

Can I Get That in Writing?: Established and Emerging Protections of Paternity Rights [*In re K.M.H.*, 169 P.3d 1025 (Kan. 2007)]

Jason Oller*

I. INTRODUCTION

Imagine an unmarried man and woman who have remained best friends since childhood and have decided that they want children. After a long discussion, they make the decision to have children together. The two friends acknowledge that natural conception goes beyond the bounds of their friendship. Accordingly, they agree to use artificial insemination, but they do not memorialize their arrangement in writing. Neither party has any reason to believe that their agreement needs that kind of formality. They conceive on the first attempt, and throughout the pregnancy, the man provides support, takes an active role in the pregnancy, transforms a room in his house into a nursery, and constantly informs family and friends of his coming child.

Nature takes its course and the mother gives birth to a child. For the first three months, the child stays with the mother, and the father visits regularly for extended play sessions. Before the child spends its first night at the father's house, the mother, for unspecified reasons, brings a declaratory action arguing that the father has no parental rights. She bases her action on a Kansas statute that precludes a sperm donor from having parental rights unless he has a written paternity agreement. The judge construes the statute according to its plain language and grants the mother's request. The judgment results in a childless father and a fatherless child.

This scenario resembles the facts of *In re K.M.H.*,¹ a case of first impression not only in Kansas, but throughout the nation.² In its opin-

* B.A. 2007, Fort Hays State University; J.D. Candidate 2010, Washburn University School of Law. I thank all of those people in my life who make life worth living, in particular my friends, family, and fiancé. I want to thank Professor Nancy Maxwell for visiting with me early in the process to aid me in the formulation of my thoughts on this project. Additionally, I appreciate Professor Bill Rich acting as my guide in the labyrinth that is constitutional law. Finally, I thank Mark Lippleman for his patience as an editor, Tim Belsan for his motivational methods, and Angela Chesney Herrington for aiding me in the conclusion of my paper, as well as all other members of the *Washburn Law Journal*.

1. 169 P.3d 1025, 1029-30 (Kan. 2007).

2. *Id.* at 1038. Although the Kansas Legislature is not alone in requiring a written agreement,

ion, the Kansas Supreme Court approved the termination of a father's rights based on an irrebuttable statutory presumption that, without a written agreement, Kansas courts should not consider a sperm donor the natural father of any conceived children.³ In Parts II through IV, this Comment provides the pertinent facts of the case, applicable legal principles, and an examination of the court's opinion.⁴ Part V of this Comment explores the Kansas Supreme Court's misapplication of substantive due process protections usually afforded to parental rights under Due Process Clause precedent. Additionally, that section will discuss the application of contract principles as a means to protect parental rights, an approach that some consider an emerging analysis.⁵

II. CASE DESCRIPTION⁶

SH, an unmarried female lawyer, and her friend DH, an unmarried male non-lawyer, both desired to have a child.⁷ SH considered several options⁸ before asking DH to donate sperm to artificially inseminate her.⁹ The situation suited both parties' needs, so the Kansas residents allegedly decided the terms and reached an oral agreement in Kansas.¹⁰ SH contended that DH agreed to an unconditional sperm donation,¹¹ while DH asserted that they arranged to have children together.¹² According to DH's brief, the parties chose not to put their agreement in writing due to their close friendship.¹³ For this reason, no written agreement about the nature of the donation or the parties' expectations existed.¹⁴

no court "has yet subjected such a statute to [the] constitutional crucible." *Id.*

3. *Id.* at 1030, 1044 (affirming the trial court's decision, which concluded that section 38-1114(f) was constitutional and that the application of the statute effectively terminated all parental rights of the sperm donor).

4. See discussion *infra* Parts II, III, and IV.

5. See discussion *infra* Part V; Katharine K. Baker, *Bargaining or Biology? The History and Future of Paternity Law and Parental Status*, 14 CORNELL J.L. & PUB. POL'Y 1, 21-22, 61 (2004) (arguing that the current law governing paternity has become incoherent and that states need to provide a new system, which should be based on contract law, as it better correlates with the morals, values, and laws of American society).

6. Although the parties did not attempt to controvert many facts, any discrepancies between DH's and SH's versions are noted somewhere in the discussion, either in a footnote or in the text. For the purposes of this Comment, the facts are construed in favor of DH, just as the Kansas Supreme Court interpreted the facts. See *infra* notes 126-127 and accompanying text.

7. *In re K.M.H.*, 169 P.3d at 1029.

8. SH visited the clinic several times, looked at various artificial insemination options, and conducted extensive investigation before concluding that donation by a known sperm donor provided her with the best option because it would allow her to know the children's medical history. Brief of Appellee at 1, *In re K.M.H.*, 169 P.3d 1025 (Kan. 2007) (No. 96,102).

9. *In re K.M.H.*, 169 P.3d at 1029.

10. See *id.* The exact terms of the parties' agreement remained undeveloped by either party or the court, except for whether DH was to act as a father. See *id.*

11. Brief of Appellee, *supra* note 8, at 2.

12. Amended Brief of Appellant at 1, *In re K.M.H.*, 169 P.3d 1025 (Kan. 2007) (No. 96,102).

13. *Id.*

14. *In re K.M.H.*, 169 P.3d at 1029.

DH and SH both attended the first insemination, which allowed DH to provide the necessary specimen to the doctor in person.¹⁵ This particular procedure failed to result in pregnancy, so they tried the insemination process again.¹⁶ For unspecified reasons, DH did not attend the second procedure.¹⁷ The second attempt resulted in conception¹⁸ and on May 18, 2005, SH gave birth to twins, KMH and KCH.¹⁹

The day after giving birth, SH filed a child in need of care (CINC) petition for each child,²⁰ seeking to divest DH of his parental rights.²¹ Initially, SH did not attempt to terminate DH's parental rights using section 38-1114(f) of the Kansas Statutes,²² but instead relied on his lack of prenatal involvement and unfitness as a parent.²³ DH filed an answer to SH's claims along with a paternity action, which asserted that he attempted to provide prenatal support and visit the children.²⁴ After DH filed his petition for paternity, SH moved to dismiss DH's claim of paternity pursuant to section 38-1114(f), and the trial judge combined the causes of action.²⁵

The trial judge decided that section 38-1114(f) applied to DH's situation.²⁶ Furthermore, the judge upheld the statute's constitutionality, so that the lack of a written agreement between the parties barred DH from asserting any rights to paternity.²⁷ DH appealed the ruling, raising the same objections as he did in the trial court, along with a few new arguments.²⁸

15. *Id.* The clinic was located in Kansas City, Missouri. *Id.*

16. *Id.*

17. *See id.* Because DH could not attend the second attempt, he provided the necessary specimen directly to SH, who in turn provided it to the physician. *Id.*

18. Although the artificial insemination procedure certainly occurred in Missouri, one cannot accurately determine where conception actually occurred. Brief of Appellee, *supra* note 8, at 2; *see infra* note 125 (discussing the irrelevance of the place of conception).

19. *In re K.M.H.*, 169 P.3d at 1029.

20. *Id.* SH argued that DH's actions during the pregnancy proved his intent to remain only a sperm donor because DH allegedly never attended fertility tests, sonograms, or medical appointments. *Id.* at 1030. Moreover, SH "argued that D.H. was morally, financially, and emotionally unfit to be a father." *Id.* However, in her CINC petition, SH referred to DH as the "father" fifty-six times. *Id.* at 1043.

21. Amended Brief of Appellant, *supra* note 12, at 2-3.

22. KAN. STAT. ANN. § 38-1114(f) (2000). "The donor of semen provided to a licensed physician for use in artificial insemination of a woman other than the donor's wife is treated in law as if he were not the birth father of a child thereby conceived, unless agreed to in writing by the donor and the woman." *Id.*

23. Amended Brief of Appellant, *supra* note 12, at 2-3.

24. *See In re K.M.H.*, 169 P.3d at 1030.

25. *See* Amended Brief of Appellant, *supra* note 12, at 3. The trial judge requested the parties discuss whether Kansas or Missouri law applied and the constitutionality of section 38-1114(f). *In re K.M.H.*, 169 P.3d at 1029-30.

26. *In re K.M.H.*, 169 P.3d at 1030. In making this decision, the judge also decided that Kansas law, not Missouri law, governed the dispute; that the CINC petition did not recognize DH as a father in writing; that SH's act of providing the semen to the physician on behalf of DH did not take the parties beyond the control of the statute; and that DH's attempts at prenatal support did not change this analysis. *See id.*

27. *See id.*

28. *Id.* at 1030-31. There were six issues on appeal: (1) Did Kansas law govern the issues? (2)

III. BACKGROUND

In addressing DH's and SH's arguments, the Kansas Supreme Court touched on diverse areas of law. One of the key components of the court's decision was its discussion of substantive due process.²⁹ In analyzing this issue, the court examined the roots of the Uniform Parentage Act (UPA) and previous cases involving bars to sperm-donor paternity.³⁰ In addition, the court considered issues of equity in the context of a statute that required a written agreement.³¹ Although the court's discussion did not directly implicate equitable doctrines in contract law, such as promissory estoppel, the allusion to equity in general opened the door for such an argument.³² For this discussion, the Constitution provides the starting point for the applicable law.

A. Substantive Due Process³³

The Fourteenth Amendment to the United States Constitution states, "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."³⁴ This Amendment protects people from action taken by the government against property and liberty interests,³⁵ not only by requiring notice and a hearing³⁶ but also by prohibiting the government from taking arbitrary action that interferes with these rights.³⁷ The latter protections come from the United States Su-

Did section 38-1114(f) pass federal constitutional muster under the Equal Protection and Due Process Clauses? (3) Did section 38-1114(f) require the donor to provide the specimen to a licensed physician? (4) Did a CINC petition equate to a writing between the parties under section 38-1114(f)? (5) Did another provision of section 38-1114 provide parental rights to sperm donors? and (6) Did equity require the court to enforce DH's oral agreement? *Id.*

29. *Id.* at 1040-43.

30. *Id.* at 1034-38.

31. *Id.* at 1043-44.

32. See discussion *infra* Part V.B.

33. As is well known, substantive due process has its roots in protecting the right of parties to contract, as well as other economic freedoms. Anthony Miller, *The Case for the Genetic Parent*: Stanley, Quillion, Caban, Lehr, and Michael H. *Revisited*, 53 LOY. L. REV. 395, 403 (2007) (citing JOHN E. NOWAK & RONALD ROTUNDA, CONSTITUTIONAL LAW 442 (West, 7th ed. 2004)). The use of substantive due process analysis as a means of protecting economic liberties became disfavored by the United States Supreme Court in the 1930s, but the protections provided by substantive due process emerged again to protect property and liberty rights. *Id.* at 403-04 (stating that the trend of protecting fundamental rights with substantive due process started with *Griswold v. Connecticut*, 381 U.S. 479 (1965), and may have finished with *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (plurality opinion)). Today, the primary protection of parental rights comes from substantive due process precedent. *Id.* at 407-08 (citing *Troxel v. Granville*, 530 U.S. 57 (2000)).

34. U.S. CONST. amend. XIV, § 1.

35. "'Liberty' and 'property' are broad and majestic terms. They are among the 'great constitutional concepts . . . purposely left to gather meaning from experience. . . . They relate to the whole domain of social and economic fact, and the statesmen who founded this Nation knew too well that only a stagnant society remains unchanged.'" Bd. of Regents v. Roth, 408 U.S. 564, 571 (1972) (citing Nat'l Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 646 (Frankfurter, J., dissenting)) (alterations in original omitted).

36. See *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

37. *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974). The Fourteenth Amendment has its roots "in the 'law of the land' clause of the Magna Carta." Andrew T. Hyman, *The Little Word "Due,"* 38

preme Court's substantive due process precedent; however, the Supreme Court's precedent has not provided an exceptionally lucid method for assessing substantive due process violations.³⁸ Generally, the Court examines the nature of the right asserted and whether a state has regulated it.³⁹ If the Court recognizes a fundamental right and state regulation, then the Court will review the statute's burden on the right and the state's interest in regulating it.⁴⁰ In the context of these considerations, the Court will determine the appropriate level of judicial review.⁴¹

1. Fundamental Rights⁴²

When deciding if a person has a fundamental right, the Supreme Court looks "not merely [at] the 'weight' of the individual's interest, but whether the nature of the interest is one within . . . liberty. . . ."⁴³ Al-

AKRON L. REV. 1, 10 (2005); see *Collins v. City of Harker Heights*, 503 U.S. 115, 127 n.10 (1992) (citing *Daniels v. Williams*, 474 U.S. 327, 331 (1986) (citing Edward S. Corwin, *The Doctrine of Due Process of Law Before the Civil War*, 24 HARV. L. REV. 366, 368 (1911))). The purpose of both the Magna Carta and the Fourteenth Amendment is "to secure the individual from the arbitrary exercise of the powers of government." *Collins*, 503 U.S. at 127 n.10 (citing *Daniels*, 474 U.S. at 331 (quoting *Hurtado v. California*, 110 U.S. 516, 527 (1884))).

