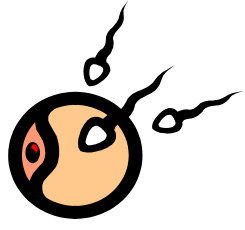
LexVid: INTRO TO ASSISTED REPRODUCTIVE TECHNOLOGY (ART) LAW & DRAFTING

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What Do We Plan to Cover?

- Terminology & Different Types of ART
- Prerequisites Prior to Contract Drafting
- Drafting Basics and Provisions to Include
- Important Legal Issues:
  - Divorce & Frozen Embryos
  - Abortion & Selective Reduction Provisions
  - Choice of Law & Conflict of Law issues
  - Issues Unique to International Intended Parents, Single Parents, Same-Sex Couples & Unmarried Couples

INTRODUCTION:

- **Assisted Reproductive Technology ("ART") Law is an constantly evolving area of the law**
- **ART law is most closely tied to adoption law but largely rooted in contract law**
- **most clients seek to utilize ART or adoption due to infertility issues**
- **their goal: a family - to have a child or children to parent**
- **many potential intended mothers have tried unsuccessfully to get/stay pregnant: they may have viable eggs or gestational ability**
- **many potential intended fathers have tried unsuccessfully to be fathers: they may have viable sperm**
- **there are thousands of frozen embryos in storage that may not be used by their "owners"**

EMBRYOS IN STORAGE: HUNDREDS OF THOUSANDS




IVF CLINIC
ALL I WANT IS A WOMB SOMEWHERE
Berkin.

THE NEW WORLD OF FAMILY CREATION OPTIONS:



- Donor Egg: known or anonymous
- Donor Sperm: known or anonymous
- Donated Embryo: known or anonymous
- Gestational Carrier: the possibility of using a carrier (with clients' sperm & egg; client's sperm & donor egg; client's egg & donor sperm or donor embryo)
- Traditional Surrogate: the possibility of using client's sperm or donor sperm with the surrogate's egg

Families from Assisted Reproductive Technologies



Whose parts? What are the Options?

IM egg + IF sperm into gestational carrier

Donor egg + IF sperm into IM or carrier

Donor sperm + IM egg into IM or carrier

Donor egg + Donor sperm = Donor embryos into IM or carrier

IF or Donor sperm into true surrogate

White carrier + Asian donor parts = Asian twins

Black carrier + Caucasian donor parts = Caucasian child

The Most Common Agreements

- Egg Donor Agreement (Female Egg Donor donates directly to the Intended Parent(s) or the Clinic – can be known or anonymous)
- Sperm Donor Agreement (Male Egg Donor donates directly to the Intended Parent(s) or the Clinic – can be known or anonymous)
- Embryo Donor Agreement (Note that “embryo adoptions” are the exception not the norm; Male and Female donors donate their embryo directly to the Intended Parent(s) or the Clinic)
- Surrogacy and Gestational Carrier Agreements
- Agreements with the Fertility Clinics (which can encompass any of the above but typically are informed consents, financial agreements, and embryo preservation agreements signed with the clinic and/or medical provider and not agreements between the involved parties)

Typical Roles for the Attorney

- To review the agreement on behalf of a party
- To negotiate the agreement on behalf of a party
- To draft (and negotiate) the agreement on behalf of a party
- To handle the birth certificate amendment, parentage order, pre- or post-birth order, or other court or governmental proceeding to resolve parentage issues

Attorney's Role (cont.)

- DO NOT PRACTICE LAW IN A STATE IN WHICH NOT LICENSED
- WATCH OUT FOR DUAL REPRESENTATION!!
  - E.g., representing both the clinic and the Intended Parents or the Donor; representing the agency and a non-agency party
  - NEARLY ALL STATES FORBID IT!
  - Even if the state permits it, it is not a recommended best practice!

THE NEW WORLD OF FAMILY CREATION OPTIONS VIA CARRIERS:

- These possibilities exist even in states that may NOT recognize compensated surrogacy/ARTs arrangements *
- Just as adoptive parents (APs) can adopt from a birth mother entirely in another state and do the adoption in another state, Intended Parents (IPs) can contract with a carrier in a different state and the procedure may be completed in the carrier's state
- *Caution where states forbid arrangement for compensated surrogacy (Michigan)

Surrogacy Friendly Jurisdictions

- My AAAA colleague Diane Hinson keeps a summary of surrogacy laws on her website at:

http://www.creativefamilyconnections.com/state-map-surrogacy-law-practices

- That said – state laws constantly are evolving and sometimes are locality dependent
- Always check with local experienced counsel as it is hard to always know the details

TERMINOLOGY:

- Certain words have achieved “term of art” status in the realm of reproductive technology law. Conversations among the various professionals are punctuated with these words and an alphabet soup of abbreviations. Knowledge of these basic terms and proper use of



Assisted Reproductive Technology

- All fertility treatment in which eggs and sperm are handled outside the body
- Purpose is to facilitate the conception of a child



Artificial insemination

Female artificially inseminated – meaning sperm injected via some artificial means

Does that include home insemination kits? It can and – depending on state law –might.

