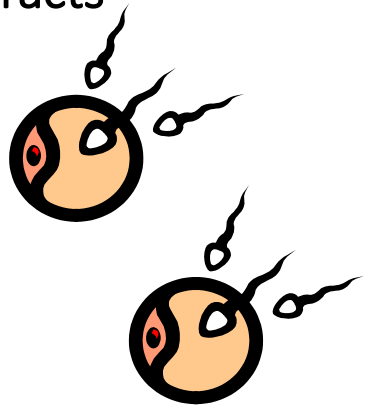
LexVid: Advanced & Ethical Drafting of Surrogacy Contracts

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INTRODUCTION:

- **This presentation assumes the attendee has either been practicing in the ART (assisted reproductive technology) world for several years and has drafted a number of surrogacy contracts AND/OR**
- **Has attended the LexVid ART drafting fundamentals course and knows the basic terminology, structure and provisions of a contract – this outline does not cover all of the provisions – just the more complex once AND/OR**
- **Is a renegade and just really wants to dive into the more complex aspects of drafting surrogacy/gestational carrier contracts (but still should know the fundamentals).**

INTRODUCTION:

- **The term "surrogacy" contract in this presentation will loosely refer to true surrogate and gestational carrier/gestational surrogate agreements – however – clearly the true surrogate agreements have greater risk and other implications when the surrogate is also the genetic parent.**
- **Please know the acronyms involved – this is an advanced course.**
- **Most of the complexity in contracting comes from the "what ifs" – and with experience you will see more and more of those "what ifs" coming into reality. Or you will learn about them from colleagues.**
- **Know the ASRM guidelines and any other applicable regulations, statutes, guidance, ethics codes – do not be caught off guard (e.g. VA anti-surrogacy broker statute and "compensation" will void the contract, Michigan prohibition on matching, IL needing fertility doctor affidavit as addendum, Issues in Louisiana, etc.)**

Sharing Materials



- I am sharing many of my materials with this presentation – you are welcome to modify them – but if you improve them – please also then consider sending back to me the new and improved version (e.g., my questionnaires for contract drafting; my prerequisite checklist summaries).
- I also am sharing some suggested language – you are free to use – but again if you improve it – consider sending back to me the improved versions.
- Please remember though not to ask other folks outright for their contracts – they are state specific plus represent years of work in many cases. Also they are unique from client to client and not “templates.” One size does not fit all.

What We Will Cover:

- Know the ASRM guidelines – stay current!
- Should you even be involved in the arrangement? Ethically is it right to do?
- Enforce the need for separate representation.
- Manage client expectations! Coordinate with clinics and cryobanks on the timing.
- Require consultations and enforce prerequisites met before attempting contract drafting. Provide resources to clients.
- Plan for enforceability and parentage.

What We Will Cover (cont.):

- Address insurance issues including alternative coverage, Medicaid, Tricare, etc.
- Contingency – “what if?” planning. Third party potential liability, divorce, death and more.
- Breach provisions. Why arbitration provisions typically do not make any sense.
- Make contracts flexible if possible so addendums are not necessary.
- Characterizing payments and tax consequences.

ASRM Guidelines & Recent Data

- Stay current with the most recent ASRM and other guidance
- For example, ASRM guidance and other studies show that surrogates should be vaccinated before getting pregnant – see materials provided
- Prior to COVID-19 – concerns with the Zika virus led to modifying or adding addendums to surrogacy contracts
- Join ASRM to stay current and also be aware of ethical guidance (note LPG contributions to ASRM publications)

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 JOIN ASRM AND KNOW THEM!

-Recommendations for practices utilizing gestational Carriers: a committee opinion (Jan 2022)

-Third Party Reproduction – A Guide for Patients (Sperm, egg, and embryo donation and surrogacy)

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
- COVID & ZIKA & reducing viral transmission in gametes recommendations

Should You Even Be Involved?

- WATCH OUT FOR THE UNAUTHORIZED PRACTICE OF LAW!! Drafting an agreement under the law of a state in which you are not licensed can result in legal malpractice
- Always associate a reputable and experienced attorney in the “other” state if more than one state is involved
- When dealing with more then one state – always make sure you designate a governing law and map out parentage options

Why are you involved 

- Are you involved because a parentage order will be obtained in the state where you practice? Because the birth will occur there? Because you practice under the governing law of the contract? Because the clinic is in your state?
- Should you be involved? Too many contracts are being drafted by lawyers who have zero connection to the governing law of the contract – e.g., contracts drafted under Virginia law with no VA lawyer involved and that actually violate VA law – this is an ongoing problem.

Before Contract Drafting – Start with the End in Sight

- What states are involved or possibly implicated? Contact an attorney in the other states implicated who practice ART law before you do anything else!!
- Simply trying to keep the work for yourself can get you in a heap of trouble



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

- The parties may be committing a crime and not even know it.
- The contract may be void or voidable.
- 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.

AAAA CODE OF ETHICS PROVISIONS 16(b)

www.adoptionart.org

(b) A Fellow may represent a Party in an ART Matter if: (1) The representation is in accordance with all applicable laws and ethics rules pertaining to competence, the unauthorized practice of law, and multijurisdictional practice, including the laws and rules of the jurisdiction in which the Fellow is licensed to provide legal services and the laws and rules of any other jurisdiction in which the Fellow provides legal services; and, (2) The Fellow is licensed in at least one of the following jurisdictions: A) the jurisdiction of the Child's expected birth; B) the jurisdiction in which at least one Party resides; or C) the jurisdiction in which the medical procedures in furtherance of the ART Matter are expected to take place.

AAAA CODE OF ETHICS PROVISIONS 16(b)(cont.) and 16(c)

(3) A Fellow who is not licensed in one of the jurisdictions described in 16(b)(2) may provide legal services in a jurisdiction where that Fellow is not licensed to practice law if such legal services are undertaken as co-counsel with, or in consultation with, a lawyer licensed to practice in that jurisdiction.

(c) A Fellow who represents any Party in an ART Matter shall ensure that any agreement between or among the Parties in that ART Matter is drafted or reviewed by an attorney licensed to practice law in the governing jurisdiction as defined by that agreement's choice of law provisions.

AAAA Code of Ethics 16(d)

(d) If the Fellow is advising a client as to the laws of a jurisdiction in which the Fellow is not licensed to practice law, the Fellow shall inform the client as to the Fellow's understanding of the laws of that jurisdiction, provided that the Fellow: (1) Discloses to the client that the Fellow is not licensed to practice in that jurisdiction; and (2) Advises the client of the benefit of obtaining advice from an attorney licensed to practice law in that jurisdiction.

