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Naomi R. Cahn

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*Naomi R. Cahn**

As assisted reproductive technology and third-party gametes have fostered new ways of creating families in the United States, they have also influenced developments in the trusts and estates world. The Uniform Probate Code explicitly addresses children conceived through "assisted reproduction," ensuring that a "third-party" donor does not have a parental relationship with any resulting child.[1] Consequently, one sperm or egg donor[2] can help create multiple children, yet have no legal relationship with any of them, and may not necessarily know that any offspring have been produced. Any resulting offspring may not know of their genetic connections to one another or to the gamete provider. There is no way of knowing just how many donor-conceived people exist in the United States; while the federal government keeps track of the number of children born through donor eggs, it does not maintain any records for donor sperm.[3]

The growing number of people conceived through donated gametes, direct-to-consumer technology, and other developments have finally begun to dissolve the silence around the use of donor gametes in assisted reproduction. And this is leading to law reform on the identity rights of a child in these new families; substantively, when it comes to the anonymity of donors and the rights of siblings (also known as

* Naomi R. Cahn is the Justice Anthony M. Kennedy Distinguished Professor of Law, the Nancy L. Buc '69 Research Professor in Democracy and Equity, and Co-director of the Family Law Center at the University of Virginia School of Law. Many thanks to Alyssa DiRusso and Ashleigh Gough for their engagement and to Tiffany Gardner and Tyler Sniff for generous comments and support. This was originally written as a comment on an unpublished article.

1 UNIF. PROB. CODE § 2-120(a)(3) (UNIF. L. COMM'N amended 2019).

2 Although this article uses the term "donor," I do so with the recognition that donors are frequently paid, and thus the term "third party," "gamete provider," or "parent's donor" may be more accurate descriptions of their role. *See Terms and Abbreviations*, U.S. DONOR CONCEIVED COUNCIL (2022), https://www.usdcc.org/2022/01/23/terms-abbreviations/ [https://perma.cc/JJ4P-FBU5].

3 Rachel Arocho, Elizabeth B. Lozano & Carolyn T. Halpern, *Estimates of Donated Sperm Use in the United States: National Survey of Family Growth 1995–2017*, 112 FERT & STER. 718 (2019) (providing an estimate of the number of people who have used donor sperm, but noting the difficulty of doing so in the absence of mandated recordkeeping).

"same-donor peers"[4]) to connect with one another, there is a growing legal movement.[5]

Several states have adopted the 2017 Uniform Parentage Act,[6] which requires that banks and fertility clinics collect identifying information from donors and determine whether donors have agreed to disclosure of this information to their donor-conceived children.[7] Even if the donor has not consented to disclosure, the clinic must make a "good-faith" effort to provide the child with nonidentifying information and also to notify the donor of any request for information.[8] In 2022, Colorado became the first state to grant donor-conceived people the absolute right to know the identity of the donor,[9] although no state grants such a right with respect to the identity of others who share the same gamete provider.[10]

Notwithstanding the lack of formal legal connections, donor-conceived people are increasingly finding not only their genetic or biological parent,[11] but also their donor-conceived siblings: same-donor peers. When donor-conceived people and their families have formed relation-

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[4] Joanna E. Scheib, et al., *Finding People Like Me: Contact Among Young Adults Who Share an Open-Identity Sperm Donor*, 2020 HUMAN REPROD. OPEN 1, 2 (2020).

[5] *See* Susan Frelich Appleton, *Between the Binaries: Exploring the Legal Boundaries of Nonanonymous Sperm Donation*, 49 FAM. L.Q. 93, 114 (2015) ("How would we analyze known-donor controversies if we shifted the focus to children?"). For further argument on the need to respect children's rights in assisted reproductive technology, see Robin Fretwell Wilson, *Uncovering the Rationale for Requiring Infertility in Surrogacy Arrangements*, 29 AM. J.L. & MED. 337, 353-54, 356 (2003).

[6] *E.g.*, CAL. HEALTH & SAFETY CODE § 1644.3 (West 2022); CONN. GEN. STAT. § 46b-546 (2022); 15 R.I. GEN. LAWS § 15-8.1-904 (2022).

[7] UNIF. PARENTAGE ACT § 904 (UNIF. L. COMM'N 2017).

[8] *Id.* § 905(a), (b).

[9] Colorado passed the "Donor-conceived Persons and Families of Donor-conceived Persons Protection Act," effective as of August 10, 2022. *See* COLO. REV. STAT. § 25-57-101 (2022); *see* Tiffany D. Gardner, *Forgotten Parties: Shifting the Focus to the Donor Conceived in Donor Conception*, 74 MERCER L. REV. (forthcoming Winter 2023) (discussing the Colorado legislation).