Also sometimes loosely referred to as Intrauterine Insemination (IUI) – however there is a technical distinction

AI versus IUI

- Artificial insemination (AI) historically encompasses any technique involving the introduction of sperm into the female reproductive tract without sexual intercourse. Semen can be placed into the vagina (intravaginal insemination) or into the cervix (intracervical insemination) without any special preparation of the specimen. However, if unprepared semen is placed directly into the uterus (intrauterine insemination (IUI)), then severe spasmodic uterine cramping can occur. With IUI, the sperm must first be washed and prepared prior to placement inside the uterus. Washing the sperm removes the prostaglandins that cause the violent uterine contractions and eliminates substances that might lower the sperm quality and activates the sperm, thereby leading to improved sperm motility. Generally, the IUI specimen is prepared in the doctor's office just prior to insemination.
- The pregnancy rates with IUI typically are better than those obtained by intravaginal insemination or intracervical insemination.

IVF =

- *In Vitro* Fertilization
  - Ovaries medically hyperstimulated
  - Eggs surgically removed
  - Fertilized in laboratory
  - Resultant embryos implanted in uterus



Eggs

- Eggs, which are unfertilized female gametes, may be variously referred to as
  - oocytes-eggs prior to ovulation or surgical retrieval
  - ovum or ova



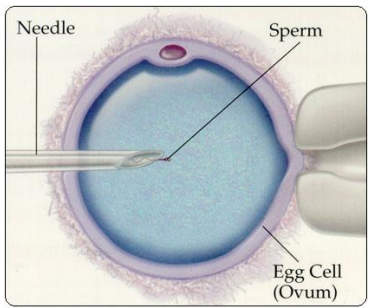
Sperm



- Sperm (or semen) is the male reproductive gamete
- Testicular sperm is sperm that has to surgically be retrieved from the testicles as opposed to ejaculated sperm
- There is much debate about which is better
- Men can have their sperm checked for motility and sperm count

ICSI

- Intracytoplasmic Sperm Injection: in the lab, inserting one sperm into the nucleus of an egg in hopes of achieving fertilization. This procedure has revolutionized the treatment of male infertility, allowing men with extremely low sperm counts to conceive a child, which was nearly impossible before this technique.



Sperm Injection



Donor Conception

- Donor Conception refers to conception via donor parts which can be via donor egg, donor sperm, or donor embryo
- Banked eggs and embryos are less expensive then eggs that need to be retrieved from a donor or embryos that still have to be formed (via fertilizing the egg with sperm)

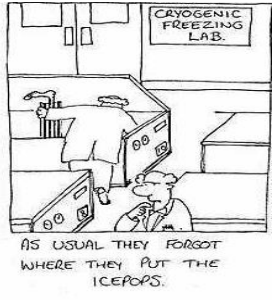
GIFT vs ZIFT vs PROST

- Gamete intrafallopian transfer (GIFT) uses multiple eggs collected from the ovaries. The eggs are placed into a thin flexible tube (catheter) along with the sperm to be used. The gametes (both eggs and sperm) are then injected into the fallopian tubes under general anesthesia via laparoscopy.
- Zygote intrafallopian transfer (ZIFT) combines in vitro fertilization (IVF) and GIFT. Eggs are stimulated and collected using IVF methods. Then the eggs are mixed with sperm in the lab. Fertilized eggs (zygotes) are then laparoscopically returned to the fallopian tubes where ideally they will carry into the uterus, implant in the uterus and develop into a fetus.
- Pronuclear stage tubal transfer (PROST), similar to ZIFT, uses in vitro fertilization. But it transfers the fertilized egg to the fallopian tube before cell division occurs.

The first step of each of these above treatments is superovulation. This uses hormone injections to stimulate the ovaries to produce multiple eggs. These procedures have higher costs and risks related to laparoscopy. And they do not provide as much useful information about embryo development as IVF does. For these reasons, these procedures are rarely used.

Cryopreservation





- Freezing for storage. In ART, sperm and embryos, and, with growing frequency but less success, eggs and ovarian tissue, may be frozen in liquid nitrogen and saved for future use. Tissue in storage is often referred to as “frozen” or “cryopreserved”.

