ASSISTED REPRODUCTION FOR SAME-SEX MARRIED COUPLES POST *OBERGEFELL*

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RECOGNITION

- Texas Super Lawyers (Family Law) - As printed in Texas Monthly Magazine (2010 - 2018)
- San Antonio's Best Lawyers - Scene in SA Magazine (Family Law - 2010, 2012 - 2018; Collaborative Law 2012 - 2018)
- The Best Lawyers in America; Family Law (2015 - 2018)
- Featured in San Antonio Woman Magazine - Women in Business: *Practitioners of Family Law* (July/August 2015)
- Best Lawyers® 2016 Family Law "Lawyer of the Year" - San Antonio, Texas

PRESENTATIONS

- Presenter and Co-Presenter on collaborative law for San Antonio Family Lawyers Association and Collaborative Professional Association of San Antonio (2009 - present)
- Moderator; Judges' Panel, "*Attorney's Fees: How Can I Get Sum?*" San Antonio Family Lawyer's Association (April 3, 2012)
- Author and Presenter, *The Fundamentals of Evidence*; Marriage Dissolution Course sponsored by State Bar of Texas (April 25, 2012)
- Author and Presenter, *Temporary Orders*; Marriage Dissolution Course sponsored by State Bar of Texas (April 17, 2013)
- Author and Presenter, *Discovering the Marital Estate*, Marriage Dissolution Course sponsored by State Bar of Texas (April 24, 2014)
- Author and Presenter, *Child Support: Tax Returns and Beyond*, Advanced Family Law Seminar sponsored by State Bar of Texas (August 4-7, 2014)
- Author and Presenter, *Child Support: Tax Returns and Beyond*, Advanced Family Law Seminar, Title IV-D Associate Judges Program sponsored by State Bar of Texas (August 6, 2014)

- Author and Presenter, *The Low Tech Courtroom - Tips for Using "Old School" Technology*, Family Law Technology Course sponsored by State Bar of Texas (December 5, 2014)
- Author and Presenter, *Discovery Outside the Forms,* Marriage Dissolution Course sponsored by State Bar of Texas (April 10, 2015)
- Co-Author and Co-Presenter, *Drug and Alcohol Testing,* Advanced Family Law Seminar sponsored by State Bar of Texas (August 3, 2015)
- Author and Presenter, *Preparing the Client for Mediation*, Advanced Family Law Seminar sponsored by State Bar of Texas (August 1-4, 2016)
- Co-Author and Presenter, *Temporary Spousal Support - What is it and How do I get it?*, Marriage Dissolution Course sponsored by State Bar of Texas (April 20-21, 2017)
- Co-Author and Co-Presenter, *Primer: Psychological and Psychiatric Issues in Family Law Cases*, Family Law 101 sponsored by State Bar of Texas (August 6, 2017)
- Author and Presenter, *Post-Judgment Enforcement - Chapter 9 Remedies*, Advanced Family Law Drafting sponsored by State Bar of Texas (December 7-8, 2017

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PRESENTATIONS

- Co-Author, *Temporary Spousal Support - What is it and How do I get it?*, Marriage Dissolution Course sponsored by State Bar of Texas (April 20-21, 2017)

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I. INTRODUCTION.

On June 26, 2015, the state of rights for same-sex couples in the United States changed. In *Obergefell v. Hodges*, the United States Supreme Court declared the then-existing marriage laws at issue were in essence unequal stating specifically that, "[s]ame-sex couples are denied benefits afforded opposite-sex couples and are barred from exercising a fundamental right."[1] The Court then laid out the four principals and traditions that demonstrate the reasons marriage is fundamental to both opposite-sex and same-sex couples: (1) Right to personal choice, (2) Supports a two-person union, (3) Safeguards children and families, and (4) Marriage is a keystone of the Nation's social order.[2] While *Obergefell* set the stage for same-sex couples and their journey to equal protection in the United States, the ruling does not fully protect married same-sex couples desirous of having children.

