INSIDE THE MINDS

Strategies for Family Law in California

Leading Lawyers on Understanding Developments in California Family Law

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The Post-Nuclear Family: Changing Definitions of What Constitutes a Familial Relationship

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Introduction

Last year, the Supreme Court issued its landmark decision, *Obergefell v. Hodges*, which held that the fundamental right to marry is guaranteed to same-sex couples under the United States Constitution.[1] While a handful of county clerks in a handful of states have resisted the high court's mandate, the battle over same-sex marriage is over. But that does not mean that the definition of family is settled. Far from it. This chapter will discuss the extent to which advances in reproductive technology and shifts in cultural norms continue to challenge static assumptions about what constitutes a family.

This chapter will also discuss a far more mundane, but perennial topic—how to get paid. Regardless of whether an attorney is fighting over a cutting-edge legal issue or a garden-variety property dispute, obtaining payment in a family law case can be a challenge in instances where there is a disparity in resources between the spouses. Other wrinkles arise where one spouse has access to funds *outside* the community. Recent case law squarely addresses the issue.

The Changing Face of the Family

While the traditional conception of a family as headed by a heterosexual couple with children conceived during marriage is still the most common, many families do not fit this mold. There are many reasons this can be so. Divorce is common, as is cohabitation without any sort of formal recognition. Furthermore, older couples may decide to avoid marriage to preserve federal benefits or to avoid creating estate-planning headaches.

Children, too, may find themselves outside of the traditional conception of family. Many states presume that a child born to a married couple is the biological child of both spouses.[2] Complexities arise when a marriage is invalid or if the marriage occurs *after* the birth of the child. While California applies the presumption of parenthood in those circumstances,[3] the rules

[1] *Obergefell v. Hodges,* 135 S. Ct. 2584, 192 L. Ed. 2d 609 (2015).
[2] *E.g.*, Fam. Code § 7540; N.J. Stat. § 9:17-43; *Michael H. v. Gerald D.*, 491 U.S. 110, 109 S. Ct. 2333, 105 L. Ed. 2d 91 (1989)..
[3] *E.g.*, Fam. Code, § 7611(c).

may vary from state to state. Moreover, children may be born to cohabitating, non-married partners. And, while same-sex couples now have the right to marry, the status of their children may remain uncertain, depending on how and when they were conceived. Further complicating matters, in some states—including California—a child can, under certain circumstances, have more than two legal parents.

The rise of assisted reproduction has also challenged traditional conceptions of family—in addition to yielding a whole new vocabulary for describing conception itself. For example:

- Assisted reproductive technology (ART) is conception by any means other than sexual intercourse.
- In vitro fertilization (IVF) is any procedure yielding conception outside of the human body, followed by implantation of one or more fertilized eggs into the carrier's uterus.
- Artificial insemination (AI) is defined as sperm being transferred to a woman's uterus or cervix.
- Surrogacy refers to an arrangement where a woman other than the "intended mother" carries the child. A typical surrogacy arrangement involves the use of the surrogate's own egg with the intended father's sperm or donor sperm, but in some instances, a surrogacy involves genetic material from one or two third parties.

This vocabulary is becoming increasingly ubiquitous. Use of IVF has doubled over the past decade. According to the Center for Disease Control, over 175,000 IVF procedures occurred in the United States in 2012, resulting in over 50,000 deliveries and over 65,000 live births. These births account for more than one percent of all infants born in the United States in 2012.[4]

IVF and artificial insemination have become far more common as the age of parents has increased. Rates for all births to women over age thirty-five have been rising over the past twenty years. In 1970, only around 1.7 out of

[4] *Assisted Reproductive Technology (ART)*, Centers for Disease Control and Prevention (last visited Apr. 15, 2016), http://www.cdc.gov.art/.

1,000 women had their first baby between the ages of thirty-five to thirty-nine years. By 2006, as many as 10.9 women out of 1,000—a six-fold increase. By 2012, 11.0 out of 1,000 women were having their first child between the ages of thirty-five to thirty-nine. As the CDC reports, the predictable result of the rising age of mothers has resulted in the increased use of fertility treatments and therapies—including IVF—since a woman's fertility declines with age.[5]

These new technologies have raised the questions regarding how to determine parentage. Fortunately, in most cases, California law has kept pace with these questions.

