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NOTE

Statutory Requirements for Artificial Insemination: A Sperm Donor's Fight to Let Go of His Rights

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INTRODUCTION

In 2009, an auto-mechanic from Topeka, Kansas by the name of William Marotta answered a Craigslist ad posted by Angela Bauer and Jennifer Schreiner, a lesbian couple seeking a private sperm donor for artificial insemination.[1] After discussing the issue with his wife, Marotta arranged a meeting with the couple and agreed to donate. The parties then signed a contractual agreement intended to sever Marotta's parental rights and relieve him of any future child support obligations.[2] Once the agreement was signed, Marotta produced a sperm sample and delivered it to the couple's

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[1] Heather Hollingsworth & John Hanna, *Kansas Sperm Donor Law On Child Support Payment Is Outdated: Attorney*, HUFFINGTON POST (Jan. 3, 2013, 10:18 PM), http://www.huffingtonpost.com/2013/01/03/kansas-sperm-donor-law_n_2404170.html.

[2] *See* Jim Doblin & Matthew DeLuca, *Kansas judge hears arguments in case of sperm donor sued for child support*, NBCNEWS.COM (Nov. 16, 2013, 8:09 PM), http://www.nbcnews.com/news/us-news/kansas-judge-hears-arguments-case-sperm-donor-sued-child-support-v21150280.

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home in a plastic container.[3] After that, he left. The couple agreed that Schreiner would be the child's birth-mother, and after just one attempt, the artificial insemination proved successful and resulted in the birth of baby girl.[4] At no time during the process was a physician consulted.[5]

While Marotta's motivations were indeed benevolent, what appeared to be a selfless act of kindness spawned a precarious legal situation that could possibly render him responsible for future child support payments. This is because the Kansas statute governing paternity determinations requires the use of a physician for donors to relinquish parental rights and financial obligations.[6] After the birth of the child, Schreiner and Bauer eventually separated, and due to an injury that rendered Schreiner unable to work, she applied for state assistance to help care for the child.[7] In order to receive assistance, however, the Kansas Department for Children and Families required her to provide the identity of the child's father.[8] She told the state that Marotta provided the sperm for the artificial insemination, but that he was only a donor and that they had signed a contract precluding him from ever having to make child support payments. Regardless, the state of Kansas sought an order seeking to recover $6,000 from Marotta to offset the costs of the assistance to Schreiner.[9]

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[3] Hollingsworth & Hanna, *supra* note 1.

[4] *Id.*

[5] *Id.*

[6] *See* KAN. STAT. ANN. § 23-2208(f) (2013) ("The donor of semen provided to a licensed physician for use in artificial insemination of a woman other than the donor's wife is treated in law as if he were not the birth father . . . unless agreed to in writing by the donor and the woman.").

[7] Hollingsworth & Hanna, *supra* note 1.

[8] *Id.*

[9] *Id.*

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The state argues that since no physician was used in the artificial insemination, it has a legal right to seek reimbursement from Marotta as the father, regardless of the contractual agreement between himself and the couple. Marotta's attorney, by contrast, says that the contract should be honored nonetheless. He believes the Kansas law is outdated, and points to laws in nine other states which say that donors cannot be the legal parents of children conceived through artificial reproduction.[10] Kansas, on the other hand, argues that at least 10 other states require the involvement of a physician in order to absolve sperm donors of child support obligations.[11] Both Marotta and the state motioned for summary judgment in October of 2013, and after hearing arguments from both sides, the Shawnee County District Court issued an order granting the state's motion and declaring Marotta the legal father of the child.[12]

This case, which Marotta plans to appeal, offers a paradigm that highlights the complex legal issues arising from the practice of unassisted, at-home artificial insemination. The venue for the showdown could not be more appropriate, as Kansas is no stranger to the debate over the rights of sperm donors. In 2008, the Kansas Supreme Court upheld the constitutionality of its paternity statute when a donor attempted to assert his parental rights after donating sperm to a friend.[13] That case, however, did not involve a contract between the mother and the donor, and unlike the *Marotta* case, the parties used a physician to perform the artificial insemination.[14] The use of a private

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[10] Heather Hollingsworth & John Hanna, *Sperm Donor Legal Issues Highlighted by Kansas Case*, HUFFINGTON POST (Jan. 4, 2013, 3:11 AM), http://www.huffingtonpost.com/2013/01/04/sperm-donor_n_2408580.html.

[11] *Id.*

[12] Kansas *ex rel.* Sec'y Dep't for Children & Families v. W.M., Case No. 12 D 2686 (Kan. Dist. Ct. Jan. 22, 2014) (memorandum decision and order granting petitioner's motion for summary judgment).

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

[14] *See id.*

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donor without physician assistance adds another level of complexity in the *Marotta* case, and also creates an issue of first impression in Kansas.

