

# Lesbian ART\*

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## I. Introduction

The structure of the American family is changing.<sup>1</sup> Over the past twenty years, “alternative” families have become more common and more pronounced in our society.<sup>2</sup> What was once thought of as the American norm, a married couple with their own children, is now a shrinking minority.<sup>3</sup> In 1970, the “traditional” nuclear family (consisting of a married couple and their biological or adopted children) was the most common family structure, comprising more than forty percent of all families.<sup>4</sup> By 1994, fewer than twenty-six percent of all households consisted of this type of family.<sup>5</sup> With the decrease in the popularity of the traditional

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\* ART is an acronym for Assisted Reproductive Technology. There are many methods of assisted conception. See generally D. KELLY WEISBERG & SUSAN FRELICH APPLETON, MODERN FAMILY LAW 1207-59 (1998) (discussing alternatives to adoption such as artificial insemination, surrogacy, in vitro fertilization, and embryo transplantation). For the purposes of this Note, ART refers to artificial insemination.

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1. See James R. Robinson, *Untangling the “Loose Threads”: Equitable Adoption, Equitable Legitimation, and Inheritance in Extralegal Family Arrangements*, 48 EMORY L.J. 943, 943 (1999).

2. See *id.* Television reflects the change in popular culture. In an earlier era, popular television programs such as *Leave it to Beaver* (CBS & ABC, 1957-1963) and *Father Knows Best* (CBS & NBC, 1954-1962) depicted traditional nuclear families. However, the Beaver Cleaver family is no longer the norm. See *infra* notes 3-9 and accompanying text. Today, modern ideas of family are reflected in television plots including: a single father sharing custody of his son with his ex-wife (the mother) and her lesbian partner, see *Friends* (NBC, premiered 1994); divorced parents sharing custody of their son by regularly flying him cross-country, see *Frasier* (NBC, premiered 1993); and a child having “two daddies,” which is viewed by his playmates as “a dude’s paradise,” see *Malcolm in the Middle* (Fox, premiered 2000).

3. See STEVE W. RAWLINGS & ARLENE F. SALUTER, U.S. DEP’T OF COMMERCE, NO. P20-483, HOUSEHOLD AND FAMILY CHARACTERISTICS: MARCH 1994, at vii (1995).

4. See *id.*

5. See *id.*

family structure, a rise has occurred in the number of nonfamilies and other types of families, such as co-habiting partners (both opposite-sex and same-sex couples) and lesbian- and gay-parented families.<sup>6</sup> In 1970, 523,000 households were headed by an unmarried couple.<sup>7</sup> In 1998, that number had climbed to 5,911,000.<sup>8</sup> Of these, 1,674,000 (over twenty-five percent) were headed by two unrelated adults of the same sex, and 167,000 of those had children under age fifteen.<sup>9</sup>

The courts have already recognized that this change in family structure requires changes in the laws governing families.<sup>10</sup> Unfortunately, state legislatures have been slow to act on the subject. While there has been a recent movement by the National Conference of Commissioners on Uniform State Laws (hereinafter "NCCUSL") to address current parenting issues,<sup>11</sup> the Uniform Parentage Act (UPA) drafted by NCCUSL in 1973 is still the most

6. *See id.* The Census Bureau defines "family" as a group of two or more people living together and related by birth, marriage, or adoption. *See id.* at B-2. Though the Census Bureau does not define "nonfamily," this Note will assume it is a household consisting of people not related by birth, marriage or adoption.

7. *See* U.S. DEPT OF COMMERCE, UNMARRIED-COUPLE HOUSEHOLDS, BY PRESENCE OF CHILDREN: 1960 TO PRESENT, at <http://www.census.gov/population/socdemo/ms-la/tabad-2.txt> (Jan. 7, 1999) (citing TERRY A. LUGAILA, U.S. DEPT OF COMMERCE, NO. P20-514, MARITAL STATUS AND LIVING ARRANGEMENTS: MARCH 1998 (UPDATE) (1998) and earlier reports; U.S. DEPT OF COMMERCE, 1970 CENSUS OF THE POPULATION, NO. PC(2)-4B, PERSONS BY FAMILY CHARACTERISTICS tbl.11 (1970)).

8. *See* TERRY A. LUGAILA, U.S. DEPT OF COMMERCE, NO. P20-514, MARITAL STATUS AND LIVING ARRANGEMENTS: MARCH 1998 (UPDATE) 71 tbl.8 *Households with Two Unrelated Adults, by Marital Status, Age, and Sex: March 1998* (1998), at <http://www.census.gov/population/www/socdemo/ms-la.html>.

9. *See id.* There are no statistics from the 1970 census that reveal how many households were headed by same-sex couples.

10. *See, e.g.,* Kathleen C. v. Lisa W., 84 Cal. Rptr. 2d 48, 50 (Ct. App. 1999) (stating that the court's hands are tied without legislative action on the matter); *In re R.C., Minor Child*, 775 P.2d 27, 29 (Colo. 1989) (citing commentary regarding the flaws of section 5 of the UNIF. PARENTAGE ACT, 9B U.L.A. 287 (1973)); Thomas S. v. Robin Y., 618 N.Y.S.2d 356, 361 (App. Div. 1994) ("While the question of the respective rights of a gay life partner vis-à-vis a biological parent presents a timely issue for consideration . . . reform of the Domestic Relations Law § 111 is exclusively the province of the Legislature."); McIntyre v. Crouch, 780 P.2d 239, 243 (Or. Ct. App. 1989) ("We cannot rewrite the act.").

11. *See* UNIF. PUTATIVE AND UNKNOWN FATHERS ACT (UPUFA), 9B U.L.A. 98 (1998 & Supp. 2000) (addressing late claims of paternity); UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT (USCACA), 9B U.L.A. 199 (1998 & Supp. 2000). Neither of these laws has been widely adopted by the states. To date, no state has adopted the UPUFA, and only two states have adopted the USCACA. *See* N.D. CENT. CODE §§ 14-18-01 to 14-18-07 (1999); VA. CODE ANN. §§ 20-156 to 20-165 (1999).

widely used uniform law. Eighteen states currently follow the Uniform Parentage Act.<sup>12</sup>

The UPA has not been revised in its twenty-seven years of existence, despite the changes in family structure, demographics, and reproductive technologies. As a result, it perpetuates significant problems regarding custody and visitation rights, particularly as applied to same-sex parents. In light of the modern family structure and accompanying legal issues, it is time that the UPA legally recognize same-sex parents, and thus create legal certainty for these families. One particular recurring problem arises out of the UPA's failure to acknowledge a second parent for children conceived through assisted reproductive technology by a lesbian couple.

While adoption has become a popular means for same-sex couples to begin their families,<sup>13</sup> more and more lesbian couples are seeking to have children through ART.<sup>14</sup> For many lesbian couples, private conception through ART is inexpensive and easy, providing the couple with all the advantages of childbearing: a genetic connection with the child, the experience of pregnancy and childbirth, and a link to society's preconceived notions of womanhood.<sup>15</sup>

This Note focuses on the injustices the UPA creates for lesbian parents and their ART children. It discusses the UPA

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12. See ALA. CODE §§ 26-17-1 to 26-17-22 (1998); CAL. FAM. CODE §§ 7600-7731 (West 1999); COLO. REV. STAT. §§ 19-4-101 to 19-4-130 (1999); DEL. CODE ANN. tit. 13, §§ 801-819 (1998); HAW. REV. STAT. §§ 584-1 to 584-26 (1998); 750 ILL. COMP. STAT. ANN. 45/1.1-45/21.1 (West 1999); KAN. STAT. ANN. §§ 38-1110 to 38-1131 (1993); MINN. STAT. §§ 257.51-.75 (1999); MO. ANN. STAT. §§ 210.817-.852 (West 1999); MONT. CODE ANN. §§ 40-6-101 to 40-6-135 (1999); NEV. REV. STAT. ANN. §§ 126.011-.371 (Michie 1999); N.J. STAT. ANN. §§ 9:17-38 to 9:17-59 (West 1999); N.M. STAT. ANN. §§ 40-11-1 to 40-11-23 (Michie 1999); N.D. CENT. CODE §§ 14-17-01 to 14-17-26 (1999); OHIO REV. CODE ANN. §§ 3111.01-.19 (West 1999); R.I. GEN. LAWS §§ 15-8-1 to 15-8-27 (1999); WASH. REV. CODE ANN. §§ 26.26.010-.905 (West 1999); WYO. STAT. ANN. §§ 14-2-101 to 14-2-120 (Michie 1999).

13. See Karla J. Starr, *Adoption by Homosexuals: A Look at Differing State Court Opinions*, 40 ARIZ. L. REV. 1497, 1497 (1998) (citing as an example *In re the Adoption of Two Children* by H.N.R., 666 A.2d 535, 536 (N.J. Super. Ct. App. Div. 1995)).

14. See Holly J. Harlow, *Paternalism Without Paternity: Discrimination Against Single Women Seeking Artificial Insemination by Donor*, 6 S. CAL. REV. L. & WOMEN'S STUD. 173, 183 (1996); Kyle C. Velte, *Egging on Lesbian Maternity: The Legal Implications of Tri-Gametic In Vitro Fertilization*, 7 AM. U. J. GENDER SOC. POL'Y & L. 431, 436 (1999).

15. See Harlow, *supra* note 16, at 184. What have come to be known as "baster babies" can be conceived in the privacy of one's own home for no cost. See *id.* at 179 (citing Daniel Wikler & Norma J. Wikler, *Turkey-baster Babies: The Demedicalization of Artificial Insemination*, 69 MILBANK Q. 5 (1991)). All that is required to perform the procedure is a willing sperm donor, a turkey baster and a woman ready to become impregnated. See *id.*

generally, focusing on certain provisions that are especially problematic: those that cause courts to disregard the best interests of the children and the rights of their mothers in deciding custody and visitation issues.<sup>16</sup> It then describes NCCUSL's proposed revisions to the UPA drafted during the fall of 1999;<sup>17</sup> analyzes case law under the current UPA; and predicts the effects the proposed revisions may have.<sup>18</sup> This Note concludes by proposing that NCCUSL could equitably solve most of the problems faced by courts applying the UPA today by creating an intent-based standard in determining the legal parentage of ART children.<sup>19</sup>

## II. Background

The UPA does not recognize the possibility of unmarried motherhood-by-choice.<sup>20</sup> The UPA was not written to address situations in which the mother of a child wished to be the sole parent or co-parent with a person other than the biological father. To the contrary, it was written to address the problems faced by unmarried mothers-by-accident who are often left to face the parental responsibilities and financial burdens of child rearing alone.<sup>21</sup> As a result, states that have adopted the UPA, as well as those that have not, base their laws on one set of assumptions about all unmarried mothers, consistently adhering to the policy goal that "a child be provided with a father as well as a mother."<sup>22</sup> These assumptions have led to two major consequences for unmarried women, particularly lesbians, who choose to have children through ART. One is that the sperm donor may later return and declare paternity rights.<sup>23</sup> Another is that the non-

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16. See *infra* notes 38-60 and accompanying text.

17. See UNIF. PARENTAGE ACT Prefatory Note (Proposed Revisions 1999), at <http://www.law.upenn.edu/library/ulc/upa/upa1099.htm> (Oct. 1999).

18. See *infra* notes 121-235 and accompanying text.

19. See *infra* notes 236-237 and accompanying text.

20. See UNIF. PARENTAGE ACT Prefatory Note, 9B U.L.A. 288 (1973); Carol A. Donovan, *The Uniform Parentage Act and Nonmarital Motherhood-by-Choice*, 11 N.Y.U. REV. L. & SOC. CHANGE 193, 207 (1983). In her article, Donovan coins the terms "unmarried mother-by-choice" as opposed to the oft-presumed "unmarried mother-by-accident." See *id.* at 193.

21. See UNIF. PARENTAGE ACT Prefatory Note, 9B U.L.A. 287-90 (1973); Donovan, *supra* note 20, at 193-94.

22. *C.M. v. C.C.*, 377 A.2d 821, 824 (Juv. Dom. Rel. Ct. Cumberland County, N.J. 1977).