38. See *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (stating that the Supreme Court has determined, in piecemeal fashion, that substantive due process protects the right to bodily integrity, to abortion, to marital privacy, to marry, to have children, to raise children, to use contraception, and probably to refuse life-saving medical treatment); Byron R. Chin, Note, *One Last Chance: Abigail Alliance v. Von Eschenbach and the Right to Access Experimental Drugs*, 41 U.C. DAVIS L. REV. 1969, 1975-79 (2008) (discussing *Glucksberg* and *Casey* as two methods of substantive due process analysis, because each case developed a different framework for determining whether there is a fundamental right at stake and each applied a different standard of review); Note, *Assessing the Viability of a Substantive Due Process Right to In Vitro Fertilization*, 118 HARV. L. REV. 2792, 2798 (2005) [hereinafter *In Vitro Fertilization*] (discussing *Lawrence v. Texas*, 539 U.S. 558 (2003), as confusing the landscape created by *Glucksberg* and *Casey* because the Court seemed to combine elements of both cases).

39. See discussion *infra* Part III.A.1.

40. See discussion *infra* Part III.A.2.

41. See discussion *infra* Part III.A.2.

42. The Supreme Court's recognition of unenumerated rights in the Constitution is not new, but has a tradition stretching back to the birth of the nation. Howard J. Vogel, *The "Ordered Liberty" of Substantive Due Process and the Future of Constitutional Law as a Rhetorical Art: Variations on a Theme from Justice Cardozo in the United States Supreme Court*, 70 ALB. L. REV. 1473, 1478-79 (2007) (noting that the Supreme Court first recognized implied rights in *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798), although not by the name of fundamental rights). Although wide agreement exists that the Bill of Rights does not contain the full listing of all the fundamental rights, a fierce debate rages about the "identity, source, and content" for protection of those rights. *Id.* at 1498. Unenumerated fundamental rights are controversial not only because they have no sound textual basis, but also because their origin has been attributed to various constitutional provisions over the years. *Id.* at 1477-78 (citing *Saenz v. Roe*, 526 U.S. 489, 501-04 (1999) (noting that fundamental rights have come from the Privileges and Immunities Clause); *Eisenstadt v. Baird*, 405 U.S. 438, 453-54 (1972) (noting that equal protection has provided a source of fundamental rights); *Duncan v. Louisiana*, 391 U.S. 145, 148 (1968) (noting that the Due Process Clause has served as a source of fundamental rights); *Poe v. Ullman*, 367 U.S. 497, 542-43 (1961) (Harlan, J., dissenting) (recognizing the unenumerated nature of fundamental rights). Even though the constitutional basis of fundamental rights has varied over the years, in the past forty years, it has again become engrained in the Due Process Clause. *Id.* at 1477 (citing, for example, *Lawrence*, 539 U.S. at 578).

43. *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) (internal citations omitted).

though the Court tries to avoid rigid definitions in this area of law,⁴⁴ it has acknowledged that the Fourteenth Amendment does not protect an infinite number of rights.⁴⁵ The highest protections of the Due Process Clause are only implicated if a party complaining of a substantive due process violation offers proof of a “fundamental right[] and libert[y] . . . ‘deeply rooted in this Nation’s history and tradition.’”⁴⁶

The Court’s commitment to judicial restraint requires it to demand that petitioners carefully describe the right at stake and the state action that interferes with that right.⁴⁷ This requirement ensures that the Court does not create arbitrary lines, but rather sets the limits of substantive due process based on “respect for the teachings of history [and] solid recognition of the basic values that underlie our society.”⁴⁸ If the petitioner can prove the existence of a fundamental right and state action affecting that right, then that party may engage substantive due process protections.⁴⁹

2. Determining the Level of Judicial Review

Traditionally, if the Supreme Court recognizes a fundamental right, it applies strict scrutiny to review the state action.⁵⁰ Nevertheless, the Court appeared to take a different course in *Planned Parenthood v. Ca-*

44. Historically, the Supreme Court decided whether state action implicated the Due Process Clause based on distinctions between rights and privileges, but over time, the Court has undermined and finally overruled this distinction. *Graham v. Richardson*, 403 U.S. 365, 374 (1971). Furthermore, the Court over time has recognized that a property interest includes more than ownership of valuable objects and a liberty interest goes beyond physical constraints imposed by the State. *Bd. of Regents v. Roth*, 408 U.S. 564, 571-72 (1972).

45. *Roth*, 408 U.S. at 570.

46. See *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (citing *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977)).

47. *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992). The Court has recognized the danger of expanding substantive due process protections “because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended.” *Id.*

48. *Glucksberg*, 521 U.S. at 766 (Souter, J., concurring) (citing *Moore*, 431 U.S. at 503).

49. See *Sturgell v. Creasy*, 640 F.2d 843, 853 (6th Cir. 1981); Samantha Harper, Note, “*The Morning After*”: *How Far Can States Go to Restrict Access to Emergency Contraception?*, 38 COLUM. HUM. RTS. L. REV. 221, 249-53 (2006) (discussing within a hypothetical situation that, to implicate the protections of the substantive due process, a claim must allege and prove significant state interference with a fundamental right).

50. See *Glucksberg*, 521 U.S. at 721. Strict scrutiny does not allow states to merely rely on the “rationality or a presumption of constitutionality.” *Id.* at 766-67 (Souter, J., concurring) (citing *Poe v. Ullman*, 367 U.S. 497, 548 (1961) (Harlan, J., dissenting)) (stating that this standard ensures that the state has “an interest sufficiently compelling to place within the realm of the reasonable a refusal to recognize the individual right asserted”). Regardless of the process used by the state, it cannot infringe on a fundamental liberty unless the statute is “narrowly tailored to serve a compelling state interest.” *Reno v. Flores*, 507 U.S. 292, 302 (1993); see generally Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 799 (2006) (recognizing that the concept of strict scrutiny did not enter Supreme Court precedent until *United States v. Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938), but the term “strict scrutiny” did not appear in the Supreme Court’s lexicon until *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942)).

sey,⁵¹ in which it purportedly maintained the application of strict scrutiny analysis under substantive due process precedent, but stated it would only strike down those statutes that posed an “undue burden” on the exercise of a fundamental right.⁵² In subsequent cases, the Court has done little to clarify how the “undue burden” language has changed the standard of review it applies to statutes impinging on fundamental rights.⁵³

Although the effect of the “undue burden” language remains unclear, it seems that before declaring legislation constitutional the Court will still require states to identify a compelling interest.⁵⁴ Additionally, the Court will probably continue to demand that states properly tailor a statute to meet their avowed ends,⁵⁵ but whether the state has properly tailored a statute seems to depend on the extent of the burden placed on one’s fundamental right.⁵⁶ The greater the burden on the right, the closer the Court will examine the correlation between the means and the end.⁵⁷ Even before *Casey*, the Court had already begun to analyze burdens to determine the level of scrutiny.

For instance, in *Zablocki v. Redhail*⁵⁸ a Wisconsin statute barred persons with minors in their care from marrying unless they could obtain a court order, which courts only issued upon proof that the minors would not at the time of the marriage or within the foreseeable future become wards of the state.⁵⁹ The Legislature wanted to ensure that par-

51. 505 U.S. 833 (1992) (plurality opinion).

52. See *id.* at 873-74 (rejecting the trimester framework, but evidently not rejecting the strict scrutiny analysis); *In Vitro Fertilization*, *supra* note 38, at 2807 (discussing that in *Casey* the Court upheld the strict scrutiny standard of review, but had changed the standard by interjecting the “undue burden” language).

53. See *In Vitro Fertilization*, *supra* note 38, at 2808 n.95 (recognizing that *Troxel v. Granville*, 530 U.S. 57 (2000), and *Lawrence v. Texas*, 539 U.S. 558 (2003), struck down statutes under substantive due process, but that neither opinion stated the standard of review, which drew criticism from the concurrence and dissent).

54. See *Casey*, 505 U.S. at 871 (discussing the importance of the state’s compelling interest in the mother’s health and in the life of an unborn child); *In Vitro Fertilization*, *supra* note 38, at 2809 (discussing the necessity of a sufficiently compelling state interest before legislating, although the author believes that instead of applying strict scrutiny the Supreme Court would apply intermediate scrutiny).

55. See *In Vitro Fertilization*, *supra* note 38, at 2809 (discussing that the Supreme Court’s standard of review still includes a tailoring requirement, although the author believes the Court applies something more akin to an intermediate scrutiny tailoring requirement).

56. *Casey*, 505 U.S. at 920 (Stevens, J., concurring) (stating that “[a] burden may be ‘undue’ either because the burden is too severe or because it lacks a legitimate, rational justification”); see *In Vitro Fertilization*, *supra* note 38 at 2812 (discussing that the burden imposed by the regulation may factor into how narrowly the Supreme Court will demand the state tailor the statute).

57. See *In Vitro Fertilization*, *supra* note 38, at 2812-13 (stating that, “[g]enerally speaking, if the regulation in question effectively eliminates a person’s ability to [exercise one’s right] . . . then it will almost certainly be struck down as overbroad, regardless of the importance of the asserted state interest,” but “if the person’s basic freedom . . . remains generally intact, then the regulation is likely to be upheld as long as it is attached to an important state interest”).

58. 434 U.S. 374 (1978).

59. *Id.* at 375. In this case, the Supreme Court examined Wisconsin Statute section 245.10(1), (4), (5) (1973) (repealed 1978). The length of the statute makes replication here cumbersome, but the description in the text gives a good general overview of the statute. See WIS. STAT. § 245.10(1),

ents cared for their out-of-custody children.⁶⁰ The Supreme Court held that it had to apply a strict standard of review because the Wisconsin statute substantially and directly burdened the fundamental right to marry.⁶¹

The Court also engaged in this analysis, albeit in a subtler form, in *Califano v. Jobst*.⁶² The Social Security Act, which has as its goal the proper administration of a tax-based trust fund, provided that an adult disabled dependent child's receipt of child insurance benefits continued only if the recipient married another beneficiary.⁶³ A plaintiff challenged the termination of the child insurance benefits on the basis that it interfered with the fundamental right to marry, but the Supreme Court did not find the interference to be direct and substantial, and therefore applied only a rational basis standard of review.⁶⁴

In the context of these cases, the Court's use of the "undue burden" language in *Casey* makes more sense. It appears that the Supreme Court will determine whether state action has sufficiently interfered with or severely burdened a fundamental right to warrant the highest protections of the Due Process Clause.⁶⁵ To make this determination, the Supreme Court will examine the state action to decide if it has significantly interfered with a person's ability to exercise his or her rights.⁶⁶ Significant interference requires evidence that state action has a direct and substantial impact on the ability to exercise those rights.⁶⁷ If a person can prove such significant interference or a heavy burden, the Supreme Court will likely review the statute under strict scrutiny.⁶⁸

B. The Uniform Parentage Act and Problems Posed by Sperm Donors

As the above discussion recognized, when a state attempts to further a legislative goal by passing a statute, it must ensure that the statute

(4), (5) (1973).

60. *Zablocki*, 434 U.S. at 388.

61. *Id.* at 386-87.

62. 434 U.S. 47, 56-58 (1977).

63. *Id.* at 50-52. The provisions under consideration essentially stated that a child with a disability before the age of eighteen who had the disability after the age of eighteen, and who depended upon a parent wage earner would receive benefits until he or she married. Congress adopted an exception to the loss of those benefits if both persons in the marriage were disabled and received benefits. See 42 U.S.C. § 402(d)(1)(D), (d)(5) (2000).

64. See *Califano*, 434 U.S. at 57-58 (commenting on the rational and reasonable nature of Congress's decision while never directly stating the standard of review).

65. See *Zablocki*, 434 U.S. at 386-87; *Sturgell v. Creasy*, 640 F.2d 843, 853 (6th Cir. 1981).

66. *Sturgell*, 640 F.2d at 853.

67. See *Zablocki*, 434 U.S. at 386-87; Harper, *supra* note 49, at 248 (quoting *Zablocki* for the proposition that the Supreme Court examines the statute for "[t]he directness and substantiality of the interference").

