



# Future Choices

*Assisted Reproductive Technologies and the Law*

Jessica Arons  
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## Insurance Coverage of Infertility Treatments

**T**he one thing the majority of these procedures have in common is that they are quite expensive. The average cost of an IVF cycle in the United States is \$12,400.<sup>26</sup> Using a surrogate may cost around \$60,000; eggs can go for anywhere from \$2,500 to \$50,000 or even \$100,000; and screening embryos for genetic traits adds approximately \$3,500 to the price of assisted reproduction.<sup>27</sup> For most people then, having health insurance coverage of some or all infertility treatments may make the difference between accessing those services or not.

This section will cover two areas of the law: state statutes that require health plans to cover or offer infertility services and court cases that determine whether federal antidiscrimination laws are violated by employer health plans that do not cover infertility treatments. (See text box on page 9 on the intersection of state and federal laws in this arena.)

Embedded in the statutory requirements are judgments on who qualifies as “deserving” of coverage, which reasons for excluding coverage are deemed legitimate, and what types of treatments are considered valid. In the court cases, judges have tried to answer whether infertility is a disability, whether lack of coverage for infertility treatments that only women can use constitutes sex discrimination, and whether discrimination against the infertile is pregnancy discrimination.<sup>28</sup>

### State Health Insurance Mandates and Exclusions

Fourteen states currently require some types of health insurance plans<sup>29</sup> to include coverage of certain infertility services<sup>30</sup> or to make such coverage available.<sup>31</sup> In contrast, Louisiana and Nevada explicitly exempt health plans from having to cover certain infertility services in statutes that require coverage for other reproductive health care.<sup>32</sup> (See Table 1 on page 10.)

Of the 14 states requiring coverage or the opportunity for coverage, five have their mandates apply only for patients who are married,<sup>33</sup> and four of those require the wife’s eggs to be fertilized with the husband’s sperm<sup>34</sup>—in other words, they cannot use donated gametes if they want their treatments to be covered by insurance. Even if the laws do not expressly limit coverage to married couples, nearly all 14 states routinely refer to coverage for “medically necessary expenses” or define infertility to be the inability to conceive after a specified period of unprotected sexual intercourse, thereby implicitly excluding from coverage single people and lesbian, gay, and transgender couples.

## Federalism 101 and Assisted Reproduction

Our Constitution provides for a balance of power among the federal and state governments. In some areas, only Congress can legislate; other areas are subject only to state regulation; and in still others, both can govern so long as the state laws do not conflict with the federal ones. For instance, the states generally have the power to regulate the practice of medicine, the insurance industry, family law, contract law, and property law—all areas implicated by assisted reproduction.

That power is limited, however, by areas that overlap with the federal government's power, as well as where the Constitution imposes its own limits. With regard to ART specifically, constitutional rights such as the right to procreate or the right not to procreate may restrict a state's ability to regulate assisted reproduction. And federal employment law prohibits discrimination based on certain characteristics, which can affect the health benefits an employer must offer its employees. Thus, in this paper, we will be discussing both federal and state law as appropriate.

Four states allow health plans to impose age requirements on coverage for infertility services. Connecticut<sup>35</sup> allows coverage to be excluded when a person turns 40; New Jersey<sup>36</sup> requires coverage for patients age 45 or younger; New York's<sup>37</sup> coverage applies from age 21 to 44; and Rhode Island<sup>38</sup> sets age limits of 25 to 40, but only for female patients.

Some states allow insurance plans to impose monetary limits on the infertility services provided, but other states have crafted benefit maximums on the type, amount, or frequency of services. For instance, Connecticut does not require coverage beyond four cycles of ovulation induction, three cycles of IUI, and two cycles of techniques that involve the transfer of gametes or embryos. Connecticut also has the only cap in the country on the number of embryo implantations allowed: two per each cycle of treatment.<sup>39</sup>

Hawaii requires only one cycle of IVF to be covered.<sup>40</sup> Illinois limits the number of egg retrievals to four for a first birth and two for a second birth.<sup>41</sup> It appears that no egg retrievals are covered after a patient has had two live births. Maryland gives couples three chances to achieve a live birth with IVF and has a lifetime

monetary cap on benefits, but there is no lifetime cap on the number of IVF cycles allowed assuming a child is born at least once every three attempts and the monetary cap has not been reached.<sup>42</sup> Finally, New Jersey imposes a lifetime cap on cycles involving egg retrieval at four.<sup>43</sup>

Of course, none of the above states prohibits treatments that go beyond their specified limits; they simply do not require insurers to provide coverage for treatments in excess of the caps in the statutes.<sup>44</sup>

Seven states permit some type of exemption for religious institutions whose beliefs conflict with certain methods of treatment for infertility.<sup>45</sup> Some of the exemptions apply to issuers of health insurance plans, some to employers to whom the plans are issued, and some to both. Massachusetts exempts an employer only if it is a diocese.<sup>46</sup> Connecticut also allows individuals to request a policy or rider that excludes such services due to their religious or moral beliefs.<sup>47</sup> Two states require notice to be issued to each insured or prospective insured that such services have been excluded pursuant to a religious exemption.<sup>48</sup>

While some states have acted to ensure that people with health insurance can

**TABLE 1: STATE MANDATES FOR INFERTILITY INSURANCE**

STATE	COVERAGE MANDATE		BENEFIT RESTRICTIONS					RELIGIOUS EXEMPTION	
	Mandate to Cover	Mandate to Offer	Age	Marriage	Own Gametes	Benefit Caps	Government Program Exclusions	Employer	Other
Arkansas	•			•	•				
California		•						•	• <sup>a</sup>
Connecticut	•		< 40 yrs			• <sup>b</sup>		•	• <sup>c</sup>
Hawaii	•			•	•	• <sup>d</sup>			
Illinois	•					• <sup>e</sup>		•	• <sup>f</sup>
Maryland	•			•	•	• <sup>g</sup>		•	
Massachusetts	•							• <sup>h</sup>	
Minnesota							•		
Montana	•						•		
New Jersey	•		< 46 yrs <sup>i</sup>			• <sup>j</sup>	•	• <sup>k</sup>	
New York	•		21–44 yrs						
Ohio	•						•		
Oklahoma							•		
Pennsylvania							•		
Rhode Island	•		25–40 yrs <sup>l</sup>	•		• <sup>m</sup>	•		
Texas		•		•	•			• <sup>n</sup>	• <sup>o</sup>
West Virginia	•								

CA a Health plan exemption.

