

## Commentary

# Tread Cautiously in Unregulated World Of Assisted Reproductive Technology

By William S. Singer

As scientists break new ground to assist the infertile to create families through assisted reproductive technology (ART), entrepreneurs devise schemes to make profits. In New Jersey, the use of ART is largely unregulated. It can be a trap for the inexperienced lawyer.

Any attorney needs to proceed cautiously when advising clients in these ventures. Legally, it is a thicket with few guideposts. These transactions raise ambiguous ethical issues and even more troubling legal ones.

Consider the following: A couple anxious to have a child consults you. Through the Internet, the couple has begun negotiations with a broker. The broker knows a pregnant woman carrying a fetus conceived by fertilizing an anonymously acquired egg with anonymous sperm. Your clients are told that the woman is a gestational carrier in an ART transaction with another couple who reneged on their commitment. If your clients pay the broker \$100,000, the child will be theirs.

How should an attorney representing this couple counsel them? Is this fact pattern baby selling? Does it violate New Jersey law if the broker is not an approved

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adoption agency?

In a traditional adoption, no birth parent is paid, except for out-of-pocket costs, such as medical expenses. Arrangements for the surrender and adoption are generally done under the auspices of a licensed adoption agency.

At the other end of the spectrum, in the unregulated world of ART, there are multiple potential parties — intended parents, sperm donors, egg donors and gestational carriers, as well as brokers, medical personnel and attorneys. All of them provide services for which the intended parents pay. ART transactions may be brought together through many sources. There is no regulation, other than self-regulation and the benign oversight of organizations such as the American Academy of Assisted Reproductive Technology Attorneys and the American Society for Reproductive Medicine.

So what about the fact pattern described in the above hypothetical?

*The Los Angeles Times* reported on Aug. 9 that Theresa Erickson, a southern California ART attorney, pleaded guilty in federal court to wire fraud in a scheme similar to the hypothetical. She has not been charged with baby selling.

In a strange brew of surrogacy and medical tourism, Erickson hired U.S. women who she sent to the Ukraine, where they were implanted with embryos created by sperm and an egg from anonymous

donors.

Once the pregnant women returned to the United States, Erickson sought couples wanting to create a family. Erickson allegedly told her prospects that there had been intended parents for a child who reneged on their contract. As a result, a baby was now available.

As reported in the newspaper, couples paid Erickson \$100,000 to \$150,000 to adopt the baby. The pregnant women were paid up to \$40,000 to carry the child to full



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term.

Erickson filed allegedly false documents with the courts at the time of the adoptions, alleging that the couple seeking to adopt had actually contracted for the pregnancy before the gestational carrier

became pregnant.

Eventually, some participants in these schemes sought legal counsel and then went to the FBI. All the adoptions with fraudulent documents were reopened and the couples were allowed to adopt the children again, this time with accurate information.

Although Erickson was not charged with baby selling, it appears that it is illegal to seek to profit by creating a child and then find a family for it. But what if the facts in the hypothetical were true? What if there had actually been a situation where the intended parents had reneged and there was a gestational carrier carrying a fetus unrelated to her?

Or what if there is an ART transaction agreed upon before steps are taken to create a child, but the child is not genetically related to the intended parents? Since they and the child are unrelated, does that transaction constitute a private placement of a child, which is subject to statutory restrictions?

Where are the lines being drawn? There are no New Jersey statutes or case law that expressly covers these facts. There is a Kentucky case, *Surrogate Parenting Assocs. v. Kentucky*, 704 S.W. 2d 209 (Ky 1986), where a court found that a statute prohibiting the sale of a child for purposes of adoption did not pertain to a surrogacy contract signed before conception.

So it may not be baby selling if the contractual arrangements are made before anyone creates a baby. And, unlike adoption, in an ART transaction, the woman who gives birth to the child can be paid.

But with each variation of the facts, the legal analysis can change. ■