My Daddy's Name is Donor: Determining the Parental Status and Child Support Obligations of a Sperm Donor

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> *Anybody who is a sperm donor ought to understand that their identity could be made known to any child that's produced and they could be seen by the courts as the best place to go to make sure the child has adequate financial support.*[1]

I. INTRODUCTION

"Sperm Donor Must Pay Child Support."[2] This has been the pronouncement of a State Appeals Court in the United States when it held that a verbal agreement between a woman and her sperm donor was invalid and ordered the man to pay child support for the woman's twins.[3] This ruling is perhaps a novelty for having stirred publicity and for having destroyed our settled notion of paternity in assisted conception — that is, that a sperm donor is nothing but what his name says, a donor — not a parent. Apparently, cases like this give us pause to deliberate on Assisted Reproductive Technology and its implications on settled notions of paternity as well as on persons who are liable for child support.

The advent of modern reproductive technology has dictated that parenthood is no longer the certainty it was in the traditional scheme of family law, which pronounced that the obligation of child support is premised on parenthood.[4] Sperm, egg and womb, and even *parenthood,* it would seem, may now be readily manipulated. It is not improbable that private agreements waiving parental status and child support obligations are drawn by participants ensuring that, at the onset, parenthood is made clear and would not, in the future, be subject of court dispute. In other instances where no written agreement is made, an implicit understanding nevertheless

1. Arthur Caplan, *Sperm Donor Must Pay Child Support, at* http://www.cnn.com/2004/LAW/07/23/sperm.donor.ap.html (last accessed Dec. 19, 2006).
2. *Id.*
3. *Id.*
4. *See,* The Family Code of the Philippines [FAMILY CODE] art. 164.

exists to the effect that the parental tie of the donor to the resulting child is severed. These agreements, however, whether verbal or written, express or implied, have been continually challenged for their doubtful validity and enforceability.

Clearly, there is a need for the legislature to sort out the parental rights and responsibilities of those involved in Assisted Reproductive Technology as well as the implications of any private agreement or implicit understanding between the participants designating parental status and waiving child support. Notably, even if all forms of reproductive technology were outlawed and looked upon with disfavor, courts would still be faced with the task of deciding the identity of the legal parents of the child as well as the persons who are duty-bound to provide for the child's maintenance and support.

II. A THUMBNAIL SKETCH OF ASSISTED REPRODUCTIVE TECHNOLOGY AND THE USE OF DONOR SPERM

Assisted Reproductive Technology (ART) "is broadly defined as the 'art and science' of a third party bringing together a man's sperm and a woman's egg to produce a child."[5] Indeed, ART offers a myriad of choices open to couples and individuals wishing to start a family[6] — the most common forms of which are artificial insemination, in vitro fertilization, surrogate motherhood,[7] as well as cloning (which has also received much attention as of late). Although each form creates its own legal repercussions in family law, this discussion shall focus on the implications of using donor sperm in artificial insemination and in vitro fertilization.

5. Laura M. Katers, *Arguing the "Obvious" in Wisconsin: Why State Regulation of Assisted Reproductive Technology Has Not Come to Pass, and How It Should*, 2000 WIS. L. REV. 441, 445 (2000) (citing ROBERT J. STILLMAN AND PAUL R. GINDOFF, ASSISTED REPRODUCTIVE TECHNOLOGY IN OBSTETRICS AND GYNECOLOGY 739 (James R. Scott, et al. eds., 7d ed. 1994)).

6. Martha J. Stone, *Tick...Tick...Tick: As Biological Clocks Wind Down, The Laws Governing Inheritance and Parental Rights Issues Heat Up*, 43 S. TEX. L. REV. 233, 235 (2001).

7. F. Barrett Faulkner, *Applying Old Law to New Births: Protecting the Interests of Children Born Through New Reproductive Technology*, 2 J. HIGH TECH. L. 27, 28 (2003). Surrogacy generally involves an agreement between an infertile couple and a woman (the "gestational" or "surrogate" mother) who is willing to bear a child that the infertile couple intends to raise. Technically, it is defined as the "practice whereby a woman carries a baby for another with the intention that the child should be handed over after birth." The gestational mother generally has her expenses paid and a stipend provided by the couple, although she may agree to do it as an act of love for a relative or friend.

Artificial Insemination (AI) is the oldest, simplest, and most common technique of alternative procreation.[8] It refers to the "impregnation of a female with the semen from a male without sexual intercourse."[9] AI is done either by implanting the sperm of the husband into the uterus of the wife (Homologous Artificial Insemination or AIH),[10] implanting the semen of a third-party donor (Heterogonous Artificial Insemination AID),[11] or the implanting the semen of the donor and the husband mixed together.[12]

While AI avoids sexual or coital reproduction, In Vitro Fertilization (IVF) moves the entire process of conception outside the body.[13] IVF, literally meaning "fertilization in glass,"[14] is "a process whereby an egg and sperm unite outside the human body."[15] It involves removing a ripe egg from a woman's body and combining that egg with a sperm in a petri dish. If fertilization occurs, the fertilized egg is permitted to divide until it is multi-cellular and is then implanted into a woman's womb.[16]

A. Understanding Sperm Donation

8. Denise S. Keiser, *Artificial Insemination: Donor Rights in Situations Involving Unmarried Recipients*, 26 J. FAM. L. 795 (1988).

9. Flerida Ruth P. Romero, *Legal Aspects of Artificial Insemination*, 59 PHIL. L. J. 280 (1984).

10. Tim R. Schlesinger, *Assisted Human Reproduction: Unsolved Issues in Parentage, Child Custody and Support*, 61 J. MO. B. Jan.-Feb. 2005, at 22.

11. *Id.*

12. Chrysilla Carissa P. Bautista, Beatrice Ann M. Pangilinan & Faye Christine M. Paredes, *Exploring Reproductive Technologies: The Pursuit Towards Procreative Legislation*, 74 PHIL. L. J. 435, 442 (2000) (citing Melissa O'Rourke, *The Status of Infertility Treatments and Insurance Coverage: Some Hopes and Frustrations*, 37 S.D. L. REV. 343, 346 (1992)). Proper treatment of infertility begins with systematic attempts to diagnose the factors impairing infertility. The first step in the infertility investigation is a detailed health history and physical examination, involving both partners. When testing results have yielded a diagnosis of treatable conditions, a variety of drug therapies may be utilized.

13. Marsha Garrison, *Law Making for Baby Making: An Interpretative Approach to the Determination of Legal Parentage*, 113 HARV. L. REV. 848 (2000).

14. Bautista, *supra* note 12, at 443 (citing Elizabeth Ann Pitrolo, *The Birds, the Bees, and the Deep Freeze: Is There International Consensus in the Debate Over Assisted Reproductive Technologies?*, 19 HOUS. J. INT'L L. 147, 152 (1996)).

15. *Id.*

16. Harvard Law Review, *Developments in the Law - Medical Technology and the Law: II. Reproductive Technologies*, 103 HARV. L. REV. 1525, 1537 (1990).

Prior to the 1940s, adoption was the remedy for couples who could not conceive a child.[17] The advent of AID, however, introduced another remedy in cases of male partner infertility, impotence, or low sperm count, or in cases where the husband is a carrier of an inheritable disease.[18]

There are two ways of going about AID: the recipients can either select the sperm donor, who is likewise able to select the individuals who will use his semen (donor-directed system), or employ the anonymous system where the semen is from an anonymous donor. The donor-directed system, however, have caused problems such as when the sperm donor attempts to claim visitation or custody rights over the child,[19] or when the sperm donor who had no intention of being treated as the legal father is adjudged liable for child support.[20] As such, the vast majority of donors usually prefer to remain anonymous after receiving compensation for their services,[21] as there is less likely to be any dispute on parental rights and child support.

B. Sperm Donation in the Philippine Setting

Whereas reproductive technologies and the practice of sperm donation enjoy media exposure in foreign jurisdictions, in the Philippines, only one sperm bank has been identified to exist. Sperm Bank Manila,[22] according to founder Dr. Dominador A. Garduno, M.D., unlike blood banks and foreign

17. Mary Lyndon Shanley, *Collaboration and Commodification in Assisted Procreation: Reflections on an Open Market and Anonymous Donation in Human Sperm and Eggs*, 36 LAW & SOC'Y REV. 257, 261 (2002).

18. Karen M. Ginsberg, *FDA Approved? A Critique of the Artificial Insemination Industry in the United States*, 30 U. MICH. J. L. REFORM 823, 827 (1997).

19. *See*, Jhordan C. v. Mary K., 224 Cal. Rptr. 530, 535-36 (Ct. App. 1986); In re R.C., 775 P.2d 27, 27 (Colo. 1989); Thomas S. v. Robin Y., 618 N.Y.S. 2d 356, 356 (N.Y. App. Div. 1994); McIntyre v. Crouch, 780 P.2d 239, 241 (Or. Ct. App. 1989). *See generally*, Vickie L. Henry, *A Tale of Three Women: A Survey of the Rights and Responsibilities of Unmarried Women Who Conceive by Alternative Insemination and a Model for Legislative Reform*, 19 AM. J. L. & MED. 285, 290-300 (1993) (describing cases and contrasting the rules governing AID births to married and unmarried women).

20. *See*, Ferguson v. McKiernan, 2004 PA. SUPER. 289, *at* http://www.courts.state.pa.us/OpPosting/Superior/out/a15043_04.pdf (last accessed May 15, 2005).

21. Ginsberg, *supra* note 18, at 826.

22. Sperm Bank Manila is a private clinic located in Malate, Manila, offering artificial insemination services to infertile couples, as well as sperm freezing, storage, and testing services.

sperm banks, is not even a clinic that buys sperm from walk-in donors;[23] it merely offers artificial insemination services and sperm freezing and storage services to infertile couples.[24] Its conservative service offer can be attributed to the fact that the use of donor sperm in reproductive procedures is highly influenced by the negative opinions espoused by moralists and ethicists.[25] Thus, such procedures although undertaken are nevertheless shrouded in secrecy.[26]

C. Legal Implications of the Use of Donor Sperm

Although AIH and AID both proffer an infertile couple increased chances of conceiving a child, both processes engender different results and legal issues.[27] In AIH, the gametes that are used are those of the husband and the wife. As such, they are still considered as the genetic parents of the child, which consequently make them the child's legal parents pursuant to traditional family law principles.[28]

In AID or IVF using donor sperm, on the other hand, only the wife is genetically-related to the child.[29] Hence, AID and IVF using donor sperm are the methods which usually create a conflicting situation where there are three people with potential parental interest in the child,[30] namely, the recipient mother, the genetic father (the sperm donor), and the husband of the recipient mother. Jurisprudence at the time when the use of AID was emerging shows that the husband's parental status was unclear.[31]

23. Interview with Dr. Dominador A. Garduno, M.D., Senior Fellow, Advanced Reproductive Unit, Department of Obstetrics and Gynecology, St. Luke's Medical Center, and founder of Sperm Bank Manila (July 25, 2005).

24. *Id.*

25. *Id.* For instance, the Philippine Obstetrics and Gynecological Society, a private association of obstetricians and gynecologists in the Philippines, provides guidelines in conducting ART, among which is the ethical rule that there be no third party participation either by donation or by acting as a surrogate. *See*, Bautista, *supra* note 12, at 448-49.