Put Attorney Disclosures in the Contract!

- The contract should indicate the names of the attorneys and who they represent.
- The contract should indicate under what state law each attorney is licensed and why each is involved.
- The contract should indicate if attorneys were consulted in other relevant states.
- This ensures complete disclosure and transparency to everyone. And makes a contract more enforceable.

Sample contract provisions: Limits of licensed practice



Acknowledgement of Advice of Counsel. The Parties further acknowledge that _____, Esq., counsel for Intended Parents, is not licensed to practice law in the State of Virginia. Intended Parents further acknowledge that _____, Esq. is licensed to practice law in the State(s) of _____ and is advising Intended Parents based on general contract principles and not specifically with regard to the laws of the State of Virginia. Gestational Carrier's attorney Colleen M. Quinn is licensed to practice in Virginia and the parties understand and agree that Quinn will review the Agreement to assure the Agreement's compliance with Virginia law.

OR – ANOTHER EXAMPLE:

Acknowledgement of Advice of Counsel. Each party acknowledges that he or she fully understands this Agreement and its legal effect and has had the benefit of legal counsel. Each party has discussed each and every provision in detail with all the possible ramifications which may be associated with these provisions. The Intended Parents have been represented by Colleen Quinn, Esq. who is licensed to practice in Virginia, but is not licensed in California, and who has ensured that this Agreement is compliant with Virginia law and has advised her clients under her general knowledge of assisted reproductive technology law and principles of contract law. The Gestational Carrier and the Husband of the Gestational Carrier have been represented by _____. Esq. who is licensed in California, but is not licensed in Virginia, and has reviewed this Agreement to ensure its compliance with California law and has advised her clients under her general knowledge of assisted reproductive technology law and principles of contract law.



Separate Legal Representation



- Make sure everyone knows it is required from the very beginning – by ASRM, the ABA Model Act and by AAAA – and represents best practices
- Have the legal assistant advise at intake
- Put the requirement in the retainer agreement
- Coordinate with the medical professionals & fertility clinics to back up the requirement
- See AAAA letter in the materials



"And if you don't have an attorney, we've got millions of them."

AAAA Code of Ethics

16. REPRESENTATION in ART MATTERS and AVOIDANCE of CONFLICTS of INTEREST: (a) In every ART Matter in which a Fellow represents a Party, **the other Party(ies) must also have independent legal counsel** except: (1) in an uncontested process to establish parentage in which no actual conflict of interest exists or is likely to arise among the Parties to that proceeding, so long as the unrepresented Party is informed of a right to independent legal counsel; (2) A Fellow may represent (i) both Intended Parents, (ii) a Donor and Donor's spouse or partner or (iii) a Surrogate and Surrogate's spouse or partner provided that there is no actual conflict of interest and the potential conflict of interest has been disclosed and waived.

SAMPLE CONTRACT PROVISION – Represented Party

Acknowledgement of Advice of Counsel. Each party acknowledges that he or she fully understands this Agreement and its legal effect and has had the benefit of independent and separate legal counsel. Each party has discussed each and every provision in detail with all the possible ramifications which may be associated with these provisions. Each party acknowledges that this Agreement may at some time be subject to approval by a Court and may be subject to the Court's interpretation. All parties believe that the terms of this Agreement are necessary in the best interests of the child. Each party acknowledges that he or she is signing this Agreement freely, voluntarily, and knowingly, being fully informed of the possible ramifications, and that no party has reason to believe that the others did not freely, voluntarily, and knowingly execute this Agreement. All parties acknowledge that this Agreement, in some instances, may represent compromises of positions.

ASRM Guidance – Legal Issues & Informed Consent:

3.b. vi. Gestational carriers must have ongoing independent legal representation by an appropriately qualified legal practitioner who is experienced with gestational carrier contracts and who is licensed in the relevant state or states, or in the event of an international arrangement, in addition to any relevant states, the intended parent(s)' home country.

ASRM Guidelines

- Sample provision:

  Legal and Attorney Fees: Advanced payment or reimbursement of reasonable attorneys' fees, up to the amount of $1650 for representation of the Gestational Carrier and Husband of Gestational Carrier in the drafting, formation, negotiation, and execution of this Agreement, including any actual incidental out-of-pocket expenses. Moreover, in the event that Gestational Carrier wishes to consult with her legal counsel regarding any questions that she has regarding the Agreement terms (including any questions about payments and/or reimbursements) during the course of the Agreement, and so long as the Gestational Carrier is not taking any adversarial position, an additional amount not to exceed $500 will be paid directly to the attorney of Gestational Carrier's choice.

Manage Client Expectations re Contract Timeframe

- Many clients come to the attorneys at the last minute and expect the contract to be drafted in several days
- We advise them to plan for a month on average – see the Anticipated Timeline in the materials – provide this at the initial consultation!
- Charge an expedite fee if the contract is expected to be done in 14 days or less.

Insist on a Preliminary Consult

- Even if matched through a program – have the initial consult to ensure all prerequisites have been met and to manage client expectations.
- Many red flags can be identified through an initial consultation – be sure to find out everyone's exact marital status; reinforce separate representation; What is surrogate's job and home situation? How is conception to occur and where?
- See the prerequisite checklists in the materials – both the short and narrative versions

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



- The Prerequisite 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 Recommendations (Guidelines) for Practices Utilizing a Gestational Carrier.

The Prerequisite 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
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. Carrier/Surrogate's attorney lined up
13. Guardians and Estate Docs discussed
14. Expected Restrictions on the Carrier

Prerequisites Prior to Drafting Donor & Surrogacy Agreements:

- Insurance coverage
- Screening (physical and mental) & background checks
- Monetary Issues
- Applicable law
- Views on abortion & selective reduction/gamete destruction
- Proximity/logistics

Insurance Coverage is critical

- Ensure coverage review for any existing applicable policy – protect yourself with a coverage review done or have the carrier get a coverage letter!
- Alternatively for coverage, the parties can consider coverage under the Affordable Care Act – refer to Art Risk or New Life or International Fertility Insurance (can also look at complications coverage)
- Coverage under Medicaid is problematic due to payments disqualifying the GC unless maybe compassionate or quasi-compassionate arrangement
- Will review use of Tricare next…

Special Issues with Tricare

- See the exact Tricare language and check the published rates
- Tricare covers surrogacy for a beneficiary who has a contractual agreement and “pays second after the surrogate mother seeks reimbursement from the adoptive parents” and any “amount designated for medical expenses under the contract must be exhausted before TRICARE will cover other covered benefits for the surrogate mother”

Tricare (cont.)

