

# P E N N S Y L V A N I A LAW WEEKLY

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## **BABY STEPS FOR THE JUSTICE SYSTEM**

### **State and federal law evolving to protect the parental rights of same-sex couples**

By Dorothy K. Phillips  
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Congress added "sexual orientation" to the list of protected rights in the Federal Hate Crimes Act last month, making clear that the expansion addressed physical attacks, not speech.

President Obama has indicated he will sign the legislation, which passed the Senate Oct. 22. This additional category of hate crimes produces an unanticipated merger of two 21st century phenomena: assisted reproductive techniques, known as ART, and the reproductive rights of same-sex couples.

I noted in a prior *Pennsylvania Law Weekly* article, "Life Imitates Art," 31 PLW 489; May 5, 2008, that the Pennsylvania Supreme Court recognized ART as a viable alternative for conception in its landmark opinion, *Ferguson v. McKiernan*, 940 A.2d 1236 (Pa. 2007).

*Ferguson* thrust the commonwealth of Pennsylvania rocket-like into the 21st century by recognizing that when conception of a child is accomplished by non-sexual means in a clinical setting and the parties enter into a contract to determine rights and responsibilities, the intent of the parties will control.

As we approach the close of 2009, there have been some mind-boggling legal and lifestyle developments, both nationally and locally. Wanda Sykes, the famous comedian, has a show airing on HBO called "I'ma Be Me."

Sykes recently "came out," got married and refers to her "wife" throughout the special. She is also the mother of six-month-old twins, conceived by ART. Surrogacy has become a vehicle for same-sex couples to have a child.

*The New York Times* "Sunday Styles" section of Oct. 26 announced the marriage of Ivanka Trump along with the marriages of same-sex couples. The Federal Hate Crimes Act now includes gender identity as a protected category.

I recently noted in my article "Don't Ask, Don't Tell," (32 PLW 738, July 6, 2009) that the Pennsylvania Human Relations Act offers no protection for sexual orientation or gender identity.

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Pennsylvania has not repealed its legislation against gay marriages and still has not passed state laws affording certain rights to same-sex couples which heterosexual couples enjoy. However, justice takes baby steps. Family law practitioners have been advocating the merger of ART and rights of same-sex couples with some success. For instance, for purposes of the birth certificate, it is now possible for male same-sex partners to secure a Pre-Birth Order (PBO) declaring that the partners are the legal parents of the unborn child, which is being carried by a surrogate gestational carrier.

A family law attorney must draft a joint petition for order of court declaring "John Doe" and "Michael Smith" the legal parents of "Baby Doe." The content of such a petition is quite exacting and requires the gestational carrier to join in the petition in order to relinquish her claim to the child. Attached to the petition must be an affidavit by the physician who presided at the in vitro fertilization affirming that there is no possibility that the fertilized ova came from the gestational carrier but came from an anonymous donor. Also required is an affidavit by the gestational carrier affirming that she has no genetic connection to the child. If the gestational carrier is married, an affidavit from her husband is also required. Both of the intended parents must also execute affidavits to accompany the joint petition.

The executed petition with affidavits attached is then sent to the Pennsylvania Department of Health for the signing of a stipulation by the department that a pre-birth order is recommended and that the department will issue a birth certificate at the time of child's birth with the names of the intended parents as the legal parents of the child. The gestational carrier is then out of the loop by virtue of the prior approval of the pre-birth order by the Pennsylvania Department of Health.

Once a stipulation from the Department of Health is received, counsel for the intended parents must secure an order of court by the county where the birth will take place that approves the pre-birth order and sets out that the intended parents are the legal parents of the child to be born.

What the pre-birth order accomplishes is avoiding naming the gestational carrier as "mother" on the birth certificate. A pre-birth order also avoids the necessity of the partner who did not genetically participate in the creation of the child going through adoption of the child and termination of the gestational carrier's rights (because she was named as "mother" on the birth certificate, even though she may have had no genetic nexus in the creation of the fertilized ova.) Family lawyers have made this progress by taking baby steps.

County courts in Pennsylvania are approving joint petitions and are issuing pre-birth orders declaring the same-sex partners the legal parents of the child. The knowledgeable practitioner requests a sealed record, which request is usually granted by the court. The physicians in attendance at the birth of the child are well aware of the pre-birth order and the language to be

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placed on the birth certificate. Hospital administrators have been educated and have cooperated with effecting pre-birth orders.

Family law practitioners have slowly moved forward with the help of enlightened courts in helping in the creation of new definitions for "parent," "mother," "father" and "family" in Pennsylvania. Children are being born to parents who desperately want them. Legal procedures are being streamlined. Pennsylvania's "baby steps" have successfully pushed open the door for the merger of ART and gender identity rights.

Although Pennsylvania has not yet added "gender identity" to the protected rights under its Human Relations Act, the state is participating in procedures such as those described in this article.

Now that the federal government has added "gender identity" to the Federal Hate Crimes Act, gay citizens of Pennsylvania can now invoke the umbrella of federal protection. Meanwhile, baby steps by practitioners in conjunction with cooperation by courts have greatly advanced the rights of same-sex couples who use ART to conceive much wanted babies.

Justice is patient and will ultimately prevail. •

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