26. *Id.*

27. Garrison, *supra* note 13, at 845.

28. *Id.*

29. *Id.*

30. Faulkner, *supra* note 7, at 2.

31. Garrison, *supra* note 13, at 846 (comparing People v. Sorensen, 437 P.2d 495, 501-02 (*en banc*, Cal. 1968), and Strnad v. Strnad, 78 N.Y.S.2d 390, 391-92 (Sup. Ct. 1948), which both held a mother's husband to be her child's legal father on the theory that he had voluntarily assumed that responsibility by consenting to AID, with Gursky v. Gursky, 242 N.Y.S.2d 406, 411-12 (Sup.

In the United States, during the 1970s, most states resolved this potential conflict of unclear legal parentage by removing parental rights or responsibilities from those who contribute gametes to a medical facility or sperm bank, and assigning those rights and responsibilities to the consenting husband of the impregnated woman.[32] The Uniform Parentage Act of 1973, for instance, provided that, "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."[33] In the Philippines, moreover, the Family Code specifically designates the husband of the recipient wife in AI as the legal father of the child in cases of married couples, provided that both the husband and the wife consent in writing.[34]

Current ART statutes, however, were not drafted with an eye to new legal contexts in which donor sperm is used, neither does it account for its new users. For instance, most states have not enacted laws addressing the paternity of an AID child born to an unmarried woman,[35] or the donor's right to a relationship with his biological child or the child's right to information about his origins.[36] Case law over the years have shown that even sperm donors who have asserted claims to visitation or custody rights have sometimes been recognized as legal parents.[37] Conversely, there were sperm donors who, arguably, had no intention to be treated as the legal fathers but were adjudged liable for child support.[38]

Ct. 1963), which held the child illegitimate but the husband liable for the child support based on his consent to AID).

32. Faulkner, *supra* note 7, at 3.

33. Uniform Parentage Act [UPA], 9B U.L.A. 301, § 5(a) (1973).

34. FAMILY CODE, art. 164.

35. Garrison, *supra* note 13, at 846. Garrison notes that

> [a]s of 1996, only fifteen states had statutes that explicitly severed the parental rights of a sperm donor who had provided sperm to a licensed physician, whether or not the sperm user was married. The Uniform Status of Children of Assisted Conception Act [USCACA], 9B U.L.A. 191, 196, § 4(a) (Supp. 1994), adopted in two of those fifteen states, provides that a sperm donor is 'not a parent of a child conceived through assisted conception,' whether or not the mother is married.

36. Garrison, *supra* note 13, at 846.

37. *See*, Jhordan C. v. Mary K., 224 Cal. Rptr. 530, 535-36 (Ct. App. 1986); In re R.C., 775 P.2d 27, 27 (Colo. 1989); Thomas S. v. Robin Y., 618 N.Y.S. 2d 356, 356 (N.Y. App. Div. 1994); McIntyre v. Crouch, 780 P.2d 239, 241 (Or. Ct. App. 1989).

38. Ferguson v. McKiernan, 2004 PA. SUPER. 289, *at* http://www.courts.state.pa.us/OpPosting/Superior/out/a15043_04.pdf (last accessed May 15, 2005).

In sum, existing law on ART, especially in the Philippines, fails to integrate the use of donor sperm into a broader set of legal principles governing parental rights and relationships, providing only an extremely limited response to isolated legal issues.[39]

III. RIGHT TO PRIVACY AND PROCREATIVE LIBERTY: A CONSTITUTIONAL POINT OF VIEW

A. The Right to Procreate and the Right to Privacy

The use of ART, including the practice of sperm donation, to be protected, must be anchored on some constitutional foundation. To this, attorney and ethicist Professor John Robertson, advances the view that its use rests on the primacy of procreative liberty — the freedom to decide to have an offspring and to control the use of one's reproductive capacity.[40] According to Robertson, the right to procreative liberty encompasses the right to choose — free from the interference of others, in particular, from government interference — whether to reproduce.[41]

Furthermore, Robertson argues that since the United States Constitution affords people the right to procreate coitally, it also gives individuals the right to procreate non-coitally.[42] He explains that "the interest of the couple in rearing children who are biologically related to one or both rearing partners is so close to the coital model that both (coital and non-coital reproduction) should be treated equivalently."[43]

In the Philippines, though procreative liberty is not among the rights explicitly enumerated in the Bill of Rights,[44] its grant may be logically inferred from the state policy of promoting and protecting the family, as stated in article II, section 12 of the Philippine Constitution,[45] since the state cannot promote family life without providing for the right to procreate.[46]

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39. Garrison, *supra* note 13, at 848.

40. JOHN A. ROBERTSON, CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES (1994) [hereinafter ROBERTSON].

41. Dan W. Brock, *Procreative Liberty*, 74 TEX. L. REV. 187, 191-92 (1995).

42. *Id.*

43. ROBERTSON, *supra* note 40, at 39.

44. *See*, PHIL. CONST. art III.

45. PHIL. CONST. art III, § 3:

> The State recognizes the sanctity of family life and shall protect and strengthen the family as a basic autonomous social institution. It shall equally protect the life of the mother and the life of the unborn from conception. The natural and primary right and duty of parents in the

Another salient argument that advances the view that the Constitution protects citizens' reproductive liberties, including their right to pursue reproductive technologies, is an individual's right to privacy.[47] In *Griswold v. Connecticut*,[48] the Supreme Court recognized that the right to privacy extended to an individual's right to reproductive freedom, establishing a couple's right not to procreate by guaranteeing the right to use contraception to avoid conception. Justice Brennan in *Eisenstadt v. Baird*[49] stated, "if the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[50] In additional cases, the Court continued to emphasize the importance of the right to procreate, its existence as a fundamental right, and its protection by the right to privacy.[51]

The right to procreate, as included in the right to privacy, is basic but not absolute.[52] Similar to any other freedom granted by any democratic society, procreative liberty may be, and must be, limited when there are compelling state interests that make it imperative for the state to do so,[53] such as when it would inflict substantial harm to others.[54] There is substantial harm when the child's best interest is at stake in single parenthood, that single families burden the state resources, and that the state ought to act to discourage illegitimate births.[55]

rearing of youth for civic efficiency and the development of moral character shall receive the support of the government.

46. PHIL. CONST. art III, § 3.

47. Justyn Lezin, *(Mis) Conceptions: Unjust Limitations on Legally Unmarried Women's Access to Reproductive Technology and Their Use of Known Donors*, 14 HASTINGS WOMEN'S L. J. 185, 197 (2003).

48. Griswold v. Connecticut, 381 U.S. 479, 484-85 (1965) (holding that married couples may decide to use contraceptives because this falls within the penumbral rights of marital privacy as guaranteed by the Bill of Rights).

49. Eisenstadt v. Baird, 405 U.S. 438 (1972).

50. *Id.*

51. Lucy R. Dollens, *Artificial Insemination: Right Of Privacy And The Difficulty In Maintaining Donor Anonymity*, 35 IND. L. REV. 213, 219 (2001). *See also*, Stanley v. Illinois, 405 U.S. 645, 651 (1972) (the Court struck down a statute that automatically deprived unwed fathers of custody of their children upon their mothers' deaths); Carey v. Population Services International. 431 U.S. 678, 687 (1977).

52. Gilbert Meilander, *Products of the Will: Robertson's Children of Choice*, 52 WASH. & LEE L. REV. 173, 173 (1995).

53. Bautista, *supra* note 12, at 487.

54. Lezin, *supra* note 47, at 199.

55. Dollens, supra note 51, at 219.

It is not improbable to think that the Court would extend constitutional protection to some forms of ART, particularly those that are employed by married individuals using their own gametes.[56] Yet, once third parties like gamete donors or surrogates enter the picture, it is difficult to see ART as a purely private decision.[57] Furthermore, it raises some doubt as to whether a collaborator such as a sperm donor is indeed meaningfully exercising his right to procreate if he is merely providing semen without any rearing role.[58] It should be noted that procreative liberty is given importance because parenting children is seen to be a part of a personal privacy or liberty[59] and that reproduction is viewed as central to personal identity, meaning, and dignity.[60] Thus, if procreative liberty is given protection because it is a means of achieving parenthood, how could a similar protection be extended to the practice of sperm donation where the underlying value of parenthood does not exist? Where would the personal identity, meaning, and dignity referred to in procreative liberty lie if we make reproduction a commodity for sale in an open market?

Hence, it may be doubtful if the right to procreate would absolutely extend to any and all medical procedures resulting in the birth of a child. It is likewise questionable whether the right to procreate indeed extends to the right to obtain court enforcement of preconception contracts that purport to bargain away rearing rights and support obligations to the child. Indeed, the real difficulty in mapping out the limits of procreative liberty is the recognition that the exercise of the right to procreate may diminish other recognized rights and values, and disregard the constitutional rights of others.[61]

B. Reflections on an Open Market and Anonymous Donations of Human Sperm

Clearly, the practices through which we regulate the transfer of human gametes (eggs and sperms) reflect and shape our understanding of our relationship to our reproductive materials, the extent to which family bonds are created by nature and by will, and the role which the market should play in building families.[62] These practices would prompt us to think about how

56. Carl M. Coleman, *Assisted Reproductive Technologies and the Constitution*, 30 FORDHAM URB. L. J. 57, 66 (2002).

57. *Id.*

58. Meilander, *supra* note 52, at 175.

59. ROBERTSON, *supra* note 40, at 39.

60. *Id.* at 30.

61. Radhika Rao, *Constitutional Misconceptions*, 93 MICH. L. REV. 1473, 1487 (1995).

62. *Id.* at 258.

we view our body parts and organs, more particularly, our reproductive materials as objects or property.

The legal question of whether sperm is a property has ramifications on custody disputes, inheritance questions,[63] as well as child support obligations. Since ordinarily, one may sell one's property, the identification of sperm as property creates a presumption that it may, like any other object, be used, destroyed, given away, sold, and so forth.[64] After a sale has been concluded, no other rights and obligations attach to the donor, because along with the sale of his gamete is the relinquishment of any parental ties that may be created with it. Conversely, if sperm is not treated as a mere object or property in the strict sense, responsibility should necessarily attach to its use and disposition because of its potential to create human life.

In *Moore v. Regents of the University of California*,[65] the court suggested that "the laws ... deal with human biological materials as objects *sui generis*, regulating their disposition to achieve policy goals rather than abandoning them to the general law of personal property."[66] Nevertheless, there are commentators who take the view that a property interest in gametes must exist. For example, according to Robertson, one has the right to decide what is to be done with stored sperm, and therefore, one "owns" or has a "property" interest in stored semen.[67] Thus, Robertson says, "it is 'his' semen both in a biological and property sense, and thus [he] has the right to decide what happens to it,"[68] so long as he does not harm others.[69]

This argument, however, overlooks the fact that even personal autonomy is limitable. While the right of an individual to direct the use of his body is recognized in a lot of instances, this does not necessarily entail that his body or any part thereof may be bought and sold in the market; while the procreative liberty and personal autonomy of men to "give away" their sperm may be recognized, this does not necessarily affirm the belief that such practice does not entail any responsibility for them. Disposing of the rights over one's sperm does not entail disposing of the obligations which attach to it.

