields all donors, whether of sperm or eggs, (§ 102 (8), supra), from parenthood in all situations in which either a married woman or a single woman conceives a child through ART with the intent to be the child’s parent, either by herself or with a man, as provided in sections 703 and 704.” Comment to Section 702, 2000 UPA.
assisted reproduction by a woman as provided in Section 704 with the intent to be the parent of her child, is a parent of the resulting child.

SECTION 704. CONSENT TO ASSISTED REPRODUCTION.

(a) Consent by a woman, and a man who intends to be a parent of a child born to the woman by assisted reproduction must be in a record signed by the woman and the man. This requirement does not apply to a donor.

(b) Failure of a man to sign a consent required by subsection (a), before or after birth of the child, does not preclude a finding of paternity if the woman and the man, during the first two years of the child’s life, resided together in the same household with the child and openly held out the child as their own.\(^{42}\)

Although between nineteen and twenty-one states have attempted to pass legislation based on the UPA,\(^ {43}\) most other states have little, if any, guidance on the rights of persons participating in AI. Further, of the states adopting some version of the UPA, most have significantly varying provisions that make the act far from “uniform.”\(^ {44}\) Absent any legislation, courts are left to grapple with child custody disputes over the children resulting from AI, creating the further ambiguous state of the law for lesbian couples attempting to navigate the legal pitfalls of AI.

\(^{42}\) 2000 UPA.

\(^{43}\) Michael L. Hopkins, “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 (2006). With the vast variations in the adopted UPA language in several states, the exact number of states basing their statutes on the UPA may vary depending on the reviewer.

\(^{44}\) For example, see N.J. STAT. ANN. §9:17-44(b)(West 1983), adding statutory language formalizing the right to contract for paternity. The additional language states: “unless the donor of semen and the woman have entered into a written contract to the contrary . . . .” Other states have completely re-written the UPA. See, for example, KAN. STAT. ANN. §§ 38-1110 to 38-1138 (1985) and OHIO REV. CODE ANN. §§ 3111.01 to 3111.19 (1982).
With or without legislation, parties contemplating AI may attempt to draft contracts in order to formalize their intentions, clarify parental rights and responsibilities, and provide legal guidelines where no state legislation or judicial guidance exists. In those states with no guidance from statutes like the UPA or courts knowledgeable and/or accepting of these cases, those who enter into these contracts have little guidance as to how these contracts might be interpreted in the event that they are later challenged. Absent clear guidelines, contracts for the donation of sperm may not be enforceable, and a recipient of donor sperm may not be able to ensure that the donor will not later seek custody. Of course the donor of sperm, similarly, would be unable to terminate his parental rights or obligations because of the lack of legislative protections and the unenforceability of contracts for the donation.

These issues highlight the overall failure of many states to protect gays and lesbians in the process of creating a family, calling particular attention to the limitations of allowing individual judges to make decisions based on their own view of what is in the “best interests of the child” and the similar limitations to the alternative of enforcing contracts for artificial insemination.

3. Inconsistent Legislation Clashing with Insemination

While many states have adopted the UPA or variations of the UPA, courts have struggled to apply its often antiquated provisions to modern scenarios.\(^{45}\) Recall that the 1973 UPA, versions of which are still in effect in most states with any UPA legislation,\(^{46}\) has several requirements that must be followed in order to adequately protect the rights of the parties involved in the insemination process. Typically the legislation requires that

\(^{45}\) *Who’s Your Daddy*, supra, at 636-37.

\(^{46}\) *See, supra, at n. 5.*
the insemination must occur under the supervision of a licensed physician.\textsuperscript{47} Secondly, both husband and wife must consent to the procedure in writing, and those signatures must be certified by the physician.\textsuperscript{48} The consent must be filed with the State’s Department of Health and is kept there in a sealed file.\textsuperscript{49} Once the procedure is followed, the husband of the mother is to be treated as the natural father of the resulting child.\textsuperscript{50} The donor has no rights to the child if the UPA is followed.\textsuperscript{51} Several issues have been litigated under the UPA, and courts have had varying opinions about a couple’s failure to follow the exact procedures.

For example, in \textit{Jhordan C. v. Mary K.},\textsuperscript{52} the failure of the parties to involve a physician during AI rendered the protections of the California version of the UPA ineffective.\textsuperscript{53} The California Court of Appeals was clear, “[s]ubdivision (b) states only one limitation on its application: the semen must be ‘provided to a licensed physician.’ Otherwise whether impregnation occurs through artificial insemination or sexual intercourse, there can be a determination of paternity with the rights, duties and obligation such a determination entails.”\textsuperscript{54}

Similarly, in \textit{C.O. v. W.S.},\textsuperscript{55} the Ohio Court of Common Pleas found that a sperm donor is granted parental rights when the parties failed to adequately follow all statutory guidelines. In this case, the sperm donor was selected and known by the recipient mother

\textsuperscript{47} 1973 UPA §5(a), \textit{supra}, at n. \textbf{Error! Bookmark not defined.}, to 38 and accompanying text.
\textsuperscript{48} 1973 UPA §5(a).
\textsuperscript{49} 1973 UPA §5(a).
\textsuperscript{50} 1973 UPA §5(a).
\textsuperscript{51} 1973 UPA §5(a). \textit{See also, Who’s Your Daddy, supra}, at 637.
\textsuperscript{52} 224 Cal. Rptr. 530 (Cal. Ct. App. 1986)
\textsuperscript{53} \textit{Id.} at 533-34.
\textsuperscript{54} \textit{Id.} at 534 (\textit{quoting CAL. CIVIL CODE § 7005} (b)).
and her partner. According to the Ohio court, the applicable statutes provide that “the insemination must be performed by a physician or a person who is under the supervision and control of a physician . . . and, the physician must obtain and maintain various information, statements, and records, including a statement that the donor shall not be advised as to the identity of the recipient, and that the recipient shall not be advised as to the identity of the donor.” The court found that the failure of the parties to adhere to the “critical element of anonymity” negates the mother’s attempts to use the statutes as a shield to prevent parental rights in the donor.

In light of these cases, parties would be advised to follow the strict language of the UPA in the insemination procedures. However, lesbian couples may find these requirements impossible to follow in that the 1973 UPA presumes that artificial insemination will be used by heterosexual couples who are infertile. Ambiguousness arises when the person being inseminated is unmarried. For example, the 1973 UPA does not address the rights of the donor to terminate parental rights if the woman inseminated is unmarried.

