2019

Who's Your Daddy?: In Vitro-Fertilization and the Parental Rights of the Sperm Donor

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Recommended Citation
Watkins, Elizabeth (2019) "Who's Your Daddy?: In Vitro-Fertilization and the Parental Rights of the Sperm Donor," University of Florida Journal of Law & Public Policy. Vol. 30: Iss. 1, Article 6. Available at: https://scholarship.law.ufl.edu/jlpp/vol30/iss1/6

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WHO’S YOUR DADDY?: IN VITRO-FERTILIZATION AND THE PARENTAL RIGHTS OF THE SPERM DONOR

Elizabeth Watkins

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INTRODUCTION

A young man, 25-years-old, decides to donate his sperm to earn some extra money. He makes an appointment at a clinic where he eventually donates. His sperm now sits in a freezer at a sperm bank. Flash forward six months when a 35-year-old female, who has always wanted a child but has never been able to conceive, decides it is time to start a new chapter in her life and have a child on her own. She goes to the same sperm bank and looks at the available donor profiles which include the donor’s medical history and genetic test summary, as well as his age, ethnicity, hobbies, and talents. She reaches a picture of an attractive young man, age 25, with brown hair and a nice smile. She looks through his profile and finds that his ethnic background matches hers and they have many hobbies in common. She decides this is the one. She undergoes a procedure called in vitro-fertilization and gives birth nine months later to a baby girl. Little does that sperm donor know that he is
now a father. His sperm is then chosen by another woman months later, and yet again a year after that. Unbeknownst to him, within seven years, the donor is the biological father of fifteen children.

Curious about his donation, he eventually decides to contact the sperm bank and find out if he was ever chosen as a donor. Stunned by the news that fifteen procedures were successful, he is unsure what he should do now. Now a successful 33-year-old, he feels responsible for these children and has a lot to offer them—he could give them a comfortable home, an education, and money. Should he search for his biological children? Would they want to meet him too? Does he have any legal right to these kids at all?

This Note considers and analyzes this last question: Do sperm donors have parental rights to their biological children conceived through in vitro-fertilization? To answer this question, this Note begins by discussing the history of in vitro-fertilization and the different kinds of sperm donors. Next, it explains the existing state laws, or lack thereof, regarding the parental rights of sperm donors. Finally, this Note analyzes common law that supports the conclusion that states must have more uniformity with in vitro-fertilization laws and decisions in order to put sperm donor parentage issues to rest. With this new revolutionary technology in reproduction, the law also needs to revolutionize.

I. HISTORY OF IN VITRO-FERTILIZATION

In vitro-fertilization ("IVF"), surrogacy, and gestational carriers are some of the different types of assisted reproductive technology. Specifically, Patrick Steptoe, a practicing gynecologist, and Robert Edwards, a professor of human reproduction at Cambridge University, introduced IVF in the 1970s. Steptoe and Edwards created IVF for women who had trouble conceiving due to damaged or blocked fallopian tubes. IVF is a procedure where the sperm and egg are fertilized "outside of the body," in a petri dish. The embryos are conceived when viable male sperm and female eggs are combined in the petri dish with a solution of saline and nutrients which is then incubated—similar to the conditions of the female uterus.

3. Id.
4. See id.
A. The Woman’s Process

During the early years of IVF, the process was very demanding for women, much more so than today. For example, women were required to spend three to four weeks as inpatients during which their urine was collected every three hours to monitor their hormone levels. During this time, this process was the only way to monitor hormones, and it resulted in the women being constantly awakened in the middle of the night.

Now, physicians give hormone therapy to women two weeks before retrieving the eggs to increase the likelihood of retractor healthy eggs. Women are no longer treated as inpatients, but as day patients with no “three-hourly urine collections.” To determine when the eggs are ready for fertilization, women undergo ultrasounds and blood tests. Once the eggs have reached their “optimal time,” they are retracted and placed in a petri dish for fertilization. Once the egg and sperm are fertilized in the petri dish, the fertilized eggs are placed in the uterus for implantation. On average, seven to nine eggs are fertilized in the petri dish and become embryos. The more embryos placed in the uterus, the greater the chance of pregnancy. However, the transfer of many embryos increases the risk of multiple pregnancies (e.g., the “Octomom”); therefore, the transfer of more than two embryos is discouraged. Some of these fertilized eggs are placed in the uterus, while the others are frozen for future use in case the embryos fail to implant. This process of freezing the eggs is called...

7. Id.
8. Id.
12. Zhu, *supra* note 2 (explaining that optimal time is defined as “when the eggs are almost ready for fertilization”).
14. Zhu, *supra* note 2 (explaining that in cases of male fertility problems, a physician may manually inject a sperm into an egg, a process called intracytoplasmic sperm injection).
16. MY VIRTUAL MED. CTR., *supra* note 5.
17. *See, e.g.*, The Associated Press, *8 facts about ‘Octomom’ Nadya Suleman*, USA TODAY (Jan. 24, 2014, 5:27 AM), https://www.usatoday.com/story/news/nation/2014/01/24/8-facts-octomom/4816235/ (describing how implementation of twelve embryos resulted in the birth of octuplets). Nadya Suleman has been given the name “Octomom” because she has given birth to fourteen children through IVF, six of whom were born through multiple treatments but eight of whom were a result of implanting twelve embryos. Id.
18. Id.; see also MY VIRTUAL MED. CTR., *supra* note 5 (“[T]he transfer of more than two embryos per cycle is discouraged by Australian ethical guidelines.”).
cryopreservation.\textsuperscript{20} If the implantation in the uterus is successful, the embryo will grow in the woman as if it was conceived naturally.\textsuperscript{21}

