

PARENTAGE DETERMINATIONS AS THE PUBLIC FACE OF ASSISTED REPRODUCTION

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I. THE WILD WEST OF ASSISTED REPRODUCTION

- A. Little Direct Regulation
 - 15 states address human reproductive cloning
 - 13 prohibit it; no consistency in wording
- B. Limited Insurance Coverage
- C. Little Federal Funding
- D. For Profit Clinics
- E. Parentage as the Necessary Legal Determination
- F. Invisibility except for Baby M? the Ohio triplets? Our friends?

II. THE FRACTURING OF LEGAL PARENTHOOD

Mom is married to X, conceives a child with Y, and lives with Z who assumes a parentlike role. Who are the parents and what rights and responsibilities do they have? As a national legal response -- we have no idea.

- A. The End of Marriage as the Umbrella for Parentage
- B. Biological Certainty and its Destabilizing Effects
- C. The Lack of Agreement on Functional Parenthood
- D. Polarization over Family Values

III. ASSISTED REPRODUCTION AS A SYMBOL OF FAMILY VALUES?

- A. Artificial Insemination by Donor
 - 1. Where are we now?

Gaia Bernstein, *The Socio-Legal Acceptance of New Technologies: A Close Look at Artificial Insemination*, 77 WASH. L. REV. 1035, 1037 (2002) (“[The story of artificial insemination is] the story of an abandoned innovation, of a rejected dissertation, of imposed silence, of dark secrets and shame and to this day – of discrimination against those considered ‘unfit’ to use the technology.”)

2. Continuing uncertainty: “First, sixteen states continue to have no legislation on point, and common law principles may require the establishment of the facts on a case-by-case adjudication. Second, sixteen of the thirty-four states that do have such legislation limit it to married women, despite the growing popularity of AID for the unmarried. Third, even in states that clearly provide for a given result, uncertainty may arise if the statutory procedures are not unwaveringly followed. Decisions vary, for example, as to whether a husband who orally consents to his wife's insemination, but does not provide the statutorily required writing, can be considered a father to the child. Fourth, even in those states where the law is reasonably clear, it may not cover all of the contingencies. For example, state law that terminates the parental rights of a donor who contributes sperm to an unmarried woman may leave open the circumstances in which her partner may be granted parental status. Finally, the law that applies to sperm donors may or may not apply with equal force to egg donors.”

Howard Fink and June Carbone, *Between Private Ordering and Public Fiat: A New Paradigm for Family Law Decision-making*, 5 J. L. Fam. Stud. 1 (2003).

3. A shifting debate?

Increasing use to create untraditional families
80% of American clinics serve unmarried customers

B. Surrogacy

1. The key to acceptance: IVF and gestational surrogacy

2. Lack of legislation:

Uniform Parentage Act of 2000: married couples only

Uniform Parentage Act of 2002: little adoption, much variation

Pre-conception approval v. post-conception fait accompli

Virginia legislation (never used)

Doe v. Doe (Conn.): overruled by Troxel?

3. Same-sex couples and domestic partnership legislation

C. Jurisdiction shopping on a global and local basis

CA surrogacy

Eastern European IVF clinics

Danish sperm

Adoption in Kansas

III. The Next Round of Controversies

A. Two Parents Rather Than One?

K.M. v. E.G.: (CA)

Woman donates egg to her same sex partner, signing forms terminating her parental status. CA S. Ct. rules that sperm donation laws do apply in circumstances in which the couple jointly raised the child

After the fact parenthood
Two parents for every child?
Destabilizing written agreements?

D. H. v. S. H. (KS)

Lawyer persuades a former client to donate sperm and takes sperm to a doctor without a written agreement. Trial court rules that statute severs sperm donor's parental standing when conception is accomplished with use of a doctor, unless there is a written statement to the contrary. Case pending before Kansas Supreme Court.

Varying interpretations of uniform act?
Statement on the importance of fathers?
Discourage known donors?

B. Interstate Recognition of Unmarried Partners

Reissuance of birth certificates
Second parent adoption
Stepparent rights after *Troxel*

C. Age, Men and Biology

Can the gestational surrogate as mother rule be made to stick?
J.F. v. D.B., 66 Pa. D. & C.4th 1 (Pa. C.P 2004); *J.F.*, 897 A.2d at 1261; *J.F. v. D.B.*, 848 N.E.2d 873 (Ohio Ct. App. 2006), *cert. granted*, 852 N.E.2d 187 (Ohio 2006).

Gestational surrogate gave birth to triplets and seeks custody. The trial court treated the parties as anonymous; the appellate opinion described the father as “a math professor and department chair at Cleveland State University in Cleveland, Ohio.” The trial court decision described his partner as his “paramour,” and emphasized her lack of a legal relationship to the children. The appellate decision noted that she was a widowed dentist, she had retired in order to be able to take care of the children, she and the father were in a long term relationship, they had not married because of the impact of marriage on her benefits, they were willing to marry if necessary to obtain custody of the children, and they had begun preparations for adoption before the children were born. The appellate

court also emphasized the intended parents' difficulties in traveling from Cleveland on short notice, particularly in light of the fact that the surrogate did not tell them of the scheduled cesarean section, and the misinformation they received from the hospital. The appellate court concluded, two years after the children were born, that the surrogate lacked standing to seek custody because she had no biological connection to the children and had gained in loco parentis status in defiance of the legal parent's wishes.

Does biology win out?
Does uncertainty encourage jx shopping?
Will clinics become more selective?

D. Egg and sperm donation as contested turf

Donor Identity
Payment
Abortion Wars Revisited
Are All Gametes Equal?

IV. Fracture, Polarization or Consensus?

A. Parenthood is Fractured

B. Family Values Engender Polarization

Same-sex Partners
Distinctions Based on Marriage
The Importance of Biology

C. The Impact on Children as a Potential Source of Consensus

Case-by-case decisions rather than legislative action
Jurisdictional and procedural rather than substantive rulings
After the fact ratification of parental status

D. *Troxel* as a Wild Card: Is Parenthood an All or Nothing Category?