

# You Are Not the Father! — Parental Liabilities and Rights of Sperm Donors in Tennessee

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## I. INTRODUCTION

The purpose of the Uniform Parentage Act (“UPA”) is to provide equal rights between the parent and child, regardless of the marital status of the parents.<sup>1</sup> The UPA’s goal is to rid the United States of old common law values, which required legitimacy of a child before any parental rights or obligations attached.<sup>2</sup> Section two of the 1973 version of the UPA provided that “[t]he parent and child relationship extends equally to every child and every parent, regardless of the marital status of the parent.”<sup>3</sup> Though the UPA provided a platform for parentage in instances in which two unmarried adults could establish paternity, its provisions were not flexible enough to address the looming technological advancements in child conception. Because of the UPA’s initial failure to address impending technological advancements, amendments to the UPA in support of unconventional methods of conception were inevitable; these UPA amendments address technological advancements in reproduction and the legal ramifications of sperm donors.<sup>4</sup>

Tennessee’s current parentage statute regarding paternity fails to address the obligations and rights of a sperm donor when he donates sperm to an unwed mother without anonymity.<sup>5</sup> Tennessee’s failure to address obligations and rights of non-anonymous

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1. The Nat’l Conference of Comm’rs on Unif. State Laws, *Parentage Act Summary*, UNIF. L. COMM’N, <http://www.uniformlaws.org/ActSummary.aspx?title=Parentage%20Act> (last visited Mar. 4, 2017) [hereinafter Uniform Law Commission].

2. UNIFORM LAW COMMISSION, *supra* note 1.

3. *Id.*

4. *See id.*

5. TENN. CODE ANN. § 36-2-304 (2014) (providing instances in which there is a rebuttable presumption that a male is the father of a child.) While the focal point of the statute is to determine paternity, the statute never addresses sit-

sperm donors exposes the people and the state to litigation in which no statutory provision is available to reference and there is only a minute amount of precedent for guidance.<sup>6</sup> There are 30,000-60,000 children in the United States conceived every year using assisted reproductive technology (“ART”).<sup>7</sup> As ART becomes more prevalent, the Tennessee legislature must enact a statute that clearly outlines the rights and obligations of sperm donors when they donate sperm non-anonymously<sup>8</sup> to unwed women. Otherwise, Tennessee’s only solution is for courts to address this issue on a case-by-case basis.<sup>9</sup>

Consider Jane, a 37-year-old single woman who wants to be pregnant. Though Jane would prefer to be married before having children, she does not see marriage in her near future. Thus, Jane uses a sperm donor to get pregnant. Rather than going to a clinic and obtaining sperm from a bank of anonymous donors, Jane decides to ask her good friend, John, to donate his sperm,<sup>10</sup> as John’s

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uations in which a sperm donor—who has no intent of being a father—has a contractual relationship with a single woman who wishes to become pregnant. *See id.*

6. Jane Marie Lewis, Note, *New-Age Babies and Age-Old Laws: The Need for an Intent-Based Approach in Tennessee to Preserve Parent-Child Succession for Children of Assisted Reproductive Technology*, 43 U. MEM. L. REV. 479, 480–84 (2012).

7. Jennifer Nadraus, Note, *Dodging the Donor Daddy Drama: Creating a Model Statute for Determining Parental Status of Known Sperm Donors*, 53 FAM. CT. REV. 180, 182 (2015) (citing Stephanie Chen, *With the Web, Curiosity and Luck, Sperm Donor Siblings Connect*, CNN (Aug. 11, 2010, 9:25 AM), <http://edition.cnn.com/2010/LIVING/08/11/sperm.donor.sibling.connect/>) (this number is representative of successful conceptions as a result of ART).

8. This Note will focus primarily on statutory protection as it relates to non-anonymous sperm donors who donate in an ART facility contractually.

9. *In re C.K.G.*, 173 S.W.3d 714, 721–24 (Tenn. 2005) (“[T]he clear intention, discussed intention, of this [bill] was not to deal with sperm donors at all. . . .”) (quoting *Tenn. S. Judiciary Comm. Tape S-Jud #4* (May 13, 1997) (statement of Representative Steve Cobb)); Nadraus, *supra* note 7, at 181 (“Unambiguous legislation that clearly defines the rights of all parties involved should be enacted to provide guidance in these type of situations.”).

10. Nadraus, *supra* note 7, at 182 (“While using a known donor creates a greater risk of legal battles, many women choose this option anyway. ‘They are willing to accept this risk because this method eliminates the potential difficulties in gaining access to medical information and permits the prospective mother to make the choice of donor herself.’”) (quoting Patricia A. Kern & Kathleen M.

genes and medical history are excellent. John agrees to provide the sperm pursuant to a contract in which he agrees to waive all rights and be released from all obligations to the child or to Jane. Jane also signs the agreement. The child is conceived in an ART facility without sexual contact between Jane and John.<sup>11</sup> The procedure is successful, and Jane's dream of being a mother is now a reality. She raises the child alone for five years and decides that she wants to enroll the child in private school. A private school education is prohibitively expensive and Jane cannot do it alone. Jane has yet to find a suitable husband, so she contacts John for financial assistance. John is unable to deliver, resulting in Jane filing an action demanding child support from John.<sup>12</sup> Because Tennessee does not allow parents to waive their child support obligations,<sup>13</sup> should John be obligated to support the child after he contractually donated his sperm to Jane? Under Tennessee's current statutory scheme, the answer to this question is unknown.<sup>14</sup>

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Ridolfi, *The Fourteenth Amendment's Protection of a Woman's Right to be a Single Parent Through Artificial Insemination by a Donor*, 7 *WOMEN'S RTS. L. REP.* 251, 256 (1982)).

11. See Hutton Brown et al., *Legal Rights and Issues Surrounding Conception, Pregnancy, and Birth*, 39 *VAND. L. REV.* 597, 608 (1986) (for a discussion of artificial insemination). The process of Jane using John's sperm to conceive without sexual intercourse is called artificial or noncoital reproduction. *Id.* at 605–06. In artificial insemination, the male's sperm is collected and “deposited by a plastic syringe into the opening of the woman's uterus shortly after [ovulation].” *Id.* “The source of the sperm could be either the husband of the woman inseminated, or another male” whom the woman has picked, or who is contributing anonymously. *Id.* at 608. When the donor is not the husband of the woman inseminated, the form of insemination is called heterologous artificial insemination—the focal point of this Note. *Id.*

12. This would seem like a breach of contract claim, but some courts do not enforce contractual relinquishments of obligations to a child against the mother of the child if the father is the biological father. This is discussed further in *infra* Part II.

13. *Gallaher v. Elam*, 104 S.W.3d 455, 461 (Tenn. 2003) (“In Tennessee, support obligations are mandatory, and a parent may be criminally prosecuted for failure to support.”) (citation omitted); see also *TENN. CODE ANN.* § 34-1-102(a) (2015) (“Parents are the joint and natural guardians of their minor children, and are equally and jointly charged with their care, nurture, welfare, *education* and support. . . .”) (emphasis added).

14. Nadraus, *supra* note 7, at 182 (“When a donor is anonymous, the law is clear: the donor has no parental rights or obligation to the child. In contrast,

This Note will propose that Tennessee's legislature enact a statute outlining the paternal rights and obligations of sperm donors in Tennessee, specifically with respect to non-anonymous donors and their child support obligations.<sup>15</sup> Additionally, this Note investigates the UPA's and other state law approaches to paternal liability and rights of sperm donors, including the value of enacting a statutory scheme addressing such issues. Further, this Note will rework Tennessee's statutory scheme to include protection to non-anonymous sperm donors who donate their sperm in ART facilities to unwed women. This Note will encourage Tennessee to protect non-anonymous donors when they have relinquished all obligations and liabilities, such as child support, via a contractual agreement in an ART facility. Part II of this Note will discuss Tennessee's current statutory scheme regarding parentage and how Tennessee addresses the growing phenomenon of ART. Part III of this Note will examine the Uniform Parentage Act and how it has affected the states. Part IV will provide a proposed statutory scheme for Tennessee with respect to ART and non-anonymous sperm donors.

## II. TENNESSEE ON PARENTAGE

In some states, including Tennessee, "legislatures and judges prefer to regulate familial relationships through rigid, formalistic ordering based on traditional bionormative models . . . ."<sup>16</sup> An example of a traditional bionormative model is the idea that every child has one father and one mother linked through genetics.<sup>17</sup> This view of family is vastly antiquated as eleven percent of people in the United States in 2013 alone used infertility services to assist in family creation.<sup>18</sup> Societal and technological changes have allowed for

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known donors are individuals who are identified by the intended parent(s). Often individuals will ask a friend, relative, or a complete stranger to be a donor. The law regarding known donors is less straightforward.") (citations omitted).

15. While maternal rights and obligations involving ART are important and have not been addressed statutorily, this Note will focus only on paternal rights and obligations of sperm donors.

16. Yehezkel Margalit, *Artificial Insemination from Donor (AID)—From Status to Contract and Back Again?*, 21 B.U. J. SCI. & TECH. L. 69, 70 (2015).