- TRICARE policy states: If “the contract doesn’t specify a reasonable amount for reimbursement for medical expenses, the surrogate mother will pay a reasonable amount of the expense.” And, “Without a contract, TRICARE doesn’t cover maternity services provided by a TRICARE beneficiary acting as a surrogate.”

TRICARE Sample Published Rates (look up by area)

- https://health.mil/Military-Health-Topics/Business-Support/Rates-and-Reimbursement/TRICARE-Allowable-Charges
- Cesarean section delivery with prenatal/postnatal visits: $2,663.18
- Ultrasound, after first trimester: $142.35
- Vaginal delivery with prenatal/postnatal visits $2,413.98

Tricare Sample Language:

Gestational Carrier represents that she has a health benefit program with Tricare Select that, to the best of her knowledge, provides maternity coverage to her for the pregnancy envisioned under this Agreement. Gestational Carrier understands that such continued program is a material aspect of this Agreement. Accordingly, Gestational Carrier will take no action or inaction to jeopardize such program. Intended Parents understand that Gestational Carrier's heath benefit program is with Tricare and they have had an opportunity to review the benefits and make their own determination regarding coverage. Moreover, the parties understand that Tricare has set into place exceedingly vague, conflicting and contradictory language regarding its benefit plans as to "surrogate" pregnancies requiring the Gestational Carrier and/or the Intended Parents to be primary payers and to "cost-share" in any or all medical expenses. The parties agree that they do not believe that the language set out by Tricare is enforceable. However, should Tricare make a claim under its "cost-share" provisions, and should the Intended Parents choose not to contest the claim by Tricare, or should they choose to contest any such claim and a court find the cost-share provision to be enforceable, then the Intended Parents hereby designate that they will pay up to $3,500 towards the Gestational Carrier's medical expenses of prenatal care, delivery and post-delivery care, which amount the parties deem to be far more than adequate based on the Tricare published reimbursement provision amounts set out for such care. Moreover, nothing in this Agreement shall be construed to create a legal obligation to pay on the part of the Intended Parents for services clearly covered under the Gestational Carrier's health benefit plan. The Intended Parents are in no way to be characterized as Guarantors of medical payments, and the parties do not intend that there be any third party beneficiaries of or to this Agreement including Tricare. Should the Intended Parents decide to contest the issue of cost-sharing with Tricare, they will be responsible for any and all legal expenses and will indemnify the Gestational Carrier for any costs or legal expenses involved.

Who Covers the Baby?

- Make it clear in the Agreement that the Intended Parents cover the baby's medical costs and it will be a material breach if they do not; when representing the carrier – get proof of coverage
- This poses problems with Intended Parents who do not have health insurance esp. foreign IPs – funds may need to be set aside in escrow
- Ensure IPs without health insurance consult ART Risk or another specialty company about the options including self-pay negotiation; attend the free webinars on this issue

Provide resources for the Carrier to get Life & Disability Insurance

- Does the carrier have existing coverage? How much? Is that enough? Can it be increased?
- Most carriers can simply get term life (and even disability) insurance by going on line and finding a reputable carrier
- Some can get it through an employer
- Also options can be obtained from specialty insurance programs like ART Risk and New Life
- If the IPs are paying for it – consider making them the beneficiaries of part of the proceeds

Sample Provision re Purchase of life/disability Insurance

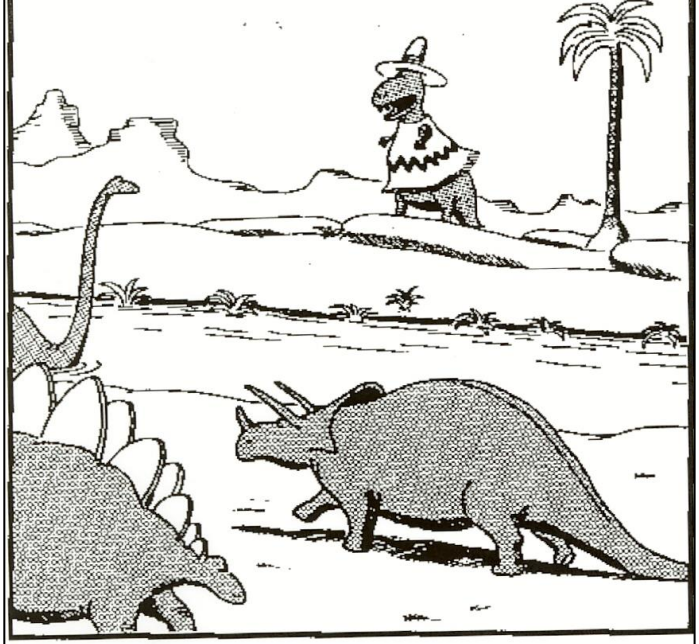
Intended Parents shall reimburse the Gestational Carrier for the purchase of a one year term, or supplemental, death and disability insurance policy in the face amount of $500,000 for the Gestational Carrier, commencing as soon as possible after execution of this Agreement and prior to the first attempt at embryo transfer procedure envisioned under this Agreement. Gestational Carrier will specify the Intended Parents as the beneficiaries of $100,000 of such policy which may not be changed and may specify anyone of her choosing as the beneficiary for the remaining $400,000 of such life insurance policy, which latter beneficiary the Gestational Carrier may change at any time. Such policy will be purchased by the Gestational Carrier with the Intended Parents advancing the cost of the premium for such policy within five days of Gestational Carrier's execution of this Agreement.

Other Insurance Coverage

- Be aware of other coverages available to best educate the parties involved including:
  - Short term disability coverage – may be available through an employer or on-line or through a specialty agency
  - Complications Coverage – can cover loss of reproductive organs and other pregnancy complications
  - Hospital Indemnity Coverage

Addressing Choice of Law, Enforcement, Conflict of Law and Parentage Issues

a. Where is birth expected to take place? Might it take place elsewhere?
b. Where is the medical procedure occurring?
c. Where do the parties live?
d. What law is going to apply?
e. How does the court have enforcement power (personal and subject matter jurisdiction)?
f. How will parentage be accomplished?



However, there was no question that, on the south side of the river, the land was ruled by the awesome *Tyrannosaurus Mex.*

Jurisdiction

- What is going to be the court's ability to have personal and subject matter jurisdiction over the parties?
- Simply contracting with someone in that state usually is not enough (look at the law in this area).
- What is the basis for the court to have jurisdiction? Are the embryos owned by IPs located in the state of the contract? Have they physically come to that state (to meet the carrier? get screened by the clinic? Etc.? Did they pay and hire a lawyer in that state? How does the court get jurisdiction over them? (very real issue with international IPs).