23. See, e.g., *Jhordan C. v. Mary K.*, 224 Cal. Rptr. 530, 533-35, 537-38 (Ct. App. 1986) (declaring the sperm donor to be the legal father when semen was given directly to mother rather than to physician); *Thomas S. v. Robin Y.*, 618 N.Y.S.2d 356, 362 (N.Y. App. Div. 1994) (reversing lower court's denial of parental rights to

biological mother in a lesbian couple may lose all rights to the children should the couple ever separate.<sup>24</sup>

### A. *The Uniform Parentage Act*

In 1973, when the UPA was written, many state laws governing nonmarital children had recently been subjected to constitutional scrutiny by the Supreme Court.<sup>25</sup> In 1972, the Court declared that discrimination based on the "status of illegitimacy" is both "illogical and unjust."<sup>26</sup> At the time, fighting for the equal rights of nonmarital children seemed to be a novel idea.<sup>27</sup> Since many states' laws perpetuated this type of discrimination,<sup>28</sup> a new set of acts was needed to replace those that would surely be declared unconstitutional when challenged. In 1973, NCCUSL drafted the UPA to resolve the legal issues surrounding nonmarital children.<sup>29</sup> These issues include rights of intestate succession, financial support obligations, and custody and visitation rights.<sup>30</sup> Since the Supreme Court had already declared constitutional equality for nonmarital children, NCCUSL focused its drafting efforts on identifying the person "against whom these rights may be asserted."<sup>31</sup>

sperm donor, when he was known to the child as her father).

24. See, e.g., *Nancy S. v. Michele G.*, 279 Cal. Rptr. 212, 214-19 (Ct. App. 1991) (awarding sole legal custody to the biological mother); *Alison D. v. Virginia M.*, 572 N.E.2d 27, 28 (N.Y. 1991) (denying visitation rights to former partner who was a "biological stranger" to the child, even though the couple had agreed to raise the child together). Though the non-biological mother may legally adopt the child, this option is available only in those states that allow adoption by stepparents. Stepparent adoption allows a second parent to adopt a child without the biological parent losing legal recognition as a parent. See generally *Julia Frost Davies, Two Moms and a Baby: Protecting the Nontraditional Family Through Second Parent Adoption*, 29 NEW ENG. L. REV. 1055, 1055-78 (1995) (examining the legal obstacles to lesbian co-parent adoption). Another legal hurdle for lesbian couples is that some states do not allow adoption by homosexuals. See *infra* note 67.

25. See UNIF. PARENTAGE ACT Prefatory Note, 9B U.L.A. 287-90 (1973).

26. *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972), quoted in UNIF. PARENTAGE ACT Prefatory Note, 9B U.L.A. 288 (1973).

27. See UNIF. PARENTAGE ACT Prefatory Note, 9B U.L.A. 288 (1973).

28. See *id.* at 287-90.

29. See *id.*

30. See, e.g., *Levy v. Louisiana*, 391 U.S. 68, 70 (1968) (declaring that "illegitimate" children are "persons" within the meaning of the Equal Protection Clause of the Fourteenth Amendment," and therefore cannot be denied standing to sue for the wrongful death of their mother). The Louisiana Court of Appeals had held that "child" in the state laws meant only "legitimate child." *Id.* This Note focuses on the legal issues of determining who an ART child's legal parents are for the purposes of custody and visitation rights, but it should be noted that establishing a legal parent-child relationship implicates many legal consequences. See *Mary Louise Fellows et al., Committed Partners and Inheritance: An Empirical Study*, 16 LAW & INEQ. 1, 35-40 (1998).

31. UNIF. PARENTAGE ACT Prefatory Note, 9B U.L.A. 289 (1973).

In its entirety, the UPA creates a set of presumptions to determine the parentage of a child.<sup>32</sup> For example, section 4 creates the presumption that a married woman's husband is the father of any children born during their marriage.<sup>33</sup> The UPA governs who may bring an action to establish paternity,<sup>34</sup> when and where such an action may be brought,<sup>35</sup> who is to be party to such an action.<sup>36</sup> It also establishes a set of presumptions to determine the parentage of an ART child.<sup>37</sup>

### B. Section 5 of the UPA

The UPA devotes only one section, section 5, to conception through ART.<sup>38</sup> The comment following UPA section 5 admits that "[t]his Act does not deal with many complex and serious legal

32. See *supra* notes 20-31 and accompanying text; *infra* notes 33-60 and accompanying text.

33. See UNIF. PARENTAGE ACT § 4, 9B U.L.A. 298 (1973). Though this provision may seem superfluous to many, it has been relied upon in litigation. See, e.g., *Miller v. Sybouts*, 645 P.2d 1082, 1084 (Wash. 1982) (presuming the ex-husband to be the father of the child when it was born after the couple divorced, but within the 300-day time limit imposed by the UPA), noted in UNIF. PARENTAGE ACT notes of decs., 9B U.L.A. 300 (1973).

34. See UNIF. PARENTAGE ACT § 6, 9B U.L.A. 302 (1973) (stating that a child, his or her natural mother, the putative father or any interested party may bring an action to establish paternity).

35. See *id.* § 7, at 306 (dictating that an action must be brought within three years of the birth of a child if brought by someone other than the child; if the child brings the action, the statute of limitations expires three years after the child has reached the age of majority); see also *id.* § 8, at 309-10 (establishing that an action may be brought in the state where the child was conceived).

36. See *id.* § 9, at 312 (requiring that the child, the mother and every presumed or alleged father must be made party to the action).

37. See *id.* § 5, at 301; see also *infra* notes 38-39 and accompanying text (providing text of § 5 and citing authorities that discuss the presumptions).

38. Section 5 of the Uniform Parentage Act reads in its entirety:

#### § 5. [Artificial Insemination]

(a) If, under the supervision of a licensed physician and with the consent of her husband, a wife is inseminated artificially with semen donated by a man not her husband, the husband is treated in law as if he were the natural father of a child thereby conceived. The husband's consent must be in writing and signed by him and his wife. The physician shall certify their signatures and the date of the insemination, and file the husband's consent with the [State Department of Health], where it shall be kept confidential and in a sealed file. However, the physician's failure to do so does not affect the father and child relationship. All papers and records pertaining to the insemination, whether part of the permanent record of a court or of a file held by the supervising physician or elsewhere, are subject to inspection only upon an order of the court for good cause shown.

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

UNIF. PARENTAGE ACT § 5, 9B U.L.A. 301 (1973).

problems raised by the practice of artificial insemination.”<sup>39</sup> In fact, the UPA not only ignores many legal problems faced by women seeking ART, but also creates additional ones.<sup>40</sup>

Provision (a) of section 5 addresses the issue of establishing a legal parent-child relationship between the intended father and an ART child rather than legally recognizing the sperm donor as the father.<sup>41</sup> The provision allows paternity to be established between the intended father and his ART child if a licensed physician supervises the insemination and verifies that the husband consented to the procedure.<sup>42</sup> The intended father in these cases is necessarily the husband since the UPA contemplates ART only for married women.<sup>43</sup> If the physician fails to fulfill her or his statutory obligations, the UPA states that this cannot affect the parent-child relationship otherwise established.<sup>44</sup> In other words, the intended father is still the legal father of the child even if the physician does not fulfill her or his obligation under the UPA.

Some states following the UPA have omitted the word “married” as a qualifier from provision (a).<sup>45</sup> To date, this omission has not been a benefit to the interests of unmarried women who conceive through ART.<sup>46</sup> While courts have read the omission to signify that unmarried women are not proscribed from ART, no state has interpreted it to mean that they receive the same protections under the statute as married women do.<sup>47</sup>

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39. *Id.* at 302; see also *In re R.C., Minor Child*, 775 P.2d 27, 30 (Colo. 1989) (acknowledging that the UPA, which was adopted in Colorado, does not address all the questions concerning ART); Denise S. Kaiser, *Artificial Insemination: Donor Rights in Situations Involving Unmarried Recipients*, 26 J. FAM. L. 793, 796 (1987/88) (“The proposed AID [artificial insemination by donor other than husband] section of the UPA is sketchy overall, and is silent as to what its application would be for an unmarried woman.”).

40. See *infra* notes 109-212 and accompanying text.

41. See UNIF. PARENTAGE ACT § 5, 9B U.L.A. 301 (1973).

42. See *id.*

43. See *id.*

44. See *id.*

45. See, e.g., CAL. FAM. CODE §§ 7600-7730 (West 2000) (codifying the UPA but omitting the word “married” from the artificial insemination section); COLO. REV. STAT. §§ 19-4-101 to 19-4-130 (1999) (same); N.M. STAT. ANN. §§ 40-11-1 to 40-11-23 (Michie 1999) (same).

46. See *infra* note 47 and accompanying text.

47. See, e.g., *In re R.C., Minor Child*, 775 P.2d 27, 30 (Colo. 1989) (noticing that the word “married” is omitted from Colorado’s version of the UPA). Here, the court interpreted the omission to mean that in the case of married women, the “legal rights and duties of fatherhood [shall be] borne by the recipient’s husband rather than the donor.” *Id.* at 30. The court does not address the effect this omission has on unmarried women. See *id.*; see also *Jhordan C. v. Mary K.*, 224 Cal. Rptr. 530, 534 (Ct. App. 1986) (noticing that California has also omitted the word “married” from its codification of the UPA). In *Jhordan C.*, the court interpreted this to mean that the statute can apply to unmarried women, thus precluding a donor’s claim of

Provision (b) of section 5 defines who is *not* the father of an ART child.<sup>48</sup> The provision clearly states that a sperm donor who gives semen to a married woman who is not his wife is not the father of a child so conceived.<sup>49</sup> Unlike provision (a), there is no margin for error. Rather, the clause has two all-important qualifiers. The sperm donor must provide the semen to a *licensed physician* who in turn provides it to a *married woman*.<sup>50</sup> Again, the UPA does not comment on what should happen if the woman is not married or if the sperm donor does not use a physician as an intermediary.<sup>51</sup> As case law demonstrates, neither marriage nor the supervision of a physician is necessary for a woman to successfully conceive a child through ART.<sup>52</sup>

The "licensed physician" requirement<sup>53</sup> and the "married woman" requirement have consequently become particularly problematic. A survey of cases decided under the UPA reveals that the assumption that only married women conceive by ART with the help of a licensed physician is erroneous.<sup>54</sup> Partially because of these requirements and partially because the UPA simply fails to address the possibility of a non-traditional family, a substantial amount of litigation has arisen under this section of the UPA.<sup>55</sup> These issues are especially problematic for lesbian mothers since they cannot legally marry and thereby obtain the protection of the UPA to preclude a claim of paternity.<sup>56</sup>

paternity, as long as the sperm was provided to a licensed physician. *See id.* at 534. For more on this point, see *infra* notes 53-58 and accompanying text.

48. *See id.*

49. *See id.*

50. *See id.* *See generally infra* notes 109-127 and accompanying text (discussing these requirements and the legal ramifications for lesbian partners contemplating ART).

51. *See* UNIF. PARENTAGE ACT § 5, 9B U.L.A. 301 (1973) (failing to address the situations of unmarried women or self-insemination).

52. *See* *Jhordan C. v. Mary K.*, 224 Cal. Rptr. 530 (Ct. App. 1986) (unmarried mother and no physician involvement); *C.M. v. C.C.*, 377 A.2d 821 (Juv. Dom. Rel. Ct. Cumberland County, N.J. 1977) (same); *Alison D. v. Virginia M.*, 572 N.E.2d 27 (N.Y. 1991) (unmarried mother).

53. Though the UPA is not phrased in such a way to state that the presence of a licensed physician is "required," its language does not address the possibility that a physician would not be involved in the procedure. *See* UNIF. PARENTAGE ACT § 5, 9B U.L.A. 301 (1973). Consequently, the courts have read the Act to require the presence of a licensed physician to receive the protections of the presumptions under the UPA. *See, e.g., Jhordan C.*, 224 Cal. Rptr. at 537-38 (holding that because no physician was involved in the procedure, *Jhordan C.* (a known donor) maintained paternity rights even though he would not have been the legal father of the child under the UPA if a physician had been involved).

54. *See infra* notes 109-115 and accompanying text.

55. *See infra* notes 139-168 and accompanying text.

