LESBIANS CHOOSING MOTHERHOOD:

Legal Implications of Donor Insemination, Second Parent Adoption, Co-Parenting, Ovum Donation and Embryo Transfer

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Kate Kendell, Editor, Robin Haaland, Legal Intern

National Center for Lesbian Rights

870 Market Street, Suite 570
San Francisco, CA 94102
Tel: (415) 392 - 6257
e-mail: info@NCLRights.org
Website: www.NCLRights.org

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INTRODUCTION

Over the years, the National Center for Lesbian Rights has had the opportunity to serve the unique needs of a variety of lesbian families. Many lesbians are choosing to rear children,

creating a diversity of alternative families. Because our lesbian-centered families are considered nontraditional, it remains uncertain how the courts will interpret the laws that affect these families. Because the courts are a part of -- and reflect -- our homophobic, racist, and sexist society, the potential for judicial hostility is always present.

In an effort to plan for and protect their families, hundreds of lesbians call the National Center for Lesbian Rights each year seeking guidance in making important legal decisions. The information presented in this publication is the result of our extensive legal research and experience with lesbians who are becoming mothers through donor insemination, adoption, and ovum donation. We hope that this information will enable lesbians to avoid frustrating, time consuming, and potentially expensive legal problems.

This publication is not intended to be a substitute for a personal consultation with a lawyer. Each state's laws governing parent-child relationships are different. If you are considering donor insemination, adoption, second-parent adoptions, or ovum donation and embryo transfer, it is crucial that you seek further advice from an attorney in order to be fully informed about the legal rights and responsibilities of parenthood. 1

I. ARTIFICIAL INSEMINATION BY DONOR

Clearly there is no "typical" lesbian family. A lesbian family might consist of a single lesbian raising her children on her own or with the help of an extended family she has developed in her community; two women in a committed relationship and their children; a lesbian mother and a known donor, gay or straight, sharing the joys and responsibilities of parenthood; or a group of life-long friends and their children who have chosen to live together as a family. The possibilities are endless because each lesbian family is as unique as the individual lesbians who create it.

Over the last twenty-five years, lesbians who became pregnant through donor insemination most often used an unknown donor who subsequently had no role in the child's life.

This choice was one of the only means lesbians had to protect the integrity of their families and prevent interference from donors and the courts. In recent years, however, the choices lesbians are making about donor participation have changed. More lesbian mothers are now seeking some form of donor participation in their families. Donor participation can range from full parental rights and responsibilities to very limited visitation rights, or may merely reflect an understanding that the donor's identity will eventually be revealed to the child. While there are many valid reasons why some mothers may want some degree of donor participation in raising a child, this choice also opens them up to unexpected legal risks. Using an unknown donor is perhaps the only safe legal protection available, especially in states where no statutory or case law protections exist.

The choices you make now about using a known or unknown donor, involving a physician in the insemination, and the role the donor plays in your child's life, will all have a significant impact on how your family is shaped now and in the future. Unfortunately, you may not be able to predict or control all of the legal effects your decisions may have. For example, while your known donor may sincerely believe at the time of conception that he wants a very limited role, or no role at all, in raising the child, unforeseen circumstances may later change his mind. He may be unable to have children of his own, or he may simply find himself increasingly attached to your child as she or he gets older.

If no measures were taken prior to conception to sever the donor's rights as a father, he can later seek custody or visitation through the courts regardless of your prior understanding with him, and it is highly unlikely that the courts will be willing to honor that understanding. It is therefore vital not only to conduct a careful evaluation of the needs and plans of each person involved in the decision to conceive a child, but also to take whatever steps are available to legally safeguard your decisions.

Because available legal protections vary significantly in each state, it is important to consult with a knowledgeable attorney before you actually start your family.

A. Is the Donor a Father? A Statutory Analysis

One of the primary legal concerns among lesbians using donor insemination is whether the sperm donor will be recognized as the legal father of the child. The answers to this and other legal questions for women using donor insemination vary from state to state, depending on state laws and court decisions that determine the rights and responsibilities of the mother, donor, and the child conceived by donor insemination.

As donor insemination has gained in popularity, most states have responded by enacting legislation that establishes criteria for determining whether the child of donor insemination has a father and, if so, whether the donor is the father.2 About a third of these states3 have adopted language from a 1973 model law known as the Uniform Parentage Act ("U.P.A."), which reads:

> (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 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.
>
> (b) The donor of semen 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.4

For women who do not want a donor to be legally recognized as the father of a child born through donor insemination, statutes modeled after the U.P.A. provide protection against a paternity suit. But in order to invoke the protections of these laws, strict adherence to the statutory requirements must be maintained. In states where the U.P.A. language has been adopted verbatim, it is likely that only married women are protected, and then only with the

consent of their husbands and under the supervision of a licensed physician.5 The explicit use of the word "married" in the statute may deny lesbians coverage under these statutes since lesbian relationships are not recognized as legal marriages in any state. It is possible, however, that a judge could interpret any one of these statutes more broadly to include coverage of unmarried women, including lesbians. Lesbians who live in these states and who do not want the donor to have parental rights should try to comply with all of the other requirements of these statutes as a precaution. Since most of these statutes have not yet been tested in the courts, it is very important that you consult with an attorney who can tell you how the statute has been or is likely to be interpreted by judges in your state.

A growing number of states that have adopted the U.P.A language have dropped the word "married" from their statutes,6 and they seem to apply to all women. In these states, lesbians who wish to establish that a sperm donor is not the legally recognized father of a child conceived through donor insemination would theoretically not be barred from doing so -- provided they complied with the requirements of the statute. Even in these states, however, it is very important to consult with an attorney about court interpretations of the statute in cases involving single women and lesbians. The courts have consistently shown a policy favoring the requirement that a child be provided with a father. When there is no husband to assume that role, some judges have been known to place a burden beyond the requirements of the statute on single women to demonstrate that the donor did not intend to be the father of the child (such as a written agreement by the donor to relinquish his parental rights),7 otherwise the donor may be considered a natural father entitled to visitation with respect to an "illegitimate" child.

Three states have adopted statutes that provide similar protections to those provided under the U.P.A.-based statutes, but are not modeled after the U.P.A.8 Each statute contains provisions extinguishing the donor's rights, but each has different language and somewhat different requirements from any other donor insemination statute. While the language in the Idaho and Connecticut statutes appear to only apply to married women, the Ohio and Oregon statutes do not appear to have that restriction. If you live in one of these states, you should

familiarize yourself with your state's statute. Excerpts from these statutes appear in the Appendix.

Some donor insemination statutes only address the issue of whether a child conceived through donor insemination is legitimate.9 These "legitimacy" statutes are confined to marital situations and most focus only on the child's right to confirm the paternity of the mother's husband when the husband is not the donor. These statutes may be of little use to a lesbian seeking to establish that a donor is not the father of her child, since they do not address the paternity status of an unrelated donor.

U.P.A. and "legitimacy" statutes that only address married women, and require the consent of the husband, are sometimes used to bar an unmarried woman from access to donor insemination. To our knowledge, the application of these "legitimacy" and U.P.A. statutes in this manner has not yet been challenged, but we believe that a strong argument can be made that denying single women legal access to donor insemination is unconstitutional.10

It is also important to note that most donor insemination statutes require physician performance or supervision of the insemination in order to invoke the protections of the statute. In most cases, we highly recommend complying with this requirement, regardless of whether there is a state statute that provides protections to lesbians. In some states, civil or criminal penalties attach to those who perform donor insemination who are not licensed physicians.ll But even if there is no fear of civil or criminal prosecution, physician involvement serves to help establish in the eyes of most judges that conception occurred through donor insemination (see Section I.B.1.).

As of this writing, North Dakota and Virginia are the only states to have adopted the 1988 model law known as the Uniform Status of Children of Assisted Conception Act ("U.S.C.A.C.A.").l2

This model law was developed to address the rapid advances that are being made in reproductive technologies, and is not limited to only donor insemination, but also addresses surrogacy and other modern reproductive methods. Because the U.S.C.A.C.A. was drafted much

more recently than the U.P.A., its application is much more comprehensive in dealing with issues of parentage surrounding donor insemination and in vitro fertilization. Concerning donor status, the language of this model statute reads unambiguously: "A donor is not a parent of a child conceived through assisted conception." Moreover, the published comments of the drafters of this model statute clearly state the intent to sever the donor's parental rights, even when the mother is not married:

> It should be noted . . . that under Section 4(a) nonparenthood is also provided for those donors who provide sperm for assisted conception by unmarried women. In that relatively rare situation, the child would have no legally recognized father. Id.

While the U.S.C.A.C.A. disposes of the problems for lesbians inherent in the U.P.A. statutes, its application has not yet been tested in the courts, and it may ultimately prove to be less protective of lesbian families than it appears. The interpretation of any statute rests, at least in part, on the personal values of the judge hearing the case, and is not always decided strictly by the letter of the law, particularly in cases involving a child's welfare. While adoption of the U.S.C.A.C.A. language may be progress towards protection of lesbian families, it is important not to lose sight of the need to take additional precautions if you do not want your donor to have parental rights.

In fact, regardless of which donor insemination law, if any, your state has adopted, it is important to build a solid record (e.g. drafting and signing a donor-recipient agreement, exchanging payment for semen, keeping the donor's name off the birth certificate, etc.) which shows that the donor never intended to be considered the child's father. By doing this, you are more likely to be able to convince a court, if you need to, that it was never your intention, nor the intention of the donor, to preserve his parental rights or responsibilities (See Sections I.B.1. and I.D.1.).

1. What Does it Mean if the Donor is a Father?

If a donor is determined by the courts to be the father of a child, he can be granted legal recognition of certain rights and responsibilities regarding the child. The most significant of these are:

a. A right to seek sole or joint physical or legal custody of the child;

b. A right to regular visitation with the child when the child is in the mother's custody;

c. The right to seek decision-making authority regarding the child 's education, health care and religion;

d. A right to custody of the child in the event of the mother's death or incapacity;

e. The right to seek to prevent a change in the child 's geographic location of residence;

f. The right to prevent an adoption;

g. An obligation to provide child support; and

h. The right to have his name appear on the birth certificate as the father.

Some lesbians choosing donor insemination may want their children to know the donor as a father because they believe he will provide a positive male role model, because they want their children to have access to medical history and biological family members on the donor's side, or because of any number of other reasons. Other lesbians may not want the donor to be recognized as the father of their child because they want to avoid the possibility of harm to their families through legal and emotional conflict or because they do not want to involve men in their family circle. It is important, when making your decision, to remember that "donor" and "father" have very different legal meanings and implications.

While it is true there are many roles that a donor can assume that fall somewhere between being a donor in name alone, and being a full-fledged father, it is important to recognize that in our system of law there are only two options. Either the donor is merely a donor, with no

parental rights or relationship with the child whatsoever, or he is the father, with all of his parental rights intact. There is no grey area in the law, and, when in doubt, the courts will grant donors full parental rights in cases involving single mothers. From the lesbian mother's perspective, unless she is prepared to fully co-parent her child with the donor under court order, she is much safer if the donor remains strictly a donor in the eyes of the law.

In states that have donor insemination statutes that cover single women, it is possible for lesbian mothers to safeguard against court intrusion by complying with the requirements of the statute. But even in states without these statutes, we recommend establishing the mother's and donor's intent of severing the donor's parental rights. The severance of the donor's rights does not necessarily prevent the child from gaining access to medical records or the identity of the donor,13 but it does permit the mother to define the parameters of the donor's involvement in her child's life, and may ultimately save the child from a traumatic custody battle.

The extent of the donor's involvement that you envision in your child's life will affect the donor method you choose, and should be carefully considered. If you choose to use a known donor, it is vital that you be very clear about your expectations, and that you thoroughly discuss his expectations as well.14 You should understand that the more on-going involvement a donor has in your child's life, the more likely it is that he will be successful in the future if he tries to assert his parental rights before a court of law. Behavior on your part that is inconsistent with a record that otherwise severs the parental rights of the donor may serve to negate all previous intent and allow the donor to assert his rights as the father. With no grey area, it does not take much to tip the scales from donor to father, and there is no room for your ambivalence about the donor's legal role with your child.

B. Selecting a Donor Method

Each of the donor selection methods available presents its own set of benefits and problems. Carefully weigh the pros and cons of each and select a method that will best suit the

particulars of your life's circumstances. Because it may take some time for the conception to occur, you will want to choose a method that you will find financially, practically, and emotionally feasible to repeat over the course of several months. The expense of using a medical facility or sperm bank for donor insemination, for example, may be prohibitive to some lesbians. Even if you cannot afford the method which would provide the maximum legal and health protections, however, we encourage you to take advantage of every precaution available to you.

1. Using A Known Donor

In order to gain access to medical records or to make the donor insemination process feel more personal, some women choose a male friend or acquaintance as a sperm donor and either inseminate themselves or ask a friend or their partner to do the insemination. Though the desire for privacy and an aversion to the expense and clinical atmosphere of a physician-supervised insemination are understandable, this donor method can subject the mother to serious legal risks.

