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# REFORMING THE LAW TO RESPECT FAMILIES CREATED BY LESBIAN AND GAY PEOPLE

*Marc E. Elovitz\**

## INTRODUCTION

The case of *Thomas S. v. Robin Y.*<sup>1</sup> has engendered conversations of tremendous significance to the lives of lesbian and gay people and our families. This Essay joins in the rich dialogues created by the parties, amici, trial and appellate courts and members of the lesbian and gay community.

One way to discuss this case is to analyze the relative degrees of truth of various assertions and conclusions made by different speakers. For example, was there, or was there not, regular telephone contact between Thomas S. and Ry prior to this lawsuit? Another mode of discourse is an analysis of the meaning of various assertions and conclusions, or the weight to be assigned to them. For example, of the many facts included in the voluminous briefs, the majority of the appellate division notes that Thomas S. brought congratulatory flowers when Ry was born, while the dissenters note that Thomas S. "was not present when Ry cut her first teeth, started to walk, was sick or needed parental comfort or guidance."<sup>2</sup> Yet, another mode of inquiry considers the relative legal importance of

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\* Staff Counsel, American Civil Liberties Union - National Lesbian and Gay Rights Project. Although the ACLU submitted an amicus curiae brief to the First Department of the Appellate Division of the New York State Supreme Court in the *Thomas S.* case, the author was not one of the attorneys on that brief and the views expressed in this Essay are his alone. The author would like to thank Laura Ryan for her invaluable insights into parenting and the creation and maintenance of loving family relationships.

<sup>1</sup> *Thomas S. v. Robin Y.*, 618 N.Y.S.2d 356 (1st Dep't 1994).

<sup>2</sup> *Id.* at 363 (Ellerin, J., dissenting).

various facts, such as the role of biology, in establishing paternity and the question of what legal status "functional parents" should be afforded.

As the case of *Thomas S.* unfolds, and as others like it arise, these inquiries will necessarily continue, and we all have a responsibility to engage in them to help shape the law and fairly order our lives. This Essay considers the context of the conflict and offers proposals for reforming the law to respect the families created by lesbian and gay people.<sup>3</sup>

Part I of this Essay considers the context of families created by lesbian and gay people, addressing first, the need for respect for these families and second, the ways in which semantic choices reveal varying degrees and natures of such respect. Part II of this Essay calls for reforming the New York statute governing artificial insemination<sup>4</sup> to cover lesbians. Part III of this Essay calls for equal access to anonymous artificial insemination for lesbians.

#### BACKGROUND OF *THOMAS S. v. ROBIN Y.*

Robin Y., Sandra R. and Thomas S. orally agreed that Thomas S. would serve as a known sperm donor, Robin Y. would be artificially inseminated with that sperm, and the child born by this process would be jointly raised by Robin Y. and Sandra R.<sup>5</sup> The parties also agreed that Thomas S. would be available to meet the child if she became curious about her origins.<sup>6</sup> Ry was born in 1981.<sup>7</sup> When Ry was five years old, Robin Y. and Sandra R.

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<sup>3</sup> The author uses the term "families created by lesbian and gay people" as the broadest description of all of the many different relationships and clusters of relationships formed by lesbians, gay men, children and other adults. The category is not limited to families including children with a lesbian and a gay male as biological progenitors.

<sup>4</sup> N.Y. DOM. REL. LAW § 73 (McKinney 1988) [hereinafter DRL § 73]. The term "artificial insemination" is used in this Essay to reflect its use in statutes and case law, though "alternative insemination" is a more appropriate way of describing the procedure which is in no way "unreal."

<sup>5</sup> *Thomas S. v. Robin Y.*, 618 N.Y.S.2d 356, 358 (1st Dep't 1994).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

arranged for her to meet Thomas S.<sup>8</sup> Over the next six years, while Robin Y. and Sandra R. served as Ry's day-to-day caregivers, they permitted Ry to develop a relationship with Thomas S., though all interactions were at their discretion.<sup>9</sup> Following a disagreement with Sandra R. and Robin Y. over the nature and extent of his relationship with Ry, Thomas S. initiated an action in Family Court of the City of New York seeking a declaration of paternity and an order of visitation with Ry.<sup>10</sup>