56. *See* Defense of Marriage Act, Pub L. No. 104-199, 110 Stat. 2419 (1996)



Two main types of cases have emerged from the litigation regarding the custody and visitation of ART children of unmarried women. In one type of case, the sperm donor enters the child's life against the will of the mother(s).<sup>57</sup> The courts have consistently granted the sperm donor paternity status, with all of its privileges and obligations.<sup>58</sup> The second type of case, which affects lesbian couples exclusively, arises after the couple breaks up and the non-biological mother brings an action requesting joint custody or visitation.<sup>59</sup> Under the UPA, the non-biological mother has no legal claim to the children; indeed, courts have almost uniformly found that this mother lacks standing to even sue.<sup>60</sup>

### C. *The Latest Developments*

Recently, the courts have begun considering intent when determining parentage in non-traditional families.<sup>61</sup> Although these decisions have been criticized as extreme examples of judicial willfulness, each case has considered the equitable interests involved in reaching its conclusion.<sup>62</sup> This line of cases,

(codified in scattered sections of 1 and 28 U.S.C.) (precluding same-sex marriage as a matter of federal law, thus preempting any state law to the contrary); *see also infra* notes 139-168 and accompanying text (discussing cases in which lesbian mothers have been denied standing as parents).

57. *See infra* notes 139-168 and accompanying text.

58. *See infra* notes 145-182 and accompanying text.

59. *See* UNIF. PARENTAGE ACT § 5, 9B U.L.A. 301 (1973) (failing to address the non-biological mothers' rights in relation to their ART children); GREGORY S. ALEXANDER ET AL., FAMILY PROPERTY LAW 146 (2d ed. 1997) (asserting that under a literal interpretation of the UPA and similar statutes, "if one lesbian partner gives birth to a child as a result of [ART], the other partner isn't treated as that child's parent."); *see also* Curiale v. Reagan, 272 Cal. Rptr. 520, 522 (Ct. App. 1990) (deciding that the non-biological mother has no statutory standing to assert a claim for custody or visitation against the biological mother).

60. *See infra* notes 191-198 and accompanying text.

61. *See In Re McAllister & Subak*, No. FL032006 (Cal. Super., San Fran. Co., May 24, 1999) (unpublished decision), *discussed in California Superior Court Grants Legal Parent Status to Lesbian Couple Prior to Child's Birth*, LESBIAN/GAY LAW NOTES (LeGaL Found. of the Lesbian & Gay Law Ass'n of Greater N.Y.) Summer 1999, at 110. Judge Donna Hitchens granted a petition to declare both mothers in a lesbian couple the parents of their ART child. *See id.* Though this case had especially unique facts (one mother donated her egg, the other carried the fetus to term), Judge Hitchens stated that the intent of the parties was the guiding principle. *See id.*; *see also* R.E.M. v. S.L.V., FD-15-748-98N (N.J., Ocean County Super. Ct., Nov. 2, 1998) (unpublished decision) (granting joint custody to non-biological mother). This case was apparently the first to grant a same-sex co-parent joint custody where the issue was contested. *See* Elizabeth Amon, *Lesbian Ex-Partner Awarded Joint Custody*, 154 N.J.L.J. 433, 433, 440 (Nov. 9, 1998). Judge Vincent Grasso based his decision in part on his finding that both partners intended to parent the child together. *See id.*

62. *See supra* note 61. Another New Jersey judge confronted with a similar set of facts denied custody to the non-biological mother, stating that "[t]here is no basis for the relationship between the plaintiff and defendant to be afforded the same

albeit a minority, provides persuasive precedent demonstrating how courts can and have interpreted existing law so that non-traditional parents and their children receive the legal protection they desire and deserve.

### 1. States Have Begun to Recognize Same-sex Parents Through Legislation.

Under current interpretations of the UPA, it is sometimes possible for lesbian-headed families to protect their rights and their family autonomy even if they have ART children.<sup>63</sup> At least one state that adopted the UPA also adopted subsequent legislation that protects women's autonomy in ART.<sup>64</sup> Other states have allowed same-sex couples to participate in stepparent adoptions, where a stepparent (or equivalent) adopts a child without terminating the biological parent's rights.<sup>65</sup> It should be noted, however, that this solution has not been accepted by all states.<sup>66</sup> A few states proscribe any adoption by a homosexual

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protection as a heterosexual marriage because New Jersey does not recognize same-sex marriages." Press Release, Associated Press, Amy Westfeldt, Lesbian Denied Joint Custody of Ex-Partner's Children (Sept. 23, 1998) (on file with *Law and Inequality: A Journal of Theory & Practice*).

63. See *supra* note 61.

64. See *In re R.C., Minor Child*, 775 P.2d 27, 32 n.6 (Colo. 1989) (noting that after the decision in *C.M. v. C.C.*, 377 A.2d 821 (Juv. Dom. Rel. Ct. Cumberland County, N.J. 1977), the New Jersey legislature enacted a statute creating the presumption that a man donating sperm to a woman other than his wife has no parental obligations to a child so conceived, and the presumption is rebuttable only if there was an agreement in writing and to the contrary, *citing* N.J. REV. STAT. § 9:17-44(b) (1988)). Notably, this statute does nothing to establish a parental relationship for an intended co-parent other than the biological father. See *generally* N.J. REV. STAT. § 9:17-44(b) (1988) (adopting the provisions of the UPA concerning parental status of ART children).

65. See *Adoptions of B.L.V.B. and E.L.V.B.*, 628 A.2d 1271 (Vt. 1993). In this case, the court held that "when the family unit is comprised of the natural mother and her partner, and the adoption is in the best interest of the children, terminating the natural mother's rights is unreasonable and unnecessary." *Id.* at 1272. The court found that while adoption by same-sex couples was likely not contemplated by the drafters in 1945, it was not proscribed by statute, and thus should be permitted. See *id.* at 1274. The court also noted that creation of the stepparent exception in the adoption statutes recognizes the ridiculous outcome should the biological parent's relationship with her child be legally terminated in spite of the fact that the parent will continue to be active in her child's life. See *id.* Thus, the court found it consistent with this logic and policy to apply the stepparent exception to those similarly situated. See *id.* The court also noted that a District of Columbia court had reached a similar result, as had a New York court. See *id.* at 1274-75.

66. The parental rights of same-sex couples vary widely with the states' treatment of gay rights in general, particularly regarding same-sex marriage. Vermont is now widely regarded as one of the most progressive states with respect to gay rights in light of its recent Supreme Court decision recognizing a state

couple,<sup>67</sup> and others refuse to apply the stepparent exception to same-sex couples.<sup>68</sup> Without legal recognition of the parental status of both women, lesbian parents' relationships with their children cannot be secure. Finally and perhaps most importantly, the welfare of the children may be jeopardized by forcing them to go through extended litigation and casting doubt upon the legitimacy of their family structure.<sup>69</sup>

## 2. Trends in the Arguments Proffered by Lesbian Mothers Seeking Rights to Their Children.

Typically, in cases where the partners are splitting up and the biological mother is attempting to gain sole custody of the children, the non-biological mother will advance three arguments to legitimize her relationship with the children in the eyes of the law.<sup>70</sup> First, she will argue that the relationship is included in the common law definition of *de facto* parenthood, or "psychological parenting."<sup>71</sup> This argument has not been widely successful.<sup>72</sup>

constitutional right to the privileges of marriage for gay and lesbian couples. See *Baker v. Vermont*, 744 A.2d 864 (Vt. 1999). This decision was codified to provide same-sex couples the right to a "civil union," which bestows all the privileges of marriage upon them. See 2000 Vt. Acts & Resolves P.A. 91 H. 847. *But see* Defense of Marriage Act, Pub L. No. 104-199, 110 Stat. 2419 (1996) (codified in scattered sections of 1 and 28 U.S.C.) (precluding same-sex marriage as a matter of federal law, thus preempting any state law to the contrary).

67. Florida and New Hampshire are well known for proscribing adoptions by homosexuals. See FLA. STAT. ANN. § 63.042 (West 1997), ("No person eligible to adopt under this statute may adopt if that person is a homosexual."); N.H. REV. STAT. ANN. § 170-F:6 (1999) ("[A]n appropriate adoptive family shall not be any family in which one or more of the adults is a homosexual."); *see also* CONN. GEN. STAT. ANN. § 45a-726a (West 2000) (authorizing adoption agencies to discriminate against homosexuals when placing children in adoptive or foster homes); H.R.J. Res. 35, 1998 Leg., Reg. Sess. (Ala. 1998) (issuing a joint resolution stating the state legislature's intent to prohibit adoption by homosexuals).

68. See *In re Adoption of Baby Z*, 724 A.2d 1035 (Conn. 1999) (holding that even though its decision is contrary to the best interests of the child, the state adoption statute does not contemplate extending the stepparent exception to same-sex couples and the court would not do so on its own). *But see In re M.M.D. & B.H.M.*, 662 A.2d 837 (D.C. 1995) (applying stepparent exception to a same-sex couple); *In re Jacob*, 660 N.E.2d 397 (N.Y. 1995) (same).

69. See *Thomas S. v. Robin Y.*, 618 N.Y.S.2d 356 (N.Y. App. Div. 1994). Here, the sperm donor sued for visitation and won, despite the court psychologist's testimony that the child did not want a relationship with him and that she felt as though her family structure was being threatened by him and the court. See *id.* at 362.

70. See Tsippi Wray, *Lesbian Relationships and Parenthood: Models for Legal Recognition of Nontraditional Families*, 21 *HAMLIN L. REV.* 127, 141-42 (1997).

71. See *id.* at 142; *see also Kathleen C. v. Lisa W.*, 84 Cal. Rptr. 2d 48, 51 (Ct. App. 1999) (finding that non-biological mother exhibited the characteristics of a *de facto* parent but still could not claim the rights of a parent without showing detriment to the child); *Kazmierzak v. Query*, 736 So. 2d 106, 110 (Fla. Dist. Ct. App. 1999) (denying non-biological mother standing as "psychological parent");

Another argument available to the non-biological mother is that of equitable estoppel.<sup>73</sup> Under equitable estoppel, the non-biological mother argues that the biological mother fostered and encouraged a parent-child relationship between the child(ren) and the non-biological mother, and that she should now be estopped from denying its existence.<sup>74</sup> The courts have generally declined to recognize a legal relationship between the non-biological mother and the child based on this theory.<sup>75</sup> A final argument the non-biological mother may proffer is that of *in loco parentis*.<sup>76</sup> This doctrine applies to adults who have acted as parents and will impose all the rights and responsibilities of parenthood upon them.<sup>77</sup> Again, the courts have refused to extend the application of this doctrine to grant custody to someone who is, in the eyes of the law, a "nonparent."<sup>78</sup>

### 3. The Most Recent Cases Predict a Promising Future for Same-sex Parents.

Despite the barrage of precedent against same-sex parents, some courts have recently gone the other way. In 1996, a Pennsylvania court granted a non-biological mother standing *in*

Alison D. v. Virginia M., 572 N.E.2d 27, 29 (N.Y. 1991) (denying non-biological mother standing to sue for visitation by virtue of status as a de facto parent).

72. See *supra* note 71.

73. See Wray, *supra* note 70, at 142.

74. Equitable estoppel claims have traditionally been applied to men who have held children out as their own, then later denied paternity to avoid child support claims. See *Nancy S. v. Michele G.*, 279 Cal. Rptr. 212, 217 (Ct. App. 1991). In this case, the lesbian couple had been "married" and the non-biological mother was listed as the father of the ART child on his birth certificate. See *id.* at 214. For three years after the couple broke up, the mothers shared custody of their son. See *id.* Nevertheless, when they no longer agreed about the custody arrangement and went to court over visitation issues, the court rejected the estoppel theory. See *id.*

75. See *Nancy S.*, 279 Cal. Rptr. at 212; *Alison D.*, 572 N.E.2d at 29 (holding that a parent by estoppel claim brought by same-sex partner is not cognizable to gain standing in a custody or visitation suit); cf. *Thomas S. v. Robin Y.*, 618 N.Y.S.2d 356, 362 (N.Y. App. Div. 1994) (granting the sperm donor visitation rights against the will of the mothers and the daughter). In *Thomas S.*, an ART daughter of a lesbian couple inquired about her father, so the mothers introduced them and allowed a few supervised visits. Subsequently, the donor sued for visitation. In granting the sperm donor visitation rights, the court suggested that the mothers should be estopped from denying his involvement in the child's life after they had "fostered" the relationship by allowing these few supervised visits. See *id.* at 362.

