Published in *Family Advocate*, Vol. 32, No. 4, (Spring 2010) p. 36-40.

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ART Enter the Lawyer

Surrogacy brings attorneys in at the beginning of the family, rather than at the end of the marriage, to answer probate, paternity, and constitutional questions among others

Assisted reproductive technology (ART) has expanded the relevant time frame during which family law practitioners are involved with a family. Where once family law attorneys dealt mainly with a rupture of the family, the expanding use of ART has led to their being involved in the early stages of the family—with the creation of children, the disposition of not-quite-created children, and post-mortem family planning.

ART brings medical technology and bioethics to family law. It also forges a new nexus between family law and probate, and always implicates paternity/maternity laws. Because ART involves reproductive rights and the fundamental rights of parents, constitutional law lurks within every ART matter. As ART opens up a debate about who qualifies as a child's legal parents, it has profoundly affected the recognition of same-sex couples.

What is involved?

The general definition of ART is human reproduction by any means other than sexual intercourse. Thus, ART includes:

- sperm donation
- egg donation
- embryo donation
- embryo adoption
- intrauterine insemination
- in vitro fertilization (IVF)
- embryo transfer (frozen and tubal)
- gamete intrafallopian transfer (GIFT)
- zygote intrafallopian transfer (ZIFT)
- gestational surrogacy
- traditional surrogacy
- gamete cryopreservation
- embryo cryopreservation
- post-death gamete harvesting
- post-death conception
- disposition of cryopreserved embryos

ART is used by many different categories of intended parents: married opposite-sex couples, unmarried opposite-sex couples, older couples, single parents, married same-sex couples, unmarried same-sex couples, post-binary family structures, and widows and widowers.

The number of children created through ART is increasing dramatically. In 2008, the Centers for Disease Control and Prevention (CDC) published the 2006 Assisted Reproductive Technology Report. At that time, 483 fertility clinics were in operation. Those clinics provided verified data on the outcomes of all ART cycles started at their clinics. The 138,198 ART cycles performed at these reporting clinics in 2006 resulted in 41,343 live births and 54,656 infants that year.

According to the CDC, the number of ART cycles performed in the United States has more than doubled in ten years, from 64,681 cycles in 1996, to 138,198 in 2006. The number of live-birth deliveries in 2006 (41,343) was more than two and a half times higher than in 1996 (14,507). The number of infants conceived using ART also increased steadily between 1996 and 2006. In 2006, 54,656 ART infants were born, which was more than two and a half times the 20,840 born in 1996. The American Society for Reproductive Medicine states that starting in 2002, approximately one in every hundred babies born in the United States was conceived using ART, and that trend continues today.

Changing legal concepts

ART is a $3 billion a year industry in the United States. And indeed, it is an industry. Fertility clinics, sperm storage facilities, gamete donors, gamete donor agencies, surrogacy agencies, escrow agencies, specialty health insurance providers, mental health providers, and attorneys all generate income from the transactions involved in ART baby-making.

ART has changed the way we look at human reproduction. ART has changed the law regarding who we recognize in parent-child relationships: in same-sex couples, both parties can be legal parents; a birth woman may not be determined to be the mother of a child; and a child potentially can have a birth mother, a genetic mother, an intended mother, a genetic father, and an intended father. The practice has drastically changed how the law conceptualizes parentage. The National Conference of Commissioners on Uniform State Laws (NCCUSL), also known as the Uniform Law Commission (ULA), has promulgated the Uniform Parentage Act 2000 (UPA), amended in 2002, which contains Article 8, a major departure from previous iterations of the UPA, in large part because of the inclusion of terms related to ART. As such, adopting UPA 2000 invokes major public policy issues, which may explain why UPA 2000 has been adopted only in a few states.

The law can touch every step of baby-making through ART. In many situations, the actors involved in the making of an ART baby are in a number of different states and sometimes different countries. There is little uniformity in the applicable laws among the states, and sometimes there is little or no applicable law within a state. In light of the lack of law, the high costs, high stakes, and multiple transactions involved in ART, one might anticipate extensive ART-related litigation. In fact, to date, litigation has been relatively sparse.

A lack of consistency

Gamete donation. Most states have laws regarding the donation of sperm or eggs. In some states, the law says unequivocally that third-party donors are not legal parents. In other states, donors are not legal parents only if the donation was made through a physician, the donor was unknown, or the recipient is married to someone other than the donor. Some states require written and signed donation agreements. Spouses who donate to spouses are, however, consistently treated as legal parents.

Although ART litigation is relatively sparse, one area that has been more frequently litigated is "sperm donor" consents involving use of sperm by a friend or relative with no physician involvement and no written contract regarding the donation. Outcomes are diverse, and judgments weigh the policy of not discouraging donation against the policy of not leaving a child with only one legal parent.

Another area of gamete litigation is between divorcing spouses. The general fact pattern is that the wife used donor sperm to conceive a child, and either the husband wants to disavow his paternity to avoid child support or the wife wants to disavow the husband's paternity to invalidate his parental rights.

Policy and ethical issues relate to gamete donation, mainly because gamete donation is often not really "donation" at all. People are usually paid for the use of sperm and eggs. Sperm is pretty inexpensive, but eggs can command between $4,000 and $150,000. No state outlaws sperm donation, but a few outlaw egg donation for pay. (California, Massachusetts, Connecticut, Indiana, New Jersey, and Maryland all legislatively prohibit compensation for eggs procured for use in stem-cell research.) What are donors selling? Why are people legally allowed to sell gametes but not body parts? Are gametes purely property? Should an unregulated market control the sale price of a gamete?

There is a longstanding national discussion regarding whether donor registries should exist so that, if necessary, parents and resulting children can obtain genetic information regarding donors for medical reasons. However, there is no great push for federal regulation of donor information or a centralized database.

Defining "mother"

Surrogacy. Surrogacy involves a woman's gestation of a child, which she has no intention of parenting, on behalf of another person or couple. Most surrogacy situations are gestational surrogacies, in which the surrogate is implanted with an embryo created from another woman's eggs. Often, the egg is

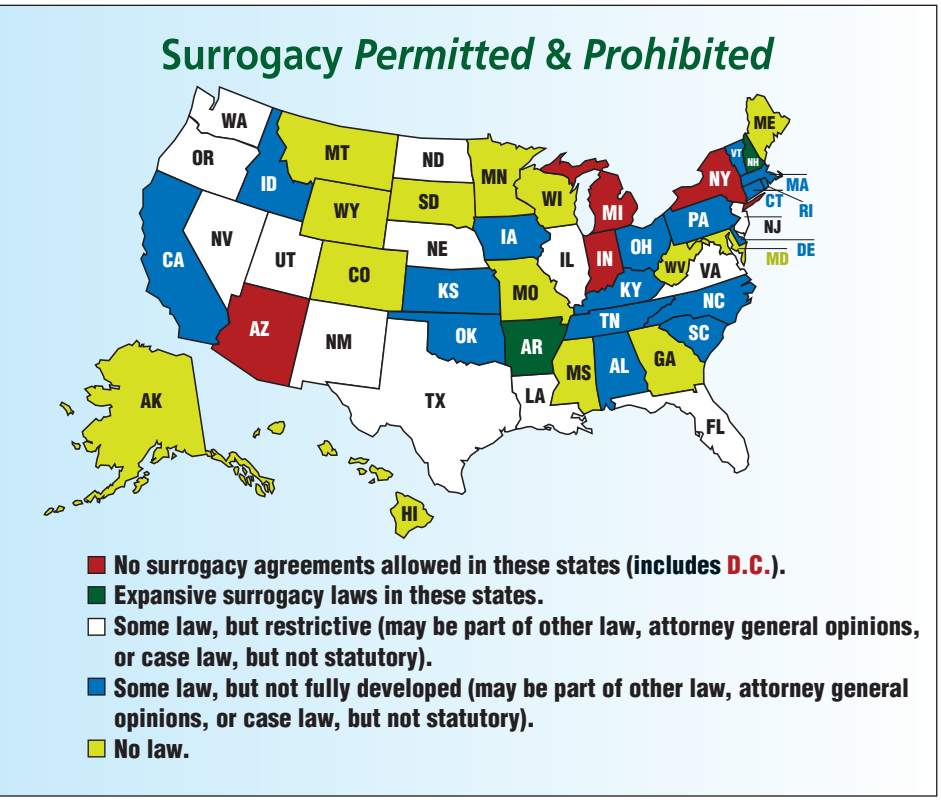
a donor egg, and the intended father's sperm is used to fertilize it. However, there are still some traditional surrogacies, in which the surrogate is also the genetic mother. After the New Jersey Supreme Court decided *Baby M*, these types of traditional surrogacies became generally disfavored by agencies and practitioners, and some states outlaw traditional surrogacies.

In many surrogacy situations, agencies are used to match intended parents with surrogates, negotiate a surrogacy agreement, recommend attorneys to the intended parents and the surrogate, be the buffer between the intended parents and the surrogate, and hold and disburse monies passed from intended parents to surrogate. Some intended parents and surrogates forgo using an agency. The Internet has made this easier.

Many different kinds of intended parents use surrogates—single individuals, married couples, unmarried couples, same-sex couples, and older (sometimes much) parents. Women who serve as surrogates tend to be lower-middle class, stay-at-home wives between the ages of 25 and 35 who have children of their own.

To legally establish parentage, courts issue pre- or post-birth orders adjudicating the intended parents as the legal parents of the child. In some states, or in traditional surrogacy situations, the surrogate relinquishes legal rights, and one intended parent adopts the child in a step- or second-parent adoption. In these situations, a surrogate will go through a relinquishment hearing, and the nongenetic parent—usually the wife—does a stepparent adoption. In those states with second-parent adoption—in addition to stepparent adoptions (usually for same-sex parents)—the second parent will adopt. If neither option is open to a couple, or if only one person is the intended parent, then the child has one legal parent. In states that do not allow two same-sex or unmarried parents to be listed on a child's birth certificate, only one will be listed.

In four states and the District of Columbia, surrogacy agreements are prohibited. (See red states on map below.) Two states, Arkansas and New Hampshire (indicated in green), have expansive surrogacy laws. Fourteen other states (in yellow below) have no laws governing surrogacy. Thirteen states (white states), have some restrictions on surrogacy (i.e., parts of other laws, attorney general opinions or case law, but no statutory law). And in seventeen other states (blue states), the laws of surrogacy are not fully developed (i.e., surrogacy is referenced in other laws, attorney general opinions, or case law, but no statutory laws exist).



Baby M

Surrogacy entered the American consciousness with the *Baby M* case in 1986. That case involved a traditional surrogacy situation. After delivering the child, the surrogate claimed parental rights. She was awarded some parenting time with the child. Not many surrogacy situations result in a dispute between the surrogate and the intended parents. More commonly, litigation is between the parents. For instance, divorced spouses dispute whether one spouse, who did not contribute gametes to the child, should have parenting rights and obligations, such as a duty of child support.

California and Massachusetts have seen the most case law regarding surrogacy. In general, when determining who has parental rights, preconception intent is the central inquiry. The people who drove the process of bringing a life into being are considered the legal parents of a resulting child, even if they are not genetically connected to the child. People who were involved in the creation of a child, but did not intend to be a parent, are not given any parental rights, even if they are genetically linked to a child. However, genetically linked traditional surrogate mothers may be given some parenting rights in the event of a dispute. Disputes can also arise from an alleged breach of the surrogacy agreement, such as a refusal to reduce embryos, or an allegation that a birth defect was the result of drug or alcohol use during pregnancy, but those cases have been very limited to date.

Cryopreservation and disposition of embryos. In vitro fertilization is a widely used form of ART. When eggs are fertilized in a culture dish, doctors usually fertilize multiple eggs, but implant only one or two. Surplus eggs are cryopreserved or "frozen." There are no statutory laws governing the terms of cryopreservation.

Cryopreserved embryos can be stored indefinitely, used by both of the intended parents, used by one intended parent, donated to research, adopted, sold, or destroyed. The disposition of surplus embryos is up to the people who own the embryos, the preservation facilities, and when there is a dispute, the courts.

One author estimated in 2003 that 400,000 surplus cryopreserved embryos existed in the United States. Although there is not much law regarding cryopreserved embryos, the legal, moral, and ethical issues involved in their disposition are quite complex. In a dispute about the disposition of cryopreserved embryos, courts turn first to the contract or consent form on file with the fertility clinic or cryopreservation facility. Most of the time, there is such a document, which indicates that the disposition of embryos is in large part a contract issue, and a prefertilization intent issue. But sometimes contracts are not involved. Also, embryos are not merely property. Courts, therefore, weigh other considerations, such as whether to allow procreation against the will of one progenitor and whether to allow procreation by a person who will have no other means of reproducing without use of the cryopreserved embryos. Case law in California recently held that the intent of the sperm donor must control in a bid by a widow to use her husband's frozen sperm after his death. The court held against the widow.

In 1998, the California Fourth District Appellate Court considered whether a married couple, who used anonymously donated sperm and egg and used a surrogate to carry the child, were the parents of the child born six days after the husband filed for divorce. Thus, husband argued that he was not the biological father and could not be forced to adopt. The court issued a decisive opinion declaring both husband and wife the parents of the child.

A recent Oregon opinion ordered destruction of six cryopreserved embryos after divorce.

Paternity laws. UPA 2000 specifically addresses parentage determinations in surrogacy situations. It also contains provisions for determining parentage in gamete donation situations. However, it has only been adopted by nine states (Alabama, Delaware, New Mexico, North Dakota, Oklahoma, Texas, Utah, Washington, Wyoming).

Most states do not have comprehensive ART laws. As a result, when dealing with ART babies, attorneys often must creatively interpret a state's paternity laws. Paternity laws are used to determine legal parentage, which in turn determines parenting rights and duties, heirship, and who can take advantage of benefits to dependents from such third parties as the Social Security Administration. In gamete donation situations, if parentage is not determined by statute, it should be determined by adjudication. Likewise, in surrogacy situations, there must be a prebirth or postbirth adjudication of parentage or an adoption if there are no specific surrogacy laws determining parentage.

The "old" paternity laws are elastic enough, though, to be used where ART children are at issue. For instance, in several states, paternity statutes are used to put both same-sex parents on a birth certificate when an ART child is involved. Old paternity laws can also be used to determine that a nongenetic child is still a legal child of an intended parent for support and parental rights purposes.

Post-mortem conception and estates. Sperm can be cryoprserved. Embryos can be cryopreserved. Soon, unfertilized eggs will be effectively croypreserved. Many states have laws about the nonparentage of unknown sperm donors. But very few states have laws regarding parentage by egg donors and embryo donors. The status of a child of a known sperm donor can be unclear in some states. In states without clear laws, it is unknown what claims genetic children may have on the estates of donors.

Starting in 2002, approximately one in every hundred babies born in the United States was conceived using ART

Currently, there are two main types of litigation in the area of post-mortem conception. The first is whether children conceived after the death of a progenitor are legal children (and therefore heirs) of that person. The question is litigated in the context of distribution of trusts and estates and entitlement to Social Security benefits. The other area is whether a survivor of the progenitor can make use of stored gametes or harvest gametes after (or just before) the progenitor's death.

In most court rulings, and in 2008 amendments to the Uniform Probate Code (UPC), the position is that if there is predeath intent to be a parent, even after death, a child of a parent who died before conception is a legal child of that parent for inheritance, support, and benefits purposes. *Woodward v. Comm'r of Social Security*, 769 N.E.2d 257 (Mass. 2002).

NCCUSL's 2008 amendments to the UPC recognize that post-mortem conception and birth will be a significant issue for probate laws in the future. The proposed amendments to the UPC allow for treating children conceived and in utero no more than 36 months after, and born no more than 45 months after, the death of the progenitor as heirs under intestacy statutes. The proposed amendments to

the UPC also clarify that third-party donors are never parents.

Sperm is treated as a sort of property that can be devised. Once eggs can be effectively stored, they likely will be treated similarly. However, the disposition of embryos through estate planning instruments will likely bring forth a different analysis. Embryos are treated not quite as property and not quite as children. Courts generally uphold agreements for use of sperm by a spouse or significant other after death, and allow harvesting of sperm.

Looking forward

What is fascinating about ART is the intersection of technology, ethics, and weighty yet oppositional legal theories. For instance, in the United States, body parts cannot be bought and sold, but gametes, wombs, and embryos can, although not at free-market prices. Paternity, when sex is involved, is a strict liability situation; whereas, with ART, the question is specific intent.

"Reproductive rights" takes on a whole new meaning when reproduction is subject to contracts. As a policy matter, governments in the United States currently stay out of reproductive rights (for the most part). But technology may force more regulation of reproduction as we see growing commercialization. Every step in making an ART baby potentially involves an exchange of money and a contract. Reproductive technology is a high-stakes endeavor with relatively wealthy consumers, but the lack of law in this area leads to unpredictability. One might infer that these factors will lead to increased litigation in this area and an evolving practice area for family law practitioners. **FA**

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