

STUDY NOTE  
“YOU ONLY DONATED SPERM”:  
USING INTENT TO UPHOLD PATERNITY AGREEMENTS

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I. INTRODUCTION

Ruth and Kim Hackford-Peer identify themselves as a lesbian couple who went to great lengths to have children in “*The Most Wanted Boys in the World*.”<sup>1</sup> Using sperm donations from two different men, Ruth was able to have two children through artificial insemination.<sup>2</sup> As a result, Ruth is the legal mother of both children, but Kim is the legal mother of only one because she adopted the first child while living out-of-state, but could not adopt the second child under Utah’s adoption laws.<sup>3</sup> In the monologue, “*Telling*,”<sup>4</sup> Martha Ertman describes herself as a single lesbian woman who wants a child. Using her gay friend Victor’s sperm, Martha was artificially inseminated and subsequently became pregnant. Although Martha anticipates that Victor will be a part of the child’s life, not all mothers and donors agree on this kind of arrangement.

Many times, a woman in Martha’s situation changes her mind about the involvement she wants from the sperm donor. Women like Ruth and Kim often do not plan on the sperm donor having any parenting role. Yet, “what if” questions often are contemplated only after important life incidents. Although unable to change the past, people still think about the many different actions they could have taken to change a series of events. What if Martha later decides that Victor should not be a part of the child’s life, or demands that Victor sign a contract that gives away his paternity rights? What if Ruth and Kim later decide that the biological fathers of their children should take a more active parenting role? What if any of the biological dads sue for custody? While none of these actions are currently foreseeable, many other people have experienced disillusioned relationships that end up needing to be resolved in the courtroom.

This Note focuses on agreements between a sperm donor and a mother that either establish or terminate paternity, and whether or not these contracts are legally enforceable. First, this Note will define the different types of sperm donors

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<sup>1</sup> Ruth Hackford-Peer & Kim Hackford-Peer, Monologue, *The Most Wanted Boys in the World*, 11 J.L. & FAM. STUD. 477 (2009); 2009 UTAH L. REV. 525.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> Martha Ertman, Monologue, *Telling*, 11 J.L. & FAM. STUD. 483 (2009); 2009 UTAH L. REV. 531.

in relation to the recipient. Second, paternity presumptions in the Uniform Parentage Act will be discussed. Third, two important cases involving paternity agreements will be contrasted. Fourth, this Note will argue that paternity agreements should be enforced.

## II. TYPES OF SPERM DONORS

There are three different categories of relationships involving mothers and sperm donors: anonymous sperm donor, known sperm donor without parental rights, and known sperm donor with parental rights.<sup>5</sup>

The first category encompasses traditional type of anonymous sperm donation. The sperm donor remains anonymous, has no contact with the mother or child, and has no parental rights or responsibilities.<sup>6</sup> Donors usually make donations at sperm banks, sign agreements that waive parental rights, and release the sperm bank from liability.<sup>7</sup> This situation will not be discussed further because the donors never intend to have a parental relationship.

The second category includes Martha and Victor's situation. The sperm donor is usually a friend who offers his sperm to the mother, and the woman asks the donor to help parent the child. The donor retains all parental rights and responsibilities so that legally it is as if the mother and donor achieved pregnancy without artificial insemination.

The third category involves situations where a mother receives sperm from a known donor, but then either asks the donor to sign a contract that removes parental rights and responsibilities, or makes an oral agreement with the donor to the same effect. This includes Ruth and Kim Hackford-Peer's situation. Litigation arises when either party decides it wants to establish paternity for one or more of a variety of reasons. This situation is the focus of this note.

