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### Summary of St. Mary v. Damon, 129 Nev. Adv. Op. 68

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FAMILY LAW: CHILD CUSTODY

**Summary**

The Court determined three issues: 1) whether the Nevada Parentage Act and its underlying policies allows for a child to have two legal mothers; 2) whether the parties' co-parenting agreement was a surrogacy agreement; and 3) whether the same-sex parties' co-parenting agreement is consistent with Nevada's public policies or void as unlawful or against public policy.

**Disposition**

Under the NPA and its policies a child conceived through artificial insemination may have two legal mothers where one mother's egg is fertilized and implanted in her female partner. An agreement is not a surrogacy agreement where it lacked any language that the birth mother was to be only a surrogate or would relinquish custody and other parental rights. An otherwise valid post-separation co-parenting agreement is not void on the basis of the parents being the same sex.

**Factual and Procedural History**

In, or about, 2006, two females, St. Mary and Damon, started a romantic relationship. They moved in together after one year and planned to have a child using Damon's egg with St. Mary carrying and birthing the child. In October 2007, Damon's egg was implanted in St. Mary. Around the same time, they drafted and signed a co-parenting agreement. The agreement provided that Damon and St. Mary would "jointly and equally share parental responsibility, with both of [them] providing support and guidance." The agreement further provided they would jointly share in the responsibilities and expenses and making major decisions. Such duties continued if the parties separated and each was to ensure the other maintained a close relationship with the child.

St. Mary gave birth to the child in June 2008. The birth certificate only listed St. Mary as the mother, although the child was given both parties' last names, hyphenated as St. Mary-Damon.

St. Mary cared for the child while Damon worked. After one year, the parties separated and St. Mary moved out. In 2009, after St. Mary signed an affidavit declaring Damon was the biological mother of the child, Damon filed an ex parte petition requesting the district court establish maternity and order the child's birth certificate be amended to add Damon as a mother. The district court issued an order in 2009 declaring that St. Mary gave birth to the child and that Damon was the biological and legal mother of the child." It directed the birth certificate be amended to add Damon as a mother.

St. Mary then filed a separate case to determine custody, visitation, and child support. The district court set an evidentiary hearing and advised St. Mary that as the child's surrogate she had the burden to establish visitation rights. Damon filed a motion to limit the scope of the

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<sup>1</sup> By Jeffrey D. Pike.

hearing to third-party visitation, excluding parentage and custody issues. The district court granted Damon's motion, believing that the 2009 Order had already determined Damon's status as the sole legal and biological mother of the child.

At the hearing, the parties focused on visitation only. St. Mary argued the parties intended to create the child together, and that they used Damon's egg, which St. Mary carried, so both parties would be related to the child. St. Mary further testified that they created the co-parenting agreement assuming it would be required by the fertility clinic, and although the clinic did not ask for it, the parties completed it after the procedure. Damon testified the parties did not intend the co-parenting agreement to be enforceable and they only created it for the clinic and insurance.

In March, 2011, the district court granted St. Mary third-party visitation but not custody. It further held that the co-parenting agreement was void and St. Mary could only be a surrogate because NRS 126.045, which was repealed in 2013, only permitted surrogacy agreements "for married couples, which only include one man and one woman."<sup>2</sup> St. Mary appealed.

## **Discussion**

### *St. Mary may be the child's legal mother*

Nevada courts apply the Nevada Parentage Act (NPA), modeled after the Uniform Parentage Act (UPA), to determine legal parentage of a child.<sup>3</sup> The Court's "ultimate goal" is to interpret the NPA to effectuate legislative intent.<sup>4</sup> Absent ambiguity, the Court focuses on the "plain and ordinary meaning" of the statute's language.<sup>5</sup>

As discussed in *Willerton v. Bassham, State, Dep't of Human Res.*,<sup>6</sup> the Legislature recognized the fundamental nature of the parent-child relationship by adopting the UPA "in response to constitutionally unequal treatment of children born out of wedlock and compelling social policies." Therefore, in Nevada a person determined to have a parent-child relationship receives all the "rights, privileges, duties, and obligations"<sup>7</sup> that accompany parenthood, regardless of the parents' marital status.<sup>8</sup>

However, surrogates cannot claim parental rights. Under the 2009 statute, a surrogate was "an adult woman who enters an agreement to bear a child conceived through assisted conception for the intended parents."<sup>9</sup> In 2013, the Legislature repealed NRS 126.045 and redefined a surrogate as a "gestational carrier:" a woman who agrees she is "not an intended parent," gives up her "legal and physical custody" of the child to the intended parents. and maybe "relinquish[es] all rights and duties as the parent."<sup>10</sup> Accordingly, St. Mary's claim rests on whether she is a legal mother or someone else, such as a surrogate under the applicable 2009 statute.

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<sup>2</sup> NEV. REV. STAT. § 126.045 (2009) (repealed by 2013 Nev. Stat. 813).

<sup>3</sup> *Russo v. Gardner*, 114 Nev. 283, 288, 956 P.2d 98, 101 (1998).

<sup>4</sup> *Salas v. Allstate Rent-a-Car, Inc.*, 116 Nev. 1165, 1168, 14 P.3d 511, 513 (2000).

<sup>5</sup> *Cromer v. Wilson*, 126 Nev. \_\_\_, \_\_\_, 225 P.3d 788, 790 (2010).

