ARTICLE

ARTIFICIAL INSEMINATION FROM DONOR (AID) – FROM STATUS TO CONTRACT AND BACK AGAIN?

YEHEZKEL MARGALIT*

INTRODUCTION

The last few decades have witnessed dramatic changes affecting the institutions of family and parenthood. If, in the past, the classic family was defined sociologically as a pair of heterosexual parents living together under one roof along with their children, different sociological changes have led to a rapid and extreme transformation in the definitions of family, marital relations, parenthood and the relationship between parents and children.[1] Furthermore, technological innovations such as artificial insemination (AI), sperm donation, and birth control have segregated partially marital relations from fertility.

This departure from traditional marriage and parenthood statuses demands a reliance on private ordering to determine legal parentage.[2] In order to bridge the gap between this social need and prevailing normative laws, couples and parents have sought to privately regulate their familial relationships by private agreement and contracts.[3] Many scholars justifiably maintain that the law has failed to catch up with rapid social and technological changes affecting the family, and that traditional legal norms fail to supply sufficient tools to cope with these changes.[4] Indeed, in certain states, legislatures and judges have preferred to regulate familial relationships through rigid, formalistic ordering

* Visiting Research Scholar, New York University Law School (2011-2012); Lecturer of Law, Tel Aviv University; PhD (Law); M.A. (Law); LL.B. Bar-Ilan University. Special thanks to Shahar Lifshitz and Rhona Schuz for their helpful comments on previous drafts of this article. All errors and omissions are mine.

[1] *See* Katharine K. Baker, *Bionormativity and the Construction of Parenthood*, 42 GA. L. REV. 649, 651, 714 (2008).

[2] Private ordering means recognizing the private agreements of individuals who have mutually agreed on their spousal and parental rights and obligations. Michael J. Trebilcock & Rosemin Keshvani, *The Role of Private Ordering in Family Law: A Law and Economics Perspective*, 41 U. TORONTO L.J. 533 (1991).

[3] *See* Katherine M Swift, *Parenting Agreements, the Potential Power of Contract, and the Limits of Family Law*, 34 FLA. ST. U. L. REV. 913, 930 (2007).

[4] *See, e.g.*, *id.* at 954-57; Katharine K. Baker, *Bargaining or Biology? The History and Future of Paternity Law and Parental Status*, 14 CORNELL J.L. & PUB. POL'Y 1, 22-69 (2004).

based on traditional bionormative models, and have rejected private agreements that are contrary to that model.[5]

A prominent iteration of the bionormative model, i.e. the traditional conception that every child should has only one father and one mother, is the continued reliance on the convention that legal parentage, fatherhood and motherhood, should be determined exclusively on the grounds of genetic affiliation.[6] The basis for this is the notion that each of the married spouses contributes biologically to create the child - the father by inseminating the woman and the mother in carrying the child to term - and both of the parents ostensibly desire to raise the child as their own.[7] This common understanding is subordinated to the fact that the marital presumption does not necessarily require us to ignore genetic truth in order to enable the continuing and flourishing of the existing marriage unit.[8]

Nevertheless, the famous position of Sir Henry Sumner Maine that mankind is pacing from status and public ordering toward freedom of contract and private ordering is increasingly observable in familial relationships. Indeed, from the second half of twentieth century, we have witnessed increased recognition of private ordering of spousal relationships by way of pre- and postnuptial agreements, agreements of cohabitants, and even the agreements of same-sex partners. We have also seen a dramatic increase in the legal efficacy of these agreements.[9]

Similarly, the prevailing legal view of child-parent relationships over the

---

[5] See, e.g., Yehezkel Margalit, *In Defense of Surrogacy Agreements: A Modern Contract Law Perspective,* 20 WM. & MARY J. WOMAN & L. 423, 428-30 (2014), for a discussion of the tendency of states and judges to invalidate any surrogacy agreement which reflects their actual adherence to the formalistic structures of the bionormative model of family and parenthood.

[6] For a discussion of the importance of establishing legal parentage on the basis of genetic affiliation and its advantages and disadvantages, see Yehezkel Margalit, עלייתו, משפטית הורות בקביעת הגנטי המודל של המחודשת ועלייתו שחיקתו [*The Rise, Fall and Rise Again of the Genetic Foundation for Legal Parentage Determination*], 3 J. HEALTH L. & BIOETHICS 125 (2010) (Isr.).

[7] *Id.* at 128-29.

[8] The marital presumption of paternity has been upheld by the U.S. Supreme Court. Michael H. v. Gerald D., 491 U.S. 110 (1989) (upholding a California statute creating a presumption that a child born to a married woman living with her husband is a child of the marriage). The other seminal cases on this topic are *Miscovich v. Miscovich*, 688 A.2d 726 (Pa. Super. Ct. 1997) (holding blood tests inadmissible to disprove paternity, although the family was no longer intact) and *Dawn D. v. Superior Court*, 952 P.2d 1139 (Cal. 1998) (holding biological link alone does not create due process rights in the biological father to overcome the husband's presumed fatherhood).

[9] *See, e.g.*, Shahar Lifshitz, *The Liberal Transformation of Spousal Law: Past, Present and Future*, 13 THEORETICAL INQUIRIES L. 15 (2012); Shahar Lifshitz, *Married Against Their Will? Toward a Pluralist Regulation of Spousal Relationships*, 66 WASH . & LEE L. REV. 1565 (2009).

past century can be conceptualized as a shift from traditional "status" to "contract" where the law treats childhood and the child-parent relationship less as a function of bionormative status and, instead, as a function of contract and agreements between independent agents.[10] At the same time, while family law has undergone a dramatic shift toward incorporating contract principles, federal and state legislation and notions of parental duty have, in recent years, caused a reversion to a status based model for ensuring that a legal parent fulfills his or her parental obligations. Thus, we actually have witnessed another shift in the opposite direction, from contract back to status.[11] This article will track this shift in the context of artificial insemination by a donor (AID).

There are a variety of types of artificial insemination.[12] The artificial insemination process involves the injection of sperm into a woman's cervix. The procedure may be done either by a licensed physician in an official medical facility or by a woman at home. Practically speaking, there are two main types of artificial insemination depending on the source of the sperm inserted into the woman. Homologous insemination occurs when the woman's husband donates sperm to be implanted into her.[13] Homologous insemination is alternatively known as artificial insemination by husband ("AIH").[14] When the procedure involves the use of donor sperm without the woman having a sexual relationship with the donor, it is referred to as either heterologous insemination or artificial insemination by donor (AID).[15] The focus of this article is not upon AIH but upon AID, and exploring its legal and social acceptance in terms of contract terminology, traditional parental statuses, and modern statuses.

For various social, ethical, legal, economic and psychological reasons, the use of AID is a very common practice in the modern era.[16] While historically the most prevalent reason for donated sperm was to contend with male infertility, in recent years sperm donation has been increasingly utilized by both single women and same-sex female partners who wish to create and raise a child without any male involvement after the moment of conception.[17]

---

[10] *See* Sarah Abramowicz, *Childhood and the Limits of Contract*, 21 YALE J.L. & HUMAN. 37 (2009); HOLLY BREWER, BY BIRTH OR CONSENT: CHILDREN, LAW, AND THE ANGLO- AMERICAN REVOLUTION IN AUTHORITY 5-13.

[11] *See* Linda D. Elrod, *Child Support Reassessed: Federalization of Enforcement Nears Completion*, 1997 U. ILL. L. REV. 695, 707.

[12] *See* Brent J. Jensen, Comment, *Artificial Insemination and the Law*, 1982 BYU L. REV. 935, 935-37.

[13] *See id.* at 936.

[14] *See* Gaia Bernstein, *The Socio-Legal Acceptance of New Technologies: A Close Look at Artificial Insemination*, 77 WASH. L. REV. 1035, 1054 (2002).

[15] See Browne Lewis, *Two Fathers, One Dad: Allocating the Paternal Obligations Between the Men Involved in the Artificial Insemination Process*, 13 LEWIS & CLARK L. REV. 949, 956-58 (2009), for a more comprehensive definition of the various AI procedures,

[16] *See* Bernstein, *supra* note 14, at 1060-83.

[17] See Yehezkel Margalit, Orrie Levy & John Loike, *The New Frontier of Advanced*

Sperm donation only causes a limited fragmentation of the traditional parental paradigm[18] given that conception, pregnancy and delivery may occur the "old fashioned" way. This stands in stark contrast to ova donation and gestational surrogacy, where the procedures are much more complicated and expensive because in vitro fertilization (IVF) is a required part of the process.[19] In AI, by contrast, the procedure is far less expensive and comparatively simple because a fertile man produces millions of sperm cells on a daily basis.[20] Moreover, AI is treated in many societies as a "cure" to the social infertility "disease" of women, which simplifies the social acceptance of this procedure as a legitimate process amongst the public.[21]

Using AID as a guide, in this article I will explore the possible next stage in eroding the legal view of paternity as status-based, and suggest a move toward greater freedom of contract and determining legal parenthood by agreement ("DLPBA"). Legal parentage has been historically subordinate to comprehensive public and legal regulation.[22] One ramification of this convention is that the vast majority of jurisdictions, legislatures, courts and scholars have traditionally rejected private agreements seeking to alter parental status. This is true concerning both the process of determining who is the legal parent and also in determining the spectrum of parental obligations and rights that flow from the parenthood such as visitation and custody rights.[23]

This article first argues that, in the context of AID, we can trace a clear shift from "status" to "contract" in the way that the law determines paternity. In the past, legal fatherhood was treated as a fixed status; every husband who impregnated his wife was determined to be the legal father of the child. In the 1930s and 1940s, however, there was a shift away from this fixed status and toward determining paternity by contract.[24] Viewed as a function of contract law, the exclusion of the sperm donor as a legal father in favor of a married woman's husband was not simply a matter of presumption. Instead, the

---

Reproductive Technology: Reevaluating Modern Legal Parenthood, 37 HARV. J.L. & GENDER 107 (2013), for the possibility of creating a child from two mothers or fathers, an interesting challenge to traditional parentage laws, and for the call to determine legal parentage of the conceived child by intentional parenthood as the preferred model.

[18] For this problem in the general context of fertility treatments, see Jonathan B. Pitt, Case Note, *Fragmenting Procreation*, 108 YALE L.J. 1893 (1999).

[19] *See* Nicole L. Cucci, Note, *Constitutional Implications of In Vitro Fertilization Procedures*, 72 ST. JOHN'S L. REV. 417, 448 (1998).

[20] *See* Christopher L.R. Barratt et al., *The Human Spermatozoon – a Stripped Down but Refined Machine*, 8 J. BIOLOGY, no. 63, 2009.

[21] *See* Noa Ben-Asher, *The Curing Law: On The Evolution Of Baby-Making Markets*, 30 CARDOZO L. REV. 1885 (2009).

[22] *See* A.M. Capron & M.J. Radin, *Choosing Family Law over Contract Law as a Paradigm for Surrogate Motherhood*, 16 J.L., MED. & ETHICS 34 (1988).

[23] *See* Marsha Garrison, *Law Making for Baby Making: An Interpretive Approach to the Legal Parentage*, 113 HARV. L. REV. 835, 865-66 (2000).

[24] See Bernstein, *supra* note 14, at 1060-61.

exclusion was based on the sperm donor's intention, will and agreement, often anchored in an explicit contract, that he would not be the parent of the child. Following donating his sperm, the donor would lose his entire spectrum of parental obligations and rights and was treated legally as a total stranger. Concomitantly, the inseminated woman's husband's legal paternity was derived from his intention, will and agreement, especially if it was embodied in an explicit agreement. The husband would then be treated as the legal father of the child and would receive the full range of paternal obligations and rights that flow from legal paternity.[25]

Nevertheless, as this intent-based practice became more socially welcomed and legally accepted, intentional fatherhood became so prevalent and static that, in effect, it became status-like. A critical ramification of this new "status" is that every attempt to change one of its terms by private agreement is rejected beforehand in much the same way that the marital presumption had excluded attempts at private ordering.[26] Thus, in the context of this new status, any attempt by a man other than the woman's husband to accept paternity status, or at least to determine what his full range of paternal obligations and rights will be, is blocked by legislatures and judges, and decried by academic scholars. In many ways, this new status is mirrored by the rejection of private agreements concerning paternity status and/or paternal obligations and rights found in the context of ova donation.[27] This article argues that this rigid social and legal approach toward intentional parenthood is problematic, can damage a child's best interest, and negatively affects a child's rights.

This article proceeds in four parts. Part I discusses the historical, status-based approach to determining parentage. Parts II and II track the shift toward a contract based system, and the modern reversion back to a status. Lastly, Part IV argues for greater reliance on contract principles in determining parentage. This article argues further that these contract principles should be combined with modern notions of status to achieve a balance between the private interest in determining parentage and the public interest in protecting the best interest of the child. Specifically, in the context of AID a donor should be permitted, by agreement, to opt in or out of paternity.

I. THE MARITAL PRESUMPTION AND AID THROUGH HISTORY

Legal paternity in the ancient era was typified by a status-based, bionormative view of the family unit. Through much of history, parentage was ascribed by virtue of an irrefutable marital presumption, i.e. the law has long presumed that a woman's husband is the father of the children born into their

---

[25] *See* Ben-Asher, *supra* note 21, at 1891-96.

[26] Jana B. Singer, *The Privatization of Family Law,* 1992 WIS. L. REV. 1443 (1992).