76. See Wray, *supra* note 70, at 142.

77. See *id.* *Black's Law Dictionary* defines "*in loco parentis*" as one charged in fact with the rights, duties and responsibilities of a parent. BLACK'S LAW DICTIONARY 787 (6th ed. 1990). The fatal flaw for mothers arguing this point is that traditionally, *in loco parentis* is understood to be temporary in nature and arises in the absence of a child's natural parents. See *id.*

78. See *Nancy S.*, 279 Cal. Rptr. at 217.

*loco parentis*.<sup>79</sup> Though courts in other states have subsequently disagreed with this court's opinion, this case may signify a critical attitudinal shift. The court stated, "changes in social mores and increased individual freedom have created a wide spectrum of arrangements filling the role of the traditional nuclear family, [and] flexibility in the application of standing principles is required in order to adapt those principles to the interests of each particular child."<sup>80</sup> While such reasoning justifiably creates hope for the future, as yet it is still an anomaly.

Another exciting development took place in a New Jersey court when it found that a non-biological mother was the psychological parent of the couple's child and was thus entitled to visitation rights.<sup>81</sup> The court considered numerous factors in making its decision.<sup>82</sup> In reaching its conclusion that visitation rights were warranted, the court gave most weight to three paramount considerations: (1) the best interests of the children;<sup>83</sup> (2) evidence of the mothers' intent that both play an active role in parenting their children;<sup>84</sup> and (3) recognition that statutory interpretations of the court must change with the times.<sup>85</sup> It should be noted that New Jersey is a UPA state, but nowhere in its opinion does the court discuss this fact. Instead, in emphasizing the need for legislative action, the court quoted an excerpt from a decision by the California Court of Appeals interpreting the UPA.<sup>86</sup> It specifically pointed out that New

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79. See *J.A.L. v. E.P.H.*, 682 A.2d 1314, 1322 (Pa. Super. Ct. 1996). The court adopted a flexible definition of *in loco parentis* that would be largely dependent on the facts of each individual case. See *id.* at 1320-21. Significantly, the court noted that the fact that the petitioner was seeking only visitation or partial custody and not attempting to supplant the role of the biological mother lowered her burden. See *id.* at 1320.

80. *Id.*

81. See *V.C. v. M.J.B.*, 725 A.2d 13, 13 (N.J. Super. Ct. App. Div. 1999). Unfortunately, the court denied the petitioner standing to sue for joint custody. See *id.*

82. The court considered factors such as the role both mothers played before and during the pregnancy; petitioner's involvement in the children's lives in the first few weeks following the birth of the twins; the fact that the affairs of both mothers were intertwined; and a psychologist's report to the court after speaking with both children. See *id.* at 15-17.

83. See *id.* at 20.

84. See *id.* at 15.

85. See *id.* at 19.

86. The court quotes the opinion of *Nancy S. v. Michele G.*, 279 Cal. Rptr. 212, 219 (Ct. App. 1991), in which that court clearly felt trapped under the UPA. See *id.* It stated:

[b]y deferring to the Legislature in matters involving complex social and policy ramifications far beyond the facts of the particular case, we are not telling the parties that the issues they raise are unworthy of legal recognition. To the contrary, we intend only to illustrate the limitations of

Jersey would not do injustice while waiting on the legislature.<sup>87</sup> The court found that denying "children of same-sex partners . . . the security of a legally recognized relationship with their second parent serves no legitimate state interest."<sup>88</sup>

In another recent and revolutionary case regarding lesbian mothers, a San Francisco judge granted a couple's petition for legal recognition as co-parents.<sup>89</sup> The facts of this case were unique in that one mother donated the eggs, and after their fertilization by a presumably anonymous donor, the other mother carried the fetus to term.<sup>90</sup> Judge Donna Hitchens referred to the UPA in deciding that although gestation is one means of establishing legal parentage, it is insufficient on its own.<sup>91</sup> Rather than focusing on the biological composition of the child, the court applied an intent-based test derived in principle from cases involving surrogate mothers.<sup>92</sup> As a result, the court found that both mothers intended to raise the child as their own, and thus both would become the legally recognized parents under the UPA.<sup>93</sup>

Although the judges in each of these cases dealt with slightly different fact patterns and reached comparable results through slightly different reasoning, there is a common thread that links each case. In each situation, the judge considered the intent of the parties at the time of conception in determining who the child's true parents were. If the UPA included an intent-based standard for determining parentage for lesbian mothers creating their families through ART, justice could be done, and the long-standing policies of "legitimizing" every child would be fulfilled.

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the courts in fashioning a comprehensive solution to such a complex and socially significant issue.

V.C. v. M.J.B., 725 A.2d 13, 19 (N.J. Super. Ct. App. Div. 1999).

87. *See id.*

88. *Id.*

89. *See In Re McAllister & Subak*, No. FL032006 (Cal. Super., San Fran. Co., May 24, 1999) (unpublished opinion), *discussed in California Superior Court Grants Legal Parent Status to Lesbian Couple Prior to Child's Birth*, LESBIAN/GAY LAW NOTES (LeGaL Found. of the Lesbian & Gay Law Ass'n of Greater N.Y.), Summer 1999, at 110.

90. *See id.*

91. *See id.*

92. *See id.* (citing *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993) and *In re the Marriage of Buzzanca*, 72 Cal. Rptr. 2d 280 (Ct. App. 1998).

93. *See id.* at 111.

*D. The UPA's Proposed Revisions Fail to Address the Non-traditional Family.*

In drafting the 1999 proposed revisions to the UPA, NCCUSL was clearly aware of the technological and societal changes affecting the modern family structure.<sup>94</sup> The prefatory note refers to the inconsistencies in case law among UPA states, recent topics of litigation that the revisions attempt to resolve, and the two more recent (but unpopular) uniform acts addressing parentage that are incorporated into the revisions.<sup>95</sup> Section 5 of the 1973 UPA was the only section addressing ART.<sup>96</sup> In the proposed revisions, the section has been renumbered and expanded. ART is now addressed in Article 8 and follows a format similar to the original version.<sup>97</sup>

The first two sections address the issue of who is the father of an ART child.<sup>98</sup> As in the 1973 UPA, the proposed revisions

94. See UNIF. PARENTAGE ACT Prefatory Note, at 1-2 (Proposed Revisions 1999), at <http://www.law.upenn.edu/library/ulc/upa/upa1099.htm> (Oct. 1999).

95. See *id.* at <http://www.law.upenn.edu/library/ulc/upa/upa1099.htm>.

96. See UNIF. PARENTAGE ACT § 5, 9B U.L.A. 301 (1973); *supra* note 38 and accompanying text (discussing the language in section 5 of the 1973 UPA).

97. See UNIF. PARENTAGE ACT Article 8 (Proposed Revisions 1999), at <http://www.law.upenn.edu/library/ulc/upa/upa1099.htm> (Oct. 1999):

Section 801. Husband's Paternity of Child Resulting from Assisted Reproduction. If a husband consents to assisted reproduction pursuant to Section 802, he is deemed to be the father of any child resulting from: (1) the artificial insemination of his wife; (2) providing his sperm to fertilize a donor's eggs that are placed in the uterus of his wife; or (3) the implanting of an embryo in the uterus of his wife, whether the donated embryo is the result of separate donations of sperm and eggs or the donated embryo is created for the purpose of assisted reproduction.

Section 802. Consent to Assisted Reproduction. (a) Each participant in assisted reproduction must consent to that participation, including, as applicable: (1) a husband and wife; (2) the donor of the sperm if other than the husband; [and] (3) the donor of eggs if other than the wife; and (4) a woman who intends to be the gestational mother on behalf of the intended parents]. (b) The consent must: (1) be in writing; and (2) be signed by the participant. (c) Failure to comply with subsection (b) does not: (1) preclude a finding that the husband is the father of a child born to his wife if the wife and husband treat the child as their child in all respects and jointly represent their parenthood to others; or (2) confer rights or impose duties on a donor as a mother or father of the child if the donation of reproductive material was made under circumstances demonstrating an intent that the assisted reproduction would not impose parental responsibility upon anyone other than the husband and wife.

Section 806. Parental Status of Donor. (a) A donor of sperm is not the father of a child conceived through assisted reproduction if the mother is: (1) married and her husband has consented to the assisted reproduction; or (2) unmarried at the time of conception, unless the donor and the mother of the child acknowledge the donor's paternity pursuant to Article 3 . . . .

98. See UNIF. PARENTAGE ACT §§ 801-802 (Proposed Revisions 1999), at <http://www.law.upenn.edu/library/ulc/upa/upa1099.htm> (Oct. 1999).

operate under the assumption that the woman being inseminated is married.<sup>99</sup> Just like under section 5, the husband must consent to his wife's insemination to be considered the natural father.<sup>100</sup> And just like under section 5, paternity is established in the husband even if his consent does not meet statutory requirements.<sup>101</sup> The revisions also state that an insufficient consent by the husband does not grant parental rights to the donor, assuming there is evidence of the husband and wife's *intent* to parent the child themselves.<sup>102</sup> The revisions proceed to cover situations where paternity of an ART child may be disputed or denied completely, as in situations where the husband denies that he consented to the procedure,<sup>103</sup> where the donor has died before the implantation of an embryo or assisted reproduction has taken place,<sup>104</sup> and where the marriage has dissolved before the procedure has taken place.<sup>105</sup> The most notable change in this section is the omission of the "licensed physician" requirement. Due to the provisions in both the 1973 UPA and the proposed revisions that allow intent to govern parentage for married couples, it is difficult to see how this omission will have any great impact.

The final section of Article 8, section 806, is the only section that considers the possibility that the recipient of donated sperm is unmarried.<sup>106</sup> This section prevents the sperm donor from claiming paternity of an ART child conceived by an unmarried woman unless the two establish the man's paternity "pursuant to Article 3."<sup>107</sup> Article 3 of the proposed revisions allows both biological parents of the ART child to take formal steps to register the donor as the legal father of the child.<sup>108</sup> This provision could effectively remedy the situation where the sperm donor later claims paternity rights against the will of the mother. In doing so, it still omits any discussion of who is to be (or may be) considered a second parent to an ART child born to an unmarried woman.

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99. *See id.* at <http://www.law.upenn.edu/library/ulc/upa/upa1099.htm>.

100. *See id.* at <http://www.law.upenn.edu/library/ulc/upa/upa1099.htm>.

101. *See id.* § 802, at <http://www.law.upenn.edu/library/ulc/upa/upa1099.htm>. The UPA requires the consent be written and signed by each participant. *See id.*

102. *See id.* at <http://www.law.upenn.edu/library/ulc/upa/upa1099.htm>.

103. *See* UNIF. PARENTAGE ACT § 803 (Proposed Revisions 1999), at <http://www.law.upenn.edu/library/ulc/upa/upa1099.htm> (Oct. 1999).

104. *See id.* § 804, at <http://www.law.upenn.edu/library/ulc/upa/upa1099.htm>.

105. *See id.* § 805, at <http://www.law.upenn.edu/library/ulc/upa/upa1099.htm>.

106. *See id.* § 806, at <http://www.law.upenn.edu/library/ulc/upa/upa1099.htm>.

107. *Id.* at <http://www.law.upenn.edu/library/ulc/upa/upa1099.htm>.

108. *See* UNIF. PARENTAGE ACT §§ 301-315 (Proposed Revisions 1999), at <http://www.law.upenn.edu/library/ulc/upa/upa1099.htm> (Oct. 1999).



Interestingly, the intent of the parties is relevant only in those provisions dealing with the insemination of a married woman.

### III. Implementing an Intent-based Standard to Determine the Parentage of ART Children Would Resolve the Current Inequities Imposed by the UPA.

If NCCUSL would incorporate an intent-based standard into its provisions governing all instances of ART, courts would be capable of reaching equitable decisions in these matters with sufficient statutory justification. Under the existing draft of the proposed revisions, no two members of the same sex can legally co-parent a child. This blanket preclusion of same-sex parentage ignores the reality of many families. Many children do in fact have same-sex parents, and the laws must reflect that for the benefit of these children as well as their parents.