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56 Id. at 524.
57 Id. (citing OHIO REV. CODE ANN. §3111.32).
58 Id. (citing OHIO REV. CODE ANN. §3111.35).
59 Id. at 526. The court found that the failure of the anonymity provision, which is contained in the physician requirements section of the statute, controlled and prevented the mother from denying parental rights to the donor father. Id. at 525. This decision was made even as the court cited Ohio Rev. Code § 3111.35 which, according to the court holds that “the failure of a physician to comply with the applicable statutory requirements shall not affect the legal status, rights or obligations of a child conceived as a result of a non-spousal artificial insemination a recipient, or the donor.” Id.
60 See 1973 UPA §5. Some states have amended the 1973 UPA, eliminating the requirements that the woman be married. For example, Jhordan, 224 Cal. Rptr. at 533-34, notes that “[t]he original UPA restricts application of the nonpaternity provision of subdivision (b) to a ‘married’ woman other than the donor’s wife.’ . . . The word ‘married’ is excluded from subdivision (b) of section 7005, so that in California, subdivision (b) applies to all women, married or not.” (citations omitted). The California court notes that “[t]his omission also occurs in the versions of the UPA adopted in Wyoming and Colorado.” Id. at 534 n.5 (citations omitted).
61 See In Interest of R.C., 775 P.2d 27, 30 (Colo. 1989) (citing Artificial Insemination: Donor Rights in Situations Involving Unmarried Recipients, 26 J. Fam. L. 793, 796 (1988)) According to the court, “section 5 is ‘sketchy overall,’ ”silent as to what its application would be for an unmarried woman,” and ‘equally ambiguous in its treatment of the donor.” See also, Who’s Your Daddy, supra, at 642.
Courts have addressed this failure with mixed results. In *Herman v. Lennon* a boyfriend donated his sperm for artificial insemination and signed a “Consent for Artificial Insemination” form. The Supreme Court, Duchess County, New York, held that this consent was insufficient to create a binding contract as the contract was “void for vagueness” and “unenforceable.” Further, the court ruled that the New York version of the UPA was inapplicable as the couple was not married.

In *Interest of R.C.*, the Colorado Supreme Court was faced with an action by a donor to seek parental rights over the child created through AI. The Court found the Colorado version of the UPA was ambiguous as to unmarried parties when the donor is known. With this failure, the court used common law principles to determine that the intent of the parties was significant in determining the rights and obligations of the donor and mother and remanded the case for further findings.

In *McIntyre v. Crouch*, an unmarried woman used the semen of an unmarried man to inseminate herself without the assistance of a physician. However, the donor

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63 *Id.* at 779.  
64 The court reasoned that the New York version of the UPA “applies only to a married woman . . . with the consent . . . of . . . her husband . . . .” *Id.* at 779. (citing N.Y. DOM. REL. LAW § 73(1) (McKinney 1974) Of interest to the court was the fact that the child was not a result of the insemination and was not, in fact, a child of the donor.  
65 775 P.2d 27 (Colo. 1989).  
66 *Id.* at 31. (The Colorado UPA had omitted the term “married” from its version of the UPA) (“Because we conclude that section 19-4-106 does not apply when the known semen donor and the unmarried recipient agreed that the known donor would have parental rights and expressly agreed at the time of insemination that he would be treated as the natural father of any child so conceived, an agreement is relevant to whether J.R.’s parental rights were extinguished through the artificial insemination process. A factual dispute remains as to whether J.R. and E.C. at the time of insemination agreed that J.R. would be the natural father of R.C. This factual dispute must be resolved on remand. If no such agreement was present at the time of insemination, then section 19-4-106(2) operates to extinguish J.R.’s parental rights and duties concerning R.C. If such an agreement was present, then section 19-4-106(2) does not operate to extinguish J.R.’s parental rights and duties concerning R.C., and the juvenile court must determine paternity.”)  
68 Of note, the Oregon statutes appear to alter the requirement that the recipient and donor of sperm be married. The statute clarifies that: “Artificial insemination shall not be performed upon a woman without
argued that the parties agreed that he would take an active role in the life of the resulting child, yet the mother contended that no such agreement existed. The court generally agreed that the statute was intended to cut off the rights of the donor under the statute even though she was unmarried, but remanded a Due Process claim by the donor on the question of “if he can establish that he and [the mother] agreed that he should have the rights and responsibilities of fatherhood and in reliance thereon he donated his semen.”

In other words, the state cannot place an absolute bar on his assertion of fatherhood through contract.

Other variations of the UPA, including the 2000 UPA, provide for mixed results as well, none of which fully address issues of unwed or lesbian mothers. For example, in

her prior written request and consent and, if she is married, the prior written consent of her husband.” Or. Rev. Stat. §677.365 (1977).

69 McIntyre, 780 P.2d at 243. Interestingly, the Court opined as to the purpose of the Oregon version of the UPA: “The legitimate purposes of the act are: (1) to allow married couples to have children, even though the husband is infertile, impotent or ill; (2) to allow an unmarried woman to conceive and bear a child without sexual intercourse; (3) to resolve potential disputes about parental rights and responsibilities: that is, (a) the mother's husband, if he consents, is father of the child and (b) an unmarried mother is freed of any claims by the donor of parental rights; (4) to encourage men to donate semen by protecting them against any claims by the mother or the child; and (5) to legitimate the child and give it rights against the mother's husband, if he consents to the insemination.” Id. (emphasis added).

70 Id. at 471-73. The Oregon statute has no prohibition against insemination of an unmarried woman, but does include the following: “SECTION 3. (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.” Id. at 465-66 (citations omitted). Of significant importance to this article is the court’s discussion of the due process rights of the donor in this case. The court quotes the United States Supreme Court stating,

[w]hen an unwed father demonstrates a full commitment to the responsibilities of parenthood by coming forward to participate in the rearing of his child, * * * his interest in personal contact with his child acquires substantial protection under the Due Process Clause. * * * But the mere existence of a biological link does not merit equivalent constitutional protection. * * *

The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development. If he fails to do so, the Federal Constitution will not automatically compel a State to listen to his opinion of where the child's best interest lie.

Id. at 470-71 (quoting Lehr v. Robertson, 463 U.S. 248, 261 (1983)).
several states the statute merely puts forth that a sperm donor has no legal rights or duties with respect to a resulting child. However, even with the simplicity of this language, courts continue to struggle with questions of clarity under the 2000 UPA.

Illustrating the confusion that even the updated version of the UPA can create, two separate courts of appeal in Texas came to different conclusions regarding the UPA’s effect on the standing of a donor to bring suit for parentage under the language of the UPA. In the court of appeals of Texas, Houston, in In re Sullivan, the court was faced with determining if a donor had standing to bring a suit to determine parentage under the Texas Family Code. In that case, the majority of the court declined to hold that the Texas equivalent to UPA § 702 denied or conferred standing to a donor to bring his case for parentage in Texas court. Instead, the majority held that the effect of §702 is to be decided on the merits at the trial level. The concurring opinion noted that “the ‘plain and common meaning’ of section 160.702 does not negate Russell’s standing.” These concurring judges attempt to clarify the meaning of section 702 noting that “[i]t does not state that a donor can never be a parent under appropriate circumstances . . .” and further argue that the language should be distinguished from a reading that could have stated that “[a] donor cannot be a parent of a child conceived by means of assisted reproduction.”

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71 Parenting Options for Same-Sex Couples in the U.S., Adoption, Foster Care, Donor Insemination, Surrogating, Custody, PARTNERS TASK FORCE FOR GAY AND LESBIAN COUPLES, Jan. 3, 2007, p. 26 (AL, CO, CT, ID, IL, MN, MT, NJ, NM, NY, OH, OR, TX, WA, WI).
73 This Texas statute holds that “a donor is not a parent of a child conceived by means of assisted reproduction.” Id. at 915 (quoting TEX. FAM. CODE ANN. § 160-702 (West 2002)).
74 Id. at 919-920.
75 Id. at 919.
76 Id. at 922.
77 Id.
The concurring opinion clarifies that, in their opinion, §702 does not negate standing by the sperm donor to assert rights as a father. 78

But, in contrast, in *In re H.C.S.*, 79 the court of appeals of Texas, San Antonio, held that standing as a “donor” is relevant in determining whether a donor father may proceed with a case for parentage.80 The court concluded that “J.S., as an unmarried man who provided sperm used for assisted reproduction and who did not sign and file an acknowledgment of paternity, does not have standing to pursue a suit to determine paternity of the child born through assisted reproduction.”81 This Texas court makes a special point of the policy argument behind its decision:

. . . [U]nder J.S.’s reading of the Family Code, any alleged donor—even one who does not know the mother or one who donates to a sperm bank—could challenge paternity in an original proceeding. Rather than promoting assisted reproduction, such a course of action would subject children born of assisted reproduction and their mothers to the financial and emotional costs of defending suits like this one on the merits.82

**B. Best interests of the Child**

As these cases demonstrate, without clear legislation, when a donor seeks to claim rights as a father to a child born from artificial insemination or a child or mother seeks support from the donor, the courts typically employ common law standards. Most often

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78 *Id.* It is of special note that the court expressly refused to decide whether a “written co-parenting agreement” present in this case had any part in the decision to confer standing upon the sperm donor to assert his rights as a parent. *Id.* at 920 n.7 and 922 n.2.