[27] See Anne Reichman Schiff, *Solomonic Decisions in Egg Donation: Unscrambling the Conundrum of Legal Maternity*, 80 IOWA L. REV. 265, 277-90 (1995), for an argument in favor of endorsing and validating more private agreements concerning maternal status, obligations and rights.

marriage.[28] Therefore, any child born into an intact marital unit was the legal child of the mother's husband.[29] One result of the historical primacy of this convention is that attempts to produce children using non-traditional means were treated as blasphemy and an attack on the holiness of marriage, even when the sperm utilized was that of the husband. Moreover, artificial insemination was viewed as an act of adultery and the resultant child could be deemed illegitimate. Unsurprisingly, for many years, AID was viewed as an attack on the family unit and as an undermining of the marital presumption. For centuries, society, and as an extension law, maintained at all costs the fiction that a woman's husband was the father of her children born during the marriage. The notion of a sperm donor was an anathema in this view of the world.[30]

A. The Marital Presumption

The strict historical adherence to the marital presumption was deeply grounded in religious ideology and the view that there should be a close nexus between marital status, sexuality and procreation. The Catholic Church, aspects of Protestantism, and Jewish law were all resistant to any attempt to unbundle and segregate legal parenthood from the marital status. Within this religious framework, the only way to conceive a legitimate child was for a legally married couple to engage in a monogamous sexual relationship.[31] The importance of the family for determining parentage was equally significant in the ancient Roman legal system. A legitimate child was one who was born to a legally cognizable family unit, even if the child was born only two weeks after the couple were wed. By contrast, every child who was born either to unmarried parents or following AID was treated as an illegitimate child, condemned to be the child of no one ("*filius nullius*").[32] In the scholarly literature one can find estimations that many children were fatherless in the

---

[28] *See* Traci Dallas, Note, *Rebutting the Marital Presumption: A Developed Relationship Test*, 88 COLUM. L. REV. 369, 369 (1988). *See also* Theresa Glennon, *Somebody's Child: Evaluating the Erosion of the Marital Presumption of Paternity*, 102 W. VA. L. REV. 547, 562-65 (2000).

[29] *See* Janet L. Dolgin, *Choice, Tradition, and the New Genetics: The Fragmentation of the Ideology of Family*, 32 CONN. L. REV. 523, 527-34 (2000).

[30] *See* Bernstein, *supra* note 14, at 1048-59.

[31] *See* M. Kabir Banu az-Zubair, *Who is a Parent? Parenthood in Islamic Ethics*, 33 J. MED. ETHICS. 605 (2007) (Islam); John T. Noonan, Jr., *Christian Tradition and the Control of Human Reproduction*, 4 J. CHRISTIAN JURISPRUDENCE 1, 2 (1984) (Christianity); Chaim Povarsky, *Regulating Advanced Reproductive Technologies: A Comparative Analysis of Jewish and American Law*, 29 U. TOL. L. REV. 409, 413-16 (1998); Pamela Laufer-Ukeles, *The Lost Children: When the Right to Children Conflicts With the Rights of Children*, 8 J.L. & ETHICS HUM. RTS. 219, 242-47 (2014) (Judaism).

[32] *See generally* Susan E. Satava, Comment, *Discrimination Against the Unacknowledged Illegitimate Child and the Wrongful Death Statute*, 25 CAP. U. L. REV. 933 (1996).

ancient era.[33]

The marital presumption was of similar importance in the 18th century. William Murray, first Earl of Mansfield and the Lord Chief Justice of the King's Bench, emphasized the marital presumption to such a degree that a married couple could not mutually agree to overcome it except in special circumstances.[34] Notably, the marital presumption was based not only on socio-religious notions, but also on the historical inability of science to conclusively determine who the genetic father of a child is and society's pragmatic desire to ensure that children are financially supported by a father. This presumption was ironclad for many centuries and served as a pillar of family law jurisprudence.[35]

The marital presumption has continued into the modern era. Courts ignore biological truths, even in the face of conclusive genetic evidence, and uphold the parental status of a woman's husband.[36] This is based, in part, on a generalized principal that a man who stands outside the family unit of the birthing mother is statistically unlikely to be the child's father.[37] The marital presumption, though often deemed inconsistent with modern, liberal views of family,[38] has remained stable and strong.[39] The presumption is well articulated in modern legislation, court rulings[40] and sociological conventions in many U.S states.[41] One scholar has even maintained that this presumption is a

---

[33] *See, e.g.*, Richard H. Helmholz, *Support Orders, Church Courts, and the Rule of Filius Nullius: A Reassessment of the Common Law*, 63 VA. L. REV. 431, 433-36 (1977); HARRY D. KRAUSE, ILLEGITIMACY: LAW AND SOCIAL POLICY 106 (1971); GROWING UP FATHERLESS IN ANTIQUITY (David M. Ratzan & Sabine R. Hübner eds., 2009); DAVID BLANKENHORN, FATHERLESS AMERICA: CONFRONTING OUR MOST URGENT SOCIAL PROBLEM (1995).

[34] *See, e.g.*, Goodright v. Moss, (1777) 98 Eng. Rep. 1257 (K.B.). See *Y.B.* 32 & 33 Edw. 1 (R.S.) 60, 63 (1304) and In re *Findlay*, 170 N.E. 471 (N.Y. 1930), for examples of the superiority of the marital presumption over the best interests of the child.

[35] *See* Michael H. v. Gerald D., 491 U.S. 110, 113 (1989); Casbar v. Dicanio, 666 So. 2d 1028, 1029 (Fla. Dist. Ct. App. 1996); Brabham v. Brabham, 483 So. 2d 341, 342 (Miss. 1986); Michael K.T. v. Tina L.T., 387 S.E.2d 866, 869 (W. Va. 1989).

[36] *See* Dolgin, *supra* note 29, at 526.

[37] *See id.*

[38] This is one of the reasons for the demise of this traditional presumption. *See, e.g.*, Glennon, *supra* note 28, at 562-65.

[39] *See Michael H.*, 491 U.S. at 113.

[40] *See, e.g.*, Miscovich v. Miscovich, 688 A.2d 726, 728 (Pa. Super. Ct. 1997).

[41] *See, e.g.*, UNIF. PARENTAGE ACT § 4(a)(1) (amended 2002), 9B U.L.A. 295 (2014).This presumption can be overcome only by certain individuals under special circumstances. *See id.* § 6. *See also* Megan S. Calvo, Note, *Uniform Parentage Act - Say Goodbye to Donna Reed: Recognizing Stepmothers' Rights*, 30 W. NEW ENG. L. REV. 773, 776-83 (2008). In other scenarios, this presumption is subordinated to the fact that there is proof that the putative father and the birthing mother had a sexual relationship either by genetic evidence or judicial discretion following the pregnancy. *See* UNIF. PARENTAGE ACT § 4.

triumph of the law and public policy over genetics.[42]

Scholars offer several justifications for the legitimacy presumption, first among them being the preservation of the integrity of the family unit. If any man could easily claim paternity, it would badly damage the existing familial structure. Even if there is biological proof proffered, the exposure of this biological truth can open a Pandora's box of familial betrayal, and can cause more harm than good.[43] Moreover, in the ancient era there was no ability to empirically prove or disprove the paternity of a given putative father and illegitimacy could have a devastating result on a child.[44] Thus, making sure that children who were born out of wedlock would not suffer from this negative stigma was a strong benefit of the marital presumption.[45]

Further, establishing a woman's husband as the legal father ensures that a child would receive shelter, education, and sustenance. These pragmatic concerns continue to inform the modern use of the marital presumption.[46] Additionally, some scholars have argued that financial considerations also shape this presumption – i.e., to defend a man from unjustified child support claims from non-genetic children[47] and to make sure that a man's inheritance will be divided between his genetic children.[48] Moreover, this presumption addresses the fear that if a putative father is able to disprove paternity, the support of the child will be cast on the entire public, including the obligation to compensate the father for any unjustified child support he was forced to pay to a non-genetic child.[49]

B. AID Through History

In light of the historical significance of the marital presumption, it is unsurprising that AID was first viewed as undermining the marital and legitimacy presumptions. Women who utilized this procedure were viewed as engaging in adultery, and thus, children who had been born from it could be

---

[42] Brie S. Rogers, Comment, *The Presumption of Paternity in Child Support Cases: A Triumph of Law Over Biology*, 70 U. CIN. L. REV. 1151, 1152, 1154 (2002).

[43] *See id.* at 1152-56; Glennon, *supra* note 38, at 591-92.

[44] *See* HARRY D. KRAUSE, ILLEGITIMACY: LAW AND SOCIAL POLICY 106 (1971); Katharine K. Baker, *Bargaining or Biology? The History and Future of Paternity Law and Parental Status*, 14 CORNELL J.L. & PUB. POL'Y 1, 24-25 (2004).

[45] *See* John L. Hill, *What Does it Mean to be a "Parent"? The Claims of Biology as the Basis for Parental Rights*, 66 N.Y.U. L. REV. 353, 373 n.96 (1991).

[46] *See supra* note 35 and accompanying text.

[47] *See* Baker, *supra* note 4, at 23 n.105 and accompanying text.

[48] 1 WILLIAM BLACKSTONE, COMMENTARIES *446-47.

[49] Jayna M. Cacioppo, Note, *Voluntary Acknowledgments of Paternity: Should Biology Play a Role in Determining Who Can Be a Legal Father?*, 38 IND. L. REV. 479, 483 n.25 (2005); Paula Roberts, *Biology and Beyond: The Case for Passage of the New Uniform Parentage Act*, 35 FAM. L.Q. 41, 55 (2000).

viewed as illegitimate.[50] In the 17th and 18th centuries, AI attempts were made in different animals,[51] but the first successful insemination of a woman with her husband's sperm was conducted around the year 1785 by the English surgeon John Hunter.[52] It was not until this time that society first began to grapple with the scientific, ethical and legal dilemmas posed by this technology.[53]

After these first tentative inroads, in 1866, the modern era of AID began in earnest following the success of the American gynecologist Marion Sims in achieving live birth from artificial insemination, who has been referred to as "the father of modern gynecology."[54] The first documented AI attempts all used the sperm of a woman's husband.[55] This scientific bias, in and of itself, is evidence of the strength of marital status and the legitimacy presumption in the popular psyche and demonstrates the deep moral discomfort at that time with the notion of unbundling procreation from the conjugal, marital relationship by using AID. Moreover, this discomfort was bolstered by the Victorian conservatism of the time which aimed to preserve the modesty of the female body and the stability of the family unit.[56]

For several decades after AI was first utilized in humans, the law treated it with ambivalence as can be learned from the following cases: for instance, in 1883, a French court dealt with a case in which a married couple hired a physician to inseminate the woman with her husband's sperm.[57] When the procedure failed, the couple refused to pay the physician and the physician sued. The Tribunal of Bourdeaux rejected the physician's suit and condemned AI on the grounds that it was immoral, contradicted natural law and jeopardized society.[58] By contrast, in the year 1905, a German court dealt with

---

[50] *See* Ben-Asher, *supra* note 21, at 1889-91; Bernstein, *supra* note 14, at 1058-59.

[51] For a survey of those attempts, see WILFRED J. FINEGOLD, ARTIFICIAL INSEMINATION 5-11 (1964); Jensen, *supra* note 12, at 937-38.

[52] For authority doubting when this practice was utilized between the years 1796 and 1799, see Charles E. Rice, *A.I.D. - An Heir of Controversy*, 34 NOTRE DAME L. REV. 510, 511 (1959). For a summary of the ancient era of AID, see HERMAN ROHLEDER, TEST TUBE BABIES 29-44 (1934); A.M.C.M. SCHELLEN, ARTIFICIAL INSEMINATION IN THE HUMAN 7-24 (1957); Bernstein, *supra* note 14, at 1048-59.

[53] *See* Bernstein, *supra* note 14, at 1048-59. For the first summary of the history of AID, see HERMAN ROHLEDER, TEST TUBE BABIES (1934). For an updated summary of treating this practice as an illegitimate one and as adultery, see Kara W. Swanson, *Adultery by Doctor: Artificial Insemination*, *1890-1945*, 87 CHI.-KENT L. REV. 591, 595, 621, 630, 633 (2012).

[54] *See* SEALE HARRIS, WOMAN'S SURGEON: THE LIFE STORY OF J. MARION SIMS xvii (1950).

[55] *See* SCHELLEN, *supra* note 52, at 14; Rice, *supra* note 52, at 511.

[56] *See* Bernstein, *supra* note 14, at 1050 n.36.

[57] See WILLIAM KEVIN GLOVER, ARTIFICIAL INSEMINATION AMONG HUMAN BEINGS: MEDICAL, LEGAL AND MORAL ASPECTS 7-9 (1948).

[58] *See* SCHELLEN, *supra* note 52, at 286-87; Alfred Koerner, *Medicolegal Considerations in Artificial Insemination*, 8 LA. L. REV. 484, 489 (1948); Anthony F. LoGatto, *Artificial*

a case in which a woman asserted that she had inseminated herself with her infertile husband's sperm, which she had found in their bed. The German appellate court, Reichgericht at Leipzig, rejected both the husband's claim and the lower court's determination that the child was illegitimate, even though the husband did not consent to the wife's insemination.[59]

Whereas the social and legal attitudes toward artificial insemination with a husband's sperm were ambivalent, the attitudes toward AID were much more hostile. When rumors spread that AID had been accomplished in Philadelphia in 1848, the public was shocked by the possibility of inseminating a woman with sperm belonging to a man other than her husband. The procedure was almost universally viewed as immoral.[60] The pioneer in performing AID was Robert L. Dickinson, who conducted the procedure for the first time in the late nineteenth century.[61] Thereafter, the first reliable news about AID in medical literature appeared in the year 1909.[62] During the same period, courts which dealt with AID performed on married women held that AID was adultery *per se* and contradicted public policy.[63]

This negative attitude toward AID prevailed even when the inseminated wife's husband gave explicit consent to the procedure. Even with consent, the procedure was treated as adultery.[64] The Canadian Supreme Court came to this same conclusion in a 1921 case which dealt with a woman who was unable to have intercourse with her husband.[65] Due to her strong desire to have a child, the woman inseminated herself using a sperm donation. She did this without the permission of her husband. The exact facts of the case were discrete and

---

Insemination: I - Legal Aspects, 1 CATH. LAW. 172, 181 (1955); Bernstein, *supra* note 14, at 1052-53.