If the donor knows the mother and child, he may develop more "paternal" feelings than he initially anticipated. Consequently, he may want to be treated as the child's father. It is not at all uncommon for a donor -- who originally genuinely thought that he did not want a parental role -- to begin to demand increased contact with the child and to ask for the right to make decisions regarding the child's upbringing as she or he gets older. If the donor has a change of heart, the donor's knowledge of the mother's identity gives him access to seeking custody of or visitation with the child. Courts in states that use language from the Uniform Parentage Act in their statutes are very likely to recognize the donor as the father of the child under these circumstances. Remember that the U.P.A.-based statutes deny the parental rights of a donor only when the insemination is supervised by a doctor. By using a known donor without the supervision of a physician, you heighten the risk of being forced by the courts into an unwanted and unexpected parenting relationship with the donor.

If a known donor is used, and you do not intend to enter into a co-parenting arrangement

with the donor, we recommend a physician-performed or -supervised insemination whenever possible. While some states actually require physician performance of the insemination in order to comply with the statute,15 in states with U.P.A.-based statutes, somewhat less involvement by the physician should be sufficient to allow you to establish that the donor is not the child's legal father. In states with U.P.A.-based statutes, the minimum involvement of the physician requires that the semen be provided to the physician, and that the physician supervise the insemination. The mother's right to control the relationship between the donor and the child can only be protected if these requirements are followed. And in states without a U.P.A.-based statute, using a doctor to supervise the insemination -becoming as clinical and removed from the concept of intercourse as possible -- will help prove to the court that the mother and donor did not have a personal relationship, and did not intend to create a parenting relationship.

The meaning of "physician-supervised" insemination can vary widely, and in most states it has yet to be defined. Many women object to the need for the procedure to be performed in a clinical setting by a licensed physician, and would prefer having their partner perform the insemination in the comfort and privacy of their own home. Medically, there is no problem with home inseminations in most cases, but legally this option may carry some risks.

Physician supervision may not have to amount to the actual performance of the insemination by the physician in her or his office, according to the laws in some states, but no state has a definitive answer to this yet. Again, the more precautions you take during insemination, the less likely it is that you will face problems in the future, and insemination by a physician in her or his office is probably the safest option.

At a minimum, though, you will need to consult with a physician, obtain the semen from the physician, and get assurances from the physician (in a written statement or in your medical record) that the insemination itself was supervised by her or him. In California, physician supervision can mean as little as this, and one court of appeals has indicated that home inseminations under this kind of supervision by a physician is enough to sever the donor's rights as a father.l6 But a trial court from a different district in California recently granted a donor

parental rights in a case where the physician did provide counseling for a home insemination, but the semen used for insemination did not pass through the physician's hands, and the physician failed to record or to later testify to the supervision.17 In the face of this recent decision, we strongly recommend that any arrangements you make for physician supervision of a home insemination be committed to writing, using the language that the physician "supervised" the insemination, or whatever other language is specified by the law of your state.

In the same vein of caution about physician supervision, it is very important when using a known donor to do all you can to build a substantial record demonstrating the donor's and the mother's intent that the donor not be considered the father of the child. Such a record might include, but is not limited to:

a. A clear, written agreement signed by both parties that expresses their understanding of the donor's role in the child 's life;

b. A donor's statement acknowledging the relinquishment of his parental rights and responsibilities;

c. The mother's refraining from naming the child after the donor, or from giving the child the donor's surname;

d. The mother's refraining from placing the donor's name as the father on the baby's birth certificate;

e. The child's failure to recognize the donor as her or his father;

f. The mother and child's refusal of financial or emotional support from the donor;

g. The specified limitation of the donor's permission to visit the child;

h. The use of a physician to supervise or perform the donor insemination; and

i. The payment of a fee for the donor's sperm.

A sample donor-recipient agreement can be found in Appendix A. We recommend that you have an attorney draft or review your agreement once you have discussed it with your donor, and before you both sign it. (See Section I.D.1. for a more extensive discussion of donor-recipient agreements.)

In a Colorado case, an unmarried woman used the sperm of a known donor for artificial insemination and complied with all the requirements of the U.P.A.-based Colorado statute. When the donor brought a paternity suit against

her, the judge declared the donor to be the child's father despite the fact that the mother's compliance with the statute seemed to extinguish the donor's parental rights. The reasons the judge gave for his decision were that the mother was unmarried; that the donor was known and claimed to have provided financial and emotional support for the mother and child during and after the pregnancy; that no written agreement to the contrary existed between the parties; and that the mother had allowed the donor to visit with the child. These factors, according to the judge, showed that the parties intended for the donor to be the child's father despite the fact that the requirements of the statute were met.18 The judge's decision indicates that the outcome of this case might have been very different if the mother had been able to present to the court a record of the donor's intent that he not be the father of this child, and a history of behavior consistent with that intent.

2. Using a "Go-Between" and an Unknown Donor

Before sperm banks or medical facilities that would perform donor insemination for single women became more common in some parts of the country, many women chose to let another person act as a "go-between." The "go-between" transported the semen from the unknown donor to the woman being inseminated. In this method, the "go-between" did not reveal the identities of either the donor or the woman to the other. Both the donor and the woman signed documents stating that the donor had no parental rights or responsibilities to the child. Sometimes two "go-betweens" were used to lend an increased sense of security to the intended confidentiality of the transaction.

Unfortunately, this previously popular method of donor selection has legal and health risks. If the insemination is not supervised by a physician, the legal dangers discussed above apply to this situation as well. Because the donor, mother, and go-between often live in the same or nearby communities, and move in similar social circles, it is possible that the donor will discover the identities of the mother and her child. Should the donor attempt to get custody or visitation rights to the child, courts in the majority of states will probably recognize his rights as the father, if the insemination was not supervised by a doctor or as otherwise required by statute. A donor's statement relinquishing his parental rights and responsibilities -- as well as agreements between donors and mothers -- both remain virtually untested by the courts, and it is unclear whether the courts will enforce them in the absence of a statute. Where a statute exists, it is

highly unlikely that these statements standing alone will be deemed enforceable without full compliance with the requirements of the statute. Although we recommend using carefully drafted agreements in most cases, it would be unwise to depend solely on these agreements without the safeguard of available statutory protections.

If your state has inadequate statutory protections for unmarried women using donor insemination, traveling to, and having the insemination performed in a state that does have such protections may, but does not always, provide the best legal safeguards against a donor's paternity suit.l9 In addition to the uncertainty of legal protections this option offers lesbians, it is neither financially nor logistically feasible for most women to take this kind of precaution. In states that have no statutes governing artificial insemination or where existing legislation may prevent single women from gaining access to artificial insemination, using a "go-between" and an unknown donor may be one of few options available to lesbians. But check with a lawyer first to find out if there are any civil or criminal penalties attached to a non-physician performing the insemination. It is unadvisable in those states to use a non-physician to act as your "go-between."

In addition to the legal dangers of the "go-between" method, using an unknown donor whose sperm is not screened for HIV and other sexually transmitted diseases presents a serious health risk to both the mother and the child. Even if the donor reports to the "go-between" that he has been screened for health problems, without testing, there is no way to guarantee that the unknown donor's sperm is actually disease free and safe to use. If you use a "go-between" and an unknown donor, we recommend that your "go-between" arrange with the donor to deposit his semen in a sperm bank for quarantine and testing, prior to your inseminating with his sperm (see Section I.C.1.).

3. Using Multiple Known Donors

In an effort to retain their power of choice in donors, and in the hope of avoiding

potential legal problems, many lesbians have opted to use several male friends or acquaintances as donors simultaneously. The expectation when using this method is that neither the donors nor the mother will know which insemination resulted in conception. In these cases, the mother hopes to have the benefit of choosing the donors' specific personality and physical traits, without facing the legal consequences of a donor's paternity suit. However, the potential benefits of this method are far outweighed by its significant legal and health risks.

It is possible, for example, that the child will look very much like one of the donors, resulting in the donor's increased "fatherly" feelings and a desire to be involved in the child's life. Blood tests and DNA tests are available which can determine paternity with a high degree of accuracy.20 Many states allow the results of these tests to be used as evidence in a paternity suit. If the donor succeeds in proving his biological relationship to the child, most states will recognize his rights as the father if the insemination was not performed using statutory protections. Once the donor's parental rights are recognized, the court may impose a parenting relationship between the mother and the donor, regardless of any earlier agreements between the parties.

The health risks associated with using donor insemination multiply with each additional donor. The chances that test results will be misreported, or that involvement in HIV-related high-risk behaviors will occur, expand with multiple donors. The time and expense necessary to test each donor sufficiently to insure the lowest possible health risks to you and your child would be more wisely invested in using a sperm bank or other medical facility if they are available to you. They can provide both effective screening for diseases,21 and the statutory protections afforded by a physician-supervised insemination.

4. Using A Sperm Bank

The use of sperm banks has become an increasingly popular option among lesbians. Traditionally, sperm banks have offered women two donor methods: women could obtain sperm

from an unknown donor (anonymous sperm); or women could obtain their known donor's sperm through the sperm bank. Having a known donor's semen pass through a sperm bank offers two advantages to the prospective mother. It allows her to take advantage of the medical screening procedures that a sperm bank has to offer, and it allows her to comply with the statutory requirements for physician supervision.

One problem with using an anonymous donor through a sperm bank is that some facilities may not keep a permanent record of the donor or his medical history. If the child later has serious medical problems where information about family medical history or tissue typing is important, it might not be available. We recommend that you investigate what information the sperm bank collects on donors and how long the bank maintains the records. It may not be a problem, as some sperm banks pride themselves on collecting as much information as possible.

Some sperm banks have begun to offer a third donor method option, known as "yes donors." This option permits women, if they choose "yes," to have the identity of the unknown donor revealed to the child when the child reaches the age of majority. The "yes donor" option permits women to take the strongest legal safeguards against unwanted donor involvement (if, in fact, it is unwanted), while not depriving the children of knowledge of their biological roots. This method helps to ensure that the donor's records, including his medical history, will not be lost or destroyed. If you choose this option, you should check on the extent and availability of the medical records maintained on the "yes donor." While not all sperm banks offer the "yes donor" option yet, it does appear to be a growing trend among sperm banks.

Not all sperm banks are willing to provide semen to unmarried women and lesbians. Sometimes they justify this policy by the language of their state statute governing insemination, which might require the husband's consent. As noted in Section I.A., we believe that this practice may be vulnerable to legal challenge. And while some sperm banks might have a policy preventing lesbians from obtaining semen, others in the same state may not. You may also find a private physician in your state who is willing to perform or supervise donor insemination for lesbians, even if sperm banks do not. Word of mouth is usually the best way in most states to

find out which facilities are available for lesbians.

While the use of sperm banks offers medical and legal protections to lesbians, sperm banks also cost more than using the informal methods of a known donor or a "go-between." Prices for each insemination vary, and many facilities encourage women to be inseminated twice during each cycle.

C. Related Issues Arising From Donor Insemination

1. Health Risks Associated With Donor Insemination

In addition to financial, practical, and legal considerations, women making choices about artificial insemination should carefully examine the health risks presented by different donor methods.

While sexually transmitted diseases have always been a concern for recipients of donor semen, during the past fifteen years, the AIDS pandemic has created new concerns for lesbians making the decision to become pregnant through the use of donor insemination. Our male friends are often willing to be donors; however, the possibility that a donor may be infected with HIV has made donor insemination with fresh sperm more risky for lesbians.

HIV infection is a health risk that is certainly not confined to the gay community. Regardless of his sexual orientation, if you use a known donor, you should become informed about the current accepted methods of screening his semen for infection. Consult with a local health care professional about accepted testing procedures. It is very important that any chosen donor initially tests negative for HIV and other sexually transmitted diseases. The donor should then have a second negative test result at least six months after the first, and you must absolutely trust that he has not engaged in any high risk behavior in the period between tests. Even these precautions won't guarantee the donor is entirely risk-free if you are using fresh sperm. Depending on where you live, you may be able to arrange with a sperm bank or physician to

freeze your donor's semen and he can retest in six months. This may help you to minimize the health risks in using a known donor's semen.22

If you are using a sperm bank or other medical facility, it is very important to determine that current accepted testing and quarantine procedures are being used on the sperm to minimize potential health risks. At the time of this printing, sperm banks and other medical facilities generally use the following procedure for testing semen: donors are interviewed about their high-risk behaviors and are screened based on their responses. If the interview reveals that the donor is not engaging in high-risk behavior, a sample of his sperm is taken and tested for HIV and other diseases. The sperm is then frozen (quarantined) and up to six months later the donor is retested. If the results of this second test are negative and the donor reports that he is continuing to refrain from high-risk behavior, his sperm will be made available to women using donor insemination.

As you make your decision, all of the variables -- financial feasibility, practicality, and health risks -- should be considered together with the legal implications of each method of donor selection.

2. Cultural And Racial Considerations Of Donor Selection

Regardless of the donor method you choose, you will most likely have some control over the medical history, physical characteristics and background (cultural and educational) of the donor you use. Sperm banks typically have each donor catalogued with this relevant information, and you will have (and should take) the opportunity to screen your donor for this information if your donor is known to you or if you use a "go-between."