17. *Id.*

18. CTRS. FOR DISEASE CONTROL & PREVENTION, 2013 ASSISTED REPRODUCTIVE TECHNOLOGY: FERTILITY CLINIC SUCCESS RATES REPORT 1

a variety of options for creating familial relationships, such as gestational surrogacy and gamete donation.<sup>19</sup> As technological and societal norms advance, the law often fails to progress.<sup>20</sup> Non-traditional forms of creating a family call for new legal definitions of familial relationships.<sup>21</sup>

#### A. Tennessee's Definition of Paternity

Title thirty-six of the Tennessee Code Annotated provides a foundation for domestic relations in Tennessee.<sup>22</sup> The statute provides for a “presumption of paternity” in section 36-2-304,<sup>23</sup> which

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(2013) <ftp://ftp.cdc.gov/pub/Publications/art/ART-2013-Clinic-Report-Full.pdf>; see also Gaia Bernstein, *The Socio-Legal Acceptance of New Technologies: A Close Look at Artificial Insemination*, 77 WASH. L. REV. 1035, 1060–83 (discussing the history of artificial insemination and how its use has grown). In 2013, 190,773 ART cycles were performed at 467 reporting clinics in the United States, which resulted in 54,323 live births (deliveries of one or more living infants) and 67,996 live born infants. FERTILITY CLINIC SUCCESS RATES, *supra* note 18, at 3.

19. See Marlene Moses & Manuel B. Russ, *Family Matters: The Art of Having Three Biological Parents*, 50 TENN. B.J. 36, 37 (2014), for a discussion on surrogacy and gamete donation and how the two assisted reproduction techniques complicate how parentage is defined legally. See also Margalit, *supra* note 16, at 69–70 (“[T]echnological innovations such as artificial insemination (AI), sperm donation, and birth control have segregated partially marital relations from fertility.”).

20. See Brown et al., *supra* note 11, at 602; Margalit, *supra* note 16, at 70; Nadraus, *supra* note 7, at 180 (“Despite recent innovations in alternative reproductive technology and the increased use of artificial insemination procedures, courts and legislatures have been unable to develop a clear and consistent test to establish parental rights and obligations of sperm donors.”).

21. Brown, *supra* note 11, at 603 (“[L]egislators must respond promptly by confronting the new legal issues that result from new medical technologies.”); Margalit, *supra* note 16, at 70–72.

22. TENN. CODE ANN. § 36-2-304 (2014).

23. TENN. CODE ANN. § 36-2-304(a)(1)–(5). “A man is rebuttably presumed to be the father of a child if:

- (1) The man and the child’s mother are married or have been married to each other and the child is born during the marriage or within three hundred (300) days after the marriage is terminated by death, annulment, declaration of invalidity, or divorce;
- (2) Before the child’s birth, the man and the mother have attempted to marry each other in compliance with the law, although the attempted marriage is or could be declared illegal, void and voidable;

delineates the situations where a man is legally presumed to be the father of the child. While the statute does provide a list of exceptions to the presumption of paternity, the statute fails to address any instances in which ART, specifically artificial insemination (“AI”), is the basis of reproduction. Moreover, Section 36-2-302 provides definitions with respect to children and establishing parentage.<sup>24</sup> There is no statutory provision addressing ART. Looking back to

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(3) After the child’s birth, the man and the mother have married or attempted to marry each other in compliance with the law although such marriage is or could be declared illegal, void, or voidable; and:

(A) The man has acknowledged his paternity of the child in a writing under the putative father registry established by the department of children services, pursuant to § 36-2-318;

(B) The man has consented in writing to be named the child’s father on the birth certificate; or

(C) The man is obligated to support the child under a written voluntary promise or by court order;

(4) While the child is under the age of majority, the man receives the child into the man’s home and openly holds the child out as the man’s natural child; or

(5) Genetic tests have been administered as provided in § 24-7-112, an exclusion has not occurred, and the test results show a statistical probability of parentage of ninety-five percent (95%) or greater.

*Id.*

24. TENN. CODE ANN. § 36-2-302(1)–(6) (2014). “As used in this chapter, unless context otherwise requires:

(1) “Child born out of wedlock” means a child born to parents who are not married to each other when the child was born;

(2) “Court” means the juvenile court or any trial court with general jurisdiction;

(3) “Father” means the biological father of a child born out of wedlock;

(4) “Mother” means the biological mother of a child born out of wedlock;

(5) “Parent” means the biological mother or biological father of a child, regardless of the marital status of the mother and father; and

(6) “Father,” “mother,” and “parent” do not include a biological parent whose parental rights have been terminated for a child whose parentage is at issue.

*Id.*

Jane and John's situation, the statute's failure to address legal parentage via ART proves problematic in instances of non-anonymous sperm donation because the statute specifically defines "father" as the biological father of the child.<sup>25</sup> Technically, under § 36-2-302(3), John would be considered the father of Jane's child because of the genetic connection between John and the baby. Based on the plain language of the statute, John could be held liable as the father of the child, regardless of the fact that he intended only to donate his sperm. The statute's silence makes Tennessee's current statutory scheme unclear in whether it accounts for new forms of conception, illustrating the need for statutory language that provides guidance for the conception options technology now affords.

Though ART is not addressed in the Tennessee statute pertaining to paternity, it is briefly addressed in T.C.A. section 68-3-306.<sup>26</sup> Although the statute addresses ART, T.C.A. section 68-3-306 only applies to the traditional concept of family, a husband and wife conceiving a child,<sup>27</sup> and similarly fails to address the possibility of non-traditional families in which a single woman seeks artificial insemination without a husband. Furthermore, the statute leaves sperm donors exposed to suit because of its failure to statutorily outline the obligations, or lack thereof, imposed on non-anonymous sperm donors in instances where the sperm donor donates heterologously.<sup>28</sup> Tennessee's statutory scheme also does not provide guidance on heterologous artificial insemination. Because the Tennessee legislature has provided no direction, the courts have dealt with these issues ad hoc. The next section discusses what the Tennessee Supreme Court has decided in ART issues.

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25. TENN. CODE ANN. § 36-2-302(3) (2014).

26. TENN. CODE ANN. § 68-3-306 (2014) ("A child born to a *married* woman as a result of artificial insemination, with consent of the married woman's husband, is deemed to be the legitimate child of the husband and wife.") (emphasis added).

27. In light of the Supreme Court's ruling in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) on same-sex marriage, this Tennessee statute could be amended.

28. Heterologous donation is when a woman is inseminated with the sperm of a male who is not her husband. Brown et al., *supra* note 11, at 608.



*B. Tennessee Supreme Court Rulings on ART – What Does It Mean for Sperm Donors?*

Without any statutory basis for resolving legal issues arising under ART, parents and donors are forced into litigation.<sup>29</sup> “Tennessee in particular has adopted a middle-ground approach that not only considers the procreative intent of the parties, but also factors in who the birth parent was and whether there are any other parties who have claims to parentage of any kind.”<sup>30</sup> The issue with using a procreative intent-based approach is that there is no real guarantee of legal parentage because, in addition to looking at intent, the court will look at other factors such as who the birth parent is and any other individuals who may have biological claim to the child.<sup>31</sup> To alleviate the uncertainty of parentage when individuals use ART in a non-traditional aspect<sup>32</sup> as a means of creating a family, it is imperative that Tennessee’s legislature address the issue statutorily.

The first Tennessee Supreme Court case to address ART was *In re C.K.G.*, where the court determined maternity rather than paternity.<sup>33</sup> *In re C.K.G.* involved an unmarried couple, Charles and Cindy, who chose to use the eggs of an anonymous donor and the sperm of Charles to create a family.<sup>34</sup> After successful fertilization of three eggs and the birth of triplets, Cindy and Charles raised the triplets together, sharing equal parental responsibilities.<sup>35</sup> Two years later, Cindy and Charles ended their relationship and Cindy attempted to establish parentage, obtain child support, and procure

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29. Lewis, *supra* note 6, at 481–82 (“Tennessee has two opposing options: passively ignore the complications to the traditional family structure that ART presents or actively resolve these challenges to clarify the rights of this vulnerable class of children. As reproductive technologies become increasingly available through a variety of methods, these surrounding issues will arise more frequently, forcing families to resort to courts . . .”).

30. Moses & Russ, *supra* note 16, at 37.

31. *Id.*

32. While there are various instances in which families can be created through the use of ART, this Note directly addresses the non-traditional use of ART in instances in which the mother is unwed and uses gametes donation from a non-anonymous donor.

33. *In re C.K.G.*, 173 S.W.3d 714, 720, 733 (Tenn. 2005).

34. *Id.* at 720.

35. *Id.* at 718.

custody of the triplets.<sup>36</sup> Charles responded with the assertion that Cindy had no genetic relationship to the children and thus lacked standing according to Tennessee law.<sup>37</sup>

The case of Cindy and Charles was one of first impression in Tennessee.<sup>38</sup> The Tennessee Supreme Court recognized that “Tennessee’s parentage and related statutes do not contemplate many of the scenarios now made possible by recent developments in reproductive technology.”<sup>39</sup> According to the legislative history of Tennessee’s current parentage statute, it is clear that the statute is not intended to address questions of parentage involving sperm or egg donation.<sup>40</sup> Despite the Tennessee Supreme Court’s call for legislative action, the Tennessee General Assembly has failed to enact a statutory framework addressing the rights and obligations of non-traditional familial relationships created through the use of ART.<sup>41</sup> The uncertainty of the “procreative-intent” factor test coupled with the complexities involved with ART, specifically, the complexities in determining parentage and parental rights and obligations, is indicative of the need for legislative action in Tennessee. Tennessee’s only reference to AI is with respect to determining maternity, and it does so only in relation to the traditional family structure; Tennessee does not discuss paternity in any part of the statute in relation to non-traditional families, leaving unwed women seeking conception via

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36. *Id.*

37. *Id.* at 718–19.

