No. 06-96102-A

IN THE SUPREME COURT
OF THE STATE OF KANSAS

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CAROL G. GREEN
CLERK APPELLATE COURTS

IN THE INTEREST OF:

K.M.H.
A Child Under Age Eighteen
And
K.C.H.
A Child Under Age Eighteen

IN THE MATTER OF THE PATERNITY OF K.C.H. AND K.M.H.
BY AND THROUGH THEIR NEXT FRIEND D.H.
Petitioner-Appellant

vs.

S. H.
Respondent-Appellee.

BRIEF OF *AMICUS CURIAE*

Appeal from the
District Court of Shawnee County, Kansas
Honorable Robert J. Schmisseur, Assigned Judge
District Court Case No. 05-D-1223

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BRIEF OF AMICUS CURIAE
IN SUPPORT OF RESPONDENT-APPELLEE

INTEREST OF AMICUS

Professor Joan Heifetz Hollinger, Susan Frelich Appleton, Naomi R. Cahn, June R. Carbone, Karen Czapanskiy, Nancy E. Dowd, Katherine Hunt Federle, Mary Louise Fellows, Taylor Flynn, Theresa Glennon, Melanie B. Jacobs, Mary Kay Kisthardt, Jason A. Macke, Nancy Polikoff, Catherine Ross, Elizabeth Samuels, Julie Shapiro, Marjorie M. Shultz, E. Gary Spitko, Richard Storrow and Barbara Bennett Woodhouse are professors of family law who seek to protect the constitutional rights of sperm donors, women who opt for artificial insemination, and children conceived by this method. Based on their knowledge of the relationship between assisted reproductive technologies and parentage laws, *amici* believe the *amicus* brief of the Children and Family Law Center urges a radical departure from widely accepted notions of parental responsibility, privacy, and constitutional law. We urge this Court to uphold the constitutionality of K.S.A. 38-1114(f) and to affirm the decision of the trial court.

ARGUMENT AND AUTHORITIES

I. This Case Is Governed By The Plain Language of K.S.A. 38-1114(f).

Kansas law states that when a woman conceives a child through physician-assisted artificial insemination by someone other than her husband, the donor has no parental rights or obligations unless he and the woman have agreed otherwise in writing. *See* K.S.A. 23-128 – 23-130 (providing for use of artificial insemination by married couples); K.S.A. 38-1114(f) (providing that a sperm donor is not a legal parent unless agreed to in writing by the donor and the woman). As the trial court in this case correctly held, the language in K.S.A. 38-1114(f) directly governs this case and requires the

dismissal of the sperm donor's paternity action. *In re Paternity of K.M.H. and K.C.H.*, Memorandum Opinion at 7-8 (Shawnee Co. Dist. Ct., No. 05-D-1223) (Dec. 27, 2005).

In its *amicus* brief, however, the Children and Family Law Center ("Center") urges this Court to disregard the "literal" language of K.S.A. 38-1114(f) and to construe the statute to mean that a known sperm donor automatically is a parent "unless he specifically *waives* his parental rights in writing." Center Brief at 3. (emphasis added).

Amici respectfully urge this Court to reject this argument and to apply K.S.A. 38-1114(f) "as written," in accordance with its plain language and purpose. The "fundamental rule" of statutory construction "is that the intent of the legislature governs if that intent can be ascertained, and when a statute is plain and unambiguous, the court must give effect to the intention of the legislature as expressed rather than determine what the law should or should not be." *Perry v. Bd. of County Comm'rs of the County of Franklin*, 281 Kan. 801, 809, 132 P.3d 1279, 1286 (2006) (internal citation omitted). Thus, "analysis . . . begins with a plain reading of the applicable statutes." *Id.* at 810.

Both the Center and the Appellant acknowledge that the plain language of K.S.A. 38-1114(f) establishes that if a known sperm donor provides semen for artificial insemination through the intervention of a licensed physician, he is not a legal father unless he and the mother agree otherwise in writing. Center Brief at 3. By complying with the statute, a sperm donor does not acquire any parental rights or obligations he might otherwise have standing to seek (or that others might otherwise have standing to impose) as a result of his biological connection to the child.

