Sixth Family Law Conference

Oregon Family Law: Change, Challenge, Opportunity

Oregon Law and Surrogacy Arrangements

Presenter:

The Honorable Beth Allen, Multnomah County Circuit Court Judge

Judge Allen sits on a dedicated family law bench that includes juvenile dependency and delinquency matters. Judge Allen is co-chair of Multnomah County's Child Welfare Committee's workgroup on LGBTQ dependency and delinquency issues. In that role, she is involved in recruitment and training for foster parents to care for that demographic and she created the Judge's LGBTQ Reference Card. She serves on the Family Court Improvement Project Tools & Standards Committee, which is developing tools, standards, and training for lawyers, custody evaluators and others in an effort to ensure they are considering whether domestic abuse is impacting families in litigation. She is also a member of the Judicial Conduct Committee of the Judicial Conference. Judge Allen is the judge who handles the Surrogacy docket for Multnomah County.

Sam R. Walton, Attorney at Law, Bouneff, Chally & Koh

Sam R. Walton, Esq. joined Bouneff, Chally & Koh as an associate attorney in 2017.Sam was born and raised in Northeast Portland and attended Grant High School before leaving Portland to earn a bachelor's degree in anthropology with a minor in Egyptology from the American University in Cairo in 2010. Sam then returned to Portland to pursue a law degree from Lewis & Clark Law School, which he completed in 2013. Prior to joining Bouneff, Chally & Koh, Sam worked as a volunteer attorney at the Multnomah County Circuit Court and subsequently served as a clerk for the Honorable Beth A. Allen from 2014 to 2016, during which time he learned the ins and outs of family court procedure and family law. Sam is licensed to practice law in Oregon and has been a member of the Oregon State Bar since 2013. His practice areas include adoption, surrogacy, and assisted reproductive technology. Outside of work, Sam enjoys hiking, backpacking, reading science fiction, climbing mountains, happy hours, board games, video games, learning new languages, and has recently taken up rock climbing.

SURROGACY NUTS AND BOLTS
(DON'T GO NUTS AND BOLT, YOU CAN DO IT!)

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Roadmap

- The Law
- Baby steps, getting started in the process
- What information do you need
- Timeline—when do you start
- Where do you file
- What must be in your pleadings
- What must be in the judgment
- Reasons for applying pre-birth
- What to do in special cases
- How long will it take to get a judgment
- What to do after you get the judgment

SW1

Oregon's Statutory Law Concerning Surrogacy

But, …

- ORS 163.537 provides in relevant part:
  - (1) A person commits the crime of buying or selling a person under 18 years of age if the person buys, sells, barters, trades or offers to buy or sell the legal or physical custody of a person under 18 years of age.
  - (2) Subsection (1) of this section does not:
  - …
- (d) Apply to fees for services in an adoption pursuant to a surrogacy agreement.

Slide 3

SW1 My thinking on this was that you left it blank intentionally to highlight the dearth of statutory law dealing explicitly with surrogacy. Is that correct?
Sam Walton, 1/31/2017

And, related…

- ORS **109.239 Rights and obligations of children resulting from artificial insemination; rights and obligations of donor of semen.** If the donor of semen used in artificial insemination is not the mother's husband:
- (1) Such donor shall have no right, obligation or interest with respect to a child born as a result of the artificial insemination; and
- (2) A child born as a result of the artificial insemination shall have no right, obligation or interest with respect to such donor.
-
- **109.243 Relationship of child resulting from artificial insemination to mother's husband.** The relationship, rights and obligation between a child born as a result of artificial insemination and the mother's husband shall be the same to all legal intents and purposes as if the child had been naturally and legitimately conceived by the mother and the mother's husband if the husband consented to the performance of artificial insemination.

Plus…

- Filiation proceedings may be relevant
  - **109.070 Establishing paternity.** (1) The paternity of a person may be established as follows: * * * (d) filiation proceedings [and] (g) (g) * * * by other provision of law.
  - Filiation proceedings are found in ORS 109.124 through 109.237.

So, Robin Pope Devised a Plan

- **Declaratory Judgment**: ORS 28.010 provides that "Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations, whether or not further relief is or could be claimed."
- ORS 28.120: "This chapter is declared to be remedial. The purpose of this chapter is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations, and is to be liberally construed and administered."
- Declaratory judgments constitute such "other provision of law," an interpretation explicitly endorsed by the Oregon Supreme Court in *Thom v. Bailey*, 257 Or. 572, 59-600 (Or 1971), and courts have so far accepted this without issue.

Supplemental Relief

- ORS 28.080: The Uniform Declaratory Judgement Act specifically includes a provision contemplating supplemental relief based on a declaratory judgment where necessary or proper. In these parentage proceedings, practitioners use this provision to request that the Court order the Oregon State Registrar of the Center for Health Statistics to amend a child's birth record and issue new or amended birth certificates reflecting the Court's determination of legal parentage.
- The basis for the Court's supplemental order lies in ORS 432.245 and ORS 432.088

What information do you need?

- The judgment will refer to the surrogacy contract the parties entered into, so you will need to confirm that the contract did what you are saying it did
- The genetic background of the child(ren)
  - However, if you have two intended fathers who both provided sperm and it is unclear which is the genetic father, it is fine to include this ambiguity in the pleadings (e.g. "either IP A or IP B is the genetic father of the child")
- Information about the medical procedures
  - IVF arranged by intended parents or donated embryos?
  - Date of embryo transfer
- Approximate due date of child(ren)
- Information about intended parents and gestational carrier (and her spouse, if applicable)

But, first…

- Matching intended parents with a surrogate
  - Agency or independent?
    - Pros and cons
  - How to determine if it's a good "fit."
  - Concerns regarding residence, marital status, degree to which intended parents want to "participate" in and direct the pregnancy
  - Representation duties
    - At contracting stage
    - At time of filing petition
    - Upon birth

Drafting the surrogacy contract

- Who drafts?
- Who pays?
- How do you begin?
- What must you include?
- What might you include?
- What to expect in negotiations
- Pitfalls to avoid

Timelines: when do you start?

- Timing will vary from case to case, depending in large part upon the needs of the intended parents and the requirements of their home state/country.
  - For example, European intended parents who, due to the particularities of their home country's national health care system and the circumstances of their surrogacy (twins), needed to begin the process earlier than usual in order to make sure they had insurance in place to take care of any unexpected expenses in the event of a premature delivery.
  - Some countries require the parentage proceedings to be filed post-birth
- In general, ~20 weeks into Gestational Carrier's pregnancy is a good time to begin meeting with clients, gathering information, and preparing documents

Where do you file?

- Multnomah County has become the go-to filing location for parentage proceedings in Oregon, in large part because the majority of the legal medical, and agency infrastructure is located here. Often the surrogates reside outside of Multnomah County and the delivery of the child(ren) will take place outside of Multnomah County, but so long as the surrogate resides in Oregon, they may (and typically do) consent to venue in Multnomah County.
  - There are unusual cases where jurisdiction is a closer question. For example, in one case the Intended Parents resided in Spain and the Gestational Carrier resided in Idaho, but they were close enough to the border that the birth was going to occur in Ontario, Oregon. Because the child would be born in Oregon and the child's birth record and birth certificate would be created by Oregon authorities, we found that the Oregon court had jurisdiction over the proceeding.

What must be in your pleadings?

- The pleadings need to be as complete as possible and include ALL relevant information. There is generally not a concern with a petition or accompanying declarations attracting the attention of unfriendly foreign authorities.
- See Sam's checklist. If it's in the judgment, it needs to be alleged in the petition or declaration or other supporting testimonial document; and to be ordered it must be requested in the petition

What must be in the judgment?

- Findings of Fact that support the judgment
  - Recitation of the parties' residency
  - Explanation of the surrogacy contract and what the parties intended by it
  - Recitation of the medical procedures undertaken, and confirmation that the statement of the physician who performed the procedures was filed with the court
  - Statement that all parties consented to the medical procedures
  - Statement re: estimated due date of the child
  - Statement that all parties believe establishing legal parental rights in intended parents and amending birth records/certificates to reflect this is in the child's best interests
  - Statement that all parties contractually agreed that the intended parents would assume all parental rights and obligations for the child, including support, education, and all other expenses that they would have incurred had the child been born to them
  - Statement re: Declaratory Act (i.e. the action is brought to resolve uncertainty regarding the legal rights of the parties to the child)

What must be in the judgment?

- Some of the Findings of Fact can be omitted from the judgment where the circumstances call for it (i.e. intended parents' home country does not look kindly on surrogacy as a matter of policy – e.g. Germany), so long as they are included in other pleadings (i.e. Petition, Declaration of Intended Parents, etc.). However, the jurisdictional facts and facts supporting the application of the relevant statutes must be included regardless of any permissible intentional omissions.

What must be in the judgment?

- Regardless of truncation, there are certain things that must be included and which are not concerns in terms of attracting unwanted attention from foreign authorities
  - Conclusions of Law – These generally are always included. Be sure that if surrogate is married, the presumption of ORS 109.070(1)(a) is specifically rebutted.

What must be in the judgment?

- Establishing legal parentage is the whole purpose of this process, so regardless whether the judgment is being tailored to avoid any mention of surrogacy, the judgment must include specifics as to what the court is ordering. Generally:
  - Jurisdictional statement
  - Applicability of Uniform Declaratory Judgment Act
  - Disestablishing surrogate (and spouse, if married) as legal parents (if applicable – in some two-step proceedings the surrogate remains the legal mother until her rights are terminated in a second parent adoption)
  - Establishing legal parentage of intended parent(s)
  - Granting custody to intended parents on the basis of their status as legal parents of the child (this is not strictly necessary, and some practitioners choose not to include such a provision – really redundancy for the sake of complete clarity)
  - Ordering a new or amended birth record/certificate to be created/issued for the child that reflects the order of the court.

Reasons for filing pre-birth

- Ensure that intended parents have legal parental rights from the moment of birth
  - This moves the various post-birth administrative procedures along more quickly (e.g. obtaining birth certificates, apostilles, passports, etc.), which can be a big concern for international clients anxious to get home.
- International law concerns (e.g. Hungary case where parentage had to be established pre-birth to get the child registered)
- No interim period where parental rights are uncertain

Special cases: what do you do?

- While surrogacy has become common enough in Oregon that the judgment in a standard surrogacy arrangement is essentially pro forma, there are no lack of special cases that call for particular attention to the details.
  - Unfriendly home country: there are a number of countries that have strong public policies against surrogacy – in such cases the judgment will usually be tailored to avoid any mention of surrogacy, with all the relevant information being included in the petition or in declarations supporting the petition.
  - Intended parents not genetically related to child(ren): In most gestational carrier surrogacies, at least one of the intended parents will be genetically related to the child or children at issue. However, in the case of an embryo donor, none of the parties have any genetic relationship to the child or children and the pleadings will need to reflect this (in such cases the focus shifts to intended parents' ownership of the donor embryos and to the intent of the parties in entering into the agreement.)

How long will it take to get a judgment?

- Parentage proceedings in Multnomah County must be e-filed. This is a fairly recent change in process (judgments used to be brought to family law ex parte).
  - Having judgments go through the e-filing process means that the length of time from filing to entry of the signed judgment is far more reliant on the efficiency of court staff and judges.
  - Luckily, Multnomah County has dedicated itself to processing these judgments quickly, and so far the process has been working quite well.

What to do after you get the judgment

- Applying for a passport
- Getting a SSN for the child – Generally not issued at birth because birth certificates will be amended shortly after
- Registered as a citizen in home country?
  - Refer to our Hungarian case from a couple years ago
- Is this a two-step process? Will they be doing second-parent adoption proceeding?
- Do they need apostilles?
  - This is like a certified copy that is recognized internationally
- Practical concerns back home
  - Getting the child insured, etc.

Questions?

Thank You!

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Introduction: The Legal Framework

Oregon has been identified as a destination state for people seeking surrogacy services:

> In a convergence of medical advances and cultural shifts, Oregon has quietly become an international destination for gestational surrogacy, an industry banned in many states and countries. Couples from all over the world, especially gay and lesbian couples, come to the state and pay $100,000 or more for the chance to become biological parents, a transaction that mixes business with joy and wraps the resulting babies in a bundle of practical, legal and ethical questions.[1]

The Oregonian article referred to above, and included in the materials, notes that intended parents find Oregon surrogates more healthy, reputable reproduction clinics more numerous, costs more reasonable, and the legal process more straightforward.

Yet, like many other states, Oregon has little in the way of statutory and case law specifically addressing surrogacy arrangements. One of the few statutes that does address surrogacy is not, as one might expect, a statutory scheme laying out a legal process for dealing with these arrangements, but rather an exception to a provision in Oregon's criminal statutes prohibiting buying or selling a person under 18 years of age. ORS 163.537 provides in relevant part:

> (1) A person commits the crime of buying or selling a person under 18 years of age if the person buys, sells, barters, trades or offers to buy or sell the legal or physical custody of a person under 18 years of age.
>
> (2) Subsection (1) of this section does not:
>
> …
>
> (d) Apply to fees for services in an adoption pursuant to a surrogacy agreement.