CT b Cap of 2 embryo implantations per cycle.

c Individual exemption available; notice of exclusion required.

HI d Maximum Benefit: One cycle of IVF.

IL e Maximum Benefit: 4 egg retrievals for the first birth; 2 egg retrievals for the second birth.

f Any entity that issues a plan or policy is exempted.

MD g Maximum Benefit: 3 IVF cycles per live birth with a lifetime cap of \$100,000.

MA h Law exempts diocese employers only.

NJ i A woman is considered “infertile” if she is under 35 and unable to conceive for 2 years or if she is older than 35 and unable to conceive after 1 year.

j Egg retrieval is capped at 4 cycles per lifetime.

k Religious employers do not have to cover specific types of procedures; a notice of exclusion is required.

RI l Age limit applies to women only.

TX m Maximum Benefit: \$100,000 lifetime cap.

n Exempts self-insured employers only.

o Law includes exemptions for insurers and HMOs.

obtain infertility services, others have limited access for people who receive public medical assistance.<sup>49</sup> For instance, Minnesota and Oklahoma explicitly exclude fertility drugs from their public medical assistance programs.<sup>50</sup> And Montana, New Jersey, Ohio, Pennsylvania, and Rhode Island do not provide infertility treatments to recipients of Medicaid, the State Children’s Health Insurance Program, or other state medical assistance programs.<sup>51</sup>

As can be seen from the statutes already in place, several policy positions have been expressed through the regulation of the health insurance industry’s coverage of assisted reproduction. For instance, the states that limit coverage to married couples simultaneously exclude unmarried couples and single people, reflecting a bias against their fitness as parents. The limitation to medical infertility likewise excludes the situationally infertile.

The states that require couples to use their own sperm and eggs discourage the use of donor gametes. The imposition of age limits may be based on medical concerns or concerns about the ability of older parents to raise their children to adulthood, but it may also be based on preconceived notions of what is an appropriate age to become a parent. The exclusion of public benefits for infertility services not only reveals possible concerns about the financial cost of parenthood, but also may reflect a historical prejudice in our country against low-income parents.<sup>52</sup>

From a progressive perspective, the religious exemptions in some of these laws seem especially problematic. Religious exemptions in the context of reproductive health care are nothing new. Numerous states allow individuals and facilities to refuse to provide abortion care, counseling, or referrals on religious grounds, and federal funding requires hospitals to allow employees to opt out of providing such care. Some states also allow pharmacists and/or pharmacies to refuse to fill prescriptions for birth control or emergency contraception if it interferes with their religious beliefs.

Although the practice of any religion should be accorded great respect, when a religiously affiliated entity engages in a pervasively secular service such as the provision of insurance or employing staff for predominately nonreligious activities, secular standards of conduct should apply. In short, those who would otherwise be eligible for insurance coverage should be able to obtain such coverage.

Beyond the questions raised by the above limitations is the threshold question of whether health insurance coverage for infertility treatments should be a priority

for policymakers in the first place. Not to minimize the suffering of people who face infertility, but with 47 million people in the United States lacking health insurance for basic health care, it may be hard to justify investing substantial resources in what is a relatively new and still somewhat experimental medical field.

Moreover, our resources may be better spent investigating and addressing the upstream causes of infertility, such as untreated sexually transmitted infections and exposure to environmental toxins. That said, where legislators have acted to expand access to infertility services, it is incumbent upon progressives to ensure that restrictions are based on rational and legitimate reasons rather than abject bias.

## **Employer-Based Health Insurance and Federal Antidiscrimination Laws:**

### ***The Americans with Disabilities Act, Title VII of the Civil Rights Act, and the Pregnancy Discrimination Act***

Rochelle Saks received health benefits from her employer, Franklin Covey Co. The health plan covered several types of infertility products and procedures, including fertility drugs and most surgical infertility treatments. The plan did not, however, cover surgical impregnation procedures such as IUI and IVF, all of which happen to be performed only on women. Do such exclusions amount to sex discrimination, pregnancy discrimination, and/or disability discrimination? As we shall see in the cases detailed below, lawsuits on these grounds have uniformly failed for Saks and others in her position.

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## The Americans with Disabilities Act

Congress passed the Americans with Disabilities Act in order to protect people with disabilities from discrimination in the terms, conditions, or privileges of their employment, which includes the provision of fringe benefits such as health insurance.<sup>53</sup> In order to qualify as a person with a disability under the ADA, one must establish that he or she has a physical or mental impairment that substantially limits a major life activity.<sup>54</sup>

Initially, the courts were split when considering whether infertility qualified as a disability under the ADA.<sup>55</sup> In *Bragdon v. Abbott*,<sup>56</sup> however, the Supreme Court ruled that reproduction was a major life activity and that a person with HIV qualified for protection under the ADA because HIV substantially impaired that major life activity.

Since that ruling, courts have readily found that infertility also is a physical impairment that substantially affects the major life activity of reproduction, and a person struggling with infertility falls within the class of people the ADA was designed to protect.<sup>57</sup>

Nevertheless, courts have been reluctant to find a violation of the ADA simply because an employer's health plan excludes some or all infertility treatments. The primary reason for this outcome is that the health plans at issue have offered the same set of benefits to both infertile and fertile employees.<sup>58</sup> Therefore the benefits received are not conditioned upon a person's fertility.