In an effort to raise awareness to the legal obstacles often faced by private sperm donors and same-sex couples, this note examines the different approaches courts often take in resolving paternity issues, and recommends a two-part solution that alleviates public policy concerns. Part I of this note explores the history and purposes of the Uniform Parentage Act of 1973 and its subsequent amendments in 2002. Part II focuses on states that have not adopted the Uniform Parentage Act's 2002 amendments and examines paternity decisions involving private sperm donation within those states. Part III, by contrast, seeks to examine court decisions in states that have adopted the amendments to the UPA. Part IV continues by discussing the policy arguments in favor of and against unassisted, at-home artificial insemination. Finally, Part V recommends that states adopt the 2002 amendments to the UPA and enact regulations that effectively track donations from private sperm donors.

I. CHANGING SOCIETAL ROLES AND THE UNIFORM PARENTAGE ACT

As social views on same-sex relationships evolve and reproductive technologies rapidly advance, the need for a clear understanding of state parentage laws is crucial for all parties involved in assisted reproduction. One of the more recurrent issues that has inundated courts in disputes over parentage is whether the source of sperm used for artificial reproduction is considered a father, with full parental rights and financial obligations, or a donor, where parental rights and financial obligations can be waived. Several scenarios can materialize that give rise to legal issues hinging on a biological father's status as one or the other. For instance, it could be the case that a biological father wishes to claim parental rights and accept financial obligations after donating sperm to a same-sex couple. By contrast, it could also be the case that the biological father wishes waive his parental rights and be absolved of financial obligations. Such situations have been further complicated by the existence of preconception contracts purporting to relinquish parental rights, especially in cases where the biological father seeks to invalidate the contract and assert parenthood.

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The National Conference of Commissioners on Uniform State Laws ("Commissioners") attempted to simplify issues of parentage in 1973 with the drafting of the Uniform Parentage Act, which sought to address antiquated notions of parent-child relationships under the common law.[15] The Commissioners envisioned a body of law that granted support rights to children regardless of the marital status of their parents, a concept that was largely absent from the common law prior to 1973.[16] Most states enacted provisions of the Act in one form or another, which signaled a revolution in the law of parentage determination, paternity actions, and child support.[17] As time progressed, however, advances in technology—namely the development of DNA identification—prompted a call for greater modernization of state parentage laws.[18]

In 2000, the Commissioners drafted several revisions to the Uniform Parentage Act, which combined parts of the 1973 version with two other Acts that had previously been drafted to address various parentage issues.[19] One important change was noted in Section 702, which states that "[a] donor is not a parent of a child conceived by means of assisted reproduction."[20] This section of the new UPA represents a marked change from the 1973 version, which stated that "[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

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[15] *See Parentage Act Summary*, UNIFORM LAW COMMISSION, http://www.uniformlaws.org/ActSummary.aspx?title=Parentage%20Act (last visited Feb. 7, 2014).

[16] *See id.*

[17] BARRY R. FURROW ET AL., HEALTH LAW: CASES, MATERIALS AND PROBLEMS 1360 (7th ed. 2013).

[18] *See Parentage Act Summary*, *supra* note 15.

[19] In 1988, the National Conference of Commissioners drafted the Uniform Status of Children of Assisted Conception Act and the Uniform Putative and Unknown Father's Act.

[20] UNIF. PARENTAGE ACT § 702, 9B U.L.A. 355 (2000) (amended 2002).

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conceived."[21] The removal of the physician requirement precludes donors of any kind from being able to sue for paternity status, thus providing certainty of non-parentage for prospective donors.[22]

II. STATUTORY MANDATES FOR PHYSICIAN INVOLVEMENT IN ARTIFICIAL INSEMINATION

As of the date of this note, the 2002 amendments to the UPA have been adopted in only nine states.[23] The natural consequence has been that a majority of state courts still require physician involvement in artificial insemination in order for a paternal father to relinquish his paternity rights and to relieve him of child support obligations. In these states, arguments in favor of donor status when at-home artificial insemination is performed are likely to fail, as courts are reluctant to interpret the plain language of the 1973 UPA as anything but an absolute requirement that a physician be involved.[24] Several cases illuminate this concept.

The 1986 case of *Jhordan C. v. Mary K.* draws striking parallels to the *Marotta* case and showcases the emphasis that courts place on statutory language in disputes over parentage. *Jhordan C.* involved a California woman, Mary K., who decided to conceive through artificial insemination

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[21] UNIF. PARENTAGE ACT § 5, 9B U.L.A. 407 (1973) (repealed 2000).

[22] *See* UNIF. PARENTAGE ACT § 702, 9B U.L.A. 355 cmt. (2000) (amended 2002).

[23] The Uniform Parentage Act of 2000, which was amended in 2002, has been adopted in Alabama, New Mexico, North Dakota, Oklahoma, Texas, Utah, Washington, and Wyoming. *See Parentage Act*, UNIFORM LAW COMMISSION, http://www.uniformlaws.org/Act.aspx?title=Parentage%20Act (last visited Feb. 7, 2014).

[24] *See*, *e.g.*, E.E. v. O.M.G.R., 20 A.3d 1171 (N.J. Super. Ct. Ch. Div. 2011); *see also*, *e.g.*, Mintz v. Zoernig, 198 P.3d 861 (N.M. Ct. App. 2008).