63. *See generally*, Bonnie Steinbock, *Sperm as Property*, 6 STAN. L. & POL'Y REV. 57 (1995).

64. *Id.* at 61. Under certain circumstances, one can own something one is not permitted to sell. For example, the Queen of England owns a great deal of land and many art treasures that she may not sell.

65. Moore v. Regents of the University of California, 793 P.2d 479 (Cal.1990).

66. *Id.* at 480.

67. Steinbock, *supra* note 63, at 60.

68. John A. Robertson, *Posthumous Reproduction*, 69 IND. L. J. 1027, 1036-38 (1994).

69. Steinbock, *supra* note 63, at 62.

C. *Commodification of the Body and Commercialization of Reproduction*

Commercialization of body parts is not intrinsically demeaning to human dignity but becomes so under certain circumstances, such as exploitation and coercion.[70] For instance, there are laws disallowing commercial traffic of body organs, such as the heart or kidneys, because these organs are essential to health, and removal involves a risky, invasive procedure. But this is not so in the case of sperm, which is available in immeasurable quantities, easily renewable, and can be easily extracted without the use of an invasive procedure. To this argument, however, one commentator points out that the distinction "also involves a judgment that some parts of the body should not be for sale either because of the significance of reserving aspects of the human body from commodification, or because economic need might lead poor people to sell body parts."[71]

Another argument which favors sperm donation is that there is really no commercialization of reproduction or baby-selling that is involved. Hence, unlike in adoption, there is no existing child yet when sperm is sold and, consequently, the prohibitions on baby-selling do not really apply.[72]

Treating gametes as a commodity with a corresponding price attached to it, however, suggests that individuals "own" their reproductive materials in the same manner that it owns transferable objects; but, a person's relationship to his or her genetic material is better thought of as a kind of stewardship than as ownership.[73] The kind of ownership which we can be said to possess in relation to our gametes is conditional. We are not allowed to do anything we like with them, because they are not unequivocally ours. They are held in common with past and future generations.[74] Thus, the issue becomes very different when what is involved is the potential of bringing a child into existence.

Hence, although the sale of sperm does not strictly involve selling babies, nevertheless, because of its life-creating potential, its use and disposition has corresponding consequences, for which one must readily take responsibility.

70. *Id.*

71. Shanley, *supra* note 17, at 272-73.

72. *Id.* at 272.

73. *Id.* at 273.

74. *Id.* (citing Donna L Dickenson, *Procuring Gametes for Research and Therapy: The Argument for Unisex Altruism — A Response to Donald Evans*, 23 J. OF MED. ETHICS 93, 95 (1997)).

IV. SPERM DONATION AND PARENTAL RESPONSIBILITY

The responsibility of sperm donors to support children resulting from their semen primarily depends on whether said donor may be attributed the status of parenthood. If a sperm donor is declared to be the father of the resulting child, the obligation to give support, as a matter of law, necessarily follows. The next question is, however, granting that a sperm donor may be attributed paternity, may the rights and responsibilities arising from parenthood be validly waived in a contract? Is an agreement waiving child support enforceable?

Since the obligation to support a child is a necessary consequence of parenthood, it is imperative to initially examine whether a sperm donor may be accorded parental status. After this, the enforceability of contracts relinquishing claims of parenthood and child support obligations shall then be scrutinized.

A. Case in Point: Ferguson v. McKiernan

In the recent and controversial case of *Ferguson v. McKiernan*,[75] decided in July 2004, a Pennsylvania State Appeals Court ruled that a verbal agreement waiving child support between a woman and her sperm donor was invalid and ordered the sperm donor to pay child support for the woman's twins. This case was thus seen by many as one creating a "serious chilling effect"[76] to donors, especially to those who expect anonymity and do not anticipate any potential responsibility for the resulting offspring.

In the said case, Ferguson convinced McKiernan to be her (Ferguson) anonymous sperm donor and promised that she would release him from any obligation, financial or moral, to any child conceived.[77] Notably, Ferguson named her husband, from whom she was then divorced, as the father of the twins on their birth certificates.[78] Later on, however, Ferguson filed an action for child support against McKiernan. As a defense, McKiernan contended that (1) the presumption of paternity of Ferguson's husband should prevail; (2) that the contract relieving him of any support obligation should be enforced; and (3) that Ferguson was estopped, on the basis of fraud, from claiming that he is the father of the children.

75. Ferguson v. McKiernan, 2004 PA. SUPER. 289, *at* http://www.courts.state.pa.us/OpPosting/Superior/out/a15043_04.pdf (last accessed May 15, 2005).

76. Post-gazette.com, *Sperm Donor Fights Order to Support 2 Children*, May 20, 2005, *at* http://www.post-gazette.com/pg/05140/507736.stm (last accessed Jan. 13, 2007).

77. *Ferguson*, 2004 PA. SUPER. 289.

78. *Id.*

In rejecting these arguments, the court considered the welfare of the innocent children involved and found McKiernan to be their legal father liable for child support. The court found that the marital presumption of paternity cannot be applied against Ferguson's ex-husband because the latter already left the marital home two years before the IVF was performed and obtained and filed for divorce on the very day the procedure was performed, obtaining the final decree two months later, before the children were born.[79]

Anent the argument of estoppel on the basis of fraud exercised by the mother as well as the contract waiving child support, the court did acknowledge that, on its face, the parties' agreement constituted a legal contract.[80] Nevertheless, the court found that because the contract bargained away a legal right not held by either of them, but belonging to the subject children: the contract was not enforceable.[81]

Commenting that the court's decision of the case could have implications for sperm and egg donors who expect anonymity, Arthur Caplan, a professor and medical ethicist at the University of Pennsylvania, said: "Anybody who is a sperm donor ought to understand that their identity could be made known to any child [that is] produced, and they could be seen by the courts as the best place to go to make sure that the child has adequate financial support."[82]

Notably, at least 19 states, but not Pennsylvania, have adopted a version of the Uniform Parentage Act, which severs the parental ties between the sperm donor and the child, ensuring that the sperm donor cannot be forced

79. *Id.* The court, citing Warfield v. Warfield, 815 A.2d 1073, 1075 (2003), ruled that

> the policy underlying the presumption of paternity was the preservation of marriage, and the ever-changing nature of relationships in our society dictates that the presumption would apply only where that underlying policy would be advanced by its application. In other words, where there is an intact family or marriage to preserve, the presumption applies; if there is no marriage to protect then the presumption is not applicable.

80. *Id.*

81. *Id.* (citing Kesler v Weniger, 744 A.2d 794, 796 (PA. SUPER. 2000), which held that a parent cannot bargain away a child's right to support; and Sams v. Sams, 808 A.2d 206 (PA. SUPER. 2002), which held that, *inter alia*, while child support orders and private agreements for support may co-exist, a child's right to support cannot be bargained away by either parent, and any release or compromise is invalid to the extent it prejudices the child's welfare)

82. Arthur Caplan, *Sperm Donor Must Pay Child Support*, *at* http://www.cnn.com/2004/LAW/07/23/sperm.donor.ap.html (last accessed Dec. 19, 2006).

to take on the responsibilities of fatherhood.[83] Verily, in the absence of a statute declaring a gamete donor as a non-parent, the paternity rights and obligations of a sperm donor remain viable.

B. Determination of Legal Paternity under Current Law

In determining the legal parental status of a sperm donor, it is imperative to consider how the law weighs biology and intent as separate components of parenthood, because although the sperm donor provided the genetic imprint of the child, he generally has no intentions whatsoever of participating in the rearing of the child. Specifically, how much significance does the law accord biology under the present family law regime when the biological act of procreation is unaccompanied by an intent to raise the child?

In many areas of the law, such as contract, tort, and criminal law, the mental state or intent of an individual is essential in determining the legal consequences of one's actions.[84] In family law, however, intent is usually found to be relatively unimportant in determining parental status.[85] When a baby is conceived though the conventional means of coital reproduction, biology has been accorded the primary basis for the determination of paternity, and the intent of the man to be a father or to participate in the rearing of the child is essentially irrelevant.

Nevertheless, although the law has placed a high value on the biological component of fatherhood,[86] genes are not all that determine parenthood. Rather, the core of responsible parenthood is still the commitment to love and care for the child in such a manner which promotes human flourishing.[87] Hence, the law has likewise introduced other means of providing for legal paternity whenever biology has failed in this respect.

Under the current family law regime, there is paternity by biology, by adoption, and by marital presumption. Paternity by biology occurs when the father is "the male who provided the sperm that impregnated the child's

83. Mark Scolforo, *Court Rules Sperm Donor Must Pay Support*, www.timesleader.com/mld/timesleader/9228387.html (last accessed Dec. 19, 2006).

84. Ann Richman Schiff, *Frustrated Intentions and Binding Biology, Seeking Aid in the Law*, 44 DUKE L. J. Dec. 1994, at 524, 528.

85. *Id.*

86. *Id.* at 529.

87. Ilana Hurwitz, *Collaborative Reproduction: Finding the Child in the Maze of Legal Motherhood*, 33 CONN. L. REV. 127, 154, 155 (2000). Paul Lauritzen has identified a primary motivational force of parenthood as the quest "to establish a relationship with a child whom the parents will nourish and nurture, teach and train."

biological mother and resulted in the child's birth."[88] In paternity by adoption, parental status may be derived statutorily.[89] In adoption, the relationship of the biological parents with the child is severed, thereby making the former legal 'strangers' insofar as the child is concerned. The adopter or adopters subsequently become the legal parents of the child, assuming all the rights and obligations of parenthood.[90] Paternity by marital presumption speaks of the presumption that "children conceived or born during the marriage of the parents are legitimate."[91] The marital presumption was designed to ensure the stability of the family by creating certainty in paternity, for children conceived during the marriage would (and should) logically be the biological offspring of the marriage, since to presume otherwise would mean that the wife had committed an act of infidelity.[92] Consequently, this presumption would aid in preserving intact the family and would promote peaceful union between the father and mother by avoiding disputes about the paternity of the child.[93]

88. Cynthia R. Mabry, *"Who is my Real Father?" — The Delicate Task of Identifying a Father and Parenting Children Created From an In Vitro Mix-Up*, 18 NAT'L BLACK L. J. 1, 17 (2004-2005).

89. *See*, FAMILY CODE, art. 163.

90. Katherine T. Barlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879, 896 (1984). *See also*, An Act Establishing the Rules and Policies of Domestic Adoption of Filipino Children and for Other Purposes, Republic Act No. 8552, § 16 (1998) [hereinafter DOMESTIC ADOPTION ACT OF 1998] ("Except in cases where the biological parent is the spouse of the adopter, all legal ties between the biological parent(s) and the adoptee shall be severed and the same shall then be vested on the adopter(s).").

91. *See*, FAMILY CODE, art. 164. Another provision supporting the marital presumption of legitimacy is article 168, which states:

> [i]f the marriage is terminated and the mother contracted another marriage within three hundred days after such termination of the former marriage, these rules shall govern in the absence of proof to the contrary: (1) A child born before one hundred eighty days after the solemnization of the subsequent marriage is considered to have been conceived during the former marriage, provided it be born within three hundred days after the termination of the former marriage; (2) A child born after one hundred eighty days following the celebration of the subsequent marriage is considered to have been conceived during such marriage, even though it be born within the three hundred days after the termination of the former marriage.