Second, the courts have consistently read the ADA not to require insurance companies to offer a specific set of ben-

efits: "Had Congress intended to control which coverages had to be offered by employers, it would surely have spoken more plainly."<sup>59</sup> The fact that the selection of benefits offered may adversely affect people with specific disabilities is of no consequence, so long as the restriction was not intended to burden that class of people.

## Title VII and the Pregnancy Discrimination Act

Only two federal appellate courts have considered whether health plans that exclude infertility treatments violate Title VII of the Civil Rights Act of 1964 or the Pregnancy Discrimination Act. Both ruled against the plaintiffs.<sup>60</sup>

Title VII prohibits discrimination in employment based on a number of factors, including discrimination "because of sex."<sup>61</sup> The Pregnancy Discrimination Act amends Title VII's definition of that phrase to include discrimination "on the basis of pregnancy, childbirth, or related medical conditions."<sup>62</sup>

In *Krauel v. IMMC*, the plaintiff argued that because there is a causal connection between infertility and pregnancy, infertility was a medical condition "related to" pregnancy. Therefore, a health plan's failure to provide infertility treatments violated the PDA. The court disagreed, explaining that pregnancy and childbirth "occur after conception [and] are strikingly different from infertility, which prevents conception." The court also found that unlike pregnancy or potential pregnancy, infertility is a condition that applies to both men and women. Thus a policy that denies benefits for the treatment of infertility is gender neutral.<sup>63</sup>



Similarly, in *Saks v. Franklin Covey Co.*, the Second Circuit found no violation of the PDA because fertility or reproductive capacity, as distinct from childbearing capacity, is common to both men and women. Because the PDA was intended to clarify the scope of sex discrimination under Title VII, the court concluded that a condition must be unique to women in order for it to fall within the PDA.<sup>64</sup>

Because the Franklin Covey plan only excluded fertility procedures that were performed on women, Rochelle Saks also argued that the exclusion violated Title VII's prohibition on sex discrimination. The court acknowledged that in some circumstances, complete coverage of male surgeries but not female surgeries might constitute a violation. But even though surgical impregnation procedures could only be performed on women, they could be used to overcome either male or female infertility. Therefore, the exclusions of those procedures disadvantaged men and women equally.<sup>65</sup>

Some have suggested that case law regarding contraceptive equity may provide some guidance in this field.<sup>66</sup> In *Erickson v. Bartell Drug Co.*,<sup>67</sup> the Western District of Washington found that because only women use prescription contraceptives, a health plan's failure to cover prescription contraceptives constituted sex and pregnancy discrimination. Yet the only appellate court to rule on the matter, the Eighth Circuit, recently came to the opposite conclusion.<sup>68</sup>

Even if the courts were to reach consensus on the contraceptive question, the *Saks* court found a distinction between the two circumstances. It viewed the contraceptive exclusion as burdening only women, but saw the surgical impregnation exclusion as disadvantaging both women and men.

From a review of the decisions, it is clear that the courts are not likely to interpret these statutes as requiring the inclusion of infertility treatments in employer health benefit plans. If the result is to change, Congress must amend existing law.<sup>69</sup>

The PDA itself was a congressional response to a Supreme Court decision that found no sex discrimination when an employee disability benefits plan provided compensation during all periods of disability except pregnancy. Congress disagreed with the Court and passed the PDA in order to correct the mistake.<sup>70</sup>

Once again, though, progressives must first determine whether there is value in changing the antidiscrimination laws to ensure coverage of infertility treatments under employee health benefit plans. Specifically:

- Does the lack of coverage of such care discriminate against infertile people?
- When plans exclude procedures that are performed only on women but can be used to correct infertility in both women and men, do they discriminate on the basis of sex?
- Should infertility be considered sufficiently related to pregnancy to fall under the PDA's protection?
- Are society's interests best served by advocating for expanded coverage of infertility treatments or for some other type of health care?

These questions do not have easy answers, but it is important that we ask them and attempt to resolve them.

## Endnotes

- 1 Naturally, the commercial structure of the fertility industry also has real-life ramifications, but that topic is beyond the scope of this paper. For a thorough review of the market aspects of assisted reproduction, see Debora L. Spar, *The Baby Business: How Money, Science, and Politics Drive the Commerce of Conception* (Boston: Harvard Business School Press, 2006).
- 2 Rob Stein, "First U.S. Uterus Transplant Planned; Some Experts Say Risk Isn't Justified," *The Washington Post*, January 15, 2007, p. A01.
- 3 "Hidden No More: What Everyone Should Know About Infertility," available at [http://www.resolve.org/site/PageServer?pagename=lrn\\_wii\\_home](http://www.resolve.org/site/PageServer?pagename=lrn_wii_home) (last accessed November 2007); "Fast Facts About Infertility," available at [http://www.resolve.org/site/PageServer?pagename=fmed\\_mcff\\_ffj](http://www.resolve.org/site/PageServer?pagename=fmed_mcff_ffj) (last accessed November 2007).
- 4 "Infertility Myths and Facts," available at [http://www.resolve.org/site/PageServer?pagename=lrn\\_ffaf\\_moi](http://www.resolve.org/site/PageServer?pagename=lrn_ffaf_moi) (last accessed November 2007).
- 5 "Frequently Asked Questions About Infertility," available at [www.resolve.org/site/PageServer?pagename=lrn\\_wii\\_faq](http://www.resolve.org/site/PageServer?pagename=lrn_wii_faq) (last accessed November 2007).
- 6 See Liza Mundy, *Everything Conceivable: How Assisted Reproduction Is Changing Men, Women, and the World* (New York: Knopf, 2007), ch. 5-7.
- 7 Some have noted that people who provide eggs or sperm for a fee are "vendors," not "donors." However we will use the term "donor" in this paper because of its current widespread use.
- 8 "Multiple Pregnancy and Birth: Considering Fertility Treatments," available at [http://www.asrm.org/Patients/multiple\\_pregnancy\\_and\\_birth.pdf](http://www.asrm.org/Patients/multiple_pregnancy_and_birth.pdf) (last accessed November 2007).
- 9 The variation used will depend on the type of fertility problem that is in need of correction.
- 10 Originally, PGD and PGS were used primarily to screen for early-onset life-threatening or severely impairing diseases. However, PGD and PGS also have been used for late-onset diseases, for diseases that are not severely debilitating, or for non-therapeutic characteristics such as sex. The current and potential uses of this technology have raised criticism from some activists in the disability rights, civil rights, women's rights, and LGBT rights movements.  
  