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with the plan of raising the child jointly with her friend, Victoria.[25] After consulting various acquaintances and interviewing several potential donors, Mary K. and Victoria ultimately decided on Jhordan C.[26] Over a period of six months, Jhordan C. provided multiple sperm samples to Mary K. in the privacy of her home, and after several attempts, the artificial insemination was successful.[27] After the child's birth, Mary K. allowed Jhordan C. to visit the child on approximately five separate occasions.[28] However, she quickly terminated the visits and attempted to induce Jhordan C. to sign a contract indicating that he would not seek paternity rights.[29] Jhordan C. refused and subsequently initiated an action to establish both paternity and visitation rights.[30] The court ultimately held for Jhordan C., reasoning that Mary K. had "omitted to invoke" the California paternity statute by failing to utilize a licensed physician in the artificial insemination.[31]

At the time *Jhordan C.* was decided, the California statute governing the paternity of sperm donors stated that a "donor of semen *provided to a licensed physician* for use in artificial insemination of a woman other than the donor's wife is treated in law as if he were not the natural father of a child thereby conceived."[32] As the court noted, the statutory language of the

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[25] Jhordan C. v. Mary K., 179 Cal. App. 3d 386, 389 (Cal. Ct. App. 1986).

[26] *Id.*

[27] *Id.* at 390.

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] CAL. CIV. CODE § 7005 (California's statutory code has since been amended, and the current statute states: "The donor of semen provided to a licensed physician and surgeon or to a licensed sperm bank for use in assisted reproduction of a woman other than the donor's spouse is treated in law as if he were not the natural parent of a child thereby conceived, unless otherwise

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California parentage statute was taken almost verbatim from the 1973 UPA.[33] Mary K. argued that the drafters of the UPA incorrectly assumed that all artificial inseminations would occur under the supervision of a physician, and that the language was merely suggestive as opposed to mandatory.[34]

The court, however, was not persuaded. In rejecting Mary K.'s argument, it noted that the initial discussion draft of the UPA did not contain a provision pertaining to physicians, and that "[its] eventual inclusion . . . in the final version of the UPA suggests a conscious decision to require physician involvement."[35] The court went on to say that the "[California] [l]egislature ha[d] embraced the apparently conscious decision by the drafters of the UPA to limit application of the donor nonpaternity provision to instances in which semen is provided to a licensed physician." While the court gave considerable merit to Mary K.'s arguments, they were not enough to trump the intent of the legislature.

E.E. v. O.M.G.R. is a similar case from New Jersey involving a single woman, E.E., who wanted to have a child but did not want to assume the added expense of going through a physician.[36] As an alternative, E.E. enlisted the services of a friend, O.M.G.R., who produced a sperm sample that was "transported to its intended location [via] kitchen turkey baster."[37] Unlike the case of *Jhordan C.*, the parties in *E.E.* drafted a consent order that purported to surrender all paternity rights and relinquish all financial obligations of O.M.G.R.[38] The order was signed by both parties and submitted to the court

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agreed to in a writing signed by the donor and the woman prior to the conception of the child." CAL. FAM. CODE § 7613.).

[33] *Jhordan C.*, 224 Cal. Rptr. at 392.

[34] *Id.*

[35] *Id.* at 393.

[36] E.E. v. O.M.G.R., 20 A.3d 1171, 1172 (N.J. Super. Ct. Ch. Div. 2011).

[37] *Id.*

[38] *Id.*

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after the child was born.[39] Similar to the case of *Jhordan C.*, the New Jersey statute governing the parentage of sperm donors contained a physician requirement.[40] Thus, the court was left with the issue as to whether a written contract could circumvent the physician requirement in the statute.[41]

As this was an issue of first impression in New Jersey, the court sought guidance in *Jhordan C.* and *In re K.M.H.*, and held that termination of O.M.G.R.'s parental rights could not be accomplished by contract.[42] In rejecting the contract's validity, the court placed a tremendous amount of emphasis on the language of New Jersey's parentage statute[43] in the same manner as the court in *Jhordan C.* The court also invoked its stated principle

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[39] *Id.*

[40] N.J. STAT. ANN. § 9:17-44 (The statute states: "Unless the donor of semen and the woman have entered into a written contract to the contrary, the donor of semen provided to a licensed physician for use in artificial insemination of a woman other than the donor's wife is treated in law as if he were not the father of a child thereby conceived and shall have no rights or duties stemming from the conception of a child.").

[41] *E.E.*, 20 A.3d at 1172.

[42] *Id.* at 1173.

[43] *See id.* at 1176 (The court states the following: "Our Supreme Court has consistently he that the best indicators of legislative intent are the plain words of the statute. . . . In reviewing the statutory language, courts should 'ascribe to the statutory words their ordinary meaning and significance, and read them in context with related provisions so as to give sense to the legislation as a whole.' . . . The Court has cautioned against '[]rewrit[ing] a plainly-written enactment of the Legislature or presum[ing] that the Legislature intended something other than that expressed by way of the plain language.[]' . . . The court notes that the New Jersey Legislature, in enacting the UPA, could have removed the requirement of a licensed physician, as other states have done.").