This provision, however, is somewhat outdated, because adoption is no longer the standard procedural mechanism for ensuring that parental rights are established in the intended parents pursuant to

[1] Oregonian, April 16, 2015, Oregon's paid surrogates are choice for same-sex couples around the world. http://www.oregonlive.com/kiddo/index.ssf/2015/04/surrogacy_in_oregon.html.

a surrogacy arrangement. This makes sense because using adoption as a mechanism in this context is something of a legal fiction: in terms of genetic heritage (in the case of a gestational carrier surrogacy), and perhaps more importantly, in terms of the intent of both the surrogate and the intended parents, the child's parentage properly lies with the intended parents. Going through the adoption process essentially means that the intended parents are "adopting" their own child or children, simply because Oregon's statutes require that the name of the mother who gives live birth (the surrogate in these arrangements) be listed as the "live birth mother" in the report of live birth, which, when registered, becomes the record of live birth. A judgment of adoption does allow the birth certificate to be amended,[2] but there is another avenue through which this amendment may occur: ORS 432.245(1)(b) provides that the record of live birth shall be amended when the State Registrar of the Center for Health Statistics receives "[a] request that a replacement record of live birth be prepared to establish parentage, as…ordered by a court of competent jurisdiction in this state that has determined the paternity of a person." The use of the word "paternity" reflects the assumption at the time of enactment that the only action to establish parentage, other than adoption, is a filiation proceeding. In any event, the majority of surrogacies involve a determination of "paternity" for at least one of the intended parents and sometimes both. Further, apparently the State Registrar has interpreted that provision to include determinations that neither intended parents established paternity (i.e. non-paternity – no father).[3]

About a decade ago, Robin Pope, an Oregon practitioner representing intended parents and surrogates, tried a creative solution: the declaratory judgment.[4] ORS 28.010 provides that "Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations, whether or not further relief is or could be claimed." The purpose of declaratory judgments is then spelled out in ORS 28.120: "This chapter is declared to be remedial. The purpose of this chapter is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations, and is to be liberally construed and administered." Oregon's paternity statutes specifically allow for paternity to be "established or declared *by other provision of law*."[5] Practitioners have been including a statement in their parentage petitions and proposed declaratory judgments that the declaratory judgment proceeding constitutes such "other provision of law," in large part based upon the Oregon Supreme Court's ruling to that effect in 1971,[6] and courts have so far accepted this without issue. Thus, the uncertain parentage is resolved by declaratory judgment, which establishes parentage pursuant to Oregon's paternity statutes, which in turn allows the court to order the State Registrar of the Center for Health Statistics to prepare an amended birth record and issue an amended birth certificate.

There is, however, some uncertainty about the role of the paternity statutes in these proceedings. At the heart of this uncertainty is the question whether Oregon's paternity statutes are in fact the only way to establish legal paternity, and what the relationship between the various provisions for establishing

[2] ORS 432.245(1)(a) (2013).
[3] *See* OAR 333-011-0275(1)(b). Also, OAR 333-011-0275(3)(a) provides the details that must be included on the form for a new record when a new record of live birth is to be prepared after "adoption, *legitimization*, determination of paternity," etc. Thus far, there are no known cases of the State Registrar refusing to amend a birth certificate when the court has specifically "determined the paternity" of the child. The new birth certificates are prepared as a matter of course.
[4] Oregonian, April 16, 2015, Oregon's paid surrogates are choice for same-sex couples around the world. http://www.oregonlive.com/kiddo/index.ssf/2015/04/surrogacy_in_oregon.html
[5] ORS 109.070(1)(g) (2013).
[6] *See* Thom v. Bailey, 257 Or 572, 599-600, 481 P.2d 355 (Or 1971)

paternity is. Furthermore, there is a question regarding the meaning of the word "paternity" as used in the statutes. Traditionally, the term was used to refer to legal *fatherhood*, so there is a question as to whether the paternity statutes may also be used to establish a woman as the legal *mother* of a child (i.e. maternity). These questions make it clear that, although we have established this procedure in Oregon and it has so far been functioning remarkably well, there are some fundamental issues that need to be addressed going forward to avoid uncertainty and the potential for litigation going forward. Many practitioners are currently taking a "wait and see" approach, and dealing with procedural issues as they arise. This has been working well enough, but it would perhaps be useful to resolve these uncertainties with a legislative fix, though this would, of course, be costly in terms of time and resources.

The declaratory judgment is an ideal solution because at the center of any surrogacy arrangement lies a fundamental uncertainty: who will be the child's legal parents? A well-drafted declaratory judgment establishing parentage answers this question by referencing all facets of the arrangement between the parties (and also any donors of genetic material): the initial surrogacy agreement between the surrogate (and her spouse if she is married) and the intended parents, a statement of any genetic material donor's intent to relinquish any rights to their genetic material as well as any embryos or children created using such genetic material, a declaration of the physician performing the various procedures involved in surrogacies (artificial insemination, egg/sperm retrieval, in vitro fertilization, embryo transfer), and in some cases a declaration of the intended parents. These references support findings of fact that the child is not the genetic (if not a "traditional" surrogacy) or intended child of the surrogate, but is the intended and/or genetic child of the intended parents, and therefore the intended parents have certain legal rights (to be recognized as the legal parents) and obligations (to be legally responsible for the child safety, welfare, education, etc.).

Oregon's artificial insemination statutes could be argued to apply to surrogacy arrangements as well where one or both of the intended parents is not the source of the genetic material used to create the child, but rather they have obtained genetic material from one or more donors. ORS 109.239 provides "[i]f the donor of semen used in artificial insemination is not the mother's husband: (1) Such donor shall have no right, obligation or interest with respect to a child born as a result of the artificial insemination," and ORS 109.243 provides "The relationship, rights and obligation between a child born as a result of artificial insemination and the mother's husband shall be the same to all legal intents and purposes as if the child had been naturally and legitimately conceived by the mother and the mother's husband if the husband consented to the performance of artificial insemination." Thus, if a married surrogate is impregnated using "donor" semen, and the surrogate's husband consents (which he must), than the "donor" has no "right, obligation or interest" in the child, *and* the surrogate's husband "shall be" a legal parent. A surrogacy agreement explicitly addressing this issue, or a declaration in the pleadings that the statute does not apply because of the unique circumstances, is generally a useful addition to avoid issues down the road.

Oregon courts have extended the protections of ORS 109.243 to unmarried same-sex couples where the partner of the biological parent has consented to the artificial insemination *and* the couple would have chosen to marry had the choice been available to them.[7] Of course, after the Supreme Court's

[7] Madrone v. Madrone, 271 Or App 116 (Or. App., 2015); *See also* Shineovich and Kemp, 214 P.3d 29, 229 Or. App. 670 (Or. App., 2009).

decision last year in Obergefell v. Hodges[8], the fact-intensive inquiry to determine if a same-sex couple was similarly situated to a married heterosexual couple spelled out by the Oregon Court of Appeals in Madrone has become a thing of the past, as same sex couples now have the same choice whether or not to marry as heterosexual couples. Assuming that the artificial insemination statutes apply to a surrogacy, then, the practitioner should take care when the surrogate is married, no matter the gender of her spouse.

One interesting thing about Madrone is that the Court quite specifically declined to base its decision on whether or not the same-sex partner of a woman impregnated through artificial insemination *intended* to be a parent to the child. The Court reasoned that to create a test based on intent would be to abrogate the wishes of the legislature to only extend the protections of ORS 109.243 to *married* couples, while recognizing that, given the state of marriage equality at that time, such a restriction raised constitutional issues. By couching their decision in language of choice to be married or not (despite the fact that no such choice was available) rather than intent to be a parent, the Madrone court reasoned that the underlying intent of the legislature was preserved as much as possible in ensuring that same-sex couples were not discriminated against in a manner that violated the Oregon Constitution. Assuming again that the artificial insemination statutes apply in a gestational surrogacy (or if one considers a traditional surrogacy), this raises some practical issues for the practitioner: if one cannot disclaim parenthood in the surrogate's spouse by way of a statement in the pleadings that she did not intend and never intended to be a legal parent of the child, how does one get past the operation of ORS 109.243? The language of the statute is not that of a presumption that may be rebutted, but rather that of a legal relationship created automatically by operation of law. It seems possible that in this situation, adoption might be the only option to terminate the legal parental relationship formed in the surrogate's spouse.

However, a strong argument can also be made that, at least in the case of gestational carrier surrogacies, which have become vastly more common than traditional surrogacies, Oregon's artificial insemination statutes, on their face, do not apply because none of the procedures involved qualify as "artificial insemination" as defined by ORS 677.355: "artificial insemination means introduction of semen into a woman's vagina, cervical canal or uterus through the use of instruments or other artificial means." Because gestational carrier surrogacies operate by way of in vitro fertilization and embryo transfer, there is no "introduction of semen into a woman's vagina, cervical canal, or uterus" as contemplated by the statute, and thus the provisions of ORS 109.239 through ORS 109.247 simply do not apply, regardless of the parties' intent one way or the other.

Different Approaches to Establishing Parentage

There are three main theories regarding establishment of parentage, each with different legal consequences. The first would be focusing on the genetic parentage. This places primary importance on the declaration of the physician who performed the procedures involved, because this, of the things we typically see, is the most concrete evidence of the child's genetic heritage (barring a DNA test, which for various reasons Oregon courts don't require for these parentage judgments, perhaps in large part because many of these judgments are done pre-birth at a stage in the pregnancy where DNA testing carries with it a certain level of risk). The problem with a strictly genetic approach to establishing parentage is that it works only when both the sperm and the egg were retrieved from the intended parents. But it is typically the situation in which most judges are comfortable.

[8] Obergefell v. Hodges, 135 S.Ct. 2584 (2015

The second approach to establishing parentage in these cases may be characterized as a "property-based" approach. Under this approach, because the intended parents are the legal "owners" of the genetic material used to create the child (whether through self-production or by acquiring it from donors), they are also the legal parents of the child that is created with that genetic material. As a preliminary matter, it should be noted that Oregon case law specifically defers to the parties' intent where there has been agreement as to the disposition of embryos created through in vitro fertilization.[9] While that case does not specifically define embryos as property, it does hold that parties are free to agree as to disposition of joint genetic material (i.e. embryos), which would suggest that a single person is free to dispose of their own genetic material as they see fit, which of course would include donating it (i.e. relinquishing all rights to it). Here, a declaration from the intended parents stating that they "owned" the genetic material used to create the child is the most important piece of evidence supporting establishment of parentage. Referring to or including the contract that transferred "ownership" may be helpful if a judge is concerned about how the intended parents came to own the sperm and/or eggs. This approach resolves the problems raised by situations where neither intended parents is, in fact, the genetic parent of the child.

Finally, one may look to the contractual intent of the parties involved to determine parentage of a child. Under this approach, establishment of legal parentage in the intended parents is built upon the fact that all parties involved (surrogate and intended parents) specifically *want* legal parentage to go to the intended parents. Here, the crucial piece of evidence would be the surrogacy agreement entered into by the parties. The cases we have seen generally have not included the surrogacy agreement as part of the court file. However, the petition and the judgment itself usually reference the critical provisions: That the parties entered into an agreement that the intended parents would be the legal parents and that all parties relied on that agreement in undertaking the procedures which led to the surrogate's pregnancy. This approach in many ways makes the most sense of these three separate approaches. However, because under this approach paramount importance is placed on agreement between the parties, the enforceability of such agreements by the court must be addressed.

In Oregon, there are actually a couple cases dealing with the enforceability of surrogacy agreements.[10] Unfortunately, neither is directly on point in that they involve traditional surrogacies (where the surrogate is the genetic mother of the child as well as carries the child to term) and adoption proceedings. In Adoption of BABY A, the question presented to the court was whether an adoption judgment pursuant to traditional surrogacy agreements should be granted where the surrogate was paid for her services. The trial court denied the adoption judgment stating that the payment of money to the surrogate vitiated her consent to the adoption and therefore the adoption could not be completed, relying on dictum from an older case.[11] The trial court then ruled that the surrogate's consent was involuntary and declined to sign the judgement. The court of appeals reversed, basing its decision on evidence that the surrogate would have consented even without the payment, and added that she had never withdrawn her consent.[12]

[9] In re Marriage of Dahl and Angle, 194 P.3d 834, 222 Or. App. 572 (Or. App., 2008).
[10] Adoption of BABY A 128 Or. App. 450, 877 P.2d 108 (1994), Weaver v. Guinn, 176 Or App 383, 385, 31 P3d 1119 (2001).
[11] Franklin v. Biggs, 14 Or App 450, 461, 513 P2d 1216 (1973).
[12] 128 Or. App. 450, 453.

This is distinguishable from current parentage proceedings because we are not dealing with an adoption judgment, but rather a declaratory judgment of parentage. However, the court in Adoption of BABY A did state that the "primary purpose of the adoption proceedings is the promotion and protection of a child's best interests."[13] 128 Or. App. 453, 877 P.2d 108, *quoting* P and P v. Children's Services Division, 66 Or. App. 66, 72, 673 P.2d 864 (1983). Although the purpose of a declaratory action is not to transfer custody and legal parentage by extinguishing the birth parent's (or parents') rights, a court must consider the child's best interests.[14] Where the agreement shows that the surrogate and, if relevant, her spouse, have indicated complete disinterest in raising the child, the intended parents have declared their ability and desire to raise the child, and the all parties have agreed that the intended parents are best situated to be the legal parentage of the child, it is in the child's best interest that legal parentage be established in the intended parents.