Same-sex couples clearly want children and are having children as evidenced by data from the 2010 Census. According to the 2010 Census, 46,401 same-sex couples live in Texas with 52% being same-sex female couples.[3] More than one in five same-sex couples in Texas are raising children under the age of 18 which is an estimated 10,864 same-sex couple households raising 18,671 children.[4] 58% of those children are biologically related to one member of the couple, 18% are adopted children and 4% are stepchildren.[5] Those percentages equate to 10,785 biological children, 3,401 adopted children, and 796 stepchildren.[6]

Among couples with children, same-sex couples in Texas are nearly seven times more likely than their heterosexual married counterparts to raise an adopted child with 18% of same-sex couples having an adopted child, compared to less than 3% of opposite-sex couples.[7] While there is likely a biological-related explanation for the higher percentage of same-sex adoptive couples, this reality is a clear indicator of same-sex couples' desire to have children. Similarly, same-sex couples in Texas are more likely to foster children.[8] It is important to consider the latest Census is eight years old and does not reflect the likely increase in the aforementioned numbers following *Obergefell*.

II. ASSISTED REPRODUCTION TECHNOLOGY

Assisted Reproduction Technology ("ART") is a common avenue used to assist same-sex couples in building a family. ART, also called third-party reproduction, refers to the various processes used to assist individuals in achieving pregnancy.[9] Forms of ART include the use of donor eggs, donor sperm, donor embryos, a gestational carrier, traditional surrogacy, and a combination thereof.

The Texas Family Code provides the following definition of assisted reproduction: a method of causing pregnancy other than sexual intercourse. The term includes:

(A) intrauterine insemination;
(B) donation of eggs;
(C) donation of embryos;
(D) in vitro fertilization and transfer of embryos; and
(E) intracytoplasmic sperm injection.

The medical procedures by which a pregnancy can be achieved through ART include Intrauterine Insemination ("IUI"), In Vitro Fertilization ("IVF"), and Intracytoplasmic Sperm Injection ("ICSI"). IUI is a fertility treatment that involves placing sperm inside a woman's uterus to facilitate fertilization. The goal of IUI is to increase the number of sperm that reach the fallopian tubes and subsequently increase the chance of fertilization. In conventional IVF, the eggs and sperm are mixed together in a dish and the sperm fertilizes the egg 'naturally.' The resulting embryo is then transferred to the woman's uterus or fallopian tube.[10]

ICSI is very similar to conventional IVF in that gametes (eggs and sperm) are collected from each partner. The difference between the two procedures is the method of achieving fertilization. With ICSI, a single sperm is picked up with a fine glass needle and injected directly into each egg. [11] This procedure is carried out in the laboratory by embryologists. [12] Very

[1] *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015)
[2] *Id*.
[3] Gates, G.J. (2014). Same-sex Couples in Texas: A demographic summary. Los Angeles, CA: The Williams Institute, UCLA School of Law. Retrieved from: http://williamsinstitute.law.ucla.edu/wp-content/uploads/TX-same-sex-couples-demo-sept2014.pdf
[4] *Id.*
[5] *Id.*
[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] *Traditional Surrogacy*, https://surrogate.com/about-surrogacy/types-of-surrogacy/what-is-traditional-surrogacy/ (last visited April 15, 2018).
[10] http://www.sims.ie/treatments/intracytoplasmic-sperm-injection-icsi.1040.htm
[11] http://www.sims.ie/treatments/intracytoplasmic-sperm-injection-icsi.1040.htm
[12] http://www.sims.ie/treatments/intracytoplasmic-sperm-injection-icsi.1040.htm

few sperm are required and the ability of the sperm to penetrate the egg is no longer important as this has been assisted by the ICSI technique. [13] ICSI does not guarantee that fertilization will occur as the normal cellular events of fertilization still need to occur once the sperm has been placed in the egg.[14]

A "donor" is defined as an individual who provides eggs or sperm to a licensed physician to be used for assisted reproduction, regardless of whether the eggs or sperm are provided for consideration.[15] The following are not donors: (1) a husband who provides sperm or a wife who provides eggs to be used for assisted reproduction for the wife; (2) a woman who gives birth to a child by means of assisted reproduction; and (3) an unmarried man who, with the intent to be the father of the resulting child, provides sperm to be used for assisted reproduction by an unmarried woman, as provided by Section 160.7031.[16] The Family Code makes it explicitly clear that a donor is not a parent of a child conceived by means of assisted reproduction.[17]

A written contract between a donor of eggs, sperm or embryos and the recipient(s) is not mandated.[18] A contract is however required between a gestational carrier (and her husband if she is married) and the intended parents, who must be a married.[19] This written contract is known as a Gestational Agreement. A Gestational Agreement must include the following elements:

(1) the prospective gestational mother agrees to pregnancy by means of assisted reproduction;
(2) the prospective gestational mother, her husband if she is married, and each donor other than the intended parents, if applicable, relinquish all parental rights and duties with respect to a child conceived through assisted reproduction;
(3) the intended parents will be the parents of the child;
(4) the gestational mother and each intended parent agree to exchange throughout the period covered by the agreement all relevant information regarding the health of the gestational mother and each intended parent;
(5) the eggs used in the assisted reproduction procedure will be retrieved from an intended parent or a donor such that the gestational mother's eggs may not be used in the assisted reproduction procedure;
(6) a statement that the physician who will perform the assisted reproduction procedure as provided by the agreement has informed the parties to the agreement of:

(i) the rate of successful conceptions and births attributable to the procedure, including the most recent published outcome statistics of the procedure at the facility at which it will be performed;
(ii) the potential for and risks associated with the implantation of multiple embryos and consequent multiple births resulting from the procedure;
(iii) the nature of and expenses related to the procedure;
(iv) the health risks associated with, as applicable, fertility drugs used in the procedure, egg retrieval procedures, and egg or embryo transfer procedures; and
(v) reasonably foreseeable psychological effects resulting from the procedure. [20]

A gestational agreement may not limit the right of the gestational mother to make decisions to safeguard her health or the health of an embryo.[21] This prohibition acknowledges that a pregnant woman has a constitutionally-recognized right to decide issues regarding her prenatal care. In other words, the intended parents have no right to demand that the gestational carrier undergo any particular medical regimen at their behest.

Parties to a gestational agreement cannot rush into entering such a contract. Not only do most intended parents prefer to wait until their prospective gestational carrier has passed all medical and psychological screening protocols to confirm her suitability to serve as a carrier, but also the Family Code requires that the contract be entered into before the 14th day preceding the date of transfer of either eggs, sperm, or embryo to the gestational mother.[22]

After the intended parents and the prospective gestational mother (and her husband, if she is married) execute their gestational agreement, the intended parents and the gestational mother may then commence a proceeding for the court to validate the agreement, although it is typically the intended parents who assume such responsibility.[23] Chapter 160 of the Texas Family Code contemplates that a gestational agreement may be validated even prior to the embryo transfer procedure,[24]

[13] *Id.*
[14] *Id.*
[15] Tex. Fam. Code § 160.102 (6)
[16] *Id.*
[17] Tex. Fam. Code § 160.702
[18] Tex. Fam. Code, Chap. 160
[19] Tex. Fam. Code § 160.754
[20] *Id.*
[21] *Id.*
[22] Tex. Fam. Code § 106.754
[23] Tex. Fam. Code § 106.755
[24] Tex. Fam. Code § 106.756, 160.759

yet a petition to validate the gestational agreement is most often filed after completion of the first trimester of pregnancy. An Order Validating Gestational Agreement includes a finding that the gestational carrier and her husband, if married, are not the parents of the child born to the gestational carrier and orders that the parent-child relationship will exist only between each intended parent and the child. The order also directs the birth registrar at the hospital where the child is born to only include the intended parents' names on the application for the child's birth certificate.

It is important to emphasize that the court *may* validate the Gestational Agreement at the court's discretion and such ruling is only subject to review for an abuse of discretion.[25] The statutory language giving the court discretion to grant or deny a petition to validate a gestational agreement makes the process more intimidating to same-sex couples as their legal parentage and family legitimacy is subject to denial.

After the child is born, a Notice of Birth is filed with the Court.[26] To complete the legal process, on a showing that an order validating the gestational agreement was rendered in accordance with Section 160.756, the court is mandated to order that the intended parents are the child's parents and are financially responsible for the child.[27] The sole exception to the requirement that the court enter this final order is if a party alleges the child was not born to the gestational carrier pursuant to assisted reproduction procedures, in which case the court shall order genetic testing to ascertain the child's parentage.[28]

Traditional surrogacy is where the surrogate mother uses her own eggs and is artificially inseminated using sperm from the intended father or a donor.[29] The surrogate then carries and delivers the baby, relinquishes her parental rights, and the intended parent(s) not genetically related to the child adopt.[30] Many states, including Texas, do not permit the use of traditional surrogacy. The Texas Family Codes explicitly prohibits the use of the gestational mother's eggs in the assisted reproduction procedure."[31] There are a number of legal complications that can arise from traditional surrogacy - consider the 1986 "Baby M" case[32] - which is the reason many states do not permit the traditional process.