\section*{B. Outcomes of In Vitro-Fertilization}

The first “test-tube baby,”\textsuperscript{22} Louise Brown, was born in England on July 25, 1978, and was a production of Steptoe’s and Edwards’s work.\textsuperscript{23} The first baby in the United States to be born via IVF, Elizabeth Carr, was born 1981.\textsuperscript{24} Over three million children have been born through the assistance of IVF.\textsuperscript{25} The success rate of IVF treatments has increased due to scientific discoveries.\textsuperscript{26} In the 1990s, the pregnancy rate per embryo transferred to the uterus was 15\% compared to 35\% in 2008.\textsuperscript{27} In the United States in 2013, approximately 1.5\% of children born were born through assisted reproductive technology.\textsuperscript{28} Since the 1970s, women in the United States have undergone procedures involving third-party sperm donors, as well as moral and legal issues that followed.\textsuperscript{29}

From the beginning, the Roman Catholic Church criticized IVF as immoral.\textsuperscript{30} The Church saw IVF as unnatural conception and viewed it with skepticism.\textsuperscript{31} The “test-tube bab[ies]” were not seen as natural through the eyes of the public.\textsuperscript{32} Furthermore, general concerns consisted of the “depersonalization” of the reproduction process and the destruction of unused embryos during IVF.\textsuperscript{33} Despite these critiques, IVF has helped many couples who were previously unable to conceive children to do so.\textsuperscript{34}

During an interview with “Good Morning America,” Michelle Obama revealed that Malia and Sasha, her two daughters, were conceived

\begin{thebibliography}{99}
\bibitem{20} Zhu, \emph{supra} note 2.
\bibitem{21} \textit{My Virtual Med. Ctr.}, \emph{supra} note 5.
\bibitem{22} “Test-tube baby” is a name given to babies born through IVF because the embryo is created outside of the body, in a lab and then put into the woman’s body to finish developing. \textit{Test-tube baby,} \textsc{Merriam-Webster Dictionary}, \url{https://www.merriam-webster.com/dictionary/test-tube%20baby} (last visited Mar. 15, 2019).
\bibitem{23} Zhu, \emph{supra} note 2.
\bibitem{25} Zhu, \emph{supra} note 2.
\bibitem{26} \textit{My Virtual Med. Ctr.}, \emph{supra} note 5.
\bibitem{27} \textit{My Virtual Med. Ctr.}, \emph{supra} note 5.
\bibitem{28} Thompson, \emph{supra} note 24, at 131.
\bibitem{29} Zhu, \emph{supra} note 2.
\bibitem{30} Zhu, \emph{supra} note 2.
\bibitem{31} Zhu, \emph{supra} note 2.
\bibitem{32} Brian, \emph{supra} note 6.
\bibitem{33} Thompson, \emph{supra} note 24, at 131.
\bibitem{34} \textit{My Virtual Med. Ctr.}, \emph{supra} note 5.
\end{thebibliography}
through IVF. Professional women like Michelle Obama are more likely to undergo IVF because they can afford it. IVF costs $17,000 on average but many women pay more depending on how many treatments it takes for the implantation to be successful.

During the 1990s, many states began to pass bipartisan legislation allowing health insurance coverage of IVF. In 15 states, some fertility procedures are covered through private health insurance plans. Of these states, Arkansas, Connecticut, Hawaii, Illinois, Maryland, Massachusetts, New Jersey, and Rhode Island have specific IVF mandates, where private health insurance companies are required to cover at least some cost of IVF. Additionally, Delaware recently passed a bill that requires health insurance companies to provide at least limited IVF coverage. Even in these states where some coverage is mandatory, many women are still paying thousands of dollars out-of-pocket.

II. IN VITRO-FERTILIZATION AND THE SPERM DONOR

There are three types of sperm donors: (1) Anonymous Donors; (2) Known Donors; and (3) ID Disclosure Donors. Consider the hypothetical in the beginning of this Note. Let’s name the sperm donor Chris and the woman Amy. Chris made an anonymous donation to a sperm bank, accordingly, he would be considered an Anonymous Donor. Consider another scenario, one in which Amy and Chris are friends, where Amy approaches Chris and asks him to be the sperm donor. If Chris agrees, he now will be considered a Known Donor, or a Directed Donor. The final scenario is a compromise between the prior two: Chris can consent to having his identity revealed to children conceived from his sperm donation when they reach 21 years old. Here, Chris would be considered an ID Disclosure Donor.

36. Id.
37. Id.
38. Thompson, supra note 24, at 131.
39. Thompson, supra note 24, at 132.
40. Thompson, supra note 24, at 132.
41. Beers, supra note 35.
42. Beers, supra note 35.
44. Id. (explaining “[a] Directed Donor is a donor who is known to the recipient of the sperm samples.”).
45. Id. (explaining “[a]n ID Disclosure Donor is a sperm donor who has consented to having his identity released to children conceived of his specimens when they reach the age of 21.”).
A. Anonymous Sperm Donor

An Anonymous Donor is a sperm donor who does not consent to the release of his identity to any children born from his donation. In other words, the sperm bank is not allowed to release his identity. However, while the donor has decided against revealing identity at that time, he may still have the opportunity to do so in the future. For example, a sperm bank in California called Cryobank allows a child of a sperm donor to request information regarding the identity of the biological father. The child can do so when he or she has reached the age of 18 and only the child may initiate this contact. Cryobank will then contact the donor, who will decide if he wants to allow Cryobank to reveal his identity to his biological child. Anonymous sperm donation provides the sperm donor with the ultimate decision to remain anonymous or not.

