

AND BABY MAKES 2: LEGAL ISSUES *in* SINGLE-PARENT FAMILY BUILDING *through* ART

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INTRODUCTION

The last several decades have seen a dramatic change in how society has come to view a family. The term “family” no longer necessarily means a married mother and father raising their genetic or adopted offspring in one household. Families can consist of one parent, two parents of the same sex, and even children gestated by one parent but not genetically related to either. The law does tend to favor two parents – two parents to make decisions, two parents so that if one parent is injured or dies, the other parent can care for the child, two parents to provide financial and emotional support. Child support enforcement laws are a case in point. Although social criticism of and difficulty in legally defining “alternative families” continues, research has not demonstrated that this deviation from the norm (or perceived norm) results in harm to children. This causes one to question why the path to parenthood for single men and women can be so difficult at times.

BRIEF BACKGROUND

In 1972, in the case of *Eisenstadt v. Baird*, the United States Supreme Court asserted that “If the right of privacy means anything, it is the right of the individual, *married or single* to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision to bear or beget a child.” (emphasis added). Despite this Supreme Court ruling, single men and women seeking to build their families through assisted reproductive technologies (ARTs) may not be afforded the same access or legal protections as married couples. Fertility centers may deny treatment to single individuals, state laws on egg donation, artificial insemination and surrogacy may not offer protection to single individuals, and insurance coverage may be unavailable for single participants. None of this means that parenthood for the unmarried is impossible, it merely means that one must be aware of the potential barriers in order to more easily confront and overcome them.

OBSTACLES

Fertility Center: By and large, fertility centers are private entities and can pick and choose their patients at will so long as

they are not discriminating based on race, sex, religion or national origin or in violation of any state laws prohibiting certain types of discrimination. Just as individuals have autonomy to decide when and how to build their families, physicians have autonomy to determine whom to treat. In a practical sense, this means that a fertility center can have and enforce a policy refusing treatment to unmarried individuals or less directly, a program may refuse to offer treatment for non-medical purposes (i.e. because one does not have a partner). A survey of 210 responding fertility centers done by Gurmankin and colleagues in 2001 found that 20% of programs were extremely likely to refuse treatment to an unmarried woman without a partner and more than double that, 53% were extremely likely to turn away an unmarried man without a partner. The Ethics Committee of the American Society for Reproductive Medicine has weighed in on this issue of and found that unmarried individual should be afforded the same respect as married couples in determining which services should be provided to a patient.

Because single women may fear (with justification) that they may be denied treatment, some choose to seek treatment elsewhere, maybe from their OB/GYN or may forego medical assistance entirely opting for home insemination. For single men, the options are not as simple but nevertheless a single man may have a female friend or family member willing to be inseminated and subsequently gestate and give birth to his child. Such “do-it-yourself” arrangements may become legally problematic in light of what the current laws in each state say and do not say about the rights and obligations of the participants in collaborative reproduction.

Laws: The wording of current legislation does little to protect the interests of single parents as evidenced by use of the terms “husband” and “wife.” No laws currently prohibit use of ARTs by single men or women, although a bill was introduced in Virginia last year which would have prohibited licensed physicians from providing services to unmarried women to enable them to conceive by means of replacing sexual intercourse.

Some state laws, though are less protective of single men and women utilizing donated gametes or a surrogate than they are of married couples. For example, the term ‘married woman’ appears in the most state statutes that deny sperm donors parental rights and relieve him of obligations to any child conceived of the donation. Similarly in the handful of egg donation laws that exist, the terms “husband” and “wife” are also utilized in determining parentage of any child conceived in such a manner.

Finally, even in those states with very favorable surrogacy statutes the term “Intended Parent” is often defined to mean a man and a woman married to one another. What does this mean practically? Well, it means that a single woman conceiving with donated sperm or a single man seeking to parent with the assistance of a surrogate and an egg donor is not necessarily protected against parentage claims by the gamete donor and/or surrogate. Additionally, some of these laws require that for the arrangement to be afforded the protection of the law, the procedure must be “medically indicated.” This is not necessarily the case for single individuals. . . or is it? Semantics may be an issue here. If a man does not have a uterus, is not the use of a surrogate medically indicated?

Home inseminations further run afoul of the legal protections in many states as well, as these laws can require that the insemination occur under the supervision of a physician. Courts have been addressing this issue for quite some time. In a 1977 case a New Jersey court awarded visitation to a known donor who provided semen to a single woman who inseminated herself without the assistance of a physician. Other cases, however, have supported a single woman’s sole parental rights given a written agreement as such or given that no agreement to the contrary had been entered into. In any event, before attempting to circumvent the process, knowing the law in one’s jurisdiction before proceeding can certainly avoid protracted, costly, and disruptive court battles between donors and recipients in the future.

Insurance Coverage: Another example of less than protective legislation of unmarried individuals is found in state laws that provide insurance coverage for ART to treat infertility. Illinois and a number of other states that mandate insurance coverage for infertility services define infertility as “the inability to con-

ceive after one year of unprotected sexual intercourse or the inability to sustain a successful pregnancy” which by definition may exclude those seeking access to fertility services who do not have a partner or whose partner is of the same sex.

SOLUTIONS

Once a supportive fertility center is identified a number of measures can be taken to help to protect the family that is created. First, consulting with a mental health professional can help to clarify the roles and expectations of the soon-to-be parent as well as those of a known donor and/or surrogate who may be involved in the family building process. Second, consulting with a legal professional can help to memorialize those expectations in contract clarifying the parties rights and expectations with respect to one another and to the child. An attorney can also help to identify if are any legal obstacles that may exist and advise on how to prevent or prepare for them. It will also be important that for any and all of the consent forms of the fertility center appropriately characterize the nature of the arrangement. Another legal consideration involves estate planning to ensure that any child that is born will be cared for in the event the sole parent dies or becomes incapacitated and unable to care for the child. Although social, financial and legal obstacles may exist for single men and women seeking to build their families with the assistance of donor gametes or other ARTs, those obstacles are not insurmountable. Enlisting the assistance of all the necessary professionals and being proactive can help to produce the end result...a happy family, no matter how many parents.

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THE BLESSED TRINITY AND BEYOND:

Third-Party “Contraction”: How to Locate a Potential Surrogate

BY STEVEN H. SNYDER, ESQ..

I WAS GOING TO DISCUSS IN THIS ARTICLE THE DESIRABLE CHARACTERISTICS AND REPRESENTATIONS OF THE PARTIES TO A THIRD-PARTY REPRODUCTION AGREEMENT—A SURROGACY AGREEMENT. IN THINKING ABOUT THOSE ISSUES, I REALIZED THAT THE FIRST CHALLENGE THAT ARISES REGARDING THE SELECTION OF THE PARTIES TO SUCH AN AGREEMENT IS ACTUALLY FINDING THE NECESSARY PARTIES TO PARTICIPATE IN THE PROCESS. It is not, of course, hard to find the intended parents, as they are usually the parties seeking the procedure in the first place. It is more difficult to find an appropriate and reliable surrogate to assist the parents. This article addresses the issue of finding a potential surrogate.

Once intended parents have decided that third-party reproduction is a family-building option for them, there are three primary sources for finding a surrogate who is willing to participate. The first source is to have a family member or friend volunteer to assist them by gestating their child. A second source is to visit numerous Web sites to locate a surrogate who is individually marketing herself to intended parents. Finally, the intended parents can contact a surrogacy agency to locate a surrogate who has been pre-screened for suitability by the agency. Each of these sources has advantages and disadvantages.

Using a relative or friend has the advantage of going through the surrogacy process with a person with whom the parents already have a good relationship and, presumably, a level of comfort and trust. This can minimize or eliminate the parents' inherent fear that the surrogate will “change her mind” and want to keep the baby against the parents' wishes. This option maximizes the likelihood of sustained contact after the child's birth, where the surrogate's egg is used in order to monitor the surrogate's developing medical history as it may relate to the child. It is also the option in which the parents are most likely to find a surrogate who will charge a modest fee or no fee at all.

However, in order to have a relative or friend volunteer, that person must know of the parents' situation and intent. Not every intended parent discusses such private issues openly, even with relatives. Even assuming that the parents are actively advertising their situation in order to raise the interest of a possible volunteer, they may not find one. If they do find one, the friend or relative that does volunteer may not be medically, psychologically or emotionally suited to participate in third-party reproduction. Substantial screening must take place before this is determined. If the volunteer is not suitable, an unnecessary delay may occur as a result.