80 *Id.* at 36.

81 *Id.* “While J.S. is a man and his paternity as to H.C.S. has not been adjudicated, and while he alleges himself to be the father of H.C.S., he is admittedly a male donor and thus statutorily he is not an alleged father and does not have standing to pursue an original suit. Further, the standing provision J.S. relies on clearly states that it is subject to other provisions regarding voluntary acknowledgment of paternity.” *Id.*

82 *Id.* at 37.
courts apply the standard of what is “in the best interest of the child.” Each state’s standards may vary, however.

The Uniform Marriage and Divorce Act attempts to provide some guidance with determining what is in the best interest of the child in child custody matters. According to the Act, a court shall consider the following:

1. the wishes of the child’s parent or parents as to his custody;
2. the wishes of the child as to his custodian;
3. the intersection and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child’s best interest;
4. the child’s adjustment to his home, school, and community; and
5. the mental and physical health of all individuals involved.

The court shall not consider conduct of a proposed custodian that does not affect his relationship to the child.

However, states are inconsistent in the guidance that courts are given in their treatment of lesbian and gay individuals under these factors. For example, Mississippi courts have adopted factors similar to the UMDA factors in the “Albright” factors.

In Albright v. Albright, the court set out the following factors for consideration in making a custody award between natural parents:

84 Hereinafter “UMDA.”
(1) The age, health and sex of the child;
(2) Which parent had continuing care of the child prior to separation;
(3) Which parent has the best parenting skills;
(4) Which has the willingness and capacity to provide primary child care;
(5) Employment responsibilities of both parents;
(6) Physical and mental health and age of parents;
(7) Emotional ties of the parent and child;
(8) Moral fitness of the parents;
(9) Home, school and community record of the child;
(10) Preference of the child at the age of 12;
(11) Stability of the home environment and employment of each parent, and
(12) Other relevant factors.\(^6\)

Mississippi’s significant departure from the UMDA’s factors indicates that state’s willingness to consider factors of “moral fitness,” “stability of the home environment” and “other relevant factors” – all factors that give a chancellor significant latitude in making a decision on the “best interest of the child.”

For example, when asked to enforce a private contract to delineate and secure the rights of a lesbian couple, their potential child, and a potential sperm donor, one Mississippi chancery court judge responded: “They obviously can’t have their own child naturally, and the law prevents them from adopting. Every child needs a father. Clearly

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these laws were put there for a reason. As difficult as it is for them to have a child, perhaps they should just reconsider having children at all.”

In S.B. v. L.W., a Mississippi Court of Appeals Judge boldly described her thoughts on the best interest of a child:

the mother may view her decision to participate in a homosexual relationship as an exertion of her perceived right to do so. However, her choice is of significant consequence, as described before in the discussion of our State’s policies, in that her rights to custody of her child may be significantly impacted. . . . Under the principles of Federalism, each state is permitted to set forth its own policy guidelines through legislative enactments and through judicial renderings. Our State has spoken on its position regarding rights of homosexuals in domestic situations. I agree that . . . the homosexual lifestyle of one of the parents in this case [may be considered] as a factor in determining suitability for custody.

87 Conversation with the author and a Mississippi chancery court judge.
88 793 So. 2d 656 (Miss. App. 2001).
89 Id. at 663-64. The case is of considerable controversy as the following quote from the concurring opinion was joined by Judge Leslie Southwick, a recent appointee to the 5th Circuit Court of Appeals by President George W. Bush. The following is a more complete quote from that opinion:

While I do agree with the majority, I write separately because I feel the dissent has delved into an area where our State legislature has made clear its public policy position relating to particular rights of homosexuals in domestic relations settings. In my review of statutory authority, I find that in 2000 the legislature added an amendment to Miss. Code Ann. § 93-17-3 (Supp. 2000) which reads, “(2) Adoption by couples of the same gender is prohibited.” This statute is brand new and has not yet been challenged in our appellate courts. Another statute which shows the legislature’s intention concerning homosexuals and family relations is Miss. Code Ann. § 93-1-1(2) (Supp. 2000). A 1997 amendment to that statute added the sub-section which reads, “Any marriage between persons of the same gender is prohibited and null and void from the beginning. Any marriage between persons of the same gender that is valid in another jurisdiction does not constitute a legal or valid marriage in Mississippi.” Additionally, Miss. Code Ann. § 97-29-59 (Rev. 2000) states, “Every person who shall be convicted of the detestable and abominable crime against nature committed with mankind or with a beast, shall be punished by imprisonment in the penitentiary for a term of not more than ten years.” That statute has been held to apply to homosexual acts. See Miller v. State, 636 So. 2d 391
Mississippi is not the only state with judges willing to express these homophobic opinions. Other judges have similar views. In a concurring opinion in an Alabama custody matter, Chief Justice Moore

\[90\] clarified his position:

I write specially to state that the homosexual conduct of a parent—conduct involving a sexual relationship between two persons of the same gender—

(Miss.1994); \textit{Haymond v. State}, 478 So.2d 297 (Miss.1985); \textit{State v. Mays}, 329 So. 2d 65 (Miss.1976). Looking to these cited authorities and to the United States Supreme Court case of \textit{Bowers v. Hardwick}, 478 U.S. 186, 106 S. Ct. 2841, 92 L.Ed.2d 140 (1986), which upheld the constitutionality of a Georgia sodomy statute, I find that the legislature has clearly set forth the public policy of our State with regard to the practice of homosexuality.

The concurring opinion continued:

I do recognize that any adult may choose any activity in which to engage; however, I also am aware that such person is not thereby relieved of the consequences of his or her choice. It is a basic tenet that an individual's exercise of freedom will not also provide an escape of the consequences flowing from the free exercise of such a choice. As with the present situation, the mother may view her decision to participate in a homosexual relationship as an exertion of her perceived right to do so. However, her choice is of significant consequence, as described before in the discussion of our State's policies, in that her rights to custody of her child may be significantly impacted.

Under the principles of Federalism, each state is permitted to set forth its own public policy guidelines through legislative enactments and through judicial renderings. Our State has spoken on its position regarding rights of homosexuals in domestic situations. Coupling the legislature's unambiguous rules with our established case law rules, I agree that we should not find that the chancellor erred in considering the homosexual lifestyle of one of the parents in this case as a factor in determining suitability for custody.

\[S.B. v. L.W., 793 So. 2d 656 (Miss. App. 2001). \] See also \textit{Inscribing Lesbian and Gay Identities: How Judicial Imaginations Intertwine with the Best Interests of Children}, 11 Cordozo Women’s L. J. 1 (Fall 2004). While the opinions of these judges may still apply in their decisions regarding “best interests of the child,” it should be noted that, with respect to sodomy among adults, “their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.” \textit{Lawrence v. Texas}, 539 U.S. 558, 578 (2003).

