Assisted Reproductive Technologies

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I. Introduction

The U.S. Code defines Assisted Reproductive Technology (ART) as any treatment or procedure that includes the handling of human eggs (oocytes) or embryos.[1] ARTs have made parenthood possible for individuals and couples

1. 42 U.S.C.A. § 263a-7 (West, Westlaw through Pub. L. No. 117-168).

who, for a variety of reasons, are unable to reproduce through sexual intercourse. Despite enabling the creation of new families, ARTs present doctrinal issues that were not contemplated before the emergence of a field combining U.S. law and human reproductive medicine in 1981.[2] These new risks have led to novel legal disputes, and, in the absence of comprehensive federal regulation, states have struggled to adapt existing legal theories—such as contract, tort, and property law—to the emerging scenarios presented by advances in ART.[3]

Unlike the strict regulations associated with medications and medical devices, the federal government plays only a modest role in directly regulating innovative medical procedures such as ARTs.[4] In total, ART procedures are divided into five sources of regulation: (1) self-regulation by the industry; (2) indirect regulation by the federal government through statutes and federal agencies indirectly overseeing reproductive medicine;[5] (3) indirect regulation by the state government under various common law doctrines and licensing requirements; (4) direct regulation by the federal government; and (5) direct regulation by the state government under state statutes.[6] The sole federal law that explicitly regulates the infertility industry is the Fertility Clinic Success Rate and Certification Act of 1992.[7] The Act creates a system by which clinics must systematically report their pregnancy success rates—calculated by live birth rates—to the Center for Disease Control (CDC).[8] This information is then made available to the public.[9] One criticism of the Act is that the only real consequence of non-reporting of the data is that the non-reporting clinic's name is included in the annual report, resulting in potential reputational damage.[10] The Food and Drug Administration (FDA)'s legal recommendations concerning tissue donation have been promulgated through guidelines created by the Uniform Parentage Act (UPA),[11] the

2. The first live birth from IVF in the United States was Elizabeth Carr, born in 1981 in Norfolk, Virginia per H.W. Jones, Jr. and his team. *See* SUSAN L. CROCKIN & HOWARD W. JONES JR., LEGAL CONCEPTIONS: THE EVOLVING LAW AND POLICY OF ASSISTED REPRODUCTIVE TECHNOLOGIES 4, 14 (John Hopkins Univ. Press 2010).

3. While the federal government did enact the Fertility Clinic Success Rate and Certification Act, which does address the industry, the Act explicitly bars federal regulation of the "practice of medicine in assisted reproductive technology programs." *See* Delores V. Chichi, *In Vitro Fertilization, Fertility Frustrations, and the Lack of Regulation,* 49 HOFSTRA L. REV. 535, 545 (2021), https://perma.cc/74AT-8P9K. States have largely declined to directly regulate ART in the absence of federal regulation. *See id.* at 554.

4. *See id.*, at 555; *see* Valarie K. Blake, Michelle L. McGowan, & Aaron D. Levine, *Conflicts of Interest and Effective Oversight of Assisted Reproduction Using Donated Oocytes*, 43 J.L. MED. & ETHICS 410, 411–12 (2015).

5. *What You Should Know – Reproductive Tissue Donation*, U.S. FOOD & DRUG ADMIN. (Apr. 25, 2019), https://perma.cc/6HRZ-D5Q4.

6. *See* Blake, McGowan, & Levine, *supra* note 4, at 411–12.

7. *See* 42 U.S.C.A. §§ 263a-1–a-7 (West, Westlaw through Pub. L. No. 117-168).

8. *See id.* § 263a-l.

9. *Id.* § 263a-5.

10. *Id.*

11. *See* Unif. Parentage Act (Unif. Law Comm'n 2017) [hereinafter UPA].

Uniform Probate Code (UPC),[12] and a Model Act adopted by the American Bar Association (ABA).[13] States are not required to adopt model acts or uniform codes, and none have adopted the ABA Model Act. State legislatures and judges have attempted to clarify some of the legal issues, but state-by-state variations in statutory language and judicial precedent persist. This Article will focus on the legal landscape surrounding ARTs. Part II provides an overview of ARTs and describes the medical procedures employed and any potential risks to offspring. Part III will discuss the general legal uncertainty lurking in various areas of state regulation concerning ARTs, as well as implications for insurance for the procedures. Part IV will discuss specific challenges same-sex couples face regarding utilization of ARTs. Finally, Part V will discuss the legal issues associated with future regulation of ART.

II. ASSISTED REPRODUCTIVE TECHNOLOGIES: A BRIEF OVERVIEW

A. PROCEDURES EMPLOYED IN ASSISTED REPRODUCTIVE TECHNOLOGIES

Assisted reproductive technologies involve combining sperm with ova that have been surgically removed from the body, and returning the fertilized eggs to the uterus, or donating the produced embryos to another person or couple.[14] ART procedures include in vitro fertilization (IVF), gamete intrafallopian transfer (GIFT), zygote intrafallopian transfer (ZIFT), and intracytoplasmic sperm injection (ICSI).[15] Artificial insemination (AI) and surrogacy, while not technically ARTs, implicate similar legal issues by assisting individuals and couples in achieving pregnancy, and thus will be considered in this discussion.[16]

IVF is the dominant form of ART. "In vitro" in Latin translates to "in glass." A fairly literal name, IVF involves the combination of the egg and sperm to achieve fertilization outside of the body, usually under a microscope in a glass petri dish.[17] The embryo is then placed in the uterine cavity for implantation.[18] GIFT and ZIFT are variations of IVF that involve placement of the egg and sperm in the fallopian tubes instead of the uterus. In GIFT, unfertilized eggs and sperm are placed in the fallopian tube and fertilization occurs inside of the body.[19] ZIFT, on the other hand, involves placement of a pre-fertilized egg in the

12. *See* Unif. Prob. Code §§ 2-115, 2-118–121, 2-705, 3-703, 3-705 (Unif. Law Comm'n amended 2019) [hereinafter UPC].

13. AM. BAR ASSOC., *Model Act Governing Assisted Reproductive Technology* (Feb. 2008), 42 FAM. L.Q. 171, 175 (2008) [hereinafter ABA Model Act].

14. *See 2019 Assisted Reproductive Technology Fertility Clinic Success Rates Report*, CTRS. FOR DISEASE CONTROL & PREVENTION, U.S. DEP'T OF HEALTH & HUM. SERVS. 2 (2019) [hereinafter CDC *2019*], https://perma.cc/FRL9-PK9J.

15. *Id.*

16. *See generally Surrogacy Dictionary*, WORLDWIDE SURROGACY SPECIALISTS L.L.C., https://perma.cc/547P-2NAB (last visited Mar. 9, 2023) [hereinafter WORLDWIDE SURROGACY SPECIALISTS].

17. CDC *2019*, *supra* note 14, at 51.

18. *Id.*

19. *Id.* at 2.

fallopian tubes.[20] In ICSI, an embryologist uses a micropipette to inject a single sperm into the center of an egg; the fertilized egg grows in a laboratory for one to five days before being placed in the uterus.[21] AI involves any method of manually inserting sperm to achieve possible fertilization and implantation.[22]

In legal practice, "surrogate" and "gestational carrier" are often used synonymously, but medically, surrogacy has two forms: traditional and gestational. A traditional surrogate supplies both the egg, or genetic component, and the gestational role of carrying the pregnancy to term.[23] This process can, but need not, involve ART. In gestational surrogacy, the surrogate supplies no genetic material and simply gestates the provided embryo.[24] ART (IVF) is always required for this scenario.

The CDC ART Fertility Clinic Success Rate Report, last compiled in 2019, states that 330,773 ART cycles were performed at 448 reporting clinics in the United States (U.S.) during 2019, resulting in 77,998 live births (deliveries of one or more living infants) and 83,946 (individual) live born infants.[25] Of the ART cycles for 2019, 121,086 were banking cycles in which embryos or eggs were frozen for future use and for which a live birth would not be expected; additionally, the total excludes cycles in which a new treatment was being evaluated.[26] The CDC also reports that approximately 2.1% of all infants born in the U. S. in 2019 were conceived using ART.[27]

B. POTENTIAL RISKS TO OFFSPRING

Since the birth of the first IVF, or "test tube" baby in 1978, the use of ART has increased substantially.[28] The increased prevalence of ART has raised concerns among some researchers who found tentative correlations between the use of certain ARTs and physical risks to parents and offspring.[29] Some experts criticize the methodology of these studies because many of the reproductive challenges that lead couples to undertake ARTs can also cause birth defects.[30] The fact that many using ART procedures are older individuals who are also undergoing hormone therapy could also be responsible for the increased rates of birth

20. *Id.*

21. *See Fact Sheet: What is lntracytoplasmic Sperm Injection?*, REPRODUCTIVEFACTS.ORG (2014), https://perma.cc/SB49-E9T9.

22. *See* WORLDWIDE SURROGACY SPECIALISTS, *supra* note 16.

23. *Id.*

24. *Id.*

25. CDC *2019*, *supra* note 14, at 25.

26. *Id.*

27. *State-Specific Assisted Reproductive Technology Surveillance, United States 2019 Data Brief*, CTRS. FOR DISEASE CONTROL & PREVENTION 4 (2019).

28. *See id.*

29. *See* Lars Noah, *Assisted Reproductive Technologies and the Pitfalls of Unregulated Biomedical Innovation*, 55 FLA. L. REV. 603, 603 (2003).

30. *See ART and Birth Defects*, CTRS. FOR DISEASE CONTROL & PREVENTION (Mar. 24, 2018), https://perma.cc/MCJ4-3NWH.

defects associated with ARTs.[31] Scientists may find it difficult to prove the cause and effect relationship between the use of ART and specific outcomes where underlying infertility and other factors are just as likely to lead to "adverse outcomes" for the parent and/or baby.[32]

A study published in 2021 in the Journal of Human Reproduction attempts to address whether conception through ART results in an increased risk of birth defects.[33] In surveying more than 1.2 million births, the authors discovered a greater risk of birth defects in ART children versus births that were not ART induced—an overall increase of 18% relative to naturally conceived births.[34] The authors also found that a history of infertility was associated with an increased risk of birth defects, with or without ART intervention.[35]

While some risks associated with ARTs remain, the solutions to address and resolve these problems do not generally fall within the purview of the legal field. In 1998, the American Society for Reproductive Medicine (ASRM) and the Society for Assisted Reproductive Technologies created ethical guidelines for a number of medical issues, including the preferred number of embryos transferred in an IVF procedure.[36] Since 2013, the guidelines have recommended reductions in the number of embryos transferred.[37] However, while doctors face potential professional ostracism or decreased profits from noncompliance with the ASRM guidelines, they are not legally required to follow them barring specific negligence resulting in a medical malpractice suit.[38]

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31. *See, e.g.*, Melissa Reynolds, Note, *How Old Is Too Old?: The Need for Federal Regulation Imposing A Maximum Age Limit on Women Seeking Infertility Treatments*, 7 IND. HEALTH L. REV. 277, 284 (2010).

32. *See id.* at 288.

33. *See* Barbara Luke, Morton B. Brown, Ethan Wantman, Nina E. Forestieri, Marilyn L. Browne, Sarah C. Fisher, Mahsa M. Yazdy, Mary K. Ethen, Mark A. Canfield, Stephanie Watkins, Hazel B. Nichols, Leslie V. Farland, Sergio Oehninger, Kevin J. Doody, Michael L. Eisenberg, & Valerie L. Baker, *The risk of birth defects with conception by ART*, 36 HUM. REPROD. 116, 116 (2021), https://perma.cc/2BV7-3523.

34. *See id.* at 116–117.

35. *See id.* at 121.

36. *See* Prac. Comm. of the Am. Soc'y for Reprod. Med., & Prac. Comm. for Assisted Reprod. Tech., *Guidance on the Limits to the Number of Embryos to Transfer: A Committee Opinion*, 116 FERTILITY & STERILITY 651, 651 (2021).

37. *Compare id.* at 652 (recommending the transfer of one to four embryos, depending on a patient's age) *with* Prac. Comm. of the Am. Soc'y for Reprod. Med., & Prac. Comm. for Assisted Reprod. Tech, *Guidance on the Limits to the Number of Embryos to Transfer: A Committee Opinion*, 99 FERTILITY & STERILITY, 44, 45 (2013) (recommending the transfer of one to five embryos, depending on a patient's age).

38. *See, e.g.*, Paretta v. Med. Offs. of Hum. Reprod., 760 N.Y.S.2d 639, 647 (N.Y. Sup. Ct. 2003) (finding for the first time that plaintiffs may have a negligence claim where an egg donor's genetic abnormality was tested for but accidentally not disclosed to the donor recipients); *see also* Malloy v. Meier, 679 N.W.2d 711, 713–15 (Minn. 2004) (finding liability where a negligent failure on the part of the IVF clinic to disclose a child's Fragile X condition resulted in his mother conceiving (naturally) a second child with the same condition).

C. ATTEMPTS TO CREATE A UNIFORM LEGAL CODE

State-by-state variations in statutory language and judicial interpretation create considerable uncertainty about how courts will rule in ART-specific cases, meaning a patient's decision to engage in the use of ART is surrounded by murky legal doctrine. The lack of national consensus has motivated three attempts by national organizations to unify state legislation and clarify the relevant legal issues. The UPA was enacted in 1973 to provide a comprehensive scheme for addressing issues of paternity, embryo ownership, and genetic testing.[39] With the advent of additional ARTs, the UPA has gone through new iterations. The 1973 version of the Act dealt primarily with children born out of wedlock and those born using artificial insemination.[40] The 2000, 2002, and 2017 UPAs stem from this version of the Act, but addressed the donation of all reproductive material, donor status regardless of the marital status of the recipient, new forms of ART, maternity, and parentage and conception after a donor's death.[41] Seven states have adopted the UPA since its most recent update in 2017.[42] Nine other states have adopted the 2002 version of the UPA in whole or in part.[43] Although the UPA has not been uniformly adopted by states, it has helped to produce some level of national consensus, showing that model acts can be effective in addressing the legal uncertainties surrounding the use of ARTs.[44]

In February 2008, the ABA adopted the Model Act Governing Assisted Reproductive Technology (Model Act) to address many of the legal issues left unresolved by the UPA. The Model Act borrowed a significant portion of the UPA's language but went beyond parenting issues to clarify the legal interests of all parties involved with ART procedures.[45] The Model Act represented the ABA's first attempt to clarify an area of law that is largely without legal regulation and provide state legislatures with a flexible framework for regulating the legal rights, obligations, and protections of the various stakeholders.[46] The historic effort included input from a cross-section of professional entities and practitioners.[47] The ABA approved an expanded Model Act in 2016 that deals with

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39. *See generally* UPA, *supra* note 11.

40. *See* Kristine S. Knaplund, *The New Uniform Probate Code's Surprising Gender Inequities*, 18 DUKE J. GENDER L. & POL'Y 335, 337 (2011).

41. *See id.*

42. California, Connecticut, Maine, Rhode Island, Vermont, and Washington have enacted the 2017 UPA, and Colorado has adopted a substantially similar language. *Parentage Act: Enactment History*, UNIFORM L. COMM'N, https://perma.cc/M8MF-X567 (last visited Feb. 24, 2023).

43. Alabama, Delaware, Illinois, New Mexico, North Dakota, Oklahoma, Texas, Utah, and Wyoming have enacted the 2002 UPA. *Legislative Fact Sheet—Parentage Act*, UNIFORM L. COMM'N, http://perma.cc/HAL9-BXXL (last visited Nov. 16, 2017).

44. *See id.*

45. *See* Charles Kindregan, Jr. & Steven H. Snyder, *Clarifying the Law of ART: The New American Bar Association Model Act Governing Assisted Reproductive Technology*, 42 FAM. L.Q. 203, 207–09 (2008).

46. *See id.* at 203.

47. *See id.*

ART agencies.[48] Although the Model Act does not yet have the force of law, it offers a useful clarification of relevant issues and a starting point for national consensus.[49]

In 2008, the UPC added Sections 2-120 and 2-121, covering issues stemming from assignment of parenting and inheritance issues related to ARTs.[50] Scholars have criticized "gender inequality" in the UPC because of curious wording that "allow[s] a [cisgender] woman, particularly a married woman, to alter the property distribution of a [cisgender] man's estate by having a PMC [post-mortem child] (even a child without his genetic material), but accord[s] very few men the same power."[51]

III. LEGAL ISSUES GENERALLY

A. OWNERSHIP OR CONTROL OF THE EMBRYO

One issue faced by prospective parents using ART involves the disposition of any unused embryos. Procedures such as IVF, ZIFT, and ICSI all involve the fertilization of an egg outside of the body to create an embryo.[52] In the event that there are extra embryos, as frequently occurs with IVF, those embryos are often cryopreserved (frozen) pursuant to a consent agreement between the intended parents and the fertility clinic.[53] The existence of these embryos presents a legal problem when couples are jointly responsible for the embryos and their relationship dissolves due to death or separation. For example, one individual may seek to use the embryos in a future pregnancy attempt, but the other parent may object or no longer be able to consent to the implantation of the embryo. The resulting problem for the legal system is the determination of which party has the authority to make decisions about the disposition of remaining embryos in the absence of a pre-separation or death agreement.[54] Even in the event that a consent agreement exists, issues arise as to whether such a contract should be enforced given public policy implications.[55] Authority over the disposition of frozen embryos can be

48. *ABA Model Act Governing Assisted Reproductive Technology Agencies*, AM. BAR ASS'N (June 1, 2016), https://perma.cc/2W8G-X99T.