For an overview of the laws governing mistakes in the use of PGD, donor gametes with genetic abnormalities, and a failure to warn family member of the results of genetic tests, see Susan L. Crockin, "Overview of Court Decisions Involving Reproductive Genetics" (Washington: Genetics and Public Policy Center, 2007), available at [http://www.dnapolicy.org/resources/Overviewofcourtdecisions\\_Crockin.pdf](http://www.dnapolicy.org/resources/Overviewofcourtdecisions_Crockin.pdf) (last accessed November 2007).
- 11 "Multiple Pregnancy and Birth: Considering Fertility Treatments," available at [http://www.asrm.org/Patients/multiple\\_pregnancy\\_and\\_birth.pdf](http://www.asrm.org/Patients/multiple_pregnancy_and_birth.pdf) (last accessed November 2007).
- 12 For a more in-depth overview of reproductive and genetic technologies, see Emily Galpern, "Assisted Reproductive Technologies: Overview and Perspective Using a Reproductive Justice Framework" (Oakland: Center for Genetics and Society, 2007), available at <http://geneticsandsociety.org/downloads/ART.pdf> (last accessed November 2007).
- 13 Anne Harding, "Survey belies tales of donor egg market gone awry," Reuters News Service, May 31, 2007, available at <http://uk.reuters.com/article/healthNews/idUKFLE16477220070531> (last accessed November 2007).
- 14 Peggy Orenstein, "Your Gamete, Myself," *New York Times Magazine*, July 15, 2007, available at <http://www.nytimes.com/2007/07/15/magazine/15Egg-t.html?ex=1187409600&en=41cd9fb9fb0178d5&ei=5070> (last accessed November 2007).
- 15 Ibid.
- 16 Spar, *The Baby Business*, at xi, 46.
- 17 "ASRM Issues Guidelines For Egg Freezing To Preserve Fertility For Some Young Women," available at [www.kaisernetwork.org/daily\\_reports/rep\\_index.cfm?hint=2&DR\\_ID=48371](http://www.kaisernetwork.org/daily_reports/rep_index.cfm?hint=2&DR_ID=48371) (last accessed November 2007).
- 18 Mundy, *Everything Conceivable*, p. 214. Multiple pregnancies also can result from the use of hormonal drugs, such as Clomid, that stimulate egg production.
- 19 March of Dimes, "Multiple Pregnancy and Birth: Considering Fertility Treatments" (2006), available at [http://www.asrm.org/Patients/multiple\\_pregnancy\\_and\\_birth.pdf](http://www.asrm.org/Patients/multiple_pregnancy_and_birth.pdf) (last accessed November 2007); Shari Roan, "Multiple births, multiple risks; The recent news of sextuplet births isn't being celebrated by fertility experts," *Los Angeles Times*, June 25, 2007, p. F01.
- 20 Mundy, *Everything Conceivable*, p. 215-19; American Society of Reproductive Medicine, "Patient's Fact Sheet: Complications of Multiple Gestations" (2001), available at <http://www.asrm.org/Patients/FactSheets/complications-multi.pdf> (last accessed November 2007).