III. ESTABLISHMENT OF PARENTAL RIGHTS.

A. Maternity.

Per the Texas Family Code, the mother-child relationship is established between a woman and a child by (1) the woman giving birth to the child; (2) an adjudication of the woman's maternity; or (3) the adoption of the child by the woman.[33] A woman who conceives using a donor egg is therefore the mother of the child she gives birth to, regardless of her marital status. In the context of a gestational surrogacy arrangement, the Family Codes explicitly states that the mother-child relationship exists between a woman and a child by adjudication confirming the mother as a parent of the child born to a gestational mother under a gestational agreement if the gestational agreement is validated under Chapter 160, Subchapter I or enforceable under other law.[34]

B. Paternity.

There are two sections of the Family Code which establish paternity when a child has been conceived with ART. The first of which relates to a child born to a gestational carrier and provides that the father-child relationship exists between a child and a man by an adjudication confirming the man as a parent of the child born to a gestational mother under a gestational agreement if the gestational agreement is validated under this subchapter or enforceable under other law.[35] Family Code § 160.703 applies to a child born to a married woman and states that if a husband provides

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[25] Tex. Fam. Code § 160.756
[26] Tex. Fam. Code § 106.760
[27] Tex. Fam. Code § 106.760
[28] *Id.*
[29] *Traditional Surrogacy*, https://surrogate.com/about-surrogacy/types-of-surrogacy/what-is-traditional-surrogacy/ (last visited April 15, 2018).
[30] *Id.*
[31] Tex. Fam. Code § 160.754

[32] "Baby M" was the pseudonym used in the case *In re Baby M*, 537 A.2d 1227, 109 N.J. 396 (N.J. 1988) for the infant whose legal parentage was in question. *In re Baby M* was a custody case that became the first American court ruling on the validity of surrogacy. William Stern entered into a surrogacy agreement with Mary Beth Whitehead, whom he and his wife Elizabeth Stern found through a newspaper ad. According to the agreement, Mary Beth Whitehead would be inseminated with William Stern's sperm (making her a traditional, as opposed to gestational, surrogate), bring the pregnancy to term, and relinquish her parental rights in favor of William's wife, Elizabeth. After the birth, however, Mary Beth decided to keep the child. William and Elizabeth Stern then sued to be recognized as the child's legal parents. The New Jersey court ruled that the surrogacy contract was invalid according to public policy, recognized Mary Beth Whitehead as the child's legal mother, and ordered the Family Court to determine whether Whitehead, as mother, or Stern, as father, should have legal custody of the infant, using the conventional 'best interests of the child' analysis. Stern was awarded custody, with Whitehead having visitation rights. *https://en.wikipedia.org/wiki/Baby_M*

[33] Tex. Fam. Code § 160.201
[34] Tex. Fam. Code § 160.753
[35] Tex. Fam. Code § 160.753

sperm for or consents to his wife undergoing assisted reproduction, he is the father of the child resulting from that process.[36] Section 160.703 however has not been expanded to apply to a woman who consents to her wife's assisted reproduction, nor to a man who consents to his husband's use of assisted reproduction to bring a child into their marriage.

The Family Code also includes provisions for a married man's presumption of paternity.[37] A man is presumed to be the father of a child if he is married to the mother of the child and:

(1) the child is born during the marriage,
(2) he is married to the mother of the child and the child is born before the 301st day after the date the marriage is terminated,
(3) he married the mother of the child before the birth of the child in apparent compliance with law, even if the attempted marriage is or could be declared invalid, and the child is born during the invalid marriage or before the 301st day after the date the marriage is terminated, and
(4) he married the mother of the child after the birth of the child in apparent compliance with law, regardless of whether the marriage is or could be declared invalid, he voluntarily asserted his paternity of the child, and

    (A) the assertion is in a record filed with the vital statistics unit;
    (B) he is voluntarily named as the child's father on the child's birth certificate; or
    (C) he promised in a record to support the child as his own.[38]

There however are no similar parental presumptions for a woman whose wife gives birth under these same criteria. While it's possible a court might establish the parent-child relationship between a child and a woman married to birth mother, there is no statutory right to such an adjudication.