49. *Id.*

50. *See* Sheldon F. Kurtz & Lawrence W. Waggoner, *The UPC Addresses the Class-Gift and Intestacy Rights of Children of Assisted Reproduction Technologies*, 35 ACTEC J. 30, 32 (2009).

51. Knaplund, *supra* note 40, at 352.

52. *See Procedures Employed in Assisted Reproductive Technologies, supra* Section II.A.

53. There are an estimated one million frozen embryos in the U.S. *See* Tamar Lewin, *Industry's Growth Leads to Leftover Embryos, and Painful Choices*, N.Y. TIMES (June 17, 2015), https://perma.cc/PHR2-RHXH. *See also* Melinda Traeger, Comment, *The Legal Status of Frozen Pre-Embryos When a Dispute Arises During Divorce*, 18 J. AM. ACAD. MATRIM. L. 563, 563, 568 (2003).

54. *See* Charles P. Kindregan Jr. & Maureen McBrien, *A Look at Embryos in Divorce*, FAM. LAW. MAG. (Dec. 18, 2019), https://perma.cc/V4JS-PXFT.

55. *See id.*

determined through binding consent agreements between parties, state statutes, adjudication, or a combination of the three.[56]

1. Binding Agreements Between Parties

The ABA's Model Act and ASRM guidelines suggest the use of binding agreements executed prior to creation of embryos that spell out the intended use and disposition of the embryos in the event of divorce, illness, death, or other changed circumstances.[57] While such agreements are useful for clarifying expectations and resolving disputes about control over embryos, they can lead to legal uncertainty because contractual agreements remain subject to state statutes and judicial precedent.

2. State Statutes

Most states do not have statutes directly addressing the disposition of frozen embryos.[58] Louisiana, one of the few states that does address the issue head-on, chose to categorize pre-implantation embryos as biological persons.[59] Consequently, due to the state's restrictions on abortion, public policy prohibits embryos from purposely being destroyed. This means that if a couple relinquishes its right to the embryo, it must be made available for donation.[60] In contrast, Florida law indicates that contract theories, not public policy, will prevail in determining the disposition of frozen embryos.[61] However, the Florida statute does not address situations in which a couple divorces with no written contract in place and subsequently disagrees over the disposition of frozen embryos.[62] Due to the fact that few state statutes specifically address frozen embryos and the lack of existing comprehensive statutes, many disputes are likely to be resolved through litigation.

The UPA addresses two important issues arising from the use of frozen embryos: (1) use of an embryo after the sperm donor's death and (2) ownership

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56. Michael T. Flannery, *"Rethinking" Embryo Disposition Upon Divorce*, 29 J. CONTEMP. HEALTH L. & POL'Y 233, 233 (2013).

57. *See* Kindregan & Snyder, *supra* note 45, at 212, 215.

58. *But see* CAL. HEALTH & SAFETY CODE § 125315 (West, Westlaw through Ch. 997 of 2022 Reg. Sess.); TEX. FAM. CODE ANN. §160.706 (West, Westlaw through end of the 2023 Reg. & Called Sess., of the 88th Leg.); FLA. STAT. ANN. § 742.17 (West, Westlaw through the 2023 2nd Reg. Sess. & Spec. A, C, & D Sess. of the 28th Leg.). State legislation banning abortion since the decision in *Dobbs v. Jackson Women's Health Org.*,142 S. Ct. 2228 (2022), may indirectly regulate the disposition of frozen embryos through granting "fetal personhood" rights, but this remains an open question. *See* Michelle Jokisch Polo, *Infertility Patients Fear Abortion Bans Could Affect Access to IVF Treatment*, NPR (July 21, 2022, 5:04 AM), https://perma.cc/X5MQ-D98Q.

59. *See* LA. REV. STAT. ANN. §§ 9:126, 130, 133 (West, Westlaw through 2023 1st Extra., Veto, Reg., & Spec. Sess.).

60. *See* Shelly R. Petralia, Note, *Resolving Disputes Over Excess Frozen Embryos Through the Confines of Property and Contract Law*, 17 J.L. & HEALTH 103, 126 (2002–03).

61. *See id.* at 128.

62. *Id.*

of an embryo upon the dissolution of a marriage.[63] UPA Section 708, Parental Status of Deceased Individual, dictates that if an intended parent dies before placement of an embryo, the decedent will only be considered a legal parent of the resulting child if they agreed in a record to be the child's parent should assisted reproduction occur after death, or if the deceased's intent to be the child's parent can be established by "clear-and-convincing evidence."[64] In these situations, the embryo must be in utero within thirty-six months, or the child must be born within forty-five months of the parent's death.[65] Section 706, Effect of Certain Legal Proceedings Regarding Marriage, states that if the marriage is dissolved before transfer of gametes or embryos to the body, the former spouse is not a parent of the resulting child unless the former spouse consented in a record to such an arrangement.[66] Under Section 707, consent of a former spouse regarding the placement of the embryo may be withdrawn at any time before implantation.[67] The Act does not address which party has the right to control the gametes or embryos following the dissolution of a marriage.[68]

3. Adjudication

When adjudicating matters regarding disposition of frozen embryos, courts have relied on three different theories, often called (1) the contractual approach; (2) the contemporaneous mutual consent approach; and (3) the balancing approach.[69] There is no universal approach, and the few courts that have decided the issue do not align in their reasoning. The Tennessee Supreme Court first set the legal precedent for disposition of frozen embryos in 1992 in *Davis v. Davis*.[70] In that case, the court identified two controlling factors to govern disposition: the written agreement of the parties and the public policy of the state.[71] After finding an original agreement invalid for lack of mutual intent, the court balanced the "relative interests of the parties" against the potential burdens imposed by different resolutions.[72] Under this method, "[o]rdinarily, the party wishing to avoid procreation should prevail."[73]

After *Davis*, at least five other courts of last resort considered the issue of embryo disposition agreements.[74] No court permitted one partner in a couple to

63. *See* UPA, *supra* note 11, §§ 706, 708.
64. *Id.* § 708(b).
65. *Id.*
66. *Id.* § 706.
67. *Id.* § 707(a).
68. *Id.* § 706 cmt.
69. *See, e.g.*, Flannery, *supra* note 56, at 233.
70. *See id.* at 281.
71. *Id.* (citing Davis v. Davis, 842 S.W.2d 588, 590 (Tenn. 1992)).
72. *See Davis*, 842 S.W.2d at 604.
73. *Id.*
74. *See generally In re* Marriage of Witten, 672 N.W.2d 768 (Iowa 2003); A.Z. v. B.Z., 725 N.E.2d 1051 (Mass. 2000); J.B. v. M.B., 783 A.2d 707 (N.J. 2001); Kass v. Kass, 696 N.E.2d 174 (N.Y. 1998); Litowitz v. Litowitz, 48 P.3d 261 (Wash. 2002).

use embryos the couple had created together over the objection of the other partner. Under the approach used by courts in Tennessee, New York, and Washington, "agreements between progenitors . . . should generally be presumed valid and binding."[75] In both of the guiding New York and Washington cases, the couples signed disposition agreements that stated their intent, and the courts enforced the agreements as a manifestation of the parties' intent.[76]

In 2000, the Massachusetts Supreme Judicial Court became the first court to reject a couple's previous disposition agreement, making its decision on public policy grounds.[77] The court based its determination on the legislative intent that individuals should not be bound by agreements to enter into familial relationships, concluding that forced procreation violated public policy.[78] It also relied on prior decisions in which the court had "expressed its hesitancy to become involved in intimate questions inherent in the marriage relationship."[79]

Shortly thereafter, in *J.B. v. M.B.*, a New Jersey court rejected the sufficiency of a valid disposition agreement.[80] Although the court stated its willingness to enforce such contracts, it created a loophole that effectively rendered disposition agreements useless by granting legal significance to either party's change of heart.[81] If there is a later disagreement, then a balancing test, similar to the *Davis v. Davis* approach, is used to determine the interests of the parties, with great weight given to the interests of the party "wishing to avoid procreation."[82] The New Jersey approach mirrors the Massachusetts approach in that it provides an absolute bar against enforcement of disposition agreements where one party does not wish to be a parent.

Whereas New Jersey and Massachusetts courts refuse to enforce a disposition agreement that leads to an unwanted child, Iowa courts will refuse to enforce any disputed agreement, regardless of the result of enforcement. The Iowa court in *In re Marriage of Witten* rejected both the contract-based and balancing test approaches in favor of a "contemporaneous mutual consent" rule: if there is disagreement as to disposition, "no transfer, release, disposition, or use of the embryos can occur without the signed authorization of both donors."[83] The court

75. *Kass*, 696 N.E.2d at 180; *see also Davis*, 842 S.W.2d at 597 (stating that "an agreement regarding disposition . . . should be presumed valid and should be enforced as between the progenitors"); *Litowitz*, 48 P.3d at 268 (accepting the validity of the contract in stating that "it is appropriate for the courts to determine disposition of the preembryos under the cryopreservation contract").

76. *See Kass*, 696 N.E.2d at 181; *Litowitz*, 48 P.3d at 271.

77. *See A.Z.*, 725 N.E.2d at 1057–58.

78. *See id.* at 1058 (pointing out that the legislature eliminated any cause of action for breach of a promise to marry, and providing that no mother may agree to surrender a child for adoption, regardless of prior agreement, until four days after the child's birth).

79. *Id.*

80. *See* J.B. v. M.B., 783 A.2d 707, 717 (N.J. 2001).

81. *Id.* at 719 (enforcing valid disposition agreements "subject to the right of either party to change his or her mind up to the point of use or destruction of any stored preembryos").

82. *Id.* at 716 (agreeing with the Tennessee Supreme Court that "ordinarily, the party wishing to avoid procreation should prevail") (quoting Davis v. Davis, 842 S.W.2d 588, 604 (Tenn. 1992)).

83. 672 N.W.2d 768, 783 (Iowa 2003).

sought to maintain the status quo in the event of disagreement about embryo disposition and placed the costs of maintaining the status quo on the party opposing the destruction of their embryos.[84] Instead of focusing on the rights of the individual parties, the court opted to permit the parties to continue negotiating the issue indefinitely.[85] Similarly, in *McQueen v. Gadberry*, the Missouri Court of Appeals held that a couple's right to freedom and privacy to make their own intimate decisions outweighed the pre-embryos' statutory right to life and awarded rights to the embryos to the man and woman jointly.[86]

Conversely, in *Szafranski v. Dunston*, the Illinois Court of Appeals found that mutually expressed intent as set out in a couple's prior agreements rather than "contemporaneous consent" wins in the disposition of frozen embryos created with one party's ova and the other party's sperm.[87] Before Karla Dunston began chemotherapy treatments that would most likely cause the loss of her fertility, she asked her then-boyfriend Jacob Szafranski to donate sperm to create pre-implantation embryos; he agreed.[88] The relationship later ended and Szafranski sought to enjoin Dunston from utilizing the embryos.[89] In this case of first impression under Illinois law, the court determined that the contractual agreements set forward by the couple at the time of the creation of the embryos were enforceable, regardless of whether they required a party to engage in a familial relationship he or she no longer desired.[90] The court held that "[a]greements between progenitors, or gamete donors, regarding disposition of their pre-zygotes should generally be presumed valid and binding, and enforced in any dispute between them."[91]

The variation in the approaches taken by these courts provides little guidance for the states that have not yet addressed these issues. Interestingly, many clinics also have their own contractual requirements for the embryos, not required by law, including restrictions on placement after a specific age of the intended gestational carrier.[92] Clinics in the U.S. usually have an "upper age limit after which they will not perform in vitro fertilization with the [cisgender] woman's own eggs," often between ages forty-two and forty-five.[93] Most IVF clinics will not allow individuals over the age of fifty to receive donor eggs to create a pregnancy.[94] The uncertain disposition of unused embryos has a direct impact on individuals who desire to use a donated embryo. Iowa's test would maintain the

84. *Id.*
85. *See id.*
86. 507 S.W.3d 127, 147 (Mo. Ct. App. 2016).
87. 993 N.E.2d 502, 515 (Ill. App. Ct. 2013).
88. *Id.* at 503.
89. *Id.* at 504–05.
90. *Id.* at 516–17.
91. *Id.* at 508 (quoting Kass v. Kass, 696 N.E.2d 174, 180 (N.Y. 1998)).
92. *Fertility After Age 40 - IVF in the 40s*, ADVANCED FERTILITY CTR. OF CHI., https://perma.cc/M7C8-9RHT (last visited Mar. 9, 2023).
93. *Id.*
94. *Id.*

status quo in the case of a dispute and prohibit donation of contested embryos, denying other couples the chance to use them.[95] The balancing and intent-of-the-parties tests also present roadblocks for these individuals. In order to determine the disposition of a given embryo, the courts must engage in a fact-specific, litigation-driven process.

B. DETERMINING PARENTAGE

Another significant area of legal doctrine concerning ARTs is the determination of parentage. Determinations of parentage confer substantial rights, and without those rights, a person cannot exercise parental control over the child involved. As noted, some states have adopted versions of the UPA.[96] The UPA sets forth guidelines for identifying, determining, and adjudicating a child's parentage.[97] Article 2 of the UPA pertains to the different aspects of the parent-child relationship,[98] indicating the various reproductive methods, including surrogacy and ART, that can establish a parent-child relationship.[99] Article 2 also stipulates that children born to unmarried parents have the same legal rights as children born to married parents.[100] Article 3 addresses voluntary acknowledgement of paternity,[101] and Article 4 discusses the provisions, operation, and search procedures related to a paternity registry.[102]

Article 7, titled "Assisted Reproduction," applies only to children born as the result of assisted reproduction technologies, and not those conceived through sexual intercourse.[103] It provides that a donor is not a parent of a child conceived by means of assisted reproduction; however, an individual who consents to assisted reproduction by a cisgender woman with the intent to be the parent of the child, is a parent of the resulting child.[104] Generally, consent must be in written form and signed by both parties.[105] However, parentage can be established without written consent if either party can show with "clear-and-convincing" evidence that they both intended to be parents of the child.[106] Additionally, parentage can be established if during the first two years of the child's life the individual who gave birth and another individual who intended to be the child's parent reside together in the same household with the child and openly hold out the child as their own.[107]

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95. *See In re* Marriage of Witten, 672 N.W.2d 768, 783 (Iowa 2003).
96. *See Legislative Fact Sheet—Parentage Act, supra* note 43.
97. *See* UPA, *supra* note 11, §§ 412–623; *see generally Parentage Act: Enactment History*, *supra* note 42.
98. UPA, *supra* note 11, §§ 201–04.
99. *Id.* § 201.
100. *Id.* § 202.
101. *Id.* §§ 301–14.
102. *Id.* §§ 401–15.
103. *Id.* § 701.
104. *Id.* §§ 702–03.
105. *Id.* § 704(a).
106. *Id.* § 704(b)(1).
107. *Id.* § 704(b)(2).

