

EXPLORING NEW TERRAIN: ASSISTED REPRODUCTIVE TECHNOLOGY (ART), THE LAW AND ETHICS

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INTRODUCTION

Where assisted reproductive technology (ART) was once in the realm of science fiction, it has become reality. Now, not unlike adventurers sent to explore a new territory without the help of maps or navigational instruments, New Jersey lawyers are asked to counsel clients about ART.

In 1980, the Baby M² case riveted public attention to the concept of ART. Baby M was born after William and Elizabeth Stern, a New Jersey couple, contracted with Mary Beth Whitehead, a New Jersey woman, to have a child using Stern's sperm and Whitehead's egg with Whitehead carrying the resulting embryo full term. Whitehead agreed to surrender

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² Baby M, 109 N.J. 396 (1988)

the child, Baby M, to the Sterns upon payment of a fee. After the birth of Baby M, Whitehead refused to surrender Baby M and abide by her contractual; obligation.³

As a result, what had previously been tempered curiosity about reproductive technology, overnight became charged with fear and speculation as the laws of nature seemed to be rewritten. This transformation has been analogized to a moral panic “in which the public, the media and political actors reinforce each other in an escalating pattern of intense and disproportionate concern in response to a perceived social threat.”⁴

In reaction, some states legislature acted swiftly to prohibit all types of surrogacy.⁵ In New Jersey, where the holding in Baby M is limited to one facet of ART, traditional surrogacy, state legislators considered more comprehensive legislation, but ultimately did not act.

In contrast to the legislature’s inaction, New Jersey citizens are increasingly using ART techniques to create families. Likewise, brokers,

³ Kelly Oliver, “The Matter of Baby M; Surrogacy and the courts,” Issues in Reproductive Technology edited Helen B. Holmes (1992)

⁴ Elizabeth S. “Scott, Surrogacy and the Politics of Commodification, “<http://law.duke.edu/journals/lcp> (last checked December 10, 2010).

⁵ See for example, Ariz. Rev. Stat. Ann. § 25-218 (A) (1989); Ind. Code § 31-20-1-1 (1988); La. Rev. S/2t. Ann § 9: 2713 (1989); Mitch Comp. Laws §§ 722.851-863 (1988); N.D. Cent. Code §§ 14-18-01-07 (1989).

agencies, and medical clinics all located in New Jersey hawk their ability to help individuals and couples use ART for the creation of human life.⁶

Twenty years after Baby M., in a case involving a controversy between a divorcing couple about disposition of preembryos, New Jersey Chief Justice Poritz decried this lack of the legislative direction.⁷ The Chief Justice remarked

Advances in medical technology have far outstripped the development of legal principles to resolve the inevitable disputes arising out of reproductive opportunities now available Without guidance from the legislature, we must consider a means by which courts can engage in a principled review of the issues presented in such cases in order to achieve a just result.⁸

New Jersey lawyers confront unresolved ethical and legal issues when advising clients about ART. The purpose of this article is to examine some of these quandaries. Unfortunately, there are many more questions than available answers. This paper will first review the vocabulary of ART and then consider ethical issues that lawyers face, including multiple representation, representation of the unborn, jurisdictional issues and the extent of an attorney's duty of care.

⁶ See for example, Reproductive Medicine Associates of New Jersey at <http://www.rmanj.com/index.html>. or A Woman's Gift at <http://www.awomansgift.com/>

⁷ JB v MB, 170 N.J. 9 (2001)

⁸ Id at _____.

I. DEFINITIONS

The growth of ART has spawned its own vocabulary. Before beginning this discussion, it is important to define terms. Following are some “terms of ART”:

1) **Sperm donation.** Donated sperm has been in use for over 150 years.⁹ Female same-sex couples, transgender people and heterosexual couples who are unable to conceive due to male infertility use this technique. The New Jersey legislature has enacted a statute about sperm donation.¹⁰ It provides that unless there is a written agreement to the contrary, if a wife, with the consent of her husband and under the supervision of a physician, is inseminated with sperm from a donor other than her husband, the husband’s name will be placed on the birth certificate when the child is born.

