Who's Your Daddy?: A Legitimate Question Given Louisiana's Lack of Legislation Governing Assisted Reproductive Technology

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TABLE OF CONTENTS

I. Introduction ...........................................................................................................610

II. The Smorgasbord of Options (and Problems) of Assisted Reproductive Technology (ART) .......................................................... 615
   A. A Survey of the Most Common Procedures ................................. 615
      1. Artificial Insemination ...................................................................... 615
      2. In Vitro Fertilization (IVF) ............................................................. 616
   B. The Psychological Impact of ART on Donors, Parents, and Children .......................................................... 617
      1. The Donors .................................................................................. 617
      2. The Recipients: The Intended Parents ............................................ 618
      3. The Children ............................................................................. 621
   C. The Legal Implications of ART: Recent Disputes in the Courts ...................................................................................... 623

III. Potential Legal Fiascos for Louisiana Under the Current Filiation Laws ............................................................................. 626
   A. Overview of Louisiana’s Approach to Parentage ....................... 626
      1. Presumption of Paternity and Rebutting the Presumption via a Disavowal Action ...................................................... 627
      2. The Filiation Action: Codal Authority Allowing It and the Possibility of Dual Paternity ............................................................. 627
      3. The Avowal Action (A Jurisprudentially-Created Doctrine Recently Codified in Louisiana) and the Possibility of Dual Paternity ...................................................................................... 629
   B. Applying Louisiana’s Laws (and Lack Thereof) to ART .......................................................... 631
      1. Bizarre Results When Following Louisiana’s Rules to Their Logical Conclusions ............................................................................. 631
      2. Areas of Parentage Ignored by Louisiana Law ..632

IV. Comparative Study ...................................................................................... 635
   A. Other States Within the United States ............................................ 636
      2. The “Modified” UPA Approaches .................................................... 642
III. Other Approaches ..............................................644
   a. Presumed Consent ...........................................644
   b. Donor Intent to Determine Parentage ..................645
   c. Contracting for Parentage ..............................645

B. Foreign States ..............................................646
   1. Common Law Jurisdictions Outside the United States: The United Kingdom and Australia .....646
   2. Civil Law Jurisdictions Outside the United States ..............................................648
      a. The Non-Comprehensive Approach: Philippines, Georgia (former Soviet Republic), Peru, France, Brazil, Quebec, Denmark ......648
      b. The Comprehensive Approaches .......................650
         1) Spain ...............................................650
         2) Switzerland .......................................651
   3. A Scandinavian Approach: Iceland .....................653

V. Recommendations for Louisiana .............................654
   A. Lessons from the Law of Other States Within the U.S ...........................................654
   B. Lessons from the Law of Foreign States ...............656
   C. Lessons of an Innovative Nature .......................657

I. INTRODUCTION

The latest rage in fast-food is the “mix-match” combo: the customer chooses, not only his or her main dish from the menu, but also selects from french fries, salad, baked potato, or other side items and selects from cola, water, or milk as well. In much the same way, reproductive technology now offers a smorgasbord of choices to prospective parents, beyond just a baby. “Modern technology has made procreation without sex possible." Do you need to make a baby? No problem. We have sperm. What type of donor will you choose? Ethnicity preferred? Height, weight, athletic ability, level of education? Do you need an egg with that? Same choices as above apply. Oh, you need both? Well, we can handle that, too. Will this be dine-in or delivery? A surrogate mother can be located to carry the child.

It is now possible for numerous people to be involved in the creation of a human life: egg donor, sperm donor(s), a surrogate mother and her husband or partner, an intended mother and an intended father, or two intended mothers or fathers, in the case of a lesbian or gay couple. This multiplication of child creators could be problematic, because, as one author described it, the participation of so many people in the creative process opens up "a Rubik's cube of parental possibilities."2

This risk is no idle possibility. An estimated 6.1 million couples, or one in six, in the United States cannot have children from coital reproduction3 and could potentially seek the assistance of science in order to make a baby. There are approximately one million children world-wide who have been born through Assisted Reproductive Technology (hereinafter ART)4 and over 40,000 U.S. babies were born in 2001 through ART.5 Restated, one in every 100 babies in America today is born through infertility treatments, and the demand for these procedures is steadily rising.6 According to the most recent figure available, from 1994 to 2001, the number of children born through ART quadrupled.7

Critics argue that what originated as a method for infertile couples to fulfill the lifelong dream of having a child has morphed into a commercial world, with sperm, eggs, and surrogate carriers becoming little more than costly products for desperate couples unable, for various reasons, to have a baby of their own.8 Thomas

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4. Nancy S. Green, Risks of Birth Defects and Other Adverse Outcomes Associated With Associated Reproductive Technology, Pediatrics, July 1, 2004, at 256.
6. Id. at 62.
7. Id. at 61.
8. Liza Mundy, Ordering Up Baby, The Washington Post, June 30, 2002, at W06. There are other problems with ART, most associated with the failure of both the state governments and federal government to regulate fertility clinics. Only ten sperm banks belong to the American Association of Tissue Banks, which promulgates guidelines for such facilities. Otherwise, the industry is not uniformly governed. The FDA has been promising to develop its own guidelines but has not. Jennifer Wolff, Return of the Sperm Bank Babies, Men's Health, Mar. 2004, at 122, 127. This lack of regulation has led to problems of multiple births and premature babies. Green, supra note 4, at 256.
Murray, bioethicist from Case Western Reserve University noted, "There are certain things for which markets are appropriate—toasters. And there are others for which they aren’t appropriate—babies."

Just as disturbing are the legal implications of these choices, all of which have the potential to lead to tremendous legal problems for all of the parties involved. Who are the "parents" of a child born under these circumstances? What rights, if any, does a donor have to develop a relationship with that child? What obligations, if any, does a donor owe to that child? Most importantly, what rights does the child have? Does such a child have a right to know the identity of his or her biological parents and to demand support from them? Does such a child and his or her intended parent(s) have a right to be protected from unwanted interference from donors, who might seek to claim parental rights?

As medical technology has advanced into phases that most lay persons cannot fathom, the laws of most states and foreign countries have failed to anticipate and handle the ramifications that accompany it. To be sure, some states have made at least an effort to address those ramifications. Many states have adopted the Uniform Parentage Act, which terminates a donor’s rights to a child. Others have amended the Uniform Parentage Act, while retaining its basic principles. One state uses legislation whereby a donor’s intent is determinative of his parenthood. A few incorporate a contractual scheme that allows a donor to ensure paternity by agreement. However, these efforts at addressing the

problem all leave something to be desired. As one author noted, "ART has produced one of the most confused and underdeveloped areas of the law." 14

As for Louisiana, she stands among those jurisdictions that still have no legislation to handle the issues of parenthood that arise when a woman employs artificial insemination or in vitro fertilization to create an embryo from a gamete of an intended parent and a gamete of a donor. Louisiana does have legislation that sets forth a procedure for the adoption of a fertilized embryo created by in vitro fertilization patients who choose not to implant it. 15 This law is of no help, however, to donors of sperm and egg, recipient parents, and children born of donor artificial insemination or donor in vitro fertilization. This means Louisiana courts have no legislative guidance when it comes to balancing the competing interests of donors of sperm and eggs against those of the prospective parents, while keeping in mind the most important interests of all, those of the child resulting from such innovative technology.

In the ever-changing world of baby-making, the failure of the Louisiana Legislature to provide such guidance could be detrimental to all persons involved. That is so because without such guidance, Louisiana courts may well have great difficulty equitably handling the multitude of various claims relating to ART that could be put before them to decide. As one author observed, "[S]urrogate mothers, anonymous sperm donors and gay parents have pushed the definition of family into a nebulous arena where even veteran judges must pray for the wisdom of Solomon. The law simply hasn't caught up with technology—or evolving social mores." 16 Judges will have no choice but to resolve controversies based on their own sense of equity and morality. 17 This, in turn, will lead to inconsistency and confusion. 18 As one author ironically observed, "... [T]he legal vacuum leaves the definition

17. Katers, supra note 14, at 442. "Judges visibly struggle to remedy broken contracts and sort through consent forms with little statutory guidance, leaving a confused, contradictory body of case law." Id.
18. Id.
of parenthood far less clear than the test tubes in which the babies were conceived."\(^{19}\)

The point of this comment is two-fold—first, to demonstrate that Louisiana desperately needs to enact legislation governing the sensitive legal issues to which the use of ART gives rise, in particular, issues relating to the filiation of children conceived through ART; second, to suggest what form that legislation should take. With these objectives in mind, the comment has been organized as follows. Part II explores the world of contemporary ART. Specifically, this section reviews (1) the scientific processes of artificial insemination and in vitro fertilization; (2) the psychological impact that the use of these processes have on the sperm and egg donors, the intended parents, and the children who are produced; and (3) the legal implications that may arise from the use of these two procedures. Part III examines the legal fiascos that will occur if Louisiana's current law of filiation is applied to resolve the novel and complex issues of the paternity that will arise from the unrestricted use of ART. This examination will entail, first, an explication of the current law of filiation and, second, the sometimes uncertain, sometimes bizarre results to which that law, as applied to children of ART, will lead. Part IV reveals a comparative study of the ART legislation that has been adopted in various states within the United States (Section A) and in various foreign countries (Section B). The purpose of this study is to identify appropriate models to which Louisiana legislators may look in fashioning ART legislation here. Since those jurisdictions have already researched and implemented ART legislation, Louisiana lawmakers could possibly benefit from their experience and, in doing so, save themselves considerable time and effort. Part V proposes a model for Louisiana to consider implementing, based on the positive aspects of the ART legislation of other states and foreign jurisdictions identified in the comparative study. Ultimately, Louisiana must enact legislation that will best avoid conflict by being well-written and equitable, and the proposed model legislation will do just that.

II. THE SMORGASBORD OF OPTIONS (AND PROBLEMS) OF ASSISTED REPRODUCTIVE TECHNOLOGY

A. A Survey of the Most Common Procedures

There are several medical procedures available to adults who want to have a child but are unable to create one naturally. The oldest and most common procedures, however, are artificial insemination and in vitro fertilization. Due to their prevalence, this section presents a brief overview of the scientific processes and the history of each.

1. Artificial Insemination

Artificial insemination, the oldest form of ART, is a procedure whereby the sperm of a man is injected into the reproductive tract of a woman in order to create a child. If the sperm is that of a woman’s husband, the procedure is called homologous insemination; if the sperm is instead that of a third-party donor, the procedure is referred to as heterologous or donor insemination.

Artificial insemination has been around now for over two centuries. The first known example of artificial insemination was performed by a Scottish surgeon, Dr. John Hunter, in 1785. The medical phenomenon made its way into the United States in 1866 through the efforts of Dr. James Marion Sims. The first donor insemination reportedly occurred in Philadelphia in 1884 when Dr. William Pancoast inseminated a woman with the sperm of his best-looking medical student.

Heterologous insemination, or donor insemination (DI), has historically been controversial. For many years, the process was viewed as a form of adultery, even when performed with the consent of a married woman’s husband. The resulting children

22. Id.
24. Id. The irony of this story is that neither the woman nor her husband were informed of the genetic link the child they reared shared with another man. Id.
25. Lorio, supra note 20, at 1644.
of the procedure were labeled illegitimate.  