Article 7 also discusses limitations on a spouse's ability to dispute paternity[108] and the effect of a divorce or withdrawal of consent on parentage.[109]

Because the ABA's Model Act asserts that "[t]he sections dealing with parentage are intended, as much as possible, to be consistent with and to track the corresponding provisions of the Uniform Parentage Act of 2000, as amended in 2002," its provisions present similar parentage guidelines.[110] The ABA has also approved the 2017 version of the UPA, which makes several major updates to the 2002 version.[111] First, the language of the 2017 adaptation is gender neutral to ensure the equal treatment of children born to same-sex couples.[112] Second, it includes a new section that recognizes a *de facto* parent as a legal parent of a child.[113] Third, the 2017 update precludes the establishment of a parent-child relationship by the perpetrator of a sexual assault that resulted in the conception of the child.[114] Finally, the Act reflects developments in state surrogacy statutes[115] and includes an additional article that stipulates the rights of children born through ARTs to access medical and identifying information about gamete donors.[116]

There are several parentage issues with ARTs that state courts frequently deal with. *Rosecky v. Schissel* demonstrates one of these problems.[117] David and Marcia Rosecky entered into a Parentage Agreement (PA) with their friends Monica and Cory Schissel.[118] The agreement stipulated that Monica would serve as a traditional surrogate, utilizing David's sperm, following Marcia's infertility diagnosis.[119] The couples discussed and signed agreements purporting to govern the status of the child, who would be raised by the Roseckys.[120] The couples had a falling out, and Monica refused to relinquish her parental rights upon the birth of F.T.R.[121] The legal limbo in a case like this stems from Monica's presumed motherhood of the child by virtue of having given birth to the baby and David's adjudicated father status. Though the Supreme Court of Wisconsin found the PA to be generally enforceable, the court excepted a provision of the PA terminating Monica's parental rights.[122] Because Monica refused to terminate parental rights, "[u]nder the current [Wisconsin] statutory schemes, Marcia is left without any

108. *Id.* § 705.
109. *Id.* §§ 706–07.
110. ABA Model Act, *supra* note 13, at 1.
111. Jamie D. Pedersen, *The New Uniform Parentage Act of 2017*, AM. BAR ASS'N (Apr. 1, 2018), https://perma.cc/4SLX-UMUD.
112. *Id.*
113. *See* UPA, *supra* note 11, § 609.
114. *Id.* § 614.
115. *Id.* at Art. 8.
116. *Id.* at Art. 9.
117. 833 N.W.2d 634 (Wis. 2013).
118. *Id.* at 637.
119. *Id.* at 637–38.
120. *Id.* at 638.
121. *Id.* at 639.
122. *Id.* at 648–49.

parental rights unless and until Monica's parental rights are terminated and Marcia adopts F.T.R."[123] Cases similar to *Rosecky* in other states have come to similar conclusions about terminating parental rights of the surrogate prior to the birth of the child.[124] However, Iowa has held that the opposite is true; the court in *P.M. v. T.B.*, held that a surrogacy agreement was enforceable under state law.[125]

When two unmarried individuals undertake ART together, but the relationship later deteriorates, other parentage issues can arise. *In re C.K.G.* involved an unmarried heterosexual couple who produced triplets using anonymously donated eggs fertilized with the male partner's sperm.[126] When the relationship dissolved, the man argued that the woman was not a parent because she had no genetic connection to the children.[127] The juvenile court awarded joint custody, and the court of appeals, adopting the intent test of *Johnson v. Calvert*, affirmed.[128] On appeal, the Tennessee Supreme Court analyzed four factors to determine parentage: genetics, intent, gestation, and absence of controversy between the gestating party and a genetic mother.[129] After finding that genetics was the only absent factor, the court acknowledged the woman as the legal mother of the children.[130] The four-factor approach recognizes the difficulty in proving intent through examination of bright-line factors such as genetics and gestation.

Other problematic parentage situations arise when a person engaging in ART is inadvertently implanted with an embryo containing genetic material from an unexpected individual. In *Andrews v. Keltz*, a couple, after conceiving a child through IVF, suspected the child was not the husband's biological child based on her appearance at birth.[131] Subsequent DNA tests confirmed their suspicion and the family sued on a number of theories, including medical malpractice, emotional distress, breach of contract, and assault and battery.[132] The court held that the child could not recover damages for emotional distress because the doctors had no legal duty of care "to an individual who was not yet in utero."[133] However, the parents' claims for emotional distress were permitted because of their legitimate concerns that the child's biological father may one day assert his rights and

123. 833 N.W.2d 634, 646 (Wis. 2013).

124. *See e.g.*, *In re* Baby, 447 S.W.3d 807, 840 (Tenn. 2014) ("[T]he contractual provisions circumventing the statutory procedures for the termination of parental rights are unenforceable."); *In re* T.J.S., 54 A.3d 263, 266–67 (2012) (Hoens, J., concurring) (asserting that, in the absence of clear legislation allowing for the statutory termination of parental rights, contractual provisions terminating parental rights are unenforceable).

125. 907 N.W.2d 522, 533–34 (Iowa 2018).

126. 173 S.W.3d 714, 716 (Tenn. 2005).

127. *Id.* at 718–19.

128. *Id.* at 719.

129. *Id.* at 727–29.

130. *Id.* at 729.

131. 838 N.Y.S.2d 363, 365 (N.Y. Sup. Ct. 2007).

132. *Id.* at 365.

133. *Id.* at 369.

interfere with their parental roles.[134] Further, the court held that the parents' fears concerning the misuse of their genetic material and the possible existence of other biological children could survive a motion to dismiss.[135] However, plaintiffs could not recover damages based on the fact that they were deprived of having a child with their combined genetic makeup, even though the resulting child was of a different race.[136] The court stated that "[a]s a matter of public policy we are unable to hold that the birth of an unwanted but otherwise healthy and normal child constitutes an injury to the child's parents."[137]

C. DETERMINING CITIZENSHIP FOR CHILDREN BORN ABROAD USING ASSISTED REPRODUCTIVE TECHNOLOGIES

The situations discussed above deal with children born within the U.S. However, the question of how to determine parentage of children born abroad to U.S. citizens through the use of ARTs has posed problems.[138] There are two ways to acquire U.S. citizenship at birth: by being born in the U.S., or by being born abroad as the child of a U.S. citizen.[139] Until 2013, the State Department required a blood relationship between the parent and the child for a child to acquire U.S. citizenship.[140] In late 2013, the State Department amended its position based on the changing definition of motherhood.[141] This new definition assumes that the person who gives birth is also the genetic parent of the child because a child's blood relationship to the birth parent is immediately obvious through the act of giving birth.[142] Thus, a child born abroad may acquire U.S. citizenship at birth if (1) the U.S. citizen father is the genetic parent of the child; (2) the U.S. citizen is the genetic and/or the gestational and legal mother of the child at the time and place of the child's birth; *or* (3) a U.S. citizen parent who is not the genetic or gestational parent of the child is, at the time of the child's birth, married to a genetic and/or gestational parent of the child.[143]

However, this definition still fails to include children who do not have a genetic or gestational relationship to their intended parents, as may happen when a U.S. citizen abroad does not provide sperm or eggs or act as the gestational carrier of a

134. *Id*. at 368.
135. *Id*.
136. *Id*.
137. 838 N.Y.S.2d 363, 366 (N.Y. Sup. Ct. 2007) (quoting Weintraub v. Brown, 470 N.Y.S.2d 634, 641 (N.Y. App. Div. 1983)).
138. *See generally* Kristine S. Knaplund, *Baby Without a Country: Determining Citizenship for Assisted Reproduction Children Born Overseas*, 91 DENV. U. L. REV. 335 (2014) [hereinafter Knaplund, *Baby Without a Country*]; Scott Titshaw, *Sorry Ma'am, Your Baby is an Alien: Outdated Immigration Rules and Assisted Reproductive Technology*, 12 FLA. COASTAL L. REV. 47 (2010).
139. Knaplund, *Baby Without a Country*, *supra* note 138, at 336.
140. *Id*. at 352.
141. *Id*. at 352–53.
142. *Id*. at 353.
143. *Assisted Reproductive Technology (ART) and Surrogacy Abroad*, TRAVEL.STATE.GOV, https://perma.cc/YY7S-F6ZY (last visited Mar. 9, 2023).

child conceived through ART. As a way to address this, in 2017, the ABA adopted a resolution suggesting that the State Department alter its guidelines even further.[144] It argues in favor of expanding the definition of child for purposes of citizenship acquisition under the Immigration and Nationality Act to include those children born to intended parents, even if those legally recognized parents do not have a biological (genetic or gestational) relationship to the child.[145] That way, the ABA argues, the law could keep up with the latest advances in ART.[146]

D. INHERITANCE RIGHTS

Historically, the birth of a child following the death of a biological parent could only take place within a discrete window of time. However, the storage and implantation of frozen embryos created the potential for offspring to be produced years after the death of a biological parent. Although the UPA's[147] and UPC's provisions on parentage indirectly address inheritance issues,[148] states have adopted varying statutes to address unconventional concerns related to ARTs. For example, California only allows posthumously conceived children to inherit from their parents if; (1) the parent provided written consent for posthumous use of genetic material; (2) the parent designated a person to control the genetic material's use; (3) the parent notified the designee in writing; and (4) the child was conceived within two years of the decedent's death.[149] In Florida, a posthumously conceived child may inherit only if the decedent explicitly provided for the child in their will.[150] Louisiana allows a posthumously conceived child to inherit from their father if (1) the father provided written consent for the use of his semen; and (2) the child is born within three years of the father's death.[151] However, an adversely affected person has a one-year time limit to challenge the child's paternity.[152]

Other states have resolved these issues through common law. However, this has led to divergent results across the country. In *Gillett-Netting v. Barnhart*, the Ninth Circuit required the provision of benefits to twins conceived via IVF after their father's death.[153] The court reasoned that because the children would be

144. *Report to the House of Delegates: Resolution 113*, AM. BAR ASSOC. 1 (2017), https://perma.cc/F46P-PKWE.

145. *Id.*

146. *Id.*

147. *See* UPA, *supra* note 11, § 708 (noting a decedent is the parent of a child if the decedent agreed to posthumous use of genetic material).

148. *See* UPC, *supra* note 12, § 2-120(f)(2)(C) (determining parent-child relationship exists when an individual "intended to be treated as a parent of a posthumously conceived child, if that intent is established by clear and convincing evidence").

149. CAL. PROB. CODE § 249.5 (West, Westlaw through Stat. 997 of 2023 Reg. Sess.).

150. FLA. STAT. ANN. § 742.17 (West, Westlaw through 2023 2nd Reg. Sess. & Spec. C & D Sess. of the 28th Leg.).

151. LA. REV. STAT. ANN. § 9:391.1.A (West, Westlaw through 2023 Extra., Veto, Reg., & 2nd Extra. Sess.).

152. *Id.* § 9:391.1.B.

153. Gillett-Netting v. Barnhart, 371 F.3d 593, 594, 598 (9th Cir. 2004).

considered the father's legitimate children under Arizona law, they were deemed dependent on the father for insurance benefits.[154] The court further stated that because developing reproductive technology has outpaced federal and state laws, it would base its decision under the law as currently formulated, including the "well-reasoned opinion" of the Massachusetts court in *Woodward v. Commissioner of Social Security*.[155]

In Massachusetts, instead of automatically allowing inheritance rights, the court articulated three controlling factors in whether posthumously conceived children should be considered legal heirs of a deceased parent: (1) the genetic relationship between the child and deceased father; (2) affirmative consent given by the deceased father to have a child posthumously; and (3) whether there was affirmative consent to support a child resulting from the assisted reproduction procedure.[156]

The New Hampshire Supreme Court reached yet another conclusion in *Khabbaz v. Commissioner*.[157] The U.S. District Court for the District of New Hampshire certified a question to the New Hampshire Supreme Court to determine whether a posthumously conceived child could inherit from her father under the New Hampshire intestacy law.[158] Because the posthumously conceived child was not "remaining alive or in existence" at the time of her father's death, she was not a "surviving issue" within the statute's plain meaning.[159] The court interpreted part (a) of the statute—which did not use the term "surviving issue"—in light of the rest of the statute, and "a clear legislative intent to create an overall statutory scheme under which those who 'survive' a decedent—that is, those who remain alive at the time of the decedent's death—may inherit in a timely and orderly fashion contingent upon who is alive."[160] The court also emphasized that "waiting for the potential birth of a posthumously conceived child could tie up estate distributions indefinitely."[161]

A New York court, on the other hand, held that children conceived after their father's death via IVF were "issues" and "descendants" for the purposes of administering a trust fund.[162] In *In re Martin B*., the grantor's son, James, died in 2001 from Hodgkin's Lymphoma.[163] Before commencing treatment, James had his sperm frozen and gave control of the sperm to his wife in the event of his death.[164] After he died, his wife used his sperm for IVF and ultimately gave birth

154. *Id*. at 598.
155. *Id*. at 596 n.3.
156. Woodward v. Comm'r of Soc. Sec., 760 N.E.2d 257, 272 (Mass. 2002).
157. Khabbaz v. Comm'r, 930 A.2d 1180, 1182 (N.H. 2007).
158. *Id*. at 1182.
159. *Id*. at 1183–84.
160. *Id*. at 1184.
161. *Id*.
162. *In re* Martin B., 841 N.Y.S.2d 207, 212 (N.Y. Sup. 2007).
163. *Id*. at 207.
164. *Id*.

to two children.[165] Although numerous states prohibit posthumously born children from inheriting under a dead parent's will, the court distinguished this case from those pertaining to estates.[166] "[T]he concerns related to winding up a decedent's estate differ from those related to identifying whether a class disposition to a grantor's issue includes a child conceived after the father's death but before the disposition became effective."[167] The grantor's intent is the controlling factor determining whether a person is a descendant because "[s]uch instruments provide that, upon the death of the grantor's wife, the trust fund [should] benefit his sons and their families equally. . . . [A] sympathetic reading of these instruments warrants the conclusion that the grantor intended all members of his bloodline to receive their share."[168]

These cases are particularly important in light of the Supreme Court's 2012 ruling in *Astrue v. Capato*. Following the death of her husband from cancer, Karen Capato used his frozen sperm and became pregnant with twins; she then applied for them to receive Social Security survivor benefits.[169] Her claim was denied under the Social Security Administration's interpretation of the statute, and she appealed.[170] In a unanimous opinion, the Supreme Court rejected Capato's argument that "under the government's interpretation . . . posthumously conceived children are treated as an inferior subset of natural children who are ineligible for government benefits simply because of their date of birth and method of conception."[171] Instead, the Court held that a genetic connection alone was insufficient to assume inheritance of Social Security benefits and accepted the Social Security Administration's interpretation that the purpose of benefits was to provide for children supported by the decedent at the time of his death.[172] The Court's ruling requires that all children, no matter their method of conception, "qualify under state intestacy law" and held that this "test . . . ensured benefits for persons plainly within the legislators' contemplation, while avoiding congressional entanglement in the traditional state-law realm of family relations."[173] The ruling also allowed for children to "satisfy one of the statutory alternatives to that requirement."[174] *Astrue v. Caputo* marks an important national jurisprudential recognition by the Supreme Court of the challenges inherent in ART law.

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165. *Id.*
166. *Id.* at 209.
167. *Id.* at 210.
168. *Id.* at 212.
169. Astrue v. Capato *ex rel.* B.N.C., 566 U.S. 541, 544 (2012).
170. *Id.*
171. *Id.* at 557.
172. *See id.* at 552, 558 ("[L]aws directly addressing use of today's assisted reproduction technology do not make biological parentage a universally determinative criterion.").
173. *Id.* at 554.
174. *Id.* at 545.

E. SURROGACY CONTRACTS

A surrogacy contract is an agreement in which an individual, or "surrogate," (usually, but not necessarily, a cisgender woman) agrees to carry a pregnancy and to relinquish the resulting child to intended parents who agree to take on the duties of raising the child.[175] Surrogacy contracts typically require the intended parents to pay for medical costs and other expenses associated with the surrogacy, and some contracts provide for additional compensation as consideration for the surrogate's services.[176] Because pregnancy and birth have very high medical costs, surrogacy can be an expensive process.[177] Without the stability provided by a contract, prospective parents take financial and emotional risks by entering into a surrogacy arrangement because they are at the mercy of the surrogate's discretion.[178]

States approach surrogacy contracts in different ways, ranging from near-total enforcement, to criminalization, to total silence; the legal landscape may consist of statutes, case law, or both. Generally speaking, states can be placed along a spectrum of permissive, restrictive, and prohibitive jurisdictions. In all three, the legality and enforceability of surrogacy contracts often turns on distinctions based on the marital status of the prospective parents, the mode of surrogacy, and the degree of compensation.[179]

1. Permissive Jurisdictions

Permissive jurisdictions authorize compensated surrogacy agreements in all or most circumstances. Of the permissive jurisdictions, California has historically been considered the most favorable for prospective parents.[180] Under California statutory law, gestational surrogacy agreements are presumed valid so long as they meet certain procedural requirements.[181] The enforceability of such agreements depends neither on the gender, marital status, or sexual orientation of the

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175. *See* Christina Caron, *Surrogacy Is Complicated. Just Ask New York*, N.Y. TIMES (Apr. 18, 2020), https://perma.cc/VC5G-33S9. A surrogate merely needs to have the biological capability to carry a pregnancy to term. Gender identity does not impact this ability.

176. *Id.*

177. *Id.*

178. *See, e.g.*, Tamar Lewin, *Surrogates and Couples Face a Maze of Laws, State by State*, N.Y. TIMES (Sept. 17, 2014), https://perma.cc/R89U-EZ5S (describing how a surrogate fled to a state where surrogacy contracts were unenforceable when the prospective parents asked her to abort the fetus after an ultrasound showed congenital defects in the fetus's palate, brain, and heart). *See* Debra E. Guston & William S. Singer, *A Well Planned Family: How LGBT People Don't Have Children by Accident*, 282 N.J. LAW. 36, 40 (2013) (describing how a gestational carrier changed her mind and acquired shared visitation rights).

179. *See* Melissa Ruth, *Enforcing Surrogacy in the Courts: Pushing for an Intent-Based Standard*, 63 VILL. L. REV. 1, 9–11 (2019).