[10] *E.g.*, Naomi Cahn, *The New "ART" of Family: Connecting Assisted Reproductive Technologies & Identity Rights*, 2018 U. ILL. L. REV. 1443, 1445 (2018) [hereinafter Cahn, *ART*]; Naomi Cahn, *Do Tell! The Rights of Donor-Conceived Offspring*, 42 HOFSTRA L. REV. 1077, 1096 (2014); Karinne Ludlow, *Genetic Identity Concerns in the Regulation of Novel Reproductive Technologies*, 7 J.L. & BIOSCIENCES 1, 14-15 (2020); Naomi Cahn, *Knowing Origins* (forthcoming 2023) (on file with author); Sarah Zhang, *The Children of Sperm Donors Want to Change the Rules of Conception*, ATLANTIC (Oct. 15, 2021), https://www.theatlantic.com/science/archive/2021/10/do-we-have-right-know-our-biological-parents/620405 [https://perma.cc/2KPV-G8UW]. The Uniform Parentage Act provides an option for states to allow donor-conceived people to learn the identity of their donors. UNIF. PARENTAGE ACT § 904.

[11] *Terms and Abbreviations*, U.S. DONOR CONCEIVED COUNCIL (2022), https://www.usdcc.org/2022/01/23/terms-abbreviations/ [https://perma.cc/JJ4P-FBU5].

ships with one another, or learned the identity of their donors, it has been through voluntary and non-governmental means, such as registering on the Donor Sibling Registry, which is a private organization that does not receive governmental funding,[12] or through the increasing availability of direct-to-consumer genetic testing, which allows for matching with genetic relatives.[13] Moreover, because there is no centralized registry of donor-conceived families, nor any effort even to collect data on those families, what studies exist of donor-conceived families are limited. Nonetheless, available research confirms the importance of these relationships for many people.[14]

With the movement towards application of a functional approach to creating the parent-child relationship, questions might arise with respect to the intestacy rights of donor-conceived siblings. Indeed, the new Uniform Parentage Act is nudging family law towards greater acceptance of functional parenthood, and it has been influential to the 2019 revisions to the Uniform Probate Code.[15] Although these revisions focus on the parent-child relationship, there may be additional places to consider functional families.[16]

Legal scholarship has begun to recognize the importance of analyzing potential relationships in donor-conceived families,[17] and questions

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12 *See* DONOR SIBLING REGISTRY, www.donorsiblingregistry.com [https://perma.cc/DW5S-FJ8Z].

13 *E.g.*, Cahn, *ART, supra* note 10, at 1453.

14 Studies have analyzed the strength of these bonds. "While the participants did not necessarily view these relationships as close, as with a close friend, the connections were important." Scheib et al., *supra* note 4, at 10. Similarly, another study found:

> a clear difference in reports of feeling close in regarding donor siblings as immediate family[;] it is important to note that nearly 70% of all interviewees depicted relationships with at least one donor sibling to be significant and meaningful. In other words, "donor sibling" had come to connote a level of emotional connection that had not existed previously.

Rosanna Hertz, *Sociological Accounts of Donor Siblings' Experiences: Their Importance for Self-Identity and New Kinship Relations*, 19 INT. J. ENVIRON. RES. PUBLIC HEALTH 9 (2022), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8871783/pdf/ijerph-19-02002.pdf. Hertz reports that those raised as only children "were twice as likely to regard donor siblings as 'immediate family' when compared to youth who had siblings in their household." *Id.*

15 "With all of these changes to parentage law, the approval of the 2017 UPA created the necessity and opportunity for a revision of the UPC, which the Commission completed in 2019." Mary Louise Fellows & Thomas P. Gallanis, *The Uniform Probate Code's New Intestacy and Class Gift Provisions*, 46 ACTEC L.J. 127, 130 (2021).

16 *E.g.*, Sarah Steadman, *It's Still Me: Safeguarding Vulnerable Transgender Elders*, 30 YALE J.L. & FEMINISM 371, 385 (2018); Nancy J. Knauer, *LGBT Elders in A Post-*Windsor *World: The Promise and Limits of Marriage Equality*, 24 TEX. J. WOMEN, GENDER, & L. 1, 59 (2014).

