THE WINDING ROAD TO THE TWO-DAD FAMILY: ISSUES ARISING IN INTERSTATE SURROGACY FOR GAY COUPLES

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INTRODUCTION

In recent decades, medical technology has advanced rapidly to allow couples who cannot conceive using traditional means the opportunity to bear children through assisted reproductive technology (ART). These advances in ART have accompanied, and sometimes driven, societal shifts in parenting norms and the broader acceptance of non-traditional families. For lesbian, gay, bisexual and transgender (LGBT) couples and individuals, and in particular, gay men and gay male couples, ART provides a means to build families through the use of a gestational surrogate.

This article addresses the problems gay men face when seeking to have a child through a surrogacy arrangement due to major differences between state laws and the complex relationship between laws governing surrogacy and laws governing relationship recognition for same-sex couples. In this article, I will examine how the widely varying laws regulating surrogacy and the changing laws affecting relationship

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recognition for same-sex couples impacts a gay couple's access to reproduction through gestational surrogacy arrangements.

BACKGROUND

A "gayby boom" has exploded in the past twenty years as reproductive technology has advanced and American culture has become more accepting of LGBT individuals and couples.[2] The most recent census data available from the 2010 Census shows that, nationally, one-quarter of all same-sex couple households report at least one child under the age of eighteen living in the home.[3] The total current data for the number of children being raised by same-sex parents from the 2010 Census is still being processed, but as of 2005, an estimated 270,313 children in the United States were living in households headed by same-sex couples.[4]

Unlike many births, same-sex couples do not conceive children by accident. Although many couples choose to adopt, many LGBT individuals and couples seek to build their families through ART, so that at least one partner in the relationship has a genetic relationship to the resulting child.

ART procedures were initially developed to assist heterosexual couples diagnosed with infertility to conceive children and were used primarily by married couples during their childbearing years. Artificial insemination and in vitro fertilization achieve conception without sex and thus allows the

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[2] *See* Sue Ann Pressley & Nancy Andrews, *For Gay Couples, the Nursery Becomes the New Frontier*, WASH. POST, Dec. 20, 1992, at A1 (explaining that the "gay-by boom" is the nickname given to the trend starting in the 1980s whereby a growing number of gay men and lesbians create families through adoption, artificial insemination and surrogate motherhood).

[3] Susan Donaldson James, *Census 2010: One-Quarter of Gay Couples Raising Children*, ABC NEWS (June 23, 2011) http://abcnews.go.com/Health/sex-couples-census-data-trickles-quarter-raising-children/story?id=13850332. *See also Census Snapshot: 2010*, THE WILLIAMS INST., http://www3.law.ucla.edu/williamsinstitute/home.html (last visited Aug. 2, 2011) (releasing reports about same-sex couples).

[4] Adam P. Romero, Amanda K. Baumle, M. V. Lee Badgett and Gary J. Gates, *Census Snapshot, United States*, THE WILLIAMS INST. (Dec. 2007), http://www2.law.ucla.edu/williamsinstitute/publications/USCensusSnapshot.pdf.

use of sperm, ova and gestational services from different individuals that may be bought or donated to an individual or couple seeking to conceive a child.[5]

Artificial insemination is the process where sperm is inserted into the vagina or uterus of a woman through non-sexual means. In Vitro Fertilization or "IVF" is a laboratory medical procedure in which sperm are placed with an unfertilized egg in a Petri dish to achieve fertilization. The embryo is then transferred into the uterus to begin a pregnancy or is cryopreserved (frozen) for future use. IVF is most frequently used by women who have fertility problems to assist in achieving pregnancy.[6]

Surrogacy is a method of reproduction whereby a woman agrees to become pregnant and deliver a child for a contracted party. There are two types of surrogacy - traditional surrogacy and gestational surrogacy. Traditional surrogacy refers to the situation where a surrogate mother is artificially inseminated with sperm from an intended father and carries the baby to term. The child is genetically related to the surrogate mother and the intended father.

A gestational surrogacy involves a woman who carries a pregnancy to term for another individual or couple who are the intended parents of the child. The gestational carrier does not provide a genetic contribution (ovum) to the pregnancy, but is impregnated via IVF with an embryo that was conceived via donated ovum and sperm. A gestational carrier typically receives monetary compensation for her services, and these arrangements are entered into through a careful screening process and a contract. For gay male couples, a gestational carrier is often used in conjunction with a known or anonymous egg (ovum) donor and sperm from one member of the male couple. Therefore, the child conceived is genetically related to one member of the gay male couple and his partner is an intended parent.

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[5] Marsha Garrison, *Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage*, 113 HARV. L. REV. 835, 838 (2000).

[6] The first child conceived through in vitro fertilization was born in 1978. *Id.* at 848.

Births resulting from gestational surrogacy arrangements are estimated to be more than a thousand each year. The few statistics available show that the number of babies born to gestational surrogates grew 89% from 2004 to 2008.[7]

For lesbians, procreation is often more accessible. The majority of lesbian couples possess ova and two wombs, so artificial insemination-based arrangements, where one partner is inseminated with donor sperm and the biological mother and her partner co-parent the child, are often feasible and inexpensive.

Transgender individuals may also use ART methods to preserve their reproductive capacity prior to transitioning from one gender to another. For example, a female-to-male transgender individual may undergo harvesting of ovum, fertilization with donor sperm and then the cryogenic freezing of the embryos for future implantation in a female partner. A male-to-female transgender individual may freeze sperm prior to sex reassignment surgery for future use to conceive embryos for a future ART procedure.

Gay male couples face an obvious problem – neither individual has the means to carry a child. For gay couples, prior to the advent of ART, this resulted in restricted options for parentage. Adoption is often restricted based upon marital status, age and other factors that may make it difficult for gay men to become parents through this process.[8] Thus, more gay men are turning to surrogacy as a pathway to parenthood.