180. *See* Darra L. Hofman, *"Mama's Baby, Daddy's Maybe": A State-by-State Survey of Surrogacy Laws and Their Disparate Gender Impact*, 35 WM. MITCHELL L. REV. 449, 461 (2009); *compare* Lewin, *supra* note 178 (noting that California allows "anyone to hire a woman to carry a baby and the birth certificate to carry the names of the intended parents") *with In re* Roberto d.B., 923 A.2d 115, 130–32 (Md. 2007) (noting that surrogacy contracts are illegal in Maryland and a surrogate is presumed to be the child's mother).

181. CAL. FAM. CODE § 7962 (West, Westlaw through Ch. 565 of 2023 Reg. Sess.)

intended parent or parents, nor on the amount of compensation paid to the surrogate.[182] Before this law was passed in 2013, California solely relied on case law, which benefited petitioners by virtue of the flexibility of common law: single individuals, heterosexual couples, and homosexual couples could successfully obtain parental rights through the surrogacy process.[183] The California Supreme Court first addressed the issue of parentage arising from a surrogacy contract in the 1993 case *Johnson v. Calvert*.[184] In *Johnson*, the court recognized that both the genetic mother and the gestational surrogate had presented acceptable proof of maternity under state law, so the court turned to the parties' intentions, as manifested in the surrogacy agreement, to determine parentage.[185] The court found that the parties intended for the genetic parents to bring a child into the world, not to donate a zygote to the surrogate.[186] Thus, it held that the intended parents were the child's natural parents, not the gestational mother.[187] The court justified its approach by stating that it was "not the role of the judiciary to inhibit the use of reproductive technology when the [l]egislature has not seen fit do so."[188] As such, the California Supreme Court articulated the necessity to inquire into the intentions of parties to determine parentage in gestational surrogacy agreements.[189]

Following *Johnson*, lower courts in California began inquiring into the intent of the parties in surrogacy cases, such as *In re Marriage of Buzzanca*.[190] In *Buzzanca*, neither the intended mother nor the surrogate were biologically related to the child.[191] Despite this, the court held that the intended mother was the legal parent of the child[192] because the intended mother's consent to the surrogacy arrangement triggered the medical procedure to impregnate the surrogate.[193] Thus, she had an "initiating role" in the process.[194] This role, paired with her intent to parent, was determinative.[195] This intent-based inquiry has since spread to other jurisdictions.[196]

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182. *See id.*

183. *Id.*; Hofman, *supra* note 180, at 461. *But see* Carla Spivack, *The Law of Surrogate Motherhood in the United States,* 58 AM. J. COMP. L. 97, 102 (2010) (stating that common law enforcement mechanisms put couples at risk of unfavorable court determinations on public policy or constitutional grounds).

184. Johnson v. Calvert, 851 P.2d 776, 777–78, 789 (Cal. 1993).

185. *Id.* at 782.

186. *Id.*

187. *Id.* at 778.

188. *Id.* at 787.

189. *Id.* at 782.

190. *In re* Marriage of Buzzanca, 72 Cal. Rptr. 2d 280, 293 (Cal. Ct. App. 1998). *See also In re* Marriage of Moschetta, 30 Cal. Rptr. 2d 893, 900 (Cal. Ct. App. 1994) (determining that the parties' intentions did not govern the validity of a traditional surrogacy contract because, unlike in *Johnson*, the issue of parentage could be easily resolved under the Uniform Parentage Act).

191. *Buzzanca*, 72 Cal. Rptr. 2d at 282.

192. *Id.* at 293.

193. *Id.* at 288.

194. *Id.* at 293.

195. *Id.*

196. *See, e.g.*, N.J. STAT. ANN. § 9:17-65 (West, Westlaw through L. 2023, c. 114 & J.R. No. 6) (expressly making the intent of the parties the standard by which parentage is determined in a gestational

Like California, Vermont is a historically permissive state that codified its permissive rules into law. Effective in 2018, Vermont law expressly authorizes gestational surrogacy agreements.[197] Prior to this, surrogacy agreements in Vermont were governed by dicta in the Vermont Supreme Court's decision in *Baker v. State*.[198] *Baker* affirmed same-sex marriage as a state constitutional right.[199] In doing so, the court rejected the State's policy argument that affirming same-sex marriage could complicate the law governing reproductive technologies, noting that "Vermont does not prohibit the donation of sperm or the use of technologically assisted methods of reproduction."[200] The language in *Baker* was expansive, but it held no precedential value. Accordingly, until the new law took effect, Vermont was slightly less permissive than California—not for scope but for stability.

Arkansas is another historically permissive jurisdiction,[201] almost by accident: the state's statutory language is broad and has allowed prospective parents, regardless of sexual orientation, to enter into enforceable surrogacy agreements.[202] Arkansas authorizes gestational surrogacy by statute,[203] and traditional surrogacy is permitted because it is not prohibited by statute or case law.[204] Arkansas's law currently grants parentage to the spouse of the genetic father only if the spouse is a cisgender woman.[205] However, the state has admitted that this provision is unconstitutional[206] and is unlikely to use it to discriminate against same-sex cisgender male couples, especially following the Supreme Court's decision in *Pavan v. Smith*, which held that Arkansas must afford same-sex spouses the same right as opposite-sex spouses to have both spouses listed as parents on a

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surrogacy agreement); *see also* Belsito v. Clark, 644 N.E.2d 760, 764. *But see* Belsito, 644 N.E.2d at 765 (Ohio C.P. 1994) (rejecting *Johnson's* intent test as violative of public policy because a compensated surrogacy agreement could be a sale of parental rights, but termination of parental rights in Ohio required an appearance before a magistrate judge).

197. VT. STAT. ANN. tit. 15C, § 802 (West, Westlaw through end of Chs. 186 & M-19 of Adjourned Sess. of the 2021–2022 Vt. Gen. Assemb.).

198. Baker v. State, 744 A.2d 864, 884–85 (Vt. 1999). *See* Sinnott v. Peck, 180 A.3d 560, 574 (Vt. 2017).

199. *Baker*, 744 A.2d at 867.

200. *See id.* at 884, 910 n.14 (Johnson, J., concurring) (explaining that the state fails to address the conflict between its policy argument and Vermont's laws governing the use of reproductive technologies).

201. For an understanding of the historical context, *see* Hofman, *supra* note 180, at 455 n.18.

202. *See* ARK. CODE ANN. § 9-10-201(b)–(c)(1) (West, Westlaw through acts of 2023 Reg. Sess. of the 94th Ark. Gen. Assemb.) (determining that a child born to a gestational carrier is the child of "(1) [t]he biological father and the woman intended to be the mother if the biological father is married; (2) [t]he biological father only if unmarried; or (3) [t]he woman intended to be the mother in cases of a surrogate mother when an anonymous donor's sperm was utilized for artificial insemination").

203. *Id.*

204. *See Gestational Surrogacy in Arkansas*, CREATIVE FAM. CONNECTIONS, https://perma.cc/8QYW-ANHJ (last visited Feb. 25, 2023).

205. ARK. CODE ANN. § 9-10-201(b)(1), (c)(1). (West, Westlaw through acts of 2023 Reg. Sess. of the 94th Ark. Gen. Assemb.).

206. Smith v. Pavan, No. CV-15-988, 2017 WL 4683761, at *4 (Ark. Oct. 19, 2017) (Baker, J., dissenting)

child's birth certificate.[207] Therefore, in practice, Arkansas is (or likely will be) one of the most permissive states.

In contrast to California, Vermont, and Arkansas, several states used to be prohibitive but, due to legislation enacted in the late 2010s, became permissive. For example, in 2018, New Jersey passed the Gestational Carrier Agreement Act (GCAA).[208] The statute is similar to California's: it permits gestational carrier agreements that meet certain procedural requirements, without regard to the gender, marital status, or sexual orientation of the intended parent(s), or to the amount of compensation provided to the surrogate.[209] Parentage is determined by the parties' intent, as expressed in the agreement.[210] Should an agreement prove unenforceable by virtue of noncompliance with the statute, a court must use the parties' intent to determine parentage.[211] New Jersey's new law is a significant change from the state's prior rules, which had been created solely through case law. In the state's landmark case, *Matter of Baby M*, the New Jersey Supreme Court ruled that a traditional surrogacy contract was invalid and unenforceable for being contrary to public policy and to established laws related to termination of parental rights, nonpayment in adoptions, and the right to revoke consent in private adoptions.[212] Until 2018, *Baby M* barred both traditional and gestational surrogacy agreements in New Jersey.[213] Although traditional surrogacy agreements remain unenforceable,[214] by passing the GCAA, the state went from being one of the most restrictive to one of the most permissive jurisdictions.

Other jurisdictions to change from prohibitive to permissive include the District of Columbia (D.C.) and Washington State. D.C. used to be one of the most restrictive jurisdictions—prohibiting both gestational and traditional surrogacy—but since new laws took effect in 2017, D.C. permits agreements for both types of surrogacy.[215] Similarly, the State of Washington allowed only compassionate (i.e., non-compensated) gestational surrogacy,[216] but legislation that took effect on January 1, 2019 permits agreements for compensated gestational and traditional surrogacy.[217]

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207. Pavan v. Smith, 137 S. Ct. 2075, 2077 (2017).

208. 2018 N.J. Laws 18.

209. N.J. STAT. ANN. § 9:17-65 (West, Westlaw through L. 2023, c. 118 & J.R. No. 8).

210. *Id.* § 9:17-63(a)(1).

211. *Id.* § 9:17-65(d).

212. *See In re* Baby M., 537 A.2d 1227, 1235, 1240, 1250, 1252 (N.J. 1988).

213. *See id.* at 1234; N.J. STAT. ANN. § 9:17-63(a) (West, Westlaw through L. 2023, c. 118 & J.R. No. 8).

214. This is by default; the new statute does not address traditional surrogacy, and therefore *Baby M* still applies. *See* N.J. STAT. ANN. § 9:17-62 (West, Westlaw through L. 2023, c. 118 & J.R. No. 8).

215. *See* D.C. CODE § 16-402 (1993), *repealed by* D.C. CODE § 16-402 (2017); D.C. CODE § 16-407 (2017).

216. WASH. REV. CODE § 26.26.210 (repealed 2019); *Id.* § 26.26.230 (repealed 2019); Devon Quinn, Note & Comment, *Her Belly, Their Baby: A Contract Solution for Surrogacy Agreements*, 26 J.L. & POL'Y 805, 828 (2018).

217. WASH. REV. CODE § 26.26A.715 (West, Westlaw through all legis. from 2023 Reg. Sess. of the Wash. Leg.).

Last, some states are permissive under binding appellate-level case law but lack statutes that expressly permit surrogacy agreements. Such states include Iowa, Ohio, Pennsylvania, Tennessee, and Wisconsin.[218]

Even as many states have become more permissive of surrogacy contracts, the costs involved with these surrogacy agreements have increased, which might restrict access to surrogacy for those who cannot afford the process. For example, some permissive states impose procedural requirements, such as notarization[219] or judicial approval,[220] to make a surrogacy contract enforceable. Procedural requirements such as these add bureaucratic inefficiency costs to a surrogacy agreement. Additionally, many of the newer state laws require intended parents and surrogates to have separate legal representation, which adds legal fees into the total cost of the surrogacy arrangement. Since 2012, at least eight states and D.C. have passed legislation requiring the parties on either side of a surrogacy agreement to have separate, independent legal counsel: Washington, New Jersey, Vermont, D.C., Maine, New Hampshire, California, Delaware, and Nevada.[221] Although these legal requirements may reduce costs in the long run by deterring litigation over the validity of surrogacy contracts,[222] they impose hefty costs up

218. *See* P.M. v. T.B., 907 N.W.2d 522, 525 (Iowa 2018) (holding that a gestational surrogacy contract in which the intended father was genetically related to the child was enforceable); J.F. v. D.B., 879 N.E.2d 740, 740–42 (Ohio 2007) (finding a gestational surrogacy contract enforceable); J.F. v. D.B., 897 A.2d 1261, 1280 (Pa. Super. Ct. 2006) (vacating a trial court's finding that a gestational surrogacy contract was contrary to public policy and holding that the gestational surrogate was not the child's legal mother); *In re* Baby, 447 S.W.3d 807, 812 (Tenn. 2014) (holding that a traditional surrogacy contract was not void for being against public policy but that a provision terminating the surrogate's parental rights pre-birth was unenforceable); Rosecky v. Schissel, 833 N.W.2d 634, 637–38, 647 (Wis. 2013) (permitting both traditional and gestational surrogacy so long as it is in the best interests of the child, and holding that a provision terminating a traditional surrogate's parental rights pre-birth was unenforceable but did not render the entire contract void).

219. *E.g.*, CAL. FAM. CODE § 7962(c) (West, Westlaw through Ch. 997 of 2023 Reg. Sess.); D.C. CODE § 16-406 (West, Westlaw through Dec. 28, 2022) (requiring notarization or signatures by two witnesses).

220. Louisiana and Virginia require judicial preauthorization of a surrogacy agreement, meaning that it must be approved before the surrogate undergoes any procedures to become pregnant. LA. STAT. ANN. § 9:2720(B) (West, Westlaw through 2023 2nd Extra. Sess. & Reg. Sess.); VA. CODE ANN. § 20-160 (A)–(B) (Lexis through Ch. 2 of Spec. Sess. I). In Utah, an agreement must be validated by a court for it to be enforceable, but there is no requirement as to the timing of the validation. *See* UTAH CODE ANN. § 78B-15-809(1) (West, Westlaw through 2023 3rd Spec. Sess.).

221. *See* WASH REV. CODE § 26.26A.710(7) (West, Westlaw through all legislation from Reg. Sess. of Wash. legislation); N.J. STAT. ANN. §9:17-65(a)(3) (West, Westlaw through L. 2023, c. 118 & J.R. No. 8); VT. STAT. ANN. tit. 15C, § 802(b)(7) (West, Westlaw through end of Chs. 186 & M-19 of Adjourned Sess. of 2021–2022 Vt. Gen. Assemb.); D.C. CODE § 16-406(a)(3) (West, Westlaw through Dec. 28, 2022); ME. STAT. tit. 19-A, § 1932(3)(G) (West, Westlaw through 2023 2nd Reg. Sess. of 130th Leg.); N.H. REV. STAT. ANN. § 168-BB:11(III) (West, Westlaw through Ch. 35 of 2023 Reg. Sess.); CAL. FAM. CODE § 7962(b) (West, Westlaw through Ch. 997 of 2023 Reg. Sess.); DEL. CODE ANN. tit. 13, § 8-807(b)(3) (West, Westlaw through Ch. 5 of the 152nd Gen. Assemb. (2023-2024)); NEV. REV. STAT. § 126.750(2) (West, Westlaw through end of Ch. 2. of 33rd Spec. Sess. of Nev. Leg. (2023)).

222. *See* Yehezkel Margalit, *In Defense of Surrogacy Agreements: A Modern Contract Law Perspective*, 20 WM. & MARY J. WOMEN & L. 423, 467 (2013) (arguing that mandatory judicial pre-authorization would decrease associated enforcement costs).

front. As these costs increase, some prospective parents will likely be priced out of the market.

2. Restrictive Jurisdictions

Restrictive jurisdictions authorize surrogacy agreements only in narrow circumstances. For example, in Louisiana, a surrogacy agreement is enforceable only when (1) it involves a gestational surrogacy arrangement;[223] (2) the intended parents are married;[224] (3) a doctor diagnoses the intended mother as infertile or determines that a pregnancy would subject her to "serious risk of death or substantial and irreversible impairment of a major bodily function;"[225] (4) the resulting child will be genetically related to *both* intended parents;[226] (5) compensation to the surrogate only includes reimbursement for expenses related to the pregnancy;[227] and (6) a court approves the contract before the surrogate undergoes any procedures to become pregnant.[228] The genetic relationship requirement excludes same-sex couples and couples in which one spouse has had both ovaries or testes removed, because it would not be possible for both spouses to be genetically related to the child. Other restrictive jurisdictions include Florida,[229] Illinois,[230] North Dakota,[231] Texas,[232] Utah,[233] and Virginia.[234] These jurisdictions create significant practical hurdles for intended parents and surrogates (and their lawyers).

Restrictions on surrogacy agreements reflect ways that states have dealt with some of the ethical debates that surround surrogacy agreements. One such debate

223. LA. STAT. ANN. § 9:2719 (West, Westlaw through 2023 1st Extra. Sess. & Reg. Sess.).

224. *Id.* § 9:2718.

225. *Id.* § 9:2720.3(B)(4)–(5).

226. *Id.* § 9:2718.

227. *Id.* § 9:2720(C), 27.18.1(1).

228. *Id.* § 9:2720(B).

229. *See* FLA. STAT. ANN. § 742.15 (West, Westlaw through laws and joint resolutions in effect from the 2022 Spec. A Sess. & 2023 Spec. B Sess. of the 28th Leg.) (regulating gestational surrogacy agreements; requiring the intended parents to be married and at least one intended parent to be genetically related to the child; and restricting compensation to reasonable expenses related to the perinatal, intrapartal, and postpartal periods).

