

The Kansas case of *K.M.H.* US law concerning the legal status of known sperm donors

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1. Introduction

On October 27, 2007, the Kansas Supreme Court issued its opinion in the case of *In the Interest of K.M.H and K.C.H*¹ (hereinafter *K.M.H.*), joining the growing number of states that have determined the legal status of known sperm donors *vis-à-vis* their biological children born to women who are not in heterosexual marriages. This article examines the *K.M.H.* decision within the context of this increasing body of US case law, in an attempt to discern *K.M.H.*'s contribution to, and its place in, this 'nascent area of law which is changing on almost a daily basis.'²

The article begins with an explanation of parentage law in the United States, including a discussion of the constitutional ramifications of parental rights. Next the article examines the US court decisions involving known sperm donors asserting parental rights prior to the *K.M.H.* decision. The purpose of the case law examination is three-fold. First, under the common law system the courts have the authority to make law in the absence of statutory provisions that deal with a particular issue before the court. In the common law system the court decisions are the *law* and the inferior courts must follow the appellate court decisions. Consequently, in those situations in which there are no applicable assisted insemination by donor (AID) statutes, the court decisions become the sole law on the subject of whether known sperm donors have parental rights. Second, even when the legislature has enacted AID statutes that address the parental rights of sperm donors, the courts have the authority to interpret those statutes and these interpretations become binding law until the legislature amends the statute. Finally, the courts in the United States have the authority to strike down statutes as violations of federal or state constitutional provisions, resulting in the statutes becoming unenforceable. Interestingly, all three of these possibilities occurred in US known sperm donor cases that were decided prior to the *K.M.H.* case.

The article proceeds with a synthesis of the cases that were decided before the *K.M.H.* case, attempting to find common themes among the cases. The article then details the four different opinions in the *K.M.H.* case and, in particular, lays out the discussion of the constitutional

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1 169 P.3d 1025 (Kan. 2007).

2 *Browne v. D'Alleva*, 2007 Conn. Super. LEXIS 3250, p. *28.

challenges to the Kansas sperm donor statute. Next the article discusses how the previous known sperm donor cases impacted the sperm donor's arguments in *K.M.H.*, and how these cases failed to support his claim for parental rights.

The article continues with a review of two more decisions, issued after the *K.M.H.* case, incorporating these cases into the evolving trends discerned in the recent court decisions. The article concludes by summarizing *K.M.H.*'s position within that evolution.

2. Parentage law in the United States

Although each state in the United States has the authority to determine the laws concerning a child's parentage, once parentage is established, the child's parent or parents have exclusive rights to exercise their authority over the child. As a general rule, if a child is born during a heterosexual marriage, then parentage laws create a presumption that the husband and wife are the child's legal parents and the couple shares parental authority. When the child is not born to a heterosexual marriage, however, the parentage rights of a biological father were unrecognized in earlier US cases, following the traditional common law rules. This changed, though, when unmarried fathers began to challenge the constitutionality of statutes that had prevented them from asserting parental rights concerning their biological children. State statutes that ignored unmarried fathers in custody or adoption actions were struck down as unconstitutional because the statutes violated either the equal protection or the due process clause, or both, of the United States Constitution.³ One of the cases that is quoted and plays prominently in the *K.M.H.* case is *Lehr v. Robertson*.⁴ There the United States Supreme Court held that, 'When an unwed father demonstrates a full commitment to the responsibilities of parenthood by coming forward to participate in the rearing of his child, (...) his interest in personal contact with this child acquires substantial protection under the Due Process Clause. (...) If he grasps that opportunity and accepts some measure of responsibility for the child's future' then the unwed father's constitutional due process rights must be protected.⁵

Based on this analysis, a father of a non-marital child must be given an opportunity to assert his parental rights and, if he has attempted to assume parental obligations, he cannot be excluded from the protections granted to other legal parent-child relationships. These rights include the ability to petition a court for a custody/residency order or a visitation/contact order. Only a court-ordered termination of his parental rights, or an adoption of the child by a person other than his spouse, can cut off the biological father's status as a legal parent. Therefore, the question of whether a known sperm donor in an AID birth is the child's legal parent becomes extremely important, because conferring legal fatherhood to a sperm donor puts him on equal footing with the legal mother, regardless of whether they are married to each other.

3. Early case law

In 1977, a New Jersey court decided the first reported case dealing with the parental rights of a man who provided his sperm to an unmarried woman in the case of *C.M. v. C.C.*⁶ As with many

3 The due process clause appears in two places in the United States Constitution, in the fifth amendment, which applies to the federal government and the fourteenth amendment, which applies to the state governments. The equal protection clause appears in the fourteenth amendment.

4 *Lehr v. Robertson*, 463 US 248 (1983).

5 *Ibid.*, at pp. 261, 262.

6 See generally *C.M. v. C.C.*, 377 A.2d 821 (N.J. Juv. & Dom. Rel. Ct. 1977).

of the cases that were to follow, the testimony of the sperm donor and the mother were conflicting and contradictory. For example, in the majority of these cases, including the Kansas case of *K.M.H.*, the mother asserted she did not intend for the sperm donor to have a parental relationship with the child. The sperm donor, on the other hand, claimed he assumed, or the parties agreed, he would be the child's father and have certain parental rights concerning any child born of the AID. In the facts of the New Jersey case, the mother testified that she told the sperm donor she wanted to have a child by donor insemination. The sperm donor suggested he would be willing to provide his sperm and the mother accepted his offer. The mother stated she did not intend for the sperm donor to have a parental relationship with the child. The sperm donor, on the other hand, testified he and the mother were dating each other and contemplated marriage. He further testified the mother wanted to have a child by him, but she did not want to have intercourse before they were married. Consequently, the sperm donor provided sperm to the mother, who inseminated herself at her home, pursuant to a doctor's description of the insemination process. The parties stopped seeing each other three months into the mother's pregnancy, when they discovered they did not share the same assumption about the role the sperm donor would have in the child's life.

Because there was no applicable AID statute in New Jersey in 1977, the court relied on common law principles that had developed in New Jersey case law. The court first noted, under current law, a 'natural' father had visitation rights to his children, even though he was not married to the child's mother. The court framed the issue as one involving the definition of a 'natural' father. In doing so, the court looked at AID cases concerning married couples. The court determined these cases were factually distinguishable from the present case because the issue in those cases was whether the husband or a sperm donor was the child's legal parent. The present case, however, did not involve competing interests of two men. The court therefore analogized this case to conception by intercourse and stated the sperm donor was the only other parent figure in this case, and the fact that an unmarried woman conceived the child without intercourse was not relevant. In addition, the court stated the sperm donor did not waive his parental rights by donating his sperm. The court held that because (1) it was in the child's best interests to have two parents whenever possible; (2) there was no one else to assume the responsibilities of fatherhood; (3) the sperm donor was asserting those responsibilities; and (4) the sperm donor actively participated in the insemination, he should be considered the legal parent of the child. The court granted visitation rights against the wishes of the mother, who the court characterized as 'thwarting' the sperm donor's attempts to establish a relationship with the child. In a subsequent action, the court ordered the mother to sign the necessary documents to amend the child's birth certificate, changing the designation of the father from 'unknown' to the name of the sperm donor.⁷

4. Cases interpreting statutes that regulate the parental rights in AID births

As mentioned previously, each state in the United States has the authority to determine its laws concerning a child's parentage. However, the desirability of interstate uniformity and predictability concerning a child's parentage resulted in the National Conference of Commissioners on Uniform State Laws proposing the Uniform Parentage Act in 1973.⁸ Although a state's legislature is not required to adopt a uniform act drafted by the Commissioners, many state legislatures do so because these acts are the product of much study and debate by the leading legal experts in a

⁷ *C.M. v. C.C.*, 407 A.2d 849 (N.J. Juv. & Dom. Rel. Ct. 1977).

⁸ Unif. Parentage Act, 9B *U.L.A.* 287 (1987).

particular field of law. Consequently, the Uniform Parentage Act has been adopted in a number of the states within the United States.⁹

The Uniform Parentage Act creates presumptions of parentage. Many of the presumptions are based on the man and woman's marriage to one another. In addition, Section 5 of the Act addresses the parentage of a child born by AID. There are two subsections in Section 5 that work together in establishing who will be considered the father of the child. The first subsection specifically provides if a physician supervises the AID and the husband consents to the AID, then 'the husband is treated in law as if he were the natural father of a child thereby conceived.'¹⁰ Subsection (b) of Section 5 then states that a man, who provides semen to a physician for AID '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.'¹¹ The limitation of the 1973 Uniform Parentage Act, however, is that it only addresses parentage in an AID conception involving a heterosexual married couple. There are no specific provisions that address the rights of the persons who participate in AID if the woman does not have a husband. This can result in uncertainty when the AID involves a woman who is not in a heterosexual marriage, particularly if the procedure is not done under the supervision of a physician. Both of these factors have played an important role in the courts refusing to apply Subsection (b), resulting in a court determination that the sperm donor was the legal parent of the child.

The first case that interpreted a state's AID statute was a California Court of Appeals case, *Jhordan C. v. Mary K.*¹² Mary K. and Victoria T., her female friend who lived in a nearby town, decided Mary would attempt to have a child, who the two women would raise together. After interviewing several possible sperm donors, Mary and Victoria chose Jhordan C. However, there was conflicting testimony about the parties' intentions concerning the involvement of the sperm donor beyond providing the semen for the insemination. According to Mary, she told Jhordan she did not intend for him to have an on-going relationship with any child who might be conceived with his semen, but she did agree that Jhordan could satisfy his curiosity concerning the physical appearance of the child by having an opportunity to look at the child. Jhordan, however, testified he and Mary agreed they would have an on-going friendship, he would have consistent contact with the child and he would care for the child as much as two or three times a week. Neither party consulted an attorney about their intentions or legal rights, nor were they aware there was a statute that addressed AID births.

Jhordan provided Mary with semen on several occasions. Mary did not use a physician for the insemination procedures and, instead, inseminated herself or Victoria assisted her with the insemination. After Mary became pregnant, she and Jhordan had several social contacts and Jhordan called her to tell her he had obtained baby furniture for the child; Mary responded by telling him to keep those items at his home. Jhordan also informed Mary he had started a trust fund for the child. However, when Jhordan asked for legal guardianship of the child in the case of Mary's death, Mary refused. On March 30, 1980, Mary gave birth to a baby boy, Devin.

9 The 1973 version of the Uniform Parentage Act has been adopted in Alabama, California, Colorado, Hawaii, Illinois, Kansas, Minnesota, Missouri, Montana, Nevada, New Jersey, New Mexico, Ohio, and Rhode Island. The 2000/2002 version has been adopted in Delaware, North Dakota, Washington, Wyoming, Oklahoma, Texas, and Utah. See 'Final Acts and Legislation-Parentage Act- Legislative Fact Sheet,' Uniform Parentage Act, at www.nccusl.org

10 Unif. Parentage Act § 5, 9B *U.L.A.* 301 (1987).

11 Unif. Parentage Act § 5(b), 9B *U.L.A.* 301 (1987). The 2002 Uniform Parentage Act no longer requires the use of a physician. Section 702 states 'Parental Status of Donor. A donor is not a parent of a child conceived by means of assisted reproduction.' Unif. Parentage Act, § 702 (2002). The comments to this section acknowledge that married and unmarried women will use of AID and other forms of assisted reproduction.

