What Family Law Attorneys Should Know About ART Issues

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Family law and matrimonial attorneys are finding that assisted reproductive technology (ART) issues are cropping up more and more. Twenty percent of women are infertile and those who wait until their late thirties or early forties to conceive will find this number substantially higher. Understanding the risks of waiting to have children, some women are freezing their eggs now to have them available at a later age.¹ For same-sex male couples, using ART is the only option for them to have biologically related children. The question is not whether you will be presented with ART questions, but what you should do when they arise. It is important to recognize ART issues and to understand which issues you can handle yourself and which are better referred to a specialist.

ASK THE QUESTIONS

If 20 percent of heterosexual married couples have infertility issues, it is always good to ask your clients if they are seeking infertility treatments. If they answer yes, you should offer to review their health insurance policy. Currently 15 states have mandates for infertility insurance coverage.² Many policies written to comply with the mandates provide coverage for egg donation and permit couples to create and store embryos for later use with a gestational carrier. With egg donation the entire in vitro fertilization (IVF) process may be covered. In the case of a gestational carrier, the screening, medication, and implantation into the carrier may not be covered by the policy, but the more expensive part of screening the couple, medicating the intended mother, and creating and storing embryos, may well be covered. ART is an expensive undertaking and any insurance coverage can help.

DISPOSITION OF EMBRYOS IN DIVORCE OR CONTROVERSY

Infertile couples may come to you with the expectation that the consents they signed at an IVF center are sufficient to handle the issues that arise with the embryos they created but did not yet use for IVF. A dozen or more embryos may be created during an IVF procedure, while only one or two will be implanted at one time. Cryopreservation (freezing) of the embryos allows couples to have

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subsequent implantations if the first procedure does not result in pregnancy or if they want more children. A separation or divorce may lead to a dispute over use of the frozen embryos. Although this is a matter that family and matrimonial attorneys should be able to handle on their own, a background of the legal issues is necessary.

Courts Are Split

First, the courts are split in how to even characterize this issue. Some courts consider embryos to be property. In York v. Jones, a married couple created embryos in Virginia and then moved to California. The couple arranged for storage at a clinic in California, but the Virginia clinic refused, arguing that the Cryopreservation Agreement did not permit interinstitutional transfer. The couple sued for breach of contract. The federal district court determined that the Cryopreservation Agreement created a bailment and found that the bailee had "an absolute obligation to return the subject matter of the bailment to the bailor." The Cryopreservation Agreement gave the couple the right to "withdraw our consent and discontinue participation at any time" and, as such, the clinic was obligated to return the embryos to the couple upon request.

Twenty percent of women are infertile.

In contrast to the property definition, the Louisiana statute defines a "human embryo" to be a "judicial person" that is "recognized as a separate entity." Barring such a statutory definition, no court has found that an embryo may be considered a person. The New York Court of Appeals concluded:

Disposition of these pre-zygotes does not implicate a woman's right of privacy or bodily integrity in the area of reproductive choices; nor are the pre-zygotes recognized as "persons" for constitutional purposes.

'Persons' or 'Property'?

Courts in Tennessee and California have endorsed the view that genetic materials are not "persons" or "property" but occupy an "interim category that entitles them to special respect because of their potential for human life." The Davis Court explained:

It follows that any interest that Mary Sue Davis and Junior Davis have in the preembryos in this case is not a true property interest. However, they do have an interest in the nature of ownership, to the extent that they have decision-making authority concerning disposition of the preembryos, within the scope of policy set by law.

The Tennessee Supreme Court determined that the divorced husband's interest in discarding the embryos prevailed over Mary Sue's interest in donating the embryos.

Fifteen states have mandates for infertility insurance coverage.

The concept of "special respect" for genetic material creates a good sound bite until you read the holding of the Tennessee Supreme Court:

"If there is dispute, then their prior agreement concerning disposition should be carried out. If no prior agreement exists, then the relative interests of the parties in using or not using the preembryos must be weighed. Ordinarily, the party wishing to avoid procreation should prevail, assuming that the other party has a reasonable possibility of achieving parenthood by means other than use of the preembryos in question. If no other reasonable alternatives exist, then the argument in favor of using the preembryos to achieve pregnancy should be considered. However, if the party seeking control of the preembryos intends merely to donate them to another couple, the objecting party obviously has the greater interest and should prevail.