Surrogacy

- As used in ART, the process of a woman carrying a pregnancy with the intention of placing the child with another or others for rearing and parenting
- Often is used as a general term although a “true” surrogate carries her own eggs



Surrogate: Two Types

- Traditional or true (TS)
  - A woman who becomes pregnant with her own egg and the sperm of the intended father (or donor sperm), with the intention of placing the child with the IF, or IF & his wife or partner. Due to the genetic connection, TS is a birth mother and, in many jurisdictions (especially without ARTs schemes), an adoption by IM or father's partner must occur after birth for IM or partner to be parent.

Surrogate (con't)

- Gestational Carrier/Surrogate (GC or GS)
  - A women who becomes pregnant with an embryo genetically unrelated to her, through the intra-uterine placement ('transfer') of an IVF-created embryo, and carries the child for IM, IF or IPs, with intention of placing child w/ them at birth. Also referred to as a host womb. Gestational 'Carrier' is preferred term to distinguish from a True Surrogate.

Cost Estimates for ART:



- IVF: $15,000-$45,000 (average medical cost, regional variations, does not include storage)
- Donor Egg: $5,000 - $15,000 (if donor is agency/clinic recruited & paid, higher for clinic fees and the extraction procedure; banked egg is less)
- GC (if paid): minimum typically $25,000, can range from $15,000 to $75,000 but usually $25,000 to $50,000 on average just for the carrier's costs – does not include add-ons, clinic and legal fees, GCs through programs did to be paid more
- ICSI: additional approx. $2000 for each attempt, in addition to IVF cost

Medical Insurance for ART

- For fertility procedures: insurance may or may not cover certain ART procedures if in a non-mandated state. Insurance rarely covers if insured is using donated gametes.



Health Insurance for Gestational Carriers

- Prenatal and delivery charges have historically been covered by GC's insurance, but occasionally clear exceptions are written into contracts.
- Coverage specifically

  for IPs to insure GCs

  is expensive

  $24,000 +



Helpful Information for Clients

- Patient/Client Support Groups
  - Path2Parenthood (formerly American Fertility Association)
  - RESOLVE
- ASRM: American Society for Reproductive Medicine
- SART: Society for Assisted Reproductive Technology
- AAAA – Academy of Adoption and Assisted Reproduction Attorneys

PREREQUISITES PRIOR TO CONTRACT DRAFTING



Coordination Among the Professionals is Crucial

- What counseling and medical and psychological screening has been done of the parties?
- What background data has been gathered?
- What medical professionals and/or clinics are involved and what contracts have the parties already executed?
- Do those contracts conflict with the contract you are about to draft?
- Did you check to get copies? Review them?
- Get to know your fertility clinics and medical providers.

FACT Sheets to Read & Share with Clients from ASRM's ReproductiveFacts.org

- Gamete and embryo donation: deciding whether to tell
- Embryo Donation
- Egg Donation
- Gestational Carrier (Surrogate)
- Fertility rights and responsibilities
- Avoiding conflict in third party reproduction
- Counseling Issues for Gay Men and Lesbians Seeking ART

ASRM GUIDELINES

While the Guidelines do contain numerous medical factors typically addressed by fertility clinics – they also contain numerous medical and socio-legal factors and prerequisites that should be considered by the legal practitioner. YOU NEED TO KNOW THEM!

- Recommendations for practices utilizing gestational carriers: a committee opinion (May 2022)
- Third Party Reproduction – A Guide for Patients (Sperm, egg, and embryo donation and surrogacy)

ASRM GUIDELINES FOR CARRIERS

- **Quarantining of embryos**

All potential gestational carriers should be offered the option of cryopreserving and quarantining embryos derived from the intended parents for 6 months, with release of embryos only after the intended parents have been retested with confirmed negative results

- **One embryo transfer**

Recommend ideally only one embryo be transferred – note availability now of pre-implantation genetic screening (PGS) and pre-implantation genetic diagnosis (PGD)

Ethical Guidance

- Look to the ASRM Guidance, ABA Model Act and AAAA (Academy of Adoption & Assisted Reproduction Attorneys) Ethics Code
- Note that all parties in all donor or surrogacy contracts should have separate and independent legal counsel per the above noted ethical guidance.

Issues Unique to Surrogacy Contracts

- Views on abortion & selective reduction
- IPs willing to have estate documents (listing guardian and trustee) prepared
- Proximity of the parties
- Medical Instructions
- Contact During the Agreement
- Parentage Issues

Know the Primary Prerequisite Issues Applicable to all Contracts (Donor or Surrogacy)

- Screening (physical and mental), Background Checks & Counseling Done
- Monetary-Financial Issues Agreed Upon
- Insurance coverage (no exclusion)
- Applicable and Governing Law Determined
- Continued Contact & Duty to Report
- Confidentiality Determined
- Breach Provisions

Before Surrogacy Contract Drafting
- Ensure all Prerequisites are met
via the QUICK CHECKLIST



- The Quick Checklist is not intended to be exhaustive but just a starting point. ART law is an evolving area of law and new issues continually arise!
- It Should be Used in Conjunction with the ASRM Guidelines for Guidance.