## III. UNIFORM PARENTAGE ACT

The Uniform Parentage Act ("UPA") was drafted by the Conference of Commissioners on Uniform State Laws in 1973 for the purpose of standardizing the various state laws governing parentage.<sup>8</sup> Since it was drafted, nineteen states have adopted the model act.<sup>9</sup> When first drafted, the UPA only mentioned married women using sperm donors: "The donor of semen provided to a licensed physician for use in artificial insemination of a married woman other than the donor's wife is

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<sup>5</sup> Dawn R. Swink & J. Brad Reich, *Caveat Vendor: Potential Progeny, Paternity, and Product Liability Online*, 2007 BYU L. REV. 857, 874-75 (2007).

<sup>6</sup> *Id.* at 874 n.96.

<sup>7</sup> *Id.* at 875.

<sup>8</sup> Meghan Anderson, Comment, *K.M. v. E.G.: Blurring the Lines of Parentage in the Modern Courts*, 75 U. CIN. L. REV. 275, 278 (2006).

<sup>9</sup> *Id.*

treated in law as if he were not the natural father of a child thereby conceived.”<sup>10</sup> The New Jersey case of *C.M. v. C.C.* was the first to deal with the paternity rights of a known sperm donor who donated his sperm to an *unmarried* woman.<sup>11</sup>

The court in that case relied on public policy rationale, which “favor[s] the requirement that a child be provided with a father as well as a mother,” to award the donor all the rights and obligations of a natural father.<sup>12</sup> Because of this policy, a known sperm donor who donated to an unmarried woman friend faced potential liability for all parental responsibilities and obligations. Many states, viewing this prejudice against an unmarried woman as problematic, amended their own sperm donation statutes to remove the word “married,”<sup>13</sup> thereby reading: “The donor of semen provided to a licensed physician and surgeon 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.”<sup>14</sup> This change created a “complete bar to paternity for any sperm donor not married to the recipient,” whether or not the donor was known or whether the woman was married.<sup>15</sup>

Many non-traditional couples, including lesbian couples using known sperm donors, try to circumvent the UPA and state statutory presumptions of paternity through contract law.<sup>16</sup> In her article, *Bargaining or Biology?*, Katherine Baker argues that “contract as a basis for paternity has more historical support than does biology.”<sup>17</sup> Rather than relying on the oral or written contract themselves, courts are more likely to rely on the intent of the parties to either uphold or dismiss paternity agreements.<sup>18</sup>

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<sup>10</sup> Jason Oller, Comment, *Can I Get that in Writing?: Established and Emerging Protections of Paternity Rights [In Re K.M.H., 169 P.3d 1025 (Kan. 2007)]*, 48 WASHBURN L.J. 209, 217 (2008) (citing UNIF. PARENTAGE ACT § 5(b), 9B U.L.A. 407–08).

<sup>11</sup> 377 A.2d 821, 821 (Cumberland County Ct. 1977) (explaining “[t]his is a case of first impression, presenting a unique factual situation with no reported legal precedents directly on point, in this or any other jurisdiction”).

<sup>12</sup> *Id.* at 824.

<sup>13</sup> *In re K.M.H.*, 169 P.3d 1025, 1034 (Kan. 2007).

<sup>14</sup> *Id.* at 1034–35.

<sup>15</sup> *Id.* at 1034.

<sup>16</sup> Katharine K. Baker, *Bargaining Or Biology? The History and Future of Paternity Law and Parental Status*, 14 CORNELL J.L. & PUB. POL'Y 1, 22 (2004).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 27. A larger discussion of the “intent test” can be found in Anderson, *supra* note 8, at 297–303.