12 *Jhordan C. v. Mary K.*, 224 Cal. Rptr. 530 (Ct. App. 1986).

Although Mary permitted Jhordan to visit and photograph her and Devin at the hospital, Mary initially resisted Jhordan's request to visit Devin five days later. She then allowed the visit, but she told Jhordan she was angry about the request. During the visit Jhordan claimed a right to visit Devin. Mary responded by agreeing Jhordan could see Devin once a month. In August, 1980, after five monthly visits, Mary terminated the visits. Jhordan told Mary he would consult an attorney if Mary refused future visitation. Mary requested Jhordan sign a contract stating he would not assert paternity but Jhordan refused. In December, 1980, Jhordan filed an action against Mary to establish that he was Devin's parent and to assert visitation rights. Later he amended his petition and requested joint legal custody of Devin.

Mary supported Victoria's request to be considered a party to the action, joining in Victoria's request for joint legal custody of the child and court-ordered visitation. Victoria and Mary presented evidence at the time of trial to support their claim that Victoria was the child's de facto parent. At the parentage trial, the court found Jhordan was Devin's legal parent and granted both Jhordan and Victoria visitation rights, with the stipulation that Victoria's visitation was not to impinge on Jhordan's visitation schedule. Mary and Victoria appealed, arguing, among other points, that the trial court erred by not applying the AID provisions of the California parentage act. This provision states the 'donor of semen provided to a licensed physician for use in artificial insemination of a woman other than the donor's wife is treated in law as if he were not the natural father of a child thereby conceived.'¹³

The California Court of Appeals reviewed this statute by first noting this language originated from the Uniform Parentage Act, except that the California legislature had eliminated one word from the uniform act. The uniform act stated the semen donor was not the natural father of the child in the insemination of a 'married' woman. The California appellate court found the legislature, by eliminating this one word, intended the statute to apply to all inseminated women, regardless of marital status. However, the appellate court ruled the statutory provision did not apply to the facts in this case because the statute stated the donor was not the legal parent of the child if the semen was 'provided to a licensed physician for use in artificial insemination.' Because Jhordan did not provide the semen to a licensed physician, but rather provided the semen to Mary directly, the appellate court found the statute did not prevent Jhordan from asserting his legal parentage to Devin.¹⁴ The appellate court upheld the trial court's order, finding Jhordan the legal parent of Devin.

Three years after the *Jhordan C. v. Mary K.* case was decided, the Colorado Supreme Court, in *In re R.C.*,¹⁵ interpreted the Colorado AID statute, which contained language identical to the California statute. Like the two previously discussed cases, the Colorado case involved conflicting claims from the sperm donor, J.R., and the mother, E.C., regarding the parties' intention concerning the sperm donor's involvement with the child. J.R. claimed he donated sperm for E.C.'s insemination only because she promised him he would be the legal parent of the child. E.C., however, alleged she never promised J.R. he would be treated as the father of the child and she advised him numerous times to consult an attorney. Another similarity between this case and the earlier California case was that, at the time of insemination, neither party was aware that Colorado had an AID statute.

13 CAL. CIV. CODE § 7005(b) (West 1983), (repealed 1992, c. 162 (A.B.2650), 4, operative Jan. 1, 1994, and replaced with CAL. FAM. CODE § 7613 (2004)).

14 Although Mary argued that statutory language requiring the sperm donor to provide the semen to a physician was merely directory language, the court did not agree. The appellate court noted that the Commissioners of the uniform act deliberately added the use of a physician in later drafts of the act and that, therefore, it was an important statutory requirement.

15 775 P.2d 27 (Colo. 1989).

Although the case involved the same statutory language that was interpreted in the *Jhordan C.* case, in the Colorado case the mother's gynecologist performed the insemination. Since it was the failure to follow this statutory language that resulted in *Jhordan C.* succeeding in his parentage petition, one might expect when a sperm donor provided semen to a licensed physician, the semen donor would not succeed in his petition to assert parental rights to the child. However, the Colorado Supreme Court held the language of the AID statute, stating the sperm donor would not become the father of the child when a physician performs the insemination, was 'ambiguous' when the mother knew the sperm donor. The court found the statute only applied when the sperm donor was anonymous. The Colorado Supreme Court stated if the mother knew the sperm donor, and the sperm donor alleged he and the mother had an agreement that he would be considered the father, then the statutory provision did not operate automatically to prevent him from having a trial on that issue.¹⁶ Because the Colorado Supreme Court decided the case based on the interpretation of the statutory language, there was no need for the court to address the known sperm donor's due process and equal protection arguments.

These constitutional arguments, however, became important in an Oregon case, *McIntyre v. Crouch*,¹⁷ in which Kevin McIntyre provided his sperm to an acquaintance, Linden Crouch, who used the sperm to inseminate herself. As in the previous cases, Mr. McIntyre alleged he had given his sperm to Ms. Crouch pursuant to an oral agreement that he would have an active role in the life of the child, but Ms. Crouch denied the existence of any agreement between the parties. There also was no indication the parties were aware of the existence of the Oregon statute dealing with AID.

Although not modeled after the Uniform Parentage Act, the Oregon AID statute was similar to the California statute because it provided for a physician to perform the insemination. It also stated:

'If the donor of semen used in the 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 the donor.'¹⁸

Mr. McIntyre alleged in his pleadings that because no physician was involved in the insemination and because he was a known donor, the provisions of the statute that excluded him from legal parenthood did not apply in this case. Unlike the California and Colorado courts, the Oregon appellate court rejected this argument. The Oregon appellate court found the statute did not exclude the donor from its provisions if the parties failed to use a physician nor did the statutory language state the donor must be anonymous; the court held that to decide otherwise would 'rewrite the act.'¹⁹

¹⁶ However, the court was clear that this interpretation of the statute only applied if the woman did not have a husband. The court determined if the woman receiving the sperm had been married, then 'an agreement that the donor would be the natural father is *not* a relevant consideration when the recipient is married and her husband consents in writing to the artificial insemination.' *In re R.C.* 775 P.2d at 33 (Colo. 1989) (emphasis added). It appears that the presence of a husband protects a woman from a challenge of legal parenthood by the sperm donor, even if there is an agreement otherwise. For a detailed description of the different treatment of unmarried and married women who use AID to conceive children and suggested legislative changes to protect unmarried women, see 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', 1993 *Am. J.L. & Med.* 285.

¹⁷ *McIntyre v. Crouch*, 780 P.2d 239, 83 ALR 4th 277 (Or. App. 1989), *rev. denied* 784 P.2d 1110 (Or. 1989), *cert. denied* 495 US 905 (1990).

¹⁸ OR. REV. STAT. 109.239 (1977).

¹⁹ *McIntyre*, 780 P.2d p. 243.

The court next addressed Mr. McIntyre's constitutional argument that the statute violated equal protection and due process. The Oregon appellate court first determined the statute did not violate equal protection because of the biological differences between unmarried men, who contribute the sperm, and unmarried women, who conceive and bear the child. In addition, the court found the distinctions between unmarried men and unmarried women were rationally related to the purpose of the statute. The appellate court, however, struck down the statute as an unconstitutional violation of the due process rights of a sperm donor if the statute was an absolute bar preventing the sperm donor from alleging and proving he donated his sperm in reliance on an agreement with the mother that he would have an active role in the child's life. The court relied on the language of the United States Supreme Court in *Lehr v. Richardson*,²⁰ which held a biological father, who had 'grasped the opportunity' to 'participate in the rearing of his child,'²¹ must be granted due process protections by including him as an interested party in litigation concerning the child. Therefore, the Oregon court found the Oregon AID statute, 'as applied to [the sperm donor], will violate the Due Process Clause of the Fourteenth Amendment if he can establish that he and [the mother] agreed that he should have the rights and responsibilities of fatherhood and in reliance thereon he donated his semen.'²²

Three cases were decided in 1994 in which lesbian couples sought sperm from gay males. The first case from Ohio, *C.O. v. W.S.*,²³ was similar to the previous cases because it involved conflicting testimony concerning the role the sperm donor would have in the life of the child. The parties also disagreed on whether the insemination was done under the supervision and control of a physician. In addition, the parties disagreed on whether the sperm donor would have full parental rights, although the parties did agree the sperm donor would be considered a male role model and would be referred to as the child's father. Also there was no indication that the parties were aware of the Ohio AID statute, which stated '[i]f a woman is the subject of a non-spousal artificial insemination, the donor shall not be treated in law or regarded as the natural father of a child conceived as a result of the artificial insemination, and a child so conceived shall not be treated in law or regarded as the natural child of the donor.'²⁴

At the time of the child's birth, the mother and her female partner refused the sperm donor's request for visitation and his offer to support the child financially. Six months later the sperm donor filed an action to determine parentage, including a request for custody, child support and visitation. Although the Ohio statutes on AID contemplated the insemination to be done by a physician, the statutes also provided that the physician's failure to follow certain provisions of the insemination statute did not affect the legal status of the child, who was not to be considered the child of the sperm donor. However, the Ohio appellate court, citing the earlier Colorado and New Jersey cases, determined the statute did not apply in situations in which the sperm donor was not anonymous and the donor alleged he and the mother had an oral agreement that the sperm donor would have a relationship with the child. The court also stated if its interpretation of the statute was erroneous, then, in any event, the statute was unconstitutional under a due process analysis. Citing the earlier Oregon case of *McIntyre* and the United States Supreme Court case of *Lehr v. Richardson*,²⁵ the Ohio court held that the due process clause protected a father who attempted to assume financial responsibility for his child and a statute that extinguished a

20 *Lehr v. Richardson*, 463 US 248, 103 S. Ct. 2985, 77 L.Ed.2d 614 (1983).

21 *Ibid.* pp. 261, 262.

22 *McIntyre*, 780 P.2d p. 244.

23 *C.O. v. W.S.*, 64 Ohio Misc. 2d 9, 639 N.E.2d 523 (1994).

24 OHIO REV. CODE ANN. § 3111.37(B) (1998).

25 *Lehr v. Richardson*, 463 US 248 (1983).

father's efforts to assert his rights and responsibilities of being a parent was therefore unconstitutional. Pursuant to this finding, the court ordered an investigation of the two parties' homes and psychological evaluations of the parties and their partners in order to determine the residency of the child.