But the rule does not contemplate the creation of an automatic veto..."

Id. at 604 (emphasis supplied).

That is a lot of "ifs" "buts" and "howeveres" in the Court's holdings when the reality is that the balancing test is somewhat illusory. Most often, the
agreements signed by the parties are upheld. In Kass, for example, the New York Court of Appeals determined that because the parties' agreement was clear, "we have no cause to decide whether the pre-zygotes are entitled to 'special respect.'" Kass v. Kass, supra 191 N.Y.2d at 564-565. Even the Davis Court believed "as a starting point, that an agreement regarding disposition of any untransferred preembryos in the event of contingencies...should be presumed valid and should be enforced." Davis, supra 942 S.W. 2d at 597.

The cryopreservation agreement created a bailment.

Practically all reported decisions on disposition of frozen embryos come down on the side of the person who does not wish to procreate. This is explained by several factors: First, Courts are upholding contracts that contain language limiting the disposition of the embryos to discarding or donation. See Kass v. Kass, supra (NY). Accord In re Marriage of Dahl & Angle, 222 Or. App. 572, 194 P.3d 834, 841 (2008); Roman v. Roman, 193 S.W. 3d 40 (Tex. App. 2006); Litowitz v. Litowitz, 48 P.3d 261 (Wash. 2002), cert. denied, 537 U.S. 1191 (U.S. 2003). Second, Courts are adopting a "contemporaneous mutual consent" approach. See In re Marriage of Witten, 672 N.W.2d 769, 783 (Iowa 2003). Third, Courts have determined that forced procreation is against public policy:

[W]e would not enforce an agreement that would compel one donor to become a parent against his or her will.

AZ v. BZ, 431 Mass. 150, 160 (2000) (granting injunctive relief to husband to prevent wife from using embryos). See also J.B. v. M.B., 170 N.J. 9, 783 A.2d 707 (2001) (preventing husband from using frozen embryos with surrogate where husband could still procreate without wife's involvement). Indeed, some states by statute protect the participants from unwilling procreation or from unilateral decision making by one of the participants.

The only situation in which the person wishing to use the embryo for procreation could prevail over a partner opposed to such use, would be when he or she is incapable of biological procreation without use of the embryos.

As of the time of this writing, such a case is currently pending in the Appellate Courts of Illinois. In Szafrenski v. Dunston, Karla Dunston was diagnosed with non-Hodgkin lymphoma. Szafrenski agreed to create three embryos with her and they signed an agreement saying that both needed to consent to use the embryos. Dunston's cancer treatment left her infertile and, even though she and Szafrenski had broken up and he did not consent for the embryos to be used, two trial courts awarded the embryos to Dunston. It is difficult to understand how Dunston could prevail in the second trial, given that the Illinois Appellate Court remanded the first decision with instructions for the trial court to use the contract analysis. If nothing else, the trial court decision demonstrates that when dealing with matters of embryo possession, contract law is anything but dry.

Clinic Liability

If your client's rights and wishes are not followed or respected by the clinic, the clinic can be held liable for damages. In Gladu v. Boston IVF, Richard Gladu donated sperm that was used to fertilize oocytes from an anonymous donor. Mrs. Gladu was implanted with the embryos and their son was born in 1994. There were two embryos remaining and, unbeknownst to Richard, Mrs. Gladu returned to the clinic and gave permission for a second implantation in December 1995. A baby girl was born in September 1996. Neither Mrs. Gladu nor the clinic asked Richard for his permission. Richard sued for failure to obtain informed consent. The clinic argued that it was reasonable for them to rely on Mrs. Gladu to speak for herself and her husband. The jury found that the clinic was liable for treating Mrs. Gladu without her husband's knowledge or consent. They awarded damages including financial support of the child and emotional distress.

When meeting with an infertile couple engaged in IVF, ask to review the Cryopreservation Agreement, signed consents, and any other documentation, and make sure that they understand and agree with what they signed. Talk about future contingencies. You can ward off future litigation by making sure that the forms signed by your clients comply with their wishes in all future potential scenarios.