68. See *Zablocki*, 434 U.S. at 388 (applying a standard of review that required the state to have a sufficiently compelling interest and a narrowly tailored law to achieve only those interests, better known as strict scrutiny).

comports with substantive due process;⁶⁹ yet legislatures have found meeting both challenges in the context of paternity rights of sperm donors to be an elusive objective. The original UPA⁷⁰ provides minimal guidance by stating that “[t]he donor of semen provided to a licensed physician for use in artificial insemination of a married woman other than the donor’s wife is treated in law as if he were not the natural father of a child thereby conceived.”⁷¹ The statutory language explains what should occur when married women receive sperm donations but states nothing about unmarried women.⁷²

The court in *C.M. v. C.C.*⁷³ became one of the first to adjudicate the issue of a known sperm donor inseminating an unmarried woman.⁷⁴ It concluded that it would return to the presumptions of paternity⁷⁵ provided by the common law.⁷⁶ The presumption of paternity meant courts would treat a sperm donor as the father with all the rights and obligations attached to parenthood.⁷⁷ As evidenced by *C.M. v. C.C.*, the UPA’s lack of coverage for sperm donors and unmarried recipients who knew each other created the potential for the imposition of parental obligations on men who never wanted them, and for putative fathers⁷⁸ to

69. See discussion *supra* Part III.A.

70. The National Conference of Commissioners on Uniform State Laws wrote the original UPA in 1973, and had as its purpose the unification of the laws governing parentage. See Meghan Anderson, Comment, *K.M. v. E.G.: Blurring the Lines of Parentage in the Modern Courts*, 75 U. CIN. L. REV. 275, 278 (2006). Since the initial drafting, the Conference has made changes to the UPA, which now provides that “a donor is not a parent of a child conceived by means of assisted reproduction.” UNIF. PARENTAGE ACT § 702, 9B U.L.A. 355 (2000).

71. UNIF. PARENTAGE ACT § 5(b), 9B U.L.A. 407-08 (1973). It is instructive to know that subsection (a) of the Act provided that the husband of a woman that receives a sperm donation is treated as if he were the biological father, as long as the parties followed the proper procedures, such as having the insemination performed by a licensed physician, having the husband consent to the donation in writing, and filing the papers properly. *Id.* § 5(a).

72. See *id.* cmt. (noting that the drafter never intended for the original statute to deal with complex issues but instead drafted it to cover one common factual situation).

73. 377 A.2d 821 (N.J. Super. Ct. 1977).

74. See *id.* at 824. In this case, a man and woman in a relationship desired to have a child, but remained unmarried and did not want to have sex prior to marriage. *Id.* at 821. The woman inseminated herself with the man’s semen and subsequently ended her relationship with the donor. *Id.* at 821-22. The case was heard in New Jersey, which, at the time of the decision, had yet to pass a statute governing the relationship between sperm donors, recipients, and the children thereby conceived. See *In re K.M.H.*, 169 P.3d 1025, 1034 (Kan. 2007) (discussing the lack of statute in New Jersey at the time).

75. The common law presumed the legitimacy of a child. *Michael H. v. Gerald D.*, 491 U.S. 110, 124 (1989). In fact, a person could only rebut the presumption at common law if one could prove that the husband could not procreate or had been away for the relevant period of time. *Id.* at 124. The common-law presumption served two purposes. First, the policy ensured that children would have rights of inheritance, without which the state would have had to accept them as wards. *Id.* at 125. Second, the rule sought to protect the peace of the family. *Id.*

76. See *C.M.*, 377 A.2d at 824 (stating that the sperm donor should act as a father to the child; although the court never actually stated the term “presumption of paternity,” but rather noted that if conception had occurred through traditional means, the court would have considered the sperm donor the father).

77. See *id.*

78. A “putative father” is defined as “[t]he alleged biological father of a child born out of wedlock.” BLACK’S LAW DICTIONARY 641 (8th ed. 2004).

unexpectedly thrust their parental rights upon reluctant mothers.⁷⁹

In adopting the sperm donor portion of the UPA, several states attempted to solve the aforementioned problem by modifying the statute's language.⁸⁰ Most state legislatures solved the problem by removing the word "married" from the UPA language, so that the statutes read: "The donor of semen provided to a licensed physician and surgeon for use in artificial insemination of a woman other than the donor's wife is treated in law as if he were not the natural father of a child thereby conceived."⁸¹ If courts applied the statute according to its plain meaning, it functioned as a complete bar to sperm donors' efforts to act as fathers to their children, unless they were married to the recipient.⁸² The absolute ban became fertile ground for challenges to the constitutionality of the statute.⁸³

The Kansas Legislature attempted to solve the difficult problems posed by the sperm donor situation through legislation passed in 1994.⁸⁴ The Legislature removed the word "married," so that the statute would have read like others; however, the Legislature also provided that a sperm donor was not the natural father of any children conceived, unless he had a written agreement between him and the recipient.⁸⁵ Thus, section 38-1114(f) states, "The donor of semen provided to a licensed physician for use in artificial insemination of a woman other than the donor's wife is treated in law as if he were not the birth father of a child thereby conceived, unless agreed to in writing by the donor and the woman."⁸⁶ Although Kansas is not alone in requiring a written agreement for a donor to have protectable parental rights,⁸⁷ no other court has directly adjudicated the constitutionality of such a statute.⁸⁸

79. See *Jhordan C. v. Mary K.*, 224 Cal. Rptr. 530, 537-38 (Ct. App. 1986) (recognizing the purpose of parentage statutes is to avoid problems of parental rights and obligations being thrust upon reluctant parties).

80. See *In re K.M.H.*, 169 P.3d 1025, 1034-35 (Kan. 2007) (citing, for example, CAL. FAM. CODE § 7613(b) (West 2004); ILL. COMP. STAT. 750/40-3(b) (1999); WIS. STAT. § 891.40(2) (2005-06)).

81. See *id.* (recognizing that without the word "married," the statute barred all sperm donors from parental status).

82. See, e.g., *McIntyre v. Crouch*, 780 P.2d 239, 243-44 (Or. Ct. App. 1989) (stating that the statute functions to bar known and anonymous sperm donors, with or without an agreement, from asserting paternity).

83. See discussion *infra* Part III.C.

84. *In re K.M.H.*, 169 P.3d at 1038.

85. *Id.* (citing Minutes of the House Judiciary Committee, January 19, 1994, and February 25, 1994, for the purpose of showing that the legislative record failed to specify why the Kansas Legislature decided to require a written agreement).

86. KAN. STAT. ANN. § 38-1114(f) (2000).

87. See, e.g., N.H. REV. STAT. ANN. § 168-B:3(I)(e) (2002); N.J. STAT. ANN. § 9:17-44(b) (West 2002); N.M. STAT. ANN. § 40-11-6(B) (West 2003).

88. *In re K.M.H.*, 169 P.3d at 1038.

C. Challenges to Statutory Bars on Paternity

Because no other court has specifically adjudicated a constitutional challenge to such a statute, the examination of other cases that bar sperm donors from asserting their paternity rights should provide context for understanding the potential issues.⁸⁹ Most sperm donors have challenged absolute bar statutes on the grounds of due process and equal protection.⁹⁰ Unfortunately, most courts avoid the constitutional issue when faced with these objections by deciding that the factual situation takes the parties outside the purview of the statute.⁹¹

The one exception is *McIntyre v. Crouch*,⁹² in which a sperm donor entered into an oral agreement with the recipient that purportedly granted him parental rights.⁹³ In a filiation action,⁹⁴ the father challenged an Oregon statute, which barred him from asserting parental rights on due process and other grounds.⁹⁵ In applying the statute to the known sperm donor, who had orally agreed with the mother to act as a father to the child, the Oregon Court of Appeals concluded that the statute violated the Due Process Clause.⁹⁶

89. See Recent Case, *Fourth Amendment—Search and Seizure—Ninth Circuit Upholds Issuance of Warrant Based on Recipient List*.—United States v. Kelley, 482 F.3d 1047 (9th Cir. 2007), 121 HARV. L. REV. 1261, 1268 (2008) [hereinafter *E-mail Recipient List*] (noting the importance of analogies in legal reasoning, especially in novel areas of the law).

90. See, e.g., *McIntyre v. Crouch*, 780 P.2d 239, 242-43 (Or. Ct. App. 1989).

91. In *Jhordan C. v. Mary K.*, 224 Cal. Rptr. 530 (Ct. App. 1986), the court avoided the constitutional issue because the donor provided the semen to the mother instead of a licensed physician. *Id.* at 535. This action took them outside of the purview of the statute, and thus the common-law presumption applied, making the donor the father. *Id.* at 537-38 (holding that the sperm donor was the father, but not directly stating the presumption of paternity as the basis for the decision). In *In re R.C.*, 775 P.2d 27 (Colo. 1989), the court stated that the statutory protection against a sperm donor's attempts to establish paternity did not end just "because [the mother] knows the donor." *Id.* at 35. Nevertheless, the court held that the "agreement and subsequent conduct are relevant to preserving the donor's parental rights despite the existence of the statute." *Id.* The court concluded that the existence of an agreement took the parties beyond the situations contemplated by the legislature. *Id.*

In *C.O. v. W.S.*, 639 N.E.2d 523 (Ohio Misc. 1994), a woman had allegedly artificially inseminated herself with the donor's semen. *Id.* at 524. The court, like the others before it, held the statute was inapplicable to the facts before it because the mother had failed to involve a physician in the insemination procedure. *Id.* at 525. Like the court in *McIntyre*, the Ohio court opined that "[a] statute which absolutely extinguishes a father's efforts to assert the rights and responsibilities of being a father, in a case with such facts as those *sub judice*, runs contrary to due process safeguards." *Id.*

In contrast, the court in *Steven S. v. Deborah D.*, 25 Cal. Rptr. 3d 482 (Ct. App. 2005), held that the statute validly prevented a sperm donor from having parental rights, despite the mother's intention to have the sperm donor act as a father. *Id.* at 486. The father, however, had not challenged the statute on due process grounds or equal protection grounds, or if he did, the court never discussed the subject. See *id.* at 486-88.

92. 780 P.2d at 244 (discussing that the court must consider the constitutional problems).

93. *Id.* at 241.

94. A "filiation action" is defined as a "[j]udicial determination of paternity." BLACK'S LAW DICTIONARY 661 (8th ed. 2004).

95. *McIntyre*, 780 P.2d at 242-43. Section 109.239 of the Oregon Statutes, in relevant part, stated: "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." OR. REV. STAT. § 109.239 (2007).

96. *McIntyre*, 780 P.2d at 244.

In determining the constitutionality of the statute, the court relied heavily on *Lehr v. Robertson*,⁹⁷ a Supreme Court decision involving an absent putative father whose parental rights were terminated without a hearing or notice so that another man could adopt his child.⁹⁸ In *Lehr*, the Supreme Court decided that a biological link does not earn much constitutional protection, but that “an unwed father demonstrat[ing] a full commitment to the responsibilities of parenthood by coming forward to participate in the rearing of his child” has a liberty interest that requires substantial protection under the Due Process Clause.⁹⁹ The biological link merely “offers the natural father an opportunity that no other male possesses, [which is] to develop a relationship with his offspring.”¹⁰⁰ Assuming that the putative father seizes the opportunity to act as a father to the child, he has a protectable interest.¹⁰¹

In *McIntyre*, the court determined that the sperm donor had a biological connection with the child, and if he had forged a contract with the mother, oral or otherwise, then he had seized the opportunity to act as a father to the child.¹⁰² Based on this reasoning, the Oregon Court of Appeals held that biological fathers cannot receive different protections under due process based merely on how the parties conceived the child.¹⁰³ At least in Oregon, the court found that an oral agreement could protect a father’s parental rights.¹⁰⁴

D. Contracts and Paternity¹⁰⁵

As the opinion in *McIntyre* highlights, the application of contract law to parental rights is hardly a new concept, especially in the realm of

97. 463 U.S. 248 (1983). At the time, New York had a statute that required putative unwed fathers to sign a registry, as means for those fathers to prove their intent to claim paternity. *Id.* at 251-52 (citing N.Y. SOC. SERV. LAW § 372-c (McKinney 1983)). Signing with the registry entitled fathers to notice before an adoption took place. *Id.* (citing N.Y. SOC. SERV. LAW § 372-c). In addition to signing the registry, fathers could also ensure that they received notice if one of seven other factual scenarios existed, such as a man living with the child and mother while holding himself out as the child’s father. *Id.* (citing N.Y. DOM. REL. LAW § 111-a (McKinney 1983)).

98. *Lehr*, 463 U.S. at 264-65.

99. *Id.* at 261.

100. *McIntyre*, 780 P.2d at 245 (quoting *Lehr*, 463 U.S. at 261).

101. *Id.* (quoting *Lehr*, 463 U.S. at 262).