If the legislature had wished to carve out an exception for known sperm donors, it could have easily done so. *See, e.g., State ex rel. Hermesmann v. Seyer*, 252 Kan. 646,

847 P.2d 1273 (1993) (holding that where the legislature has not created an exemption from an otherwise generally applicable statute, the courts should not create one). Instead, the legislature expressly created a statutory mechanism by which a known donor can assert his rights and preserve his standing to establish his parentage. K.S.A. 38-1114(f) (providing that donor may opt out of general rule established by the statute by entering into written agreement with mother).

Other states have enacted similar statutes that enable men to donate semen without acquiring any parental rights or responsibilities while permitting those who wish to be parents to do so in writing prior to the insemination. *See*, *e.g.*, N.M. Stat. Ann. § 40-11-6(B); N.J. Stat. Ann. § 9:17-44(b). The purpose of these provisions, as one court has noted, is to avoid the "confusion" that may result when a statute fails "to differentiate the rights of known semen donors who have no intent or desire to retain parental rights from the rights of known semen donors who not only intend to retain parental rights but who are led to believe by the unmarried recipient they will be treated as the father of the child." *In Interest of R.C.*, 775 P.2d 27, 33 n. 7 (Colo. 1989) ("A growing number of legislatures have sought to clear up this confusion by enacting laws that extinguish parental rights of semen donors unless the donor acknowledges his paternity in writing.").

The Center argues that this Court should disregard the "literal" statutory language and look to the statute's legislative history and purpose. Center Brief at 4-8. In fact, however, there is nothing in the legislative history or purpose of the statute that supports the Center's assertion that the statute means the opposite of what it says. It is true, as the Center argues, that *one* of the purposes of the 1994 amendments was to encourage voluntary acknowledgements of paternity. *See* Center Brief at 4-8 (discussing legislative

history of amendments that added K.S.A. 38-1114(f) and other provisions). But the amendments also reflect the Legislature's intent to clarify the legal parentage of children born through artificial insemination and the status of sperm donors.

The Supplemental Note states that the purpose of the amendments is not only to clarify that there is a duty of support for all children, but also to provide that "a semen donor, unless agreed to in writing, will not be treated as the birth father of a child unless the artificial insemination procedure is performed on the donor's wife." *See* Center Brief at 7 (quoting Supplemental Note). Contrary to the Center's assertion, there is no inherent conflict between these two objectives. Rather, as other state legislatures have done, the Kansas Legislature simply has enacted parentage statutes that reflect multiple purposes, including both encouraging unmarried fathers to support their children and clarifying the parentage of children born through artificial insemination.

II. The Constitutional Protections Afforded To Parents Do Not Require Kansas To Treat Sperm Donors As Legal Parents.

The Center argues that a sperm donor automatically has a constitutionally protected right to assert his paternity merely by virtue of his biological connection to a child. State and federal case law do not support this view.

The Oregon Court of Appeal rejected this argument in *McIntyre v. Crouch,* 780 P.2d 239 (Ore. Ct. App. 1989). Citing the U.S. Supreme Court's decision in *Lehr v. Robertson*, 463 U.S. 248 (1983), the court held that biology alone does not give rise to a constitutionally protected parental claim. *McIntyre*, 780 P.2d at 245 ("[T]he mere existence of a biological link does not merit . . . constitutional protection." (quoting *Lehr*, 463 U.S. at 261)). Rather, only where a biological father has taken affirmative steps to "demonstrate[] a full commitment to the responsibilities of parenthood" does a

constitutionally protected interest arise. *Id.* (quoting *Lehr*, 463 U.S. at 261). Accordingly, the court held: "There is no constitutional requirement that, because the donor is known to the unmarried woman when he gives his semen, he must have a claim to be a father." *Id.* at 245 n.5. The court further explained: "Simply by donating semen and making his identity known to the unmarried woman, he does not, in the language of *Lehr*, 'grasp the opportunity to accept some measure of responsibility for the child's future.'" *Id.*

Moreover, contrary to the Center's view, the Constitution does not require that states define legal parentage based exclusively on biology. It is well settled that states may define legal parentage based on factors other than biology, such as marriage or a longstanding parental relationship with a child. *See, e.g.*, *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (holding that a state may prevent a child's biological father from asserting legal paternity when child is living with the mother and the mother's husband). Courts may determine that a person other than a child's biological parent has a superior legal claim to be deemed the child's legal parent in some circumstances. *See In re Marriage of Ross*, 245 Kan. 591, 602, 783 P.2d 331, 338-339 (1989) (holding that where a child has an established relationship with her presumed father, a court must consider the child's best interests before ordering a blood test to determine whether the presumed parent is the biological parent); *see also In re Adoption of Baby Boy S.*, 22 Kan. App. 2d 119, 912 P.2d 761 (1996) (affirming constitutionality of Kansas statutes permitting adoption of child without father's consent where father had no tie to child other than biology).