Artificial Insemination

IVF and AI often utilize the genetic material of the intended parent (or parents). Many states' statutes grant parental rights over children born from artificial insemination or IVF, thus creating legal parent-child relationships between the child and the person or persons requesting and consenting in writing to the use of the technique.[6]

However, IVF and artificial insemination may sometimes use the genetic material of one or two third-party donors. California law has adapted to accommodate this possibility. If a woman conceives through artificial insemination or other ART techniques using sperm donated by a man who is *not* her husband, the woman's spouse is treated as if he or she were the natural parent of the child if: (a) the insemination or other ART technique was performed with the supervision of a licensed physician; and (b) the conception was done with the consent of her spouse.[7]

California has provided statutory forms to demonstrate the participants' intent to create a parent-child relationship for a child conceived using assisted reproduction. These forms are provided for convenience. There is

[5] *See* Ellie Kincaid, *American women are waiting longer than ever to become mothers*, Business Insider (June 15, 2015), available at http://www.businessinsider.com/average-age-of-mother-having-first-child-going-up-2015-6.
[6] *See, e.g.*, N.C. Gen. Stat. § 49A-1; N.D. Cent. Code § 30.1-04-19 at ¶ 6.
[7] Fam. Code, § 7613.

no requirement that one of these forms be used. Rather, other written agreements may be valid to achieve similar results.[8]

Where the process of harvesting and fertilizing eggs for IVF yields more embryos than the intended parents require, issues arise regarding what happens to the other embryos—including who gets to decide whether they are donated, and to whom. These issues have already been the subject of litigation. For example, in November 2015, a California court ordered the destruction of frozen embryos after a man challenged his ex-wife's right to use them.[9]

The court began by noting that there are over 4 million frozen embryos maintained at ART clinics in the United States, yet no federal regulations or statutes address the disposition of these embryos. California Health & Safety Code section 125315[10] addresses the topic, however, and requires the gamete progenitors to state their intentions for the embryos at the time they undergo fertility treatments that may yield frozen embryos. Thus, the *Findley* court relied on the couple's statement that they intended to thaw and discard any frozen embryos in the event of divorce.

Surrogacy

Surrogacy is another cutting-edge means for conceiving a child in California. In fact, California is unique in its broad acceptance of surrogacy, as in most of the world, it is illegal to hire a woman to carry a child—i.e., to be a paid surrogate.[11] Even within the United States, surrogacy can be controversial. Not all states allow it. As of 2014, seventeen states had laws permitting surrogacy. In twenty-one states, there were no laws or published opinion regarding surrogacy. In five

[8] Fam. Code, § 7613.5.

[9] *Findley v. Lee*, Nov. 18, 2015 Order (FDI-13-780530), available at http://www.sfsuperiorcourt.org/sites/default/files/pdfs/FINDLEY_Statement_Of_Decision%20Rev_1.pdf; *see also* Andy Newman, *California Judge Orders Frozen Embryos Destroyed*, The New York Times (Nov. 18, 2015), available at http://www.nytimes.com/2015/11/19/us/california-judge-orders-frozen-embryos-destroyed.html?_r=0.

[10] Health & Saf. Code, § 125315.

[11] Tamar Lewin, *Coming to U.S. for Baby, and Womb to Carry It: Foreign Couples Heading to America for Surrogate Pregnancies*, The New York Times (July 4, 2015), available at http://www.nytimes.com/2014/07/06/us/foreign-couples-heading-to-america-for-surrogate-pregnancies.html?_r=0.

states, surrogacy had been banned. And seven states had at least one court opinion upholding some form of surrogacy.[12]
California allows anyone to hire a woman to carry a baby. The birth certificate will carry the names of the intended parents—either through adoption or through a petition to be named on the child's birth certificate. The parental rights of all others are terminated in connection with the adoption or petition.

Because of California's permissive surrogacy rules, clients come from all over the world to have children via this method.

