

Who's Your Momma? A Review of Surrogacy Rights of Partners in the Commonwealth of Massachusetts Helps to Answer This Question.

By Julie Dialessi-Lafley, Esq.

In 2003, the Massachusetts Supreme Judicial Court held that same-sex marriages were legal in the Commonwealth. The landmark decision in *Goodridge v. Massachusetts Department of Public Health* made same-sex unions legal in Massachusetts and applied all the benefits and laws regarding heterosexual marriages applicable to same-sex unions. However, in the wake of *Goodridge* many questions arose regarding the semantics of the new law and the applicability of certain traditions to same-sex unions. Not least among these were questions regarding parental and adoption rights of same-sex partners.

A popular option for same-sex couples wishing to have children has been surrogacy agreements. A surrogacy agreement is an agreement with an individual to carry and give birth to a child that may or may not share biological characteristics with one of the partners in a same-sex union. After the birth of the child, the surrogate relinquishes her parental rights, and the child is adopted by the partner who did not provide DNA for the child's conception. While these agreements are legal in the Commonwealth of Massachusetts, they are also strictly monitored by the courts, and unless the agreement complies with the rigid standards required by Massachusetts law, they can be voided by the court system. Among these rules are the requirement that a surrogate mother be paid no compensation for her carrying and delivery of the child. While the intended parents may, and usually do, pay all of the medical expenses associated with the pregnancy, no additional compensation may be given to the surrogate mother. Massachusetts courts have held that any surrogacy agreement

that provides for financial compensation for the surrogate can create an artificial financial incentive for potential surrogates. As a result, these types of agreements are considered contrary to public policy and are void in the Commonwealth of Massachusetts.

Additionally, Massachusetts law requires that any surrogate mother be given the right to refuse to relinquish her parental rights after the birth of the child. Therefore, any surrogacy agreement that requires the surrogate mother to relinquish her parental rights prior to the birth of the child will likely be voided by the court system if challenged. Despite the rigid requirements, surrogacy agreements remain one of the most popular options for same-sex couples and are often successful with a well-drafted agreement that complies with Massachusetts law. The important thing to remember is that any surrogacy agreement in the Commonwealth of Massachusetts that does not comply with the requirements of Massachusetts law will be considered void, as against public policy, and the courts will refuse to honor it.

Another option open to same-sex couples who wish to have children is adoption. Moreover, many same-sex partners choose to adopt the biological child of their partner. Since the children of same-sex couples generally share the biological characteristics of one parent, the other partner must adopt the child to be seen as a legal parent in the eyes of the law and be able to make personal, medical, and educational decisions on behalf of that child. The law of adoption in Massachusetts is purely statutory, and courts have interpreted the language of that law strictly and precisely.

Chapter 210 of the Massachu-

setts General Laws sets out the general requirements for adoption in the Commonwealth of Massachusetts. The courts have held that same-sex partners have the same right to adopt the children of their partner as a heterosexual partner. However, any person seeking to adopt a child in the state of Massachusetts must comply with the requirements of General Laws Chapter 210. Specifically, in order to begin adoption proceedings, a person seeking to adopt must petition the Probate and Family court to issue a decree of adoption. In order to succeed in making this petition, the petitioner must show that he or she can meet one of the five preconditions established in the General Laws, Chapter 210. These preconditions include that the child sought to be adopted has been placed with the petitioner or petitioners

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Services or by an agency authorized by said department for such purpose, the petitioner is a blood relative of the child sought to be adopted, the petitioner is a step-parent of the child sought to be adopted, the petitioner was nominated in the will of a deceased natural parent of the child as a guardian or an adoptive parent, or the petition for adoption has been approved in writing by the department of social services or by an agency authorized by said department.

Often the best course of action for a same-sex couple is to make a joint petition for adoption. When making a joint petition, Massachusetts law only requires one of the petitioners to meet the preconditions of Chapter 210. Therefore, if both the biological parent and the non-biological partner petition for the adoption of the child, then Massachusetts law should hold that the preconditions of Chapter 210 have been met and the petition for adoption will not be barred by the statute.

The decision to bear children and to raise these little people is a difficult one in any situation, and the existence of complex state laws does not ease the burden of the decision. What is important to know is that there are many options for same-sex couples who wish to have children. Appropriate guidance at the time of the initial consideration of deciding to become a parent will help address many potential problems in the future. Carefully advised couples, with properly drafted agreements and ultimately petitions, can have successful surrogacy arrangements, adoption proceedings, and hopefully happy homes. ■