Robin Y. and Sandra R. opposed the action, and after twenty-six days of hearings, Family Court Judge Edward Kaufmann decided against Thomas S., holding that he was equitably estopped from being issued an order of paternity and an order of visitation.<sup>11</sup> Thomas S. appealed, and the Appellate Division, First Department, reversed in a three to two decision. The court held that Thomas S. was entitled to a declaration of paternity and remanded the case to a different family court judge for a hearing on the issue of visitation.<sup>12</sup>

## I. CONTEXT

### *A. Respecting the Families Created by Lesbian and Gay People*

The law cannot accurately or adequately govern peoples' lives if it is not guided by an understanding of the nature of those lives. The fact that lesbian and gay people are suitable to be parents is far from universally acknowledged in our culture, including our legal culture.<sup>13</sup> Even more fundamentally, there is the lack of awareness

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<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Thomas S. v. Robin Y.*, 157 Misc.2d 858, 599 N.Y.S.2d 377 (N.Y. Fam. Ct. 1993).

<sup>12</sup> *Thomas S. v. Robin Y.*, 618 N.Y.S.2d 356 (1st Dep't 1994).

<sup>13</sup> See, e.g., *S.E.G. v. R.A.G.*, 735 S.W.2d 164 (Mo. Ct. App. 1987) (denying custody based on parents' sexual orientation); *Chicoine v. Chicoine*, 479 N.W.2d 891 (S.D. 1992) (restricting lesbian mother's visitation rights with her child, stating that "[u]ntil such time that she can establish, after years of therapy

of the families being created by lesbian and gay people: families that may include two parents of the same gender, with or without additional involvement in the child's life by other adults who may or may not be biological progenitors of the child. Judges and legislators must begin to respect individual autonomy with regard to reproductive choice and family decision making.

The freedom to create intimate family relationships without interference from the state is protected as a critical component of liberty and autonomy. As the U.S. Supreme Court has held, the right to intimate association "reflects the reality that individuals draw much of their emotional enrichment from close ties with others. Protecting these relationships from unwarranted state interference therefore safeguards the ability to independently define one's identity that is central to any concept of liberty."<sup>14</sup> By respecting the choices of adults who decide to have children and create families, the law reduces the likelihood that there will be substantial or irreconcilable differences as to the rearing of the children.

One example of such understanding and respect can be found in *In re Adoption of Evan*.<sup>15</sup> In this case, a lesbian couple, one member of which was the biological progenitor of the child, sought a second-parent adoption so that both would have a legally recognized relationship with the child. Surrogate Preminger recognized and acted to protect the child's family reality—his "strong parental bond with both" his lesbian mothers, one related to him biologically and one not.<sup>16</sup>

A compelling example of the absence of respect for the families created by lesbian and gay people can be found in the amicus curiae brief of the Council for Equal Rights In Adoption ("CERA")

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and demonstrated conduct, that she is no longer a lesbian living a life of abomination (see *Leviticus* 18:21) she should be totally stopped from contaminating these children").

<sup>14</sup> *Roberts v. United States Jaycees*, 468 U.S. 609, 619 (1984); see also *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977) (freedom of personal choice in matters of family life is one of the liberties protected by due process).

<sup>15</sup> 153 Misc.2d 844, 583 N.Y.S.2d 997 (Sur. Ct. 1992).

<sup>16</sup> The known sperm donor had "explicitly waived" his parental rights. *Id.* at 845, 583 N.Y.S.2d at 998.

filed with the appellate division in the *Thomas S.* case.<sup>17</sup> From the perspective of advocates for "the preservation and reunification of families," CERA argues for seeking sweeping adoption reform that stresses biological ties.<sup>18</sup> CERA suggests that these principles developed in the context of adoption apply in the *Thomas S.* case, and CERA supports legal intervention to recognize and further a relationship between Thomas S. and Ry. However, CERA fails to consider its principles in the context of families created by lesbian and gay people.

The ultimate result of many of CERA's suggestions would be to make it impossible for lesbian and gay people to create families. For example, CERA claims that there is an "innate right to have a father who is a real person."<sup>19</sup> Such a right would require all lesbian mothers to make a sperm donor a "real person," ostensibly by recognizing the donor as the child's biological progenitor and fostering some kind of relationship between the donor and child. CERA evidently maintains that a woman's autonomous right to create a family without a male participant or "father" involved beyond the act of donating sperm is insignificant. If a relationship between donor and child is required, is there any way that a donor would not be granted parental rights, thereby making it possible for women to raise children alone or together without a man?<sup>20</sup>

To be effective and just, the law must be shaped and applied in ways that accurately reflect people's lives. In cases of families created by lesbian and gay people, this principle requires judges and legislators to understand that families may have one parent or two parents of the same gender.