#### *A. The "Licensed Physician" Requirement of the 1973 UPA Imposes Undue Burdens on Lesbian Mothers.*

NCCUSL provided no explanation for its decision to include in the 1973 UPA the requirement of a licensed physician's supervision of the insemination. However, its inclusion seems to be based on the common perception that artificial insemination is a medical procedure that a professional must perform.<sup>109</sup> The reality is that artificial insemination is an easy procedure that many people prefer to perform in the privacy of their own home.<sup>110</sup> Some women choose a known donor based, at least in part, on privacy issues. One mother argued that the physician requirement offended her "sense of privacy and reproductive autonomy, might result in burdensome costs to some women, and might interfere with a woman's desire to conduct the procedure in a comfortable environment such as her own home."<sup>111</sup> To date, none of the states that have enacted the UPA have seen fit to

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109. See *Jhordan C. v. Mary K.*, 224 Cal. Rptr. 530, 534-35 (Ct. App. 1986) (reasoning that by maintaining the licensed physician requirement when adopting the UPA, the legislature was concerned with how the semen was to be obtained, how the procedure was to be performed, the health history of the donor and the desire to make the procedure a formal and documented one).

110. See *id.* at 535. In addition to privacy concerns, many women may choose to self-inseminate for financial reasons. Conception through professionally administered artificial insemination can be extremely expensive, often costing up to tens of thousands of dollars, especially if the procedure needs to be performed multiple times before the recipient becomes pregnant. When compared with this expense, private self-insemination is an attractive, low- or no-cost alternative. See Harlow, *supra* note 16, at 182-85.

111. *Jhordan C.*, 224 Cal. Rptr. at 535.

change the "licensed physician" provision to reflect the reality of the procedure and the preferences of those who utilize it.<sup>112</sup>

An additional consideration is the discrimination unmarried women face from medical professionals who perform ART.<sup>113</sup> Many physicians expressly refuse to perform ART on unmarried women. When surveyed, physicians cited such factors as marital status, psychological immaturity, and homosexuality as reasons for their refusal.<sup>114</sup> In 1995, three states attempted to pass legislation limiting or prohibiting unmarried women's access to ART.<sup>115</sup> In light of this blatant discrimination, it is not surprising that women opt to conceive in a supportive and nurturing environment in the privacy of their homes.

*B. The "Married Woman" Requirement Unconstitutionally Differentiates Between Unmarried and Married Women.*

All women wishing to conceive through ART are similarly situated; therefore, it is unconstitutional to treat them differently by statute.<sup>116</sup> The Supreme Court has long held that it is unconstitutional to differentiate between married and unmarried persons with respect to procreation.<sup>117</sup> By requiring that women conceiving through ART be married, the UPA discriminates against not only all unmarried women who wish to have a child, but also and especially against lesbians who cannot legally marry.<sup>118</sup> Although motherhood by unmarried women is traditionally looked upon as accidental in the eyes of the law, it is

112. See UNIF. PARENTAGE ACT § 5, 9B U.L.A. 301, 302 (1973).

113. See Harlow, *supra* note 14 at 174-75.

114. See *id.* at 188.

115. See *id.* at 175 & n.8 (citing S. Con. Res. 75, 18th State Leg. (Haw. 1995); S. File No. 1785, 79th Leg. Sess. (Minn. 1995); H.B. No. 2303, 68th Leg. (Or. 1995)). The Hawaii legislature requested that the Department of Health investigate whether ART should be available only to infertile married couples, which would not only prohibit unmarried women's access, but also exclude lesbian couples completely. See *id.* Similar legislation was proposed in Minnesota, which would have required a male to claim paternity prior to the insemination. See *id.* The Oregon statute was proffered to totally prohibit ART for single women. See *id.*

116. Different treatment for married and unmarried women who are similarly situated violates the Equal Protection Clause of the Fourteenth Amendment. See *Eisenstadt v. Baird*, 405 U.S. 438, 438 (1972). In *Eisenstadt*, which held that unmarried people have a fundamental right of access to contraception, the Court reasoned that the decision whether or not to reproduce is so personal that the state cannot regulate it. See *id.* at 438-39. In addition, the Court has held that the right to reproduce is a fundamental right. See *infra* note 126.

117. See *Eisenstadt*, 405 U.S. at 453.

118. See Defense of Marriage Act, Pub L. No. 104-199, 110 Stat. 2419 (1996) (codified in scattered sections of 1 and 28 U.S.C.) (precluding same-sex marriage as a matter of federal law, thus preempting any state law to the contrary).

time the law recognize that this is not always the case.<sup>119</sup> Families formed through ART are generally well planned, whether the biological mother is single, married, or in a committed relationship.<sup>120</sup>

In *Jhordan C. v. Mary K.*,<sup>121</sup> the mothers argued that by allowing the sperm donor to intervene in their family, the court was unconstitutionally denying their rights to family autonomy and procreative choice.<sup>122</sup> Though the court rejected their claim, it did so erroneously. The court's rejection of the argument that the mothers had a right to family autonomy was based on its refusal to recognize the mothers and their children as a "family."<sup>123</sup> Other courts, however, have recognized gay couples without children as constituting a "family."<sup>124</sup> It follows that gay parents, like all other parents, constitute a family. The court also stated that the UPA did not inhibit procreative choice because it did not proscribe self-inseminations, it merely regulated the consequences.<sup>125</sup> To the contrary, the UPA does effectively deny unmarried women procreative choice by removing the elements of privacy and autonomy from the procedure. Each of these factors violates women's constitutional rights.<sup>126</sup>

In addition to being unnecessary and unconstitutional, the "married woman" requirement of the 1973 UPA is socially inefficient. State legislatures, as well as Congress, often craft laws around a policy promoting marriage.<sup>127</sup> The merits of this policy in

119. See Donovan, *supra* note 20 and accompanying text.

120. See Abigail Garner, *The Changing Face of Parenting*, LAVENDER, Feb. 11-24, 2000, at 41, 47-49; Harlow, *supra* note 16, at 174-75; Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459, 465-66 (1997).

121. 224 Cal. Rptr. 530 (Ct. App. 1986).

122. See *id.* at 536-37.

123. See *id.* at 536. The court stated that because the child had developed a "social relationship" with the sperm donor, the donor was as much a part of the child's family as either of his mothers who had raised him since birth. See *id.*

124. See ALEXANDER, *supra* note 59, at 103 (citing *Braschi v. Stahl Ass'n Co.*, 543 N.E.2d 49 (N.Y. 1989) (holding that gay partners constitute a family for the purposes of rent control)).

125. See *Jhordan C.*, 224 Cal. Rptr. at 537.

126. The right to privacy and family autonomy, including the decision to have a child or not, has long been viewed as a constitutional right by the Supreme Court. See, e.g., *Roe v. Wade*, 410 U.S. 113, 152 (1973) (stating that the zone of privacy guaranteed by the Fourteenth Amendment extends to family relationships and procreation) (citing *Skinner v. Oklahoma*, 316 U.S. 535 (1942), for the right to privacy in procreation, and *Prince v. Massachusetts*, 321 U.S. 158 (1944), for the right to privacy in family relationships).

127. In the recent news, we have seen federal legislation such as the Defense of Marriage Act and controversy over whether to change the tax code to eliminate the so-called "marriage penalty." See Defense of Marriage Act, Pub. L. No. 104-199,

general are debatable, but as applied to women seeking ART, the policy is completely out of place. As a general rule, women seeking to conceive through ART have contemplated and prepared for the pregnancy and child,<sup>128</sup> requiring a marriage to verify this is nonsensical.

Unmarried women who participate in ART are choosing to become mothers either independently or with an intended co-parent.<sup>129</sup> By over-regulating these decisions, socially unfavorable consequences will surely result. If the biological parents and intended co-parents were able to enter into a legally binding contract regarding future obligations to a child, children could have more stable and predictable futures, at least regarding the identity of their parents.<sup>130</sup>

*C. As a Result of the UPA's Requirements of Marriage and Physician Involvement, Courts Have Applied a Double Standard to Sperm Donors and Lesbian Mothers Seeking Visitation or Custody Rights.*

In the eighteen states that currently follow the UPA, the non-biological mother of a lesbian couple has no legal claim to her ART child if the couple who planned for, conceived and raised the child ever separates.<sup>131</sup> In contrast, the sperm donor may intervene at any time to establish paternity rights, regardless of any agreement he had with the mothers prior to conception.<sup>132</sup> In the case of the

110 Stat. 2419 (1996) (codified in scattered sections of 1 and 28 U.S.C.). In Minnesota, the state legislature passed an anti-palimony statute with the primary motive of promoting marriages. See Telephone Interview by David W. Selden with Judge (formerly Senator) Davies, Minnesota Court of Appeals (Sept. 20, 1999); MINN. STAT. §§ 513.075-.076 (1999).

128. See, e.g., Garner, *supra* note 120, at 47-49 (describing the case of an unmarried woman who planned to have a child through ART since she was a teen); see also Curiale v. Reagan, 272 Cal. Rptr. 520, 521 (Ct. App. 1991) (finding that mothers did carefully plan conception, pregnancy and child rearing).

129. See Donovan, *supra* note 20.

130. Cf. UNIF. PARENTAGE ACT § 6(d), 9B U.L.A. 303 (1973) (stating that any agreement between a putative father and the mother does not bar an action to determine paternity).

131. See, e.g., Kathleen C. v. Lisa W., 84 Cal. Rptr. 2d 48, 51 (Ct. App. 1999) (denying that former partner had standing to sue for custody or visitation under the UPA because she could not show that the natural mother was unfit). But see *supra* notes 61-67 and accompanying text (discussing cases with differing outcomes on this issue).

132. See, e.g., Jhordan C. v. Mary K., 224 Cal. Rptr. 530, 533-35, 537-38 (Ct. App. 1986) (awarding sperm donor parental rights because the lesbian mother did not utilize a physician for transfer of semen as required by the UPA); see also C.M. v. C.C., 377 A.2d 821, 824-25 (Juv. Dom. Rel. Ct. Cumberland County, N.J. 1977) (awarding paternity to sperm donor against the intent of the mother by refusing to make any distinction between artificial insemination and conception by

sperm donor, courts purportedly rely on the best interests of the child standard,<sup>133</sup> citing the popular idea that it is in every child's interest to have both a mother and a father.<sup>134</sup> In the cases in which the mothers are fighting over custody, the courts have not considered the best interests of the child, stating simply that the non-biological mother has no statutory standing to sue.<sup>135</sup>

1. "This Child Does Have Two Mothers . . . and a Sperm Donor with Visitation."<sup>136</sup>

Under the current version of the UPA, any putative father can seek a determination of paternity in court that gives him visitation or custody rights to the child.<sup>137</sup> Naturally, private administration of ART necessitates the use of a known sperm donor, who may make this same claim later on. Case law has demonstrated that lesbians who conceive through ART run the risk of losing parental rights completely,<sup>138</sup> or they may be forced to cooperate in visitation arrangements with a sperm donor who suddenly wants to participate in the child's life.<sup>139</sup>

intercourse).

133. The best interests of the child are often indeterminate. Some states have codified a standard; others have left it to the courts. See Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226, 233-37, 255-56, 261-64 (1975), quoted in D. KELLY WEISBERG & SUSAN FRELICH APPLETON, MODERN FAMILY LAW 816-18 (1998). The Uniform Marriage and Divorce Act requires a court to consider the wishes of the parents and the child; the interaction of the child with his or her parent(s) and siblings; the child's adjustment to home, school and community; and the mental and physical health of all the parties involved. See UNIF. MARRIAGE & DIVORCE ACT, 9A U.L.A. 147 (1987), quoted in WEISBERG & APPLETON, *supra*, at 818.

134. See, e.g., *C.M.*, 377 A.2d at 824 (awarding paternity to sperm donor against the intent of the mother by refusing to make any distinction between artificial insemination and conception by intercourse).

135. See, e.g., *Nancy S. v. Michele G.*, 279 Cal. Rptr. 212, 214-19 (Ct. App. 1991) (awarding sole legal custody to biological mother).

136. See Fred A. Bernstein, *This Child Does Have Two Mothers . . . and a Sperm Donor With Visitation*, 22 N.Y.U. REV. L. & SOC. CHANGE 1 (1996).