The second 1994 case, *Thomas S. v. Robin Y.*,²⁶ involving a New York court, is noteworthy because the parties agreed at the time of the insemination the sperm donor would not have parental rights. Both parties testified they orally agreed the sperm donor, Thomas S., was donating his sperm so the mother, Robin Y., and her female partner, Sandra R., would raise the child together,²⁷ without Thomas having any parental rights or obligations. Thomas did agree, however, to meet with the child if the child asked about his or her biological origin.²⁸ Robin performed several self-inseminations in California, Thomas's home state, and in her home state of New York. Robin became pregnant and gave birth to a daughter named Ry, while she and Sandra were temporarily living in California. Although Thomas and the mother's partner, Sandra R., were attorneys, neither party sought the advice of an attorney or attempted to put their agreement in writing.

Pursuant to their oral agreement, Thomas had little contact with Robin, Sandra and Ry during the first three years of Ry's life. Then Robin contacted Thomas to ask if he would be willing to see Ry, so she could meet the person 'who helped make her.' Over the next six years, Thomas and Ry saw each other anywhere from 60 to 148 days. All the parties were in accord, however, pursuant to their agreement, that Robin and Sandra had complete control over the terms of the visitation and, in particular, they requested they be present during all visits. In 1991, Thomas requested that Ry attend a family reunion with him, but since he was not comfortable introducing Robin and Sandra to his family, he asked that Ry be allowed to visit without them being present. Robin and Sandra denied Thomas's request, prompting him to file an action asserting he was the father of Ry and requesting visitation rights.

In the trial court decision, the judge noted the AID statutes in California and New York did not apply in this case to cut off a sperm donor's parental rights. Citing the earlier California case of *Jhordan C. v. Mary K.*,²⁹ the court stated the California AID statute required the sperm donor to provide the sperm to a physician in order for the statute to apply. The trial court did not apply the New York AID statute either because its provisions only referred to insemination of a married woman. Thomas argued the New York parentage statute was the applicable statute in this case. Under the parentage statute the court 'must' enter a finding of parentage if there is clear and convincing evidence that a man was the biological father of the child. Instead of entering the parentage order, however, the trial court applied the common law doctrine of equitable estoppel to prevent Thomas from asserting parentage rights. This doctrine prevents a party from asserting his or her legal rights if that party's prior conduct induces another person to rely on that conduct to his or her detriment, or if a party does not promptly assert his or her rights, and, because of the passage of time, it would be inequitable to permit the party to assert the rights. The court applied the equitable estoppel doctrine because Thomas agreed with Robin that he would not act as a parent to Ry and did not have any interaction with her for the first three years of her life.

26 *Thomas S. v. Robin Y.*, 618 N.Y.S.2d 356 (App. Div. 1994), *rev'g* 599 N.Y.S.2d 377 (Fam. Ct. 1993).

27 Sandra R. had given birth to a daughter, Cade, two years earlier through AID with a different man. Sandra R. and Robin Y. intended to be co-equal parents to both children who they would treat as siblings in a two-parent household. Thomas was aware of, and agreed to, Robin and Sandra's intentions. See M. Brady, 'The Sorrow of a Donor Dad', 2000 *In the Family*, p. 14, which discusses how the dispute between Robin and Thomas resulted in Sandra terminating Cade's visits with Jack, the man who provided sperm to Sandra R.

28 *Thomas S. v. Robin Y.*, 599 N.Y.S.2d at 378.

29 224 Cal. Rptr. 530 (Ct. App. 1986).

Thomas appealed the trial court decision, and the appellate court reversed, instructing the trial court to issue an order finding Thomas the legal parent of Ry. The appellate court interpreted the parentage statute as requiring the trial court to issue the parentage order once blood tests proved Thomas was the father. But in an interesting twist of the facts, the appellate court applied equitable estoppel to Robin, characterizing her as the person who initiated the contact between Thomas and Ry and consequently, she could not now deny Thomas's right to the legal recognition of his relationship to Ry. Concerning the agreement between Robin and Thomas, the court held the oral agreement between Robin and Thomas was unenforceable and against public policy.³⁰ The court also found that denying Thomas his right to a parentage determination would violate his constitutional due process rights.³¹

The third case decided in 1994, *Leckie & Voorhies*,³² stands apart from the two previous cases for several reasons. First of all, it was the first case that ruled against the sperm donor's attempt to assert parental status. Second, it involved a court that had issued a decision in one of the earlier cases, the Oregon Court of Appeals. Third, and perhaps most importantly, the case involved a written agreement, one in which the sperm donor clearly acknowledged he understood he would have no parental rights with the child.

According to the facts in this case, a detailed agreement was signed by the sperm donor, Michael, the recipient of the sperm, Janet, and Janet's female partner. The agreement expressly waived the parties' rights to bring an action to establish the sperm donor as a legal parent and prohibited Michael from referring to himself as the child's father. However, the agreement also allowed Michael visitation with the child, allowed him to identify himself as a sperm donor with limited visitation rights and the agreement contained a statement that Janet and her partner 'are happy to include the donor in their lives, not as a father, but as a good male role model for their children.'³³ Pursuant to this agreement, when the child conceived by donor insemination was born, Michael exercised visitation with the child for the first three and one-half years of the child's life. For sixteen months during this time, Janet and the child actually lived in a house Michael owned, which was located on land adjacent to Michael's home. The child referred to Michael as 'Dad' without Janet objecting. When Michael attempted to be more involved in the child's life than was acceptable to Janet, however, Michael and Janet participated in mediation to resolve their dispute. The mediation resulted in Michael and Janet re-affirming their original written agreement and signing it a second time, with an additional provision that Michael could have six hours of visitation per month. Six months later Michael filed a petition to establish parentage, requesting court-ordered visitation, claiming that the parties' conduct implicitly modified their agreement, vitiating his waiver to bring a parentage action.

The trial court dismissed Michael's petition and the Oregon Court of Appeals affirmed the trial court. The appellate court found no facts supporting Michael's claim the parties' behavior vitiated his waiver, particularly since both parties reaffirmed the waiver in writing only six months earlier. The appellate court also stated Michael did not have a constitutional claim of a denial of due process, as did the sperm donor, Kevin McIntyre, in the earlier Oregon case.³⁴ The earlier case involved the constitutionality of the AID statute that stated the donor 'shall have no

30 Both the majority and dissenting opinions determined that an agreement, between biological parents in which one parent agrees to surrender legal parentage, is unenforceable under New York law.

31 Robin appealed the appellate court's decision. The appeal was abandoned, however, when Thomas withdrew his petition to establish legal parentage in spring of 1995. See N. Polikoff, 'The Social Construction of Parenthood in One Planned Lesbian Family', 1996 *N.Y.U. Rev. L. & Soc. Change* 203.

32 *Leckie & Voorhies*, 875 P.2d 521 (Or. App. 1994).

33 *Ibid.*, p. 522.

34 *McIntyre v. Crouch*, 780 P.2d 239, 83 ALR 4th 277 (Or. App. 1989), *rev. denied* 784 P.2d 1110 (Or. 1989), *cert. denied* 495 US 905 (1990).

right, obligation or interest with respect to the child' when applied to the donor's assertion he and the mother had an agreement he could be the legal parent of the child if he donated his sperm. In this later case, the mother was not relying on the AID statute, but rather she argued the donor waived his right to assert parental rights in the written agreement. Because the donor was unable to present evidence that the parties' agreement had been altered by their conduct, the court enforced the terms of their written agreement.

In 2002, there were two cases that dealt with the legal status of known sperm donors. *Lamaritata v. Lucas*,³⁵ a Florida case, involved a written agreement that the donor would have no parental rights and obligations and both parties were 'foreclosed from establishing those rights and obligations by the institution of an action to determine the paternity of any such child or children.'³⁶ In addition, the Florida statute stated the 'donor of any egg, sperm, or preembryo, other than the commissioning couple or father who has executed a preplanned adoption agreement under s. 63.212, shall relinquish all maternal or paternal rights and obligations with respect to the donation or the resulting children.'³⁷ The court found the statute, which did not define 'sperm donor', applied to Mr. Lucas, who brought a paternity suit. The court made this determination by looking to the terms of the parties' agreement, which referred to Mr. Lucas as a 'donor.' The court also found the mother, Ms. Lamaritata, and Mr. Lucas were not a 'commissioning couple,' as defined in the statute. The parties 'joined forces solely for the purpose of artificially inseminating Ms. Lamaritata, an intent clearly set forth in the parties' contract.'³⁸ Based on the language of the Florida statute and the terms of the parties' agreement, the district court of appeals found the sperm donor was a 'non-parent.'³⁹

The second case, *Tripp v. Hinckley*,⁴⁰ involved a lesbian couple and gay couple in New York. At the time of the insemination the sperm donor and the mother agreed the lesbian couple would be the custodial parents of any child conceived and the sperm donor and his partner would have regular contact with the child. Two children were born, one in 1994 and another in 1996, using Mr. Tripp's sperm. After the birth of both children, Mr. Tripp signed acknowledgements of paternity, which authorized him to be named as the father on the children's birth certificates. The parties also entered into a visitation agreement. Mr. Tripp later filed an action for more visitation time when the lesbian couple ended their relationship.

The mother, Ms. Hinckley, objected to the increased visitation, alleging Mr. Tripp was merely a sperm donor who should be restricted to the terms of the visitation agreement. The court found, however, the case involved undisputed paternity, which creates a legal parent status. In addition, the court relied on the evidence of Mr. Tripp's 'regular contacts with the children since their births, as well as [Ms. Hinckley's] own testimony that the children view [Mr. Tripp] as their father and love him.'⁴¹ The court also noted that visitation agreements were not binding and were enforced only if they were found to be in the children's best interests. Finally, the court did not accept Ms. Hinckley's assertions that Mr. Tripp waived his right to increased visitation and he was estopped from asserting this right. The circumstances of this case supported Mr. Tripp because he had been exercising his visitation rights pursuant to the parties' agreement. Conse-

35 823 So.2d 316 (Fla. Dist. Ct. App. 2002).

36 *Ibid.*, p. 318.

37 FLA. STAT. § 742.14 (1997).

38 *Lamaritata*, 823 So.2d at 319.

39 This case was litigated a number of times because the parties entered into a visitation agreement. Ultimately the Florida District Court of Appeal held that since the sperm donor was a non-parent, the visitation order was unenforceable because, under Florida law, non-parents are not entitled to visitation rights. See *Lamaritata v. Lucas*, 827 So.2d 1049 (Fla. Dist. Ct. App. 2002).

40 *Tripp v. Hinckley*, 736 N.Y.S.2d 506 (App. Div. 2002).

41 *Ibid.*, p. 508.

quently, this case did not deviate from the result of the earlier New York decision involving parental rights of a known sperm donor when the recipient was an unmarried woman, *Thomas S. v. Robin Y.*,⁴² which the court cited in its opinion.