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that "a child's relationship with his or her parents is so significant that all doubts are to be resolved against the destruction of that relationship."[44]

III. DONOR STATUS IN STATES THAT DO NOT REQUIRE PHYSICIAN ASSISTANCE IN ARTIFICIAL INSEMINATION

On the other hand, states that have either adopted the 2002 version of the UPA or omitted the physician requirement have tended to favor donor status in at-home artificial inseminations.

A.A.B. v. B.O.C. is a Florida case from May of 2013 involving a lesbian couple, A.A.B. and S.C., who decided to conceive a child using the sperm of S.C.'s brother, B.O.C.[45] In this case, the parties made an oral agreement that B.O.C. would not assume a parental role in the child's life.[46] After three attempts using a home artificial insemination kit, A.A.B. conceived.[47] However, after three years of raising the child together, the couple ended their relationship and A.A.B. refused to allow S.C. to have any further contact with their child.[48] Notwithstanding his oral agreement to not assume a parental role, B.O.C. filed suit to establish paternity and visitation rights after his sister and A.A.B. parted ways.[49] The trial court held that since the parties employed a do-it-yourself procedure of artificial insemination rather than engaging a physician, Florida's statute did not apply and S.C. could claim paternity rights.[50]

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[44] *Id.* at 1173.

[45] A.A.B. v. B.O.C., 112 So. 3d 761, 762 (Fla. Dist. Ct. App. 2013).

[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] *Id.*

[50] *Id.*

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A.A.B. appealed, arguing that the trial court erred in failing to find that B.O.C. was a donor within the meaning of Florida's donor statute.[51] Although Florida has not yet adopted the 2002 amendments to the Uniform Parentage Act, its donor statute is similar in that it lacks the provision requiring physician involvement included in the 1973 version of the UPA.[52] The appellate court found the plain language of Florida's statute dispositive, and as a result, it reversed the trial court's decision, holding that "[b]ecause B.O.C. was a sperm donor he relinquished his paternal rights and obligations to [the child]."[53]

Another case in which the court upheld the relinquishment of donor rights is the Texas case of *In re H.C.S.* Similar to *A.A.B. v. B.O.C.*, this case involved a lesbian couple, K.D. and Marie, who wanted to have a child and decided to use sperm from Marie's brother, J.S., to impregnate K.D.[54] Similar to *A.A.B. v. B.O.C.*, the couple broke up after the child was born and J.S. filed suit to establish paternity rights.[55] K.D. disputed the lawsuit and argued that, as a sperm donor, J.S. lacked standing to file suit under Texas Family Code, and that the court thus lacked subject matter jurisdiction to hear the case.[56] J.S., on the other hand, argued that he did in fact have standing based on another Texas statute, which provided that "a proceeding to adjudicate

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[51] A.A.B. v. B.O.C., 112 So. 3d at 762.

[52] FLA. STAT. § 742.14 (2013) (Florida's parentage statute states: "The donor of any egg, sperm, or preembryo, other than the commissioning couple or a father who has executed a preplanned adoption agreement under s. 63.212, shall relinquish all maternal or paternal rights and obligations with respect to the donation or the resulting children. Only reasonable compensation directly related to the donation of eggs, sperm, and preembryos shall be permitted.").

[53] *A.A.B.*, 112 So. 3d at 764.

[54] *In re* H.C.S., 219 S.W.3d 33, 34 (Tex. App. 2006).

[55] *Id.*

[56] *Id.*

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parentage may be maintained by . . . a man whose paternity of the child is to be adjudicated. . . ."[57]

In support of his argument, J.S. relied on an earlier Texas case which concluded that donor status was irrelevant in deciding whether a man bringing suit to establish paternity has standing.[58] The court in this case declined to agree, however, saying that J.S.'s argument ignored the statutory language addressing his donor status,[59] which Texas had adopted as a result of the amendments in the 2002 UPA.[60] The court then emphasized the impact that J.S.'s interpretation of the statute would have on the financial and emotional status of children and their mothers:

> [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.[61]

IV. RELEVANT POLICY ISSUES IMPLICATED IN DISCUSSING AT-HOME ARTIFICIAL INSEMINATION

The use of known sperm donors in artificial insemination inevitably raises public health concerns. However, it also provides a valuable public service to women and couples who might otherwise be precluded from having children. The following section examines these countervailing issues

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[57] TEX. FAM. CODE ANN. § 160.602(3) (West 2013).

[58] *See In re* Sullivan, 157 S.W.3d 911, 920 (Tex. App. 2005) (disagreed with in *In re* H.C.S.).

[59] *See In re* H.C.S., 219 S.W.3d at 36.

[60] *See Parentage Act*, *supra* note 23.

[61] *In re* H.C.S., 219 S.W.3d at 36.

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in detail, and seeks to explore some of the underlying forces that might be driving state resistance to changes in public policy.

A. DOES UNREGULATED, PRIVATE SPERM DONATION FROM KNOWN DONORS POSE SIGNIFICANT PUBLIC HEALTH RISKS?

An important factor to consider in discussing the merits of unassisted, at-home artificial insemination is whether it poses any significant public health risks. One concern that has gained a fair amount of traction in the debate is the high frequency with which individual donors often choose to donate, and the potential for adverse consequences that can result.