Today, such children born to married persons are afforded the protections of legitimate status, and the woman is not labeled as an adulterer. It is now recognized that adultery requires an act of sexual intercourse, not the mere use of another man's sperm. Traditionally, in cases of heterologous insemination, donors have rarely sought rights with respect to the resulting child, because the vast majority of donors are anonymous and do not know the identity of the prospective parents. Recent times, however, have seen a change; today more and more donors are demanding the right to interact with their biological children, and more and more parents are demanding financial support from such donors.

2. In Vitro Fertilization (IVF)

In vitro fertilization (hereinafter IVF), literally meaning fertilization "in glass," is a procedure whereby an egg is fertilized by sperm outside the woman's body. A woman, either the one who will carry the child or an egg donor, must first undergo fertility treatments to stimulate egg production before the eggs may be removed from her body. Once the eggs are removed, one or more eggs are mixed with sperm, from a husband or third-party donor, in the lab, and the fertilized eggs are then implanted into a woman, either the intended mother or a surrogate. The first known IVF reportedly occurred in 1944, and the first occasion on which an actual baby was delivered after employing this method was in 1978 in England. The first live birth as a result of IVF in the United States occurred in 1981.

IVF opens the possibility of using sperm donors, egg donors, and surrogate mothers, expanding the plethora of possible persons

26. Id.
27. Id. at 1644–45.
28. Id. at 1645.
33. Katers, supra note 14, at 446.
34. Wilder, supra note 23, at 187.
35. Id.
36. Lorio, supra note 20, at 1665.
who may complete the parental pie. It is logical to assume that, like in the arena of heterologous artificial insemination or donor insemination, legal battles will soon emerge between these gamete donors and the intended parents. As the number of persons who are involved in the creation of the baby increases, statistically, it is probable that the number of claims to the baby will increase, as well.

B. The Psychological Impact of ART on Donors, Parents, and Children

There has been little investigation into the impact that ART has upon the psychological health of the donors, recipients, and children. No one knows yet if sperm or egg donation can have lasting emotional effects, for few long-term studies of donors or the resulting children have yet been conducted. Nevertheless, mental health experts worry that both donors and children may suffer long-term psychological problems.

1. The Donors

Whether sperm donors later regret their decisions to donate varies. Many donors, especially those who donate for money, do not regret their decision to donate. Sperm donors are typically paid between fifty and seventy-five dollars for each sample. As Kyle Pruett, M.D., a professor of psychiatry at Yale University’s child study center, stated, “Men have come to think about donorship only in terms of their testicles, as opposed to the more profound reality that they are sharing a deep part of who they are.”

Though that may be the norm, it is possible that some men later question their decision and begin to wonder about the child(ren) who have been born from their deposit(s). As one donor expressed after one of his possible “children” contacted him, “Possibly having children out there, and not knowing . . . it’s a loss, and you don’t realize it until you’re older. I would love to see another human being or beings like me.” Other donors are actively looking for their offspring. As they get older and have children of

37. Watson, supra note 9, at 46.
38. Id. at 44.
39. Id. at 46.
40. Wolff, supra note 8, at 122, 125.
41. Id.
42. Id. at 127–28.
their own, some donors become curious and haunted about their offspring.\textsuperscript{43} Some have started message groups over the internet for sperm donor babies, because, as one donor stated, "I want to make myself available to any offspring who choose to find me."\textsuperscript{44} A small study by a Houston psychologist, Patricia P. Mahlstedt, probed donors for their feelings toward providing information about themselves to their possible offspring.\textsuperscript{45} Of those questioned, about sixty percent said they would be willing to be contacted when their offspring reached eighteen.\textsuperscript{46}

The solution to this problem of "donor regret," one might suppose, would be to relax the strict anonymity for sperm donors, in particular, to give the donor the option to authorize the sperm bank to disclose contact information to children who may be produced from his sperm. But Dr. Susan Klock, a psychologist at Brigham and Women's Hospital in Boston, warned single men to think carefully before they agreed to allow their personal and contact information to be provided to an offspring later in life, because, by that point, the donor may have a wife and children of his own whom he may want to protect from the emotional complications of meeting a donor offspring.\textsuperscript{47} Another possible adverse repercussion for donors is that of being forced to support the resulting child.\textsuperscript{48} And in the state of Louisiana, there is yet one more: the resulting child might qualify as a forced heir and, as such, be able to demand a share of the donor's estate, a contingency that the donor would be compelled to take into account when planning his estate.\textsuperscript{49}

2. The Recipients: The Intended Parents

The recipients of sperm or egg donation who seek to become parents face numerous challenges. First and foremost, the spouse whose infertility has made resort to sperm or egg donation necessary must accept the fact that he or she cannot reproduce.\textsuperscript{50}

\textsuperscript{43} Id. at 128.
\textsuperscript{44} Id.
\textsuperscript{45} Robin Herman, When the "Father" is a Sperm Donor; A New Look at Secrecy, Wash. Post, Feb. 11, 1992, at Z10.
\textsuperscript{46} Id.
\textsuperscript{47} Id.
\textsuperscript{48} See e.g., Ferguson v. McKiernan, 855 A. 2d 121 (July 22, 2004).
\textsuperscript{49} La. Civ. Code art. 1495.
\textsuperscript{50} Andrews & Douglass, supra note 32, at 641. In forty percent of the cases, the cause of the infertility lies in the man; in another forty percent, the woman; and in twenty percent, in both. Id. at 634.
Once a potential parent has faced his or her infertility and has realized the hope of alternative reproduction, he or she faces the moral choice of whether or not to use such "unnatural" procedures. Those of a Roman Catholic upbringing must weigh their desire of parenthood against the vocal disapproval of ART by the Church. The Roman Catholic Church has condemned fertility treatments, aside from those therapies that can "facilitate" the natural sex act." The Vatican's position is that any treatment that substitutes for sexual intercourse between a husband and a wife is illicit, because the resulting child is not the "fruit of the 'conjugal union.'"

For most couples, the conflict of choosing one of these procedures does not end with the resolution of a religious inquiry. Husbands and partners of women who choose this approach sometimes fear that donor insemination will exclude them from the parent-child relationship. That is to say, some men fear that if there is no biological connection between themselves and the child born to their wives or partners via ART, they will not feel like true fathers. Additionally, prospective parents may be confronted with conflicting responses from family and friends. For example, they may be forced, even after solving their own religious inquiry, to hear that their parents, siblings, extended family, and friends feel strongly that ART is unnatural and possibly immoral. A would-be parent must weigh the voice of his or her inner fears and insecurities that question the adequacy of parental bonds that result from ART, as well as address how much importance to place on the opinions of the important people in their lives.

If a prospective parent overcomes the religious and emotional hurdles of making the choice to employ such tactics, he or she begins a roller coaster ride of physical, emotional, financial, and, assuming the procedure is successful, parental highs and lows. A prospective mother must endure medical intervention (to retrieve eggs and inject sperm) and possibly, hormonal stimulation. Women have described the procedure as a "cold, disturbing experience." Though assured by doctors that once the baby is conceived the parents will forget how it happened, parents may

52. *Id.*
53. *Id.*
55. *Id.*
well find that these assurances are unfounded. Such assurances bear a striking resemblance to those once made by psychologists and social workers to mothers who were contemplating putting their children up for adoption and to parents who were contemplating adopting those children. But experts in the adoption field have learned that the relinquishment is never forgotten and that parenting an adopted child is not the same as parenting a biological child. Adoption is not the cure for the emotional pain of infertility; it is reasonable to assume that ART will not be either.

At all times throughout the process, the parent depletes his or her economic funds, as these alternative means of reproduction are very expensive. Heterologous artificial insemination or donor insemination costs between $500 and $1,000 for the first insemination and between $300 and $700 for each subsequent insemination. IVF costs between $6,200 and $11,850 per attempt, plus the doctor(s) and hospital bills when the woman delivers the baby. Spending on IVF alone has increased at an astronomical rate of fifty percent over the last five years, totaling over one billion dollars last year. Sometimes, patients are not fully informed of the chances of success and the probability of the need for repeated treatments. Adding insult to injury, most health insurance policies do not cover ART; currently, eighty-five percent of people in the United States have insurance that does not cover the procedures. As a result, the majority of Americans who cannot conceive naturally must have access to surplus cash to utilize artificial insemination or IVF. As Diane Clapp, the medical information director at Resolve, a nationwide infertility association, commented, "For many infertile couples, the size of their pocketbook determines whether they can have a family." Of the one million couples who are infertile, only about 120,000 are financially able to utilize ART.

The recipients of sperm donation who successfully become parents face the agonizing decision of whether or not to tell the

58. Id.
59. Id.
61. Id. at 13.
62. Mulrine, supra note 5, at 62.
63. Andrews & Douglass, supra note 32, at 634.
64. Mulrine, supra note 5, at 62.
65. Id. at 64.
66. Id.
children the truth about their origins; such parents fear the child will feel stigmatized.\textsuperscript{67} In the past, secrecy was the preferred route for such parents to take.\textsuperscript{68} As a result, many children were sheltered from the truth and were given inaccurate information about their father's medical history, in order to cloak the secret.\textsuperscript{69} Today, however, many couples are voluntarily undergoing counseling before using ART and, as a result, are more likely to disclose.\textsuperscript{70} Some clinicians even assert that a parent's right to privacy does not outweigh the potential harm to their offspring that withholding information about the child's father may cause the child and declare it "morally unacceptable" to hide the facts of a child's origin from him.\textsuperscript{71} However, despite the push for openness in the family, according to the world's largest study of the long-term effects of ART, ninety percent of children conceived with donor sperm have not been told the truth about their biological heritage.\textsuperscript{72}

3. The Children

The children born from donated sperm and eggs face their own peculiar dilemmas. First and foremost, as already mentioned, many children are not informed of their biological heritage.\textsuperscript{73} There is a growing recognition that individuals born with donor eggs, sperm, or embryos have the right to know the truth.\textsuperscript{74} A number of European countries, including Sweden, Austria, Switzerland, and most recently, Great Britain, have allowed persons access to information on the identity of their genetic parents.\textsuperscript{75} The United Nations Convention on the Rights of the Child states that all children have the right to know the identity of their biological parents.\textsuperscript{76}

\begin{itemize}
\item \textsuperscript{67} Watson, \textit{supra} note 9, at 47.
\item \textsuperscript{68} Susan Cooper \& Ellen Glazer, \textit{Choices and Challenges: The Psychological Aspects of the New Reproductive Technologies}, Massachusetts Continuing Legal Education, 2000, at § 13.3.2.
\item \textsuperscript{69} Id.
\item \textsuperscript{70} Wolff, \textit{supra} note 8, at 127.
\item \textsuperscript{71} Cooper \& Glazer, \textit{supra} note 68, at § 13.3.2.
\item \textsuperscript{72} Katheryn D. Katz, \textit{Snowflake Adoptions and Orphan Embryos: The Legal Implications of Embryo Donation}, 18 Wis. Women's L.J. 179, 219 (Fall 2003).
\item \textsuperscript{73} Cooper \& Glazer, \textit{supra} note 68, at § 13.3.2.
\item \textsuperscript{74} Katz, \textit{supra} note 72, at 225.
\item \textsuperscript{75} Id.
\item \textsuperscript{76} Id. at 226.
\end{itemize}
Even for children who are informed that they are the product of sperm or egg donation, there may yet be problems. First, the parents in whose family the child grew up may encourage him not to share that information with anyone outside of the family because, although some parents may feel that the child has a right to know, they do not want the community to know. This type of encouragement could lead a child to feel as if he is harboring a family secret or that he has something to be ashamed of, which could be unduly burdensome to a child. Secondly, a child may fantasize or even feel anger toward his donor parent. According to one fifty-six year old donor child,

It's infuriating that most [sperm] banks remain wedded to the idea that sperm donation should be anonymous. They want to protect the donor as though he is a victim of some sort. But why should the medical profession have the power to deny someone their [sic] full genetic history? It's not fair to allow a child to be deluded about who they [sic] are.