There were three more known sperm donor cases decided in 2005 and another one in 2006. Interestingly, two of these cases were decided by different panels of the Texas Court of Appeals, with each panel reaching the opposite conclusion on whether a sperm donor had standing to bring a parentage action under Texas law. In the first case, *In re Sullivan*,⁴³ the parties entered into a 'Co-Parenting Agreement' drafted by the sperm donor's attorney. The agreement explicitly stated both parties intended to be the parents of the child and the parties agreed 'that any child born as a result of the donor insemination procedure will be the child of BRIAN KEITH RUSSELL as if he and SHARON SULLIVAN were married at the time of the conception, and that BRIAN KEITH RUSSELL will be named as the father on the child's birth certificate.'⁴⁴

Prior to the child's birth, however, the parties had a disagreement and when the child was born, Mr. Russell filed an action entitled 'Original Petition to Adjudicate Parentage, Suit Affecting the Parent-Child Relationship and Breach of Contract.'⁴⁵ Ms. Sullivan responded by asserting that Mr. Russell lacked standing to bring a parentage action because, under the Texas statute, he was a sperm donor without any parental rights. According to the Texas statutes relied upon by Ms. Sullivan, 'a donor is not a parent of a child conceived by means of assisted reproduction'⁴⁶ and a donor is defined as 'an individual who produces eggs or sperm used for assisted reproduction,' excluding 'a husband who provides sperm or a wife who provides eggs to be used for assisted reproduction (...).'⁴⁷ Mr. Russell, however, claimed the parentage act provided him with standing because it provided that 'a man whose parentage of the child is to be adjudicated'⁴⁸ could file a parentage action.

The Houston appellate court determined that because this section of the parentage act did not specifically exclude a male donor, particularly when other provisions of the Texas Family Code did exclude a male donor from being an 'alleged father,' then the intent was to allow the sperm donor standing to have his parentage adjudicated. The court specifically held, however, it was not deciding whether Mr. Russell was, in fact, a mere 'donor' under the parentage statute. It was deciding only whether the lower court had the jurisdiction to determine that issue, based on Mr. Russell having standing to raise the issue of his status. Consequently, the case was remanded to the trial court to determine the applicability of the sperm donor statute and the co-parenting agreement.

In the second Texas case, *In re H.C.S.*,⁴⁹ the San Antonio court of appeals panel decided a sperm donor did not have standing to bring a parentage action. The *H.C.S.* case involved a brother of one of the partners in a lesbian couple who donated his sperm so that his sister's partner could have a child. The donor, J.S., asserted he and the mother orally agreed he would be more than a mere donor and he would be involved in the child's life. The mother, K.D., disputed this fact, denying the parties made this agreement. When his sister and K.D. ended their relationship, J.S. filed a parentage action, alleging K.D. was denying visitation after having allowed visitation previously.

42 *Thomas S. v. Robin Y.*, 618 N.Y.S.2d 356 (App. Div. 1994), *rev'g* 599 N.Y.S.2d 377 (Fam. Ct. 1993).

43 157 S.W.3d 911 (Tex. App. Ct. 2005).

44 *Ibid.*, p. 913.

45 *Ibid.*

46 TEX. FAM. CODE ANN. § 160.702 (Vernon Supp. 2004).

47 TEX. FAM. CODE ANN. § 160.102(6) (Vernon Supp. 2004).

48 TEX. FAM. CODE ANN. § 160.602 (Vernon Supp. 2004).

49 219 S.W.3d 33 (Tex. App. Ct. 2006).

In ruling that J.S. lacked standing to bring the parentage action, the appellate court specifically rejected the holding in the *Sullivan* case:

‘While we acknowledge the scholarly research reflected in the *Sullivan* opinion, we respectfully disagree with the court’s conclusion that status as a donor is irrelevant to the question of standing to establish parentage. We likewise do not agree that donor status is more appropriately addressed at the merits stage of the litigation. To the contrary, based on the plain language of the Family Code (...) we conclude that J.S., as an unmarried man who provided sperm used for assisted reproduction and who did not sign an acknowledgement of paternity, does not have standing to pursue a suit to determine paternity of the child born through the assisted reproduction.’⁵⁰

The San Antonio appellate court then looked at the provisions of the Texas statutes affecting the parent-child relationship, which excluded a male donor from the definition of an ‘alleged father’⁵¹ thereby disqualifying J.S., under the parentage act, from being ‘a man whose parentage is to be adjudicated.’⁵²

The remaining two cases in 2005 came out of California. In the first case, *Steven S. v. Deborah D.*,⁵³ Steven, a married man, donated his sperm so Deborah, a single woman, could be artificially inseminated. The initial attempts at insemination, which were done through Steven providing sperm to a physician to inseminate Deborah, resulted in a miscarriage. Following the miscarriage, Steven and Deborah had a sexual relationship for several months. When the sexual relationship ended, Deborah and Steven returned to the physician to attempt another insemination, using the sperm Steven had originally provided to the physician. Trevor was born nine months later. After three years, during which time Steven developed a relationship with Trevor, who referred to Steven as ‘Daddy Steve,’ Steven filed a parentage action.

The first issue in contention at the trial court level was whether Trevor was conceived through insemination or sexual intercourse. The trial court found Trevor was conceived through the last insemination procedure. Deborah alleged Steven was not entitled to parental rights, relying on the California sperm donor statute, which stated 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.’⁵⁴ The trial court found that this statute, however ‘did not preclude a finding of paternity because of the doctrine of estoppel prevents [Deborah] from denying [Steven] his rights as a biological father. [Deborah’s] conduct clearly reflects that [she] intended [Steven] to be Trevor’s father and to be a part of Trevor’s life. It is also clear that [Steven] relied on [Deborah’s] conduct to form his expectations of ongoing contact and visitation.’⁵⁵

In reversing the trial court, the appellate court distinguished its earlier case of *Jhordan C. v. Mary K.*,⁵⁶ in which the appellate court found the sperm donor statute did not apply, because no physician was involved in the insemination. In the *Steven S.* case the appellate court held that, because the couple used a physician to inseminate Deborah, the statutory language directly

50 *Ibid.*, pp. 35-36.

51 TEX. FAM. CODE ANN. § 101.0015(a) & (b) (Vernon 2002).

52 TEX. FAM. CODE ANN. § 160.602(a)(3) (Vernon 2002).

53 *Steven S. v. Deborah D.*, 25 Cal. Rptr. 482 (Cal. App. Ct. 2005).

54 CAL. FAM. CODE § 7613(b) (2004).

55 *Steven S.*, 25 Cal. Rpt.3d p. 485.

56 224 Cal. Rptr. 530 (Ct. App. 1986).

applied. Steven urged the appellate court to carve out an exception to the statute in a situation in which the parties had an intimate relationship and attempted to conceive a child by sexual intercourse. He based his argument on the public policy of California to favor paternity and the best interest of the child. The appellate court, however, found it was a legislative function to determine public policy and, in this case, the plain meaning of the statute prevented the court from reading an exception into the language of the statute. In addition, the appellate court rejected the estoppel argument, noting the legal theory had not been presented or argued at trial.

The second California case is unique in that it involved the donation of a woman's ova (eggs) rather than sperm. In *K.M. v. E.G.*,⁵⁷ two women, who had been in a lesbian relationship, were involved in litigation over the parentage of twins born to E.G. from ova donated by K.M. The parties disagreed about their intentions when K.M. donated her ova to E.G., who was having difficulty conceiving a child through anonymous insemination and in vitro fertilization (IVF). The doctor treating E.G. for fertility suggested that E.G. use K.M.'s ova for the next IVF procedure. The couple agreed to use K.M.'s ova, but at trial E.G. stated the agreement terms were that E.G. would be a single parent, whereas K.M. stated she agreed to provide her ova because the parties intended for both women to raise any child born to E.G.

There also was disagreement about the facts surrounding K.M. signing a document provided by the medical center entitled 'Consent Form for Ovum Donor (Known)'. The document stated K.M. waived any right and relinquished any claim to the donated ova. In addition it stated K.M. agreed not to attempt to discover the identity of the person who was receiving her ova. K.M. stated she thought parts of the form were 'odd' and did not apply, particularly the clause about not attempting to discover the identity of the recipient of her ova. She testified she did not intend to relinquish her parental rights and she thought she would be the parent of the child or children born from her ova.

When the twins were born, E.G. referred to K.M.'s parents as the children's grandparents and K.M.'s siblings as the children's aunt and uncle. When the children attended school, the school forms listed both women as the parents of the twins. The children's nanny also testified that both women were the twins' parents. E.G. and K.M. ended their relationship in 2001 and K.M. filed a parentage action shortly thereafter. Although the lower courts ruled in favor of E.G., the California Supreme Court reversed, finding K.M. was a parent, together with E.G.

The California Supreme Court rejected the argument that the sperm donor statute should apply to cases in which a woman 'supplied ova to impregnate her lesbian partner in order to produce children who would be raised in their joint home.'⁵⁸ The court distinguished the *Steven S.*⁵⁹ case, stating 'the semen donor in that case did not live with the impregnated woman, so the court did not address whether the statute would apply if the child was raised in the semen donor's home.'⁶⁰ Because the court found the sperm donor statute did not apply to the facts in the *E.G.* case, K.M.'s genetic connection to the children was sufficient to establish a mother and child relationship under the California version of the Uniform Parentage Act. In addition, the court found that K.M. could not waive her parentage rights by signing the Consent Form, analogizing it to attempts by parents to limit or abrogate their obligation to support their children. According to the court, K.M. 'cannot waive her responsibility to support [her] child. Nor can such a purported waiver effectively cause [K.M.] to relinquish her parental rights.'⁶¹

57 33 Cal. Rptr.3d 61 (2005).

58 *K.M.*, 33 Cal. Rptr. 3d p. 71.

59 25 Cal. Rptr. 482 (Cal. App. Ct. 2005).

60 *Ibid.*, p. 70, n. 5.

61 *K.M.*, 33 Cal. Rptr. 3d p. 72.

5. Synthesizing the case law involving known sperm donors prior to the *K.M.H.* litigation

At first glance it may appear difficult to synthesize the cases that were decided prior to the appeal in the *K.M.H.* case because of the differences in facts and the statutory language. Some common threads, however, can be discerned in these cases. It appears in the earlier cases the courts were strongly inclined to allow a known sperm donor to assert parentage rights against the wishes of an ‘unmarried’ woman. When a state had no statutes dealing with sperm donation, as in the 1977 *C.M.*⁶² case in New Jersey, the court allowed the parentage action because it was in a child’s best interest to have two parents whenever possible. Sperm donors also were allowed to assert parentage rights, even when the sperm donor statute directly applied to unmarried women, if the parties deviated from the method of insemination contemplated in the statute, as in the 1983 *Jhordan C.*⁶³ case in California.⁶⁴ Because the couple did not use a physician to accomplish the insemination, the court found the statute cutting off the parentage rights of a sperm donor did not apply. Even when a physician performed the insemination, as in the 1989 *C.R.*⁶⁵ case in Colorado, the court found the statute was ‘ambiguous’ when applied to a known sperm donor. The next case, the 1989 *McIntyre*⁶⁶ case in Oregon, rejected the distinctions drawn in these prior cases, finding the physician insemination was not essential and the statute was not ambiguous if the donor was known to the mother. Nonetheless, the court found that applying the statute to a sperm donor, who alleged he donated his sperm based on an oral agreement with the mother that he would be the father, would violate the sperm donor’s constitutional due process rights.