In Oregon's only other case related to surrogacy, Weaver v. Guinn, the court states, in dicta, that an agreement between the parties regarding custody and visitation in a filiation proceeding do not bind the court and do not control the court's decision as to the best interests of the child. Rather, the trial court must look to the factors listed in ORS 107.137, first and foremost of which is the best interests and welfare of the child.[15] The court there did indicate, however, that courts most certainly *could* consider an agreement between the parties when determining the best interests of the child, but that it did not have to enforce the agreement. However, this is not directly on point as parentage proceedings are not filiation proceedings. Rather, they are their own creature that incorporates certain aspects of filiation proceedings and certain aspects of adoption proceedings, blending it all together under the rubric of a declaratory judgment.[16] It does not seem unlikely, however, that Oregon courts would view parentage proceedings in a similar light to filiation proceedings, and to that end, these judgments usually contain a specific finding of fact that all parties involved believe it is in the best interests of the child that the court act in accordance with the parties' intentions as stated in the surrogacy contract and declare that the intended parents are the legal parents of the child.

Rather than follow a single one of the three approaches to establishing parentage, Oregon practitioners tend to take more of a middle-ground approach. They prepare stipulated declaratory judgments of parentage addressing the intent of the parties, the surrogacy agreement they entered into, the intended parents' ownership of any donated genetic material, and the statement of the physician as to the genetic makeup of the child. This allows that, whatever approach a given judge might be inclined to take, there is evidence to support the establishment of legal parentage in the intended parents.

I interject here, however, that in many cases, whether out of an abundance of caution, particularly for same-sex intended parents, or due to particular requirements in the intended parents' home state or country, non-genetic parents may want to seek an adoption judgment even after a declaratory judgment establishing legal parentage in both intended parents has been granted. Whereas the recognition of

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[13] 128 Or. App. 450, 453, 877 P.2d 108, *quoting* P and P v. Children's Services Division, 66 Or. App. 66, 72, 673 P.2d 864 (1983).
[14] *See* Doherty v. Wizner, 210 Or App 315 (2006).
[15] Weaver v. Guinn, 388-389.
[16] *E.g.* Most (but not all) parentage judgments acknowledge the need to rebut the presumption in ORS 109.070 that the birth mother's husband is the father of the child (some judgments treat the child as "born out of wedlock" under ORS 109.124, thus negating the need to rebut the presumption, though these judgments typically also say the presumption is rebutted in any event).

adoption judgments as a matter of full faith and credit is unassailable, a declaratory judgment based on a contract another state may find violates its well-established public policy may not be. Although Oregon has not addressed the issue, other courts have found that despite the already established parentage through declaration, a judgment of adoption may be useful and necessary to provide certainty in some states or countries. [17]

Additional Concerns in International Cases

Interesting issues sometimes arise when dealing with surrogacy arrangements in which the intended parents are not U.S. citizens, simply due to the variety of foreign laws regarding surrogacy, adoption, and parentage, and the specific requirements and concerns a given country might have. For example, we once had a case where the intended parents in a gestational carrier surrogacy arrangement were from Hungary, which has some very specific requirements regarding when the parentage judgment must be signed, specifically requires that a separate judgment be produced for each child, even when both are carried by the same woman, and has some apprehensions about surrogacy arrangements in general. In that case, it was imperative that the judgment be signed before the children were born in order for the intended parents to be named on the birth certificate. Otherwise, the children could not have been registered as Hungarian citizens, which could have impacted the parents' ability to return home with the children and other problems in the future.

The attorney in that case had to be very careful to exclude, as far as possible, any reference to surrogacy in the judgment itself, because that document would need to be presented to the Hungarian authorities. Presumably, if those authorities saw that the placement of the intended parents' names on the birth certificate was pursuant to a surrogacy arrangement, they would not have allowed the children to be registered. Thus, rather than specifically cite to the contract and the declaration of the doctor and other documents that were essential to obtaining the judgment, in the stipulated judgment the attorney cited generally to all the pleadings in the record.

That case highlighted the importance of communication between legal practitioners and the court throughout the lifecycle of the parentage process. When we first received that proposed judgment and reviewed the file, I determined there was vital information missing and I was concerned that something less than forthright was going on (i.e. an illegal adoption). Once we were able to have a conversation with the attorney who submitted the judgment, however, and got a more complete picture of the context of the case, we were able to work out a solution to get the judgment signed before time ran out and the children were born. Because the concern was strictly with what appeared in the judgment itself, we simply had the attorney file the declaration of the intended parents, and the statement of the physician that performed the medical procedures involved in the surrogacy with the court without adding any additional information to the judgment itself. These documents provided me with all the information I needed to feel comfortable declaring parentage in the intended parents (information about the genetic heritage of the child, references to the surrogacy agreement and the intent of all parties involved in the case that parentage be established in the intended parents, etc.) without drawing unwanted attention from the Hungarian authorities. Since then, some practitioners have begun using such short-form judgments as a matter of course, including all the relevant facts in the petition and then simply stating in the judgment that Respondents have admitted

[17] *See* Matter of L., No. A-11966/15 (Family Court, Kings County, October 6, 2016)

all factual allegations as stated in the petition and that the court accepts the admission and finds that the facts are as alleged in the petition.

Conclusion

Oregon's approach of using declaratory judgments to establish parentage in the intended parents, who have usually invested a great deal of time, money, and emotion in starting their new family with the help of a surrogate, provides a solid legal framework to establish parentage while remaining flexible enough to accommodate the vast array of possibilities currently available and adapt to the innovations that are sure to continue into the future. Until all states recognize the value of supporting families created through ART, Oregon will likely remain a destination state.

Oregon's paid surrogates are choice for same-sex couples around world

By **Amy Wang | The Oregonian/OregonLive**

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on April 16, 2015 at 2:00 PM, updated April 17, 2015 at 10:18 AM

The first time Carey Flamer-Powell gave birth, she delivered a girl and took her home. The second time, she delivered a boy and sent him to Georgia.

Flamer-Powell, 38, was a gestational surrogate, paid to carry the boy by his future parents, a lesbian couple. As a lesbian herself who'd struggled with infertility, Flamer-Powell found her experience so stirring that in August 2014 she set up a surrogacy agency catering to gay and lesbian clients. Eight months later, **All Families Surrogacy** does a brisk business from a third-floor office in the Beaverton Round Executive Suites, drawing clients from around the world.

In a convergence of medical advances and cultural shifts, Oregon has quietly become an international destination for gestational surrogacy, an industry banned in many states and countries. Couples from all over the world, especially gay and lesbian couples, come to the state and pay $100,000 or more for the chance to become biological parents, a transaction that mixes business with joy and wraps the resulting babies in a bundle of practical, legal and ethical questions.

Intended parents from countries of all stripes - Israel, Argentina, China, Australia, France, Sweden, Ecuador, Canada, Germany, Egypt - are flocking to All Families and other Oregon surrogacy agencies for a combination of reasons, said those working in the field:

- Oregon has no law against gestational surrogacy. Some states, such as Washington, forbid any paid surrogacy; Oregon surrogates are advised not to travel to Washington in their third trimester. In other states, surrogacy is legal for heterosexual married couples but not for same-sex couples.

- Oregon has a pre-birth procedure for amending a birth certificate so it bears the names of the intended parents and not the surrogate's. The procedure, devised by Beaverton lawyer **Robin Pope** about eight years ago, allows the intended parents to bypass a court hearing through a process called declaratory judgment. As a result, establishing legal parentage is "very straightforward" in Oregon, Pope said. The procedure puts Oregon "really ahead of quite a few states," said Judy Sperling-Newton, director of the **American Academy of Assisted Reproductive Technology Attorneys (AAARTA)** and an owner of **The Surrogacy Center in Madison**, Wisconsin.
- Oregon is home to several nationally known fertility clinics that have high success rates with in vitro fertilization and live births. John Chally, an adoption attorney and co-founder of the 21-year-old **Northwest Surrogacy Center** in Portland, said he remembers 25 percent pregnancy rates in the early days of gestational surrogacy. Now fertility clinics are so sure of success they are willing to transfer only one or two embryos at a time.
- Oregon surrogates are seen as particularly desirable. "We have a good reputation in terms of being healthy, (having) prenatal care, taking care of themselves," said Adrienne Black, a former surrogate who founded a Eugene surrogacy agency, **Heart to Hands Surrogacy**, in 2011. Geri Chambers, another former surrogate who owns the 5-year-old **Greatest Gift Surrogacy Center** in Sherwood, agreed: "We're definitely more of an organic, plant-based, natural type of surrogate."
- Oregon surrogacy is less expensive, relatively speaking. "It seems like the fees for all of these things are a little less than in California or on the East Coast," Black said.

According to 2012 statistics from the Centers for Disease Control and Prevention, gestational surrogacy accounts for about 1 percent of the annual 60,000 U.S. births through assisted reproduction technologies. It's not clear how those statistics play out in Oregon, because the state doesn't track births by surrogacy.

What is clear is that gestational surrogacy has burgeoned to where so-called intended parents can choose from an increasingly varied array of agencies in Oregon: Decades-old agencies with hundreds

of babies to their credit, newer "boutique" agencies that work with only a handful of clients at a time, agencies that once specialized in adoption but now offer surrogacy as well.

In fact, surrogacy is now gaining on adoption in popularity. The Northwest Surrogacy Center expects to facilitate 75 to 100 surrogate births this year, Chally said. With more countries shutting down international adoption and fewer women giving up babies, adoption isn't the option it used to be. "I don't know where we would be today if we hadn't added surrogacy," he said.

His comments were echoed by Susan Tompkins, executive director of Journeys of the Heart, a 25-year-old Hillsboro adoption agency, which decided last year, after years of watching adoption rates drop, **to start offering gestational surrogacy**. The agency now has 15 surrogates and is working toward its first surrogacy birth.

"It's definitely something that is a trend," Tompkins said.

* * *

In a side room at the Lucky Labrador Tap Room, seven women sit chatting amid plates of pizza and salad and glasses of wine or beer. They're here on a rainy Saturday evening in February to learn more about All Families Surrogacy and what it takes to carry someone else's baby.

The lights go down. Flamer-Powell and Angela Padilla, the agency's surrogate coordinator, click through presentation slides noting All Families' requirements for surrogates: No one under 21 or over 44. A history of uncomplicated pregnancy and at least one healthy birth since any miscarriage. At least one child at home, because a surrogate should understand what it's like to be a parent. No one who's on any form of government assistance, because "surrogacy is not meant to be a job," says Flamer-Powell. No one with a body-mass index over 34, because a surrogate should be in good health.

The women in attendance learn that intended parents cover all expenses: fertility treatments and hospital bills, prenatal vitamins and maternity clothes, legal fees and more. If they come from

overseas, they handle the paperwork for the baby's passport and, if necessary, the baby's immigration visa, a process that can require still more money for potentially lengthy stays in the U.S.

All Families Surrogacy starts new surrogates at $30,000, experienced surrogates at $35,000. In March, the agency offered a $500 signing bonus for qualified surrogates and those who referred them.

Flamer-Powell says she's not in it for the money. She doesn't need to work, she tells the attendees; she's in business to help other people experience the fulfillment of parenthood.

The lights come up, and the questions begin:

Is a surrogate's compensation taxed as income? No, says Flamer-Powell. The money is considered payment for pain and suffering. (That could change: In January, the U.S. Tax Court ruled in **Perez v. Commissioner** that the Internal Revenue Service could tax an egg donor's $20,000 compensation as income because the donor was paid for services rendered.)

What citizenship does a baby born through surrogacy have? U.S. citizenship, as with any other baby born on American soil. It's up to international parents to decide if they want to seek citizenship in their home countries as well for the baby.

Are embryos screened before being transferred to a surrogate's uterus? Yes. (Dr. Paula Amato, a reproductive endocrinologist and expert in fertility services at Oregon Health & Science University, says in a separate interview that the screening is regulated by the U.S. Food and Drug Administration "because you're transferring tissues.")

Which insurance companies are surrogacy-friendly? Flamer-Powell emphasizes that surrogates with her agency must carry their own health insurance and names three locally available health plans that cover surrogacy.

If a surrogate has a miscarriage, does she still get paid? Her compensation is pro-rated based on the length of her pregnancy. It's also pro-rated if she delivers prematurely.

What about breastfeeding after the baby is born? Surrogates don't nurse. Instead, intended parents who want the baby to have breast milk and/or its precursor, colostrum, will ask a surrogate to pump.

Not asked are the questions everyone outside the world of surrogacy has: Why would a woman do this? How can a woman carry and deliver a baby, then just walk away?

* * *

John Weltman, founder and president of **Circle Surrogacy of Boston**, a 20-year-old agency that has recorded 1,000 surrogate births for clients from 69 countries, said he'd rank Oregon among the five best states for surrogacy, alongside California, Colorado, Connecticut and Massachusetts.

"Oregon is a great state for surrogacy, no question about it," Welman said.

And being able to go through surrogacy in a state also known for its gay-friendliness is icing on the baby shower cake for gay and lesbian couples.

Chally, of Northwest Surrogacy Center, estimated that 70 percent of his clients are gay. "That part of the practice is still growing quickly and we're very happy to be doing that," he said. His clients, in turn, are delighted to be in Oregon. "People in Portland have been very kind to our clients, very embracing, very curious in a kind way about what they're doing. ... The acceptance has been high," he said.

Black said that when she first got into surrogacy about 10 years ago, "it was definitely more of a heterosexual-focused family-building opportunity. But as it becomes more popular and more well known, the availability for the LGBT community has just skyrocketed."

Black linked the increase in gay and lesbian clients to surrogates' relatively high acceptance of same-sex couples. "Surrogates have to be a pretty open-minded group of individuals," she said. "And they have that option of choosing who they want to carry for."

"Surrogacy," said Pope, the lawyer, "really has become a gay rights issue."