Choice of Law Sample Language– Personal and Subject Matter Jurisdiction

The Parties represent and acknowledge that Virginia law shall govern this Agreement and that, given that the Intended Parents have shipped their frozen embryos to a clinic in Virginia and have hired that clinic to perform the embryo transfer procedure and the Gestational Carrier lives in Virginia and expects to give birth in Virginia to the Intended Parent's child. Thus the parties agree that the courts of Virginia have personal and subject matter jurisdiction over them for any matters that arise under this Agreement.

Parentage – How will it Happen?

- Some states permit Pre-Birth Orders (PBOs) – by statute or common law
- Some states have post birth certificate amendment procedures (like VA)
- In many states where a PBO cannot be obtained – a post-birth order can be obtained (like in VA we use our Parentage Act – not our surrogacy statute)
- Under full faith & credit law, most states can take an out of state PBO and have it domesticated and given full faith and credit (we do this in VA before the birth if the IPs can get an out-of-state PBO)

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.

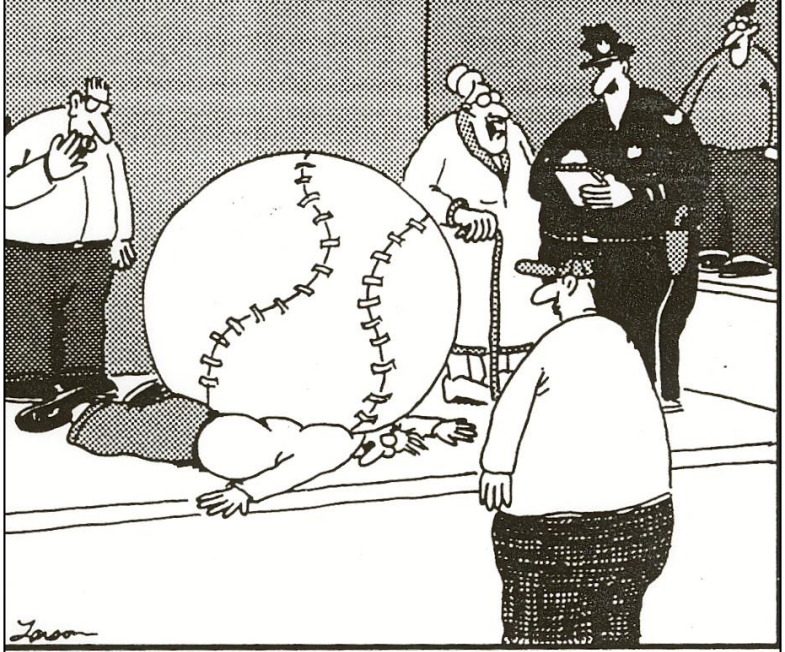
In the event that the child is born in Florida or Arizona, then the Intended Parents may seek to have a pre-birth Order obtained in Florida or Arizona or, alternatively may choose to have an Order of Parentage as to Intended Father entered in Massachusetts along with a step-parent adoption by Intended 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.



Drafting for Mishaps

What if the Carrier is hit by a drunk driver and is placed on life support?





"And then wham!
This thing just came right out of left field."

SAMPLE PROVISION AS TO LIFE SUPPORT

In the event that the Gestational Carrier is placed on life support and the pregnancy remains viable, it is her intention to be kept on life support until the child is delivered or the pregnancy is no longer viable.

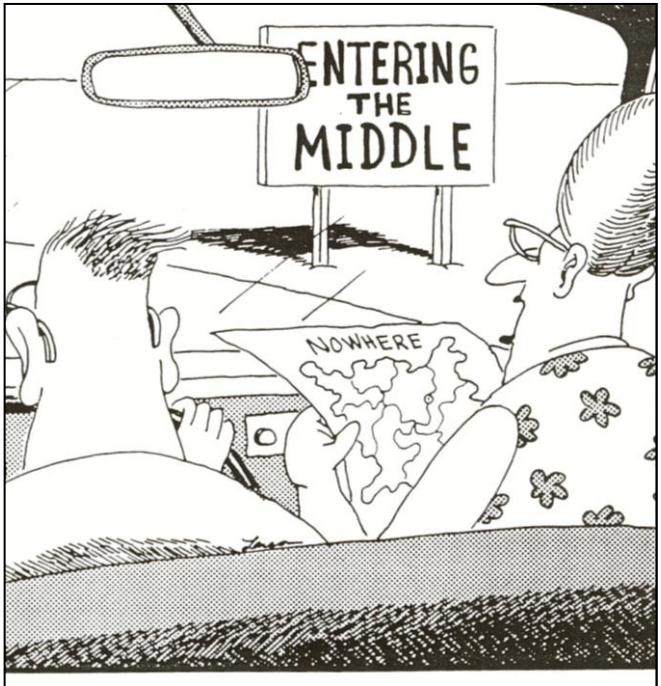
- Need to address who pays for the cost of care not covered by insurance – IPs usually do
- Need to ensure the holder of the advanced medical directive for the carrier is on the same page – may want IPs to cover the cost of having the Advanced Medical Directive –Living Will drawn up as part of the contract

More Detailed Provision re Life Support

In the event that it becomes necessary and the Gestational Carrier is placed on life support after the 26th week of pregnancy and the pregnancy remains viable, it is her intention to be kept on life support until the child is delivered or the pregnancy is no longer viable. Within five days of being provided notice by any attending Treating Physician that the sole reason for sustaining the Gestational Carrier's life via life support is for the benefit of the child, then the Intended Parents shall make a written request to the Holder of the Gestational Carrier's Advanced Medical Directive (AMD Holder) that they desire for the Gestational Carrier to be kept on life support. Otherwise, the AMD Holder shall have the sole right to terminate life support. Neither Gestational Carrier nor the AMD Holder shall be responsible for any out-of-pocket medical expenses resulting from such life-support. If Gestational Carrier's life is sustained with life-support equipment because Intended Parents exercised their option to keep Gestational Carrier alive under this Agreement, Intended Parents shall be responsible for any medical expenses that are not covered by health insurance until such time as the Child is born and life support services are discontinued. Moreover, Intended Parents will pay up to $400 for the Gestational Carrier to have her AMD in place with language that conforms to this Agrreement, no later than the fourth week after a confirmed pregnancy and shall provide proof thereof to the Intended Parents.

And Who Owns the Case Against the Drunk Driver? Or other 3rd Party?

- Who has the claim when the Carrier is the victim of third party negligence?
- What about a medical malpractice case?
- The IPs may have a direct claim (e.g. tortious interference with contractual relations – if the medical provider knew about the arrangement) or may not have a direct claim (e.g., drunk driver)



"Well, this is just going from bad to worse."