Take for instance the case of Cynthia Daily, a social worker from the state of Washington. Roughly ten years ago, Daily and her partner decided to use a sperm donor to conceive a child, with the hopes that the child would one day be able to meet some of his siblings.[62] After conceiving, the couple used a website to track the number of children fathered by their son's donor, and as the years went on, they watched the number of siblings grow to 150.[63] While this particular group of donor children is among the largest of its kind, similar groups of 50 or more siblings are cropping up on internet web sites and chat groups across the United States, as more women choose to have children on their own.[64]

Another noteworthy example is the case of Trent Arsenault, a computer security engineer from San Francisco, CA. In 2010, Arsenault caught the attention of the Food and Drug Administration when he began routinely donating his sperm to women he met through a Yahoo Group called

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[62] Jacqueline Mroz, *One Sperm Donor, 150 Offspring*, N.Y. TIMES (Sept. 5, 2011), http://www.nytimes.com/2011/09/06/health/06donor.html.

[63] *Id.*

[64] *Id.*

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FreeSpermDonors.[65] Although sperm is considered neither a food nor drug, the FDA's Center for Biologistics Evaluation and Research regulates those who commercialize in donation, with the purpose of curbing the spread of communicable diseases.[66] While the FDA generally focuses its attention on traditional sperm banks and not on private donors, Arsenault was particularly public about his activities. Once the FDA caught wind of his operation, it convinced him to agree that he was a legal "establishment" and sent agents to his home to interview him and to obtain records on his activities. By that time, he had already made a total of 340 donations to 36 separate recipients.[67] The FDA determined that Arsenault had not been screening for diseases often enough and issued a cease-manufacture order prohibiting him from making further donations.[68] However, an advocacy group filed a brief with the FDA on Arsenault's behalf, and as a result, the cease-manufacture order was suspended.[69] As of February of 2012, Arsenault had tallied more than 500 donations.[70]

Cases such as these inevitably raise public health concerns, and as a result, a growing voice has emerged among parents, donors, and medical experts regarding the possibility that rare genetic diseases could be spread more widely throughout the population.[71] While it is possible to mitigate some of the risks by requiring the donor to undergo comprehensive medical

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[65] Benjamin Wallace, *The Virgin Father*, N.Y. MAG. (Feb. 5, 2012), http://nymag.com/news/features/trent-arsenault-2012-2.

[66] *Id.*

[67] It is worth noting that not all of Arsenault's donations have proven successful. As of February, 2012, Arsenault's donations accounted for a total of 14 pregnancies. *Id.*

[68] *Id.*

[69] *Id.*

[70] *Id.*

[71] Wallace, *supra* note 65.

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screening,[72] self-administered testing might not be as effective in ensuring the healthiest specimen possible when compared to the benefits of using a physician.

Courts have taken notice of this concern as well. In *Jhordan C.*, for example, the California Court of Appeal noted that "a physician can obtain a complete medical history of the donor (which may be of crucial importance to the child during his or her lifetime) and screen the donor for any hereditary or communicable diseases."[73] The court went on to reference a comment in the original version of the UPA, which cites a law review article arguing that health considerations should require physician involvement for statutorily authorized artificial insemination.[74] According to the court, the inclusion of the reference in the comment suggests that "health considerations underlie the decision by the drafters of the UPA to include the physician requirement in the artificial insemination statute."[75]

In the Interest of R.C., a 1989 case in the Supreme Court of Colorado, echoes the same sentiment as *Jhordan C.* The concurrence is particularly illuminating because it references a specific set of guidelines for screening donor sperm, which have been promulgated by the American Fertility Society, the American Association of Tissue Banks, and the Council of

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[72] *See, e.g.*, *Lesbian Insemination*, OUR WORLD TOO, http://ourworldtoo.com/lesbian-insemination/#sperm_banks (last visited Feb. 7, 2014). The website states: "[t]here may be some real disadvantages you must consider before forging ahead. Your known donor may have some communicable disease you are not aware of or be a carrier for a genetic disease such as cystic fibrosis. SO HAVE ANY DONOR TESTED THOROUGHLY regardless of how well you know him."

[73] *Jhordan C.*, 179 Cal. App. 3d at 393.

[74] *Id.* (citing Walter Wadlington, *Artificial Insemination: The Dangers of a Poorly Kept Secret*, 64 NW. U. L. REV. 777, 803 (1970)).

[75] *Id.*

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Ethical & Judicial Affairs of the American Medical Association.[76] The American Fertility Society guidelines are summarized in a case footnote as follows:

> [The guidelines] recommend extensive infectious disease testing. They also recommend rejecting prospective donors or surrogates with a family history of nontrivial malformation, nontrivial Mendelian disorders, or a chromosomal rearrangement (unless the donor or surrogate has a normal karyotype). The donor or surrogate should not have (or have had) any disease with a known or reliably indicated major genetic component, such as asthma, juvenile diabetes mellitus, epileptic disorder, hypertension, a psychosis, rheumatoid arthritis, or a severe refractive disorder. The guidelines recommend screening donors for autosomal recessive disorders known to be prevalent in their ethnic group, and rejecting carriers. In addition to these definite reasons for rejection, there are certain conditions in relatives that should be *considered* as reasons for rejection (major psychoses, epileptic disorders, juvenile diabetes mellitus, and early coronary disease, mental retardation, neurologic disorders, unexplained deaths under age thirty, or significant congenital defects).[77]

There is also the concern that such a high number of half-siblings in a concentrated geographic area could increase the risk of accidental incest between half-brothers and half-sisters.[78] The issue is compounded by the fact

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[76] *In re* R.C., 775 P.2d 27 (Colo. 1989).