Thirdly, informing a child that he is the product of sperm or egg donation may spark in him a desire to go in search of his or her biological parent. As an illustration, take the case of a donor offspring who, due to information received from his mother that his donor genetic father was a medical student at U.C.L.A., has written over 200 letters, over a two year span, to former medical students, hoping that one of them is his biological father. As the journalist reporting the donor child's story observed, "[That child], like untold numbers of other donor offspring, can only wait and wonder about the man genetically responsible for half of everything he is." Although some donors may be receptive to being initially contacted by their offspring, it could be devastating to a child if he or she meets his or her biological father and that father decides not to foster a relationship with him or her.

77. Wolff, supra note 8, at 162.
78. Id.
80. Wolff, supra note 8, at 124.
81. Id.
C. The Legal Implications of ART: Recent Disputes in the Courts

One author notes, "A revolutionary reconfiguration of family has occurred without any of the watchful laws that have so carefully regulated adoption, abortion, divorce, and other matters pertaining to family life." Heated controversies with major consequences for numerous people have reached the courts in many states, due to the ambiguity of statutory language and a lack of manifestation of intent by parties in contractual agreements.

The term "donor" is generally defined as a person who provides his or her gametes for ART but does not "intend" to have any legal relationship with the child. Many times, a lack of manifestation of intent as to what relationship will exist between donor and child can lead, and has led, to ugly and protracted litigation. Sometimes, other people, including the judges who hear the resulting dispute over the child born by ART, have problems figuring out just what the donor intended. Without clear statutes governing ART, the floodgates to litigation have been thrown open, and judges are being called upon to referee family battles that they never could have envisioned when they began their legal careers. The resulting decisions have left other judges, attorneys, sperm donors, contractual parents, and children scratching their heads and begging for consistency and bright-line rules.

For example, the Pennsylvania Superior Court invalidated a verbal agreement between a woman and her sperm donor and ordered him to pay child support in the case of Ferguson v. McKiernan. Though the donor and the mother knew each other and had engaged in a two year affair, the children at the heart of the dispute were conceived by artificial insemination. The mother and donor had entered into an agreement, whereby the donor was assured that he would have no parental responsibility.  

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83. Cooper & Glazer, supra note 68, at § 13.5.
85. Wilder, supra note 23, at 195.
86. Id. at 196.
88. Ferguson, 855 A.2d at 123–24.
89. Id. at 122.
90. Id.
The sperm donor did not go with the woman to any of her doctor’s visits, nor did he contribute financially to her pregnancy. However, he did attend the birth of the resulting twins because she went into labor prematurely and had no one else upon whom to turn. The woman put another man’s name, her ex-husband’s, on the children’s birth certificate. The sperm donor did not have regular contact with the children or provide financial assistance to them. At the end of the day, the court was indifferent to the couple’s contract, though it did recognize that it was, in fact, valid. The court determined that the contract was unenforceable due to “legal, equitable and moral principles,” possibly relying on the appellate court’s ruling that “parents cannot bargain away a child’s right to support.”

What is the lesson to take from this and similar cases? Inadequate legislation could result in unforeseeable financial and legal consequences to a third-party donor to artificial insemination or IVF.

Currently, there is a case pending in Illinois, in which a woman asked her former boyfriend to sign a voluntary paternity form, even though there was no possibility that he was the biological father of the child. He agreed and also gave the child his last name, helped with finances, and saw the child several days a week for two years. Now, the mother wants to cut all ties to her benefactor, who is the only father figure the child has ever known. The “psychological father” is seeking visitation rights based on the voluntary paternity form and on his commitment to the child. What is the lesson to take from this case? Inadequate legislation could result in the deprivation of parental rights that were established voluntarily and contractually, to the possible detriment of the child.

92. Ferguson, 855 A. 2d at 122.
93. Id.
94. Id.
95. Id. at 123 (citing Kesler v. Weniger, 2000 PA Super. 2, 744 A.2d 794). The same result, based on similar facts, was reached in the Florida case of Bassett v. Saunders, 835 So. 2d 1198, 1201 (Fla. App. 1st Dist. 2002) where the court ruled that rights of support belong to the child and a waiver of those rights is against public policy.
96. Veciana-Suarez, supra note 2; Paulson, supra note 87.
97. Veciana-Suarez, supra note 2.
98. Id.
99. Id.
In the case of *In re Marriage of Buzzanca*, six people were involved in creating a child: an egg donor, a sperm donor, a surrogate and her husband, and the couple who hired them. After the birth of the child, the "father" (that is, the male member of the couple that had received the child) filed for divorce, alleging that there were no children born of the marriage. The trial court absolved the surrogate and her husband of parental responsibility, as they were not biological parents of the child. The court then concluded that the intended mother of the child was not truly a mother because she had no genetic connection to the child, she had not adopted the child, nor had she given birth to the child. Since she was declared not to be the child's mother, her husband was not the father, either. In essence, the trial court decided the child was a legal orphan. Eventually, the court of appeals overturned the decision of the trial court and declared the "intended" parents to be responsible for the child. These "intended" parents had consented to raise a child to whom neither were biologically tied. This case demonstrates the "tenuousness of the relationships created by such methods of conception, in which the definition of parent under existing statutes may fall to all or . . . to none of the participants in a child's birth."

It is obvious that ART is a mixed blessing. Artificial insemination and IVF allow couples who cannot conceive naturally to become parents to a baby who has the DNA of one of them, in the case of donor insemination or donor IVF, or both of them, in IVF cases where the gametes of both of the intended parents are used, or neither of them, in IVF cases where the gametes of others are used. But this blessing is sometimes accompanied by disadvantages. In some situations, donors, parents, and children born of ART battle conflicting emotions over the procedures used to create a baby and may face long-term psychological trauma. Beyond the battles that rage within the hearts and minds of these persons, in recent years, courtroom battles have been waged, as well. All of these struggles indicate the need for all states to enact comprehensive legislation to govern the use of ART.

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101. *Id.*
102. *Id.* at 1412.
103. *Id.*
104. *Id.*
105. *Id.* at 1429.
106. *Id.*
III. POTENTIAL LEGAL FIASCOS FOR LOUISIANA UNDER THE CURRENT FILIATION LAWS

A. Overview of Louisiana’s Approach to Parentage

Thanks to certain peculiar features of Louisiana’s law of filiation, the law of sorting out the paternity of children produced through recourse to ART may be complicated in Louisiana in ways that it would not be in other states. Louisiana categorizes children in one of two ways. A child is one born of marriage (formerly called legitimate), when he or she is either conceived or born during the marriage of his parents. A child is one born outside of marriage (formerly called illegitimate) when he or she is conceived and born outside of the marriage of his parents. The father of a child born outside of marriage may, however, establish filiation to the child in one of two ways. First, he may marry the mother of the child, so long as the child is not filiated to another man, and with the concurrence of the mother, acknowledge the child by authentic act or by signing the birth certificate. Alternatively, as long as the child is not filiated to another man, he may formally acknowledge such a child to establish filiation through an authentic act or by signing the birth certificate.

The problems arise in the world of ART when combining legal presumptions of paternity with filiation actions and avowal actions, which can lead to the existence of dual paternity. If the combination of Louisiana statutes and jurisprudence is carried to its logical conclusion, the ramifications for all parties to ART could be staggering, as the results of such combinations are bizarre. Likewise, the lack of legislation providing guidance on the filiation of children born via surrogate motherhood agreements

108. 2004 La. Acts No. 26. Louisiana amended this language in its 2004 legislative session to remove the terms “legitimate” and “illegitimate” from its Civil Code altogether.
109. Id.
114. See Griffin v. Succession of Branch, 479 So. 2d 324, 327 (La. 1985). (dual paternity is the recognized doctrine in Louisiana whereby two men can both be considered the fathers of one child). Even if there were no doctrine of dual paternity, the world of ART would still be complex. Dual paternity just makes things even more complicated.
and those born due to egg donation leaves many unanswered questions.

1. Presumption of Paternity and Rebutting the Presumption via a Disavowal Action

Louisiana Civil Code article 185 provides a rebuttable presumption that the husband of a married woman is the father of the children born to her during their marriage.\(^\text{115}\) This presumption always applies even if a woman has an affair, and her husband is aware of it.\(^\text{116}\) Since the presumption is rebuttable and not absolute, her husband may elect to attempt to overcome it and be judicially declared not to be the father of the child.

To overcome the presumption, the husband must bring a disavowal action, where the burden of proof is upon him to show that the child is not his biological progeny.\(^\text{117}\) The only situation in which a man is prevented from bringing a disavowal action is if he has consented to assisted conception.\(^\text{118}\) If a man who is allowed to bring a disavowal action does not do so within the allotted time of one year from the time he knew or should have known of the birth of the child, then he is barred from doing so.\(^\text{119}\) Therefore, he will be the father of the child for legal purposes,\(^\text{120}\) and he will owe support to that child.\(^\text{121}\) For example, A, the wife of B, could have an affair with C, another man. If A is impregnated by C and gives birth to his biological child, if B does not disavow that child within one year of its birth, B will forever be the legal father of A and C’s baby.

2. The Filiation Action: Codal Authority and the Possibility of Dual Paternity

\(^{115}\) La. Civ. Code art. 185.

\(^{116}\) Id.


\(^{118}\) La. Civ. Code art. 188. Notice, though, that there is no form requirement for this consent of artificial insemination; the Article does not even specify if it applies to donor insemination. It is arguable that it is only disallowing the disavowal action when a wife is inseminated with her husband’s sperm (homologous artificial insemination).


\(^{120}\) Id.

