Publisher page limitations in the second edition restricted the amount of material and number of problems that we could share with student readers. However, the web provides us with the opportunity to provide more expansive explanations of the law to in the chapters and to add more problems for review and reflection. We believe that the additional explanatory material and problems will further enhance a student’s ability to master family law and provide an added intellectual boost when preparing for final family law examinations.

Note: This material is available only to a student who has purchased the first or second edition of the Family Law Examples and Explanations book or a member of the faculty. It may not be copied or reproduced in any form without the express written consent of authors. Students who have purchased the second edition may, of course, download and print out this supplemental material for their individual use.

Chapter 18 Section 9: Alternative Reproduction—Known Donors and Unmarried Recipients

In Jhordan C. v. Mary K., 179 Cal.App.3d 386, 224 Cal.Rptr. 530 (1986), a donor provided sperm to one of two unmarried women who had decided to raise a child together. California had adopted the language of the 1973 Uniform Act with the exception that it had omitted the word “married” in the second subsection. Jhordan C., 179 Cal.App.3d at 392 (citing then-existing Cal. Civ.Code § 7005 [West 1979], which now appears, substantially unchanged, in Cal. Fam.Code § 7613 [West 2004] ). As the court put it:

[The California Legislature has afforded unmarried as well as married women a statutory vehicle for obtaining semen for artificial insemination without fear that the donor may claim paternity, and has likewise provided men with a statutory vehicle for donating semen to married and unmarried women alike without fear of liability for child support. Subdivision (b) states only one limitation on its application: the semen must be “provided to a licensed physician.” Otherwise, whether impregnation occurs through artificial insemination or sexual intercourse, there can be a determination of paternity with the rights, duties and obligations such a determination entails.” Jhordan C., 179 Cal. App.3d at 392.

Because the parties had no doctor involved in the donation or insemination and thus the sperm was never “provided to a licensed physician,” the court ruled that the case before it fell outside the statute. It therefore affirmed the lower court’s recognition of the donor’s paternity. Jhordan C., 179 Cal.App.3d
at 398. Although the court addressed its ruling’s impact on the constitutional rights of the two women, it did not address any constitutional implications for the donor. Jhordan C., 179 Cal.App.3d at 395-96.

In *In Interest of R.C.*, 775 P.2d 27 (Colo. 1989), the district court had refused to admit proffered evidence of an agreement that the donor would act as a father based on relevance; it granted the unmarried mother’s motion to dismiss the donor’s paternity suit based on Colorado’s statute. The Colorado provision, like that in California, applied to both married and unmarried recipients and contained a blanket bar to donor parental rights. See Colo.Rev.Stat. § 19-4-106).

The Colorado Supreme Court reversed the district court and remanded for findings of fact. It explicitly rejected the idea that an unmarried recipient lost the protection of the statute “merely because she knows the donor.” *R.C.*, 775 P.2d at 35. And it did not reach the equal protection and due process challenges raised by the donor. However, it concluded the statute was ambiguous and refused to apply its absolute bar to paternity because the known donor had produced evidence of an oral agreement that he would be treated as father of the child. *R.C.*, 775 P.2d at 35.

In *McIntyre v. Crouch*, 780 P.2d 239 (1989), cert. denied 495 U.S. 905 (1990), an unmarried woman artificially inseminated herself with a known donor’s semen. The donor sought recognition of his paternity, and both he and the woman sought summary judgment. The Oregon artificial insemination statute read:

> If the donor of semen used in artificial insemination is not the mother's husband: (1) Such donor shall have no right, obligation or interest with respect to a child born as a result of the artificial insemination; and (2) A child born as a result of the artificial insemination shall have no right, obligation or interest with respect to the donor.” Ore.Rev.Stat. § 109.239 (1977).

The donor challenged this statute under equal protection and due process principles. He swore out an affidavit in support of summary judgment and argued he had relied on an agreement with the mother that he “would remain active” in the child’s life and “participate in all important decisions concerning the child.” 98 Or.App. at 464. He sought visitation and said that he was willing and able to accept the same level of responsibility for the support, education, maintenance, and care of the child and for pregnancy-related expenses that he would have had if the child had been born from his marriage to its mother. The district court ruled that the donor’s paternity claim was barred by the Oregon statute.

The *McIntyre* court began its analysis by reciting its equal protection standard of review, which was strict scrutiny. The Oregon court stated: “A statute that gives a privilege to women while denying it to men is inherently suspect and subject to strict scrutiny, unless the classification (1) is based on specific biological differences between men and women and (2) is rationally related to the purposes of the statute.” *McIntyre*, 98 Or.App. at 469.