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<sup>17</sup> Amicus Curiae Brief of Council for Equal Rights in Adoption ("CERA"), *Thomas S. v. Robin Y.*, 618 N.Y.S.2d 356 (1st Dep't 1994) (No. 51466) [hereinafter CERA Brief].

<sup>18</sup> *Id.* at 1-4.

<sup>19</sup> *Id.* at 30-31 (quoting ANNETTE BARAN & REUBEN PANNAR, *LETHAL SECRETS: THE PSYCHOLOGY OF DONOR INSEMINATION* 160-161 (1989)).

<sup>20</sup> CERA's lack of respect for lesbian and gay people and their families is also evidenced by their insensitive use of language. For example, CERA describes artificial insemination as a "second-best solution" for couples (presumably heterosexual) who have been unable to conceive through (in CERA's term) "natural" means. *Id.* at 2, 28. CERA also describes people who use donor insemination as being unable to create "natural" families. *Id.* at 28.

### B. Naming

The language used by the various speakers in conversations about the *Thomas S.* case reveals much about the degree and nature of respect afforded to families created by lesbian and gay people. The names that are used are revealing.<sup>21</sup> For example, describing Thomas S. as Ry's "father" begs the question of whether an order of filiation<sup>22</sup> should be issued. Yet, many writers in this case collapsed the statuses of sperm donor and father, suggesting that sperm donors are entitled to full parental rights, even though that was an issue to be decided.<sup>23</sup> In addition to assuming that a male biological progenitor is necessarily a father, many assumed that the child could not understand that these can be two different things, for example, that she could have a male biological progenitor who was not a father.<sup>24</sup>

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<sup>21</sup> Who are the people involved in this dispute and who are they in relation to each other? Thomas S. is given a wide range of names by the parties, the amici, and the parents including: "sperm donor"; "semen donor"; "paternal biological progenitor"; "natural parent"; "biological father"; "purported father"; "close family friend"; "surrogate uncle"; "known father"; "gay father"; "father"; "Petitioner"; and the "man whom [Ry] had called 'Dad.'"

Robin Y. is: "mother"; "lesbian mother"; "birth mother"; one of Ry's "two mothers"; and "Respondent."

Sandra R. is: the "mother's lifetime companion"; one of Ry's "two mothers"; the "second parent"; the "domestic partner"; and Ry's "full mother."

Ry is: Thomas S.'s "daughter" and Cade's "sister."

Cade is: "Sandra's child."

<sup>22</sup> An order of filiation is made by a court or judge having jurisdiction, fixing the paternity of a child born out of wedlock upon a given man and requiring him to provide for its support. BLACK'S LAW DICTIONARY 1097 (6th ed. 1990).

<sup>23</sup> Even short of equating sperm donation with parenthood, some writers seemed to have been attempting to create a rhetorical flourish by making statements such as "there is no doubt [Thomas S.] is the biological father" and "the tests show 99.9% probability of paternity." *Thomas S. v. Robin Y.*, 618 N.Y.S.2d 356, 358 (1st Dep't 1994). Of course, restating that Thomas S. was the sperm donor does not answer the question of what rights the sperm donor has in this case.

<sup>24</sup> The appellate division held that Thomas S. is "known to the child as her father," and commented that "Ry has known petitioner to be her father since age

The question of whether a sperm donor is a "father" has been addressed by courts and commentators. For example, the court in *People v. Sorenson* held that

[a] child conceived through . . . artificial insemination does not have a "natural father," as that term is commonly used. The anonymous donor of the sperm cannot be considered the "natural father," as he is no more responsible for the use of his sperm than is the donor of blood or a kidney.<sup>25</sup>

One commentator endorsed this analogy, suggesting that "[t]he donor's contribution is impersonal, indeed mechanical . . . . The donor is less akin to a biological parent in an adoptive relationship than to a contributor of blood to a needed and wanted transfusion."<sup>26</sup> Another commentator noted, "The law has viewed the paternity of children conceived by artificial insemination as a thing apart from ordinary notions of biological fatherhood."<sup>27</sup> Some use the term "parent" as distinct from father, suggesting that fatherhood entails the giving of sperm, whereas parenthood entails taking part in the raising of a child.<sup>28</sup>