In 2005, a New Jersey trial judge gave this statute a gender neutral reading for a same-sex female couple thereby making the non-biological mother a co-equal parent.¹¹

⁹ Raftopol v. Ramey, Ct. (2011), at footnote 3

¹⁰ N.J.S.A 9:17-44

¹¹ In re Parentage of Robinson, 383 N.J. Super. 495, 890 A.2d. 1036 (Ch. Div. 2005)

- 2) **Egg donation.** Also known as “ova/oocyte donation,” egg donation refers to the use of an egg from a donor for purposes of creating an embryo for a parent or parents who cannot use their own eggs or choose not to do so. There is no New Jersey case law or statutes which cover this practice.
- 3) **Traditional surrogacy.** This term refers to the use of an egg from a donor who also carries the resulting embryo to full term and gives birth to a child or children. This type of surrogacy for money was strictly prohibited by the Baby M case.¹²
- 4) **Gestational surrogacy.** A woman is a gestational surrogate when she carries an embryo (or embryos) to full term and gives birth to one or more children, but she has no genetic connection to the child or children. In one reported New Jersey trial court decision, a judge approved the practice where the gestational carrier was not compensated.¹³
- 5) **In vitro fertilization (“IVF”).** IVF refers to the fertilization of an ovum (or ova) outside a woman’s body with

¹² Baby M., 109 N.J. 396 (1988)

¹³ A.H.W. v. G.H.B., 339 N. J. Super. 495 (Ch. Div. 2000)

implantation of the resulting pre-embryo(s) in uterus of a woman who carries the child to full term and gives birth.

6) **Pre-birth order.** A court may issue a pre-birth order when petitioners apply before the birth of a child to clarify who are the parents of the child about to be born.

7) **Co-maternity.** Co-maternity is possible when a same-sex female couple harvests an egg from one partner of the couple, the egg is fertilized using sperm from a known or unknown donor using IVF, and the resulting pre-embryo (or pre-embryos) is implanted in the uterus of the other partner of the couple who carries the child to full term and gives birth. There are several unreported trial court decisions where a judge entered pre-birth orders holding that both women were parents of the child. In other unreported cases, the parentage of the genetic mother was confirmed through a second parent adoption.¹⁴

8) **Intended parent.** The person(s) who initiates the ART process for purposes of creating a child or children is referred

¹⁴ The author has obtained a pre-both order for a couple in a co-maternity as well as second parent adoptions for other couples in a co-maternity.

to as an intended parent. Intended parents do not necessarily either contribute genetic material or gestate the child. They can use both gamete donors and carriers for the process. Some courts have held that the rights of the intended parents trump the rights of parties with a genetic connection to the child.¹⁵ In New Jersey, the sperm donor statute respects the intention of the parties over genetics in determining parentage.¹⁶

9) **Medical tourism.** Medical tourism is when individuals travel to a foreign country to take advantage of

¹⁵ See, e.g., Marriage of Buzzanca, 61 Cal. App. 4th 1410 (1998); Johnson v. Calvert, 5 Cal. 4th 84, 19 Cal. Rptr. 2d 494, 851 P. 2d 776 (1993), cert. den. 510 U.S. 874, 114 S. Ct. 206, 126 L.E. 2d 163, and cert. dismissed, Baby Boy J v. Johnson, 510 U.S. 938, 114 S. Ct. 374, 126 L. Ed. 2d 324 (1993); Culliton v. Beth Israel Deaconess Med Ctr, 756 N.E. 2d 1133 (Mass 2001); Vogel v. Kirkbride, 2002 WL 34119315 (Conn. Super.); Griffiths v. Taylor, 2008 WL 2745130 (Conn. Super.); Cunningham v. Tardiff, 2008 WL 4779641 (Conn. Super.)

