

Defining and Establishing Parentage: National Approaches and New Challenges

Recovery of Maintenance in the
European Union and Worldwide
Heidelberg Conference 5 – 8 March 2013

Defining Parentage: Same-Sex Unions, Reproductive Technologies, Bio-identity and the Law

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15.30 – 17.00 h

What is the Government's Interest?

- Constitutional Interest:
Equal treatment of children
- Legal Interest:
Rule of law
- Fiscal Interest:
Government as payor of last resort

How is Paternity Legally Established in the U.S.?

- Marriage
- Voluntary Establishment
- Judicial Process
- Evidence Based
- Default

How is Paternity Legally Established in the U.S.?

- Traditionally, domestic relations is a state law issue;
- However, IV-D federal law has significant influence:
 - Voluntary acknowledgement
 - Genetic testing mandated
 - Mandatory default process
 - Full Faith and Credit for acknowledgments
 - UIFSA – can't contest paternity if issue has been determined under law of issuing order state
- But other areas of federal law have different rules for when someone is a parent
- **And there is the Defense of Marriage Act (DOMA)**

How is Paternity Legally Established in the U.S.?

- State law – differs in almost every state; reflects “local” values.
 - Presumptions –
 - Marital
 - Holding out
 - Rebuttable vs. Conclusive
 - Who can challenge and when
 - How parentage is defined when conception is via ART
- Uniform Parentage Act (UPA) (2002)

Success

- In FFY 1993, paternity was established for **550,000** children
- By FFY 2011 paternity was established for **1,686,980** children - most using a voluntary acknowledgement

Downside of Success

- Voluntary paternity establishment
 - Good faith acknowledgement misfires
- Use of emerging technology
 - Genetic testing - a two-edge sword

Why Difficult Policy Call?

- No easy answers
- Interests of different actors often conflict
- No one “typical case”
- Emotional language used in the debate – paternity “fraud”
- Intense media attention

Policy Considerations

- Well-being of the child:
 - emotional, social and financial
- Fairness to fathers and mothers
- Social and legal implications of paternity disestablishment.

What are the Facts?

- Disputed Paternities
About 25% to 30% not the bio “Father”
- General Population
About 2% to 10% not the bio “Father” but varies by
population

Competing Legal Presumptions

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- Presumption of legitimacy where child born to a married woman
- Voluntary acknowledgement signed by one father while child born of marriage between mother and a different man
- Positive genetic testing completed on someone who is not the “legal” father, either by marriage or via signed acknowledgement
- May courts discount acknowledgements? Do genetics trump legal documents? Should agencies pay for genetic testing to resolve competing presumption conflicts?

Further Reading

T. Vernon Drew, *Conceiving the Father: An Ethicist's Approach to Paternity Disestablishment*, 26 **Delaware Lawyer** 18 (Spring 2006) (an interview with Joanna L. Bergmann, Arthur L. Caplan, and Nadia N. Sawicki)

Susan F Paikin, *Paternity Disestablishment – Just the Facts, Please!* 26 **Delaware Lawyer** 24 (Spring 2006)

Ruth Padawer, *Who Knew I Was Not the Father?* **New York Times Magazine** (Nov.17, 2009)

Establishing Parentage in Same-Sex Partner Cases

Why is it Important?

- More than **250,000** children are being raised by same-sex couples in the United States
- More and more, courts are struggling to apply traditional equitable parentage principles in same-sex partner cases.

Unique Challenges in Same-sex Partner Cases

- **Biological Connection**
 - May be natural birth mother
 - May have donated genetic material (with intent to raise child jointly)
- **Gender-neutral reading of the UPA**
 - UPA (1973) Section 21 – insofar as practicable, the provisions of the UPA applicable to the father-child relationship are also applicable to the mother-child relationship
 - UPA (2002) Section 201(a) clarifies that the mother-child relationship may be established by:
 - Giving birth
 - An adjudication of the woman's maternity
 - Adoption
 - Valid gestational agreement

Unique Challenges in Same-sex Partner Cases

- Presumed parent/equitable adoption/*de facto* parent
- Pre-birth agreements/co-parenting plans
- Domestic partnership laws
- DOMA

Unique Challenges in Same-sex Partner Cases

- What if 2 “moms” sign a VAP?
- Is a support order entered in same-sex partner case entitled to full faith and credit?
- May a new support order be entered?

Unique Challenges in Same-sex Partner Cases

- What about support orders from another country?
 - Full faith and credit is not applicable.
 - What about orders from foreign reciprocating countries (FRC)?
 - Are such orders “manifestly incompatible” with public policy?