<sup>6</sup> 111 Nev. 10, 19-20, 889 P.2d 823, 828-29 (1995).

<sup>7</sup> NEV. REV. STAT. § 126.021(3) (2013).

<sup>8</sup> NEV. REV. STAT. § 126.031(1) (2013).

<sup>9</sup> NEV. REV. STAT. § 126.045 (2009).

<sup>10</sup> 2013 Nev. Stat., ch. 213, §§ 10, 23, 27 at 807-08, 810-11.

### *The multiple ways to prove maternity*

The NPA provides several ways to determine maternity. First, a woman can establish she is a legal mother by proving she gave birth to the child.<sup>11</sup> Additionally, statutes to determine paternity may be applied to determine maternity were practicable.<sup>12</sup> Paternity, and where practicable maternity, may be determined by factors such as genetics,<sup>13</sup> marriage and cohabitation,<sup>14</sup> receiving the child into the home and holding oneself out as a parent,<sup>15</sup> and voluntary acknowledgment.<sup>16</sup>

Here, each party gave evidence that could establish a conclusive presumption of maternity. St. Mary testified she birthed the child. Damon demonstrated a genetic relationship by showing her egg was used to produce the child.

### *The law does not preclude a child from having two legal mothers*

Contrary to the District Court's implied presumption that a child conceived through artificial insemination may not have two legal mothers, the Court held that "the NPA and its policies do not preclude a child from having two legal mothers." In Nevada "the best interest of the child is the paramount concern in determining custody and care of children." The Legislature established the public policy that children of same-sex domestic partners have the same rights to two actively involved parents as the children of heterosexual parents.<sup>17</sup> The Legislature has not explicitly lessened these rights for children of unregistered domestic partners.

In California,<sup>18</sup> New Mexico,<sup>19</sup> and Vermont,<sup>20</sup> courts have held a child may have two legal mothers, and these states also adopted the UPC in substantially similar statutory schemes to Nevada's and their holdings advance the underlying policies of the NPA. These policies include preventing children from becoming wards of the state, providing for the child's best interest with two legal parents, including two legal mothers, and preserving and strengthening family life. Thus there are no legal or policy-based barriers that would preclude a child from having two legal mothers.

Here, the District Court erred when determined that St. Mary was not a legal mother. In acknowledging Damon's relationship, the 2009 Order did not remove St. Mary's parent-child relationship. Further, in determining that St. Mary was only a surrogate, the District Court determined parentage and thereby exceeded its own limitation on the scope of the hearing. Accordingly, the Court remanded for an evidentiary hearing to determine parentage under the NPA.

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<sup>11</sup> Nev. Rev. Stat. § 126.041 (2009).

<sup>12</sup> Nev. Rev. Stat. § 126.231 (2013).

<sup>13</sup> Nev. Rev. Stat. § 126.051(2) (2013).

<sup>14</sup> Nev. Rev. Stat. § 126.051(1)(a)-(c) (2013).

<sup>15</sup> Nev. Rev. Stat. § 126.051(1)(d) (2013).

<sup>16</sup> Nev. Rev. Stat. § 126.053 (2013).

<sup>17</sup> See Nev. Rev. Stat. § 122A.300(1) (2013); Nev. Rev. Stat. § 122A.300(3)(b) (2013).

<sup>18</sup> K.M. v. E.G., 117 P.3d 673, 675-81 (Cal. 2005); Elisa B. v. Superior Court, 117 P.3d 660, 666 (Cal. 2005).

<sup>19</sup> Chatterjee v. King, 280 P.3d 283, 292 (N.M. 2012).

<sup>20</sup> Miller-Jenkins v. Miller-Jenkins, 912 A.2d 951, 970 (Vt. 2006).

*The co-parenting agreement was not a surrogacy agreement and was consistent with Nevada's public policy*

At the time the district court heard this case, NRS 126.045 (2009) governed contracts between two married persons and a surrogate. That statute required such contracts to specify the parties' rights as to custody and parentage. Here the parties' co-parenting agreement was not within the scope of NRS 126.045 (2009). It lacked any language that St. Mary was to be only a surrogate or would relinquish custody and other parental rights. Instead it specified that the parties would jointly share in the duties of raising the child, and that they would make major parenting decisions together.

Further, the agreement was not void under NRS 126.045 (2009) for failing to be between a married man and woman. Freedom of contract and public policies support agreements resolving custody in the child's best interest with two parents, including parents of the same sex. Here, the parties co-parenting agreement is valid should the district court determine on remand that St. Mary is a legal mother and not a surrogate.

### **Conclusion**

First, the district court misinterpreted the 2009 order and therefore erred in determining that St. Mary lacked "legal rights" to the child. A child conceived through artificial insemination may have two legal mothers under the NPA and its policies. The Court remanded for a full evidentiary hearing to determine if St. Mary is a legal mother or a surrogate. Second, the parties' co-parenting agreement was not a surrogacy agreement under NRS 126.045 (2009) because it lacked language identifying the birth mother as a surrogate and limiting her parental rights. Instead, the parties co-parenting agreement provided St. Mary would continue to raise the child. Finally, the parties' co-parenting agreement is not void under NRS 126.045 (2009) simply because it is between parents of the same sex. If St. Mary is determined to be a legal mother, then the parties co-parenting agreement is valid and must be considered in determining custody.