Indeed, Whitney Lewis, 31, a married Grants Pass mother of two, said she decided to become a surrogate in part to help a gay or lesbian couple and to teach her children about equal rights for sexual minorities. Referring to her older daughter, 7, she said, "It's opened her eyes to pictures of different families."

But the law has struggled to keep pace with the medical and cultural advances. There's no regulatory oversight or licensing for surrogacy agencies, Sperling-Newton said. Instead, there are **guidelines for best practices from the American Society of Reproductive Medicine** and strong recommendations to use one of the 150 or so **attorneys who have AAARTA credentials**.

And when lawmakers do try to address surrogacy, they can run into political and ethical opposition.

In 2013 and 2014, **Louisiana Gov. Bobby Jindal vetoed bills that would have legalized surrogacy contracts** in his state. "(T)his legislation still raises concerns for many in the pro-life community," Jindal wrote in his veto letter, referring to the fact that surrogacy sometimes involves abortion of surplus embryos.

In 2012, **New Jersey Gov. Chris Christie vetoed a bill** that would have loosened his state's restrictions on gestational surrogacy. He said there were still too many questions about "the profound change in the traditional beginnings of the family" that the proposed law would have set in motion.

Critics of gestational surrogacy also voice concerns about exploitation of surrogates, saying the women might not fully realize what they're signing up for or the risks they're taking.

Sperling-Newton said every surrogate she's met in three decades in the business has known exactly what she was doing, and the objections and concerns are behind the times.

"It's happening," she said of gestational surrogacy. "It's going to be a way for people to build their families, regardless of what the law does, and so we have to catch up and try to create laws to protect people."

* * *

Tamara Belfatto, 27, is soft-spoken but unwavering; she shows no hesitation in explaining why she decided to carry twins for a couple from another country last year.

Belfatto grew up in Eugene; graduated from North Eugene High School and Pioneer Pacific College; married; and had a daughter, Arianna, now 2. Belfatto worked at a bank and at a Netflix call center, then stayed home with her daughter for awhile before returning to work this spring.

"We have a lot of infertility on both sides of our family," she said of herself and her husband. "That's what originally drew me to surrogacy."

Motherhood was the turning point for her, she said as she sat in her North Plains living room while her toddler napped in a bedroom and a tiny 6-week-old Jack Russell/rat terrier dozed in a basket on the floor.

"I had that self-realization of what it was to be a parent," she said. "I felt more for people that couldn't. ... With my daughter, I don't know what I would do without her now that I have her. I don't think anyone should have to go without kids."

And being a surrogate isn't just about giving, she said. It's also about receiving, in that surrogates and intended parents often form close ties. "I wasn't looking to just help someone have a family but I was also looking for that special relationship and connection that you can make," she said. "We added more members to our family."

Her husband, Andrew, said he was initially surprised when she brought up the idea. "It's not something I ever thought about," he said.

But neither he nor his wife recalled him objecting. She said the only questions she remembers him having were about whether she could truly walk away without a baby in the end. "For so long I wanted a baby of my own," she said. "We were married for five years before we had Arianna."

But the twins were different, she said. To explain, she cited a children's book, **"The Kangaroo Pouch" by Sarah Phillips Pellet**, which equates surrogacy with babysitting.

"I was kind of distant," Belfatto said of her feelings toward the twins in utero. "Because I knew they weren't mine."

That's a perspective echoed by other women who've been surrogates.

"I never had any attachment," said Padilla, the surrogate coordinator at All Families Surrogacy, who carried twins for a gay French couple last year as a gestational surrogate with a different agency. "It was really cool to feel them moving and kicking but I was never like ... " She gave an exaggerated sigh. Perhaps it helped, she joked, that she and her husband have three children under the age of 6. Her mindset was more along the lines of, "I am so glad I'm not taking these babies home. They are all yours!"

Flamer-Powell said surrogacy isn't about giving up a baby but about giving a baby back. "This is not a bonding experience between you and an infant," she said. "Honestly, this is more a bonding experience between you and the family."

In her case, she said, the women she carried for became close friends who now text her regularly with photos of their growing boy. On the day she delivered their son, she said, her 3-year-old told them, "Here's your baby. My mommy carried him for you."

Black said surrogacy is, ultimately, about families.

"It's one of the most beautiful family-building options out there," she said. "So intentional, with so much love and care and thought. And that's really magical."

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271 Or App 116

**In the Matter of the Registered Domestic Partnership of:
Karah Gretchen MADRONE, Petitioner-Respondent,
and Lorrena Thompson MADRONE, Respondent-Appellant.**

**No. 214
A154894**

COURT OF APPEALS OF THE STATE OF OREGON

**Argued and submitted November 4, 2014
May 13, 2015**

Klamath County Circuit Court
1201759CV;

Dan Bunch, Judge.

John C. Howry argued the cause for appellant. On the briefs were Brett A. Baumann and Frohnmayer, Deatherage, Jamieson, Moore, Armosino & McGovern, P. C.

Thomas A. Bittner argued the cause for respondent. On the brief were Mark Johnson Roberts and Gevurtz, Menashe, Larson & Howe, P. C.

Before Sercombe, Presiding Judge, and Hadlock, Judge, and Tookey, Judge.

HADLOCK, J.

Reversed and remanded.

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HADLOCK, **J**.

In this case, we consider how to determine whether an unmarried same-sex couple is similarly situated to a married opposite-sex couple for purposes of ORS 109.243 and, thus, entitled to the privilege granted by that statute. ORS 109.243 creates parentage in the husband of a woman who bears a child conceived by artificial insemination if the husband consented to that insemination. The statute's effect is automatic; it requires no judicial or administrative filings or proceedings. In *Shineovich and Kemp*, 229 Or App 670, 214 P3d 29, *rev den*, 347 Or 365 (2009), we held that the statute violated Article I, section 20, of the Oregon Constitution because it granted a privilege—parentage by operation of law—on the basis of sexual orientation, because it applied only to married couples and because, when we decided *Shineovich*, same-sex couples were not permitted to marry in Oregon. To remedy the violation, we extended the statute "so that it applies when the same-sex partner of the biological mother consented to the artificial insemination." *Id*. at 687. It was undisputed that the parties in *Shineovich* were similarly situated to a married opposite-sex couple, so we did not consider to *which* same-sex couples our extension of ORS 109.243 applies.

This case raises that question. During the parties' relationship, respondent gave birth to a daughter, R, who was conceived by artificial insemination. Shortly thereafter, the Oregon Family Fairness Act took effect, allowing same-sex couples to register domestic partnerships, which petitioner and respondent then did. They later separated, and petitioner brought this action for dissolution of the domestic partnership. Among other claims, petitioner sought a declaration that she is R's legal parent by operation of ORS 109.243. The trial court granted summary judgment for petitioner on that claim based on our analysis in *Shineovich*. Respondent appeals. For the reasons set out below, we conclude that ORS 109.243 applies to unmarried same-sex couples who have a child through artificial insemination if the partner of the biological parent consented to the insemination *and* the couple would have chosen to marry had that choice been available to them. The record in this case includes evidence creating a genuine dispute on the latter

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point. Accordingly, the trial court erred in entering summary judgment, and we reverse.

The parties present fairly divergent views of the facts. Because this appeal comes to us following a grant of summary judgment, we view the facts in the light most favorable to respondent, the nonmoving party. *Jones v. General Motors Corp*., 325 Or 404, 420, 939 P2d 608 (1997). The parties, who are both women, met briefly in March 2004 in Oceanside, Oregon, where petitioner lived. Respondent, who lived in Colorado at the time, had recently been in a serious car accident that resulted in numerous injuries and required extensive rehabilitation. The parties corresponded after respondent returned to Colorado. Three months later, respondent returned to Oceanside for a week, during which the parties began a romantic relationship. They wanted to live together, and they moved to Colorado, where respondent continued her rehabilitation from the car accident.

During their time in Colorado, petitioner pressured respondent to hold a "commitment ceremony" with family and friends. The parties agreed that they did not want to seek a legal relationship, because they "did not believe in such social constructs" and "shared a common belief in freedom from marriage." Respondent was hesitant about having a commitment ceremony because petitioner was becoming more controlling of respondent and of their situation. Respondent took comfort in knowing that a ceremony would not be legally binding with respect to either the parties' relationship or any children that either party might have. The parties believed that, if one of them had a child, the other would not automatically be recognized as a legal parent, and they "made no agreements of any kind that would be binding upon a child either of [them] chose to have * * *." They believed that, if they chose "to be parents together," they would have to take legal action to "make it official."

Notwithstanding respondent's reservations, the parties eventually agreed that they would have the commitment ceremony. Together, they chose and bought rings and dresses for the ceremony and registered for gifts. In mid-2005, respondent succumbed to pressure from petitioner to

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move back to Oregon. The parties returned to Oceanside and held the commitment ceremony that September, as they had planned. Petitioner and respondent exchanged vows and rings at the ceremony. For several years thereafter, the parties had annual anniversary photos taken in the dresses that they had worn that day.

The month after the ceremony, the parties accepted joint positions managing the Clifftop Inn in Oceanside. They lived and worked at the inn, renovating the business and the premises. In March 2007, they bought the inn.

Respondent had wanted to have a child since before the parties met. By spring 2007, that desire had become urgent. She told petitioner that she "was going to have a child of [her] own no matter what." Respondent felt that it was her decision, and it did not matter to her whether she had the child with petitioner or not. Petitioner was initially hesitant about having a child at that time because she was concerned about the parties' financial stability and about the fact that working at the inn consumed so much of their time and energy. Respondent also had "mixed thoughts" about it, but they eventually "romanticized it and talked about doing it together." Respondent was concerned about having to "legally share" her baby with the biological father, so the parties decided to use two sperm donors in order to obscure the father's identity. Respondent wanted petitioner to be biologically related to the child, so she suggested asking petitioner's brothers if they would donate sperm. Only one of the brothers agreed, so respondent asked a friend of hers, and he agreed to be the other donor. A few days apart, the parties obtained the sperm donations and respondent was artificially inseminated. Petitioner assisted with the first insemination procedure but not the second. Respondent became pregnant.

The parties' relationship deteriorated during the pregnancy. Respondent gave birth to the baby, R, on January 21, 2008. By that point, respondent later asserted, the parties were "nothing more than 'roommates.' " After R was delivered, petitioner told respondent that she had not realized how hard it would be to not have a biological connection with the baby.

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Both parties legally changed their last names. Before R was born, respondent had often considered changing her own last name, and, having studied matrilineal societies, she wanted her daughter to have a "powerful, independent" last name. Respondent and petitioner both liked the name Madrone, and they agreed to give R that name. They both changed their last names to Madrone about two weeks after R was born, and it is the surname listed for R on her birth certificate.

The summary judgment record does not disclose who filled out R's birth certificate, but petitioner was not listed as a parent. Respondent did not attempt to put petitioner's name on the birth certificate, because she did not want petitioner to be R's legal parent. Respondent stated in an affidavit that she was "always clear that [she] was the legal, biological and SOLE guardian" of R. She also said, "I had the choice to add [petitioner] to my daughter's birth certificate, and I never did and never intended to." Petitioner never asked to have her name added. The parties were both aware that petitioner's name could be added to the birth certificate, but, in respondent's words, "because of an overall deteriorated relationship and a disconnect in any parenting of [R] by petitioner, it never happened."

Nonetheless, the parties filed a declaration of domestic partnership in March 2008.[1] How the domestic partnership came about is unclear. In her affidavits in opposition to petitioner's motion for summary judgment, respondent gave somewhat conflicting accounts about signing the domestic partnership paperwork. In her first affidavit, she stated that, while she was still recovering from childbirth, the midwife who assisted with R's delivery told respondent that she had to sign the paperwork. According to respondent, she was "out of it" and "not completely aware" of what she was doing; she signed the documents and only later

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realized what she had done. In her second affidavit, respondent's story changed from not having been aware of what she was doing to having felt pressured to sign the paperwork. Respondent stated that the midwife "had her own agenda" and that respondent was "scrambled by the strength of that agenda," not to mention still in recovery from giving birth. Respondent said that she "never would have sought it, but when [the midwife] showed up with it and said to do it, [she] felt pressured and wrong not to." According to respondent, the midwife notarized the paperwork right then.

Documentary evidence conflicts with both of respondent's accounts. A copy of the declaration of domestic partnership that the parties actually filed indicates that both parties signed it, and the midwife notarized it, on February 19, 2008, nearly a month after R was born.

R was reared with "attachment parenting," a practice that calls for more-or-less constant physical contact between the baby and a caregiver. In respondent's understanding, it is a "mother-centered philosophy" that "does not allow for 'co-parenting.' " R slept between petitioner and respondent in their bed at night, but otherwise, respondent generally carried R in a sling, and R was dependent on her "for everything." Petitioner would spend time with R, but never for very long without respondent being present and never alone for a night, as respondent "always had concerns" about petitioner and R "being alone together."

The parties separated in 2012 and respondent subsequently denied petitioner regular contact with R. Later that year, petitioner commenced this action for dissolution of the domestic partnership. In the operative petition, she asserted a claim for declaratory relief, seeking a declaration that she is a legal parent to R. Petitioner alleged that, at the time of R's conception and birth, she was respondent's "domestic and life partner," that she and respondent had planned the pregnancy with the intent to raise the child together, and that she had consented to the artificial insemination procedure. Petitioner also alleged that the parties would have married had Oregon law permitted them to.

In support of the declaratory-relief claim, petitioner relied on ORS 109.243, which provides:

> "The relationship, rights and obligation between a child born as a result of artificial insemination and the mother's husband shall be the same to all legal intents and purposes as if the child had been naturally and legitimately conceived by the mother and the mother's husband if the husband consented to the performance of artificial insemination."