While society has become increasingly tolerant of lesbian mothers, gay fathers have not been widely visible until recently.[9]

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[7] Marsha Darling, *Commercial Surrogacy and the Cost of Reproductive "Freedom"*, COUNCIL FOR RESPONSIBLE GENETICS, http://www.councilforresponsiblegenetics.org/genewatch/GeneWatchPage.aspx?pageId=357 (last visited Aug. 2, 2011)

[8] Some states explicitly bar gay people or unmarried couples from adopting. *See* UTAH CODE ANN. § 78B-6-117 (LEXIS through 2010 2nd Special Session and Nov. 2010 Election); MISS. CODE ANN. § 93-17-3 (2010). Other states lack explicit statutory or judicial authority for gay or unmarried couples to adopt, leaving legal uncertainty or inconsistency within a state. *See Parenting Laws: Joint Adoption*, HUMAN RIGHTS CAMPAIGN, http://www.hrc.org/documents/parenting_laws_maps.pdf (last updated Apr. 12, 2011).

[9] Celebrity gay couples are bringing more visibility to surrogacy. Neil Patrick Harris and his partner David Burtka were featured in People Magazine,

Lesbian mothers are more common, as lesbians have been using artificial insemination and conceiving and parenting children for more than thirty years.[10]

Because women have historically been the primary caregivers of children, lesbian mothers carry out a traditional female gender roles when they parent. In contrast to their lesbian counterparts, gay men do not adopt traditional gender roles when they become parents.[11] They take on the role of primary caretaker of a child, traditionally the role reserved for a mother.[12] In parenting children, gay men not only step outside traditional male gender roles, but also step outside the stereotypical culture for gay men.[13]

Surrogacy challenges deeply held beliefs about biology and motherhood. Society still struggles with viewing a woman who carried a pregnancy to term as "not the mother" and having another woman take on that role.[14] Yet, even in those situations,

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January 10, 2011, upon the birth of their twins to a gestational surrogate. Julie Jordan, *How We Met Our Kids*, PEOPLE MAGAZINE, Jan. 10, 2011, at 54, *available at* http://www.people.com/people/archive/article/0,,20456037,00.html. Sir Elton John and his partner David Furnish have become parents to a son born to a surrogate mother in California on December 25, 2010. *Sir Elton John Becomes Father Via Surrogate*, BBC NEWS (Dec. 28, 2010), http://www.bbc.co.uk/news/entertainment-arts-12084650. *See also Exclusive: Meet Sir Elton John and David Furnish's Baby Boy!*, US MAGAZINE (Jan. 18, 2011, 6:55 AM), http://www.usmagazine.com/momsbabies/news/meet-elton-john-and-david-furnishs-baby-boy-2011181.

[10] Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459, 462, 522-27 (1990).

[11] *Id.*

[12] *Id.*

[13] Marla J. Hollandsworth, *Gay Men Creating Families Through Surro-Gay Arrangements: A Paradigm For Reproductive Freedom*, 3 AM. U. J. GENDER & L. 183, 192 (1995).

[14] "Beyond the ken of adoption, childlessness by choice, and other ART techniques, surrogacy arouses cultural and legislative ire because it challenges the fundamental categories of "woman" and of "mother" as something not tied to pregnancy." Darra L. Hofman, *"Mama's Baby, Daddy's Maybe": A State-By-*

someone is the mother of the child. Gay male surrogacy arrangements challenge societal norms even further by creating a family where *no one* is the mother of the child. Even though a woman carried a child to term and gave birth, the child will not have a legal mother, but instead will have two fathers – one biological father and one intended father.

Society's discomfort with nontraditional families, particularly families with same-sex parents, is reflected in many of the laws and policies that have been enacted regulating ART as contemplating application to married couples. For example, even though a significant number of women accessing artificial insemination are unmarried, only four states and the District of Columbia have statutes that specifically apply to children born to unmarried couples - Delaware, New Mexico, North Dakota and Wyoming. [15] This is inconsistent with the reality that indicates that up to one-third of women using assisted reproductive technology procedures are unmarried. For example, California Cryobank, which is the largest sperm bank in country, owed a third of its business to unmarried women in 2005.[16]

Additionally, many state laws restrict surrogacy in a way that affects the ability of gay men to access surrogacy such as a requirement for a couple to be married.

> Marriage has played a prominent role in the development of the law and policy that govern

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State Survey Of Surrogacy Laws and Their Disparate Gender Impact, 35 WM. MITCHELL L. REV. 449, 452 (2009).

[15] *See* Courtney G. Joslin, *Protecting Children(?): Marriage, Gender, and Assisted Reproductive Technology*, 83 S. CAL. L. REV. 1177, 1179 (2010). *See also* D.C. CODE § 16-909(e)(1) (LEXIS through Apr. 19, 2011); DEL. CODE ANN. tit. 13, § 8-703 (LEXIS through 78 Del. Laws, ch. 32); N.M. STAT. ANN. § 40-11A-703 (LEXIS through 49th Legis., 2nd Special Sess.); N.D. CENT. CODE § 14-20-61 (LEXIS through 2009 Legis. Sess.); WYO. STAT. ANN. § 14-2-903 (LEXIS through 2010 Legis. Sess.).

[16] Jennifer Egan, *Wanted: A Few Good Sperm*, N.Y. TIMES MAG., Mar. 19, 2006, at 46, *available at* http://www.nytimes.com/2006/03/19/magazine/319dad.html (last modified April 2, 2006)..

> assisted reproduction. The effect has been to restrict the use of assisted reproduction to those in socially sanctioned intimate relationships and to erect barriers to its use against those who are not in such relationships. While these barriers are no longer as salient as they once were in the artificial insemination context, they continue to exist and are particularly prominent in the regulation of surrogacy.[17]

For this reason, the interplay between laws regulating relationship recognition and laws regulating surrogacy are of particular concern for gay men considering surrogacy as an option for parenthood.