102. *Id.*

103. *Id.*

104. *Id.*

105. At first glance, contracts and substantive due process seem worlds apart, other than the obvious connection during the Lochner Era. See Miller, *supra* note 33, at 403. One commentator, however, has recognized that a string of Supreme Court decisions adjudicating the constitutional rights of unwed fathers, starting with *Stanley v. Illinois*, 405 U.S. 645 (1972), and ending with *Michael H. v. Gerald D.*, 491 U.S. 110 (1989), not only established the bounds of unwed fathers’ substantive due process rights, but can also be read as consistent with the concepts of implied contracts. See Baker, *supra* note 5, at 34-35 (noting that in cases like *Lehr*, in which the father had no contact or implied contract with the mother or child, the Supreme Court refused to protect the father’s rights, but in cases like *Stanley*, the father’s contact with the children and mother created an implicit contract, and the United States Supreme Court protected his rights).

non-traditional conception.¹⁰⁶ Nevertheless, commentators and courts remain divided about the applicability and attractiveness of applying contract law as a means of determining parental rights.¹⁰⁷ Generally, contracts entered into by the parents disposing of their rights and obligations of custody, care, and support do not bind courts.¹⁰⁸ Courts refuse to uphold these contracts because parties cannot enter into agreements that determine a third-party's rights, or in the case of parents, the children's rights.¹⁰⁹

Instead of allowing these agreements to bind them, courts have held that they may review contracts disposing of parental rights and obligations to ensure the contractual provisions are in the best interests of the child.¹¹⁰ Nevertheless, at least one court has recognized that it does not have to subjugate all other policy concerns to the best interests of the child.¹¹¹ In fact, several states have begun to presume that parents enter into custody and care agreements in the best interests of the child, but courts can still overrule the statutory presumption.¹¹²

E. Promissory Estoppel and the Statute of Frauds

In requiring a written agreement between sperm donors and recipi-

106. Baker, *supra* note 5, at 22 n.101 (citing Joseph Cullen Ayer, *Legitimacy and Marriage*, 16 HARV. L. REV. 22 (1902) for the proposition that “[t]he law of legitimacy (which lets the marital contract determine paternal relationships) predates the law of paternity by at least a thousand years”). Contracts currently govern determinations of paternity in most cases involving non-traditional means of conception, such as surrogacy contracts. *Id.* at 22.

107. Compare *id.* at 21-22 (arguing that paternity law has become, in several instances, incoherent and arbitrary, so the courts should apply a new system of law based on contract principles), and *Ferguson v. McKiernan*, 940 A.2d 1236, 1248 (Pa. 2007) (holding that a sperm donor and known recipient could enter into a valid enforceable agreement that the known donor would not have the rights or obligations of a father), with Marsha Garrison, *Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage*, 113 HARV. L. REV. 835, 861-63 (2000) (discussing that contract approaches to paternity law usually come down to the argument that reliance on actual intent of the parties is the best way to determine parentage, but according to the author, no one has given a full explanation as to why courts and people should prefer actual intent to determine parental rights), and *In re Marriage of Duffy*, 718 N.E.2d 286, 289 (Ill. App. Ct. 1999) (discussing that “[p]arents may not bargain away the interest of their children and the court is not bound by an agreement that does not protect the best interest[s] of the children”).

108. See LINDA ELROD, CHILD CUSTODY PRACTICE & PROCEDURE § 4:7 (2007).

109. See, e.g., *In re Marriage of Duffy*, 718 N.E.2d at 289.

110. ELROD, *supra* note 108 (citing, for example, *In re Marriage of Duffy*, 718 N.E.2d at 288-89, which noted that courts are not bound by agreements entered into by parents that are not in the child's best interests).

111. See *Ferguson*, 940 A.2d at 1248 (noting that, although the best interests of the child is an important policy concern, it does not mean that the court must forego all other policies to enforce it). In *Ferguson*, the Pennsylvania Supreme Court allowed an agreement between a known sperm donor and mother to divest the donor of all rights to care, custody, and support on the basis that the parties' donation closely mirrored an anonymous donation. *Id.* The court's rationale indicated that it uncovered no reason to prevent women from negotiating with a known donor in order to have a child, and until the legislature made the policy clear, the court would uphold such contracts. See *id.*

112. ELROD, *supra* note 108 (citing, for example, KAN. STAT. ANN. § 60-1610(a)(3)(A) (2007)). Section 60-1610(a)(3)(B)(i)-(xi) contains a list of factors that the Kansas Legislature has advised courts to consider in determining what custody arrangement is in the best interests of the child, but the Legislature did not limit the court to those factors. See § 60-1610(a)(3)(B).

ents to protect fathers' claims to paternity and parental rights, section 38-1114(f) seems to implicate contract law.¹¹³ Within the realm of contract law, the Kansas Legislature has also required parties to put their agreement in writing under the statute of frauds.¹¹⁴ If the parties fail to have a written agreement in a situation listed under the statute of frauds, then a court will more than likely decide that the parties cannot enforce the agreement.¹¹⁵

Across the country, courts have struggled to decide whether a party can use an oral agreement and the doctrine of promissory estoppel to overcome a state's statute of frauds.¹¹⁶ Kansas courts, however, have long held¹¹⁷ that promissory estoppel removes an oral agreement from the purview of the statute of frauds when application of the statute "would result in fraud or injustice."¹¹⁸

In Kansas, any person claiming promissory estoppel must prove that "[a] promise [was made] which the promisor should [have] reasonably expect[ed] to induce action or forbearance on the part of the promisee or a third person and which d[id] induce the action or forbearance."¹¹⁹ If these three factors are present, then the promisee can enforce the promise regardless of the statute of frauds if "injustice can be avoided only by enforcement of the promise."¹²⁰ If a party can prove

113. See KAN. STAT. ANN. § 38-1114(f) (2000).

114. Compare KAN. STAT. ANN. § 33-106 (2000), with § 38-1114(f).

115. See KAN. STAT. ANN. § 33-106; *Sturm v. Cont'l Oil Co.*, 292 P. 774, 776 (Kan. 1930) (applying section 33-106 and barring one party from being held liable for another's debt without a written agreement, even if the parties had an oral agreement).

116. See 10 WILLISTON ON CONTRACTS § 27:14 (4th ed. 1999). This treatise on contracts realizes that some courts have held that promissory estoppel can overcome the statute of frauds in narrowly construed circumstances or in a broader range of fact patterns, but in some states, promissory estoppel cannot overcome the statute of frauds at all. *Id.*

117. Since the 1930s, Kansas courts have used the Restatement of Contracts to provide guidance on the theory of promissory estoppel. See *Sw. Coll. v. Hawley*, 62 P.2d 850, 851 (Kan. 1936) (citing RESTATEMENT (FIRST) OF CONTRACTS § 90 (1932)). This trend continued in 1977, when the Kansas Supreme Court used Restatement (Second) of Contracts § 217A (Tentative Draft 1973). See *Walker v. Ireton*, 559 P.2d 340, 345-46 (Kan. 1977) (recognizing promissory estoppel as a way to overcome the statute of frauds, perhaps for the first time in Kansas). Kansas courts continue to apply those same principles today. *Rector v. Tatham*, 174 P.3d 445, 450 (Kan. Ct. App. 2008) (applying the principles of promissory estoppel as laid down in previous cases, although without citing Restatement (Second) of Contracts § 139 (Final Draft 1981)).

118. *Rector*, 174 P.3d at 450; see *Walker*, 559 P.2d at 345-46.

119. *Walker*, 559 P.2d at 345 (citing RESTATEMENT (SECOND) OF CONTRACTS § 217A(1) (Tentative Draft 1973)).

120. *Id.* (citing RESTATEMENT (SECOND) OF CONTRACTS § 217A(1) (Tentative Draft 1973)). The language used in Restatement (Second) of Contracts § 217A (Tentative Draft 1973), is the exact language used in the final draft. See RESTATEMENT (SECOND) OF CONTRACTS § 139 (1981). Additionally, Restatement (Second) of Contracts § 139 (1981) is essentially the same doctrine of promissory estoppel contained in section 90, except that section 139 (section 217A of the Tentative Draft) specifically says that promissory estoppel can overcome the statute of frauds, making an oral agreement enforceable. Compare RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981), with § 139 (1981). One should note, however, that the Kansas Supreme Court has on rare occasions required the parties to have a position of trust, or an allegation of a present misrepresentation of fact, before utilizing promissory estoppel. *Walker*, 559 P.2d at 345. This probably constituted a misstatement of the law, as parties base a theory of promissory estoppel on a misrepresentation of a future action, the promise, while a misrepresentation of a present fact normally indicates an *equitable* estoppel argu-

that promissory estoppel applies to the situation, then the court will limit the remedy as required by justice.¹²¹ Occasionally, the court may only avoid injustice by enforcing the promise. To make that determination, the court considers other remedies and their adequacy, the extent of reliance, the extent to which the parties' actions corroborate the terms of the agreement, and "the reasonableness of the action or forbearance and the misleading character of the promise."¹²² With these legal principles in mind, one can better understand the Kansas Supreme Court's reasoning in *In re K.M.H.*

IV. COURT'S DECISION

The Kansas Supreme Court began its opinion by deciding several preliminary issues, such as standing,¹²³ standard of review,¹²⁴ and choice of law.¹²⁵ Although all of these issues factored into the disposition of the case, only the standard of review had implications on the merits. Because the trial court granted summary judgment, the Kansas Supreme

ment. 28 AM. JUR. 2D *Estoppel and Waiver* § 35 (2000).

121. *Walker*, 559 P.2d at 345 (citing RESTATEMENT (SECOND) OF CONTRACTS § 217A(1) (Tentative Draft 1973)).

122. *Id.* at 346 (citing RESTATEMENT (SECOND) OF CONTRACTS § 217A(2)(d) (Tentative Draft 1973)). The Restatement (Second) of Contracts § 139 (1981) altered the wording used in Restatement (Second) of Contracts § 217A (Tentative Draft 1973) for the factors to consider when determining whether injustice will result if the promise is not enforced, but it does not appear as though a Kansas case has noted the change, probably because the change has little effect on the application of the test. Compare RESTATEMENT (SECOND) OF CONTRACTS § 139 (1981), with RESTATEMENT (SECOND) OF CONTRACTS § 217A (1973 Tentative Draft).

123. Although neither party raised the standing issue, the Kansas Supreme Court decided that DH clearly had standing based on section 38-1115(a)(1) of the Kansas statutes. *In re K.M.H.*, 169 P.3d 1025, 1031 (Kan. 2007). The statutory language "permits a child 'or any person on behalf of such a child'" to bring a cause of action "to determine the existence of a father and child relationship presumed under K.S.A. § 38-1114." KAN. STAT. ANN. § 38-1115(a)(1). As a putative father, DH brought his action pursuant to section 38-1114, and therefore the court concluded that he had standing. *In re K.M.H.*, 169 P.3d at 1031.

124. Because DH only raised questions of law on his appeal, the court reviewed all issues de novo. *In re K.M.H.*, 169 P.3d at 1031 (citing *Kluin v. Am. Suzuki Motor Corp.*, 56 P.3d 829, 833 (Kan. 2002)).

125. In determining whether Kansas or Missouri law applied, the Kansas Supreme Court examined the parties' aggregate contacts with Kansas to determine if it had an interest in resolving the matter. *Id.* at 1031 (citing *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 308 (1981)). As a general rule, Kansas courts have a tendency to apply the doctrine of *lex fori*, which means Kansas courts will usually apply Kansas law unless there is a "clear showing that another state's law should apply." *Id.* at 1032 (citing *Dragon v. Vanguard Indus., Inc.*, 89 P.3d 908, 917-18 (Kan. 2004)). DH argued that Missouri law should apply because the insemination took place there. Amended Brief of Appellant, *supra* note 12, at 7 (citing *In re Marriage of Adams*, 551 N.E.2d 635, 639 (Ill. 1990)). In response, the court noted that the facts of *In re Marriage of Adams* constituted a completely different situation because all significant events happened in the state where the insemination took place, unlike this case where only the insemination occurred in Missouri. *In re K.M.H.*, 169 P.3d at 1032. Furthermore, the court discussed that when the last act necessary to form an agreement is conception of a child, the act of conception is not indicative of the choice of law determination. *Id.* (citing *In re Adoption of Baby Boy S.*, 912 P.2d 761, 767 (Kan. Ct. App. 1996)). Because today's society has become exceptionally mobile, the place of conception carries little weight. *Id.* (citing *In re Adoption of Baby Boy S.*, 912 P.2d at 767). Instead, courts now apply the law of the state which "has the most significant relationship to the child and the parent," which in this case was Kansas. *Id.* (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 287(1) (1969)).

Court reviewed “the evidence in the light most favorable to the non-moving party, D.H.”¹²⁶ Therefore, the court had to accept as true DH’s alleged oral agreement and his assertion that he attempted to provide prenatal support.¹²⁷

After the preliminary matters, the court considered the constitutional issues implicated by the statute.¹²⁸ In his brief, DH challenged the constitutionality of section 38-1114(f) as applied to him, a known sperm donor, but he failed to specify any particular constitutional violation.¹²⁹ Because the cases cited by DH indicated several possible constitutional violations, the Kansas Supreme Court decided to consider each theory, which included equal protection,¹³⁰ procedural due process,¹³¹ and substantive due process.¹³²

Of these theories, the court found the potential for merit only in DH’s substantive due process claim.¹³³ Before considering the validity of DH’s due process argument, the court examined the case law addressing statutes that posed an absolute bar to paternity in the sperm donor context.¹³⁴ The court determined that, even if those other courts

126. *In re K.M.H.*, 169 P.3d at 1031 (citing Wachter Mgmt. Co. v. Dexter & Chaney, Inc., 144 P.3d 747 (Kan. 2006)).

