

Whose Child is This Anyway?

Law, Ethics and Assisted Reproductive Technology (ART)

by William S. Singer

In the 22 years since the *Baby M* case,¹ assisted reproductive technology (ART) and its use have infiltrated mainstream culture. Television sitcoms like "Friends" and "Frasier" and the summer hit movie "The Kids are All Right" all use aspects of ART in their plots. In addition, by sensationalizing celebrities' use of ART to create families, popular media generates further public interest. Soon, everyone will know someone who has benefited from ART. Yet, while the science of ART evolves and its implementation mushrooms, the law on these issues in New Jersey stagnates.

New Jersey lawyers advising clients who are considering taking advantage of ART have few statutes or cases on which to rely. Therefore, attorneys must learn to be creative in devising strategies for their clients using ART and, simultaneously, remain cautious in weighing what a court may countenance when adjudicating the rights of such families.

ART: TECHNIQUES AND TERMS

The following list sets forth some of the major useful terms in discussing ART:

1. **Sperm donation.** The oldest ART technique, sperm donation is used by female same-sex couples, transgender people and heterosexual couples unable to conceive due to male infertility. N.J.S.A. 9:17-44, the Artificial Insemination Statute enacted in 1983 as part of the New Jersey Parentage Act,² is the only New Jersey law that addresses the use of ART. The Artificial Insemination Statute provides that unless there is a contrary written agreement, if a woman, 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.
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 parents who cannot use their own eggs, or choose not to do so.
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.
4. **Gestational surrogacy.** A woman carries an embryo (or embryos) to full term and gives birth to one or more children, but the woman has no genetic connection to the child or children.
5. **Co-maternity.** 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, and the resulting embryo (or embryos) is implanted in the uterus of the other partner of the couple who carries the child to full term and gives birth.
6. **Intended parent.** The person(s) who initiate the ART process for purposes of creating a child or children. Intended parents do not necessarily either contribute genetic material or gestate the child. They can use donors and carriers for the entire process.
7. **In vitro fertilization (IVF).** Fertilization of an ovum (or ova) outside a woman's body with implantation of the resulting pre-embryo(s) in uterus of a woman who carries the child to full term and gives birth.
8. **Preimplantation genetic diagnosis (PGD).** Use of medical technology to ascertain whether pre-embryos have genetic disorders and the possible gender of the embryo.
9. **Pre-birth order.** An order from a court issued before the birth of a child to clarify who are the parents of the child about to be born. In New Jersey, the office of the state attorney general (on behalf of the Bureau of Vital Statistics) has opposed pre-birth orders unless the person seeking declaration of parentage has contributed genetic material to the child about to be born. Thus, for example, in a co-maternity, with the consent of the attorney general, courts have approved orders directing that the ovum-donating mother be included on the birth certificate without an adoption.
10. **Medical tourism.** Individuals travel to a foreign country to take advantage of ART tech-

niques either at less cost or not available in their home country.

11. **Donor sibling registry.** A website that brings together children who were conceived using the same 'anonymous' donor. Donors are identified by the name of the sperm bank and the donor's identifier. Occasionally, donors use the website to locate their offspring. Similar websites for egg donors could be developed.

NEW JERSEY CASE LAW IN ART MATTERS

The case of *Baby M* awoke New Jersey and the rest of the country to the legal ramifications of ART.³ In that case, the wife in a married couple was infertile and unable to carry a child full term. As a result, the married couple contracted with a married woman to assist them in a traditional surrogacy. The surrogate was to be paid \$10,000. After the child was born, the surrogate disavowed her alleged contractual obligation to surrender the child and petitioned for recognition of her parentage.

Under New Jersey law, termination of parentage can only be achieved through a private placement, through an approved adoption agency, or through the Division of Youth and Family Services (DYFS). New Jersey law also specifically bars a pre-birth surrender of parental rights.⁴

Under the facts of *Baby M*, the Court held that a traditional surrogacy contract is unenforceable under the law and against public policy. First, the Court noted that paying money to a parent to secure an adoption is prohibited by law. Secondly, the Court held that in a private placement as planned by these parties, the parties failed to meet the statutory requirement of proving the unfitness of the birth parent necessary to terminate her parental rights. As a result, the New Jersey Supreme Court upheld the parental rights of the traditional surrogate.

The *Baby M* Court invited the Legislature to revisit the current

New Jersey statutory requirements, within constitutional limits. However, the Legislature has not acted. As a result, the holdings of *Baby M* remain a strong influence on all New Jersey ART-related cases.