More Than Two Parents

While the traditional conception of family generally involves two parents, even that definition is in flux. In 2013, California passed a law recognizing that more than two individuals may assume a parenting role. The law states that a court is not precluded from finding that a child has more than two parents.[13] This law was passed in reaction to a 2011 case where two women and one man all met the criteria to be considered a legal parent.[14] The California Court of Appeal held that it had no ability to afford parental status to all three people, but it invited the legislature to reconsider the "rule of two."[15] The legislature accepted that invitation, yielding one of the most progressive laws in the country regarding what constitutes a family.

Posthumous Birth Issues

Assisted reproductive procedures are also applicable in circumstances where one of the biological parents has died—thus raising yet another batch of potential legal issues regarding what constitutes a recognized familial relationship, who may inherit, and how many parents a child can have. Indeed, with the advent of cryopreservation and post-death retrieval

[12] Tamar Lewin, *Surrogates and Couples Face a Maze of Laws, State by State*, The New York Times (Sept. 17, 2014), available at http://www.nytimes.com/2014/09/18/us/surrogates-and-couples-face-a-maze-of-laws-state-by-state.html?_r=0.
[13] Fam. Code, § 7601(c).
[14] *In re M.C.*, 195 Cal. App. 4th 197, 123 Cal. Rptr. 3d 856 (2d Dist. 2011), *overturned due to legislative action CA FAM § 3040.*
[15] *In re M.C.*, 195 Cal. App. 4th at 870-71.

of reproductive material, assisted reproduction procedures can produce a child who is both conceived and born *after* the death of one or both parents.

While post-death conception sounds like science fiction, there are many reasons why someone will decide to freeze genetic material. For example, a person may wish to preserve fertility before undergoing cancer treatments or being deployed in the military. Cryopreservation may also be used to preserve genetic material remaining after assisted reproduction procedures pursued during life. Genetic material such as embryos and sperm can be successfully used to conceive children even after they are preserved for significant periods of time—thus creating the possibility of post-death conception.

The most obvious legal issues arising out of post-death conception relate to inheritance. Many states now have statutes that expressly address the extent to which a child who is conceived posthumously is an heir of the deceased parent. As a general matter, for a child to be considered an heir of a deceased parent, that parent must have consented to the conception. Thus, in California, a child of a deceased parent who is conceived and born after the death of the decedent "shall be deemed to have been born in the lifetime of the decedent, and after the execution of all of the decedent's testamentary instruments," if the child proves by clear and convincing evidence that all of the following conditions have been met:

a. The decedent, in writing, has specified that his or her genetic material shall be used for the posthumous conception of the child;
b. The person designated by the decedent to control the use of his or her genetic material has given written notice by certified mail that the decedent's genetic material was available for the purpose of posthumous conception. This notice must have been given to the person who has the power to control the distribution of the decedent's property within four months of the date of the decedent's death; and
c. The child was in utero using the decedent's genetic material within two years of the issuance of the decedent's death certificate.[16]

[16] Prob. Code, § 249.5.

In Summary

The ramifications of all of the various non-traditional means of conceiving children and forming familial relationships are significant. In addition to the issues described above, the changing definitions of the family give rise to questions about child support, spousal support, and inheritance. For example, defined terms in estate planning documents such as "spouse" or "child" may omit persons who are otherwise treated as family. Definitions that are insufficiently broad to accommodate the possibility of post-death conception or conception outside of marriage may result in disinheritance or the loss of the ability of a person to act as trustee or be included in the class of permissible appointees under a power of appointment.

Likewise, to the extent that familial relationships fall in the gray areas unregulated by statute, would-be parents or spouses may find it problematic to establish rights to custody or support. Issues including who must pay spousal support or child support, and myriad other issues will undoubtedly play out in the coming years in the family courts, probate courts and beyond.

Getting Paid

While the litigation of cutting-edge issues affecting the definition of family may be inevitable, whether the attorney litigating those issues will be paid is not. Obtaining payment in family law matters can be a challenge, especially where there is a deep disparity in resources between the spouses. Recent case law makes clear that the less wealthy spouse may reach resources that the wealthier spouse has to draw upon, even if those resources are not that wealthier spouse's.