127. *See id.* at 1030.

128. *Id.* at 1032-33. During oral argument, DH admitted that his rights under the federal and state constitutions were the same, so the discussion centered on the United States Constitution. *Id.*

129. Amended Brief of Appellant, *supra* note 12, at 7-9.

130. The Equal Protection Clause argument goes beyond the purview of this Comment, but the Kansas Supreme Court’s analysis is summarized briefly. The court recognized that section 38-1114(f) distinguished between a male sperm donor and a female mother. *In re K.M.H.*, 169 P.3d at 1039. Because the statute always functions to make the mother a parent and only makes the father a parent if the parties had a written agreement, the statute treats them differently. *Id.* Equal protection requires the state to treat similarly situated people similarly; otherwise, the statute must pass an intermediate scrutiny test. *See id.* (citing *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985)). The court cited no authority but noted its doubt that DH and SH were similarly situated “[g]iven the biological differences between males and females . . . in conceiving and bearing a child.” *Id.* Even if the two were similarly situated, however, the statute passed intermediate scrutiny, because the requirement of a writing increased the predictability and clarity of these situations and encouraged sperm donations to help those unable to procreate otherwise. *Id.* Thus, the legislative mandate of a writing furthered a worthy legislative goal by protecting parents and children from parental limbo, and for this reason the statute did not violate equal protection. *Id.* at 1039-40.

131. The procedural due process argument also goes beyond the purview of this Comment, but the Kansas Supreme Court’s analysis is summarized briefly. Without citing authority, the court decided that the requirement of a written agreement was merely a burden of proof that DH could not meet. *In re K.M.H.*, 169 P.3d at 1040. He had a chance to challenge the statute, and for this reason, the State had not denied him procedural due process because a hearing on his oral agreement would have made no difference. *Id.* Additionally, DH’s ignorance of the law has no impact on this analysis. *Id.* (citing *Lehr v. Robertson*, 463 U.S. 248, 264 (1983)). Judge Nancy Caplinger dissented on this point, noting that no case has held that ignorance functions as a waiver of one’s fundamental right; further, she indicated the reasoning in *Lehr* actually requires the Due Process Clause to give the highest protections to a putative father claiming a desire to take an active role in the child’s life. *Id.* at 1048-50 (Caplinger, J., dissenting). Judge Caplinger stated that, by presuming waiver of one’s rights, the court has violated the Due Process Clause. *Id.* (the dissent failed to state whether waiver of a fundamental right amounted to a violation of procedural or substantive due process).

132. *In re K.M.H.*, 169 P.3d at 1040 (majority opinion).

133. *See id.*

134. *See supra* notes 89-104 and accompanying text (discussing several of the same cases used by the court).

had properly decided those cases, they had little persuasive authority because section 38-1114(f) allowed the parties to opt out of the statute by obtaining a written agreement.¹³⁵ Because the statute allowed DH to claim his parental rights and protect his liberty interest, similar to adding one's name to the putative father registry in *Lehr*, the court remained unconvinced that "the requirement of a writing. . . violate[d] D.H.'s substantive due process rights."¹³⁶

In his brief, DH argued that section 38-1114(f) could have distinguished between known and unknown donors, signifying that the State failed to narrowly tailor the statute.¹³⁷ Consequently, DH contended that the statute violated the United States Constitution.¹³⁸ The Kansas Supreme Court addressed these arguments by stating that DH failed to understand the workings of the statute.¹³⁹ It held that the writing requirement does not function to "cut off rights that have already arisen and attached," but rather "ensures no *attachment* of parental rights to sperm donors in the absence of a written agreement to the contrary."¹⁴⁰ Because the obligation of acquiring a written agreement had not burdened DH's right to the point of pushing the constitutional analysis in his favor, the court decided the statute applied to the situation, irrespective of any minor tailoring issues.¹⁴¹ Although the court ultimately upheld the statute,¹⁴² it closed that portion of its discussion by agreeing

135. *In re K.M.H.*, 169 P.3d at 1038.

136. *Id.* at 1040-41. One author makes the argument that an artificial insemination statute should require the donor and mother to write down their agreement for it to have effect. Vickie L. Henry, Note, *A Tale of Three Women: A Survey of the Rights and Responsibilities of Unmarried Women Who Conceive by Alternative Insemination and a Model for Legislative Reform*, 19 AM. J.L. & MED. 285, 304-05 (1993). According to this article, a writing requirement is legitimate because the father still has the opportunity to grasp his parental rights as required by *Lehr*, but the state has merely narrowed how he may grasp that right. *Id.*

137. See Amended Brief of Appellant, *supra* note 12, at 8 (citing *Steven S. v. Deborah D.*, 25 Cal. Rptr. 3d 482, 486 (Ct. App. 2005)). Although DH did not use the term "narrowly tailored," he basically argued that Kansas had not narrowly tailored the statute because it did not recognize the parties' intentions. See *id.* Moreover, an amicus curiae brief filed on behalf of DH made constitutional arguments based on the Due Process Clause. Although the amicus curiae failed to distinguish between procedural and substantive due process arguments, it also argued that the Legislature failed to narrowly tailor the statute. Amicus Curiae Brief Filed on Behalf of Appellant by Washburn University School of Law Children and Family Law Center at 9, *In re K.M.H.*, 169 P.3d 1025 (No. 96,102).

138. See Amended Brief of Appellant, *supra* note 12, at 9.

139. *In re K.M.H.*, 169 P.3d at 1041.

140. *Id.* (emphasis in original). Furthermore, the court recognized that the statute reflects the expectations of most sperm donors because most donate anonymously, but, for any donor that wishes to protect his rights, the statute provides a way for him to do so by acquiring a written agreement. *Id.*

141. *Id.* at 1040-41. The Kansas Supreme Court never actually reviewed, in depth, whether the statute substantially interfered with DH's rights. See *id.* at 1041.

142. The court addressed one final constitutional argument made by DH—that the statute gave the mother the power to decide whether the donor could act as a father to the child. *Id.* The court disagreed that this made the statute unconstitutional, as the United States Supreme Court had already decided that married women can choose whether to carry a pregnancy to term. *Id.* (citing *Planned Parenthood v. Danforth*, 428 U.S. 52, 69-71 (1976)). Furthermore, the Kansas Supreme Court noted that the statute allowed men to choose whether they would donate sperm based on whether they could obtain a written agreement securing their parental rights. *Id.*

with DH that promoting the presence of two parents in a child's life reflects good policy.¹⁴³ The Kansas Supreme Court said it best: "[T]hat [which] is constitutional is not necessarily wise."¹⁴⁴

The court then discussed several issues concerning statutory interpretation¹⁴⁵ and parental rights under different portions of section 38-1114¹⁴⁶ before finally reaching DH's equity argument.¹⁴⁷ In his equity argument, DH asserted an equitable estoppel claim on the basis that SH used her knowledge as a lawyer to convince him to forego an opportunity to obtain independent legal counsel and a written agreement.¹⁴⁸ Although the court determined that DH had insufficiently developed the appellate record to address the argument,¹⁴⁹ it recognized that a factual situation might arise in which equity would require the court to forego the language of the statute and hold for a sperm donor-father.¹⁵⁰

V. COMMENTARY

In *In re K.M.H.*, the Kansas Supreme Court refused to apply the

143. *In re K.M.H.*, 169 P.3d at 1041.

144. *Id.*

145. DH made two arguments based on statutory interpretation. First, DH contended that the court should rely on the plain language of the statute, which he stated clearly required him to give the sperm donation directly to a physician. Amended Brief of Appellant, *supra* note 12, at 10-12. The court disagreed because, when it examined the grammatical structure of section 38-1114(f), it found the legislative intent clear and unambiguous. *In re K.M.H.*, 169 P.3d at 1042. The court refused to adopt DH's interpretation because the grammatical structure of the statute only requires that something or someone must give the semen to a licensed physician, but the language does not require the donor to engage in the activity directly. *Id.* Hence, DH and SH did not create a situation beyond the purview of the statute.

DH also argued that the parties had met the statutory requirement of a writing acknowledging his paternity by exchanging legal documents in which SH referred to him as the "father." Amended Brief of Appellant, *supra* note 12, at 13-14. SH countered that even though these writings identified DH as the father, the parties' minds never met—an important component for finding a binding agreement. Brief of Appellee, *supra* note 8, at 30. The court agreed with SH, stating that it would require "Lewis Carroll's looking glass" to understand DH's argument, as SH wanted to terminate DH's parental rights. *In re K.M.H.*, 169 P.3d at 1043. Because the parties had no writing, SH had no choice but to file a pleading, which in this case is not sufficient to constitute the required writing. *Id.*

146. DH argued that Kansas created a presumption of paternity under section 38-1114(a)(4) for those men that openly and notoriously hold children out as their own, which DH claimed he had done. Amended Brief of Appellant, *supra* note 12, at 17. The court responded by holding that section 38-1114(f) governed the situation because Kansas had drafted it more specifically to the sperm donor context than section 38-1114(a). *In re K.M.H.*, 169 P.3d at 1043 (citing *State ex rel. Tomasic v. Unified Gov't*, 955 P.2d 1136 (Kan. 1998), for the proposition that specific statutory provisions govern over the general ones).

147. *In re K.M.H.*, 169 P.3d at 1043. Because DH had failed to reserve this issue for appeal, the court was not required to address the issue, but chose to do so, given the fundamental rights at stake. *Id.* at 1044.

148. *Id.* at 1043-44.

149. The court decided that even if it did reach the merits of this argument, ignorance of the law did not excuse a failure to comply with it. *Id.* at 1044 (citing *State ex rel. Murray v. Palmgren*, 646 P.2d 1091, 1100-01 (Kan. 1982)).

150. *Id.* at 1044 (noting that some of those instances might include if a recipient of sperm: (1) kept the statute hidden from a potential father; (2) convinced the father not to obtain a written agreement; or (3) induced the donor into not obtaining independent legal counsel). Noticeably absent from the court's discussion is promissory estoppel.

protections afforded parental rights under substantive due process precedent.¹⁵¹ The court understood the policy implications of its decision, but determined that nothing about the statute forced it to make an independent policy determination.¹⁵² Unfortunately, the court reached this problematic resolution by only asking whether section 38-1114(f), by allowing the parties to opt out of the statute, had avoided the constitutional burdens posed by absolute bar statutes.¹⁵³ In phrasing the question in this manner, the court failed to address the problems posed by the statute.

Instead, the court should have asked whether Kansas could draw a statutory line that requires sperm donors to have a written agreement before they have exercisable rights. The requirement of a written agreement still significantly interferes with fundamental rights, and for this reason, the court should have subjected section 38-1114(f) to strict scrutiny. Because the Kansas Supreme Court did not properly consider the extensive burden placed on DH's right, it never applied strict scrutiny to section 38-1114(f), and therefore failed to recognize the unconstitutionality of the statute.

In addition to the above considerations, the court rejected DH's equitable estoppel argument.¹⁵⁴ Although the court probably decided that issue correctly, DH could have made a stronger argument in equity. In particular, DH could have contended that the doctrine of promissory estoppel should have prevented SH from terminating his rights under section 38-1114(f). DH should not have had to make those arguments, however, because the court should have found the statute unconstitutional.

A. SECTION 38-1114(f) Violates Substantive Due Process: An Established Analysis

In this case, the Kansas Supreme Court did not conclude that section 38-1114(f) placed a significant burden on DH's fundamental right to be a parent.¹⁵⁵ If the court had recognized a significant burden, then it would have applied a heightened standard of review, which would have resulted in the court declaring section 38-1114(f) unconstitutional.

151. See Miller, *supra* note 33, at 403-08 (discussing the historical protections provided by substantive due process to parental rights with an emphasis on how it has protected the fundamental rights of unwed fathers).

152. *In re K.M.H.*, 169 P.3d at 1042 (discussing the public policies at stake and that a proper weighing of these interests is best left to the legislature).

153. See *id.* at 1040 (stating that Kansas had not absolutely barred a father from grasping the opportunity to act as a father, and for this reason the statute was held constitutional).

154. *Id.* at 1043-44.

155. See *id.* at 1040-41 (stating that a writing does not transform "an otherwise constitutional statute into one that violates DH's substantive due process right").

This section of the Comment will discuss DH's fundamental right, the state's compelling interest, the proper determination of the standard of review, and the application of that standard.