Child Custody Disputes for Children Born from ART

Family and matrimonial attorneys are well equipped to handle custody battles. Still, ART
procedures have resulted in fresh avenues of attack with which practitioners should be familiar. In the landmark case of *McDonald v. McDonald*, husband and wife had turned to IVF when Mrs. McDonald was unable to conceive naturally. The sperm of the husband was used to fertilize donor eggs, which were then implanted into Mrs. McDonald’s uterus. Twin girls were born in 1991. The husband sought sole custody on the ground that he was the “only genetic and natural parent available” to the children. Specifically, the husband argued that Mrs. McDonald was not the genetic mother and that carrying the twins and giving birth to them did not make her the natural mother.

*Courts have determined that forced procreation is against public policy.*

The husband relied upon *Johnson v. Calvert*, in which the California courts denied parental rights to the birth mother, the gestational carrier. He argued that in *Johnson*, the egg donor was also the intended mother and was determined by the Supreme Court to be the legal and natural mother of the child. The *McDonald* Court rejected the husband’s claim for sole custody and also rejected his reliance upon *Johnson v. Calvert*.

In fact, the *Johnson* court had specifically said that its ruling would be different in a true “egg donation” situation:

> Thus, under our analysis, in a true “egg donation” situation, where a woman gestates and gives birth to a child formed from the egg of another woman with the intent to raise the child as her own, the birth mother is the natural mother under California law.

The trial court and the intermediate appellate court found that by signing the forms, K.M. had relinquished any claim to parentage.

The Supreme Court of California reversed, finding K.M. to be a legal mother and holding that the attempted relinquishment of rights was not applicable when the resulting child was to be raised in the joint home of two partners in a lesbian relationship. Put another way, K.M. never intended to “simply donate her ova to E.G., but rather provided her ova to her lesbian partner with whom she was living so that E.G. could give birth to a child that would be raised in their joint home.” The Court ruled that having intended to raise and support the children, K.M. could not have and would not have been permitted to waive the responsibility to support her children. Unlike *Johnson*, the Court did not find it necessary to choose between K.M. and E.G. Further, the California Supreme Court clarified that the *Johnson* holding did not prohibit a baby from having two mothers.

Not all courts handle things as did the California court in *K.M. v E.G.* In Massachusetts, the courts refused to recognize *de facto* parentage when the co-parent did not provide any genetic material. The case arose when one member of a lesbian couple (B.L.) sought to walk away and refused to provide financial support to the child that she had been involved in creating (through her consent to her partner’s insemination). The court rejected the Family Court’s reliance on a contract between the two women, saying that a contract to compel
a party to become a parent against her will is void and as against public policy. The Supreme Judicial Court concluded that because B.L.’s involvement did not rise to the level of a de facto parent, she “is legally a stranger to the child. Because the defendant is not a parent under any of the statutory provisions enacted to establish parenthood, she has no duty to support the child financially, and she may not be ordered to pay child support.”

Second Parent Adoption

Custody battles can get ugly no matter what, but the California dispute could have been avoided or reduced if K.M. had not signed the release forms at the clinic when they clearly did not apply to her situation and instead consulted counsel. There was no written parentage agreement between the two women, nor was there a second parent adoption for K.M., which would have solidified her parental rights and protected both K.M. and the twins. These sorts of issues should be reviewed ahead of time so that custody disputes such as this never arise.

Written documents must be clear and straightforward.

The Massachusetts decision demonstrates that although it is critical to make arrangements in advance of what will transpire in the event of separation or divorce and who will be responsible, the only way to fully support parental rights for a nonbiological parent is with a second parent adoption. A contract between the parties was not enough when a de facto parenthood could not be supported. Still, an agreement between the parties in advance of the creation of children can ensure that all the critical issues are discussed and that both parents, intended and biological, understand the expectations of their parental rights and responsibilities. A fully negotiated agreement can avoid or reduce the risk of future litigation. In some states, it may be necessary to complete legal work during the gestation or after the birth to establish the rights of the second non-genetic parent.

DONOR AGREEMENTS

Heterosexual couples facing infertility often turn to egg or sperm donation. Such donations are, of course, a necessity for same-sex couples. It is imperative with all such situations, even with anonymous sperm or egg donors that written contracts be used. The belief by most sperm banks and IVF clinics that the parties can be protected by anonymity has been shown to be a fallacy, because children, siblings, and donors have been finding each other through donor sibling registries, DNA testing laboratories, and Internet chat groups. The cases that have arisen have made clear that without proper agreements the donor can not only have rights to such children, but also financial responsibilities for them. As a result, the use of donor agreements (even if signed with first names or X’s) in every case is essential.

It is true that many states have statutes concerning sperm donors and they do indeed declare that the sperm donor is not the father. Many require that the donation be “provided to a licensed physician” or that a physician be involved in the insemination. In California, a sperm donor was successful in a paternity action when his sperm was not “provided to a licensed physician” as set out in the statute. Because a licensed physician was not involved, the father’s parental rights were not extinguished under Civil Code Section 7005.

The Kansas case of In re K.M.H., demonstrates how the involvement of a licensed physician can categorically change the outcome. In K.M.H., a single female (S.H.) and her friend (D.H.) agreed that he would provide a sperm donation for her artificial insemination. The Kansas statute provided:

The donor of semen provided to a licensed physician for use in artificial insemination of a woman other than the donor’s wife is treated in law as if he were not the birth father of a child thereby conceived, unless agreed to in writing by the donor and the woman.

D.H. produced the sperm, which S.H. took with her to the doctor for the artificial insemination. She delivered twins and D.H. filed a petition to establish parental rights. The court rejected D.H.’s claim, finding that he was a donor under K.S.A. 38-1114(f) and holding that the statute was satisfied even though D.H. did not personally provide his semen to a licensed physician.

The court accepted D.H.’s assertion that he and S.H. had an oral agreement that he would have parental rights, but said it did not matter because the statute required any agreement about parental rights to be “in writing by the donor and the woman.” The court was unable to give D.H. any
Even if this de facto parentage history had not existed, however, the Thomas court would have declared Thomas as the father because his rights had never been terminated. A proper sperm donor agreement would have made clear that Thomas was relinquishing his parental rights. Understanding and execution of the donor agreement would have forced the parties to contemplate and agree upon future contact with the child. The intended parents likely would have insisted that all contact be initiated and agreed to by them, alleviating any misunderstanding as to the donor’s role.

JUDICIAL UPHOLDING WHEN NO STATUTE

A number of states have upheld sperm donor agreements by judicial decision, even when statutory protection for sperm donors did not exist. In Ferguson v. McKiernan, the court upheld an oral contract between a known sperm donor and a natural mother, in which the sperm donor agreed not to seek visitation and the mother agreed not to seek support. Contrary to that agreement, the mother sued for child support after she delivered her twins. The Supreme Court of Pennsylvania upheld the agreement, rejecting numerous arguments, including that this was an area reserved for legislative action and that public policy precluded parents from bargaining away a child’s entitlement to child support. Here, the court said, the agreement was entered into before conception and was fundamentally no different than an anonymous sperm donation. According to the court, a ruling in favor of child support would at worst put all sperm bank donors at risk of being sued for child support and, at a minimum, would prevent potential future known donors from agreeing to donate sperm.

You will want to avoid at all costs an oral agreement between the parties. The sperm donor in Ferguson was exceedingly lucky that the parties did not dispute the terms of the oral agreement. That is virtually unheard of. He was also fortunate that the court did not require the agreement to be in writing.

As stated previously, some statutes require a written agreement. In addition, the Indiana Court of Appeals judicially required that donor agreements be in writing.

In M.F. and C.F., the parties (J.F. and W.M.) had entered into a written donor agreement. The mother (J.F.) had two children with W.M.’s sperm, seven years apart. The court upheld the donor agreement for the first child, but found that it did not apply to

Surprisingly, not all states have statutes concerning sperm donation; Pennsylvania and South Carolina, for example, have none. Some states have statutes limited to married couples. Section 73 of the New York Domestic Law provides: “any child born to a married woman by means of artificial insemination...” (emphasis supplied). When no statute is controlling, the courts will rely upon the specific facts surrounding the sperm donation and the intentions of the parties.

In Thomas S. v. Robin Y, a woman asked a male friend to provide semen for her to conceive a child to raise with her lesbian partner. The donor (Thomas) was not listed on the birth certificate and did not financially support this child, but for many years, he spent time with her, visited her, and was known by the child to be her biological father. When a dispute arose, Thomas filed suit to establish paternity and visitation. The Appellate Court of New York ordered the Family Court to enter an order of filiation, stating:

Having initiated and encouraged, over a substantial period of time, the relationship between petitioner and his daughter, respondent is estopped to deny his right to legal recognition of that relationship.

The result in Thomas does not seem too troubling, as it appears to be consistent with the parties’ intent based upon their conduct over a period of years.
the second child (and therefore W.M. was financially responsible for that child). As a result, W.M. was found to be sperm donor to the first child and father to the second.\textsuperscript{47} It may seem ironic that the parties in this case, who put the most time and energy into the donor agreement and even had hired a lawyer, should end up with such an odd result. But perhaps it is entirely appropriate that the court that put the most emphasis on the element of the written agreement was forced to conclude that the donor agreement in 1996 referring to a child due to be born in September 1996 does not and cannot also apply to a second child born in 2003.

\begin{quote}
\textit{Selling eggs is illegal; eggs are donated.}
\end{quote}

\section*{Parameters of Agreement}

The Indiana court set out the parameters of what the writing should include and made it known that a “writing consisting of a few lines scribbled on the back of a scrap of paper found lying about” would not be enough.\textsuperscript{48} The writing “must reflect the parties’ careful consideration of the implications of such an agreement and a thorough understanding of its meaning and import.” Using the donor agreement at hand, which the court approved for the first child, the court noted that the agreement specifically acknowledge that it was “drafted by counsel retained by Mother, and that [sperm donor] has been provided full opportunity to review this Agreement with counsel of his own choosing.”

The court further described:

The Donor Agreement itself is a six-page, twenty-four-paragraph document that covers in detail matters such as acknowledgment of rights and obligations, waiver, mutual consent not to sue, a consent to adopt, a hold-harmless clause, mediation and arbitration, penalties for failure to comply, amending the agreement, severability, a four corners clause, and a choice-of-laws provision.

The court was particularly impressed with this language in the agreement:\textsuperscript{49}

Each party acknowledges and understands that legal questions may be raised by the issues involved in this Agreement which have not been settled by statute or prior court decisions and that certain provisions of this Agreement may not be enforced by a court of law. Notwithstanding such knowledge, the parties choose to enter into this Agreement with the intent and desire that it be fully enforceable in all respects and to document their intent at the time the child was conceived.

The court was careful not to endorse this agreement in all contexts or to say that all donor agreements must contain this level of sophistication, but it did caution: “in view of the lack of statutory law and the paucity of decisional law in this area, parties who execute a contract less formal and thorough than this one do so at their own peril.”

Because the agreement was adequate and in writing, the court denied the petition for paternity for the child born in 1996. The court determined that the agreement did not provide W.M. protection for the child born in 2003. The court analyzed the donor agreement and its many references to “child” and “child born in 1996” and determined that the donor agreement only applied to the first child. It explained that although there were a couple of references to “any child” that could not outweigh the “clear meaning of language consistently and frequently utilized throughout the remainder of the Donor Agreement indicating that this contract applied specifically and only to the child due to be born on September 19, 1996.”

Egg donor agreements raise all of the same issues as sperm donor agreements, plus more. It is critical to study the law of the relevant states. Some states specifically address egg donation and have statutes similar to sperm donor statutes.\textsuperscript{50} Other states have sperm donor statutes but are silent as to egg donation.\textsuperscript{51} In those cases it is appropriate to make an equal protection argument that such protection must be applied equally to both sexes. Finally, in Louisiana any compensation to an egg donor is illegal.\textsuperscript{52} From an analytical point of view, it is important to keep in mind that selling eggs is illegal in the United States, as in most countries. The eggs are donated. The funds that the egg donor receives as part of the egg donor agreement is to compensate the egg donor for the time, difficulty, pain, and inconvenience in the process as well as for the risks of medical and future complications.

In addition to all of the general elements described by the court in \textit{M.F. and C.F.}, as counsel for the egg donor, you should be prepared to alert
the donor of the potential tax consequences of the payment. The egg donor agreement should cover the following:

- Relinquishment of parental rights;
- Agreement of the donor’s spouse or significant other;
- A statement of no responsibility for any children from the donation;
- Informed consent for medical procedures;
- Compensation due the egg donor;
- Financial responsibility for expenses;
- Description of medical tests and screening;
- Description of the purpose for which the eggs will be used;
- Provisions for the creation and storage of embryos;
- Scheduling of medications and implantation;
- Traveling schedules and time lines;
- Complications insurance;
- Privacy expectations and responsibilities;
- A statement of continuing cooperation in legal proceedings to establish the parental rights of intended parents;
- The duty to keep contact information available for a certain amount of time in case of medical questions, if so agreed;
- Future contact with or knowledge of children, if so agreed;
- Attorney representation and payment of legal fees.

You should make every effort to become as informed as possible in all of the listed elements so that you can provide good advice to your client. The more evidence there is that the agreement was freely entered into and negotiated, the better the chances that it will be upheld by the court in the unlikely event that it is challenged.

Egg donor agreements are validated and enforced every day all over the United States when parentage actions are brought in family and probate courts, particularly involving surrogacy legal work. However, there has been only one reported case of an egg donor asserting her parental rights through litigation (and in that case it was only because the intended parents asked her to do so to preclude the gestational carrier from gaining rights to the children). In these companion cases, the gestational surrogate took the triplets home with her and filed suit to claim custody in Pennsylvania. The egg donor (from Texas), apparently at the behest of the intended/biological father (an Ohio resident), filed an action claiming custody in Ohio. The Ohio court found a parent/child relationship between the egg donor and the babies because the Pennsylvania trial court had never notified the egg donor or granted her an opportunity to be heard before terminating her rights (a reason for always terminating donor rights in surrogacy cases). Still, the Ohio court did not make any findings about the parental rights of the gestational carrier, saying that Pennsylvania had exclusive jurisdiction on this issue.

Alert the donor to the potential tax consequences of payment.

Ultimately, the Superior Court of Pennsylvania determined that the gestational carrier lacked standing to seek custody, lacked standing to challenge the father’s custody of the triplets, and lacked standing to seek termination of the egg donor’s parental rights. As such, after nearly three years of raising the triplets, they were given to the intended father, as the egg donor had only stepped in to help the intended parents. Aside from Ohio’s more genetic focus than other states, a reason for this disturbing precedent may be that the carrier, egg donor, and intended parents all signed a single contract and that they were all represented by the same attorney. That is never a good idea.

The carrier, donor, and intended parents should all receive their own counsel, and the carrier agreement and donor agreement should be separate documents. The hope would be that with her own counsel and with negotiation and rigorous understanding of the nature of gestational surrogacy and
custody decisions, that this type of action can be prevented. The entire factual scenario as well as the multistate complex issues involved demonstrates why donor agreements are best dealt with by attorneys experienced with ART issues.

**CARRIER AGREEMENTS**

As discussed previously, the agreement between the intended parents and the gestational carrier is something that a general matrimonial or family attorney should refer to an ART attorney. The United States has no national policies governing ART, including surrogacy. State laws vary widely: some expressly prohibit it, while a few make it a crime to pay for surrogacy. Other states allow it but restrict its use to married couples or to instances in which at least one of the intended parents has a genetic link to the child. Some states are seen as surrogate friendly, based upon reported decisions, but the nuts and bolts of the family court practices can be more burdensome than those states that have no laws directly addressing surrogacy. Although we are all equipped to read the reported decisions and statutes, the practical realities of gestational surrogacy are far more complicated.

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*The carrier, donor, and intended parents should all have their own counsel.*

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Before the carrier agreement is even considered, the matching process requires a sophisticated understanding of the parentage and surrogacy laws of the state of the carrier. The two leading cases that have indicated what law applied to the enforcement of a surrogacy contract have both come from Massachusetts. The first, *RR v. MH,* effectively held that the law of the surrogate’s state applied, but this was narrowed six years later when the surrogate delivered in a second state and the court permitted a pre-birth order in Massachusetts for a New York residing surrogate, because she would be delivering in Massachusetts.*[^9] Not only must the lawyer consider the surrogate’s residence and her planned state of delivery, but also the state parentage laws of the intended parents or the immigration and parentage laws of the country of nationality or residence of the intended parents.