B. Known or Directed Sperm Donor

In some cases, the donor is anonymous. In other cases, the donor is a friend of the recipient, or a “known donor.” In this case, Amy’s child will know her biological father, Chris, affording them the potential for a lifelong connection. Lawyers recommend that the donor and recipient explore the involvement of the known donor in the child’s life. It is also recommended to keep in mind that the parties’ intentions can change over time. For instance, the donor may want contact now, but this could change if the donor later starts a family of his own or for other reasons. Because of this, it is important that the sperm donor and the recipient consult an attorney to draft the rights of the relationship with the future child. Legal issues often arise when the intent of the parties is unclear. For instance, in our second scenario, with “Known Donor Chris,” it is possible that Chris did not want to be involved paternally in his child’s life. He simply was a friend who supplied the sperm. On the other hand, Amy may have wanted Chris to be involved from the beginning. Because

46. Id.
47. E.g., id.
49. Id.
50. Id.
51. Id.
53. See id.
54. See id.
of the ambiguity in these situations, it is very possible that Amy could sue Chris for child support and win, even though Chris never intended or wanted to be considered the father. In the reverse situation, Chris may want to support the child but Amy might not want him involved at all. Because of their friendship, the court could order Chris paternity rights or even custody of the child despite the mother’s refusal.

IVF has the potential to lead to a confusing array of possible parents. For example, if a couple obtains both the sperm and eggs from donors, the couple would not be biologically related to the child. In this example, who would be considered the legal parents, the biological couple or the intentional couple? This Note focuses some on the anonymous sperm donor but significantly considers the legal issues that arise from known sperm donations.

III. SPERM DONOR LAWS

State laws vary regarding sperm donors and their parental rights. Some states provide that if a donor is not the mother’s husband, then his rights to the child are non-existent—a scenario found in many marital presumption cases. The marital presumption exists in all states, either by common law or statute, and holds that there is a rebuttable presumption that a husband is the father of his wife’s children. This presumption supports the idea that what matters most is not the father’s biological connection with the child, but instead the father’s relationship with the mother.

In most states during the 1950s and 60s, unmarried fathers had no legal rights to their children whatsoever. However, the Supreme Court has since held that an unmarried father’s rights to his children are entitled to constitutional protection.

An anonymous donor to a sperm bank, usually signs away his right to the child before donating. Even though these outcomes are typical for

57. Tipton, supra note 55.
58. See Wendy G-M v. Erin G-M, 45 Misc. 3d 574, 577 (N.Y. Sup. Ct. 2014) (stating that public policy strongly favors legitimacy of children, and that the presumption that a child born to a marriage is the child of both parents in the marriage is one of the strongest and persuasive public policy known to law).
60. Id. at 2; see also Michael H. v. Gerald D., 491 U.S. 110, 154 (1989) (giving deference to the husband of the mother instead of the biological father when determining paternal rights).
62. Id.
63. Tipton, supra note 55.
anonymous sperm donors, for known donors, common law, state laws, and the Uniform Parentage Act are inconsistent. Because of these inconsistencies, many issues arise as to whether a sperm donor has parental rights to his child born through IVF.

A. Uniform Parentage Act

The Uniform Parentage Act ("UPA") was enacted in 1973 to clarify the ambiguities concerning unwed fathers and the lack of laws for sperm donors. During this time, Supreme Court decisions held that it was unconstitutional to discriminate against children born outside of marriage and to deny legal parental rights to fathers not married to the child's mother. The UPA was the result of the emerging non-traditional family norms and was an attempt to standardize state laws regulating parentage. However, the original language of the UPA mentioned only married women using sperm donors and excluded unmarried women: "[t]he donor of semen provided to a licensed physician for use in artificial insemination of a married woman other than the donor's wife is treated in law as if he were not the natural father of a child thereby conceived." Therefore, the original UPA did not regulate situations in which a donor donates to a single woman, like Amy.

Accordingly, legal issues developed regarding this scenario. For example, in C.M v. C.C., a 1977 case regarding a sperm donation to a single woman, the court ruled the sperm donor was the father with paternal rights. It reasoned that it is in the "child's best interests to have two parents whenever possible"—an important standard in paternity cases that will be further discussed later in this Note. After this ruling, known donors could be subject to liability for all parental responsibilities and obligations.

Furthermore, the 1973 version of the UPA does not allow paternal recognition of the sperm donor when the semen was "... provided to a licensed physician for use in artificial insemination of a married woman other than the donor's wife. ..." Under this language, if other means besides a licensed physician was used for the insemination, for example

65. Id.
66. Id.
67. UNIF. PARENTAGE ACT § 5(b) (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 1973) (emphasis added).
69. Id. at 825.
70. UNIF. PARENTAGE ACT § 5(b) (1973) (emphasis added).
if the parties performed the procedure on their own, then the sperm donor could be found to have paternal rights.\textsuperscript{71}

In 2009, William Marotta answered a Craigslist add for a sperm donor for a same-sex couple, Angie Bauer and Jennifer Schreiner.\textsuperscript{72} The parties entered into a written agreement wherein Marotta waived his parental rights.\textsuperscript{73} Upon the couple's separation when the child was three years old, the biological mother went to the state of Kansas for help and the state contacted Marotta for child support.\textsuperscript{74} In 2009, Kansas had adopted the 1973 version of the UPA that required a licensed physician for the insemination.\textsuperscript{75} However, Marotta and the couple did not use such a physician.\textsuperscript{76} He donated his sperm directly to the couple, who performed the procedure by themselves.\textsuperscript{77} Because Marotta did not follow the 1973 version of the UPA by using a licensed physician for the insemination, he was not afforded its protection, despite their written agreement.\textsuperscript{78} Therefore, he was still considered the father and was forced to pay child support.\textsuperscript{79} CNN Senior Medical Correspondent Elizabeth Cohen stated that, "[h]ad a physician carried out the insemination, that would not be the case, because Marotta would be able to document that he was a sperm donor and not the lover of the girl's mother."\textsuperscript{80} Cohen implies that having the "licensed physician" requirement is a way to document the donation and determine that Marotta had not been in a relationship with the biological mother where the child could have been conceived through intercourse, a scenario in which Marotta would not be able to dodge child support.