38. *Id.* at 720.

39. *Id.* at 721.

40. *Id.* at 724 (“The clear intention, discussed intention, of this [bill] was *not* to deal with sperm donors at all . . . . We wanted to put that off for another day . . . . The intent, and it should be stated by the sponsor in a colloquy on the floor if necessary, is not to affect that issue *at all*.” (quoting *Tenn. S. Judiciary Comm. Tape S-Jud #4* (May 13, 1997) (statement of Representative Steve Cobb))).

41. *Id.* at 729–31 (“Given the far-reaching, profoundly complex, and competing public policy considerations necessarily implicated by the present controversy, we conclude that crafting a general rule to adjudicate all controversies so implicated is more appropriately accomplished by the Tennessee General Assembly. The General Assembly is better suited than the courts to gather data, to investigate issues not subject to current litigation, and to debate the competing values and the costs involved in such issue as deciding whether generally to subject procreation via technological assistance to governmental oversight, and if so, to determine what kind of regulation to impose.”) (citations omitted).

ART unaddressed.<sup>42</sup> For heterologous sperm donors, the lack of statutory guidance for the role of the male in heterologous AI subjects the donor to unanticipated obligations.

*C. Paternity Issues that Arise from a Lack of a Statutory Scheme  
Defining Paternal Liabilities and Rights of Sperm Donors to  
Unwed Sperm Donees*

As non-traditional family structures increase, the legal implications as a result of such change increase as well. “As the assisted reproductive technologies radically alter the ways in which our society creates families, these medical advances have outpaced the legal framework to regulate them and to secure the families they help create.”<sup>43</sup> In 1985, about 20,000 women used AI in the United States; of those 20,000 women, 1,500 were unmarried.<sup>44</sup> Two years later, 80,000 women in the United States used AI, with 8,600 of them being unmarried.<sup>45</sup> Over twenty years later, in 2013, more than 190,000 people in the United States have used a form of ART to create families.<sup>46</sup> Based on these numbers, it is essential for statutory schemes to address rights and obligations of non-anonymous heterologous sperm donors when they donate to unmarried women for the purpose of conception. Sperm donors need protection from instances in which an unmarried woman attempts to, among other things, legally enforce child support obligations against heterologous sperm donors and particularly so when the sperm donor is known.<sup>47</sup> *Ferguson v. McKiernan*<sup>48</sup> provides an example of a situation in which an unwed woman uses a non-anonymous donor for AI.

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42. See TENN. CODE ANN. § 68-3-306 (2014).

43. Susan L. Crockin, *Statutory and Case Law Governing Oocyte and Embryo Donation*, in PRINCIPLES OF OOCYTE AND EMBRYO DONATION 241 (Mark V. Sauer ed., 2d ed. 1998).

44. Vickie L. Henry, *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, 288 [hereinafter *A Tale of Three Women*].

45. *Id.*

46. FERTILITY CLINIC SUCCESS RATES, *supra* note 18, at 21.

47. While only child support is stated as a cause for protection for the sperm donors here, there are other problems that sperm donors potentially face in instances as described above.

48. 940 A.2d 1236 (Pa. 2007).

## 1. Child Support

*Ferguson v. McKiernan* is a widely publicized case<sup>49</sup> that addresses whether a non-anonymous sperm donor involved in private sperm donation<sup>50</sup> effected through clinical means may be held liable for child support, regardless of the existence of an agreement signed by both parties stating that the mother would not hold the donor responsible for supporting the resultant child.<sup>51</sup> The woman, Ferguson, asked a friend, McKiernan, to donate his sperm to help her conceive a child.<sup>52</sup> McKiernan agreed to donate the sperm and was assured by Ferguson that he would have no parental obligations or financial support to the child.<sup>53</sup> Following the conception, Ferguson gave birth to twins and raised the children alone for five years, after which Ferguson filed for child support against McKiernan.<sup>54</sup> The lower courts held that McKiernan was liable for child support to the children despite the contractual agreement with Ferguson because the agreement would go against public policy “[d]ue to the fact that the contract between appellee and appellant bargained away the legal right not held by either of them . . . but belonging to the subject children . . . .”<sup>55</sup> The Supreme Court of Pennsylvania disagreed with the lower courts and held that the contract was enforceable and that McKiernan was not obligated to pay child support.<sup>56</sup> The court reasoned that there was a clear distinction between the “dissolution of a relationship (or a mere sexual encounter) that produces a child via

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49. See *Sperm donor wins child support battle*, NBCNEWS.COM (Jan. 3, 2008), [http://www.nbcnews.com/id/22488113/ns/us\\_news-life/t/sperm-donor-wins-child-support-battle/#.VrynwsePbFI](http://www.nbcnews.com/id/22488113/ns/us_news-life/t/sperm-donor-wins-child-support-battle/#.VrynwsePbFI), for the National Broadcasting Company’s coverage of the case.

50. Private sperm donation is sperm donation that occurs outside of an institutional sperm bank.

51. *Ferguson*, 940 A.2d at 1239.

52. *Id.*

53. *Id.*

54. *Id.* at 1241–43.

55. *Id.* at 1242. While this is a valid concern with respect to the best interest of the child, this Note argues that the ability for women to procreate in the way that they decide could potentially be chilled by the effects of forcing parental responsibility on sperm donors. Thus, not only does this issue effect sperm donors rights, but it also inadvertently effects women who choose alternative methods of procreation.

56. *Id.* at 1248–49.

intercourse” and “an anonymous sperm donation, absent sex, resulting in the birth of a child” because the two scenarios produce “self-evident” views.<sup>57</sup> The court went on to classify the AI as synonymous with institutional, “non-sexual conception by sperm donation”—the only difference being the lack of anonymity.<sup>58</sup> Holding the sperm donor liable in this instance would discourage non-anonymous sperm donation due to the sperm donor’s fear of parental liability, and ultimately, that fear in turn could create an obstacle for unmarried women who want to create a family.<sup>59</sup>

This case distinctively illustrates how child support in situations where an unmarried woman chooses to undergo AI is an issue that Tennessee may face in the future due to the lack of statutory guidance. While the Pennsylvania Supreme Court’s ruling was in favor of the sperm donor and is an approach that Tennessee courts should follow, it would be more efficient for Tennessee to create a proactive, statutory solution rather than resolving the issues as they appear on a case-by-case, reactive basis. If unwed women are aware of the consequences that attach when they make the decision to become single mothers by artificial insemination from a non-anonymous donor *before* the procedure takes place, they would be able to thoroughly analyze their decisions and the effects the decision may have on the child.

## 2. Assertion of Parental Rights

Aside from a child support action by the mother, non-anonymous heterologous donors may attempt to assert parental rights pertaining to the child conceived by an unwed woman as a result of AI. The lack of a statutory scheme defining paternal rights of heterologous sperm donors when donating to a single, unmarried woman can and has created issues. For example, in a Connecticut case, *Browne v. D’Alleva*, an unwed woman, D’Alleva, asked her friend, Browne, to donate his sperm so she could become pregnant and raise a child with her partner; Browne agreed to donate his

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57. *Id.* at 1246.

58. *Id.*

59. *Id.* at 1246–47; *see* Margalit, *supra* note 16, at 92 (“[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.”).

sperm.<sup>60</sup> The procedure occurred at the Center for Advanced Reproductive Services where Browne filled out a consent form that contained a waiver of the donor's rights in the event that a child was conceived from the procedure; D'Alleva became pregnant and gave birth to the child.<sup>61</sup> Browne and D'Alleva initially agreed that, upon the birth of the child, D'Alleva's partner would adopt the child and Browne would relinquish all rights and obligations to the child.<sup>62</sup> When the time came for D'Alleva's partner to adopt the child, Browne refused to sign the adoption papers, resulting in litigation to terminate Browne's parental rights.<sup>63</sup> In this case, while D'Alleva intended for Browne to remain in the child's life, she never intended for Browne to retain any parental rights to the child.<sup>64</sup> Browne argued that the Connecticut statute for Artificial Insemination by Donor ("AID")<sup>65</sup> applies only to married women who have received the consent of their husband to proceed with AI;<sup>66</sup> D'Alleva argued that the Connecticut statute is unclear in whether it applies only to married women.<sup>67</sup> The court ultimately ruled in favor of Browne, finding that Browne had standing to bring an application for joint legal custody and visitation of the child.<sup>68</sup>

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60. *Browne v. D'Alleva*, No. FA064004782S, 2007 Conn. Super. LEXIS 3250 at \*1, 30 (Conn. Super. Ct. Dec. 7, 2007).

61. *Id.* at \*3-4 ("[B]y my signature below, I give up all rights and claims to such a child.").

62. *Id.*

63. *Id.* at \*4-5.

64. *Id.* at \*5.