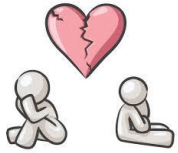
Third Party Negligence Language

All parties recognize that there is the risk of medical negligence as well as negligence or injury by third parties, that could occur during the period of this Agreement. In the event that both the Gestational Carrier and the Intended Parents are damaged or injured due to the negligence, intentional acts or other unlawful actions or inactions of a third party or parties, including where such actions or inactions cause injury or damage to, or loss of, a fetus following a confirmed pregnancy in the Gestational Carrier pursuant to this Agreement, then Gestational Carrier agrees that she will reasonably cooperate with and support the Intended Parents in pursuing any viable or meritorious action against any such third party or parties. Intended Parents agree that, if they are damaged due to the loss of, or damage to, their embryo or fetus, and a viable or meritorious cause of action arises therewith, then they will support and cooperate with the Gestational Carrier in pursuing any such cause of action.

3rd Party Negligence Language

As to any cause of action for which only the Gestational Carrier has standing to bring, Gestational Carrier agrees that, provided that the Intended Parents are responsible for a pro rata share of the costs advanced for pursuing any such viable or meritorious cause of action, and such cause of action is one in which only she has the standing to pursue, then she will assign a minimum of that pro rata share to the Intended Parents of any proceeds that she receives from such a third-party action to the extent that such proceeds are designated as damages due to loss of the fetus or pregnancy, or damage or injury to the fetus. Gestational Carrier also agrees that she will cooperate with and support the Intended Parents, including providing testimony, any requested documentation and any other support, for any matter in which the Intended Parents have a direct cause of action against a third party or parties for injuries or damages relating to this Agreement including but not limited to any gamete or embryo mix-up. Unless agreed otherwise, the proceeds from any such direct cause of action shall be 100% allocated to the Intended Parents.

Divorce – sample provision



Divorce or Separation**:** In the event of separation or divorce between Intended Mother and Intended Father, and prior to any embryo transfer procedure, no procedures shall take place pursuant to this Agreement.

- In the event Intended Mother and Intended Father separate after a successful embryo transfer, any resulting child shall remain, as intended, the child of Intended Mother and Intended Father. Because there may be issues with getting both Intended Parents on the child's birth certificate if they divorce prior to an amended birth certificate being issued after the child's birth, Intended Mother and Intended Father agree that, after any successful embryo transfer, they may separate but that they will not effectuate a divorce until an amended birth certificate is issued listing both as the parents and not listing the Gestational Carrier or Husband of the Gestational Carrier as a parent.
- Likewise, while the Gestational Carrier and the Husband of the Gestational Carrier may separate during the course of this Agreement, they will not divorce until this Agreement is terminated.

Death & Embryo Ownership



- Ensure the Intended Parents have a separate embryo disposition agreement other then what is in the fertility agreement. There is a growing body of case law on this issue!
- Ensure that whatever they put in the surrogacy contract is consistent or refers back to that agreement.

Death (continued) – Sample Language

In the event of the death of both Intended Parents prior to an embryo transfer procedure, this Agreement shall be null and void. Any existing embryos legally owned by the Intended Parents formed via Intended Mother's eggs and Intended Father's sperm shall be disposed of as set forth in any agreement that Intended Parents entered into with the attending fertility specialist and/or clinic (***or in their separate embryo disposition agreement***). In the event of the death of either Intended Parent prior to embryo transfer, either Intended Father or Intended Mother may agree to proceed with the embryo transfer procedure contemplated under this Agreement.

Death – More Sample Language



In the event of the death of either parent after a successful embryo transfer procedure, then the surviving parent shall remain as intended the legal parent of the child and all parties will engage in whatever legal measures are necessary to ensure that surviving parent is the sole legal parent.

Death – More Sample Language



In the event of the death of both of the Intended Parents after an embryo transfer resulting in the Gestational Carrier's pregnancy under the terms of this contract, then all of the parties hereto expressly agree that the Gestational Carrier and her Husband will place the child with [name] who is [relation] who reside at [] and can be reached by e-mail at [] and at phone number [] who shall adopt the child or otherwise ensure the legal parentage is secured and that the Gestational Carrier and her Husband have no parental responsibilities or parental rights whatsoever. If [] are not available or able and willing to take the child then Gestational Carrier and her Husband will place the child with [name] who is [relation] who reside(s) at [] and can be reached by email at [] and by phone number at {}, who shall adopt the child or otherwise ensure the legal parentage is secured and that the Gestational Carrier and her Husband have no parental responsibilities or parental rights whatsoever.

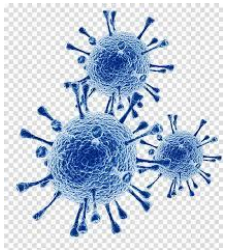
Death Provision (cont.)

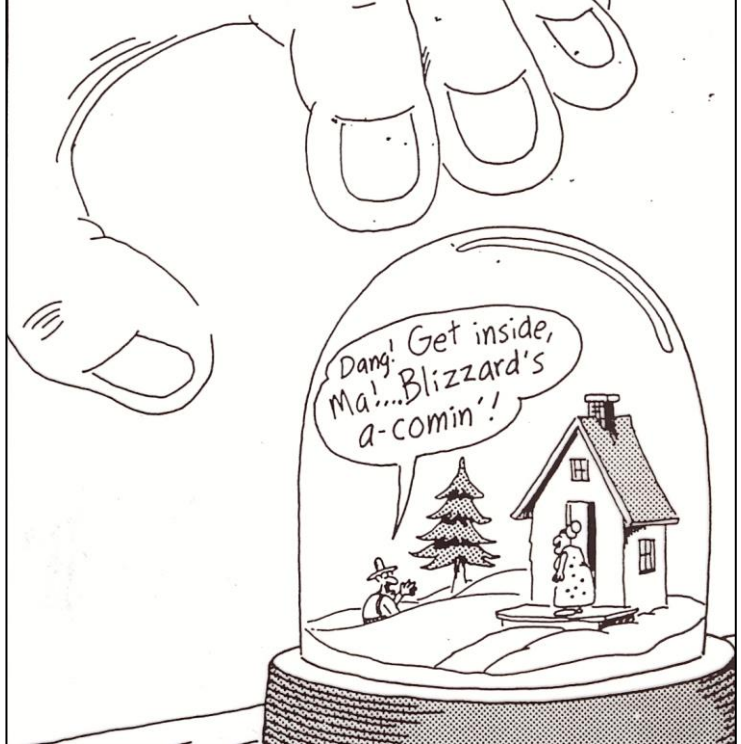


Intended Parents agree to make such funding provisions as are necessary to ensure that the financial obligations of the Intended Parents under this Agreement are fulfilled in the event of the deaths of both of them. Moreover, Intended Parents agree to have updated reciprocal Last Wills and Testaments in place with Guardianship and Trust provisions which name the designated Guardian(s) named herein no later than the fourth week of a confirmed pregnancy. Such documents also will have funding provisions in place to ensure the financial commitments under this Agreement are met, and with funding provisions in place for the Guardians and the Gestational Carrier and her Husband to effectuate an adoption by the applicable Guardian. Intended Parents agree to provide proof of such documents being in place to their attorney and to the Gestational Carrier and her attorney.

