

INSIDE: Repeal DOMA • Estate Planning Under Delaware's New Statute • And More

Delaware Lawyer

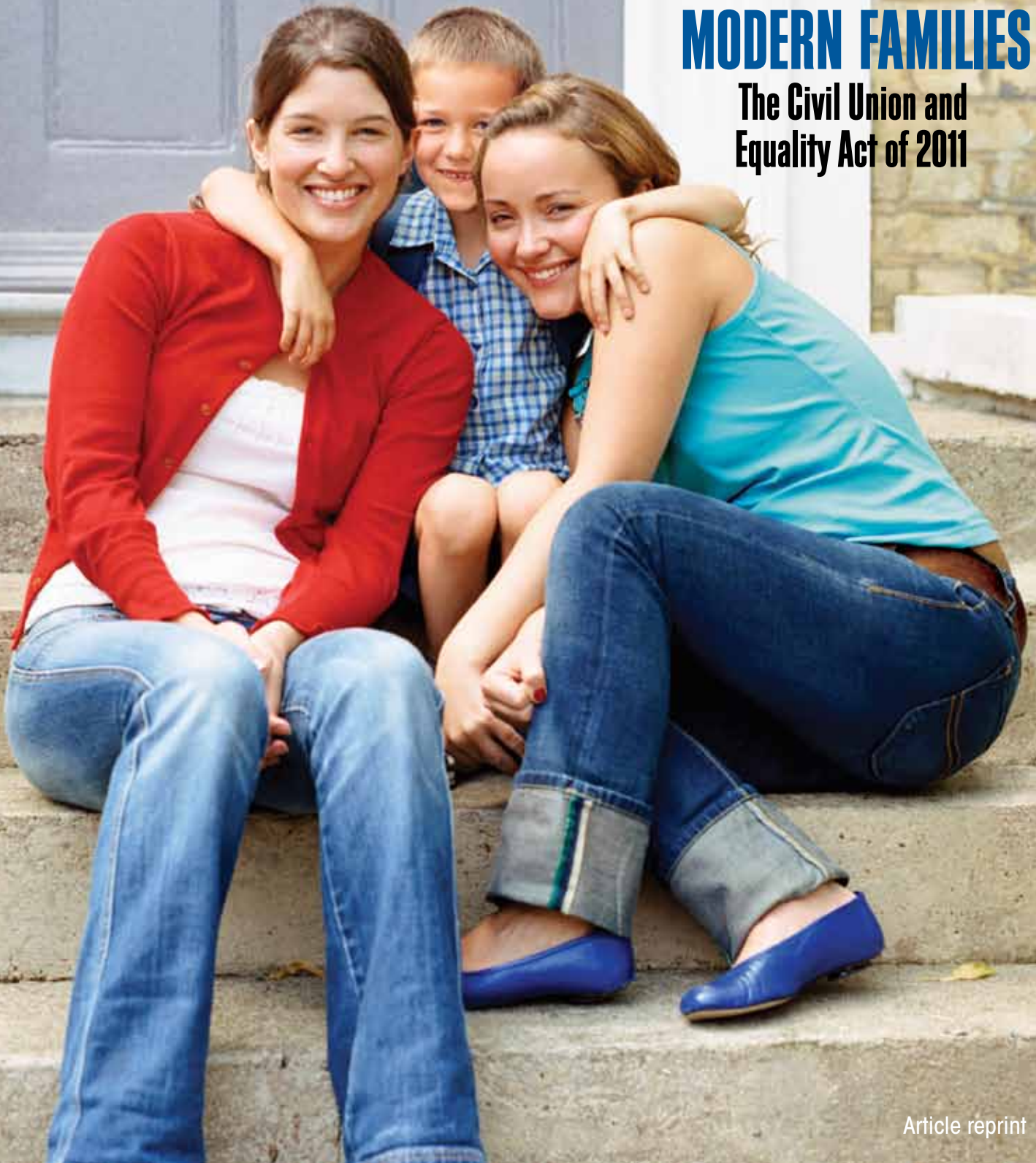
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MODERN FAMILIES

The Civil Union and
Equality Act of 2011



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FEATURE

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Civil Unions and Parentage

As advances in reproductive technology meet expanded rights for same-sex couples, new laws tackle the question, “Who is the parent?”