## IV. IMPORTANT CASES

A. *New York*: In re Thomas S. v. Robin Y.<sup>19</sup>

Robin Y. was a lesbian living with her partner, Sandra R., when they decided that they wanted to bear a child through artificial insemination.<sup>20</sup> Friends of the couple introduced them to Thomas Steel, a civil rights attorney and gay man.<sup>21</sup> Although Steel and Sandra R. were both attorneys, and, according to Robin Y., Steel said he would not assert parental rights, an agreement was never drawn up that would have limited Steel's paternity rights.<sup>22</sup> Robin Y. was successfully inseminated and gave birth to a daughter named Ry.<sup>23</sup> The relationship between Robin Y. and Steel was warm and amicable, evidenced by a letter from Robin Y. to Steel that said: "You have become a very important part of all our lives; we're so happy that we have grown together as a family."<sup>24</sup> In July 1990, when Ry was nine-years-old, Steel asked Robin Y. for permission to take Ry on vacation to see his parents.<sup>25</sup> Robin Y. refused, and during these discussions Steel indicated that he wanted to establish a paternal relationship with Ry.<sup>26</sup>

The court found the critical legal issue of the dispute to be whether the rights of a biological parental relationship can be terminated without "strict adherence to statutory provisions," and ruled in favor of Steel.<sup>27</sup> Presumably because the court did not think it was important, the supposed oral agreement between Robin Y. and Steel was only mentioned in one paragraph.<sup>28</sup> The court wrote, "[w]hile much is made by Family Court of the alleged oral understanding between the parties that petitioner would not assume a parental role towards Ry, any such agreement is unenforceable for failure to comply with explicit statutory requirements for surrender of parental rights."<sup>29</sup> Intent was more important to the court than an actual agreement. "The court looked to the *functional* agreement between the biological mother and the biological father which indicated mutual intent to have

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<sup>19</sup> *In re Thomas S. v. Robin Y.*, 618 N.Y.S.2d 356 (N.Y. App. Div. 1994).

<sup>20</sup> *Id.* at 299; see also Fred A. Bernstein, *This Child Does Have Two Mothers . . . And a Sperm Donor with Visitation*, 22 N.Y.U. REV. L. & SOC. CHANGE 1, 27 (1996) (citing facts from the lower court opinion in *Thomas S. v. Robin Y.*, which was reversed on appeal).

<sup>21</sup> Bernstein, *supra* note 20, at 27.

<sup>22</sup> *Id.*

<sup>23</sup> *In re Thomas S.*, 618 N.Y.S.2d at 358.

<sup>24</sup> Bernstein, *supra* note 20, at 28.

<sup>25</sup> *In re Thomas S.*, 618 N.Y.S.2d at 358.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 359.

<sup>28</sup> *Id.* at 361.

<sup>29</sup> *Id.*

the biological father assume a paternal role.”<sup>30</sup> Some of the factors the court relied on to show a functional agreement included visits, and the numerous cards and letters from Ry to Steel.<sup>31</sup>

If Robin Y. and Steel had drawn up a written contract abrogating Steel’s paternity rights, this case would likely have been analyzed under compliance with New York’s statutory requirements for relinquishing paternity.<sup>32</sup> Because there was no written agreement, the court was able to dismiss the oral paternity agreement and use an intent analysis instead.<sup>33</sup>

### B. Pennsylvania: Ferguson v. McKiernan<sup>34</sup>

Ivonne Ferguson was a married woman working at Pennsylvania Blue Shield.<sup>35</sup> Joel McKiernan began working at Pennsylvania Blue Shield and developed a sexual relationship with Ferguson.<sup>36</sup> During this period, Ferguson told McKiernan that she wanted to sexually conceive a child with him.<sup>37</sup> He refused, telling her that he did not want to marry her and therefore did not want to father her child.<sup>38</sup> Ferguson changed her approach and asked McKiernan if he would provide his sperm to her so she could use in vitro fertilization to become pregnant.<sup>39</sup> He agreed only after she assured him that she would release him from all paternal responsibilities, including financial support.<sup>40</sup> Ferguson was subsequently impregnated with twins after a successful in vitro fertilization procedure.<sup>41</sup> McKiernan never attended any of Ferguson’s prenatal examinations, did not pay for any prenatal expenses, and was only present during Ferguson’s labor because she requested his presence as a friend (but neither of them acknowledged his role as the sperm donor).<sup>42</sup> For five years after the birth, Ferguson acted consistently with her agreement with McKiernan not to involve

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<sup>30</sup> Baker, *supra* note 16, at 28 n.146 (emphasis added).