The Quick Checklist



1. Background forms:
(a)Intended Parent(s)
(b) Carrier/Surrogate and Husband/Partner
2. Medical clearance
(a)Intended Parent(s)
(b) Carrier/Surrogate and Husband/Partner
3. Mental Health Provider Clearance
(a)Intended Parent(s)
(b) Carrier/Surrogate and Husband/Partner
4. Medical/Mental Health Counseling
(a)Intended Parent(s)
(b)Carrier/Surrogate and Husband/Partner
(c)Group Counseling
5. Background checks
(a)Intended Parent(s)
(b)Carrier/Surrogate and Husband/Partner
6. Religious/Abortion/Selective Reduction Views Determined & Compatible
7. Carrier's Insurance Reviewed for Coverage
8. Financial Terms Agreed Upon in Full
9. Confidentiality Determined
10. Continued Contact & Contact During Agreement Determined
11. Home visit.
12. Attorney lined up for Surrogate

WAYS TO ADDRESS FAMILY & LIVING BACKGROUNDS:



- WRITTEN QUESTIONNAIRES
- INTERVIEWS
- HOME STUDIES/HOME VISIT
- MENTAL HEALTH PROVIDER EVALUATIONS & CLEARANCE
- MENTAL HEALTH PROVIDER COUNSELING

Questionnaires for contract drafting

Questionnaires should address:

- Exact financial terms
- Number of embryos to be transferred per attempt
- Number of embryo transfer attempts to be made
- How long Carrier-Surrogate will be under contract
- Number of fetuses Carrier-Surrogate is willing to carry to term
- Other issues as set out in this outline.

Unique Aspects of ART Contracts

- Please do NOT ask other ART attorneys for a copy of their contracts to use
  - law varies from state to state – so the contract will vary from state to state
  - there are malpractice implications
  - asking someone for what may be years and years of their work product
  - Each contract is unique to that arrangement



Gestational Carrier Screening

- OB-Gyn clearance done, Psych clearance?
- Does Carrier-Surrogate enjoy being pregnant and have easy pregnancies?
- Carrier ideally have no more than 5 prior pregnancies and 3 prior c-sections (see ASRM guidelines)
- Carrier have supportive spouse-partner?
- Carrier deliver at least one prior child (and more ideally – is done having children for her to raise)?
- Carrier's job conducive to being pregnant? (e.g., cannot be military subject to deployment, firefighter, elite athlete, sky diver, horseback riding instructor, etc.

Gestational Carrier Restrictions

- Carrier willing to adhere to physical activity restrictions? (e.g., no scuba diving, triathlons, sky diving, water or snow skiing (at least after first trimester), racing, horseback riding, etc.)
- Carrier willing to adhere to ingestion restrictions? (e.g., not just no non-prescribed or illegal drugs or alcohol or tobacco -but not eat raw seafood, fish that might have mercury, etc.)?
- Carrier willing to avoid any body piercings, tattoos, henna, even certain hair dyes?
- Carrier willing to not change kitty litter, avoid second-hand smoke, avoid travelling to CDC Zika virus watch places, avoid working around paints/solvents/harmful or toxic cleaning products, agree to hands-free driving equipment?
- Carrier agreeable to all travel restrictions?
- Carrier agreeable to adhere to COVID-19 restrictions and CDC guidance? To be vaccinated or has been vaccinated?
- Home visit done on Carrier's home?

PREREQUISITE RED FLAGS

- Carrier not fully divorced; not wanting estranged husband to be part of the agreement
- Carrier is single, older, no children (especially for true surrogate)
- Intended Parents want to micro-manage the pregnancy
- Parties not getting adequate medical, psychological and background clearance particularly on the Carrier
- Carrier not wanting representation
- Parties trying to utilize joint representation
- Parties not having joint group counseling



DRAFTING CONTRACTS:

- First, mentor with experienced ARTs practitioner on a case, if possible
- Please do NOT ask other attorneys for a copy of their contracts to use
  - law varies from state to state – so the contract will vary from state to state
  - Never attempt to practice law in a state where you are not licensed
  - there are serious malpractice implications to
    - (a) using someone else's contract and
    - (b) unlicensed/unlawful practice of law
  - asking someone for their work product