Five years ago in the pages of this magazine, we explored parentage and child support as these issues impacted same-sex families in interstate litigation:

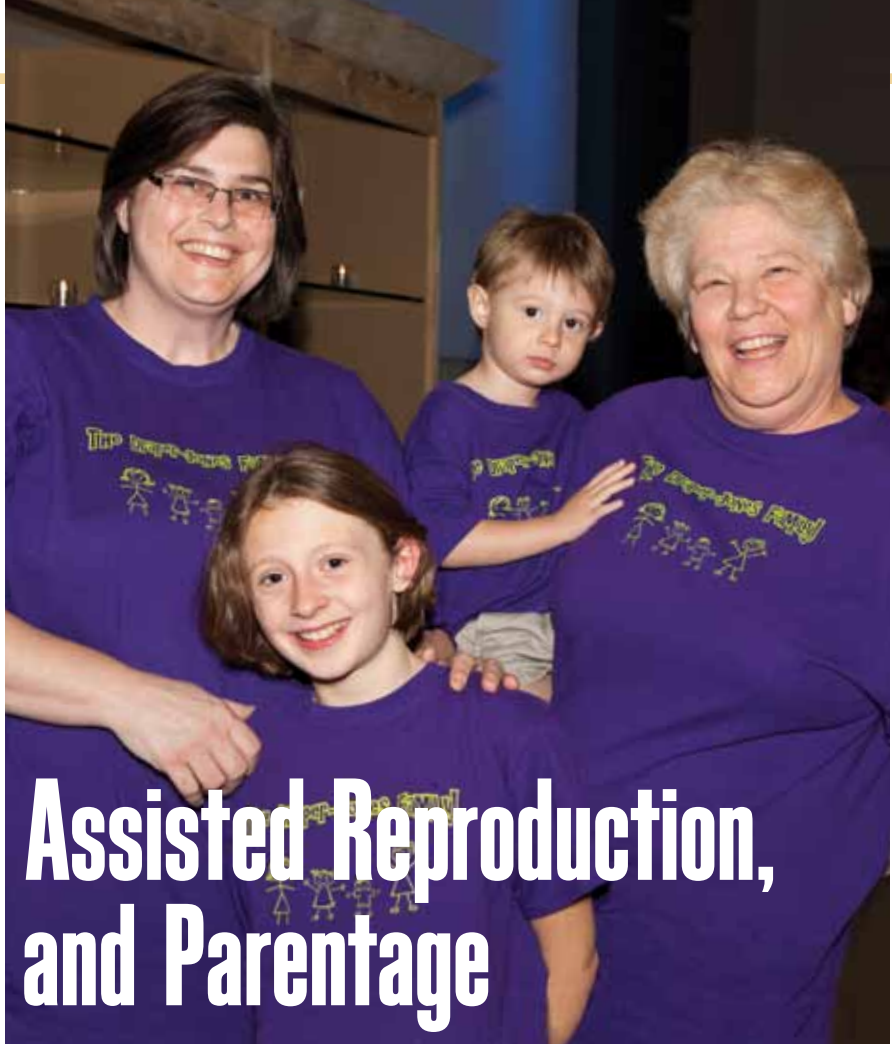
“The formation, recognition, and rights of [same-sex] families have been a constant source of not-so-polite public discourse and political wrangling. Adoption by gay individuals or partners led the way, though not without legal challenges. Medical interventions and scientific advances now offer a smorgasbord of assisted reproductive technologies, where a child may be biologically related to one, both, or neither member of the couple — and a child could have as many as six parents. Layered on top is the hot-button topic of the legal status a same-sex couple may obtain in some states or countries — domestic partnerships or gay marriage — and the *Defense of Marriage Act* (“DOMA”).”¹

Delaware’s *Civil Union and Equality Act of 2011* (“the Act”) changes the

legal landscape for determining a child’s legal parents in Delaware, and medical science has revolutionized the process of conceiving a child. Although the Act does not delineate an answer in each fact situation, it lays out straightforward principles that go a long way toward answering the question, “Who is the parent?”