65. The court in *D'Alleva* uses the term AID (Artificial Insemination by Donor), which is synonymous to AI, but is used to highlight that the donor is not the husband.

66. CONN. GEN. STAT. § 45a-774 (West 2004) ("Any . . . children born as a result of A.I.D. shall be deemed to acquire, in all respects, the status of a naturally conceived legitimate child of the husband and wife who consented to and requested the use of A.I.D.").

67. CONN. GEN. STAT. § 45a-775 (West, Westlaw through 2016 February Regular Session, the 2016 May Special Session, and the 2016 September Special Session) ("An identified or anonymous donor of sperm or eggs used in A.I.D., or any person claiming by or through such donor, shall not have any right or interest in any child born as a result of A.I.D.").

68. *D'Alleva*, 2007 Conn. Super. LEXIS 3250, at \*50.

The *D'Alleva* case addresses the exact issue regarding paternal rights that Tennessee will face as ART becomes more widespread. The *D'Alleva* case contained a slight wrinkle in that the paternity issue involved a lesbian couple in addition to a sperm donor—but the legal issue remains the same. The court in *D'Alleva* found that the Browne, the sperm donor, had standing to bring a claim of paternity against D'Alleva, regardless of the fact that D'Alleva and Browne signed a contract before the AI was performed. The ambiguity regarding whether Browne had paternal rights to the child resulted largely from the Connecticut statute.<sup>69</sup> The court ultimately came to its conclusion by relying heavily on case law, other statutory provisions, and legislative intent to determine whether Browne had standing.<sup>70</sup>

*Browne v. D'Alleva* provides an illustration of how a failure to clearly outline parental rights and liabilities of sperm donors in the statute could create similar problems for Tennessee. Under Tennessee's current statutory scheme, it is clear that married couples using AI are protected under the statute, so long as the procedure is performed in an ART facility; however, the statute does not address unwed women who want to become mothers.<sup>71</sup>

*McIntyre v. Crouch* provides an example of how clear laws regarding parental rights and liabilities of sperm donors to unwed women encourage and foster efficiency within the court system if litigation arises.<sup>72</sup> In *McIntyre*, a sperm donor challenged an Oregon statute that terminated his parental rights because of his status as a sperm donor.<sup>73</sup> The sperm donor argued, *inter alia*, that because he was a non-anonymous donor, the mother was unmarried, and did not receive assistance from a physician to perform the artificial insemination.

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69. *Id.* at \*7.

70. *Id.* at \*47–49.

71. For more examples of cases discussing state statutes that ambiguously address rights and obligations of heterosexual sperm donors who donate to unwed women, see *In Interest of R.C.*, 775 P.2d 27, 34–35 (Colo. 1989) (holding that the statute does not preclude known donors from having parental rights when the donor contracted with the unwed woman to retain parental rights and act as the natural father) and *Jhordan C. v. Mary K.*, 224 Cal. Rptr. 530, 536–38 (Cal. Ct. App. 1986).

72. *McIntyre v. Crouch*, 780 P.2d 239 (Or. Ct. App. 1989).

73. *Id.* at 241.

nation, the Oregon legislature did not intend to bar him from parental rights.<sup>74</sup> The sperm donor also insisted that because he wanted to be a parent to the child, this made a difference in how the statute applied to him.<sup>75</sup> The court in *McIntyre* held that the plain language of the statute,<sup>76</sup> which denied parental rights to sperm donors, applied to the father because the language of the statute was concise and clearly barred sperm donors, both anonymous and non-anonymous, from parental rights to a child conceived through AI to an unwed woman.<sup>77</sup> Oregon's statute clearly addresses the non-traditional familial structure.<sup>78</sup> Because of the straightforward language of the statute, the court more easily found the donor had no parental rights to the child.<sup>79</sup> Not only does the statute protect the unwed mother by disallowing the non-anonymous heterologous donor to assert any parental rights, but it also protects the sperm donor from any responsibilities that the unwed mother may try to place on the heterologous donor.

The *McIntyre* case provides an example of how Tennessee should address AI when the procedure involves a private or public, non-anonymous sperm donation to an unmarried woman. The *McIntyre* court found it easy to determine the paternal rights of the sperm donor because Oregon's statutory scheme addressed both married women and unmarried women who choose to undergo AI. Creating a statutory scheme that addresses both will clearly guide the court, ultimately resulting in more judicial efficiency. In *McIntyre*, the court used Oregon's statute, which defines artificial insemination; provides that AI procedures can only be done by physicians;

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74. *Id.* at 242–43.

75. *Id.*

76. OR. REV. STAT. § 109.239 (2011) (“If the donor of semen used in artificial insemination is not the mother’s husband: (1) Such donor shall have no right, obligation or interest with respect to a child born as a result of the artificial insemination; and (2) A child born as a result of the artificial insemination shall have no right, obligation or interest with respect to such donor.”).

77. *McIntyre*, 780 P.2d at 243.

78. OR. REV. STAT. § 109.239(1) (“Such donor shall have no right, obligation or interest with respect to a child born as a result of the artificial insemination.”).

79. *McIntyre*, 789 P.2d at 243 (“[T]he act bars a donor from the rights and responsibilities of fatherhood. It would be inconsistent with the purposes of the act if a donor were *not* barred simply because he was known to the mother at the time of conception as the semen producer.”).



and removes all rights, obligations, and interests from the sperm donor regardless of whether the donee is married.<sup>80</sup> Though the statute failed to define donor explicitly, the Oregon Appellate Court found it easy to apply the statutory provision because the structure of the AI provision makes it implicitly clear that a donor is a man who gives sperm for the purpose of insemination.<sup>81</sup> For the sake of judicial efficiency and clarity, Tennessee should use Oregon's statutory scheme as a building block for creating its own.

Applying the Oregon statute to Jane's and John's situation in the introductory hypothetical would determine whether John is liable for child support of Jane's child. If Jane and John lived in Oregon, John, being the sperm donor, clearly would not be responsible for or obligated to Jane's child. This is evident from the legislature's purposes in enacting the Oregon parentage statute.<sup>82</sup> Conversely, Tennessee's current statutory scheme falls dangerously behind because it addresses neither AI outside the bounds of holy matrimony nor the complications that can arise when determining parentage.

### III. UPA'S GUIDANCE FOR TENNESSEE

#### A. Amendments Analyzed

The UPA provides some framework to the states for technological advancements in reproduction. The original 1973 version of

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80. *Id.* at 243.

81. *Id.* ("We hold that *ORS 109.239* applies to petitioner. Although the act does not define 'donor,' it is clear that a donor is a man who gives his semen for the purpose of artificial insemination.").

82. *Id.* ("The legitimate purposes of the act are: (1) to allow married couples to have children, even though the husband is infertile, impotent or ill; (2) to allow an unmarried woman to conceive and bear a child without sexual intercourse; (3) to resolve potential disputes about parental rights and responsibilities: that is, (a) the mother's husband, if he consents, is father of the child and (b) an unmarried mother is freed of any claims by the donor of parental rights; (4) to encourage men to donate semen by protecting them against any claims by the mother or the child and (5) to legitimate the child and give it rights against the mother's husband, if he consents to the insemination.").

the UPA provided a new approach in determining parentage, specifically in paternity actions.<sup>83</sup> The 1973 version provided protection to married women who used artificial insemination by stripping the donor of any rights as the natural parent when the procedure is performed by a licensed physician.<sup>84</sup> The UPA's 1973 version of the Parentage Act was the advent of ART recognition. It provided protection to the mother in terms of establishing paternity, but the protection was very narrow in that it only applied to *married* women who undergo AI.<sup>85</sup>

The UPA has been amended twice since 1973. The 2000 amendment to the UPA resulted in a more modern version, which directly addresses technological changes in reproduction.<sup>86</sup> The 2002 amendment provided clarity in the rights and obligations of donors by acknowledging that donors are not parents to a child born through ART.<sup>87</sup> The UPA went even further to address legal concerns regarding liabilities of sperm donors by providing that they can neither be sued nor can they sue for parental obligations and support.<sup>88</sup> While the UPA is not perfect with respect to addressing

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83. Christina M. Eastman, Comment, *Statutory Regulation of Legal Parentage in Cases of Artificial Insemination by Donor: A New Frontier of Gender Discrimination*, 41 MCGEORGE L. REV. 371, 378 (2010).

84. See UNIF. PARENTAGE ACT § 5(b) (1973) (amended 2002) (establishing that a sperm donor who provides his semen to a licensed physician for artificial insemination to a married woman other than the donor's wife is treated in law as if he were not the natural father of the child conceived.).

85. *Id.* § 5(a) ("The donor of semen provided to a licensed physician for use in artificial insemination of a married woman other than the donor's wife is treated in law as if he were not the natural father of a child thereby conceived.").

86. UNIF. PARENTAGE ACT § 702 (2000) (amended 2002).

87. See UNIF. PARENTAGE ACT § 702 (2000) (amended 2002) ("If a child is conceived as the result of assisted reproduction, this section clarifies that a donor (whether of sperm or egg) is not a parent of the resulting child . . ."); Uniform Law Commission, *supra* note 1 ("The 2002 Uniform Parentage Act confronts the complicated issue of establishing legal parentage against the complications technology provides. It brings genetic testing into modern parentage actions in a manner that is efficient, but that preserves due process rights for all concerned. It is necessary law for the new century.").