Calvin and Hobbes
IT'S TRUE, HOBBES, IGNORANCE IS BLISS!
ONCE YOU KNOW THINGS, YOU START SEEING PROBLEMS EVERYWHERE...
..AND ONCE YOU SEE PROBLEMS, YOU FEEL LIKE YOU OUGHT TO TRY TO FIX THEM...
..AND FIXING PROBLEMS ALWAYS SEEMS TO REQUIRE PERSONAL CHANGE..
...AND CHANGE MEANS DOING THINGS THAT AREN'T FUN! I SAY PHOOEY TO THAT!
BUT IF YOU'RE WILLFULLY STUPID, YOU DON'T KNOW ANY BETTER, SO YOU CAN KEEP DOING WHATEVER YOU LIKE!
THE SECRET TO HAPPINESS IS SHORT-TERM, STUPID SELF-INTEREST!
WE'RE HEADING FOR THAT CLIFF!
I DON'T WANT TO KNOW ABOUT IT.
WAAAUGGHHH!
I'M NOT SURE I CAN STAND SO MUCH BLISS.
CAREFUL! WE DON'T WANT TO LEARN ANYTHING FROM THIS.

Lesson:

Should you be embarking on this adventure for the first time – find yourself an experienced partner – let them steer (draft the contract and represent one party) while you go along for the ride and help navigate (study up and represent the other party). Even then, you may not know where you ended up – but hopefully you enjoyed the ride.



Most Importantly…

- Attend ARTS sessions on contract drafting (AAAA, ASRM, ABA)



- Try to represent the donor or carrier or, in states where a guardian ad litem is needed, the infant; let ARTs practitioners know you are available

ART Sessions

- Academy of Adoption and Assisted Reproduction Attorneys (“AAAA”) – Mid-Year (Fall) conference is open to everyone. Go to www.adoptionart.org
- ABA ART Committee programs
- AAAA and ABA have webinars (past AAAA webinars can still be purchased)
- Webinar & on-line providers

CONTRACTS: DRAFTING BASICS AND PROVISIONS TO INCLUDE APPLICABLE TO SURROGACY AND DONOR CONTRACTS

A. De-Mystify Your Contract: (1) Have a Table of Contents

TABLE OF CONTENTS TO GESTATIONAL CARRIER AGREEMENT

1. Purpose and Intent
2. Representations
3. Definitions
4. Applicable Law, Jurisdiction, and Venue
5. Effective Date
6. Physical Examinations, Psychological Evaluations and Background Information
7. Home Study 6
8. Counseling 7
9. Conception 7
10. Medical Instructions 9
11. Termination of Parental Rights 11
12. Custody 14
13. Divorce or Separation 14
14. Death of the Intended Parents 14



Have a Table of Contents (cont.)



- Child's Name and Birth Certificate 15
- Health Insurance 16
- Payment of Expenses 19
- Breach of Agreement by the Gestational Carrier 23
- Breach of the Agreement by the Intended Parents 25
- Miscarriage, Consensual Abortion, Stillbirth or Death of the Child Prior to the Transfer of Custody 26
- Assumption of Risk 27
- Assumption of Responsibility 27
- Notification of Labor 28
- Termination of Pregnancy 29
- Genetic Testing and Failure of Intended Genetic Relationship 31
- Gestational Carrier's Residency 33
- Duties of the Husband of the Gestational Carrier 33
- Confidentiality and Continued Contact 34

Sample Table of Contents for Egg Donor Contract

1. Definitions 2
2. Choice of Law..... 2
3. Consent to In Vitro Fertilization 2
4. Subsequent Harvesting and Fertilizations 3
5. Conduct and Termination of Pregnancy 3
6. Acknowledgement and Assumption of Risk 3
7. Health Insurance and Medical Expenses..... 4
8. Pregnancy of the Donor and Withdrawal From Arrangement..... 4
9. Death or Disability of an Intended Parent..... 5
10. Divorce or Separation of the Intended Parents..... 5
11. Ownership of the Egg(s)/Embryo(s)..... 5
12. Acknowledgement and Assumption of Responsibility for the Child 6
13. Physical and Genetic Suitability 6
14. Reimbursement of Expenses to ED 7
15. Determination of Parental Rights 7
16. Furtherance of Parties Intent 7
17. Confidentiality, Disclosure and Registry 7
18. Future Contact 8
19. Financial Responsibility 8
20. Payment of Expenses and Limitation of Liability Therefore 8
21. Conclusive Presumptions 9
22. Contractual Obligations 9
23. Publicity 9
24. Acknowledgement of Advice of Counsel 9
25. Severability 10
26. Taxes 10
27. Alternative Dispute Resolution..... 10
28. Integration 11
29. Nature of Agreement 11
30. Modification, Revision, or Amendment 11
31. Future Interpretation 11
32. Jurisdiction, Venue, and Controlling Law 11
33. Survival..... 12
34. Termination and Duration..... 12
35. Material Breach..... 12
36. Notice..... 13
37. Counterparts..... 13
38. Copyright..... 13
39. Execution of Copies..... 13

De-Mystify Your Contract:
(2) Have Section Headings

Purpose and Intent. The sole purpose and intent of this Agreement is to provide a means for the Intended Mother and Intended Father to become the parents of a child who is genetically related to the Intended Mother and/or Intended Father. The term "child" used herein shall include children to the extent more than one child comes into being. This purpose will be accomplished through medical procedures using assisted reproductive technology, including the embryo transfer into the Gestational Carrier of embryos formed from the Intended Mother's eggs with the Intended Father's sperm.