17 *See* Naomi Cahn, *The New Kinship*, 100 GEO. L.J. 367, 367 (2012); NAOMI CAHN, THE NEW KINSHIP: CONSTRUCTING DONOR-CONCEIVED FAMILIES 6 (2013); Suzanne Da-

are arising about legal approaches to siblinghood as well as donor conception.[18] The implications of connections formed through genetics/blood or relation/function figure importantly in the consideration of potential legal approaches.[19] Indeed, there have even been a few cases in which courts have considered, and – so far — rejected, the creation of such legal rights.[20]

Assisted Reproductive Technology ("ART") is not a new concept in the trusts and estates world, with articles addressing issues such as posthumous conception and the ability of donor-conceived family members to make decisions for one another in the case of incapacity.[21] But the rights of donor-conceived siblings in intestacy present new issues.[22]

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vies, Note, *Queering America's Heteronormative Family Law Through "Well-Conceived" Legislation (Or, Genetic Parents Exist and Sometimes Your Kid Might Want to Know Them)*, 46 AM. J.L. & MED. 89, 90 (2020) ("Rather than frustrating individuals' attempts to get to know their genetic relatives, the law should reflect–and to as great an extent as possible, enable– this reality.").

18 Ruth Zafran, *Reconceiving Legal Siblinghood*, 71 HASTINGS L.J. 749, 751 (2020) ("These increasingly common scenarios raise fundamental questions about the concept of siblinghood and about family genetics, function, and form."). On the sibling relationship itself, see for example, Jill Elaine Hasday, *Siblings in Law*, 65 VAND. L. REV. 897, 899 (2012) (the relationship between siblings is "a striking illustration of a crucial, yet legally neglected, family tie"); William Wesley Patton, *The Status of Siblings' Rights: A View into the New Millennium*, 51 DEPAUL L. REV. 1, 1-2 (2001); William Wesley Patton & Sara Latz, *Severing Hansel from Gretel: An Analysis of Siblings' Association Rights*, 48 U. MIAMI L. REV. 745, 747 (1994) (exploring sibling associational rights). The sibling relationship is not on a par with the parent-child relationship. *See* Zafran, *supra*, at 752.

19 As Zafran notes: "While I contend that the key element of siblinghood that should confer legal protection upon siblings is the relational bond, I also believe that genetics plays a highly significant role." Zafran, *supra* note 18, at 776.

20 Cahn, *ART*, *supra* note 10, at 1449-51; *see* Douglas NeJaime, *The Nature of Parenthood*, 126 YALE L.J. 2260, 2297-98 (2017) (exploring one of the cases in the context of parents' rights with respect to unrelated donor-conceived people); Ayelet Blecher-Prigat, *Conceiving Parents*, 41 HARV. J.L. & GENDER 119, 146 (2018) ("[T]wo genetic siblings who shared the same male and female progenitors, and had been both born to and raised by their biological mother and her same-sex partner, were found to have different legal parents . . . the male progenitor was not the legal father of one child but should be recognized as the legal father of the second child . . .").

21 *E.g.*, Kristine S. Knaplund, *Reimagining Postmortem Conception*, 37 GA. ST. U. L. REV. 905, 905 (2021); Cahn, *The New Kinship*, *supra* note 17, at 408-09.

22 The pre-2019 version of the UPC defined a "third-party donor" as "an individual who produces eggs or sperm used for assisted reproduction," other than a spouse, the birth mother, or someone else otherwise determined to be the parent. UNIF. PROB. CODE § 2-120 (UNIF. L. COMM'N amended 2010). The 2019 revision simply provides that particular provisions (including Article 7) of the Uniform Parentage Act should determine the identity of the parents for an individual conceived through assisted reproduction. UNIF. PROB. CODE § 2-120 (UNIF. L. COMM'N amended 2019). In turn, Section 702 of the Uniform Parentage Act provides that a "donor" should not be considered to be a parent, with "donor" defined as someone who provides the gametes to be used, other than a woman (not a surrogate) who gives birth or a parent or intended parent. UNIF. PARENT-

As I explore briefly in this comment, any full consideration of the rights of donor-conceived siblings in intestacy must address numerous questions.

First are, as just mentioned, issues of whether it is blood/genetics or function that creates the relationship. If the concept of functional siblinghood has legs, then perhaps blood should be irrelevant and the focus, instead, should be on a series of other factors, albeit factors that take, as a model, paradigmatic sibling relationships.[23] Accordingly, the doctrine of "functional siblinghood" would be available as a potential means for establishing intestacy eligibility, regardless of the donor-based connection.

Second (and relatedly) are issues concerning just what would need to be shown to ensure that a donor sibling relationship qualifies as a sibling under state intestacy statutes. As always, difficulties in determining the decedent's intent are possible, particularly if there are multiple donor-conceived siblings seeking to inherit. Indeed, given that possibility, probate trials could be complex and contested with such individualized determinations.[24] The concept of functional siblinghood could be extended well beyond relationships with any genetic connection. On the other hand, as Ruth Zafran suggests, perhaps legal siblinghood should require, as a predicate to inheritance or other legal recognition, either "a genetic component" or "shared care by a common parent."[25] And consider whether reciprocity might also be a required element; must each donor-conceived sibling believe that legal recognition of their functional relationship is necessary, or does the focus on decedent's intent mean such reciprocity is not to be considered?