While decisions about the physical characteristics and background of your donor are of a very personal and individual nature, it is important to consider the effect on your child that some of these considerations may have. There is strong evidence that, in this racist society in which we live, children of color who are raised isolated from their cultural or racial communities tend

to face tremendous difficulties in adjusting to their identity as they get older.23 In the past twenty-five years, much evidence of this tragedy has surfaced about Native American children raised by white families away from the reservation and without cultural and tribal ties.24 Evidence of similar stresses and difficulties encountered by African-American, Asian, and Latino children raised in cultural or racial isolation has also been brought to light during this period of time.25

Obviously, many children in this racially diverse society are raised in multi-cultural and multi-racial environments. Children of mixed race should be encouraged to flourish in all of their diverse identities, and should not be denied their identity with any one part of their background. When a child of mixed race is raised by a parent or parents of a single race, that child is potentially at risk of losing her or his cultural heritage and ties to the child's other racial or cultural communities. Experts state that this is a serious mistake with potentially tragic consequences as the child gets older.26 Parents of mixed race children are strongly encouraged by the experts to make a commitment to actively help their children explore and identify with each of her or his races.

If you are considering having a child using a donor of another race, you should carefully and honestly examine your commitment to raising your child with a strong identity to her or his other race(s) and cultural communities. Be honest with yourself about any limitations you may have to making a commitment to help your child learn about and take part in each of her or his racial or cultural communities, for the sake of your child.

3. Receiving Public Assistance

Whenever a mother applies for public assistance, such as Aid to Families with Dependent Children (AFDC), or Medicaid for her children, welfare officials may be required to ascertain the identity of the father so they can pursue child support payments from him. Most women who have conceived their children through donor insemination, however, prefer not to divulge this

information to welfare officials, because the mother does not consider the donor to be the father, regardless of what legal support there is for this position in their particular state.

In a 1982 Wisconsin case, a single, pregnant woman applied for AFDC and revealed to her case worker that she had become pregnant through artificial insemination. The news media published the information and a huge public outcry ensued. The Wisconsin legislature passed a bill which would have made it unprofessional conduct for a physician to artificially inseminate a woman who was receiving AFDC. Fortunately, this bill never became law because the governor of Wisconsin vetoed it. The woman who sparked this dispute, however, suffered both harassment and embarrassment.

In states in which the donor's paternity has been precluded by statute and/or the donor is unknown, an AFDC applicant can truthfully state that her child's legal father is unknown. In states that have no artificial insemination statutes, or where statutes protect only married women, and the donor is known or his identity is ascertainable, the applicant faces the possibility of welfare fraud charges if she states that the child's father is unknown. Whether or not the donor's name is provided for the purpose of obtaining child support payments from him, an AFDC applicant is not required to reveal the fact that her child was conceived through artificial insemination.

There is no correct answer to this complex problem. It is a crime to provide false information regarding the identity of the child's father to welfare officials and, under the law, paternity is a matter to be determined by the courts despite their lack of sympathy towards our families. On the other hand, in many of these cases, neither donor nor recipient ever intended the donor to be the father.

Another consideration is that once the donor has been declared the child's father, it is nearly impossible in most states to reverse that decision and rescind the donor's parental rights. Before applying for public assistance, each woman must evaluate her particular situation and make her own decision about the response she will give to inquiries about the identity of the child's father.

D. DOCUMENTS

1. Agreements and Subsequent Behavior Between the Donor and the Mother

When a woman wants the donor to have some involvement in her child's life, or at least for him to be known to the child, she may choose to use a known donor. As noted earlier (see Sections I.A. and I.B.), without invoking statutory protections, this method provides the least protection against a paternity suit by the donor. One possible way to help prevent a donor's paternity suit in these circumstances, however, is to execute a written agreement between the donor and the mother defining the intentions of the parties involved to extinguish the donor's parental rights, and subsequently to develop a record of conduct that is consistent with the intentions expressed in the agreement. Subsequent behavior inconsistent with the intent expressed in the agreement will only serve to undermine or defeat the usefulness of the agreement. But consistent behavior bolsters the effect of the agreement, both as a tool to prevent litigation, and as a tool to help establish before a judge, mediator, or arbitrator that the donor is not the father.

While no lawsuit has yet determined the enforceability of these donor-recipient agreements, we still encourage you to use them as an added safeguard when a known donor is involved, even when the insemination is supervised by a doctor. These agreements serve to help each and all of the parties involved to really examine and clarify to each other what their intentions and expectations are, and to provide an opportunity to discuss and settle differences in expectations before the child is conceived. Next to a physician-supervised insemination and using an unknown donor, clearly written agreements with the donor regarding his parental role, rights, or responsibilities in the child's life are the next best protection against an unwanted paternity suit.

While it is less than certain that these contracts, standing alone, will be upheld by a court

of law as binding on the parties, it is more likely that they will be considered as one of several factors by the court to indicate the donor's intent to relinquish his rights. This will be especially true if the parties' subsequent conduct conformed to the terms of the agreement. A number of recent cases have suggested that written contracts are useful and sometimes necessary for the courts to determine the intent of the donor, even when the parties otherwise complied with the requirements of the donor insemination statute.27 Where no statutory protections are available, or the parties have not complied with the requirements of the donor insemination statute, it is at least as important to attempt to establish the intent of the donor as thoroughly as possible.28

If you wish to allow the donor some limited involvement in your child's life, but do not want him to have full parental rights and responsibilities, you should draw up two separate agreements: first, a donor-recipient agreement extinguishing all of the donor's parental rights and responsibilities; secondly, an agreement spelling out the intended extent of the donor's contact with your child, accompanied by an acknowledgement that any time spent between the donor and the child is completely at the discretion of the mother. The second agreement should contain an acknowledgement by both parties that the donor has relinquished all his parental rights and responsibilities towards the child, and the agreement should not contain such terms as "visitation," "custody," or "father" in describing the kind of contact the donor will have with the child.

While on-going contact between the donor and the child is likely to weaken the effect of the donor-recipient agreement and may in fact serve to establish that paternity was never actually extinguished, we nonetheless recognize that many lesbian families are choosing to encourage contact between the donor and the child for many valid personal reasons. If you choose this type of arrangement, we recommend drawing up an agreement that spells out the extent of contact intended between the donor and the child. An agreement spelling out the intended contact will help to prevent paternity suits in two ways. First, it will give you and your donor an opportunity from the outset to clarify both your and his intentions about the donor's role with the child; and secondly, if a paternity suit is ever filed, the agreement can be used to clarify for a court that the

parties' intentions were to limit the donor's rights and role.

We also strongly suggest including an alternative dispute resolution clause in donor-child contact agreements, in case the terms of the agreement are ever disputed, or in case you need help in revising the agreement to reflect evolving roles as the child gets older (see Section III.B). Courts typically will not be helpful to you and your donor in sorting out donor-child relationships, since the courts, for the most part, have been very reluctant to recognize that donors involved in the life of a biologically related child may not be the father of that child (especially in cases involving single women). Neither the donor-recipient nor the donor-child contact agreements have been tested for their enforceability in court, but it is unlikely that they will be strictly enforced. Unfortunately, if you wish to have the donor involved in your child's life, the limited safeguards that these agreements can offer may be the best that is available.

In order to be useful when a conflict arises, written agreements between donors and recipients must reflect accurately the understanding of the parties at the time the agreement was made, and the parties' subsequent behavior must conform to the terms of the agreement. Both the donor-recipient and the donor-child contact agreement serve to clarify the intended relationship between the parties. If a breakdown in communication occurs between the parties at any point, the language of each agreement will help a mediator or judge to determine the nature of the parties' original intentions and the degree to which their subsequent behavior conformed to those written intentions. These purposes will be undermined by failing to draft a truthful and accurate document. For example, if the donor is intended neither to be the child's father, nor to have any contact with the child or any power in decisions affecting the child's life, the donor-recipient agreement should clearly state this. If the parties intend for the donor to have limited contact with the child, on the other hand, the donor-recipient agreement should still extinguish his rights, and a donor-child contact agreement should specify the duration and frequency of the donor's contact. If the subsequent behavior of the parties contradicts the earlier written agreement (for example, if the child calls the donor "daddy"), the agreement may be seen as unreliable by the court or a mediator and may not be considered at all.

The following list identifies clauses that form the basic outline for a donor-recipient agreement. This is not an exhaustive list. If there are special circumstances in your case, you will need to include additional clauses to address those circumstances. **It is always important to have an attorney draft or review your agreement to avoid any foreseeable pitfalls in language or content.**

a. The marital status of each party;

b. A statement indicating that artificial insemination was the procedure used;

c. A donor's statement acknowledging the relinquishment of is parental rights and responsibilities;

d. The designation that the recipient has authority to name the child;

e. An acknowledgement that the donor waives any right to be named on the child's birth certificate;

f. A statement that the donor's rights to bring a paternity suit have been relinquished;

g. The designation that the recipient has sole authority to appoint a guardian or authorize an adoption;

h. A statement of how the parties will deal with the identity of the donor;

i. An acknowledgement of payment of an agreed upon fee in exchange for the semen;

j. An acknowledgement that the parties understand that the agreement presents legal questions that are unsettled; and

k. A statement that each party signed the agreement voluntarily and freely.

A sample donor-recipient agreement can be found in Appendix A.

If you and the donor do not wish him to have any parental rights, and either your state does not have an insemination law helpful to you or you did not conceive in a manner which offers protection under the law, you may be able to go to court and have the donor's parental rights terminated. A court proceeding to terminate parental rights is usually done as a step in an adoption or other proceeding, but it may be available in your state as a separate court action. Because of the strong public policy against terminating fathers' rights, thus relieving them of

child support obligations, this option may not be available to everyone. Check with a lawyer experienced in family law in your area to find out whether this is possible for you.

2. Birth Certificates

Women who conceive through donor insemination are often concerned about what information to provide on the child's birth certificate regarding the identity of the father. Unless the donor is intended to be the legally-recognized father, his name should not be put on the birth certificate. Other options include "information withheld," "not stated," "unknown," or "artificial insemination." Because a birth certificate is a public document that must be presented at various times in a person's life, most women choose to put "information withheld."

Usually, officials will not question a mother about the birth certificate information she provides regarding the child's father, as long as she gives a man's name (or other information as discussed above). Lesbian mothers whose partners have androgynous names, then, could probably put their partner's name on the birth certificate without raising questions. Some lesbian mothers have given their partners last name and first initial. Placing the name of a female in the space designated for a male on the birth certificate form in some states may be considered a crime, and you should consult with a lawyer in your state before you make any decisions about this. It is important to note, also, that placing your female partner's name on the birth certificate does not establish her as a parent and does not confer any parental rights upon her, whatsoever. Placing both of the names of a lesbian couple on a child's birth certificate has personal value, but virtually no legal value.

III. OVUM DONATION AND EMBRYO TRANSFER

A. Procedure

In the last ten years, a new reproductive strategy has emerged that has profound social and legal implications for lesbians choosing motherhood. Previously,the ovum donation and embryo transfer technique has been limited to heterosexual couples where the wife is unwilling or unable to use her own eggs. Recently, lesbians have been taking advantage of this technique by donating their egg to their partner. In the procedure, the donor is administered hormone injections and fertility drugs which causes her ovaries to produce eggs. These eggs are retrieved using an ultrasound probe. The donor's egg is then fertilized with sperm and subsequently implanted in the partner's womb. Sometimes, this process is accomplished through a procedure called gamete intrafallopian transfer. In this procedure, the donor's egg and the sperm are fertilized inside the fallopian tube. While the procedure is both physically difficult and expensive, many lesbians have called NCLR asking for legal assistance since most lawyers are unfamiliar with the legal implications of such a procedure. Additionally, many women have called asking for informed consent forms, since the forms that IVF clinics have are designed for heterosexual couples. NCLR has created a standard informed consent form that can be used by IVF clinics nationwide. A copy of this form can be found in the Appendix.

This procedure presents some risks and is invasive, particularly for the donor who must undergo hormone treatments and egg retrieval. Comprehensive medical information is obtained from the egg donor, the gestational partner and the sperm donor in order to determine whether the partners and the sperm donor, if known, are suitable candidates for the medical procedure. Ovulation-inducing drugs are prescribed in order to stimulate the growth and maturation of eggs in the follicles of the ovary(ies) of the egg donor. During the egg donor's stimulation cycle, one or more ultrasound examinations are conducted on the egg donor as deemed necessary. Ultrasonography is a diagnostic procedure using high frequency sound waves emitted from a probe inserted into the vagina that provides a "picture" of the internal organs and, specifically in this case, of the ovaries and growing follicles (the small fluid-filled cysts which hold the growing eggs), as well as the uterus and its lining.

During the egg donor's stimulation cycle, the gestational partner also undergoes a

hormone stimulation cycle in order to prepare the partner's uterine lining for the transfer of the embryos. Ultrasound examinations are conducted on the partner as deemed necessary in order to coordinate the cycle of the egg donor with the cycle of the partner who will carry the child. This partner is often called the gestational partner.

Blood samples are collected on several occasions from the gestational partner and the egg donor. In addition, it is usually necessary to perform tests on the donor's sperm. Such investigations might include, but are not limited to, routine semen analysis, tests evaluating the ability of the donor's sperm to penetrate pre-tested eggs obtained from hamsters. Immunologic tests of the gestational partner and the egg donor are usually needed.