In California, one spouse may seek an order that the other spouse pay his or her attorney's fees pursuant to Family Code section 2030.[17] Case law articulates the reach of this rule.

[17] Fam. Code, § 2030 provides in relevant part: "(a)(1) In a proceeding for dissolution of marriage, nullity of marriage, or legal separation of the parties, and in any proceeding subsequent to entry of a related judgment, the court shall ensure that each party has access to legal representation, including access early in the proceedings, to preserve each party's rights by ordering, if necessary based on the income and needs assessments, one party, except a governmental entity, to pay to the other party, or to the other party's attorney, whatever amount is reasonably necessary for attorney's fees and for the cost of

In *In re Marriage of Smith*,[18] the California Court of Appeal addressed a situation where the wife's father paid his daughter's attorney's fees on a regular basis. Wife's father took the position that these payments were loans, based on the execution of promissory notes for the amounts paid on her behalf. However, the father admitted that he did not expect repayment in his lifetime. Rather, the loans would be repaid as an offset against his daughter's inheritance.

The trial court ordered payment of the other side's attorney's fees. The Court of Appeal affirmed the decision, holding: "It was well within the trial court's discretion to consider such regular, substantial infusions of cash as part of its determination of the relative circumstances of the respective parties and their ability to maintain or defend the proceedings." The Court of Appeal held that the fact that the funds had been characterized as loans was not determinative because the court must look at the "economic reality of the situation, rather than the labels" applied by a party.[19] The appellate court even went so far as to suggest that the trial court would have abused its discretion if it had *failed* to consider the funds: "Indeed, to conclude the trial court was required to exclude those funds from consideration would vitiate one of the primary purposes of section 2030 and section 2032,[20] to prevent one party from being able to 'litigate[] [the opposing party] out of the case,' by taking advantage of their disparate financial circumstances."[21]

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maintaining or defending the proceeding during the pendency of the proceeding. [¶] (2) When a request for attorney's fees and costs is made, the court shall make findings on whether an award of attorney's fees and costs under this section is appropriate, whether there is a disparity in access to funds to retain counsel, and whether one party is able to pay for legal representation of both parties. If the findings demonstrate disparity in access and ability to pay, the court shall make an order awarding attorney's fees and costs. A party who lacks the financial ability to hire an attorney may request, as an in pro per litigant, that the court order the other party, if that other party has the financial ability, to pay a reasonable amount to allow the unrepresented party to retain an attorney in a timely manner before proceedings in the matter go forward."

[18] *In re Marriage of Smith*, 242 Cal. App. 4th 529, 195 Cal. Rptr. 3d 162 (4th Dist. 2015).

[19] *In re Marriage of Smith*, 242 Cal. App. 4th at 534.

[20] Fam. Code, §§ 2030, 2032.

[21] *In re Marriage of Smith*, 242 Cal. App. 4th at 534, citing *In re Marriage of Cryer,* 198 Cal. App. 4th 1039, 131 Cal. Rptr. 3d 424, 438 (2d Dist. 2011).

In re Marriage of Alter[22] supports the result in *Smith*. In *Alter*, the husband argued that the trial court abused its discretion by considering as income the $6,000 his mother gave him every month. The Court of Appeal rejected this argument, holding that "where a party receives recurring gifts of money, the trial court has discretion to consider that money as income for purposes of the statewide uniform child support guidelines."[23] The Court of Appeal noted that the formula for calculating child support takes into account both parents' "net monthly disposable income," which is determined based upon the parents' "annual gross income."[24] "Annual gross income" is "income from whatever source derived," and includes more than a dozen possible income sources to be considered as part of annual gross income—including wages, salaries, dividends, interest, workers' compensation benefits, and business income.[25] Section 4058 did not mention gifts, however. Nonetheless, the Court of Appeal held that "gifts may be considered income for purposes of section 4058."[26]

Thus, in holding that gifts or purported "loans" from a parent could be considered under section 2030, the Court of Appeal in *Smith* simply extended this reasoning.