¹⁶ In re Parentage of Robinson, 383 N.J. Super. 495 (Ch. Div. 205); but see J.B. v. M.B., 170 N.J. 9 (2001) the New Jersey Supreme Court determined that for in vitro fertilization contracts, the intention of the parties should be enforced subject to the right of either party to change her or his mind. In A.H.W. v. G.H.B., 339 N.J. Super. (Ch. Div. 2000), a New Jersey trial judge gave fulfillment to the intention of the parties, but as discussed below in A.G.R. v. D.R.H. and S.H., Docket #FD-09-1838-07 (N.J. Superior Ct. Hudson County, Dec. 23 2009 (available at http://graphics8.nytimes.com/packages/pdf/national/20091231_SURROGATE.pdf) (last visited January 28, 2011) the trial judge specifically rejected the argument that the initial intention of the parties should be respected.

ART techniques either at less cost or not available in their home country.¹⁷ Medical tourism has become a growth industry.

10) **Donor sibling registry.** Children who were conceived using the same “anonymous” donor have developed donor sibling registries to locate other issue of the same donor. Donors can be identified by the name of the sperm bank and other identifying information.¹⁸ Occasionally, donors use the same website to locate their offspring. Similar websites for egg donors could be developed.

11) **AAARTA.** In 2009, the American Academy of Adoption Attorneys (AAAA) formed a specialty division known as the American Academy of Assisted Reproductive Technology Attorneys (AAARTA).¹⁹ AAARTA is a credentialed, professional organization dedicated to the advancement of best legal practices in the area of assisted reproduction and to protect the interests of all parties. In

¹⁷ Audi, Tamara and Arlene Chang, “Assembling the Global Baby,” Wall St. Journal, Dec. 11, 2010 at C1.

¹⁸ Allison Matluck, “Anonymous Sperm Donor Traced on Internet,” New Scientist, 03 November 2009.

¹⁹ See, <http://www.adoptionattorneys.org/aaarta/htm>.

order to be accepted to AAARTA, an attorney must have advised clients in more than 50 ART-related matters as well as obtaining judicial and other professional references.

In 2010, AAARTA developed the first Code of Ethics to guide practitioners through the maze of issues confronting clients and professionals in any ART transaction.²⁰

II. REPRESENTATION OF CLIENT

When entering these uncharted waters, the first issue that a lawyer confronts is ascertaining who to represent. There are a plethora of possible parties, including the intended parents, a sperm donor, an egg donor, a gestational carrier, and a traditional surrogate, as well as medical facilities and agencies or brokers representing these parties.

During the debate before adoption of AAARTA Code of Ethics, some attorneys took the position that they can fulfill their roles and represent more than one party in the same transaction.

It is hard to understand how an attorney can fulfill her or his duty of care to a client if the lawyer is representing multiple parties with distinct, varying interests.

²⁰ American Academy of Assisted Reproductive Technology Attorneys, 2010-2011 Directory, at page 33-34.

The New Jersey Rules of Professional Conduct specifically prohibit representation of a client if the representation involves a concurrent conflict of interest.²¹ A concurrent conflict of interest exists if the representation of one client is adverse to another client or if there is a significant risk that representation of one client could materially affect the lawyer's responsibility to another client.

In promulgating its Code of Ethics, AAARTA takes the position that an attorney can not represent more than one party in an ART matter.²² Each party deserves separate counsel advocating only for that client. To do otherwise skirts a lawyer's ethical responsibility to keep the client's individual interests paramount.

Of course, some parties can choose to not be represented. But they need to be aware of their choices, including the option to waive counsel, after a full discussion of the risks.

III. REPRESENTATION OF THE UNBORN

As the children born through ART mature, they yearn for identity disclosure, to learn about their forbears and the details of their conception

²¹ New Jersey Rules of Professional Conduct 1.7

²² AAARTA Code of Ethics, Section 3

and gestation.²³ This curiosity in one's biological genealogy is hardly strange. Children who were adopted have asked the same questions. In the age of the internet, children born through ART have created donor sibling registries.

During the negotiation of ART transaction, it is rare that the interests of the unborn child are discussed.²⁴ Even raising this issue is fraught with concerns how it could be applied in the debate about a woman's right to reproductive autonomy. Yet, in an estate or trust matter, consideration can be given to appointment of a guardian to represent the unborn.²⁵ Does that child have a significant interest in the decisions being made about her or his creation? How should it be decided what, whether or when the child will be told the details of that process? Certainly, a child could have a range of emotions and reactions when learning that her or his parent bought gametes from a stranger or hired a woman to incubate an embryo for nine months.

