Ethical Issues in Assisted Reproduction: A Primer for Family Law Attorneys

by
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I. Introduction

At its most basic level, family law concerns the rights and obligations of persons as they create, maintain, and dissolve their family households. Whether created through marriage or a nonmarital relationship, "households" typically include children. At their most basic, adoption and assisted reproductive technology (ART) are methods that bring children into the family household without sexual intimacy between spouses or nonmarital partners.[1] The U.S. Centers for Disease Control and Prevention (CDC) defines ART to include "all fertility treatments in which both eggs and sperm are handled" to establish a pregnancy without sexual intercourse.[2] Donor insemination, which typically does not involve manipulation of eggs, is—from a legal if not a medical perspective—nonetheless often considered an ART procedure, and will be considered part of ART procedures for purposes of this article. While the two processes—adoption and ART—may achieve a similar outcome in terms of adding children to a family unit outside the privacy of a couple's bedroom, their legal and ethical attributes could not be more different. Both methods of non-sexual family formation require distinct legal arrangements to create and dissolve and are in-

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1 DOUGLAS E. ABRAMS, NAOMI R. CAHN, CATHERINE J. ROSS, DAVID D. MEYER, CONTEMPORARY FAMILY LAW, 3D ED. 1014-15 (2012).

2 CENTERS FOR DISEASE CONTROL AND PREVENTION, 2008 ASSISTED REPRODUCTIVE TECHNOLOGY SUCCESS RATES 3 (2010).

creasingly utilized by an expanding group of would-be parents, and thus should be of significant concern to family law attorneys.

While adoption is the legal equivalent to biological parenthood whereby parents acquire all of the constitutional rights and obligations of parenthood and family autonomy, adoption has long been controversial. For example, it was unknown under English common law, and it was not until 1926 that England statutorily recognized adoptions as a way to create a legal parent/child relationship.[3] Adoption law developed through decades, if not centuries, of statutory and common law accretion.[4] While ART also strives for that same outcome—a legally recognized parent/child relationship between the child born of the process and the intended parents—the two legal processes are very different. Adoption has been around for a long time, it is premised on detailed and comprehensive statutory frameworks, and the individual participants, adoption agencies, and the lawyers are heavily regulated by the state. Adoption at its core is a legal process that culminates in a judicial decree of adoption subject to all the protections of full faith and credit and res judicata.[5]

ART, on the other hand, is a relatively new legal phenomenon[6] that varies dramatically from state to state and country to

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3 E. WAYNE CARP, FAMILY MATTERS: SECRECY AND DISCLOSURE IN THE HISTORY OF ADOPTION 4-5 (1998). For other historical discussions of adoption, see Gary A. Debele, *Custody and Parenting by Persons Other than Biological Parents: When Non-Traditional Family Law Collides with the Constitution*, 83 N.D. L. REV. 1227 (2007); Stephen B. Presser, *The Historical Background of the American Law of Adoption*, 11 J. FAM. L. 443 (1971); Jamil S. Zainaldin, *The Emergence of a Modern American Family Law: Child Custody, Adoption, and the Courts, 1796-1851*, 73 NW. U.L. REV. 1038 (1979).

4 CARP, *supra* note 3, at 1-35.

5 For a discussion of the statutory requirements and variance from state to state, see RANDALL B. HICKS, ADOPTING IN AMERICA: HOW TO ADOPT WITHIN ONE YEAR (2d ed. Wordslinger Press, 1999).

6 Artificial insemination (AI) is the oldest and most popular means of technological conception; it first came into widespread use during the 1950's. While AI avoids sex, in vitro fertilization (IVF) moves the entire process of conception outside the body. While some suggest surrogacy dates back to Sarah and the Bible, it was not until IVF that gestational surrogacy—the prevalent form of that type of ART procedure—became an available method of creating a family.

country.[7] At the present time, there is very little governmental regulation of ART processes, either on the state or federal level, and there are currently no international treaties that comprehensively regulate or seek to systematize these processes across national boundaries.[8] The legal issues are largely driven by fast-changing medical technology in the field of reproductive medicine that enables otherwise infertile couples, same-sex couples, or single persons without a sexual partner to build families, and often with their own genetic material. While adoption practice and procedure, and the ethical precepts that apply to it, are relatively well settled, in the area of assisted reproduction, there is not much uniformity between the jurisdictions or even between the practitioners who work in the area.[9]