A child in Louisiana may bring suit against his or her biological parent to filiate himself or herself to that parent. 122 Louisiana Civil Code article 197 presently provides, "A child may institute an action to prove paternity even though he is presumed to be the child of another man." 123 This article, in essence, allows a child who has a presumptive father and is filiated to him to establish filiation to his biological father, as well. Louisiana is the only state to recognize the doctrine of dual paternity. 124 For succession purposes only, this action must be brought within one year of the death of an alleged father. 125 According to the

123. Id. Before the enactment of this article, there was great conflict in the interpretation of previous Article 208 which explained, "[i]n order to establish filiation, a child who does not enjoy legitimate filiation or who has not been filiated by the initiative of the parent by legitimation or by acknowledgment under article 203 must institute a proceeding under 209." La. Civ. Code art. 208. Commentators argued that former article 208 meant that only a child born outside of marriage, one with no legally recognized father, was allowed to bring an action, since the article said, "a child not entitled to legitimate filiation." La. Civ. Code art. 208 (emphasis added). The courts, however, came to a contrary conclusion by interpreting the language of this article relativistically. In other words, the courts declared that even if a child was born of marriage and had a presumptive legal father, he was not filiated as to his biological father and was allowed to bring an action to establish the paternity of his biological father, in essence allowing a child to have two legal fathers. See Smith v. Cole, 553 So. 2d 847 (La. 1989).
124. Katherine Shaw Spaht, Family Law in Louisiana, 5th ed. (LSU Law Center Publications Institute 2003), 554. In most other states, once a child brings an action to filiate to his biological father, his link of filiation to his presumed father, the husband of his mother, is severed. See, e.g., GDK v. State, 92 P. 3d 834, (Wyo. 2004). The Wyoming Supreme Court has stated, "There is no authority in Wyoming for dual paternity; therefore, the legal declaration of one man as the father could come only at the expense of the other." Id. at 839. Louisiana would still face problems in the ART world without dual paternity.
125. La. Civ. Code art. 197. According to the comments to this article, in all other situations, there is no time limit. See id. cmt. (e). That comment explicates, "The time for instituting a paternity action for the purpose of exercising the right to support, to sue for wrongful death, or to claim Social Security benefits or the like, is not limited by this Article." Id. Former Article 209 required the action be "instituted within nineteen years of the child's birth or within one year from the alleged parent's death, whichever first occurred." Id. "If the action was not timely instituted, the child could not thereafter establish his filiation for any purpose, except to recover damages under Civil Code Article 2315." Id. That was a harsh result not justified by any policy consideration.
comments of this article, in all other situations, there is no time limit.\textsuperscript{126} The child must prove filiation to a living parent by a preponderance of the evidence and to a deceased parent by clear and convincing evidence.\textsuperscript{127}

Although prominent Louisiana family law scholar Katherine Spaht argued that the legislature, when it amended former article 209, intended to eliminate dual paternity\textsuperscript{128} and other legal scholars argued the doctrine should not be recognized in Louisiana,\textsuperscript{129} the courts in Louisiana nevertheless continued to recognize the doctrine’s existence and apply it consistently.\textsuperscript{130} Furthermore, the legislature in 2005 codified this jurisprudential adherence to the doctrine.\textsuperscript{131} As a result, a child may receive support from two fathers, inherit from two fathers, and both fathers may inherit from the child, as well.

3. The Avowal Action (A Jurisprudentially-Created Doctrine Recently Codified in Louisiana) and the Possibility of Dual Paternity

An avowal action is one whereby a parent may bring a judicial action to filiate himself to a child, typically in the situation where the child is one born outside marriage.\textsuperscript{132} Louisiana, however, allows the action even when a child already has a legal father. Until the 2004 session of the Louisiana Legislature, this action was not set forth in legislation. Instead, it was a jurisprudential creation, which was perfectly illustrated in \textit{T.D. v. M.M.M.}\textsuperscript{133} In that case, a married woman committed adultery and later gave birth to a child. Though she told her paramour that she suspected he was the father of the baby, she informed her husband that he was the father of the child.\textsuperscript{134} The affair continued, and the woman allowed her lover to visit her and the child.\textsuperscript{135} The married woman and her husband divorced four years later, and she and her lover

\textsuperscript{126} La. Civ. Code art. 197, cmt. e.
\textsuperscript{127} La. Civ. Code art. 197.
\textsuperscript{130} \textit{See} Fontenot, 422 So. 2d 586; Smith v. Cole, 553 So. 2d 847 (La. 1989), Warren v. Richard, 298 So. 2d 813 (La. 1974).
\textsuperscript{131} La. Civ. Code art. 197.
\textsuperscript{132} \textit{See} T.D. v. M.M.M., 98-0167 (La. 03/02/1999), 730 So. 2d 873.
\textsuperscript{133} \textit{Id.}
\textsuperscript{134} \textit{Id.} at 874.
\textsuperscript{135} \textit{Id.} at 875.
ended their affair a few months thereafter.\textsuperscript{136} At that point, she denied her ex-lover access to the child, so he intervened in the ex-spouse's custody proceedings.\textsuperscript{137} The court in this case stated that, "Louisiana courts have traditionally recognized a biological father's right to his illegitimate child by means of an avowal action."\textsuperscript{138} This is allowed, despite the legal presumption that the husband of the mother is the father of the child born during the marriage. The court expressed several policy factors favoring this action: the susceptibility of biological parents to be sued for child support and the right of the child to inherit and receive wrongful death benefits from his parent.\textsuperscript{139} The court also focused on the constitutional rights of a biological father.\textsuperscript{140}

In its 2005 legislative session, the Louisiana Legislature passed Civil Code article 198.\textsuperscript{141} This new article codifies the jurisprudentially-created avowal action,\textsuperscript{142} as seen in \textit{T.D. v. M.M.M.}\textsuperscript{143} and provides that a man may establish his paternity of a child presumed to be the child of another man even though the presumption has not been rebutted.\textsuperscript{144} Therefore, a man, by virtue of his biological link to a child, has the right in Louisiana to filiate himself to his child by an avowal action within a prescriptive period of one year.\textsuperscript{145} There is an exception to this prescriptive period when a mother, in bad faith, deceives the father of the child

\begin{itemize}
\item \textsuperscript{136} \textit{Id.}
\item \textsuperscript{137} \textit{Id.}
\item \textsuperscript{138} \textit{Id.} at 875.
\item \textsuperscript{139} \textit{Id.} at 876.
\item \textsuperscript{140} \textit{Id.} At one time, it was believed that a biological father's right to recognition as the father of a child was not a fundamental right. \textit{See} Michael H. v. Gerald D., 491 U.S. 110, 110 S. Ct. 2333 (1989). In \textit{Michael H. v. Gerald D.}, Justice Scalia relied upon language from \textit{Bowers v. Hardwick}, 478 U.S. 186, 106 S. Ct. 342 (1986), to write, in footnote 6, that the legal recognition of a biological child is not "deeply rooted in this Nation's history and tradition" or "implicit in the concept of ordered liberty." 491 U.S. at 127 n. 6, 106 S. Ct. at 2344. However, since the Court later overruled \textit{Bowers} in \textit{Lawrence v. Texas}, 539 U.S. 558, 123 S. Ct. 2472 (2003), it is probable that Justice Scalia's footnote 6 from \textit{Bowers} has been overruled as well. It is possible that a biological father has a \textit{constitutional} right, under the Due Process clause of the 14th amendment to the U.S. Constitution, to establish paternity. Spaht, \textit{supra} note 124, at 554.
\item \textsuperscript{141} La. Civ. Code art. 198.
\item \textsuperscript{142} \textit{Id.}
\item \textsuperscript{143} 98-0167 (La. 03/02/1999), 730 So. 2d 873.
\item \textsuperscript{144} La. Civ. Code art. 198.
\item \textsuperscript{145} \textit{Id.}
regarding his paternity. In that case, the action must be instituted within one year from the date the father knew or should have known of his paternity but no more than ten years from the date of the birth of the child. In the earlier hypothetical, according to Louisiana jurisprudence, although the baby has a presumed father, namely A’s husband B, C would be allowed to file suit against both A and B to prove his biological link to the baby, and he could possibly be granted parental rights to the child. If C should be successful, the baby would legally have two fathers, B and C.

B. Applying Louisiana’s Laws (and Lack Thereof) to ART

Given the current state of the law of Louisiana, there are two sets of problems. First of all, the statutes could lead to bizarre results. A child born of ART could have two fathers, his intended father and the sperm donor. Second, the Civil Code articles fail to address questions of maternity that linger, namely, who the state should recognize as the mother of a child born to a surrogate mother and how to handle situations arising from egg donation.

1. Bizarre Results When Following Louisiana’s Rules to Their Logical Conclusions

Combining the rules of presumptive paternity with filiation actions and avowal actions, which could potentially result in dual paternity, one is quickly able to see the bizarre results that could occur when ART is used. The bizarre results stem from the fact that a child in Louisiana is allowed to have two recognized, legal fathers, both of whom may be filiated to the child and owe support to the child. When a woman uses the sperm of a man other than her husband, her husband is the presumptive husband of the resulting child, and the sperm donor is the biological father of the resulting child. Thanks to Louisiana’s lack of legislation governing a sperm donor’s rights and obligations, even though the child already has a legal father—the woman’s husband—the child and the sperm donor could still later be filiated. This could occur

146. Id.
147. Id.
148. Again, note that in most other states, when a child is later filiated to a man besides his presumed father, the filiation link to his presumed father is severed. See G.D.K. v. State, 92 P.3d 834 (Wyo. 2004). Even without dual paternity, complexities would still exist.
by action of the child utilizing a filiation action or by action of the sperm donor instituting an avowal action.

In the case of a child who is not informed of his biological origins, an action by a sperm donor to establish paternal rights to that child could possibly wreak havoc on the child's life. On the flip side, if that child does know the truth concerning his parentage, he or his mother, acting on his behalf, will be allowed the opportunity to force financial obligations on a sperm donor who had no intention of having any sort of relationship with a child who resulted from his deposit. Furthermore, if the donor later marries and has more children, those children could be forced to split their father's estate with the offspring who resulted from his sperm deposit. Combining Louisiana's rules governing paternity with the absence of legislation specifying the relationship between sperm donors and their progeny, it is obvious that there is great potential for problems and litigation in the paternity arena in Louisiana.

2. Areas of Parentage Ignored by Louisiana Law

Beyond the bizarre paternity issues that may arise in Louisiana, there is another problem with Louisiana's existing legislation on parentage and lack of legislation on ART: unanswered questions that linger concerning maternity. Though maternity may seem clear, i.e., whoever gives birth to a baby is his or her mother, surrogate motherhood agreements and egg donation make the question of maternity more difficult to solve. Although these issues have yet to arise in the jurisprudence of Louisiana, it is inevitable, as more and more couples utilize ART.

Surrogacy is a procedure whereby a woman carries and gives birth to a baby, and afterwards, relinquishes the infant to another woman or couple. Surrogacy agreements for valuable consideration are banned in Louisiana, as a matter of public policy. It is argued that surrogacy agreements violate the public policy that natural parents have equal rights relative to their child and that they should not be able to terminate them by contract. Another reason for prohibiting surrogacy agreements is that it is a form of baby-selling and could result in wealthy couples preying on those of economic deficiency. Finally, it is questionable that women who make the decision to terminate their parental rights before a child is

154. Id. It is argued that surrogacy agreements violate the public policy that natural parents have equal rights relative to their child and that they should not be able to terminate them by contract. Another reason for prohibiting surrogacy agreements is that it is a form of baby-selling and could result in wealthy couples preying on those of economic deficiency. Finally, it is questionable that women who make the decision to terminate their parental rights before a child is
gratuitous surrogacy contracts, it can be argued that such agreements are, at least in general, contrary to public morals. The sole exception to this generalization applies to gratuitous surrogacy contracts when the surrogate birth parent is a blood relative of either the husband or wife, which are the object of certain special legislation, thus seeming to presuppose that such agreements are enforceable. 155 Though compensated surrogate motherhood is and gratuitous surrogate motherhood between non-relatives may well be illegal in this state, it can and probably will happen anyway, because, not surprisingly, people do not always obey the law. Therein lies a big problem. If a woman locates a surrogate mother, who agrees to be inseminated, and the surrogate, after being inseminated and delivering the child, changes her mind about relinquishing the baby, the courts of Louisiana will be forced to decide which woman to recognize as the mother of the baby—the one who gave birth to the child or the one who intended to be the mother. Following the law of Louisiana, a woman is a mother by virtue of giving birth; 156 therefore, the surrogate would be deemed to be the mother of the baby. In contrast, if a woman finds a surrogate mother and after the birth of the child, the intended mother decides that she cannot or will not take responsibility for the baby, and then the surrogate feels the same way, what will become of the baby? According to the current law in Louisiana, the woman who gave birth to the child, a surrogate who never intended to have any parental responsibilities, will be forced by the courts to either keep the baby or go through the adoption procedure.