Of course there are other views as to the nature of "fathers" and "fatherhood." Some have argued that all biological progenitors, including semen donors, have the duties of "fatherhood" and cannot abrogate such duties, even though it may currently be morally and

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three and [the order of paternity] will therefore be no shock to her sensibilities." *Id.* at 357, 362. CERA declares that "S. is in fact Ry's biological father," that Ry "has known [this] since she was three years old," and that Ry "is being lied to." CERA Brief, *supra* note 17, at 6. Others argue that Ry understands her biological reality. See, e.g., Amici Curiae Brief of National Center for Lesbian Rights et al., *Thomas S.* (No. 51466).

<sup>25</sup> 437 P.2d 495 (Cal. 1968).

<sup>26</sup> Joan H. Hollinger, *From Coitus to Commerce: Legal and Social Consequences of Noncoital Reproduction*, 18 U. MICH. J.L. REF. 865, 922 (1985).

<sup>27</sup> JOHN P. MCCAHEY ET AL., *CHILD CUSTODY AND VISITATION LAW AND PRACTICE* 1-67 (1993).

<sup>28</sup> Of course, calling someone in *Thomas S.*'s position the "sperm donor" instead of the "father" cannot change the fact that society attaches tremendous significance to biological connections. However, by allowing society to focus on biology, one fails, in some situations, to recognize and respect the relationships and families created by lesbian and gay people.



legally acceptable to do so.<sup>29</sup> The trial court decision denying Thomas S.'s petition for a declaration of paternity has been described as "leav[ing] the child with no legal father . . . ."<sup>30</sup> One amicus in *Thomas S.* described Thomas S. as "by all accounts a good father to his daughter."<sup>31</sup> Of course this is not "by all accounts"—Robin Y. and the dissenting Appellate Division judges and certain amici vigorously assert that he has never been a *father* of any sort to Ry.

The disjunction between the legal and the linguistic makes the question of fatherhood far from simple. There are sperm donors or biological progenitors who may or may not have parental rights and there are persons with parental rights who may or may not be biological progenitors. "[F]atherhood" or "paternity" is a legally, socially, and politically defined relationship, not a biological fact."<sup>32</sup> By adopting a child, a man may become a father despite the lack of a biological connection. On the other hand, a man who is the biological progenitor of a child may be legally excluded from fatherhood by operation of an artificial insemination statute, adoption, or if the mother was married to someone else and an applicable statute prohibits his attempt to gain an order of paternity.<sup>33</sup>

Other terms in addition to "father" are subject to similar analysis. For example, the majority recognized the relationship between Robin Y. and Sandra R., according it status by naming them as "lifetime companion[s]" and "domestic partners."<sup>34</sup> Similarly, the relationship between Ry and Cade<sup>35</sup> is recognized and accorded status by their naming as "sisters."<sup>36</sup> The

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<sup>29</sup> Daniel Callahan, *Bioethics and Fatherhood*, 1992 UTAH L. REV. 735, 739-41 (1992).

<sup>30</sup> MCCAHEY ET AL., *supra* note 27, at 1-72 (1993).

<sup>31</sup> Amicus Curiae Brief of the Lesbian and Gay Parenting Group and Gay Fathers Group at 13, *Thomas S. v. Robin Y.*, 618 N.Y.S.2d 356 (1st Dep't 1994) (No. 51466).

<sup>32</sup> *Anonymous v. Anonymous*, 1991 WL 57753, at \*2 (Sup. Ct. June 18, 1991).

<sup>33</sup> *See, e.g., Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

<sup>34</sup> *Thomas S.*, 618 N.Y.S.2d at 357, 360.

<sup>35</sup> The biological daughter of Sandra R.

<sup>36</sup> *Thomas S.*, 618 N.Y.S.2d at 359.

relationship among Robin, Sandra, Ry and Cade is recognized and accorded status by their naming as "the R.-Y. family."<sup>37</sup> The one relationship between members of the R.-Y. family which the majority does not recognize is that between each child and her non-biological mother.<sup>38</sup>

The differences in naming represent variations in understanding and beliefs about the roles that people play. To treat lesbian and gay people and the families that they create fairly, these families must be understood and respected.