- 21 American Society of Reproductive Medicine, "Patient's Fact Sheet: Challenge of Parenting Multiples" (2003), available at <http://www.asrm.org/Patients/FactSheets/challenges.pdf> (last accessed November 2007).
- 22 Mark Henderson, "Single embryo IVF 'boosts chance of success while reducing the risk.'" *The London Times*, June 11, 2007, available at <http://www.timesonline.co.uk/tol/news/uk/science/article1913144.ece> (last accessed November 2007).
- 23 The Practice Committee of the Society for Assisted Reproductive Technology and the Practice Committee of the American Society for Reproductive Medicine, "Guidelines on number of embryos transferred" (2006), available at <http://www.asrm.org/Media/Practice/NoEmbryosTransferred.pdf> (last accessed November 2007).
- 24 Tom Rawstorne, "Are fertility treatments damaging our children?" *The Daily Mail*, June 18, 2007, available at [http://www.dailymail.co.uk/pages/live/articles/health/womenfamily.html?in\\_article\\_id=462644&in\\_page\\_id=1799](http://www.dailymail.co.uk/pages/live/articles/health/womenfamily.html?in_article_id=462644&in_page_id=1799) (last accessed November 2007).
- 25 Andrea Boggio, "Italy enacts new law on medically assisted reproduction," *Human Reproduction* 20(5) (2005): 1153-1157, available at <http://humrep.oxfordjournals.org/cgi/content/full/20/5/1153> (last accessed November 2007).
- 26 "Frequently Asked Questions About Fertility," available at [www.asrm.org/Patients/faqs.html#Q6](http://www.asrm.org/Patients/faqs.html#Q6) (last accessed November 2007).
- 27 Spar, *The Baby Business*, p. x-xii, 46.
- 28 Restrictions on services imposed by insurance companies also carry policy implications, but those are beyond the scope of this paper.
- 29 For instance, some laws apply only to HMOs or exempt only HMOs. Each law specifies which types of health plans must cover or offer to cover infertility services. Likewise, most of the laws regulating coverage of infertility services specify which services must be included and sometimes mention which services may be excluded.
- 30 States that require insurers to include coverage of particular infertility treatments in their health plans include Arkansas, Connecticut, Hawaii, Illinois, Maryland, Massachusetts, Montana, New Jersey, New York, Ohio, Rhode Island, and West Virginia. See ARK. CODE ANN. §§ 23-86-118, 23-85-137 (2007); CONN. GEN. STAT. §§ 38a-509, 38a-536 (2007); HAW. REV. STAT. §§ 431:10A-116.5, 432:1-604 (2007); 215 ILL. COMP. STAT. 5/356m, 125/5-3 (2007); MD. CODE ANN., INS. § 15-810 (2007); MD. CODE ANN., HEALTH-GEN. § 19-701 (2007); MASS. GEN. LAWS ch. 175, § 47H; ch. 176A, § 8K; ch. 176B, § 4J; ch. 176G, § 4 (2007); MONT. CODE ANN. §§ 33-31-102, 33-22-1521 (2005); N.J. STAT. ANN. §§ 17:48-6x, 17:48A-7w, 17:48E-35.22, 17B:27-46.1x, 26:2J-4.23 (2007); N.Y. INS. LAW §§ 3221(k)(6), 4303(s) (2007); OHIO REV. CODE ANN. § 1751.01 (2007); R.I. GEN. LAWS §§ 27-18-30, 27-19-23, 27-20-20, 27-41-33 (2007); W. VA. CODE § 33-25A-2 (2007); see also "States mandating infertility insurance coverage," available at [www.inciid.org/article.php?cat=statemandates&id=275](http://www.inciid.org/article.php?cat=statemandates&id=275) (last accessed November 2007).
- 31 California and Texas only require health plans to offer coverage of infertility services for those who want it included in their health plan. See CAL. HEALTH & SAFETY CODE § 1374.55 (2007); TEX. INS. CODE ANN. §§ 1366.001-.007 (2007); see also "States mandating infertility insurance coverage," available at [www.inciid.org/article.php?cat=statemandates&id=275](http://www.inciid.org/article.php?cat=statemandates&id=275) (last accessed November 2007).
- 32 LA. REV. STAT. ANN. § 22:215.23 (2007); NEV. REV. STAT. ANN. §§ 689A.0415, 689B.0376, 695B.1916, 695C.1694, 695C.1715 (2007).
- 33 Arkansas, Hawaii, Maryland, Rhode Island, and Texas have marriage requirements. See ARK. CODE ANN. §§ 23-86-118, 23-85-137 (2007); 054 00 Ark. Reg. 001 (2007); HAW. REV. STAT. §§ 431:10A-116.5, 432:1-604 (2007); MD. CODE ANN., INS. § 15-810 (2007); MD. CODE ANN., HEALTH-GEN. § 19-701 (2007); R.I. GEN. LAWS §§ 27-18-30, 27-19-23, 27-20-20, 27-41-33 (2007); TEX. INS. CODE ANN. §§ 1366.001-.007 (2007); 28 TEX. ADMIN. CODE § 11.512 (2007).
- 34 Arkansas, Hawaii, Maryland, and Texas require couples to use their own gametes. See ARK. CODE ANN. §§ 23-86-118, 23-85-137 (2007); 054 00 Ark. Reg. 001 (2007); HAW. REV. STAT. §§ 431:10A-116.5, 432:1-604 (2007); MD. CODE ANN., INS. § 15-810 (2007); MD. CODE ANN., HEALTH-GEN. § 19-701 (2007); TEX. INS. CODE ANN. §§ 1366.001-.007 (2007); 28 TEX. ADMIN. CODE § 11.512 (2007).
- 35 CONN. GEN. STAT. §§ 38a-509, & 38a-536 (2007).
- 36 N.J. STAT. ANN. §§ 17:48-6x, 17:48A-7w, 17:48E-35.22, 17B:27-46.1x, 26:2J-4.23 (2007).
- 37 N.Y. INS. LAW §§ 3221(k)(6), 4303(s) (2007).
- 38 R.I. GEN. LAWS §§ 27-18-30, 27-19-23, 27-20-20, 27-41-33 (2007).
- 39 CONN. GEN. STAT. §§ 38a-509, 38a-536 (2007).
- 40 HAW. REV. STAT. §§ 431:10A-116.5, 432:1-604 (2007).
- 41 215 ILL. COMP. STAT. 5/356m, 125/5-3 (2007).
- 42 MD. CODE ANN., INS. § 15-810 (2007); MD. CODE ANN., HEALTH-GEN. § 19-701 (2007).
- 43 N.J. STAT. ANN. §§ 17:48-6x, 17:48A-7w, 17:48E-35.22, 17B:27-46.1x, & 26:2J-4.23 (2007).
- 44 Instead of setting caps, Massachusetts requires parity for infertility services: it does not allow health plans to set benefit maximums that are more restrictive than those set for services unrelated to infertility. MASS. GEN. LAWS ch. 175, § 47H; ch. 176A, § 8K; ch. 176B, § 4J; ch. 176G, § 4 (2007); 211 MASS. CODE REGS. §§ 37.00-37.12 (2007).
- 45 The Catholic Church, for instance, prohibits any assisted reproduction procedures that involve obtaining sperm through masturbation, adding a third party into the act of conception, or substituting a laboratory procedure for intercourse, effectively prohibiting most types of assisted reproduction. "Reproductive Technology (Evaluation & Treatment of Infertility) Guidelines for Catholic Couples," available at [www.usccb.org/prolife/issues/nfp/treatment.htm](http://www.usccb.org/prolife/issues/nfp/treatment.htm) (last accessed November 2007). The states with religious exemptions are California, Connecticut, Illinois, Maryland, Massachusetts, New Jersey, and Texas. See CAL. HEALTH & SAFETY CODE § 1374.55 (2007); CONN. GEN. STAT. §§ 38a-509, 38a-536 (2007); 215 ILL. COMP. STAT. 5/356m, 125/5-3 (2007); MD. CODE ANN., INS. § 15-810 (2007); MD. CODE ANN., HEALTH-GEN. § 19-701 (2007); MASS. GEN. LAWS ch. 175, § 47H; ch. 176A, § 8K; ch. 176B, § 4J; ch. 176G, § 4 (2007); N.J. STAT. ANN. §§ 17:48-6x, 17:48A-7w, 17:48E-35.22, 17B:27-46.1x, 26:2J-4.23 (2007); TEX. INS. CODE ANN. §§ 1366.001-.007 (2007).