Though the hypothetical situation mentioned above would be difficult to solve, adding an egg donation by the intended mother to the surrogate mother further complicates the issue. Egg donation is a procedure whereby the egg of one woman is retrieved from her body 157 and then is either implanted in another woman 158 or mixed even conceived are not truly making an informed decision. Barbara L. Keller, Surrogate Motherhood Contracts in Louisiana: To Ban or to Regulate?, 49 La. L. Rev. 143, 157–58.

155. La. R.S. 40:34 (2004) states, “In the case of a child born to a surrogate birth parent who is a blood relative of a biological parent, the surname of the child's biological parents shall be the surname of the child.” Id. In such case, the genetic mother is relieved from having to adopt the child in order to be recognized as the child’s mother. See Spaht, supra note 124, at 572.

156. La. Civ. Code art. 84.

with the sperm of a man to create an embryo that is later implanted into another woman.\textsuperscript{159} Suppose that a woman, X, has perfectly healthy eggs but is not able, for medical reasons, to carry a baby safely to term and give birth to him or her. Now, imagine that, although it is illegal in Louisiana, X and her husband, Y, convince a doctor friend of theirs to retrieve X's egg, mix it with Y's sperm, and implant the embryo into a female friend, Z. Z agrees that after the birth of the baby she will relinquish the child to X and Y. If, however, after the birth, Z has a change of heart and decides that she wants to keep the baby, if the couple sues Z, what will the Louisiana court do? The issue is more formidable to decide now that the baby is the full biological child of both X and Y. It is hard to imagine that a court would give the baby to Z, but following the law of this state, it would be forced to do so.\textsuperscript{160}

Another area of filiation that is totally unaddressed in Louisiana pertains to the rights of egg donors. A woman who cannot produce healthy eggs for fertilization can receive an egg donation, thus enabling her to carry and give birth to a child who is genetically foreign to her. In this situation, if the egg donor later decided that she wanted access to the child, the courts would be faced with a tough decision. In this case, the egg donor is the biological parent of the baby, but the intended mother carried the baby and gave birth to it. According to Louisiana state law, the woman who gave birth to the baby, the intended mother, would be the legal mother of the baby.

In any of the aforementioned situations, under the current state of Louisiana's law, the courts would probably have to recognize the woman who gave birth to the child as the legal mother. However, the big question is whether the court would allow the other woman to bring an avowal action to filiate herself to the child.

\textsuperscript{158} Id. at 15.  
\textsuperscript{159} Id.  
\textsuperscript{160} The Majority of the Task Force on Assisted Conception and Artificial Means of Reproduction, created by a concurrent resolution of the Louisiana Legislature to study ART, has suggested that gestational surrogacy agreements for valuable consideration should be enforceable when a woman provides her egg to a surrogate. Another suggestion is that the egg donor should be presumed to be the mother of the child. These rules would only apply, however, if the egg donor, due to medical reasons, cannot carry or bear the child herself. The Minority Report from this same Task Force opposes these recommendations on the grounds that they commercialize the human body, are too ambiguous (use of the word "preclude" instead of "physically unable"), and will result in the exploitation of poor women. Spaht, \textit{supra} note 124.
or whether the child could filiate himself to his biological mother. In the past, when the avowal action was only a jurisprudentially-created doctrine, the action was only utilized by men, because they were the only ones who needed it. Louisiana has enacted Civil Code article 198 codifying this former jurisprudential rule. This article will read, "A man may establish his paternity of a child presumed to be the child of another man . . . ."161 With the fast-paced reproductive technology and the lack of legislation guiding the courts, it is highly possible that a woman, either one who donates her egg to an intended mother or an intended mother who donates her egg to a surrogate with the promise of motherhood to the baby, may seek to filiate herself to a child. Thus, such a woman would need to use article 198. It is interesting to wonder if she will be allowed to do so. The legislature obviously did not anticipate this dilemma because it only addressed men in the article. That means that unless the article is amended before a case arises, the courts will be forced to make that decision. Will the courts expand the article, reasoning *a pari*, to include women, in essence, allowing dual maternity? Or will it, utilizing an *a contrario* argument, forbid a woman from bringing an avowal action? If so, will an Equal Protection challenge be forthcoming? These unanswered questions are problematic, further illustrating Louisiana’s need for legislation on ART.

It is obvious that Louisiana did not consider ART when it implemented presumptions of paternity, filiation actions, and avowal actions. Current law, when combined with ART, could lead to bizarre results of paternity. Also, Louisiana has not confronted the unanswered questions of maternity when the ban on paid surrogacy is violated or when an intended mother utilizes an egg donation from another woman. The Louisiana Legislature must face and solve these bizarre and problematic results and questions of maternity by enacting statutes to address such situations and provide direction to persons who utilize ART. If not, numerous court battles will loom in the future, and the lives of sperm donors, egg donors, surrogates, intended parents, and children may be adversely affected.

**IV. COMPARATIVE STUDY**

After realizing the need for legislation on ART, instead of starting from scratch, Louisiana should look elsewhere for guidance. Obviously, the first place for Louisiana to turn is to her

sister states within the United States. Since some states have legislation governing this area, they have undoubtedly researched the issues. It would be very efficient for Louisiana to look to the other states for assistance. Additionally, since Louisiana is part of a larger United States culture, it is probable that the values of other states would be similar to those found in Louisiana, giving Louisiana further incentive to investigate within the United States. It is possible that the statutes of other states could be used as a starting point or even a model for Louisiana.

Although Louisiana is the only civil law jurisdiction in the United States, since she is open to suggestion from the common law ideas of her sister states within the country, she should also consider foreign common law legislation. Because such countries are members of the Western world and seem to have the same overarching principles within the realm of family law, i.e., incorporating a “best interest of the child” standard, there is a sense of a shared regional culture between them and any state within the United States, including Louisiana. This fact, in addition to the efficiency argument from above, justifies examining foreign common law jurisdictions to help Louisiana create the comprehensive law that she needs.

Louisiana should then focus her attention on other civil law jurisdictions in the world. Louisiana has several reasons for specifically considering the legislation of civil law jurisdictions. For one, Louisiana incorporates a civil law system in her legal regime. To rely on the civilian ideals of other countries would be in keeping with the tradition that this state embodies. Additionally, because Louisiana has based her private law upon that of other civil law counterparts, like France and Spain, the background law, legal terminology, and legal infrastructures of all of these countries are shared by Louisiana; this would make the solutions of other civil law jurisdictions easier to transplant into Louisiana’s existing legal scheme.

A. Other States Within the United States

The majority of state legislatures in the United States do provide some direction to those involved with ART. There are three basic categories of ART legislation in the United States: (1) the most common, the Uniform Parentage Act (hereinafter UPA);\textsuperscript{162} (2) various modified versions of the UPA;\textsuperscript{163} which

utilize the basic concepts of the model but delete or add provisions to it; and (3) independent, unique approaches by single states to determine parentage in the case of ART.\textsuperscript{164}

1. Uniform Parentage Act Approach: The Favored Approach by Most U.S. States

Many states have chosen to implement the UPA approach in order to address litigation involving reproductive technology and advances.\textsuperscript{165} Of all of the options currently in place in the United States, the UPA is the best because it provides the most comprehensive legislation found in the United States. The UPA provides a specific procedure for married persons to follow when using heterologous artificial insemination, and it also dictates the relationship that will result among the woman patient, her husband, the resulting child, and the donor. It could be considered the starting point for a future Louisiana statute because it lays the basic framework that this state needs. Unfortunately, it fails to anticipate and solve all potential problems that may arise. Furthermore, its statutory language is ambiguous, in that although several states employ the exact same language of the UPA, when disputes arise, the courts of those states have come to differing conclusions in establishing the parents of a particular child. In order to avoid such inconsistency, Louisiana should incorporate the ideas of the


UPA, but she must then look beyond the UPA to create a more thorough piece of legislation.

The first procedural requirement of the UPA is that the insemination of a woman with a third-party’s sperm must occur under the supervision of a licensed physician. The husband must consent to the procedure in writing, and both husband and wife must sign the consent form. The physician must certify the signatures and the date of the insemination and file the consent with the State Department of Health. The consent form shall be kept there in a confidential and sealed file and may only be opened upon a court order for good cause shown. The UPA specifies that a physician’s failure to follow protocol has no effect on the relationship between the husband and the resulting child. Once this procedure is followed, the legislation provides


that the husband of the mother shall be treated in law as if he were
the natural father of a resulting child. The donor, on the other
hand, is treated as if he were not the natural father of the child.
Ultimately, the child will be deemed legitimate.

Though this approach may seem sufficient to handle potential
problems by appropriately cutting off a donor's rights to the child,
the UPA is ambiguous and has been tested and applied differently
on numerous occasions. Cases have arisen concerning the parties'
failure to properly follow procedure, either by foregoing
supervision by a licensed physician or by failing to follow the
form requirement for consent. Other cases have arisen from the
failure of the UPA to address the situation in which an unmarried
woman is inseminated.

The UPA requires that a licensed physician oversee the
insemination. The question has arisen as to whether or not a

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Rev. Stat. § 19-4-106 (2004); 750 Ill. Comp. Stat. 40/3 (1999); Minn. Stat. §
257.56 (1998); Mo. Ann. Stat. § 210.824 (West 2004); Mont. Code Ann. § 40-6-
(West 1997).

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257.56 (1998); Mo. Ann. Stat. § 210.824 (West 2004); Mont. Code Ann. § 40-6-
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257.56 (1998); Mo. Ann. Stat. § 210.824 (West 2004); Mont. Code Ann. § 40-6-
(West 1997).

174. See Jhordan C. v. Mary K., 179 Cal. App. 3d 386 (Cal. 1st Cir. 1986)


176. See McIntyre v. Crouch, 780 P.2d 239 (Or. Ct. App. 1989); Herman v.
Lennon, 776 N.Y.S.2d 778 (N.Y. Sup. Ct. 2004), In the Interest of R.C., 775
P.2d 27 (Colo. 1989); Jhordan C. v. Mary K., 179 Cal. App. 3d 386 (Cal. 1st
Cir. 1986).

Rev. Stat. § 19-4-106 (2004); 750 Ill. Comp. Stat. 40/3 (1999); Minn. Stat. §
violation of this mandated provision results in the application or dismissal of the protections from donor assertions of paternity. In *Jhordan C. v. Mary K.*, a California court held that the failure to comply with the medical requirements of the artificial insemination statutes would prevent the mother from invoking the nonspousal insemination statute to obtain a dismissal of the sperm donor’s complaint to determine paternity, custody, support, and visitation. In essence, the donor had the right to obtain access to his biological child. This case illustrates a judicial attitude that if the parties do not correctly follow the procedural requirements as set forth in the UPA, then they forfeit the protection the statute gives to parents who seek to avoid interference by a sperm donor in the lives of their resulting children. In contrast, in the case of *McIntyre v. Crouch*, the opposite result was reached. In *McIntyre*, the court held that a person who provided semen to a woman was a donor under the UPA, even though a physician did not perform the insemination, and therefore, the donor’s paternal rights were terminated. The exact same statute was at issue, and the two state courts interpreting it came to two different conclusions on its meaning.