92. Niccol Kording, *Nature v. Nurture: Children Left Fatherless and Family-Less When Nature Prevails in Paternity Actions*, 65 U. PITT. L. REV. 811, 818 (2004).

93. *Id.*

It must be observed also that the current exceptions to paternity by biology, which include adoption and the marital presumption of paternity, do not include private contractual agreements or implicit understandings between the parties whereby the rights and obligations of each over the child are negotiated.[94] The state in its role as *parens patriae* has an interest in protecting the child by designating those who are responsible for the child's care and custody.[95] Generally, biological parents are accorded this responsibility. In instances, however, where the biological parents are unwilling or unable to care for the children, or are seen to pose a threat to the welfare of the child, the state intervenes by terminating the rights of the biological parents and assigning the same to another by means of adoption or placement in a foster home.[96] Verily, in these instances where parental authority is transferred to another, the state, in establishing strict rules on adoption, termination of parental rights, as well as prohibition on baby-selling, seeks to ensure that the acquisition or transfer of parental rights is not subjected to any privately-negotiated contractual agreements.

C. Legal Paternity and ART Using Donor Sperm

In the United States, there are two model statutes adopted in several states that provide guidelines in the resolution of issues dealing with parentage and the status of ART-conceived children: the Uniform Parentage Act (UPA) and the Uniform Status of Children of Assisted Conception Act (USCACA).

The Uniform Parentage Act, on one hand, was enacted to give protection to children born out of wedlock and to ensure that they are not disadvantaged by the status and stigma of illegitimacy.[97] Eighteen states adopted the UPA in whole or in part.[98] In the said act, only section 5[99] dealt with ART highlighting the following: 1) the requirement of the written consent of the husband to the AID procedure in order to be treated the "natural father" of the child,[100] and 2) the requirement of a licensed physician to perform the procedure.[101] The required written consent thus eliminates the difficulty of proving consent or lack thereof in paternity disputes involving AID — although a strict statutory construction of this would mean that if the husband failed to sign a consent form, he would not be considered as the child's legal parent, even if he has expressed consent orally or otherwise.[102] Moreover, the requirement of a licensed physician to perform the procedure intends to provide a "neutral" third party who can verify that both husband and wife had approved of the procedure and also to ensure that a woman has access to medical care during the insemination.[103]

The Uniform Status of Children of Assisted Conception Act, on the other hand, was drafted to augment and clarify the rights of children born under the new technology as well as the rights of the parties to these arrangements.[104] Only two states, North Dakota and Virginia, adopted versions of the USCACA.[105] The UPA of 1973 only dealt with artificial insemination, while the USCACA also concerned itself with other forms of assisted conception, including surrogacy and the parental status of donors. Section 3 of the USCACA provides that:

> The husband of a woman who bears a child through assisted conception is the father of the child, notwithstanding a declaration of invalidity or

94. Schiff, *supra* note 84, at 533.

95. *Id.*

96. *Id.*

97. Uniform Parentage Act [UPA], 9B U.L.A. 287 (1973).

98. Alabama, California, Colorado, Delaware, Hawaii, Illinois, Kansas, Minnesota, Missouri, Montana, Nevada, New Jersey, New Mexico, North Dakota, Ohio, Rhode Island, Washington, and Wyoming have adopted the UPA of 1973 in whole or in part.

99. UPA, § 5:

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

100. *Id.*

101. *Id.*

102. Bridget R. Penick, *Give the Child a Legal Father: A Plea For Iowa To Adopt A Statute Regulating Artificial Insemination By Anonymous Donor*, 83 IOWA L. REV. 633, 641 (Mar. 1998).

103. *Id.*

104. Uniform Status of Children of Assisted Conception Act [USCACA], 9B U.L.A. 184 (Supp. 1998). The USCACA also contains provisions concerning other forms of assisted conception, including surrogacy, and the parental status of donors.

105. *Id.*

annulment of the marriage obtained after the assisted conception, unless within two years after learning of the child's birth he commences an action in which the mother and child are parties and in which it is determined that he did not consent to the assisted conception.[106]

Comparing Section 5 of the UPA of 1973 with Section 3 of the USCACA, three important variances can be observed: (1) the absence of the written consent of the husband, (2) the lack of provision requiring the intervention of a licensed physician, and (3) the introduction of the presumption of paternity. Thus, instead of relying on the presence or absence of written consent to control the husband's parental status, the USCACA reversed the situation by immediately presuming that the husband is the father of the child, unless he denies the same by bringing an action within two years upon learning of the child's birth.

By providing for the presumptive paternity of the husband, the law is concerned with the best interests of the child, by ensuring that any uncertainty regarding the identity of the father shall be shouldered by the married woman's husband rather than the child.[107] It should be observed, however, that if the non-paternity action is timely brought and the husband is successful in showing his non-consent, the child would have no legally-recognized father. Notably, in such instance, paternity may not be asserted against the sperm donor since the Act explicitly defines the parental status of a donor, declaring that the "donor is not a parent of a child conceived through assisted conception."[108] The USCACA, therefore, provides greater protection to sperm donors;[109] it, however, fails to provide for a legally-recognized father for the AID-conceived child outside of the "wife and consenting husband" situation.[110]

In 2000, the National Conference of Commissioners on Uniform State Laws created a new Uniform Parentage Act (amended in 2002) which introduced article 7, entitled, "Child of Assisted Reproduction." It essentially re-codified the provisions of the USCACA of 1988, but expanded its application to marital as well as non-marital children born as a result of ART. Its essential points are as follows:

a. a donor is not a parent of the resulting child;

b. a man who provides sperm for assisted reproduction with the intent to parent a woman's child is the parent;

106. *Id.* § 3.

107. *Id.*

108. *Id.* § 4(a).

109. Kristin E. Koehler, *Artificial Insemination: In the Child's Best Interest?*, 5 ALB. L. J. SCI. & TECH. 321, 327 (1996).

110. *Id.*

c. the man and the woman who are the intended parents of the child to be conceived by ART must sign written consents, provided, however, that the failure to sign a consent does not preclude a finding of paternity if the man and the woman reside together in the same household during the first two years of the child's life and openly hold out the children as their own.

Clearly, this section clarifies that a donor, whether of sperm or egg, is not a parent of the resulting child. Hence, the donor may neither bring an action to establish parental rights, nor can he be sued and be required to support the resulting child. Consequently, this section shields all donors from parenthood in all situations, whether the recipient is a married woman or a single woman who conceives a child through ART with the intent to be the child's parent, either by herself or with a man.

As earlier mentioned, ART in the Philippines is often shrouded in secrecy, although there have been a growing number of medical practitioners specializing in ART.[111] The legislature then deemed it proper to keep Philippine law abreast with the said scientific advancements for the sake of the *status of the child.*[112]

As earlier mentioned, the Family Code has incorporated a provision treating of the status of a child born through Artificial Insemination. Article 164 of the Family Code provides:

x x x

Children conceived as a result of artificial insemination of the wife with the sperm of the husband or that of a donor or both are likewise legitimate children of the husband and his wife, provided that both of them authorized or ratified such insemination in a written instrument executed and signed by them before the birth of the child. The instrument shall be recorded in the civil registry together with the birth certificate of the child.[113]

A reading of said provision would show that it does not distinguish whether the sperm that was utilized was from the husband or a third party donor. The law still ensures that the child conceived by AID has a legally-recognized father as long as the following requirements of the statute are met: (1) the husband is married to the artificially-inseminated woman, and (2) the husband and wife have consented in writing to the procedure. If

111. Romero, *supra* note 9, at 284. Because AI cases are shrouded in secrecy, an estimate of their numbers in the Philippines is difficult to obtain.

112. MELENCIO STA. MARIA, JR., PERSONS AND FAMILY RELATIONS LAW 539 (4d ed. 2004) (citing Deliberations of Committee on Woman and Family Relations of the Senate, Feb. 3, 1988) [hereinafter STA. MARIA].

113. FAMILY CODE, art. 164.

these terms are met, the husband is regarded as the legitimate, natural father of the child. Consequently, any possible claim of paternity by the sperm donor is already barred. Article 164, therefore, reflects the strong public policy that favors the legitimacy of the child, as well as the adherence to the rule on presumption of legitimacy of a child born within a valid marriage.

Article 164, however, only deals with artificial insemination to the extent that the persons utilizing the same are husband and wife.[114] Clearly, therefore, when the case involves unmarried couples utilizing artificial insemination, the same provision would not apply. Furthermore, the application of the law is likewise limited to artificial insemination, thus, it fails to provide for the status of a child. when other procedures, such as in vitro fertilization, are performed.

The limited application of this provision draws attention to numerous questions yet to be addressed under current Philippine law. What would be the status of a child born through artificial insemination to an unmarried woman? In such an instance, who shall then be regarded as the legal father of the child? Or would the child suffer from the stigma of not having a father at all? Will it be possible to assert a claim of paternity against the sperm donor? Furthermore, if the legal requirements imposed under article 164 have not been complied with, will the husband still be regarded as the father of the child, especially in the event that the sperm that was used was not from the husband, but from a third person?

V. Responding to the Problematic Issues of Paternity in the Use of Donor Sperm

In determining whether a sperm donor may be considered as the father of the child, the author utilized two general themes offered by contemporary parentage law: 1) the child's interests always come first; and 2) two-parent-care is generally preferable to that of one parent alone.[115]

A. Priority of the Child's Best Interest

Children's rights and welfare must remain paramount. Consideration should be given to the fact that the reason a couple or individual use ART is to conceive and give birth to a child. The child is therefore the end result of the treatment. Although the decision making leading up to the treatment is a matter discussed only by the adult parties involved, the overriding

114. *Id.*

115. Garrison, *supra* note 13, at 895.

consideration should still focus on the child's needs, rights, and welfare rather than that of the parents.[116]

What constitutes child's best interest has been described as all that is most suitable for his proper growth and development,[117] including a psychological environment conducive to healthy relationships.[118] It may also refer to "the totality of circumstances and conditions as are most congenial to the survival, protection, and feelings of security of the minor encouraging to his physical, psychological and emotional development."[119]

Today, and perhaps more so than at any time in our history, courts and commentators hold that parents' rights are secondary to children's interests.[120] In *Welch v. Welch*,[121] the Wisconsin Supreme Court declared that the child's best interest should constitute the governing motives of judicial action.[122] Hence, in constructing a statutory framework for paternity and filiation in the field of modern reproductive technology, the author believes that the best interests of the child should be the primary and major consideration.

B. Preference for Two-Parent Care

116. United Nations Convention on the Rights of the Child [UNCRC], art. 3 (Nov. 20, 1989) (Ratified by the Philippines on Aug. 21, 1990), *available at* http://www.cirp.org/library/ethics/UN-convention (last visited Dec. 31, 2006) ("[i]In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interest of the child shall be a primary consideration.)."

117. *See generally,* Del Prado v. Republic, 126 Phil. 1 (1967).

118. *Id.*

119. Supreme Court of the Philippines, Rule on Custody of Minors and Writ of *Habeas Corpus* in Relation to Custody of Minors, A.M. No. 03-04-04-SC (May 15, 2003).

120. Harvard Law Review Editors, *Changing Realities of Parenthood: The Law's Response to the Evolving American Family and Emerging Reproductive Technologies,* 116 HARV. L. REV. 2052, 2054 (May 2003). *See also,* Shoshana L. Gillers, *A Labor Theory of Parenthood,* 110 YALE L. J. 691, 695 (Jan. 2001). Giller opines that

> favoring children's rights over adults' rights makes sense intuitively. Treating the child as a means of protecting the adults' rights contradicts the Kantian aspiration of treating every person as an end, not a means to an end. Courts' tacit assumption that adults' rights are irrelevant to discussions of custody seems to follow in this Kantian tradition.

121. Welch v. Welch, 33 Wis. 534 (1873).

122. *Id.*

"The benefits of a stable, functioning two-parent family where both adults are biologically related to the child are undisputed."[123] Several concerns about the impact[124] of single parenting on children as well as its corollary public costs have resulted in legislative interest towards paternity law reform, including comprehensive revision of child support standards and enforcement mechanisms.[125]

The author disagrees on legislation which would have the effect of giving the child only one legal parent. If children conceived sexually enjoy the right of having a father and a mother when they were born, why should the same right be denied to children conceived artificially?

Therefore, the determination of the legal parents of a child conceived through ART, whether or not the intended parents are married, unmarried, or even a single woman, would essentially be anchored on the traditional assumption that the child has two parents: a father and a mother.

C. Constructing a Legal Framework for Philippine Law

The author is of the view that in creating a framework for legal policies that would respond to these medical advances, there should be, as much as possible, minimal deviation from current law, policies, and values. In other words, consistency in terms of policy reforms should be highly considered: one should follow a uniform and coherent approach to legal change.[126]

In the formulation of rules on parental status, the difference between sexual and artificial conception should hardly be the primary determining factor as to what relational interests ultimately result.[127] Take the case of a child conceived through IVF using the sperm of the husband and the egg of the wife. It is absurd to suggest that legal parentage should be determined any differently than in the case of sexual conception just because the child was conceived in a petri dish. It is clear, therefore, that since the parent-child relationship which resulted is similar had the child been born through sexual conception, consistency would, of course, demand similar treatment.[128]

D. Married Couples and AI and IVF Using Donor Sperm

As earlier discussed, a husband who consents in writing to the artificial insemination of his wife using sperm from a third party-donor is considered in law as the father of any child born as a result of the insemination.[129] Nevertheless, it is also believed that even in the absence of a statutory declaration to that effect, the result would be the same because the said consideration arises by reason of public policy or the principles of equitable or promissory estoppel.[130]

Evidently, the presumption of paternity on the part of the wife's husband deviates from the biological definitions of the family, but is, nevertheless, seen as necessary and important to serve strong public policy considerations of protecting the child from the stigma of illegitimacy as well as the preservation and maintenance of the heterosexual family unit as much as possible.[131] This statutory recognition goes so far as to deny the biological father the opportunity to assert his own paternity or to seek any form of legal recognition of the relationship, if the mother of the child is married to another man.[132] This view was recognized in the case of *Michael H. v. Gerald D.*,[133] which ruled that a state may constitutionally deny a man parental

123. Kording, *supra* note 92, at 823.

124. Garrison, *supra* note 13, at 887. Studies made in the United States revealed that: first, children in single-parent households have a higher rate of poverty and welfare dependence than any other segment of the American population; second, as compared to their peers in two-parent families, children in single-parent families are more likely to experience serious childhood and adult problems, including poor health, delinquency, behavioral problems, low educational attainment, and early childbearing.

125. The preference for two-parent care should not be understood however as ignoring the emergence of non-traditional family forms; there is neither denial of State recognition to nor protection of the latter. The author merely suggests that in using a two-parent care scheme in the context of ART, every child, regardless of how he was conceived or born, has the same 'starting point' of having a father and a mother.

126. Garrison, *supra* note 13, at 879.

127. *Id.* at 880.

128. *Id.* at 880-81. Garrison takes the case of Louise Brown, the first child conceived through IVF, as an example. Garrison points out that while Louise was conceived in vitro, she was conceived using the sperm and ova of her married parents who had failed to conceive a child sexually — parents who planned to raise Louise after her birth and who in fact did so. Louise's parental relationship was thus extraordinarily ordinary. Louise may have felt particularly wanted because her parents went to such lengths to produce her, but there is no reason to suppose that the relationship of Louise and her parents would in other respects differ from those of other married couples and their sexually conceived children.

129. *See*, FAMILY CODE, art. 164.

130. Michael J. Yaworsky, *Rights and Obligations Resulting from Human Artificial Insemination*, 83 A.L.R. 4th 295.

131. R. Alta Charo, *Biological Determinism in Legal Decision Making: The Parent Trap*, 3 TEX. J. WOMEN & L. 287-88 (1994).

132. *Id.* at 288. This also served the public policy that an adulterer should not enjoy the fruits of his sin.

133. Michael H. v. Gerald D., 491 U.S. 110 (1989).

rights with respect to a child he fathers during a relationship with the wife of another man: it is the marital family that has traditionally been accorded a protected liberty interest, as reflected in the historic presumption of legitimacy of a child born into such a family.[134]

A complication, however, arises when the husband does not comply with statutory requirements nor disputes his paternity. In the absence of the written consent, will the child born as a result of the artificial insemination still be considered as the legitimate child of the married couple? Notably, non-compliance with the statutory requirement of written consent to artificial insemination is not one of the grounds for impugning the legitimacy of a child under the Family Code.[135]

The requirement of written consent is the most definitive way to ensure that the intentions of the parties are carried out, since in expressly consenting to the AID procedure before it occurs, the couple is reassured that the child conceived via AID will be the legal child of both husband and wife.[136] Furthermore, determining who should be considered the father and who should be legally responsible to support the child would require the courts to examine whether the mother's husband had consented to the AID.[137]

In the United States, usually in divorce litigations, the husband, more often than not, denies paternity and liability for the support of a child born of AID to his wife in case said husband had not consented in writing to his wife's insemination.[138] Strict statutory construction of the provision mandates that if the husband did not sign a consent form, he is not afforded parental rights and obligations over the resulting child, even if he has expressed consent orally or otherwise.[139] In other words, the husband shall not be considered the legal father of the child in case he has not given his written consent to the insemination of his wife, as required by law.

Nevertheless, despite the clarity of the written consent requirement, a number of courts still found public policy reasons to grant the status of "fatherhood" to the husband even if he has not exactly followed the statutory procedural requirements.[140] In fact, there have been instances

134. *See generally, id.*

135. *See,* FAMILY CODE, art. 166.

136. Penick, *supra* note 102, at 650.

137. *Id.* at 650-51.

138. *Id.*

139. *Id.* at 641.

140. *See,* S.C. v. R.C., No. 90-2299, 1991 WL 198136 (Wis. Ct. App. Aug. 28, 1991) (reasoning that a failure to meet statutory writing requirement does not absolutely prevent a husband from being deemed the father of a child born via AID.); In re Baby Doe, 353 S.E.2d 877, 879 (S.C. 1987) (discussing the tendency of courts to assign paternal responsibility to a husband if there exists conduct evidencing his consent.); R.S. v. R.S., 670 P.2d 923, 928 (Kan. Ct. App. 1983) (allowing oral consent to establish paternity.).

where it was held that husbands who give oral permission to the artificial insemination of their wives using donor sperm, or whose consent is inferable from their acts, are responsible for the support of the resulting child, despite the existence of statutory provisions requiring the husband's consent to be in writing.[141] Some cases relaxed the requirement by implying consent through conduct[142] or by inferring it from the consent to the insemination procedure.[143] The Court further noted that the consent provision of the statute appeared to have been enacted in response to fears of potential criminal and civil liability resulting from the use of artificial insemination, and that there was nothing in either that purpose or any other provision indicating a legislative intent not to allow a husband, who orally consented to heterologous insemination, to be held responsible on a theory of equitable estoppel or implied consent.

In instances, however, where the husband had absolutely no intention to be the father and was openly opposed to the AID of his wife, and there was evidence that the husband did not consent, some courts have absolved the husband from parental obligations. The Illinois Court of Appeals *In re Witbeck-Wildhagen*[144] explains that "just as a woman has a constitutionally protected right not to bear a child, a man has the right not to be deemed the parent of a child that he played no part in conceiving."[145]

Considering all these, the author is of the opinion that the mere absence of the written consent of the husband does not necessarily negate the assumption of paternity over the child born as a result of the AID of his wife: if it can be shown from the circumstances that the husband has given implied consent to the procedure, or that his conduct subsequent to the procedure would show that he has ratified the same, paternity could be adjudged. This is in keeping with the "best interest of the child" policy, such that the status of the child should not be adversely affected by a mere procedural lapse.

Nevertheless, this public policy should be tempered with the right of the husband not to procreate by refusing the AID of his wife, as well as the right of the husband not to assume parental obligations over an AID-conceived child who, strictly speaking, is a legal stranger to him, in cases where he has

141. Yaworsky, *supra* note 130.

142. *In re Baby Doe,* 353 S.E.2d at 879.

143. *R. S.*, 670 P.2d at 928.

144. In re Witbeck-Wildhagen, 667 N.E.2d 122, 125 (Ill. App. Ct. 1996) (deciding that because there was no evidence that the husband had consented to the wife's artificial insemination, he was not the legal father.).

145. *Id.*

not consented to and has vehemently refused the procedure or where he has no knowledge of the same. In this regard, if the Family Code allows the husband to impugn the legitimacy of a child born as a result of artificial insemination where the written authorization or ratification was obtained through mistake, fraud, violence, intimidation, or undue influence,[146] more so should the husband be given the same opportunity where the written consent was absent either because he opposed the procedure, or he had no knowledge that his wife underwent AID to conceive the child.

Thus, in the event that the husband proves to be successful in impugning the legitimacy of the child born through AI, the assertion of the paternity rights and obligations of the sperm donor over the child would already be viable.

E. The Sperm Donor as a Parent: Determining the Paternity of a Child Born to a Single Woman through the Use of Donor Sperm

As earlier discussed, the sperm donor is excluded from the concept of being a father in any case where the artificial insemination was conducted during a valid marriage between spouses, provided that both the husband and the wife have consented in writing.[147]

It should be observed, however, that the Family Code does not address the situation where the recipient woman is unmarried. Considering the relatively easy access to ART nowadays, it is possible that an unmarried woman may choose to be a single parent and will avail of the procedure using merely the sperm of a donor. In such an instance, a query may be raised as to whether the sperm donor may be regarded as the father of the child.

In the United States, several jurisdictions have enacted legislations which automatically severs all ties between the sperm donor and the child, whether or not the recipient woman is married or unmarried. For instance, the USCACA provides that "a donor is *not* a parent of the child conceived by means of assisted reproduction."[148] The framers of the USCACA and UPA (2000) were of the belief that this approach is more in keeping with modern assisted reproduction processes and provides certainty of non-parentage for prospective donors.[149] Likewise, these laws also provide greater protection to sperm donors against potential financial and emotional responsibility to their

146. *See*, FAMILY CODE, art. 166 (3).

147. *Id.* art. 164.

148. USCACA, § 4 (a) (emphasis supplied).

149. Anthony Miller, *Baseline, Bright-Line, Best Interests: A Pragmatic Approach for California to Provide Certainty in Determining Parentage*, 34 MCGEORGE L. REV. 637, 705-706 (2003).

offspring.[150] There are, however, various reasons why the outright termination of the ties between the sperm donor and the child, in case of unmarried recipients, would not be for the best interest of the child. For the most part, although these laws would guarantee certainty for sperm donors, they fail, however, to provide a legally-recognized father for the conceived child outside of the "wife and consenting husband" situation.[151]

One of the premises earlier adopted by the author is the preference for two-parent care. Proceeding from this principle, since parentage law encourages two-parent care even in case of non-marital birth, it would appear that two-parent care should likewise be encouraged in instances where a single woman conceives using donor sperm.[152]

In the context of sexual reproduction, the intention of the male partner in becoming a parent is usually irrelevant in his inherent obligations as one. Thus, when his sexual partner becomes pregnant, he becomes the father of the child, whether he likes it or not. Why would we now accord a different weight of relevance as to the intentions of a sperm donor? If the mechanics of conception are largely irrelevant to the relational realities of non-marital parent-child relationships, there is no obvious reason why paternity laws should mandate different results when women conceive using ART and when women conceive sexually.[153]

The fact that even single parents are allowed to adopt does not justify the assertion that single women who undergo ART using donor sperm should be regarded as the sole parent of the child to the automatic exclusion of the sperm donor. This is so because in single-parent adoptions, the choice of being a single parent does not represent the view that one parent is as good as two, but the view that one parent is better than none at all.[154] Even adoptive children begin a life of having parental claims against two parents — a mother and a father — thus, it is hard to see why technologically-conceived children should be governed by a different policy that would invariably deprive them of two legal parents.

Moreover, the mere fact that single women utilizing ART have the financial capability to support the child does not justify the exclusion of the other "parent." First of all, child support may be a crucial issue of

150. Koehler, *supra* note 109, at 327.

151. *Id.*

152. Garrison, *supra* note 13, at 903.

153. *Id.*

154. *Id.* at 907. Adoption agencies seek to ensure that children continue to enjoy the care of two parents, allowing single parent adoptions only in the case of hard-to-place children who are otherwise unlikely to be adopted at all.

parenthood, but, certainly, it is not the only issue.[155] Likewise, a rich single mother who conceives sexually cannot unilaterally rid herself of the child's father by simply demonstrating lack of need or disinterest in child support. Thus, there is obviously no reason why a woman, rich or poor, employing ART using donor sperm should be able to do so either.[156]

It is clear, therefore, that to advance the view that a child conceived through assisted reproduction shall have only one parent in the event that the recipient of the sperm is an unmarried person, it must be shown that its reasons for treating certain children differently from others comport with the equal protection clause of the Constitution.[157] The author, however, fails to see any substantial distinction between a child conceived

through artificial means and a child conceived sexually because the needs of any and every children are the same — love, care, support, and maintenance from their parents — regardless of how they were conceived and born. Therefore, the author is of the opinion that the automatic severance of the parental obligations of the sperm donor will not work to the best interest of the child. The child should not be denied the opportunity to assert filiation against the sperm donor if the opportunity otherwise permits the child to do so.

F. Sperm Donors Adjudged to be Fathers

Despite inconsistent decisions in various jurisdictions in the United States, there is case law to the effect that a sperm donor can be held liable for the support of the AID conceived child and can be adjudged to be the child's father.[158]

In the recent and controversial case of *Ferguson v. McKiernan,*[159] decided in July 2004, a Pennsylvania State Appeals Court ruled that a verbal agreement waiving child support between a woman and her sperm donor was invalid, and ordered McKiernan (sperm donor) to pay child support for the woman's twins. Verily, in the absence of a statute declaring a gamete

155. *See,* FAMILY CODE, art. 220.

156. Garrison, *supra* note 13, at 907.

157. PHIL. CONST. art III, § 1.

158. *See,* Jhordan C. v. Mary K., 224 Cal. Rptr. 530, 535-36 (Ct. App. 1986); In re R.C., 775 P.2d 27, 27 (Colo. 1989); Thomas S. v. Robin Y., 618 N.Y.S. 2d 356, 356 (N.Y. App. Div. 1994); McIntyre v. Crouch, 780 P.2d 239, 241 (Or. Ct. App. 1989).

159. Ferguson v. McKiernan, 2004 PA. SUPER. 289, *at* http://www.courts.state.pa.us/OpPosting/Superior/out/a15043_04.pdf (last accessed May 15, 2005).

donor as a non-parent, the paternity rights and obligations of a sperm donor remain viable.

In fact, the case of *Ferguson v. McKiernan* was not the first case which adjudged a sperm donor to be the father of the AID child. In *C.M. v. C.C.,*[160] it was the sperm donor who even brought the paternity action to claim parental rights over the child. An unmarried couple, upon the refusal of their doctor to perform the insemination, attempted the procedure themselves using C.M.'s sperm. The couple broke off their relationship, and when the child was born, C.M. wanted to be acknowledged as the father of the child and was seeking visitation rights. The court held C.M. to be the legal father of the child and granted him paternal rights based on the fact that C.M. had consented to the use of his sperm for the conception and had participated in the process in anticipation of the privileges of fatherhood, which the court thought evinced the intent to "assume the responsibilities of parenthood."[161] The court likewise relied on the public policy interests of a child having "two parents whenever possible."[162]

In *Jhordan C. v. Mary K.,*[163] although the court explicitly failed to reach the question of whether an oral or written non-paternity agreement between the parties would be binding, it nonetheless emphasized that the parties' conduct during the pregnancy and three months after the birth did not evince any intent to exclude the biological father. Hence, the court declared the biological father to be the legal father.[164]

It should be observed, however, that these reported cases where paternity has been adjudicated to sperm donors, involved known donors. This would then illustrate the seemingly discriminatory practice between sperm donors who give directly to users and those who give to sperm banks.[165] Since most ART procedures use the sperm of anonymous donors, the assertion of their paternity rights and obligations becomes very remote.[166]

G. Fairness to Sperm Donor v. Unfairness to the Child

160. C.M. v CC., 152 N.J. SUPER. 160, 377 A.2d 821 (1977).

161. Keiser, *supra* note 8, at 793.

162. *Id.*

163. *Jhordan C.*, 224 Cal. Rptr. at 530.

164. Katherine R. Baker, *Bargaining or Biology? The History and Future of Paternity Law and Parental Status,* 14 CORNELL J. L. & PUB. POL'Y 1, 15 (2004).

165. Garrison, *supra* note 13, at 904.

166. Koehler, *supra* note 109, at 326.

At first blush, it would seem absurd and perhaps unfair, to adjudge a sperm donor liable as a father and for him to take on the responsibilities of parenthood, especially when he never intended to be a parent in the first place. But this seeming unfairness to the sperm donor must be balanced with the consequent unfairness to the child of being deprived of a father who would be able to rear and support him. In this regard, the author believes that the balance should tilt in favor of the child.

The author simply finds no basis for supporting a one-parent policy in cases of single ART users. If such a policy is pursued, the only interests served are, ultimately, those of a single woman who wants a child but does not want that child to have a father,[167] or the interests of a sperm donor who gives away his semen for profit, without regard to the consequent life that may be produced thereby. The author believes that one should always be responsible for one's voluntary acts even though the consequence resulting therefrom may not be the same as the one intended. Indeed, as one commentator writes, "a father can hardly be held wholly responsible for what a child becomes — much will depend on circumstances — but a father can be held responsible with the mother for the fact that the child comes to be at all."[168]

The fear that donor responsibility would likely reduce the numbers of both users and donors would not be a sufficient reason to absolve donors from parental responsibility.[169] An individual's procreative liberty merely suggests that the government should not interfere in one's decision to bear a child, including the method of conception that would be utilized,[170] but this liberty does not direct the state's acquiescence or assent in one's wish to parent the child alone or to preclude the existence of the other parent. Parental authority is inalienable and every abdication of this authority by the parent is void.[171] Thus, "[i]t is morally irrelevant that (1) the donor does not want to act as a father; (2) those who collect his sperm as medical brokers do not want him to act as a father; (3) the woman whose ovum he is fertilizing does not want him to act as a father; and (4) society is prepared to excuse him from the obligations of acting as a father."[172] A parent is a parent, and his status as such may not be abrogated by the mere fact that he wants to be discharged from it.

167. Garrison, *supra* note 13, at 911.

168. Daniel Callahan, *Bioethics and Fatherhood*, 1992 UTAH L. REV. 741 (1992).

169. Garrison, *supra* note 13, at 908.

170. *Id.*

171. Luna v. Intermediate Appellate Court, 137 SCRA 7, 20 (1985). *See, id.* Makasiar, J., dissenting.

172. Callahan, *supra* note 169, at 741.

Furthermore, the concern that sperm donor responsibility might produce more parental conflicts and litigations than a scheme wherein a sperm donor has no parental rights or obligations is not sufficient basis for severing parental rights, since the risk of conflict is likewise existent and perhaps identical in cases of conception with an anonymous or semi-anonymous sexual partner.[173] Likewise, although parental conflicts do pose a risk to the child's emotional and psychological development, so does parental absence.[174]

Indeed, having a known and legally-recognized father is in the child's best interest, whether emotionally, psychologically, or financially.[175] This need is fulfilled under the current statutory scheme in the context of a married couple but is still unaddressed in the case of single woman, leaving the legal rights and obligations of the sperm donor undefined and the child without a legally-recognized father.

VI. APPLYING CONTRACT LAW IN THE DETERMINATION OF PARENTAL STATUS AND THE OBLIGATION TO SUPPORT

A. Waiver of Parental Status and Child Support Obligations

Contract law has long played a role in the ordering of familial relationships, including the rights to child custody and visitation.[176] The crucial question, however, is whether the application of contract law may likewise be utilized by parties in drawing agreements waiving parental rights and duties, including the right of the child to support. Is it permissible to relinquish parental rights by contract? May contracts waiving the rights of the child to support be validly enforced?

This was another important issue in the case of *Ferguson v. McKiernan*,[177] which involved a verbal agreement between a woman and her sperm donor, the latter waiving parental obligations, specifically the obligation to give support to any child conceived as a result. The three-judge panel, however, said that the aforesaid deal stating that the sperm donor would not be obligated for any child support was "on its face" a valid contract, but that it

173. Garrison, *supra* note 13, at 909.

174. *Id.*

175. Koehler, *supra* note 109, at 326.

176. Golnar Modjtahedi, *Nobody's Child: Enforcing Surrogacy Contracts*, 20 WHITTIER L. REV. 243, 262 (1998).

177. Ferguson v. McKiernan, 2004 PA. SUPER. 289, *at* http://www.courts.state.pa.us/OpPosting/Superior/out/a15043_04.pdf (last accessed May 15, 2005).

was unenforceable due to "legal, equitable and moral principles."[178] The author endeavors to examine if contracts waiving parental rights and child support obligations of a sperm donor is valid in this jurisdiction. But before doing so, it is necessary to examine the nature of parenthood and the obligation to give child support to determine if they may be considered as valid subjects of a contractual undertaking.

B. *Nature of Parenthood*

The validity of an agreement waiving the status of being a "parent" depends primarily on whether parental authority and responsibility may be a valid subject of a contractual stipulation.