IV. BIRTH CERTIFICATES.

While Texas began issuing birth certificates listing same-sex spouses as parents in August of 2015, many states, Arkansas for example, did not. The Arkansas Department of Health continued to issue birth certificates only bearing the birth mother's name, even when same-sex parents applied for birth certificates listing both as parents. Under Arkansas law, the mother of the child is deemed to be the woman who gave birth. [39] If she is married, her husband shall be entered on the child's birth certificate as the father.[40]

In *Pavan v. Smith,* the refusal to issue birth certificates naming both same-sex spouses as a child's parents and the existing Arkansas law was challenged by two sets of same-sex parents as unconstitutional.[41] The case made its way to the United States Supreme Court. The Supreme Court held the failure to list both parents on their children's birth certificates denied married same-sex couples access to the "constellation of benefits that the state has linked to marriage."[42] Although same-sex couples now have the right to have both spouses listed on their child's birth certificate, a court order establishing the parent-child relationship is still necessary because a birth certificate is only evidence of parentage and it is not the equivalent of an adjudication of parental rights entitled to full faith and credit.

V. FULL FAITH AND CREDIT.

The ruling in *Berwick v. Wagner* exemplifies the need for same-sex married couples to secure a court order establishing the parent-child relationship between the spouses and the child to protect that relationship.[43] Berwick and Wagner were legally married in Canada in 2003 and registered as domestic partners in California in 2005.[44] In 2005, the couple entered into a gestational surrogacy agreement with a woman in California and the woman conceived a child using an embryo created with Berwick's sperm and a donated egg.[45] After the birth of their son, the California court entered an order declaring both Berwick and Wagner to each be the legal parents of their son.[46]

Three years later, the relationship ended while the parties were living in Texas. Wagner filed a Suit Affecting the Parent-Child Relationship seeking the appointment of himself and Berwick as joint managing conservators.[47] Berwick filed a counterpetition for sole managing conservatorship and argued Wagner lacked standing because he was not biologically related to the child.[48] Wagner registered the California Judgment of Paternity as a foreign judgment in Texas.[49] The trial court appointed Wagner as sole managing conservator

[36] Tex. Fam. Code § 160.703
[37] Tex. Fam. Code § 160.204
[38] *Id.*
[39] Ark. Code. § 20-18-401(e)
[40] Ark. Code. § 20-18-401(f)(1)
[41] *Id.*
[42] *Id.*
[43] *Berwick v. Wagner,* 509 S.W.3d 411 (Tex. App. – Hous. [1st Dist.] 2014)
[44] *Id.*
[45] *Id.*
[46] *Id.*
[47] *Id.*
[48] *Id.*
[49] *Id.* at 415.

and Berwick as possessory conservator.[50] Berwick appealed.

Berwick complained on appeal that the California Judgment of Paternity was not enforceable in Texas as it was contrary to Texas law.[51] The Court of Appeals ruled that the California Judgment is entitled to full faith and credit regardless of Texas law.[52] The appellate court articulated that Berwick's argument ignored the state's public policies favoring stability and finality in matters of parentage and that such judgment was in the California court's jurisdiction to enter and was properly registered in Texas.[53] The court therefore extended full faith and credit to the California judgement as required by the United States Constitution, regardless of the laws of Texas.[54]

VI. LEGAL UNCERTAINTY FOR MARRIED SAME-SEX COUPLES.

While ART law is pretty well-settled in Texas for heterosexual married couples and individuals availing themselves of the provisions and procedures set forth in Chapter 160 of the Family Code, the Family Code does not explicitly recognize that same-sex married couples are also using ART to build their families; rather it remains silent as to these couples. Although Section 160.754 states that gestational agreements are available to "married couples," Section 160.756 states that the court can only validate a gestational agreement if the medical evidence shows the intended mother is unable to carry a pregnancy to term and give birth to a child or is unable to carry the pregnancy to term and give birth to the child without unreasonable risk to her physical or mental health or to the health of the unborn child.[55] The disconnect between these two statutory provisions is likely explained by the fact these statutes were enacted in 2003 when Texas did not recognize same-sex marriage. The absence of clear language post *Obergefell* making the procedures set forth in Chapter 160 equally available to married same-sex couples creates uncertainty for these couples. Recent case law validates the concerns of same sex couples regarding the establishment and protection of the parent-child relationship between each spouse and the couple's child conceived through ART.