The UPA also mandates that a husband’s consent must be in writing. Questions have arisen, such as “What consequence will result if a husband does not consent in writing? Will the courts infer consent and hold the husband liable for support or will they eradicate his support obligation?” In most states, the courts have found that oral permission or implied consent will suffice to constitute an implied agreement of the husband to support the child. However, the lack of direction in the legislation could be problematic in the event that a case arises wherein there are contested facts as to whether or not the husband consented to the mother’s use of donor sperm. For example A could be married to B and be inseminated with the sperm of C, a donor. Suppose that B never consents in writing to the procedure. If A and B divorce while A is pregnant with C’s baby, and B denies any oral consent...
and never acts in a way to allow the courts to imply consent, the
law is uncertain as to whether or not a court will invoke the UPA
and force parental responsibility upon B. If the court did not
invoke the UPA, then there is no certainty either as to whether or
not C will be able to assert paternity rights to the resulting child.
As this hypothetical demonstrates, the failure of a couple to follow
the form requirement when there is no corroborating evidence of a
husband's consent could pose difficult questions for a court under
the UPA.

The UPA does not address the paternity rights of a donor
whose sperm is used to impregnate an unmarried woman. By
analogy, it may be argued that if a donor's rights to a child born of
a married woman are cut off, then they should also be severed
when a child is born to an unwed woman. In other words, a donor
should never have rights to a child, regardless of the marital status
of the recipient of his sperm. Arguing by analogy is problematic,
though, because, in the case of a child born to an unmarried
woman, it could be counter-argued that the child is being deprived
of his right to support by two parents, whereas when a child is born
via artificial insemination to a married woman, he or she has the
support of two parents. In McIntyre v. Crouch, where this issue
was presented, the donor was barred by the statute from asserting
parental rights to the child born to an unmarried recipient.\footnote{183} In
Herman v. Lennon,\footnote{184} although a woman's boyfriend signed a
"Consent for Artificial Insemination" form, this was not enough to
create an enforceable contract against the boyfriend for child
support; the court ruled the statute was inapplicable as the woman
and man were not married.\footnote{185} By contrast, in Interest of R.C.,\footnote{186}
the statute was held ambiguous as to unmarried donees and donors,
and the court rejected the UPA, instead, turning to common-law
principles to determine the parties' rights and obligations.\footnote{187} Once
again, courts following the same statute have returned conflicting
decisions, indicating that the UPA is ambiguous.

Although the UPA provides an elementary framework for the
world of ART, it falls short of creating a sophisticated finished
product. It does not handle the questions that may arise as a
consequence of failing to adhere to its requirements, illustrating
that enforceability of the UPA is difficult. The legal world is
unsure of what will happen if a woman fails to employ a licensed

\footnote{183}{McIntyre, 780 P.2d 239 (1989).}
\footnote{185}{Id.}
\footnote{186}{In the Interest of R.C., 775 P.2d 27 (Colo. 1989).}
\footnote{187}{Id.}
physician to perform the insemination. Likewise, there is no certainty as to the paternity of a child when the intended father does not put his consent to the procedure in writing. Also, paternity cannot be definitively resolved when an unmarried woman utilizes sperm from a donor. It is obvious from the aforementioned issues that the UPA, though a good start, leaves much to be desired. The language of the UPA, while seemingly clear, is rather hazy when applied by the courts. Therefore, because of the lack of clarity within the language of the UPA, Louisiana should not enact it in isolation. Instead, Louisiana’s Legislature should adopt the basic premises behind it but look further into the legislation of other states and foreign jurisdictions to find other, more thorough models for our legislation.

2. The “Modified” UPA Approaches

There are other approaches that deviate slightly from the UPA while maintaining the basic premises. One deviation is found in Colorado, which extends the scope of the legislation to parties involved in an egg transfer. That state also does not merely say that a sperm donor is “not the natural father of the child;” instead, it goes further in stating that the donor is not a parent of the child, an approach also followed by Virginia. Another deviation is found in New Jersey. Its statute not only asserts that the donor is not the natural father, but also that he has no rights and duties to that child. Oregon takes the termination of the relationship even further, by stating that not only is a donor forbidden from having rights and duties to the child, but also that the child is prevented from the same. New Jersey does, however, only cut off a donor’s rights to the child if there is no written contract to the contrary. Therefore, if there is a written contract contrary to the statute, the donor may be treated as the father of the child. New Mexico and Kansas follow New Jersey’s formula of allowing donors and recipients to contract for paternity, as a way to opt out of the automatic termination of paternal rights to a donor. The New Jersey formula also provides that the

189. Id. (emphasis added).
donor may be treated as a natural father if he consents in writing and both he and the woman sign it. Alaska, Arkansas, and Oklahoma, in contrast, do not even address the rights, duties, or lack thereof, of sperm donors. They ignore the possibility of a relationship between donors and the children produced, simply noting that the child is the natural and legitimate child of both spouses who engage in ART.

Colorado's plan of applying the UPA, not only to sperm donation, but also to egg donation is a very progressive idea. It is obvious that the world of ART is exponentially growing. Although egg transfers have not been in existence as long as sperm donation, the procedure is now available. With the number of infertile couples out there who want to have babies, it is safe to assume that egg transfers will someday be prevalent, though not as popular as sperm donation. No matter what the numbers of egg transfer rise to, the fact that the procedure is available warrants legislation governing the filiation of children born to those who implement it.

The lengths that Colorado, New Jersey (in its default scheme), Virginia, and Oregon take to sever the possibility of future claims by donors and parents against each other is commendable. Parties who engage in ART must be assured that they know what they are getting into. By carefully specifying that donors are not parents and have no rights or obligations to the child and also that donors and children will have no legal way of interfering in the lives of each other, these states have assuaged the fears of many of the persons who engage in ART.

However, the statutes of New Jersey, New Mexico, and Kansas are not the most reliable, due to the clause that allows donors and recipients to contract for parenthood. This is a very dangerous allowance. Recipients of sperm tend to be persons desperate to have a baby, and donors tend to be persons desperate for cash. Desperate people are not necessarily the most reliable. When a person wants an end result so badly, he or she will agree to almost anything. However, later in life, when the desperation has waned,

197. There are some factors that may deter the use of egg transfer. One factor is that it is a more invasive procedure. See Alvare, supra note 157, at 15. To obtain sperm, there is no need for medical supervision. Egg donation, on the other hand, requires a physician to go into the woman’s body to get her eggs. Id. This, in turn, leads to another deterring factor, cost. Since egg donation requires medical assistance, it costs much more. Id. at 18.
the person may look at decisions he or she has made in a totally different light. For example, if an eighteen year old man or woman, in need of money, donates his or her gametes, he or she may never even anticipate the desire that he or she may feel later to meet the child. If he or she has signed away his or her rights to the child, the contract he or she signed in a clouded mental state will bind him or her from having rights to the child. By contrast, a couple who desperately wants to have a baby may contract to allow a donor to have rights to the child, even though they do not actually think this is a good idea, just to get the gametes of that donor. Later, these parents may regret their decision to allow a third person to have a role in the life of their child, but they will be bound by the contract they signed.

In addition to the basic framework of the UPA, Louisiana should consider adopting the ideas of states that extend paternity rules to egg transfers and also to those that effectively terminate rights and duties as between the child and the donor. Louisiana should not allow the recipients and donors to contract for parenthood. This opens the door to too many contracts that may be negotiated and signed out of a desperation so extreme that it approximates duress.

3. Other Approaches

Many states have adopted the UPA with modifications, but other states have taken other routes altogether. These states’ courts will face the most controversy when legal battles rage, because their statutory schemes are even more ambiguous and, as a result, more problematic than are those based on the UPA.

a. Presumed Consent

Maryland has a statute requiring a husband’s consent, much like the UPA. However, this statute specifies that the husband’s consent will be presumed and requires no written document to manifest consent. This provision is problematic, for it could be unfair to the husband. If a husband vetoes an insemination with donor sperm but his wife acts against his wishes and undergoes artificial insemination, and they later divorce, how will that husband rebut the presumption that he consented? His wife will undoubtedly argue that, of course, her husband consented, but that they, in a marital decision, chose to keep their use of donor sperm

a secret to avoid embarrassment. That is a heavy burden to impose upon a husband, given the fact that the husband may not have any evidence, besides his own testimony, that he was opposed to the procedure. This provision is inequitable from a husband's position, and Louisiana should not adopt it.

b. Donor Intent to Determine Parentage

Delaware is another state whose courts may face special legal dilemmas. Legislation there provides that a donor's rights to a child are not severed if he had intent to be a parent. However, there is no mechanism built into the statute to show proof of that intent. What if a man intends to be a father and expresses that intent orally, but after the birth of the child, the woman has found a male to fill the role of "dad?" Without a writing, the donor may be denied his intended right to paternity. It is possible, then, for the courts to be jammed with cases of "he said, she said." Louisiana would do well to avoid legislation of this kind.

c. Contracting for Parentage

A few states, Kansas, New Hampshire, New Jersey, New Mexico, and Oklahoma, allow donors and donees to contract for parenthood. Again, though, the statute does not mention a form requirement. How is one to prove his contractual rights to paternity?

In addition, New Hampshire and Oklahoma may face constitutional challenges, due to the fact that they only allow donors and donees who are both unmarried to contract for parenthood. This type of statute may face a Fourteenth Amendment Equal Protection challenge at a later date, because the legislation, in essence, provides parenthood for unmarried donors if the donee is also unmarried. However, it deprives a married donor or an unmarried donor whose sperm is used by a married donee of the right to paternity of their resulting offspring. Once contracting for parenthood is allowed for unmarried persons, it may be difficult to justify denying that privilege to a married couple who wishes to contract with a donor to allow him paternal rights.

The statutes of Kansas, New Jersey, and New Mexico, by contrast, do allow married persons to contract with donors for parenthood. These statutes, however, provide no guidance for the courts on how to handle a situation where a married woman contracts, without her husband’s consent, with a donor to allow him some sort of relationship and visitation with the resulting child. Likewise, there is no mechanism to address what will happen if a married man donates sperm to an unmarried woman and contracts, without his wife’s consent, to establish paternal rights to the child. Both situations could lead to major difficulties for the courts when they are asked to decide who the parents of the child are and whether or not to grant any sort of custody or visitation rights to the donor.

There are many other statutes, besides the UPA and the modified UPA, governing the rights and obligations of sperm donors, sperm recipients, and their spouses, but, as illustrated above, none of this legislation is equipped to handle effectively the complicated situations that are bound to arise in the future. These statutes are too vulnerable to emotional complications and problems of proof. More comprehensive statutes, statutes capable of anticipating the full range of paternity issues that can arise from the use of ART, need to be developed.

B. Foreign States

Since the various approaches to ART within the United States do not adequately anticipate and address potential problems, it becomes necessary to delve into legislation from foreign countries, in an effort to fill in the gaps on ART. Louisiana should look to common law and civil law jurisdictions alike. A study of foreign statutes could add insight to problems that arise worldwide, and Louisiana’s adoption of foreign solutions to these problems may prevent her courts from having to decide complicated family matters with no statutory guidance.