Likewise, statutes like K.S.A. 38-1114(f) establish that, by definition, a donor is not a parent and thus has no parental rights to "waive." This is well within the constitutional authority of the legislature. To the best of *amici*'s knowledge, no court has held that the constitution forbids statutes such as K.S.A. 38-1114(f) that permit men to donate sperm without acquiring any legal parental rights.

The Center further argues that K.S.A. 38-1114(f) is unconstitutional because "it gives the mother unilateral power to bar the children's biological father from asserting his constitutional rights and obligations as a parent, simply by refusing to sign a written agreement." Center Brief at 4. As both a practical and legal matter, however, the choice of whether to donate sperm rests entirely with the donor. A woman cannot coerce a man into providing semen to a physician for the purpose of artificial insemination. If a man is unwilling to donate semen unless he will be treated as the child's father, he may refrain from doing so unless the woman enters into a written agreement prior to the insemination. Ignorance of the statute is no excuse. *Lehr*, 463 U.S. at 264 (holding that "ignorance of the [requirement to register as a putative father in order to be notified of adoption proceedings] cannot be a sufficient reason for criticizing the law itself").

III. The Center's Arguments Logically Apply To Both Anonymous And Known Donors, As Well As To Both Married And Unmarried Women.

If accepted, the Center's position would require the Court to invalidate virtually the entire statutory scheme governing artificial insemination in this state. *Amici* urge the Court to avoid venturing down this radical and unwarranted path.

The Center attempts to distinguish between known and unknown donors, but the Center's two central arguments logically apply to both groups. First, the Center argues that the parental rights of a sperm donor "attach as a matter of law by virtue of being the

biological father." Center Brief at 3. If it were true, however, that a sperm donor necessarily gains parental rights "as a matter of law" simply by virtue of his biological connection to the child, this automatic presumption would apply equally to an anonymous sperm donor, who also shares a biological tie. In this respect, anonymous and known donors are identically situated since both are the biological progenitors of the children conceived through the use of their semen.

Second, the Center argues that a known sperm donor cannot be deemed to have waived his parental rights merely by operation of a statute. Center Brief at 8 (arguing that the legislature cannot create a statutory waiver of a constitutional right). Subsequently, however, the Center asserts that anonymous donors "waive their parental rights in exchange for immunity from parental obligations." Center Brief at 3. The Center offers no explanation as to why this "waiver" would be constitutionally sufficient for an anonymous but not for a known donor. Logically, however, either both groups may forego the opportunity to acquire parental rights by complying with the statute, or neither group may. There is no principled basis for distinguishing between them.

Because the Center's position cannot logically be restricted to known donors, it would open the door for anonymous donors to step forward years later to assert parental rights. There would be no reason to limit this alleged right, which is based exclusively on biology, to known sperm donors based on the theory presented by the Center. Just as the petitioner in this case has done, future sperm donors could demand to inspect clinic records or file a paternity action with regard to a child the donor knew or suspected to be his biological progeny.

The Center's recommended policy would also open the door to mothers, or the state, attempting to track down anonymous donors to establish paternity. In a Pennsylvania case currently under review, for example, a court held that a sperm donor whom the mother had "released from any obligation" was obligated to pay child support even though the mother was married to another man. *Ferguson v. McKiernan,* 855 A.2d 121, 122 (Pa. Super. Ct. 2004), *appeal granted*, 868 A.2d 378 (2005). For three years prior to the mother's petition for child support, the donor had no contact with either the mother or the children, consistent with the parties' agreement that he would remain "anonymous." *Id.* Anonymous donors to a sperm bank are under the same impression that they will remain unknown to any children conceived through the use of their donated sperm and not be responsible for child support. The Center asserts that "a child's fundamental right to parental support is the same regardless of how the child was conceived." Center Brief at 11. If this Court were to accept the Center's position, however, there would be little to stop mothers or the state from seeking to uncover the identities of anonymous sperm donors and to pursue them for child support or to stop husbands from seeking to disavow their obligation to support children born to their wives through artificial insemination.