137. See UNIF. PARENTAGE ACT § 6, 9B U.L.A. 302 (1973).

138. Parenting guides for lesbians have indicated that they feel vulnerable to attack, especially by a biological father wanting to interfere in their family life. Since the 1970s, lesbian mothers have had to endure long and expensive court battles in a homophobic judicial system to retain custody of their children. Even in today's judicial climate, attorneys advise lesbian clients to use an anonymous sperm donor and have the procedure performed by a physician to protect themselves from future attack. See Bernstein, *supra* note 138, at 22; see also Symposium, *Lavender Law: Getting Connected*, NLGLA Seattle (1999) (describing sample pleadings to protect gay couples).

139. See *C.M.*, 377 A.2d at 821. A New Jersey court, governed by the UPA, awarded paternity rights to a known sperm donor after the mother self-inseminated. The court seems to have based its decision largely on policy grounds, stating that courts generally prefer "the requirement that a child be provided with a father as well as a mother." *Id.* at 824. In addition, since it is allegedly in the

In the aforementioned leading case from California, *Jhordan C. v. Mary K.*,<sup>140</sup> the court relied on the fact that no licensed physician was involved in the artificial insemination to grant the known sperm donor visitation rights.<sup>141</sup> The court held that the child's two mothers had "failed to take advantage of this statutory basis for preclusion of paternity" by conducting the artificial insemination without a physician present.<sup>142</sup> The California legislature had adopted the UPA provision regarding artificial insemination almost verbatim,<sup>143</sup> and the court interpreted the licensed physician requirement as a limitation on the application of the statute.<sup>144</sup> Consequently, the court held that the rights and obligations of paternity must be assigned to the father regardless of the method by which the child was conceived.<sup>145</sup>

The court turned to the history of the UPA to justify its strict application of the licensed physician requirement.<sup>146</sup> It relied on three basic propositions. First, the court found that because the phrase "licensed physician" did not appear in any of the discussion drafts of the UPA but was included in the final one, it must have been consciously added by the drafters of the UPA.<sup>147</sup> Second, the court found that there are legitimate reasons for the state to encourage the involvement of a licensed physician in these procedures, such as screening the donor for any hereditary diseases.<sup>148</sup> Finally, the court stated that the involvement of a "professional third party such as a physician" could serve to formalize the relationship and prevent misunderstandings bound to arise otherwise.<sup>149</sup> Though the court acknowledged the mothers' arguments against physician involvement, it awarded visitation to the sperm donor largely due to the fact that the state legislature

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best interests of the child to have two parents, the court "will not make any distinction between a child conceived naturally or artificially." *Id.* at 825; accord *Jhordan C. v. Mary K.*, 224 Cal. Rptr. 530, 531 (Ct. App. 1986) (awarding paternity privileges to the sperm donor per the UPA based on the fact that the women contesting paternity opted not to utilize a physician).

140. 224 Cal. Rptr. 530 (Ct. App. 1986).

141. *See id.* at 531.

142. *Id.*

143. *See id.* at 533-34 (citing CAL. CIV. CODE § 7005 (West 1999) (omitting the qualifier "married")).

144. *See id.* at 534.

145. *See id.*

146. *See id.*

147. *See id.*

148. *See id.* The court opined that the UPA drafters must have shared its concern since the comment following cited a law review article cautioning about the dangers of artificial insemination. *See id.*

149. *Id.* at 535.

had included the licensed physician requirement.<sup>150</sup> In reaching its decision, the court ignored the fact that the mothers and the sperm donor had in fact come to an agreement prior to conception regarding the contact he would have with the child. The court also ignored the terms of this agreement. The presumption that physician involvement somehow leads to eternal understanding among the parties is implicit in the opinion, though illogical and unexplained. Finally, the argument that the licensed physician requirement must have been consciously added by the drafters since it only appeared in the final draft is pure speculation and easily refuted.

The UPA discriminates against not only all lesbians, but all unmarried women generally, as evidenced by a New Jersey court that reached a similar result under a comparable set of circumstances.<sup>151</sup> C.C. was a single woman who wanted to conceive a child through ART.<sup>152</sup> She asked a friend, C.M., to provide the sperm.<sup>153</sup> C.M. and C.C. were referred to a sperm bank, but they were refused access to the facilities.<sup>154</sup> Thereafter, the insemination took place in C.C.'s home without the assistance of a physician.<sup>155</sup> The two were in a dating relationship at the time of conception, but the relationship ended a few months later.<sup>156</sup> Once C.M. realized that C.C. had no intention of allowing him access to the child, he brought an action to establish paternity and visitation rights.<sup>157</sup> According to C.C., there was never any mention of co-parenting the child.<sup>158</sup> Without referring to the UPA, the court found in favor of C.M.<sup>159</sup>

The court's reasoning in this case turned on how it framed the issue before it: "whether a man is any less a father because he provides the semen by a method different from that normally used."<sup>160</sup> With this issue as the baseline for its reasoning, the

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150. *See id.*

151. *See* C.M. v. C.C., 377 A.2d 821 (Juv. Dom. Rel. Ct. Cumberland County, N.J. 1977).

152. *See id.*

153. *See id.*

154. *See id.* It is unclear from the opinion exactly why the couple was refused access. *See id.*

155. *See id.* at 821-22.

156. *See id.* at 822.

157. *See id.*

158. *See id.*

159. *See id.* at 825.

160. *Id.* at 824. It should be noted that this statement by the court conflicts with the UPA. If the intended parents of an ART child are married, the current UPA contains a clause to establish the legal paternity of the father even if the statutory provisions are not met. If the parents are not married, it is considerably more

court likened the circumstances to natural conception.<sup>161</sup> The court found that whether or not a child conceived through natural conception was the product of a marital relationship, the "donor" is the father.<sup>162</sup> Likewise, whether the biological parents of an ART child are married has no impact on the court's determination of paternity.<sup>163</sup>

Significantly, the court brushed aside the objections of C.C. in its opinion.<sup>164</sup> Although there was a factual dispute as to their agreement prior to conception, the court did not bother to investigate it.<sup>165</sup> The court also stated that policy favors a child having a mother and a father.<sup>166</sup> "It is in a child's best interests to have two parents whenever possible."<sup>167</sup> Although the court did not mention the UPA in its opinion, its decision is entirely consistent with section 5(b). Because the UPA does not address who shall be determined to be the father of a child in these situations, the court may assign the rights and obligations of paternity to the donor. The mother has no rights under the statute.

Cases in non-UPA states have generally reached the same result.<sup>168</sup> One New York case often referenced by commentators pointing out the flaws in the UPA and similar statutes is *Thomas S. v. Robin Y.*<sup>169</sup> In that case, the sperm donor waited nine years

difficult to establish paternity or parental responsibilities in the intended co-parent, especially in cases where the intended co-parent is the same sex as the natural parent.

161. See *id.* at 824-25 (stating that "the court has found C.M. to be the natural father . . .").

162. See *id.* at 824.

163. See *id.*

164. See *id.* at 821-24.

165. See *id.* at 822.

166. See *id.* at 824.

167. *Id.* at 825.

168. The New York Statute addressing the issue of legitimacy by artificial insemination states:

Any child born to a married woman by means of artificial insemination performed by persons duly authorized to practice medicine and with the consent in writing of the woman and her husband, shall be deemed the legitimate, natural child of the husband and his wife for all purposes.

The aforesaid written consent shall be executed and acknowledged by both the husband and wife and the physician who performs the technique shall certify that he had rendered the service.

N.Y. DOM. REL. LAW § 73 (McKinney 1999). Substantively, this statute is not different from the UPA since it implicitly requires that a woman attempting to conceive through ART be married and utilize the services of "persons duly authorized to practice medicine." *Id.*

169. 618 N.Y.S.2d 356 (App. Div. 1994); see also Bernstein, *supra* note 138, at 27 (discussing the problems of granting parental rights to sperm donors); Marc E.



after the birth of the ART child to establish his paternity.<sup>170</sup> The court, governed by a law quite similar to UPA section 5,<sup>171</sup> granted the sperm donor an order of filiation<sup>172</sup> and remanded the proceedings to determine visitation rights.<sup>173</sup> The court in this case recognized that visitation with the sperm donor would probably not be in the best interests of the child, according to the court psychiatrist.<sup>174</sup> Nevertheless, it entered the order of filiation enabling the donor to seek custody or visitation over the objections of the mothers as well as the child.<sup>175</sup>

The common thread that ties all these cases together is that in each circumstance, the court insisted on providing the child with two legally recognized parents. In one respect, NCCUSL has apparently achieved its goal of "identifying the person against whom [a child's] rights may be asserted"<sup>176</sup> by finding a "father" for each of the children in these cases. However, in light of cases demonstrating how courts reach beyond both logic and fact to deny lesbians parental rights in favor of sperm donors, it is time for NCCUSL to consider that it was striving toward the wrong goal.

Determining paternity is not always the ultimate goal, as paternity alone does not dispose of controversy over parental rights, especially in the context of ART. Many women choose to have children without relying on the continued participation of the sperm donor. The fact that women choose ART as opposed to traditional conception is per se evidence of this choice. The sperm donor should be recognized as a legal parent of a child he assisted

Elovitz, *Reforming the Law to Respect Families Created by Lesbian and Gay People*, 3 J.L. & POL'Y 431, 431-33 (1995) (using facts from *Thomas S.* to offer proposals to respect gay and lesbian families); Vickie L. Henry, *A Tale of Three Women: A Survey of the Rights and Responsibilities of Unmarried Women Who Conceive by Alternative Insemination and a Model for Legislative Reform*, 19 AM. J.L. & MED. 285, 287-300 (1993) (examining the lack of protection of lesbian families).

170. See *Thomas S.*, 618 N.Y.S.2d at 356.

171. See *supra* note 168. It should be noted that the court relied on two other Domestic Relations Acts, neither of which dealt with ART children. One statute authorizes the court to enter an order of filiation declaring paternity for a male party found to be the father of the child. See N.Y. DOM. REL. LAW § 542 (McKinney 1999). Since the biological mother and the sperm donor in this case had entered an oral agreement that the donor should not assume a parental role in the ART child's life, the court also relied on section 516 which addresses contracting of parental rights. See *id.* § 516. Since the parties had not obtained court approval of their agreement, it was not enforceable to prevent the donor from claiming paternity rights. See *id.*

172. Filiation is a judicial determination of paternity. See BLACK'S LAW DICTIONARY 628 (6th ed. 1990).

173. See *Thomas S.*, 618 N.Y.S.2d at 357.

174. See *id.* at 358.

175. See *id.* at 356-62.

176. See *supra* notes 31-36 and accompanying text.

in creating only if it was agreed prior to conception that he could be. The reason the two biological "parents" are engaging in ART rather than common conception is to avoid the intimacy that comes with, *inter alia*, playing parental roles side by side.

## 2. Sperm Donors Are Also Susceptible to a Paternity Action Against Them Under the Current Version of the UPA.

Another consequence of the UPA's failure to address the use of ART by unmarried women is the liability that could haunt a sperm donor. Not only does the UPA create a set of presumptions to determine paternity,<sup>177</sup> it permits the appropriate state agency to initiate a paternity proceeding if no father is presumed.<sup>178</sup> It also nullifies any pre-conception agreement between the mother and biological father regarding the parenting role (if any) each will play in the child's life.<sup>179</sup> Thus, the statute does not necessarily protect even anonymous donors.<sup>180</sup> Under the UPA, it is possible for a state agency to initiate a proceeding to determine the paternity of a child.<sup>181</sup> With all the resources available to the state, even an anonymous donor's identity could be uncovered, and he could be assigned all the rights and obligations of paternity.<sup>182</sup> This is obviously detrimental to sperm donors who never had any intention of becoming legal fathers to the children of women they have never met. It is also detrimental to women wishing to become pregnant through ART, as the threat of being assigned parental liability will likely deter men from donating sperm altogether.

### *D. The Double Standard Rears its Ugly Head: Courts Deny Two Parents to Children Whose Parents Are Women.*

Although men are frequently assigned parental status against their will and in spite of being absent from their child's life, it has not yet been widely accepted for both mothers in a lesbian couple to be recognized as a child's legal parents in any

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177. See *supra* notes 31-33.

