



PARENTAGE BOOM:

THE MODERN EXPANSION OF THE DEFINITION OF A “PARENT”

BY KIMBERLY M. SURRETT, ESQ.

While testifying at the Nevada State Legislature recently, it was pointed out to me that I had casually used the term reproductive industry; the chairman was surprised to hear that reproduction was considered an industry now. Modern medicine has created many new medical options being defined as Assisted Reproductive Technologies (ART).

It's true that sex and adoption are no longer the only ways to have children. For many, it is an intriguing new trend that interests people, causing them to pause at the use of terms such as reproductive industry. For others, ART procedures are a time-consuming, difficult, expensive and emotional part of life — and often the only route to a biologically related child of their own. The complex investment of time, money and emotion does make ART an industry.

In 2007, I wrote an article for *Nevada Lawyer* containing a plea that Nevada's antiquated ART laws be changed, because the new scientific ART methods

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were challenging everyone’s concept of parentage. Biology is no longer the only way to determine who is a parent; sex is no longer the only way to conceive a child. Most states and countries have not modernized their laws to reflect these changes in reproductive science. It isn’t a surprise, considering that the first so-called test-tube baby was born in 1978, and all of the subsequent methods have developed in the mere 37 years since. We now have fully developed in vitro fertilization using both anonymous and known egg donors; highly effective cryopreservation of eggs, sperm and embryos; the use of embryo donations; the use of both traditional surrogates and gestational carriers; intra-cytoplasmic sperm injection; and, most recently, the ability to create an embryo from the DNA of three different people. The future likely holds even more breakthroughs. In September 2014, news broke that scientists believed they would someday be able to take a woman’s egg, replace its DNA with that of a male, then fertilize the egg with another male’s sperm, creating an all “male” embryo.

In 2013, despite most states and countries having either simplistic or antiquated ART laws, the Nevada Legislature heard my plea for change and passed modern ART laws — arguably among the most progressive in the world. Under Nevada’s old law, the only legal assistance we had in defining parentage was for anonymous sperm

donors to a married woman and limited circumstances for surrogacy. These statutes were insufficient when it came to determining the parentage of a child brought into the world with the use of a third-party egg donor, a known sperm donor or a gestational carrier for anyone other than a married couple who were both genetically related to the child. Nevada’s new ART laws are gender neutral and marital-status neutral. Married couples, unmarried couples and single individuals can all use sperm, egg and embryo donations, from either a known or unknown donor. Same-sex couples can utilize a gestational carrier in Nevada and have both their names placed on the birth certificate for that child. Parentage is no longer unclear for co-maternity cases in which one female delivers a child created from an embryo that is genetically related to her same-sex partner



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or wife. The woman who consented to her same-sex partner undergoing ART procedures to have a child, with the intent to become a parent, is now considered a parent to that child, whether genetically related or not.

Since October 1, 2013, when the new ART law activated in Nevada, the floodgate has opened and same-sex couples from around the world (United Kingdom, Israel, France, Spain and other countries) seeking to have a baby have sought gestational carriers in Nevada. Parentage of a child is determined in the locality where the child is born. The residence of the parents isn't relevant except to the extent that the parents desire dual citizenship for the child. The best analogy is: if a married man and woman were to travel to Hawaii while the woman was pregnant, and if she were to give birth while on vacation, the child

would receive a Hawaiian birth certificate despite Nevada being the couple's place of residence. Thus, intended parents from around the world may contract with surrogates in the state of Nevada in order to have a child and assure that they will both be recognized as parents, even if only one of them is genetically related to the child. These intended parents come from countries with many different legal complications that make it impossible, or at least very difficult, to have a child through surrogacy in their own nations. Yet, when they return home with a child that has both same-sex parents on the Nevada birth certificate, most of these countries will accept them both as the child's parents.

Some same-sex intended parents from countries where it would not be impossible for them to both be parents still come to the United States, and in particular Nevada, rather than remaining in their own countries or visiting other countries, because Nevada's law is so comprehensive with greater regulation. In addition, the doctors in the United States have known success rates that the Center for Disease Control and Prevention (CDC) carefully tracks.

The other driving force bringing intended parents to Nevada is a worldwide growing concern about the treatment of gestational carriers in countries like India. The structure of Nevada's ART laws practically abolishes such concerns in our state.

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We require prior psychological testing and medical screening. Our law makes it clear that women may be compensated for being gestational carriers, but that they must be able to negotiate in good faith. One of the protections built in for the ability to negotiate in good faith is that the contract must be signed before the gestational carrier begins any medical procedures. This assures that she isn't undergoing the stress of the medical procedures or the beginning of the process when signing the contract. Our law also requires that the intended parents and the gestational carrier be represented by independent legal counsel. In the past, in Nevada and many other places around the world, it was (and in many places still is) possible for the gestational carrier to be unrepresented, thus increasing the odds that she would be taken advantage of. Under Nevada's law, it is clear that women carrying for intended parents have both protection and representation.

Nevada is at the forefront of same-sex parenting. In our state, same-sex parents no longer go without clear parental rights, nor do the children of same-sex parents lack a clear understanding of who is fiscally responsible for them. Other states and countries are starting to catch on and are taking steps to change their own laws. The lack of statutory authority and/or precedent in other states does not prevent the creation of these children. Neither state nor federal laws can, or do, prevent the use of most forms of ART; to do so would deny individuals the right to procreate.¹ Thus, women in same-sex relationships have been having children in great numbers, but in many circumstances were leaving one partner without legal

recognition as a parent. Thus far, for men in same-sex relationships, it hasn't been as easy to procreate, despite what the law may provide, because they still need a woman to assist them in carrying a child and, without a clear surrogacy statute, the risk was often deemed too great. In most places, that risk still exists. Thus, many same-sex male intended parents are also visiting Nevada and going home with court orders making both partners legal parents of the child they plan to raise together.

Science and technology have helped create a new world of families. I believe Nevada's law is properly situated for this growth as we move into the future. However, no one knows what scientific breakthroughs may lie ahead or what legal changes will be necessary to accommodate them. **NL**

1. Cloning is still extremely controversial, and is one area of reproductive technology that may not be protected as a fundamental constitutional privacy right.

Surratt Law Practice is a full-service family law firm with offices in Reno and Las Vegas, Nevada. The principal, **KIMBERLY M. SURRETT**, sits on the executive committees for both



the LGBT Section and the Family Law Section of the State Bar of Nevada. She is a Fellow with the American Academy of Assisted Reproductive Technology Attorneys (AAARTA), a member of the National Family Law Advisory Council, the National LGBT Bar Association, the National Center for Lesbian Rights and the American Society of Reproductive Medicine. Surratt is the chair of the domestic lobbying committee for the Nevada Justice Association and assists both the LGBT Section and the Family Law Section with their lobbying efforts. She is on the legal advisory board for the American Fertility Association and sits on the legislative watch committee for AAARTA. Surratt Law Practice represents and consults with various reproductive medical clinics, surrogacy agencies and donor programs internationally. Surratt is responsible for the drafting and lobbying of the new reproductive law for Nevada, a gender- and marital status-neutral law that allows everyone access to parenthood.