[77] *Id.* at 37 n.3 (citing Lori B. Andrews, *Legal Aspects of Assisted Reproduction*, 541 ANNALS N.Y. ACAD. SCI. 668, 672 (1988)).

[78] *See* Mroz, *supra* note 62.

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that, although mothers of donor children are encouraged to report births, there is no requirement to do so.[79]

B. WHAT ABOUT THE BENEFITS?

Despite the plethora of arguments against the practice of at-home artificial insemination, several reasons exist that may prompt would-be mothers to eschew commercial sperm banks and opt for private sperm donation from private, known donors.

One of the more prevalent considerations involved in the decision to choose a private donor is the cost of fertility treatment. Fertility services can be prohibitively expensive, and can often cost women and couples thousands of dollars to conceive.[80] The problem is amplified by the fact that it often takes multiple attempts for an artificial insemination to take, with costs accumulating for each attempt. Additionally, insurance in many states would not cover artificial insemination from private donors unless a woman can show that she has not been able to get pregnant.[81] Such preclusive restrictions pose difficult challenges for women in same-sex relationships and for single women who wish to have children, as payments for the entire treatment are often required up front. When ultrasound monitoring and medication are added to the mix, costs can range up to $4,000.[82] Meanwhile, at-home

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[79] Libby Kane, *The Hidden Costs of Using a Sperm Donor*, LEARNVEST (Feb. 4, 2012), http://www.learnvest.com/2012/02/the-hidden-costs-of-using-a-sperm-donor/. Only about 40% of mothers report donor births despite the recommendation.

[80] *See* Tony Dokoupil, *'Free Sperm Donors' and the Women Who Want Them*, NEWSWEEK (Oct. 2, 2011), http://www.newsweek.com/free-sperm-donors-and-women-who-want-them-68233 (describing how the purchase of sperm alone can cost up to $2,000).

[81] *Id.*

[82] *See Fertility treatment: Artificial insemination (IUI)*, BABY CENTER, http://www.babycenter.com/0_fertility-treatment-artificial-insemination-iui_4092.bc?page=1 (last visited Feb. 7, 2014).

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artificial insemination kits can cost as little as $16.99 and prove just as effective, if not more so, in many cases.[83]

Aside from alleviating the costs of commercial sperm banks, using a known donor can provide would-be mothers with various psychological and personal benefits as well. For instance, conception can be easier when using a fresh donation instead of one that has been frozen and thawed. Fresh donations have a higher sperm count than frozen sperm, and in many cases, they live longer.[84] While frozen samples live for only about six hours after being thawed, fresh donations can live for up to 36 hours.[85] This lengthens the window period for insemination and allows for a higher likelihood of success outside of a clinical environment.[86]

Perhaps one of the greatest benefits to using a known donor (and also one of the main reasons that women and couples choose to forgo commercial sperm banks) is that it provides donor children with the opportunity to know the identities of their biological fathers.[87] This is an especially attractive

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[83] *See* AMAZON, http://www.amazon.com/Human-Artificial-Insemination-Kit-Inseminations/dp/B00BEZY4NO (last visited Feb. 7, 2014). It is worth noting that it is possible to successfully conceive using a kitchen turkey baster, which can cost as little as $1.19. *See* THE WEBSTAURANT STORE, http://www.webstaurantstore.com/nylon-turkey-baster/672P816.html?utm_source=Shopzilla&utm_medium=cse&utm_campaign=Shopzilla+Campaign (last visited Feb. 7, 2014). More often than not, however, it is recommended that a disposable syringe from an artificial insemination kit be used instead. *See* BABYMED, http://www.babymed.com/home-artificial-insemination-get-pregnant-turkey-baster-method (last visited Feb. 7, 2014).

[84] KNOWN DONOR REGISTRY, http://knowndonorregistry.com/about/faq-about-known-donors#why-would-someone-consider-using-a-private-known-donor (last visited Feb. 7, 2014).

[85] *Id.*

[86] *Id.*

[87] *See* KNOWN DONOR REGISTRY, *supra* note 84.

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option for couples who want the donor to play an active role in the life of the child. It also affords children and families certain advantages that are not available through anonymous donations from sperm banks. For instance, a child might want to know what his or her father looks like, or may just want to know his name and general background.[88] Use of a known donor also provides children with the opportunity to have questions answered and to obtain access to medical and genetic information that might not be available from a commercial sperm bank.[89] Sperm banks generally resist revealing their donors' identities, fearing that such openness would scare off potential new candidates.[90] Even sperm banks that choose to reveal donor identities, however, will not do so until the child reaches 18 years of age.[91]

The benefits of unassisted, private donation have not gone unnoticed by courts either. The court in *Jhordan C.*, for instance, took particular note of both the high costs and privacy issues inherent in physician-assisted artificial insemination as opposed to conception in the privacy of one's home.[92] The court characterized these concerns as such:

> It is true that nothing inherent in artificial insemination requires the involvement of a physician. Artificial insemination is, as demonstrated here, a simple procedure easily performed by a woman in her own home. Also, despite the reasons outlined above in favor of physician involvement, there are countervailing considerations against requiring it. 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

[88] *Id.*

[89] *Id.*

[90] *See* Dokoupil, *supra* note 80.

