



**COMMONWEALTH OF MASSACHUSETTS  
JOINT COMMITTEE ON THE JUDICIARY**

**TESTIMONY OF GLBTQ LEGAL ADVOCATES & DEFENDERS  
IN OPPOSITION TO S969 – “An Act to Promote Family Stability”  
MAY 8, 2017**

Dear Chair Brownsberger, Chair Cronin and Members of the Joint Committee on the Judiciary:

Thank you for the opportunity to submit testimony. On behalf of GLBTQ Legal Advocates & Defenders (“GLAD”), I write to oppose S969 in its current form. GLAD supports the need for statutory reform to address assisted reproductive technology (“ART”) and parentage, and GLAD appreciates Senator Tarr’s effort to address these issues. GLAD, however, has grave concerns about S969 in its current form, and we write to highlight three main objections:

1. The bill **revokes** G. L. c. 46, § 4B, upon which many same-sex families rely to establish legal parentage of their children.
2. The bill **too narrowly focuses** on gestational surrogacy and does not address parentage and other forms of ART.
3. The bill **does not provide key protections** for all parties involved in the surrogacy process.

GLAD welcomes working with this committee and the bill’s sponsor to resolve these concerns.

As you know, GLBTQ Legal Advocates & Defenders works in New England and nationally to create a just society free of discrimination based on gender identity and expression, HIV status, and sexual orientation through strategic litigation, public policy advocacy, and education. I am a senior staff attorney at GLAD, focusing on family and

youth issues. Prior to working at GLAD, I was a family lawyer, assisting individuals and families to create families through ART and to secure the parentage of their children.

By way of background, alternative insemination (“AI”) and assisted reproductive technology (“ART” which includes in vitro fertilization and surrogacy) are widely accepted and utilized to enable people to build a family when they are unable to achieve pregnancy or to carry a pregnancy to term. Infertility is a very real and painful problem for couples and individuals. Infertility rates for women have increased substantially over the past few decades, and approximately 11% of women in the United States have impaired fertility.<sup>1</sup> One in eight couples has trouble getting pregnant or sustaining a pregnancy.<sup>2</sup> Between 2006 and 2010, approximately 9.4% of males aged fifteen to forty-four experienced some type of infertility.<sup>3</sup> For people dealing with infertility, AI and ART are vitally important. As of October 2013, over five million children had been born using ART, with half of that number born in the prior six years alone.<sup>4</sup>

Massachusetts leads the nation in the percentage of births involving ART. For example, in 2011, 4.5% of births in the Commonwealth involved ART.<sup>5</sup> Massachusetts has been a leader in supporting ART by assisting families in paying for ART. See Woodward v. Comm’r of Social Security, 435 Mass. 536, 546-547 (2002). Massachusetts led the nation in requiring insurance coverage for infertility care, and, this

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<sup>1</sup> Chandra, Copen, and Stephen, Center for Health Statistics National Health Statistics Report No. 67, *Infertility and Impaired Fecundity in the United States, 1982-2010: Data From the National Survey of Family Growth, 2013*, at <http://www.cdc.gov/nchs/data/nhsr/nhsr067.pdf> (last viewed May 3, 2017).

<sup>2</sup> RESOLVE: The National Infertility Association, *Fast Facts about Fertility*, at <http://www.resolve.org/about/fast-facts-about-fertility.html> (last updated April 19, 2015).

<sup>3</sup> Supra, note 1 at 18.

<sup>4</sup> Castillo, CBS News, *Report: 5 Million Children Born Thanks to Assisted Reproductive Technologies*, Oct. 15, 2013, <http://www.cbsnews.com/news/report-5-million-babies-born-thanks-to-assisted-reproductive-technologies/> (last viewed May 3, 2017).

<sup>5</sup> Saswati, Kissin, Crawford, Folger, Jamieson, Barfield, CDC Morbidity and Mortality Weekly Report: *Assisted Reproductive Technology Surveillance – United States, 2011, 2014*, at <http://www.cdc.gov/mmwr/preview/mmwrhtml/ss6310a1.htm> (last viewed May 3, 2017). The same CDC survey data reported Massachusetts as the state with the third highest numbers of ART procedures performed (10,106), behind only California (18,808) and New York (14,576). Id.

month, our infertility insurance mandate will celebrate its 30<sup>th</sup> anniversary. See, e.g., G. L. c. 175, § 47H; G. L. c. 176A, § 8K; G. L. c. 176B, § 4J; G. L. c. 176G, § 4.