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**International Legal Complexities**

Some matters are rather simple, such as a domestic heterosexual couple wanting to match with a surrogate in a state in which a pre-birth order determining parentage can be obtained. Others are fraught with more legal complexities. Take for example an international same-sex couple in which one biological parent is Dutch and the other Israeli, and they are living in the Netherlands. Under Dutch law, they would want to work in a state in which they could get a pre-birth order establishing the Dutch father’s paternity rights but keep the surrogate on the birth certificate (Dutch law requires a mother to be on the birth certificate); they could then complete a second parent adoption in the Netherlands to establish the other parent’s rights. If the child, however, is the biological child of the Israeli father, it is better to get a pre- or post-birth order determining parentage for both fathers or at least place the Israeli father alone on the birth certificate. Deciding what to do may be especially challenging if both men supply sperm and it is unclear until birth which child belongs to which. Similarly, a British single parent must match with a single surrogate based on British immigration laws. Under British parentage and immigration laws, if the surrogate is married, she is the child’s mother and her husband the child’s father until a parental order is completed in the UK establishing the British intended parents’ parentage rights. (This means that the child can only return to the UK with the combination of a US passport and a 12-month UK visa.) The parental order is only available to married couples, however, so a single parent cannot do one. As a result a single father needs a single surrogate, because then he will be treated as the child’s father. The child is then British at birth and can return home on a UK passport. Thus, it is important to establish in advance exactly what the intended parent(s) need concerning parentage, immigration, and residence before ever matching them with a surrogate.

When the carrier and intended parents are matched, every single issue that is discussed previously—such as legal arrangements, insurance, embryos, custody, and donor agreements, for example—must be considered along with a myriad of other topics need to be reviewed and covered in the carrier agreement. The carrier agreement can anticipate whether the legal work will be done pre- or post-birth. Some states do not permit pre-birth recognitions of parentage; however, babies may come early or insurance may mandate post-birth
work, thereby causing the plan to have a pre-birth order become a post-birth order. But the goal must remain to have both intended parents adjudicated as the legal parents of the child. Most countries outside the US, however, require that, for a gay couple, a second parent adoption must take place back in the intended parents’ home country.

Pre-Birth or Post-Birth Order

The issue of pre-birth or post-birth order perfectly highlights the complexities of carrier agreements and surrogacy legal work. Although a Uniform Parentage Act (2002) regulates some aspects of gestational agreements, this act has not been implemented in many states. In fact, state treatment of surrogacy varies dramatically. There are state statutes that require post-birth work and others that allow for the pre-birth determination of parentage. Other states have case law indicating pre-birth orders are allowed. Most states do not follow California’s practice of using pre-birth orders to establish the legal rights of all commissioning parents. A number of countries have refused to recognize the parentage determinations made by California. In addition, some states prohibit commercial surrogacy, making it uncertain whether a pre-birth order will be deemed to have established the non-biological parent’s legal rights to the child in the event of a later custody dispute or in the event the parties decide to move to another state where pre-birth orders are prohibited. Supra n.61 at 587.

As the court explained in Matter of Sebastian, birth certificates are “only prima facie evidence of parentage” and do not “confer parental rights that must be recognized elsewhere.” On the other hand, adoptions—a post-birth legal determination—are recognized in nearly every state and are entitled to the full faith and credit provisions of the US Constitution. Many federal circuit courts have recognized the obligation of state vital record registries to amend birth certificates to reflect two fathers’ names if provided with a second parent adoption from a same-sex couples’ home state. To our knowledge, no state appellate court or federal court has required any state to recognize a pre-birth order from another state, and one highest state court has seriously questioned whether the state courts would be obligated to do so in the event of a dispute. As such, the safest means of conveying permanent parentage to the non-biological parent in a surrogacy (especially to a non-biological parent) is by means of a post-birth order or adoption.

This is even truer with parents from foreign countries. Many foreign countries prohibit or criminalize surrogacy. Some originally made it impossible for native parents to obtain passports of that country if they do surrogacy in the United States. That has now been deemed a violation of human rights by the European Court of Human Rights. However, the court did not find it a violation of human rights to require non-genetic parents to establish their parentage in their home country. As such, requirements like those of the UK, requiring a parental order, or Belgium, requiring a second parent adoption are within reason under European law. No foreign country other than, arguably, Spain will accept a pre-birth order as a means to establish parental rights for non-biological parent. Some have even stated that such pre-birth orders will be rejected and that post-birth adoptions in the home country must be done to recognize the rights of parents through surrogacy. Although most intended parents and attorneys like the simplicity of pre-birth orders, post-birth orders are the safer way to go with international couples and those from New York State.