In Interest of A.E., the Beaumont Court of Appeals recently declined to expand the presumption of paternity to a presumption of parentage for married same-sex couples. The case involved C.W. and M.N., a female married couple, and A.E., a child born during the marriage. M.N., A.E.'s genetic and birth mother, conceived A.E. through ART with donor sperm. C.W. did not adopt the child and there was no gestational agreement or IVF agreement bearing C.W.'s signature. C.W. filed a Petition for Divorce with a SAPCR, and M.N. moved to dismiss the SAPCR, arguing C.W. lacked standing. The trial court granted M.N.'s motion, and C.W. appealed. In her appeal, C.W. argued she had standing, as her parent-child relationship was established under the presumption of paternity found in Texas Family Code §160.204. The Court disagreed with C.W. and stated that, "Obergefell does not require this Court to act as the Legislature and re-write the Texas statutes that define who has standing to bring a SAPCR."[56] The Court also went on to say that the holding in *Obergefell* does not require every state law related to the marital relationship or the parent-child relationship to be "gender neutral" and that state-derived benefits such as adoption rights, child custody, support, and visitation rules are not fundamental rights of marriage.[57]

It is important to note that *In Interest of A.E.* is not the only Texas court that has refused to expand marital rights to same-sex couples. In 2017, in *Pidgeon v. Turner*, the Texas Supreme Court reversed a Houston Court of Appeals decision that extended benefits to same-sex spouses of government employees.[58] The Texas Supreme Court held that even though *Obergefell* requires marriage licenses be issued to same-sex couples, it does not hold that states must provide the same publicly funded benefits to all married persons.[59] C.W. filed a Petition for Writ of Certiori with the U.S. Supreme Court on September 15, 2017, but the Petition was subsequently denied on December 4, 2017.

Unlike the Texas Supreme Court, state courts in Arizona and Massachusetts are applying statutes in a gender-neutral manner to protect same-sex couples. The Supreme Judicial Court of Massachusetts denied an adoption by a same-sex couple, not due to the denial of marital rights, but due to the expansion of marital rights already in place.[60] In 2014, J.S. and V.K., a married same-sex couple filed a petition to adopt their son who was conceived through IVF, using a known sperm donor.[61] Both J.S. and V.K. were listed on the birth certificate but they sought an adoption to ensure their parentage would be recognized outside the state of Massachusetts.[62] The court ruled both J.S. and V.K.

[50] *Id.* at 415.
[51] *Id.* at 416.
[52] *Id.* at 419.
[53] *Id.* at 419.
[54] *Id.* at 419.
[55] Tex. Fam. Code § 160.756
[56] *In Interest of A.E.,* 2017 WL 1535101 (Tex. App.--Beaumont Apr. 27, 2017)
[57] *Id.*
[58] *Pidgeon v. Turner,* 538 S.W.3d 73 (Tex. 2017)
[59] *Id.*
[60] *In re Adoption of a Minor,* 29 N.E.3d 830 (Mass. 2015)
[61] *Id.*
[62] *Id.*

were already the lawful parents of their child citing G.L. c. 46 § 4B which provides, "Any child born to a married woman as a result of artificial insemination with the consent of her husband, shall be considered the legitimate child of the mother and such husband." [63] The Court explained that "[l]awful parentage, as well as the associated rights and responsibilities, is conferred by the statute on the consenting spouse of a married couple whose child is conceived by one woman of the marriage, through the use of assisted reproductive technology consented to by both women.[64] Given that lawful parentage was already established, an adoption was not required for J.S. and V.K. to establish their parental rights.

The Supreme Court of Arizona also recently interpreted its Family Code in a gender-neutral manner. In *McLaughlin,* Suzan and Kimberly, a same-sex married couple, decided to start a family using donor sperm and artificial insemination.[65] Kimberly conceived through artificial insemination, and the couple subsequently moved to Arizona during the pregnancy.[66] The parties entered into a joint parenting agreement that stipulated Suzan was a co-parent with the same rights, responsibilities and obligations of a biological parent. The agreement also stated that should the relationship end, it was the intention of both Suzan and Kimberly that the relationship between Suzan and the resulting child would continue.[67] Two years after the birth of their child, the relationship ended, divorce proceedings commenced, and the argument over the expansion of parental presumptions ensued.