Similarly, there is no principled reason to limit the Center's argument to children born to unmarried women. Under the Kansas Parentage Act, the presumption that a husband is the father of a child born during the marriage may be rebutted by "clear and convincing evidence" that another man is the biological father. K.S.A. 38-1114(b). Based on the theory argued by the Center, a sperm donor (regardless of whether he was

anonymous or known) would have a constitutionally protected interest in asserting his biological paternity of a child born to a married woman under this statute.

In addition to thwarting the plain language of the Kansas statutes, these results would harm children by deterring men from becoming sperm donors and by destabilizing families and settled expectations.

IV. No Jurisdiction Has Adopted the Rule Proposed By the Center.

The Center's argument that sperm donors should presumptively be legal parents is based largely on a law review article that proposes a "new model" for determining the parentage of children born through assisted reproduction. Marsha Garrison, *Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage*, 113 Harv. L. Rev. 835, 837 (2000). In contrast to the Center's brief, however, Professor Garrison defends her arguments for requiring known sperm donors to be legal fathers on policy rather than constitutional grounds. *Id.* at 858 (arguing that constitutional considerations are largely irrelevant to determining the legal parentage of children born through assisted reproduction).[1]

No state has adopted the Center's proposed rule, either by statute or by case law. In contrast, many states in addition to Kansas have adopted statutes providing that a donor (whether anonymous or known) is not a legal parent. *See* CAL. FAM. CODE § 7613(b); COLO. REV. STAT. ANN. § 19-4-106(2); CONN. GEN. STAT. § 45a-775; DEL. CODE ANN. TIT. 13 § 8-702; IDAHO CODE ANN. § 39-5405; N.D. CENT. CODE § 14-20-60;

[1] These policy concerns are best addressed through means other than the radical measure of requiring donors to be legal parents. For example, children's interests in having access to information about their genetic progenitors could be served by providing the same kinds of access to the health histories of donors as are available to adopted individuals. The interests of children would also be served by continuing to allow women to choose known sperms donors without fear that they will assert parental rights.

N.J. STAT. ANN. § 9:17-44(b); OHIO REV. CODE ANN. § 3111.95(B); OR. REV. STAT. § 109.239(1); TEX. FAM. CODE § 160.702; VA. CODE ANN. § 20-158(a)(3); UTAH CODE ANN. § 78-45g-702; WASH. REV. CODE § 26.26.705; WIS. STAT. § 891.40(2); WYO. STAT. ANN. § 14-2-902. The revised Uniform Parentage Act (UPA) of 2002 also adopts the same rule adopted by Kansas, providing that both married and unmarried women may use known sperm donors and that donors are not legal parents. *See* Unif. Parentage Act § 702 (amended 2002) ("A donor is not a parent of a child conceived by means of assisted reproduction."). The Proposed Model Act Governing Assisted Reproduction, approved by unanimous vote of the American Bar Association Section of Family Law Council on May 5, 2006, likewise endorses this rule. *Id.* at section 602 (defining a legal parent as a person who "consents in a writing to assisted conception with the intent to be legally bound as a parent").

In sum, apart from the limited support provided by Professor Garrison's article, there is no precedent for the Center's proposed rule, which would turn the traditional legal, statutory and common sense presumption that donors are not parents on its head.

V. The Cases Cited by the Center Do Not Support The Center's Proposed Rule.

The Center incorrectly asserts that other states have adopted the Center's position that a known sperm donor should automatically have standing to assert paternity. Center Brief at 13. In fact, however, the weight of precedent, including the cases cited by the Center, is to the contrary.

In *McIntyre*, 780 P.2d 239, for example, a sperm donor claimed that he had provided his sperm "in reliance on an agreement . . . that he would have parental rights." *Id.* at 242. The Oregon statute provided that unless a donor is the woman's husband: