

Third Party Reproduction and the Law

Written by Jan Goodwin



Third-party reproduction dates back to at least the Old Testament, points out the American Fertility Association.

When the Biblical Sarah was unable to conceive, she urged her husband, Abraham, to impregnate her maidservant, Hagar. By this method, in perhaps the first recorded case of surrogacy, Abraham and Sarah were able to have a child.

Fast-forward several millennia, and nearly 10 million women in the U.S. are now using infertility services, according to the federal National Survey of Family Growth. Yet despite this vast number, there are no federal guidelines to govern the rapidly growing practices, and few states have comprehensive laws. The laws that currently exist are a poorly constructed patchwork quilt that can be confusing even to legal practitioners.

“This whole area of law is an emerging and changing field,” says family attorney Brette McWhorter Sember, author of *The Complete Adoption and Fertility Legal Guide* (Sphinx Publishing, 2004.) “The response by most states has been to not legislate, because it is currently viewed as a huge mess. There are also so many strong opinions about the different assisted reproduction methods, it’s very difficult to pass laws. Too often, assisted reproduction is reduced to debates about buying and selling babies.”

In states without specific statutes on the books, cases regarding surrogates (who use their own egg and donated sperm to carry a child for a couple) and gestational carriers (who are not biologically connected to the child they carry), can get extremely messy. In these states, if no court order is in effect, the woman who gives birth to the child is viewed as the legal mother, no matter what the original intent or arrangement may have been. A case currently going through the courts illustrates this legal can of worms. Thirty-year-old Danielle Bimber, a Pennsylvania gestational carrier, gave birth to triplets in November 2003. James Flynn, 62, is the biological father of the children. The eggs came from an anonymous donor and were fertilized by Flynn’s sperm. But since Pennsylvania has no laws on gestational carriers, the judge ruled that Bimber is the mother, even though she has no biological connection to the boys. Complicating the issue further, the egg donor is now also suing for custody.

Part of the problem for states trying to legislate is that our society has yet to decide on the bioethics of reproductive technology. Consider the sort of issues the law will have to decide on, says Daniel Becker, a New York City based reproductive rights lawyer, who has two children of his own through assisted reproduction. “Should we treat a donated embryo with more respect than donated sperm, for example? Legally, what is a pre-embryo? Is it personal property, or something else? Is it an individual, with individual rights when it is not a person under the definition in *Roe v. Wade*? From a legal-ethical point of view, at most a pre-embryo has the potential of creating a child, no matter what assisted reproductive method you choose,” says Becker. “Until there is a positive pregnancy or a live birth, there is just the potential of a child. The complexities of creating law in such cases are enormous.”

In the meantime, people considering adding to their families with third-party or assisted reproduction need to protect themselves by learning as much as possible about the laws that do exist.

Using a Sperm Donor

In the vast majority of states, if a married woman with the consent of her husband gives birth to a child conceived by artificial insemination using donor sperm, the child legally belongs to the couple, even though the husband is not the biological father. Since donor insemination has been around much longer than some of the newer, developing technologies, it's not surprising there are well-established laws governing it. But parents still need to understand that regulations may vary from state to state. Some, for example, require a husband's consent in writing.

Also, most of these state laws apply specifically to married couples who need donor sperm to conceive. "Everyone else, whether they are single, or in an unmarried heterosexual or homosexual relationship, may not be able to get such protection from state law," warns Susan Crockin, a Massachusetts lawyer specializing in adoption and reproductive technology law.

Things become a bit more complicated when sperm from a known donor rather than an anonymous one is used. In that case, it's essential that the intended parents and the donor sign a legal contract severing the donor's rights to custody and visitation.

The easiest way through all the bureaucracy is to use a well-known clinic where the contract for sperm donors and recipients is an automatic part of the process. Adds Sember, "This is also the time to establish in writing if additional donations will be available from the same person if you want genetic siblings in the future."

Using an Egg Donor

Only six states--Florida, North Dakota, Oklahoma, Texas, Virginia and Washington--have laws requiring that the donor give up her rights to the egg under a valid donation agreement, and specifying that she has no right to custody or visitation with any resulting children. In such cases, the donor also cannot be held responsible for child support, says Sember.

In one case in New York, when the parents divorced, the husband tried to claim that his wife was not the real mother of their child because an egg donor had been used. His argument was deemed invalid because the wife had parented the child for a number of years. "But the legal battle caused tremendous heartbreak, plus the expense of going to court," says New Jersey reproductive lawyer, Melissa Brisman.