[91] *Id.*

[92] *See Jhordan C.*, 179 Cal. App. 3d at 393–94.

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procedure in a comfortable environment such as her own home or to choose the donor herself.[93]

C. Does State Resistance to Changes in Donor Statutes Reflect a Bias in Favor of Traditional Families and Against Same-Sex Marriage?

Some have argued that the *Marotta* case is strictly about Kansas seeking reimbursement for the assistance it provided to Schreiner and that is has nothing to do with discrimination against same-sex couples. Corey Whelan of the New York-based American Fertility Association, for example, does not fault the state for seeking funds from Marotta.[94] Whelan, who counsels lesbian couples interested in having children and who also has a long standing practice of advising physician involvement in artificial insemination, says that this is not a homophobic issue, and that it is merely financially driven.[95] In like manner, Mark Demaray, a Washington state-based attorney and past president of an organization for attorneys who handle assisted reproduction legal issues, says that the Kansas statute is a "commonsense law."[96] According to Mr. Demaray, it is very common for women seeking artificial insemination to have to go through a doctor's office and get a sworn statement from the doctor that he or she performed the procedure.[97]

Marotta and his attorney, Ben Swinnen, see things from a different perspective. Instead of saying it is a "commonsense law," Marotta believes the Kansas statute is outdated and that the state is lagging behind in modern

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[93] *Id.*

[94] *See* Hollingsworth & Hanna, *supra* note 1.

[95] *Id.*

[96] *Id.*

[97] *Id.*

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times.[98] In an interview on a Boston talk show, he likened the statute to southern Jim Crow laws during the civil rights movement, saying that "just because a law is in the books doesn't mean it's right." Similarly, his attorney views the decision as a manifestation of the state's political agenda.[99] Kansas voters approved a constitutional amendment in 2005 which outlawed same-sex marriage,[100] and Swinnen believes the donor statute acts as an enforcement mechanism because it precludes the state from acknowledging that the couple has a child.[101] His theory has merit. While the statute clearly states that a donor is not the father when a physician is involved,[102] it does not state that a donor must be the father when a physician is not involved. According to Swinnen, both the state's pursuit of funds from Marotta and the court's subsequent decision improperly read this inference into the law, a notion with which he disagrees.[103] Additionally, Marotta says the state's interpretation of the law will have a chilling effect on donors who would otherwise be willing help out couples who wish to forgo the huge payments accompanying physician involvement.[104]

Kansas' bias against same-sex marriage is evident in other legislation as well. In February of 2014, the Kansas House of Representatives overwhelmingly approved a measure protecting religious individuals, groups,

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[98] *See Court to Sperm Donor: You Owe Child Support*, HERE AND NOW WITH ROBIN YOUNG AND JEREMY HOBSON (Feb. 12, 2014), http://hereandnow.wbur.org/2014/02/12/sperm-donor-child-support.

[99] *See id.*

[100] Hollingsworth & Hanna, *supra* note 10.

[101] *See Court to Sperm Donor: You Owe Child Support*, *supra* note 98.

[102] *See* KAN. STAT. ANN. § 23-2208(f) (2013) ("The donor of semen provided to a licensed physician for use in artificial insemination of a woman other than the donor's wife is treated in law as if he were not the birth father . . . unless agreed to in writing by the donor and the woman.").

[103] *See Court to Sperm Donor: You Owe Child Support*, *supra* note 98.

[104] *Id.*

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and businesses that refuse services to same-sex couples, particularly those who are looking to get married.[105] The proposed bill states:

> [N]o individual or religious entity shall be required by any governmental entity to do any of the following, if it would be contrary to the sincerely held religious beliefs of the individual or religious entity regarding sex or gender: (a) Provide any services, accommodations, advantages, facilities, goods, or privileges; provide counseling, adoption, foster care and other social services; or provide employment or employment benefits, related to, or related to the celebration of, any marriage, domestic partnership, civil union or similar arrangement.[106]

Critics say that once the bill is signed into law, the result will mark Kansas as the first state to legalize segregation of gay and straight people in almost all arenas of everyday life.[107] Not only will business entities that turn away gay couples be immunized from lawsuits, but anyone who attempts to sue them for discrimination will have to pay their legal fees as well.[108]

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[105] *See* Ben Brumfield & Dana Ford, *Kansas House passes bill allowing refusal of service to same-sex couples*, CNN U.S. (Feb. 13, 2014, 7:59 AM), http://www.cnn.com/2014/02/13/us/kansas-bill-same-sex-services/.

[106] *See* H.B. 2453, 2014 Sess. (Kan. 2014).