Petitioner alleged that the statute unconstitutionally discriminated against her on the basis of sex and sexual orientation because, if she were male and married to respondent, it would create legal parentage in her without regard to whether she was R's biological parent.

Petitioner later moved for summary judgment on her declaratory-relief claim. She relied on our opinion in *Shineovich* in support of the motion. In *Shineovich*, we explained that "ORS 109.243 grants a privilege—legal parentage by operation of law—to the husband of a woman who gives birth to a child conceived by artificial insemination, without regard to the biological relationship of the husband and the child, as long as the husband consented to the artificial insemination." 229 Or App 685. We held that the statute violates Article I, section 20, of the Oregon Constitution:

> "Because same-sex couples may not marry in Oregon, that privilege is not available to the same-sex domestic partner of a woman who gives birth to a child conceived by artificial

> insemination, where the partner consented to the procedure with the intent of being the child's second parent. We can see no justification for denying that privilege on the basis of sexual orientation, particularly given that same-sex couples may become legal coparents by other means—namely, adoption. There appears to be no reason for permitting heterosexual couples to bypass adoption proceedings by conceiving a child through mutually consensual artificial insemination, but not permitting same-sex couples to do so. Thus, we conclude that ORS 109.243 violates Article I, section 20."

Id. at 686. We went on to hold that the appropriate remedy for the violation was to "extend the statute so that it applies when the same-sex partner of the biological mother consented to the artificial insemination." *Id*. at 687.

In her motion, petitioner argued that, under *Shineovich*, "there are two requirements for application of the

statute to [R's] situation: that the parties be domestic partners and that [petitioner] consent to the insemination." She asserted that both requirements were satisfied and, thus, that the court should grant summary judgment in her favor.

In response to the motion, respondent argued that *Shineovich* is distinguishable from this case. She asserted that, there, the parties were registered domestic partners before their children were born, whereas she and petitioner did not become domestic partners until nearly two months after R was born. Respondent contended that "the protections afforded in ORS 109.243 apply to domestic partners, not simply people in a relationship." According to respondent, "[i]f petitioner were male, the situation at hand would be that of a boyfriend trying to assert parental rights over a child who was born before the marriage and is undisputedly not the biological father." Respondent also argued that she had never consented to petitioner being considered her "husband equivalent" and that "to presume such consent now would be to deprive Respondent of significant due process rights to consent or withhold consent to the biological and/or legal paternity of a child born of her body." Respondent argued that this case is further distinguishable from *Shineovich* because, in that case, "the parties were unable to have both parties' names on the birth certificate, but in this case the parties were able, but chose not, to add Petitioner's name to the birth certificate. This gives insight into the parties' intent * * *."

After a hearing, the trial court granted the motion for summary judgment. In a letter opinion, the court stated:

> "No pertinent facts are in dispute regarding the nature of the parties' relationship prior to the birth of [R]. It is crystal clear that they lived together as a couple, intended to remain together, and intended to have a child and to co-parent the child. It is evident that [petitioner] consented to the performance of the artificial insemination."

The court entered a limited judgment declaring that R is the child of petitioner and respondent "the same as if born to them in lawful wedlock" and ordering the State Registrar and the Center for Health Statistics to issue a birth certificate for R designating both parties as legal parents.

Respondent appeals, assigning error to the trial court's grant of summary judgment. She makes three primary arguments. First, respondent contends that summary judgment was inappropriate because there are factual disputes that, if resolved in her favor by a factfinder, distinguish this case materially from *Shineovich*. Second, she argues that the trial court's interpretation of *Shineovich* actually *creates* a privilege or immunity that is not granted to all citizens on equal terms, in violation of Article I, section 20. Specifically, respondent asserts that the trial court created a privilege for women in opposite-sex nonmarital relationships that women in same-sex relationships do not have: sole legal-parent status for a woman who conceived a child through artificial insemination, did not seek the consent of her partner, and did not intend to be a legal co-parent with her partner. Finally, respondent argues that the trial court's interpretation of *Shineovich* deprives respondent of her due process parental right to make decisions concerning the care, custody, and control of R. We address those arguments in turn.

Respondent's argument that this case is factually distinguishable from *Shineovich* misses the mark, as we addressed a different question in *Shineovich* than we address in this case. In *Shineovich*, we analyzed only whether ORS 109.243 violates Article I, section 20, because it denies a privilege to the same-sex partner of a woman who conceives a child through artificial insemination and, having concluded that the statute does violate Article I, section 20, held that the appropriate remedy was to extend the statute "so that it applies when the same-sex partner of the biological mother consented to the artificial insemination." 229 Or App at 687. Beyond addressing those broad points, we did not have reason to articulate a precise standard by which to determine whether the same-sex partner of a mother who conceived by artificial insemination comes within the reach of ORS 109.243. We attempt to draw the line more precisely here.

Article I, section 20, provides, "No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally

belong to all citizens." As we explained in *Shineovich*, that provision of the constitution

> "protects against disparate treatment of 'true classes'—that is, classes that are defined not by the challenged law itself, but by a characteristic apart from the law, such as gender, ethnic background, residency, military service, and—as pertinent here—sexual orientation. *Tanner v. OHSU*, 157 Or App 502, 521, 524, 971 P2d 435 (1998). Disparate treatment of a subset of true classes—'suspect classes'—is subject to more rigorous scrutiny than disparate treatment of other true classes. Suspect classes are those that have been 'the subject of adverse social or political stereotyping or prejudice.' *Id*. at 523. Homosexuals constitute a suspect class. *See id*. at 524 ('[I]t is beyond dispute that homosexuals in our society have been and continue to be the subject of adverse social and political stereotyping and prejudice.'). Disparate treatment of suspect classes is permissible only if it can be justified by genuine differences between the class and those to whom privileges or immunities are made available."

229 Or App at 681-82. "[R]equiring privileges or immunities to be granted 'equally' permits the legislature to grant privileges or immunities to one citizen or class of citizens as long as similarly situated people are treated the same." *State v. Savastano*, 354 Or 64, 73, 309 P3d 1083 (2013). If a statute does not treat similarly situated people the same, the statute violates Article I, section 20, and we must determine whether to invalidate the statute or to extend it so that it applies to all who are similarly situated. We will opt to extend the statute if doing so "advances the purpose of the legislation and comports with the overall statutory scheme." *Hewitt v. SAIF*, 294 Or 33, 53, 653 P2d 970 (1982). Thus, in determining whether the

protections of ORS 109.243 must be extended to a particular citizen or class of citizens, we must consider whether that person or class is similarly situated to the persons or classes expressly affected by the statute.

In *Shineovich*, we held that ORS 109.243 violates Article I, section 20, because it creates a privilege that "is not available to the same-sex domestic partner of a woman who gives birth to a child conceived by artificial insemination, where the partner consented to the procedure with the

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intent of being the child's second parent." 229 Or App at 686. In rejecting respondent's contention that the statute does not apply in this case because the parties did not establish a legal relationship before R was born, the trial court noted our reference to intent in *Shineovich*. The court stated that we had "focused on the parties' intent, not upon their legal status."

In retrospect, we recognize that our reference in *Shineovich* to the nonbiological partner's intent to be the child's second parent may be misleading. The reference simply reflected the facts of that case—there was no question that the petitioner in *Shineovich* intended to be the children's second parent. *See id*. at 672 ("The parties rushed to perform the ceremony before [the first child's] birth specifically with the intent that petitioner would be his legal parent."). We did not mean for that fact to establish a benchmark for determining whether ORS 109.243 should be applied to any particular same-sex couple. When it enacted the statute, the legislature may have assumed that any husband who consented to his wife's being artificially inseminated intended to be the resulting child's parent, and thus saw no need to include an intent requirement in the statute. Whatever the reason, the statute does not turn on intent, and our ultimate conclusion in *Shineovich* reflects that. We concluded that "the appropriate remedy is to extend the statute so that it applies when the same-sex partner of the biological mother consented to the artificial insemination." 229 Or App at 687.

Extending the statute simply on the basis of intent to be a parent would comport with one purpose of the legislation—protecting the support and inheritance rights of children conceived by artificial insemination—but it would not be consistent with the overall statutory scheme—specifically, the legislature's decision to make the statute apply only to children of married couples. If an unmarried opposite-sex couple conceives a child by artificial insemination using sperm from a donor, the statute does not apply, even if the couple, in the words that the trial court used to describe petitioner and respondent, "lived together as a couple, intended to remain together, and intended to have a child and to co-parent the child." Accordingly, it would be inappropriate for courts to extend the statute to same-sex couples

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solely on the basis of one or both of the parties' intent to have the nonbiological party assume a parental role. *See Hewitt*, 294 Or at 53 (extension of a statute should "comport[ ] with the overall statutory scheme"). Just as an opposite-sex couple may be fully committed to their relationship and family but choose not to marry, a same-sex couple, given the option to marry, could make that same choice—commitment without marriage. Because ORS 109.243 would not apply to an opposite-sex couple that made that choice, it follows that the statute also should not apply to same-sex couples that make the same choice.

We therefore conclude that *choice* is the key to determining whether ORS 109.243 applies to a particular same-sex couple. Ultimately, the distinction between married and unmarried heterosexual couples is that the married couples have chosen to be married while the unmarried couples have chosen not to be. And, as we have explained, that choice determines whether ORS 109.243 applies. Given that same-sex couples were until recently prohibited from choosing to be married, the test for whether a same-sex couple is similarly situated to the married opposite-sex couple contemplated in ORS 109.243 cannot be whether the same-sex couple chose to be married or not. Rather, the salient question is whether the same-sex partners *would have* chosen to marry before the child's birth had they been permitted to.

Whether a particular couple would have chosen to be married, at a particular point in time, is a question of fact. In some cases, the answer to that question will be obvious and not in dispute. For example, there was no disputing that the parties in *Shineovich* would have chosen to marry—they actually did make that choice, and were not *legally* married only because their marriage was later declared void *ab initio*. *Shineovich*, 229 Or App at 672-73. In other cases, the answer will be less clear. A number of factors may be relevant to the fact finder's determination. A couple's decision to take advantage of other options giving legal recognition to their relationship—such as entering into a registered domestic partnership or marriage when those choices become available—may be particularly significant. Other factors include whether the parties held each

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other out as spouses; considered themselves to be spouses (legal purposes aside); had children during the relationship and shared childrearing responsibilities; held a commitment ceremony or otherwise exchanged vows of commitment; exchanged rings; shared a last name; commingled their assets and finances; made significant financial decisions together; sought to adopt any children either of them may have had before the relationship began; or attempted unsuccessfully to get married. We hasten to emphasize that the above list is not exhaustive. Nor is any particular factor dispositive (aside from unsuccessfully attempting to get married before same-sex marriages were legally recognized in Oregon, as happened in *Shineovich*), given that couples who choose not to marry still may do many of those things. Instead, we view the factors as tending to support, but not compelling, an inference that a same-sex couple would have married had that choice been available.

In this case, the summary judgment record includes evidence pointing to two factors that tend to support the opposite inference—that the couple would not have married in any event: rejection of the institution of marriage and intent not to share legal parentage of any children born during the relationship. We use the phrase "tend to support" advisedly, particularly with respect to rejecting the institution of marriage. A factfinder would need to evaluate a professed rejection of marriage carefully in the light of a couple's conduct and history. It stands to reason that a person who has been denied the benefits of a social institution might react to that denial by rejecting the institution's validity or worth but might, once the prohibition is lifted, change his or her view and embrace the institution. Because the question is whether a couple would have married *if they could have*, the factfinder must determine what the individual's views would have been if marriage had not been prohibited. In some cases, it may be reasonable to infer that the individual's views would not have changed—that is, they still would have declined to marry, just as many committed opposite-sex couples do. In other cases, the more reasonable inference may be that a same-sex couple's rejection of marriage was rooted in the prohibition itself and that, indeed, the couple would have married had the law allowed.

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With the above standards in mind, we turn to whether summary judgment was appropriate in this case. "The court shall grant [a summary judgment] motion if the pleadings, depositions, affidavits, declarations and admissions on file show that there is no genuine issue as to any material fact and that the moving party is entitled to prevail as a matter of law." ORCP 47 C. Respondent stated in her affidavits that the parties did not want to enter into a legal relationship, because they "did not believe in such social constructs." A factfinder could find that respondent was not credible or, given that the parties registered a domestic partnership (the closest thing to marriage that the state offered to same-sex couples at the time) shortly after such partnerships became available, that her view would have been different had same-sex marriage not been prohibited. However, because the case is in a summary-judgment posture, we must draw all reasonable inferences in respondent's favor. *Jones*, 325 Or at 420. A factfinder could reasonably infer, on this record, that the parties would not have chosen to marry even if the law had permitted them to. If the fact-finder determines that the parties would not have married in any event, ORS 109.243 would not apply, and petitioner would not be entitled to a declaration that she is R's legal parent in accordance with that statute. It follows that issues of material fact remain and, therefore, that the trial court erred in granting summary judgment.

As noted above, respondent argues that ORS 109.243 does not apply for another reason, namely, that petitioner did not consent to the artificial insemination. Because the meaning of "consent" will be at issue on remand, we address it briefly here. Respondent understands "consent" to require that the biological mother not only *received* the approval of her partner for the artificial insemination, but that she also *sought* that approval in the first place. Respondent notes that the common definition of "consent" is "give assent or approval," *see Webster's Third New Int'l Dictionary* 482 (unabridged ed 2002). She argues that, "before there can be 'consent,' there must first be a request for 'assent or approval.' " In addition, respondent contends that that the use of the word "consent" indicates a legislative intent to limit the application of ORS 109.243 to couples

who intend to be legal coparents at the time of conception. In other words, according to respondent, implicit in a would-be biological mother's request for consent to artificial insemination is a request to share the legal benefits and burdens of parentage.