De-Mystify Your Contract: (3) Have a Logical Order



Chronological is best:

- Intent and purpose, representations, definitions, choice of law
- Preliminary matters – what law to apply? Prerequisite issues (background, screening, etc.)
- Medical instructions; Conception procedures
- Potential Events During the Pregnancy – Divorce, Death, Selective Reduction,
  Breach, etc.
- Boilerplate

B. Put the Majority of Boilerplate Provisions at the End – As You Would For Any Contract

- Contractual Obligations 36
- Notice 36
- Severability Clause 37
- Acknowledgement of Advice of Counsel 37
- Modification, Revision or Amendment 38
- Changing and Evolving Law 38
- Original Agreement 38
- Entire Agreement 39

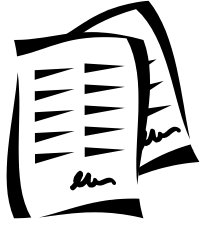
General Boilerplate Provisions:

a. Contractual obligations
b. Termination of Agreement
c. Modification, Amendment, Revision
d. Governing Law
e. Choice of forum for disputes
f. Entire contract of x paragraphs
g. Notice
h. Severability
i. Duration of the Agreement
j. Original Agreement – number of originals to be signed.



Basic Surrogacy Contract Terms to Consider (cont.):

15. Child's Name and Birth Certificate
16. Health Insurance
17. Payment of Expenses: out-of-pocket & "ancillary"
18. Breach of Agreement by the Gestational Carrier
19. Breach of the Agreement by the Intended Parents
20. Miscarriage, Consensual Abortion, Pregnancy Reduction, Stillbirth or Death of the Child Prior to the Transfer of Custody
21. Assumption of Risk
22. Assumption of Responsibility
23. Notification of Labor & Communication among Parties
24. Termination of Pregnancy
25. Genetic Testing and Failure of Intended Genetic Relationship
26. Gestational Carrier's Residency
27. Duties of the Husband of the Gestational Carrier
28. Confidentiality and Continued Contact



Before Contract Drafting – Start with the End in Sight; Address the Choice of Law & Conflict of Law: What Are The Options?

a. Where will the birth or donation take place?
b. Where is the procedure occurring?
c. Where do the parties live?
d. What law is going to apply?
e. How will the IPs ultimately be the legal parents?

Before Contract Drafting – Start with the End in Sight

- Contact an attorney in the other state who practices ARTS law before you do anything else!!
- Simply trying to keep the work for yourself can get you in a heap of trouble



Ways to Address Parentage – Varies State to State & Based on Type of Arrangement

- Pre-Birth Order
- Post-Birth Order or Order of Parentage
- Post-Birth Administrative Birth Certificate Amendment Process
- Adoption

Sample contract provisions:
Parentage options

Termination of Parental Rights. At such time either prior to the birth of the child or subsequent to the birth of the child, as shall be appropriate, Gestational Carrier and Husband of Gestational Carrier shall execute any necessary documents and/or participate in any proceeding or procedure necessary to terminate any parental right she or he may have in and to the child born as a result of the assisted conception or to consent to the adoption of said child, whichever shall be appropriate, and agree to sign all pleadings, consents, orders and affidavits and attend any scheduled Court hearing(s), if necessary, either prior to or after the birth to finalize such procedures and/or proceedings. All parties agree to furnish all information requested by Intended Parents' attorney as expeditiously as possible, including in advance of the birth.

In the event that the child is born in Florida or Arizona, then the Intended Parents may seek to have a pre-birth Order obtained in Florida or Arizona or, alternatively may choose to have an Order of Parentage as to Intended Father entered in Massachusetts along with a step-parent adoption by Intended Mother. If the child is born in Virginia and is genetically related to at least one of the Intended Parents, it is expected that, three days after birth, the Gestational Carrier and her Husband will execute the necessary consent and birth certificate amendment forms furnished by counsel for the Intended Parents and will return those forms immediately so that the forms can be filed as soon as possible after birth with the Department of Vital Statistics in Richmond, Virginia. Gestational Carrier and Husband of Gestational Carrier agree to sign such documents as quickly and as immediately as the law allows for following delivery.