Unique Challenges in Same-sex Partner Cases

CASE EXAMPLES:

- ***Matter of Sebastian***, 879 N.Y.S.2d 677 (Surr. Ct. N.Y. Co. 2009) (Court grants a second parent adoption to the genetic mother of a child conceived by donating her ova to be fertilized by an anonymous sperm donor and carried by her partner. Given NY's "evolving jurisprudence" of same-sex relationships, equal protection full faith and credit, and the effects of DOMA, the only remedy available in NY that would accord both parents full and unassailable protection was a second parent adoption.)
- ***Carol Chambers v Karen Chambers***, 2005 Del. Fam. Ct. LEXIS 1 (Del. Fam. Ct. 1/12/05) (An ex-partner of a lesbian couple found to be a de facto parent within the meaning of Delaware child support law, had legally established visitation rights, and was equitably estopped from refusing to pay child support.)

Unique Challenges in Same-sex Partner Cases

CASE EXAMPLE:

- **Matter of H.M v. E.T, 65 A.D.3d 119, 881 N.Y. S.2d 113 (N.Y. App. Div., 2nd Dept. 2009); reversed on appeal by 2010 N.Y. LEXIS 621 (N.Y. May 4, 2010) *Decision on remand, Matter of H.M. v. E.T. 906 N.Y.S.2d 85, (N.Y. App. Div. 2d Dep't 2010)* (Canadian birth mother filed an application with the Ontario, Canada agency seeking to have a New York woman adjudicated the parent of mother's 12-year old child; she also seeks child support. The litigation is lengthy and convoluted. Ultimately, the Court of Appeals determines Family Court does have subject matter jurisdiction to determine whether or not a person is responsible to contribute to the support of a child, regardless of the gender of the parties. On remand, the Supreme Court, Appellate Division opinion explores the doctrines of equitable estoppel and implied contract. "[T]his court has previously employed the 'implied promise-equitable estoppel approach' to preclude a man with no biological or adoptive connection to a child from disavowing a relied-upon, implied promise to support the child, thus preventing the man from leaving the child without the support of two parents, as originally contemplated." (citations omitted). This same reasoning is applicable to the same-sex partner of the biological mother." On remand to the Family Court the same-sex partner is found equitably estopped from denying her responsibility to support the child. Partner's second round of appeals is dismissed. Child support is established.) **Matter of H.M v. E.T, 932 N.Y.S.2d 364 (N.Y. App. Div., 2d Dept. 2011)****

Further Reading

Paula Roberts, *Parentage Case Update: Can a Child Have Two Mothers*, Pub. No. 05-53 at www.clasp.org/publications/parentage_update_120105

Susan F Paikin and William Reynolds, *Parentage and Child Support: Interstate Litigation and Same-Sex Parents*, 26 **Delaware Lawyer** 26 (Spring 2006)

Susan F Paikin and William Reynolds, *Assisted Reproduction, Civil Unions and Parentage*, 29 **Delaware Lawyer** 24 (Fall 2011)

Can Gay Marriage Strengthen the American Family? **Brookings Institution Briefing 4/1/04**, www.brookings.org/comm/events/20040401.htm

Paternity Issues in Assisted Reproduction Technology (ART) Cases

Unique Challenges in ART Cases

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- Medical advances and scientific advances offer multitude of ART technologies , where child may be biologically related to one, both, or neither member of the couple and may have as many as 6 “parents”
 - Sperm donor
 - Egg donor
 - Gestational mother
 - Gestational mother’s husband
 - Intended mother
 - Intended father

Unique Challenges in ART Cases

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- Competing legal theories: societal need to strengthen the traditional 2-parent family and recognition that in today's science and social structure picking 2 is artificial.
- Fundamental legal presumptions and genetic identity – does biology still control?
- Giving birth vs. giving genetic material
- Intent-based model for ART parenting presumptions

Unique Challenges in ART Cases

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- Some general rules:
 - Man who anonymously donates sperm to a sperm bank is NOT a parent of a child conceived by ART (though lots of discussion about breaking the seal of confidentiality)
 - But less clear if it is self-help – informal/known donation
 - Husband is obligated to support child born via artificial insemination (even though parties do not execute agreement legitimizing child under state law)
 - Also wife can't contest husband's paternity
 - UPA (2002) – biology does not control (Sec. 702: "A donor is not a parent of a child conceived by means of assisted reproduction.")
 - Does not apply to children conceived through sexual intercourse
- How does ART intersect for same-sex couples – particularly in light of DOMA

Unique Challenges in ART Cases

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- Canada: Assisted Human Reproduction Act is federal legislation that applies across Canada, regulates a variety of issues relating to new technologies and reproduction.
 - Goal is to avoid commoditization of human life by sanctioning practices such as commercial surrogacy and commercial egg donation.
 - Critics: the issue of who are the legal parents and who is liable for child support is not covered by the legislation (determination of parentage is a provincial matter)

Unique Challenges in ART Cases

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Policy Questions

- How many individuals may serve a recognized parenting role for a given child? In multiple parent situations, how should the different aspects of the parenting roles be distributed?
- Which should be more determinative of parental responsibilities and parental status – the bio-genetic connection or the intention to become a parent?

Further Reading

www.aspe.hhs.gov

www.clasp.org

www.ncsl.org

www.jech.bmjournals.com (Bellis, et al)

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