The legal process for establishing parental rights for traditional surrogacy and gestational surrogacy differ. The process for a traditional surrogacy typically involves adoption. For a gay couple, the non-biological intended father would need to adopt the child and the surrogate mother would need to legally terminate her parental rights through that adoption process. The legal process for traditional surrogacy in many states falls under the adoption laws. This process is less costly than gestational surrogacy since it may be accomplished through artificial insemination and without medical intervention. However, the legal risks of using a traditional surrogate are great because the surrogate is also the genetic mother who then must terminate her legal rights after the birth of the child to allow the non-biological intended father to adopt the child, if the fathers live in a jurisdiction that permits second-parent adoption. The termination of the surrogate's parental rights cannot be compelled or forced. Therefore, if the relationship between the surrogate and the male couple deteriorates, the surrogate would legally be determined to be the child's mother. The result would be a custody dispute between the biological father and the birth mother, with the biological father's partner, who had intended to be a parent when the child

[17] Richard F. Storrow, *Rescuing Children from the Marriage Movement: The Case Against Marital Status Discrimination in Adoption and Assisted Reproduction*, 39 U.C. DAVIS L. REV. 305, 310 (2006).

was conceived, without any legal standing. While the initial conception is less costly for the couple, the financial ramifications if the traditional surrogate changes her mind could mean a costly contested custody battle and the payment of child support. These costs could easily far exceed the costs involved in using a gestational surrogate.

The typical process involved in creating a family through gestational surrogacy takes quite a village indeed - the gay male couple, a gestational surrogate, an egg donor, a team of fertility doctors and multiple attorneys. The legal work involved in this arrangement is complex. It involves pre-conception work such as the creation of legal contracts between the intended parents and the gestational carrier and her husband, if she is married, that address a variety of issues, such as: medical screening; psychological testing; health insurance coverage for the gestational carrier and the child conceived; payments to the gestational carrier; selective reduction; termination of pregnancy; medication and drug protocols; confidentiality; life and disability insurance coverage for the gestational carrier; genetic testing; physical and legal custody of the child; access to medical records; birth certificate registration process; and choice of law, among many others.

Once pregnancy is achieved, there remains post-conception legal work to confer legal parental rights on the intended parents. Although this can sometimes be accomplished through an adoption proceeding after the child is born, in some situations, an attorney may be able to obtain a court order prior to or immediately after the birth that names the biological father and his partner as the legal parents of the child. This is typically called a "pre-birth order," which serves to determine the legal parentage of the child and direct that the original birth certificates be issued in the name of the legal parents. "Lower courts in many states have entered pre-birth orders to place a non-genetic parent on a birth certificate. . ."[18]

[18] Brief of Amici Curiae at 5 n.13 Raftopol v. Ramey, 299 Conn. 281 (2011) (No. 18482), 2010 WL 5827939 at *5 n.13. *See, e.g.*, S. K.-S. & Y. K.-S. v. R.R. & P.S., Civil Case No. 24637M (Md. Cir. Ct. Montgomery Cnty. Oct. 15, 2009); D.W.M.A. & K.A. v. K.S., E.S., & B.F. Med. Ctr., Docket No. FR 09E0017QC (Mass. Prob. & Fam. Ct. Sept. 29, 2009); M.N., K.N. & K.F. v. I. Hosp., Case No. 09-09-R-802 (N.D. Dist. Ct. Cass Cnty. Aug. 14, 2009); R.D. & M.D. v. K.M., J.M., & L.V., Civ. 09-2629 (S.D. Cir. Ct. Minnehaha Cnty. June 11, 2009).

STATUTES & LAWS REGULATING SURROGACY

As recently articulated by the Connecticut Supreme Court in a gestational surrogacy case involving gay fathers, ". . . no one can deny that assisted reproductive technology implicates an essential matter of public policy - it is a basic expectation that our legal system should enable each of us to identify our legal parents with reasonable promptness and certainty."[19] Despite this strong need, few states have enacted legislation regulating surrogacy.

Because surrogacy arrangements by their very nature involve a third party in the assisted reproduction process who does not wish to be a parent despite carrying the pregnancy, regulation can provide clarification of parental rights, duties and obligations, and can prevent possible exploitation. To date, uniform regulation has not been created or adopted, and the legality of surrogacy arrangements remains in the realm of widely varying state laws. While various model or uniform surrogacy acts have been proposed in the past twenty years, not one state has adopted any model acts. Thus, surrogacy and laws relating to determinations of parentage for children conceived through assisted reproductive technology vary significantly from state to state. Some states are considered "surrogacy-friendly" states and good jurisdictions for surrogacy arrangements and for the issuance of pre-birth orders. Few states, however, have statutes that specifically govern surrogacy arrangements.

The following states explicitly allow surrogacy either through statute or through common law or administrative process: Arkansas, California, Connecticut, Florida, Illinois, Nevada, New Hampshire, New Jersey, North Dakota, Tennessee, Texas, Utah, Virginia and Washington.[20] However, even some states that allow surrogacy prohibit compensated gestational carrier arrangements including: Florida, Kansas,

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[19] Raftopol v. Ramey, 12 A.3d 783, 784-85 (Conn. 2011).

[20] Hofman, *supra* note 14, at 460; *See* CONN. GEN. STAT. § 7-48a (LEXIS through 2010 legislation); *see also Raftopol*, 12 A.3d at 794-95 n. 28 (explaining that the term "gestational agreement" in the § 7-48a includes surrogacy arrangements).