Examples of What Can Happen When the ARTs Attorney Fails to Coordinate with an ARTs attorney in the other state

- The other state may fail to give full faith and credit to the contract or Pre-Birth Order
- The other state may forbid the payments that were made to the carrier and prevent the birth certificate from being amended
- The parties may spend a lot more money, time and effort when an easier procedure could have been followed
- The parties may have avoided more adverse tax treatment

Payments To Be Made

a. What payments are lawful? Bonus vs. fee vs. reimbursement of expenses
b. How much?
c. When to be made?
d. How disbursed (attorney escrow, direct, separate checking account)
e. Will the payments be taxed?



Payments



- When will they be paid?
- Is a receipt or proof of payment needed?
- Will they be paid through an escrow agent (expensive) or directly by the Intended Parents?
- How will the Surrogate or Gestational Carrier know the money will be there?
- How will they be paid? Check? Electronic transfer? Zelle, Venmo, Paypal?

Health Insurance Coverage Issues

a. Drafting to ensure ongoing coverage for carrier
b. Drafting to ensure Intended Parents do not become the Insurers and are not sent a bill for all the medical care
c. Drafting to ensure carrier not liable for baby's health insurance
d. Note special Tricare and Medicaid issues

Contract Drafting

- Entire day could be devoted to just contract drafting issues – goes beyond the scope of this outline
- Other sticky issues that must be addressed include:
  - Conception and medical instructions regarding conception
  - Carrier's management of the pregnancy & adherence to restrictions
  - Confidentiality
  - Abortion, miscarriage, stillbirth, selective reduction
  - Death, separation, divorce, disappearance
  - Assumptions of risk and responsibility
  - Advice of counsel and waiving counsel (dangerous!)
  - Expectations of the parties
  - Provisions in the event of Breach
  - Lab or medical errors

Abortion and Selective Reduction Issues

Surrogate mom refuses to abort fetus with birth defects

- Crystal Kelley was offered $10,000 to abort the child she's holding in this photo.



Surrogate mom refuses to abort fetus with birth defects

- When a Connecticut couple learned their surrogate mother was carrying a fetus with developmental disabilities, they offered her $10,000 to have an abortion, reported CNN.
- Crystal Kelley, 29, demanded $15,000 to undergo a procedure that she claimed went against her religious beliefs.
- The unnamed couple refused and a legal battle over the surrogacy contract and the child's fate followed.
- In August 2011, Kelley had signed an official contract with a surrogacy agency saying that she'd agree to abort if the fetus had a severe abnormality. Now she was carrying a disabled child, but she didn't want to honor the agreement.
- Determined to give the fetus a chance at life, Kelley fled Connecticut for Michigan, where under state law the surrogacy contract would be disregarded and she would be recognized as the legal guardian.
- In Ann Arbor, she gave birth to a child with severe medical conditions.

Abortion-Selective Reduction Due to Health Risk Sample Provision:

Gestational Carrier agrees that she will not abort or attempt to abort any embryo, fetus or child she carries pursuant to this Agreement, including any one or more of multiple embryos, fetuses or children, unless there are found to be more then two viable fetuses or embryos or, if in the professional medical opinion of a physician approved by the Intended Parents or her own independent obstetrician, such action is necessary to protect a serious risk to the Gestational Carrier's own physical health or poses a serious risk to one or more of the other embryos or fetuses in utero. If there is a dispute regarding the need for an abortion due to a serious health risk, and provided that there is sufficient time to seek a second opinion, then the parties agree they will seek the opinion of another physician chosen by the Gestational Carrier's attending obstetric physician. In the case of an emergency situation, no second opinion shall be required; however, every reasonable effort will be made to notify the Intended Parents prior to the procedure being done. In any event, provided that at least one involved physician indicates that there is a serious health risk to the Gestational Carrier, then the Gestational Carrier shall have the sole right to decide whether or not to abort.

NOTE: More and more states are enacting provisions that make any agreement in a surrogacy contract to abort or not abort – to not be enforceable.

Abortion-Selective Reduction When Testing Reveals Abnormalities – Sample Provision:

While pregnant, and if requested to do so by the Intended Parents, the Gestational Carrier agrees to undergo amniocentesis or such other tests designed to detect genetic and congenital defects as selected and conducted by her attending obstetric physician or a specialty obstetric physician approved by the Intended Parents. The Gestational Carrier understands that it is her responsibility to speak with her physician about the risks of amniocentesis or other tests prior to the performance of those tests. Only if such testing reveals that there is a very significant and probable chance that any of the fetuses or embryos will be born with a such a serious mental, physical, genetic or congenital defect, deformity or disability that they will need to be placed on life support or will have no chance at any meaningful existence, and if requested to do so by the Intended Parents, the Gestational Carrier agrees to selective reduction or abortion of the identified fetus or embryo (unless such reduction or abortion will subject the Gestational Carrier to criminal prosecution or to a serious health risk and only after consulting with Intended Parents and any legal counsel of their choice to verify such potential criminal liability).