These judges may find it interesting that in the 2000 Census, Mississippi, a state with no laws relating to AI and an active legislative agenda against gay and unmarried couple adoption, had the highest percentage of lesbian couples raising children in the United States – 43.8% -- and the second highest percentage of gay male couples raising children – 31%. James G. Pawelski, et al. \textit{The Effects of Marriage, Civil Union, and Domestic Partnership Laws on the Health and Well-being of Children}, J. AM. ACAD. PEDIATRICS 349, 351 (2006) (citing U.S. Census Bureau. Married-couple and unmarried-partner households: 2000-Census 2000 special reports. Available at: \url{www.census.gov/prod/2003pubs/censr-5.pdf}. Accessed March 7, 2006). While lesbian and gay individuals can and apparently do have children in that conservative location, by law their partners are denied parenthood by legislation. \textit{MISS. CODE ANN.} 93-17-3(5). One member of the same-sex couple is, therefore, in the eyes of the law, a single parent regardless of the wishes of the child or the parents.

\[90\] Chief Justice Roy Moore was removed from office on November 13, 2003, for defying a federal order to remove a 2.6 ton carving of the Ten Commandments from the Alabama Supreme Court Rotunda. When discussing his removal, Moore stated, “God has chose this time and this place so we can save our country and save our courts for our children.” \textit{Ten Commandments Judge Removed From Office}, CNN, (Friday, November 14, 2003) available at www.cnn.com/2003/LAW/11/13/moore.tencomandments/.
creates a strong presumption of unfitness that alone is sufficient
justification for denying that parent custody of his or her own children or
prohibiting the adoption of the children of others.91

One commentator, discussing the conflict between the best interest of the child
analysis and various court opinions toward homosexuality, notes several instances in
which personal bias has impacted custody decisions.92 In describing one Michigan case,
the writer notes:

During a challenge to the custody rights of one mother, Mrs. Brown, the
trial court ignored the internal aspects of the relationship, and focused
instead on what the appellate court deemed their ‘state of lesbianism’ as
partial justification for ruling against Mrs. Brown. The precise meaning of
the phrase “state of lesbianism” is unclear. Residing in this state was
apparently sufficiently evil for the trial court to conclude that these women
were unfit parents. Accordingly, the best interest of the child analysis
required the court to protect these children from what it deemed the
negative effects of “lesbianism.”93

These judges, like family court judges throughout the country, are the same
judges who would ultimately be called upon to make the decision regarding the “best
interest of the child” in issues regarding reproductive rights, child custody, child support,
and parental rights. The opinion “every child needs a father” exposes the clear bias in
any potential child custody case. While judges are, of course, free to hold a personal

91 Ex Parte H.H., 830 So. 2d 21, 24 ( Ala. 2002).
92 Christopher Carnahan, Inscribing Lesbian and Gay Identities: How Judicial Imaginations Intertwine with
the Best Interests of Children, 11 CORDOZO WOMEN’S L.J. 1 (Fall 2004) (hereinafter “Inscribing Lesbian
and Gay Identities”).
93 Id. at 11 (citing People v. Brown 212 N.W.2d 55 (Mich. Ct. App. 1973)).
opinion, as judge it is their duty to apply the law. While many courts seem to have no issue with gay parents, the bias expressed by the above sampling of opinions illustrates the problem in determining the best interest of a child.

How, then, can an AI created lesbian family, absent the UPA, protect their children against a potential challenge by a sperm donor for custody? If states have not adopted the UPA or the UPA provides no protections for unmarried women in an AI produced family, then the courts are often open to the challenge by a donor for paternity. Given the bias expressed by many judges, the use of the “moral fitness of the parents,” the “stability of the home environment and employment of each parent,” or “other relevant factors” play into the arguments of custody when the best interests of the child are considered. So how do these families protect themselves? In a custody battle, a judge could hold that “best interest of the child” means that a child should have a mother and a father based solely on a judge’s personal belief that this traditional family is best – as our Mississippi judge believes, “every child needs a father.” Whereas in even a neighboring state, a judge may honor the intentions of all parties, allowing for the creation of dual-mother families and the termination of the donor’s rights and responsibilities. Because of wide discrepancies in state-to-state or even judge-to-judge interpretation of best interests of the child, a child’s welfare and security cannot predictably be determined and may be left to the luck of the particular location or particular judge.94 This exposes an egregious gap in legislation regarding artificial insemination and establishing parental rights. Because of these gaps, parties are left to attempt to create legal documents to clarify the rights and obligations of the parties.

94 For a discussion of issues raised by discrepancies from state to state in custody battles, see Oren Goldhaber, “I Want My Mommies”: The Cry for Mini-Domas to Recognize The Best Interests of The Children of Same-Sex Couples, 45 FAM. CT. REV. 287 (April 2007).
IV. Contracts: Their Validity and Their Role

Absent legislation, or even in those states with partial or antiquated legislation, the parties to insemination are left with few options. One possible option is to mitigate the effects by private contract. As one commentator notes, “‘[u]nlike married partners whose obligations are specified by law, unmarried partners must create and delineate their mutual obligations in accordance with the needs of their relationship.’” With respect to custody and divorce proceedings, courts have been increasingly supportive of private custody contracts, stating that they are significant in child custody determinations. Other courts have held that the agreements will be upheld if they are in the “best interests of the child,” thus introducing potential judicial bias in these contracts. Herein lies the problem with courts with unchanging, historically conservative values. As the issue of custody and parental obligations many times hinges on “the best interests of the child,” judges with negative opinions on gay and lesbian parenting also have opinions as to the “best interests of the child” even in the face of clear, contract-delineated rights.

In states that have adopted the 2000 version of the UPA, often the rights of a donor are clearly expressed, as the “donor is not a parent of a child conceived by means

\[\text{\textsuperscript{95} Reproductive Technology and the New Family, supra, at 342 (quoting Note, Developments in the Law-Sexual Orientation and the Law, 102 HARV. L. REV. 1508, 1625 (1989)).}\]

\[\text{\textsuperscript{96} \text{“[T]he law is more willing to enforce agreements that tailor family life to individual preferences and . . . is more solicitous in general of individual choice in family matters.’” Bernie D. Jones, Single Motherhood by Choice, Libertarian Feminism, and the Uniform Parentage Act, 12 TEX. J. WOMEN & L. 419, 427-28 (2003). See, In Interest of R.C., 775 P.2d 27, 33-34 (Colo. 1989)(holding the Colorado version of the UPA bars contracts for paternity for donors when the parties are married or then the donor is anonymous. The same prohibition may not apply when the parties are unmarried). See also Legal Aspects of New Reproductive Technologies, 29 CLINICAL OBSTETRICS & GYNECOLOGY 190, 200 (1986); See also N.J. STAT. ANN. §9:17-44(b)(West 1983) (providing that a donor and recipient have a right to enter into a written contract affecting the paternity of the child).}\]

\[\text{\textsuperscript{97} Reproductive Technology and the New Family, supra, at 343.}\]
of assisted reproduction” by legislation.\textsuperscript{98} The major issue arises in the majority of states where either no law governing AI exists or states with the unmodified 1973 version of the UPA.\textsuperscript{99} In these states, no legislative protections exist to protect an unmarried mother against a donor’s assertion of paternity rights. In those states, most courts will revert back to determining the “best interest of the child,” a standard that arguably should no longer apply to determine parentage in AI cases.