Respondent's argument raises an issue of statutory construction. To determine whether the legislature intended "consent" to be understood to include intent by the mother to share legal parentage, we look to the text of ORS 109.243 in context and to any relevant legislative history. *State v. Gaines*, 346 Or 160, 171-72, 206 P3d 1042 (2009). As respondent notes, the common meaning of "consent" is "give assent or approval." *Webster's* at 482. Nothing about that term itself or the statutory context supports respondent's argument that "consent" requires that the artificially inseminated woman intend to share legal parentage with her husband. Nor does the legislative history support that view. In short, ORS 109.243 requires nothing more than that the mother's husband give assent or approval to the performance of artificial insemination. We acknowledge that, as applied in determining which same-sex couples are similarly situated to married opposite-sex couples for purposes of applying ORS 109.243, an intent not to share parentage might indicate that a same-sex couple would not have chosen to marry. However, we see no reason that such intent should bear on the issue of "consent" for couples that would have married.

We turn finally to respondent's due process argument. Respondent asserts that the Due Process Clause of the Fourteenth Amendment to the United States Constitution " 'protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.' " (Quoting *Troxel*

v. Granville, 530 US 57, 66, 120 S Ct 2054, 147 L Ed 2d 49 (2000).) Respondent acknowledges that that "right is not absolute," but she contends that her decision to be R's sole legal parent must be accorded "some special weight," and that applying ORS 109.243 in this case would violate her right to make decisions concerning R's care, custody, and control.

We decline to address that argument for two reasons. First, the parties' very brief arguments on appeal do

not adequately grapple with the difficulty in "identify[ing] the scope of the parental rights protected by the Due Process Clause." *O'Donnell-Lamont and Lamont*, 337 Or 86, 100, 91 P3d 721 (2004), *cert den*, 543 US 1050 (2005). More fundamentally, the due process argument is premature, given our resolution of this appeal. Neither the parties nor the trial court had the benefit of this opinion—and its articulation of a standard for determining when ORS 109.243 applies in the context of same-sex relationships—when they addressed the due process question. On remand, if respondent chooses to renew her argument that the Due Process Clause prohibits application of ORS 109.243 in the circumstances of this case, we expect that her argument will address, in detail, how application of the standard that we have announced in this decision results in an unconstitutional interference with her parental rights.

To summarize, the summary judgment record, viewed in the light most favorable to respondent, establishes that there are issues of material fact that, if resolved in respondent's favor, lead to the conclusion that the parties were not similarly situated to a married heterosexual couple. If the factual disputes were resolved in that manner, the result would be that ORS 109.243 does not operate to make petitioner R's legal parent. It follows that the trial court erred in granting petitioner's summary judgment motion.

Reversed and remanded.

Footnotes:

1. The parties registered their partnership in Tillamook County under the Oregon Family Fairness Act (OFFA), ORS 106.300 to 106.340, which provided for the "establishment of a domestic partnership system [to] provide legal recognition to same-sex relationships." ORS 106.305(6). The OFFA was signed into law in 2007, "but because of a court challenge, did not go into effect until February 4, 2008." *Slater v. Douglas County*, 743 F Supp 2nd 1188, 1190 (D Or 2010). Thus, the OFFA was not in effect when R was born.

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194 P.3d 834

222 Or. App. 572

In the Matter of the MARRIAGE OF Laura Lee DAHL, Petitioner-Respondent, and Darrell Lee ANGLE, Respondent-Appellant.

DR04090713.

A133697.

Court of Appeals of Oregon.

Argued and Submitted January 15, 2008.

Decided October 8, 2008.

[194 P.3d 835]

Mark Johnson, Portland, argued the cause for appellant. With him on the briefs was Johnson Renshaw & Lechman-Su PC.

William J. Howe, III, Portland, argued the cause for respondent. With him on the brief was Gevurtz Menashe Larson & Howe PC.

Before ARMSTRONG, Presiding Judge, and ROSENBLUM, Judge, and CARSON, Senior Judge.

ARMSTRONG, P.J.

[222 Or. App. 574]

In this marital dissolution case, husband appeals a dissolution judgment that ordered the destruction of six cryopreserved embryos (frozen embryos)[1] that were formed using husband's sperm and wife's eggs and that

[194 P.3d 836]

have been held in storage at Oregon Health and Science University (OHSU). For the reasons stated below, we affirm.

Although we review the evidence *de novo*, ORS 19.415(3), we will defer to the trial court's implied and express credibility findings. *Olson and Olson*, 218 Or.App. 1, 3, 178 P.3d 272 (2008). Husband and wife married in March 2000. Wife bore one son, J, whom she and husband conceived by traditional means. In May 2004, the parties decided to try to conceive a child through *in vitro* fertilization (IVF), which involved OHSU staff harvesting eggs from wife, combining those eggs with husband's sperm to form embryos, and implanting some of the embryos in wife's uterus. After several failed attempts to implant embryos through that process, the parties discontinued that effort. Soon after, the parties decided to dissolve their marriage. The parties reached an agreement on all matters pertaining to the dissolution of their marriage except for one: the disposition of six frozen embryos that remained from the IVF process.

At the time of the IVF procedure, the parties and OHSU executed an Embryology Laboratory Specimen Storage Agreement (agreement) that detailed the terms of

[222 Or. App. 575]

storage of embryos created through the IVF procedure. Section 5 of the agreement addressed the parties' ability to transfer and dispose of the embryos. As is relevant here, that section provides:

"In connection with requests for transfer of the Embryos or upon termination of this Agreement, UNIVERSITY is hereby irrevocably authorized and directed to transfer or dispose of the Embryos as follows:

"A. In accordance with the written joint authorization of CLIENTS pursuant to the terms of this Agreement, or if one of said CLIENTS is deceased (as established by a certified copy of a death certificate) in accordance with the surviving CLIENT'S such authorization; or

"B. *If the CLIENTS are unable or unwilling to execute a joint authorization,* the CLIENTS hereby designate the following CLIENT or other representative to have the sole and exclusive right to authorize and direct UNIVERSITY to transfer or dispose of the Embryos, pursuant to the terms of this Agreement[.]"

(Emphasis added.) Directly below paragraph 5B, wife's name is printed in a space designated "Name," and, next to wife's name, her initials ("LD") and husband's initials ("DA") appear in spaces designated for the parties' approval. Below that, the following paragraph states:

"Provided however, prior to any transfer/thaw in accordance with the foregoing, if any court of competent jurisdiction shall award to either CLIENT all rights with respect to the Embryos to the exclusion of the other CLIENT, by an order or decree which is final and binding as to them, then UNIVERSITY shall have the right thereafter, whether or not a party to the proceedings in which such order or decree is issued, to deal exclusively with the CLIENT to whom such rights were awarded, without liability or accountability to the other CLIENT."

Paragraph C then sets forth steps that OHSU will take to dispose of the embryos in the event that (1) the parties refuse to comply with the provisions in paragraphs A and B, (2) either party fails to comply with provisions of the agreement within 60 days of written demand from OHSU, or (3) both parties die. Those steps entail, first, OHSU using reasonable efforts to accomplish up to three alternatives,

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with the first two requiring the approval of husband and wife. The first alternative provides for OHSU to donate the embryos to another woman who is attempting to initiate a pregnancy, in which case both husband and wife would need to sign and have notarized a donation consent form and would waive and release any claims to the embryos or any resulting offspring. The spaces designated for the parties' election of that option are blank. The second alternative provides for OHSU either to donate the embryos to a recognized research facility approved by its Institutional Review Board or to use the embryos in its own laboratory. The initials "LD" and "DA" appear in the designated spaces below that alternative. Paragraph C then reads:

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"If neither alternative (1) or (2) is selected, or if UNIVERSITY has been unable to accomplish the selected alternative(s) in accordance with the foregoing, UNIVERSITY may thaw and discard the Embryos."

The final page of the agreement has the parties' signatures, which were executed and notarized on May 14, 2004. In addition, every page of the agreement has spaces for the parties' and the OHSU representative's initials; each of those spaces is marked with the initials "LD," "DA," and those of the OHSU representative.

Both wife and husband testified at a hearing in the dissolution proceeding on the disposition of the six embryos. Wife testified that, when she and husband signed the agreement, they had intended to use the embryos to create a child for themselves as a married couple and did not intend to use the embryos if they were no longer married. She further stated that they had discussed what would happen to any embryos that were not used by them and had agreed that they would donate the embryos to a facility for scientific research. Her understanding of the agreement was that, if she and husband disagreed on the disposition of the embryos, she would have sole and exclusive right to direct OHSU to transfer or dispose of the embryos. She opposed having the embryos donated to another woman for implantation. She expressed concern that, if the embryos were successfully implanted, then the resulting offspring might eventually attempt to contact J, as his or her genetic sibling. In addition,

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she did not want to produce another child with husband, and she stated that, if she were to produce more children genetically, she would not want someone other than her to raise them.

Husband denied having initialed or read the OHSU agreement, and stated that he had signed the last page of the document without a notary present and without having seen the rest of the document. He said that he believed that the "embryos are life," and opposed their destruction or donation to science because "there's no pain greater than having participated in the demise of your own child." Accordingly, he wished to have the embryos donated to others who were attempting to conceive. He testified that he would do "everything" to protect wife's and J's confidentiality related to the donation of the embryos, but acknowledged that he could not guarantee their anonymity.

After hearing the parties' testimony, the court found that the OHSU agreement "is the agreement of the parties," that both parties had signed the agreement with a notary present, and that it did not believe that husband was being untruthful but, rather, that husband had an inaccurate recollection of signing the consent form. The court then ordered, based on the parties' positions, that the embryos be destroyed. However, it further stated that, if the parties jointly agreed that the embryos should be donated to medical research, then the court would honor that decision for the embryos' disposition.[2] The court subsequently issued a dissolution judgment, which included an order that the embryos be destroyed.

Husband appeals, assigning error to the trial court's order that the embryos be destroyed. He urges us to award the embryos to him, over wife's objection, under our authority to make a just and proper distribution of the parties' property. Because he views the embryos as living things that he does not

[222 Or. App. 578]

want killed, husband argues that it is just and proper for the court to award the embryos to him because his desire to preserve what he believes to be life should be considered more important than wife's desire to

avoid having a child born from one of her eggs. Wife responds that the court lacks authority to interfere with her decision because the embryos are not property and, thus, are not subject to court disposition in a marital dissolution proceeding. Ultimately,

[194 P.3d 838]

however, she urges us to affirm the trial court's order to have the embryos destroyed or, provided husband agrees, donated for research purposes, in effect enforcing the agreement that the parties signed at the time of the IVF procedure. In the alternative, wife argues that, even if the embryos are subject to court disposition as property, the court cannot award decision-making authority in a way that could result in the birth of a child over the objections of a source of the genetic material.

We summarize the issues in this case, which are questions of first impression in Oregon, as follows: *First*, does a contractual right to dispose of embryos that have been created during a marriage and cryopreserved for potential later use constitute personal property under ORS 107.105(1)(f) that is subject to the court's authority to distribute in a subsequent dissolution proceeding? *Second*, if the court has such authority, what constitutes a distribution of that property that is "just and proper in all the circumstances"?

Although our review of the evidence in dissolution cases is *de novo*, the first question — whether a contractual right to dispose of embryos is personal property that is subject to disposition in a dissolution case — presents a legal question that we review for legal error. *See Shelton and Shelton*, 196 Or.App. 221, 234, 100 P.3d 1101 (2004), *adh'd to on recons.*, 197 Or.App. 391, 105 P.3d 944 (2005) (reviewing question of law in dissolution case for legal error). ORS 107.105 lists the subject matter over which the court has authority to enter a judgment in a dissolution proceeding. That statute provides, in part:

"(1) Whenever the court renders a judgment of marital annulment, dissolution or separation, the court may provide in the judgment:

"* * * * *

[222 Or. App. 579]

"(f) For the division or other disposition between the parties of the real or personal property, or both, of either or both of the parties as may be just and proper in all the circumstances."

ORS 107.105. Marital property "constitutes the entire class of property subject to the dispositional authority of the court in a marital dissolution action." *Massee and Massee*, 328 Or. 195, 206, 970 P.2d 1203 (1999). Given the statutory language, we first must determine whether the contractual right to dispose of frozen embryos is "personal property" for purposes of the statute. If it is not, then the court has no authority in a dissolution proceeding or judgment to deal with those contractual rights.[3] If the court does have such authority, we will need to determine what distribution of that property is just and proper in all the circumstances.

Our courts have had few occasions to explore the meaning of "personal property" in ORS 107.105(1)(f). The Oregon Supreme Court looked to a dictionary definition of property when it determined that appreciation of one party's separately held assets was property, stating that "`property' means something that is or may be owned or possessed, or the exclusive right to possess, use, enjoy, or dispose of a thing." *Massee*, 328 Or. at 206, 970 P.2d 1203 (citing *Webster's Third New Int'l Dictionary* 1818

(unabridged ed. 1993)). Notwithstanding the apples-to-oranges comparison between appreciation of assets and an intangible contractual right to dispose of frozen embryos, the latter right appears to fit within that admittedly broad definition. As shown by the agreement, the parties have rights to direct the facility holding the embryos to transfer or dispose of them through implantation, donation to another woman, donation to a research facility, or destruction.