1. SECTION 38-1114(f) Significantly Interferes with a Fundamental Right

Before a father can invoke the protections of substantive due process, he must first describe to the court the nature of his right and establish that it is fundamental.¹⁵⁶ The United States Supreme Court has referred to the right to conceive and raise children as "one of the basic civil rights of man,"¹⁵⁷ which are "rights far more precious . . . than property rights."¹⁵⁸ Moreover, the "custody, care, and nurture of . . . child[ren] reside[s] first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."¹⁵⁹ In addition, the Supreme Court has long recognized these parental rights as well-established in the nation's history.¹⁶⁰ In *In re K.M.H.*, the Kansas Supreme Court stated that DH's only worthwhile due process argument came from substantive due process, as section 38-1114(f) implicated "D.H.'s fundamental right to care, custody, and control of his children."¹⁶¹ As described by the Kansas Supreme Court, DH's right comports with those described and traditionally protected by the United States Supreme Court.¹⁶² Therefore, the court properly recognized that DH described his right and proved its fundamental nature.

Moreover, these fundamental parental rights exist even if the biological link between the parent and child comes by way of artificial insemination¹⁶³ and remains unlegitimized by marriage.¹⁶⁴ The United

156. See *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992).

157. *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (discussing the fundamental right to procreate).

158. *May v. Anderson*, 345 U.S. 528, 533 (1953) (discussing the parental rights of care, custody, and control) (internal citations omitted).

159. *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (discussing the rights of parents to raise their children according to their beliefs). The Supreme Court in *Stanley v. Illinois* arranged the structure for the text accompanying this and the preceding two footnotes. 405 U.S. 645, 651 (1972).

160. See *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (deeming the right to conceive and raise one's children as "long recognized at common law as essential to the orderly pursuit of happiness by free men"); see also *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (noting the parental rights of care, custody, and control as "the oldest of the fundamental liberty interests recognized by this Court"); *Miller*, *supra* note 33, at 408 (discussing that the Supreme Court has used the Fourteenth Amendment as the primary means of protecting the fundamental rights of parents since the time of *Meyer*).

161. *In re K.M.H.*, 169 P.3d 1025, 1040 (Kan. 2007).

162. See *id.*; *supra* notes 156-160 and accompanying text (referring to parental rights as fundamental and describing them as the right to care, custody, and control).

163. See *McIntyre v. Crouch*, 780 P.2d 239, 245 (Or. Ct. App. 1989) (citing *Lehr v. Robertson*, 463 U.S. 248, 261 (1983), for the proposition that the means of conception does not affect an unwed father's rights; instead courts should determine paternity and parental rights of a putative father based not only on the biological connection, but also on whether the putative father has seized the opportunity to parent).

164. See *Stanley*, 405 U.S. at 651-52 (citing *Levy v. Louisiana*, 391 U.S. 68, 71-72 (1968), in which

States Supreme Court has already stated that a biological link provides fathers with a superior opportunity to act as a father to a child, and so long as he seizes that opportunity, the substantive due process clause will protect his rights from significant state interference.¹⁶⁵

In DH's case, Kansas limited the manner in which he could seize that opportunity by requiring him to obtain a written agreement.¹⁶⁶ One might argue that section 38-1114(f) establishes a legal test to determine paternity rather than relying on biology, but that "is to avoid the issue. For [substantive due process] necessarily limits the authority of a State to draw such 'legal' lines as it chooses."¹⁶⁷ Section 38-1114(f) constitutes state action that interfered with DH's ability to exercise his rights.¹⁶⁸ If the State had a compelling interest, as discussed in the next section, and the statute significantly interfered with the exercise of his parental rights, then the Kansas Supreme Court should have applied strict scrutiny to determine the validity of the statute¹⁶⁹ instead of concluding that the statute was not burdensome enough to "tip[] the constitutional scales in favor of D.H."¹⁷⁰

2. Determining the Level of Judicial Review

Once the court determines that state action impedes the exercise of a fundamental right, it will then examine the degree to which the right is burdened. The United States Supreme Court has decided that it should apply strict scrutiny only if the state action significantly interferes with people's ability to exercise their rights.¹⁷¹ The Court makes this determination by examining whether the statute directly and substantially

the Supreme Court decided that the State had unconstitutionally barred natural but illegitimate children from pursuing the estate of their deceased mother "because familial bonds in such cases were often as warm, enduring, and important as those arising within a more formally organized family unit").

165. See *Lehr*, 463 U.S. at 262.

166. See KAN. STAT. ANN. § 38-1114(f) (2000) (requiring a written agreement between a sperm donor and recipient before granting the donor parental rights).

167. *Stanley*, 405 U.S. at 652 (citing *Glonn v. Am. Guarantee & Liab. Ins. Co.*, 391 U.S. 74, 75-76 (1968)). The bracketed material originally stated "Equal Protection Clause," and while substantive due process is obviously different from equal protection, they both function to restrict the ability of states to pass laws without justification, so the change seems justified. Compare *Glonn*, 391 U.S. at 75-76 (stating that equal protection limits the lines states can draw), with *Collins v. City of Harker Heights*, 503 U.S. 115, 126-27 (citing *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 196 (1989), for the proposition that the Due Process Clause limits the states from taking arbitrary action or line-drawing).

168. See *Stanley*, 405 U.S. at 649 (recognizing that the Court could review state law under the Due Process Clause because it constituted state action).

169. See *Sturgell v. Creasy*, 640 F.2d 843, 853 (6th Cir. 1981) (discussing that a substantial interference with the exercise of a person's fundamental rights warrants application of strict scrutiny, otherwise the courts will apply only a rational basis test to the statute). Courts use strict scrutiny to ensure that the state has drawn a properly justified line. See *Roe v. Wade*, 410 U.S. 113, 155 (1973).

170. See *In re K.M.H.*, 169 P.3d 1025, 1040 (Kan. 2007) (providing only an overview of whether section 38-1114(f) substantially interfered with DH's rights).

171. See *Sturgell*, 640 F.2d at 853.

burden the ability to exercise a right.¹⁷² To appropriately determine whether section 38-1114(f) significantly interfered with the exercise of DH's fundamental rights, a more in-depth evaluation of the Supreme Court cases of *Zablocki* and *Califano* proves useful.¹⁷³

First, in *Zablocki*, the Court explained that the requisite burden of proof that one's children will not become wards of the state barred many people from ever exercising their right to marry and would force others to forego marriage.¹⁷⁴ In *Califano*, the Court recognized that the termination of child insurance benefits may make some marriage partners less attractive, but it did not deny anyone the ability to marry.¹⁷⁵ Thus, the Court determined that the Wisconsin statute, by barring some people from ever marrying, substantially interfered with the right to marry, whereas the Social Security Act merely made marriage financially more difficult for some people.¹⁷⁶

Next, in *Zablocki*, the Wisconsin statute attempted to achieve its goal by solely targeting people's ability to marry.¹⁷⁷ In *Califano*, the Social Security Act achieved its goal by terminating the child insurance benefits of those disabled children who married.¹⁷⁸ The Court determined that the Wisconsin statute specifically targeted people's ability to marry by taking away their right to marry, a direct burden, but the Social Security Act only tangentially affected people's ability to marry through termination of a person's child insurance benefits.¹⁷⁹ Because the statute in *Zablocki* resulted in a heavier burden on the fundamental right to marry, the Supreme Court applied a strict scrutiny test, while in *Califano* the Court applied a lesser standard of review given the lesser burden.¹⁸⁰ The question in *In re K.M.H.* is whether section 38-1114(f) is more akin to the statute in *Zablocki* or *Califano*.

172. See *id.*; Harper, *supra* note 49, at 249 (discussing that the burden does not have to constitute an absolute or total inability to exercise one's right; something as simple as a restriction can significantly interfere with one's ability to exercise a right).

173. See *Zablocki*, 434 U.S. at 387 n.12 (comparing the difference between the statutes at issue in *Zablocki* and *Califano*); *Sturgell*, 640 F.2d at 853 (elaborating on the comparison made in *Zablocki*); see also *supra* notes 58-64 and accompanying text (discussing the background in these two cases).

174. *Zablocki*, 434 U.S. at 387. The Court determined that Wisconsin had set the evidentiary burden so high that it pushed the scales of the Constitution in favor of those who wanted to marry but could not under the statute. See *id.*

175. See *Califano v. Jobst*, 434 U.S. 47, 58 (1977).

176. Compare *Zablocki*, 434 U.S. at 387 (describing a heavy evidentiary burden that prevented some people from marrying), with *Califano*, 434 U.S. at 58 (holding that the loss of benefits functioned as an obstacle that made marriage with some people more difficult, but far from impossible).

177. See *Zablocki*, 434 U.S. at 387.

178. *Califano*, 434 U.S. at 56-58. In *Califano*, the petitioning party only lost his child insurance benefits, which amounted to a total loss of only \$20 every month. *Id.* at 58 n.17.

179. Compare *Zablocki*, 434 U.S. at 387 (discussing that the statutory bar only affected people's ability to marry), with *Califano*, 434 U.S. at 58 (noting that the termination of people's child insurance benefits may or may not affect people's ability to marry).

180. *Zablocki*, 434 U.S. at 388; see *Califano*, 434 U.S. at 56-57 (without stating the standard of review, the Court allowed the statute in *Califano* to pass constitutional muster as rational and reasonable).

Section 38-1114(f) is more like the statute in *Zablocki* than the statute in *Califano* for two reasons. First, section 38-1114(f) bars sperm donors from exercising their parental rights if they cannot bring forth evidence of a written agreement, which sounds extremely similar to the statute in *Zablocki* that barred people from marrying who could not produce evidence that their children would not become wards of the state.¹⁸¹ This is unlike *Califano* because section 38-1114(f) did not merely make it more difficult to exercise one's parental rights; it actually barred some people from being a parent.¹⁸² Second, section 38-1114(f) specifically targets a sperm donor's ability to exercise his parental rights by declaring that he has no rights without a written agreement, which again sounds like the Wisconsin statute in *Zablocki* that specifically targeted one's right to marry for not having the ability to provide a particular kind of evidence.¹⁸³ Section 38-1114(f) places a burden directly on a sperm donor's ability to parent, which is nothing like *Califano*, where the statute only created a discouraging financial condition that tangentially affected the fundamental right to marry.¹⁸⁴

Section 38-1114(f) places a substantial and direct burden on a fundamental right, just like the statute in *Zablocki*.¹⁸⁵ Therefore, this case consists of the classic set of conditions that have traditionally resulted in the application of strict scrutiny.¹⁸⁶ As such, the Kansas Supreme Court should have reviewed section 38-1114(f) under strict scrutiny to ensure Kansas used the least restrictive means to meet a compelling state interest.¹⁸⁷

3. Strict Scrutiny

Because the context calls for the application of strict scrutiny, the court should have determined whether the state had a compelling interest and whether section 38-1114(f) was narrowly tailored to meet that interest.¹⁸⁸ Before a court deems a state interest compelling, it must first uncover the state's interest in passing the statute, which is normally done by examining the legislative history.¹⁸⁹ In this case, the legislative

181. *Cf. Zablocki*, 434 U.S. at 386-87.

182. *See Califano*, 434 U.S. at 58.

183. *Cf. Zablocki*, 434 U.S. at 386-87.

184. *See Califano*, 434 U.S. at 57-58 (affecting a person's child insurance benefits not by targeting a person's ability to marry, but by targeting the benefits themselves).

185. *See supra* notes 179-184 and accompanying text (discussing the significant burden that section 38-1114(f) placed on DH's fundamental right to parent).

186. *See Zablocki*, 434 U.S. at 388.

187. *Cf. id.* at 386-87.

188. *See Washington v. Glucksberg*, 521 U.S. 702, 721 (1997); 16A AM. JUR. 2D *Constitutional Law* § 387 (1998).

189. *See Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421, 452-53 (1986) (discussing legislative history as a means of determining the government's interest in passing the law).

history provides little guidance as to why the Kansas Legislature worded section 38-1114(f) the way it did.¹⁹⁰

Even though the legislative history provided little to no guidance on the issue, the Kansas Supreme Court agreed with the court in *McIntyre* that the sperm donor statute served a state interest.¹⁹¹ According to the court, Kansas has an interest in aiding couples and single females in conceiving children by encouraging sperm donors to provide the necessary biological material.¹⁹² To encourage sperm donations, the statute must protect the rights anticipated by donors and recipients in making donations, and provide a means to resolve issues of paternal rights and obligations.¹⁹³

Assuming Kansas planned to advance the aforementioned interests by enacting section 38-1114(f), difficulties abound in deciding if those interests reach the level of compelling because the United States Supreme Court has failed to provide a test for recognizing a compelling state interest.¹⁹⁴ Nevertheless, courts around the nation have recognized that “the state has a compelling interest in encouraging and fostering procreation of the race and providing status and stability to the environment in which children are raised.”¹⁹⁵ If Kansas passed the statute as a means to encourage procreation, a goal that other courts have recognized as reaching the level of a compelling state interest, then the Kansas Supreme Court correctly accepted this interest as compelling.¹⁹⁶ Given the noted difficulties in making an independent evaluation of this

190. Amicus Curiae Brief Filed on Behalf of Appellant by Washburn University School of Law Children and Family Law Center, *supra* note 137, at 7 (noting that the legislative history does not explain the changes made to the sperm donor section of the statute).