Even in cases in which lesbian couples were trying to create their own families, the courts found a known sperm donor could assert parental rights. Thus, in the 1994 *C.O.*⁶⁷ case in Ohio, the court held the sperm donor statute did not apply to a known sperm donor, and even if the statute did apply, a sperm donor, who asserted he had an agreement with the mother to act as a parent, had a due process right to a parentage determination. In the second case involving a lesbian couple attempting to form a family, the 1994 New York case of *Thomas S.*,⁶⁸ the court also found the sperm donor statute inapplicable to cut off the parental rights of the sperm donor because the New York statute only applied to married women. Even in the face of both parties testifying they agreed at the time of insemination the sperm donor would have no parental rights, the court found the agreement unenforceable ‘for failure to comply with explicit statutory requirements for surrender of parental rights.’⁶⁹ The court noted the termination of Thomas’s parentage rights without strict adherence to the parentage statutes would be ‘in violation of well established standards of due process and cannot stand.’⁷⁰

In all of these earlier cases, the sperm donor was successful in obtaining parentage rights. These cases share the facts that, at the time of the insemination, none of the parties entered into a written agreement, the parties appeared unaware of the existence of a sperm donor statute, there were no allegations that the parties consulted an attorney and, except for the last case of

62 377 A.2d 821(N.J. Juv. & Dom. Rel. Ct. 1977).

63 224 Cal. Rptr. 530 (Ct. App. 1986).

64 But see *Steven S. v. Deborah D.*, 25 Cal. Rptr. 482 (Cal. App. Ct. 2005), which found that when a physician does perform the insemination, the statute applies, even if the couple had a previous sexual relationship and the sperm donor had exercised visitation for a period of years.

65 775 P.2d 27 (Colo. 1989).

66 780 P.2d 239, 83 ALR 4th 277 (Or. App. 1989), *rev. denied* 784 P.2d 1110 (Or. 1989), *cert. denied* 495 US 905 (1990).

67 64 Ohio Misc. 2d 9, 639 N.E.2d 523 (1994).

68 *Thomas S. v. Robin Y.*, 618 N.Y.S.2d 356 (App. Div. 1994), *rev’g* 599 N.Y.S.2d 377 (Fam. Ct. 1993).

69 *Ibid.*, p. 361.

70 *Ibid.*

Thomas S.,⁷¹ the sperm donor and mother disagreed over whether the parties intended for the sperm donor to be a parent.

A noticeable shift occurs, however, when the evidence involves a written agreement at the time of the insemination,⁷² coupled with the courts becoming aware of the widespread use of known sperm donors by ‘unmarried’ women, who wanted to become mothers. The first case involving a written agreement was the 1994 *Leckie*⁷³ case in Oregon, where the sperm donor signed an agreement, not only at the time of insemination, but also re-affirmed it six months prior to bringing a parentage action. The agreement stated ‘[e]ach party relinquishes and releases any and all rights he or she may have to bring suit to establish paternity.’⁷⁴ When the sperm donor brought a paternity action, the court found he was barred from doing so by his relinquishment of that right in the agreement. In addition, the sperm donor was unable to show that the parties conduct after the child’s birth vitiated his waiver of parental rights. The court did not find, as courts in other states had found, that the sperm donor’s visitation with the child equitably estopped the mother from arguing that the sperm donor does not have parental rights,⁷⁵ nor did it hold that an agreement relinquishing parental rights violated public policy.⁷⁶ In addition, the Oregon court held that its prior decision in *McIntyre* did not apply to the *Leckie* case because the mother in *Leckie* was not relying on the sperm donor statute and the written agreement prevented the sperm donor from asserting the due process violations mentioned in the *McIntyre*⁷⁷ case.

In the 2002 *Lamaritata*⁷⁸ case from Florida, the court enforced the parties’ written contract, which stated the sperm donor agreed he would have no parental rights and both parties were foreclosed from bringing a parentage action. In addition, the court applied the language of the state’s sperm donor statute, which provided a sperm donor relinquished all rights and obligations towards any children resulting from the donation.

In the 2002 New York case of *Tripp v. Hinckley*,⁷⁹ in which the court allowed the sperm donor to assert parental rights, the parties did not have a written agreement at the time of insemination. The mother, however, had signed acknowledgements of paternity, which allowed the sperm donor to be named as the father on the children’s birth certificates. Signing the acknowledgements of paternity created a legal parent-child relationship with the sperm donor and two children, preventing the mother from later claiming Mr. Tripp was merely a ‘sperm donor’ and should be held to the terms of the parties ‘visitation agreement’ signed after the birth of the second child.

The first of the two Texas cases also involved a written agreement but, unlike the prior written agreement that cut off the sperm donor’s parental rights, this agreement preserved his rights, stating he was to be treated as if he were married to the mother.⁸⁰ Although the mother asserted the Texas sperm donor statutes cut off the sperm donor’s standing to file a parentage action, the Texas appellate court disagreed, granting the sperm donor standing, and advised the

71 *Ibid.*, p. 359.

72 Two cases involving written agreements deserve mention. *Myers v. Moschella*, 677 N.E.2d 1243 (Ohio App. 1996) and *LaChapelle v. Mitten*, 607 N.W.2d 151 (Minn. Ct. App. 2000). In both cases the agreements granted visitation rights to the sperm donors, although the agreements specifically stated the sperm donors did not have parental rights. The mothers attempted to cut off the sperm donor’s visitation, prompting the sperm donors to file parentage actions in order to secure their visitation rights. The issues on appeal in these cases did not involve the validity of the written agreements nor were the mothers appealing the lower courts’ orders granting parentage rights to the sperm donors.

73 875 P.2d 521 (Or. App. 1994).

74 *Ibid.*, p. 522.

75 See *Thomas S. v. Robin Y.*, 618 N.Y.S.2d 356, 361 (App. Div. 1994), *rev’g* 599 N.Y.S.2d 377 (Fam. Ct. 1993).

76 See *K.M. v. E.G.*, 33 Cal. Rptr.3d 61 (2005).

77 780 P.2d 239, 83 ALR 4th 277 (Or. App. 1989), *rev. denied* 784 P.2d 1110 (Or. 1989), *cert. denied* 495 US 905 (1990).

78 823 So.2d 316 (Fla. Dist. Ct. App. 2002).

79 736 N.Y.S.2d 506 (App. Div. 2002).

80 *In re Sullivan*, 157 S.W.3d 911 (Tex. App. Ct. 2005).

mother to raise the applicability of the sperm donor statutes within the context of that litigation. The second Texas case,⁸¹ however, departs from the earlier cases involving oral agreements. As in the prior cases, the parties disputed whether they orally agreed, at the time of the insemination, that the sperm donor would be involved in the child's life. In addition, the mother allowed visitation with the child, which, in previous cases, could have estopped her from trying to prevent the sperm donor from asserting parental rights. Instead of following the path of the earlier cases involving oral agreements, the second Texas court held that the sperm donor statutes denied the sperm donor standing to bring a parentage action.⁸²

The cases come full circle in the California case of *Steven S.*⁸³ Although the parties did not have any written agreement concerning the sperm donation, they followed the provisions of the California sperm donor statute by providing the sperm to a physician, for the purposes of the inseminating 'a woman other than the donor's wife.'⁸⁴ This case came nineteen years after the first California appellate court ruled in *Jhordan C.*⁸⁵ that the sperm donor statute did not apply if the parties did not use a physician for the insemination. In *Steven S.* the court not only found the statute directly applied to the parties, but did so even though the parties tried unsuccessfully to have children through sexual intercourse and the sperm donor exercised visitation with the child.⁸⁶

Consequently, it appeared that in the more recent decisions, the courts were beginning to apply the sperm donor statutes to deny sperm donors parental rights if the facts, at the time of the insemination, matched the clear language of the statutes. In addition, when the parties executed a written agreement at the time of insemination, particularly an agreement that cut off the sperm donor rights, the courts were willing to follow the parties intention at the time of the signing of the agreement. It also is worth noting that, in 1994, the year in which the first appellate court enforced a written agreement against a sperm donor who attempted to assert parental rights in contradiction to that agreement, the Kansas legislature adopted its present sperm donor statute.⁸⁷ This statute incorporates the requirement of a written agreement, but the agreement is one that acknowledges the parental rights of the sperm donor. The statute states: 'The donor of semen provided to a licensed physician for use in artificial insemination of a woman other than the donor's wife is treated in law as if he were not the birth father of a child thereby conceived, unless agreed to in writing by the donor and the woman.'⁸⁸ This was the legal landscape at the time of the Kansas *K.M.H.*⁸⁹ case.

6. The Kansas case: *K.M.H.*

6.1. Facts and procedural history

The *K.M.H.* case involved S.H., an unmarried woman who was an attorney. She was friends with D.H., an unmarried man, who agreed he would provide S.H. with his sperm. The parties did not

81 *In re H.C.S.*, 219 S.W.3d 33 (Tex. App. Ct. 2006).

82 *Ibid.*, p. 36.

83 25 Cal. Rptr. 482 (Cal. App. Ct. 2005).

84 CAL. FAM. CODE § 7613(b) (2004).

85 224 Cal. Rptr. 530 (Ct. App. 1986).

86 The final California case, *K.M. v. E.G.*, 33 Cal. Rptr.3d 61 (2005), which granted parental rights to an ova donor, is consistent with the other two California cases because the sperm donor statutory language did not apply to ova donations, the children had been raised over a period of years by the ova donor and the gestational mother, and the court found, in the absence of an applicable statute, the parties could not contractually waive their parental rights.

87 Kan. Stat. Ann. § 38-1114(f) (2000).

88 *Ibid.*

89 169 P.3d 1025 (Kan. 2007).

have a written agreement, at the time of the donation and insemination, addressing the expectation of the parties concerning D.H.'s parental rights. D.H. alleged the parties had an oral agreement that they would co-parent any children born from the insemination. S.H. denied there was a co-parenting agreement, arguing she intended to raise any children born from D.H.'s sperm as a single mother. It was undisputed, however, that the parties' agreement for S.H. to be inseminated with D.H.'s sperm was entered into in Kansas.