²³ "Informing offspring of their conception by gamete donation," Fertility and Sterility, vol 81, no 3, (March 2004); Robert Klitzman, M.D., "Who Made Me? The Ethical Issues That IVF Families Face", available at http://www.huffingtonpost.com/robert-klitzman-md/in-vitro-fertilization-families_b_782. (last visited November 16, 2010)

²⁴ Susan L. Crockin, "Where is Anonymous Reproduction Taking US Now," DePaul Journal of Health Care Law, Vol 12.1:241

²⁵ R. 4:26-3.

IV. MULTIPLE JURISDICTIONS

In an ART transaction, it is not unusual for the intended parents to be domiciled in one state and to be acquiring either sperm or an egg or both from donors in other states and using a gestational carrier in a third state. These multi-jurisdictional issues obviously complicate matters.

Usually by the time an attorney gets involved, the prospective parties have already pieced together an ART transaction across state and national boundaries. Given the tremendous costs and complexity of ART, many clients just want to ignore the ramifications of which state law will apply.

There is no easy answer how to determine which state's laws will control the agreements between the individuals. If an attorney is not licensed in one of the foreign states, she or he should consult with co-counsel in the foreign jurisdiction. The AAARTA Code of Ethics requires that an attorney inform the client that the lawyer is not licensed in one of the jurisdictions involved and to ensure that any agreement shall be reviewed in each jurisdiction where it may be interpreted ²⁶

²⁶ AAARTA Code of Ethics, *supra*, Rules 2(c) and (d)

With the increasing popularity of medical tourism, complications increase. Immigration laws are now involved. For example, some parents have been stranded abroad with their children when their home country refused to admit the children as citizens. Foreigners coming to the United States confront these issues as do U.S. citizens going abroad to obtain ART services ²⁷

V. NECESSITY FOR WRITTEN AGREEMENTS

Lawyers have an ethical duty to guarantee that the client has considered all of the implications of the proposed course of action. ²⁸ Lawyers need to help the client consider all possible outcomes.²⁹ Given the cross-jurisdictional issues involved as well as the paucity of statutes and caselaw, it is not always easy to predict an outcome

What theory of law can lawyers expect a judge to use when confronted with a conflict among the parties? Will the judge be guided by

²⁷ See e.g., “Spain Reverses Course & Will Allow Registration of Children Born to International Surrogate,” <http://eggdonor.com/blog/2010/10/06/spain-reverses-course-will-allow-registration> -of- children-born-to-international-surrogates (last checked December 13, 2010; “Childless couples face jail as part of international baby ban,” <http://www.new.com.au/national/childless-couples-face-jail-as-part-of-international-baby-ban/story-e6frfkvr-1225958115275> (last checked December 13, 2010)

²⁸ Rules of Professional Conduct 1.4.

²⁹ Rules of Professional Conduct 1.4.

the intention of the parties and enforce the contract ³⁰ or will the judge decide the matter based on a state's parentage act ³¹ or will the best interest of the child prevail?

As a best practice suggestion, even if the enforceability of a contract among the parties is questionable, it makes sense to have written agreements in order to have an understanding of issues that could arise. For example, after an IVF procedure during which several embryos are implanted, it is not uncommon to perform a "selective reduction" if there are too many fetuses. But who is to decide? The intended parents? The gestational carrier?

Recently, a couple in British Columbia using a surrogate learned that the fetus had Down syndrome. They wanted the surrogate to undergo an abortion.³² If she did not, who would be responsible for raising the child? These ethical and legal issues need airing. In this particular case, the carrier did agree to terminate the pregnancy.

³⁰ See Buzzanca, supra; J.B. v. M.B., supra.

³¹ See A.G.R. v. D.R.H. and S.H. supra

³² Couple urged surrogate to abort fetus due to defect, <http://www.nationalpost.com/couple+abort+fetus+defect/3629330/story.html#ixzz11j4CRPq2> (last visited November 25, 2010).

An attorney should raise these issues and help the client determine a resolution. The act of setting down the intentions, expectations and goals of the parties will diminish the chance of later conflict or disappointment.

VI. SCREENING OF PARTICIPANTS

Adoption agencies in New Jersey are strictly regulated by state law.³³ In contrast, there is no New Jersey statutory or regulatory supervision of agencies and brokers negotiating ART transactions. Where an adoption agency is required to undertake background checks and home studies of potential parents,³⁴ agencies and brokers involved in ART have no similar statutory requirement to screen the participants to any degree other than the ability of the intended parents to satisfy their financial obligations.

Failure to regulate these agencies and brokers or to require them to investigate the participants in the ART process can have consequences. Absent a statutory framework, caselaw as developed in other jurisdictions has begun to create a common law duty of care to screen possible participants, both medically and psychologically.³⁵ Some State

³³ N.J.S.A. 9:3-40

³⁴ N.J.S.A. 9:3-48

³⁵ Stiver v. Parker, 975 F.2d 268 (1992) and Huddleston v. Infertility Center of America, 700 A. 2d 453 (Pa. Super. 1996)

legislatures have also enacted legislation outlining the permitted uses of ART techniques.³⁶

As a result of this unregulated environment some responsible ART agencies have developed guidelines.³⁷ For example, in locating a gestational carrier, an agency may require that the woman (1) be over the age of 21 and under the age of 40, (2) have no sexually transmitted diseases, cancer substance abuse and other disqualifying medical conditions, (3) be financially secure, (4) have a supportive environment and (5) be capable of handling the physical and emotional issues that come with pregnancy.

Failure to follow these guidelines resulted in unhappiness and trouble in one New Jersey case.³⁸ In that matter, a New Jersey same-sex male couple, married in California, contracted with the sister of one of the men to be their gestational carrier. The sister, who was 42 years old, had never been married nor ever had any children. After giving birth to twin

³⁶ See for example, Illinois Gestational Surrogacy Act (750 ILCS 47/1); New Hampshire Chapter 168-B Surrogacy; Utah Section 78B Judicial Code; and Washington RCW 26.26.210-270.

³⁷ Stephen L. Corson, M.D., Maureen Kelly, M.D., Andrea M. Braverman, Ph. D. and Mary E. English, “Gestational Carrier Pregnancy”, *Fertility and Sterility*, Vol 69, No. 4 (1998).

³⁸ A.G.R. supra

girls, the sister stated that she had bonded with the children during her pregnancy and asserted her rights of parentage.

Following the New Jersey Parentage Act ³⁹, the trial judge held that the statute creates a presumption of maternity to a birth mother. Therefore, the gestational carrier was a legal parent because she had given birth to the girls. The judge found the lack of genetic connection between the gestational carrier and the children to be of no moment. The judge ruled that argument about intention; estoppel and detrimental reliance were irrelevant.

While some agencies screen potential gestational carriers, both medically and psychologically, there is no similar requirement to screen the intended parents. In surfing the internet, one finds advertisements for agencies working in this field which appear to provide services to anyone.

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³⁹ N.J.S.A. 9:17-41

⁴⁰ See for example, “Gay Surrogacy India-Low Cost Gay Surrogacy India” <http://lifestyle.ezinemark.com/gay-surrogacy-india-low-cost-gay-surrogacy-india-gay-surrogacy-india-31e92a77f04>; “Surrogacy Abroad Inc. offers Both Egg Donation And Surrogacy Services,” <http://www.articlesnatch.com/Article/Surrogacy-Abroad-Inc-Offers-Both-Egg-Donation-And-Surrogacy-Services/1640387>; see also Steven H. Snyder, Esq., “Screening and Qualification of Intended Parents Participating In Third-Party Reproduction,” <http://www.snyderlawfirm.com/Articles> 10.html; (last visited January 28, 2011);

Although the Federal Drug Administration requires testing of potential donors of human cell and tissue products, including semen, oocytes and embryos,⁴¹ there is no required screening for intended parents who are not donating genetic material. What is the role of the attorney in this fact situation?