Indeed, although the language of the embryo storage agreement does not control what constitutes personal property under ORS 107.105, it does indicate that the parties

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understood that husband and wife had the "exclusive right to possess, use, enjoy, or

[194 P.3d 839]

dispose of" frozen embryos that were stored under the agreement. Under a heading entitled "Storage," the agreement provides:

"The UNIVERSITY will provide storage services for CLIENTS' personal property consisting of cryopreserved embryos (Embryos), which might later be used by CLIENTS in an effort to create a pregnancy."

Further, in the paragraph that follows the storage paragraph, under a heading entitled "Description of Embryos," the agreement provides:

"CLIENTS represent and warrant that they have *lawful possession of and the legal right and authority to store* the Embryos under the terms of this Agreement."

(Emphasis added.)

We acknowledge that there is some inherent awkwardness in describing those contractual rights as "personal property," as we discuss in more detail below. However, we nonetheless conclude that the contractual right to possess or dispose of the frozen embryos is personal property that is subject to a "just and proper" division under ORS 107.105. The trial court did not err in treating it as such.

Given that conclusion, the question of what constitutes a just and proper distribution of that right presents a significantly more difficult question. The division of property rarely gives rise to this level of deeply emotional conflict and, notwithstanding the idea that some properties are unique and personally meaningful, a decision to award particular property to a party generally can be considered to be a decision that is ultimately measured in monetary (or equivalent) value. A decision about the contractual right to direct the disposition of embryos cannot reasonably be viewed that way, as the parties appear to agree. As such, our case law controlling the just and proper distribution of property in a marital dissolution proceeding — all of which addresses the distribution of property to which some sort of monetary value can be ascribed — offers little assistance in our task here. Nor can we identify any express source of public policy in our constitution, statutes, administrative rules, or elsewhere that could inform the distribution of property of this nature.

[222 Or. App. 581]

Given the dearth of Oregon legal authority to guide our inquiry, we look to legal authority from outside Oregon. As of this writing, eight other state appellate courts have confronted similar cases. While those cases are not controlling, several are instructive, and we briefly discuss them here.

The first reported marital dissolution case addressing the disposition of embryos is *Davis v. Davis*, 842 S.W.2d 588 (Tenn.1992). In that case, the husband and wife disagreed on how to dispose of embryos on the dissolution of their marriage. They had not signed an agreement with the IVF clinic regarding the storage of the embryos and, hence, had not resolved how they and the clinic would deal with contingent events. The Tennessee Supreme Court ultimately held that courts should resolve such disputes

"first, by looking to the preferences of the progenitors. If their wishes cannot be ascertained, or if there is dispute, then their prior agreement concerning disposition should be carried out. If no prior agreement exists, then the relative interests of the parties in using or not using the preembryos must be weighed."

Id. at 604. In that case, there was no agreement between the progenitors, so the court weighed the relative interests of the parties, determining that the husband's interest in not procreating outweighed the wife's interest in donating the eggs to another couple. *Id.*

Kass v. Kass, 91 N.Y.2d 554, 673 N.Y.S.2d 350, 696 N.E.2d 174 (1998), is the first marital dissolution case involving the disposition of embryos in which parties had signed an agreement with the IVF facility concerning the storage of the embryos. In that case, the wife wanted to implant the embryos in an attempt to get pregnant, while the husband wanted to have the embryos donated for scientific research. The agreement with the IVF facility provided, among other things, that (1) the frozen embryos would not be released from storage without the parties' mutual written consent; (2) in the event of divorce, legal ownership of the stored embryos was to be determined in a property

[194 P.3d 840]

settlement by a court with jurisdiction; (3) in the event that the parties no longer wished to initiate a pregnancy or could not agree on the disposition of the embryos, then the parties elected to

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donate the embryos for scientific research. *Id.* at 559-60, 673 N.Y.S.2d 350, 696 N.E.2d at 176-77.

The New York Court of Appeals first noted that New York courts should generally presume that "[a]dvance directives, subject to mutual change of mind that must be jointly expressed," are valid, binding, and enforceable as between the progenitors. *Id.* at 565, 673 N.Y.S.2d 350, 696 N.E.2d at 180 (citing *Davis*, 842 S.W.2d at 597). The court acknowledged the difficulty the parties faced in determining in advance their preferences for disposition in the event of contingent events, such as death, divorce, aging, or the birth of other children, but further explained:

"Advance agreements as to disposition would have little purpose if they were enforceable only in the event the parties continued to agree. To the extent possible, it should be the progenitors — not the State and not the courts — who by their prior directive make this deeply personal life choice."

Id. at 566, 673 N.Y.S.2d 350, 696 N.E.2d at 180.

The court then focused its inquiry on the agreement. The wife's only argument about the agreement was that it was ambiguous as to the parties' intent that the embryos be donated to science in the event of a divorce.[4] The court disagreed with the wife, concluding that, under New York case law, the agreement was unambiguous and manifested the parties' mutual intent at the time that they signed it that the embryos be donated for research. *Id.* at 569, 673 N.Y.S.2d 350, 696 N.E.2d at 182. Accordingly, the court enforced the agreement and upheld the lower court's order that the embryos be donated for scientific research.

Several of the other courts confronted with disputes over embryos in cases in which the parties had signed an agreement with a medical facility for the disposition of stored embryos have adopted, or implicitly followed, the general framework set forth in *Davis* and *Kass*. *See, e.g., Cahill v. Cahill,* 757 So.2d 465, 468 (Ala.Civ.App.2000) (enforcing

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agreement stating that parties relinquished control of the embryos to the IVF facility on dissolution of marriage); *Roman v. Roman,* 193 S.W.3d 40, 50 (Tex.App.2006), *rev. den.* (2007), *cert. den.*, ___ U.S. ___, 128 S.Ct. 1662, 170 L.Ed.2d 356 (2008) (ordering frozen embryos destroyed in accordance with IVF agreement); *Litowitz v. Litowitz,* 146 Wash.2d 514, 533, 48 P.3d 261, 271 (2002), *cert. den.,* 537 U.S. 1191, 123 S.Ct. 1271, 154 L.Ed.2d 1025 (2003) (same); *cf. A.Z. v. B.Z.,* 431 Mass. 150, 159-60, 725 N.E.2d 1051, 1057 (2000) (determining that the agreement was unenforceable for public policy reasons while neither rejecting nor accepting *Davis* and *Kass* framework). Other courts require mutual contemporaneous consent by the parties. *See In re Marriage of Witten,* 672 N.W.2d 768, 783 (Iowa 2003) (enjoining any transfer of frozen embryos until parties reached consensus where agreement required parties' joint written consent); *J.B. v. M.B.,* 170 N.J. 9, 29-30, 783 A.2d 707, 719-20 (2001) (balancing interests of parties when parties contemporaneously disagreed).

We conclude that the general framework set forth by the courts in *Davis* and *Kass,* in which courts give effect to the progenitors' intent by enforcing the progenitors' advance directive regarding the embryos, is persuasive. Moreover, giving effect to a valid agreement evincing the parties' intent regarding disposition of embryos is consistent with our statutory and case law that give similar effect to prenuptial agreements and agreements made during a marriage. *See, e.g.,* ORS 108.700 to 108.740 (governing prenuptial agreements); ORS 107.104 (stating policy encouraging enforcement of marital settlement agreements); *Patterson and Kanaga,* 206 Or.App. 341, 347-48, 136 P.3d 1177 (2006) (settlement agreements incorporated

[194 P.3d 841]

into judgments enforceable unless enforcement contravenes law or public policy).

Thus, on *de novo* review, we agree with the trial court's determination that the agreement evinced the parties' intent. The parties signed the agreement at the time that they participated in the creation of the embryos. The agreement provided that, in connection with requests for the transfer of the embryos or the termination of the agreement,[5]

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OHSU would transfer the embryos in accordance with the parties' joint written authorization. In the absence of such authorization, the parties designated wife to authorize and direct OHSU to act regarding the embryos. Although the agreement did not specifically state that the couple was selecting options for

disposition of the embryos in the event of marital dissolution or separation, the parties contemplated the contingency of their not being able to reach agreement on the disposition of the embryos, and they selected wife to be the primary decision maker in that regard. Further, the parties were given choices when they entered the agreement on possible disposition of the embryos. At that time, they did not choose to donate the embryos to another woman for implantation, the choice that husband now advocates; rather, they chose either to donate the embryos to science or to have them destroyed. In sum, the parties agreed that wife would decide the disposition of the embryos unless a court, in essence, overruled the parties' preference for a decision maker and allocated that responsibility to a different party. The parties further understood that OHSU would either donate the embryos to a facility for scientific research or destroy them if the parties did not comply with the agreement.

Husband does not argue that the agreement itself is ambiguous or invalid for public policy reasons. Rather, he asks that we award possession of (and decision-making authority over) the embryos to him, because his belief that the embryos are life and his desire to donate the embryos in a way that would allow "his offspring to develop their full potential as human beings" should outweigh wife's interest in avoiding genetic parenthood.

We reject husband's request. Again, while we review *de novo* the trial court's division of marital property, we review the award itself for the proper exercise of discretion. *See Kunze and Kunze,* 337 Or. 122, 136, 92 P.3d 100 (2004)

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(holding that the ultimate determination of what is just and proper is discretionary); *Olson,* 218 Or.App. at 14, 178 P.3d 272. Accordingly, based on our conclusion that courts should give effect to agreements showing the parties' intent for the disposition of frozen embryos, we will not disturb the trial court's decision unless it fails to comport with that framework.

We do not see how the court's decision to issue an order that the embryos be destroyed is not a disposition that is just and proper in all the circumstances. The trial court determined that the agreement showed the intent of the parties. Husband fails to advance, and we cannot identify, any affirmative countervailing state policy that would impose a genetic parental relationship on someone as a default principle. Nor does he identify any affirmative state policy favoring his preferred disposition of the embryos.[6] Given

[194 P.3d 842]

that, we have no basis on which to disturb the trial court's conclusion.

Absent a countervailing policy, it is just and proper to dispose of the embryos in the manner that the parties chose at the time that they underwent the IVF process. According to the agreement here, the parties designated wife to be the decision maker regarding the embryos. Wife's stated preference for disposition of the embryos is expressed in the trial court's order to destroy them, absent husband's renewed agreement to donate them for scientific research. In issuing the order to destroy the embryos, the trial court essentially gave effect to the agreement. Accordingly, we do not disturb that decision.

Affirmed.

Notes:

1. Although we generally adopt the parties' use of the term "embryo" in this opinion to refer to a fertilized egg that has not been implanted in a uterus, the medically accurate term for an egg in that state is a "preembryo" or "prezygote." *See* Elizabeth A. Trainor, J.D., *Right of Husband, Wife, or Other Party to Custody of Frozen Embryo, Pre-Embryo, or Pre-Zygote in Event of Divorce, Death, or Other Circumstances,* 87 A.L.R.5th 253, 260 (2001). A preembryo develops into an embryo only after implantation into a woman's uterus. *Id.* The parties here did not present evidence at trial of the embryos' stage of development. However, the appendix to the agreement that the parties entered with Oregon Health and Science University identifies the embryos as cleaving embryos, as distinguished from zygotes and blastocysts. In all events, the embryos are those that were not implanted in wife.

In addition, the term "frozen embryos" is a term of art for preembryos that have been cryogenically preserved. *Id.* The six embryos at issue in this case are, technically speaking, frozen embryos; because we need not differentiate between frozen and unfrozen embryos, we likewise use the term "embryo" to refer to frozen embryos.

2. It is not clear whether the trial court, when it issued the order to destroy the embryos, was enforcing the IVF agreement (either by issuing an order in accordance with wife's desire to avoid parenthood, or in accordance with the alternatives selected by the parties when they signed the agreement), or was balancing the interests of the parties and concluding that wife's interest in avoiding genetic parenthood was more compelling than husband's interest in preventing the destruction of the embryos by donating them to others for implantation.

3. The parties do not contend that any statutory provision other than ORS 107.105(1)(f) confers on the court in a dissolution proceeding the authority to deal with contractual rights involving the distribution of frozen embryos. Our independent review of ORS 107.105 and related statutes leads us to conclude that there is no other statutory provision that could be a source of authority for a court to deal with the contractual rights to dispose of frozen embryos in such a proceeding.

4. The court observed that, in some instances, such agreements might be unenforceable for violating public policy or due to significantly changed circumstances. *Kass,* 91 N.Y.2d at 565 n. 4, 673 N.Y.S.2d 350, 696 N.E.2d at 179-80 n. 4. The wife did not raise either of those issues, and the court declined to pursue them.

5. The agreement has a clause on its duration, which provides in part:

"The term of this Agreement shall be for the period of one (1) year commencing upon the date of first freeze of zygotes or embryos, at the end of which time it shall automatically terminate, unless said date is extended prior to the termination date by mutual agreement of all parties hereto in writing. The above notwithstanding, in the event that zygotes or embryos are not frozen within six (6) months of the signing of this agreement, the agreement [*sic*] shall be destroyed."

The record does not indicate whether the parties extended the term of the agreement; likewise, it is silent as to the date on which the "first freeze" occurred. However, the agreement was signed on May 14, 2004. Assuming that the first freeze occurred within six months of May 2004, the agreement had terminated by the time that the court held a hearing regarding the embryos, which was in June 2006.