230. *See* 750 ILL. COMP. STAT. 47/20(b)(1)–(2) (West, Westlaw through P.A. 102-1102 of 2023 Reg. Sess.) (requiring that at least one intended parent in a gestational surrogacy agreement be genetically related to the child and requiring a medical need for the surrogacy).

231. *See* N.D. CENT. CODE § 14-18-01 (West, Westlaw through leg. effective through Feb. 23, 2023 from the 2023 Reg. Sess.) (defining "gestational carrier" to require that both intended parents be genetically related to the child and thereby disqualifying same-sex cisgender couples).

232. *See* TEX. FAM. CODE ANN. §§ 160.754(b)–(c), 756(b)(2) (West, Westlaw through end of the 2023 Reg. & Called Sess. of 88th Leg.) (requiring intended parents in a gestational surrogacy agreement to be married and to show a medical need for the surrogacy).

233. *See* UTAH CODE ANN. § 78B-15-801(3), (7) (West, Westlaw through 2023 3rd Spec. Sess.) (requiring intended parents in a gestational surrogacy agreement to be married).

234. *See* VA. CODE ANN. § 20-160(B)(4)–(5) (West, Westlaw through 2023 Reg. Sess. cc. 1 to 3) (making provisions in surrogacy contracts beyond reasonable medical and ancillary costs void and unenforceable).

is whether surrogacy contracts exploit surrogates and children.[235] In particular, limits on compensation prompt longstanding and controversial debates, such as: does commercial surrogacy implicate the potential parents in human trafficking?[236] Are restrictions on compensation anti-feminist by undervaluing work and promoting gender-based stereotypes?[237] Or are such restrictions pro-feminist by proscribing the reduction of surrogates from persons to commodities?[238] Additionally, genetic relationship requirements sever links between the surrogate and the child and conform with traditional kinship norms by linking prospective parent and child.[239] They also address concerns about eugenics, particularly fear of "designer babies," by preventing prospective parents from seeking out and using the "best" eggs and sperm available.[240] The medical necessity requirement is perhaps the most troubling because it suggests that people who can have children but choose surrogacy are deviating from a biologically prescribed imperative.[241] Many feminist legal scholars argue that refusing to enforce surrogacy contracts on this basis is both sexist and misogynistic because it denies individuals the opportunity to enter into contractual relationships as intelligent autonomous agents and renders harsh judgments on those who choose to go forward with surrogacy.[242] The wide variation in how states treat surrogacy contracts reflects differences in how legislatures and courts have resolved these thorny debates.

3. Prohibitive Jurisdictions

Prohibitive jurisdictions expressly ban surrogacy arrangements. Three states prohibit the enforcement of both traditional and gestational surrogacy agreements: Indiana, Michigan, and Nebraska.[243] Washington ceased to be a prohibitive

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235. *See, e.g.*, Adeline A. Allen, *Surrogacy and Limitations to Freedom of Contract: Toward Being More Fully Human*, 41 HARV. J.L. & PUB. POL'Y 753, 781 (2018) ("[T]he birth mother's contractual arrangement in surrogacy exploits her by objectifying and commodifying her.").

236. *See, e.g.*, Evie Jeang, *Reviewing the Legal Issues that Affect Surrogacy for Same-Sex Couples*, 39 L.A. L. 12, 13 (2016) (explaining that some U.S. states refuse to recognize surrogacy on moral grounds because they view it as a form of human trafficking).

237. *See* Pamela Laufer-Ukeles, *The Disembodied Womb: Pregnancy, Informed Consent, and Surrogate Motherhood*, 43 N.C. J. INT'L L. 1, 50 (2018) (commenting that prohibitions on compensation undervalue surrogates' labor); Kimberly D. Krawiec, *A Woman's Worth*, 88 N.C. L. REV. 1739, 1767 (2010) (discussing compensation limits and altruistic donation in the surrogacy market).

238. *See* Allen, *supra* note 235, at 781 (arguing that commercial surrogacy agreements constitute "womb-renting").

239. Hofman, *supra* note 180, at 450–51.

240. Lewin, *supra* note 178.

241. *See* Hofman, *supra* note 180, at 463.

242. *Cf.* Marjorie Maguire Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297, 354–55. For a full discussion on the sociopolitical contentions around enforceability and surrogacy, *see generally* Elizabeth S. Scott, *Surrogacy and the Politics of Commodification*, 72 L. & CONTEMP. PROBS. 109 (2009).

243. IND. CODE § 31-20-1-1 (West, Westlaw through all legis. of 2023 Reg. Sess., 2nd Technical Sess, & 2nd Reg. Spec. Sess. of 122nd Gen. Assemb.); MICH. COMP. LAWS ANN. § 722.855 (West, Westlaw through P.A. 2022, No. 278 of 2022 Reg. Sess., 101st Leg.); NEB. REV. STAT. ANN. § 25-21,200 (West, Westlaw through end of 2nd Reg. Sess. of 107th Leg.).

jurisdiction as of January 1, 2019.[244] Two states reinforce these bans by imposing criminal or civil penalties on compensated surrogacy agreements.[245]

Notably, the number of states that ban surrogacy agreements and impose criminal or civil sanctions is decreasing. For example, Utah repealed its complete ban in 2005, D.C. repealed its complete ban in 2017,[246] and Washington's ban expired at the end of 2018.[247] Other states do not have statutes explicitly addressing the enforceability or legality of surrogacy agreements but do exempt surrogacy agreements from criminal statutes that prohibit the sale of persons.[248]

Still other states do not have legislation or binding appeals court decisions regulating surrogacy arrangements, causing inconsistencies in the status of surrogacy in many jurisdictions.[249]

F. INSURANCE COVERAGE

Access to reproductive technologies is often determined by the practical affordability of these procedures. Given the high costs of fertility treatments, a lack of insurance coverage can be a *de facto* barrier for many couples. For example, donor insemination, the simplest reproductive procedure, costs between three hundred and four thousand dollars per cycle depending on whether the partner's sperm or an anonymous donor's sperm is used.[250] A couple can pay anywhere from fifteen to twenty thousand dollars per cycle for GIFT or ZIFT.[251] IVF is even more expensive (often ranging from fifteen to thirty thousand dollars per cycle),[252] as it always carries the possibility that more than one cycle will be necessary to achieve pregnancy.[253] However, the introduction of "Mini-lVFs" can

244. *See* WASH. REV. CODE § 26.26A.710 (West, Westlaw through all legislation from 2023 Reg. Sess. of Wash. Leg.).

245. Michigan imposes criminal penalties on compensated surrogacy agreements. MICH. COMP. LAWS ANN. § 722.859 (West, Westlaw through P.A. 2023, No. 3, of the 2023 Reg. Sess, 102nd Leg.). New York imposes civil penalties on compensated agreements. N.Y. DOM. REL. LAW § 123 (West, Westlaw through L. 2023, Chs. 1–841).

246. *See* D.C. CODE § 16-402 (1993), *repealed by* D.C. CODE § 16-402 (Lexis through Aug. 26, 2022); D.C. CODE § 16-407 (Lexis through Aug. 26, 2022).

247. *See* WASH. REV. CODE § 26.26A.710 (West, Westlaw through all legislation from 2023 Reg. Sess. of Wash. Leg.).

248. *E.g.*, ALA. CODE § 26-10A-34 (West, Westlaw through end of 2023 Reg. & 1st Spec. Sess.); Iowa Code § 710.11 (West, Westlaw through legislation eff. Feb 16, 2023 from 2023 Reg. Sess.).

249. Many such states are generally favorable towards surrogacy agreements because they lack laws expressly prohibiting them. However, results can vary between courts within the same state. *See e.g.*, *Gestational Surrogacy in Tennessee*, CREATIVE FAM. CONNECTIONS, https://perma.cc/CVJ9-WM7V (last visited Feb. 25, 2023); *see also The US Surrogacy Law Map*, CREATIVE FAM. CONNECTIONS, https://perma.cc/5Z5V-8AR7 (last visited Feb. 25, 2023).

250. *Donor Insemination*, AM. PREGNANCY ASS'N, https://perma.cc/TN4F-6VZH (last visited Feb. 25, 2023).

251. *GIFT and ZIFT*, WEBMD (Nov. 12, 2022), https://perma.cc/9AY9-R6J4.

252. Marissa Conrad, *How Much Does IVF Cost?*, FORBES HEALTH (Jan. 23, 2023, 12:40 PM), https://perma.cc/44KD-RYV9.

253. *See Paying for Single IVF Cycles vs. Multi-Cycle IVF Plans*, WINFERTILITY, https://perma.cc/6RPW-LZJT (last visited Jan. 24, 2023).

significantly lower costs for eligible couples per cycle.[254] The approach lowers the required dosage of fertility drugs and requires less embryo monitoring prior to transfer, decreasing the price range to between five and seven thousand dollars.[255] Nevertheless, the high costs of these procedures may put them out of reach for individuals or couples with no coverage. A full inquiry into ART access requires an in-depth look at insurers' lack of coverage of ART, state responses to coverage gaps, and creative responses to these access barriers; this Article does not provide such comprehensive treatment.

Insurers often cite skyrocketing costs as a reason for not providing coverage for infertility treatments.[256] Insurers have historically argued that while "improper function" of reproductive organs may be an illness, infertility is not.[257] Therefore, because insurance plans only provide coverage for "illnesses," procedures used to change an infertility condition are not "compensable."[258] The Iowa Supreme Court has not accepted this argument.[259] In *Witcraft v. Sundstrand*, the court discounted the insurer's claim that infertility was not an illness and stated that the "natural function of the reproductive organs was to procreate."[260] As such, the court found that improper functioning of these organs should be considered an "illness" under the insurance plan.[261] While the *Witcraft* decision limits insurers' ability to argue that infertility is not an illness, it is likely limited to artificial insemination procedures and not broad enough to cover procedures such as reversals of sterilization.[262] Those types of procedures are not likely to be viewed as improper functioning of reproductive organs but rather as "voluntary" procedures "that the plaintiff is now seeking to reverse."[263] For example, a Georgia court found that reversal of a vasectomy was not covered by an insurance

254. Rachel Gurevich, *What Is Mini or Micro IVF?*, VERYWELLFAMILY (Mar. 11, 2021), https://perma.cc/2C4L-5SYN.

255. *See id.*

256. *See* Lisa M. Kerr, *Can Money Buy Happiness? An Examination of the Coverage of Infertility Services Under HMO Contracts*, 49 CASE W. RSRV. L. REV. 599, 630 (1999) (explaining that one of the main objectives of managed care is "curbing costs"; therefore, the unpredictable and often high costs of fertility treatment are directly in conflict with this objective); Sophie Bearman, *Fertility Treatments are Becoming a Financial and Physical Risk for Many Americans*, CNBC (Nov. 21, 2017, 10:31 AM), https://perma.cc/A93K-ASKD (explaining that artificial reproductive technologies often result in multiple births and "insurance companies understand that when they're covering IVF, the greatest expense they have is paying for extremely premature infants").

257. James B. Roche, *After* Bragdon v. Abbott*: Why Legislation Is Still Needed to Mandate Infertility Insurance*, 11 B.U. PUB. INT. L.J. 215, 216 (2002).

258. *Id.*

259. *See* Witcraft v. Sundstrand Health & Disability Grp. Benefit Plan, 420 N.W.2d 785, 787, 789–90 (Iowa 1988) (rejecting the insurer's argument that fertility treatment was not covered under the health insurance plan because the fertility treatment did not remedy an illness).

260. *Id.* at 788.

261. *Id.*

262. Roche, *supra* note 257, at 217.

263. *Id.*

policy.[264] Similarly, a Louisiana court found that an insurance policy did not cover the reversal of an "elective" tubal ligation.[265] Even so, an additional hindrance to insurers' argument that infertility is not an illness might arise from the decisions of health authorities, such as the World Health Organization, the American Society for Reproductive Medicine, and the American Medical Association, to "[designate] infertility [as] a disease."[266] It is unclear what effect this reclassification will have on insurance coverage.

Insurance companies also argue that artificial insemination is not a "treatment."[267] The insurer in *Witcraft* argued that "treatment" should be defined as "all the steps taken to affect a cure of an injury or disease."[268] According to this meaning of "treatment," an "insurer would not be required to provide coverage for infertility treatments" because they do not "cure . . . the infertility," they only "allow for pregnancy in spite of" it.[269] The *Witcraft* court held that because the policy stated that the plan covers "expenses related to injury or illness," an "average reader" would interpret this to mean "any expenses" incurred because of the infertility problem, not for specific treatment of that problem.[270] This ruling, however, leaves open the possibility that insurance companies will try to write narrow policies that only speak in terms of "treatment."[271]

An insurer may also argue that denial of coverage is justified because infertility treatment is not "medically necessary."[272] Insurers are essentially asserting, and courts have agreed, that infertility treatments are elective procedures not necessary to "preserve" a patient's health.[273] Further, they assert that because the patient's infertility is not reversed or cured by ARTs, they cannot be "medically necessary."[274] For example, in *Kinzie v. Physician's Liability Insurance Co*., an Oklahoma court of appeals upheld an insurer's denial of coverage for an IVF treatment, noting that an infertility treatment was not "medically necessary"

264. *See* Reuss v. Time Ins. Co., 340 S.E.2d 625, 626 (Ga. Ct. App. 1986) (upholding the trial court's decision that the reversal of a successful vasectomy was not covered under an insurance plan because "such expenses may not reasonably be considered 'usual, customary, and necessary' to the performance of a vasectomy.").

265. *See* Marsh v. Rsrv. Life Ins. Co., 516 So.2d 1311, 1315 (La. Ct. App. 1987) (holding that the reversal of an elective tubal ligation was a voluntary procedure, and, therefore, not covered).

266. Sara Berg, *AMA backs global health experts in calling infertility a disease*, AMA (June 13, 2017), https://perma.cc/RH78-42V4.

267. *See* Roche, *supra* note 257, at 216.

268. *See* Witcraft v. Sundstrand Health & Disability Grp. Benefit Plan, 420 N.W.2d 785, 790 (Iowa 1988) (quoting BLACK'S LAW DICTIONARY, 1346 (5th ed. 1979)).

269. Roche, *supra* note 257, at 217–18; *see also* Kinzie v. Physician's Liab. Ins. Co., 750 P.2d 1140, 1142 (Okla. Civ. App. 1987) (holding that the policy did not cover *in vitro* treatments because, although the treatment resulted in a child, the policy only covered treatments that were "medically necessary" to physically cure or reverse Kinzie's infertility).

270. Roche, *supra* note 257, at 218.

271. *Id.*

272. *See id.*

273. *See* Kerr, *supra* note 256, at 609; *see also Kinzie*, 750 P.2d at 1141.

274. Kerr, *supra* note 256, at 609.

to the insured's physical health.[275] Conversely, in *Egert v. Connecticut General Life Insurance Co.*, the Seventh Circuit held that an insurance company could not make a medical necessity argument when the company's internal memoranda used language referring to infertility as an illness for which treatments should be covered.[276] The court, however, did not address the insurer's main argument that procedures circumventing an underlying physical problem instead of permanently correcting it should not be considered medically necessary.[277] Resolution of this question is central to determining whether infertility procedures "such as IVF, GIFT, or ZIFT" could ever be considered "medically necessary."[278]

Finally, insurers may argue that ART procedures are "experimental" and, therefore, should be excluded from coverage.[279] Insurance companies claim that infertility treatments are experimental because they have success rates of less than 50%.[280] The Seventh Circuit addressed this argument in *Reilly v. Blue Cross & Blue Shield United of Wisconsin*.[281] In *Reilly*, the insurance company's internal advisory committee determined that IVF was an experimental procedure.[282] The court was concerned with the inherent conflict of interest in allowing a plan administrator to interpret the plan in order to avoid its fiduciary duties to the plaintiffs.[283] Consequently, the court found "[n]ot only may the decision to grant or deny coverage based solely on a success ratio per se be arbitrary and capricious, but the particular ratio selected, in this case, for IVF, may well be arbitrary and capricious."[284] The scope of this decision is limited, however, as it is uncertain how the case would have resulted had an "independent third party" determined that IVF was an experimental treatment.[285]

Although there has been a consistent effort to introduce legislation to address the lack of insurance coverage, no federal requirement mandates insurance coverage for infertility treatments.[286] Where states have enacted legislation mandating insurance coverage for infertility services, self-insured employers need not offer insurance that meets the minimum state requirements since they are exempt by

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275. Kinzie v. Physician's Liab. Ins. Co., 750 P.2d 1140, 1142–43 (Okla. Civ. App. 1987).

276. *See* Egert v. Connecticut Gen. Life Ins., 900 F.2d 1032, 1038 (7th Cir. 1990).

277. *See* Kerr, *supra* note 256, at 609.

278. *See id.*

279. *See* Hazel Glenn Beh, *Sex, Sexual Pleasure, and Reproduction: Health Insurers Don't Want You to Do Those Nasty Things*, 13 WIS. WOMEN'S L.J. 119, 134 (1998).