S.H. underwent two attempts at insemination, both of which were done by a physician in the state of Missouri. D.H. accompanied S.H. to Missouri for the first insemination attempt, where he provided his semen to medical personnel at the clinic. When this insemination attempt was unsuccessful, S.H. underwent a second insemination in Missouri. This time, however, D.H. did not accompany S.H. to Missouri, but instead he gave his semen to S.H. in a plastic container in Kansas and S.H. delivered the semen to the Missouri doctor for the insemination procedure. S.H. became pregnant and delivered twins, in Kansas, on May 18, 2005. The next day S.H. filed a Child In Need of Care (CINC) petition in the local Kansas district court. According to the facts in the Kansas Supreme Court's majority opinion, written by Justice Carol Beier, the 'petition identified D.H. as "[t]he minor children's father" and alleged that the twins were in need of care "as it relates to the father" and that "the [f]ather should be found unfit and his rights terminated." The petition continued to refer to D.H. throughout as the twins' father.'⁹⁰

On May 31, 2005, D.H. filed an answer to the CINC petition, and, in addition filed a parentage action in which he acknowledged his financial responsibility for the children and requested joint legal custody and visitation with the children. S.H. filed amended CINC petitions, for the first time asserting the sperm donor statute barred D.H.'s claim as a parent. The CINC case and the parentage action were consolidated and S.H. filed a motion to dismiss the parentage action, based on the Kansas sperm donor statute.

The trial judge requested the parties brief the issues concerning choice of law and the constitutionality of the sperm donor statute. According to S.H., Kansas law applied to the parties' dispute and the sperm donor statute was constitutional, thereby cutting off D.H. from asserting parental rights in the absence of a written agreement otherwise. D.H. argued that Missouri law applied, but if Kansas law did apply, then the sperm donor statute was unconstitutional, both on its face and as applied to the facts in the case. He also asserted that, because S.H. referred to him as the children's 'father' in the CINC petition, this was written evidence of the parties' intent that he not be a mere sperm donor, but a parent. The trial court ruled against D.H. on all points and granted S.H.'s motion to dismiss, finding that, as a matter of law, D.H. had no legal rights or responsibilities for the twins born to S.H.

6.2. Issues on appeal

D.H. raised six issues on appeal to the Kansas Supreme Court:

'(1) Did the district court err in ruling that Kansas law would govern? (2) Did the district court judge err in holding K.S.A. 38-1114(f) constitutional under the Equal Protection and Due Process Clauses of the Kansas and federal Constitutions? (3) Did the district judge err in interpreting and applying the 'provided to a licensed physician' language of K.S.A. 38-1114(f)? (4) Did the district judge err in determining that the CINC petition did not satisfy

90 *Ibid.*, p. 1029.

the requirement of a writing in K.S.A. 38-1114(f)? (5) Did K.S.A. 38-1114(a) grant D.H. parental rights and (6) Does equity demand reversal of the district court?’⁹¹

6.3. Standing and standard of review

The *K.M.H.* opinion began with the statement that D.H.’s ‘standing is not in serious doubt.’⁹² According to the appellate court, because the district court considered more than the parties’ pleading, the trial court’s decision to dismiss the case should be viewed as a summary judgment. Consequently, on appeal the evidence must be viewed in the light most favorable to D.H., who objected to the case being dismissed. The court also noted the district court’s judgment will only be affirmed ‘if there is no genuine issue of material fact for trial and the case is appropriate for disposition in [S.H.’s] favor as a matter of law.’⁹³

6.4. Choice of law

D.H. argued that Missouri law should control in this case because Missouri was where the insemination took place. According to D.H.’s argument, because Missouri did not have a sperm donor statute that would apply to the facts in this case, he could assert parental rights to the children. The Kansas Supreme Court noted that the law in Kansas is the doctrine of *lex loci contractus*, which looks to the law of the state where the contract was made. In addition, Kansas judges tended to apply *lex fori*, the law of the forum, applying Kansas law unless there was a clear showing that another state’s law applied. According to D.H., the last act in the contract formation was the insemination in the state of Missouri. The Kansas Supreme Court rejected D.H.’s argument because the facts overwhelmingly favored the application of Kansas law. The parties’ agreement that D.H. would provide S.H. with sperm occurred in Kansas, D.H. provided his semen to S.H. in Kansas, the children were born in Kansas, and all the parties resided in Kansas. Based on the significant connections to Kansas, the Kansas Supreme Court determined that Kansas law applied.

6.5. Constitutionality of K.S.A. § 38-1114(f)

There are two ways to attack the constitutionality of a statute, either alleging the statute is invalid on its face or as it is applied to the particular facts in a case. In this case, D.H. challenged the constitutionality of the Kansas sperm donor statute as it applied to his situation, based on equal protection and due process grounds. In analyzing this claim, the court first set out the standard of review when a litigant has alleged that a statute is unconstitutional. Under this circumstance, a statute is presumed to be constitutional and all doubts must be resolved in favor of the statute’s validity. In addition, a ‘statute should not be stricken down unless the infringement of the superior law is clear beyond substantial doubt.’⁹⁴

The Kansas Supreme Court then mapped the evolution of the Uniform Parentage Act and reviewed a number of the sperm donor cases from other jurisdictions. The opinion also discussed the enactment of the Kansas sperm donor statute, which was adopted from the 1973 Uniform Parentage Act. The Kansas legislature made two amendments to the Uniform Act, however. The original statute stated ‘the donor of semen provided to a licensed physician for use in artificial insemination of a married woman’⁹⁵ would be treated in law as if he were not the father. The

91 *Ibid.*, pp. 1030-31.

92 *Ibid.*, p. 1031.

93 *Ibid.*

94 *Ibid.*, p. 1033.

95 Unif. Parentage Act § 5(b), 9B *U.L.A.* 301.

Kansas legislature removed the word ‘married,’ with the result that the statute applied to all women regardless of their marital status.

The second amendment was the addition of the language ‘unless agreed to in writing by the donor and the woman.’⁹⁶ Although other states have a similar statutory requirement that the parties must have a written agreement in order for the sperm donor to obtain parental rights,⁹⁷ none of these states had determined their statute’s constitutionality. Consequently, *K.M.H.* was the first case to address the issue of whether this requirement met constitutional muster.⁹⁸

The court addressed D.H.’s equal protection challenge by noting that a denial of equal protection arises when similarly situated individuals are treated differently. According to D.H., he was being treated differently than S.H. because he could only obtain parental rights if S.H. agreed in writing to give them to him. The court stated, however, that based on the differences between a sperm donor’s role, when compared to a woman who carries and gives birth to a child, ‘we are skeptical that S.H. and D.H. are truly similarly situated.’⁹⁹ In addition, the court found there were legitimate legislative purposes for the difference in treatment. For example, the statute allowed both married and unmarried women to become parents without sexual intercourse, it protected donors from claims of child support and it protected women from donors asserting parental rights if there was no written agreement. The statute enhanced ‘predictability, clarity, and enforceability’ and it encouraged ‘early resolution of the elemental question of whether a donor will have parental rights.’¹⁰⁰ Therefore, the court found the statute did not violate equal protection.

As regards the due process challenge, the court noted D.H. failed to clarify whether he was making a procedural or substantive due process claim. It first dealt with the potential procedural due process challenge. The court disagreed with D.H.’s argument that the statutory requirement of a written agreement denied him ‘a meaningful opportunity to be heard’ on the issue of whether the parties had an oral agreement. Even assuming the parties did have an oral agreement to co-parent, the court found ‘the statute merely sets up a burden of proof that [D.H.’s] own inaction before donating his sperm left him unable to meet.’¹⁰¹

Therefore, the court assumed D.H.’s claim that he has a fundamental right to the care, custody, and control of his children to be a substantive due process claim. In making that argument, D.H. focused on the United States Supreme Court case of *Lehr v. Robertson*.¹⁰² The facts of the *Lehr* case, however, were not helpful to D.H. In that case, an unwed father, who had not developed a relationship with his child, did not realize that, in order to preserve his right to be notified of his child’s adoption, he must register with the New York Putative Father Registry.

The *Lehr* court stated that a state would violate the due process rights of an unwed father, who demonstrated ‘a full commitment to the responsibilities of parenthood,’¹⁰³ if a statute created an absolute bar from the father asserting his parental rights. Because the unwed father in the *Lehr*

96 Kan. Stat. Ann. § 38-1114(f) (2000).

97 See Ark. Code Ann. § 9-10-201 (2002); Fla. Stat. § 742.14 (2005); N.H. Rev. Stat. Ann § 168-B:3(I)(e) (2002); N.J. Stat. Ann. § 9:17-44(b) (2002); N.M. Stat. Ann. § 40-11-6(B) (2006).

98 Two amici briefs were filed in this case, both dealing with the constitutionality of the Kansas sperm donor statute. The first amicus curie brief was filed by the Washburn University School of Law Children and Family Law Center, with Linda Henry Elrod, Distinguished Professor of Law and Director of the Center, on the brief, arguing the sperm donor statute was unconstitutional. The other amicus curie was the Family Law Professors, with Timothy M. O’Brien on the brief, which took the position that the statute was constitutional.

99 *K.M.H.*, 169 P.3d, p. 1039.

100 *Ibid.*

101 *Ibid.*, p. 1040. It appears, therefore, that D.H. lacks standing under this analysis, contradicting the court’s earlier statement that D.H.’s standing was not in question. *Ibid.*, p. 1031. See also *In re H.C.S.*, 219 S.W.3d 33 (Tex. App. Ct. 2006).

102 *Lehr*, 463 US 248 (1983).

103 *Ibid.*, p. 261.

case had not developed a relationship with his child and because he could have protected his right to receive notice of the adoption if he had registered as a putative father, the Supreme Court did not find a violation of the unwed father's due process rights. The Court stated 'the mere existence of a biological link does not merit equivalent constitutional protection.'¹⁰⁴ In applying the *Lehr* case to D.H.'s situation, the Kansas Supreme Court noted that the sperm donor statute did not create an absolute bar to a biological parent from asserting parental rights, because the statute allowed a sperm donor to become a legal parent if he had a written agreement with the mother.

Next the court addressed D.H.'s argument that because the statute required the parties to have a written agreement to prevent him from being cut off as the legal father, this requirement transformed the otherwise constitutional statute into one that violated the due process rights of known donors such as him. The court stated that although it agreed

'that one goal of the Kansas Parentage Act as a whole is to encourage fathers to voluntarily acknowledge paternity and child support obligations, the obvious impact of the plain language of this particular provision in the Act is to prevent the creation of parental status where it is not desired or expected. To a certain extent D.H. (...) evidently misunderstand[s] the statute's mechanism. It ensures no *attachment* of parental rights to sperm donors in the absence of a written agreement to the contrary. It does not *cut off* rights that have already arisen and attached.'¹⁰⁵

Consequently, the court found the statute prevented the attachment of a known sperm donor's parental rights in the absence of an agreement, noting this statutory interpretation was in accord with the expectation of anonymous and unknown sperm donors. If a known sperm donor had a different expectation, the court pointed out the statute instructed him on how to become a father, by having a written agreement that stated that intention.

Although D.H. also argued the requirement of a written agreement allowed S.H. to be the 'sole arbiter' of whether he could become a legal father, the court pointed out that was the case only after the donation was made. Before the donation was made, however, 'a prospective donor has complete autonomy to refuse to facilitate an artificial insemination unless he gets an agreement in writing to his paternity terms. This is more than most fathers, wed or unwed to their children's mothers, can ever hope for.'¹⁰⁶ Consequently, the court held the requirement that the sperm donor and mother must have a written agreement in order for the sperm donor to become a legal father did not violate D.H.'s due process rights.