## II. REFORMING NEW YORK'S ARTIFICIAL INSEMINATION STATUTE

Section 73 of New York's Domestic Relations Law ("DRL") provides that when a wife and husband sign a written statement agreeing to conceive a child through artificial insemination using a donor's sperm, and a physician performs the insemination, the husband is deemed to be the legal father for all purposes.<sup>39</sup> Implicit in the statute is the result that the sperm donor, who could

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<sup>37</sup> *Id.* at 358.

<sup>38</sup> Perhaps recognizing the mother-child relationship between Sandra and Ry by naming it would seem to the majority to weaken its determination that Thomas S. is Ry's father.

In an interesting aside, the appellate division recommends "therapy to reestablish the relationship of Ry and her father." *Thomas S.*, 618 N.Y.S.2d at 362. The suggestion here, and elsewhere in the majority decision, is that Robin and Sandra pushed Thomas S. out of his role as father in part by denying him that name, which the court, by its order of filiation, restores. The court then turns to psychotherapy to relocate the actors back into the roles to which they have been (re)assigned.

<sup>39</sup>

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

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

be anonymous or known, is forever barred from asserting paternity despite his biological connection to the child. Operation of the statute results in a legal reality that should accurately reflect the intended family reality—a donor with no parental rights and responsibilities, and two adults with parental rights and responsibilities.

The limitation of New York's artificial insemination statute to situations involving husbands and wives must be cured in order to respect the families created by lesbian and gay people.<sup>40</sup> Like the New York statute, the Uniform Parentage Act ("UPA") speaks only in terms of married women and their husbands.<sup>41</sup> The UPA, as adopted by California, Colorado and Wyoming, however, omits the term "married," thereby affording its protections to unmarried women, including lesbians.<sup>42</sup> To cure this defect in the New York statute, legislation should be enacted to allow unmarried women to gain protection from claims by known sperm donors.<sup>43</sup>

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<sup>40</sup> The Practice Commentary to DRL § 73 notes that the statute applies only to the insemination of married women. There is no comparable legislation, as yet, where the woman who is inseminated has a romantic, but nonmarital, relationship with a man other than the sperm donor. The statute was plainly designed to protect a husband from a claim by his wife that he gave oral consent. The legislature, by insisting upon a formal writing, sought to avoid the inevitable credibility issue that arises in cases of claimed oral consents. Thus, where the wife claims that the consent was oral and the husband denies having given such consent, DRL § 73 should be construed as requiring rejection of the husband as the father of the child. *See* N.Y. DOM. REL. LAW § 73 (Practice Commentary).

<sup>41</sup> UNIF. PARENTAGE ACT § 5 (1994).

<sup>42</sup> CAL. CIV. CODE § 7005(b) (West 1994) (repealed 1994); COLO. REV. STAT. § 19-4-106 (1994); WYO. STAT. § 14-2-103 (1977); *Jhordan C. v. Mary K.*, 179 Cal. App. 3d 386 (Cal. Ct. App. 1986); *In re R.C.*, 775 P.2d 27 (Colo. 1989). In *R.C.*, the court interpreted the omission of the word "married" from the statute as indicating an intent to permit unmarried as well as married women to share in the protection of the statute. *See also* *McIntyre v. Crouch*, 780 P.2d 239 (Or. 1989) (noting that one purpose of the statute was to allow unmarried women to conceive without sexual intercourse), *review denied*, 784 P.2d 1100 (Or. 1989), *cert. denied*, 110 S. Ct. 1924 (1990).

<sup>43</sup> The Practice Commentary to DRL § 73 notes that the rights of known donors in cases not covered by the statute "needs to be addressed, either by obtaining a waiver of rights from the sperm donor prior to insemination or by remedial legislation." N.Y. DOM. REL. LAW § 73 (Practice Commentary).

As an alternative to the enactment of such legislation, DRL section 73 should be expansively interpreted by courts to cover unmarried women. In general, DRL section 73 has been strictly interpreted by the courts.<sup>44</sup> For example, in *Anonymous v. Anonymous*,<sup>45</sup> the court held that only strict compliance with the formalities required by DRL section 73 creates an irrebuttable presumption that the husband is the father of the child. However, depending on the situation presented, a strict interpretation of the statute may not always be appropriate, as the DRL Practice Commentary notes.<sup>46</sup>