[59] *See* SCHELLEN, *supra* note 52, at 287-88; Barry S. Verkauf, *Artificial Insemination: Progress, Polemics, and Confusion - An Appraisal of Current Medico-Legal Status*, 3 HOUS. L. REV. 277, 294 (1966); Bernstein, *supra* note 14, at 1055-56.

[60] *See* A.T. Gregoire & Robert C. Mayer, *The Impregnators*, 16 FERTILITY & STERILITY, no. 1, 1965, at 130, 132-33.

[61] *See* Robert L. Dickinson, *Artificial Impregnation: Essays in Tubal Insemination*, 1 AM. J. OBSTETRICS & GYNECOLOGY 255 (1920).

[62] *See* A.D. Hard, *Artificial Impregnation*, 27 MED. WORLD 163 (1909).

[63] *See generally* Swanson, *supra* note 53.

[64] Lawrence F. Ledebur, Recent Decision, Doornbos v. Doornbos, *139 N.E.2d 844 (Ill. Appl. Ct. 1954)*, 43 GEO. L.J. 517, 517-20 (1955). For the courts' perception of AID as adultery, see June Carbone, *The Role of Adoption in Winning Public Recognition for Adult Partnerships*, 35 CAP. U. L. REV. 341, 357-61 (2006) and Povarsky, *supra* note 31, at 416-24.

[65] Orford v. Orford, [1921] 58 D.L.R. 251, 257-59 (Can. Ont. Sup. Ct.). For a discussion of this case and of other rulings that have defined the conceived child by AID as illegitimate, see Editorial, *Artificial Insemination and Illegitimacy*, 112 J. AM. MED. ASS'N 1832, 1832-33 (1939), and Richard F. Storrow, *"The Phantom Children of the Republic": International Surrogacy and the New Illegitimacy*, 20 AM. U. J. GENDER SOC. POL'Y & L. 561, 589-93 (2012).

vague, making it unclear whether the woman had used AI or if she simply had a sexual relationship with another man.[66] The husband requested a divorce from his wife based on her alleged adultery, and the court rejected the woman's claim that without having sexual intercourse with a man there can be no finding of adultery.[67] Instead, the court explicitly found that AID, even in the absence of a sexual relationship, was a "monstrous" conclusion.[68] Additionally, three years later, in 1924, Lord Dunedin concluded in a case before the House of Lords that giving birth to a child out of wedlock without a sexual relationship constitutes adultery.[69]

In Europe the hostile approach toward AID continued into the middle of the 20th century. In the year 1948, for instance, the British Supreme Court dealt with an unmarried couple who had not consummated their marriage but nonetheless decided to conceive a child. After several unsuccessful AIH attempts, they decided to use AID. The court held that the couple should separate because of the lack of consummation even though the child would be deemed illegitimate.[70] Similarly, in the year 1959, the Italian Supreme Court ruled that a married woman who was living away from her husband and had inseminated herself without his permission had engaged in adultery.[71] The United States viewed AID through a similarly conservative lens. In a case from 1954, the court argued that although the husband had given his permission, the wife's use of AI constituted adultery and was against public policy. As a result, the child was deemed illegitimate and his father was not entitled to any parental rights.[72] In another case, the court found that, in absence of any laws

---

[66] *See Orford*, 58 D.L.R. at 254-55; Bernstein, *supra* note 14, at 1057-59.

[67] The other side of this convention is that AID performed in a woman without her consent was, in certain instances, considered rape. *See* Olivia N. v. Nat'l Broad. Co., 74 Cal. App. 3d 383 (1977).

[68] *Orford*, 58 D.L.R. at 258.

[69] Russell v. Russell, [1924] A.C. 687, 721 (H.L.) (Eng.) (the essence of adultery is not intercourse but rather "fecundation ab extra"). For a discussion of that case, see, e.g., Andrew D. Weinberger, *A Partial Solution to Legitimacy Problems Arising from the Use of Artificial Insemination*, 35 IND. L.J. 143, 147 (1960); Stuart Lang, *Does Artifical Insemination Constitute Adultery*, 2 MAN. L.J. 87, 93-94 (1966-1967).

[70] *L. v. L.*, [1949] 1 All E.R.141, 143 (Eng.) (the child was illegitimate because although the wife became pregnant by intrauterine insemination, the marriage was not consummated). For a similar conclusion reached by the British court in 1954, see *Sapsford v. Sapsford*, [1954] 2 All E.R. 373, 373-75 (Eng.) (the sexual intimacies between the plaintiff's wife and a third person had not extended to sexual intercourse, adultery was nevertheless committed).

[71] *See* Weinberger, *supra* note 692, at 146.

[72] Doornbos v. Doornbos, 23 U.S.L.W. 2308 (Ill. Super. Ct. Dec. 13, 1954). *See also* Kelly L. Frey, *New Reproductive Technologies: The Legal Problem and a Solution,* 49 TENN. L. REV. 303, 313-16 (1982) (discussing the court's contention that "AID, even with the consent of the husband, is an act of adultery and that the offspring of AID are illegitimate"). For the wide public and medical attention that was given to this case, see Arthur A. Levinson, *Dilemma in Parenthood: Socio-Legal Aspects of Human Artificial*

governing AID that were similar to adoption laws, a child born from AID is illegitimate. [73]

II. AID IN THE MODERN ERA – FROM STATUS TO CONTRACT

Although AID in the first half of the 20th century was met with significant legal and social opposition due to notions of the marital unit and the marital presumption, AID began to slowly gain greater societal and legal acceptance in the second half of the century. For instance, in 1958, a Scottish court maintained that using AID without a sexual relationship was not adultery, even if the woman used AID without the husband's consent.[74] One scholar argued that the reason for this increased acceptance was that AIH and AID were more widely used during the 1950s, when, during the Korean War, soldiers banked their sperm for later use by their wives.[75] Various other factors supported the increased use of AID, including the simplicity of the procedure, its success, and the strong social need for cures to infertility.[76]

This modern era of AID, starting in the middle of the 20th century, can be conceptualized as a movement from the legal significance of marital status to that of human agency and contract.[77] Put differently, prior to the mid-20th century, legal paternity was treated as a status that should be ascribed only to the birthing mother's husband; courts rejected any attempt by the parties to stipulate otherwise.[78] From the second half of the 20th century, however, both the law and society began to view family law and the role of AID as a matter of agreement between the parties. In the second half of the 20th century, numerous courts in the context of AID abandoned the slavish adherence to the primacy of the family unit and the historical nexus between marriage, procreation and parentage. Instead, over time, courts began to utilize contract principles in the family realm. Thus, the sperm donor could be excluded from parenthood not based on the fiction of the marital presumption, but based on the donor's agreement to opt out of legal paternity and on the husband's agreement to accept legal paternity and its attendant rights and obligations.

A survey of various court rulings from this period demonstrates this trend

---

Insemination, 4 J. FORENSIC MED. 147, 166 (1957).

[73] Gursky v. Gursky, 242 N.Y.S.2d 406, 408-10 (Sup. Ct. 1963) (a child born through heterologous artificial insemination by a third party donor is not considered born in wedlock and is therefore illegitimate). For a discussion of this ruling, see Naomi Cahn, *The New Kinship*, 100 GEO. L.J. 367, 389 n.112 (2012).

[74] MacLennan v. MacLennan, (1958) S.C. 105 (Scot.) (AID, even without the husband's consent, did not constitute adultery since adultery is concerned with the means of impregnation rather than with the impregnation itself). For a discussion of this verdict, see Stuart Lang, *supra* note 69, at 88-96.

[75] Storrow, *supra* note 65, at 588-89.

[76] For a survey of these reasons, see Bernstein, *supra* note 14, at 1060-71.

[77] *See* Bernstein, *supra* note 14, at 1060-83.

[78] *See supra* note 5 and accompanying text.

and shows the various ways in which courts, relying on contract principles, addressed AID. The first American decision that adopted this modern view of AID was in Illinois in the year 1945.[79] In that case, the court determined that AID should not be defined as adultery and does not constitute a sufficient reason to get divorced.[80] Similarly, a New York court held in 1948 that, where a child was conceived through AID to which the husband had consented, the husband was entitled to visitation rights; by consenting to AID, the husband effectively adopted or semi-adopted the child.[81]

In 1963, another New York court reached two important conclusions concerning AID. The first conclusion was that when a couple signs an AID agreement and the husband agrees to pay the expenses, the husband should be deemed the legal father of the child and is obligated to provide financial support.[82] The reasoning behind this conclusion is that the husband's actions create an implied promise and an implied agreement to continue supporting the child.[83] This agreement then prompts reliance by the mother that causes her to detrimentally change her position.The second conclusion the court came to was that if a husband gives his permission and the mother relies on the agreement implied by that permission, the husband cannot refuse to pay child support based on a theory of estoppel.[84]

In 1968 a California court ruled that a child born after AID, where the mother and her husband had signed an AID agreement, is legitimate. The couple had signed an agreement with the physician requesting that he "inseminate the wife with the sperm of a white male."[85] The husband knew at the time he signed the consent that when his wife took the treatments she could become pregnant and that if a child was born it was to be treated as their child. The court maintained, without using any explicit contractual doctrine, that even though the agreement only concerned the husband's consent to his wife's insemination, the agreement of the husband created an additional implied promise to support the resultant child.[86] Further, this obligation survives the

---

[79] Hoch v. Hoch, No. 44-C-8307 (Ill. Cir. Ct. 1945).

[80] Mary Ann B. Oakley, *Test Tube Babies: Proposals for Legal Regulation of New Methods of Human Conception and Prenatal Development*, 8 FAM. L.Q. 385, 387 n.17 (1974). *See also* Rice, *supra* note 52, at 514.

[81] Strnad v. Strnad, 78 N.Y.S.2d 390, 391 (Sup. Ct. 1948).

[82] Gursky v. Gursky, 242 N.Y.S.2d 406, 412 (Sup. Ct. 1963).

[83] *Id.* at 411. *See also* Anonymous v. Anonymous, 246 N.Y.S.2d 835, 837 (Sup. Ct. 1964) (recognizing an implied contract when a woman's husband consents to artificial insemination of her by a third party donor); People *ex rel.* Abajian v. Dennett, 184 N.Y.S.2d 178, 182 (Sup. Ct. 1958) (finding that a mother could not contest the legal rights of her ex-husband in regards to her children after her ex-husband relied on a separation agreement and divorce decree that she and her ex-husband signed identifying the children as belonging to the mother and her ex-husband).

[84] *Gursky*, 242 N.Y.S.2d at 412.

[85] People v. Sorenson, 437 P.2d 495, 497 (Cal. 1968).

[86] *Id.* at 499-500.

potential divorce of the couple.[87] Thus, the logical conclusion of this case is that through this nearly automatic mechanism of implied agreement, the parental relationship created by the husband's agreement could not be renounced based on a change of heart later on.

In 1973 another court dealt with a divorced woman who remarried but whose ex-husband had agreed expressly to her insemination with donor sperm.[88] During her first marriage, a child was born of consensual AID, and "her ex-husband was listed as the father on the birth certificate."[89] Later the couple separated and divorced, with both "the separation agreement and the divorce decree declar[ing] the child to be the "daughter" and "child" of the couple."[90] The woman wanted her current husband to adopt the child, despite her ex-husband's resistance.[91] The court maintained that the ex-husband's express agreement bound him as the legal father of the conceived child and he therefore needed to give his permission for the new husband to adopt the child.[92] The court further noted that, after the husband agreed to the insemination, any claims that the wife betrayed the husband (thus rendering the child illegitimate and available for adoption) should be rejected.[93]

In 1977, the New Jersey Supreme Court found that, in a case where a couple intended to get married and the wife underwent AIH, the child was the legal son of the father even though the couple was not formally married and the child was not conceived through sexual intercourse In this case, the man testified that he and the mother had been together some time and were contemplating marriage, but that the mother wanted a pre-marital child with him but without having pre-marital intercourse.[94] On this reasoning, the man consented to provide the sperm for artificial insemination. The court based its decision on the couple's initial implied agreement and the father's will to become the father of the child.[95]

This movement toward greater acceptance of AID through contract principles was not limited to the common law. Georgia in the year 1964, Oklahoma in the year 1967, and Kansas in the year 1968 enacted laws which embodied this new contractual approach. In Georgia, the legislature enacted a conclusive presumption of legitimacy if a couple agreed in writing to AID.[96] Oklahoma[97] and Kansas,[98] in addition to this writing requirement, further

---

[87] *Id.* at 500.

[88] *In re* Adoption of Anonymous, 345 N.Y.S.2d 430 (Surr. Ct. 1973).

[89] *Id*. at 431.

[90] *Id*.

[91] *Id.*

[92] *Id.* at 435-36.

[93] *Id.* at 435.

[94] C.M. v. C.C., 377 A.2d 821, 821 (N.J. Super. Ct. App. Div. 1977).

[95] *Id.* at 825.

[96] GA. CODE ANN. § 74-9904 (1968).

[97] OKLA. STAT. ANN. tit. 10, §§ 551-53 (West 1967).

required the agreement of the performing physician and judicial confirmation.[99] In the 1970s, the regulation of this contractual practice accelerated, even in jurisdictions where private agreements were not legally recognized.[100] A unified act, the Unified Parentage Act, published in 1973 (that until 2006 was enacted in about half of U.S. states, and which was partially accepted in many other states)[101] and another two acts, Unified Putative & Unknown Fathers Act and Unified Status of Children of Assisted Conception Act, published in 1988 determined that the sperm donor is excluded from paternity status, including any related parental obligations and rights.[102]

In effect, under the abovementioned statutes, the legal father is the inseminated wife's husband who agreed to the insemination of his wife.[103] Through the agreement to inseminate, the sperm donor/biological father 'opts out' of his legal paternity and, by the same token, the inseminated wife's husband 'opts in.' Until 1982, amongst the twenty states that legislated AID, the majority of them required the inseminated wife's husband's consent – only four of them were satisfied with general agreements while the remaining sixteen specifically demanded a written agreement.[104] Likewise, fifteen states required the woman's written agreement.[105]

This article claims that the abandonment of historical notions of status and the move toward contract principles was dramatic in its pervasiveness and speed. Even in states that did not legislate with respect to AI, courts agreed that a child born after AI should be legitimate and that the agreement of the wife's husband obligated him with parental obligations on a purely contractual

---

[98] KAN. STAT. ANN. §§ 23-128-130 (1968).