178. See UNIF. PARENTAGE ACT § 6(c) 9B U.L.A. 303 (1973).

179. See *id.* § 6(d).

180. See Donovan, *supra* note 20, at 221.

181. Section 6 of the UPA allows "[a]ny interested party" to bring a claim to establish paternity. See UNIF. PARENTAGE ACT § 6(b)-(c) 9B U.L.A. 302-03 (1973). These provisions thereby permit any state agency to bring an action to establish paternity for any reason, though most of the cases involve a child on public assistance. See Donovan, *supra* note 20, at 211-13. The state can initiate these proceedings regardless of the contrary wishes of the mother or child. See *id.* at 214.

182. See Donovan, *supra* note 20, at 215.

circumstance.<sup>183</sup> Denying legal recognition to both mothers has a variety of consequences. Most often litigated are the custody battles that ensue when a lesbian couple separates after having children.<sup>184</sup> The typical situation involves couples who together discuss, plan and select a donor for the future child.<sup>185</sup> One partner is then inseminated, carries the child to term and stays home to raise it.<sup>186</sup> The other partner works to support the family.<sup>187</sup> If the couple eventually separates, the partner who was not inseminated has no legal claim to the child.<sup>188</sup>

Despite the general policy favoring two parents for every child, courts have been unwilling to assign two parents when their only option is two women.<sup>189</sup> As a result, when lesbian relationships involving children end, one mother is left with nothing—no custody rights, no visitation and no support obligations. Meanwhile, the child is left with only one parent. It is hard to imagine that these circumstances are in the best interests of the child.

One case out of California demonstrates the predicament. In *Curiale v. Reagan*,<sup>190</sup> a lesbian couple decided to have a child together.<sup>191</sup> During the couple's five-year relationship, Reagan was artificially inseminated and gave birth to a child, whom the couple agreed they would raise together.<sup>192</sup> During the

183. See *supra* notes 70-78 and accompanying text.

184. See *Kathleen C. v. Lisa W.*, 84 Cal. Rptr. 2d 48, 51 (Ct. App. 1999) (denying that former partner had standing to sue for custody or visitation under the UPA because she could not show that the natural mother was unfit); *Nancy S. v. Michele G.*, 279 Cal. Rptr. 212, 216-17 (Ct. App. 1991) (holding that because partner was not the natural mother, had not adopted the children, and was not legally married to her former partner, the UPA prevented her from establishing a legally cognizable parent-child relationship); *Kazmierazak v. Query*, 736 So. 2d 106, 108-10 (Fla. Dist. Ct. App. 1999) (non-UPA state holding that it is necessary to show that custody with biological parent would be detrimental to the child in order to place him with non-biological parent); *Alison D. v. Virginia M.*, 572 N.E.2d 27, 29 (N.Y. 1991) (non-UPA court holding that the word "parent" in the statute granting standing to sue for visitation foreclosed any claim by biological mother's former partner).

185. See *Curiale v. Reagan*, 272 Cal. Rptr. 520, 521 (Ct. App. 1990); see also *Nancy S.*, 279 Cal. Rptr. at 214 (describing a case where lesbians planned family together but later separated); *Wray*, *supra* note 70, at 136-37 (discussing legal changes necessary to protect lesbian families).

186. See *Curiale*, 272 Cal. Rptr. at 521; see also *Wray*, *supra* note 70, at 136-37 (discussing legal changes necessary to protect lesbian families).

187. See *Curiale*, 272 Cal. Rptr. at 521.

188. See *id.*

189. See *supra* note 184 (detailing cases in which non-biological lesbian mothers were denied parental rights).

190. 272 Cal. Rptr. 520 (Ct. App. 1990).

191. See *id.* at 521.

192. See *id.*

relationship, Curiale supported the family financially and Reagan cared for the child.<sup>193</sup> When the couple split up, the mothers entered into a voluntary joint custody agreement, and Curiale continued to provide financial support.<sup>194</sup> Approximately eighteen months later, Reagan denied Curiale access to the child, and Curiale brought an action to establish de facto parent status.<sup>195</sup> The court held that the UPA was inapplicable in this situation, due to the fact that the defendant was indisputably the biological mother of the child.<sup>196</sup> As a result, the non-biological mother lacked standing to bring suit to establish joint custody, guardianship or dependency.<sup>197</sup>

While *Curiale* demonstrates how courts typically deny the non-biological mother of an ART child any legal recognition as a parent, an anomalous New York case reached a different result. In *Karin T. v. Michael T.*,<sup>198</sup> the non-biological mother was assigned support obligations regarding the ART children she and her partner had raised.<sup>199</sup> When the couple broke up, the biological mother sued her former partner for support obligations under the Uniform Support of Dependents Act.<sup>200</sup> In response, the non-biological mother argued that she had no legal obligation to the children; she had never adopted them, and furthermore, as a woman, she could not be the biological parent of the children.<sup>201</sup> In spite of the lack of legal foundation, the court held her responsible on equitable grounds.<sup>202</sup> It focused the bulk of its reasoning on the fact that the respondent lived as a man, "dressed in men's clothing and obtained employment that she regarded as 'men's work.'"<sup>203</sup> The respondent attempted to deny status as a "parent" as defined by statute, but the court found that she fit the definition both because of her relationship with the children and the other mother's reliance on her commitment.<sup>204</sup>

In effect, the court in *Karin T.* reached the right result for the wrong reasons. Its decision should not have been based on the fact

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193. *See id.*

194. *See id.*

195. *See id.*

196. *See id.* at 522.

197. *See id.*

198. 484 N.Y.S.2d 780 (Fam. Ct. Monroe County 1985).

199. *See id.* at 784.

200. *See id.* at 781.

201. *See id.* at 784.

202. *See id.*

203. *Id.* at 781.

204. *See id.* at 784.

that the respondent lived as a "man," but rather that the respondent was in fact a parent to her children and should have been responsible to them, regardless of the success or failure of her relationship with the co-parent. Indeed, despite the superficially favorable result of recognizing a lesbian as a non-biological co-parent, the court's reliance on the fact that respondent held herself out as "a man" is ironically consistent with the practice of courts routinely reaching to find a "male" parent for every child.<sup>205</sup> It seems clear from the facts of this case that the mothers at one time intended to raise the children together. Though the court did not explicitly consider intent, it should have been a primary factor in assigning parental rights and obligations.

With the exception of *Karin T.*, lesbian mothers are repeatedly denied legal recognition as parents.<sup>206</sup> Courts tend to recognize the injustice in their decisions, but generally maintain that it is the role of the legislature to provide a remedy.<sup>207</sup> It is in only exceptional and anomalous situations that lesbian co-parents are given legal rights and recognition as parents on an equal basis with heterosexual parents.<sup>208</sup> Until state legislatures amend existing laws and thereby provide the courts with a clear framework allowing parentage based on intent rather than mere biology, courts will continue to deny lesbian mothers rights to their children, and correspondingly, rights of the children to have two legal parents.

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205. See *supra* notes 131-176 and accompanying text (discussing how courts grant parental rights to sperm donors).

206. See, e.g., *Nancy S. v. Michele G.*, 279 Cal. Rptr. 212, 214-19 (Ct. App. 1991) (holding that a lesbian partner who was not the natural or adoptive parent was not a parent within the meaning of the UPA).

207. See *Curiale v. Reagan*, 272 Cal. Rptr. 520, 522 (Ct. App. 1990); *accord Nancy S.*, 279 Cal. Rptr. at 219; see also *supra* note 10 and accompanying text (detailing cases in which courts express frustration with decision yet defer to the legislature).

208. In at least one UPA state, the legislature has provided a statutory remedy after such a case was decided. After the decision in *C.C. v. C.M.*, 377 A.2d 821 (Juv. Dom. Rel. Ct. Cumberland County, N.J. 1977) (see *supra* notes 151-166 and accompanying text), the New Jersey legislature enacted a statute providing that "a donor of semen to someone other than his wife has no parental rights to a child conceived through artificial insemination unless the donor and the woman have entered into a written contract to the contrary." *In re R.C.*, Minor Child, 775 P.2d 27, 32 n.6 (Colo. 1989) (citing N.J. REV. STAT. § 9:17-44(b) (1988)).

1. By Failing to Legally Recognize that Some ART Children Have Two Parents of the Same Sex, the Law is Denying These Children Their Right to Support from Two Individuals.

If a lesbian couple with ART children does separate, not only does one parent stand to lose all claims to the children, but the children also lose all the privileges that come with having two legally recognized parents.<sup>209</sup> Despite the possibility that former partners can negotiate an acceptable custody or visitation arrangement just as heterosexual parents do, in the eyes of the law, ART children of lesbian parents have only one parent.<sup>210</sup> This means that the children have only one source of financial support; they can inherit through intestacy from only one parent; and, should anything happen to their biological mother, they run the risk of being placed for adoption or into foster care, despite any actions taken by the non-biological mother.<sup>211</sup> Not only does this put the children at a disadvantage, but it violates the public policy the courts have consistently identified—that “[i]t is in a child’s best interests to have two parents whenever possible.”<sup>212</sup>

2. Help is on the Way? The Dubious Effects of the Proposed Revisions.

When drafting the proposed revisions in October of 1999, NCCUSL was responding to a host of problems states had encountered in interpreting and implementing the UPA. The prefatory note and the reporter’s notes throughout the text are littered with references to litigation that has arisen under the UPA and NCCUSL’s goals of supplying a remedy to common cases.<sup>213</sup>

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209. See *supra* notes 24, 30, 59-61 and accompanying text.

210. See, e.g., *Nancy S.*, 279 Cal. Rptr. at 217 (holding lesbian non-biological mother a “nonparent”).

211. If the biological mother becomes incapable of caring for her children for any reason, the non-biological mother has no stronger claim to adopt or provide foster care for them than a third-party stranger does. See *supra* note 24 and accompanying text. In some states, the non-biological mother will even be prevented from adopting the children by statute. See *supra* notes 65-67 and accompanying text.

212. *C.M. v. C.C.*, 377 A.2d 821, 825 (Juv. Dom. Rel. Ct. Cumberland County, N.J. 1977); see also *Nancy S.*, 279 Cal. Rptr. at 214-19 (making it clear that the non-biological mother is not a parent under the law and refusing to provide another legal parent for the child); *Kathleen C. v. Lisa W.*, 84 Cal. Rptr. 2d 48, 50-51 (Ct. App. 1999) (same).

213. See UNIF. PARENTAGE ACT Prefatory Note (Proposed Revisions 1999), at <http://www.law.upenn.edu/library/ulc/upa/upa1099.htm> (Oct. 1999). “[T]he binding effect [of a paternity judgment] is very confused in the case law. . . . This section is

a. *The Drafters' Elimination of the "Licensed Physician" and "Married Woman" Requirements Will Result in Legal Protection for Unmarried Mothers and Sperm Donors.*

Fortunately, NCCUSL did address the "licensed physician" requirement that had been a problem under section 5 of the 1973 UPA.<sup>214</sup> By omitting this requirement for women who participate in ART and creating a presumption that the sperm donor is not the father of the child, the proposed revisions have indeed provided a remedy to one problem under current law that diminishes the rights of unmarried mothers-by-choice.<sup>215</sup> The presumption that the sperm donor is not the legal father of the child will benefit all unmarried mothers-by-choice by precluding the possibility that the donor may intrude into the child's life and destroy the familial relationships the child has developed.<sup>216</sup>

In addition, the "married woman" requirement has disappeared from the revised statute. While this may work to diminish the discrimination lesbians suffer under the proposed Act, it does not eliminate it.<sup>217</sup> The revisions still discuss ART as if it happens only between a husband and wife.<sup>218</sup> In the one provision that does raise the possibility that an unmarried woman could participate in ART, the 1999 UPA defines only who is *not* the father.<sup>219</sup> Until the UPA addresses the reality that many children

to avoid evidentiary problems, such as the finding that the report of the results of genetic testing is not admissible in a paternity case . . ." *Id.* § 503, reporter's note.

214. *See supra* notes 38-53 and accompanying text.

215. *See supra* notes 140-167 and accompanying text.