This case represents the problem in those states that have adopted the 1973 version of the UPA. The 1973 version overlooks the fact that many people cannot afford artificial insemination through a licensed physician because it can cost about three thousand dollars.\textsuperscript{81} It allows protection for those who can afford it but ignores the fact that many cannot.


\textsuperscript{72} Id. at 2.

\textsuperscript{73} Id.


\textsuperscript{75} UNIF. PARENTAGE ACT § 5(b) (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 1973).

\textsuperscript{76} Staple, supra note 71, at 3.

\textsuperscript{77} Staple, supra note 71, at 3.

\textsuperscript{78} CNN, supra note 74.

\textsuperscript{79} See CNN, supra note 74.

\textsuperscript{80} CNN, supra note 74.

these situations into consideration, the UPA was revised in 2000 and amended in 2002. The legislature again updated in 2017 to apply equally to same-sex couples and is not very different compared to the 2002 version.\textsuperscript{82}

Section 702 of the Uniform Parentage Act of 2017 states that, "[a] donor is not a parent of a child conceived by assisted reproduction."\textsuperscript{83} This section completely bars the parental rights of a donor, whether the recipient is married or unmarried.\textsuperscript{84} However, § 703 states that, "[a]n individual who consents under Section 704 to assisted reproduction by a woman with the intent to be a parent of a child conceived by the assisted reproduction is a parent of the child."\textsuperscript{85} Due to this section, it is possible for known donors to have parental rights depending on the intent of the donor. The consent needed for this to occur under § 704, "must be in a record signed by a woman giving birth to a child conceived by assisted reproduction and an individual who intends to be a parent of the child."\textsuperscript{86} Furthermore, if the parties do not consent pursuant to § 704(a), parentage can still be established under the UPA if the, "woman or the individual proves by clear-and-convincing evidence the existence of an express agreement entered into before conception that the individual and the woman intended they both would be parents of the child,"\textsuperscript{87} or "if for the first two years of the child's life, the individual resided together in the same household with the child and both openly held out the child as the individual’s child."\textsuperscript{88}

It is clear from this language that written consent from both parties gives the most protection, and the courts will honor what the parties decide in writing. However, it is trickier when there is no written consent, and the parties have to rely on an express agreement before conception under § 704 to establish parentage. Parties that do not consent in writing have to prove the express agreement by clear and convincing evidence, which is a high burden on the parties.\textsuperscript{89} Some courts have strictly applied written consent requirements, producing results that are inequitable and harmful to the child.\textsuperscript{90} Other courts, however, rely on common law doctrines such as public policy arguments to do justice in such cases.\textsuperscript{91}

\textsuperscript{82} \textit{Unif. Parentage Act} § 103 CMT. (Nat'l Conf. of Comm'rs on Unif. State Laws 2017).
\textsuperscript{83} \textit{Unif. Parentage Act} § 702 (2017).
\textsuperscript{84} \textit{Id.}
\textsuperscript{85} \textit{Unif. Parentage Act} § 703 (2017).
\textsuperscript{86} \textit{Unif. Parentage Act} § 704(a) (2017).
\textsuperscript{87} \textit{Unif. Parentage Act} § 704(b)(1) (2017).
\textsuperscript{88} \textit{Unif. Parentage Act} § 704 CMT (2017).
\textsuperscript{89} \textit{Id.}
\textsuperscript{90} \textit{Id.}
\textsuperscript{91} \textit{Id.}
In re Parentage of M.J.\textsuperscript{92} discussed the relationship between Raymond Banary and Alexis Mitchell, who gave birth to twins through artificial insemination.\textsuperscript{93} The donor, Banary, was a friend of Alexis for over ten years.\textsuperscript{94} Mitchell asked the court for child support.\textsuperscript{95} This case considered whether the lack of a written agreement prevents the establishment of a parent-child relationship and the burden of child support.\textsuperscript{96} Even though the court established that the written consent requirement precluded the obligation of child support, the court also looked at the enforcement of a support obligation through an estoppel, or waiver theory and decided that the lack of a written agreement did not bar further inquiry into the parties’ decision to use artificial insemination.\textsuperscript{97} The court held that Banary is considered a parent under common law principles because it found that through his alleged conduct, Banary consented to using his sperm for the artificial insemination.\textsuperscript{98} The court reasoned that to find otherwise would deprive the children of financial support simply because of a technicality.\textsuperscript{99}

Most states have adopted a version of the UPA. The 2017 version of the UPA has only been enacted in three states—California, Vermont and Washington—but it has also been introduced in Connecticut and Pennsylvania.\textsuperscript{100} The 2000 version of the UPA has been adopted in 11 states.\textsuperscript{101} Additionally, 14 states have adopted the 1973 version of the UPA.\textsuperscript{102} Considering the differences between each version of the Act, the outcome of each case in different states can vary. Additionally, a few states lack any statutory authority for sperm donors, which results in even more unbalanced decisions regarding these issues.

B. Florida State Laws on Sperm Donors

The state laws and courts that have considered parentage issues have formed statutes, which attempt to reconcile these sperm donor parentage

\textsuperscript{92} 787 N.E.2d 144 (Ill. 2003).
\textsuperscript{93} Id. at 146.
\textsuperscript{94} Id.
\textsuperscript{95} Id. at 147.
\textsuperscript{96} Id. at 148–49.
\textsuperscript{97} Id. at 150, 152.
\textsuperscript{98} In re Parentage of M.J., 787 N.E.2d at 152.
\textsuperscript{99} Id.
issues. For example, Florida's state law contains a chapter titled "Determination of Parentage." In this chapter, § 742.14 of Florida Statutes (2018) states that, “[t]he donor of any egg, sperm, or preembryo . . . shall relinquish all maternal or paternal rights and obligations with respect to the donation or the resulting children.” Accordingly, Florida takes the stance that a sperm donor has no parental rights and Florida cases have reinforced that position. However, this law does not include the sperm donor of the “commissioning couple or a father who has executed a preplanned adoption agreement . . . .” In all, the Florida statutes simply allow paternal obligations only in sperm donor cases with a couple or a father with an adoption agreement. If this is not the case, then the sperm donor does not have any parental rights under this statute.