Section 204² of the Act provides that the parties should be treated as married spouses “with respect to a child of whom either party becomes the parent during the term of the civil union.” Specifically, the marital presumption applies to the civil union parent, and he or she has the right to be named as parent on the child’s original birth certificate.

While this provision, especially when coupled with the requirement to construe the Act broadly “to accomplish its stated purposes”³ is a significant positive change, it likely will not eliminate parentage litigation — either within Delaware or in interstate cases.



B. Proud Photography

This article raises some of the potential legal arguments. It is important to remember, particularly when considering family law case law, that litigation stems from failed relationships and arrangements — and they frequently disintegrate with animus.

Lesbian Couples in a Civil Union

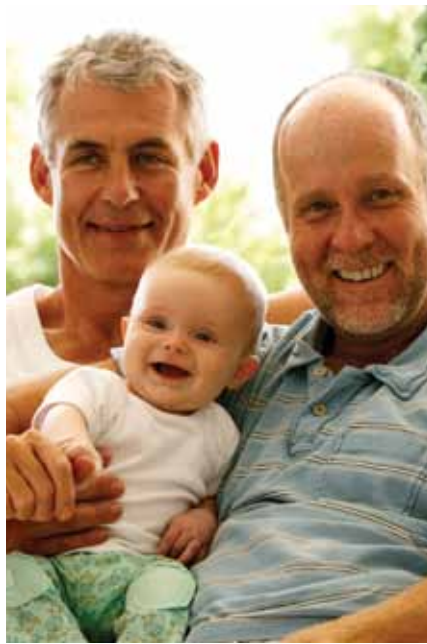
Where a child is born to one woman (using her egg), under the Act her civil union partner is presumed to be the legal parent of the child, entitled to the same standing as a husband with respect to a child born to his wife. The primary rule for a child born to a married woman is the marital presumption of legitimacy — her husband is the father of the child. The common law permitted rebuttal of the presumption only by proof that a husband was “beyond the four seas” — and thus could not possibly have fathered the child.

However, that era has long since passed. Today, the marital presumption is codified into state law. And, with the advent of and advances in genetic testing, the presumption is frequently rebuttable.⁴

Delaware’s *Uniform Parentage Act* (“UPA”) establishes a mother’s husband as the presumed father by operation of law “...until that status is rebutted or confirmed in a judicial proceeding.”⁵ An action to rebut the presumption may be brought within two years of the child’s birth by mother, husband or an individual claiming parental rights. This statutory period is not limited where the court finds certain facts present in the case.⁶

As the civil union partner stands in the shoes of the husband, it appears that the man providing the required sperm may have standing to assert his parental rights under § 8-607. However, UPA specifies that a donor is not a parent of a child conceived by means of assisted reproduction — unless intended to be the parent.

UPA does not distinguish between an anonymous sperm donor through an ART medical facility and donation by a known man — but



other states have drawn that distinction, and donation of sperm by a friend who remains involved with the child may raise questions as to whether the biological father is a third legal parent.⁷

It will be interesting to see whether the courts will be as reluctant to rebut the marital presumption, where the challenge to parentage is raised timely by either the mother or her presumed parent partner.

Modern reproductive technologies make it possible for a woman to give birth to a child with whom she has no genetic connection. As an alternative to straightforward artificial insemination, a lesbian couple may choose for the ova of one partner to be fertilized by a sperm donor and carried by her partner.