216. *See, e.g.,* Jhordan C. v. Mary K., 224 Cal. Rptr. 530, 537-38 (Ct. App. 1986) (awarding visitation rights to sperm donor over objection of both lesbian co-parents). Here, the sperm donor was intervening in the child's life over the objections of his mothers. *See id.* The court found that the donor was also entitled to visitation with the child, but not to any input into decisions regarding the child's welfare. *See id.*; *see also* Thomas S. v. Robin Y., 618 N.Y.S.2d 356 (App. Div. 1994) (demonstrating the damage an intervening sperm donor can cause a child). In *Thomas S.*, the court recognized that the child felt that any relationship with her biological father would necessarily threaten her relationship with her mothers. *See id.* In addition, a court-appointed psychologist reported that the child was concerned that visitation with her father would "undermine the legitimacy of her perception of the family unit." *Id.* at 358. Nevertheless, the sperm donor was granted an order of filiation, a first step in his pursuit of visitation privileges. *See id.* at 361.

217. Heterosexual women can get married and gain statutory protection, but lesbians cannot. *See* Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified in scattered sections of 1 and 28 U.S.C.).

218. *See* UNIF. PARENTAGE ACT Article 8 (Proposed Revisions 1999), at <http://www.law.upenn.edu/library/ulc/upa/upa1099.htm> (Oct. 1999).

219. *See id.*

have parents of the same sex, it will continue to fail in its attempt to justly establish parentage.<sup>220</sup>

Section 806 of the 1999 UPA establishes that the sperm donor is not the father of an ART child unless he and the mother so agree and register his paternity status accordingly.<sup>221</sup> It does not establish who the co-parent should be, if any, with the unmarried mother. In light of the rest of Article 8, this section is flawed. Both the 1973 and the 1999 versions of the UPA allow for the determination of paternity based on intent when a married woman engages in ART, whether or not she has complied with the statute.<sup>222</sup> It does not do the same for unmarried women. For married women, the 1999 UPA allows the father to be anyone who *intended* to be the father.<sup>223</sup> Unmarried women who intend to co-parent with a man must register, but are thus able to establish legal paternity.<sup>224</sup> Lesbian couples do not have this option.

This failure on the part of NCCUSL creates a host of consequences. In spite of the recognizable improvements to the UPA, it has left too many issues untouched.<sup>225</sup> Though the Prefatory Note claims to avoid issues of custody and visitation, it necessarily affects these issues in the states where the UPA is adopted, as many states statutorily grant standing to sue for custody or visitation to those legally recognized as parents under the UPA.<sup>226</sup>

*b. To be Truly Remedial, the UPA Must Recognize that Some Children Have Same-sex Parents.*

The changes made to the ART provision of the UPA are insubstantial in light of the real problems faced by same-sex parents in all contexts. The effect the revisions will have on lesbian parents with ART children is questionable. The proposed revisions to the 1999 UPA still define parentage from an exclusively biological perspective, ignoring the reality that being a

220. See UNIF. PARENTAGE ACT Prefatory Note, 9B U.L.A. 287 (1973); *accord* UNIF. PARENTAGE ACT Prefatory Note (Proposed Revisions 1999), at <http://www.law.upenn.edu/library/ulc/upa/upa1099.htm> (Oct. 1999).

221. See UNIF. PARENTAGE ACT § 806 (Proposed Revisions 1999), at <http://www.law.upenn.edu/library/ulc/upa/upa1099.htm> (Oct. 1999).

222. See *id.* § 802(c).

223. See *id.*

224. See *id.* § 301.

225. See *supra* notes 94-107 and accompanying text.

226. See, e.g., *Nancy S. v. Michele G.*, 279 Cal. Rptr. 212, 214-19 (Ct. App. 1991) (awarding sole legal custody to the biological mother). In *Nancy S.*, the petitioner was requesting that the court give her status as a parent so she could obtain joint custody or visitation with her and her former partner's children. See *id.* at 214.



parent involves much more than the contribution of genetic matter.<sup>227</sup> The paramount goal of the 1999 UPA in its entirety is still the determination of a father.<sup>228</sup> However, establishing paternity is not always necessary where a child has two parental figures that actively participate in its life and provide love, nurturing, and material comforts.<sup>229</sup> For these fortunate children, the biological sex of their parents is irrelevant.<sup>230</sup>

A review of Article 8, which addresses ART, discloses that NCCUSL clearly has not embraced the concept of intentional parenthood by unmarried women.<sup>231</sup> Nor does it allow for the possibility that a child could have two mothers. Therefore, courts will continue to search for a second parent of the opposite sex, even where a same-sex parent is present and pleading for legal parental status. If the UPA is to follow the principle that it is "in every child's best interest to have two parents,"<sup>232</sup> it must recognize two parents whenever possible, even if both parents are of the same sex. Notwithstanding its recent revisions, the UPA remains incapable of providing a practical solution for same-sex parents and adequate protection for their children.

In addition to Article 8, another section of the 1999 UPA may be of importance to same-sex parents. The 1999 UPA added Article 7, entitled "Parentage Based on Equitable Estoppel."<sup>233</sup>

227. See UNIF. PARENTAGE ACT art. 8 (Proposed Revisions 1999), at <http://www.law.upenn.edu/library/ulc/upa/upa1099.htm> (Oct. 1999).

228. See UNIF. PARENTAGE ACT (Proposed Revisions 1999), at <http://www.law.upenn.edu/library/ulc/upa/upa1099.htm> (Oct. 1999).

229. See generally David K. Flaks et al., *Lesbians Choosing Motherhood: A Comparative Study of Lesbian and Heterosexual Parents and Their Children*, 31(1) DEV. PSYCHOL. 105, 105-14 (1995) (presenting results of comprehensive comparative analysis of children of lesbian co-parents and heterosexual parents). The study found that there are no significant differences between the children of heterosexual parents and the children of lesbian parents born via ART. See *id.* The study also found that "lesbian mothers had more parenting awareness skills than heterosexual parents." *Id.* at 111.

230. See *id.*; see also Jerry J. Bigner & R.B. Jacobsen, *Adult Responses to Child Behavior and Attitudes Toward Fathering: Gay and Nongay Fathers*, 23(3) J. HOMOSEXUALITY 99, 99-112 (1992) (finding that parenting styles and attitudes towards fathering are substantially similar for gay and heterosexual fathers); Susan Golombok et al., *Children in Lesbian and Single-parent Households: Psychosexual and Psychiatric Appraisal*, 24(4) J. CHILD PSYCHOL. & PSYCHIATRY 551, 551-72 (1983) (noting no differences in the children of heterosexual and homosexual mothers in gender identity, sex-role behavior, friendships and peer relationships; one difference noted by this study is that psychiatric problems were more common in the children of heterosexual mothers).

231. See *supra* note 97 and accompanying text.

232. C.M. v. C.C., 377 A.2d 821, 825 (Juv. Dom. Rel. Ct. Cumberland County, N.J. 1977).

233. See UNIF. PARENTAGE ACT § 701 (Proposed Revisions 1999), at <http://www.law.upenn.edu/library/ulc/upa/upa1099.htm> (Oct. 1999).

Article 7 functions to deny a determination of paternity by genetic testing where another man has held the child out as his own for an unspecified length of time.<sup>234</sup> The effect of the provision may be to deny parental status to a person who actually is biologically related to the child. Although the UPA discusses such a situation only in the context of a man and a woman, this provision may be significant for lesbian parents, as well.

There have been several custody battles between a non-biological and a biological mother where the non-biological mother has attempted to establish parental status by estoppel.<sup>235</sup> Though this claim has never been successful in court for lesbian mothers, the fact that the Article 7 of the proposed revisions recognizes claims of parentage by equitable estoppel for heterosexual parents may have some effect for same-sex parents. If adopted, this provision would allow courts to acknowledge that the best interests of the child may be achieved through legal recognition of her or his perceived parent, as opposed to only a biological parent. If courts can do so for children of heterosexual parents, they may be willing to extend application of the estoppel theory to children of homosexual parents. To make this possibility a reality, NCCUSL should include a provision in the final draft that accounts for same-sex couples in the same way that it accounts for heterosexual couples. Because same-sex couples necessarily rely on third-party biological donors, they and their children have a much greater need for the parentage by estoppel theory than opposite-sex couples do.

*E. The UPA Should Adopt an Intent-based Standard to Determine the Parentage of ART Children.*

To remedy and prevent ongoing problems in determining legal parent-child relationships regarding ART children, the UPA should adopt an intent-based standard. The parties involved in

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234. *See id.*

235. *See, e.g., Nancy S. v. Michele G.*, 279 Cal. Rptr. 212, 214-19 (Ct. App. 1991) (awarding sole legal custody to the biological mother). In *Nancy S.*, the court was evaluating a non-biological mother's claim to visitation or custody rights to her children. *See id.* The petitioner proffered three arguments, one of which was parentage based on equitable estoppel. *See id.* at 217. The court denied this claim on two grounds. *See id.* at 218. First, it said that parenthood by equitable estoppel is reserved for paternity suits where a presumed father is attempting to avoid support payments by denying paternity after he has held the children out as his own. *See id.* at 217. The court said that estoppel could not apply to petitioner because she was not a putative father, but rather merely a "nonparent." *See id.* at 218; *see also Alison D. v. Virginia M.*, 572 N.E.2d 27, 27, 29-30 (N.Y. 1991) (stating that parenthood by estoppel is simply insufficient to overcome the objections of a biological parent and denying the non-biological mother any rights to the children).

ART should be able to contract or agree amongst themselves to determine who will be the legal parent(s) of the child. Because intent can change over time, contracts should be entered into around the time of conception. Those involved should not be forced to draft complex legal documents requiring the assistance of an attorney, since doing so could potentially violate their need for privacy. If a contract is not entered into to establish legal parentage of the child, the court should look at extrinsic evidence to find out what the intent of the parties was at the time of conception. Intent should be determinative, unless it is found that the best interests of the child would be better served by denying one parent custody or visitation with the child.

Adopting an intent-based standard would resolve the unfavorable situation which arises when sperm donors intervene unexpectedly and against the child's and the mothers' wishes. It would also allow both mothers in a lesbian couple to have legal recognition as parents. In addition, an intent-based standard for lesbian mothers would provide a baseline for courts to work from for other non-traditional families.<sup>236</sup> Allowing the "parents" to predetermine the role each will (or will not) play in the child's life at the time of conception would benefit both the child and the parent(s) by creating legal security to maintain family autonomy indefinitely.<sup>237</sup>

#### IV. Conclusion

Recent case law regarding ART children demonstrates that courts are becoming increasingly reluctant to be bound by the UPA when it so obviously yields unjust results. Courts are regularly compelled to address legal problems that arise in the modern, non-

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236. Modern technology allows a range of situations involving multiple "parents." Reproductive technology allows a child to be conceived by a sperm donor and an egg donor, carried to term by a gestational mother, and raised by another individual or individuals. Therefore, it is possible for five persons to have claims of parental rights to a single child. See generally Marla J. Hollandsworth, *Gay Men Creating Families Through Surro-Gay Arrangements: A Paradigm for Reproductive Freedom*, 3 AM. U. J. GENDER & L. 183, 183-246 (1995) (discussing various technologies gays and lesbians utilize in creating their families).

237. For lesbian parents in particular, the lack of legal security may result in unfortunate circumstances for both mother(s) and child. For example, if one mother were to die unexpectedly, neither the surviving mother nor the child could necessarily take through intestate succession. If the mothers split up, the child has no guarantee of continued financial support. See *supra* notes 30, 211 and accompanying text. Finally, there is always the risk that the sperm donor could intervene in the child's life if paternity is established. See *supra* note 23 and accompanying text. With the support of law in determining the identity of an ART child's parents, the child's future will be much more predictable legally, financially and emotionally.

traditional family, and thus have begun to realize the need for legal recognition of same-sex parents. However, in more than one-third of all states, courts are unable to legally recognize these relationships since they must enforce the law as it stands.

The UPA must respond to the changes in society and the American family structure by creating an intent-based standard to determine the parentage of ART children, thereby allowing true family autonomy for lesbian mothers and other non-traditional families. The proposed revisions to the UPA provide the ideal vehicle for change. It is now up to NCCUSL or state legislatures to address the issue of same-sex parents and give these parents legal recognition. By adopting an intent-based standard for children of same-sex parents conceived through ART, the revised UPA will equip the courts to settle disputes over custody and paternity in an equitable manner that is truly in the best interests of these children.