A. **Types of Protections for Contracts**

One strategy for mitigating judicial bias and for clearly establishing intentionality has been a two-step contract to ensure the rights of co-parents.\textsuperscript{100} This two-step contract would include the following: the first step terminating the parental rights of the donor, and the second step providing the non-biological co-parent with rights in the event of a separation of the couple or death or incapacity of one of the biological parents.\textsuperscript{101} The difficulty is in determining how courts will view these private contracts, however.

While the two-step contract is a good basic start for AI agreements, the terms should be much more detailed and comprehensive. Contracts are drawn to outline expectations for artificial insemination for several reasons. Typically, three or four parties need to be protected in contracts for artificial insemination. Contracts could include the rights and obligations of the mother, the donor, the child and the co-parent, if there is one. Formal contracts may also be useful in the event that a court wishes to

\begin{itemize}
\item \textsuperscript{98} 2000 UPA at § 702.
\item \textsuperscript{99} The 1973 UPA applies only to married women and would therefore have no applicability to lesbian couples in any state where same-sex marriage is not possible. 1973 UPA at §5.
\item \textsuperscript{100} *Reproductive Technology and the New Family*, supra, at 342.
\item \textsuperscript{101} *Reproductive Technology and the New Family*, supra, at 342.
\end{itemize}
consider the “intent of the parties” in determining custody and support issues in a court proceeding.\textsuperscript{102}

From the perspective of the mother, contracts often spell out that the donor will have no contact with the child or that the donor has no legal right to custody of the child. The contracts seek to formalize the agreement between mother and donor that the donor has no legal connection, right, or obligation to the child, whatsoever. In the event that the parties agree to some sort of support arrangement, then those rights are also spelled out in the contract.\textsuperscript{103} Further, a clause stating that the donor shall remain anonymous could assist the mother in protecting her rights to the child.\textsuperscript{104} Again, having these terms spelled out could assist a court in determining the intent and rights of the parties in the event of a custody challenge.

Contracts are also important in protecting the rights of the donor. Contracts are drawn in an attempt to protect the donor against suits for support from the potential child or the mother.\textsuperscript{105} Contracts also can contain other points, such as a confidentiality statement so that no one is allowed to speak of the donor’s identity in order to protect anonymity for various reasons, including protection from suits for support.\textsuperscript{106} Of course, some donors and recipients may wish to spell out other terms, such as terms for visitation for the donor, the manners and methods by which the donor is allowed to have other

\textsuperscript{102} See, for example, McIntyre v. Crouch, 780 P.2d 239 (Or. Ct. App. 1989); Johnson v. Calvert, 851 P.2d 776 (Cal. 1993); T.F. v. B.L., 813 N.E.2d 1244 (Mass. 2004); Ferguson v. McKiernan, 940 A.2d 1236 (Penn. 2007).

\textsuperscript{103} See, for example, McIntyre, 780 P.2d 239 (ruling that a contract with the mother may overrule the statutory presumption of no-paternity); C.O. v. W.S., 639 N.E.2d 523 (Oh. Ct. App. 1994) (holding a contract could override the statutory presumption against paternity); Ferguson, 940 A.2d 1236 (holding a contract terminating rights and obligations of a donor valid without UPA type legislation); In Re Sullivan, 1575 S.W.3d 911 (Tex. Ct. App. 2005) (holding donor had standing to bring suit to enforce co-parenting agreement – ruling limited to standing, however).

\textsuperscript{104} See, for example, Ferguson, 940 A.2d 1236.

\textsuperscript{105} See, for example, Ferguson, 940 A.2d 1236.

\textsuperscript{106} See, for example, Ferguson, 940 A.2d 1236 (the court seemed to find significant the parties attempts to maintain anonymity and other requirements of the UPA).
contact with the child. They may also wish to spell out if the donor will be contributing to the care of the child and, if so, under what terms.\textsuperscript{107}

Further, contracts are to protect the child. Contracts could attempt to prevent a donor from seeking to take the child away from the mother who has raised the child or for even seeking visitation rights.\textsuperscript{108} Such documents may also spell out the terms under which the donor is no longer anonymous, for example on the child’s eighteenth birthday or at some other event. If a support agreement exists, then the contract could formalize the terms for that support.

Finally, contracts may be used to spell out the rights and obligations of a co-parent. Given the infancy of same-sex marriage or civil unions in the United States, rights for same-sex co-parents are far from automatic. Absent a formal adoption by a co-parent, a solution that is against legislation in some states, a contract should spell out the obligations for support and rights to custody of a child in the event of a break up or death of one or both of the co-parents.\textsuperscript{109}

B. Questionable Enforceability: Judicial Bias, Antiquated Understanding or Legitimate Interests?

While the possible contractual terms are unlimited, their enforceability remains the problem. Absent legislation protecting the agreements between donors and mothers,

\textsuperscript{107} See, for example, In Re Sullivan, 1575 S.W.3d 911.

\textsuperscript{108} See, for example, Ferguson, 940 A.2d 1236.

courts acting in equity could invalidate all or part of the private contract between the parties just because of the judge’s personal belief as to what is in the “best interests of the child” – arguing “public policy”. A court could substitute its beliefs, regardless of the parties’ beliefs and intentions about what is in the best interests of the child. While both a donor and mother could agree that the donor remain anonymous and that the donor have no support obligations, a court could deem that “every child needs a father” and force obligations on the parties that none intended. In short, because the “best interest of the child” might supersede the right of these individuals to contract, the judge’s personal view and opinions might be used to manipulate cases, bringing about unpredictable and potentially damaging rulings.

Perhaps no single case illustrates the struggles between the standards of “best interest of the child,” contract principles and lack of legislative intervention better than the Pennsylvania case Ferguson v. McKiernan. In Ferguson, the mother of a child created through AI procedures sought to force the sperm donor to make child support payments. The donor and mother were formerly in a relationship and remained friends up to and past the time of insemination. Prior to any attempt at IVF or insemination, the parties entered into an oral agreement where mother purported to release the donor of any and all financial burdens associated with the donation and any obligations of being a father. The agreement also provided that the donor “surrender any rights and privileges to the children arising from his biological paternity in return for being released

110 For a discussion of the effects of judicial bias against gays and lesbians, see Inscribing Lesbian and Gay Identities, 11 Cordozo Women’s L.J. 1 (2004).
111 940 A.2d 1236 (Penn. 2007).
112 Id. at 1238.
113 Id. at 1238-39.
114 Id. at 1239-41.
of any attendant support obligation.” 115 The parties further agree to keep the terms of the procedure and knowledge of the donor confidential. 116 After the agreement was formed, the donor provided his sperm donation to a physician at the Hershey Medical Center in Hershey, Pennsylvania. 117 The IVF procedure was successful, and the mother gave birth to twins. 118 There was limited contact between the donor and the mother for the next five years. 119 However, five years after the birth of the twins, the mother found the donor and filed a claim for child support. 120