When at least one ovarian follicle develops sufficiently to allow the successful aspiration of one or more mature eggs, with high degree of probability, the egg donor is given an injection of human chorionic gonadotropin (hCG). Thereafter,the egg donor is subjected to either transvaginal ultrasound egg retrieval or laparoscopy, egg retrieval.

The transvaginal ultrasound oocyte retrieval involves the use of ultrasound to view the ovary(ies) and follicles. A needle is passed through the probe and through the vaginal wall into the follicles of the ovaries to attempt to recover eggs. The transvaginal ultrasound egg retrieval is associated with minimal discomfort, and normal activities can be resumed within a few hours of completion. It may be necessary during transvaginal ultrasound egg retrieval to perform a laparoscopy in order to assure the chances of retrieving as many eggs as possible.

The fluid aspirated from the ovaries is immediately transferred to a special tissue processing laboratory where the egg or eggs are cultured in a special growth medium in preparation for fertilization with sperm.

B. Health Risks

In addition to financial, practical, and legal considerations, women making choices about ovum donation and embryo transfer should carefully examine the health risks presented by the procedure.

The following are considerations which both partners should think about before perform the procedure: 1) ovulation-inducing agents are capable of producing over-stimulation of the ovary(ies) which might produce pain or result in the growth of cysts; 2) the transfer of embryos to the uterus of the gestational partner may cause some discomfort and there is a risk of infection or bleeding; 3) the physician may be unsuccessful in obtaining eggs at the time of the retrieval since the timing of ovulation may be misjudged; 4) transfer of the embryo(s) to the gestational partner might no be successful since the implantation of the embryo(s) into the gestational partner's uterine lining might not occur; 5) there is a possibility that the embryo(s) may implant in the fallopian tube(s) producing a tubal pregnancy which could result in major complications; and 6) the risk of multiple pregnancy increases proportionate to the number of embryo(s).

The procedure entails some health risks and is medically invasive for both partners. Before making a decision of such magnitude, discuss the health implications with your own doctor, as well as the clinic's physician. In the appendix, there is a more detailed description of the potential health risks and we strongly recommend you consider all the possible health repercussions of the procedure.

C. Legal Implications

If after the child is born, the couple separates and a custody dispute erupts, what will the courts do? Or if one partner seeks to cover the child on her health insurance or claim the child as a dependent for tax purposes? Who will be recognized as the mother? A good argument can be made that both mothers are "natural" mothers under the Uniform Parentage Act. The UPA recognizes both genetic consanguinity and giving birth as a means to establish maternity. Clearly, the UPA was not designed with reproductive technologies in mind since until recently, the genetic mother and the gestational mother were the same; however, at least one court has ruled that the UPA facially applies to any parentage determination, even when reproductive technologies are involved.29

Through collaborative reproduction, lesbians are creating families that do not fit neatly under state parentage statutes pr common law presumptions, and since judges play a prominent role in creating family law, it is not clear how the courts will respond to this new medical procedure.

States legislatures have responded to this new technology in very different manners.30 Most states have created statutes that address surrogacy contracts. For example, North Dakota adopted the Uniform Status Of Children of Assisted Conception Act, and decided to ban surrogacy agreements.31 Clearly, this statute is designed to deal with a heterosexual couple who wants to create a contract with a woman to have a child in the traditional surrogacy context and is inapplicable to an arrangement between two lesbians. Virginia also adopted the USCACA; however, Virginia allows court-approved surrogacy contracts.32 The statute provides that the gestational mother is the child's mother, unless the intended mother is a genetic parent, in which case the intended mother is the mother. Obviously, the statute does not contemplate both the gestational and genetic mothers being the intended mothers.

Florida's statute explicitly contemplates and allows gestational surrogacy under certain conditions; however, the statute does not address what the rights and responsibilities are when a lesbian decides to donate an egg to her partner. Once again, the statute is designed for a heterosexual couple, and is inapplicable to a lesbian couple.33

In California, the state supreme court addressed a case in which a gestational surrogate brought suit to establish maternity.34 The court recognized that both parties had established maternity under the act, but the court concluded that under California law there can only be one natural mother. The court found that when the two means of establishing maternity do not coincide in one woman, she who intended to bring about the birth of the child is the natural mother. The preconception intent model, a popular legal solution to the complex problems of reproductive technologies, presumes that only one woman intends to be the mother. In other words, the gestational mother only intends to bring the child to term and then intends to relinquish all rights and responsibilities to the child. But if both the gestational and genetic

mothers intend to be the mothers, the court's analysis fails, especially since the court's explicit goal is to find only one natural mother.

Many legal commentators have advocated the intent model since the traditional family law paradigm cannot accommodate the complex issues presented by reproductive technologies. These scholars argue that only a contract law model can effectively address the competing interests involved.35 We agree. NCLR has consistently argued, in many contexts, that courts should honor the intent of the parties when resolving custody and visitation disputes. For example, NCLR has argued that when a known donor enters into a contract that relinquish his parental rights, the courts should respect the agreement.

If the court respects an agreement between a genetic, intended mother and a gestational, intended mother, then both women would be viewed as the child's legal mothers. However, as the California case indicates, courts are reluctant to find more than one mother, even when both parties actually participated in the biological creation of the child. It is also likely that a court may simply fall back on a simple genetic argument. In other words, the genetic mother is the legal mother, and the gestational mother was simply a vessel in which the fetus resided for nine months.

Despite the legal uncertainties and health risks, many lesbians are going forward with this procedure. This procedure offers a route for both women to be actively involved in the reproductive process, and uniquely connects them both to the child. As has been noted before, NCLR is uncertain as to how courts will respond to a custody dispute between a genetic and a gestational mother; however, if you need any legal assistance with respect to IVF clinics or with your attorney, contact us and we will provide you with any necessary documents.

III. PROTECTING THE RIGHTS OF THE NON-BIOLOGICAL OR NON-ADOPTIVE MOTHER

A. Documents

Very often the decision to start a family using adoption or donor insemination is made jointly by partners in a lesbian couple. The couple may initially intend to raise the children as equal co-parents. If the relationship later dissolves and there is a dispute over custody of the children, however, the non-adoptive or non-biological parent will discover that she has no legally recognizable relationship to the child.

Because joint adoptions in most communities are not yet available to lesbians and gay men, usually only one partner becomes the legally adoptive parent when a lesbian family adopts a child. (See Section III.D) Similarly, the birth mother of a child conceived through donor insemination is the only mother considered to be the legal parent of that child. While the biological or adoptive mother will be recognized by the legal system as having full parental rights, the non-biological or non-adoptive parent is often viewed by the courts as a "biological stranger" to the child. Tragically, in most cases this means that the non-biological or non-adoptive mother will have no rights to an on-going relationship with her child if the family ever breaks up, or if the legally recognized mother dies or becomes incapacitated, even if the non-biological or non-adoptive mother had been the child's primary care-giver on a daily basis for many years.

Some methods of protecting the relationship between the child and the non-biological or non-adoptive parent include co-parenting agreements, medical consent forms, nominations of guardianship/conservatorship, or provisions in the legal parent's will.

1. Co-Parenting Agreements

Like donor agreements, co-parenting agreements should reflect accurately the understanding of the parties involved and should contain language that recognizes the parental role, affection, and responsibility that develops between the child and the non-biological or non-adoptive mother.

While many may believe that parenting should be equally shared, in actuality many

co-parents do not equally divide all responsibilities of parenting. For countless individual reasons, one parent may financially support the entire family, or one parent may take on a primary parenting role, regardless of that parent's biological relationship to the child. Some lesbian partners do share the responsibilities of parenting equally by dividing up the types of responsibilities they assume, while others just share each responsibility equally. Most combine all of these approaches at different times to cope with whatever circumstances around parenting arise.

Parenting roles for most people carry with them certain assumptions about discipline or decision-making on behalf of the child. While one parent may assume that decisions are shared equally, the other may believe that she has ultimate veto power. It is vital to be clear from the beginning about truly being in this together. Co-parenting for most adults generally means not only sharing the responsibilities of caring for the child, but also in making important decisions about that child together. If you are not prepared to share both aspects of parenting, it is important that you explore together the parameters of your roles in raising the child, and that you are both clear on those decisions.

The dreams, roles, and assumptions you carry with you should all be discussed as thoroughly as possible with your partner before you enter into a co-parenting relationship.36 Because we have few role models, and very few legal protections, simple misunderstandings or unstated assumptions can lead to disastrous consequences for your child. Drafting a co-parenting agreement that addresses many of these issues will help guide you through this discussion and increase the likelihood of both of you entering this relationship with your child with your eyes open to the risks, responsibilities, and rewards of co-parenting.

The co-parenting agreement will also help you in the future if you ever reach an impasse about your respective roles and relationships with your child. And, if a dispute about your roles should ever have to be brought to a more formal dispute resolution setting, like a court, a mediator, or an arbitrator, your co-parenting agreement will help both of you to identify your original intentions about co-parenting. While these agreements are probably no more

enforceable than a donor-recipient agreement, like the donor-recipient agreement, they may be useful to demonstrate the intentions of both partners, and the consistency of their conduct with those intentions. This may be useful to the non-legally recognized parent to establish a parent-child relationship, should that ever be disputed.

The following list identifies clauses that form the basic outline for a co-parenting agreement. However, this list is far from exhaustive of all the issues that may be important in your individual circumstances, and we strongly recommend having a lawyer draft or review your agreement before you sign it. A local lawyer will be able to help you with the language, and to avoid pitfalls the laws in your state might present for you. These contracts have not been tested in most states. Where they have, they have received, at best, mixed reception by the courts. Generally, it is unlikely that they will be upheld as binding by a court of law.

a. A statement indicating that conception or adoption was a joint decision;

b. The name and birth date of the child;

c. An agreement to share equally or otherwise in child-rearing costs;

d. A statement of intent of both parties to continue to provide for the child if the adult relationship dissolves;

e. A statement identifying the non-biological or non-adoptive parent as a psychological parent;

f. The terms of visitation, custody, and support if the adult relationship dissolves;

g. An agreement to make all major decisions jointly;

h. A statement indicating that the non-biological or non-adoptive parent will be guardian of the child in case of incapacitation or death of the biological or adoptive parent;

i. An agreement to use alternative dispute resolution if a dispute arises;

j. An acknowledgement that the agreement involves questions not yet settled by statute or the courts;

k. An acknowledgement that the agreement was signed voluntarily and freely; and

l. An agreement that designates liquidated damages to either party should the contract be breached.

A sample co-parenting agreement can be found in Appendix B.

2. Consent Forms for School, Travel, and Medical Decision-making

In most cases, a letter signed by the legally recognized parent, informing school officials that the biological or adoptive mother grants authority to her co-parent to make decisions regarding their child's education, should prevent confusion on this issue. A follow-up meeting among the co-parents, teachers, and other school personnel may also be helpful. Similarly, a letter granting the non-biological or non-adoptive mother the authority to make travel decisions for the child should prevent problems in this area. Through the use of a medical consent form, finally, the biological or adoptive mother can give her co-parent authority to make decisions regarding their child's medical care. If the child's father is known (especially if the biological mother and father have joint custody of the child) you may be required under law to obtain his consent in order to execute a valid consent form allowing the non-biological or non-adoptive parent to make medical or other decisions for the child. We know of no cases which challenge the authority of these kind of consent forms. It is important to bear in mind that their enforceability has not been tested in the courts.

A sample medical consent form is attached in Appendix C.

3. Nomination of Guardianship/Conservatorship

A nomination of a guardian or conservator designates the care and custody of the child to a named, responsible adult in the event that the child's legal parent becomes physically or psychologically unable to care for her or him. While the nomination is not binding, most courts will give great deference to a clear nomination of guardianship in cases where there is no other legally recognized parent. We strongly urge all biological or adoptive parents to execute a

nomination of guardianship or nomination of conservatorship.37 In lesbian co-parenting arrangements, a provision indicating that this document has been executed to help to make the wishes of the biological or adoptive mother clear will underscore the importance of the relationship that exists between the co-parent and the child before an emergency situation arises. Since the required format of these documents vary significantly from state to state, and conformity, or non-conformity with the requirements can determine the validity of the document, we strongly encourage you to have the written nomination drafted by an attorney who is aware of all the technical statutory requirements for your state, and can thus ensure the document's validity. The technical requirements in many states will necessitate that the formal nomination be drafted separately from the co-parenting agreement.

In many states a nomination of guardianship or conservatorship can be included in the biological mother's will. A provision in a will might state, for example:

> If I am unable to raise my child, I believe that it is in her/his best interest to have the continuity of the loving and supportive relationship already established between (name of partner) and herself/himself This appointment is based upon the fact that said minor has lived with this adult and looks to her for guidance, support, and affection.

To try to prevent other relatives from contesting this provision in her will, the biological or adoptive mother should include a statement that specifically explains that she has intentionally failed to name any of these relatives as guardian of her child because she does not believe that it would be in the best interest of the child to be placed in their custody. If the intent of the legally recognized parent is clear, and the nomination of guardianship serves the child's best interests, courts will usually honor the nomination. In a recent case in Vermont a probate court upheld the will of the biological mother against the challenge brought by the child's grandparents. The biological mother's will had nominated her lesbian partner of twelve years as the guardian of the son they co-parented.38

In most states, a surviving legally-recognized parent has a right to custody of the child

upon the death of the custodial parent. If an artificial insemination donor is unknown, there should be no problem. Where the donor is known, however, and the court declares him to be a legal parent, he may be given custody of the child if the biological mother dies. To attempt to protect against this, the mother should include in the donor-recipient agreement a clause giving her exclusive rights to name a guardian for the child in the event of her death.