- 46 MASS. GEN. LAWS ch. 175, § 47H; ch. 176A, § 8K; ch. 176B, § 4J; ch. 176G, § 4 (2007).
- 47 CONN. GEN. STAT. §§ 38a-509, 38a-536 (2007).
- 48 CONN. GEN. STAT. §§ 38a-509, 38a-536 (2007); N.J. STAT. ANN. §§ 17:48-6x, 17:48A-7w, 17:48E-35.22, 17B:27-46.1x, 26:2J-4.23 (2007).
- 49 To our knowledge, no state provides coverage of infertility treatments to recipients of public benefits. We simply mention here those states that have expressly codified the exclusions in their statutes or regulations. Several states also explicitly exclude coverage of fertility drugs or other infertility services within their state plans for medical assistance.
- 50 MINN. STAT. § 256B.0625, Subd. 13(a) (2006); 56 OKLA. STAT. § 204 (2007).
- 51 MONT. ADMIN. R. 37.79.309, 37.85.207 (2007); N.J. STAT. ANN. §§ 17:48-6x, 17:48A-7w, 17:48E-35.22, 17B:27-46.1x, 26:2J-4.23 (2007); OHIO ADMIN. CODE §§ 5101:3-2-03, 5101:3-4-07, 5101:3-4-28 (2007); PA. STAT. ANN. tit. 62, § 443.6 (2006); R.I. GEN. LAWS § 23-13-21 (2007).
- 52 In contrast, for instance, the IRS allows individuals to include some infertility treatment costs in deductible health care costs, which benefits those who can afford out-of-pocket payments for services in the first place. See, e.g., Sandra Block, "Individual Insurance Buyers Should Check IRS Deductions," *USA Today*, Oct. 14, 2003, available at [http://www.usatoday.com/money/perfi/columnist/block/2003-10-14-ym\\_x.htm](http://www.usatoday.com/money/perfi/columnist/block/2003-10-14-ym_x.htm) (last accessed November 2007).
- 53 *Saks v. Franklin Covey Co.*, 117 F. Supp. 2d 318, 323 (S.D.N.Y. 2000).
- 54 See *Krauel v. Iowa Methodist Med. Ctr.*, 95 F.3d 674, 677 (8th Cir. 1996).
- 55 *Ibid.*
- 56 *Bragdon v. Abbott*, 524 U.S. 624 (1998).
- 57 *LaPorta v. Wal-Mart Stores, Inc.*, 163 F. Supp. 2d 758, 765 (W.D. Mich. 2001); *Saks*, 117 F. Supp. 2d at 324.
- 58 *Krauel*, 95 F.3d at 678; *Saks*, 117 F. Supp. 2d at 326.
- 59 *Alexander v. Am. Airlines*, 2002 U.S. Dist. LEXIS 7089, \*6 (N.D. Tex.); cf. *Niemeier v. Tri-State Fire Protection Dist.*, 2000 U.S. Dist. LEXIS 12621, \*19 (N.D. Ill.) (noting that the PDA does not require an employer to cover every expense associated with pregnancy; it just must treat pregnancy and related conditions in a neutral way).
- 60 Some courts have found potential PDA or Title VII violations, however, when an employee has experienced an adverse employment action (like termination) for taking leave in order to undergo surgical impregnation. *Erickson v. Bd. of Governors*, 911 F. Supp. 316 (N.D. Ill. 1995), *rev'd on other grounds*, 207 F.3d 945 (7th Cir. 2000); *Pacourek v. Inland Steel Co.*, 858 F. Supp. 1393 (N.D. Ill. 1994).
- 61 42 U.S.C. §§ 2000e to 2000e-17 (2000).
- 62 42 U.S.C. § 2000e(k) (2000).
- 63 *Krauel*, 95 F.3d at 679-80.
- 64 *Saks v. Franklin Covey Co.*, 316 F.3d 337, 345 (2d Cir. 2003).
- 65 The court did note that an argument could be made that the exclusion disadvantaged unmarried female employees as compared to unmarried male employees, but *Saks* did not make that argument.
- 66 See Justin Trent, *Health Care Law Chapter: Assisted Reproductive Technologies*, 7 GEO. J. GENDER & L. 1143, at \*10 (2006).
- 67 *Erickson v. Bartell Drug Co.*, 141 F. Supp. 2d 1266 (W.D. Wash. 2001).
- 68 *Standridge v. Union Pac. R.R. Co.*, 479 F.3d 936 (8th Cir. 2007).
- 69 Relief may also be available at the state level. Connecticut, for instance, includes fertility in its definition of discrimination on the basis of sex in its human rights statute. CONN. GEN. STAT. § 46a-51 (2007).
- 70 *Saks*, 316 F.3d at 343-44 (discussing Congress's reaction to *Gen. Elec. v. Gilbert*, 429 U.S. 125 (1976)).
- 71 Kevin Stack, "Her Embryos or His?" *Los Angeles Times*, May 30, 2007, p. A1.
- 72 *Ibid.*
- 73 "Court Won't Hear Battle over Embryos," *The New York Times*, Aug. 26, 2007, available at [http://www.nytimes.com/2007/08/26/us/26embryos.html?\\_r=2&oref=slogin&oref=slogin](http://www.nytimes.com/2007/08/26/us/26embryos.html?_r=2&oref=slogin&oref=slogin) (last accessed November 2007).
- 74 Mundy, *Everything Conceivable*, p. 7.
- 75 See CAL. HEALTH & SAFETY CODE § 125315 (2007); CONN. GEN. STAT. § 19a-32d (2007); MD. CODE ANN. art. 83A, § 5-2B-10 (2007); N.J. STAT. ANN. § 26:2Z-2 (2007); see also MASS. GEN. LAWS ch. 111L, § 4 (2007) (similar to other statutes but no requirement of written consent for research donation).
- 76 Massachusetts does require that an informed consent form be executed by the patient prior to treatment, but only with regard to the nature of the treatment, not to the disposition of unused embryos. See also CAL. PENAL CODE § 367g (2007).
- 77 FLA. STAT. § 742.17 (2007).
- 78 In addition, New Mexico states that IVF will not be governed as clinical research provided that the procedure includes "provisions to ensure that each living fertilized ovum, zygote or embryo is implanted in a human female recipient." But it does not appear to mandate affirmatively that every embryo created be implanted in a woman. N.M. STAT. ANN. § 24-9A-1 (2007).
- 79 N.H. REV. STAT. ANN. § 168-B:15 (2007).
- 80 See LA. REV. STAT. ANN. §§ 9:121-9:133 (2007).