The problem with this analysis is that it does not account for situations in which giving the sperm donor parental rights could be in the best interests of the child. The statute fails to address this circumstance. What if the sperm donor, like Chris, is a genuine person who could be a great father figure? What if his living situation could benefit the child who may not be in the best financial circumstances? This is what the state statute misses because it denies any parental right to the sperm donor despite their situation and the best interests of the child. A more recent Florida case sheds some light on this issue.

In a 2013 case regarding an egg donation to a birth mother, who was previously in a same-sex relationship with the donor, the egg donor filed a petition to establish parental rights after the couple split. The Florida Supreme Court determined that the mother was a “donor” pursuant to § 742.14 of the Florida Statutes. If the Court stopped here, the egg donor would not have a parental claim to the child because under the statute she relinquished all maternal rights when she donated her egg. However, the Court took another approach to this situation and looked at the constitutionality of the statute. The Court concluded that the egg donor’s right to maintain a relationship with her biological child was a fundamental right deserving protection through the Due Process Clauses of the Florida and United States Constitutions, along with Florida’s constitutional privacy provision. Accordingly, the state did not have a compelling interest in depriving the egg donor of her right to be a

108. Id. at 333.
109. Id. at 332.
110. Id. at 340.
In the Court’s analysis, it was helpful that the donor and the birth mother lived together as a couple, and jointly assumed rights and responsibilities for their daughter after her birth. In this case, Florida found a way to allow parentage despite its lack of statutes covering this scenario. Even though this situation involves an egg donor and not a sperm donor, it still applies to sperm donations because it interprets the same relevant statute.

IV. IMPORTANT COMMON LAW ANALYSES AND INCONSISTENCIES

The UPA attempts to resolve all artificial insemination parentage disputes. However, as previously stated, not all states have adopted the UPA and many lack authority that deals with parental rights of sperm donors. The states that have not adopted the UPA are forced to rely on common law principles. Even the states that follow the UPA still run into ambiguities. For example, when the parties do not have written consent pursuant to § 704, the parties have to follow the high burden of proving parentage by clear and convincing evidence. The case-by-case analysis of this burden has resulted in inconsistent case holdings.

Courts consider what is in the best interest of the public. In the circumstances of sperm donors, what would be the best interest of the public? Would upholding agreements be? What about the best interest of the child? Besides the language in the UPA, courts look at public policy arguments to determine outcomes of these cases. Some states look at the intent of the parties and take the child’s best interest into consideration to determine the outcome of the paternity battle of the sperm donor, while other courts focus on the agreement between the donor and the biological mother. Below, different analyses of sperm donor parentage found in case law are discussed, highlighting the inconsistencies of these different standards.

A. The Intent of Parties

When states face ambiguities within the UPA or their state laws regarding parentage, they sometimes look at the intent of the parties

111. Id. at 341.
112. Id.
113. Staple, supra note 71, at 4.
involved. *Johnson v. Calvert*[^117] was one of the first cases to discuss the intent of the parties, or intent-based parentage.[^118] This California surrogate case arose from an agreement between a married couple, the Calverts, and Anna Johnson.[^119] The couple arranged for Anna to be impregnated with their embryo, carry it to term, and for her to relinquish her parental rights to the child upon birth in exchange for $10,000.[^120] During the pregnancy, the couple and Anna’s relationship deteriorated and both parties sought for parental rights of the unborn child.[^121] The court noted that the couple intended that the child be born through IVF and that “[b]ut for their acted-on intention, the child would not exist.”[^122] Further, the court stated that the aim of the agreement between the parties was to bring the Calverts’ child into the world, not for the Calverts to donate a zygote to Anna.[^123] In sum, because the intent of the parties was for Anna to carry the Calverts’ child to term and to exclude Anna’s parental rights, the court ruled in the couple’s favor.[^124]

This intent-based parentage analysis has been used in many other cases over the years. *In re Thomas S. v. Robin*[^125] describes how this intent-based parentage analysis is used in sperm donor situations. In this case, a lesbian couple met Thomas Steel, who agreed to be a known donor for the couple, but no written agreement was ever signed.[^126] There were approximately twenty-six visits between Steel and the child over the years.[^127] The couple eventually wanted the visits to stop. In response, Steel moved for an order of filiation and visitation rights.[^128] When the court analyzed the parental rights of Steel, it looked at the intent of the parties rather than the oral agreement they had made.[^129] The court looked to the functional relationship between the mother and sperm donor.[^130] Through their relationship and actions, they exhibited mutual intent to have the biological father assume a paternal role in the child’s life.[^131] Because there was no concrete written agreement, the court was able to

[^118]: See id. at 782.
[^119]: Id. at 778.
[^120]: Id.
[^121]: Id.
[^122]: Id. at 782.
[^123]: Johnson, 851 P.2d at 782.
[^124]: Id.
[^126]: See id. at 315.
[^127]: Id. at 299.
[^128]: Id.
[^129]: Id. at 300.
[^131]: Id.
[^132]: Id. at 490–91.
reject the oral agreement the parties had and use the intent based analysis instead.\textsuperscript{133}