Despite the statutory enumeration of the rights and responsibilities of parenthood,[179] jurisprudence has already recognized that parenthood proceeds from a natural right and obligation, such that its existence is still recognized even in the absence of a statutory mandate or a court recognition. In *Skedas v. Skalaroff*,[180] for instance, it was recognized that

> the right of parents to the custody of their minor children is one of the natural rights incident to parenthood, a right supported by law and sound public policy. The right is an inherent one, which is not created by the state or decisions of the courts, but derives from the nature of the parental relationship.[181]

178. *Id.*

179. The effects of parental authority have been enumerated under article 220 of the Family Code:

> The parents and those exercising parental authority shall have with respect to their unemancipated children or wards the following rights and duties: (1) To keep them in their company, to support, educate and instruct them by right precept and good example, and to provide for their upbringing in keeping with their means; (2) To give them love and affection, advise and counsel, companionship and understanding; (3) To provide them with moral and spiritual guidance, inculcate in them honesty, integrity, self-discipline, self-reliance, industry and thrift, stimulate their interest in civic affairs, and inspire in them compliance with the duties of citizenship; (4) To enhance, protect, preserve and maintain their physical and mental health at all times; (5) To furnish them with good and wholesome educational materials, supervise their activities, recreation and association with others, protect them from bad company, and prevent them from acquiring habits detrimental to their health, studies and morals; (6) To represent them in all matters affecting their interests; (7) To demand from them respect and obedience; (8) To impose discipline on them as may be required under the circumstances; and (9) To perform such other duties as are imposed by law upon parents and guardians.

180. Skeadas v. Skalaroff, 84 R. I. 206, 122 A.2d 444.

Furthermore, it is said that the relationship of a parent and child is a status, not a property right nor a contract.[182] Nevertheless, the status is one which may be altered or abrogated by the state as *parens patriae* in furtherance of a societal concern for the protection of the child's best interest.[183]

In *Santos, Sr. v. Court of Appeals*,[184] the Supreme Court explicitly stated that "the law allows a waiver of parental authority only in cases of adoption, guardianship and surrender to a children's home or an orphan institution .... Even if a definite renunciation is manifest, the law still disallows the same."[185]

Thus, while it is said that parenthood is inalienable, and that the policy is to give preference to biological connections, still, the preference for biological parents has to give way to the need to find substitute parents when genetic linkages are missing or inconvenient.[186] As earlier explained, genetic linkage is not the only basis of parenthood. This is evident in cases of adoption, guardianship, or surrender to a child's home or an orphan institution where the law allows the parent to relinquish his/her parental rights in favor of another.[187] In these instances, the welfare of the child is the paramount consideration such that when the parent is incapable of fulfilling his obligations, the law would not jeopardize the well-being of a child by insisting that the child remain with the biological parents. The law instead finds a substitute home or parental care that will assist the child in his wholesome development.

C. *Child Support Obligations as a Primary Duty of Parenthood*

Support includes whatever is necessary to keep a person alive.[188] A duty to support and maintain minor children is universally recognized as resting

181. *Id.*

182. 59 Am. Jur. 2d § 1.

183. *Id.*

184. Santos, Sr. v. Court of Appeals, 242 SCRA 407 (1995).

185. *Id.*

186. Charo, *supra* note 131, at 283.

187. *See*, An Act to Ordain and Institute the Civil Code of the Philippines [NEW CIVIL CODE] art. 210.

188. STA. MARIA, *supra* note 112, at 666. This is highlighted by the use of the term "indispensable" in article 194 of the Family Code:

upon the parents of such children.[189] Notably, the duty to support is, at the same time, a legal and natural obligation, the consistent enforcement of which is equally essential to the well-being of the state, the morals of the community, and the development of the individual.[190] The parental duty to support their children is usually accompanied by the parental rights to custody, control, services, and earnings of such children, and is often spoken of as correlative or reciprocal to those rights.[191] This duty, however, is not regarded as necessarily dependent on those rights, as always following them, or as invariably non-existent in their absence.[192] Rather, the duty may be said to rest primarily on the inability of children to care for themselves. There is support for the view that apart from any statute, its imposition as a legal obligation upon parents while their children are too young to care for themselves is sufficiently justified on the ground that such liability ought to attach as part of their responsibility for having brought the children into being.[193]

D. Preconception Agreements: Bargaining Away Parental Ties

The law is explicit in enumerating the instances where parental authority may be alienated, namely, adoption, guardianship, and surrender to a children's home or an orphan institution.[194] Verily, a contract relinquishing parental rights is not among them. But may the case of a contract involving a sperm donor be validly differentiated and treated as an exception?

If a man engages in sexual intercourse with a woman, he thereby assumes the risk of any consequence of such act, regardless of whether the object of the sexual activity was for procreation or merely for pleasure. If a woman contracts with a man to engage in sexual intercourse with her for the purpose of impregnating herself, subject to the conditions that the man not be responsible for supporting the resulting child and that he not be

> Support comprises everything indispensable for sustenance, dwelling, clothing, medical attendance, education and transportation, in keeping with the financial capacity of the family.
>
> The education of the person entitled to be supported referred to in the preceding paragraph shall include his schooling or training for some profession, trade or vocation, even beyond the age of majority. Transportation shall include expenses in going to and from school, or to and place of work.

189. 59 Am. Jur. 2d, § 41.

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

194. Sagala-Eslao v. Court of Appeals, et al. 266 SCRA 317, 323 (1997).

recognized as the father, the contract would, most probably, be struck down as null and void for being against public policy.[195]

On the other hand, in the case of sperm donation, the donor explicitly abandons his parental rights over the child usually through a written agreement with the licensed physician, sperm bank, or the mother. In fact, even in the absence of said written contract, an implicit understanding to such effect may be inferred whenever a donor gives away his semen, usually for a fee. If in the ordinary context of sexual conception, however, a contract which purports to abdicate parental authority is null and void for being against public policy,[196] how could the same practice be legitimated by the mere expedient of undergoing a medical procedure to conceive a

Clearly, regardless of a child's manner of conception — whether coitally or non-coitally — parental authority remains inalienable and every abdication of this authority by the parent is void.[197]

E. Bargaining the Child's Right to Support

Every child has the right to a wholesome family life full of love, care and understanding, guidance and counseling, and moral and material security.[198] It is important to emphasize that, while the child primarily needs to be loved and nurtured by his parents, he equally needs material security to ensure a balanced diet, adequate clothing, sufficient shelter, proper medical attention, education, and all the basic physical requirements of a healthy and vigorous life. Hence, the child has the right to be supported by his parents and every parent has the correlative obligation to support his child.

When one contracts with a sperm donor, the agreement, express or implied, usually provides that the donor would "donate" his sperm in

195. Silva v. Court of Appeals, 275 SCRA 604 (1997). The Court ruled:

> [p]arents have the natural right, as well as the moral and legal duty, to care for their children, see to their proper upbringing and safeguard their best interest and welfare. This authority and responsibility may not be unduly denied the parents; neither may it be renounced by them. Even when the parents are estranged and their affection for each other is lost, the attachment and feeling for their offsprings invariably remain unchanged. Neither the law nor the courts allow this affinity to suffer absent, of course, any real, grave and imminent threat to the well-being of the child.

196. *See generally*, Tonog v. Court of Appeals, 376 SCRA 523 (2002).

197. Luna v. Intermediate Appellate Court, 137 SCRA 7, 20 (1985). *See, id.* (Makasiar, J., dissenting).

198. The Child and Youth Welfare Code, Presidential Decree No. 603, art. 3 ¶ 2 (1974).

exchange for being released from any obligation to any child conceived. However, if the right to support belongs to the child, how may another person validly contract away such right without the child's consent?

A number of cases have ruled to the effect that a contract for the purpose of relieving a father of his child support obligation is against public policy.[199] Moreover, in *Sams v. Sams*,[200] it was held that while child support orders and private agreements for support may co-exist, a child's right to support cannot be bargained away by either parent, and any release or compromise is invalid to the extent that it prejudices the child's welfare. Furthermore, any such contract is not binding on the court, as the court may in fact enforce the parent's obligation in a manner inconsistent with this contractual undertaking regarding it.[201]

While these rulings have been made in the context of a child born through sexual conception, the author however fails to see why it cannot be applied in the context of ART involving a sperm donor. If it would be so, an absurdity would exist in that a child born through assisted conception would have lesser rights than that of a child born through sexual conception. This would run afoul of the equal protection clause[202] of the Constitution because in the absence of any substantial distinction between them, there is no reason for any disparity in treatment.

The child has the right to call upon the parent for the discharge of this duty, and public policy will not permit or allow the parent to irrevocably divest himself of his obligations in this regard or to abandon them at his mere will or pleasure.[203] An omission to discharge this duty is a public wrong which the state, under its police powers, may prevent.[204] It is difficult to see why neglect of this obligation can be legalized and not viewed as a public wrong by the mere expedient of entering into a contractual undertaking or implicit understanding waiving child support obligations in cases of children born through assisted conception.

199. 59 Am. Jur. 2d § 57. *See also*, Kesler v. Weniger, 744 A.2d 794, 796 (PA. SUPER. 2000). Elkind v. Byck, 68 Cal 2d 453, 67 Cal. Rptr. 404, 439 P2d 316 (1968).

200. Sams v. Sams, 808 A.2d 206 (2002).

201. 59 Am. Jur. 2d § 57.

202. PHIL. CONST. art III, § 1 ("[n]o person shall be deprived of life, liberty and property without due process of law nor shall any person be denied the equal protection of the laws."). In People v. Cayat, 68 Phil. 12 (1939), any classification, in order not to violate the equal protection clause "([1] must rest on substantial distinctions; [2] must be germane to the purposes of the law; [3] must not be limited to existing conditions only; and [4] must apply equally to all members of the same class.").

203. *Id.*

204. *Id.*

Clearly, a simplistic treatment of using contract law in the enforcement of agreements waiving parental rights as well as obligation to support overlooks the fact that contracts executed within the sphere of family law are not ordinary contracts which are subject to the usual remedies of specific performance, damages, or rescission in case of breach thereof. Contracts in family law, such as marriage, are those which are imbued with public interest subject to the limitation and regulation of the state. As in marriage, a contract which purports to sever parental ties or bargain away a child's right to support is not merely a contract but is an arrangement which involves an important public interest — ordinary remedies in law cannot be blindly applied to it lest we ignore the primordial role of the family in our society.[205]

VII. PROCREATIONAL RESPONSIBILITY AND SPERM DONATION

A. Responsibility in Sperm Donation

Reproduction via gamete donation is widely assumed to be morally unproblematic. Perhaps due to the rapid medicalization of ART using donor sperm and the consequent legalization of the practice in many jurisdictions, it became widely accepted with relatively little public discussion concerning the probable psychological and emotional impact on both the child and the donor.[206] In fact, since the principal purpose of sperm banks was to assist infertile couples, sperm donation has generally been socially encouraged and even applauded.[207] Undeniably, in most instances, the practice of sperm donation was seen by many, especially the medical community, to be a health issue rather than a matter with profound societal ramifications.