Arizona law states that a man is presumed to be the father of a child if he and the mother of the child were married in the ten months immediately preceding the birth or if the child is born within ten months following the termination of the marriage.[68] The appeals court noted that while the statute only references a male presumption, in the wake of *Obergefell*, the presumption in favor of males only violates the Fourteenth Amendment.[69] The court refused to interpret *Obergefell* narrowly and instead concluded that it would be inconsistent with *Obergefell* to only allow same-sex couples to legally marry, but deny them the same benefits of marriage afforded opposite-sex couples, which includes legal parent status as a benefit of marriage.[70]

The court reasoned that the statute, through its plain words, would allow for a man married to a woman who conceives a child with donor sperm through ART to be the presumed father of the resulting child, but would not extend that same parental presumption to a same-sex couple undergoing the same process.[71] This means that a spouse in a same-sex marriage has only one route to legal parentage – adoption – while a husband in an opposite-sex marriage may adopt, but can simply rely on the marital paternity presumption instead which in itself treats same-sex couples differently.[72] "Because the marital paternity presumption does more than just identify biological fathers, Arizona cannot deny same-sex spouses the benefit the presumption affords."[73]

In arriving at its decision, the Arizona Supreme Court explored the purpose of the marital paternity presumption, which it articulated is to promote the family unit, ensure the needs of the child are met, and provide meaningful parenting time and participation in respect to parents and their children.[74] The Court specifically notes that *Obergefell* states that the right to marry is fundamental partly due to the safeguarding of families and children,[75] and explained that by extending the statute to same-sex spouses, the court can ensure all children, and not just children born to opposite-sex spouses, have financial and emotional support from both parents and a strong family unit.[76]

The case did not end with the Arizona Supreme Court's decision. On December 18, 2017, Kimberly filed a Petition for Writ of Certiori with the United States Supreme Court, in which the issue presented was: Whether the Arizona Supreme Court erred when it held that a biology-based paternity statute violates the Fourteenth Amendment and the Supreme Court's decisions in *Obergefell v. Hodges* and *Pavan v. Smith*. The United States Supreme Court denied review of the case on February 26, 2018.

VII. PROTECTING THE PARENT-CHILD RELATIONSHIP FOR MARRIED SAME-SEX COUPLES.

Given the current state of the law, it is critical that same-sex couples utilizing ART to build their families cover their legal bases as effectively as possible. While some states have begun to recognize legal parentage through statutory expansion and case law, many married same-sex couples, including those residing in Texas, must still face the unknown implications of *Obergefell.*

[63] *Id.*
[64] *In re Adoption of a Minor*, 29 N.E.3d 830
[65] McLaughlin v. Jones in and for County of Pima, 401 P.3d 492 (Ariz. 2017), cert. denied sub nom. McLaughlin v. McLaughlin, 138 S. Ct. 1165 (2018)
[66] *Id.*
[67] *Id.*
[68] A.R.S. § 25-814(A)(1)
[69] *McLaughlin*, 401 P.3d 492, 496
[70] *Id.* at 497
[71] *Id.* at 497.
[72] *Id.* at 498.
[73] *Id.* at 498.
[74] *Id.* at 499, 500.
[75] *Obergefell* 135 S. Ct. 2584, 2590
[76] *McLaughlin*, 401 P.3d 492, 500

Consequently, there are several additional legal hoops through which married same-sex parents must jump to establish their legal parentage.

A. Married Male Couples.

For a married male couple, the process of building a family often begins with making the decision between adoption or ART. Those couples wishing to have a child biologically related to one spouse will require the use of an egg donor and a gestational carrier. Although a written contract is not required between a donor and the recipients, it is advisable to have an egg donation agreement signed by all parties. The most important reason to have this written agreement is to confirm that the woman is an egg donor and she understands she is irrevocably relinquishing all rights relating to the retrieved eggs, resulting embryos, resulting fetus, and the child. Another important purpose of an egg donation agreement is to confirm the donor is donating her eggs to both spouses.

As previously mentioned, the provision authorizing a gestational agreement between a gestational carrier, and her husband if she is married, and married intended parents, was enacted in 2003 when same-sex marriage was not recognized in Texas. That fact, coupled with the requirement of medical evidence regarding the mother's inability to successfully carry the pregnancy in order for the court to validate the gestational agreement and the court's discretionary power to grant or deny a petition to validate a gestational agreement, has cast some doubt as to whether or not a court will validate a gestational agreement if the petitioners are a same-sex married couple.

Nevertheless, there are certainly some courts which will allow a married male couple to avail themselves of the procedures set forth in Texas Family Code Chapter 160, meaning the court will sign both an Order Validating Gestational Agreement and an Order Confirming Parentage Pursuant to Validated Gestational Agreement after the child is born. If the court will enter these orders for a same-sex couple, then there will be no need for an adoption. However, in an abundance of caution, there are some ART practitioners who still recommend an adoption to protect the parent-child relationship between both fathers and their child.