[99] Harry S. Chandler, Note, *A Legislative Approach to Artificial Insemination*, 53 CORNELL L.Q. 497, 498 (1968); Walter Wadlington, *Artificial Insemination: The Dangers of a Poorly Kept Secret*, 64 NW. U. L. REV. 777, 793-97 (1969-1970).

[100] *See* EMILY JACKSON, REGULATING REPRODUCTION 265 (2001); Rachel Cook et al., *Introduction* to SURROGATE MOTHERHOOD: INTERNATIONAL PERSPECTIVES 1, 11–12 (Rachel Cook et al. eds., 2003).

[101] For a survey of various legislation up to the year 1982, see Jensen, *supra* note 12, at 952-56. For a similar survey up to the year 1995 and for a call to enable more freedom of contracts to opt-in the sperm donor, see Marla J. Hollandsworth, *Gay Men Creating Families Through Surro-Gay Arrangements: A Paradigm for Reproductive Freedom*, 3 AM. U. J. GENDER & L. 183, 207-15 (1995).

[102] *See* UNIF. PARENTAGE ACT §5 (amended 2002), 9B U.L.A. 295 (2014); UNIF. PUTATIVE & UNKNOWN FATHERS ACT § 1(2)(ii), 9C U.L.A. 59 (2014); UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT 4(a), 9C U.L.A. 363 (2014) [hereinafter USCACA].

[103] *See supra* note 111 and accompanying text.

[104] For a list of those states, see Jensen, *supra* note 12, at 954-55.

[105] George J. Annas, *Fathers Anonymous: Beyond the Best Interests of the Sperm Donor*, 14 FAM. L.Q. 1, 1-2 n.2 (1980). For the importance of embodying the agreement for AID in an official contract signed by both sides, see FINEGOLD, *supra* note 51, at 43-45.

basis.[106] Notably, in certain cases, this contractual method was gender-blind.[107] Nearly three decades ago, one court ruled that where a female transgender pretended to be a male and consented to her partner's insemination, the transgender female was obligated with all the traditional paternity obligations due to the contractual doctrine of Third-Party Beneficiary.[108]

Likewise, courts incorporated contract principles without reference to traditional notions of marital status. Specifically, if a man agreed to the insemination of a woman, even if she was not his wife, and, after the birth of the child, the woman tries to deny his parental obligations, the man can sue her for a breach of contract. In addition, in recent years, these contract principles have been applied in the case of same sex partners.[109] If an inseminated woman's female partner supports and agrees to the woman's insemination, that partner can be obligated to take on a parental role.[110] The incorporation of contract principles was not simply used by husbands as a tool to gain legal status, but by donors in order to ensure that they would not be deemed parents. Under the new contract framework, donors argued that there was an implied (and often explicit) agreement between the donor and the mother to exclude the donor from any parental rights and obligations.[111] Moreover, notwithstanding statutory requirements of a written contract, courts were traditionally satisfied with oral or even implied agreements between the parties. [112]

Interestingly, while courts moved from a status based system to a system based on contract principles, the functional result was typically the same – i.e., a woman's husband would be the legal father to the exclusion of the donor.[113] To that effect, courts even created a fictional husband's agreement presumption, even in cases where there had been no actual implied or express agreement.[114] Additionally, courts were not particularly picky in terms of what

---

[106] Karin T. v. Michael T., 484 N.Y.S.2d 780, 784 (Fam. Ct. 1985).

[107] *Id.*

[108] For a comprehensive and up to date discussion of applying this contractual doctrine in the context of regulating the relationships between the donor, donee and the clinic, see Mary K. Kearney, *Identifying Sperm and Egg Donors: Opening Pandora's Box*, 13 J.L. & FAM. STUD. 215, 230-32 (2011).

[109] *See, e.g.,* Dunkin v. Boskey, 98 Cal. Rptr. 2d 44, 57 (Ct. App. 2000).

[110] *See* Elisa B. v. Superior Court, 117 P.3d 660, 670 (Cal. 2005).

[111] *See* Estes v. Albers, 504 N.W.2d 607, 609 (S.D. 1993); Straub v. B.M.T. by Todd, 645 N.E.2d 597, 598 (Ind. 1994); Kesler v. Weniger, 744 A.2d 794, 796 (Pa. Super. 2000); Bassett v. Saunders, 835 So.2d 1198, 1199-1200 (Fla. Dist. Ct. App. 2002); Budnick v. Silverman, 805 So.2d 1112, 1113 (Fla. Dist. Ct. App. 2002).

[112] For one of the central verdicts determining that without the permission of the husband, the husband will not be the child's legal father, see In re *Marriage of Witbeck-Wildhagen*, 667 N.E.2d 122, 126 (Ill. App. Ct. 1996).

[113] *See* Howard Fink & June Carbone, *Between Private Ordering and Public Fiat: A New Paradigm for Family Law Decision-making*, 5 J.L. & FAM. STUD. 1, 54 (2003).

[114] Even in a case where the husband's written agreement was missing, the court

contract doctrine they would use to validate the parental rights of a husband.[115] Rather, courts would rely on various estoppel doctrines to force a husband to continue supporting the child.[116]

This societal and legal shift, in conjunction with technological advancements in the 1990s, further accelerated a departure from the traditional status based system. This acceleration manifested itself in the revised Uniform Parentage Act ("UPA") in the year 2000.[117] Under the 2000 UPA, the notion that agreement should serve as the basis for assigning parental rights and obligations was codified and applied to both sperm and ova donations (whereas this was vague in the 1973 version).[118] Moreover, there was no need for the inseminated woman to be married in order to exempt the sperm donor from parental obligations; meaning, that even if the woman is single, the donor can be excluded from parental obligations by agreement.[119] Further, under the UPA, there is no need to use a licensed physician to achieve this result.[120]

In the more recent version of the UPA that was published in 2002, freedom of contract is further strengthened and traditional notions of marital status are weakened.[121] One remarkable example of this can be found in the major changes to the language of article 703, which is currently entitled "Paternity of Child of Assisted Reproduction."[122] Article 703 states that "man who provides

---

concluded from his deeds that he gave his implied agreement. K.B. v. N.B., 811 S.W.2d 634, 638 (Tex. App. 1991).

[115] For a survey of judicial and legislative implementation of this convention, see Richard F. Storrow, *Parenthood by Pure Intention: Assisted Reproduction and the Functional Approach to Parentage*, 53 Hastings L.J. 597, 623-39 (2002).

[116] For the argument that a husband's oral agreement to perform an insemination is sufficient to estop the husband later on from claiming that he is not the father due to an implied contract or equity, see *R.S. v. R.S.*, 670 P.2d 923, 927 (Kan. Ct. App. 1983) and *Jackson v. Jackson*, 739 N.E.2d 1203, 1211 (Ohio Ct. App. 2000). This conclusion was even reached based on a husband's claims when he sued for divorced from his wife. Lane v. Lane, 912 P.2d 290, 292 (N.M. Ct. App. 1996).

[117] UNIF. PARENTAGE ACT (amended 2002), 9B U.L.A. 295 (2014).

[118] For the 2000 suggested laws version, see *id.* §§ 702-704. For the contention that the omitting of the word "sperm" from the law was done in order to equate the disengagement of gamete donor, either sperm or ova, see Kira Horstmeyer, Note, *Putting Your Eggs in Someone Else's Basket: Inserting Uniformity into the Uniform Parentage Act's Treatment of Assisted Reproduction*, 64 WASH. & LEE L. REV. 671, 687 n.90 (2007).

[119] *See* UNIF. PARENTAGE ACT §§ 702-703 (amended 2002), 9B U.L.A. 295 (2014).

[120] *See* David D. Meyer, *Parenthood in a Time of Transition: Tensions Between Legal, Biological, and Social Conceptions of Parenthood*, 54 AM. J. COMP. L. 125, 129-30 (2006).

[121] *See* Susan L. Crockin, *"What Is an Embryo?": A Legal Perspective*, 36 CONN. L. REV. 1177, 1182 (2004) (arguing that the 2002 UPA emphasizes intent over genetics). The new law of New Mexico was designed to prevent a situation where a man who gave his sperm to a woman while agreeing with her that he would not serve as his legal father would be unable to enforce his initial agreement because the sperm was not handled by a licensed physician. *But see* Mintz v. Zoernig, 198 P.3d 861 (N.M. Ct. App. 2008).

[122] UNIF. PARENTAGE ACT § 703 (amended2002), 9B U.L.A. 295 (2014).

sperm for, or consents to, assisted reproduction by a woman as provided in Section 704 with the intent to be the parent of her child, is a parent of the resulting child."[123]

By omitting the word "Husband" from the title - which used to be "Husband's Paternity of Child of Assisted Reproduction," any single man who agrees to the insemination of a woman can be deemed the legal father of the resultant child based on an initial agreement.[124] This conclusion can also be deduced from the removal of the words "husband" and "married woman" from the 2002 version, in contrast to the original version of articles 703 and 704.[125]

This overview of the progression of the common law and legislative enactments with respect to AID demonstrates the gradualshift toward DLPBA in the context of AID.[126] In practice, this shift has enabled couples to bring a child into the world through AID, with legal stability and certainty as to who will be deemed the legal father, and to exert some control over that decision.[127] It has done so in a way that seeks to comport with the desires of the parties and not with formalistic notions of status.

III. FROM CONTRACT BACK TO STATUS?

In recent years, the shift to a contract based model has become so entrenched, notions of implied agreements so pervasive, and codification of AID laws so rampant, that the prevailing practice of opting-out the sperm donor and opting in the inseminated wife's partner reverted to a status-based system.[128] Moreover, the increased reliance on statutes in this area and formalistic criteria such as the use of a licensed physician have caused a further reversion to a status-based system.[129] Thus, though the impetus for moving away from a status-based system was driven by contract and agency principles, contract-based rulings have eventually yielded a system that is incredibly rigid.

---

[123] *Id.*

[124] After the last amendment to the UPA one can count five different categories of public policy in the state statutes regarding gamete donation. *See* Horstmeyer, *supra* note 118, at 684-90.

[125] I would like to emphasize that, in my opinion, the main innovation of these provisions has not been sufficiently understood. For instance, Texas, which amended its laws in accordance with the new UPA, still left in the word "husband." As a result, Texan AID law deals only with a married woman and excludes non-married individuals. *See* TEX. FAM. CODE ANN. § 160.703 (West 2001).

[126] *See* Bernstein, *supra* note 14, at 1096-97.

[127] For the importance of determining the parentage and the status of the artificially conceived child for the continuance of AID, see Jeffrey M. Shaman, *Legal Aspects of Artificial Insemination,* 18 J. FAM. L. 331, 350-51 (1980).

[128] *See* Mary Patricia Byrn & Erica Holzer, *Codifying the Intent Test*, 41 WM. MITCHELL L. REV. 130, 135-36, 143-48 (2015).

[129] *See* Sarah Abramowicz, *Contractualizing Custody*, 83 FORDHAM L. REV. 67, 96-97 n.158-63 (2014).

In effect, every attempt to privately change the basic allocation of rights in this new status-based system is impossible.[130] The statutes concerning AID became the only way to determine the legal status of the parties in an AID situation. This is true in terms of determining the identity of the man who will receive paternity status, in opting out a known donor, in opting in an anonymous donor, and in attempting to determine the accurate range of paternal obligations and rights.

The reversion to a status-based, statutory system is particularly observable in the context of single women and same sex partners and the difficulty these women face in negotiating the role of the sperm donor.[131] As noted, scholars and jurists who initially supported the practice of AIH, since it was viewed as a "cure" for infertility, believed that using it in the context of a single woman or a lesbian couple was inappropriate and immoral. This view quickly found its way into the law and practices of AI. Physicians – sperm banks and fertility clinics typically refused to help single women receive sperm donations simply because they were single or in a lesbian relationship.[132] Although the prevailing laws regulating AID in the last half century do not explicitly prohibit the use of donor sperm in the context of single women and same sex couples, courts have chosen to interpret those laws as limited to married women.[133] Thus, a series of cases concluded that laws relating to AID should

---

[130] For those judicial conclusions, see, e.g., *Bassett v. Saunders*, 835 So. 2d 1198, 1201 (Fla. Dist. Ct. App. 2002) ("The rights of support and meaningful relationship belong to the child, not the parent; therefore, neither parent can bargain away those rights . . . ."); *T.F. v. B.L.*, 813 N.E.2d 1244, 1246 (Mass. 2004) ("'[P]arenthood by contract' is not the law of Massachusetts and the agreement is unenforceable as against public policy.").

[131] For a survey of the current legal practice of single and lesbian women in various jurisdictions, see Harvey L. Fiser & Paula K. Garrett, *It Takes Three, Baby: The Lack of Standard, Legal Definitions of "Best Interest of the Child" and the Right to Contract for Lesbian Potential Parents*, 15 CARDOZO J.L. & GENDER 1, 2 n.1 (2008).