Under this standard, the Oregon court ruled that the statute before it drew an acceptable “classification of unmarried males and unmarried females ... based on biological differences.... Only a male could contribute the sperm to accomplish conception; only a female could conceive and bear the child.” 98
Further, the classification was rationally related to the purposes of the statute, which were: (1) to allow married couples to have children, even though the husband was infertile, impotent, or ill; (2) to allow an unmarried woman to conceive and bear a child without sexual intercourse; (3) to resolve potential disputes about parental rights and responsibilities: that is, (a) the mother's husband, if he consents, is father of the child, and (b) an unmarried mother is free from any claims by the donor of parental rights; (4) to encourage men to donate semen by protecting them against any claims by the mother or the child; and (5) to legitimate the child and give it rights against the mother's husband, if he consented to the insemination. 98 Or.App. at 467-68, 470. Thus the statute did not offend equal protection either on its face or as applied.

The court rejected the donor's due process challenge to the statute on its face. 98 Or.App. at 470. However, the donor also argued that the statute violated due process under the federal and state Constitutions as applied to him, a known donor who had an agreement with the mother to share the rights and responsibilities of parenthood. The court agreed the statute would violate the Due Process Clause of the Fourteenth Amendment as applied to the donor if such an agreement was proved. 98 Or.App. at 470-72.

On this point, the court looked to Lehr v. Robertson, 463 U.S. 248, 261, an adoption case. Lehr dealt with the necessity of notice of pending adoption proceedings to an unwed father who had not filed with New York's putative father registry and had never established a substantial relationship with the child. The Court stated:

When an unwed father demonstrates a full commitment to the responsibilities of parenthood by ‘com[ing] forward to participate in the rearing of his child,’ [citation omitted], his interest in personal contact with his child acquires substantial protection under the Due Process Clause.... But the mere existence of a biological link does not merit equivalent constitutional protection. Lehr, 463 U.S. at 261 (quoted in McIntyre, 98 Or.App. at 470).

The Lehr Court ultimately held that the State's failure to notify the father of adoption proceedings did not deny him due process of law. 463 U.S. at 264-65. No substantive due process right to care, custody, and control of the child had vested in a man who could demonstrate nothing more than a biological link to his offspring. 463 U.S. at 258-62. The Lehr Court noted, however, that an unwed father who demonstrated “a full commitment to the responsibilities of parenthood” could not be absolutely barred from asserting his parental rights without a violation of due process. 463 U.S. at 261.

The McIntyre court reasoned that the Due Process Clause should afford no less protection to a sperm donor who had facilitated artificial insemination than an unwed father, “provided that [the sperm donor] could prove the facts” in his summary judgment affidavit that tended to support the existence of an agreement with the mother and his reliance upon it. Because the court concluded the constitutionality of the Oregon statute as applied to this donor would turn on whether he was given an opportunity to establish those facts, summary judgment in favor of the mother was reversed. 98 Or.App. at 472.
In *C.O. v. W.S.*, 639 N.E.2d 523 (Ohio 1994), the court concluded, as the *McIntyre* court did, that a statute purporting to be an absolute bar to paternity of sperm donors, while constitutional in the absence of an agreement to the contrary, could be unconstitutional as applied when the donor can establish that an agreement to share parenting existed between him and the unmarried woman who was the recipient of the sperm.

Most recently, the Kansas Supreme Court observed that most artificial insemination statutes draw a gender-based line between a necessarily female sperm recipient and a necessarily male sperm donor for an artificial insemination. By operation of the statute, the female is a potential parent or actual parent under all circumstances; by operation of the same statute, the male will never be a potential parent or actual parent unless there is a written agreement to that effect with the female. *In re K.M.H.*, --- P.3d ----, 2007 WL 3119499 (Kan. October 26, 2007). Does this distinction violate the Equal Protection Clause of the United States Constitution?

In conducting its constitutional analysis, the Kansas court reviewed the legislative purposes of the statute. It observed that the statute envisions that both married and unmarried women may become parents without engaging in sexual intercourse, either because of personal choice or because a husband or partner is infertile, impotent, or ill. It encourages men who are able and willing to donate sperm to such women by protecting the men from later unwanted claims for support from the mothers or the children. It protects women recipients as well, preventing potential claims of donors to parental rights and responsibilities, in the absence of an agreement. Its requirement that any such agreement be in writing enhances predictability, clarity, and enforceability. . . . [T]he design of the statute implicitly encourages early resolution of the elemental question of whether a donor will have parental rights. Effectively, the parties must decide whether they will enter into a written agreement before any donation is made, while there is still balanced bargaining power on both sides of the parenting equation.

The court concluded that the statute's gender classification substantially furthers and is thus substantially related to these legitimate legislative purposes and important governmental objectives. It stated that the Kansas statute establishes the clear default positions of parties to artificial insemination. If these parties desire an arrangement different from the statutory norm, they are free to provide for it, as long as they do so in writing. *In re K.M.H.*, --- P.3d ----, 2007 WL 3119499 (Kan. October 26, 2007).