CONCLUSION

The goal of a surrogacy journey, including all of the many facets discussed that make up the journey, is for it to end with a healthy baby and to secure the parental rights of the intended parents. It is also to embrace and enhance the lives of all involved. It is not unusual for carriers and intended parents to engage in sibling journeys and to continue a relationship far into the future. To accomplish this it is necessary to meticulously manage all of the legal intricacies of the surrogacy, to make sure that all of the parties are properly represented and understand all of the legal documents and procedures, and to create an atmosphere of dedication to the best interests of the parties involved and especially to the babies.

NOTES


4. Id. at 425.

5. RS 9:121-133.


7. Davis v. Davis, 842 S.W. 2d 588, 597 (Tenn. 1992); Hecht v. Superior Court of Los Angeles County, 20 Cal. Rptr.2d 275 (1993).

8. Davis, supra, n.7 at 597.

9. Id. at 596-597 and 603-604.

10. See Fla. Stat. Ann. § 742.17(2) (West 2012) (“Absent a written agreement, decision making authority regarding the disposition of preembryos shall reside jointly with the commissioning couple.”); Tex. Fam. Code Ann. § 160.706(b) (Vernon 2011) (“The consent of a former spouse to assisted reproduction may be withdrawn by that individual in a record kept by a licensed physician at any time before the placement of eggs, sperm, or embryos.”).

11. See, e.g., Reber v. Reiss, 42 A.3d 1131 (Pa. Sup. Ct. 2012) (when the wife was unable to achieve biological pregnancy after cancer treatment, the court upheld the trial court’s finding that the wife’s interests in procreating outweighed the divorced husband’s interests in avoiding unwanted procreation); Mbah v. Anong, CAD11-11394, CAD10-24995 (consolidated) (Md. Cir. Ct., 7th Jud. Dist., December 21, 2012) (upholding the contract that gave the parties’ frozen embryos to the wife in the event of divorce over the husband’s objection when she was unable to have children without embryos).


15. Id.


17. Id.

18. Id.


20. McDonald, supra, n.16 at 11-12.


22. McDonald, supra, n.16, 196 A.D. 2d at 12. Accord In re CKG, 173 S.W. 3d 713, 730 (Tenn. S. Ct. 2005) (rejecting the father’s claim for sole custody when his partner carried triplets intending to raise the babies as their children).

23. 117 P.3d 673 (Cal. 2005).

24. Id. at 676.

25. Id. at 65.

26. Id. at 66-67.

27. Id. at 68.

28. Id. at 72.

29. Elisa B. v. Superior Court, 117 P.3d 660 (Cal. 2005) (limiting Johnson to the facts presented and holding that when there is no father, both parents can be women). By statute, California now permits three parents (October 1, 2013 S.B. 274).


31. Id. at 533.
32. Straub v. B.M.T. by Todd, 645 N.E.2d 597, 600 n. 7 (Ind. 1994) (listing statutes).


35. 169 P.3d 1025 (Kan. 2007).

36. K.S.A. 38-1114(f).

37. Supra, n.35 at 1042-1043.

38. Jhordan, supra n.33 at 389.

39. 169 P.3d 1025, 1040 (Kan. 2007) ("ignorance of the statute’s requirement of a writing to record any agreement between D.H. and S.H. as to his parental rights does not necessitate a ruling that the statute cannot be constitutionally applied to him").


41. Id.

42. Id.

43. 940 A.2d 1236 (Pa. 2007).

44. Id. at 1246-1247.

45. Id.


47. Id.

48. Id. at 1261.

49. Id. at 1261-1263.

50. See, e.g., Conn. Gen Stat § 45a-775 (2013).

51. See, e.g., M.G.L. c. 46, § 4B.

52. La. R.S. 9:122 (2007) prohibits “the sale of a human ovum, fertilized human ovum, or human embryo.”

53. The Tax Court recently held that payment to the egg donor was taxable. Perez v. Commissioner of Internal of Revenue, 144 T.C. 4 (Jan. 22, 2015).


56. Id. at 1266.


62. See, e.g., Belgium and France.


64. Id. at 576.

65. Finstuen v. Cratcher, 496 P.3d 1139, 1156 (10th Cir. 2007).

66. Id. (invalidating an Oklahoma statute barring recognition of out-of-state adoptions by same-sex couples under the due process clause).

67. Sebastian, supra, n.61 at 587.

68. Arrêt n 370 du 6 avril 2011 (10-19.053), Cour de cassation, Première chambre civile, France, overturned by the 26 juin 2014 decision by the European Court of Human Rights.