In *A.H.W. v. G.H.B.*,⁵ another ART-related case arose in 2000 when a married couple entered into an uncompensated gestational carrier agreement with the wife's unmarried sister using ovum from the wife and sperm from the husband. The couple sought a pre-birth order clarifying the identity of the legal parents of the child about to be born. Considering *Baby M*, the court in *A.H.W.* recognized that although the Supreme Court had ruled that certain surrogacy contracts were void, the *A.H.W.* court specifically found "no offense to our present laws where a woman voluntarily and without payment agrees to act as a surrogate mother, provided that she is not subject to a binding agreement to surrender her child."⁶

The *A.H.W.* court declined to grant the pre-birth order because doing so would terminate the gestational carrier's parental rights before the birth of the child. Importantly, however, the *A.H.W.* court did not find the subject uncompensated gestational contract to be void or against public policy.

Five years later in 2005, in *In re Parentage of Robinson*,⁷ a same-sex female couple petitioned a New Jersey court for a pre-birth order naming both as parents without an adoption. One of the women, with the consent of her partner, had become pregnant through insemination of sperm from an anonymous donor under the supervision of a physician. The women asked the *Robinson* court to give the Artificial Insemination Statute a gender-neutral reading. They submitted proof of their long-term relationship, including their marriage in Canada. Despite opposition by the attorney general, the *Robinson* court found in favor of the couple's request.

The *Robinson* court found the women had proven their commit-

ment to each other and a commitment to raise the expected child jointly. In reaching its decision, the court relied on the strong public policy in New Jersey focusing on the best interests of the child. Noting that the laws of this state have not kept pace with the scientific advances, the court reasoned that "the dynamic times dictated law sensitive to the advances of science and to evolving family structures."⁷ The *Robinson* court concluded that the couple was entitled to the statutory presumption of parenthood afforded by the Artificial Insemination Statute.

AND NOW...

Two recent unreported trial court decisions have further churned the uncharted state of the law concerning ART.

In *A.G.R. v. D.R.H. and S.H.*,⁸ the defendants, a gay male couple legally married in California, entered into a written surrogacy agreement with the plaintiff, the sister of one of the defendants. Initially they planned a traditional surrogacy using the plaintiff's ova and sperm from the unrelated defendant. When it was discovered the plaintiff could not conceive, the plan was altered so the plaintiff would serve as a gestational surrogate via in vitro fertilization (IVF) using a donated egg and sperm from the unrelated defendant. A doctor successfully implanted two embryos in the plaintiff. As a result, two girls were born.

After giving birth, the plaintiff refuted the written surrogacy agreement and petitioned the court for recognition of her parental rights. Relying on *Baby M*, the *A.G.R.* court held that the surrogacy agreement was unenforceable. The court noted that the New Jersey Parentage Act bars any agreement in which one party promises not to seek enforcement of parentage rights.¹⁰

The *A.G.R.* court found that the lack of genetic connection between the plaintiff and the children was of no import, nor did the court find any distinction between *Baby M*, a

case involving traditional surrogacy, and the case before it involving a gestational surrogate. In reliance on *Baby M*, the A.G.R. court found issues of intent, estoppel and detrimental reliance were irrelevant. The court found the plaintiff possessed parental rights relative to the infants under the New Jersey Parentage Act¹¹ and that the gestational agreement was void, and, therefore, the gestational agreement could not serve as a basis for terminating the plaintiff's parental rights. Further, the A.G.R. court stated that "surrogacy as a whole is bad for women even if in any one particular case the surrogacy agreement is entirely satisfactorily [sic] to all of the parties involved."¹² The plaintiff has also commenced medical and legal malpractice lawsuits. If these claims are litigated, the resulting opinions could provide much-needed guidance regarding the standards for conduct of lawyers—and doctors—in these tricky situations.

Several months later, in *In re the Parentage of a Child by TJS and ALS, b/w*,¹³ the court granted a motion by the state to vacate an order of parentage. The facts are straightforward. After ascertaining that they needed to employ ART in order to have a child, a married heterosexual couple, TJS and ALS, acquired a donated egg that was inseminated with the sperm of TJS. A physician transferred the resulting embryo to a gestational carrier.

Prior to the birth of the resulting child, TJS and ALS filed an application for a pre-birth order requesting that both their names appear on the child's birth certificate and that the rights of the gestational carrier be terminated. In making their application for an order of parentage, the plaintiffs did not notify the office of the attorney general or the New Jersey Bureau of Vital Statistics and Registration.