[132] *See* SCHELLEN, *supra* note 52, at 208; Martin Curie-Cohen et al., *Current Practice of Artificial Insemination by Donor in the United States*, 300 NEW ENG. J. MED. 585, 585 (1979); OFFICE OF TECH. ASSESSMENT, U.S. CONG., OTA-13P-BA-48, ARTIFICIAL INSEMINATION: PRACTICE IN THE UNITED STATES (1988); Maureen McGuire & Nancy J. Alexander, *Artificial Insemination of Single Women*, 43(2) FERTILITY & STERILITY 182, 182 (1985); Barbara Kritchevsky, *The Unmarried Woman's Right to Artificial Insemination: A Call for an Expanded Definition of Family*, 4 HARV. WOMEN'S L.J. 1, 16-18 (1981); THE ETHICS COMMITTEE OF THE AMERICAN FERTILITY SOCIETY, ETHICAL CONSIDERATIONS OF ASSISTED REPRODUCTIVE TECHNOLOGIES, 62(5) FERTILITY & STERILITY 1s, 19s (Supp. 1 1994); Bernstein, *supra* note 14, at 1098-1101.

[133] The discrimination and exclusion of lesbian couples from the right to receive sperm donation is one of the most debated issues in legal writing. For a criticism of the current legal practice and for a call to recognize intentional parenthood, see Holly J. Harlow, *Paternalism Without Paternity: Discrimination Against Single Women Seeking Artificial Insemination by Donor*, 6 S. CAL. REV. L. & WOMEN'S STUD. 173 (1996); Justyn Lezin, Note, *(Mis)Conceptions: Unjust Limitations on Legally Unmarried Women's Access to Reproductive Technology and Their Use of Known Donors*, 14 HASTINGS WOMEN'S L.J. 185

not be applied to single women and that private contracts between the parties should not be honored.[134]

For instance, in an unpublished federal opinion, a lesbian couple argued that rejection by a Minnesota physician and infertility clinic was a form of discrimination.[135] The court rejected this argument and concluded that AID laws did not apply to same sex partners and single women because the word "married" still appeared in the statute. [136] In the court's view, marital status was a prerequisite to the right to use AID and enjoy the advantages of the legislation governing it.[137] This conclusion was analogous to the traditional inclination whether by legislation or by court ruling[138] to prohibit single women from adopting.

In one instructive case from 1977 that demonstrates this phenomenon, *C.M. v. C.C.*, a known sperm donor had impregnated a single woman by AI after they explicitly agreed that the donor would not be deemed the legal father.[139] After the child was born, the donor contended that he and the mother had a longstanding dating relationship before the insemination, were contemplating marriage, and that he fully intended to assume the responsibilities of parenthood.[140] The court reasoned that the man's rights, as a known sperm donor to an unmarried woman, were equivalent to the rights of a father of a child conceived by intercourse.[141] The court, therefore, granted the donor parental rights in contravention of the parties initial agreement.

Interestingly, a reliance on formalistic statutory principles has also led to the opposite result in certain instances. One prominent example is the 2005 California case of *Steven S. v. Deborah D.*, which dealt with a child that was born to a single mother and her partner who was married to another woman.[142] In that case the man donated sperm to a licensed physician to inseminate the woman. The man and woman, however, were engaging in a sexual relationship at around the same time that the man donated the sperm. The man accompanied the woman to the insemination, and attended her first ultrasound.

(2003); Vickie L. Henry, Note, *A Tale of Three Women: A Survey of the Rights and Responsibilities of Unmarried Women Who Conceive by Alternative Insemination and a Model for Legislative Reform*, 19 AM. J.L. & MED. 285 (1993).

[134] *See infra* notes 145-147 and accompanying text.

[135] Harlow, *supra* note 133, at 207-09. *See* Bernstein, *supra* note 14, at 1102-03.

[136] Harlow, *supra* note 133, at 207-09. *See* Bernstein, *supra* note 14, at 1102-03.

[137] Harlow, *supra* note 133, at 207-09.

[138] A decade ago, only thirteen states embodied equality between married and single women in their legislation. Bernstein, *supra* note 14, at 1106 n.295. For one example of a court not initially recognizing the right of single mothers and lesbians to adopt a child, even their partner's child, see In re *Adoption of Two Children by H.N.R.*, 666 A.2d 535 (N.J. Super. Ct. App. Div. 1995).

[139] C.M. v. C.C., 377 A.2d 821 (N.J. Juv. & Dom. Rel. Ct. 1977).

[140] *Id*. at 824.

[141] *Id*. at 824-25.

[142] Steven S. v. Deborah D., 25 Cal. Rptr. 3d 482, 484-85 (Ct. App. 2005).

When the child was born, the woman called the man and exclaimed "Congratulations! You're a father!"[143] Thereafter, the man petitioned the court to establish a parental relationship.[144] The lower court found that, based on notions of estoppel, the man could assert his rights as parent.[145] On appeal the court cited Family Code § 7614(b), which states that "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."[146] The court found that this statute was dispositive. The man had provided sperm to a licensed physician for use in a woman other than his wife and therefore could not claim paternity.[147]

This rejection of contract principles in the context of single mothers applies with equal force in the context of same sex partners. This is particularly problematic in comparison to the context of single mothers. Because in the latter scenario, courts could at least argue that the coercion of a known sperm donor to be a legal father to a child supports the societal desire to ensure that no child will be left without sufficient parental support. But this policy consideration does not make sense in the context of a same-sex couple because the child will ostensibly be born to a family headed by two supporting, caring, and loving parents who can satisfy his needs, just like a heterosexual couple.[148]

Nevertheless, in the context of female same-sex couples, courts have traditionally ignored the intentions of the parties and relied instead on formalistic notions of whether the women had followed statutory procedures for terminating a donor's paternity rights. In the seminal 1986 case of *Jhordan C. v. Mary K.*, a donor brought an action to establish paternity and visitation rights over a child conceived by AI where he personally donated semen to the mother. The mother had been raising the child with a close female friend.[149] The California Court of Appeals affirmed the trial court's decision that the semen donor was properly declared the legal father, because his semen was not provided to a licensed physician, but was instead given directly to the inseminated mother.[150] As a result, the parties failed to take advantage of the statutory basis for preclusion of the donor's paternity.[151]

Likewise, seven years later in the 1993 California case of *Steven W. v. Martha Andra N. & Mary M.N.S*, a known donor agreed to provide sperm to a

---

[143] *Id*. at 485.

[144] *Id*. at 484.

[145] *Id* at 485.

[146] *Id* at 484.

[147] *Id* at 483.

[148] Yehezkel Margalit, *Intentional Parenthood: A Solution to the Plight of Same-Sex Partners Striving for Legal Recognition as Parents*, 12 WHITTIER J. CHILD & FAM. ADVOC. 39, 63 (2013).

[149] Jhordan C. v. Mary K., 224 Cal. Rptr. 530, 531-32 (Ct. App. 1986).

[150] *Id.* at 530.

[151] *Id.* at 531.

lesbian couple and to play a very limited role in the child's life.[152] After the lesbian couple was successfully self-inseminated, the donor changed his mind and immediately initiated a paternity action. Because the California statute governing AID required the participation of a licensed physician in the insemination process, the court held that the donor's rights had not been terminated.[153]

The same conclusion was reached the following year, 1994, in New York.[154] In the case of *Thomas S. v. Robin Y.*, the sperm donor sought an order of filiation and visitation for a child who was conceived by AI and raised by her mother and lesbian partner.[155] The court maintained that the alleged oral understanding between the parties stipulating that the father would not assume a parental role failed to comply with explicit statutory requirements for the surrender of parental rights.[156] Therefore, the sperm donor could obtain an order of filiation and visitation.[157] A particularly noteworthy takeaway is that the court reached this conclusion despite the fact that the sperm donor did not apply for the order until the child was already nine years old, the mother was decisively against the granting of such an order, and a psychiatrist submitted to the court that granting the order would harm the child's interest.[158]

Similarly, several years later in the New York case of *Matter of Tripp v. Hinckley*, the mother, a lesbian woman, arranged for the father, a gay man, to impregnate her by AID, twice. This was done with the understanding that she and her partner would be the children's primary custodians while the father and his partner would have visitation rights.[159] The father remained involved in the children's lives, and, after the mother and her partner ended their relationship, sought a more expanded visitation schedule.[160] The court upheld the expanded visitation schedule and rejected the mother's argument that the man was "merely a sperm donor, who should be restricted to the terms of the parties' written agreement." The court found that the best interests of the

---

[152] Steven W. v. Martha Andra N., 3 Civ CO12456, slip op. at 2-3 (Cal. Super. Ct. May 6, 1993).

[153] *See, e.g.*, Alexa E. King, *Solomon Revisited: Assigning Parenthood in the Context of Collaborative Reproduction*, 5 UCLA WOMEN'S L.J. 329, 354 (1995); Kyle C. Velte, *Egging on Lesbian Maternity: The Legal Implications of Tri-Gametic in Vitro Fertilization*, 7 AM. U.J. GENDER SOC. POL'Y & L. 431, 447-48 (1998-1999).

[154] Thomas S. v. Robin Y., 618 N.Y.S.2d 356 (App. Div. 1994).

[155] *Id.* at 357.

[156] *Id.* at 361.

[157] *Id.* at 357-59, 362. For a critical reading of this precedent, see Pamela Laufer-Ukeles & Ayelet Blecher-Prigat, *Between Function and Form: Towards a Differentiated Model of Functional Parenthood*, 20 GEO. MASON L. REV. 419, 479-80 (2013).

[158] *Thomas S.*, 618 N.Y.S.2d at 356-62. For another case where the court concluded that known sperm donor cannot waive parental rights, see *Jacob v. Shultz-Jacob*, 923 A.2d 473, 481 (Pa. Super. Ct. 2007).

[159] *See In re* Tripp v Hinckley, 736 N.Y.S.2d 506, 507 (App. Div. 2002).

[160] *Id*. at 508.

children outweighed the parties' original agreement and that the best interests of the children would be served by continue contact with the father who had always been part of their lives.[161]

These cases, and the statutes and principles with which they grapple, are emblematic of a reversion to a status based, formalistic model for determining parentage. Under this new model, the sperm donor can be excluded from parental rights on the basis of purely formalistic grounds such as whether a licensed physician was involved in the AI, even when there is an agreement to the contrary.[162] By the same token, a sperm donor that fails to follow statutory proscriptions can be forced to undertake certain parental obligations, even if the parties did not originally contemplate that eventuality. This is particularly true in a case where a sperm donor donates sperm to a single woman or lesbian couple.[163] In sum, though the movement away from a status based system was motivated by contract principles, there has been a reversion back to a status based system due to the codification of AI and the reluctance to supplement or displace statutes with common law principles.

This reversion to a status based, formalistic system presents significant problems. The rigidity of the system may cause individuals not to use AID and perpetuates the socio-legal fear espoused by legislators and jurists of expanding the benefits traditionally afforded to marital status to single mothers and same-sex couples.[164] As a result, the wills, desires, and negotiated agreements of the parties concerning parentage in the context of AID are overridden by statutory technicalities.

IV. A RETURN TO CONTRACT PRINCIPLES THROUGH DLPBA

A. The Advantages of DLPBA

In a previous article,[165] I advocated for the determination of legal parentage by DLPBA as the best way to solve various modern dilemmas in the evolving field of fertility treatments. I argued that in numerous contexts where a child is brought into the world through artificial means, the parties should be required[166] to agree before the delivery of the child who should be determined as the legal parents and what will be their range of parental obligations and rights. I further argued that this agreement be documented in a binding

---

[161] *Id.* at 506-08.

[162] *See* Steven W. v. Martha Andra N., 3 Civ CO12456, slip op. at 10-11 (Cal. Super. Ct. May 6, 1993).

[163] *Thomas S.*, 618 N.Y.S.2d at 364.

[164] Bernstein, *supra* note 14, at 1105-07.

[165] Margalit, *supra* note 148, at 59.

[166] For a similar call to obligate parties possessing frozen embryo to agree ex ante by disposition agreement about the fate of their mutual genetic material in any case of disagreement, see Yehezkel Margalit, *To Be or Not to Be (A Parent)? - Not Precisely the Question; the Frozen Embryo Dispute*, 18 CARDOZO J.L. & GENDER 355 (2012).

contract, which is confirmed *ex-ante* by judiciary or administrative inspection.[167] With this background in mind, I posit that the continued reliance on formalistic, status based notions in the context of AID is highly problematic because of the numerous advantages of DLPBA.

Offering greater freedom of contract in the context of AID would provide numerous normative benefits to both parents and society. In the larger sense when the intentions of the various parties are deliberate and clear, they express, in contract law terminology, their reliance and expectation interests and therefore should be honored. Similarly, offering greater freedom of contract would increase the autonomy of individuals, as well as their sense of personal responsibility and self-fulfillment. Moreover, it would enable single mothers and female same-sex partners to satisfy their desire for a child without the fear that the child's parents will be determined reflexively by statutes. It would also enlarge the circle of individuals who are eligible to fulfill their procreative desires and rights. Further, a party that intended to produce a child via AID and to serve as that child's parent will probably be a far better parent than someone who is coerced into being a parent by statutory compulsion.[168]

Furthermore, rigid public regulation of legal parentage and fatherhood is not conducive to the uniqueness of child-parent relationships in an era when reproductive technology has diminished the law's reliance on genetics and marital status to determine parentage.[169] DLPBA also comports with the general inclination of family law to resolve interfamily quarrels privately before involving the courts. Notably, even if these private agreements are challenged due to a party's change of heart and/or a change in circumstances, modern contract law offers efficient and tested measures to cope appropriately with these challenges.[170]

Utilizing the intentions of the parties in the context of AID also supplies us with certainty. Since social policy demands that at least one (with a preference for two) recognized legal parents are obligated to raise a child from the moment of delivery, DLBA helps ensure that at least one parent will be identified as a caregiver. This method is uniquely suited to address the struggles that may arise in the case of an artificially conceived child. Obligating parties to negotiate their rights and obligations beforehand and reach consensus will yield far greater adherence to the agreed upon terms than

---

[167] Henry, *supra* note 133. For a suitable preauthorization procedure in the context of surrogacy agreements and in advanced fertility treatments, see Margalit, *supra* note 5, at 423.