AGE ACT § 102(9) (UNIF. L. COMM'N 2017). Section 703 reinforces that a donor is not a parent by providing that "An individual who consents [under the UPA] to assisted reproduction by a woman with the intent to be a parent of the child conceived by the assisted reproduction is a parent of the child." *Id.* § 703.

23 Some of those factors are, as the author notes, set out in Ralph C. Brashier, *Consanguinity, Sibling Relationships, and the Default Rules of Inheritance Law: Reshaping Half-blood Statutes to Reflect the Evolving Family*, 58 SMU L. REV. 137, 193 (2005).

24 *See id.* at 188-89 (noting that the potential number of claimants in probate litigation is "unlimited"). The estate of singer Prince was ultimately distributed to his siblings and half-siblings, after extensive litigation – and the identity of his siblings was known and countable. Amy Forliti, *Prince's Six Siblings Declared Official Heirs to his Still-Uncounted Estate*, USA TODAY (May 19, 2017, 6:35 PM), https://www.usatoday.com/story/life/music/2017/05/19/princes-six-siblings-declared-official-heirs-his-still-uncounted-estate/101877394 [https://perma.cc/7DTK-JHLU]; Maria Puente, *Prince Died Three Years Ago, His Estate is Still Unsettled: Here's Why*, USA TODAY (Apr. 21, 2019, 2:02 PM), https://www.usatoday.com/story/life/2019/04/18/prince-died-3-years-ago-his-estate-still-unsettled-heres-why/3344038002 [https://perma.cc/5PSY-2437].

25 Zafran, *supra* note 18, at 776.

Third are questions concerning the functional turn[26] itself, that is, should the law use function as a basis for recognizing relationships, rather than, for example, relying on formally established ties or a more formal registration system? Functionality has allowed for expanding legal conceptions of family,[27] may promote child well-being,[28] and may promote the touchstone of trusts and estates law – the decedent's intent, as it looks to the decedent's actual relationships. Yet the use of functionality has been subjected to various criticisms.[29] Functional approaches require an intensive inquiry into whether familial relationships actually exist, potentially requiring great detail (and a related loss of privacy) to show that the alleged relationship functioned in conformity with a relationship that the law has chosen to recognize.[30] Moreover, the functional turn suggests that there is a paradigmatic legal relationship to which a functional relationship is analogous,[31] a model relationship with attributes to which a functional relationship must establish its similarity.[32] Those criticisms have, in turn, been criticized as failing to recognize the realities of new families.[33]

And finally, donor-conceived siblings do have alternatives to relying on intestacy. Opting out of intestacy means drafting a will, which, in about half of states, can be handwritten, and, in an increasing number of states, can be done electronically.[34] And recognition of other ties, such as surrogate healthcare decision-making, can be done through advance medical directives.[35]

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26 Susan Frelich Appleton, *The Forgotten Family Law of* Eisenstadt v. Baird, 28 YALE J.L. & FEMINISM 1, 43 (2016) (identifying the "functional turn").

27 "The functional approach acknowledges the significance of developed parent-child relationships, prioritizes children's welfare, and embraces families that break from the traditional norms of the gendered, heterosexual, marital family." Douglas NeJaime, *The Constitution of Parenthood*, 72 STAN. L. REV. 261, 273 (2020); *see* Fellows & Gallanis, *supra* note 15, at 145-46 (exploring how the functional doctrine of de facto parentage is incorporated into the 2019 UPC revisions).

28 Clare Huntington & Elizabeth S. Scott, *Conceptualizing Legal Childhood in the Twenty-First Century,* 118 MICH. L. REV. 1371, 1425 (2020).

29 NeJaime, *supra* note 27, at 370 (noting – and rejecting – criticisms); *see* Katharine K. Baker, *Equality and Family Autonomy,* U. PA. J. CON. L. (forthcoming 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3826639.

30 Brian Bix, *Against Functional Approaches*, JOTWELL (Jan. 12, 2022), https://family.jotwell.com/against-functional-approaches/ [https://perma.cc/WK7L-57P6].

31 *See* Baker, *supra* note 29.

32 Thus, although it recognizes alternative means of forming familial relationships, the functional turn does not challenge the familial structures themselves. *See generally* Fellows & Gallanis, *supra* note 15, at 144.

33 *E.g.*, NeJaime, *supra* note 27, at 274.

34 *E.g.*, UNIF. ELEC. WILLS ACT, prefatory note (UNIF. L. COMM'N 2019).

35 *E.g.*, Cahn, *The New Kinship, supra* note 17, at 417. Of course, this is true outside of the donor sibling relationship.

Ultimately, the future of donor-conceived siblings in trusts and estates law requires resolving a number of issues arising both within – and outside – of the field. Onward indeed.