The court ended its analysis of the due process challenge by noting 'all that is constitutional is not necessarily wise.'¹⁰⁷ The court pointed out that children may benefit from having two parents, and those parents resources, available to them. In addition, other countries, such as Britain and The Netherlands, no longer have anonymous sperm donation, because children in these countries can obtain information about their biological fathers. The court stated it sympathized with AID children who want to know their biological fathers' identities. 'However, weighing of the interests of all involved in these procedures as well as the public policies that are furthered by favoring one or another in certain circumstances, is the charge of the Kansas Legislature, not of this court.'¹⁰⁸

104 *Ibid.*

105 *Ibid.*, p. 1041 (emphasis in original).

106 *Ibid.*

107 *Ibid.*

108 *Ibid.*, p. 1042.

6.6. ‘Provided to a licensed physician’

D.H.’s third argument was that the Kansas sperm donor statute required the semen to be provided *by the donor* to a licensed physician for use in artificial insemination. According to D.H.’s interpretation of the statute, because S.H. provided the semen to the physician, the statute was not followed and consequently did not apply, similar to the California case of *Jhordan C.* The court rejected this argument using the ‘plain meaning’ rule. Only in the situation in which a statute was unclear and ambiguous would courts turn to rules of statutory construction or legislative intent. The court pointed out the Kansas statute stated ‘[t]he donor of semen provided to a licensed physician for use in artificial insemination’, not ‘the donor of semen to be provided *by the donor* to a licensed physician for use in artificial insemination.’ Because D.H.’s interpretation of the statute would require that words be added to the statute, the court rejected D.H.’s interpretation and, instead, adopted the plain meaning of the statute. ‘[The statute] requires only that the donor’s sperm be provided to the physician by *an unspecified someone or something*. The fact that S.H. was that someone here did not prevent application of the statute to this situation.’¹⁰⁹

6.7. ‘Unless agreed to in writing’

D.H.’s fourth argument on appeal was that S.H.’s CINC pleadings, in which she referred to D.H. 56 times as the ‘father’ and D.H.’s parentage petition, in which he asserted his paternity, should be read together to form the written agreement required under K.S.A. § 38-1114(f). The court rejected this argument, pointing out it was the *absence* of a parenting agreement which resulted in both pleadings. The court also mentioned S.H.’s use of a CINC petition to terminate D.H.’s parental rights was ‘an odd procedural vehicle for effecting S.H.’s desire – a court order stating that D.H. never acquired any parental rights’ but the court recognized this case was ‘in uncharted waters.’¹¹⁰

6.8. Parental rights under K.S.A. § 38-1114(a) (4)

D.H. also argued the general parentage act provisions should control in this case rather than the sperm donor statute. He relied on the language of K.S.A. § 38-1114(a) (4) which states a man is presumed to be the father of a child if he notoriously or in writing recognizes paternity of the child. The Kansas Supreme Court rejected this argument, relying on the rule of statutory construction that a specific provision within a statute controls over a general provision. Because D.H. is a sperm donor, the specific sperm donor statutory provision applies to him, not the more general provision listing the presumptions of paternity.

6.9. Equity

D.H.’s last argument on appeal was based on S.H.’s ‘unclean hands’ in this case. D.H. argued in his reply brief on appeal that S.H., a lawyer, told D.H. he did not need a lawyer or a written agreement that they would be co-parents of any children born of the insemination. He also asserted S.H.’s conduct violated her ethical duties as an attorney. The Kansas Supreme Court pointed out that D.H.’s equity claim was not raised in the lower court or in his opening appellate brief, and thus it was not preserved for appeal. In addition, the court stated it was prevented from dealing with this issue because D.H. did not have any evidence in the record to support his claims of S.H.’s deceit. In the lower court, D.H. only alleged he and S.H. had an oral agreement and he tried to provide support, not that S.H. deliberately deceived him. Although the court conceded

¹⁰⁹ *Ibid.* (emphasis in original).

¹¹⁰ *Ibid.*, p. 1043.

there might be a case in the future in which a donor could prove deliberate concealment of the sperm donor statute, or fraudulent inducement not to obtain legal advice or not to enter into a written agreement, D.H. failed to allege and prove these facts. In the absence of these facts, D.H.'s ignorance of the sperm donor statute would not excuse him from its application. Consequently, based on the language of the Kansas sperm donor statute, D.H. was not a birth father and had no parental rights.

6.10. Concurring opinion

Justice McFarland concurred in the court's decision. She noted the sperm donor statute was very specific in its language. She viewed the statute as allowing a woman to be a true 'single parent' regardless of whether she used sperm from an anonymous or a known donor. The statute 'appears to be aimed at protecting both parties from unwanted duties and/or obligations being imposed without their consent in the very limited factual situation to which it applies.'¹¹¹ Justice McFarland also noted, however, that she agreed with the majority 'that some factual situation might result in the statutory bar [against the donor becoming a legal parent] being held inapplicable under those specific facts.'¹¹²

6.11. Dissenting opinions

There were two dissents in the *K.M.H.* case, by Judge Caplinger and Judge Hill, both members of the Kansas Court of Appeals, who were appointed to sit with the Supreme Court on this case. These judges found the sperm donor statute was unconstitutional as applied to D.H. because it violated his fundamental rights without due process of law.

Judge Caplinger objected to the majority's finding that due process was satisfied by the written agreement requirement and it was D.H.'s inaction in not getting a written agreement, before he donated his sperm, which resulted in him not having legal parentage. According to Judge Caplinger, '[t]herein lies the constitutional problem with the statute. Fundamental rights must be actively waived, rather than passively lost due to inaction.'¹¹³ Judge Caplinger cited the United States Supreme Court, stating courts must 'indulge every reasonable presumption against waiver of constitutional rights',¹¹⁴ requiring instead that a waiver must be 'an intentional relinquishment or abandonment of a known right or privilege.'¹¹⁵ Because the Kansas sperm donor statute allowed a known donor to waive his fundamental right to parent through his 'inaction,' Judge Caplinger did not find the 'escape clause' of a written agreement saved the statute from violating due process.¹¹⁶

In addition, Judge Caplinger disagreed with the majority's position that 'ignorance of the law is no excuse.' In particular, she focused on the *Lehr* case by noting it involved the issue of whether the New York putative father registry protected a biological father's opportunity to form a relationship with his child. The United States Supreme Court found that the registry provided sufficient due process protections for a biological father in the context of an adoption, where an adoptive father 'was ready, willing and able to assume the responsibilities of parenthood'¹¹⁷ and a previously absent biological father was attempting to block the adoption. In contrast, D.H. was

111 *Ibid.*, p. 1045 (McFarland, C.J., concurring).

112 *Ibid.*, p. 1046 (McFarland, C.J., concurring).

113 *Ibid.*, (Caplinger, J., dissenting).

114 *Johnson v. Zerbst*, 304 US 458, p. 464 (1938).

115 *Ibid.*

116 *K.M.H.*, 169 P.3d, pp. 1047-1048 (Caplinger, J., dissenting).

117 *Ibid.*, p. 1049 (Caplinger, J., dissenting).

not competing with a non-biological father figure after having failed to come forward. Instead he was attempting to participate, emotionally and financially, in raising his children. Because the record disclosed that D.H. was unaware of the sperm donor statute and its requirement that he enter into a written agreement with the mother in order to have rights as a legal parent, Judge Caplinger stated she ‘would find the statute’s requirement that a known sperm donor affirmatively take action to preserve his fundamental rights to parent constituted a violation of due process as applied to D.H.’¹¹⁸

Judge Caplinger also was not persuaded by the majority’s position that the statutory requirement of a written agreement acknowledging the donor as a legal father enhanced predictability, clarity and enforceability. Although she acknowledged the Kansas sperm donor statute provided an efficient means to reject paternity claims, she pointed out it must, nonetheless, meet due process requirements. According to Judge Caplinger, in the case of a known sperm donor and an unmarried woman, due process would require the sperm donor be given ‘the opportunity for a hearing to establish his intent to be something other than a sperm “donor” – *i.e.* to establish his paternity and rights as a parent. Simply stated, I would find the statute’s clarity does not justify its constitutional violation.’¹¹⁹

In addition, Judge Caplinger noted S.H.’s original CINC petitions could be perceived as supporting D.H.’s position that the parties had an agreement to co-parent the children. For example, S.H. filed the CINC petitions alleging D.H.’s parental rights should be terminated because, among other things, he failed to provide prenatal emotional and financial support, thereby implying S.H. expected D.H. to be more than a mere sperm donor. S.H. also did not mention the sperm donor statute at all in her original filings, which also could support D.H.’s version of the facts. It was over two weeks later, when S.H. filed amended CINC petitions, that she raised the sperm donor statute for the first time. Based on these facts, Judge Caplinger would remand the case to the district court for a hearing on the intention of the parties at the time D.H. donated his sperm. If the trial court were to find, on remand, the parties had an oral agreement that D.H. would co-parent the children, then Judge Caplinger would hold the sperm donor statute did not apply to D.H. and D.H. could proceed with his parentage action.

Judge Hill dissented in order to raise an additional concern he had with the Kansas sperm donor statute. Not only did he find the statute unconstitutional as applied to D.H., but he also objected to the statute because it cut off the ability of the court to determine the best interests of the children when a donor attempted to assert parental rights. ‘None of the elaborate and meticulous safeguards our Kansas law afford parents *and children* in proceedings before our courts when confronted with questions of parentage have been extended to these children.’¹²⁰ Judge Hill believed the Kansas sperm donor statute fits the Ohio court’s assessment of its sperm donor statute – when a donor and the mother have an oral agreement that the donor will be a legal parent, but the sperm donor statute absolutely extinguishes a father’s efforts to assert his parental rights, the statute ‘runs contrary to due process safeguards.’¹²¹

118 *Ibid.*, pp. 1049-1050 (Caplinger, J., dissenting).

119 *Ibid.*, p. 1050 (Caplinger, J., dissenting).

120 *Ibid.*, p. 1051 (Hill, J., dissenting) (emphasis in original).

121 *C.O. v. W.S.*, 64 Ohio Misc. 2d 9 p.12, 639 N.E.2d 523, p.524 (1994). (citing *Lehr v. Robertson*, 463 US 248 (1983)).

7. The significance of the known sperm donor cases in *K.M.H.*

One can readily recognize D.H.'s arguments in the *K.M.H.* case, based on the previous cases dealing with known sperm donors attempting to gain parental rights when an unmarried woman was inseminated with their sperm. D.H. was asserting the statute should not apply to a known sperm donor, if the parties had an oral agreement at the time of insemination, that the sperm donor would be a parent to the children conceived from his sperm, similar to *C.M.*, *R.C.*, *McIntyre*, *C.O.* and *Steven S.* D.H. also was arguing the specific statutory requirements setting out how the semen was to be provided for insemination, by examining the language 'provided to a licensed physician' as was done in the *Jhordan C.*, *Thomas S.* and *Steven S.* cases. He also asserted constitutional questions that were raised in *R.C.*,¹²² *McIntyre* and *C.O.* In addition, D.H. argued the general provisions of parentage statutes should be read to allow him to assert his parentage claim, similar to the sperm donors' arguments in the two Texas cases, *In re Sullivan* and *In re H.C.S.* Finally, D.H. argued equity and esptoppel, as was done in the *Thomas S.* and *Tripp* cases.