Kentucky, Louisiana, Nebraska, Nevada, New Hampshire, New Mexico, Virginia and Washington.[21] This limits the availability of surrogacy arrangements since most arrangements are compensated. The actual procedures in the jurisdictions that allow surrogacy range from "straightforward to arcane" and the process by which intended parents become legal parents remains within the purview of the judiciary.[22] While no state statutes explicitly contemplate gay fathers in surrogacy laws, the following states allow surrogacy arrangements for gay couples: California, Connecticut and Vermont.[23] Other states allow gay couples to obtain pre-birth orders in surrogacy arrangements inconsistently. For example, Pennsylvania, Iowa and Wisconsin are examples of states that have no laws either allowing or prohibiting surrogacy in a manner that restricts same-sex couples, and thus, individual judges may issue parentage orders

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[21] FLA. STAT. ANN. §§ 742.11-.16 (LEXIS through Act 2011-32 of 2011 Reg. Sess.); 9 Op. Kan. Att'y Gen. No. 96-73 (Sept. 11, 1996); Op. Ky. Att'y Gen. No. 81-18 (Jan. 26, 1981); *but see* Surrogate Parenting Assocs. v. Commonwealth *ex rel.* Armstrong, 704 S.W.2d 209, 212, 214 (Ky. 1986); LA. REV. STAT. ANN. § 9:2713 (LEXIS through 2011 1st Extraordinary Sess.); NEB. REV. STAT. ANN. § 25-21,200 (LEXIS through 2010 1st Sess.); NEV. REV. STAT. ANN. § 126.045 (LEXIS through 26th (2010) Special Sess.); N.H. REV. STAT. ANN. § 168-B:16 (LEXIS through ch. 117 of 2011 Sess.); N.M. STAT. ANN. § 32A-5-34 (LEXIS through 49th Legis., 2nd Special Sess.); VA. CODE ANN. § 20-162 (LEXIS through 2010 Reg. Sess.); WASH. REV. CODE ANN. § 26.26.101 (LEXIS through 2011 Reg. Ses.); WASH. REV. CODE ANN. §§ 26.26.210, .230 (LEXIS through 2011 Reg. Sess.); Op. Wash. Att'y Gen. No. 4 (1989), 1989 Wash. AG LEXIS 41.

[22] Hofman, *supra* note 14, at 460-61.

[23] *Surrogacy Laws: State by State*, HUMAN RIGHTS CAMPAIGN, http://www.hrc.org/issues/parenting/surrogacy/surrogacy_laws.asp (last visited Apr. 12, 2011). California has no statute directly addressing surrogacy, but courts have used the state's Uniform Parentage Act to interpret several cases concerning surrogacy agreements. In fact, one of the most influential cases in the country regarding surrogacy rights (*Johnson v. Calvert*) was decided in California. *Id*.; CAL. FAM. CODE §§ 7600-7614 (Deering 2010); K.M. v. E.G., 117 P.3d 673, 675 (Cal. 2005); Kristine H. v. Lisa R., 117 P.3d 690. 692 (Cal. 2005); Elisa B. v. Superior Court of El Dorado Cnty., 117 P.3d 660, 670 (Cal. 2005); Johnson v. Calvert, 851 P.2d 776, 782 (Cal. 1993); *In re* Marriage of John A. and Luanne H. Buzzanca, 72 Cal. Rptr. 2d 280, 285-86 (Cal. Ct. App. 1998); *In re* Marriage of Cynthia J. and Robert P. Moschetta, 30 Cal. Rptr. 2d 893, 896-97, 903 (Cal. Ct. App. 1994); *Raftopol*,12 A.3d at 786-87; VT. STAT. ANN. tit. 15A, § 1-102(b) (2011); Baker v. State, 744 A.2d 864, 889 (Vt. 1999).

on a case-by-case basis.[24] Still other states expressly forbid and even criminalize surrogacy arrangements; namely, Arizona, District of Columbia, Indiana, Michigan and New York.[25]

However, just because a state may be considered "surrogacy friendly", this does not mean the state is "friendly" to all types of intended parents seeking to become parents through surrogacy. Of those states that do regulate and legislate surrogacy arrangements, some restrict the process only to married couples or in another manner that excludes gay couples. For example, one intended parent may be required to demonstrate a "medical need." The states requiring marriage include: Florida, Nevada, Texas, Utah and Virginia.[26] Those states that require a demonstration of medical need include:

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[24] 20 PA. CONS. STAT. § 711 (2010); IOWA CODE § 710.11 (2010); WIS. STAT. § 69.14(h) (2010). Furthermore, now that same-sex couples have the right to marry in Iowa, a court would likely look favorably upon enforcing a surrogacy arrangement for gay intended parents. Varnum v. Brien, 763 N.W.2d 862, 906-07 (Iowa 2009). While courts have issued pre-birth orders for same-sex couples on a case-by-case basis, second-parent adoption is not an option for same-sex couples. *See* In the Interest of Angel Lace M., 516 N.W.2d 678, 686 (Wis. 1994).

[25] ARIZ. REV. STAT. § 25-218 (LEXIS through 15th Legis., 1st Sess.)*; but see* Soos v. Superior. Court. of the State of Ariz. *ex rel.* Cnty. of Maricopa, 897 P.2d 1356, 1360-61 (Ariz. Ct. App. 1994) (holding that Ariz. Rev. Stat. § 25-218 is unconstitutional in violation of the federal equal protection clause because the statute creates a rebuttable presumption that the husband of the gestational carrier is the father, but does not allow the intended mother to rebut the presumption that the gestational carrier is the mother). D.C. CODE §§ 16-401, -402 (LEXIS through Apr. 19, 2011); IND. CODE ANN. § 31-20-1-1 (LEXIS through Act PL 129 of 2011 1st Reg. Sess.); MICH. COMP. LAWS SERV. §§ 722.851-.861 (LEXIS through 2011 P.A. 24); Doe v. Att'y Gen., 487 N.W.2d 484, 488-89 (Mich. Ct. App. 1992); Doe v. Kelley, 307 N.W.2d 438, 441 (Mich. Ct. App. 1981); N.Y. DOM. REL. LAW § 122 (Consol. 2011); McDonald v. McDonald, 608 N.Y.S.2d 477, 479 (N.Y. App. Div. 1994); Doe v. N.Y.C. Bd. of Health, 782 N.Y.S.2d 180, 183 (N.Y. Sup. Ct. 2004); *In re* Adoption of Paul, 550 N.Y.S.2d 815, 818 (N.Y. Fam. Ct. 1990).