The trial court heard the evidence and found that the parties had entered into “a binding oral agreement prior to the twins’ conception.” 121 The trial court also found that the donor’s “donation” and mother’s agreement not to seek financial support was valid consideration to support the contract.” 122 However, the trial court found the agreement unenforceable stating that “‘a parent cannot bind a child or bargain away that child’s right to support . . . ’” 123 In ruling against the donor, the trial court reasoned that “‘[a]lthough we find the [mother’s] actions despicable and give [sic] the [donor] a sympathetic hue, it is the interest of the children we hold most dear.’” 124

On appeal to the Pennsylvania Supreme Court, the mother continued to argue that the “best interests of the children” were paramount to the case and should override and nullify any agreement between her and the donor. 125 The donor contended that the public

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115 Id. at 1241.
116 Id. at 1241.
117 Id. at 1240.
118 Id.
119 Id. at 1240.
120 Id. at 1240.
121 Id. at 1241.
122 Id.
125 Id. at 1244.
policy arguments for “precluding parents from bargaining away a child’s entitlement to
child support should not preclude enforcement of an otherwise binding contract where the
bargain in question occurs prior to, and indeed induces, the donation of sperm for IVF
and implantation in a clinical setting.”126 The donor makes particular note that this
contract was formed months before any conception occurred, thus distinguishing this case
from prior precedent holding that contracts to bargain away rights of support for children
in existence are void as not in the “best interest of the child” and therefore void as against
public policy.”127

The Supreme Court rejected the mother’s arguments, noting that the public policy
argument is not persuasive “in the face of the evolving role played by alternative
reproductive technologies in contemporary American society.”128 The court noted:

it violates the commonsense distinction between reproduction via sexual
intercourse and the non-sexual clinical options for conception that are
increasingly common in the modern reproductive environment. The
inescapable reality is that all manner of arrangements involving the
donation of sperm or eggs abound in contemporary society, many of them
couched in contact or agreements of varying degrees of formality. . . . An
increasing number of would-be mothers who find themselves either unable
or unwilling to conceive and raise children in the context of marriage are
turning to donor arrangements to enable them to enjoy the privilege of
raising a child or children, a development neither our citizens nor their

126 Id. at 1242 (emphasis added).
127 Id. at 1242.
128 Id. at 1245.
General Assembly have chosen to proscribe despite its growing pervasiveness.\textsuperscript{129}

Of particular interest to these contracts, and an issue that many courts overlook, however, is that it can be argued that these contracts between sperm recipient and sperm donor are not contracts for paternity or to necessarily determine the rights of the child; these contracts are drawn up prior to insemination and are contracts for the donation of sperm, not necessarily about the custody or creation of a child.\textsuperscript{130} At most, these are contracts for potential children. The donor is not donating a child, he is donating sperm which may or may not result in the recipient’s impregnation. One could argue that the donation of sperm is equivalent to the donation of any other body part or fluid.\textsuperscript{131} People regularly donate blood; body parts, such as kidneys, are also donated, and bone marrow donations are becoming routine.\textsuperscript{132} In the not too distant future, other fertilization processes may also be possible making sperm irrelevant as long as some DNA can be harvested from any body part.\textsuperscript{133} This is analogous in that a bone marrow donor might actually give the substance of life in order to save a child, a child that would die otherwise. But what if this child does not have a legal father? If the same court

\textsuperscript{129}Id. (citing 2000 UPA, Prefatory Cmt. to Art. 7) (other citations omitted).
\textsuperscript{130}See J.F. v. D.B., 848 N.E.2d 873, 878-79 (Oh. Ct. App. 2006) (noting that a contract for surrogacy was made prior to any parental rights attaching, therefore the contract did not violate Ohio public policy against private agreements to forgo parental rights).
\textsuperscript{131}See Ronald Munson, Artificial Insemination, Who’s Responsible, SEX/MACHINE, READINGS IN CULTURE, GENDER, AND TECHNOLOGY 107 (Patrick D. Hopkins, ed. 1998).
\textsuperscript{132}See Hecht v. Superior Court, 20 Cal. Rptr. 2d 275, 282 (Cal. Ct. App. 1993)(“The American Fertility Society, in its Ethical Statement on in vitro fertilization, has written that ‘it is understood that the gametes and concepti are the property of donors. The donors therefore have a right to decide at their sole discretion the disposition of those items, provided such disposition is within medical and ethical guidelines . . . .’” (quoting York v. Jones, 717 F. Supp. 421, 426 n.5 (E.D. Va. 1989)(citations omitted).
\textsuperscript{133}Will Science Render Men Unnecessary?, MSNBC (June 27, 2007), available at www.msnbc.msn.com/id/17937813/ (“[R]ecently a team of scientists announced they had made artificial sperm from human bone marrow”).
procedures were in play, that donor might then have legal rights to this child, or the child’s mother might then have grounds to sue the marrow donor for support.\footnote{134}{See generally, Legal & Ethical Safeguards: Protection Of Society’s Most Vulnerable Participants In A Commercialized Organ Transplantation System, 21 AM. J.L. & MED. 45, 51-52 (1995).}

To make the counter argument that this is the creation of a child, one would have to logically argue that life begins not at conception, but at ejaculation, a currently impossible scientific argument. If sperm cannot be donated with legal guidelines and protections, then why can other body fluids or parts be donated? Why should contracts for sperm be subject to the prejudices of a judge in a particular locale while the same prejudices would not apply to contracts for other fluids, tissues or organs? No judge would ask what is in the best interest of red blood cells or whether or not the custody of bone marrow or its recipient needs to be fought. Why then is sperm the subject of different contractual rules? Judges must address the purpose of the contract prior to determining if the standards of “best interests of a child” even apply to the given situation. In a typical artificial insemination, the donor is not present for the point of conception. And sperm, arguably, is merely personal property until the point of conception.\footnote{135}{See supra at n.132.} If so, then one could contract away rights with it just as with any other bodily fluid. Or, will donors of blood be able to seek custody rights of the recipients of blood or marrow products? Of course, in many cases, but for the contract for the donation that could provide security to both the donor and the donee, no child would exist in the first place, no child whose “best interests” trump donor and donee intentions.

\section*{V. \ \ Working with the Current Legal System}
Given the current state of the legal system with respect to contracts for the donation of sperm, parties to these contracts are invited to “trick” the system instead of being able to rely on sound legal precedence for guidance as to how a particular court may rule.

A. **Forum Selection Clauses**

Parties to contracts may be left with inserting elements into contracts in an effort to circumvent the prejudices of one judge or jurisdiction. For example, forum selection and choice of law clauses may be employed. Those clauses may attempt to pick a jurisdiction that either has adopted a favorable version of the UPA or one that is known to be friendly toward lesbian parenthood. For example, parties could choose to have the contract decided under the laws of a more favorable state or county within a state. However, of course, many states require a nexus to the chosen state to use the laws of another state.

To circumvent this requirement, lesbian and gay parents are even going as far as to traveling to friendly states for the insemination process and the completion of requisite contracts. This would potentially allow the benefit of the friendlier state’s laws to be used in the event of a challenge to the insemination contract.

B. **Indemnification and Support Provisions**

Other donors may consider adding indemnification provisions in sperm and egg donation contracts. Of course, there are several types of indemnity and support provisions possible. In the case of lesbian co-parents, in the absence of rights under

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137 See RESTATEMENT (SECOND) CONFLICT OF LAWS § 187 (2004) (typically requiring the choice of law to have a substantial relationship to the action or parties).