280. *See* Aaron C. McKee, *The American Dream—2.5 Kids and a White Picket Fence: The Need for Federal Legislation to Protect the Insurance Rights of Infertile Couples*, 41 WASHBURN L.J. 191, 200 (2001).

281. Reilly v. Blue Cross & Blue Shield United of Wis., 846 F.2d 416, 423–24 (7th Cir. 1988).

282. *See* McKee, *supra* note 280, at 200.

283. *See Reilly*, 846 F.2d at 419, 423.

284. *Id.* at 423–24.

285. *See* Boland v. King Cnty. Med. Blue Shield, 798 F. Supp. 638, 645 (W.D. Wash. 1992) (finding that, unlike in *Reilly*, there was no conflict of interest because the insurer relied on a classification of medical necessity "produced by an independent third party").

286. *See* H.R. 4450, 117th Cong. (2021–2022); S. 2352, 117th Cong. (2021–2022).

the Employee Retirement Income Security Act.[287] In response to this issue, some states have enacted "mandate-to-cover" or "mandate-to-offer" laws.[288] According to Resolve: The National Infertility Association, "20 states have passed fertility insurance coverage laws."[289] A mandate-to-offer law requires an insurer to let employers know that coverage is available; it does not, however, require insurers to cover or employers to purchase such policies.[290] California and Texas are two states that have enacted such laws.[291] Mandate-to-cover laws require an insurer to cover some fertility treatments.[292] At least six states explicitly cover IVF in their mandates-to-cover or -offer.[293] At least five states also exempt religious organizations from the coverage requirement.[294] Coverage for fertility

287. *See* Kerr, *supra* note 256, at 617.

288. ARK. CODE ANN. §§ 23-85-137, 23-86-118 (West, Westlaw through acts of the 2023 Reg. Sess. of the 94th Ark. Gen. Assemb. effective Feb. 13, 2023); CAL. HEALTH & SAFETY CODE § 1374.55 (West, Westlaw through Ch. 997 of 2023 Reg. Sess.); CAL. INS. CODE § 10119.6 (West, Westlaw through Ch. 997 of 2023 Reg. Sess.); CONN. GEN. STAT. ANN. §§ 38a-509, 38a-536 (West, Westlaw through Gen. Stat. of Conn., Revised 1958, Revised to Jan. 1, 2023); HAW. REV. STAT. ANN. §§ 431:10A-116.5, 432:1-604 (West, Westlaw through the end of the 2023 Reg. Sess., pending text revision by the revisor of statutes.); 215 ILL. COMP. STAT. ANN. 5/356m (West, Westlaw through P.A. 102-1142 of the 2023 Reg. Sess.); LA. REV. STAT. ANN. § 22:1036 (West, Westlaw through the 2023 1st Extra, Veto, Reg., & 2nd Extra. Sess.); MD. CODE ANN., INS. § 15-1502 (West, Westlaw through all legislation from the 2023 Reg. Sess. of the Gen. Assemb.); MASS. GEN. LAWS ANN. ch. 175, § 47H; ch. 176A, § 8K; ch. 176B, § 4J; ch. 176G, § 4 (West, Westlaw through the 2023 1st Ann. Sess.); N.J. STAT. ANN. §§ 17B:27-46.1X, 17:48A-7W, 17:48-6X, 17:48E-35.22 (West, Westlaw through L. 2023, c. 9 & J.R. No. 1); N.Y. INS. LAW §§ 3216(13), 3221(k)(6), 4303(s) (West, Westlaw through L. 2023, Chs. 1 to 841); OHIO REV. CODE ANN. § 1751.01(A)(1)(h), (West, Westlaw through File 177 (End) of the 135th Gen. Assemb. (2023–2024) & 2023 Statewide Issue 1 & 2023 Statewide Issue 2); R.I. GEN. LAWS §§ 27-18-30, 27-19-23, 27-20-20, 27-41-33 (West, Westlaw Ch. 442 of the 2023 Reg. Sess. of the R.I. Leg.); TEX. INS. CODE ANN. § 1366.001 (West, Westlaw through the end of the 2023 Reg. & Called Sess. of the 88th Leg.); W. VA. CODE ANN. § 33-25A-2 (West, Westlaw through Feb. 15, 2023).

289. *See Insurance Coverage by State*, RESOLVE (June 2022), https://perma.cc/WQ78-5ZB6; *State Laws Related to Insurance Coverage for Infertility Treatmen*t, NAT'L CONF. OF STATE LEGISLATURES (Mar. 12, 2021), https://perma.cc/2PCZ-B95P.

290. *Pre-ACA State Mandated Benefits in the Small Group Health Insurance Market: Mandated Coverage in Mental Health*, KAISER FAM. FOUND., https://perma.cc/Q6DZ-5A9P (last visited Feb. 25, 2023).

291. CAL. HEALTH & SAFETY CODE § 1374.55 (West, Westlaw through Ch. 997 of 2023 Reg. Sess.); CAL. INS. CODE § 10119.6 (West, Westlaw through Ch. 997 of 2023 Reg. Sess.); TEX. INS. CODE ANN. § 1366.003 (West, Westlaw through 2023 Reg. & 1st Called Sess. of 88th Leg.).

292. *See* KAISER FAM. FOUND., *supra* note 290.

293. ARK. CODE ANN. §§ 23-85-137, 23-86-118 (West, Westlaw through acts of the 2023 Reg. Sess. of the 94th Ark. Gen. Assemb. effective Feb. 13, 2023); CONN. GEN. STAT. ANN. § 38a-536 (West, Westlaw through Gen. Stat. of Conn., Revised 1958, Revised to Jan. 1, 2023); HAW. REV. STAT. ANN. §§ 431:10A-116.5, 432:1-604 (West, Westlaw through the end of the 2023 Reg. Sess., pending text revision by the revisor of statutes); 215 ILL. COMP. STAT. ANN. 5/356m(b)(1) (West, Westlaw through P.A. 102-1142 of the 2023 Reg. Sess.); MASS. GEN. LAWS ANN. ch. 175, § 47H (West, Westlaw through the 2023 1st Ann. Sess.); N.J. STAT. ANN. § 17B:27-46.1X(a) (West, Westlaw through L. 2023, c. 9 & J.R. No. 1).

294. CAL. HEALTH & SAFETY CODE § 1374.55(e) (West, Westlaw through Ch. 997 of 2023 Reg. Sess.); CAL. INS. CODE § 10119.6 (West, Westlaw through Ch. 997 of 2023 Reg. Sess.); CONN. GEN. STAT. ANN. §§ 38a-509, 38a-536 (West, Westlaw through Gen. Stat. of Conn., Revised 1958, Revised to Jan. 1, 2023); 215 ILL. COMP. STAT. ANN. 5/356m(b)(2) (West, Westlaw through P.A. 102-1142 of the 2023 Reg. Sess.); MD. INS. CODE ANN. § 15-810.1 (West, Westlaw through all legislation from the 2023

treatments, a category including ARTs, varies significantly from state-to-state and some procedures may be specifically excluded from otherwise broad coverage of fertility treatment.

IV. SAME-SEX COUPLES AND ASSISTED REPRODUCTIVE TECHNOLOGIES

Because ART, by definition, divorces the act of intercourse from reproduction, ART opens up the prospect of family-building not only for those who meet the clinical definition of infertility,[295] but also for non-heterosexual couples. This has wide-reaching legal implications and consequences. First, the implications of parentage determination, while important for all couples, are even more vital for same-sex couples, and can limit the non-biological parent's legal recourse to protect or care for their child.[296] Some states, however, have amended their insurance laws to prevent discrimination.[297] Second, widespread bias and discrimination against same-sex couples persists, resulting in physicians' discretion and insurance coverage exclusions, which sometimes serve as a

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Reg. Sess. of the Gen. Assemb.); N.J. STAT. ANN. § 17B:27-46.1X(b) (West, Westlaw through L. 2023, c. 9 & J.R. No. 1).

295. Infertility is not defined in many state statutes, but in states such as California, Connecticut, Illinois, Massachusetts, New Jersey, New York, and Rhode Island, the definition encompasses the incapability of conceiving after one year or more of sexual relations. *See* Seema Mohapatra, *Assisted Reproduction Inequality and Marriage Equality*, 92 CHI.-KENT L. REV. 87, 94 (2017).

296. Alabama, Arizona, Kansas, Kentucky, Mississippi, Nebraska, North Carolina, Ohio, Utah, and Wisconsin all prohibit or limit second-parent adoption by unmarried same-sex couples. *See In re* Adoption of K.R.S., 109 So. 3d 176 (Ala. Civ. App. 2012) (holding unmarried same-sex couples cannot use the stepparent adoption procedure; however, same-sex spouses must be allowed to do so); ARIZ. REV. STAT. ANN. § 8-103 (West, Westlaw through the 2nd Reg. Sess. of the 55th Leg.) (giving preference to married couples over single adults in adoption placement); *In re* Adoption of I.M., 48 Kan. App. 2d 343 (Kan. Ct. App. 2012) (finding that Kansas does not permit second parent or co-parent adoption by unmarried couples); S.J.L.S. v. T.L.S., 265 S.W.3d 804 (Ky. Ct. App. 2008) (requiring relinquishment of parental rights by the biological parent for the adoption of a child by her partner, although the case was later distinguished when same-sex marriage was legalized); MISS. CODE ANN. § 93-17-3(5) (West, Westlaw through laws from the 2023 Reg. Sess. effective through July 1, 2023) (prohibiting adoption of children by any same-sex couple; however, under the Supreme Court ruling, Mississippi must allow same-sex spouses to adopt on equal terms as heterosexual married couples); *In re* Adoption of Luke, 640 N.W.2d 374 (Neb. 2002) (requiring relinquishment of parental rights by the biological parent for the adoption of a child by her partner); N.C. GEN. STAT. ANN. § 48-2-301 (West, Westlaw through S.L. 2022-75 of the 2023 Reg. Sess. of the Gen. Assemb.) (prohibiting any person but a spouse from joining a petition to adopt); *In re* Adoption of Doe, 719 N.E.2d 1071 (Ohio Ct. App. 1998) (requiring relinquishment of parental rights by the biological parent for the adoption of a child by her partner); UTAH CODE ANN. § 78B-6-117(3) (West, Westlaw through the 2022 3rd Spec. Sess.) (prohibiting adoption by any person in a non-married cohabiting relationship); *Ex rel*. Angel Lace M., 516 N.W.2d 678, 683 (Wis. 1994) (prohibiting second parent or co-parent adoption by unmarried couples). *See generally Adoption by LGBT Parents*, NAT'L CTR. FOR LESBIAN PARENTS (June 2020), https://perma.cc/8HHY-T3YE.

297. *See* CAL. HEALTH & SAFETY CODE § 1374.55 (b, g) (West, Westlaw through Ch. 997 of 2023 Reg. Sess.) (preventing discrimination based on "domestic partner status, gender, gender expression, gender identity . . . marital status, . . . sex, or sexual orientation," while still deeming being part of a same-sex couple the "condition" that causes infertility); MD. INS. CODE ANN. § 15-810.1 (West, Westlaw through all legislation from the 2023 Reg. Sess. of the Gen. Assemb.) (stating that specified conditions of coverage for infertility benefits are not permitted for same-sex married couples).

barrier to access.[298] Because the legal structure surrounding ART was crafted largely without same-sex couples in mind and in isolation from other regulations of family relationships, the legal regime has provided same-sex couples substantially less security and protection than it has opposite-sex couples.[299]

A. SURROGACY CONTRACTS AND SAME-SEX COUPLES

Although state regulations of surrogacy contracts vary,[300] state laws restricting the rights of same-sex couples significantly impede the ability of same-sex couples to access ART. After *Obergefell*, the landmark marriage equality case upholding same-sex couples' fundamental right to marriage,[301] states that required marriage as a prerequisite to surrogacy arrangements may present fewer obstacles for LGB populations.[302] Nonetheless, the influence of cultural conditioning with respect to homosexuality and parenting creates a heightened risk for discrimination where judges and politicians allow heteronormative suppositions to influence law and policy.[303]

Furthermore, statutory construction can still exclude couples without relying on marriage requirements. Florida, for instance, allows both gestational and traditional surrogacy. In the case of gestational surrogacy, however, the statutory language requires a finding of medical necessity on the part of the prospective mother,[304] leaving this avenue open only for lesbian couples who can prove infertility or pregnancy risk.[305] Cisgender male couples, by definition, will be unable

298. *See* Jeffrey M. Jones, *Most in U.S. Say Gay/Lesbian Bias Is a Serious Problem*, GALLUP (Dec. 6, 2012), https://perma.cc/VTG2-L68L; *see also* Jennifer Kates, Usha Ranji, Adara Beamesderfer, Alina Salganicoff, & Lindsey Dawson, *Health and Access to Care and Coverage for Lesbian, Gay, Bisexual, and Transgender (LGBT) Individuals in the U.S.*, KAISER FAM. FOUND. (May 3, 2018), https://perma.cc/AU93-RUAF; Andrew M. Seaman, *Barriers to healthcare more common for lesbians, gays, bisexuals*, REUTERS (Mar. 18, 2016, 4:59 PM), https://perma.cc/N4HV-GUXR.

299. *See* Precious Fondren, *Gay Couple was Denied I.V.F. Benefits. They Say That's Discriminatory*, N.Y. TIMES (Apr. 12, 2022), https://perma.cc/W9P2-59NW.

300. *See supra* Part III.E.

301. *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2599–2600 (2015) (declaring that marriage and to "intimate association" are fundamental rights and "same-sex couples have the same right as opposite-sex couples to enjoy intimate association").

302. States such as Florida, New Hampshire, Nevada, Tennessee, Texas, Utah, and Virginia, which have marriage prerequisites, should then be more permissive; however, given some refusals to grant marriage licenses to same-sex couples, there are grounds for speculating that the practical impediments of marriage to prospective same-sex couples will continue to exist in spite of legal precedent. *See, e.g.*, Alan Blinder & Tamar Lewin, *Clerk in Kentucky Chooses Jail Over Deal on Same-Sex Marriage*, N.Y. TIMES (Sept. 3, 2015), https://perma.cc/8BZU-74MA (reporting on a "Kentucky county clerk who . . . was jailed . . . after defying a federal court order to issue [marriage] licenses to gay couples").

303. Anne R. Dana, Note, *The State of Surrogacy Laws: Determining Legal Parentage for Gay Fathers*, 18 DUKE J. GENDER L. & POL'Y 353, 356 (2011).

304. FLA. STAT. ANN. § 742.15(2) (West, Westlaw through laws and joint resolutions in effect from the 2022 2nd Reg. Sess. & Spec. A, C & D Sess. of the 27th Leg.).

305. The contention that only lesbian couples with fertility issues would need a surrogate is overly presumptive; surrogacy is an avenue of reproduction that may be chosen for a wide array of reasons.

to show a medical need for a surrogate because there is no cisgender woman in the couple who could fulfill the infertility requirement.[306] States such as Utah and Texas have similar statutory requirements for gestational surrogacy.[307] As for traditional surrogacy, Florida law speaks in terms of "intended father[s] and intended mothers[s]," making the plain language of the statute exclusionary to same-sex couples.[308] Future litigation on the construction of statutes with similar heteronormative language is highly probable.

Ultimately, any restrictions on surrogacy contracts may disproportionately affect cisgender male same-sex couples seeking to become parents because they are more likely to need another person to act as a surrogate. For instance, laws banning or limiting compensation for surrogacy reduce the bargaining power of couples seeking to engage a surrogate, which laws will therefore disproportionately impact the ability of cisgender male same-sex couples to access ART. Additionally, the inability to contract against the surrogate asserting parental rights results in a potentially uncertain outcome for couples using a surrogate. While this uncertainty is also present for heterosexual couples, the added stigma of homophobia creates disproportionate concern for cisgender male same-sex couples using ART. Moreover, restrictions like the Utah law prohibiting the surrogates from donating an egg further complicate the situation because cisgender male same-sex couples must seek out one individual to serve as a surrogate and another to donate an egg.[309] Thus, as greater restrictions make surrogacy more difficult to obtain, fewer same-sex couples will be able to utilize reproductive technology to fulfill their desire to become parents.

B. INSURANCE COVERAGE AND SAME-SEX COUPLES

Now that same-sex marriage is legalized across the country, insurance companies and state legislatures will need to navigate the complicated impacts *Obergefell*[310] has on insurance. Despite growing concern that employers may decrease coverage for domestic partners now that legal marriage is available

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Indeed, the narrowing of those possibilities is precisely the reason that Florida is a restrictive jurisdiction.

306. *See* Erez Aloni & Judith Daar, *Marriage Equality: One Step Down the Path Toward Family Justice*, 57 ORANGE CNTY. L. 22, 24 (Aug. 2015) (explaining that these states require a showing of the intended mother's infertility and explaining that these "requirements thwart gestational surrogacy by single individuals, unmarried couples, and married male couples"). An analogous construction problem occurs in the insurance context. For example, Section 1366.005, subsection 3 of the Texas Insurance Code mandates infertility coverage only when "the patient and the patient's spouse have a history of infertility of at least five continuous years' duration."