88. UNIF. PARENTAGE ACT § 702, cmt. (2000) (amended 2002) ("[T]his section clarifies that a donor . . . can neither sue nor establish paternal rights, nor be sued and required to support the resulting child. In sum, donors are eliminated from the parental equation.").

all issues concerning ART or AI, it is a good building block for creating statutory protections to those who wish to create families non-traditionally.<sup>89</sup>

*B. State Statutes Addressing ART Directly and Indirectly*

Some states have taken proactive steps to address ART issues by following the UPA's lead and writing statutes that mirror the most recently amended version of the UPA<sup>90</sup> or by adopting similar variations of the UPA.<sup>91</sup> Other state statutes make reference to

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89. Nadraus, *supra* note 7, at 181 (“Legislatures have attempted to provide guidance in this area through statutes like the Uniform Parentage Act . . . [h]owever, these provisions have proved to be inadequate in providing a consistent approach for when a court should or should not enforce a non-paternity contract where a known sperm donor is involved.”).

90. Eastman, *supra* note 83, at 380 n. 74 (The following states mirror the language of the 2002 amended UPA: Colorado, COLO. REV. STAT. § 19-4-106(2) (2016); Delaware, DEL. CODE ANN. tit. 13, § 8-702 (2009); North Dakota, N.D. CENT. CODE § 14-20-60 (2009); Texas, TEX. FAM. CODE ANN. § 160.702 (West 2008); Utah, UTAH CODE ANN. § 78B-15-702 (LexisNexis 2012); Washington, WASH. REV. CODE ANN. § 26.26.705 (West 2005); and Wyoming, WYO. STAT. ANN. § 14-2-902 (2013)).

91. The following states have adopted variations of the UPA: Alabama, ALA. CODE § 26-17-702 (Westlaw through 2016 Sess. and Act 2016–485) (“A donor who donates to a licensed physician for use by a married woman is not a parent of a child conceived by means of assisted reproduction. A married couple who, under the supervision of a licensed physician, engage in assisted reproduction through use of donated eggs, sperm, or both, will be treated at law as if they are the sole natural and legal parents of a child conceived thereby.”); Connecticut, CONN. GEN. STAT. ANN. § 45a-775 (West 2013) (“An identified or anonymous donor of sperm or eggs used in A.I.D., or any person claiming by or through such donor, shall not have any right or interest in any child born as a result of A.I.D.”); Florida, FLA. STAT. ANN. § 742.14 (West 2016) (“The donor of any egg, sperm, or preembryo, other than the commissioning couple or a father who has executed a preplanned adoption agreement . . . shall relinquish all maternal or paternal rights and obligations with respect to the donation or the resulting children . . . .”); Idaho, IDAHO CODE ANN. § 39-5405(1)-(2) (2011) (“The donor shall have no right, obligation or interest with respect to a child born as a result of the artificial insemination. A child born as a result of the artificial insemination shall have no right, obligation or interest with respect to such donor.”); New Mexico, N.M. STAT. ANN. § 40-11A-702 (Westlaw through 2016 legislation) (“Donors of eggs, sperm or embryos are not the parents of a child conceived by means of assisted reproduction.”); and Virginia, VA. CODE ANN. § 20-158(A)(3) (2008) (“A donor

the UPA indirectly by providing that “a child conceived through AI and born to a married couple is the natural and legitimate child of both spouses.”<sup>92</sup> Based on this language, sperm donors statutorily would not be the natural parent of a child conceived via AI, “so long as the woman giving birth is married and the donor is not one of the spouses.”<sup>93</sup> States following this statutory scheme are silent in situations where the donee is unwed and desires to be a mother. This leaves the sperm donor’s obligations to the child open to challenges because the statutory scheme fails to specifically outline what the sperm donor’s liabilities and rights entail.<sup>94</sup> This is the current issue with Tennessee’s AI statutory scheme. Under Tennessee law, AI is only addressed in the context of married individuals who choose to

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is not the parent of a child conceived through assisted conception, unless the donor is the husband of the gestational mother.”).

92. These states include Alaska, ALASKA STAT. § 25.20.045 (2012) (“A child, born to a married woman by means of artificial insemination performed by a licensed physician and consented to in writing by both spouses, is considered for all purposes the natural and legitimate child of both spouses.”); Arizona, ARIZ. REV. STAT. ANN. § 25-501(B) (“A child who is born as the result of artificial insemination is entitled to support from the mother as prescribed by this section and the mother’s spouse if the spouse either is the biological father of the child or agreed in writing to the insemination before or after the insemination occurred.”); Louisiana, LA. CIV. CODE ANN. art. 188 (2016); Massachusetts, MASS. GEN. LAWS ANN. CH. 46, § 4B (Westlaw through 2016 Sess.) (“Any child born to a married woman as a result of artificial insemination with the consent of her husband, shall be considered the legitimate child of the mother and such husband.”); New York, N.Y. DOM. REL. LAW § 73(1) (McKinney 2010) (“Any child born to a married woman by means of artificial insemination performed by persons duly authorized to practice medicine and with the consent in writing of the woman and her husband, shall be deemed the legitimate, birth child of the husband and his wife for all purposes.”); North Carolina, N.C. GEN. STAT. § 49A-1 (Westlaw through 2016 Sess.) (“Any child or children born as the result of heterologous artificial insemination shall be considered at law in all respects the same as a naturally conceived legitimate child of the husband and wife requesting and consenting in writing to the use of such technique.”); Tennessee, TENN. CODE ANN. § 68-3-306 (2013) (“A child born to a married woman as a result of artificial insemination, with consent of such married woman’s husband, is deemed to be the legitimate child of the husband and wife.”). In addition, Louisiana indirectly implicates gamete donation by mandating that “[t]he husband of the mother may not disavow a child born to his wife as a result of an assisted conception to which he consented.”

93. Eastman, *supra* note 83, at 381.

94. *See id.*

undergo AI; the statute completely ignores women who choose not to marry but still desire to be mothers.<sup>95</sup> The statute proves problematic not only for women who choose to conceive without sexual contact, but also for the men who choose to donate their sperm.

As opposed to addressing this issue statutorily, Tennessee has allowed the courts to resolve an issue that should be decided by the legislature. As a result, Tennessee is left with messy case-by-case analyses that can only be applicable in very narrow instances, which in turn fosters judicial inefficiency. As will be discussed in Part IV of this Note, a good start to creating an effective statutory scheme for AI so that sperm donors like John will not be forced into court, is to acknowledge how antiquated the concept of the “traditional family” is and to embrace the reality that many individuals are turning to ART to create families.

*C. Why Not Adopt the UPA? — Some Considerations Regarding the UPA*

The primary purpose of the Uniform Law Commission (“ULC”), the drafters of the UPA, is to provide states with “non-partisan, well-conceived[,] and well-drafted legislation that brings clarity and stability to critical areas of state statutory law.”<sup>96</sup> With this purpose in mind, the ULC drafted amendments to the UPA to provide both a statutory guideline for parentage in the hopes of creating uniformity among the states and clarity with respect to ART, specifically AI.<sup>97</sup> The most recent amendments to the UPA clarified the ambiguities of legal parentage by dissolving donors’ parental obligations to the resulting child of AI and addressing situations in which there is no husband involved.<sup>98</sup> Though the UPA has attempted to address new-age technologies, few states have actually

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95. See Tenn. Code Ann. § 68-3-306 (2014).

96. *About the ULC*, UNIF. LAW COMM’N, <http://www.uniform-laws.org/Narrative.aspx?title=About%20the%20ULC> (last visited Mar. 5, 2017).

97. M. Scott Serfozo, *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, 721–22 (2008). (“The UPA sought to establish uniformity, while recognizing technological advancements and changing societal conceptions of ART.”).

98. UNIF. PARENTAGE ACT § 702, cmt. (2000) (amended 2002).

adopted some variation of the UPA.<sup>99</sup> States' failures to adopt the UPA and its amendments undermine the purpose of the UPA, which is to create uniformity among the states. Many states have declined to adopt the UPA and its amendments, which could be seen as indicative of the UPA's insufficiencies.

Another concern with adopting the amended UPA is that the amended 2002 version is limited to heterosexual couples and relationships; the plain language of § 703 provides that "[a] man who provides sperm . . ." can be "a parent of the resulting child."<sup>100</sup> While this Note does not focus on parentage issues concerning lesbians and sperm donors, it is important to highlight a critical flaw in the UPA. The amended 2002 version of the UPA has extended greater protection to sperm donors; however, "the operation of the statute does not fully protect parties' intentions and expectations."<sup>101</sup>

#### IV. PROPOSED STATUTORY SCHEME FOR PATERNAL OBLIGATIONS AND RIGHTS OF SPERM DONORS

As the court recognized in *Ferguson v. McKiernan*, the prevalence of ART and the use of written agreements in contemporary society is something that should be recognized through legislative enactment.<sup>102</sup> It is imperative that states—most pertinently for this Note, Tennessee—create clear guidelines that speak directly to the complications that may accompany scenarios where non-traditional families choose to undergo ART. First, an ideal statute that addresses ART should extend the use of reproductive technologies beyond the confines of marriage because many unmarried women are

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99. Nadraus, *supra* note 7, at 183 ("Most of the states enacting some version of the UPA have significantly varied the provisions, making the act far from uniform. Specifically, only nineteen states have adopted some form of the UPA, and only nine of those states have adopted the most recent version of the sperm donor provision.").