<sup>31</sup> *In re Thomas S.*, 618 N.Y.S.2d at 358.

<sup>32</sup> See *In re Baby Boy P.*, 382 N.Y.S.2d 644, 646 (N.Y. Fam. Ct. 1976). “If a natural mother is to have her rights to her child foreclosed, strict compliance with the statute must be had and full effect given to the plain language of the documents executed.” *Id.*

<sup>33</sup> *In re Thomas S.*, 618 N.Y.S.2d at 362.

<sup>34</sup> 940 A.2d 1236 (Pa. 2007).

<sup>35</sup> *Id.* at 1238.

<sup>36</sup> *Id.* at 1238–39.

<sup>37</sup> *Id.* at 1239.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 1240.

<sup>42</sup> *Id.*

him in any way in the twins' lives.<sup>43</sup> Then, during the fifth year, Ferguson filed a motion seeking child support from McKiernan.<sup>44</sup>

The Supreme Court of Pennsylvania ruled that the pre-insemination oral agreement between Ferguson and McKiernan was enforceable.<sup>45</sup> First, the court looked at the intent of the parties when they negotiated an agreement.<sup>46</sup> Ferguson told McKiernan that she would not request support; they attempted to hide McKiernan's paternity from friends, family, and the doctor who performed the in vitro fertilization; furthermore, McKiernan and Ferguson behaved for five years after the birth of the twins in a manner consistent with their initial agreement.<sup>47</sup>

Second, the court found the public policy reasons for upholding the paternity agreement to be compelling. If two parties could not contract to remove the paternity rights of a known sperm donor:

[I]t 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 seek custody of the child.<sup>48</sup>

The mother would have to choose between using an anonymous donor who she knows little about, or she would have to abandon her dreams of motherhood.<sup>49</sup> The court found no "basis in law" to enforce this type of policy.<sup>50</sup> Knowing that non-traditional families rely on contracts or other agreements of "varying degrees of formality" to govern the donation of sperm or eggs, the court upheld the agreement.<sup>51</sup> The court recognized that using contracts to establish or relinquish paternity is a viable way of memorializing the intent of the parties.

## V. CONTRACTING AWAY PATERNITY RIGHTS

Courts hesitate to rely on contract law in paternity issues because contract principles use rules of the marketplace, and courts are uncomfortable treating families like commodities.<sup>52</sup> Paternity involves a child's rights to "parental care,

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<sup>43</sup> *Id.* at 1238.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 1248.

<sup>46</sup> *Id.* at 1246.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 1247.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 1245.

<sup>52</sup> Baker, *supra* note 16, at 29 n.158 (quoting JANET L. DOLGIN, *DEFINING THE FAMILY: LAW, TECHNOLOGY AND REPRODUCTION IN AN UNEASY AGE* 178–82 (1997)).

custody, and support.”<sup>53</sup> Because courts use the “best interest of the child standard” in making determinations concerning children, contract law and contract principles cannot be applicable.<sup>54</sup> Martha Ertman herself 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.”<sup>55</sup>

Courts are not unanimous in this regard. The court in *C.M. v. C.C.* ruled that children should have a right to know to their fathers and “[i]t is in the child’s best interest to have two parents whenever possible.”<sup>56</sup> The court held that the sperm donor was the natural father and was thereby entitled to visitation rights.<sup>57</sup> However, while the court in the previously discussed *Ferguson* case viewed the best interest of the child standard as an important policy concern, it ruled that this standard was not the *only* policy concern involved in paternity contracts.<sup>58</sup> Moreover, some commentators have opined that contract law, specifically a marriage contract, has always governed paternity.<sup>59</sup>