307. *Id.*

308. FLA. STAT. ANN. § 63.213(e) (West, Westlaw through laws and joint resolutions in effect from the 2023 2nd Reg. Sess. & Spec. A, C, & D Sess. of the 28th Leg.).

309. UTAH CODE ANN. § 78B-15-801(7) (West, Westlaw through the 2023 3rd Spec. Sess.).

310. Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

to everyone, in 2016 there was only a slight decrease in same-sex partner benefits.[311]

Under the Affordable Care Act (ACA), if a federal insurance provider covers procedures for heterosexual couples, it must also cover those same procedures for homosexual couples.[312] In 2017, the House passed the new American Health Care Act (AHCA) but it ultimately died in the Senate in July 2018.[313] Regardless, infertility is considered to be a pre-existing condition, meaning an individual who is determined to be infertile would receive less coverage under the AHCA due to the MacArthur Amendment, which allows states the choice of whether to charge individuals with pre-existing conditions more for insurance coverage.[314] In 2017, however, the American Medical Association officially determined infertility to be a disease, which could potentially spark the change for expansion of insurance coverage.[315]

Although employees may receive healthcare coverage, there is no guarantee that their insurance package covers ART procedures. Even "mandate-to-offer" states[316] only require that insurance companies make employers aware of the existing ART coverage. Despite the increase in demand for IVF, insurance coverage for ARTs remains static.[317] Only twelve states provide some coverage of ARTs.[318] Therefore, the ACA provision mandating identical coverage of

311. *See* Rita Pyrillis, *More Employers Are Dropping Domestic Partner Benefits*, WORKFORCE (Nov. 9, 2017), https://perma.cc/T2PW-VPA9 (stating that only an 11% decrease in employers providing benefits to same-sex partners occurred between 2014 and 2016).

312. *See Health care coverage options for same-sex couples*, HEALTHCARE.GOV, https://perma.cc/5KTB-D9UM (last visited Mar. 9, 2023).

313. *See* Jen McGuire, *Will Trumpcare Cover IVF?*, ROMPER (May 10, 2017), https://perma.cc/F45H-37FX.

314. *See id.*

315. *See* Bearman, *supra* note 256.

316. ARK. CODE ANN. §§ 23-85-137, 23-86-118 (West, Westlaw through acts of the 2023 Reg. Sess. of the 94th Ark. Gen. Assemb. effective Feb. 13, 2023); CAL. HEALTH & SAFETY CODE § 1374.55 (West, Westlaw through Ch. 997 of 2023 Reg. Sess.); CONN. GEN. STAT. ANN. § 38a-536 (West, Westlaw through Gen. Stat. of Conn., Revised 1958, Revised to Jan. 1, 2023); HAW. REV. STAT. ANN. § 432:1-604 (West, Westlaw through the end of the 2023 Reg. Sess., pending text revision by the revisor of statutes) (proposed legislation may contract this provision, limiting it to couples diagnosed with infertility that is not the result of voluntary procedures, voluntary cessation, or natural menopause); 215 ILL. COMP. STAT. ANN. 5/356m (West, Westlaw through P.A. 102-1142 of the 2023 Reg. Sess.); MD. CODE ANN., INS. § 15-1502 (West, Westlaw through all legislation from the 2023 Reg. Sess. of the Gen. Assemb.); MASS. GEN. LAWS ANN. ch. 175, § 47H; ch. 176A, § 8K; ch. 176B, § 4J; ch. 176G, § 4 (West, Westlaw through the 2023 1st Ann. Sess.); N.J. STAT. ANN. §§ 17B:27-46.1X, 17:48A-7W, 17:48-6X, 17:48E-35.22 (West, Westlaw through L. 2023, c. 9 & J.R. No. 1); N.Y. INS. LAW §§ 3216 (13), 3221(k)(6), 4303(s) (West, Westlaw through L. 2023, Chs. 1 to 841); OHIO REV. CODE ANN. § 1751.01(A)(1)(h), (West, Westlaw through File 177 (End) of the 135th Gen. Assemb. (2023–2024) & 2023 Statewide Issue 1 & 2023 Statewide Issue 2); R.I. GEN. LAWS §§ 27-18-30, 27-19-23, 27-20-20, 27-41-33 (West, Westlaw Ch. 442 of the 2023 Reg. Sess. of the R.I. Leg.); TEX. INS. CODE ANN. § 1366.001 (West, Westlaw through the end of the 2023 Reg. & Called Sess. of the 88th Leg.); W. VA. CODE ANN. § 33-25A-2 (West, Westlaw through Feb. 15, 2023).

317. Bearman, *supra* note 256.

318. ARK. CODE ANN. §§ 23-85-137, 23-86-118 (West, Westlaw through acts of the 2023 Reg. Sess. of the 94th Ark. Gen. Assemb. effective Feb. 13, 2023); CAL. HEALTH & SAFETY CODE § 1374.55 (West,

procedures for both heterosexual and homosexual couples did little to expand the coverage of ARTs.[319] However, some states are amending their insurance statutes to allow for ART coverage for same-sex couples. For example, in 2015, Maryland removed a restriction that required ARTs to be covered only if the husband's sperm was used.[320] This allows not only same-sex couples to have coverage for ARTs, but single individuals as well. California also requires coverage of infertility treatments with the exception of IVF.[321]

Although these state laws appear promising, it remains undetermined if the Supreme Court decision in *Burwell v. Hobby Lobby Stores, Inc*.[322] will allow religious exemptions to providing ART services to same-sex couples. Thus far, no cases have cited *Hobby Lobby* in an attempt to refuse provision of ART services to same-sex couples, but this may change.

C. PARENTAGE AND SAME-SEX COUPLES

Although same-sex couples have achieved marriage equality at the state and federal levels, significant disparities exist in the treatment of same-sex couples and opposite-sex couples. For example, Vermont, which provides both for marriage equality and for two individuals of the same sex to be listed on a birth certificate, has significant case law[323] suggesting that "many facts other than the couple's [legal relationship]" should be considered in determining whether the non-biological member of the couple constitutes a "parent."[324] On the other hand, Maryland has adopted a four-part test that determines whether one is a *de facto* parent. This allows a non-biological, non-adoptive parent the opportunity (through custody or visitation) to maintain a relationship with a child they have

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Westlaw through Ch. 997 of 2023 Reg. Sess.); CONN. GEN. STAT. ANN. § 38a-536 (West, Westlaw through Gen. Stat. of Conn., Revised 1958, Revised to Jan. 1, 2023); 215 ILL. COMP. STAT. ANN. 5/356 (m) (West, Westlaw through P.A. 102-1142 of the 2023 Reg. Sess.); MD. CODE ANN., INS. § 15-1502 (West, Westlaw through all legislation from the 2023 Reg. Sess. of the Gen. Assemb.); MD. CODE ANN. HEALTH–GEN. § 19-701 (West, Westlaw through all legislation from the 2023 Reg. Sess. of the Gen. Assemb.); MASS. GEN. LAWS ANN. ch. 175, § 47H; ch. 176A, § 8K; ch. 176B, § 4J; ch. 176G, § 4 (West, Westlaw through the 2023 1st Ann. Sess.); MONT. CODE ANN. § 33-31-102(2)(h)(v) (West, Westlaw through the 2023 Sess. of the Mont. Leg.); N.J. STAT. ANN. §§ 17B:27-46.1X, 17:48A-7W, 17:48-6X, 17:48E-35.22 (West, Westlaw through L. 2023, c. 9 & J.R. No. 1); N.Y. INS. LAW §§ 3216 (13), 3221(k)(6), 4303(s) (West, Westlaw through L. 2023, Chs. 1 to 841); OHIO REV. CODE ANN. § 1751.01(A)(1)(h), (West, Westlaw through File 177 (End) of the 135th Gen. Assemb. (2023–2024) & 2023 Statewide Issue 1 & 2023 Statewide Issue 2); TEX. INS. CODE ANN. § 1366.005 (West, Westlaw through the end of the 2023 Reg. & Called Sess. of the 88th Leg.); W. VA. CODE § 33-25A-2 (West, Westlaw through Feb. 15, 2023).

319. *See* Tara Siegel Bernard, *Insurance Coverage for Fertility Treatments Varies Widely*, N.Y. TIMES (July 25, 2014), https://perma.cc/A88E-K2DH.

320. MD. CODE ANN., INS. § 15-1502 (West, Westlaw through all legislation from the 2023 Reg. Sess. of the Gen. Assemb.).

321. CAL. INS. CODE § 10119.6 (West, Westlaw through Ch. 997 of 2023 Reg. Sess.).

322. 573 U.S. 682 (2014).

323. Miller-Jenkins v. Miller-Jenkins, 912 A.2d 951 (Vt. 2006).

324. Nancy D. Polikoff, *A Mother Should Not Have to Adopt Her Own Child: Parentage Laws for Children of Lesbian Couples*, 5 STAN. J. C.R. & C.L. 201, 215 (2009).

parented without having to prove exceptional circumstances.[325] Still, disparate treatment of same-sex couples seeking parentage continues in many states and arises primarily from two sources: gendered language of state statutes and judicial parentage tests that consider factors beyond intent.[326]

1. The UPA and State Statutes

The mechanisms for establishing parentage in the 2017 update to the UPA are gender neutral and designed to equally "apply to children born to same-sex couples."[327] However, only seven states have enacted the 2017 adaptation of the UPA.[328] In states that still rely on the 2002 UPA, parentage laws apply differently to same-sex and opposite sex couples.[329] Under the 2002 UPA, a mother-child relationship can rest on birth, adjudication, adoption, or a valid surrogacy agreement.[330] A father-child relationship can rest on an "unrebutted presumption of paternity," an acknowledgement of paternity, adjudication, adoption, consent to an ART procedure, or a valid surrogacy agreement.[331]

The language of the 2002 amendments allows single LGBT individuals and same-sex couples to obtain legal parental rights, although in practice, they may still remain subject to differential treatment. The 2002 amendments provide for determination of parentage through adjudication in Sections 201(a)(2) and 201(b)(3).[332] This is of particular importance to same-sex couples given that they are disproportionately likely to have to adjudicate parentage: opposite-sex couples are able to simply rely on the presumption of parentage provided for in Section 705, which prevents contention of paternity, except under certain enumerated circumstances.[333] Sections 201(a)(2) and 201(b)(3) outline several factors to be considered by the judge in order to determine the appropriateness of conferring parental rights on the prospective parent, which are defined in several sections of the UPA.[334] Section 106 is particularly important because Section 201(b)(1)

325. *See* Conover v. Conover, 141 A.3d 31, 37 (Md. Ct. App. 2016) (holding that to determine *de facto* parenthood, "the legal parent must consent to and foster the relationship between the third party and the child; the third party must have lived with the child; the third party must perform parental functions for the child to a significant degree; and most important, a parent-child bond must be forged."); *see also* Jennifer A. Davison, *Parental Rights of Non-biological, Non-Adoptive Parent Recognized*, FELDESMAN, TUCKER, LEIFER & FIDELL, LLP (Aug. 15, 2016), https://perma.cc/835D-4FY3.

326. Elizabeth Harris, *Same-Sex Parents Still Face Legal Complications*, N.Y. TIMES (June 20, 2017), https://perma.cc/Q3CY-9PAU (stating New York's process for second-parent adoptions is "lengthy and complicated," proving "more invasive, upsetting, and disturbing" than the fight to win same-sex marriage rights).

327. *Uniform Parentage Act (2017): An Overview*, AM. BAR ASS'N. (2018), https://perma.cc/7JCN-SKZW.

328. *Parentage Act: Enactment History*, *supra* note 42.

329. UPA, *supra* note 11, §§ 106-705, 201.

330. *Id.* § 201(a)(1)–(4).

331. *Id.* § 201(b)(1)–(6).

332. *See id.* §§ 201(a)(2), 201(b)(3).

333. *Cf id.* § 705.

334. *Id.* §§ 201(a)(2), 201(b)(3).

permits a "presumption of paternity."[335] One of the conditions for such a presumption applies where the parent resides in the same household as the child and holds the child out as their own.[336] On its face, Section 204(a)(5) applies only to cisgender men, but it is applied to others through Section 106, which provides for determination of maternity.[337] A person who fulfills Section 204(a)(5) will thus be entitled to the Section 201(b)(1) presumption of paternity.[338] A lesbian seeking a determination of maternity may use Section 106 to claim that she is entitled to a presumption of maternity under Section 201(b)(1) because Section 106 makes Section 201 applicable to her.[339] Therefore, a lesbian non-biological parent could reside with her child, hold the child out as her own, and receive parental rights over the child by winning adjudication in favor of maternity.

Section 204(a)(5) is also helpful to GBT men.[340] A cisgender male partner in a same-sex relationship with no genetic link to the child could use this provision to confer paternity. For same-sex couples with insufficient resources for ARTs, Section 204(a)(5) permits a work-around if the couple can acquire a child through private means.[341] This provision could permit, for example, otherwise legally unenforceable agreements between same-sex couples and willing donors. In general, the availability of this provision is important for same-sex parents because the language of the other four provisions under Section 204(a) only address the various circumstances in which an opposite-sex couple may conceive a child regardless of marital status.[342] Since most provisions in Section 204(a) are inapplicable to LGBT parents, Section 204(a)(5) is a crucial provision for such individuals who want court recognition as legal parents.

Parentage laws differ from state to state. Some state attorneys general have suggested courts interpret parentage laws in a gender-neutral manner.[343] However, same-sex couples living in states that have not adopted gender–neutral parentage laws must rely upon either mutual goodwill (which often dissipates during the course of, or prior to, a divorce) or the expensive services of a lawyer to ensure they have followed the letter of the law.

2. Judicial Tests for Parentage

The method of acquiring parental rights by holding out a child as one's own suggested by the UPA was validated by the California Supreme Court.[344] In *Elisa B. v. Superior Court*, a lesbian couple agreed to bear children via artificial

335. *Id.* § 201(b)(1).
336. *See id.* § 204(a)(5).
337. *See id.* § 106.
338. *Id.* §§ 201(b)(l), 204(a)(5).
339. *Id.* §§ 106, 201(b)(l).
340. *Id.* § 204(a)(5).
341. *Id.*
342. *See id.* § 204(a)(l)–(4).
343. *See* Va. Att'y Gen. Op. No. 14-074, 2014 WL 7407210 (Dec. 18, 2014).
344. *See* Elisa B. v. Superior Court, 117 P.3d 660, 670 (Cal. 2005).

insemination using the same sperm donor.[345] Elisa bore a single child, Emily bore twins, and the couple lived together for nearly two years.[346] Upon their separation, Emily successfully petitioned the Superior Court for an order to compel Elisa to pay child support for her twins.[347] The Court of Appeals reversed, finding that Elisa had no obligation to pay because she was not a legal parent of Emily's children.[348] The California Supreme Court reversed again, concluding that Elisa was a mother of Emily's children because she had received them into her home and openly held them out as her children.[349] The court's reasoning in *Elisa B*. supports the argument that Section 204(a)(5) may apply to lesbian couples, thereby conferring parentage on those individuals.

Adoption is another avenue to establish parental relationships for same-sex couples. Sections 201(a)(3) and 201(b)(4) permit parent-child relationships based on adoption.[350] For LGBT individuals and same-sex couples, however, this avenue is somewhat restricted by prejudice against LGBT parents. All states permit adoption by any single adult. However, some states give preference to married couples and others allow adoption organizations to refuse to work with LGBT persons.[351] Even if an LGBT individual is able to adopt a child, this does not automatically confer parental rights on that individual's partner, as discussed *supra*. Adoption, therefore, is an imperfect solution for LGBT parentage issues.

A creative use of surrogate pregnancy may be another avenue for prospective cisgender lesbian mothers; one partner could donate a fertilized egg to the other, who would carry the embryo to term. Using IVF in this way could provide both partners with a link to the resulting child: the donor partner would have a genetic link, while the gestational partner could rely on the traditional notions of motherhood by carrying and birthing the child.

The California Supreme Court faced this situation in *K.M. v. E.G.*, the sister case to *Elisa B*.[352] K.M. donated an egg via IVF to her partner, E.G., who subsequently gave birth to twins in 1995.[353] The relationship dissolved in 2001, and K.M. filed a petition to establish a parental relationship.[354] The Superior Court held that K.M. relinquished her rights to claim legal parentage; the Court of Appeals affirmed on the grounds that only E.G. intended to bring about the birth

345. *Id*. at 663 (discussing lesbian partners who chose to use the same sperm donor so the resulting children would be genetic half-siblings).

346. *Id*.

347. *Id*. at 664.

348. *Id*.

349. *Id*. at 670.