A sample nomination of guardian form is attached in Appendix D.

B. Alternative Dispute Resolution

For years, lesbians have been drafting co-parenting agreements in an attempt to create rights and protections for their families. Inevitably, just as with heterosexual relationships, some lesbian relationships end in a break-up. Although many laws have been established to protect the interests of family members in a heterosexual divorce, virtually none exist to govern the dissolution of lesbian families. As a result of this inequity and of the personal biases of some judges, most courts have been unwilling to recognize and protect lesbian families. Consequently, attempts by lesbians to seek resolution of their family disputes through the courts are often expensive, emotionally taxing, legally complex, and can result in a solution that contradicts the nature of the original relationship. It is not unusual for lesbians to emerge from court proceedings with a binding order that neither party feels is fair, because the case was not decided on the premise that a valid family relationship existed

Because of the intensely personal and fundamental nature of these conflicts, and the insensitive decisions made by the traditional judicial system in lesbian family disputes, one of the most important clauses to include in a lesbian co-parenting agreement is one that calls for mediation or arbitration of disputes not covered by the agreement. Abiding by an agreement to alternative dispute resolution would require the disputing parties to bypass the judicial system and bring any conflicts that arises to mediation or arbitration.39 While abiding by an alternative

dispute resolution clause may or may not be enforceable by a court in your state, a good-faith agreement to bypass the courts will serve to remind both co-parents of the need to take special care to safeguard the child's relationships with both adults even during periods of stress.

Recently, lesbian co-parents, like other parents, have become increasingly involved in custody and visitation disputes when their relationships dissolve. Where lesbian couples have been forced to seek redress for their dissolution disputes in the courts; however, the outcome has been tragic for parents and children alike. Unlike the situation with heterosexual parents, the courts do not view lesbian co-parents as each having an equal relationship to their children. In many cases, in fact, the non-biological or non-adoptive parent has found that the courthouse doors were closed to her because the law did not recognize any relationship between her and her child. As a result of being viewed by the courts as a "biological stranger" to her children, the non-biological or non-adoptive parent in these cases is denied the right even to have her claim for visitation heard by the court.40 At best, non-biological and non-adoptive parents have occasionally been considered "significant adults" in their child's life and granted extremely limited visitation. The rights of a "significant adult" are substantially inferior to those of a parent. In contrast, in an alternative dispute resolution forum, the mediators would consider the interests of both of the disputing parties as if they were on equal footing. The resolution reached by the parties in this forum is much more likely to reflect the family relationship and the intent of the original agreement.

C. Lesbian Co-Parent Visitation and Custody Disputes

At the time of this printing, five states have allowed a lesbian non-biological or non-adoptive parent to seek custody or visitation of her children in a disputed custody case.41 Typically, courts are hesitant to intervene with a parent's constitutionally protected interest, but in Wisconsin, the state supreme court recently concluded that if the non-biological mother can prove that she has a parent-like relationship with the child(ren) and that the biological parent has

substantially interfered with this relationship, the non-biological mother can have standing to seek a visitation order. "Standing" is a legal term of art which means the right to sue. As noted before, courts traditionally view a lesbian co-parent as a biological stranger to the child and since lesbians cannot marry, the lesbian co-parent is left without any legal recourse after a breakup.

The Wisconsin court described four elements that prove a parent-like relationship in order to obtain standing: (1) that the biological parent consented to, and fostered the non-biological mother's formation and establishment of a parent-like relationship; (2) that the non-biological mother and the child lived together in the same household; (3) that the non-biological mother assumed responsibility for the child's care; and (4) that the non-biological mother had been in a parental role for a sufficient period of time to have established with the child a bonded, dependent relationship parental in nature.

The existence of signed documents discussing and declaring your intentions and responsibilities are vital in proving these elements. While it is unlikely that other states in large numbers will soon follow suit, it is important to establish a record.

A few states have statutes that seem to allow limited visitation rights for non-biologically related adults, if they can demonstrate to the court a significant parental relationship with the child, and if the court believes that granting visitation would serve the child's best interests.42 While the existence of these expanded visitation statutes is a hopeful sign, most, with the exception of Oregon's,43 have not yet proved to be useful in settling visitation disputes between lesbian co-parents. Most cases testing these statutes that have involved lesbian co-parents have been decided in one of two ways: 1) the statute was held not to confer rights to- the non-biological or non-adoptive parent when the legally-recognized parent objected to the visitation; or 2) the non-biological or non-adoptive parent was shut out from any access to court whatsoever, based on a court imposed requirement that the right to visitation could only be invoked during the course of an existing family court proceeding (like a divorce). The necessity of a pending divorce proceeding makes it virtually impossible for lesbian co-parents to use these statutes.

The children of lesbian co-parents and their non-biological or non-adoptive parents have already suffered a number of devastating set-backs in their attempts to seek protections for their parent-child relationships under these expanded visitation statutes. But not all of these statutes have been tested yet, and it is important that you consult with a lawyer in your state if you find yourself in a visitation dispute. If your state has an untested expanded visitation statute, you may have some legal means of enforcing your right to visitation with your children. Even in states with expanded visitation statutes, though, lesbian families who settle their visitation disputes through mediation or arbitration are likely to reach a more workable resolution than if the dispute is brought before the current judicial system.

As long as the courts remain unwilling to recognize the nature of the families and parental relationships lesbians are creating and nurturing, our children risk the loss of a relationship with one of their parents. In order to protect the stability of our children's relationships with their parents and their home environment, lesbians creating families together must make a commitment to deal responsibly and fairly with family disputes and dissolutions by agreeing to avoid the traditional legal system whenever possible and to seek resolutions in mediation or arbitration.

D. Second-Parent Adoption

In most states, there are virtually no legal means of protecting the relationship that develops between the non-biological or non-adoptive parent and the child. If the biological or adoptive parent dies or becomes incapacitated, the child does not automatically remain with her or his other parent. Even where a nomination of guardianship or conservatorship has been drafted, it is up to the discretion of the court whether the child will be allowed to stay with her or his non-legally recognized parent. If the non-biological parent dies, the child may be barred from inheritance from her or his non-legally recognized parent if a will was not properly executed, and the child is certain not to qualify for social security benefits. And if the

relationship between the mothers dissolves, there are no guarantees of civil feelings between the mothers - - civil enough, that is, to be able to work out a custody and visitation schedule rationally. And, for the biological mother, it is unlikely that she will be able to actually get child support enforced if the non-legally recognized parent believes that she is relieved from that obligation. Even if you are fortunate enough not to encounter these difficulties, a non-biological mother may find it difficult to obtain a health insurance, disability insurance, or life insurance policy that names her non-biological or non-adoptive child as the beneficiary.

Most of these potential problems can be eliminated if the non-biological or non-adoptive parent is permitted to adopt the child, without having to compromise the rights of the first legally recognized parent. Many lesbian families have hopes that the mother's partner will be able to adopt the child and that she will become the child's other legal parent. Such "second-parent" adoptions are granted fairly routinely in a heterosexual context as step-parent adoptions in families blended through marriage. In a lesbian context, however, where the mother's partner is not legally related to the mother (by marriage), nor is she biologically related to the children, the courts have been slow to grant such adoptions and several courts have outright denied them. There are currently a little over a dozen jurisdictions in this country where second-parent adoptions have become available without requiring that the original legally-recognized mother relinquish all of her parental rights. In the same vein, the biological or adoptive mother's partner generally cannot become the legal guardian of the child without limiting some of the legal rights of the biological or adoptive mother. As of this printing, second-parent adoptions are gaining acceptability in an increasing number of states, and it may be useful for you to consult an attorney in your area to help you determine whether a second-parent adoption is possible for you.44

While there may not be a precedent in your jurisdiction, most states follow the same standard in adoptions, "the best interests of the child." The amount of discretion the judge has to determine whether this standard has been met, however, varies from state to state.

Since most state statutes are silent on whether the statute permits the adoption, the judge

has enormous discretion in this arena as well. If the judge strictly interprets the statute, it is likely that the adoption will be denied. Most state adoption laws contain cutoff provisions, which cuts off the biological parents rights and responsibilities. If the judge finds that the cutoff provision is mandatory, then a joint adoption is not possible; but if the judge relies on the best interests of the child rationale, then she will likely find the cutoff provision is directory, not mandatory, and allow the joint adoption without terminating the rights of the biological parent.

In two states, statutes exist which ban lesbians and gay men from adopting.45 In these states, the law presumes that lesbians and gay men are unfit to serve as adoptive parents. Where individual adoptions are not yet an option for lesbians and gay men, it is highly unlikely that second-parent adoptions will be available for some time. And while, in some states, the adoption statutes may seem open to individual lesbian or gay adoptions, their language may preclude second-parent adoptions. If you are thinking about pursuing a second-parent adoption, consult with an adoptions attorney to learn if the law in your state permits them.46

Second-parent adoption is not the same proceeding as step-parent adoptions under most adoption statutes. They are usually considered independent (non-agency) adoptions, for which a state-licensed social worker is assigned to do a home study. Home studies usually entail one or more visits to the home and interviews with all the family members. When the home study is complete the social worker produces a report of findings for the judge and includes a recommendation that the adoption either be granted or denied. The judge almost invariably follows the recommendation made by the social worker.

Even in states where the legal standard for adoptions is the best interests of the child, many adoption agencies have formal or informal policies to automatically issue negative recommendations for second-parent adoptions. Sometimes a social worker assigned to your case may not be able to get beyond her personal bias against lesbians or same-sex couples, even if no agency policy exists. The intricacies of the law, coupled with the myriad biases you may encounter from the agency or the judicial system, have consistently rendered second-parent adoptions very complex and fragile. We strongly urge you not to proceed with a second-parent

adoption without having secured a lawyer with experience in these cases, or one who is willing to learn.47

As noted before, these adoptions are not yet widely available. Ideally, no family seeking legal protection should be barred from obtaining a second-parent adoption, but we are not yet at that point. In jurisdictions where these adoptions have not yet been attempted, there is a good chance that if the first one is denied, all subsequent ones will also be denied. And even in jurisdictions that have already granted these adoptions, it is still advisable to proceed with some caution, until this right becomes better anchored. We hope that, in time, these adoptions will receive more wide-spread acceptance; for now, we recommend only seeking a second-parent adoption if you are able to demonstrate overwhelming evidence of stability for the child.

Some of the factors we look for as evidence of stability are: the longevity of the adult relationship (a minimum of five years is recommended); employment and income stability of the parent(s); sufficient age and verbal skills of the child (preferably old enough to speak and to verbalize the parental relationship she or he feels towards the non-biological parent); the absence of a father (known donors are acceptable if their rights were or can be severed under state law, but the existence of a known father is likely to defeat the adoption); and general stability of the home environment. Any special needs the child may have concerning health care, financial support or emotional stability are also extremely helpful in these cases to establish with the judge that granting the adoption is in the child's best interests.

In the jurisdictions where the possibility of second-parent adoptions has become more wide-spread, your lawyer may advise you that the "white picket fence" standard in your community has been relaxed, and something less than overwhelming evidence of stability will be enough to obtain a second-parent adoption. This will most likely be true only in the jurisdictions where numerous second-parent adoptions have already been granted, and it is a good idea if you live in any of those areas to consult with a lawyer, or contact NCLR to ascertain how strictly your case should conform to our suggested factors of stability.

In cases where the initial legal parent became a parent through an individual adoption, it

is important to remember what information was divulged at the time the adoption was granted. If the social worker or adoption agency asked directly whether you were a lesbian, you may have committed fraud if you denied the truth. If it is discovered that a misrepresentation occurred, even after an adoption is final the adoption may be reversible based on that fraud. However, if you were not asked directly, the failure to voluntarily disclose your sexual orientation is not likely to be considered fraud, and pursuit of a second-parent adoption is safer.

Whatever your circumstance, it is best to consult with a lawyer before getting your heart set on the possibility of a second-parent adoption, since they are not an option in every state. And if it appears that one might be available under your particular circumstances, you should be prepared to proceed only with the assistance of a lawyer.

CONCLUSION

The growing phenomenon of lesbians choosing to become mothers and co-parents continues to create a number of new and unique problems. Although donor insemination has now been available for some time, lawmakers have not kept up with the new developments and concerns facing lesbian mothers. While we now have more favorable case law with which to work than we did when this publication's first edition was released, much of the law is still very limited in its usefulness for lesbians. Sadly, much of the precedent is more of a hindrance than a help to lesbians who are trying to protect their families, and we still find ourselves with very little guidance from the legal system to aid lawyers in providing sound advice to protect women considering lesbian parenting.48

The purpose of this publication has been to highlight the potential problems and suggest some legal alternatives that might be helpful. Because there are still so many unknowns, and because the law in this area changes so rapidly and varies from state to state, every potential parent should consult an attorney to discuss the legal implications of parenthood whether it be through donor insemination, adoption, second-parent adoption, or ovum donation.