In sum, the current rule in California is that the trial court has discretion to treat funds provided to the wealthier spouse as funds available to pay the other spouse's legal fees. Moreover, the trial court has discretion to consider the wealthier spouse's access to funds *outside* the marriage (i.e., a trust or loan from a parent) in determining whether there is a disparity in the financial resources of the parties.

It is important to remember, however, that financial resources are only one factor for a trial court to consider in determining how to apportion the overall cost of the litigation equitably between the parties under their

[22] *In re Marriage of Alter,* 171 Cal. App. 4th 718, 89 Cal. Rptr. 3d 849, 852-53 (6th Dist. 2009).
[23] 171 Cal. App.4th at 722-23 at 852, citing Fam. Code §§ 4050 et seq.
[24] 171 Cal. App.4th at 731, citing Fam. Code §§ 4055(a), (b), 4058.
[25] Cal. Fam. Code § 4058(a).
[26] *Alter*, 171 Cal.App.4th at 732.

relative circumstances.[27] The trial court must also consider the reasonableness of the fees incurred. As the appellate court noted in *Alan S.*: "'An award measured summarily by what the applicant has been billed or what his or her attorney is presently owed is an *abuse of discretion* if it does not reflect consideration of whether the fees allegedly incurred were reasonably necessary.'"[28]

What all of this means is that where the less wealthy spouse's attorney handles discovery, appears at pre-trial hearings, attends settlement conferences, and tries a case, all of those matters are appropriately compensated using funds regularly available to the wealthier spouse. To establish entitlement to payment, the attorney must provide evidence of his or her rates, plus a summary of his or her time spent on the matter. The trial court may require the attorney to provide redacted billing records. And, if the trial court orders payment of one spouse's fees in the lower court, a challenge to that order is appealable, and the less wealthy spouse may again seek to have the other spouse pay those appellate legal fees as well.

Conclusion

Family law continues to evolve as contemporary conceptions of familial relations evolve. With increasing numbers of women having children later in life, assisted reproductive technology is becoming a fact of life. While many of those ART-pregnancies are likely to occur within the context of a marriage, and are therefore likely to be governed by the body of default statutory rules governing the creation of parent-child relationships, some of these pregnancies will occur outside of marriage. Awareness of the potential legal issues stemming from surrogacy, posthumous conception, multiple-parent situations and other non-traditional models, is essential to helping clients avoid and navigate litigation.

Unlike the dynamic world of non-traditional familial relationships, one aspect of practice that never changes is the importance of getting paid. Where an attorney represents the less wealthy spouse, obtaining funds for the less wealthy client to pay his or her legal bills is a necessity for client and

[27] Cal. Fam. Code § 2032(b); *Alan S., Jr. v. Superior Court*, 172 Cal. App. 4th 238, 91 Cal. Rptr. 3d 241, 255 (4th Dist. 2009), *as modified,* (Apr. 2,2009) *and as modified,* (Apr. 15, 2009)..

[28] *Alan S., Jr.*, 91 Cal. Rptr. 3d at 255.

lawyer alike. Remaining abreast of the courts' increasingly expansive interpretation of Family Code section 2030 is critical, both for the attorney representing the less wealthy spouse and for the attorney representing the spouse who regularly receives funds from parents or others.

Key Takeaways

- Stay on top of the changing definitions of what constitutes a family, as well as the many ways a family may not fit the traditional mold of a heterosexual couple with children conceived during marriage.
- Become familiar with the new vocabulary for describing conception, including: assisted reproductive technology (ART); in vitro fertilization (IVF); artificial insemination (AI); and surrogacy.
- Obtain familiarity with the various developing technologies for fertility and conception, as these new technologies have raised legal issues regarding how to determine parentage. Stay on top of the developments in the law as it keeps pace with these questions, as family law clients will have need of this knowledge and familiarity as they face issues arising out of the family structure and relationships.
- When dealing with posthumous birth issues, make sure that the necessary conditions have been met relating to establishing inheritance and the recognized familial relationship. Be conversant with the statutes specific to the state in which the conception took place, to ensure a child of a deceased parent who is conceived and born after the death of the decedent is deemed to have been born in the lifetime of that parent, and after the execution of all testamentary instruments.

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***Dedication**: This chapter is dedicated to my own post-nuclear family.*

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