Arguably, there are a lot of fathers who abandon and neglect their children, and this abandonment is a usual cause that would allow the state to intervene and terminate his parental status. When the child is then subsequently adopted, the rights and obligations of fatherhood are then assumed by the adopter. Using the same reasoning, a sperm donor may likewise be viewed as a biological father who abandoned his child, as vividly portrayed by his intentions not to participate in the child's life; this view would, thus, accept the intentions of the parties to privately sever the ties between the donor and the child. There are, however, problems with this line of reasoning. First, it institutionalizes neglectful fatherhood. While society looks with disgust at fathers who abandon their children, sperm donors easily escape this hostility and even receive an incentive, usually a fee. As one commentator describes the present system of sperm donation:

205. Bautista, *supra* note 12, at 518.

206. Schiff, *supra* note 84, at 562.

207. *Id.*

> As a symbol of male irresponsibility — and a socially sanctioned symbol at that — one could hardly ask for anything better than artificial insemination with the sperm of anonymous donors. It raises male irresponsibility to the high level of a praised social institution, and it succeeds in getting males off the hook of fatherhood and parenthood in a strikingly effective and decisive way.[208]

Second, accepting the proposition that the abandonment of the child shall relieve the father of his rights and responsibilities overlooks the fact that rights and responsibilities of parenthood are diverse and independent of the other. Although they usually co-exist, the exercise of rights is not always dependent on the existence of duties, and the fulfillment of the obligations of a parent does not depend on the exercise of his rights. The abdication of parental rights does not necessarily carry with it the abdication of parental duties. The author, therefore, is of the opinion, that when the sperm donor intended not to father the child, what he abandoned is merely what he possessed — his rights over the child — but he cannot forsake his obligations to provide for the maintenance and well-being of the child because this is an inherent right owned by the child and not the parent.

B. Enforcing Donor Responsibility: Abandoning Donor Anonymity

As earlier discussed, there were already a number of cases which have adjudged paternity and support obligations over sperm donors.[209] It should be observed, however, that these reported cases involved known donors. This would then illustrate the fact that a claim of paternity rights or support obligations are more likely to occur in a donor-directed system[210] rather than a system of anonymous donation.[211] Since most artificial insemination and in vitro fertilization procedures, however, use the sperm of anonymous donors, the assertion of their paternity rights becomes very remote.[212]

For many, anonymity in sperm donation is a "sacrosanct principle," and any contrary position is highly objectionable.[213] A variety of concerns made anonymity and secrecy seem appropriate in the case of married heterosexual

208. *Id.*

209. *See,* Jhordan C. v. Mary K., 224 Cal. Rptr. 530, 535-36 (Ct. App. 1986); In re R.C., 775 P.2d 27, 27 (Colo. 1989); Thomas S. v. Robin Y., 618 N.Y.S. 2d 356, 356 (N.Y. App. Div. 1994); McIntyre v. Crouch, 780 P.2d 239, 241 (Or. Ct. App. 1989).

210. In a donor directed system, the sperm donors give their semen directly to the users, without the intervention of an intermediary, such as a sperm bank.

211. Garrison, *supra* note 13, at 904.

212. Koehler, *supra* note 109, at 326.

213. Schiff, *supra* note 84, at 565.

couples who had a child using ART using donor sperm.[214] For one, the association of manliness with potency and the stigma attached to the inability to sire children, make many couples keep their use of sperm donor a secret.[215] Furthermore, parents rarely tell their children that they were conceived with donated sperm because their goal is to create an "as if" family, wherein which the children, to all appearances, were the biological offspring of the husband and wife.[216] Secrecy and anonymity is also preferred to protect the couple and their child from the possibility of resentment on the part of the child, when he learns that he is "different" from other children. On the part of the sperm donor, on the other hand, anonymity is usually resorted to ensure privacy and to foreclose any possible claim of child support obligations against him. Anonymity being the accepted norm in adoption, all the more in cases of sperm donation should this practice of anonymity be maintained.[217] However, how much weight should we really give to the donor's right to privacy, as against the child's right to trace his biological origins?

Clearly, to minimize the possible harmful psychological and emotional effects of anonymous donation for both the donor and the child born of ART using donor sperm, it is imperative that a critical examination of the current system of long-term anonymity for donors be made.

From the perspective of the child, and the person that child will become, knowledge of how and from where one came into being is now being recognized as part of the right to an identity.[218] The adoption experience has shed much light on the importance of being able to trace one's biological heritage.[219] In fact, a recognition of the strong psychological need experienced by many adoptees to identify their biological parents has led a number of courts to allow children access to sealed adoption records.[220] In many states, adopted children are allowed access to their sealed records when they have reached the age of majority[221] or provided that good cause can be shown.[222] In the Philippines, moreover, while adoption cases and records are regarded as confidential in nature, still, if the court finds that the disclosure of the information is necessary for purposes connected with or

214. Shanley, *supra* note 17, at 262.

215. *Id.*

216. *Id.* at 262-63.

217. *Id.* at 266.

218. *Id.* at 268.

219. Schiff, *supra* note 84, at 567.

220. *Id.* at 564.

221. *See,* Kan. Stat. Ann. § 65-2423 (1993).

222. *See*, N.Y. Dom. Rel. Law § 114 (McKinney 1994).

arising out of the adoption and will be for the best interest of the adoptee, the court may allow the necessary information to be released.[223] Furthermore, the right to know and be cared for by one's parents has also been recognized in the Convention on the Rights of the Child.[224]

In addition, it has likewise been argued that the right to specific information about one's biological parents is a moral and ethical right which supersedes all other interests in the ART process, regardless of any prior expectation of secrecy.[225] Research would also tend to show that children who have no knowledge of their biological origins suffer from "genealogical bewilderment," a term which characterizes general insecurity and a poor sense of identity which result when children are raised by non-biological parents.[226] As Suzanne Rubin, a child born of AID, poignantly stated:

> I hope that any man who is thinking of being a sperm donor will stop and consider the possibility that twenty years from now your child will confront you and want to know what kind of human being you are, and why you found it so easy to sell the essence of life to a total stranger.[227]

Furthermore, another commonly advanced reason in advocating access to donor information is the child's need for medical histories. Doctors use this information to advise their patients on the risks of developing certain diseases and other health problems.[228] Such information is critical considering that hereditary disorders, which may not develop until years later, can be life-threatening if not properly diagnosed and treated.[229]

The child also needs to know his genetic history in order to prevent incestuous relationships between persons of unknown biological parentage, since a single donor may produce multiple offspring in a small geographic area.[230] Since there are really no laws that regulate the number of children a donor can father, sperm donors are allowed to donate numerous times at a sperm bank, hence, one sperm donor may father numerous children in the same geographic area.[231]

It is, nonetheless, argued that disclosure of donor identity would discourage many to be sperm donors. Indeed, donor anonymity has been

223. DOMESTIC ADOPTION ACT, § 15.

224. UNCRC, § 7.

225. Koehler, *supra* note 109, at 329.

226. *Id.* at 329-30.

227. Schiff, *supra* note 84, at 567.

228. Ginsberg, *supra* note 18, at 849.

229. Dollens, *supra* note 51, at 232.

230. Koehler, *supra* note 109, at 331.

231. Dollens, supra note 51, at 235.

regarded as essential in ensuring a constant and plentiful supply of sperm; any threat to guaranteed long-term anonymity would deter prospective donors, resulting in depleted resources.[232] Nevertheless, even if we assume that the fear of the depletion of resources resulting from a decline in the number of possible donors is well-founded, still, this fact is not sufficient to outweigh the child's interests and absolve donors of parental responsibility.[233] Indeed, as one writer points out:

> Even if there were some cost in the form of reduction of the number of available donors, it might be preferable — both from an individual and from a societal point of view — to accept fewer donors, but donors of a different type: namely, donors who do not just donate their genetic materials for financial gain, but who have given serious thought to the complicated psychological and emotional implications of AID and who are prepared to take some responsibility for their involvement in the process.[234]

As discussed, children may have compelling needs to have access to their biological heritage. While the donor has a choice whether he would enter into an AID arrangement, depending on whether he sees his privacy interest outweighing his desire to be a donor, the child is helpless as to any choice regarding the arrangements made between the adult participants — arrangements that may affect the child's life profoundly.[235] Given the potentially damaging consequences that anonymous fatherhood might have on the child's development as well as the child's relative powerlessness as to the situation, it seems that the law may have been protecting the donor's interests at the expense of the child's for too long.[236]

VIII. CONCLUSION

> *I hope that any man who is thinking of being a sperm donor will stop and consider the possibility that twenty years from now your child will confront you and want to know what kind of human being you are, and why you found it so easy to sell the essence of life to a total stranger.*
>
> \- Suzanne Rubin[237]

Sperm donors have been seen as a blessing for many infertile couples in fulfilling their dreams of having a child of their own. Perhaps this is also the

232. Schiff, *supra* note 84, at 565.

233. Garrison, *supra* note 13, at 908.

234. Schiff, *supra* note 84, at 569.

235. *Id.* at 565.

236. *Id.*

237. Schiff, *supra* note 84, at 567. Suzanne Rubin is a child born of AID.

reason for their ready acceptance and why society seems to be willing to disregard any moral restraints and conventions on the practice.

However, when it came to a point where sperm donation is seen as an easy way of earning a buck, especially so where many recklessly donate sperm for profit, sperm donation can be seen as a practice of highly institutionalized "neglectful fatherhood." It is, therefore, imperative to see that sperm donation is not merely a practice which helps infertile couples or unmarried individuals to have a child of their own, but more so, a procedure which entails responsibility, not only on the part of the recipients of the sperm, but on the part of the sperm donor as well.

In other countries, the discussion regarding sperm donation has always been based on the perspective of the rearing parents, the licensed physicians, or the sperm donor. In this regard, a trend has been developed towards a rule of anonymity, ensuring that the rearing parents would keep their privacy and that the sperm donors would not be saddled with any financial responsibility in the future. It is now time, however, to shift the focus from the perspective of the adult participants to the perspective of the child.

A child has the right to be loved, cared for, and nurtured by his parents. He has a right to receive care and support from both his father and mother. But, more importantly, he has the right to know his origins. The basic instinct of a human being is to try to solve the puzzle of one's life. We are fascinated by the process of how life started millions of years ago, with more reason do we have a natural yearning for knowing who we are and where we came from. Why should a child conceived through ART using donor sperm then be denied of such a right to know on the mere basis of the manner of his conception?

It has likewise been the practice of drawing agreements or making implied understandings relinquishing parental status and child support obligations, whether the sperm donor is known or unknown. It is difficult to see, however, why these contracts could pass the test of morals and public policy considering that parenthood, and all the rights and obligations inherent from it, is inalienable. It is grueling to accept the idea that parenthood can be easily bargained away just because a more complicated medical procedure has been utilized in bringing another life into this world. Further, even if we assume that that the sperm donor abandons his rights as a father, it is hard to see why abandoning one's right as a parent should also entail abandonment of responsibilities.

While it is true that one may not be forced to love and care for one's child because affection is not something which can be insisted upon, one can nevertheless be forced to give support and maintenance; this is one responsibility attached to parenthood which cannot be bargained away or relinquished by any other person except the child.

Considering all these, a man may donate and give away his sperm for whatever reason and for whatever purpose he deems proper. In doing so, however, every man must pause and take time to think that what he is giving away is not only the essence of life but, more importantly, the essence of fatherhood. Every child has the right to know the whole of his self by learning the identity of the persons responsible in bringing him or her into this world. And this right is not fulfilled if all the child can merely utter is, "My daddy's name is donor."