A more recent case also discussed the intent-based parentage. In \textit{Ferguson v. McKiernan},\textsuperscript{134} the parties were intimate partners for some time, but McKiernan consistently refused to marry Ferguson or bear a child with her through IVF.\textsuperscript{135} Only when Ferguson promised to release him from any of the financial burdens associated with paternity and agreed that she would raise the child alone, did McKiernan consent to becoming her sperm donor.\textsuperscript{136} During the pregnancy, McKiernan and Ferguson remained friends without any romantic relationship.\textsuperscript{137} McKiernan later married another woman and had two kids of his own.\textsuperscript{138} Even so, Ferguson sought child support after the birth of twins as a result of the IVF through McKiernan’s sperm donation.\textsuperscript{139} The question presented in this case was whether a mother and sperm donor could enter an agreement for IVF, where the donor relinquishes his right to visitation with the resultant child in return for the mother’s agreement to not seek child support.\textsuperscript{140} The court considered the oral agreement and actions of both, the sperm donor and the mother, to determine the intent of the parties and to conclude that McKiernan did not owe child support to Ferguson.\textsuperscript{141} For example, Ferguson told McKiernan that she would not ask for child support; they attempted to hide McKiernan’s biological relationship from close family and friends; additionally, McKiernan and Ferguson acted in accordance with their initial agreement for five years after the birth of the twins.\textsuperscript{142} The court found that this was enough to prove that the parties never intended for McKiernan to have any parental rights.\textsuperscript{143}

In \textit{Mintz v. Zoernig},\textsuperscript{144} the court faced the issue of whether a known sperm donor is responsible for child support when there was a pre-donation agreement, releasing the donor from all associated financial obligations.\textsuperscript{145} The donor ultimately donated twice per the mother’s request and biologically fathered two children.\textsuperscript{146} After the birth of the

\begin{thebibliography}{99}
\bibitem{133} Id. at 491.
\bibitem{134} 940 A.2d 1236 (Pa. 2007).
\bibitem{135} Id. at 1239.
\bibitem{136} Id.
\bibitem{137} Id. at 1240.
\bibitem{138} Id. at 1241.
\bibitem{139} Id. at 1240.
\bibitem{140} \textit{Ferguson}, 940 A.2d at 1242.
\bibitem{141} See id. at 1248.
\bibitem{142} Nix, \textit{supra} note 130, at 492.
\bibitem{143} See \textit{Ferguson}, 940 A.2d at 1248.
\bibitem{144} 198 P.3d 861 (N.M. Ct. App. 2008).
\bibitem{145} Id. at 862.
\bibitem{146} See id.
\end{thebibliography}
children, the father had significant contact with them, but the mother served as the primary parent and the donor did not pay child support. Eventually, the mother filed a paternity action, seeking child support for the children. Despite the agreement releasing the father of financial responsibility for the children, the court concluded that because he held himself out to be the children's father through regular visits, and because he acknowledged that he is the natural father, he was liable for child support. Even though the parties agreed to one thing before the birth of the children, their actions and intentions when the children were born indicated another, and the court found their actions to be dispositive.

B. Contracting Away Their Rights

In addition to looking at the intent of parties, courts will sometimes determine that the agreements between parties should be upheld because of the importance to protect contractual rights. People are allowed the freedom of contract, therefore, they can contract their parental rights in sperm donor cases. Contract law is another avenue of analysis that the court uses to determine the outcome of these cases. The case of Ferguson v. McKiernan, discussed above, sheds some light on this analysis. The case looked at the contract between the parties, to determine the intent of the parties, and gave insight to the importance of the contractual rights of the parties. The court stated that if the two parties could not contract to remove the paternity rights of a known sperm donor:

[It] would mean that a woman who wishes to have a baby but is unable to conceive through intercourse could not seek sperm from a man she knows and admires, while assuring him that he will never be subject to a support order and being herself assured that he will never be able to see custody of the child. Accordingly, to protect herself and the sperm donor, that would-be mother would have no choice but to resort to anonymous donation or abandon her desire to be a biological mother, notwithstanding her considered personal preference to conceive using the sperm of someone familiar, whose background, traits, and medical history are not shrouded in mystery. To much the same end, where a would-be donor cannot trust that he is safe from a future support action, he will be considerably less likely to provide his

147. Id.
148. Id.
149. Id. at 864.
150. Mintz, 198 P.3d at 864.
151. 940 A.2d 1236 (Pa. 2007).
152. Id. at 1242.
sperm to a friend or acquaintance who asks, significantly limiting a would-be mother's reproductive prerogatives.\textsuperscript{153}

The court in \textit{Ferguson} ultimately decided that the agreement between the parties should be considered over the interest of the children in the decision to afford child support.\textsuperscript{154} Specifically, the court recognized that to rule in favor of McKiernan denies support to two children "who did not ask to be born into this situation," but the court further reasoned that absent the parties' agreement the twins would not have been born at all.\textsuperscript{155}

This contractual approach offers the court a way to determine what should be done in paternity cases where the donor and mother used an oral or written agreement.\textsuperscript{156} To use this approach, the parties must prove that an agreement was created.\textsuperscript{157} To demonstrate this, one party must show that he or she relied on the agreement.\textsuperscript{158} For instance, one court ruled that a non-biologically related man was considered a father because the mother relied on his conduct and assurance that he would support the child.\textsuperscript{159} Another court ruled that a man who acted like the father for two years and the mother relied on such commitment was the father.\textsuperscript{160} Essentially, the parentage of children under this standard would be decided through the realms of contract law where there is an offer, acceptance, and consideration.