COVID-19 & Force Majeure

- Since the pandemic – COVID-19 compliance provisions started to be added to contracts requiring the carrier's compliance with all precautionary CDC and WHO measures
- Force Majeure provisions also started to be added to address clinic shut downs and unforeseen or unanticipated delays




Dang! Get inside, Ma!....Blizzard's a-comin'!

Force Majeure Provision

Force Majeure. Delays can and do occur in the surrogacy process and normally may not be used to excuse a party's non-performance or delay of performance of this Agreement. However, a party shall not be liable for any failure of or delay in the performance of this Agreement (other than a payment obligation) for the period that such failure or delay is beyond the reasonable control of the party, does not arise or result from the fault or negligence of the party, and could not reasonably have been foreseen or provided against. Such a force majeure includes: acts of God, acts of civil or military authority, embargoes, famines, epidemics, pandemics, war or acts of war, riots, insurrections, fires, explosions, earthquakes, floods, sudden and unusually severe weather conditions, labor problems, or a severe injury to or death of a party's immediate family member.



Drafting for Breaches and Remedies

- Sufficiency and nature of the breach
- Specify damages and remedies
- Attorney fees and costs
- Specific Performance
- Mediation vs Arbitration vs Counseling

Breach provisions should be enforceable

There is very limited law in the area of contractual breach of ART agreements. Instead, general principles of contractual breach must be consulted. Remedy and damage provisions as a general rule must be proportionate to the nature of the breach. Thus, it generally is advisable to make a distinction between material and non-material breach provisions. Moreover, as with breach in any contractual situation – notice and cure provisions should be included as well as mediation provisions. Specific state law should be examined to determine the extent of enforceability.

Enforceability of Breach Provisions

- Is it reasonable to think that a judge will require a carrier to keep the genetic child of the IPS because she exercised her Constitutional right and has refused to abort? ***NO***.
- Is it reasonable to think that a judge would require her to pay back to the Intended Parents the monies she received if she had agreed to abort but refused and the baby came out fine? ***NO.***
- ***So why have unenforceable provisions in the contract?***

Minor Breach



- Is it reasonable to think that a judge will require a carrier to pay back ALL the monies she has received AND pay as damages to the IPS ALL the money they have expended on the ART arrangement (doctors, lawyers, insurance, storage, etc.) because she “breached” the contract by having a couple of glasses of wine (and the baby is fine)? ***NO***.

Law of Liquidated Damages



Note that repayment of all monies paid to the carrier plus all monies expended by the Intended Parents is similar to a liquidated damages provision. Liquidated damages provisions generally are unenforceable if the liquidated damages are not a reasonable estimate of the prospective damages. Whether this stipulated sum is a penalty generally depends on whether the sum is reasonable and in proportion to the damage that will probably result from the breach.

Liquidated Damages

- For example, Virginia courts will not enforce liquidated damages clauses when there is a gross difference in the amounts between the actual damage and the stipulated damages. *See Dahlgren Limited Partnership v. Board of Supervisors,* 240 Va. 200, 396 S.E.2d 651 (1990).
- Therefore it is important to distinguish between material and non-material breach.

Material Breach. The Gestational Carrier materially breaches this Agreement if she:

(Acts in a manner that is recklessly unfavorable to the well being of the child or fetus by failing to follow the directions of the attending obstetric physician, or by any physician retained by the Intended Parents as set forth herein, or violates the provisions of paragraph ___ of this Agreement, and such failure , to a reasonable degree of medical probability , results in the child having significant and severe physical, mental or emotional deformities [***ideally define these – what is or is not included? Down's Syndrome? Spina Bifida?, etc***.] as a result of the breach.

Material Breach (cont)

- Without a compelling and reasonable excuse or justification, fails to appear at the precise date and time set for any embryo transfer, is not properly ready for the procedure in accordance with the supervising physician's instructions, or chooses not to complete the procedure. If the Gestational Carrier has a compelling and reasonable justification or excuse for failing to appear or not being ready or not completing the procedure, but agrees to appear for a rescheduled procedure, and does appear and is ready and completes the procedure at the next scheduled transfer, then she will not be in breach. If she fails to appear for a second time, regardless of excuse, it is a breach.
- Fails to transfer custody of the child to the Intended Parents as required under this Agreement.

Need to tie the damages to and as proximately caused by the breach.

Remedies for Material Breach By Carrier

In the event that the Gestational Carrier materially breaches this Agreement then:

The Gestational Carrier shall pay or reimburse the Intended Parents for all expenses incurred and amounts paid by the Intended Parents to the Gestational Carrier pursuant to Paragraphs ____ through ____ as well as all of the Intended Parents' expenses associated with the assisted reproductive arrangement Such expenses include, but are not limited to, all travel expenses, medical expenses, psychological expenses, all reasonable legal expenses, and any expenses incurred by the Intended Parents in proceeding with the assisted reproduction process that resulted in this specific pregnancy. Intended Parents also shall be entitled to receive any and all attorney fees and costs expended in seeking their remedies set out herein for material breach.

- WHAT Breach might justify the above?

Food for Thought



- **COMMENT:** What if the Gestational Carrier carries one healthy baby to term and refuses to selectively reduce the baby detected with Down's Syndrome that the Intended Parents wanted her to selectively reduce? Should she still get "paid" for the healthy baby? What would a judge probably do?
- **COMMENT**: Would a judge likely enforce a provision that required the Gestational Carrier to pay for all the ***consequential damages*** associated with a child that she refused to abort or selectively reduce that had to be placed on life support? That needed round the clock care? ***NO.Not at all likely - especially with the SCOTUS Dobbs ruling.***

Specific Performance



In the event that the Gestational Carrier materially breaches this Agreement by refusing to transfer the baby to the Intended Parents, then the Intended Parents shall be entitled to seek specific performance and enforcement of the terms of this Agreement to require the Gestational Carrier to give them custody of the child. During such time period the Intended Parents are not required to reimburse the Gestational Carrier or make any payments required under this Agreement and shall be entitled to any and all attorney fees and costs incurred in seeking such specific enforcement.