1. Common Law Jurisdictions Outside the United States: The United Kingdom and Australia

Looking at two of the more influential common law jurisdictions, the United Kingdom and Australia, one is able to see some commonalities related to filiation of ART children. For one, in both countries, maternity is established in the same manner: the woman who is carrying or has carried a child is the mother of the
child.\textsuperscript{201} Likewise, in both countries, if a woman is married and then delivers a baby, her husband is presumed to be the father of the baby, as long as he consented to the procedure.\textsuperscript{202}

There are differences between the two, however, probably as a result of the age of the Australian legislation, which dates back to 1985. In the United Kingdom, even if a woman is not married, if she and a man together engage in treatment services through a licensed person to utilize another man’s sperm, then the man engaged in the treatment with her is treated as the father of the child.\textsuperscript{203} In this case, no other man is treated as the father of the child.\textsuperscript{204} The United Kingdom’s legislation also provides that if a person is labeled as a mother or father of a child born of ART, then that person will be treated as the legal mother or father for all purposes.\textsuperscript{205} If a person is declared not to be the mother or father, then he or she is not the legal mother or father for any purpose.\textsuperscript{206} Within the aforementioned legislation, one can see that the United Kingdom addresses an area that has been neglected by all of the states within the United States—unmarried couples. Louisiana, after adopting the basic premises of the UPA and the aforementioned provisions of the modified UPA, should consider incorporating into her own legislation something akin to the portion of the United Kingdom’s legislation governing unmarried couples who utilize ART.

It is a very persuasive argument that every child should have two \textit{married} parents to love, nurture, and support him or her,\textsuperscript{207} and therefore, that ART should be forbidden to unmarried couples. While this is preferable, it is undoubtful that unmarried persons, even if banned by law, will engage in ART. If they choose to do so in the United Kingdom, where it is not banned, there is legislation in place that requires the man to be labeled the father of the child.\textsuperscript{208} This is good, as even though the parents of the child are unmarried, the child is still guaranteed the support of two

\begin{enumerate}
\item[201.] Human Fertilisation and Embryology Act, 1990, c. 37 (Eng.); Artificial Conception Act, 1985, c. 5 (Western Australia).
\item[202.] Human Fertilisation and Embryology Act, 1990, c.37 (Eng.); Artificial Conception Act, 1985, c. 5 (Western Australia).
\item[203.] Human Fertilisation and Embryology Act, 1990, c. 37 (Eng.).
\item[204.] Id.
\item[205.] Id.
\item[206.] Id.
\item[208.] Human Fertilisation and Embryology Act, 1990, c. 37 (Eng.).
\end{enumerate}
parents. In this situation, when an unmarried couple together engages in ART, both are deemed to be the parents of the child, and both must support the child. This scheme protects the best interest of the child, which should be the overarching theme of any legislation related to children.

Although adding the United Kingdom’s ideas to those found within the United States creates a more comprehensive statutory scheme for Louisiana to utilize, it still does not solve all of the problems associated with ART, in particular, potential psychological problems, bizarre results, and unanswered questions of maternity that could occur in this state as a result of ART. Therefore, Louisiana must look to her civil law counterparts throughout the rest of the world to try to fill in the lacunae.

2. Civil Law Jurisdictions Outside the United States

In the civil law jurisdictions around the world, there are two basic approaches taken to ART—a non-comprehensive approach and a comprehensive approach. The non-comprehensive approach merely scratches the surface of ART and does not go very far beyond the legislation found in the United States and in the common law jurisdictions worldwide. The comprehensive legislation, however, goes far beyond that of any thus far examined and bears careful analysis to determine whether or not the ideas presented within it would be suitable for enactment in Louisiana.

a. The Non-Comprehensive Approaches: Philippines, Georgia (former Soviet Republic), Peru, France, Brazil, Quebec, Denmark

In the civil law jurisdictions, the common theme found throughout the Civil Codes was one of husband consent and legitimacy. All of the legislation located provided that a husband must consent to the procedure. However, not all of the countries require the consent to meet a form requirement. The Philippines, Georgia (former Soviet Republic), and Peru require a writing but do not specify that an authentic act be used. The Philippines also require that the authorization or ratification be prepared before


the birth of the child, that both spouses sign the instrument, and that it be recorded with the child’s birth certificate. France provides that the spouses or cohabitatees must give their consent before a judge or a notary who informs them of the consequences of their act as regards parentage; France also has in place a procedure whereby a spouse may later revoke his or her consent by death, divorce, judicial separation, discontinuance of community life, or a writing, as long as such revocation occurs before the utilization of the procedure. In the Civil Codes of Brazil and Quebec, there is no specification of a writing to prove spousal consent.

Some other differences were located. Whereas France, Georgia, and Quebec specify that there will be no filiation to the donor of the sperm, Brazil and Peru do not; that is, they leave the possibility open. Denmark and Quebec provide for the confidentiality of the parties, but Quebec allows the files to be opened for health reasons. France and Quebec mandate that a husband, even if he never acknowledges the resulting child, as long as he has consented to the insemination, will still be financially responsible for the child. Georgia provides for surrogate motherhood agreements and specifies that a surrogate mother shall have no right to claim to be the mother of the child.

Though this legislation specifically address ART, it, just like the common law legislation examined earlier, fails to anticipate all of the legal questions and problems that could inevitably arise. Overall, the statutes add very little to the legislation currently existing in America. Furthermore, recurring themes of failure to require a certain form, failure to specifically eliminate the rights of donors, and failure to provide confidentiality of the parties leave too many lacunae in the legislation for it to pass muster.

There is, however, at least one distinctive element in the Georgian legislation that merits consideration. It will be recalled that Louisiana has an absolute ban on paid surrogacy. Though the

211. Fam. C. art. 164 (Phil.) (J.R. Trahan trans.).
212. C. Civ. art. 311-20 (Fr.).
214. Quebec Civil Code art. 538; C. Civ. art. 311-20 (Fr.).
215. Danish Law No. 460 of 10 June 1997 (as amended by Danish Law No. 427 of 10 June 2003); Quebec Civil Code art. 542.
216. Quebec Civil Code art. 542.
217. C. Civ. art. 311-20 (Fr.); 2004 Quebec Civil Code art. 540.
ban should remain in place, if a Louisianian decides to violate the ban, this state should follow Georgia's example and deny any maternal rights to the surrogate. This would simply be an extension of Louisiana Revised Statutes 40:34, which already allows filiation to an intended mother in the case of a surrogate who is a blood relative of one of the biological parents. Louisiana should impose financial sanctions upon the intended mother, however, for willfully violating the law against paid surrogacy in this state.

b. The Comprehensive Approaches

Research on the countries of Spain and Switzerland reveals the most cumulative statutes governing ART in the civilian world. These countries address almost every possible questionable area surrounding ART, but some of the provisions are repetitive of those found in the noncomprehensive approaches, and some are beyond the scope of this article. However, several provisions of this comprehensive legislation could aid Louisiana in formulating legislation to govern ART.

1) Spain

The Spanish legislation adds several beneficial ideas for Louisiana to consider adopting. In Spain, before utilizing ART, sufficient information and advice must be given to the recipients and donors, concerning not only the physical risks and implications, but also the juridical, ethical, and economic consequences. Additionally, this is the only legislation whereby a recipient is required by the government to be a major. Donors, too, must be eighteen years of age and are subjected to an examination of his or her psycho-physiological state. The donors are banned by law from receiving compensation for their donation.

219. These provisions deal with numerous subjects, including storage of gametes and embryos, regulation of doctors, reporting mandates, and penalties for violations of the requirements.


221. Id.

222. Id.

223. Id.

224. Id.
Louisiana would benefit from the aforementioned ideas gleaned from the Spanish legislation. It would be advisable to give information to donors and recipients on their legal, ethical, and financial responsibilities. As Arthur Caplan, a professor and medical ethicist at the University of Pennsylvania complained, "Not enough is done to inform donors of their legal status . . . ."225 Fully informing donors and parents would allow them the ability to make an informed decision on ART. It obviously would be advantageous to mandate that women and donors alike attain majority before undergoing such procedures, to ensure the maturity of all the parties. Examining the psychology and physiology of donors226 would also be in the best interest of the parents, and children. This could prevent the unknown transmission of hereditary mental and physical illnesses from a donor to the child.227 In addition, banning compensation for donation of sperm and eggs would assure that donors are doing so for more altruistic reasons, beyond the mere making a quick dollar. This would give donors more certainty that their intentions are to help a family and would circumvent the feelings of regret some paid donors feel later in life when reflecting on their blase attitude at the time of their deposit.

2) Switzerland

The Swiss legislation is the most comprehensive legislation available. Almost all of the provisions mentioned from the Spanish legislation are included in the Swiss statutes. The Swiss, however, go beyond even the legislation found in Spain. The Swiss seem to focus more than any other country on the psychological risks associated with utilizing ART. They require

225. Legal Issues; Court Rules Sperm Donor Must Pay Support, Fitnessweek, Aug. 14, 1004, at 759. See also Wolff, supra note 8, at 124 ("Typically, when a man becomes a sperm donor, no one is there to counsel him about the issues that may arise one day.").

226. The position furthered here is that the psychology and physiology of donors should be examined when their gametes are given to others. If the intended parents use their own gametes, they would not be subject to the psychological and physiological examinations.

227. Consider the case of donor no. 276 who donated 320 deposits of sperm. One of his resulting offspring now has autosomal dominant polycystic kidney disease (ADPKD), a life-threatening genetic kidney condition that has a fifty percent chance of being passed from parent to child. Though no. 276 marked the box next to his mother and aunt for kidney disease, the sperm bank did not heed the red flags. Wolff, supra note 8, at 129.
those undergoing such procedures to be fully informed of all the medical, psychological, physical, juridical (including the child’s right of access to a donor file), and financial aspects, much like the Spanish. 228 What distinguishes their approach is that those desiring to use ART must, after being counseled, observe a four week period of reflection before they are able to employ the technique. 229 Furthermore, if the procedures fail for three cycles, the persons must renew their consent and observe another period of reflection. 230 Not only is psychological assistance given to donors and intended parents before the treatment, but it is also provided during and after it as well. 231 These provisions, like their similar Spanish ones, ensure that people who choose to utilize ART will have no doubt of their desire to create a baby via medical assistance and will be less likely to have conflicting emotions at a later date.

The Swiss also protect the psychological health of the children born of ART by allowing them access to the identity of their donor parents upon their eighteenth birthday, or beforehand, upon a showing of a legitimate interest. 232 Before giving out the information, the Federal Office of Statistics must inform the donor of the child’s demand for release of the donor’s identity. 233 The donor may refuse to see the child, and the child must be informed of this. 234 This procedure would also be beneficial to all of the parties involved. It leaves parents with the choice of whether or not to tell their children the truth of their biological origins. It provides children who are given disclosure by their parents access to donor information, so that they do not feel genetically incomplete. It also allows donors to reject the initiative of such children and protects donors from claims of child support during the child’s minority. 235 Louisiana should adopt these ideas from the Swiss. Because Louisiana allows a child the right to bring a filiation action at any time until one year after the death of an

229. Id.
230. Id.
231. Id.
232. Id.
233. Id.
234. Id.
235. Id.
alleged father, which, in turn, could cause child support obligations to fall upon a donor, a child in this state should not have access to the donor's identity until after his eighteenth birthday. This way, donors, at least during their lifetime, would not have to fear potential financial demands resulting from the child's access to their file.