Sorting out parentage in such a situation is mind bending. On the one hand, under UPA, the mother-child relationship is established by a woman giving birth.⁸ Thus, the non-biological birth mother is a parent and, under the Act, her civil union partner — the child’s biological parent — is a presumed parent. On the other hand, in this case, the mother’s partner is the egg donor. As noted earlier, under the UPA a donor is not a parent — unless the donor establishes her intent to be

the child’s parent under § 8-703 by a consent signed by both partners.⁹

So, in this fact situation, does the presumption contradict the need for written consent? Perhaps not, though if the union falls apart, the lack of consent may be raised to rebut the marital presumption.

Gay Couples in a Civil Union

Despite all the advanced human reproductive technologies, it is still true that only a woman can give birth to a child. For a gay couple, a gestational mother is required, whether or not one of the partners donates sperm so the child will carry his genes or they use a sperm donor. A gestational mother can also be the child’s genetic parent if she provides the egg in addition to carrying the child. Obviously, the complications in these cases are myriad.¹⁰

The most recent version of UPA contains Article 8 covering gestational agreements; however, after considerable debate, the Uniform Law Commission (“ULC”) elected to mark this article as optional, so as not to sink the entire UPA.¹¹ Delaware did not enact Article 8 when it passed UPA in 2004;¹² however, neither does Delaware explicitly prohibit gestational agreements (also known as surrogacy agreements).

The Delaware Family Court, in *Hawkins v. Frye* (1988),¹³ held a contractual agreement to terminate parental rights contrary to public policy and, therefore, unenforceable in Delaware. The decision analogized the case to Baby M,¹⁴ New Jersey’s infamous surrogacy case. The holding found “receipt of money in connection with adoption is barred by Delaware law.”

Today gestational agreements are reportedly in wide use in Delaware. Twenty-three years after *Hawkins v. Frye*, it is reasonable to wonder whether the decision would be precedential were the gestational mother in such an agreement to assert her parental rights contrary to its terms.

Where one of the partners is the biological father and no valid gestational agreement exists, Delaware’s statutory

scheme appears fraught with complications. Giving birth establishes the mother-child relationship with the gestational mother (whether or not she is also a biological mother).¹⁵ The biological father may establish his parentage by executing and filing a voluntary acknowledgment of paternity under 13 Del. C. § 8-302.

Unless the acknowledgment is rescinded within 60 days or timely challenged within two years “a valid acknowledgment of paternity filed with the Office of Vital Statistics is equivalent to an adjudication of paternity of a child and confers upon the acknowledged father all of the rights and duties of a parent.”¹⁶

Federal law requires that every state give Full Faith and Credit to the valid acknowledgments signed in other states under its procedures.¹⁷ Where a man is established as the legal parent of a child during a civil union, would his legal partner automatically become a presumed parent of that child under the Act? Would the existence of two legal parents rebut the statutory presumption of the partner in a civil union? Or does Delaware’s civil union statute envision a child having three legal parents? What is in a child’s best interest?

It will be interesting to see how these issues are sorted out when — as is inevitable — relationships and agreements break down.

Enforcement of Parental Rights and Obligations

As we noted in our earlier article, “[b]ecause the establishment of duty [for child support] against a same-sex ex-partner has been recognized by the Family Court, Delaware would unlikely have a basis for precluding enforcement of a comparable order from another state, even though Delaware has enacted its own DOMA provision.”¹⁸

The Act makes this assumption a reality. It gives the Family Court “the non-exclusive jurisdiction ... for all proceedings for divorce and annulment of such civil unions, even if one or both parties no longer reside in [Delaware].”¹⁹ The grant of jurisdiction where all parties

have left the state is available “...if the jurisdiction of domicile or residence of the petitioner and/or respondent does not by law affirmatively permit such a proceeding to be brought in the courts of that jurisdiction.”²⁰

Offering continuing jurisdiction to dissolve a civil union created under Delaware law is reasonable and appropriate; however in interstate cases, the legal framework related to where disputes on issues of custody, parentage or child support are litigated may not line up with jurisdictions where a marriage or civil union may or may not be dissolved.