138 Informal survey of gay and lesbian couples, on file with authors.
marriage or formal registered partnerships, the parties may contract for child support, custody and visitation rights in the event that the co-parents split. As the parties intended to have a child together, equity would seem to support a claim that both parties should share in the financial burden of raising the child.

With respect to the donor, the parties may include a contract for reimbursement of child support or other financial payments to the parents in the event that the donor seeks custody of the child and wins. Finally, the donor may seek indemnity against the mother and, in the event that a lesbian co-parent is involved, the donor may employ a separate contract with the co-parent that seeks to indemnify and defend the donor for any losses that he may incur as a result of the donation if a court awards child support against him. While the indemnification agreement against the biological mother, under current case law, will most likely be found unenforceable as against public policy, the co-parent agreement should be less likely to be thrown out as the primarily responsible party is still the donor in the event that the original contract is challenged.

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139 Formal contracts of this nature have rarely been enforced. If enforced at all, the courts have typically used equitable theories such as the “presumed parent doctrine” or the “defacto parent doctrine.” See, Parenting Agreements, The Potential Power of Contract, and the Limits of Family Law, 34 Fla. St. U.L. Rev. 913 (2007). But see, T.F. v. B.L., 813 N.E.2d 1244 (Mass. 2004) (holding that the plaintiff “established the existence of an implied agreement, ‘parenthood by contract,’” but that contract was unenforceable as against public policy in Massachusetts.) Id. at 1246.

140 For a discussion of cases regarding contractual support and equity, see Parenting Agreements, supra, and What is Sauce for the Gander, supra.

141 While this is a relatively small penalty for seeking to remove a child from his/her family, seeking to become an involved father should carry with it the financial burdens of that support. See, for example, Miesen v. Frank, 522 A.2d 85 (Pa. Sup. Ct. 1987) (holding that a divorce settlement agreement indemnifying husband for any ordered child support payments is void as against public policy).

142 Courts have based the general denial of indemnity on the arguments that to have one parent indemnify the other parent for mandated child support payments would be effectively taking money out of the child’s pocket. See Miesen, 522 A.2d at 87. However, in jurisdictions that will refuse to recognize any rights in a lesbian co-parent, these same courts should have difficulty explaining a decision to refuse to allow payments for child support and indemnity from a person it considers a “non-party” to the family, but not the contract.
he remains primarily liable, but is entitled to reimbursement from a non-party in the eyes of a court that does not recognize lesbian co-parenting.

C. Custody Provisions and Co-Parent Adoption

Of the utmost difficulty under current laws would be any provision to establish custody rights by contract for a co-parent. However, forming a contract clearly indicating the intent to co-parent may, in a sympathetic jurisdiction, show that it is in the “best interest of the child” to have both parents involved in the parenting decisions.

Some couples have resorted to forum shopping to assist them in seeking co-parental rights. For example, one couple in North Carolina may consider establishing residency in Virginia in order to avail themselves of the jurisdiction of a court that allows co-parent adoption, relying on the Full Faith and Credit Clause of the U.S. Constitution to enforce that adoption decree after the couple returns to their home state.144

VI. Simple Solution – Enforcement of Contracts Based on Intent

One possible solution to these issues is for courts to recognize the rights to private contracts in AI matters. There is a distinct difference between parents of a child created by accident during heterosexual intercourse and parents of a child born through AI processes to single mothers and to lesbian and gay couples. Most often, a great amount of thought and often significant financial outlay has occurred in AI cases.145 The parties have often discussed and rehearsed the outcomes of their actions. These informed and

144 See Finstuen v. Crutcher, 496 F3d 1139 (10th Cir. 2007) (holding Oklahoma statute denying recognition of gay co-parent adoption, valid in other jurisdictions, is a violation of the Full Faith and Credit Clause of the United States Constitution).
145 As one writer explains: “When a child is conceived through the process of artificial insemination into a union of two women, ‘the decision to create the child is even more conscious and deliberate than the decision that is made by some couples who are both biological parents and conceived a child by direct sexual intercourse.’ While the latter could occur in a time span of about ten minutes in an act of lust, the former could take weeks if not months to obtain the necessary reproductive assistance.” What is Sauce for the Gander, supra, at 220 (quoting T.F. v. B.L., 813 N.E.2d 1244 (Mass. 2004).
deliberate parties should have their agreements enforced. Indeed, some courts are already recognizing the intent of the parties in enforcing these parentage rights.146

Courts should end the reliance on “best interest of the child” in determining legal parentage and instead look to the intent of the parties and more on basic contract principals of meetings of the minds and informed parties. Informed parties, gay, lesbian or straight, should be allowed to make their own decisions about their rights and abilities to procreate. Allowing parties to enter into contracts that delineate rights in AI and that enforce the wishes of those parties would take the prejudice and bias of certain judges out of the equation in AI cases. Certainly, legal precedence for statutes of this nature exists. Some courts are already using intent of the parties to help form their decisions in custody battles.147 Indeed, even the drafters of the Uniform Marriage and Divorce Act saw that “intent” is an important factor in child custody battles.148 Why not formalize the legality of the contracts and allow parties to protect themselves without the potential bias of a judge who is unwilling to allow lesbians to be co-parents or unwilling to terminate the rights of a donor?149 Equity and reason should hold that those parties who joined together with the intent to create a child—whether gay, straight, unmarried, or married--should be allowed to legally protect their interests as legal parents.150 Courts have made

147 See, for example, K.M. v. E.G., 117 P.3d 673 (Ca. 2005); In Re Sullivan, 157 S.W.3d 911 (Tex. Ct. App. 2005) and discussion of Laura WW. v. Peter WW., 2008 WL 991130 (N.Y.A.D. 3 Dept. April 11, 2008), discussed infra, at n. 150..
148 In considering the “best interest of the child” in child custody matters, courts shall consider: “(1) the wishes of the child’s parent or parents as to his custody . . . .” UNIFORM MARRIAGE AND DIVORCE ACT, § 402 (1970)
149 Several courts have addressed this possibility with mixed results. In T.F. v. B.L., 813 N.E.2d 1244 (Mass. 2004), the Massachusetts Supreme Court held that “‘Parenthood by contract’ is not the law in Massachusetts, and to the extent the plaintiff and the defendant entered into an agreement, express or implied, to coparent a child, that agreement is unenforceable.” Id. at 1251. But see Ferguson, 940 A.2d 1236 (Pa. 2007).
150 In Laura WW. V. Peter WW., 2008 WL 991130 (N.Y.A.D. 3 Dept. April 11, 2008), one New York court noted that: “Certainly, situations will arise where not all of these statutory conditions are present, yet equity
clear that a biological donor of sperm must be given the right to participate as a father if he has entered into an agreement to do so.\textsuperscript{151} There is now precedent allowing a donor to terminate his parental rights and obligations by contracts even in jurisdictions without a version of the UPA.\textsuperscript{152}

Clearly biology has had an impact on the earlier cases determining parentage. As the court in \textit{McIntyre v. Crouch} held, it would be unconstitutional to refuse to allow a biological donor the right to prove a contract existed for parentage.\textsuperscript{153} More recently, California courts created an intent-based right to parenthood in a case involving two potential biological mothers.\textsuperscript{154}

In \textit{Johnson v. Calvert}, the court was faced with a child custody battle between two women, one supplying an egg for fertilization and one contracted as a surrogate.\textsuperscript{155} In choosing the genetic mother over the birth mother, the California court noted that pre-

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\textsuperscript{151} \textit{McIntyre v. Crouch}, 780 P.2d 239 (Or. Ct. App. 1989) (holding that a “donor” of semen has a right to fatherhood under “the Due Process Clause of the Fourteenth Amendment if he can establish that he and respondent agreed that he should have the rights and responsibilities of fatherhood and in reliance thereon he donated his semen.” \textit{Id.} at 245.