350. UPA, *supra* note 11, §§ 201(a)(3), 201(b)(4).

351. *See* Howard Fischer, *Arizona Lawmakers OK Adoption Preference for Married Couples*, EAST VALLEY TRIB. (Apr. 7, 2011), https://perma.cc/YWA5-YSZQ; *See* Julie Moreau, *LGBTQ Parents Face 'State-Sanctioned Discrimination,' American Bar Association Says*, NBC NEWS (Feb. 6, 2019), https://perma.cc/KCC8-WBYD.

352. K.M. v. E.G., 117 P.3d 673, 675 (Cal. 2005).

353. *See id*. at 676.

354. *Id*. at 677.

of the children.[355] The California Supreme Court reversed, holding that K.M.'s genetic relationship to the twins constituted evidence of a mother-child relationship.[356] The court relied on *Johnson v. Calvert*, in which the court applied the provisions concerning presumptions of paternity to a determination of maternity and held that the intent of the parties as expressed in their surrogacy contract was controlling.[357]

The California "intent" approach also allows for an individual to be recognized as the parent of a child without biological or genetic relationship to the child. In *In re Marriage of Buzzanca*, a heterosexual, married couple contracted to have an embryo, genetically unrelated to either of them, implanted in a surrogate and carried to term.[358] Following the birth of the child, the couple divorced, and the husband disclaimed responsibility for the child. However, the court held that both mother and father were the child's parents because the child's creation "was initiated and consented to" by them with the intent to be parents.[359] The California approach has thus resulted in a parentage test in which intent to be a parent is the overriding factor. This "intent" test is particularly favorable for cisgender male same-sex couples, who often do not have genetic or biological relationships to the children they seek to conceive through ART.

There are difficulties, however, in resting parentage determinations on intent for cisgender men in same-sex partnerships. Some states explicitly preclude same-sex couples from establishing a presumption of intent on the basis of the relationship of the couple. For example, in *In re Paternity of Christian R.H.*, a Wisconsin court held that "a same-sex partner of the child's biological mother can never receive the presumption of parenthood."[360] However, post-*Obergefell v. Hodges*, married same-sex couples should receive the same presumption of parenthood as heterosexual couples.[361] Despite these additional hurdles for same-sex couples in many states, the intent analysis nonetheless appears to be a successful path to parentage for same-sex couples. The language of the UPA allows LGBT couples to use surrogacy or other means of ARTs to show their intent to be parents.[362] Section 201(b)(5) permits parentage to be based on consent to assisted reproduction.[363] Under Section 703, a cisgender man who consents to assisted reproduction and intends to be the parent of the resulting child is the parent.[364] The purpose of these provisions was to allow infertile husbands to show parentage when their spouse was impregnated via assisted reproduction, but the 2002

355. *Id.*
356. *Id.* at 678.
357. *Id.* (citing Johnson v. Calvert, 851 P.2d 776, 780 (Cal. 1993)).
358. *In re* Marriage of Buzzanca, 72 Cal. Rptr. 2d 280, 282 (Cal. Ct. App. 1998).
359. *Id.*
360. 794 N.W.2d 230, 232 (Wis. Ct. App. 2010).
361. *See generally* 135 S. Ct. 2584 (2015).
362. *See, e.g.*, UPA, *supra* note 11, §§ 201(b)(5), 703.
363. *Id.* § 201(b)(5).
364. *Id.* § 703.

amendments eliminated references to the term "husband."[365] The new language allows LGBT individuals to make use of these provisions.

The importance of intent in *Elisa B*. and *K.M*., however, has been rejected by other states in favor of a balancing test.[366] In Tennessee, the State Supreme Court considered intent in addition to other factors such as gestation and genetics.[367] Gestation is a much easier factor to find than intent, which involves determinations of degree concerning the subjective mindset of a prospective parent. The Tennessee test, which puts greater emphasis on genetics and gestation, is less friendly to lesbian would-be parents than the California test.

The question of whether a parent is automatically recognized or must go through the adoption process is significant not only because of the stress of the adoption process but also because some states do not recognize adoptive parents in unmarried, same-sex relationships.[368] Even for married couples, the "biological partner" is automatically considered to be a parent, while the other must go through the process of adoption.[369] Opposite-sex couples, on the other hand, do not face this problem.

Caselaw presents some advancements improving paths to parentage for same-sex couples. In *In re Marriage of Dee J. and Ashlie J*., the court upheld the trial court's determination that "the nonbiological parent in a same-sex marriage was legally the parent of a child conceived through artificial insemination."[370] In *Pavan v. Smith*, the Supreme Court held that a state may not, consistent with *Obergefell*, deny married same-sex couples recognition on their children's birth certificates that the state grants to married different-sex couples.[371] In this case, married, same-sex female couples successfully challenged omission of the female partner on a child's birth certificate when, under Arkansas law, the name of the mother's male spouse generally was compulsorily included on the child's birth certificate, even for a child conceived by ART who had no genetic ties to the male spouse.[372] The Court reasoned that same-sex parents in Arkansas should enjoy the same benefits as opposite-sex parents by being listed on the birth certificate, in keeping with *Obergefell*'s ruling that same-sex couples are entitled to civil marriage "on the same terms and conditions as opposite-sex couples."[373]

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365. *See id.*

366. Mary L. Bonauto & Patience Crozier, *Equity Actions Filed by* De Facto *Parents*, PATERNITY AND THE LAW OF PARENTAGE IN MASSACHUSETTS § 7, § 7.4.1, Westlaw (Pauline Quirion ed., 3d ed. 2018) (citing case law in which Massachusetts Supreme Judicial Court announced "[w]e must balance the defendant's interest in protecting her custody of her child with the child's interest in maintaining her relationship with the child's de facto parent.").

367. *In re* C.K.G., 173 S.W.3d 714, 716 (Tenn. 2005).

368. Ann K. Wooster, Annotation, *Adoption of Child by Same-Sex Partners*, 61 A.L.R. 1 (2011).

369. Jennifer L. Laporte, Note, *Connecticut's Intent Test to Determine Parentage: Equality for Same-Sex Couples at Last*, 26 QUINNIPIAC PROB. L.J. 291, 309 (2013).

370. 103 N.E.3d 627, 627 (Ill. App. Ct. 2018).

371. Pavan v. Smith, 137 S. Ct. 2075, 2078–79 (2017) (citing Obergefell v. Hodges, 135 S. Ct. 2584, 2605 (2015)).

372. *Id*. at 2077.

373. *Id*. at 2078, 2076 (citing *Obergefell*, 135 S. Ct. at 2605).

D. THE IMPACT OF DISCRIMINATION

Another potential barrier to all forms of ART for same-sex couples is a physician's discretion to refuse treatment.[374] Physicians have broad discretion to choose among their patients who receives treatment. The majority of states and the federal government permit "conscience clauses," through which healthcare professionals can refuse, on moral or religious grounds, to participate in certain procedures.[375] Moreover, in January 2018, the Department of Health and Human Services created a new division to focus on the "conscience" of healthcare workers who refuse to treat certain patients.[376] If a physician is a state employee, it is possible that under *Lawrence v. Texas*, they would be barred from this form of discrimination against same-sex couples seeking ART.[377] However, in practice, discrimination against same-sex couples may force them to find and visit other doctors (even out-of-state doctors), which increases the economic costs of ARTs and overall burden for those couples.

In response to controversy over birth control, some states propagated and implemented "conscience" statutes as early as 1991, allowing pharmacists to

374. *See* Hurley v. Eddingfield, 59 N.E. 1058, 1058 (Ind. 1901) (holding that physicians have no common law duty to treat).

375. See 42 U.S.C.A. § 300a-7(d) (West, Westlaw through Pub. L. No. 117-262); ARIZ. REV. STAT. ANN. § 36-2154 (West, Westlaw through the 2nd Reg. Sess. of the 55th Leg.); CAL. HEALTH & SAFETY CODE § 123420 (West, Westlaw through Ch. 997 of 2023 Reg. Sess.); DEL. CODE ANN. tit. 24, § 1791 (West, Westlaw through Ch. 5 of the 152nd Gen. Assemb. (2023–24)); HAW. REV. STAT. ANN.§ 453-16 (West, Westlaw through end of 2023 Reg. Sess.); IDAHO CODE ANN. § 18-612 (West, Westlaw through Ch. 1 of 1st Reg. Sess. of the 67th Idaho Leg.); IND. CODE ANN. §§ 16-34-1-4 (West, Westlaw through 2023 2nd Reg. Sess.); IOWA CODE ANN. § 146.1 (West, Westlaw through 2023 Reg. Sess.); KAN. STAT. ANN. § 65-443 (West, Westlaw through 2023 Reg. Sess. of Kan. Leg.); KY. REV. STAT. ANN. § 311.800 (West, Westlaw through 2023 Reg. Sess.); MD. CODE ANN., HEALTH–GEN. § 20-214 (West, Westlaw through 2023 Reg. Sess. of Gen. Assemb.); MO. ANN. STAT. § 197.032 (West, Westlaw through 2023 2nd Reg. Sess. & 1st Extra. Sess. of 101st Gen. Assemb.); MONT. CODE ANN. § 50-20-111 (West, Westlaw through 2023 Sess. of the Mont. Leg.); NEV. REV. STAT. ANN. § 632.475 (West, Westlaw through Ch. 2 (End) of the 33rd Spec. Sess. (2023)); N.J. STAT. ANN. §§ 2A:65A-1 to 3 (West, Westlaw through L. 2023, c. 142 & J.R. No. 12); N.M. STAT. ANN. § 30-5-2 (West, Westlaw through 2023 1st Reg. Sess. & 3rd Spec. Sess. of the 56th Leg. (2023)); N.C. GEN. STAT. ANN.§ 14-45.1 (West, Westlaw through S.L. 2023-75 of the 2023 Reg. Sess. of the Gen. Assemb.); N.D. CENT. CODE ANN. § 23-16-14 (West, Westlaw through 2023 Reg. & Spec. Sess. of 68th Leg. Assemb.); OHIO REV. CODE ANN. § 4731.91 (West, Westlaw through File 177 (End) of the 135th Gen. Assemb. (2023–2024) & 2023 Statewide Issue 1 & 2023 Statewide Issue 2); 63 OKL. STAT. ANN. § 1-741 (West, Westlaw through 1st Reg. Sess. of 59th Leg. 2023); 18 PA. STAT. & CONS. STAT. ANN. § 3213 (West, Westlaw through 2023 Reg. Sess. Act 164); R.I. GEN. LAWS ANN. § 23-17-11 (West, Westlaw through Ch. 442 of 2023 Reg. Sess. of the R.I. Leg.); S.C. CODE ANN. §§ 44-41-40, 50 (West, Westlaw through 2023 Act No. 268); TEX. OCC. CODE ANN. §§ 103.001-002 (West, Westlaw through the end of 2023 Reg. & Called Sess. of the 88th Leg.); UTAH CODE ANN. § 76-7-306 (West, Westlaw through 2023 3rd Spec. Sess.); VA. CODE ANN. § 18.2-75 (West, Westlaw through 2023 Reg. Sess. & Spec. Sess. I); WIS. STAT. ANN. § 253.09 (West, Westlaw through 2023 Act 267).

376. Judy Stone, *Refusal (Conscience) Clauses – A Physician's Perspective*, FORBES (Jan. 22, 2018, 7:00 AM), https://perma.cc/W8YY-H5F2.

377. 539 U.S. 558, 559 (2003) (holding that the Due Process Clause includes a right to privacy that protects private consensual homosexual conduct); *see also* John Robertson, *Gay and Lesbian Access to Assisted Reproductive Technology*, 55 CASE W. RSRV. L. REV. 323, 354 (2004).

refuse to fill prescriptions for moral and religious reasons.[378] In some states, these or similar statutes also cover doctors and other medical personnel, allowing them to refuse ART assistance for LGBT patients.[379] Given the existence of these conscience refusal statutes, LGBT individuals and same-sex couples may not have any legal recourse in the face of a denial of ART services. However, in *Moon v. Michigan Reproductive & IVF Center, PC*., a single woman successfully brought suit against an ART clinic that refused to provide services to single women.[380] The court rejected the idea that under the state's civil rights legislation, "a professional, such as a doctor, may reject a patient or client for any reason, including discriminatory animus toward a protected characteristic."[381] Such cases seem to indicate that conscience clauses are not absolute and that LGBT individuals and same-sex couples may not be without recourse in states where they are recognized as a protected class if they are willing to litigate, although this has yet to be tested by a same-sex couple.

V. FUTURE REGULATION OF ASSISTED REPRODUCTIVE TECHNOLOGIES AND EMERGING TRENDS

Given the innovative nature of ARTs, medical advances have often preceded the law. Before 1978, ARTs were almost unimaginable, the stuff of science fiction. Now, revolutionary advances in reproductive medicine have transformed the parenting landscape while the law often struggles to catch up. One such advance is preimplantation genetic diagnosis (PGD). PGD is a procedure by which an embryologist removes one cell from an eight-cell embryo and tests that cell for the presence of genetic defects.[382] PGD has tremendous capacity to prevent certain sex-linked and other inheritable diseases.[383] One consequence of this testing is that it can reveal the sex of the embryo. Since the parents will know the sex of a given embryo, PGD creates the potential for sex-based selection of embryos, a practice that has received considerable criticism.[384] The general concern is that sex-selection through PGD, and not-yet-developed future

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378. Julie Cantor & Ken Baum, *The Limits of Conscientious Objection—May Pharmacists Refuse to fill Prescriptions for Emergency Contraception?*, 351 NEW ENG. J. MED. 2008, 2009 (2004).

379. Steve Inskeep, *Gay Rights, Religious Liberties: A Three-Act Story*, NPR (June 16, 2008, 12:12 AM), https://perma.cc/SX2T-HY22.

380. 810 N.W.2d 919, 919 (Mich. Ct. App. 2011).

381. *Id*. at 923–24.

382. *See* Molina Dayal, *Preimplantation Genetic Diagnosis*, EMEDICINE (Aug. 29, 2018), https://perma.cc/7XL2-PYEK.

383. There are many sex-linked diseases, which are often passed from a mother (who may carry an abnormal X chromosome) to a son or from an affected father to his daughter (who would then have a 50% chance of being a carrier). Single gene defects, like Tay-Sachs disease and cystic fibrosis, can also be detected via PGD. *See* Molina B. Dayal, Lila Taylor, Morgan Elizabeth Miller, & Ioanna Athanasiadis, *Preimplantation Genetic Diagnosis*, MEDSCAPE (Dec. 7, 2022), https://perma.cc/UB56-ED7T.

384. *See* David S. King, *Preimplantation Genetic Diagnosis and the New Eugenics*, 25 J. MED. ETHICS 176 (1999); Bratislav Stankovic, *"It's a Designer Baby!" Opinions on Regulation of Preimplantation Genetic Diagnosis*, 2005 UCLA J.L. & TECH. 3, 5 (2005).

technologies, could lead to sex discrimination, sex inequalities, and harm to children. The ASRM guidelines do not prohibit sex-selection for non-medical reasons, although they do caution against it, and many labs will not practice sex-selection for non-medical reasons out of ethical concerns.[385]

Another significant player that is likely to lead the push towards a more comprehensive legal framework surrounding ARTs is the technology industry. Tech giants such as Facebook and Apple have begun company-paid elective egg freezing,[386] normalizing family-building on one's own time and terms, which is likely to require an updated legal regime.

VI. CONCLUSION

Many of the legal uncertainties concerning ART stem primarily from the rapid advancement in the science of ART, for which the law has not had a chance to develop an applicable cohesive legal theory. This legal landscape leaves much uncertainty for prospective parents—from inconsistency in court decisions to drastically varied state laws—making it difficult to predict every legal hiccup that may occur when utilizing ART. In time, the courts will have been exposed to a substantial number of these issues and will more easily be able to develop a somewhat uniform understanding of the underlying legal regime. The increasing popularity and success rates of ART suggest high demand for these reliable legal outcomes. The same can also be said for insurance coverage of these new techniques. As use of ARTs becomes more widespread, consumers of insurance policies will begin to demand better coverage of fertility treatments. The ABA's Model Act attempts to address some of the regulatory issues surrounding ARTs, but regardless of whether the Act is adopted, state regulation or further guidance from courts will be necessary to clarify the future of reproductive technology.[387] The continuing development of ART methods means that the resulting legal questions will not die down any time soon. The legal landscape must catch up in order to provide prospective parents with the stability needed to take advantage of all science has to offer.

385. Ethics Comm. of the Am. Soc'y for Rep. Med., *Use of Reproductive Technology for Sex Selection for Nonmedical Reasons*, 103 FERTILITY & STERILITY 1418, 1419 (2015).

386. Laura Sydell, *Silicon Valley Companies Add New Benefit for Women: Egg-Freezing*, NPR (Oct. 17, 2014, 3:21 AM), https://perma.cc/M6CG-3VH5.

387. *See, e.g.*, *American Bar Association Model Act Governing Assisted Reproductive Technology*, 42 FAM L.Q. 171, 171 (2008).