All parties involved in egg donation should record in writing their joint intentions. A legal agreement is a well-advised precautionary step. "Because of the lack of law, there is no guarantee that such an agreement is enforceable," warns Crockin. "But it does provide a roadmap of the intentions of the parties entering into such an arrangement, which could help if the case went to court."

Donating or Adopting Embryos

Only six states—California, Florida, Louisiana, North Dakota, Oklahoma and Texas—have laws on embryo donation that make the recipient the legal parent or parents, says Sember. Yet embryo donating is becoming increasingly popular as more couples use in vitro fertilization and have extra fertilized eggs or embryos frozen and stored for later use. An estimated 400,000 human embryos are currently frozen and stored in the U.S. now, according to the National Embryo Donation Center (NEDC) in Knoxville, Tennessee, a non-profit Christian organization (www.embryodonation.org). Couples who have embryos available but decide their family is complete must choose whether to offer the embryos to research, allow them to be destroyed, or donate them to a couple who is unable to conceive. Since the Bush administration opposes embryos being used for stem cell research, government grants are being made available to promote embryo donations.

Reproductive attorneys warn that this area is so new that no one knows what the legal outcome would be if an embryo donor decided to come back and fight for parental rights. “This means the recipients must have as airtight a contract as possible,” says Brisman. “And then you hope the courts honor it. That’s all you can do at this point. So few states have laws on this, it could become a legal quagmire.”

Using a Surrogate

Surrogacy is perhaps the most legally controversial of all assisted reproductive technologies, according to Sember. A surrogacy arrangement involves a woman—the surrogate—using her own egg and donated sperm to become pregnant and carry a child for another couple. “Even in states that are progressive in most other things, such as New York, surrogacy is looked upon negatively,” says Becker. “If financial compensation is involved, it is deemed as selling babies.” Some states have banned surrogacy outright, or made it a crime to pay a surrogate. In other states any surrogacy contracts are regarded as unenforceable.

It wasn’t until the headline-grabbing case of Baby M in 1987, in which the biological father eventually won custody of a child from surrogate mother Mary Beth Whitehead, that a number of states even passed laws regulating surrogacy. Experts concur that in most states, traditional surrogacy arrangements (as opposed to arrangements with a gestational carrier) are probably the most vulnerable collaborative reproductive arrangement from a legal perspective.

“Surrogacy is legally complicated, but can be done successfully,” says the American Fertility Association, which recommends that surrogate and biological parents obtain separate legal counsel to avoid the conflict of interest that would arise if one attorney counseled both parties. Currently, laws in California, Connecticut, Maine, Massachusetts, Pennsylvania, and Rhode Island are considered most supportive of the rights of the intended parents.

Using a Gestational Carrier

In order to reduce the risk of legal complications, many couples now prefer to use a gestational carrier rather than a traditional surrogate. The difference is that while a surrogate uses her own egg to become pregnant, a gestational carrier uses both donor egg and donor sperm to carry a child. The egg and sperm may or may not be from the couple who are the intended parents of the child. Unlike a surrogate, a gestational carrier has no biological connection to the child she

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bears.

Because of this distinction, the law views gestational surrogacy differently than traditional surrogacy. In this case, many states do not consider the carrier as the legal mother of the child. A growing number, in fact, now have statutes or judicial decisions that allow the intended parents to be recognized as the legal parents, at least in the absence of any opposition.

Currently Florida, Illinois, Massachusetts, and Virginia have procedures that permit the biological parents to be listed on the birth certificate, rather than the gestational carrier. But each state handles this differently, and in some cases a court order is needed. "If the parents are from one state and the carrier from another, the law from both places must be factored into any contract," says Crockin.

Making Sure the Law is on Your Side

When it comes to third-party reproduction, the thing to remember is that the law is constantly changing. It's crucial to thoroughly research state laws, and to make sure you use an experienced reproductive rights or adoption lawyer. How to find one and learn more about the laws in your area?

For assisted reproduction, contact the following organizations and ask to be put in touch with your local chapter:

American Fertility Association, 666 Fifth Avenue, Suite 278, New York, N.Y., 10103, tel: 888-917-3777, www.theafa.org

Resolve, 1301 Broadway, Somerville, MA 02144, tel: 888-623-0744, www.resolve.org

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