191. See *In re K.M.H.*, 169 P.3d 1025, 1039 (Kan. 2007); Henry, *supra* note 136, at 305 (citing *McIntyre v. Crouch*, 780 P.2d 239, 247 (Or. Ct. App. 1989) (Richardson, J., dissenting) for the proposition that “the state generally has a ‘legitimate and compelling interest in the regulation of artificial insemination and its social and economic incidents’”).

192. *In re K.M.H.*, 169 P.3d at 1039.

193. *Id.* at 1039, 1041 (discussing the importance of the parties’ expectations because the law allows them to govern so long as they are in writing).

194. See *Hopwood v. Texas*, 78 F.3d 932, 965 (5th Cir. 1996) (Wiener, J., concurring); Eric M. Albritton, *Race-Conscious Grand Juror Selection: The Equal Protection Clause and Strict Scrutiny*, 31 AM. J. CRIM. L. 175, 200 (2003) (noting that the Supreme Court’s lack of guidance has continued since *Hopwood*). Although these sources discuss the compelling interest requirement in terms of the Equal Protection Clause, the tests used by the Court in equal protection and due process cases are usually similar. See Vogel, *supra* note 42, at 1494 (citing ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 763 (2d ed. 2002)).

195. *E.g.*, *Andersen v. King County*, 138 P.3d 963, 1008 (Wash. 2006) (quoting *Adams v. Howerton*, 486 F. Supp. 1119, 1124 (C.D. Cal. 1980), but discussing the issue in the context of marriage); see also Russell Shorto, *No Babies?*, N.Y. TIMES, June 29, 2008, at 37, available at <http://www.nytimes.com/2008/06/29/magazine/29Birth-t.html?pagewanted=1&ref=magazine> (discussing the dangers posed to Europe due to its pathologically low birthrate with the worst outcome being collapse of the state). The United States is currently a notable exception to the low birth rate problem, as it has reached a point of population sustainability that other nations wish they could reach. Shorto, *supra*, at 40.

196. See *Andersen*, 138 P.3d at 1008. Insofar as the state interest revolves around speed and efficiency in adjudicating the rights of parties, those statutory purposes are not compelling. See *Stanley v. Illinois*, 405 U.S. 645, 658-59 (1972).

issue, this commentary accepts the aforementioned interests as sufficiently compelling. Because Kansas has the requisite interest to legislate, the next issue is whether the state narrowly tailored the statute.

To determine whether a state has narrowly tailored a statute, courts will occasionally ask whether the legislature could have used a more precise test to accomplish its asserted ends.¹⁹⁷ Following this logic, an overinclusive statute provides one of the best indicators that a legislature has failed to narrowly tailor a statute.¹⁹⁸ An overinclusive statute usually affects the rights and obligations of people without furthering the compelling interest of the state.¹⁹⁹

Kansas passed section 38-1114(f), which presumes sperm donors are not fathers and have no expectation of fatherhood unless they have a written agreement to the contrary.²⁰⁰ Kansas passed the statute as a means to encourage sperm donations by protecting the parties' expectations that they would be able to avoid unwanted paternity claims.²⁰¹ The statute makes an overinclusive presumption that sperm donors,

197. See *Carrington v. Rash*, 380 U.S. 89, 95-97 (1965). The Court wants to ensure that the state has used the least restrictive means for accomplishing its goal, so that the state "express[es] only the legitimate state interests at stake." See *Roe v. Wade*, 410 U.S. 113, 155 (1973) (citing *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965)).

198. See Theane Evangelis, Note, *The Constitutionality of Compensating for Low Minority Voter Turnout in Districting*, 77 N.Y.U. L. REV. 796, 828 (2002). The article discusses narrowly tailored means, in terms of the Equal Protection Clause, but as previously stated, the tests used for equal protection and due process are usually similar. See *id.*

199. See *id.* at 828 n.151 (citing *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 506 (1989), in which the Supreme Court "reject[ed an] affirmative action program because class of beneficiaries was too broad and did not match class of victims of past discrimination"); *Carrington*, 380 U.S. at 95 (stating that a presumption based on employment "affords [no] permissible basis for distinguishing between qualified voters within the State," which meant the State could have conceived a more narrow test).

Stanley v. Illinois, 405 U.S. 645 (1972), provides an excellent example of an overinclusive statute that violated the Due Process Clause. Miller, *supra* note 33, at 418 (recognizing that even though *Stanley* constituted an equal protection and procedural due process case, the opinion had a substantive due process element to it, and the court failed to cloak the conversation in substantive due process language because it had not fully developed the analysis by this point in time). In *Stanley*, Illinois attempted to protect the mental and physical welfare of children by passing a statute classifying all unwed fathers as unfit parents without a hearing. *Stanley*, 405 U.S. at 652. After examining the statute, the United States Supreme Court found the presumption overinclusive, because by not considering the very factor under review—fitness of the father—the statute included potentially fit fathers within the realm of unfit parents. See *id.* at 654-55.

The Supreme Court in *Stanley* analogized the situation it faced with *Carrington*, in which Texas attempted to advance the compelling state interest of protecting its electorate by only allowing bona fide citizens to vote. See *id.* at 655-56 (discussing *Carrington*). Texas attempted to achieve its goal by excluding all servicemen from voting, as they are not normally citizens of the state in which they are stationed. *Carrington*, 380 U.S. at 92-93. The Supreme Court refused to allow this because the State could make a finer distinction based on a more precise test, namely individualized determinations of residency. *Id.* at 95. In *Stanley*, the Court decided that a more precise test existed, namely an individualized adjudication of Stanley's fitness as a parent. See *Stanley*, 405 U.S. at 656-59. In fact, by not narrowly tailoring the statute, the State had actually worked against its stated interest, in that if Stanley could prove his fitness as a parent, the State would have furthered its interest by leaving the children with the father. *Id.* at 654-55.

200. See KAN. STAT. ANN. § 38-1114(f) (2000).

201. See *supra* notes 190-196 (discussing Kansas's compelling interest in passing this legislation).

without a written agreement, have no expectation of being a father.²⁰² States have a difficult task in proving the narrowness of statutory presumptions, such as the one made by section 38-1114(f), because presumptions attempt to make a determination about a set of facts without reviewing the essential facts under consideration, such as the parties' expectations in this case.²⁰³

The Supreme Court has examined statutory presumptions and recognized that untrue presumptions seem to indicate an overinclusive statutory classification.²⁰⁴ Although the presumption created by section 38-1114(f) may be true in most cases, the presumption that all sperm donors without a written agreement have no expectations to act as a parent presumes too much.²⁰⁵ This bar to paternity fails because the parties' expectations rely in large part on whether the father has seized the opportunity of parenthood, which a sperm donor may accomplish not only by written agreement, but also through oral agreement and even his own actions.²⁰⁶ Although a written agreement rationally relates to proving the expectations of the parties, it is not necessarily related to making that determination.²⁰⁷

In fact, a more accurate assessment exists, specifically that in the absence of a written agreement the court must adjudicate the parties' expectations.²⁰⁸ In this case, the statutory bar works against the parties' expectations, as DH and SH had an oral agreement that he should act as a father to the children.²⁰⁹ Because the statute divests DH of his parental rights without requiring an examination of his intent to form a rela-

202. *Cf. Stanley*, 405 U.S. at 656-59 (noting the overinclusive nature of the law that all unwed fathers are unfit fathers). Section 38-1114(f) creates a presumption that all sperm donors without a written agreement have not seized the opportunity of parenthood, and therefore have no expectation of parental rights, which seems as overinclusive as the statute in *Stanley*. *Cf. id.*

203. *See id.* (recognizing that states tend to violate the Due Process Clause when they pass statutes that attempt to make a determination of someone's rights and privileges without considering the facts essential to that determination).

204. *See, e.g., id.* (arguing that a statutory presumption that all unwed fathers are unfit fathers is untrue and unconstitutional); *Carrington v. Rash*, 380 U.S. 95, 97 (1965) (holding that a statutory presumption that all soldiers were not bona fide citizens is both untrue and unconstitutional).

205. *Compare In re K.M.H.*, 169 P.3d 1025, 1030 (Kan. 2007) (noting DH's attempts to visit the children and give financial support, which appeared to show DH's expectations even though he had no written agreement), *with Stanley*, 405 U.S. at 654-55 (recognizing that a statute falsely presumed all unwed fathers were unfit fathers).

206. *See Lehr v. Robertson*, 463 U.S. 248, 262 (1983). The Supreme Court has not explicitly stated that the parties' expectations govern the existence of paternity rights, but if one seizes the opportunity to parent, he expects the state and the mother to treat him as a father. *See id.*

207. For instance, parties must also obtain a written contract when the agreement falls within the purview of the statute of frauds. *See KAN. STAT. ANN. § 33-106* (2000). In discussing the statute of frauds, courts have stated that a written agreement is needed to prevent false representation of the parties' expectations. *See 9 WILLISTON ON CONTRACTS § 21:1* (4th ed. 1999). Essentially, requiring a written agreement in the sperm donor context serves a similar purpose of ensuring that a court fulfills the parties' expectations. *See KAN. STAT. ANN. §§ 38-1114(f)*, 33-106.

208. *Cf. Carrington*, 380 U.S. at 95-97 (requiring individualized findings).

209. *In re K.M.H.*, 169 P.3d at 1038 (accepting DH's claim of an oral contract as true); *see supra* notes 126-127 (discussing why the Kansas Supreme Court assumed an oral agreement existed in this case).

tionship with his children, the State has not protected DH's opportunity to form a parent-child relationship.²¹⁰ For this reason, section 38-1114(f) fails the narrowly tailored test and violates the constitutional protections of substantive due process.

*B. Contract Law as a New Protection: An Emerging Analysis*²¹¹

Because the Kansas Supreme Court did not declare section 38-1114(f) unconstitutional, practitioners should consider new and creative methods for overcoming the statutory presumption. In its decision, the court considered a claim based on equitable estoppel and noted that a case may exist where the equities will require it to forego application of the statute.²¹² The remainder of this Comment discusses why DH's case had the makings of an argument based on equity, under the doctrine of promissory estoppel.

1. The Legal and Logical Reasons

“Legal reasoning relies on the application of necessarily imperfect analogies when courts confront novel, highly technological fact patterns.”²¹³ In this case, section 38-1114(f) governed the relationship between two people engaging in a novel and fairly technological means of reproduction.²¹⁴ In doing so, the statute required a written agreement before granting the father enforceable parental rights.²¹⁵ As the above quote indicates, consideration of other statutes requiring written agreements before a party will have enforceable rights could prove useful in identifying and understanding the contours of this area of law.²¹⁶ Section 33-106, the Kansas statute of frauds, requires parties to put their agreement in writing before the court will find their contract enforceable.²¹⁷ The comparison of these statutes provides the “necessarily im-

210. See *Lehr*, 463 U.S. at 262.

211. The purview of this commentary is not to provide a global view of how and when contract law should apply to paternity. Instead, the focus is merely to explain why and how it would work in this particular case.

212. *In re K.M.H.*, 169 P.3d at 1044 (discussing the possibility that application of equity may result in the court foregoing the application of section 38-1114(f)).

213. *E-mail Recipient List*, *supra* note 89, at 1268 (discussing the importance of analogical reasoning in legal reasoning).

214. *In re K.M.H.*, 169 P.3d at 1033 (discussing the “relative newness of the medical procedure of artificial insemination, and thus newness of K.S.A. § 38-1114(f)”).

215. See KAN. STAT. ANN. § 38-1114(f) (2000).

216. See *E-mail Recipient List*, *supra* note 89, at 1268.

217. Compare KAN. STAT. ANN. § 38-1114(f), with KAN. STAT. ANN. § 33-106 (2000). Section 33-106 is Kansas's version of the statute of frauds, which states in relevant part:

No action shall be brought whereby to charge a party . . . unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him or her lawfully authorized in writing.

perfect” analogy.²¹⁸

Courts have recognized that injustice may result when one party relies on an agreement made unenforceable by the statute of frauds.²¹⁹ For this reason, courts have created methods for upholding an agreement that otherwise violates the statute of frauds.²²⁰ Because of the similarities in function between sections 38-1114(f) and 33-106, analogous concerns of unfairness arise from application of these laws.²²¹ For this reason, Kansas courts should apply the same protections against injustice to section 38-1114(f) as they apply to section 33-106.²²² In order to prevent injustice caused by one party’s reliance on an agreement made unenforceable by the function of the statute, courts in Kansas have applied promissory estoppel.²²³

Before delving into the promissory estoppel analysis, one nuance in the law demands attention. Because courts remain unwilling to enforce agreements involving a child’s rights to parental care, custody, and support, unless made in the best interests of the child, it seems unlikely that a court would apply contract principles that lead to the same outcome without first ensuring that the results meet the child’s best interests.²²⁴ Unfortunately, the facts reviewed by the court in *In re K.M.H.* have little worth in determining the best interests of the children, which makes such an analysis difficult, if not impossible to complete.²²⁵

As a general matter, courts have decided that children have a right to know their fathers, and that such knowledge usually serves their best interests.²²⁶ People have realized that “paternal acceptance-rejection

218. Compare *In re K.M.H.*, 169 P.3d at 1030 (discussing the trial judge’s application of section 38-1114(f) as barring DH’s claim to paternity after alleging an oral contract), with e.g., *Sturm v. Cont’l Oil Co.*, 292 P. 774, 776 (Kan. 1930) (applying section 33-106 and barring one party from being held liable for another’s debt without a written agreement, even if the parties had an oral agreement).

