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# Verdict

January 27, 2014

Joanna L. Grossman

## Why a Craigslist Sperm Donor Owes Child Support



While presumably some people who buy things on Craigslist (or similar Internet sites) are disappointed because they got less than they bargained for, William Marotta might lodge the opposite complaint. He answered an ad posted by two lesbian women who were looking for a sperm donor. Although the three adults signed agreements making clear that Marotta's role was to cease after he donated the sperm, the state of Kansas claims that he is the father of the child that was conceived with his sperm. And the state has just won the first round in the litigation (which Marotta has said he will appeal). In *Kansas v. W.M.*, a trial court ruled that the agreements between Marotta and the two women are not enforceable, and that he is liable for child support dating back to the child's birth.

### A Thoroughly Modern Conception

J.L.S. and A.B. were in a committed lesbian relationship when they decided to become parents together. In 2009, they placed an advertisement on Craigslist, in search of a man would make a private sperm donation to them. Although this may sound unusual, it is an increasingly common practice among prospective parents seeking to save money or seeking to meet a prospective donor in person, rather than simply relying on information provided by a cryobank about an anonymous donor. (As I explain [in a previous column](http://verdict.justia.com/2012/01/24/men-who-give-it-away) (<http://verdict.justia.com/2012/01/24/men-who-give-it-away>), there are a variety of websites designed to match women with potential donors, and there are a variety of reasons why people might turn to such a site.)

In this case, the two women briefly corresponded with Marotta before meeting with him in person and agreeing to proceed with the donation. At the first meeting, Marotta was presented with a sperm donor contract, which he believed had been downloaded from the Internet. He did not seek legal advice as to the enforceability of such a contract.

After signing the contract, a week after the initial meeting, Marotta delivered sperm in a specimen cup to the women's home on each of three consecutive nights. The women then performed a series of self-inseminations on J.L.S., through which she became pregnant. She then gave birth to a child in December 2009.

### The Donor Is Outed—And Sued for Child Support

A year after the child was born, the two women broke off their relationship. After the breakup, J.L.S. applied for

welfare benefits on multiple occasions. On forms requesting her to identify other household members, she did not include A.B. On forms requesting that she identify the child's father, she indicated that the father was an unnamed "donor." At one point, she indicated the father was an "anonymous donor."

However, Marotta's identity was eventually revealed when J.L.S. finally complied with the request by The Kansas Department for Children and Families (DCF) that she turn over a copy of the sperm donor contract. Once she did, so, it became clear to both that there was another female intended parent and that the donor was not anonymous.

DCF filed a petition to establish Marotta's paternity—a necessary step towards obtaining a child support order against him—and requested an order of support, payment for expenses of the child's birth, and costs for pursuing the action against him. A regular (and sometimes controversial) part of state welfare programs is that applicants with children must assign the right to establish paternity and collect support to the state agency, which can pursue claims to offset its own expenditures on benefits. (A.B. was also brought into the proceeding, as she sought to be recognized as the child's second legal parent, but her claims were bifurcated and deferred.)

### **Kansas Law on Sperm Donors**

Like many states, Kansas has a specific provision of law dealing with sperm donors. Under Section 23-2208(f) of the Kansas code, a "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." (emphasis added)

This "non-paternity" rule is typical in that it (1) protects sperm donors from unwanted responsibilities for a child and (2) protects women who conceive with donated sperm from unwanted intrusions by another adult who might claim to be a parent. The general rule comes with an exception, which allows the woman and the donor to opt out of the non-paternity rule in cases where both intend to parent any child who is conceived with the donated sperm.

The fact that Marotta was a known donor makes no difference. The statute does not differentiate between known and anonymous donors. (The same is true in most states.) The catch for Marotta is that the sperm was donated directly to the women, rather than to a licensed physician as the law required. Instead, the women performed the insemination at home, without any medical assistance. Under the plain language of the statute, neither the biological mother nor the sperm donor is protected by the non-paternity rule.

The question, then, is whether the agreement between the donor and the mother, providing that Marotta would have no rights or responsibilities with respect to any resulting child, protects him from the state's claim that he owes child support. DCF argued that the statutory bar to paternity cannot be applied to Marotta since the two women admittedly did not comply with the statutory requirements.

All three of the adults involved in the child's conception objected to DCF's motion for summary judgment. J.L.S. opposed DCF's motion on the grounds that she did not intend Marotta to be a father and that "introducing a virtual stranger into the family unit would violate the right to family integrity." A.B. objected on grounds that recognition of Marotta as a presumptive parent would mean that she would be replaced, since a child cannot have three legal parents. (A discussion of California's unusual new law allowing three legal parents is discussed [here](http://verdict.justia.com/2013/10/15/california-allows-children-two-legal-parents) (<http://verdict.justia.com/2013/10/15/california-allows-children-two-legal-parents>).) And Marotta objected on the grounds that the parties had an enforceable agreement that precluded, and still precludes, his being recognized as a legal father.

### **The Court's Ruling in *Kansas v. W.M.*: The Non-Paternity Rule Does Not Apply**

As described by the trial judge, the issue in this case (or at least this part of this case) is whether Marotta's status "is that of a sperm donor or birth father, even in the face of a written non-paternity agreement, when his semen was used in an artificial insemination procedure that resulted in a live birth but was not provided to a licensed physician."