Should we allow parental rights to be established through contract law? If so, what other rights would we be able to contract away? As stated by Marjorie Shultz, our society favors the fulfillment of individual purpose and the freedom of individual choice and liberty.\textsuperscript{161} Many oppose parentage through contract law and reason that contracts may be at odds with children's welfare, that the contract results in the commodification of children and, further, that IVF exploits women.\textsuperscript{162} However, if we do not honor paternity contracts, will that deter future mothers from undergoing IVF who would prefer to form a contract with a known donor, instead of going the anonymous route? Additionally, would we be undermining the force of contract law by not upholding these agreements? Contracts, as Sarah Abramowicz argues, would enable

\begin{itemize}
\item \textsuperscript{153} Id. at 1247.
\item \textsuperscript{154} See id. at 1248.
\item \textsuperscript{155} Id.
\item \textsuperscript{156} Nix, supra note 130, at 493.
\item \textsuperscript{157} Nix, supra note 130, at 493.
\item \textsuperscript{158} Nix, supra note 130, at 493.
\item \textsuperscript{159} Nix, supra note 130, at 493–94 (citing Markov v. Markov, 758 A.2d 75, 83 (Md. 2000)).
\item \textsuperscript{160} Nix, supra note 130, at 493 (citing Perkins v. Perkins, 383 A.2d 634, 634, 636 (Conn. Super. Ct. 1977)).
\item \textsuperscript{162} Sarah Abramowicz, \textit{Contractualizing Custody}, 83 FORDHAM L. REV. 67, 114 (2014).
\end{itemize}
parents to provide their families with stability, security and freedom from government intervention, which would serve the welfare of both the children and the parents.163

C. The Best Interests of The Child

Even though enforcing the agreement of the parties involved in sperm donation is an important public policy, it is not the only one. Some courts also look at what are the best interests of the child and many have determined that the interests of the child is the most important public policy to consider in these circumstances. In agreement with this argument, Martha Ertman wrote that “contracts affecting children are not enforceable in the way that most other contracts are enforceable, primarily because the State has an interest in safeguarding the best interests of children that trumps the parties’ intentions.”164 Additionally, Justice Eakin’s dissenting opinion in Ferguson states that the primary concern in child support proceedings in the best interests of the child.165 Further, Eakin concludes that:

[t]his private contract involves traditional support principles not abrogated by the means chosen by the parents to inseminate the mother, and I would apply the well-settled precedent that the best interest of the child controls. A parent cannot bargain away the children’s right to support. These children have a right to support from both parents, including the man who is not an anonymous sperm donor, but their father.166

In addition to the Justice Eakin’s dissent, the majority in C.M. v. C.C.167 ruled that the best interests of the child is the right public policy to follow.168 C.M. donated sperm to C.C. during a time when they were dating and contemplating marriage.169 Despite their relationship, both parties had different intentions regarding the child.170 C.M. assumed he would act as a father toward the child but C.C. testified that C.M. was only to be a visitor; at this point, the relationship between the two broke off.171 The court was then to decide whether C.M. is the father of the child

163. Id. at 129.
166. Id. at 1251 (Eakins, J., dissenting).
168. See id. at 825.
169. Id. at 821.
170. See id. at 822.
171. Id.
or whether he is not simply because the sperm used was not transferred to C.C. through intercourse.\textsuperscript{172} The court reinforced the public policy of the child's best interest by stating:

It is in a child's best interests to have two parents whenever possible. The court takes no position as to the propriety of the use of artificial insemination between unmarried persons, but must be concerned with the best interest of the child in granting custody or visitation, and for such consideration will not make any distinction between a child conceived naturally or artificially. In this situation a man wants to take upon himself the responsibility of being a father to a child he is responsible for helping to conceive.\textsuperscript{173}

The court further discussed how C.M. is not an unfit father and has shown a genuine interest in the child.\textsuperscript{174} Further, the court noted that he is a teacher and is financially capable of contributing to the support of the child.\textsuperscript{175} Through this reasoning, the court held that C.M. is the natural father of the child and was entitled to visitation rights.\textsuperscript{176}

In child custody cases resulting from divorce, the court considers a number of factors to determine the best interests of the child that include but are not limited to: (1) the physical and emotional needs of the child; (2) capability and desire of the parents to meet the child’s need; (3) the child’s preference; and (4) any evidence of domestic violence, child abuse, or neglect.\textsuperscript{177} The state’s interest in the interests of children potentially conflicts with the parents’ private right of contract law. For example, a woman contracts with a known sperm donor to use his sperm and for him to not be involved in the child’s life. However, the court uses these factors to determine that it is in the child’s best interest for the sperm donor to be the father, therefore, the sperm donor is given parental rights, thus undermining any contract the parties might have had that stated other intentions.

Additionally, the best interest standard could potentially give rights to donors who were never intended to have rights. An example of this situation can be found more clearly in surrogacy cases, where the surrogate mother may have more money, more stability, or may be in a better situation all around than the intended parents. This standard could

\textsuperscript{172. Id.}
\textsuperscript{173. C.M., 377 A.2d at 825.}
\textsuperscript{174. Id.}
\textsuperscript{175. Id.}
\textsuperscript{176. Id.}
remove newborns from the custody of their biological parents simply because they are poor and transfer parental rights to someone with greater financial stability.\textsuperscript{178} Should we give the surrogate mother the rights to the child because it may be in the best interests of the child to do so? Should we allow such a standard that could potentially permit such a slippery slope?

V. WHAT IS THE PROPER ANALYSIS TO DETERMINE PARENTAL RIGHTS?

The different analyses and outcomes of these cases confirm the proposition to have more uniformity throughout the states. Should the UPA be mandatory for all states? Should we allow paternity rights to be contracted? Should we solely look at the parties’ intent? Or should we simply look at what is in the best interest of the child? I recommend that all states should adopt the 2017 version of the UPA. Or, in the alternative, if states do not adopt this version, the courts should follow a “pyramid test” when determining the paternity rights of fathers in sperm donor cases.