According to the court's opinion vacating the original order of parentage, the requested relief had been granted by a trial court in the Camden vicinage, and a Gloucester County trial court followed a simi-

lar procedure. Accordingly, the court granted the plaintiffs the requested relief. The Bureau of Vital Statistics issued a birth certificate naming ALS as the mother.

Upon learning of the facts underlying the order of parentage, the state moved that the order be vacated. The state argued that there is no legal support for that order under the Parentage Act. The state contended that since ALS had no genetic relationship to the child, she could only be declared a parent through a formal adoption.

The trial judge ultimately agreed with the state's position and vacated his prior order of parentage. The judge ruled that the current birth certificate would remain in effect for 90 days while ALS applied for a stepparent adoption to avoid problems arising from the "inadvertently issued" birth certificate.

WHAT WE KNOW

We know the following about New Jersey law:

1. Sperm donation is permitted by statute. The statute provides a procedure to permit the name of the husband of a married couple to appear on the birth certificate from birth and insulates the donor from claims of parentage and support.
2. Using a known sperm donor without following the procedure in the statute can result in the donor asserting paternity or the mother or child seeking support from the donor.
3. There are no statutes or case law covering egg donation.
4. Paid traditional surrogacy is prohibited.
5. The state will oppose any pre-birth order addressing parentage unless the person seeking to be on the birth certificate can prove a genetic connection to the child about to be born. The state will not oppose a pre-birth order for a co-maternity.
6. As a result of *Lewis v. Harris*,¹⁴ a female same-sex couple who are in a civil union or an out of state marriage recognized as a civil union by New Jersey will both be listed on the birth certificate without the need for a stepparent adoption.
7. Both members of a same-sex male couple cannot be on the birth certificate from birth. The state will oppose any pre-birth order because one member of the couple has no genetic link to the child. In addition, under New Jersey law, the birth mother cannot surrender her rights until 72 hours after birth. In these cases, the second father must pursue a second parent adoption as well as request termination of any rights of the egg donor, gestational carrier and husband of the donor and carrier.
8. New Jersey law prohibits discrimination due to sexual orientation, marital status and gender identity. As a result, in New Jersey, ART is accessible to gay men, lesbians, single people and transgendered persons.
9. Whether a court will enforce a gestational carrier agreement is unsettled. Certainly, under the Parentage Act, a birth mother can assert parentage based on giving birth to the child. Also, a woman who has given birth to a child cannot surrender the child for adoption until 72 hours after birth.
10. In some jurisdictions, notably California, courts have relied upon the intention of the parties in determining parentage in contested matters. The New Jersey sperm donation statute also recognizes and validates the intention of the parties. Otherwise, in some cases the intention of the parties has been recognized and respected (*A.H.W. v. G.H.B., In re the Parentage of Robinson*); in others, intention has been disregarded (*Baby M, A.G.R. v. D.R.H. & S.H., and In re the Parentage of a Child by TJS and ALS*).

OBSERVATIONS AND ETHICAL CONSIDERATIONS

When advising clients on the use of ART, consider these observations, including the myriad of ethical issues raised:

1. The center of all of this activity, the child born as a result of ART, is often an unrepresented party whose rights are rarely considered. The *Robinson* court was guided by best interests of the child. Otherwise, courts have looked only to the exact wording of the current statutes to decide who is a parent, with no weight given to what might be in the best interest of the child. A more open, inclusive model should be created that recognizes the legitimate concerns of the children, as well as each adult.
2. In determining whether an ART agreement is enforceable, should the rules of contract law apply? In other words, should a court be looking at contract-based solutions, or should a court instead consider what is in the best interest of the child?
3. What role should the intent of the parties play? New Jersey recognizes intent in its alternate insemination statute. Future cases could build on this legislative recognition of intent.
4. Multiple-parent families have been created in New Jersey, and in other states. In situations rivaling the quandary faced by King Solomon, the multiple-parent option should be considered by judges called upon to determine parentage of ART children.
5. The intent of the parties should be memorialized by a written agreement. Even if it is uncertain whether the agreement will be enforced, the writing is a tangible, contemporary record of the intent of the parties.
6. To assist in navigating the complicated legal rights and responsibilities arising from the use of ART, each party must have independent counsel. To increase the chance that an ART agreement will be enforced, there must be full disclosure and informed consent.
7. All parties should be screened and provided psychological counseling. The long-term ramifications of ART are too profound to be undertaken without making sure that all parties can psychologically accept the results.
8. Parties making these contracts often live in different states. In ART cases, the attorney must investigate the differing laws in the various states.
9. Experts in ART agree that only a woman who has already been pregnant and given birth to a child should be considered as a gestational or traditional surrogate.
10. As long as laws regarding consanguinity are respected, it is considered ethically acceptable in ART cases for parties to use family members as gamete donors and surrogates. However, parties should examine issues such as the psychological impact upon a child conceived using ART. Proceed with caution.
11. Egg donation is not analogous to sperm donation. Egg donation is more complicated, requires medication to stimulate and increase ovulation, and is certainly more invasive than sperm donation. Since no one knows whether the courts in New Jersey would enforce an egg donor agreement, attorneys should be especially cautious when advising clients with respect to this type of agreement.
12. The continued anonymity of a donor or carrier is uncertain at best. Given the availability and affordability of DNA testing, old concepts of anonymity are no longer valid. Parties to ART and their attorneys should consider whether children will be informed and, if so, how and when that information will be disclosed.
13. Pre-implantation genetic diagnosis (PGD), used to detect inheritable genetic familial diseases, is now readily available. What are the ethical considerations of PGD as a vehicle for gender selection? Does the use of PGD perpetuate gender oppression? Is PGD part of the right to reproductive choice?
14. Is it ethical for egg and sperm donors or surrogates to be compensated? Organ donation is common in our country, but there is a prohibition against payment for these donations. In other countries, it is illegal to compensate sperm and egg donors. If compensation is to be allowed, how should it be determined? Is it ethical to base payment on the ethnic or other personal characteristics of the donor?
15. What happens to unneeded embryos? After successfully completing IVF, what should a couple do with extra cryopreserved embryos? If they are to be donated, should there be legal standards, similar to the adoption of a child?
16. Unlike adoption agencies, which are licensed and regulated by states, ART agencies and brokers that arrange sperm and egg donations as well as carrier agreements are free of any government oversight. ART has grown into a lucrative industry devoid of supervision. Procreative decisions usually are considered private, but are there countervailing concerns for the welfare of the resulting children?
17. If ART is subjected to regulation by the government, should such regulation be on a state by state basis or by federal laws since the parties are often from different states?
18. Donors and carriers should have access to their own independent medical providers

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who are not subject to conflicting interests between the parties providing payment and the individual receiving medical services. There should be complete disclosure to all participants of any such relationship.

19. Does the use of gestational carriers commodify and/or exploit women? Or does it fall within a woman's reproductive autonomy?
20. Does the expanded use of 'medical tourism,' such as the practice of paying women overseas to carry an ART child to term, amount to exploitation of women in less-developed countries? Or is it part of a woman's right to choose?
21. Who pays for the medical services involved? Should an insurance company pay the medical expenses of a gestational or traditional surrogate under her medical insurance policy? The Supreme Court of Wisconsin has recently held that an insurer can not exclude maternity coverage for an insured acting as a surrogate mother.¹⁷
22. And who is considered the mother of a child born under

any of the various scenarios above? The United Nations Convention on the Rights of the Child places the biological connection at the heart of the parent-child relationship. However, California courts have ruled that the intention of the parties should control.¹⁸ New Jersey cases and statutes offer a variety of answers depending on the facts in each matter and the county where the case is heard, as discussed above.

IN CONCLUSION

While the frequency of the use of ART continues to spiral, New Jersey lawyers are often left with many unanswered questions. As a result, when advising ART clients, New Jersey practitioners often face legal issues lacking clear answers and a potential ethical minefield. The author's best advice for a practitioner in New Jersey in this position is to go slow and document each step of the process. Moreover, practitioners counseling ART clients should make sure all parties have full knowledge of what is expected, and all parties are afforded the right to independent counsel and access to psychological counseling. ■

ENDNOTES

1. *In re Baby M*, 109 N.J. 396 (1988).
2. N.J.S.A. 9:17-38 *et seq.*
3. *Id.*
4. N.J.S.A. 9:3-41(c).
5. *A.H.W. v G.H.B.*, 339 N.J. Super. 495 (Ch. Div. 2000).
6. *Id.* at 503 (emphasis added).
7. 383 N.J. Super. 165 (Ch. Div. 2005).
8. *Id.* at 171.
9. 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 checked Sept. 16, 2010).
10. *A.G.R.* at p. 4 (citing *Baby M*, 109 N.J. at 433).
11. N.J.S.A. 9:17-41 (providing that proof of having given birth to a child establishes maternity).
12. *A.G.R.* at p. 4.
13. Camden County. (Chancery Division April 1, 2010).
14. 188 N.J. 415 (2006).
15. *Mercycare Ins. Co. HMO, Inc. v Wisconsin Comm'r of Ins.*, 786 N.W.2d. 785 (Wis. 2010).
16. See *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993).

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