[168] For references supporting this argument, see Yehezkel Margalit, הורות קביעת לקראת בישראל בהסכמה משפטית [*Towards Determining Legal Parentage by Agreement in Israel*], 41 Hebrew U.L.R. 835 (2012) (Isr.).

[169] *See* Margalit, *supra* note 148, at 59.

[170] See Margalit, *supra* note 5, for the practical implementations of this convention in the context of surrogacy contracts.

a forced court decree.[171]

Nevertheless, it is important to emphasize that I do not advocate for a full recognition of freedom of contract in this sensitive context. Such unfettered and unregulated freedom of contract could be proven to be very dangerous and detrimental to the best interests and rights of the child who is conceived by the AID process. We should reject out of hand any call to enable freedom of contract without any legal and/or administrative supervision in the context of AID. In my opinion, in the modern era, the best normative model is a combination of freedom of contract and safeguards that preserve the best interests of the child. Therefore, while contracts are crucial in this context to effectuate the intentions of the parties, this freedom should be tempered by some form of public supervision to preserve the child's best interests and rights. In the next chapter, I turn to the practical implementation of this balanced model.[172]

B. Legal Parenthood - From Traditional Status to Modern Status by DLPBA

Based on the advantages of DLPBA, I argued in the previous section that the determination of who should be a parent in the context of AID should be based on contract principles and the intentions of the parties. Conceptualizing parentage as a function of intent, is in my view, the best way to move away from the formalistic, status-based system we have today. However, utilizing DLPBA in this way is only the first step. Once the parties determine who will be a legal parent, a question arises as to what rights and obligations flow from that designation and to what extent those rights and obligations should be regulated. I posit that while the determination of who should be a parent should be determined by contract and intent, in order to preserve the best interest of

---

[171] For an additional discussion of the various advantages of using intent in the context of determining legal parenthood in AID, see Anne Reichman Schiff, *Frustrated Intentions and Binding Biology: Seeking AID in the Law*, 44 DUKE L.J. 524 (1994); Elizabeth E. McDonald, *Sperm Donor or Thwarted Father? How Written Agreement Statutes are Changing the Way Courts Resolve Legal Parentage Issues in Assisted Reproduction Cases*, 47 FAM. CT. REV. 340 (2009); MARTHA M. ERTMAN, LOVE & CONTRACTS: THE HEART OF THE DEAL ch. 2 (2013) (unpublished manuscript) (on file with author) ("[T]wo thirds of the states have AI statutes that allow men to contract in and out of legal fatherhood . . . . [C]ontracts can and do resolve many of these situations, and contract law principles can protect Plan B families."); Lewis, supra note 15, at 958-72, 987-88 ("The better approach would be to amend the language of the UPA to make consent alone enough."); BROWNE C. LEWIS, PAPA'S BABY: PATERNITY AND ARTIFICIAL INSEMINATION ch. 3, 8 (2012). *See also* Cahn, *supra* note 73; Nancy D. Polikoff, *A Mother Should Not Have To Adopt Her Own Child: Parentage Laws for Children of Lesbian Couples in the Twenty-first Century*, 5 STAN. J.C.R. & C.L. 201, 240-43 (2009); Nancy D. Polikoff, *Breaking the Link Between Biology and Parental Rights in Planned Lesbian Families: When Semen Donors Are Not Fathers*, 2 GEO. J. GENDER & L. 57 (2000).

[172] For the general discussion of this nexus, see Kristin E. Koehler, *Artificial Insemination: In the Child's Best Interest?*, 5 ALB. L.J. SCI. & TECH. 321 (1996).

the child, the legal ramifications of parenthood should remain status-based and subject to a narrower freedom of contract. Meaning, if you are deemed a parent, society should be permitted to regulate the ramifications of that designation. To distinguish this quasi-formalistic framework from the traditional presumption-based status, I will refer to it as modern status.

This nuanced application of DLPBA would not affect public legal paternity. In practice, if we use the normative convention that DLPBA enables a man to fully or partially opt in or out from legal paternity, but at the same time use notions of modern status to ensure that no child will remain without at least one, supporting parents we can effectively meld contract principles with the protection of the child. Notably, the notion of modern status is sporadically discussed in the academic literature. If traditional status allows the state to determine who will be determined as the legal parent and what will be the legal ramifications of this determination, modern status enables freedom of contract and private agreement only with respect to determining the identity of the chosen parent. But, using modern status, the ramifications of parenthood are static and unchangeable by agreement. This represents a compromise between traditional status and freedom of contract.

In other words, traditional status has been used to enforce public conventions either in determining the identity of the man who will be determined as the legal father of the child or in ascribing the various legal ramifications of this determination. However, modern status enforces public conventions only in the latter context. By way of example, academic literate defines marriage as a modern status since the parties enter into that status freely, but various rights and obligations of that status are determined formalistically.[173] Thus, in the context of family law, these two poles, freedom of contract and formalistic status-based regulation, do no repel each other,[174]

---

[173] On the tension between modern status and contract principles, see Howard O. Hunter, *An Essay on Contract and Status: Race, Marriage, and the Meretricious Spouse*, 64 VA. L. REV. 1039 (1978); Wolfgang G. Friedmann, *Some Reflections on Status and Freedom*, in ESSAYS IN JURISPRUDENCE IN HONOR OF ROSCOE POUND 22, 26 (Ralph A. Newman ed., 1962); Patrick S. Atiyah, *Contracts Promises & the Law of Obligations*, *in* ESSAYS ON CONTRACT ch. 22 (2d ed., 1990). In this context, I should mention the following prominent case: *Maynard v. Hill*, 125 U.S. 190, 201-11 (1888). On the perception of the marriage as modern status in the legal literature, see generally Gregg Temple, *Freedom of Contract and Intimate Relationships,* 8 HARV. J.L. & PUB. POL'Y 121 (1985); Laura P. Graham, *The Uniform Premarital Agreement Act and Modern Social Policy: The Enforceability of Premarital Agreements Regulating the Ongoing Marriage*, 28 WAKE FOREST L. REV. 1037 (1993); Lisa Milot, *Restitching the American Marital Quilt: Untangling Marriage From the Nuclear Family*, 87 VA. L. REV. 701 (2001); R. Brent Drake, *Status or Contract? A Comparative Analysis of Inheritance Rights Under Equitable Adoption and Domestic Partnership Doctrines*, 39 GA. L. REV. 675 (2005).

[174] For a similar convention, see Kimberly D. Richman, *(When) Are Rights Wrong? Rights Discourses and Indeterminacy in Gay and Lesbian Parents' Custody Cases*, 30 LAW & SOC. INQUIRY 137, 172 (2005), criticizing Main's description of the right of same-sex

but rather, complement each other. [175]

This view of modern status should be incorporated into parentage determinations in the context of AID. With respect to the first question, determining paternity, it is clear that notions of traditional status are unsatisfactory since entering into an AID arrangement requires clear intentionality. The traditional marital and parental bionormative models do not necessarily require a choice to create a child. In the context of AID, the desire and intention to be a parent is deliberate and clear. Since the essence of the AID is to bring a child to the world, and this goal is achieved only after the parties have reached an agreement, we should recognize and respect the parties' intent as to who will be a parent. In other words, in AID, procreation does not occur by chance. Rather, there is a bright and clear understanding that the sides intentionally planned to bring this child to the world. Their agreement to artificially conceive the child by this procedure instead of adopting a child, or alternatively, abandoning the desire to become a parent, is a bright and clear indication as to their desire to be parents. This will should be respected and recognized by the law.[176]

However, while individuals should be permitted to privately agree upon the identity of the man who will be obligated with parental obligations and rights, as soon as this individual is determined, the state should be permitted to interfere in the private agreement and coerce the individual to fulfill certain parental obligations, just as in the case of traditional status. This would allow society and the state to comprehensively dictate public conventions and thoroughly regulated what should happen in the most private realm of the family, while allowing the parties themselves to make the choice of whether they want to be parents.

C. The Practical Implementation of DLPBA to Determine Legal Paternity in Various Contexts of AID

In the previous sub-chapters of the article I argued why, in my opinion, the implementation of DLPBA in the context of AID is possible only if we conceptualize legal paternity as a combination of contract principles and modern status. Additionally, I enumerated the different advantages of this

---

couples to adopt children as a linear movement from status to contract. For the dialectic tension which continues to exist as long as the society admires both the individual and the public interests, see Hunter, *supra* note 173, at 1097.

[175] For a previous attempt to merge contract and status, see MILTON C. REGAN, FAMILY LAW AND THE PURSUIT OF INTIMACY 34-42 (1993); Margaret F. Brinig, *Status Contract and Covenant*, 79 CORNELL L. REV. 1573, 1573, 1577 (1994) (book review).

[176] For a survey of the process of enlarging the current options available to a couple due to the advanced technologies and for the claim that this important element should determine the legal intentional parenthood, see Marjorie M. Shultz, *Reproductive Technology and the Intent-Based Parenthood: An Opportunity for Gender Neutrali*ty, 1990 WIS. L. REV. 297, 310-16 (1990).

convention and endorsed the ascribing of legal status to an individual who wills, desires and agrees to be the conceived child's parent. In other words, we should recognize freedom of contract in the context of AID and enable a private ordering to determine who will be the child's father and what will be his range of parental obligations and rights. In this chapter I will explore the practical implementations of DLPBA in various scenarios. Afterwards, I will demonstrate that my normative conclusions fit well with recent movements in judicial opinions and legislation in the United States. This movement represents the first hints of a new pendulum swing back toward greater freedom of contract. This understanding of parentage will give greater freedom of contract to opt in an anonymous sperm donor as a legal parent or to opt out a known sperm donor from this legal status.

Since society gained the ability to determine the biological parenthood of a given individual by genetics in the modern era, law has generally determined legal parenthood by genetic affiliation.[177] Therefore, the starting point for determining legal fatherhood should be genetic affiliation, i.e., every man who impregnates a woman should be determined as the legal father of the resultant child.[178] However, legal paternity in the context of AID should be determined according to the initial agreement between the parties. Further, this agreement should be embodied in a binding legal contract and should be prospectively confirmed by judiciary or administrative inspection.

Therefore, in the simplest scenario of an anonymous sperm donor who donates his sperm to a married heterosexual couple, we should, first and foremost, require the various parties to this procedure to sign an explicit contract which will regulate their initial understanding. Only that way will enable us to respect their private agreement and, by implementing DLPBA, we should exempt the sperm donor from his legal paternity. Instead, we should ascribe it to the inseminated wife's husband.[179] Indeed, coercing legal paternity on the non-consenting donor, and, to the contrary, declining paternity to the man agreed to be a legal father may be very detrimental to the various parties, including the conceived child.[180] The most reasonable approach would

---

[177] HARRY D. KRAUSE, ILLEGITIMACY: LAW AND SOCIAL POLICY 69 (1971). For applying this convention in the general context of determining the legal parentage of a child, especially if he was conceived by the advanced bio-medical innovations, see Margalit, *supra* note 5.

[178] LEWIS, *supra* note 171, at 186-87, 210-11, 213.

[179] For a reasoning that the essence of the legal ordering is attaching children to married couples in order to prevent the illegitimacy problem while equating the artificially conceived child to a legitimate one, see NAOMI R. CAHN, TEST TUBE FAMILIES: WHY THE FERTILITY MARKET NEEDS LEGAL REGULATION 88-90 (2009).

[180] On imposing the legal paternity on the sperm donor in a case where the mother does not want him as additional parent as badly damaging the best interests of the child, see Katharine Bartlett, *Re-expressing Parenthood,* 98 Yale L.J. 293, 312-15 (1988). On the other hand, for the claim that the best interests of the child would be served by not recognizing the rights of the sperm donor, even if he is a known one, until that intention is

therefore be to fully recognize the initial agreement.[181]

When dealing with single mothers or lesbians, however, the picture is much more complex for several reasons. In these instances, we are departing from the known and familiar traditional bio-normative parental structure. Further, the potential for damaging the best interest and welfare of the child increases since in these structures the child does not benefit from a father-figure and the child may have a difficult time identifying his genealogical progenitor.[182] Moreover, in the case of single mothers, there is the added fear of damaging the child's best interests and welfare[183] as we can deduce from of the number of children living under the poverty threshold, even with two supporting parents.[184] When only a mother supports the child, the child's chance of suffering from poverty and its obvious disadvantages, such as poor health or educational challenges, is logically much higher.[185] Therefore, a priori, in the absence of a preauthorized explicit contract to opt him out of his legal parenthood, if a known sperm donor is at hand, especially if he had a sexual relationship with the mother,[186] he should be determined as the legal father of the child. That is logically because otherwise the child will be without a male father-figure and it may damage the child's best interests and rights.[187]

---

explicitly embodied in a contract between him and the mother, see Charles W. Adamson, *Assisted Reproductive Techniques: When is Sperm Donor a Dad?*, 8 WHITTIER J. CHILD & FAM. ADVOC. 279, 293-96 (2009).

[181] *See supra* note 180.

[182] Some scholars also try to support this contention with empirical evidence. *See*, *e.g.*, Laura E. Montgomery et al., *The Effects of Poverty, Race, and Family Structure on U.S. Children's Health: Data From the NHIS, 1978 through 1980 and 1989 through 1991*, 86 AM. J. PUB. HEALTH, no. 10, 1996, at 1401 (poor health); Christine Winquist Nord et al., *Home Literacy Activities and Signs of Children's Emerging Literacy: 1993 and 1999*, 2 EDUC. STAT. Q. 19 (2000) (literacy skills).

[183] For seminal court opinions expressing this perception, see, e.g., C.M. v. C.C., 377 A.2d 821, 825 (N.J. Super. Ct. App. Div. 1977) ("[I]t is in the child's best interests to have two parents whenever possible."); Caban v. Mohammed, 441 U.S. 380, 391 (1979) ("We do not question that the best interests of illegitimate children often may require their adoption into new families who will give them the stability of a normal, two-parent home.").