One case which predated the FDA required testing set forth an attorney's duty of care.⁴² There, a traditional surrogate sued after she was inseminated with the sperm of an intended father without proper medical screening. After the child was born with severe birth defects as a result of being infected with cytomegalovirus (CMV), it was determined that both the father and the surrogate had pre-existing CMV which had been undiagnosed.

The court ruled that the broker, physician and the attorneys involved all owed an affirmative duty of protection to the parties. In this particular case the broker, an attorney, recruited the surrogate, negotiated the contract and acted as lawyer for the contracting father.

The court held that “[t]his ... affirmative duty of protection, marked by heightened diligence, arises out of a special relationship because the defendants engaged in the surrogacy business and expected to profit

⁴¹ 21 CFR, Parts 1270 and 1271 regulations

⁴² Striver v. Parker, 975 F. 2d 268 (1992)

thereby.”⁴³ The court ruled that the defendants owed a duty to their clients to design and administer a program, including medical testing, to protect the parents and the child from any foreseeable harm.

Several years later, a Pennsylvania court held that a broker also had an affirmative obligation to investigate and counsel an intended parent.⁴⁴ In this case, the broker-attorney was found to have violated its duty when it assisted a single father without screening. The 26 year old intended parent/father killed the five week old baby by shaking the infant to death. An autopsy also showed that the child had other preexisting injuries. The surrogate mother sued.

The court stated that we conclude that a business operating for the sole purpose of organizing and supervising the very delicate process of creating a child, which reaps handsome profits from such an endeavor, must be held accountable for the foreseeable risks of the surrogacy undertaking because a ‘special relationship’ exists between the surrogacy business, its client-participants, and most especially, the child...⁴⁵

Those two cases involved brokers who were also attorneys. Even if the attorney’s role is limited to legal advice, that attorney still should confirm that psychological and medical screenings have been conducted of all parties.

⁴³ Id at 285.

⁴⁴ Huddleston v. Infertility Center of America, 700 A. 2d 453 (1997)

⁴⁵ Id at 460

VII. FINANCIAL ISSUES

ART transactions entail the expenditure of thousands, if not hundred of thousands of dollars. People involved are often driven by conflicting purposes – from the human desire to have a child, to the altruistic urge to help a childless person or couple or to the ability to make a profit.

This mix of the emotions and goals, brewed in a world with little or no legal scrutiny or regulation, can detonate. There are opportunities for people to use lack of oversight to their advantage to defraud participants or to ignore the few laws that do exist.⁴⁶

Reports of surrogacy agencies absconding with escrowed funds intended for surrogates led the California legislature to pass a law requiring the use of bonded agencies to handle the funds in a surrogacy.⁴⁷ New Jersey has no similar protective laws for surrogates.

⁴⁶ “American Woman Jailed for Running International Surrogacy Scam,” <http://eggdonor.com/blog/2010/11/22/american-woman-jailed-running-international-surrogacy/scam/> (last visited December 13, 2010)

⁴⁷ Chapter 138, Laws of California 2010; <http://www.around the capital.com/billtrack/text.nml2bvid+2009OAB242694> CHP; (last visited December 8, 2010); see also <http://debwald.blogspot.com/2010/08/surrogacyescrowfundshtml>, (last visited December 8, 2010).

In the gray areas of transactions conducted over the internet by parties in different states or countries, there is also the opportunity for unknowing or desperate parties to pay exorbitant fees. Lawyers guiding clients through this process need to protect their clients from being gouged and paying inflated fees for services. In its Code of Ethics, AAARTA provides that no member shall charge or collect an illegal or unconscionable fee.⁴⁸

IX. CONCLUSION

In conclusion, there are few conclusions -- only questions and differing responses depending on the intent of the parties, the judge asked to make a decision and the jurisdiction where the case is brought. Because New Jersey legislators have avoided entering this legal thicket, New Jersey lawyers have few tools at hand in helping to counsel clients.

Until a body of statutes or caselaw is developed, attorneys advising clients about ART practices must be cautious, proceed slowly and focus their clients on pitfalls that they could encounter.

⁴⁸ AAARTA Code of Ethics, *supra*, Rule 6