Thomas S. argued that DRL section 73 was not applicable because Robin Y. was an unmarried woman, and therefore not covered by the plain language of the statute. There is, however, no basis for a distinction between married and unmarried women and, any imposition of such a distinction serves to deprive lesbians—as well as non-lesbian unmarried women—from the benefits of the statute. The argument that married and unmarried women are not similarly situated<sup>47</sup> does not provide a sound basis because it rests entirely on a specious interest in supporting the goals of certainty and stability in those families which include a marriage relationship and not supporting the goals of certainty and stability in families which do not include a marriage relationship. The affirmative goal

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<sup>44</sup> See, e.g., *Anonymous v. Anonymous*, 151 A.D.2d 330, 542 N.Y.S.2d 586 (1st Dep't 1989) (holding that a husband could challenge the paternity of a child conceived by his wife through artificial insemination without his written consent).

<sup>45</sup> *Id.*

<sup>46</sup> At first blush, the court's insistence on strict compliance with DRL § 73 may seem unduly rigid. Where oral consent or defective written consent is clearly given, there seems to be little reason to follow form over substance. But as the court noted in *Anonymous*, the statute is designed, at least in part, to protect husbands against contrived claims of consent. The strict approach taken in *Anonymous* may well have been appropriate under the particular circumstances presented: the court found that the husband did not know of the particulars of the insemination and had not promised, prior to conception, to assume responsibility. However, it may be less appropriate to apply the strict compliance test to other circumstances. N.Y. DOM. REL. LAW § 73 (1991 Practice Commentary).

<sup>47</sup> See, e.g., *Jhordan C. v. Mary K.*, 179 Cal. App. 3d 386, (Cal. Ct. App. 1986).

should be to provide all women with a high degree of personal and family autonomy, not just those women who are married to men.

DRL section 73 should "not rest on fictitious legal distinctions . . . , but should find its foundation in the reality of family life."<sup>48</sup> While DRL section 73 may provide certainty to husbands and fathers in the artificial insemination process, it also provides certainty to mothers, donors and children. To fail to recognize the relationships in families created by lesbian and gay people would be to fail to effectuate the statute.<sup>49</sup>

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<sup>48</sup> *Braschi v. Stahl Assocs. Co.*, 74 N.Y.2d 201, 209, 543 N.E.2d 49, 53, 544 N.Y.S.2d 784, 789 (1989) (holding that surviving gay life partner is a "family" member for purposes of rent control regulation).

<sup>49</sup> The physician requirement of DRL § 73 is another issue ripe for examination by the courts and legislature. It is widely recognized that a physician is not required for the process of alternative insemination. *See, e.g., Jhordan C.*, 179 Cal. App. 3d at 393-94. However, even recognizing this, courts have interpreted statutes including such a requirement strictly, holding that donor's parental rights are not extinguished by an artificial insemination statute because a physician was not used. *Id.* at 392. In *Jhordan C.*, the court held that the statute reflects the legislature's conscious adoption of the physician requirement, and found that the requirement safeguards health (by allowing the physician to take the donor's medical history and to screen for hereditary and communicable diseases) and helps to formalize the insemination procedure. *Id.* at 393.

The initial draft of the model UPA did not contain a provision requiring physician supervision of the artificial insemination process. However, the drafters ultimately chose to condition the model UPA's applicability to situations supervised by licensed physicians, no doubt in consideration of the inherent risks to all participants in the process, including the child. (citations omitted). *In re R.C.*, 775 P.2d 27, 36 (Colo. 1989) (Kirschbaum, J., concurring).

Reasons against the physician requirement include the woman's right to privacy and autonomy, the cost of physician involvement and a preference for performing artificial insemination at home.

In several states, it is illegal to perform artificial insemination without a physician. *See, e.g.,* CONN. GEN. STAT. § 45a-772 (1993); GA. CODE ANN. § 43-34-26 (1994); OKLA. STAT. ANN. tit. 10, § 551 (West 1989); OR. REV. STAT. § 677.360 (1993). Interestingly, in Oregon, a court refused to read a physician requirement into the artificial insemination statute governing the donor's rights, even though another Oregon statute required the use of a physician in the process. *See McIntyre v. Crouch*, 780 P.2d 239, 241-43 (1989).