Even if the volunteer successfully passes the preliminary screening, the risk remains that the surrogacy process may adversely affect the parties' relationship and/or the parties' preexisting relationship may unnecessarily complicate the surrogacy process. Although there are many success stories involving women who have carried babies for their siblings, there are also parents who have regretted using a sister to carry their child because of negative emotional family issues that surfaced only after the pregnancy occurred. In addition, for parents who may wish to minimize such contact, using a surrogate who is already part of the parents' social network complicates the issue of post-birth disclosure and the surrogate's contact with the child. Finally, unless an attorney or other entity is hired to handle the many administrative details that must be managed for the process to go smoothly, one of the parties will have to assume these responsibilities.

Those parents who do not have a relative or friend who will carry a child for them must look elsewhere for a surrogate.

The Internet is a wonderful marketing tool and is useful in this regard. Finding a surrogate who is individually marketing herself on the Internet has the advantage of significantly increasing the number of potential candidates that the parents can consider. Parents can then more easily select a surrogate who shares certain physical characteristics with one of the intended parents if that is important to them. They can also

select a surrogate who has no prior or ongoing relationship with their family, thereby permitting a more “anonymous” process if that is their preference.

The Internet also expands the geographic scope of the search for a surrogate, which is especially important for parents who live in a state where surrogacy is limited or banned. These parents can look for a surrogate in a state where third-party reproduction is permitted, since the law of the state in which the surrogate resides normally governs the outcome of the process, not the law of the state where the parents reside. In addition, this type of search allows parents to find a surrogate without incurring the fee typically charged by agencies (discussed below).

With these benefits come some disadvantages. Surrogates who advertise on the Internet are typically in close communication with other surrogates on the Internet. They are educated on the “market rate” for their service and often charge premium fees for their services, which currently average around \$25,000. The motivation for these candidates is usually more financial than altruistic, and this may make the process feel more like a business transaction than cooperative family building.

Furthermore, these surrogates have usually not been screened to determine their suitability for third-party reproduction, so the potential for them to fail the screening and a delay in the the process exists. Screening is important, as these candidates are the candidates who may most likely “change their minds,” even if only to leverage better compensation from the parents. In addition, while the parents may want to sever personal contact with the surrogate after the birth, obtaining necessary medical information about her may be difficult in later years with an individual surrogate.

Finally, if the surrogate lives in another state, it is challenging to maintain communication between the parties, arrange medical procedures and execute the financial arrangements between the parties. These administrative burdens will fall either on the parents or the surrogate during the pregnancy, a time when everyone would rather be focusing on the miracle of birth than on the business details of the process.

Parents can also locate a surrogate through an agency. This procedure has the same advantages as finding an individual surrogate on the Internet, without the disadvantages. Parents retain the expanded number and geographic location of the surrogates from whom they can select, and they still have sole



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discretion to select a surrogate based on their own criteria. However, an agency will typically have available numerous pre-screened surrogates from which to choose, so there will be no unexpected delay.

Candidates are screened to find a reasonable balance between their desire for compensation and their desire to give the gift of their services to build the parents' family. As a result, they are often available for a more reasonable fee and are much less likely to "change their mind."

In addition, once the surrogate is chosen, an agency will usually negotiate the terms of and draft the surrogacy agreement on the parents' behalf. Moreover, an agency will arrange for and/or manage the administrative details of the process, including ongoing communication between the parties, necessary travel and lodging, medical procedures, financial arrangements and post-birth legal procedures. An agency will also stay in communication with the surrogate after the birth in order to monitor and facilitate the continuing exchange of information about the surrogate's medical status.

This creates a buffer between the parents and the surrogate for post-birth privacy if that is desired.

The challenge is finding a reputable agency. Significant inquiry and research should precede the parents' selection of an agency with which to work. As in all professions, there are the good and the bad. One disadvantage may be the agency fee, which is typically between \$16,000 and \$20,000. Whether the services provided by an agency justify the fee depends on the individual circumstances and perspective of the parents.

This article is not intended as legal advice and should not be relied upon as such. Each family and agreement is unique, so you should hire a competent attorney to advise you specifically about your particular case.

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