The problem, however, is the Kansas statute has one significant difference, setting it apart from the statutes in the previous cases. The Kansas statute states a sperm donor is not the birth father 'unless agreed to in writing by the donor and the woman.' This one clause significantly changes the nature of the arguments made in the prior cases, particularly those cases that found the sperm donor statutes did not apply to the parties because the parties had an oral agreement the sperm donor would be a legal parent. Because the Kansas statute requires a written agreement to that effect, it is difficult to argue that only an oral agreement is required.

The significance of D.H. relying on the presence of an oral agreement, however, is not fully understood until he alleges in his reply brief the facts surrounding the formation of the oral agreement. There D.H. asserted for the first time he relied on S.H. being an attorney, that she knew the law required him to have a written agreement to be considered the birth father and she entered into an oral agreement instead, because she 'knew that she could obtain the sperm and be safe from [D.H.] if he asserted claims.'¹²³ Even more specific was the affidavit D.H. unsuccessfully attempted to submit with his Motion for Re-Hearing, after the Kansas Supreme Court ruled against him. In this affidavit D.H. stated S.H. told him it was not necessary to consult an attorney about their co-parenting agreement, because S.H., herself, was an attorney, and oral contracts were binding in Kansas. It is only when one understands this context that D.H.'s insistence on the presence of an oral agreement between the parties becomes significant and the argument makes sense. For D.H., however, his assertion of these surrounding facts comes far too late. If he had asserted these facts and provided evidence to support his allegations at the lower court level, it appears the majority opinion might have decided the case in his favor.¹²⁴

122 Although the sperm donor, J.R., challenged the constitutionality of the Colorado sperm donor statute, the Colorado Supreme Court did not decide the case on that issue. See *In re R.C.*, 775 P.2d 27 (Colo. 1989).

123 Corrected Reply Brief of Appellant p. 3, *In re K.M.H.*, 169 P.3d 1025 (Kan. 2007).

124 'There may be a case in the future in which a donor can prove that the existence of K.S.A. 38-1114(f) was concealed, or that he was fraudulently induced *not* to obtain independent legal advice or *not* to enter into a written agreement to ensure creation and preservation of his parental rights to a child conceived by artificial insemination. This is not such a case.' *K.M.H.*, 169 P.3d . p. 1044 (emphasis in original).

8. Known sperm donor cases decided after *K.M.H.*

After the decision in *K.M.H.*, two more cases have dealt with the issue of whether a known sperm donor is a legal parent.¹²⁵ The first case in Ohio, *In re R.A.S.*,¹²⁶ involved the mother, V.S., asking J.M., a person she knew through her employment, if he would donate sperm so she could have a child. V.S. alleged the parties had an oral agreement that J.M. would be considered a ‘friend’ or ‘uncle’ to the child. Before the child was born, however, J.M. changed his mind and told V.S. he wanted to be the child’s father. Shortly after the child was born, J.M. filed a parentage action in the juvenile court. The juvenile court magistrate adjudicated J.M. as the natural father of R.A.S., based on paternity tests, and ordered a new birth certificate and birth record be issued, indicating J.M. was R.A.S.’s father. The parties were given 14 days to file written objections to the juvenile court’s adjudication, but neither party filed any objections.

Some time later at a hearing on the issue of visitation, V.S. raised for the first time the Ohio sperm donor statute, alleging the statute precluded J.M. from being the child’s natural parent. The magistrate ruled against the mother because she failed to present evidence of the method of insemination, noting the previous Ohio case of *C.O.* The magistrate also determined, based on the *C.O.* case, the sperm donor statute did not apply to a known sperm donor. This finding was affirmed by the juvenile court judge, who also noted the parties failed to comply with the statutory requirement that a physician perform the insemination. The appellate court not only agreed with the magistrate and the juvenile court judge, but, in addition, held the mother was foreclosed from raising the sperm donor statute, in a hearing on visitation, after a final order granting parental rights to J.M. had become effective.

In adding this case to the synthesis of the previous cases involving known sperm donors, this decision is very similar to *Tripp v. Hinckley*.¹²⁷ In both cases, the parties had an oral agreement at the time of insemination that the donor would not be a legal parent. However, in both cases the mothers allowed, without timely objection, the filing of documents establishing the donor’s status as a legal parent.

The second case decided after *K.M.H.* was *Browne v. D’Alleva*,¹²⁸ in the state of Connecticut. As in many of the previous cases, the donor agreed to provide sperm to the mother, but the parties later disagreed about the terms of the oral agreement they entered into prior to the insemination. The mother, Ms. D’Alleva, alleged she agreed with the donor, Mr. Browne, that she and her female partner would adopt any children born of the insemination and Mr. Browne and his male partner would have ‘a role as secondary or “fun parents”’.¹²⁹ Mr. Browne, however, claimed the parties agreed he would be a legal guardian and have ‘a permanent and significant role’ in the lives of any children born from his sperm. When the parties went to the health center where the insemination took place, Mr. Browne signed a standard form, stating he gave up ‘all rights and claims’ to any children born of his sperm.

When a child was born to Ms. D’Alleva, she signed an acknowledgement of paternity and Mr. Browne was listed as the child’s father on the birth certificate. Mr. Browne later filed an

¹²⁵ There was one other case that involved a known sperm donor, *Ferguson v. McKiernan*, 2007 WL 4555437 (Penn.). This case is distinguishable for the other known sperm donor cases, however, because Pennsylvania does not have a sperm donor statute, the case involved IVF rather than AID and the mother was married to another man at the time of the IVF procedure. The mother was seeking child support after five years of honoring the parties oral agreement that the sperm donor would not be treated as the legal father and he was released of any obligation of support.

¹²⁶ 2007 WL 4146828 (Ohio. App. 12 Dist.).

¹²⁷ 736 N.Y.S.2d 506 (App. Div. 2002).

¹²⁸ 2007 Conn. Super. LEXIS 3250.

¹²⁹ *Ibid.*, p. *2.

action for custody and access to the child. Ms. D'Alleva responded with a motion to dismiss the action, based on the Connecticut sperm donor statute, asserting Mr. Browne lacked standing to bring the custody action. The sperm donor statute stated a 'donor of sperm used in AID, or any person claiming through him, shall not have any right or interest in any child born as a result of AID.'¹³⁰

The Connecticut court relied on the *K.M.H.* court's analysis of several of the known sperm donor cases. Although the court noted these cases were not 'dispositive,'¹³¹ it applied some of the rationale found in the various cases. First, the court pointed out the sperm donor statute was not clear and unambiguous, finding the language did not address known sperm donors and unmarried women, particularly because the statute was enacted in 1970 when 'it was not envisioned by our legislatures that the statute would apply to this unique fact situation.'¹³² Thus the court held the statute only applied to married couples, based on the intent of the legislature at the time of enactment. Second, the court noted that even if the statute were to cover a known sperm donor, it would violate the donor's due process rights if the effect of the statute was to cut off the donor's standing in a case in which he alleged he had an oral agreement with the mother to be a parent.

Based on these two rationales, the Connecticut case could be viewed as relying on the earlier known sperm donor cases, where the sperm donors were allowed to assert parentage rights when there was a dispute between the donor and the mother concerning the nature of the parties' oral agreement. However, the case has one more factor that is more compelling than the similarities with these earlier cases. In this case the mother signed an acknowledgement of paternity, naming Mr. Browne as the child's father. Under Connecticut law, a written acknowledgement of paternity 'has the same force and effect as a judgment of a court.'¹³³ It was this factor 'in particular'¹³⁴ that resulted in the court determining Mr. Browne, as a legal parent, had standing to apply for joint custody and visitation with the child. Consequently, similar to the facts in the *Tripp* and *R.A.S.* cases,¹³⁵ once a mother participated in the creation of documents that established the donor as a legal parent, all other facts become irrelevant, including the fact she was ignorant of the operation of the law and did not intend that result.

9. Conclusion

An examination of the known sperm donor cases reveals discernable trends in the US law, particularly among the most recently decided cases. In these cases, the courts applied the language of the sperm donor statutes if the statutory language was unambiguous and the legislature contemplated the possibility of a known sperm donor providing sperm to an unmarried woman. If the parties had an oral agreement that differed from the clear language of the sperm donor statute, the more recent court decisions have not allowed that agreement to override the application of the statute, unlike the earlier sperm donor cases. And, if the parties had a written agreement, the terms of which complemented the language of the sperm donor statute, courts have enforced the written agreement. Finally, although several recent cases appeared, at first blush, to have fallen back on the holdings of the earlier cases, where a sperm donor was able to

130 Conn. Gen. Stat. §45a-775 (2004).

131 *Browne v. D'Alleva*, 2007 Conn. Super. LEXIS 3250. p. *47.

132 *Ibid.*

133 *Ibid.*, p. *49 (citing *Bleidner v. Searles*, 561 A.2d 954 (Conn. App. Ct. 1989)).

134 *Ibid.*, p. *50.

135 *Tripp v. Hinckley*, 736 N.Y.S.2d 506 (App. Div. 2002), *In re R.A.S.*, 2007 WL 4146828 (Ohio. App. 12 Dist.).

avoid the application of the sperm donor statute by asserting he had an oral agreement with the mother that he would be a legal parent, these cases ultimately turned on the mothers participating in the creation of legal documents that irrevocably established the donor as a legal parent.

K.M.H. is clearly aligned with the recent trends in the US cases. The Kansas case was unique because it was the first case to deal with a statute that specifically allowed a sperm donor to become a legal parent – if the sperm donor had a written agreement, he would fall squarely within the language of the sperm donor statute and his parental rights would be secured. Similar to the later sperm donor cases, the Kansas Supreme Court applied the plain meaning of the statute when the sperm donor, D.H., attempted to assert the terms of an oral agreement giving him parental rights. The clear language of the statute, however, prevented him from being able to raise that issue. In addition, because D.H. had the opportunity to become a legal parent through the operation of a written agreement, the statute also withstood his constitutional challenge based on due process. Ultimately D.H. found himself in the same situation as the mothers who were not allowed to argue that they did not intend to give sperm donors equal parental rights when they acquiesced in, or acknowledged, paternity – their ignorance of the law did not prevent it from taking effect. Unlike these mothers, however, who found themselves sharing their children with unintended co-parents, D.H. found he did not have any children at all. Perhaps this is the ultimate question that legislators should consider when drafting statutes that add or subtract potential legal parents – what will be the law’s impact on all interested parties when individuals continually create children through assisted reproduction, completely ignorant of the law and its consequences?