[107] *See* Mark Joseph Stern, *Kansas' Anti-Gay Segregation Bill Is an Abomination*, SLATE MAG. (Feb. 13, 2014, 8:30 AM), http://www.slate.com/blogs/outward/2014/02/13/kansas_anti_gay_segregation_bill_is_an_abomination.html. Although the bill has not been signed into law as of the date of this note, it passed the state's Republican-dominated House by a vote of 72-49 and is anticipated to easily pass in the state's Republican-dominated Senate and signed into law by Governor Sam Brownback, a conservative Christian known for his public stance against same-sex marriage. *See* Brumfield & Ford, *supra* note 105.

[108] *See* Brumfield & Ford, *supra* note 105.

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V. A PROGRESSIVE WAY FORWARD

Despite Kansas' legislative balk to the country's push for equality, the growing acceptance of same-sex marriage in other states[109] has created a need for more progressive laws that can accommodate alternative families. At the very core of the alternative family is the ability of lesbian couples to conceive, and as this note has shown, statutory laws requiring physician involvement in artificial insemination can present significant obstacles that inhibit this ability. Such laws stand in the way of the country's progress towards equal rights, and the call for reform in this very important aspect of American life is at an all-time high. At the same time, the public health risks that might accompany reform must be given equal, if not greater weight. If progress is to be made, steps must be taken responsibly with the interests of donor children at the forefront of the debate.

In order to address these two conflicting concerns, this note recommends that states undertake a two-part legislative process. First, states that have not yet adopted the 2002 amendments to the UPA should enact legislation removing the physician requirement included in the 1973 UPA. When the 2002 amendments to the UPA were enacted, the Commissioners made a conscious choice to remove the language referencing physician involvement in artificial insemination.[110] This revision reflected a change in the Commissioner's interpretation of the word, "donor," to one that was broader and not subject to the complex and serious legal problems inherent in the 1973 UPA.[111] If states follow the lead of the Commissioners, more donors will choose to donate since the legal ramifications of child support

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[109] *See, e.g.*, Robert Barnes, *Federal judge strikes down Va. ban on gay marriage*, WASH. POST (Feb. 14, 12:40 AM), http://www.washingtonpost.com/politics/federal-judge-strikes-down-va-ban-on-gay-marriage/2014/02/13/c65b7674-9528-11e3-83b9-1f024193bb84_story.html.

[110] *See* UNIF. PARENTAGE ACT § 702, 9B U.L.A. 355 cmt. (2000) (amended 2002) ("The new Act does not continue the requirement that the donor provide the sperm to a licensed physician.").

[111] *See id.*

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obligations will be lifted. This will result in a positive step forward for same-sex couples, as monetary barriers in the form of expensive fertility treatment and commercial sperm banks will substantially fall.

Second, in order to mitigate the public health risks of accidental incest and the widespread passage of hereditary diseases, states should enact stricter regulations governing anonymous sperm donation as well as the number of donations that can be made per individual donor in a given geographic area. This could be accomplished by developing state donor registries and mandating registration for each private donation. One possibility worth considering comes from the American Society for Reproductive Medicine, which suggests limiting a single donor to no more than 25 births per a population of 800,000.[112] Another recommendation would be for states to institute restrictions on anonymous sperm donation that are similar to those in the United Kingdom, New Zealand, Finland, and Australia.[113] While this note does not suggest a complete ban on anonymity, a mandate that requires ready access to a donor's genetic and medical information would provide children with beneficial information in making future medical decisions.

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[112] *See* Samantha Pfeifer, M.D. et al., *Recommendations for gamete and embryo donation: a committee opinion*, SOCIETY FOR ASSISTED REPRODUCTIVE TECHNOLOGY, http://www.sart.org/uploadedfiles/asrm_content/news_and_publications/practice_guidelines/guidelines_and_minimum_standards/2008_guidelines_for_gamete%281%29.pdf (last visited Feb. 7, 2014).

[113] *See* Gaia Bernstein, *Unintended Consequences: Prohibitions on Gamete Donor Anonymity and the Fragile Practice of Surrogacy*, 10 IND. HEALTH L. REV. 291, 292 (2013) (describing how "a growing movement of commentators is advocating a shift to an open identity model that would ban anonymity.").

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CONCLUSION

The Marotta lawsuit demonstrates that donors and would-be mothers should approach the practice of unassisted artificial insemination with the utmost care. As case law indicates, courts are reluctant to exhibit flexibility on matters of statutory interpretation regarding donor status. In states that have yet to adopt the language of the UPA's 2002 amendments, men who donate their sperm for use in artificial insemination without the involvement of a physician will most likely be considered legal fathers. Conversely, states that have adopted the language will likely regard them as donors.

As same-sex marriage continues to gain widespread acceptance throughout the country, the law must adapt to accommodate changes in public policy. However, if states are to enact legislation that could lead to an increase in private sperm donation, they must also consider the public health issues that would arise in order to protect the well-being of children conceived through artificial insemination. Such needs can be met if state legislatures enact statutes akin to the 2002 amendments of the UPA and pass regulations that effectively track the activity of private sperm donors. Such reforms are important not only for donors and couples who wish to conceive, but they are also necessary in our country's march towards equality for all.

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