100. See UNIF. PARENTAGE ACT § 703 (amended 2002).

101. Stephen J. Staple, *The Craigslist Father: Uncertain Law and Outcomes for Known Sperm Donors 7* (Spring 2013) (unpublished manuscript) (on file with Michigan State University College of Law), <http://www.law.msu.edu/king/2012-2013/Staple.pdf>.

102. *Ferguson v. McKiernan*, 940 A.2d 1236, 1244–45 (Pa. 2007).

choosing motherhood.<sup>103</sup> Second, the statute needs to extend protection from demands for child support to the men who donate their sperm to the unmarried women. Third, this statute needs to protect contractual agreements made between the parties. Fourth, the statute must address anonymity and how anonymity is unnecessary to enforce contractual agreements made through ART—and specifically to AI. As a policy matter, holding contractual agreements unenforceable in matters of ART could deter individuals from participating in ART procedures, resulting in a chilling effect on the creation of non-traditional families.<sup>104</sup>

#### A. Extending AI statute to Unmarried Individuals

Under Tennessee's current AI statute, protections are only provided in instances where the individuals who use AI for conception are married.<sup>105</sup> In the statutory provision, the first requirement is that a child be born to a *married* woman as a result of AI.<sup>106</sup> The obvious issue with this requirement is that it is discriminatory and antiquated because the concepts of unconventional conception and non-traditional families have transformed societal norms.<sup>107</sup> Many women are opting to become pregnant without the assistance of a husband. In addition to single, heterosexual women, lesbian couples are seeking to create families through AI.<sup>108</sup>

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103. See *Unmarried Childbearing*, Ctrs. for Disease Control & Prevention (page last updated June 13, 2016) <https://www.cdc.gov/nchs/fastats/unmarried-childbearing.htm> (Forty percent of all births are to unmarried women.).

104. See *supra* Section II.C, for a policy discussion on the drawbacks of rescinding ART contracts solely based on a lack of anonymity. See also *Ferguson*, 940 A.2d at 1249–51 (Eakin, J., dissenting).

105. TENN. CODE ANN. § 68-3-306 (2014) (“A child born to a *married* woman as a result of artificial insemination, with consent of the married woman’s husband, is deemed to be the legitimate child of the husband and wife.”) (emphasis added); Lewis, *supra* note 6, at 481 (“One Tennessee statute contemplates non-traditional means of conception, but only concerns the straightforward situation in which a married woman has a child through intrauterine insemination.”).

106. TENN. CODE ANN. § 68-3-306 (2014).

107. Stephanie Chen, *With the Web, Curiosity and Luck, Sperm Donor Siblings Connect*, CNN (Aug. 11, 2010, 9:25 AM), <http://www.cnn.com/2010/LIVING/08/11/sperm.donor.sibling.connect/> (“Studies estimate 30,000 to 60,000 children are born each year with the help of donated sperm.”).

108. See, e.g., *Shineovich v. Shineovich*, 214 P.3d 29 (Or. Ct. App. 2009).

Historically, unmarried women were prohibited from using AI because of conflicting societal norms.<sup>109</sup> There was also a fear that unmarried women would not be able to adequately care for the child as a single parent.<sup>110</sup> However, the right to procreate is constitutionally protected, and therefore a legislative action prohibiting an individual's right to procreate is unconstitutional.<sup>111</sup> "*Skinner* implicitly associated the rights of procreation with marriage . . . [supported] by later cases[,] [which speak of an independent right to procreate]."<sup>112</sup> Given that the right to procreate is constitutionally protected, AI should not be limited to married women but should be a right provided to all women, regardless of marital status.<sup>113</sup>

The second part of Tennessee's statute requires that a married woman who seeks AI receive consent from her husband in order for the child to be deemed the legitimate child of the husband and wife.<sup>114</sup> This portion of the statute is necessary for establishing paternity between the child and the married woman's husband when choosing heterologous AI, but in addition to providing clear protections and guidelines to married couples, Tennessee's statutory provision should also extend to single persons who choose AI. Specifically, the statute needs to provide a basis for which sperm donors may or may not be held responsible for the resulting child. To resolve this issue, a proposed revision to the statute is to remove the

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109. See 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, 17 (1981) ("Some believe, as did most of the earlier commentators, that children should not be born outside the traditional family unit. Some doctors may well have moral or religious objections to the practice of A.I.D . . . .") [http://heinonline.org/HOL/Page?handle=hein.journals/hwlj4&div=6&g\\_sent=1&collection=journals](http://heinonline.org/HOL/Page?handle=hein.journals/hwlj4&div=6&g_sent=1&collection=journals); Nadraus, *supra* note 7, at 189 ("Another reason that some physicians refuse to inseminate single women is because they believe strongly in preserving the 'traditional' family unit. One physician briefly summed up this view: 'I just won't inseminate singles; every baby needs a momma and a papa.'").

110. Kritchevsky, *supra* note 109, at 17.

111. *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

112. Kritchevsky, *supra* note 109, at 27.

113. See, e.g., Kritchevsky, *supra* note 109 (discussing an unmarried woman's right to artificial insemination).

114. See TENN. CODE ANN. § 68-3-306 (2014) ("A child born to a married woman as a result of artificial insemination, *with consent of the married woman's husband*, is deemed to be the legitimate child of the husband and wife.") (emphasis added).



word “married”<sup>115</sup> or to include a provision that addresses unmarried individuals who participate in AI.<sup>116</sup> Adopting the portion of Arkansas’s statutory scheme that addresses the growth of ART would strengthen Tennessee’s ART statute, thus alleviating the stress on the courts to make decisions that should be reserved for the legislature.<sup>117</sup> Arkansas’s statute provides guidelines for married as well as unmarried women who choose to use AI as a means of conception.<sup>118</sup> This is important because of the increasing trend of women choosing more modern familial structures.

In Arkansas, the legislative body recognized the growth of ART by providing a provision that included both married and unmarried women who seek to use AI to conceive a child.<sup>119</sup>

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115. See Staple, *supra* note 101, at 5 (“The most common alteration of the [UPA] text was omitting the word married.”). (“The most common alteration of the [UPA] text was omitting the word married.”).

116. See Margalit, *supra* note 16, at 74–75 (“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.”); Nadraus, *supra* note 7, at 189 (“Physicians turn down single and lesbian women for a myriad of reasons. One of these excuses involves a physician’s religious convictions. Many religions, including Catholicism, condemn heterologous insemination as ‘morally illicit.’ Furthermore, because masturbation is the most common method for donors to obtain semen, AI is considered a sin.”) (footnote omitted).

117. See ARK. CODE ANN. § 9-10-201(c)(1) (2009).

118. See generally ARK. CODE ANN. § 9-10-201 (2009), for an example of a statutory scheme that addresses both married and unmarried women who choose ART.

119. ARK. CODE ANN. § 9-10-201 (2009) provides:

(a) Any child born to a married woman by means of artificial insemination shall be deemed the legitimate natural child of the woman and the woman’s husband if the husband consents in writing to the artificial insemination.

(b) A child born by means of artificial insemination to a woman who is married at the time of the birth of the child shall be presumed to be the child of the woman giving birth and the woman’s husband except in the case of a surrogate mother, in which event the child shall be that of:

(c) (1) A child born by means of artificial insemination to a woman who is unmarried at the time of the birth of the child shall be, for all legal purposes, the child of the woman giving birth, except in the case of a surrogate mother, in which event the child shall be that of:

But while Arkansas's statutory scheme manages to recognize that both married and unmarried women may choose to undergo AI as a means to conceive, the statute still falls short because it does not clearly outline the rights and obligations of non-anonymous sperm donors who have no intention of caring for the child beyond conception.<sup>120</sup> As with Tennessee's statutory scheme, this will leave courts in disarray when scenarios like John's and Jane's arise. It exposes non-anonymous sperm donors to potential obligations to a child of an unmarried woman who chooses AID, rather than "natural procreation."

*B. AI Statute Addressing Private Agreements and Protection to Sperm Donors*

Another crucial flaw of Tennessee's current AI statutory scheme is that it does not address contractual agreements between sperm donors, anonymous or non-anonymous, and the female donee unless the sperm donor is the husband.<sup>121</sup> Historically, many courts and legislatures rejected the use of private agreements to establish parentage.<sup>122</sup> Private agreements that contemplate AI are particularly important, though, because they clearly outline the parental rights and obligations for each party involved in the procedure.

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(A) The biological father and the woman intended to be the mother if the biological father is married;

(B) The biological father only if unmarried; or

(C) The woman intended to be the mother in cases of a surrogate mother when an anonymous donor's sperm was utilized for artificial insemination.

(2) For birth registration purposes, in cases of surrogate mothers the woman giving birth shall be presumed to be the natural mother and shall be listed as such on the certificate of birth, but a substituted certificate of birth may be issued upon orders of a court of competent jurisdiction.

120. See § 9-10-201(c)(1) ("A child born by means of artificial insemination to a woman who is unmarried at the time of the birth of the child shall be, for all legal purposes, the child of the woman giving birth . . .").