[26] FLA. STAT. ANN. § 742.15(1) (LEXIS through Act 2011-32 of 2011 Reg. Sess.); NEV. REV. STAT. ANN. § 126.045(4)(b) (LEXIS through 26th (2010) Special Sess.); *but see* S.B. 283, 2009 Leg., 75th Sess. (Nev. 2009), 2009 Nev. ALS 393 (2009); TEX. FAM. CODE ANN. § 160.754 (LEXIS through 2009 1st Sess.); UTAH CODE ANN. § 78B-15-801 (LEXIS through 2010 2nd Special Sess.); UTAH CODE ANN. § 78B-6-117 (LEXIS through 2010 2nd Special Sess.); VA. CODE ANN. § 20-156 (LEXIS through 2010 Reg. Sess.).

Florida, Illinois, New Hampshire and Virginia.[27] This, of course, disparately impacts gay male couples seeking to build their families through surrogacy who cannot legally marry in their home state or whose marriage may not be recognized by the state where the gestational carrier resides because of a Defense of Marriage Act statute or constitutional amendment prohibiting the recognition of same-sex marriages.

Parentage is determined by the state where a child is born since that is the state that will issue the birth certificate for the child. This is typically the state where the gestational carrier resides. Therefore, the state of residence of the gestational carrier is a critical consideration in any surrogacy matching arrangement. If the gestational carrier resides in or moves to a state that criminalizes surrogacy or will not issue pre-birth orders for same-sex couples, it may not be possible for the intended parents to obtain a court order determining parentage. The result could mean that if a gestational carrier is used in one of these states, the gestational carrier would be named as the mother on the child's birth certificate.

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[27] FLA. STAT. ANN. § 742.15(2) (LEXIS through Act 2011-32 of 2011 Reg. Sess.); 750 ILL. COMP. STAT. ANN. 47/20(b)(2) (LEXIS through P.A. 97-3 of 2011 Legis. Sess.); N.H. REV. STAT. ANN. § 168-B:17 (LEXIS through ch. 117 of 2011 Sess.); VA. CODE ANN. § 20-160(B)(8) (LEXIS through 2010 Reg. Sess.).

The New Hampshire surrogacy statute provides:

II. The intended mother shall be medically determined to be physiologically unable to bear a child without risk to her health or to the child's health.

III. The intended mother or the intended father shall provide a gamete to be used to impregnate the surrogate.

IV. The intended mother or surrogate shall provide the ovum.

§ 168-B:17. These factors suggest that surrogacy agreements are unavailable to LGBT individuals; however, now that same-sex couples have the right to marry in New Hampshire, it seems possible that a court may look favorably upon a surrogacy agreement involving LGBT individuals.

STATUTES & LAWS AFFECTING SAME-SEX RELATIONSHIP RECOGNITION

Marriage has been one path to parenthood for heterosexual couples who also conceive using assisted reproduction. For a married woman who gives birth to a child conceived using an anonymous sperm donor, the law will recognize her husband as the father of the child.[28] However, legislative restrictions on the recognition of same-sex marriages mean that same-sex couples – even those legally married in a state that allows same-sex marriage – cannot rely upon marital presumptions to confer parental rights.

The laws relating to relationship recognition in the United States are varied and evolving. Six (6) states and the District of Columbia will grant marriage licenses to same sex couples.[29] Other states that have previously denied issuing marriage licenses to same-sex couples, have recognized same-sex marriages entered into in other jurisdictions.[30] Some states have enacted marriage-equivalent avenues such as civil unions or domestic partnerships.[31]

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[28] UNIF. PARENTAGE ACT § 5(a) (1973) , *available at* http://www.law.upenn.edu/bll/ulc/fnact99/1990s/upa7390.pdf .

[29] D.C. CODE § 46-401 (LEXIS through Apr. 19, 2011); CONN. GEN. STAT. § 46b-20 (LEXIS through 2010 legislation); N.H. REV. STAT. ANN. § 457:1-a (LEXIS through ch. 117 of 2011 Sess.); N.Y. DOM. REL. LAW § 10-a (Gould 2011); VT. STAT. ANN. tit. 15, § 8 (LEXIS through 2009 Sess.);Varnum v. Brien, 763 N.W.2d 862, 906-07 (Iowa 2009).

[30] Martinez v. Cnty. of Monroe, 850 N.Y.S.2d 740 (N.Y. App. Div. 2008); 95 Op. Md. A'tty Gen. 53 (2010); Op. N.M. A'tty Gen. No. 11-01 (Jan. 4, 2011); Same-sex marriages will be recognized in certain contexts. Letter from R.I. Att'y Gen. Patrick C. Lynch, to Gen. Treasurer Paul J. Tavares (Oct. 19, 2004); Letter from R.I. Att'y Gen. Patrick C. Lynch to Comm'r Jack R. Warner (Feb. 20, 2007).

[31] CAL. FAM. CODE § 297 (LEXIS through Urgency Ch. 27 of 2011 Sess.); DEL. CODE ANN. tit. 13, § 201 (2011); NEV. REV. STAT. ANN. §§ 122A.010-.510 (LEXIS through 26th (2010) Special Sess.); N.J. STAT. ANN. § 37:1-28 to -36 (LEXIS through 214th Legis.); OR. REV. STAT. § 106.325 (LEXIS through 2009 Reg. Sess.); WASH. REV. CODE ANN. § 26.60.020 (LEXIS through 2011 Reg. Ses.).

In contrast to those states that recognize same-sex marriage or have created a "marriage-like" equivalent, some states have taken steps to ban recognition of these unions. Some states have enacted statutes called Defense of Marriage Act laws that prohibit recognition of same-sex marriages.[32] Even more extreme, other states have amended their state constitutions to ban recognition of any type of same-sex union, even beyond marriage.[33] One example is Virginia, which has enacted a restrictive constitutional amendment:

> Only a union between one man and one woman may be a marriage valid in or recognized by this Commonwealth and its political subdivisions. This Commonwealth and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance, or effects of marriage. Nor shall this Commonwealth or its political subdivisions create or recognize another union, partnership, or other legal status to which is assigned the rights, benefits, obligations, qualities, or effects of marriage.[34]

Such restrictive laws may impact same-sex couples who are residents of Virginia or are seeking to work with a gestational carrier in Virginia. As discussed later in this article,

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[32] *E.g.*, ALASKA STAT. ANN. § 25.05.013 (LEXIS through 2010 Reg. Sess.); FLA. STAT. ANN. § 741.212 (LEXIS through Act 2011-32 of 2011 Reg. Sess.); MONT. CODE ANN. § 40-1-401 (LEXIS through 2010 legislation); OHIO REV. CODE ANN. § 3101.01 (LEXIS through 129th Gen. Assemb.); TEX. FAM. CODE ANN. § 6.204 (LEXIS through 2009 Sess.); UTAH CODE ANN. § 30-1-2 (LEXIS through 2010 2nd Special Sess.); VA. CODE ANN. § 20-45.2 (LEXIS through 2010 Reg. Sess.).