[184] TRUDI J. RENWICK, POVERTY AND SINGLE PARENT FAMILIES: A STUDY OF MINIMAL SUBSISTENCE HOUSEHOLD BUDGETS (CHILDREN OF POVERTY) (1998).

[185] *See infra* note 182. *See also* Ronald Angel et al., *Single Motherhood and Children's Health*, 29 J. HEALTH & SOC. BEHAV. 38 (1988); LEWIS, *supra* note 171, at 184-85, 207, 213-14; SARA MCLANAHAN & GARY SANDEFUR, GROWING UP WITH A SINGLE PARENT: WHAT HURTS, WHAT HELPS (1994).

[186] Several courts have found that there is no option of private agreement for a man who had a sexual relationship with the mother to opt out. Straub v. B.M.T. by Todd, 645 N.E.2d 597, 601 (Ind. 1994); Kesler v. Weniger, 744 A.2d 794 (Pa. 2007). Moreover, even where the parties agree in the contract that the sperm donor will be exempt from any parental obligations, if the child is born by a sexual relationship the initial agreement is void due to public policy. Weaver v. Guinn, 31 P.3d 1119 (Or. Ct. App. 2001).

[187] For the rejection of an attempt of a known sperm donor and the mother to exempt the

As abovementioned, in all these contexts we should not validate any implied agreement to exempt a sperm donor from his parental obligations. Instead, we should demand an explicit agreement, embodied in a binding contract, and confirmed by judicial or administrative inspection.[188] Moreover, as was explained in the previous chapter, the best interests of the child require that only in rare cases with unique circumstances, where the decision will enhance and not damage the child's economic interests, should the man opt out of his obligations.[189] Nevertheless, in any scenario where a woman who meets certain economic conditions or alternatively makes the appropriate financial arrangements for the support of the child[190] is seeking to raise a child on her own without the presence of the sperm donor, we should respect the initial agreement that the donor will has opted out of his legal paternity. [191] Similarly, when a lesbian couple explicitly agrees in an initial agreement that the donor should be exempt from his parental obligations, we should respect this private agreement only when it does not damage the child's economic interests.[192]

---

donor from his parental obligations, even though an oral agreement reflected this understanding, see *Jhordan C. v. Mary K.*, 224 Cal. Rptr. 530 (Ct. App. 1986); *Thomas S. v. Robin Y.*, 618 N.Y.S.2d 356 (App. Div. 1994); *Ferguson v. McKiernan*, 940 A.2d 1236 (Pa. 2007). For a rejection of such an agreement, even though this agreement was embodied in a contract, because local law enabled it, see In re *Parentage of J.M.K.*, 119 P.3d 840 (Wash. 2005). For a discussion of *Ferguson*, see Dawn R. Swink and J. Brad Reich, *Caveat Vendor: Potential Progeny, Paternity, and Product Liability Online*, 2007 BYU L. REV. 857, 874-78 (2007). For a discussion of *J.M.K.*, see M. Scott Serfozo, Note, *Sperm Donor Child Support Obligations: How Courts and Legislatures Should Properly Weigh the Interests of Donor, Donee, And Child*., 77 U. CIN. L. REV. 715, 722-24 (2008) (concluding that the holding of *J.M.K.* exhibits the reluctance of courts to relieve donors from their support duties in spite of seemingly contrary legislative intent).

[188] That is the reason why I disagree with the very problematic reliance of the Pennsylvania Supreme Court on oral agreement in *Ferguson*, 940 A.2d at 1248. For a discussion of the innovative results of this case, see David T. Rohwedder, Recent Development, Ferguson v. McKiernan*: Can a Sperm Donor Be Held Liable for Child Support After the Recipient Has Contractually Waived that Right?*, 32 AM. J. TRIAL ADVOC. 229 (2008).

[189] *See infra* note 171 and accompanying text; Part IV(b) and accompanying text.

[190] For the latter possibility and for the additional requirement of appointing a guardian for the child, see LEWIS, *supra* note 171, at 208-09; Lewis, *supra* note 15, at 1002-03 (adding the additional requirement of appointing a guardian for the child).

[191] Therefore, I normatively agree with the court that there is no need in the case of two lesbians, who used an anonymous sperm and asked to be co-guardians of the child, to receive the agreement of the sperm donor. That was true due to the fact that the donor had signified his wish to remain unknown, and therefore had forgone any claim to parenthood. *In re* Guardianship of I.H., 834 A.2d 922, 927 (Me. 2003).

[192] For a similar caveat to a known sperm donor who donated his sperm to lesbians that he may find himself outside the legal paternity, see Allison J. Stone, Comment, *"Sisters Are Doin' It for Themselves!" Why the Parental Rights of Registered Domestic Partners Must Trump the Parental Rights of Their Known Sperm Donors in California*, 41 U.S.F. L. REV.

As a point of clarification, in these scenarios, while I focus only on the child's financial welfare,[193] there are numerous other factors concerning the child's best interest that should be taken into account such as sociological factors, psychological factors, etc.[194] Therefore, I want to make it clear that every private ordering in the context of legal parentage must be subordinated to preserving the best interests and rights of the child.[195] My insights above are relevant only so far as it has not clearly been proven that conceiving a child by AID is detrimental to a child's interests and welfare.[196]

As far as I know, it has not been empirically proven that an artificially conceived child in those contexts will suffer from the non-traditional familial and parental structures, and that the "missing gender" in his life will cause him any emotional harm. Therefore, there has never been any proven justification to reject conceiving a child by single and lesbian women by AID. While, prima facie, arguments concerning preserving the welfare, rights and interests of the child, such as sociological, psychological and economical arguments, could be very intuitive and reasonable, there are very strong counter justifications, such as the dignity of human life and the right of procreation. Since we do not have any unambiguous empirical evidence to reject *ab initio* my contentions concerning the feasibility of recognizing parentage by DLPBA in this unique context, those unproved claims could easily be found to be speculative, political, manipulative and powerless. But, if it is proven that those options are detrimental to the child,[197] we should cease those processes.

Furthermore, this possibility of opting a donor in or out from his legal paternity should be applied even if the identity of the donor is known and even if the insemination was performed without the involvement of a licensed physician. It is my opinion that the medicalization of this practice is unnecessary and should have no bearing on the legal ramifications of the parties' use of AID.[198] Moreover, if the real purpose of this professional involvement is to create certainty or to provide seriousness to the initial agreement, these goals will be achieved much better by confirming the agreement by judicial or administrative inspection since these legal entities would not confirm the agreement without making sure that the agreement was

---

505, 515, 526 (2007).

[193] *See also* LEWIS, *supra* note 171, at 186 (focusing on the "economic best interests of the child").

[194] *See* JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD (1973); JOSEPH GOLDSTEIN ET AL., THE BEST INTERESTS OF THE CHILD (1996).

[195] *See generally* Yehezkel Margalit, Bridging the Gap Between Intent and Status (unpublished manuscript) (on file with author).

[196] For a similar argument, see LEWIS, *supra* note 177, *supra* note 83, at 184-85, 188, 202, 214.

[197] *See* ELIZABETH MARQUARDT, ONE PARENT OR FIVE? A GLOBAL LOOK AT TODAY'S NEW INTENTIONAL FAMILIES 23-25, 28, 55 (2011).

[198] For a similar outcome, see LEWIS, *supra* note 171, at 185-86.

a result of free will and informed consent.[199] If later on it is proven that the initial free will and informed consent were compromised, or alternatively, that the child's best interests would be served by rejecting the initial agreement, then the contract should be overridden. This would be similar to the prevailing practice where any private agreement concerning children can be rejected if the best interest of the child would be damaged.[200]

On the other hand, in the context of a lesbian couple, and especially in the case of a single mother, if an anonymous sperm donor is interested in opting into legal paternity, we should fully or partially respect the parties' agreement to opt in the donor.[201] This should occur even if the woman/couple just orally agree to this unique arrangement and, if under the given circumstances, the child's interest will be enhanced and not damaged. The impetus for this position is that an additional, supporting parent will logically serve the best interests of the child.[202] Indeed, filling the gap of the missing "gender" makes sense, both in the context of single mothers and lesbian couples, because the benefit of exposing the child to two different genders is logical, reasonable and may be meaningful to the child's development.[203] Therefore, this initial agreement should be respected, even if it was not embodied in an official and binding contract. [204]

Moreover, this normative call to ascribe legal paternity by DLPBA, while giving flexibility and wider freedom of contract to opt out a known sperm

---

[199] This is exactly one of the main goals of the Israeli mechanism of the approving committee which actually provide administrative inspection for every domestic surrogacy agreement in Israel. For a description of this mechanism and for suggesting to apply it as the best domestic regulation of the international surrogacy market, see Yehezkel Margalit, From Baby M to Baby M(anji): Regulating International Surrogacy Agreements (unpublished manuscript) (on file with author).

[200] See RESTATEMENT (SECOND) OF CONTRACTS § 191 (1981).

[201] For a similar legislative call to recognize the rights of sperm donors where there was an explicit agreement between the sides, see CAHN, *supra* note 179, at 236-37.

[202] Melanie B. Jacobs, *More Parents, More Money: Reflections on the Financial Implications of Multiple Parentage*, 16 CARDOZO J.L. & GENDER 217, 223-26 (2010).

[203] *See* Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 U. ILL. L. REV. 833, 861 ("The loss of cross-gender parenting may have severe emotional consequences for the child."); Monte Neil Stewart, *Genderless Marriage, Institutional Realities, and Judicial Elision Genderless Marriage, Institutional Realities, and Judicial Elision*, 1 DUKE J. CONST. L. & PUB. POL'Y 1, 16-24 (2006); Hernandez v. Robles, 855 N.E.2d 1, 7 (N.Y. 2006) ("Intuition and experience suggest that a child benefits from having before his or her eyes, every day, living models of what both a man and a woman are like."). For an updated summary of those outcomes, see Ruth Butterfield Isaacson*, "Teachable Moments": The Use of Child-Centered Arguments in the Same-Sex Marriage Debate*, 98 CALIF. L. REV. 121, 134-35 (2010).

[204] On the desire of a child who grew up with a single mother to know his genetic father in comparison to other familial structures, see Annette R. Appell, *Controlling for Kin: Ghosts in the Postmodern Family*, 25 WIS. J.L. GENDER & SOC'Y 73, 119 (2010).

donor from legal paternity or to opt in an anonymous sperm donor, fits well with recent court opinions and legislation.[205] Current legislation in California, New Mexico and the District of Columbia permit the use of contracts to opt in an anonymous sperm donor.[206] In these jurisdictions, every man who agrees to the insemination of a woman, even if she is not his wife, with the agreement that he will be the legal father, should be deemed the legal father. The innovation of this legislation is that it enables parties to privately agree to depart from default legal rulings, and instead, to permit the sperm donor to be partially or fully recognized as the legal father.[207] In other words, the private initial agreement can overcome the prevailing practice and determine that legal paternity should be ascribed to sperm donors even when a licensed physician was involved in the AID.

This move toward greater freedom of contract in the context of AID is also discernible in legislative proposals to enable more freedom of contracts in regulating the relationship between a sperm donor, the conceived child, and the child's mother. Under these proposals, it is possible to privately regulate the information that will be provided about the sperm donor. I contend that this issue should be agreed upon in advance since it is a very intimate, personal and sensitive issue, making it particularly appropriate to self-regulation. For example, the updated American Bar Association (ABA) suggests signing a contract before AID is initiated so that the sides can privately regulate the extent and type of information that will be released concerning the sperm donor. In this agreement the donor can stipulate that his identify will not be revealed or to any other restricting condition. Further, the donor should not be permitted to revoke this agreement after transfer of the donated gametes or of the embryos created with the donated gametes.[208]

---

[205] For additional scholars who support this convention, see Jason Oller, Comment, *In re* K.M.H., *169 P.3d 1025 (Kan. 2007)*, 48 WASHBURN L.J. 209, 235-37 (2008); Fiser & Garrett, *supra* note 131, at 27-31. For a description of a pure contract model in AID (The Private Ordering Approach), see Bernard M. Dickens, *Canada: The Ontario Law Reform Commission Project on Human Artificial Reproduction*, *in* LAW REFORM AND HUMAN REPRODUCTION 47, 58-59 (Sheila A.M. McLean ed., 1992); William J. Wagner, *The Contractual Reallocation of Procreative Resources and Parental Rights: The Natural Endowment Critique*, 41 CASE W. RES. L. REV. 1, 23-25 (1990).

[206] It should be noted that this shift can be found in the prefatory note to the USCACA, where it was determined that it is possible to privately agree on opting out a sperm donor. Similarly, Section 806 of the October draft of the 1999 UPA suggested that an agreement between the sperm donor and the inseminated wife is sufficient to support the donor's legal paternity. *See* Audra E. Laabs, Note, *Lesbian ART*, 19 LAW & INEQ. 65, 96 (2001).

[207] *See* D.C. CODE § 16-909(e)(1) (2001); N.H. REV. STAT. ANN. §§ 168-B:11 (2013); N.M. STAT. ANN. § 40-11-6 (West 2009); N.J. STAT. ANN. § 9:17-44 (West 2009); TEX. FAM. CODE §§ 160.7031(a) (West 2007); CAL. FAM. CODE 7613(a)-(b) (2012). For an updated survey of the relevant law, see Jacqueline M. Acker, *The Case for an Unregulated Private Sperm Donation Market*, 20 UCLA WOMEN'S L.J. 1 (2013).