Distinguish Non-Material Breach

Any breach of this Agreement not set forth in paragraph A above shall be considered a non-material breach. In the event of a non-material breach, the Intended Parents shall be entitled to terminate this Agreement with no further payments being made to the Gestational Carrier if no embryo transfer has occurred or if an embryo transfer has occurred but not resulting in any pregnancy. If a non-material breach occurs after the Gestational Carrier achieves a pregnancy as envisioned under this Agreement, then the Intended Parents shall not be required to make any further payments under this Agreement unless and until the breach is cured. Moreover, if the breach is not cured or not capable of being cured, then the Gestational Carrier shall not receive any reimbursements or payments by the Intended Parents during the period of the breach and the Intended Parents shall be entitled to any actual damages that may be shown including attorney fees and costs.

Notice and Cure Prov



If the Gestational Carrier (and/or her Husband as applicable) commits a breach, whether material or non-material, then the Intended Parents shall send written notice to the Gestational Carrier (and/or her Husband) of such breach and, unless time is of the essence, allow five (5) days for the Gestational Carrier (and/or her Husband) to cure or remedy such breach. If such breach is not cured, or not capable of being cured, then Intended Parents may seek legal action, including an action for specific performance or damages, as applicable, and, should they prevail, may recover their legal fees and costs incurred in taking such legal action.

And Dispute Resolution



As a prerequisite to taking any legal action or if any dispute arises between the parties under this Agreement, and so long as time is not of the essence, all parties agree that, for each such dispute or breach, they shall, within five (5) days of the notice of the breach or dispute and upon written notice by the other party, attend one joint counseling session with a counselor experienced in dispute resolution in an attempt to resolve the dispute short of mediation or litigation. The parties also agree to mediate the issue prior to any litigation, so long as time is not of the essence, if the joint counseling session does not resolve the issue.

Remedies for Breach By Intended Parents

If the Intended Parents breach this Agreement as described herein, subject to the Notice, Cure and Dispute Resolution provisions, the Gestational Carrier may seek a specific performance action to order that the Intended Parents specifically perform their obligations under this Agreement and the Court may require the Intended Parents to pay any reasonable legal fees and/or costs incurred by the Gestational Carrier in seeking such an award of specific performance. Moreover, the Court may order that the Intended Parents take immediate custody of such child and then the Intended Parents are responsible for raising such child or making such other disposition including placing the child for adoption.

Notice and Cure for IPs

In the event that the Intended Parents commit a breach under this paragraph, the Gestational Carrier shall send written notice of such breach to the Intended Parents and provide them with five (5) days to cure or remedy such breach. If such breach is not cured or remedied, then Gestational Carrier may proceed to take legal action, including an action for specific performance and, should she prevail, may recover her reasonable legal fees and costs incurred in taking such legal action. Moreover, the Court may order that the Intended Parents take immediate custody of the child and that the Intended Parents are responsible for the child or making such other disposition including placing the child for adoption.

Dispute Resolution for IP Breach

As a prerequisite to taking any legal action or if any dispute arises between the parties under this Agreement, and so long as time is not of the essence, all parties agree that, for each such dispute or breach, they shall, within five (5) days of the notice of the breach or dispute and upon written notice by the other party, attend one joint counseling session with a counselor experienced in dispute resolution in an attempt to resolve the dispute short of litigation. The parties also agree to mediate the issue instead of having a joint counseling session.



General Counseling Provision



For those minor issues that do not appear to rise to the level of a breach – for example, the Intended Parents are micro-managing the pregnancy and spending an inordinate amount of time on the phone with the Gestational Carrier, the following contractual provision can be helpful to include:

Moreover, during the course of this Agreement, any party may request in writing up to 10 (ten) times, and no more than once every two weeks, that all parties submit to a conflict counseling session by a mental health counselor qualified in conflict resolution. Such a request may be made if there is/are any issue(s) that arise that cannot be resolved solely by attorney intervention. Additional counseling sessions may be conducted by mutual agreement of all parties. Such counseling session(s) shall be paid for by the Intended Parents unless covered by the health insurance of any party.

Mediation Provision

So long as time is not of the essence, the Parties agree to mediate prior to the initiation of any legal action. The Parties agree to use [name of agreed upon group] located in [name of area and state] and the Party seeking mediation will obtain the names of five possible mediators from such group. The Party not seeking the mediation shall then choose the mediator from such five. The Parties agree to cooperate in setting the mediation for the earliest date possible. The Parties may attend such mediation remotely if attending in person is costly or will delay the mediation.



Why is Having an Arbitration Provision not a Good Idea?

- Arbitration is all or nothing – that is not conducive to arrangements where a person is carrying someone else's child
- Arbitration is unbelievably expensive – especially with the American Arbitration Association – and time consuming
- Most arbitrators will have no clue about surrogacy
- These arrangements need third party facilitators – not edicts. They need joint counselors or mediators when things go south. Yes, arbitration is private but so is joint counseling and mediation.

Addressing Abortion & Selective Reduction

- Needs to be addressed in the initial consult (see article in the materials and provide it to the clients and have them share with the other parties)
- Are the IPs and GC (and GC spouse) aligned in their pro-choice versus pro-life views?
- Where do they all fall on the spectrum?
- Ensure IPs sign an internal form –acknowledging you have explained a judge is not going to be expected to order a GC to abort or not abort – and some state laws (like VA and TX) might expressly state any such provisions are not enforceable.
- The GC's beliefs are likely to control.

Addressing Abortion & Selective Reduction

The spectrum:

- Will abort for any reason (except maybe not for something surgically correctible – like a cleft palate) to
- Will not abort for any reason whatsoever even if child has no chance of any meaningful existence
- And then there is everything in between – mild to more severe.



Sample Language – GC Rights

All parties recognize that the Gestational Carrier has a Constitutional right to abort or not to abort any child in utero. The Intended Parents recognize that they cannot enforce the Gestational Carrier's agreement to abort or not abort. However, all parties have discussed their views extensively and it is their intent to follow the expectations as set forth in this Agreement.