219. See *Fireworks Spectacular, Inc. v. Premier Pyrotechnics, Inc.*, 147 F. Supp. 2d 1057, 1064-65 (D. Kan. 2001) (citing *Decatur Coop. Ass’n v. Urban*, 547 P.2d 323, 329-30 (Kan. 1976), for the proposition that the statute of frauds sometimes functions to work an injustice against a person that relies on an oral promise that is unenforceable unless in writing).

220. *Id.*

221. See *Decatur Coop. Ass’n*, 547 P.2d at 330 (noting that the cooperative had a valid promissory estoppel claim based on injustice because it changed its position in reliance on an oral promise of a farmer to sell wheat to the cooperative). If DH had an oral agreement, and relied on it in donating to SH, then certainly the requirement of a written agreement has functioned to keep him from his expectations of having parental rights, which is an injustice. See *id.*

222. See *E-mail Recipient List*, *supra* note 89, at 1268 (recognizing that novelty in the law requires analogies to more familiar circumstances to discover answers in these new situations).

223. See, e.g., *Decatur Coop. Ass’n*, 547 P.2d at 329-30 (recognizing a valid claim of promissory estoppel as a means to prevent injustice).

224. See discussion *supra* Part III.D.

225. See *In re K.M.H.*, 169 P.3d 1025, 1029-30 (Kan. 2007).

226. *C.M. v. C.C.*, 377 A.2d 821, 825 (N.J. Super. Ct. 1977) (stating unequivocally that “[i]t is in a child’s best interests to have two parents whenever possible”); see Cynthia R. Mabry, *Who is the Baby’s Daddy (and Why Is It Important for the Child to Know)?*, 34 U. BALT. L. REV. 211, 230 (2004). As evidenced by the title of the article, the author spends a great deal of time developing the reasons it is important for children to know their fathers, and why it is in the children’s best interests. The article links children’s identity, mental health, physical health, and general well-being to knowing

(father love) is heavily implicated not only in childrens' [sic] and adults' psychological well-being and health but also in an array of psychological and behavioral problems. Moreover, father love may affect offspring development at all ages from infancy through at least young adulthood."²²⁷ Unless a court determines that DH is unfit to parent, the court serves the children's best interests by allowing them to know their father.²²⁸

2. Application in DH's Case

The court can best serve the interests of the children by providing them with a father, and promissory estoppel offers the court a means to make this happen. Before the court can provide relief by applying promissory estoppel, DH must prove that he and SH had an agreement, that SH expected reliance on DH's part, that DH did in fact reasonably rely on the promise, and that the court can only avoid injustice by enforcing the promise.²²⁹ In determining whether the above elements exist in this case, one must construe the evidence in favor of DH, because the trial judge granted summary judgment to SH.²³⁰

By interpreting all rational inferences in favor of DH, as the Kansas Supreme Court did, one can assume that DH had an oral agreement with SH and that he attempted to provide prenatal support.²³¹ In addition, SH approached her good friend DH to donate sperm, and because of their close friendship, the parties agreed to the donation without a written agreement.²³² The parties' close relationship provided DH a basis of trust on which he could have reasonably relied, and for this reason SH should have reasonably expected DH to rely on their oral agreement.²³³

their fathers. *Mabry*, *supra*, at 228-35.

227. *Mabry*, *supra* note 226, at 230 (citing Ronald P. Rohner & Robert A. Veneziano, *The Importance of Father Love: History and Contemporary Evidence*, 5 REV. GEN. PSYCHOL. 392 (2001)) (alterations in original omitted).

228. *See id.* SH alleged that DH was not fit to parent, and DH asserted that he had in fact taken the steps required for the court to consider him a fit parent. *See supra* notes 20-25 and accompanying text. Ultimately, these allegations must be resolved in favor of DH due to the standard of review. *See supra* notes 126-127 and accompanying text.

229. *See Walker v. Ireton*, 559 P.2d 340, 345 (Kan. 1977) (citing RESTATEMENT (SECOND) CONTRACTS § 217A (Tentative Draft 1973)).

230. *See supra* notes 126-127.

231. *See In re K.M.H.*, 169 P.3d 1025, 1038 (Kan. 2007).

232. Amended Brief of Appellant, *supra* note 12, at 1-2.

233. *See Decatur Coop. Ass'n v. Urban*, 547 P.2d 323, 326 (Kan. 1976) (deciding, without directly stating, that a cooperative could have reasonably relied on the promise from one of its members, even though the member had been around less than a year and made the oral contract over the phone); *Lane v. Magnum Corp.*, No. 275939, 2008 WL 2066587, at *8 (Mich. Ct. App. May 15, 2008) (arguing that two friends could have agreed to a contract of life-long employment without considering the problems that might arise in the absence of a written agreement); *Conrad v. Fields*, No. A06-1387, 2007 WL 2106302, at *2-*3 (Minn. App. July 24, 2007) (holding that a wealthy friend should have foreseen reliance on his promise to pay for his friend's law school expenses because he had a

In addition to the parties' relationship, courts have recognized that the "nature and extent of the promisee's action in reliance upon an oral promise" can also play a vital role in whether a party should have foreseen reliance.²³⁴ In the context of paternity rights, a court attempting to find reliance should examine the man's actions to determine whether he took steps to act as a father after providing the donation.²³⁵ Examples of reliance might include proof that the man provided prenatal support, informed friends and family of the coming child, turned a room into nursery, or similar acts.²³⁶ In this case, the court and parties have not properly developed the facts to prove or disprove reliance.²³⁷ Nevertheless, one should note that DH alleged attempts to provide prenatal support and to visit his children,²³⁸ which if substantiated might carry enough weight to persuade a judge or jury of his reliance.²³⁹ Moreover, if proven true, these facts could bolster DH's argument that SH should have foreseen his reliance.²⁴⁰

Finally, a court asked to apply promissory estoppel must consider whether injustice will result if it does not enforce the parties' agreement, and one key consideration in making this determination is the misleading nature of the promise.²⁴¹ In this case, SH had argued that neither she nor DH ever intended him to act as a father to any children they conceived.²⁴² Nevertheless, SH's legal filings continually referred to DH as the "father," when she could have used other appropriate descriptors such as "sperm donor," "DH," or even "putative father," all of which do not connote the idea that he had parental rights.²⁴³ Furthermore, SH ini-

history of generosity toward his friend). Note that none of these cases stated that the relationship was the determinative factor, but it certainly was an important consideration.

234. Robert A. Brazener, *Comment Note—Promissory Estoppel as Basis for Avoidance of Statute of Frauds*, 56 A.L.R.3d 1037, 1071-72 (1974); see, e.g., *Decatur Coop. Ass'n*, 547 P.2d at 325, 330 (enforcing an oral contract despite statute of frauds because the cooperative had a policy of immediately selling wheat that it had just bought from farmers); *McIntosh v. Murphy*, 469 P.2d 177, 181 (Haw. 1970) (discussing that after an employee had relied on employer's promise by moving 2,200 miles for a job that the employer could not just revoke its promise of employment).

235. Cf. *McIntosh*, 469 P.2d at 181.

236. Cf. *Decatur Coop. Ass'n*, 547 P.2d at 330. A father taking actions consistent with a belief that he is a parent is like a cooperative taking actions consistent with the belief that it had ownership of a commodity another party had promised to sell it. See *id.*

237. See *In re K.M.H.*, 169 P.3d 1025, 1029-30 (Kan. 2007). The opinion lacks the facts necessary to make a proper judgment on whether reliance occurred. See *id.*

238. *Id.*

239. See *supra* notes 234-236 and accompanying text (discussing actions that constituted reliance, which involved a person taking actions consistent with the belief that a valid agreement existed granting that person an opportunity he or she would not otherwise have had).

240. See *supra* note 234 and accompanying text (discussing the importance of the nature and extent of reliance in the court's determination of whether a claim of promissory estoppel will succeed).

241. *Walker v. Ireton*, 559 P.2d 340, 345-46 (Kan. 1977) (citing RESTATEMENT (SECOND) CONTRACTS § 217A (Tentative Draft 1973)).

242. See Brief of Appellee, *supra* note 8, at 2 (arguing that the parties had agreed to an unconditional sperm donation).

243. Amended Brief of Appellant, *supra* note 12, at 13 (noting that SH in her CINC petition referred to DH as the father fifty-six times).

tially stated that the trial court should have declared DH unfit because he had failed to provide prenatal support.²⁴⁴ These statements and the references to DH as a father seem to imply that DH may have retained his parental rights had he provided SH prenatal support.²⁴⁵ Although parties may plead in the alternative, the pleadings in this case have resulted in a conflicted view of SH's intention as to DH's relation to the children.²⁴⁶ As the dissent recognized, SH's inconsistencies in theories and pleadings at least raised the possibility that SH made some kind of agreement that DH should act as a father to the children.²⁴⁷ Even the majority opinion recognized the abnormality of using a CINC petition to declare that a person never had rights under section 38-1114(f) because the CINC petition implies that a father has rights but that the court should not allow him to exercise those rights.²⁴⁸ If the court had truly construed the facts in favor of DH, such inconsistencies would seem to indicate the misleading nature of the promise SH made to DH.

As a final note, courts also consider the adequacy of other remedies to determine whether injustice will ensue from an unenforced promise.²⁴⁹ In this case, a monetary remedy or cancellation of the contract cannot make DH whole because raising children is a unique experience.²⁵⁰ No amount of monetary damages can adequately rectify the grave injustice that would occur from not enforcing this promise, and therefore the court should require specific performance of the contract.²⁵¹ For all of the foregoing reasons, DH could have used the equitable remedy of promissory estoppel in his case.

244. See Reply Brief of Appellant at 1-2, *In re K.M.H.*, 169 P.3d 1025 (No. 96,102) (arguing that SH's original CINC petition implied that DH could have protected his parental rights as a father if he had provided prenatal support).

245. *In re K.M.H.*, 169 P.3d 1025, 1050-51 (Kan. 2007) (Caplinger, J., dissenting) (noting that the court can examine the inconsistency of SH's pleadings and actions as potential evidence against her and in favor of an oral agreement); see 71 C.J.S. *Pleading* § 88 (2000) (recognizing that facts pleaded in alternative pleadings will be construed against the pleader or in this case SH).

246. *In re K.M.H.*, 169 P.3d at 1050-51 (Caplinger, J., dissenting). The context in this case includes the odd manner in which she filed her causes of action, the delay in time, and the consistent reference to DH as the father. *Id.*

247. *Id.* (arguing that the court should have remanded the case for consideration of all evidence in relation to the existence of an agreement between the parties).

248. *Id.* at 1043 (majority opinion) (recognizing that the court gave SH a pass because this statute put her and her counsel in "uncharted waters").

249. *Walker v. Ireton*, 559 P.2d 340, 345-46 (Kan. 1977) (citing RESTATEMENT (SECOND) CONTRACTS § 217A (Tenative Draft 1973)).

250. See 67A C.J.S. *Parent and Child* § 3 (2002) (recognizing the special and unique bond between parents and children).

251. See RESTATEMENT (SECOND) OF CONTRACTS § 359 (1981). Whenever damages are inadequate to protect one's interest, the court may consider specific performance. *Id.* In particular, the courts have historically awarded specific performance when the subject matter is unique. See RESTATEMENT (FIRST) OF CONTRACTS § 360 cmt. a (1932) (stating that because land is unique, the court should order specific performance on contracts for the sale of land).

VI. CONCLUSION

In issuing its opinion, the Kansas Supreme Court has probably not changed the manner in which substantive due process protections will apply to parental rights. The lasting legal implications of this case are simply that section 38-1114(f) is constitutional and applicable in Kansas. However, the implications of the court's failure to properly apply substantive due process protections have real ramifications for people like DH and his children—they are forever separated from each other.

As DH's case proves, section 38-1114(f) poses a danger to unwary sperm-donor fathers and their children. For this reason, this Comment has attempted to provide at least one alternative means for protecting those enduring relationships. One can hope that DH has not suffered in vain, that his disheartening story will reach the ears of those who have the power to change the law, and that those with the power may heed the court's words of wisdom: "all that is [potentially] constitutional is not necessarily wise."²⁵²

252. *In re K.M.H.*, 169 P.3d at 1041.