- 81 One could read the law to say that fetuses, and therefore embryos, have no rights. But there would be little purpose in enacting such a law.
- 82 For further analysis of the Louisiana human embryo statutes, see Jessica Arons, "Sex, Lies, and Embryos," *Science Progress*, October 16, 2007, available at [www.scienceprogress.org/2007/10/sex-lies-and-embryos/](http://www.scienceprogress.org/2007/10/sex-lies-and-embryos/) (last accessed November 2007).
- 83 Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992).
- 84 Ibid. at 597.
- 85 Ibid.
- 86 Ibid. at 601.
- 87 Ibid.
- 88 Ibid. at 602.
- 89 Kass v. Kass, 696 N.E.2d 174 (N.Y. 1998).
- 90 In addition to looking to the text in statutes to decide cases, courts often look to the policies that underlie or are expressed by the statutes. Some contracts are said to be against public policy if they are seen as injurious to the public good, and courts will refuse to enforce them for that reason. See, e.g., Black's Law Dictionary 1041 (5<sup>th</sup> ed. 1979).
- 91 Kass, 696 N.E.2d at 180.
- 92 J.B. v. M.B., 783 A.2d 707 (N.J. 2001); In re Witten, 672 N.W.2d 768 (Iowa 2003).
- 93 J.B., 783 A.2d at 719.
- 94 In re Witten, 672 N.W.2d at 783.
- 95 A.Z. v. B.Z., 725 N.E.2d 1051, 1057-58 (Mass. 2000); J.B., 783 A.2d at 717-18; In re Witten, 672 N.W.2d at 781.
- 96 Davis, 842 S.W.2d at 604.
- 97 Litowitz v. Litowitz, 48 P.3d 261 (Wash. 2002).
- 98 Roman v. Roman, 193 S.W.3d 40, 48 (Tex. App. 2006).
- 99 Ibid. at 49-50.
- 100 Ibid. at 53.
- 101 Mundy, *Everything Conceivable*, p. 101 (quoting an adoption lawyer).
- 102 Elizabeth Marquardt, "When 3 Is Really a Crowd," *The New York Times*, July 16, 2007, available at <http://www.nytimes.com/2007/07/16/opinion/16marquardt.html> (last accessed November 2007).
- 103 Johnson v. Calvert, 851 P.2d 776 (Cal. 1993); see also Belsito v. Clark, 644 N.E.2d 760 (Ohio Misc. 1994). Of course, these decisions are each made based upon a particular set of facts, and it is impossible to predict the extent to which prior agreements, understandings, and actions influenced each judicial outcome.
- 104 Andrea F. Siegel, "Ruling Alters Idea of Mother," *Baltimore Sun*, May 17, 2007.
- 105 Galpern, *supra* note 12, "Assisted Reproductive Technologies," available at <http://geneticsandsociety.org/downloads/ART.pdf>.
- 106 "The Uniform Parentage Act of 2002," available at <http://family-law.lawyers.com/paternity/The-Uniform-Parentage-Act-of-2002.html> (last accessed November 2007).
- 107 See Maria Kokiasmenos & Lori Mihalich, *Health Care Law Chapter: Assisted Reproductive Technology*, 5 GEO. J. GENDER & L. 619, at \*3-4.
- 108 Elisa B. v. Emily B., 117 P.3d 660 (Cal. 2005); see also In re Parentage of Robinson, 890 A.2d 1036 (N.J. Super. 2005); Chambers v. Chambers, 2002 Del. Fam. Ct. LEXIS 39. But see In re Parentage of L.B., 122 P.3d 161 (Wash. 2005) (lesbian non-biological co-parent did not have standing to establish parentage under Washington Uniform Parentage Act, but she did have standing under the state's common law).
- 109 K.M. v. E.G., 117 P.3d 673 (Cal. 2005).
- 110 In order to protect the privacy of the parties and their children, the court did not divulge the couple's last names.
- 111 In re C.K.G., 173 S.W.3d 714 (Tenn. 2005).
- 112 COLO. REV. STAT. § 19-4-106 (2006).
- 113 TEX. FAM. CODE ANN. § 160.704 (2007); UTAH CODE ANN. § 78-45g-704 (2007); WASH. REV. CODE § 26.26.715 (2007).
- 114 WASH. REV. CODE § 26.26.735 (2007).
- 115 WASH. REV. CODE § 26.26.101 (2007).
- 116 OHIO REV. CODE ANN. § 3111.97 (2007).
- 117 See Spar, *The Baby Business*, Ch. 6.
- 118 10 OKLA. STAT. §§ 554-556 (2007).
- 119 Spar, *The Baby Business*, p. 82.
- 120 In addition, although Maryland has not passed a law that addresses surrogacy, an Attorney General's opinion states that paid surrogacy contracts are generally illegal and unenforceable under the state law. However, the payment of a surrogacy fee will not be a bar to an adoption proceeding and may be considered with regard to the voluntariness of the birth mother's consent and other factors relevant to the adoption. 85 Op. Md. Att'y Gen. 348 (Dec. 19, 2000) (interpreting Md. CODE ANN., FAM. LAW § 5-362, which bars payment for children).