In the court's view, this question invited a clear answer: Marotta is a birth father, subject to the rights and responsibilities of parenthood.

First, the non-paternity rule, adopted as part of a comprehensive parentage act in 1994 and based on a model act adopted by many other states, imposed clear requirements. Per its terms, a sperm donor is relieved of legal parent status (and deprived of concomitant rights) if and only if the semen is provided to a licensed physician. The statute is written in clear, directive terms and reflects a conscious policy choice by the Kansas legislature to “afford[] a woman a statutory vehicle for obtaining semen for AI in a manner that protects her and her child from a later claim of paternity by the donor.” Similarly, the judge wrote, “the legislature has provided a man with a statutory vehicle for donating semen to a woman in a manner that precludes later liability for child support.” Whether or not the parties were ignorant of this legal option at the time is irrelevant, in this court's view.

Second, the court cannot read the non-paternity rule to apply to all sperm donations when the legislature has made clear that a licensed physician must be involved for the non-paternity rule to be triggered. The Kansas Supreme Court rejected an attempt in another sperm donor case, *In re K.M.H.* (<http://statecasefiles.justia.com/documents/kansas/supreme-court/101438.pdf>), to give the provision something other than its obvious meaning. There, the donor, seeking to avoid application of the non-paternity rule (and claim parental rights), argued that because he did not personally provide the semen to the physician, the statutory requirements had not been met. He had provided the semen to the woman, and she had provided it to the physician. But the court refused to apply a cramped interpretation of the statute, unsupported by its text. Instead, the court gave the non-paternity its clear, bright-line intent, an approach for which it found support in a very similar case in California, *Jhordan C. v. Mary K.* (<http://law.justia.com/cases/california/calapp3d/179/386.html>) (1986).

### **The Ruling in *Kansas v. W.M.*: Parental Obligations Cannot Be Terminated by Contract**

Marotta's second line of argument is based in contract. He argued that because the written agreement he had with the two women made clear their collective intent that he not have parental rights or responsibilities, he cannot be deemed a legal parent. The judge, however, rejected this claim, concluding that a “parent may not terminate parental rights by contract, however, even when the parties have consented.”

In reaching this conclusion, the judge noted that the termination of parental rights is strictly controlled by statute in Kansas. It can only happen three prescribed ways: (1) relinquishment and adoption; (2) adjudication of a child in need of care; and (3) through a judicial finding of parental unfitness. In the court's view, these are the only mechanisms for relieving a parent of obligations. To allow otherwise would compromise the child's right to financial support from its parents, a right that the state does not take lightly.

In a recent case, the Kansas Supreme Court considered the question of creating parental rights by contract. In *Frazier v. Goudschaal* (2013), which I discuss in greater detail [here](http://verdict.justia.com/2013/04/16/parenthood-by-contract) (<http://verdict.justia.com/2013/04/16/parenthood-by-contract>), the court enforced a lesbian co-parenting agreement that gave the biological mother's partner presumptive mother status based on the written parenting agreement between the parties, executed when they were living together and clearly intent on raising a child as a couple. When the couple broke up, the biological mother argued that her partner had no enforceable rights and that to give her any would infringe her constitutional parental rights. But the court held that she had waived her right to exclusive parental status by entering the written agreement with her partner.

The court in *W.M.*, the sperm donor case, does not cite or mention *Frazier*. However, together the two rulings suggest that, under Kansas law, parental rights may be created, but not negated, by contract. This would be consistent with the general policy favoring support for children and may also reflect the particular issues raised by lesbian co-parenting arrangement, in which only one of two intended mothers will have a biological tie to a child.

A further question—perhaps to be determined at a later stage of the *W.M.* case—is what this ruling entails for A.B., the lesbian co-mother in this case. Like the lesbian co-parent in *Frazier*, she had at least some type of written agreement with J.L.S. to share parental rights. But if Marotta is the father, and J.L.S. is the mother, and

## Kansas limits children to two legal parents—where does that leave A.B.?

### Conclusion

This case has received tremendous media attention from the beginning. The whole idea of advertising for sperm on Craigslist is unfamiliar and thus interesting. But the real lesson, for which Marotta may pay an expensive price, is that the decision to conceive with donor sperm has legal, in addition to medical, consequences. Parent-child relationships are regulated by the state and give rise to a comprehensive set of rights and obligations. And while parties' intent can be relevant to creating legal parent-child relationships, particularly as social changes and reproductive technology makes it easier to separate conception from sex and marriage, there is no guarantee that parentage is a matter of self-determination. Individuals seeking to donate or utilize donor sperm should stop first at the lawyer's office to be apprised of the consequences of making the next stop.



Joanna L. Grossman, a Justia columnist, is the Sidney and Walter Siben Distinguished Professor of Family law at Hofstra University. She is the coauthor of [Inside the Castle: Law and the Family in 20th Century America](#) (Princeton University Press 2011), co-winner of the 2011 David J. Langum, Sr. Prize for Best Book in American Legal History, and the coeditor of [Gender Equality: Dimensions of Women's Equal Citizenship](#) (Cambridge University Press 2009). Her columns focus on family law, trusts and estates, and sex discrimination.

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