ENDNOTES

1. For assistance finding attorneys familiar with donor insemination or adoption issues, check with your local bar association, consult your phone book, or contact the National Center for Lesbian Rights (NCLR), Lambda Legal Defense and Education Fund, American Civil Liberties Union (Lesbian and Gay Rights Project), Gay and Lesbian Advocates and Defenders or Lavender Families Resource Network.

NCLR, Lambda, ACLU, GLAD, and Lavender Families all offer information and advice on lesbian motherhood, including national referrals of attorneys sympathetic to lesbian and gay issues, and publications addressing the legal aspects of donor insemination.

Contact NCLR at 870 Market Street, Suite 570, San Francisco, CA 94102, 415/392-6257.

Contact Lambda at 666 Broadway, New York, NY 10012, 212/995-8585, or 606 South Olive, #580, Los Angeles, CA 90014, 213/937-2728.

Contact ACLU (Lesbian and Gay Rights Project) at 132 West 43rd St, New York, NY 10036, 212/944-9800 ext. 545.

Contact GLAD at P.O. Box 128, Boston, MA 02112, 617/425-1350.

Contact Lavender Families at P.O. Box 21567, Seattle, Washington 98111, 206/325-2643.

2. At publication, 33 states had adopted some form of legislation addressing issues of parental rights and responsibilities arising from donor insemination as the means of conception. As donor insemination increases in popularity, we anticipate more and more states will follow suit. As a result, the lists of states that have statutes contained in this publication might not be as current at the time of reading. In the same vein, the breadth of coverage from these statutes varies widely from state to state, and we cannot predict whether any of the states listed may increase or decrease their protections in the future.

3. The artificial insemination clause of the Uniform Parentage Act has been adopted in some form in Alabama (Ala. Code Sec. 26-17-21 (1995)), California (Cal. Civ. Code Sec. 7613 (1994)), Colorado (Colo. Rev. Stat. Sec. 19-4-106 (1995)), Delaware (13 Del.C.Sect. 801-819 (1994)), Hawaii (H.R.S. Sect 584-1 to 584-26 (1994)), Illinois (Il. St. Ch. 750 Sect. 40/3 (1995), Kansas (K.S. St.
Sect. 38-114 (1994)), Minnesota (Minn. Stat. Sec. 257.56 (1994)), Missouri (Mo. Rev. Stat. Sec. 210.824 (1994)), Montana (Mont. Code Ann. Sec. 40-6-106 (1993)), Nevada (Nev. Rev. Stat. Ann. Sec. 126.061 (1993)), New Jersey (N.J.Rev. Stat. Sec. 9:17-44 (1995)), New Mexico (N.M. Stat. Ann. Sec. 40-11-6 (1995)), North Dakota (N.D. St. 14-17-01 to 14-17-26 (1995)), Ohio (OH. St. Sect. 3111.30-38 (1995)), Rhode Island (Gen. Laws 1956, Sec. 15-8-1 to 15-8-27 (1994)), Washington (Wash. Rev. Code Sec. 26.26.050 (1994)), Wisconsin (Wis. Stat. Sec. 891.40 (1995)), and Wyoming (Wyo. Stat. Sec. 14-2-103 (1995)). This Act is concerned only with the issue of how paternity is determined. Its provisions do not discuss custody.

4. Uniform Parentage Act Sec. 5, 9A U.L.A. 592-93 (1979).

5. The states with U.P.A. statutes that only address paternity when the inseminated woman is married include Alabama, Minnesota, Missouri, Montana, and Nevada. See Ala. Code. Sec. 26-71-21; Minn. Stat. Sec. 257.56; Mo. Rev. Stat. Sec. 210.824; Mont. Code Ann. Sec. 40-6-106; and Nev. Rev. Stat. Ann. Sec. 126.061.

6. States that have U.P.A. statutes that apply to all women, regardless of their marital status, include California, Colorado, Illinois, New Jersey, New Mexico, Washington, Wisconsin, and Wyoming. An example of this type of statute reads:

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

New Jersey and New Mexico have special provisions in their statutes not found in the other U.P.A.-based statutes, that provide additional protections to the mother. In these states the donor is presumed to have no parental rights if the other requirements of the statute have been met, unless he is able to demonstrate that he and the mother entered into a written contract to the contrary. In this manner the burden is placed on the father to prove paternity, rather than on the mother to disprove it.

7. See In re R.C., 775 P.2d 27 (Colo. 1989); Jhordan C. v. Mary K., 179 Cal. App. 3d 386, 224 Cal. Rptr. 530 (Cal. Ct. App. 1986); C.O. v. W.S. et al., 64 Ohio Misc.2d 9, 639 N.E.2d 523 (1995); Thomas S. v. Robin Y. 209 A.D.2d 298, 618 N.Y.2d 356 (N.Y. 1994); C.M. v. C.C. 152 N.J. Superior 160 (1977); See also, McIntvre v. Crouch, 980 Or. App. 462, 780 P.2d 239, cert. denied 110 S. Ct. 1924 (1989), where the donor was granted the right to a court hearing in the absence of a written agreement establishing his intent to relinquish his parental rights.

8. Donor insemination statutes that are not modeled after the Uniform Parentage Act, but do extinguish the paternity rights of donors, include Connecticut (Conn. Gen. Stat. Sec. 45-69 (f,g,i,j) (1994)), Idaho (Idaho Code Sec. 39-5405 (1995)), and Oregon (Or. Rev. Stat. Sec. 109.243 (1993)). Each statute differs in the amount of protection it offers to lesbians, and a careful review of the language, or consultation with an attorney, is advisable when planning an insemination in these states. See Appendix E for excerpts from each of the statutes.

9. States that have "legitimacy" statutes that address the status of children born from donor insemination include Alaska (Alaska Stat. Sec. 25.20.045 (1994)), Arizona (Ariz. Rev. Stat. Ann. Sec. 12-2451 (1994)), Arkansas (Ark. Stat. Ann. Sec. 9-10-201 (1994)), Florida (Fla. Stat. Sec. 742.11 (1994)), Georgia (Ga. Code Ann. Sec. 19-7-21 (1995)), Kansas (Kan. Stat. Ann. Sec. 23-129 (1994)), Louisiana (La. Civ. Code Ann. art. 188 (1994)), Maryland (Md. Est. & Trusts Code Ann. Sec. 1-206 (1995)), Michigan (Mich. Comp. Laws Sec. 333.2824 (1995)), New York (N.Y. Dom. Rel. Law. Sec. 73 (1995)), North Carolina (N.C. Gen. Stat. Sec. 49A-1 (1994)), Oklahoma (Okla. Stat. tit. 10, Sec. 552 (1994)), Tennessee (Tenn. Code Ann. Sec. 68-3-306 (1995)), and Texas (Tex. Fam. Code Sec. 12.03 (1993)). An example of this type of statute reads:

> A child, born to a married woman by means of artificial insemination performed by a licensed physician and consented to in writing by both spouses, is considered for all purposes the natural and legitimate child of both spouses.

"Legitimacy" is a legal term, and its precise meaning and implications vary from state to state. The language of these statutes differs from state to state, but, with the exception of the Arkansas and Texas statutes, these statutes are of little to no use to lesbians because they contain no provision that extinguishes the parental rights of the donor. They only serve to establish the parental rights of the husband.

10. See Eisenstadt v. Baird, 405 U.S. 438, 453, (1972). In this case the U.S. Supreme Court struck down a state statute that prohibited single women from obtaining birth control, as a violation of equal protection under the constitution. Denial of access to reproductive technology for single women is analogous to the unconstitutional Eisenstadt restrictions.

11. The donor insemination statute in Georgia, for example makes it a felony (imprisonment for one to five years) for a non-physician to inseminate a woman. Ga. Code Ann. Sec. 43-34-42 (1995). Idaho (Idaho Code 39-5401) is an example of a state that makes insemination by a non-physician a criminal misdemeanor. Other state statutes require a physician to perform or supervise donor insemination, but provide no sanctions when a non-physician performs the insemination (see footnote 15 for a list of those states that require physician performance). We strongly recommend that you consult with a lawyer if you plan on by-passing the physician requirement.

12. See N.D. Century Code Sec. 14-18 (1994) and Va. St. Sect. 20-156 (1995), modeled after the U.S.C.A.C.A., National Conference of Law Commissioners on Uniform State Laws, Washington, D.C., July 29-August 5, 1988.

13. Most sperm banks screen out donors with poor medical histories, and it is possible with many sperm banks to arrange for access to the specific medical profile of the donor if you request it. There is also a growing trend among sperm banks to allow clients to opt for making the identity of the donor known to the child when she or he reaches the age of majority.

14. The Lesbian and Gay Parenting Handbook by A. Martin (Harper Collins 1993), is a useful guide to lesbians who are exploring parenthood, co-parenting with a lesbian partner, co-parenting with a donor, single parenting, and other options. The book is a valuable resource to prepare you for discussions with your known donor or a co-parent that might otherwise be fraught with

uncertainty and mystery. While you may not have all of your questions and anxieties settled prior to discussing issues of paternity or co-parenting, it is a good idea to have thought through the issues before discussing them with your donor or prospective co-parent.

15. The states that specify a requirement that the insemination be performed by a physician include Connecticut, Georgia, Idaho, New York, Oklahoma, Oregon, and Virginia. Most U.P.A.-based state statutes require physician-supervision (not necessarily performance), as do some legitimacy statutes. Some, but not all, statutes carry criminal or civil sanctions for non-compliance with the physician supervision or performance requirement (see footnote 11).

16. In 1986 a California Court of Appeal (First District) made the following comment in a decision interpreting "physician supervision" under the California donor insemination statute:

However, because of the way section 7005 is phrased, a woman (married or unmarried) can perform home artificial insemination or choose her donor and still obtain the benefits of the statute. Subdivision (b) does not require that the physician independently obtain the semen and perform the insemination, but requires only that the semen be "provided" to a physician. Thus, a woman who prefers home artificial insemination or who wishes to choose her donor can still obtain statutory protection from a donor's paternity claim through the relatively simple expedient of obtaining the semen, whether for home insemination or from a chosen donor (or both), through a licensed physician.

Jhordan C. v. Mary K., supra note 7.

17. Steven Wittmann v. Martha Andra Northup. Mary M. Northup. Intervenor, Yolo Co. Super. Ct. 65787 (July 24, 1991). While the donor's semen was provided to the medical clinic for fertility testing, the actual semen used for the insemination by-passed the clinic and went directly to the woman inseminating at home. This fact contributed to the court's finding that physician supervision was not involved in this case.

18. In re R.C., supra note 7; See also, McIntyre v. Crouch supra note 7.

19. When the actions that lead up to the conception and birth of a child through donor insemination take place in more than one state, there are no consistent rules about which state's laws govern paternity. While in some states the place of insemination determines the law to be applied, elsewhere, the law of the state where the child is born or resides governs. Few states have these rules spelled out by statute, and in most cases where state lines have been crossed, lawyers can do little more than guess which state's laws will apply.

A few states do have statutes that govern inseminations involving more than one state. For example, the donor insemination statute in Connecticut expressly applies to cases where a Connecticut resident inseminates outside of Connecticut, but gives birth to the child in Connecticut. There is virtually no uniformity to these rules relating to conflicting state laws, and it is best to consult with lawyers from each state involved if you choose to attempt this approach.

20. H.L.A. test involves a tissue typing analysis done on blood samples from the mother, child, and alleged father. lt has been proven to be 90-99.5% accurate in determining paternity, depending on the spectrum of blood tests done. Most states accept the H.L.A. test as rebuttable proof of paternity. Some states are now accepting a recently developed D.N.A. fingerprinting test for paternity, which has a proven accuracy rate of 99.9%. This test is also a blood test, and involves comparing the genetic make-up between the parents and the child.

21. While the health risks are minimized by the use of sperm banks, it should be noted that no procedure is risk-free. Although extremely rare, it is possible for lab tests to be misreported

regardless of the donor method you choose. However, the use of frozen sperm through a medical facility or sperm bank does offer you the advantage of eliminating the concern about donor lapses in high risk behavior.

22. No current form of insemination is 100% risk-free from the contraction of sexually transmitted diseases. But some methods (such as the use of quarantined frozen sperm) may be less risky than others. Using frozen sperm under the conditions currently accepted by most sperm banks will most likely minimize your risks. Unfortunately, a narrow margin of risk remains. Although HIV infection through the use of frozen sperm is extremely rare, at least four women in Australia are known to have contracted the AIDS virus from insemination with frozen sperm. Eskenuzi, et al., HIV SeroloPv in Artificially Inseminated Lesbians, Journal of Acquired Immune Deficiency Syndromes 2:187-193 (1989).

23. See Perry, Race and Child Placement: The Best Interest Test and The Cost of Discretion, 29 J. Fam. L. 51 (1990/1991); See also Howe, Redefining the Transracial Adoption Controversy, 2 Duke J. Gender L. & Pol'y 131 (1995).