If the attorney working with a married male couple practices in a jurisdiction where the court will not allow a same-sex married couple to avail themselves of the gestational surrogacy procedures set forth in Chapter 160, there is an alternative. In this scenario, the intended fathers should still enter a gestational agreement pursuant to the Texas Family Code. After the child is born, the spouse providing the sperm to create the embryo transferred to the gestational carrier can still be named as the father on the child's birth certificate. The genetic father should sign an Acknowledgment of Paternity to establish his paternity, particularly if the gestational carrier is married. The father can then petition the court to establish the gestational carrier is not the mother, as evidenced through genetic testing and an affidavit of relinquishment of presumed parental rights. The father's petition should also include a request that the court order the removal of the gestational carrier's name from the birth certificate. Once the court orders the gestational carrier is not the child's mother, the father and his husband can initiate adoption proceedings. Although the Texas Family Code provides that the court has discretion to grant an adoption, the current trend is that courts are granting adoption petitions of same-sex couples to establish the parent-child relationship between the child and the spouse not genetically related to the child.

B. Married Female Couples.

Married same-sex female couples using ART require a sperm donor and achieve pregnancy using either Intrauterine Insemination ("IUI"), In Vitro Fertilization ("IVF"), or Intracytoplasmic Sperm Injection ("ICSI"). Similar to married male couples using an egg donor, female married couples should enter a written contract with their sperm donor if the donor is known to them. The contract should confirm the donor is donating his sperm and irrevocably relinquishing his rights to the sperm, resulting embryos, resulting fetus, and the child. The donation should also be made to both women and not just the wife whose eggs will be used to create embryos to achieve pregnancy. Ideally, intended mothers would also enter into a written agreement even with an anonymous sperm donor, but the reality is most women will obtain sperm from a sperm bank and so it is not practical to enter into a contract with the sperm donor.

Another ART process not yet mentioned in this paper is Reciprocal IVF. Reciprocal IVF involves the retrieval of eggs from one spouse which are then fertilized with donor sperm, and the resulting embryos are implanted into the uterus of the other spouse. Often the wife providing the eggs to create the embryos is referred to as the genetic mother and the wife to whom the resulting embryos are transferred is referred to as the gestational mother. Accordingly, Reciprocal IVF allows for both women to physically participate in the conception process.

Many IVF physicians will not proceed with a Reciprocal IVF procedure absent a contract between the spouses. This required contract is known as a Reciprocal IVF Agreement. Three essential elements of a Reciprocal IVF Agreement are confirmation that the spouse providing the eggs used to create the embryo shall not be considered an egg donor, the spouse gestating the fetus shall not be considered a gestational carrier, and the agreements set forth in the Reciprocal

IVF Agreement supersede any consent forms signed at the fertility clinic and IVF physician's office.

If the intended mothers using Reciprocal IVF petition the court to confirm each spouse's maternity after the child is born, it's possible the court may declare legal parentage on both spouses given the gestational and genetic involvement of each woman. However, given the Family Code's silence on such arrangements, there is no guarantee the court will enter such an order. To protect the parent-child relationship between each spouse and the resulting child, it is therefore preferable to establish the parent-child relationship between each spouse and the child through an adoption.

If the intended mothers are using IUI, such that one spouse will both use her egg and carry and deliver the child, then the spouses should use an adoption to establish the parent-child relationship between the child and the wife who is not the birth and genetic mother.

VIII. CONCLUSION.

Unfortunately for many same-sex couples in the United States, *Obergefell* does not protect their families as anticipated. *Obergefell* has opened the flood gates and has been influential since the ruling was announced on June 26, 2015. However, some courts fail to apply the ruling beyond requiring the issuance of a marriage license to same-sex couples. ART has allowed for many same-sex couples to build their families, but Texas laws do not yet fully protect those families and essentially create the need for married same-sex couples to pursue an adoption when their heterosexual counter-parts utilizing the same ART procedures do not need such protection. Until such time as Texas law requires a gender-neutral application of the assisted reproduction and parentage statutes, it is incumbent upon the practitioner working with married same-sex couples to understand their clients' legal vulnerabilities relative to the parent-child relationship and to take all steps possible to protect these relationships.