121. TENN. CODE ANN. § 68-3-306 (2014) ("A child born to a married woman as a result of artificial insemination, *with consent of the married woman's husband*, is deemed to be the legitimate child of the husband and wife.") (emphasis added).

122. See Margalit, *supra* note 16, at 73 ("The vast majority of jurisdictions, legislatures, courts[,] and scholars have traditionally rejected private agreements

Traditionally, parentage was determined through 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 marriage.”<sup>123</sup> While such notions of traditional familial structure may be grounded in good intentions to prioritize the best interest of the child, statutory schemes that do not leave room for technological and societal changes can be harmful to societal growth and result in an imposition on fundamental rights.<sup>124</sup> Under Tennessee’s archaic AI statute, not only is there a presumption that the woman’s husband is the father of the child, but there is also a presumption that the woman who chooses AI is married. Under such presumptions, there is no room for Tennessee’s AI statute to address instances in which the woman chooses a donor and, via contract, allows him to relinquish his rights and obligations to the resulting child.<sup>125</sup> The concept of having two parents can benefit the child; however, it takes away from the transforming purpose of ART, which is to allow individuals to choose their method of procreation whether the individual is married or single.

AID was originally viewed as undermining the traditional framework of family and marriage.<sup>126</sup> Presently, AID has become

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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.”).

123. Margalit, *supra* note 16, at 74; *see also* TENN. CODE ANN. § 36-2-304(a)(1)–(5) (2014).

124. *See* Kritchevsky, *supra* note 109, at 27 (“The Supreme Court has long held that the right to procreate is constitutionally protected. In striking down legislation which required the sterilization of certain habitual criminals, in *Skinner v. Oklahoma*, the Court said that the law deprived those subject to it ‘of a right which is basic to the perpetuation of a race—the right to have an offspring . . . We are dealing here with legislation which involves the basic civil rights of man.”).

125. Margalit, *supra* note 16, at 74 (“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.”).

126. *See* CHARLES P. KINDREGAN, JR. & MAUREEN MCBRIEN, ASSISTED REPRODUCTIVE TECHNOLOGY: A LAWYER’S GUIDE TO EMERGING LAW AND SCIENCE 312 (2006); Margalit, *supra* note 16, at 74.

more widely accepted in society and by the law in many jurisdictions.<sup>127</sup> The wide acceptance of AID has been attributed to the “movement from the legal significance of marital status to that of human agency and contract.”<sup>128</sup> Through the use of contract principles in family law, sperm donors have been excluded from parentage because of the donor’s agreement to relinquish legal paternity.<sup>129</sup>

With the enactment of the UPA, the Unified Putative and Unknown Fathers Act, and the Unified Status of Children of Assisted Conception Act, anonymous sperm donors are excluded from paternity status, including any related parental obligations and rights.<sup>130</sup> If a woman chooses to use a sperm bank in which the donor is unknown, the issue of paternity is less of a problem<sup>131</sup> than when a woman chooses to non-anonymously select a donor.<sup>132</sup> The issue of anonymous donors versus non-anonymous donors is largely due to the question of the parties’ intent—this is where the need for a statute that addresses private agreements is essential.<sup>133</sup>

### *C. Reliance on Private Ordering to Determine Parentage*

Private agreements that modify parental status<sup>134</sup> have traditionally been rejected by a vast majority of jurisdictions based on

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127. See Margalit, *supra* note 16, at 80–81.

128. See *id.* at 81 (citation omitted) (“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.”).

129. *Id.* at 81.

130. See UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT 4(a), 9C U.L.A. 363 (2014) [hereinafter USCACA]; UNIF. PUTATIVE & UNKNOWN FATHERS ACT § 1(2)(ii), 9C U.L.A. 59 (1988); UNIF. PARENTAGE ACT § 5(b), 9B U.L.A. 295 (1973).

131. See *Choosing an Egg Donor*, FERTILITY SOURCE COMPANIES, <https://www.fertilitysourcecompanies.com/egg-donation/choosing-a-donor/> (last visited Mar. 4, 2017).

132. See *id.*; Deborah L. Forman, *Using a Known Sperm Donor: Understanding the Legal Risks and Challenges*, PATH2PARENTHOOD (May 9, 2011), <http://www.path2parenthood.org/article/using-a-known-sperm-donor-understanding-the-legal-risks-and-challenges/>.

133. Staple, *supra* note 101, at 21–28.

134. Private agreements that modify parental status are also known as DLPBA—Determining Legal Parenthood By Agreement. Margalit, *supra* note 16, at 72.

the historical view of legal parentage.<sup>135</sup> In the 2000 amendment to the UPA, the idea that agreement could constitute a basis for assigning (or terminating) parental rights and obligations was codified and applied to both sperm donors and surrogates.<sup>136</sup> This eliminated the need for an inseminated woman to be married in order to terminate parental rights and liabilities of the sperm donor.<sup>137</sup> The 2002 Amendment to the UPA further strengthens the notion of “freedom of contract” by providing guidelines for determining who the legal parent is when a child is conceived through ART.<sup>138</sup> The offering of more freedom to contract in the context of ART encourages clear and deliberate intentions of the parties by allowing the parties to express, via contract, their reliance and expectation interests.<sup>139</sup>

Legislatures and courts should encourage and uphold contracts between donors and donees as the use of ART continues to grow in the United States. Due to the unique nature of the parent-child relationship, specifically in regard to single women who undergo AI, the “rigid public regulation of legal parentage and fatherhood is not conducive to [healthy] child-parent relationships.”<sup>140</sup> The changes occurring through the implementation of ART require some room for private ordering due to the contractual nature of ART rather than blind reliance on genetics in determining parentage.<sup>141</sup> Individuals who desire to become parents in a non-traditional way should be put at ease in determining which party has parental rights and obligations.

A statute that allows for a writing that outlines the responsibilities of the parties in conjunction with the intent of the parties would be ideal with respect to sperm donor protection from parental obligations to the resulting child.<sup>142</sup> In states such as Kansas, a writ-

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135. A.M. Capron & M.J. Radin, *Choosing Family Law Over Contract Law as a Paradigm for Surrogate Motherhood*, 16 L. MED. & HEALTH CARE 34 (1988); see also Margalit, *supra* note 16, at 73.

136. Margalit, *supra* note 16, at 85.

137. *Id.* at 85–86.

138. *Id.* at 86.

139. *Id.* at 92.

140. *Id.* at 93.

141. *Id.*

142. See Nadraus, *supra* note 7, at 187.

ing component is required when individuals choose to use heterologous AID.<sup>143</sup> While Kansas's statute includes a writing requirement, it only addresses married couples who use AID.<sup>144</sup> An ideal statute would remove the marriage requirement, as addressed *supra* IV(A)–(B), and include a written component that adds an intent-based analysis. As previously discussed, the writing requirement serves as a basis for clearly outlining the parental rights and obligations of both parties but, more specifically, the rights and obligations of non-anonymous sperm donors.

As for the intent-based analysis, what exactly is its purpose? Intent-based analysis provides even more protection to sperm donors in the event that an issue arises in which the mother attempts to force parental obligations on a sperm donor based solely on the lack of anonymity, like the situation of Jane and John discussed in the introductory hypothetical. The intent-based analysis is a subjective inquiry into what the parties expected the sperm donor's role to be in the child's life. Often, the contractual relinquishment of parental rights has been ruled unenforceable as the agreement goes against the public policy of some states.<sup>145</sup> However, the advent of modern reproductive technology has "greatly enhanced the potential for intention in procreative behavior."<sup>146</sup> While determining a person's intent can be difficult at times, if combined with a written agreement, determining the original intent of the parties involved in AI may prove to be less problematic.<sup>147</sup>

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143. KAN. STAT. ANN. § 23-2301 (West, Westlaw through 2016) ("The technique of heterologous artificial insemination may be performed in this state at the request and with the consent of a writing of the husband and wife desiring the utilization of such technique for the purpose of conceiving a child or children.").

144. *Id.* (AID is authorized "with the consent of a writing of the *husband* and *wife* desiring the utilization of such technique for the purpose of conceiving a child or children.") (emphasis added).

145. Susan L. Crockin & Amy B. Altman, *Statutory and Case Law Governing the Practice of Third-Party Reproduction*, in PRINCIPLES OF OOCYTE AND EMBRYO DONATION 351, 355 (Mark V. Sauer ed., 2d ed., 2013).

146. Marjorie Maguire Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297, 307 (1990). ("The concept as used here envisions conscious decision-making. While pre- or subconscious forces may influence decision-making and behavior, they are, by definition, unknown and therefore difficult to take account of.").

147. *Id.* at 313–14, 397.