24. In response to the severe crisis in identity that many of these children suffered, as well as the hardship the tribes were caused by losing their children, the Indian Child Welfare Act was enacted in 1978, ensuring that tribal courts can take jurisdiction over most adoptions involving Indian children. ICWA, 25 U.S.C. Sec. 1900 et. (1978). A series of congressional hearings held before the enactment of the ICWA supported the need to return Indian children to their cultural and tribal roots. Indian Child Welfare Program: Hearings Before he Subcommittee on Indian Affairs of the Senate (Insular Affairs, 93rd Congress, 2d Session 70 (1974); Indian Child Welfare Act of 1977: Hearing on S. 1214 before the Senate Select Committee on Indian Affairs, 95th Congress, 1st Session (1977). Testimony from Drs. Mindell and Gurwitt at the 1977 hearing supported the congressional finding that Indian children raised in non-Indian homes generally have significant social problems adjusting in their adolescent and adult lives. See also, Matter of Appeal in Pim County, 635 P.2d 187, 130 Ariz. 202 (1977), finding that it is in the best interests of an Indian child to retain her or his tribal ties and cultural heritage; and Acculturation, Child Rearing and Self Esteem in Two Northern American Indian Tribes, 4 Ethos 385-401 (1976).

25. Chestang, The Dilemma of Bi-Racial Adoptions, 17 Soc. Work, 100 (1972); L. Grow, D. Shapiro, Black Child -- White Parents: A Study of Trans-Racial Adoptions (1974); R, McRoy, L. Zurcher, Trans-Racial and In-Racial Adoption: The Adolescent Years (1983).

26. See footnotes 23-25.

27. See. e.g., In re R.C. 775 P.2d 27 (Colo. 1989); McIntyre v. Crouch, 980 Or. App. 462, 780 P.2d 239, cert. denied 110 S. Ct. 1924 (1989).

28. In Jhordan C. v. Mary K., 179 Cal.App.3d 386, 224 Cal.Rptr. 530 (Cal. Ct. App. 1986), a lesbian couple decided to co-parent a child using artificial insemination. A known donor was selected after an extensive interview, from which the women believed that the donor was not interested in having legal rights to, or financial responsibility for, the child. The insemination was performed by a nurse practitioner, rather than a doctor, and the parties failed to enter into a written donor-recipient agreement. After the child was born, the co-parents allowed the donor to visit regularly with her. When the donor sued for paternity, the judge recognized the donor as the father of the child and ordered visitation for him. The judge reasoned that a physician had not supervised the insemination, so the donor's paternity rights were not severed by the California donor insemination statute. Moreover, no written agreement to contradict this finding had been executed, and the donor had been permitted visitation with the child by the mothers. With no record to establish the voluntary relinquishment of the donor's parental rights, the donor was declared the father of the child.

29. See Johnson v. Calvert, 5 Cal.4th 84, 19 Cal.Rptr.2d 494 (Cal. 1993).
30. See Fla. Stat. ch. 742.11(2) & 742.14 (1994); N.D. Cent. Code Sec. 14-18-01 to 14-18-07 (1995); Okla. Stat. tit. 10, Sec. 554-555 (1994); Tex. Fam. Code Ann. Sec. 12.03A (1993); Va. Code Ann. Sec. 20-158 (1995).

31. See N.D. Cent. Code Sec. 14-18-01 to 14-18-07 (1995).

32. See Va. Code Ann. Sec. 20-158 (1995)

33. See Fla. Stat. ch. 742.11(2) & 742.14 (1994).

34. See Johnson v. Calvert 5 Cal.4th 84, 19 Cal.Rptr.2d 494 (Cal. 1993).

35. See Schultz, Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality, 1990 Wis. L. Rev. 297; and See Schiff, Solomonic Decisions in Egg Donation: Unscrambling the Conundrum of Legal Maternity, 80 Iowa L. Rev. 265 (1995).

36. See footnote 14.

37. Whether a document is called a nomination of guardianship or a nomination of conservatorship, the exact protections they offer and the rules governing the specific clauses the document must contain, vary from state to state. Consult an attorney to determine the statutory requirements in your state.

38. See In Re Estate of Susan Hamilton, No. 24950 (Vt. Probate Ct., Washington Co. 1989); See also, In re Pearlman, No. 87-24926 DA (Broward Co. Cir. Ct. March 31, 1989).

39. Most urban communities have private mediation or arbitration services available. But we recommend that you make some inquiries before you choose a service to identify on your co-parenting agreement. While most mediators or arbitrators are not required to go through any formal sensitivity training on lesbian and gay issues, some undoubtedly provide services sensitive to our needs, while others do not. To save yourselves some grief later, make some phone calls before you draft your co-parenting agreement to inquire about the services offered to lesbian and gay families, the familiarity a particular service has with the unique issues that arise in our families, and the general willingness of the service providers to accept our families as families. Any additional concerns regarding the service's sensitivity to your needs should be raised at this point also.

A recent trend in larger lesbian and gay communities has been to establish alternative dispute resolution services that are specifically tailored to the needs of the lesbian and gay community. The Los Angeles and New York communities have each launched an alternative dispute resolution service for lesbians and gay men, and we hope that more are on their way.

40. In Nancy S. v. Michelle G., No. 642975-5 (Alameda Cty Super. Ct. (1989), 279 Cal. Rptr. 212, 228 CaL App. 3d 831 (Cal. Ct. App. 1991), a non-biological mother sought shared custody or visitation with the two children she co-parented with her former partner of fifteen years. For four years following their break up, the co-mothers agreed to an arrangement of ongoing visitation and shared custody of the children, but this arrangement dissolved abruptly when the biological mother sought a court order to declare herself to be the children's sole legal parent. The children were 4 and 8 years old, respectively, at the time this suit was filed, and both children had always known both women to be their mothers. The trial court refused to hear the non-biological mother's request for visitation or shared custody with the children, finding that under existing law she was considered a biological stranger to her children and, therefore, did not have a right to bring her claim before the court. This decision was affirmed by the California

Court of Appeal in 1991, depriving Michelle G. of her right ever to seek or enforce visitation with her children.

See also, Wheeler v. Goldstein, No. CF025020 (Cal. Super. Ct., Los Angeles Co. 1986); Sabol v. Bowling, No. CF 27024 (Cal. Super. Ct., Los Angeles Co. 1990); Altha C. v. Carol B., No. 12335 (N.M. Ct. App. April 12, 1990); In re Alison D., 77 N.Y.2d 651, 569 N.Y.S.2d 586 (1991); In Re. Interest of Z.J.H., 162 Wis.2d 1002, 471 N.W.2d 202 (1991); Kulla v. McNulty/Marone, 472 N.W.2d 175 (Minn. Ct. App. 1990); and Curiale v. Reagan, 222 Cal. App. 3d 1597, 272 Cal. Rptr. 520 (Cal. Ct. App. 1990).

41. See A.C. v. C.B., 829 P.2d 660 (N.M. Ct. App. 1992), a non-biological mother petitioned for joint custody after termination of a lesbian relationship. Trial court dismissed petition with prejudice after parties settled. Non-biological mother petitioned again because mother refused to comply with settlement. Trial court granted biological mother's summary judgement, and the non-biological parent appealed. The appellate court reversed summary judgement because "under New Mexico law, the district court erred in concluding that this type of agreement is unenforceable as a matter of law . . ." 829 P.2d at 664.

See also, In re Custody of H.S.H-K.: Holtzman v. Knott, 553 N.W. 2d 419 (Wis. 1995), Non-biological mother sought visitation after termination of a lesbian relationship. The state supreme court, in a 4-3 decision, held that a lesbian co-parent can seek a visitation order. The court required the petitioner to meet two elements: (1) that she had a parent like relationship with the child; and (2) that a significant triggering event justifies state intervention with the parent's constitutionally protected interest.

See A.I. v. C.D., Case no. 940902124 (Utah 1994), a non-biological mother sought visitation after termination of a lesbian relationship. The trial court granted the non-biological mother standing to seek visitation. The court noted several facts, including the fact that the couple jointly decided to have the child; the non-biological mother paid for great portion of the insemination, as well as the biological mother's living expenses during pregnancy; the non-biological mother supported the child financially and was fully involved in the day to day care, as well as making decisions about the child's life; and the biological mother held the non-biological mother out as a co-parent.

42. Minnesota and Oregon each have statutes expanding visitation rights to non-biological parents under special circumstances. Minn. Stat. Sec. 257.022 (1990); Or. Rev. Stat. Sec. 109.119. But a recent Minnesota Court of Appeals decision held that the Minnesota expanded visitation statute did not apply in a case where the biological mother was a fit parent and she objected to visitation by the non-biological mother. Kulla v. McNulty/Marone, 472 N.W.2d 175 (Minn Ct. App, 1991). In that case the child had a legally recognized father as well, a fact which undoubtedly swayed the court, in view of the fact that most courts have a strong bias for children to have no more, and no less, than one mother and one father. In contrast, lesbian families in Oregon have used Oregon's statute since its enactment to establish legal custody with both co-parents.

Other states have statutes that allow for a non-biological parent to seek visitation within the context of an existing divorce proceeding (or other family court proceeding). See, e.g., Cal. Civ. Code Sec. 4351.5; Wis. Stat. Ann. Sec. 767.245. These statutes rarely offer non-biological lesbian mothers access to the courts because the dissolution of the lesbian family does not involve a divorce proceeding. See Nancy S. v. Michelle G., 279 Cal. Rptr. 212, 228 Cal. App. 3d 831 (Cal. Ct. App. 1991); Curiale v. Reagan, 222 Cal.App.3d 1597, 272 Cal.Rptr. 520 (Cal. Ct. App. 1990).

Still other states have statutes that do not expressly allow for visitation for the

non-biological parent, but have been interpreted by the courts to apply quite broadly to include significant adults in the child's life. See, e.g., Md. Ann. Code Sec. 9-101 to 9-307 (1984). The Maryland statute does not require an existing family court proceeding in order to be invoked, but in a recent case involving a non-biological lesbian mother who was granted limited visitation under this statute, the court has proved to be extremely reluctant to enforce the awarded visitation over the objections of the biological mother. M.C.C. v. C.I.D., No. 89191039/CE99949 (Baltimore City Cir. Ct. July 10, 1989).

Each state's statute differs on its face, and each has been interpreted uniquely by the case law of the state. It would be impossible to summarize in this short space the visitation laws of every state. If you need more information about the visitation laws of your state, contact a local attorney. See also, Polikoff, This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families, 78 Georgetown L J. 459 (1990), for a more detailed discussion of legal standards and theories promoting the recognition of the rights of a non-biological or non-adoptive parent. See also, Berner, Child Custody Disputes Between Lesbians: Legal Strategies and Their Limitations, 10 Berkeley Women's L.J. 31 (1995).

43. See footnote 42.

44. Second-parent adoptions have been granted in Alaska, California, the District of Columbia, Indiana, Massachusetts, Minnesota, New Jersey, New York, Pennsylvania, Oregon, Washington, and Vermont. See, In re Adoption of Minor Child (C), No. 1-Ju-86-73 P/A (Alaska First Jud. Dist. Feb. 6, 1987); In re M.M.D. & B.H.M., 1995 WL 410984 (D.C. App. 1995); In re Adoption of Logan Lee Hentgen-Moore, 9101-9405-AD-009 (Ind. 1995); In re Adoption of Tammy, 619 N.E.2d 315 (Mass. 1993); In the Matter of Adoption of Child by J.M.G., 632 A.2d 550 (N.J. Super. Ch. 1993); In the Matter of Jacob, 1995 WL 643833 (N.Y.); In Adoption of E.O.G. & A.S.G., 14 Fiduc.Rep.2d 125 (Pa. C.P. York County April 28, 1994); Adoptions of B.L.V.B. and E.L.V.B., 628 A.2d 1271 (Vt. 1993). Additional information about second-parent adoptions is available from NCLR, 870 Market Street, Suite 570, San Francisco, CA 94102, 415/392-6257.

45. Florida and New Hampshire are the only states in the country with laws that expressly bar lesbians and gay men from adopting. See, In re Opinion of the Justices, 530 A.2d 21 (1987); Dept. of Health and Rehabilitative Serv. V. Cox, 627 So.2d 1210 (Fla. Dist. Ct. App. 1993).

Other states may have per se rules against lesbian and gay adoptions based on the existence of a sodomy statute (See In re Pima County Juvenile Court, 151 Ariz. 335, 727 P.2d 830 (Ariz. Ct. App. 1986), where a bisexual man was denied an adoption of a minor based on his admitted illegal conduct under the Arizona sodomy statute), or of custody law that holds lesbian and gay parents as per se unfit. The laws which affect the availability of adoptions to lesbians and gay men are rather complex and involved, and it is best to consult with an attorney familiar with the adoption and related statutes of your state.

But See Seebol v. Farie, No. 90-923-CA-18 (Monroe Co. Cir. Ct. March 15, 1991). A Florida Circuit Court struck down the Florida ban on lesbian and gay adoptions. Unfortunately, this decision is only binding in one county in Florida at present.

46. For a more technical legal discussion on second-parent adoptions, See, Bryant, Second Parent Adoption: A Model Brief, 2 Duke J. Gender L. & Pol'y 233 (1995). For a social science perspective, See, Patterson, Adoption of Minor Children by Lesbian and Gay Adults: A Social Science Perspective, 2 Duke J. Gender L. & Pol'y 191 (1995).

47. For more detailed information about second-parent adoptions and lawyer referrals, contact NCLR, 870 Market Street, Suite 570, San Francisco, CA 94102, 415/392-6257; or Lambda Legal

Defense and Education Fund, Inc., 666 Broadway, New York, NY 10012, 212/995-8585, or 606 South Olive, #580, Los Angeles, CA 90014, 213/937-2728.