[33] *E.g.*, IDAHO CONST. art. III, § 28; KAN. CONST. art. 15, § 16; LA. CONST. art. XII, § 15; MICH. CONST. art. I, § 25; NEB. CONST. art. I, § 29; OHIO CONST. art. XV, § 11; OKLA. CONST. art. 2, §3 5; TEX. CONST. art. 1, § 32; UTAH CONST. art. I, § 29.

[34] VA. CONST. art. 1, § 15-A.

it could also negatively impact couples that later move to Virginia.

INTERSTATE ARRANGEMENTS: CROSSING BORDERS & CONFLICTING LAWS

Couples seeking to utilize the services of a surrogate are often matched, for varying reasons, with a potential surrogate who lives in a different state. For gay male couples seeking a gestational surrogate, the creation of an interstate gay surrogacy arrangement is fraught with legal pitfalls. Gay men find themselves caught between the wildly variant patchwork of laws that govern both surrogacy and the nation's equally non-uniform relationship recognition laws, creating a jurisdictional roulette for establishing parental rights.

Let us imagine an example: A gay male couple living in New York is married in Massachusetts. Their Massachusetts marriage will allow them to be treated as a married couple by New York State – despite the fact that New York did not allow its own clerks to issue marriage licenses to same-sex couples at the time they were married.[35] However, surrogacy is criminalized in New York, so this couple is unable to legally conceive a child together in New York through a surrogacy arrangement. Their most legally sound option to conceive a biological child, then, would be to seek out a gestational carrier in a "surrogacy-friendly" state. Nevada is one example of a state that could be considered to be friendly to surrogacy arrangements.[36] Thus, a surrogacy agency might attempt to match our New York couple with a potential gestational carrier who lives in Nevada.

However, problems may arise in this instance that would not exist for a married heterosexual couple. Nevada's law

[35] Op. N.Y. Att'y. Gen. No. 2004-1 (Mar. 3, 2004). New York began granting marriage licenses to same-sex couples on July 24, 2011 pursuant to the Marriage Equality Act of 2011. N.Y. DOM. REL. LAW § 10-a (Gould 2011).

[36] Nevada has promulgated a statute that specifically allows surrogacy arrangements under certain circumstances. NEV. REV. STAT. § 126.045(4)(b) (LEXIS through 26th (2010) Special Sess.).

specifically restricts surrogacy arrangements to married couples.[37] This should certainly not be a problem, one might think, for our New York friends, whose marriage is recognized in their own state. And yet, it could be a real problem. The Nevada surrogacy statute restricts the adopting parties in a surrogacy agreement to people "whose marriage is valid" under Nevada law. The statute defines "intended parents" as "a man and a woman, married to each other."[38] This specific language seems to exclude gay couples by definition. Nevada also has amended its State Constitution to restrict recognition of same-sex marriages as follow: "[o]nly a marriage between a male and female person shall be recognized and given effect in this state."[39]

However, even more layers of complication lurk beneath the surface. As it turns out, in 2009, Nevada enacted a Domestic Partnership Act, which states that "[d]omestic partners have the same rights, protections and benefits, and are subject to the same responsibilities, obligations and duties under law, whether derived from statutes, administrative regulations, court rules, government policies, common law or any other provisions or sources of law, as are granted to and imposed upon spouses."[40] The Act also establishes that "[t]he rights and obligations of domestic partners with respect to a child of either of them are the same as those of spouses."[41] Thus, the Nevada Domestic Partnership Act *may* be interpreted to allow same-sex couples that are domestic partners to enter into surrogacy arrangements, although the courts have not yet adjudicated this. Whether this would also allow same-sex partners who are married in other states and who are not residents to Nevada to proceed with surrogacy in that state in light of the Constitutional amendment is another question. As this example illustrates, gay male couples – even those with access to excellent legal counsel – cannot always know the legal result of an attempt at interstate gestational surrogacy.

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[37] *Id*.

[38] *Id*.

[39] NEV. CONST. art I, *§* 21.

[40] S.B. 283, 2009 Leg., 75th Sess. (Nev. 2009).

[41] *Id.*

In addition, an attorney cannot always assume that the existence of a prohibition on same-sex marriage will mean that a state will refuse to recognize two parents of the same sex for a pre-birth order. Pennsylvania provides a helpful example of this situation. Pennsylvania has a DOMA statute, forbidding recognition of marriages by same-sex partners. [42] Pennsylvania also has no statute regulating ART.[43] While there is no statute in Pennsylvania regulating ART, there *is* a statute that provides that the Orphan's Court with original jurisdiction over the recording of birth certificate matters.[44] Under this power, the Pennsylvania Department of Health has developed a procedure for issuing pre-birth orders for children conceived through gestational surrogacy, known as the Assisted Conception Birth Registration Process.[45] The Directive states that a court order is needed for the intended parents' names to be listed on the certified copies of the child's birth certificate.[46] Currently, pre-birth orders are issued on a county-to-county basis at the discretion of the judge.[47] Pre-birth orders have been issued for

[42] 23 PA. CONS. STAT. § 1102 (LEXIS through Act 3 of 2011 Reg. Sess.); 23. PA. CONS. STAT. § 1704 (LEXIS through Act 3 of 2011 Reg. Sess.).