Sample Language re Abortion & Selective Reduction

The Gestational Carrier agrees that she will not abort or attempt to abort any embryo, child in utero or child she carries pursuant to this Agreement, including any one or more of multiple embryos, child(ren) in utero or children, unless, in the professional medical opinion of a specialty obstetric physician approved by the Intended Parents, her own independent obstetrician or emergency medical doctor, such action is necessary to protect against a serious risk to the Gestational Carrier's own physical health, or poses a serious risk to one or more of the other children in utero, or if there are more than two (2) fetuses. In such event, absent an emergency as discussed below, she will discuss the matter with the Intended Parents and any attending and specialty physicians beforehand. All parties agree that the Gestational Carrier has agreed to carry up to two (2) fetuses/children and will not be expected to carry more than two and if she were to be carrying three or more fetuses that Gestational Carrier may choose to undergo a selective reduction to reduce the pregnancy to no more than two fetuses.

NOTE: May want or need to leave off any breach provisions in this part of the contract.

Sample Language re Abortion & Selective Reduction (cont.) – agreement to confer



If there is a dispute regarding the need for an abortion or selective reduction 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 Intended Parents (including any specialty obstetric or high-risk physician chosen by the Intended Parents). 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. Gestational Carrier agrees, provided there is time to do so without physically endangering her, to discuss this matter with the Intended Parents, if possible, prior to any such procedure being performed.

Sample Pro-Life Language



While pregnant, and if requested to do so by the Intended Parents, the Gestational Carrier agrees to undergo non-invasive testing and, if such non-invasive testing suggests that invasive testing should be done, including amniocentesis or such other tests designed to detect genetic and congenital defects, then the Gestational Carrier will undergo such invasive test(s) as advised 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. All parties agree that even if such testing shows that the child in all probability will have physical or mental abnormalities including but not limited to severe Down's Syndrome or other severe, significant or concerning issues, that the Gestational Carrier will not be asked to, and will not, abort or selectively reduce the fetus even if the child is determined to have no chance of meaningful existence.

Sample Pro-Choice Language



While pregnant, and if requested to do so by the Intended Parents, the Gestational Carrier agrees to undergo non-invasive testing and, if such non-invasive testing suggests that invasive testing should be done, including amniocentesis or such other tests designed to detect genetic and congenital defects, then the Gestational Carrier will undergo such invasive test(s) as advised 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. All parties agree that if such testing shows that the child in all probability will have any physical or mental abnormalities, disabilities, deformities or deficiencies, even if mild, except for a surgically correctible minor deformity such as a cleft palate, that the Intended Parents may ask the Gestational Carrier to abort the child, and so long as she is not subject to any criminal implications, she agrees to do so.

Will she also agree to travel to another state if necessary if the Intended Parents dover the costs? The Parties will want to know that and have a meeting of the minds on it and put in the Agreement ***even if the provision may not be enforceable.***

Make contracts flexible so addendums are not necessary.

- Many clients are “locked” into how they want things to be – but may need to explore other contingent options
- I have had many clients come back later and ask for addendums or revisions
- Clients need to be educated about the costs associated – and may want to allow for flexibility in the initial contract – after all – what is the harm of a contingency plan?

Make contracts flexible

- In the contract, allow for the creation of more embryos by the IPs
- Allow for the creation of embryos with donor parts and even the purchase of embryos where the IPs have no genetic connection
- Allow for the parties to easily extend the contract via a simple addendum
- Ensure all possible parentage options are set out.

DO NOT SAY AREA OF LAW IS UNCERTAIN

- Have your Agreement read that you KNOW what the law is and the parties intend to rely upon it.
- Do NOT state that the law is uncertain, unchartered, unknown, cannot predict the outcome, etc. – put that in your retainer letter instead
- We want certainty in contract drafting and interpretation (even if the law is mud).



SAMPLE PROVISION RE CHANGING LAW

In the event that guidelines are promulgated by relevant legislation or judicial decision(s) which regulate or purport to regulate gestational parenting or which would govern some or all of the provisions of this Agreement, **the Parties hereto shall forthwith adopt amendments** to this Agreement, which will result, in the opinion of counsel for the Intended Parent's and for the Gestational Carrier, in this Agreement complying with such guidelines.

Payments



- Watch out how payments are characterized and the tax consequences.
- Anything called “compensation,” “bonus,” “fee,” “lost wages,” or the like will be subject to taxation.
- Some states (like VA) do not allow for “compensation” which voids the contract – but do allow for reimbursable living and household expenses related to the pregnancy.

Sample Provision re Tax Liability



All parties recognize that any amounts paid are viewed as reimbursements for reasonable medical and ancillary costs and expenses under Virginia law and in no way are to be construed as compensation or a fee for services or the like. However, while all payments under this Agreement are to be construed solely as reimbursements, and therefore not subject to taxation, no definitive tax opinion has been or is being offered by Intended Parents' attorney or Gestational Carrier's attorney on the taxation of such expenses or reimbursements. Accordingly, Intended Parents agree to indemnify and hold harmless the Gestational Carrier from any tax implications, if any, of the amounts paid to her under this Agreement.

Copyright



Why have a copyright provision?

- It mainly is to preclude non-lawyers and lawyers who do not understand or know ART law from using the agreement.
- I have had prospective clients contact me on several occasions and indicate that they already had a contract drafted – then when the contract was provided – it was an older out-of-date version of my contract
- One prospective carrier even said another local attorney had drafted it and included her name – to enormous surprise to that attorney who had zero knowledge of it!

Sample Copyright Language (thanks to Melissa Brisman who let me first borrow her language and then I added to it and sent back to her!)

Copyright. Each Party acknowledges that the original draft of this document, as well as any revised drafts, is/are protected by United States Copyright Laws, and is/are intended for the sole use of the undersigned Parties in connection with the subject matter hereof. Each Party further acknowledges that the final draft of this document, as executed, is proprietary and confidential and may not be revealed to the public, press or any individual whose employment does not require him/her to have access to the same. Any unauthorized use or disclosure of this document is unlawful, including but not limited to: re-using this Agreement beyond its termination period without the express written permission of the author, sharing this Agreement with any unauthorized persons (other than tax advisors and medical and hospital personnel), posting this Agreement on the internet or any other public forum, and any other unauthorized use or disclosure. Such unauthorized use or disclosure will terminate the attorney-client relationship between the Parties and their respective counsel, will release, remise and discharge such counsel from any and all liability in connection with unauthorized use or disclosure and may expose the Parties to liability and damages from such unauthorized use or disclosure.

TO SUMMARIZE A CRITICAL POINT:

- Avoid and address the ethical issue of the unlicensed practice of law (practicing law in state in which not licensed) by ensuring that an attorney in every involved state and/or country is consulted.
- Start with the end in sight – address in the beginning how parentage will be established at the end. Make sure everyone understands the road map. Make sure the contract does not violate the laws of any potentially involved state
- Make sure qualified and competent ART attorneys are engaged – including immigration and foreign counsel for international cases.


ADIOS AMOEBAS!
S R O S Z