NCLR also provides technical assistance to lawyers who are doing second-parent adoptions for the first time, and can make available a pleadings packet and sample brief, as well as useful information and assistance with the strategy of seeking such an adoption. Because the right of obtaining a second-parent adoption is not yet firmly anchored in most jurisdictions, we urge you not to try to obtain one without a lawyer, and to make good use of NCLR's services to assist the lawyer you choose.

48. For those seeking additional information regarding lesbian motherhood, the National Center for Lesbian Rights offers assistance which includes a national referral list of attorneys sympathetic to lesbian and gay issues; no-fee advice and counseling for lesbians and gay men seeking information, legal representation, or referrals on matters relating to discrimination based on sexual orientation; and technical assistance for lawyers nationwide, providing them an opportunity to consult with an NCLR attorney about the issues, problems, and strategies arising from litigation involving lesbians and their families, and to obtain sample pleadings and briefs.

NON U.PA-BASED DONOR INSEMINATION STATUTES

Four states have donor insemination statutes that extinguish the donor's rights, but are not modeled after the U.P.A. and are not tradition "legitimacy' statutes. The following are the relevant sections from each of those statutes.

Connecticut

Section 45a-771. Child born as a result of artificial insemination legitimate.

(a) It is declared that the public policy of this state has been an adherence to the doctrine that every child born to a married woman during wedlock is legitimate.

(b) This chapter shall be construed as a codification and clarification of such doctrine with respect to any child conceived as a result of heterologous artificial insemination.

Section 45a-772. A.I.D. Who may perform. Consent required.

(a) The technique known as heterologous artificial insemination, or artificial insemination with the semen of a donor, referred to in this chapter as A.I.D., may be performed in this state only by persons certified to practice medicine in this state pursuant to chapter 370.

Section 45a-773. Request and consent to be filed in probate court. Confidentiality.

(a) Whenever a child is born who was conceived by the use of A I.D., a copy of the request and consent required under subsection (b) of section 45-69g, together with a statement of the physician who performed the A.I.D., that to the best of his knowledge the child was conceived by the use of A.I.D., shall be filed with the judge of probate in the district in which the child was born or in which the child resides.

(b) The information contained in such statement may be disclosed only to the persons executing the consent. No other person shall have access to the information except upon order of the probate court for cause shown.

Section 45a-774. Status of child born as result of A.I.D.

Any child or children born as a result of A.I.D. shall be deemed to acquire, in all respects, the status of a naturally conceived legitimate child of the husband and wife who consented to and requested the use of A.I.D.

Section 45a-775. No rights in donor of sperm.

A donor of sperm used in A.I.D., or any person claiming by or through him, shall not have any right or interest in any child born as a result of A I.D.

Section 45a-776. Status of child determined by jurisdiction of birth.

(a) Any child conceived as a result of A I.D. performed in Connecticut and born in another jurisdiction shall have his status determined by the law of the other jurisdiction unless the mother of the child is domiciled in Connecticut at the time of the birth of the child.

(b) If a child is conceived by A.I.D. in another jurisdiction but is born in Connecticut to a husband and wife who, at the time of conception, were not domiciliaries of Connecticut, but are domiciliaries at the time of the birth of the child, the child shall have the same status as is provided in section 45-69i, even if the provisions of subsection (b) of section 45-69g and section 45-69h may not have been complied with.

Idaho

Section 39-5401. Definitions.

As used in this act:

(1) "artificial insemination" means introduction of semen of a donor as defined herein, into a woman's vagina, cervical canal, or uterus through the use of instruments or other artificial means. (2) "Donor" refers to a man who is not the husband of the woman upon whom the artificial insemination is performed.

Section 39-5402. Performed only by a physician.

Only physicians licensed under chapter 18, title 54, Idaho Code, and persons under their supervision may select artificial insemination donors and perform artificial insemination.

Section 39-5403. Consent--Filing and notice requirements [Effective through July 1, 1995].

(1) Artificial insemination shall not be performed upon a woman without her prior written request and consent and the prior written request and consent of her husband.

(2) Whenever a child is born who may have been conceived by artificial insemination, a copy of the request and consent required under subsection (1) of this section shall be filed by the physician who performs the artificial insemination with the state registrar of vital statistics. The state board of health and welfare shall have the authority to promulgate rules and regulations and to prescribe methods and forms of reporting, and fees to carry out the provisions of this act. Storage, retrieval, and confidentiality of records shall be governed by chapter 3, title 9, Idaho Code.

(3) The information filed under subsection (2) of this section shall be sealed by the state registrar and may be opened only upon an order of a court of competent jurisdiction, except that pursuant to chapter 3, title 9, Idaho Code, data contained in such records may be used for research and statistical purposes.

(4) If the physician who performs the artificial insemination does not deliver the child conceived as a result of the artificial insemination, it is the duty of the mother and her husband to give that physician notice of the child's birth. The physician who performs the artificial insemination shall not be liable for noncompliance with subsection (2) of this section if the noncompliance is a result of the failure of the mother and her husband to notify the physician of the birth.

Section 39-5404. Restrictions on semen donations. No semen shall be donated for use in artificial insemination by any person who:

(1) Has any disease or defect known by him to be transmissible by genes; or

(2) Knows or has reason to know he has a venereal disease.

Section 395405. Rights of donor, child, husband.

(1) The donor shall have no right, obligation or interest with respect to a child born as a result of artificial insemination.

(2) A child born as a result of the artificial insemination shall have no right, obligation or interest with respect to such donor.

(3) The relationship, rights, and obligation between a child born as a result of artificial insemination and the mother's husband shall be the same for all legal intents and purposes as if the child had been naturally and legitimately conceived by the mother and the mother's husband, if the husband consented to the performance of artificial insemination.

Section 39-5407. Penalty.

A person who violates the provisions of sections 2 [39-5402], 3 [39-4503] or 4[39-5404] of this act is guilty of a misdemeanor.

Section 39-5408. HIV-III antibody.

Every hospital, bank, or other storage facility where a person has donated semen shall use all reasonable means to detect if the donor has an antibody to HIV-III in his blood. In the event that an antibody to HIV-III is detected, such semen shall not be used for any purposes of artificial insemination

As used in this section, "HIV-III" means the human T-cell lymphotropic virus type III that causes acquired immunodeficiency syndrome.

Ohio

section 3111.30 Definitions.

(a) "Artificial insemination" means the introduction of semen into the vagina,

cervical canal, or uterus through instruments or other artificial means.

(b) "Donor" means a man who supplies semen for a non-spousal artificial insemination of a woman with the semen of a man who is not her husband.

(d) "Physician" means a person who is licensed pursuant to Chapter 4731 of the Revised Code to practice medicine or surgery or osteopathic medicine or surgery in this state.

(e) "Recipient" means a woman who has been artificially inseminated with the semen of a donor.

Section 3111.31 Sections applicable to non-spousal artificial insemination.

Sections 3111.30 to 3111.38 of the Revised Code deal with non-spousal artificial insemination for the purpose of impregnating a woman so that she can bear a child that she intends to raise as her child. These sections do not deal with the artificial insemination of a wife with the semen of her husband or with surrogate motherhood.

Section 3111.34 Consents to non-spousal insemination of a married woman.

The non-spousal artificial insemination of a married woman may occur only if both she and her husband sign a written consent to the artificial insemination as described in section 3111.35 of the Revised Code.

Section 3111.35 Recipient information and statements; date of insemination to be recorded.

(A) Prior to a non-spousal artificial insemination, the physician associated with it shall do the following:

(1) Obtain the written consent of the recipient on a form that the physician shall provide. The written consent shall contain all of the following:

(a) The name and address of the recipient and, if married, her husband;

(b) The name of the Physician;

(c) The proposed location of the performance of the artificial insemination;

(d) A statement that the recipient and, if married, her husband consent to the artificial insemination;

(e) If desired, a statement that the recipient and, if married, her husband consent to more than one artificial insemination if necessary;

(f) A statement that the donor shall not be advised by the physician or another person performing the artificial insemination as to the identity of the recipient or, if married, her husband and that the recipient and, if married, her husband shall not be advised by the physician or another person performing the artificial insemination as to the identity of the donor;

(g) A statement that the physician is to obtain necessary semen from a donor and, subject to any agreed upon provision as described in division (A) (1) (n) of this section, that the recipient and, if married, her husband shall rely upon the judgment and discretion of the physician in this regard;

(h) A statement that the recipient and, if married, her husband understand that the physician cannot be responsible for the physical or mental characteristics of any child resulting from the artificial insemination;

(i) A statement that there is no guarantee that the recipient will become pregnant as a result of the artificial insemination;

(j) A statement that the artificial insemination shall occur in compliance with sections 3111.30 to 3111.38 of the Revised Code;

(k) A brief summary of the paternity consequences of the artificial insemination as set forth in section 3111.37 of the Revised Code.

(l) The signature of the recipient, and if married, her husband;

(m) If agreed to, a statement that the artificial insemination will be performed by a person who is under the supervision and control of the physician.

(n) Any other provision that the physician, the recipient, and if married, her husband agree to include;

(2) Upon request, provide the recipient and, if married, her husband with the following information to the extent the physician has knowledge of it:

(a) The medical history of the donor, including but not limited to, any available genetic history of the donor and persons related to him by consanguinity, the blood type of the donor, and whether he has an RH [sic] factor;

(b) The race, eye, and hair color, age, height, and weight of the donor;

(c) The educational attainment and talents of the donor;

(d) The religious background of the donor;

(e) Any other information that the donor has indicated may be disclosed.

(B) After each non-spousal artificial insemination of a woman, the physician associated with it shall note the date of the artificial insemination in his records pertaining to the woman and the artificial insemination, and retain this information as provided in section 3111.36 of the Revised Code.

Section 3111.37 Husband rather than donor regarded as natural father of child. (A) If a married woman is the subject of a non-spousal artificial insemination and if her husband consented to the artificial insemination, the husband shall be treated in law and regarded as the natural father of a child conceived as a result of the artificial insemination, and a child so conceived shall be treated in law and regarded as the natural child of the husband. A presumption that arises under division (A) (1) or (2) of section 3111.03 of the Revised Code is conclusive with respect to this father and child relationship, and no action under sections 3111.01 to 3111.19 of the Revised Code shall affect the relationship.

(B) If a woman is the subject of a non-spousal artificial insemination, the donor shall not be treated in law or regarded as the natural father of a child conceived as a result of the artificial insemination, and a child so conceived shall not be treated in law or regarded as the natural child of the donor. No action under sections 3111.01 to 3111.19 of the Revised Code shall affect these consequences.

Oregon

Section 109.239 Rights and obligations of children resulting from artificial insemination; rights and obligations of donor of semen.

If the donor of semen used in artificial insemination is not the mother's husband:

(1) Such donor shall have no right, obligation, or interest with respect to a child born as a result of the artificial insemination; and

(2) A child born as a result of the artificial insemination shall have no right, obligation, or interest with respect to such donor.

Section 109.243 Relationship of child resulting from artificial insemination to mother's husband.

The relationship, rights, and obligation between a child born as a result of artificial insemination and the mother's husband shall be the same to all legal intents and purposes as if the child had been naturally and legitimately conceived by the mother and the mother's husband if the husband consented to the performance of artificial insemination.

Section 109.247 Application of law to children resulting from artificial insemination.

Except as may be otherwise provided by a judicial decree entered in any action filed before October 4, 1977, the provisions of ORS 109.239 to 109.247, 677.355 to 677.365 and

677.990 (3) apply to all persons conceived as a result of artificial insemination.

Section 677.355 "Artificial insemination" defined.

As used in ORS 109.239 to 109.247, 677.355 to 677.370 and 677.990 (3), "artificial insemination" means introduction of semen into a woman's vagina, cervical canal, or uterus through the use of instruments or other artificial means.

Section 677.360 Who may select donors and perform procedure.

Only physicians licensed under this chapter and persons under their supervision may select artificial insemination donors and perform artificial insemination.

Section 677.365 Consent required; filing with the State Registrar of Vital Statistics; notice to physician.

(1) Artificial insemination shall not be performed upon a woman without her prior written request and, if she is married, the prior written request and consent of her husband.

(2) Whenever a child is born who may have been conceived by the use of semen of a donor who is not the woman's husband, a copy of the request and consent required under subsection (1) of this section shall be filed by the physician who performs the artificial insemination with the State Registrar of Vital Statistics. The state registrar shall prescribe the form of reporting.

(3) The information filed under subsection (2) of this section shall be sealed by the state registrar and may be opened only upon an order of a court of competent jurisdiction.

(4) If the physician who performs the artificial insemination does not deliver the child conceived as a result of the use of semen of a donor who is not the woman's husband, it is the duty of the woman and the husband who consented Pursuant to subsection (1) of this section to give that physician notice of the child's birth. The physician who performs the artificial insemination shall be relieved of all liability for noncompliance with subsection (2) of this section if the noncompliance results from lack of notice to the physician about the birth.

Section 677.370 Who may be donor.

No semen shall be donated for use in artificial insemination by any person who:

(1) Has any disease or defect known by him to be transmissible by genes; or

(2) Knows or has reason to know he has a venereal disease.