## III. ENSURING ACCESS TO ANONYMOUSLY DONATED SPERM

Lesbians should not be forced to confront the myriad of issues raised by using a known sperm donor unless they so desire. There can be benefits to knowing the identity of the sperm donor: (1) medical information and history can be useful to address health problems that the child might face; (2) some children may wish to know the identity of the donor; and (3) women may be better able to screen the sperm because some sperm banks may be unreliable.<sup>50</sup> Yet, discriminatory practices have made access to anonymously donated sperm difficult for lesbians in many situations. To respect the personal and family autonomy rights of lesbians, such discriminatory practices must be prevented.

Anonymous insemination helps to create a predictable scenario for everyone involved. Members of the new family do not need to be concerned that the donor may at any point seek to assert a legal relationship.<sup>51</sup> Donors are assured that they will not be subjected to the rights and responsibilities of parenthood.

Many sperm banks will not provide services to lesbians and other unmarried women.<sup>52</sup> For example, some staff members at the University of Washington's infertility clinic refused to assist

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Another important reason for abolishing the physician requirement, is the fact that physicians often discriminate against lesbians and single women, refusing to assist them with artificial insemination. See *infra* notes 52-56 and accompanying text.

<sup>50</sup> In one extreme example, a physician used his own semen to inseminate married women after telling couples that he had matched the husband's physical traits and religious preference up with an anonymous donor. See JULIA J. TATE, ARTIFICIAL INSEMINATION AND LEGAL REALITY 2 n.1 (A.B.A. 1992) (citing a 1987 survey by Congress' Office of Technology Assessment).

<sup>51</sup> "[S]perm banks routinely require sperm donors to waive any and all rights that may follow from a successful insemination." N.Y. DOM. REL. LAW § 73 (Practice Commentary).

<sup>52</sup> See Carol A. Donovan, *The Uniform Parentage Act and Nonmarital Motherhood-By-Choice*, 11 N.Y.U. REV. L. & SOC. CHANGE 193, 196 (1983); see also *Developments in the Law - Sexual Orientation and the Law*, 102 HARV. L. REV. 1508 (1989).

single women and lesbians with artificial insemination.<sup>53</sup> In a judicially reported decision, a sperm bank refused to assist an unmarried heterosexual couple with artificial insemination, so the couple performed the procedure at home without physician assistance.<sup>54</sup> The situation was recently described as "widespread reluctance of physicians, who, by and large, control artificial insemination, to perform AID<sup>55</sup> upon single, particularly lesbian, women . . . [which creates] a barrier to a woman's success in achieving that goal."<sup>56</sup>

Access to anonymous artificial insemination must be made equally to lesbians and single women as to married heterosexual women. State and local laws which prohibit discrimination by public accommodations on the basis of marital status or sexual orientation should be aggressively enforced to gain such access for lesbians. Specific legislation governing non-discrimination by providers of artificial insemination should be considered and evaluated. Finally, regulatory oversight of artificial insemination should be used to prevent unfounded distinctions based on sexual orientation or marital status which acts as a barrier for lesbians in obtaining anonymously donated sperm.

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<sup>53</sup> Warren King & Carol M. Ostrom, *U.W. Clinic Split Over Fertility Help for Singles: Some Staff Won't Help Lesbians, Unmarried Women Conceive*, SEATTLE TIMES, Nov. 11, 1993, at A1.

<sup>54</sup> *C.M. v. C.C.*, 377 A.2d 821 (N.J. Cumberland Co. Ct. 1977). In 1980, the American Civil Liberties Union, on behalf of an unmarried woman, challenged a policy of Wayne State University's Mott Clinic, which allowed only married women to apply for artificial insemination. The clinic agreed to change its policy. Donovan, *supra* note 52, at 196.

<sup>55</sup> Artificial insemination using a donor's sperm—as opposed to "AIH," artificial insemination using the husband's sperm.

<sup>56</sup> MCCAHEY ET AL., *supra* note 27, at 1-59 (citing McGuire & Alexander, *Artificial Insemination of Single Women*, 43 FERTILITY & STERILITY 182 (1985)) (questioning the basis for apprehension of some physicians that a child's lack of a father might have adverse social, financial and cognitive effects).

## CONCLUSION

The law must be developed and applied in ways that respect the families created by lesbian and gay people. Difficult and heart-wrenching disputes over familial relationships are probably impossible to prevent entirely, but the law can—and indeed must—allow people to be able to order their lives in ways to avoid such disputes when possible. To exclude lesbians from the protections of DRL section 73, while at the same time they face barriers to obtaining anonymously donated sperm, is to invite conflict instead of reducing it. Families created by lesbian and gay people deserve better.