6. Such policy would be found in legislative enactments, administrative rules, regulations, and the state and federal constitutions. *See Compton v. Compton,* 187 Or.App. 142, 145, 66 P.3d 572 (2003) (citing *A-1 Sandblasting v. Baiden,* 293 Or. 17, 22, 643 P.2d 1260 (1982)). Oregon is not among the handful of states

that have enacted legislation addressing state policy regarding decision-making authority over preembryos. *See, e.g.*, Cal. Health & Safety Code § 125315 (West 2006) (requiring IVF providers to obtain informed and voluntary choice regarding disposition of unused embryos); Fla. Stat. Ann. § 742.17 (West 2005) (requiring IVF agreement and prescribing decision-making authority absent such an agreement); La. Rev. Stat. Ann. § 9:121-133 (2008) (defining a human embryo as a "juridical person" that must be implanted); Mass. Gen. Laws Ann. ch. 111L, § 4 (West Supp. 2008) (requiring IVF providers to obtain informed and voluntary choice regarding disposition of unused embryos); N.J. Stat. Ann. § 26:2Z-2 (West 2007) (permitting embryonic research, requiring informed and voluntary choice by parties regarding disposition).

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877 P.2d 107

128 Or.App. 450

**In the Matter of the ADOPTION OF BABY A and Baby B, Minors.
J.F., C.F., T.C. and D.C., Appellants.**

93C-33419; CA A83037.

Court of Appeals of Oregon.

**Argued and Submitted June 1, 1994.
Decided June 22, 1994.**

Russell Lipetzky, Salem, argued the cause and filed the brief, for appellants.

Before WARREN, P.J., and EDMONDS and LANDAU, JJ.

[128 Or.App. 452] WARREN, Presiding Judge.

In this adoption case, the prospective adoptive parents and the birth mother and her husband appeal the trial court's refusal to grant the petition for adoption. On de novo review, we reverse.

The birth mother entered into a surrogate agreement with adoptive parents, in which she agreed to be artificially inseminated with adoptive father's sperm. The artificial insemination was successful and she gave birth to twins. The birth mother was paid $14,000, which exceeded her pregnancy related expenses. Birth mother and her husband gave their consent to the adoption. There is no objection to the adoption petition. The report prepared for Children's Services Division concluded that the adoption was in the children's best interests. Nonetheless, the trial court denied the petition, relying on Franklin v. Biggs, 14 Or.App. 450, 513 P.2d 1216, rev. den. (1973). It concluded that the payment of money to birth mother makes her

consent involuntary and invalidates her consent to the adoption.

We conclude that neither the adoption statutes nor Franklin v. Biggs, supra, preclude this adoption. ORS 109.350 provides that the court shall order an adoption if, among other things, "it is fit and proper that such adoption be effected * * *." ORS 109.311(1) provides that each adoption petition

"shall be accompanied by a written disclosure statement containing an itemized accounting of all moneys paid or estimated to be paid by the petitioner for fees, costs and expenses related to the adoption, including all legal, medical, living and travel expenses."

The petition in this case did that. ORS 109.311(3) provides that no fee may be paid or accepted for locating a child for adoption or for locating another person to adopt a child, except that reasonable fees may be charged for services provided by licensed adoption agencies. There was no fee paid in this case for locating the children or any other party to the adoption. Therefore, the statute does not prohibit the court from granting this adoption.

The trial court's reliance on Franklin v. Biggs, supra, is misplaced. In that case, the mother gave birth to [128 Or.App. 453] twins. Thereafter, she gave her consent to their adoption by third parties. She was paid $200 shortly after she released the twins to the adoptive parents. She later sought to withdraw her consent. We said that she could withdraw her consent, because the payment of money "vitiates any consent * * *." 14 Or.App. at 461, 513 P.2d 1216.

This case is factually distinguishable. Although the surrogate agreement provided that the birth mother would be paid money in addition to her medical expenses, the evidence was that she would have entered into the agreement even without the payment of money. Further, the birth mother does not seek to withdraw her consent, and in fact continues to assert strongly her desire to have the twins adopted by the adoptive parents. "The primary purpose of adoption proceedings is the promotion and protection of a child's best interests." P and P v. Children's Services Division, 66 Or.App. 66, 72, 673 P.2d 864 (1983). All parties, as well as the investigating agency, agree that the adoption is in the children's best interest. There is nothing in the adoption statutes that prohibits this adoption, and we conclude that the trial court should have granted the petition.

Reversed and remanded with instructions to grant petition for adoption.

31 P.3d 1119
176 Or. App. 383

Judy Ann WEAVER, Respondent,
v.
Richard Linwood GUINN, Appellant.

99-2050-F-2; A110516

Court of Appeals of Oregon.

Argued and Submitted August 2, 2001.

Decided September 5, 2001.

[31 P.3d 1120]

Laurance W. Parker, Medford, argued the cause and filed the brief for appellant.

Colette Boehmer, Medford, argued the cause and filed the brief for respondent.

Before LANDAU, Presiding Judge, and BREWER and SCHUMAN, Judges.

LANDAU, P.J.

In this filiation proceeding, father appeals the judgment of the trial court awarding mother custody of the child. Father argues that the trial court erred in declining to enforce the terms of an agreement between the parties concerning custody of the child. We affirm.

The parties stipulated to the following facts. Father and mother met in 1998 through a mutual friend who understood that father was interested in locating a woman who would be willing to be artificially inseminated and to carry a child to term and that mother might be interested in doing that under the appropriate circumstances. The parties reached a verbal agreement that mother would attempt to become pregnant with father's child through artificial insemination and would carry the child to term in exchange for $12,000, plus other costs and insurance. Mother further agreed that she would surrender the child to father, who would then be responsible for parenting the child.

In July 1998, father reduced their agreement to writing. Entitled "Artificial Insemination Surrogate Contract," the agreement begins by acknowledging that "this Agreement may be held unenforceable in whole or in part as against public policy." It then explains that its purpose is

[31 P.3d 1121]

"to provide a means for [father] to fertilize by Artificial Insemination the egg of [mother], who agrees to carry the embryo to term and relinquish custody of the child born pursuant to this Agreement to its Genetic Father * * *."

The agreement goes on to spell out various representations of the parties, selection of physicians to assist in the artificial insemination, medical instructions, and the like. The parties did not execute the agreement at that time.

Between July 1998 and September 1998, the parties agreed to engage in consensual sexual intercourse. Mother became pregnant in September 1998.

Seven months later, the parties signed the artificial insemination agreement. No amendment was made to reflect the fact that the parties subsequently had agreed to initiate the pregnancy by means other than artificial insemination.

On May 19, 1999, mother gave birth to the child. Meanwhile, by the date of the birth, mother had accepted approximately $12,000 in payments from father. On May 20, mother executed a "special consent" form acknowledging the paternity of father and permitting him to leave the hospital with the child in his custody. Three weeks later, mother initiated this filiation proceeding seeking custody of the child. Father acknowledged his paternity but asserted that, in accordance with the terms of the parties' agreement, he was entitled to exclusive custody of the child. Mother replied that the agreement did not apply and, in any event, was void as against public policy. According to mother, agreements regarding child custody cannot bind the courts in deciding what is in the best interests of the child.

The trial court held that the artificial insemination agreement did not apply, because mother did not become pregnant by artificial insemination. The court further held that the agreement was unenforceable as against public policy. The court then ordered an evidentiary hearing to determine the best interests of the child. At the hearing, mother testified that, although she had agreed that father would have custody of the child, she understood that she would have substantial visitation rights. Father testified that he agreed to nothing of the sort. After the hearing, the trial court awarded custody to mother, with substantial parenting time for father. The court found that both parents loved the child and were adequate and appropriate parents. The court's only expressed reservations were that, during one visitation, mother briefly had left the child in the care of a six-year-old and that father's apparently irremediable hostility to mother was detrimental to the child.

On appeal, father contends that the trial court erred in failing to enforce the contract between the parties. According to father, the fact that the written agreement speaks of artificial insemination is merely a technical matter of form that should not have sidetracked the court from the underlying substance of the agreement that mother was to bear a child and relinquish custody. Moreover, he argues, the agreement was not unenforceable as against public policy. Given changes in the technology of reproduction and public morals over the last several decades, he contends, it no longer can be said that agreements to bear children for remuneration violate public policy.

Mother contends that the fact that the written agreement speaks of artificial insemination is not a mere technicality, but rather is a material term that was never performed. In any event, she argues, the trial court correctly concluded that such an agreement violates public policy against creating markets in the production of children.

ORS 109.239 spells out the rights of donors of semen used in artificial insemination:

"If the donor of semen used in an artificial insemination is not the mother's husband:

"(1) Such donor shall have no right, obligation or interest with respect to a child born as a result of the artificial insemination; and

"(2) A child born as a result of the artificial insemination shall have no right, obligation or interest with respect to such donor."

[31 P.3d 1122]

Clearly, the statute affords no relief to father in this case, and, indeed, father claims no support from that statute.

Father argues that, notwithstanding ORS 109.239, he has a right to sole custody of the child pursuant to the terms of the artificial insemination agreement. According to father, ORS 109.230 expressly authorizes such contracts in providing that "[a]ny contract between the mother and father of a child born out of wedlock is a legal contract," and in this case the parties' agreement expressly provides that father is to have custody of the child.

To begin with, ORS 109.230 does not apply to artificial insemination agreements. As we held in *McIntyre v. Crouch*, 98 Or. App. 462, 780 P.2d 239, *rev. den.* 308 Or. 593, 784 P.2d 1100 (1989), that statute—which applies only to the "mother" and the "father" of a child born out of wedlock—was enacted long before the artificial insemination statute and before the legislature reasonably would have considered a semen donor to be a "father." *Id.* at 468, 780 P.2d 239.

Moreover, as the trial court concluded, the parties did not perform the terms of an artificial insemination agreement. The agreement clearly spells out that its purpose is "to provide a means for [father] to fertilize by Artificial Insemination" an egg of mother's. It contains representations as to mother's capability to carry an artificially inseminated embryo to term and medical instructions as to how the artificial inseminations are to be accomplished. The references to artificial insemination throughout the agreement are not mere formalities; they constitute material terms to an agreement that the parties simply never performed.

Father argues that, even if the written agreement does not apply, there was an oral agreement to produce a child by means other than artificial insemination, and that agreement, too, required mother to relinquish any claim to custody of the child. Mother responds that the stipulated facts contain no mention of such an oral agreement, and father relied on no such agreement at trial.

We agree with mother that father cannot seek the enforcement of an oral agreement that was not mentioned at trial. Moreover, even assuming the parties entered into an oral agreement, the record contains no evidence that its terms included a waiver of parental rights. In any event, such an agreement could not bind the courts in their determination of child custody.

ORS 109.175 provides that, in a filiation proceeding, once paternity has been established, the custody of the child must be determined in accordance with the standards set out in ORS 107.137. That statute, in turn, provides that, in determining the custody of a minor child, the court "shall give primary consideration to the best interests and welfare of the child." ORS 107.137(1). Agreements concerning the custody of children "are worthy of the court's consideration." *Laurance v. Laurance*, 198 Or. 630, 638, 258 P.2d 784 (1953). They may even constitute an admission on the question of parental fitness. *Id.* But they do not control the court's decision as to the best interests of the minor child. *Id.; see also Truitt and Truitt*, 124 Or.App. 531, 534, 863 P.2d 1287 (1993) ("trial court is not bound by * * * agreements regarding

the custody and visitation of minor children"); *Cope and Cope*, 49 Or.App. 301, 306, 619 P.2d 883 (1980), *aff'd* 291 Or. 412, 631 P.2d 781 (1981) ("although the parties' stipulations regarding custody of their children are worthy of consideration, they are not binding on the trial court"); *cf. Leckie and Voorhies*, 128 Or.App. 289, 875 P.2d 521 (1994) (waiver of parental rights in artificial insemination contract enforced).

Father argues that, even if the trial court were entitled to award custody on the basis of the best interests of the child, the fact is that it is not in the best interests of the child to award custody to mother. In support of that argument, father relies on the single incident in which mother briefly left child in the care of a six-year-old. On *de novo* review, we conclude that—particularly in light of the substantial parenting time awarded to father—the trial court did not err in awarding custody to mother.

Affirmed.

Checklist for Parentage Judgments

- Did the parties enter into a gestational carrier agreement? Is it referenced in the proposed judgment?
- Have all parties stipulated to the judgment and does the judgment have their signatures on it as evidence of such stipulation?
- Is the gestational carrier married? If yes, has the presumption in ORS 109.070(1)(a) been addressed (i.e. is there a statement to the effect that the presumption does not apply or has been rebutted?)
- Has the statement of the physician that carried out the procedures involved in the surrogacy (egg retrieval, IVF, embryo transfer) been filed with the court (either as attachment to petition or separately)?
- Does the judgment contain any recitation regarding the parties' belief that establishing legal parentage in the intended parents is in the best interests of the child?
- Is there a statement regarding requirements for declaratory judgments (i.e. something along the lines of "this action is brought for purposes of resolving uncertainty…")?
- Does the language in the judgment accurately reflect the genetic heritage of the child/ren? (I.e. is what the judgment says scientifically possible?)
- Does the judgment establish that the court has jurisdiction?
- Does the judgment, in fact, declare that intended parents are the sole & exclusive legal parents of the child?
- Does the judgment order the State Registrar to amend the birth certificate pursuant to ORS 432.245?
- Any typos (incorrect dates, names, etc.)?

This checklist is not meant, by any means, to be exhaustive or cover every provision that must be included in a parentage judgment, it simply highlights some of the key points that we keep an especially close eye out for.

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