Some argue that contractual relinquishment of rights should not be enforced where the sperm donor is known. In *Ferguson v. McKiernan*, for example, the dissent argued that in the case of a known sperm donor, “[t]he only difference between this case and any other conception is the intervention of hardware between one identifiable would-be parent and the other.<sup>148</sup> For children resulting from normal sexual intercourse, “[a] parent cannot bargain away the children’s right to support.”<sup>149</sup> While the dissent in *Ferguson* provides some guidance regarding parental responsibilities, as the majority noted, no real basis exists for making a distinction between known sperm donors and unknown sperm donors.<sup>150</sup> Based on the fact that there is no clear distinction (other than the lack of anonymity) between known and unknown sperm donors, when an unwed woman uses the sperm with no sexual contact, the intentions of the parties evidenced by a writing that clearly outlines the rights and obligations of the non-anonymous sperm donor is necessary.<sup>151</sup>

Another argument against enforcing parties’ intentions evidenced by a writing is a public policy argument. This argument is premised on the “best interest of the child” standard<sup>152</sup> and the fact that the child is left without a second source of support by allowing the sperm donor to contractually relinquish his responsibilities to the child.<sup>153</sup> Critics argue that the lack of secondary support from another parent consequently causes an increased “burden on the state when mothers who cannot afford to provide for their children apply for government aid.”<sup>154</sup> However, a refusal to uphold a contract that outlines a known sperm donor’s rights and obligations would result in two primary issues, as outlined by the court in *Ferguson v. McKiernan*. First, women would be forced to use anonymous donations, leaving them without the comfort of knowing who their donor is and

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148. *Ferguson v. McKiernan*, 940 A.2d 1236, 1250 (Pa. 2007) (Eakin, J., dissenting).

149. *Id.* at 1251.

150. *Id.* at 1247.

151. *See id.* at 1243, n.11.

152. *Id.* at 1249–50 (Eakin, J., dissenting); *see also*, CHILDREN’S BUREAU, DETERMINING THE BEST INTERESTS OF THE CHILD, [https://www.childwelfare.gov/pubPDFs/best\\_interest.pdf](https://www.childwelfare.gov/pubPDFs/best_interest.pdf) (discussing the best interest of the child standard).

153. *Ferguson*, 940 A.2d at 1244.

154. Nadraus, *supra* note 7, at 190.

the inability to express their personal preference.<sup>155</sup> Second, sperm donors would be discouraged from donating their sperm to an unwed woman (or lesbian couple) based on the fear that they could be held responsible for child support obligations.<sup>156</sup> As for the financial burden on the state, “most often, great amounts of thought and significant financial outlay have occurred in ART cases.”<sup>157</sup> Furthermore, doctors who perform the AI procedure have the discretion to consider the financial status and child support plans as a preliminary inquiry before performing the procedure.<sup>158</sup> To avoid this worry of burdening the state for government aid to the resulting child, statutory guidelines could be inserted into the pre-insemination screening, as is frequently done with adoption cases.<sup>159</sup> Amendments to Tennessee’s current AI statute would prove beneficial to Tennessee residents as well as to Tennessee courts. By providing clear statutory guidelines provided by the legislative body rather than the judiciary, Tennessee can avoid piecemeal litigation and rely on the statute for guidance and support.

*D. Tennessee’s Revised Artificial Insemination Statute — TENN. CODE ANN. § 68-3-306 (Amended)*

TENN. CODE ANN. § 68-3-306. Birth from Artificial Insemination (Amended)

(a) **Definitions:**

- (1) “Artificial Insemination” means introduction of semen into a woman’s vagina, cervical canal, or uterus through the use of instruments or other artificial means.
- (2) A “Donor” as applicable to artificial insemination is a man who provides sperm for the purpose of conception through insemination of a woman.
- (3) “Man” means a male individual of any age.

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155. *Ferguson*, 940 A.2d at 1247.

156. *Id.* at 1248. (“[W]e recognize that to rule in favor of Sperm Donor in this case denies a source of support to two children who did not ask to be born into this situation. Absent the parties’ agreement, however, the [children] would not have been born at all, or would have been born to a different and anonymous sperm donor, who neither party disputes would be safe from a support order.”).

157. Nadraus, *supra* note 7, at 190.

158. Kritchevsky, *supra* note 109, at 17.

159. *See, e.g.*, TENN. CODE ANN. § 36-1-116(b)(10) (2014) (“The petition to adopt must state that the petitioners are financially able to provide for the child.”).



- (4) "Parent" means an individual who has established a parent-child relationship.
- (5) "Heterologous Artificial Insemination" means a male sperm donor who donates sperm to a woman who is not his wife.
- (6) "Known Donor" means a donor who the inseminated woman knows and chooses to be her donor at her request.
- (7) "Anonymous Donor" means a donor who the inseminated woman does not know, but uses for artificial insemination.
- (8) "Parent-Child Relationship" is:
  - (A) A relationship that exists between a child of artificial insemination who, before or after the child's birth, consents by record to act as a parent of the child.
  - (B) In the absence of recorded consent, clear and convincing evidence is shown that the individual acted as the parent to the child of artificial insemination within the first two years of the child's life. Clear and Convincing evidence includes, but is not limited to, (1) financial support, (2) the sperm donor holding the child out as his own, and (3) amount of time the sperm donor spends with the child.
    - i. Where there is a contractual relinquishment of the parent-child relationship and the absence of clear and convincing evidence to show that the individual acted as the parent to the child of artificial insemination within the first two years of the child's life, there is no parent-child relationship.
    - ii. This provision does not apply to the birth of a child conceived by means of sexual intercourse.
- (b) A child born to a married woman as a result of artificial insemination, with consent of the married woman's husband, is deemed to be the legitimate child of the husband and wife.
- (c) A child born by means of artificial insemination to a woman who is unmarried at the time of the birth of the

child shall be, for all legal purposes, the child of the woman giving birth.

- (d) **Donor's Rights and Obligations.** A donor is not a parent of a child conceived by means of artificial insemination, nor does the owner have any rights or obligations to the resulting child unless:
- (1) The donor is the husband of the inseminated woman and consents to artificial insemination; or
  - (2) The donor consents to artificial insemination with the intent to be the parent of the resulting child.
- (e) **Writing Requirement.** To establish the parental rights and obligations or the relinquishment of parental rights and obligations of heterologous donors to the child resulting from heterologous artificial insemination, there must be a writing that outlines the specific parental rights and obligations or relinquishment of those parental rights and obligations to the resulting child.
- (1) The agreement must be signed prior to the insemination by both the intended parent(s) and the donor; and
  - (2) The agreement must contain a statement that the parties are choosing to nonetheless enter into a written agreement to establish parental rights and obligations for the donor; and
  - (3) The agreement must contain a formal parenting plan, including a description of the level of involvement the parties intend for the donor to have in any resulting child's life.
  - (4) Should the heterologous donor perform in any way in which would show that the intent of the donor was to be a parent to the child resulting from artificial insemination, the writing is unenforceable.
- (f) **Absence of a Writing.** Despite the absence of a written agreement meeting the standards of section (e), a donor may be deemed a legal parent if he/she could prove, by clear and convincing evidence that:
- (1) The donor currently is, or has in the past, played an active role in the child's life, such that the refusal to recognize the parental rights and duties of the donor would be inconsistent with the child's best interest.
  - (2) A list of factors for the court to consider in applying this exception include, but are not limited to:

- (A) Relationship of donor and intended parent(s) prior to conception;
  - (B) Evidence of oral agreements as to the rights and obligations of donor;
  - (C) Current level of parenting time/visitation/contact donor has with child;
  - (D) Current level of financial responsibility donor has to child;
  - (E) Child's opinion of who donor is.
- (g) **Physician Requirement.** The procedure of artificial insemination must be performed in a licensed assisted reproductive treatment center by a licensed physician.

## V. CONCLUSION

As ART continues to grow, the need for statutory regulations becomes more necessary. Because of ART's prevalence, it is likely that the problems concerning donor status will occur more often.<sup>160</sup> While it is clear that Tennessee acknowledges the advancements of reproductive technology, as evidenced by its artificial insemination statute, the fact remains that Tennessee's current statutory scheme lacks in various ways—the primary shortcoming being that it exposes sperm donors to unintended obligations to the resulting child of AI.

Consider Jane and John once more.<sup>161</sup> Under Tennessee's current AI statute, John is exposed to potential liability to Jane's child despite the fact that he had no sexual contact with Jane and signed over all rights and obligations of the child to Jane. This is so because Tennessee's AI statute only provides protection to married couples who choose to use AI.<sup>162</sup> Without any statutory protections, people like Jane and John are forced into court to resolve an issue that could be determined through legislative action, as recognized by the court in *In re C.K.G.*<sup>163</sup> With legislative action, potential AI users will know the exact legal ramifications that they face before

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160. Nadraus, *supra* note 7, at 182.

161. *See supra* Part I.

162. TENN. CODE ANN. § 68-3-306 (2014).

163. *In re C.K.G.*, 173 S.W.3d 714, 730 (Tenn. 2005).

making the decision to become mothers through AI or to become non-anonymous donors through AI.

Tennessee should consider amending its current statutory scheme regarding AI in order to provide more protection to sperm donors, particularly those who non-anonymously donate their sperm to a friend. The amendments to Tennessee's AI statute should include expansion of the statute to include unmarried women, as well as lesbian couples who choose to use AI as a means of procreation. The statute should also provide a provision in which written agreements that relinquish the parental rights and obligations of the sperm donor are enforceable. Along with the statutory enforcement of the written agreement between the donor and the donee, there should also include an intent caveat, which provides that the intent of the donor may override the enforceability of the written agreement. The above mentioned amendments to Tennessee's current AI statutory scheme would provide protection to the donor, while also creating judicial efficiency in the courts.