**1. GLAD opposes S969 because it revokes without replacing G. L. c. 46, § 4B (“§ 4B”), which is a critical protection for LGBTQ families and their children.**

Currently, Massachusetts has one statute addressing assisted reproduction and parentage. The statute, G. L. c. 46, § 4B (“§ 4B”), was enacted in 1981. General laws chapter 46, section 4B, reads as follows: “Any child born to a married woman as a result of artificial insemination with the consent of her husband, shall be considered the legitimate child of the mother and such husband.” This statute provides that for a woman who undergoes alternative insemination or in vitro fertilization with the consent of her husband, then the husband is automatically the child’s legal parent. See Okoli v. Okoli, 81 Mass. App. Ct. 371 (2012). This provision ensures that a child’s legal parent is the husband, not the sperm donor, and that the husband’s parentage is secured automatically at birth. Under this current statute, parentage is established by operation of law, and no court action or intervention is necessary. This clarity and security promotes the well-being of children by making it clear from birth who that child’s parents are, thereby ensuring they have access to all of the emotional and financial support that comes from having two legal parents. This statute is a critical protection for infertile different-sex married couples.

This statute is also a critical protection for same-sex married couples. Because all Massachusetts’ statutes must be read as gender-neutral, § 4B protects same-sex couples. See G.L. c. 4, §6. When a married, lesbian couple conceives a child via ART and the child is born during the marriage, § 4B ensures that the nonbiological mother is an equal, legal co-parent. General laws chapter 46, section 4B is a critical statute that ensures legal parentage for many children of LGBTQ families.

Section 4B has been addressed numerous times by our appellate courts, and appellate courts have further interpreted it to provide critical protections for children and families. See, e.g., Adoption of a Minor, 471 Mass. 373 (2015); Hunter v. Rose, 463 Mass. 488 (2012); Okoli v. Okoli, 81 Mass. App. Ct. 371, (2012); Della Corte v. Ramirez, 81 Mass. App. Ct. 906 (2012). The legal certainty and security § 4B provides

for intended parents and their children, as well as for gamete donors, is a paramount concern for families using ART. See Woodward, 435 Mass. 536, 547 (2002). This statute is a bedrock pillar of stability for children born via alternative insemination and in vitro fertilization in the Commonwealth.

Although critical to many children and families, G. L. c. 46, § 4B, does not address parentage in all ART circumstances. The statute does not address parentage of children born via ART to unmarried couples, nor does it apply in the context of traditional or gestational surrogacy. See, e.g., R.R. v. M.H., 426 Mass. 501 (1998)(noting that G. L. c. 46, § 4B, does not apply to traditional surrogacy); Culliton v. Beth Isr. Deaconess Med. Ctr., 435 Mass. 285 (2001)(noting that G. L. c. 46, § 4B, does not apply to gestational surrogacy). Massachusetts' children and families would benefit from a comprehensive statute that addresses parentage vis a vis all forms of ART. However, any comprehensive ART statute should augment, and not revoke, G. L. c. 46, § 4B. Removing this pillar of stability would create chaos and would destabilize countless Massachusetts' families. G.L. c. 46, § 4B, should be maintained and not superseded.

**2. GLAD opposes S969 because it too narrowly focuses on gestational surrogacy.**

S969 is narrowly focused on gestational surrogacy and does not address parentage and other forms of ART. For example, in its definition of “intended parent,” the bill confines the term intended parent to someone who intends to be a parent through gestational surrogacy. This narrow definition excludes people who are intended parents but whose children resulted from other forms of ART such as in vitro fertilization. The bill is missing key provisions needed to ensure that all intended parents, regardless of the form of ART they utilize, will be the legal parents of their children resulting from ART.

**3. GLAD opposes S969 because it does not provide guidance necessary to protect all parties involved in gestational surrogacy.**

S969 does not provide any guidance for what terms should be included in a gestational carrier agreement, and such guidance is critical for ensuring that everyone involved in the gestational carrier process is protected. For example, provisions could be included to guide the probate and family court that an agreement is presumptively enforceable if all parties are over age 21, if the carrier has previously given birth to at

least one child, if all parties have independent counsel, and if the agreement is in writing and signed before the commencement of ART. Further, other provisions that should be considered would address reasonable compensation for the carrier and payment of expenses and insurance, provisions safeguarding the health of the carrier, and provisions regarding termination of the agreement. A gestational surrogacy agreement should have certain baseline protections that ensure a fair and equitable process for all parties to the agreement. S969 does not provide any guidance to the court or to the parties regarding best practices for surrogacy agreements.

### **Conclusion**

Although GLAD opposes S969 in its current form, GLAD supports the good intent of the bill. Legislation addressing assisted reproduction and parentage is critical to ensure that Massachusetts is keeping pace with scientific advancements in the realm of ART and to ensure that there is a clear, uniform process for individuals and families using gestational surrogacy. Although statutory reform is needed, GLAD has grave concerns about the current language of this bill, particularly its revocation of G. L. c. 46, § 4B, and GLAD cannot support this bill in its current form. GLAD would welcome the opportunity to work with Senator Tarr and this Committee to resolve these concerns. Thank you for your consideration.

Respectfully yours,

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GLBTQ Legal Advocates & Defenders  
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