Another interesting feature of the Swiss legislation is that it, like that of many countries and like the UPA found in the United States, requires that a physician oversee the procedure. What differentiates the Swiss approach, however, is that it provides that if a man gives his sperm to anyone besides a licensed physician, he could be held responsible for the child if either the child or the mother brings a paternity action. This would be a positive idea for Louisiana to adopt to correlate with the beneficial aspects of the UPA in that it would deter people from practicing "at-home" ART.

3. A Scandinavian Approach: Iceland

Iceland's legislation provides that, in order to undergo "artificial fertilisation," the couple must have satisfactory mental and physical health and social circumstances. This is an excellent idea for Louisiana to adopt. By mandating a psychological investigation when intended parents use donor gametes, Louisiana could avoid situations where mentally unstable people are allowed to create human life through ART. By illustration, take the case of the baby, Jonathan Austin, who was created at the request of his father, for a price of $30,000. After taking his son home, in less than sixty days, the father, James Alan Austin, beat and shook the baby to death. When a parent is paying to create a human life, he or she should be investigated to

237. After the age of eighteen, however, the only child support obligations that could befall the donor would be for the cost of education. See La.Civ. Code art. 230B (2004).
239. Id.
240. Artificial Fertilisation Act, 1996, no. 55 (Iceland) (Anna Yates trans.).
242. Id.
be certain that he or she is fit to become a parent.\(^{243}\) Having the financial resources to make a baby does not entitle a person to automatically qualify for parenthood. A physical examination would ensure that parents are healthy enough to handle the extensive toll that giving birth to and rearing a child can have upon the human body. Ascertaining intended parents’ social circumstances will ensure that all children created through ART will receive the adequate support that they deserve.

V. RECOMMENDATIONS FOR LOUISIANA

There is a desperate need for all states to adopt legislation that can handle the plethora of potential legal problems that arise as a result of ART. Louisiana especially, due to its continued acceptance of dual paternity, avowal actions, and filiation actions, needs clarity on which men and women may be considered parents, in order to determine if they may then obtain custody of or at least visit their children and be forced to support them. The legislation that other states and countries, common law and civil law alike, have adopted does not adequately or equitably solve all the problems created by such procedures as artificial insemination and IVF by sperm donors or egg transfers and surrogate motherhood agreements. A useful artificial insemination/IVF statute will protect donors, children, and parents and allow all parties involved to retain as much privacy as possible.\(^{244}\)

Overall, the best interest of the child should be the underlying theme of paternity decisions. The problem with ART is that it lies somewhere in between sexual intercourse and adoption, and legislation in most other jurisdictions has leaned more towards analogizing it to sexual intercourse; this is a monumental mistake. The best interest of any child is to know, from his or her infancy, who his or her parent(s) are, and the only way for the child to know this is for the parents themselves to know.

A. Lessons From the Law of Other States Within the U.S

Utilizing the UPA provides the basic foundation for Louisiana. It requires the husband’s consent for a married woman to engage in artificial insemination or IVF using donor sperm and that a

\(^{243}\) This requirement is no different in ART as it would be for adoption in Louisiana.

licensed physician must oversee the procedure. It additionally labels the child born of such procedures "legitimate" and establishes that the consenting husband of the mother is the father of the baby. It further provides that the donor is not treated as a natural father. This is a good beginning for Louisiana legislation.

The basic foundation laid by the UPA can be built upon by implementing portions of the modified UPA. The beneficial portions include: the extension of provisions regarding sperm donation to egg transfers, the stipulation that no donor will be considered a parent at all to a child born of ART, and reciprocal elimination of the relationship between donor and child. These approaches take legal regulation of ART to a higher level than that suggested by the UPA and provide more certainty to the world of ART.

Though the aforementioned ideas are an excellent beginning, many other uncertainties remain, including how to handle the realm of dual paternity when ART is utilized. Another hazy arena is the question of maternity in this state, when parents violate the law and use surrogacy agreements, especially when the intended mother has donated an egg to the surrogate. Furthermore, the maternal rights of egg donors who transfer their eggs to the intended mothers who are intended to carry the child need to be addressed. Finally, the psychological needs of all parties to ART.


need to be considered in the legislation of Louisiana. Since the answers to these questions are not addressed by the legislation of the other forty-nine states in America, Louisiana must look to the statutes in place in foreign jurisdictions to help her find an equitable solution.

B. Lessons from the Law of Foreign States

By looking outside of the United States into the common law jurisdictions, Louisiana can further develop her ART statutes. The United Kingdom's method of addressing unmarried couples who together utilize ART would be a step in the right direction for Louisiana. This would guarantee that a large portion of children who otherwise might not have the support of two parents, will have just that. Such a guarantee would further the best interest of the child, which should be the main focus of any ART legislation.

By investigating the other civil law jurisdictions in the world, Louisiana will have the benefit of keeping her civilian traditions and of emulating legislation that fits into her existing legislative schemes. Louisiana should incorporate Georgia's attitude towards surrogacy, while retaining the absolute ban that already exists upon such agreements. By completely cutting off a surrogate's right to the child, Louisiana would eliminate questions of maternity that may arise as a result of combining ART with surrogacy.

Incorporating provisions of the comprehensive approaches of Spain and Switzerland, as well as those found in Iceland, will conclude Louisiana's adoption of other jurisdictions' ideas. Using Spain's provisions mandating an age of majority of donors and recipients will certify that the parties to ART possess the maturity necessary to undergo such procedures. Furthermore, the Spanish theory of providing counseling to parties on their legal, ethical, and financial responsibilities serves as a valuable consideration for Louisiana. This will make all parties aware of the consequences of their decisions. Additionally, their idea of a physical and mental examination of the donors will prevent hereditary diseases from being transmitted to children, and the ban of compensation of donors will ensure that such donors do not enter the decision to donate with solely fiscal motives, which may haunt them later in life.

Switzerland adds important pieces of the puzzle that Louisiana can fit together with pieces incorporated from other jurisdictions.

251. This requirement will apply if intended parents use gametes of donors; it will not apply for parents utilizing their own gametes.
This country’s period of reflection for intended parents who use donor gametes will ensure that the parents are certain of the decision to utilize ART. The requirement of continued counseling during and after the procedure will further help parents to adjust to psychological issues they and their children may face. Switzerland’s concern for a child’s psychological welfare, too, is commendable. Allowing a child access to the donor’s information, upon attaining an age at which there is no longer any possibility of subsequent child support demands, could combat the uncertainty that a child may face, as a result of being born of ART. This would allow the child to have closure to the lingering questions that may result and would also assuage a donor’s fear of being forced to support the child during his or her minority. Furthermore, mandating physician supervision with the penalty of requiring donor support for the child in the event of a violation of that mandate will emphasize the importance of having a doctor perform the procedure and will deter people from attempting ART on their own.

Incorporating provisions of Iceland’s legislative scheme completes the ideas that Louisiana should take from foreign countries. The concept of a physical and mental examination of potential parents, as well as an investigation of their social circumstances, would ensure that such people are mentally, physically, and socially capable of rearing a child.

C. Lessons of an Innovative Nature

Though much is gained from looking to other states within the United States and foreign countries, there are still a few unanswered issues relating to ART that Louisiana must face and resolve on her own, that is, without assistance from the legislative experience of other jurisdictions. Louisiana’s reliance on dual paternity brings bizarre results to the paternity arena and may, by analogy, do the same in the area of maternity when egg donation is used. Louisiana must suspend her reliance on this doctrine, at least when ART is involved.²⁵² Doing this, in addition to the above mentioned ideas taken from the United States and other countries, will curb competing claims to paternity and maternity. In addition, Louisiana must confront the problem of a husband’s failure to

²⁵². Though there are criticisms of dual paternity, in general, they are beyond the scope of this article. The position being asserted here is that dual paternity complicates an area that is already wrought with complexities. It is unknown whether suspension of dual paternity only in ART scenarios would pass a constitutional challenge. That is also beyond the scope of this article.
follow the form requirement for consent. Though it may be unfair to the husband, it will have to be in the court’s fact-finding powers to determine if the husband consented to the procedure. Though not an ideal solution, it is the lesser of two evils, the greater one being deprivation of support to a child. Finally, Louisiana must impose fines on women and couples who engage in compensated surrogacy agreements.

Louisiana’s lack of legislation on ART must be remedied. Without action, the lives of sperm and egg donors, recipient parents, and children born of ART will be adversely affected. By adopting ideas from other states and other jurisdictions, as well as implementing innovative ideas of her own, Louisiana will successfully answer the lingering questions of parentage of children born of ART.

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APPENDIX

MODEL LEGISLATION ON THE FILIATION OF CHILDREN BORN OF ASSISTED REPRODUCTIVE TECHNOLOGY

I. Filiation of Children Born of ART:

1. If, under the supervision of a licensed physician and with the consent of her husband, a wife is inseminated artificially or combines her egg 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. If, under the supervision of a licensed physician and with the consent of her husband, a wife consents to assisted reproduction with an egg donated by another woman, to conceive a child herself, the wife is treated in law as if she were the natural mother of the child thereby conceived.

2. The child born of ART will be deemed a child born of marriage if born to a married woman, if the requirements of Section II are followed.

3. If an unmarried couple, together, engages in ART with the addition of a donated gamete, the woman shall be the legal mother of the child and the man who accompanies her shall be the legal father of the child.

4. No donor will be considered a parent to a child born of ART and will not have any rights or duties to such a child. Civil Code article 198 (avowal action) and article 197 (filiation action) will not apply in the area of ART. There will be no dual paternity or maternity when dealing with ART.

5. The woman who gives birth to a child is the mother of the child, except in the case of a paid surrogate.

   A) In the case of a paid surrogate, the intended mother will be the mother of the child. Both the payor and the payee, however, will face a financial penalty for violating La. R.S. 9:2713.

6. A child born of ART will not have any rights to a donor and will not be owed any duties by the donor.

II. Required Procedure for ART:

1. Both the husband and wife's consent must be in writing and signed by each of them. The physician shall certify the signatures and file the consent with the State Department of Health, where it shall be kept confidential and in a sealed file.

2. All parties to ART, donors and intended parents, shall be at least 18 years of age.
3. Donors of gametes must undergo a psychological and physiological examination before donating.

4. Donors of gametes may not receive compensation for their deposits.
   A) Violation of this provision will result in financial sanctions upon both the payor and payee.

5. All parties to ART, donors and intended parents, shall be counseled on the physical risks and implications, and juridical, ethical, and economic consequences of the procedures.
   A) After such counseling, intended parent(s) must observe a minimum four week period of reflection.
   B) After three consecutive failed ART attempts, intended parent(s) must renew their consent and observe another four week period of reflection.

6. Intended parent(s) will also be counseled during and after ART.

III. Consequences for Failure to Follow Required Procedure:

1. Failure to engage a licensed physician will render this statute inapplicable.

2. Failure of a physician to follow procedure will not affect the parent and child relationship.

3. Failure to obtain consent in writing will be a determination of fact to be decided by the courts, should parties dispute whether the requisite consent was given.

IV. Miscellaneous Provisions

1. A child born of ART will have access to the donor’s file upon his eighteenth birthday.
   A) Before releasing such information, the Department of Health must inform the donor of the child’s demand.
   I) The donor may refuse to see the child. If so, the child must be informed of this.