[208] *See* Charles P. Kindregan & Steven H. Snyder, *Clarifying the Law of Art: The New*

Similarly, over the past half century, one can recognize a trend toward recognizing more freedom of contract in the judiciary. This trend has caused a slow shift away from the notion that a sperm donor is automatically deemed not to be a parent, and toward increased reliance on contract principles. Indeed, in several rulings a private agreement was found to overcome this automatic opting out of the sperm donor where the donor's identity was known. [209]

One well known ruling was from Colorado in 1989 in the case of In Interest of R.C. In that case, a known sperm donor agreed to donate sperm to an unmarried woman, his acquaintance, for use in AID. After a child was born, the donor refused the mother's request for him to sign a release of his parental rights. The Supreme Court of Colorado concluded that the mother did not lose statutory protection merely because she knew the donor where the parties agreed at the time of insemination that the donor would be the natural father. The reason is that the statute extinguishing parental rights of donors to any child conceived by AI does not apply to known semen donors and unmarried recipients who agreed that the donor will be treated as the legal father of the child. Furthermore, the court argued that the agreement and subsequent conduct were relevant to preserving the donor's parental rights despite the existence of the statute normally cutting off parental rights of semen donors.[210]

Likewise, five years later an Ohio trial court held that the parties' agreement was relevant to the determination of the rights of the donor. In the case of C.O. v. W.S., although the mother and the known sperm donor agreed prior to her insemination that the donor would be the child's "male role model," the mother allegedly refused to actually allow him to play any such role. When the donor sued to determine paternity, custody, support, and visitation, the mother argued that the claim was barred by Ohio's legislation and therefore, he had failed to state a claim. The court denied her motion to dismiss, and declared that the donor had established a parental relationship with the child.

The Court held that failure to comply with medical requirements of AID

American Bar Association Model Act Governing Assisted Reproductive Technology, 42 FAM. L.Q. 203, 214 (2008). On the contractual aspects of revealing the identity of the sperm donor, see Kearney, *supra* note 108; Julie L. Sauer, *Competing Interests and Gamete Donation: The Case for Anonymity*, 39 SETON HALL L. REV. 919, 947-50 (2009); Vanessa L. Pi, *Why Requiring Exposed Donation Is Not the Answer*, 16 DUKE J. GENDER L. & POL'Y 379, 391-92 (2009). *See also* Doe v. XYZ Co., 914 N.E.2d 117, 122 (Mass. App. Ct. 2009) (a written contract guaranteeing confidentiality might be modified subsequently by an oral representation that the donor was willing to have his identity disclosed).

[209] For prominent cases in this context, in addition to the cases that I will discuss later, which maintain that the sperm donor is entitled to his parental rights, or at least that he could have been entitled to parental rights if there was an explicit contract, see *McIntyre v. Crouch*, 780 P.2d 239, 240 (Or. Ct. App. 1989); In re *H.C.S.*, 219 S.W.3d 33, 36-37 (Tex. App. 2006); In re *K.M.H.*, 169 P.3d 1025, 1026, 1029 (Kan. 2007). For additional cases and for scholars who also support this convention, see Hollandsworth, *supra* note 101, at 214-15, n.141-142.

[210] *See In re* R.C., 775 P.2d 27, 35 (Colo. 1989).

statutes would preclude the mother from invoking the statute precluding the donor. Moreover, even if medical requirements were met, the statute establishing the legal relationship between the donor and mother did not apply where the mother solicited the participation of the donor, who she knew, and where the donor and mother agreed that there would be a relationship between the donor and child. Furthermore, even if the statute did apply, it was unconstitutional as applied to the donor and child under the circumstances of the case.[211]

A decade later, in Texas, the case of In re *Sullivan* dealt with parties that had an agreement whereby the mother would attempt to conceive a child through donor insemination and that she would provide the primary residence for the child. The agreement further contemplated that the donor would have possession of the child at any and all times mutually agreed upon in advance by the parties. The donor brought a petition to adjudicate parentage. The mother asserted that the donor lacked parental rights and standing to maintain a parentage proceeding under Texas law. The court denied the petition maintaining that an unmarried man who donated sperm to an unmarried woman for conception of a child was a man whose paternity was to be adjudicated under the Family Code, and thus, he had standing to maintain a proceeding to adjudicate parentage of the resulting child.[212]

Recently, in the 2011 case *Breit v. Mason*, a mother and known sperm donor were in a long-term romantic relationship and lived together as an unmarried couple.[213] The mother desired to have a child, and during the course of their relationship the mother and Breit engaged in sexual intercourse for the purpose of conceiving a child.[214] Their efforts to conceive a child through sexual intercourse were unsuccessful and they turned to AI.[215] Prior to the child's birth, they entered into a written Custody and Visitation Agreement, prepared by the mother's attorney, providing that the sperm donor would have reasonable visitation with the child and that such visitation would serve the best interests of the child.[216]

The Virginia Court of Appeals allowed the sperm donor to pursue a parentage action after the parties separated, since he placed his name on the

---

[211] *See* C.O. v. W.S., 639 N.E.2d 523 (Ohio Ct. Com. Pl. 1994). *See also* Browne v. D'Alleva, No. FA064004782S, 2007 Conn. Super. LEXIS 3250 (Conn. Super. Ct. Dec. 5, 2007) ("[I]if there is an agreement between the parties about the donor's parental rights and that he would have them, it would be a violation of his due process rights to apply the [donor non-paternity] statute to him.")

[212] *In re* Sullivan, 157 S.W.3d 911, 912 (Tex. App. 2005).

[213] Breit v. Mason, 17 S.E.2d 482, 484 (Va. Ct. App. 2011*) aff'd sub nom*. L.F. v. Breit, 285 Va. 163 (2013).

[214] *Id.*

[215] *Id.*

[216] *Id.* at 485.

child's birth certificate, and executed an acknowledgement of paternity.[217] In its conclusion the court reasoned that the Virginia General Assembly did not intend to permanently bar a parentage action by a sperm donor under the factual circumstances presented, including the voluntary acknowledgment of parenthood under oath, solely because the mother and the sperm donor were unmarried at the time of conception.[218] Therefore, the statute did not bar the biological father of the artificially conceived child under those unique circumstances from petitioning to determine parentage of the child.[219]

Similarly, my call to enable more freedom of contract in the context of AID to fully or partially opt out a known sperm donor fits within several cases which recognized the ability to restrict the range of a known sperm donor's parental rights. Notably, in this scenario, a known man is being exempted from his parental obligations toward his biological children; a rare scenario in the law which only occurs under special circumstances. Therefore, there are very few cases discussing this notion. Nevertheless, the limited caselaw is quite informative.

The first precedent in this context is Matter of Marriage of Leckie and Voorhies, which took place in the year 1994.[220] In this case the sperm donor entered into an AI agreement with the recipient and her partner.[221] After the parties' daughter was born, the sperm donor was permitted to visit the daughter on a regular basis, but when the daughter was three years old, his visitation became more limited and he brought a filiation claim.[222] The Court of Appeals held that the conduct of a sperm donor and recipient after the daughter's birth did not implicitly modify the initial agreement between the parties, which the parties reaffirmed when the daughter was three years old.[223] Since it explicitly stated that the man "expressly and effectively waived any entitlement to assert parental rights, including prosecution of a filiation claim," his conduct post-birth did not vitiate his waiver of his entitlement to assert parental rights, including bringing a filiation claim.[224]

Another remarkable example can be found in the case of *Lamaritata v. Lucas*, which was decided in 2002 and dealt with a known sperm donor with whom the mother explicitly agreed that the donor would be exempt from

---

[217] *Id.* at 489 ("Accordingly, we reverse the holding of the trial court sustaining appellees' pleas in bar to Breit's Petition to Determine Parentage, and remand for further proceedings.").

[218] *Id.*

[219] *Id.*

[220] Leckie & Voorhies, 875 P.2d 521 (Or. Ct. App. 1994).

[221] *Id* at 521.

[222] *Id.* at 522.

[223] *Id.* at 521.

[224] *Id*. at 522. For a survey of those precedents in Canada, see A.A. v. B.B., 2003 CanLII 2139 (Can. Ont. Sup. Ct. J.); Angela Campbell, *Conceiving Parents Through Law*, 21 INT'L J.L. POL'Y & FAM. 242, 253 (2007).

parental obligations and rights.[225] Since the notion of "sperm donor", who is exempt from any parental obligations, was not exactly defined in the local Florida's legislation, but the contract designated the donor as "donor" and indicated that sperm was the only donation required of him, the court argued that in light of their initial agreement the donor is exempt from any parental obligations and rights.[226] In addition, the court concluded that the contract, which was originally signed in Florida, was also valid eventually in Georgia, nonetheless the local law there did not validate such a contract exempting a sperm donor.[227]

In another seminal case, Ferguson v. McKiernan, in the year 2007, a known donor and mother were involved in a sexual relationship for several years.[228] After the relationship ended, the mother approached the donor and asked him to furnish her with his sperm for purposes of IVF.[229] The parties entered into an oral agreement under which the mother would not seek child support from the donor and the donor would not seek parental privileges from the mother.[230] Though the donor assumed no parental role in the years after the birth of the mother's twins and had very little contact with the mother and the children, the mother filed for child support five years after the children were born.[231] The Supreme Court of Pennsylvania held that the parties' agreement not to seek visitation or support was enforceable.[232] The agreement was a legally valid contract and was not against public policy as the facts revealed the parties' mutual intention to preserve all the trappings of a conventional sperm donation, including formation of a binding agreement.[233]

Similarly, in the same year in the case of *Brown v. Gadson*, the mother and the known sperm donor, residents of Florida, agreed in Florida that the donor would provide his semen to a fertility clinic for the mother's use in conceiving a child by AID.[234] As part of the agreement the mother relinquished all her rights to hold the donor responsible for any resulting child.[235] In a subsequent

---

[225] Lamaritata v. Lucas, 823 So. 2d 316, 318 (Fla. Dist. Ct. App. 2002).

[226] *Id.* at 318-19. For a discussion of Florida's local law and this case, see Becky A. Ray, Note, *Embryo Adoptions: Thawing Inactive Legislatures With A Proposed Uniform Law*, 28 S. ILL. U. L.J. 423, 437-38 (2004).

[227] *See* Brown v. Gadson, 654 S.E.2d 179 (Ga. Ct. App. 2007). For a discussion of the international private law aspects of this legal precedent, see Sonia Bychkov Green, *How Modern Assisted Reproductive Technologies Challenge the Traditional Realm of Conflicts of Law*, 24 WIS. J. L. GENDER & SOC'Y 25, 93-94 (2009).

[228] Ferguson v. McKiernan, 940 A.2d 1236, 1239 (Pa. 2007).

[229] *Id.*

[230] *Id.* at 1241.

[231] *Id.* at 1238.

[232] *Id.* at 1248-49.

[233] *Id.* at 1246.

[234] Brown v. Gadson, 654 S.E.2d 179, 180 (Ga. Ct. App. 2007).

[235] *Id.*

lawsuit in Georgia, the court first held that the Florida agreement was not unenforceable as contrary to public policy.[236] The Supreme Court of Georgia had previously held that in cases of AID biological paternity did not correspond with the responsibility to provide support.[237]

Finally, in the 2010 case of In re *Paternity of M.F.*, the court found that an agreement between a mother and known sperm donor relieving the donor of parental rights and responsibilities was enforceable as to a child conceived pursuant to the agreement.[238] In that case, the mother previously cohabited and had a long-term relationship with a female life partner.[239] Since they wanted a child, they asked the father, a friend of the mother's, to provide his sperm with which to impregnate the mother.[240] After the child was conceived but prior to birth, the parties signed a donor agreement.[241] The mother had a second child from the same donor seven years later.[242] On appeal, the court noted that the manner of insemination determined the enforceability of the agreement, since insemination via intercourse would render it unenforceable as against public policy.[243] Under traditional contract law principles, since the mother sought to avoid the agreement, she bore the burden of proving the means of avoidance.[244] The court concluded that mother failed to demonstrate that the donor agreement was void on public policy grounds, but the agreement did not apply to preclude a petition to establish paternity of the second child.[245]

V. CONCLUSION

The AID practice is the most longstanding and prevailing procedure among the various fertility treatments. Nevertheless, this practice faced significant hurdles until, during the middle of the 20th century, it became a socially, legally, and even to some degree a religiously, legitimate practice. However, until greater legal recognition is afforded to AID contracts, and the parties are permitted to privately determine the identity of the legal father, AID will not reach its full potential. In addition, although the majority of states have statutes that allocate the paternal obligations of the inseminated woman's husband and of the sperm donor, these statutes have not offered sufficient guidance to the

---

[236] *Id.* at 179.

[237] *Id.* at 180.

[238] *See In re* Paternity of M.F., 938 N.E.2d 1256 (Ind. Ct. App. 2010).

[239] *Id.* at 1256.

[240] *Id* at 1257.

[241] *Id.*

[242] *Id* at 1258.

[243] *Id.* at 1258.

[244] *Id.* at 1260.

[245] *Id.* at 1263-64. *See In re* K.M.H., 169 P.3d 1025, 1038 (Kan. 2007); Ferguson v. McKiernan, 940 A.2d 1236, 1248 (Pa. 2007) (upholding an oral agreement between sperm donor and mother, under which donor relinquished rights to visitation and mother agreed not to seek child support from the donor).

courts. Moreover, in states that do not have these statutes, the outcomes of cases involving the paternity of artificially conceived children have been inconsistent. This situation presents an urgent need for legislation to clarify the identity of the legal father and his accurate spectrum of parental obligations.

The model of DLPBA I propose, and its implementation alongside notions of modern status, should serve as an outline for the comprehensive and coherent legal framework needed to regulate the determination of legal paternity in the context of AID. This model should be applied in two basic scenarios, first, an anonymous sperm donor should be permitted to fully or partially opt in to legal paternity by agreement with the mother. Second, a known sperm donor should be permitted to fully or partially opt out from this legal status in rare cases and under specific circumstances where the best interests of the child will not be damaged. In each instance, however, once the parties have determined legal paternity by agreement, the ramifications of that legal designation should be determined in a modern status-based fashion, allowing for greater governmental intervention to ensure that the best interests of the child are protected.