\textsuperscript{152} See \textit{Ferguson v. McKiernan}, 940 A.2d 1236 (Penn. 2007).

\textsuperscript{153} \textit{Id.}


\textsuperscript{155} \textit{Id.} at 778.
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conception intent is what controlled. The majority opinion challenges the dissent for attempting to invoke the “best interests of the child standard” in determining parentage. The court notes, in part, that “[s]uch an approach raises the repugnant specter of governmental interference in matters implicating our most fundamental notions of privacy, and confuses concepts of parentage and custody. . . . It may be argued that, by voluntarily contracting away any rights to the child, the gestator has, in effect, conceded the best interests of the child are not with her.” This approach allows parties to decide what parentage role is best in their particular situation – the parties that are the most informed of the facts surrounding their decision to parent. Further, it removes potential bias of judges with a negative view of lesbian and gay relationships.

The suggested intent rule for contracts does not negate the “best interest of the child” standard. It merely places it in its proper role. At least one court has opined on the possibility of having contracts in a co-parenting relationship, stating that it does not

156 Id. at 782. The Court noted: “Because two women each have presented acceptable proof of maternity, we do not believe this case can be decided without enquiring into the parties’ intentions as manifested in the surrogacy agreement. Mark and Crispina are a couple who desired to have a child of their own genetic stock but are physically unable to do so without the help of reproductive technology. They affirmatively intended the birth of the child, and took the steps necessary to effect in vitro fertilization. But for their acted-on intention, the child would not exist.” Id.

157 Id. at 782 n.10. (“Thus, under our analysis, in a true “egg donation” situation, where a woman gestates and gives birth to a child formed from the egg of another woman with the intent to raise the child as her own, the birth mother is the natural mother under California law. The dissent would decide parentage based on the best interests of the child. Such an approach raises the repugnant specter of governmental interference in matters implicating our most fundamental notions of privacy, and confuses concepts of parentage and custody. Logically, the determination of parentage must precede, and should not be dictated by, eventual custody decisions. The implicit assumption of the dissent is that a recognition of the genetic intending mother as the natural mother may sometimes harm the child. This assumption overlooks California’s dependency laws, which are designed to protect all children irrespective of the manner of birth or conception. Moreover, the best interests standard poorly serves the child in the present situation: it fosters instability during litigation and, if applied to recognize the gestator as the natural mother, results in a split of custody between the natural father and the gestator, an outcome not likely to benefit the child. Further, it may be argued that, by voluntarily contracting away any rights to the child, the gestator has, in effect, conceded the best interests of the child are not with her.”)

158 Id.
affect or weaken any standards of “best interests of the child.” It has also been suggested that in the face of intent-based decisions for custody, “best interests of the child” should continue to have a significant role. In AI cases of lesbian co-parents and donor contracts, intent should be the primary consideration in determining parentage of a child, whether that involves lesbian co-parents or termination of the rights of a donor. However, in the event of a split between the co-parents, then a court determining custody should invoke the “best interests of the child” standard – not to determine parentage which has already been established by intent, but to determine custody, visitation and support from the lesbian co-parent. A clear separation of these concepts is possible and preferable.

VII. Conclusion

Obviously, the nature of family in the United States is changing. In the 80s, when the fictional Murphy Brown stood up to literal Dan Quayle to argue for her right as a single parent, Candace Bergen and her supportive television audience could not have imagined where the American family would be today. In fact, the demise of the notion that “the American family” is some monolith that the courts should uphold and protect is long overdue. The most recent U.S. Census indicates there are 105.5 million households

159 In a co-parenting situation, one Massachusetts court described the interplay of the best interests standards with contracts as follows: “We disagree with the dissent’s assertion that ‘parenthood by contract’ would weaken the ‘best interests’ standard. . . . Where a person's obligation to support a child is established, a court uses the ‘best interests’ standard to measure whether and how that obligation is being fulfilled. However, this standard is irrelevant unless and until the person in question has a legal relationship to the child. Here, where there is no legal relationship (other than an unenforceable contract), the ‘best interests’ standard does not come into play.” T.F. v. B.L., 813 N.E.2d 1244, 1250 n.6 (Mass. 2004).

160 See Sanja Zgonjanin, What Does It Take to be a (Lesbian) Parent? On Intent and Genetics, 16 HATINGS WOMEN’S L.J. 251 (2005) (noting that “[w]hile the advocates of nontraditional family rights include intent as an approach to solving parentage disputes between lesbian parents, it is clear that the intent must not be the determinative factor considered in isolation.”) Id. at 279.

161 While this article does not presume to address all of the problems involved in the “best interest of the child” standard, one issue that must be addressed, even under the proposed scenario is that all sexual orientation bias be removed from determining “best interests of the child.”
in the USA. Of this 105.5, 5.5 million of these consist of unmarried partnerships.\textsuperscript{162} Of these 5.5 million, at least 595,000 consist of same-sex partners. That means that the face of the “traditional” family in the United States is sufficiently “non-traditional.” And, whether the U.S. legal system is prepared to provide them Constitutional rights, there are 10,456,405 people who identify as gay or lesbian living in the United States. Sodomy laws have been rendered unconstitutional.\textsuperscript{163} Several states have granted the right to gay marriage or civil unions.\textsuperscript{164} In fact, “the love that dare not speak its name” is now talked about in almost every political debate.

The legal issues to be handled are not, however, spoken of as frequently. In fact, just as with interracial relationships in the 1960s, social norms in this country have far out-distanced the legal system. The issues regarding civil rights for gay and lesbian Americans abound, and the courts may be well on their way to addressing gay marriage or civil unions. But laws regarding gay adoption are still woefully vague. And laws protecting the rights of lesbian potential parents are practically non-existent. These issues will likely be settled in case after case, with wide discrepancies depending on the state in which or the judge by which the case is heard. Clarifications to the UPA, including thorough consideration of “unwed” mothers and, more specifically, lesbian mothers, would begin to remedy this gap in legislation. Acceptance of contracts between sperm donors and donees would further remedy this situation. Until then, however,

\textsuperscript{162}U.S. Census Bureau, Profile of General Demographic Characteristics, available at http://factfinder.census.gov/servlet/QTTable?_bm=y&-geo_id=01000US&-qr_name=DEC_2000_SF1_U_DP1&-ds_name=DEC_2000_SF1_U.


\textsuperscript{164}Only Massachusetts and California grant full marriage rights for same-sex couples. \textit{Goodridge v. Dept. of Pub. Health}, 798 N.E.2d 941 (Mass. 2003) (ruling that the Massachusetts state constitution prohibits the denial of same-sex marriage rights) and \textit{In Re Marriage Cases}, 2008 WL 2051892 (Cal. May 15, 2008) (holding that the California state constitution guarantees the right to marry to all individuals and couples regardless of sexual orientation).
thousands of gay and lesbian parents live in this country in fear that their parental rights might be taken away. What is more, the children of these parents are being taught that they and their parents are second-class citizens in a country that purported to provide “equal protection under the law” and that “all men,” or in this case, all men and women, gay or straight, “are created equal.”