Abortion-Selective Reduction Due to Agreed Limitation on Number of Fetuses to Carry to Term

If there are more then two viable fetuses or embryos or it is medically determined that too many embryos or fetuses exist that may present a health risk to either/or the Gestational Carrier and/or the child, the number may be reduced to a smaller number that can be successfully and healthily carried to a full term pregnancy and healthy birth. In such event, the Gestational Carrier shall undergo the medical procedures for selective reduction at the request of the Intended Parents and only after consultation of the Intended Parents and the Gestational Carrier with the attending physician. The Gestational Carrier agrees to carry up to two fetuses provided there is no serious risk to the Gestational Carrier's health or to the health and viability of the fetuses.

Be Aware of State Law & Coverage Issues

- Some states criminalize abortions
- Some states – like Texas – make abortion clauses in surrogacy contracts unenforceable
- Many health insurance policies exclude elective abortions
- In all likelihood no courts are going to enforce abortion & selective reduction provisions in surrogacy contracts given Roe v Wade.

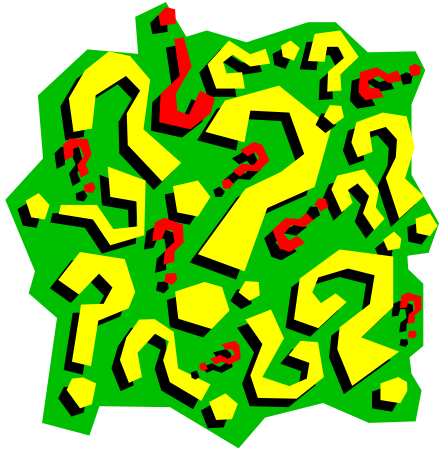
Advice to Clients

In your retainer letter – not in the contract - please be sure to advise your Intended Parent clients about (1) the fact that a court probably will not enforce an abortion or selective reduction provision and (2) the risk of the carrier moving to another state or foreign country and the difficulty in enforcing the contract should that happen.



OTHER THOUHGTS - THINK DOWN THE ROAD: IDENTITY ISSUES FOR CHILDREN OF ART

- Should they be told and if so, when & how?
- Will ongoing contact agreements be possible & beneficial?
- What search options will these children have?
- What registries will exist?
- Are these factors addressed in the contracts – especially donor contracts?



Parentage Issues Unique to Same-Sex Couples – Birth Certificate is Not Proof of Parentage

- A Birth Certificate is an Administrative Document – Not Granted Full Faith and Credit like a Court Order
- *Castillo v. Lazo*, Court of Appeals of Arizona, Division 2, 386 P.3d 839 (December 9, 2016) -- held that a birth certificate is not proof of parentage
- *V.L. v. E.L.*, 136 S. Ct. 1017 (2016) -- AL obligated to grant FF&C credit to GA second-parent adoption decree

Issues Unique to Unmarried Couples

- Where unmarried heterosexual couples use their own gametes (egg and sperm), they may be able to get a Pre-Birth Order or Order of Parentage in most states although not married.
- Where unmarried heterosexual or same-sex couples use any donor gametes – the law varies from state to state. Some states permit second parent adoptions (where not married) while others only permit step-parent adoptions (meaning married).

Issues Unique to International Couples

- Coordination with immigrations and attorneys in the foreign country is critical
- Use of translators might be necessary; watch for cultural differences
- Obtaining criminal record & background checks can be more difficult
- Support of the carrier and communication between the parties can be trickier
- Finding newborn insurance coverage or securing self-pay can be tricky
- All funds secured up front in trust/escrow
- Expect issues with expediting the birth certificate, providing passport assistance, securing apostilles and/or certified translations and, in some cases, ensuring embassy involvement; COVID-19 has created more issues



Divorce & Frozen Embryos

- Couples creating embryos ideally should have a specific embryo disposition agreement as between the two of them.
- While some courts have found the clinic documents dispositive of the parties' intentions upon divorce; other courts have not found the clinic document to govern (or the clinic document is silent on the issue).
- This is an evolving area of law with varying outcomes when no document exists as between the two owners of the embryos governing disposition.



Divorce & Frozen Embryos – Part 2



- Given that embryos are special property – a provision in a separation agreement or equitable distribution document governing the disposition of the embryo in all likelihood will not be upheld
- Embryos need to be transferred under a donation agreement in order to properly be transferred & ideally such agreement should be put into place only after the parties are divorced.
- Clinics will not transfer ownership of embryos without a proper donation agreement & release.


ADIOS AMOEBAS!