For example, a reading of DOMA and the underlying policies of relevant statutes related to children strongly suggest that a sister state will enforce a valid Delaware custody or child support order even if it will not recognize the validity of the Delaware civil union.

What remains a concern is whether a DOMA state will accept jurisdiction on a petition to establish or challenge parentage, custody or child support under the *Uniform Interstate Family Support Act* (“UIFSA”) or the *Uniform Child Custody Jurisdiction Enforcement Act* (“UCCJEA”) and what substantive rules will they apply.

For example, under UIFSA, a responding jurisdiction may not consider nonparentage as a defense where parentage has been previously determined.²¹ Is parentage “a right or claim arising from [the civil union]” and therefore falling within DOMA? Will other states accept the presumptive parentage established under Delaware’s civil union law as a “previously determined” parentage?

Passage of the *Respect for Marriage Act* (S.598) will ensure that the rights and obligations of civil union parents will be enforced everywhere. Besides repeal of DOMA, it can be hoped that same-sex families are more stable than opposite-sex marriages have been in recent decades. We also hope a respectful approach to the needs and best interests of children remain in the forefront when the adult relationship breaks down. ♦

FOOTNOTES

1. “Parentage and Child Support: Interstate Litigation and Same-Sex Parents,” *Delaware Lawyer*, Vol. 24, No. 1 (Spring 2006) at p. 26 (footnotes omitted).
2. 13 Del. C. § 204.
3. 13 Del. C. § 217(a).
4. See, e.g., “Paternity Disestablishment — Just the Facts, Please!” *Delaware Lawyer*, Vol. 24, No. 1 (Spring 2006) at p.24.
5. 13 Del. C. § 8-204.
6. The Court must find: “(1)(a) The presumed father and the mother of the child neither cohabited nor engaged in sexual intercourse with each other during the probable time of conception; and (b) The presumed father never openly held out the child as his own; or (2) The presumed father did not commence an action within the limitation period in reliance on the mother’s failure to disclose the possibility of any other alleged fathers.” 13 Del. C. § 8-607.
7. See, e.g., *Laura G. v. Peter G.*, 830 N.Y.S.2d 496(N.Y. Supr. 2007); *Ferguson v. McKirenan*, 940 A.2d 1236 (Pa. 2007).
8. 13 Del. C. § 8-201(a)(1).
9. A gender-neutral application of the UPA — as required — is sometimes challenging. As to sperm donors, the Delaware Supreme Court held that a man whose sperm was used by the mother to impregnate herself through ART without his consent was the not the child’s legal father as he had not signed the consent required by the UPA. *Adams-Hall v. Adams*, 3 A.3d 1096 (Del. 2010).
10. For a recent example, albeit involving a heterosexual couple, see, *T.V. v. New York State Department of Health*, 2011 N.Y. App. Div. LEXIS 6120 (N.Y. App. 2nd Dept Aug. 9, 2011).
11. See the Article 8 Gestational Agreement Prefatory Note in “*Uniform Parentage Act* (2000) (with Unofficial Annotations by John J. Sampson, Reporter)” *Family Law Quarterly*, Vol. 35, No. 1 (Spring 2001) at p. 166.
12. Only Texas and Utah have enacted Article 8.
13. *Hawkins v. Frye*, 1988 Del. Fam. Ct. LEXIS 31 (Del. Fam. Ct 1988).
14. *Matter of Baby M*, 537 A.2d 1227 (N.J. 1998).
15. As to whether the law allows a father to rebut the maternity of the gestational mother, see, e.g., *In re Roberto d.B.*, 923 A.2d 115 (Md. 2007) (relying on Maryland’s equal rights amendment to hold that courts must interpret the state’s paternity statute, which allows men to rebut paternity based on evidence of the lack of a genetic relationship, to apply equally to women).
16. 13 Del. C. § 8-305(a).
17. 42 U.S.C. § 666(a)(5)(C) (iv).
18. EN1, *supra*, at p.30
19. 13 Del. C. § 216.
20. *Id.*
21. 13 Del. C. § 6-315.