[43] While Pennsylvania has no statutory authority specific to ART, at least one case has addressed the standing of a gestational carrier in a custody context. *See* J.F. v. D.B., 897 A.2d 1261 (Pa. Super. Ct. 2006). The Court noted that there is an "absence of statutory guidance" on gestational surrogacy arrangements. *Id.* at 1280 n.25. The Court held: "There is no law in this Commonwealth that accords standing to a surrogate with no biological connection to the child she seeks to take into her custody. Today, on these facts, we decline to grant such a party standing." *Id.* at 1280.

[44] 20 PA. CONS. STAT. § 711(9) (LEXIS through Act 3 of 2011 Reg. Sess.).

[45] DIV. OF VITAL RECORDS, PA. DEP'T OF HEALTH, IMPORTANT NOTICE: ASSISTED CONCEPTION BIRTH REGISTRATIONS (Oct. 2003) (on file with author). The Department of Health defines assisted conception as: "The implantation of a woman's fertilized egg into another woman (the gestational carrier) who carries the child during gestation and delivers the child." *Id.*

[46] *Id.*

[47] The most recent data collected by the Pennsylvania Department of Health shows that in the calendar year 2010, 77 pre-birth orders were issued, with 5 granting a pre-birth determination for same-sex male parents, 1 for same-sex female parents, 9 for single male parent, 2 for single female parent, and 60 for opposite-sex parents. *See* Letter from Audrey Feinman Miner, Senior Counsel, Pa. Dep't of Health (Mar. 15, 2011) (on file with author).

both same-sex and opposite-sex intended parents who conceive children through gestational carrier situation.[48] Therefore, a DOMA is not necessarily a prohibition for gay surrogacy arrangements and not all states, or even counties within a state, have consistent practices.

RISKS OF CUSTODY LITIGATION WITH GESTATIONAL CARRIER

For gay men using a gestational surrogate, the legal stakes are high, and the possibility of complications looms large. A surrogacy agency or attorney that understands the complexities of gay surrogacy arrangements and the interplay of relationship recognition is critical. The agency or attorney locating a surrogate must understand the legal ramifications of choosing a carrier who lives in a particular state, and an attorney charged with ensuring that both men are named the parents of the child must understand whether the surrogate's home state allows the issuance of pre-birth orders to same-sex couples – a legal nuance that may not be apparent on the face of any statute.

Additionally, because surrogacy is a complex area of law, there can be great risks to gay couples who engage in "self help" or "do it yourself" over-the-internet schemes. Clients who engage in a search online to find their perfect gestational carrier may find the right woman who just happens to live in the wrong state. If the intended parents cannot obtain a pre-birth order determining legal parentage, the results could be devastating and costly, and could result in custody and child support litigation between the intended parents and the surrogate in the event that relationships deteriorate between the parties.

In surrogacy arrangements, there is the possible risk of a custody battle with the gestational carrier if relations between the intended couple and the surrogate break down prior to a final determination of legal parentage. This is especially true if

[48] *Id*. Children conceived through traditional surrogacy where the surrogate is genetically related to the child are typically handled as adoption matters and the surrogate must terminate her parental rights as a birth mother through that process. *See* 23 PA. CONS. STAT. .ANN. §§ 2502, 2711 (LEXIS through Act 3 of 2011 Reg. Sess.).

the intended parents do not, or find that they cannot, obtain an order of parentage prior to the birth of the child.

One of the major risks to be avoided in a surrogacy arrangement is a future custody dispute between the surrogate and the gay fathers. The only way to legally avoid such a suit is to ensure that the surrogate's parental rights are terminated. This requires that the surrogate and/or the gay fathers live in jurisdictions that allow either a pre-birth order or a second-parent adoption.

A custody case in Virginia illustrates the complications when a surrogate's rights are not terminated and a surrogate attempts to use DOMA-type laws to argue a restriction or denial of the rights of gay parents. In an interstate custody case, a surrogate, the biological father and his partner were tied in a court battle where the surrogate attempted to use the Virginia Constitutional Amendment to deny custodial rights to the non-biological father. In *Prashad v. Copeland*, a gay couple, Spivey and Copeland, and a traditional surrogate, Prashad, entered into a surrogacy agreement in 2003 whereby Prashad was inseminated with sperm from both men and a child was born in Minnesota in 2004.[49] Copeland was listed on the birth certificate as father.[50] The gay fathers later moved to North Carolina.[51] In 2005, the relationship between Prashad and the couple began to deteriorate and Prashad's requests to see the child went unanswered.[52] Copeland and Spivey obtained a Declaration of Domestic Partnership with the State of California in 2005 and then moved to Virginia.[53]

At some point, Prashad filed a Complaint for Custody, seeking custody of the child, in North Carolina, the last state of residence of the child.[54] The Court allowed both Spivey and

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[49] Prashad was a traditional surrogate and the genetic mother of the child. No pre-birth order was issued and no adoption was ever granted to terminate her parental rights. Prashad v. Copeland, 685 S.E.2d 199, 201 (Va. Ct. App. 2009)

[50] *Id*. at 202.

[51] *Id*. at 201.

[52] *Id*.

[53] *Id*. at 202.

[54] *Id*.

Copeland as parties to the custody case.[55] The parties then entered into a written agreement resolving the custody dispute.[56] The contents of the agreement were later reflected in an order entered by the North Carolina court on September 20, 2006 awarding Copeland and Spivey primary legal and physical custody of the child and Prashad was awarded secondary legal and physical custody.[57]

But in 2007, Prashad filed two petitions in Virginia: "Emergency Petition for Registration and Expedited Enforcement of Child Custody Order and Petition for Ex Parte Order to Take Physical Custody of Child" ("Registration Petition") and "Petition for Modification of Custody" ("Modification Petition").[58] Prashad sought immediate custody of the child and specifically asked the court to register the custody orders only to the extent that they addressed the parental and custodial rights of herself and Spivey.[59] She expressly asked the court not to register the portions of the custody orders that dealt with the parental and custodial rights of Copeland.[60] In the Modification Petition, Prashad asked the court to modify the custody orders so that she had sole legal and physical custody of the child.[61]

Prashad argued that registering the custody orders in their entirety under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) violated the Virginia Constitution, specifically, the Virginia Marriage Amendment ("VMA").[62] She argued that Copeland's custodial and visitation rights arose from his relationship with Spivey and were, therefore, an "effect of

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[55] *Prashad*, 685 S.E. 2d at 202.