First, as discussed before, the 2017 UPA tries to consider all potential situations in regard to sperm donations. For example, it first looks at the intent of the parties when one consents to donating his sperm.\textsuperscript{179} Further, it provides that consent must be in writing and signed by the woman who is using the donated sperm.\textsuperscript{180} Even when there is no written agreement, the newest version of the UPA will then look at whether there was an express agreement between the parties and what they both intended the sperm donor’s role in the child’s life would be.\textsuperscript{181} If this cannot be proven by clear and convincing evidence, the UPA looks to see if the sperm donor resided together in the same household for the first two years and held the donor out as the child’s father.\textsuperscript{182}

By following the UPA, if there is an express agreement, the court will rule pursuant to it.\textsuperscript{183} It honors the agreement of parties, while also taking into account their intentions.\textsuperscript{184} It awards a father’s paternity right when they have had played a role in the child’s life, by holding them out as their own.\textsuperscript{185}

\textsuperscript{179} UNIF. PARENTAGE ACT § 703 (NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS 2017).
\textsuperscript{180} UNIF. PARENTAGE ACT § 704(a) (2017).
\textsuperscript{181} UNIF. PARENTAGE ACT § 704(b)(1) (2017).
\textsuperscript{182} UNIF. PARENTAGE ACT § 704 CMT (2017).
\textsuperscript{183} UNIF. PARENTAGE ACT § 704(b)(1) (2017).
\textsuperscript{184} UNIF. PARENTAGE ACT § 704(b) (2017).
\textsuperscript{185} UNIF. PARENTAGE ACT § 704(b)(2) (2017).
For those states that do not follow the UPA, I propose that they should follow a “pyramid test.” At the top of the pyramid is the right to contract. In the next two tiers are the parties’ intentions/actions and the best interest of the child, respectively. First, the court should look at whether the parties have formed a contract. Next, the court should look at the intent, or actions of the parties. For example, the court will look at whether the sperm donor has been playing a role as the father. If there is a contract, and the parties’ actions or intentions conform to it, then the court should honor it. If there is no proof of a contract, but the parties’ intentions are aligned, then the court should stop there and rule in favor of their intentions. However, if there is no proof of a contract, and the intentions of the parties are not in line, then the court should look at the best interests of the child and rule accordingly. Additionally, if the contract and the intentions conflict, the court should then also consider the best interests of the child. The judge will have the final say on what is indeed in the child’s best interests.

According to Michael Austin, because the best interests of the child standard does not also weigh the interests of the parents in a proper manner, it seems to be an unfair standard based on monetary and materialistic principles that gives a child to those with greater finances. Additionally, scholars greatly reject a system in which the government would have the power to determine who is fit to raise a child. Therefore, under this test, the contract will outweigh the best interests of the child by default unless there is any conflict between the contract and the parties’ intentions. When considering the best interests of the child, the court would not issue parentage to a sperm donor who could have their paternity rights evoked in other cases (drug use, abuse, etc.). By considering these public policies, the court does not overlook any option.

Consider Amy and Known Donor Chris again. If they contracted their rights and Chris is not to have any paternal rights, then the contract should be honored. However, if the intent of the parties does not line up with the contract, for example, if Chris is holding himself out at the child’s father, or taking a paternal role in the child’s life, then the court will look into what the best interests of the child is. If Chris is a decent person, who has an income, no substantial criminal record or history of domestic violence, the court may rule him as the father. However, if Chris has a history of abuse or drug use, the court could rule that he is not.

Unfortunately for “Anonymous Donor Chris,” he does not have any luck for paternity rights under the pyramid test, because he contracted his rights away. Additionally, Amy might not have proceeded with IVF but for his doing so. Therefore, Chris would not be able to assert his paternity
rights, even though he may be able to provide for the children, maybe even more so than Amy. This approach honors the parties’ contractual rights and protects a woman who wants to raise a child on her own through IVF.

In the Craigslist donor case involving the sperm donor found through Craigslist and the same-sex couple, the sperm donor would not have been considered the father under this approach.\textsuperscript{188} In this case, the parties had an agreement and their intentions lined up with the agreement. Therefore, the analysis should have stopped there. My proposal takes the shape of a pyramid, giving the most weight to contracts, where there is one, while also recognizing the parties’ actions and the best interests of the child for support if necessary.

\textbf{CONCLUSION}

With the increasing amount of technology, the law must adapt accordingly. IVF is a new approach that allows single mothers, or couples with fertility issues, the opportunity to still have a child. Despite its controversial beginnings, IVF has resulted in over three million births. But unforeseen paternity debates followed IVF and the courts have ruled inconsistently.

Honoring contracts, looking at intent, and determining the best interests of the child are all important public policies and have been used to determine paternity for many reasons. Courts have historically used one or the other. However, they are all important. Protecting the freedom to contract allows a mother to undergo IVF and use a known donor without the worry that their agreement would not hold up. Looking at the parties’ actions allows us to see into their intentions and it is important for courts to follow them. One of the most important public policies is considering the child’s best interests because it protects children, who do not have the power to protect themselves. By following the proposed “pyramid,” states should take all these public policies into account when determining paternity in sperm donor cases.

\textsuperscript{188} See \textit{supra} Part IV.A.
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The University of Florida Journal of Law & Public Policy is an interdisciplinary organization whose primary purpose is the publication of scholarly articles on contemporary legal and social issues facing public policy decisionmakers. The Journal is composed of two governing bodies: the Advisory Board and the Executive Board. The Advisory Board is comprised of faculty and honorary members who provide independent guidance. The Executive Board, which includes both law and graduate students, is responsible for researching and preparing each volume for publication. The Executive Board also selects the articles that are published. All student members must complete a writing requirement and help research and prepare the Journal for publication.

The Journal thanks Marjorie A. Niblack and the Office of Instructional Resources, University of Florida, for the use of the Century Tower graphic on the back cover.
ACKNOWLEDGMENT

This issue of the *University of Florida Journal of Law & Public Policy* is a direct result of the collaboration and hard work of the Journal members, staff, advisors, sponsors, and contributing authors.

The Journal extends its deep appreciation for the generosity of the University of Florida Fredric G. Levin College of Law and the Huber C. Hurst Fund in supporting and assisting the Journal in its publication of this issue and for supporting our interdisciplinary journal concept.

Special thanks to our faculty advisor, Dean Jon L. Mills, and our staff editor, Lisa-Ann Caldwell.