- 121 North Dakota and Washington fall into more than one category because they allow some types of contracts but void or ban others.
- 122 See, e.g., ALA. CODE § 26-10A-34 (2007); IOWA CODE § 710.11 (2006); OR. REV. STAT. § 163.537 (2005); W. VA. CODE § 48-22-803 (2007).
- 123 TENN. CODE ANN. § 36-1-102(48) (2007).
- 124 In the Matter of Baby M., 537 A.2d 1227, 1234 (N.J. 1988).
- 125 See also R.R. v. M.H., 689 N.E.2d 790 (Mass. 1998) (finding traditional surrogacy agreement unenforceable where compensation was paid beyond pregnancy-related expenses and mother was given no reasonable period after birth in which to revoke consent to father's custody).
- 126 Johnson v. Calvert, 851 P.2d 776 (Cal. 1993).
- 127 As noted previously, the court later clarified this position in K.M. v. E.G., 117 P.3d 673 (Cal. 2005).
- 128 Johnson, 851 P.2d at 787.
- 129 In re Marriage of Buzzanca, 72 Cal. Rptr. 2d 280 (Cal. Ct. App. 1998).
- 130 In re Marriage of Moschetta, 30 Cal. Rptr. 2d 893 (Cal. Ct. App. 1994).
- 131 Belsito v. Clark, 644 N.E.2d 760 (Ohio Ct. Comm. Pleas 1994); see also J.F. v. D.B., 848 N.E.2d 873 (Ohio App. 2006).
- 132 Dorothy Roberts, "Race and the New Reproduction," in *Killing the Black Body: Race, Reproduction and the Meaning of Liberty* (New York: Pantheon Press, 1997), available at <http://geneticsandsociety.org/article.php?id=1993> (last accessed November 2007).
- 133 Spar, *The Baby Business*, p. 82.
- 134 Katherine Drabiak, et al., "Ethics, Law, and Commercial Surrogacy: A Call for Uniformity" J.L. MED. & ETHICS, 300, 304, 306-308 (Summer 2007).
- 135 Ibid.
- 136 Due to the controversial nature of gestational agreements, the drafters made adoption of Part 8 of the 2002 Uniform Parentage Act optional for the states. See UNIF. PARENTAGE ACT Art. 8 cmt. at 68-69 (amended 2002), available at <http://www.law.upenn.edu/bll/archives/ulc/upa/final2002.pdf> (last accessed November 2007). Thus far, it appears that only Texas and Utah have enacted a version of it.
- 137 Arthur Caplan, "Should Kids Be Conceived after a Parent Dies?" *MSNBC.com*, June 27, 2007, available at <http://www.msnbc.msn.com/id/17937817/> (last accessed November 2007).
- 138 Claudia Wallis, "Quickening Debate over Life on Ice," *Time*, July 2, 1984, available at <http://www.time.com/time/magazine/article/0,9171,926680,00.html?iid=chix-sphere> (last accessed November 2007).
- 139 Linda Kramer, "He Looks Just Like His Dad," *People*, September 10, 2007, p. 111-12.
- 140 FLA. STAT. § 742.17 (2007).
- 141 VA. CODE ANN. § 20-158 (2007); see also VA. CODE ANN. §§ 64.1-5.1, 64.1-8.1 (2007).
- 142 COLO. REV. STAT. § 19-4-106 (2006); 13 DEL. C. § 8-707 (2007); N.D. CENT. CODE § 14-20-65 (2007); TEX. FAM. CODE § 160.707 (2007); UTAH CODE ANN. § 78-45g-707 (2007); WASH. REV. CODE § 26.26.730 (2007); WYO. STAT. ANN. § 14-2-907 (2007).
- 143 UNIF. PARENTAGE ACT § 707, at 67 (amended 2002), available at <http://www.law.upenn.edu/bll/archives/ulc/upa/final2002.pdf> (last accessed November 2007).
- 144 Gillett-Netting v. Barnhart, 371 F.3d 593 (9th Cir. 2004).
- 145 Stephen ex rel. Stephen v. Barnhart, 386 F. Supp. 2d 1257 (M.D. Fla. 2005).
- 146 The Arizona Court of Appeals found that the presumption provision violated the Equal Protection Clause of the federal and state constitutions because it did not afford a genetic mother the opportunity to rebut a presumption of maternity. That case involved a dispute between the intended parents who had divorced. The court made no ruling as to the validity of the statute if a gestational surrogate wanted to keep the child. Soos v. Superior Court, 897 P.2d 1356 (Ariz. 1994).
- 147 Every state would void a contract with a person who is not competent to enter into a contract, but Washington goes a step further by penalizing those who induced the incompetent person to enter the contract. Michigan does so as well.
- 148 The Michigan Court of Appeals has interpreted the statute to mean that any surrogate parentage contract that requires both the impregnation of a surrogate and the relinquishment of her parental rights is void and unenforceable, and those that provide compensation are unlawful and prohibited. However, the Act does not prohibit contracts which compensate for conception or gestation services alone, meaning a commercial contract potentially could be upheld if payment is not conditioned on the surrender of the child. Jane Doe v. Atty. Gen., 487 N.W.2d 484 (Mich. Ct. App. 1992).
- 149 New Hampshire and Virginia's surrogacy laws are modeled after the 2000 version of the Uniform Parentage Act. Amy M. Larkey, Note, *Redefining Motherhood: Determining Legal Maternity in Gestational Surrogacy Arrangements*, 51 DRAKE L. REV. 605, 630 (2003).

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