[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] *Id.*

[60] *Id.*

[61] *Prashad*, 685 S.E. 2d at 202.

[62] *Id.* at 207; *See* VA. CONST. art. I, § 15-A.

marriage."[63] According to Prashad, the VMA prohibits the recognition of such "effects of marriage," and thus the trial court erred in registering the custody orders.[64] Ultimately, Prashad was unsuccessful in her arguments.[65] However, the lengthy trail of litigation left behind this case demonstrates that for gay men seeking to form families through interstate surrogacy agreements, the risks are great and the necessity of understanding the law in every relevant state cannot be overstated.

RISK OF CUSTODY LITIGATION BETWEEN THE BIOLOGICAL FATHER AND THE INTENDED FATHER

The ever-evolving nature of the laws affecting both surrogacy and relationship recognition create future uncertainty even for gay couples who obtain parentage orders. Parentage orders, as final judgments of a court, should - theoretically - be given full faith and credit recognition in every state even if a couple later moves to a surrogacy unfriendly state and/or a state with restricted relationship recognition for the parents.[66] This is true of final adoption decrees and paternity determinations.[67] Since there has been little or no case law addressing this specific issue, the future is uncertain as to how it may play out in high conflict custody disputes. Could the widely varying laws from state to state mean these parent-child relationships are at risk if challenged in the future by the biological father?

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[63] *Prashad* at 207.

[64] *Id*.

[65] *Id*. at 208.

[66] "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." U.S. CONST. art. IV, § 1.

[67] *See* Adar v. Smith, 597 F.3d 697 (5th Cir. 2010) (finding adoption decree for same-sex couple, though against the public policy of the domicile, is still entitled to Full Faith and Credit); Finstuen v. Crutcher, 496 F.3d 1139 (10th Cir. 2007) (same).

There have been few reported cases of custody disputes between gay male partners who have co-parented a child through surrogacy, as compared with cases involving lesbian couples embroiled in a variety of custody disputes.[68] This may be because fewer children are conceived by gay male couples using surrogacy than by lesbian couples using other, less-expensive, ART methods. It could also be that gay surrogacy is newer and these cases have yet to make their way into the court system. But it is a sad, but real, possibility that future challenges to the validity of gay men's parental rights to a child conceived through surrogacy will not be brought by the surrogates, but instead, by one member of a couple during a separation.[69] Such separations may invoke all of the complexities of choice of law and full faith and credit issues familiar in interstate custody disputes as demonstrated in the highly publicized *Miller-Jenkins v. Miller-Jenkins* case.[70] However, they will likely also feature legal arguments related to the validity of parentage orders resulting from surrogacy.

In fact, of the currently existing cases involving lesbian custody disputes, many have involved exactly these sorts of legal arguments, in which biological mothers launch challenges to the court orders that conferred parentage or custody on the non-biological mother. In some of these cases, biological mothers have sought to gain a legal advantage by taking the child to a jurisdiction that is hostile to the recognition of LGBT families.[71]

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[68] The vast majority of litigation in this area is between separating partners. *See* Elisa B. v. Superior Court, 117 P.3d 660 (Cal. 2005); Kantaras v. Kantaras, 884 So. 2d 155 (Fla. Dist. Ct. App. 2004); A.H. v. M.P., 857 N.E.2d 1061 (Mass. 2006); White v. White, 293 S.W.3d 1 (Mo. Ct. App. 2009); Russell v. Bridgens, 647 N.W.2d 56 (Neb. 2002); Rubano v. DiCenzo, 759 A.2d 959 (R.I. 2000); Miller-Jenkins v. Miller-Jenkins, 912 A.2d 951, 955-57 (Vt. 2006).

[69] See *supra* note 68.

[70] This case involved a legal tug of war between the courts of Vermont and Virginia in a custody battle over a little girl conceived by two women who resided together in Vermont whereby one was the biological mother and her partner was a co-parent. *See* Miller-Jenkins v. Miller-Jenkins, 912 A.2d 951, 955-57 (Vt. 2006); Miller-Jenkins v. Miller-Jenkins, 637 S.E.2d 330 (Va. Ct. App. 2006).

[71] This has been referred to as a "seize and run" approach. *See* Courtney Joslin, *Interstate Recognition of Parentage in a Time of Disharmony: Same-*

The same approach could be a harbinger of things to come for gay men who achieved parentage via surrogacy and who are separating.[72] As one law professor wrote:

> In light of the wide and often strongly expressed disagreement among the states with regard to the permissibility and parentage of children born through surrogacy, it is not hard to imagine how a party could seek to rely these differences in law and public policy to avoid a parentage determination with which the party was unhappy.[73]

Whether gay male parents facing off in custody battles against one another will follow the same course as lesbians is uncertain. However, as the laws relating to relationship recognition and surrogacy continue to change and evolve, the courts may see more interstate jurisdictional conflicts in custody cases for children conceived through surrogacy arrangements and challenges to parentage orders.

CONCLUSION

Today, gay men have a unique opportunity to form families in ways unimaginable only a few decades ago. However, this opportunity requires legal caution, as the unstable landscapes of relationship recognition and surrogacy regulation come together in unexpected, and sometimes unplanned-for ways. Practitioners representing gay men seeking surrogacy must be exceptionally careful, and well-versed in both relationship recognition law and surrogacy regulation, potentially in multiple jurisdictions.

Sex Parent Families and Beyond, 70 OHIO ST. L.J. 563, 564-65, 572-73, 577-78 (2009).

[72] *Id.* at 577-78.

[73] *Id.* at 609.