Promissory estoppel offers the court a way to determine what should be done in disputed paternity cases where the donor and recipient used an oral or written agreement.<sup>60</sup> To apply promissory estoppel, one of the parties must prove that an agreement was created.<sup>61</sup> The first party must anticipate reliance by the second party, and the second party actually must have reasonably relied on the agreement.<sup>62</sup> If the court’s only option to avoid injustice is to enforce the agreement, then the agreement must be enforced.<sup>63</sup>

Courts have applied a promissory estoppel analysis in situations where fathers try to deny paternity. One court found that a man was for all “intents and purposes the father of the child” because he acted like the father for two years and the mother relied on the man’s commitment.<sup>64</sup> Another court ruled that a non-biologically related man had paternity rights because the mother relied on his

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<sup>53</sup> Oller, *supra* note 10, at 237.

<sup>54</sup> See *In re Marriage of Duffy*, 718 N.E.2d 286, 289 (Ill. App. Ct. 1999) (“Parents may not bargain away the interest of their children and the court is not bound by an agreement that does not protect the best interest of the children.”).

<sup>55</sup> Martha M. Ertman, *What’s Wrong with a Parenthood Market? A New and Improved Theory of Commodification*, 82 N.C. L. REV. 1, 23 (2003).

<sup>56</sup> 377 A.2d 821, 825 (Cumberland County Ct. 1977).

<sup>57</sup> *Id.*

<sup>58</sup> *Ferguson v. McKiernan*, 940 A.2d 1236, 1246 (Pa. 2007).

<sup>59</sup> Baker, *supra* note 16, at 22 n.101 (citing Joseph Cullen Ayer, Jr., *Legitimacy and Marriage*, 16 HARV. L. REV. 22 (1902)).

<sup>60</sup> Oller, *supra* note 10, at 237.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Perkins v. Perkins*, 383 A.2d 634, 634, 636 (Conn. Super. Ct. 1977).

conduct and assurance that he would provide support.<sup>65</sup> The intent of the parties was central to the court's promissory estoppel analysis in both cases. The same type of analysis should be used in paternity suits.

If the court had used a promissory estoppel analysis in *In re Thomas S.*, it is likely that the oral agreement might have been enforced, and the two women could have cared for Ry without the interference of the sperm donor. Though the court looked at the intent of the parties, it viewed the actions of the parties through a traditional family lens, namely the presence of a mother and father.<sup>66</sup> Instead, the court should have looked at who was raising Ry: Robin Y. and her partner Sandra R. Had the court viewed the situation through a lens which recognized a lesbian couple's ability to raise their child, the court might have ruled in favor of Robin Y. Without explicitly stating so, the court in *Ferguson* used promissory estoppel and the intent of the parties to determine that McKiernan had no paternity rights or obligations.<sup>67</sup> McKiernan reasonably relied on this agreement and it would have been unjust for the court to impose parentage on him five years after the birth of the twins. Thus, when courts are hesitant to enforce paternity agreements, they should look to principles of promissory estoppel.

## VI. CONCLUSION

Paternity agreements deal with the creation and raising of a child, arguably two of the most important life events in a father or mother's life. As more people chose artificial insemination to become mother and fathers, it is likely that more people will enter into written or oral paternity agreements (either establishing paternity or removing paternity). These agreements are important to evidence the intent of the parties when they agreed to this important decision. Only when the situation turns litigious will courts have to look at these paternity agreements. It is important for courts to recognize the intent of the parties at the creation of the agreement and their actions afterward. If courts do not uphold paternity agreements, then there is no way for parties to plan for "what if" scenarios.

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<sup>65</sup> *Markov v. Markov*, 758 A.2d 75, 83 (Md. 2000).

<sup>66</sup> *In re Thomas S.*, 618 N.Y.S.2d at 361.

<sup>67</sup> *Ferguson v. McKiernan*, 940 A.2d 1236, 1248 (Pa. 2007).