From both a legal and an ethical perspective, it is important to recognize that the practice of in vitro fertilization (IVF) and the associated assisted reproductive technologies developed against the backdrop of a very volatile debate in the United States over abortion. The U.S. Supreme Court decided *Roe v. Wade*[10] in 1973. The first IVF baby in the world was born five years later in 1978, the first in the United States in 1981, and these were years during which public policy debates were prevalent in America. The federal government's repeated decisions to either limit federal funding or otherwise fail to support IVF re-

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7 For a good overview of the ARTs process and practice, see Craig Dashiell, *From Louise Brown to Baby M and Beyond: A Proposed Framework for Understanding Surrogacy*, 65 RUTGERS L. REV. 851 (2013).

8 For a discussion of challenges regarding international ARTs and their regulation, see Kristine S. Knaplund, *Baby Without a Country: Determining Citizenship for Assisted Reproduction Children Born Overseas*, 91 DENV. U. L. REV. 335 (2014); Erin Nelson, *Global Trade and Assisted Reproductive Technologies: Regulatory Challenges in International Surrogacy*, 41 J.L. MED. & ETHICS 240 (Spring 2014); Brock A. Patton, *Buying a Newborn: Globalization and the Lack of Federal Regulation of Commercial Surrogacy Contracts*, 79 UMKC L. REV. 507 (2010); Caroline Vincent & Alene D. Aftandilian, *Liberation or Exploitation: Commercial Surrogacy and the Indian Surrogate*, 36 SUFFOLK TRANSNAT'L L. REV. 671 (2013).

9 For an overview of ARTs history and practice challenges, including detailed discussions of both legal and medical developments and related litigation, see SUSAN L. CROCKIN & HOWARD W. JONES, JR., LEGAL CONCEPTIONS: THE EVOLVING LAW AND POLICY OF ASSISTED REPRODUCTIVE TECHNOLOGIES (2010).

10 410 U.S. 113 (1973).

lated research reflects those debates. An Ethics Advisory Board was created within the National Institutes of Health in 1979, with guidelines issued for an approval and oversight process for IVF related research, but it was never staffed and thus was never able to fulfill its oversight function.[11]

Without publicly funded or supported research relating to IVF, most IVF advances developed in privately funded clinics, with patients in treatment essentially also acting as human research subjects.[12] Ethical issues were similarly left to the private sector, and initially handled on a clinic-by-clinic basis. In 1987, the first Ethics Committee was formed by what is now known as the American Society of Reproductive Medicine (ASRM, formerly the American Fertility Society or AFS), an international, albeit largely U.S. focused, professional organization to which most reproductive endocronologists and related ART medical professionals belong. That organization continues to issue non-binding professional guidance on ethics as applied to specific and emerging technologies and practices[13] The committee was first proposed and then chaired by Howard W. Jones, Jr., M.D., whose IVF clinic produced the first American IVF baby, Elizabeth Carr, in 1981.[14] The committee continues to operate under a rotating chairmanship, with its task to consider the ethical issues that arise in the practice of ARTs, and to provide ethical guidance—primarily to medical professionals—to those who practice it. While non-binding on the medical profession or outside it, pronouncements have at times found their way into legal forums and judicial opininions, including the 1992 seminal case involving the disposition of frozen embryos in a divorce proceeding, *Davis v. Davis*.[15]

It is the authors' impression that many U.S. lawyers who work in the area of ARTs are not general family law attorneys by training or practice. Instead, many attorneys working in the ARTs area come from an adoption practice, which now is viewed

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11 For a more detailed historical timeline, see CROCKIN & JONES, *supra* note 9, at 13-19.

12 CROCKIN & JONES, *supra* note 9, at 352.

13 For more information on this Ethics Committee, its ethics opinions, and ASRM in general, see the organization's website at www.asrm.org.

14 CROCKIN & JONES, *supra* note 9, at 5.

15 842 S.W.2d 588 (Tenn. 1992).

more as a sub-specialty of family law—and a practice that few family law practitioners wade into anymore on account of its growing complexity. Many also come from commercial transaction backgrounds where they have acquired experience drafting contracts and other corporate documents, but very little if any family law or adoption law practice experience and little experience dealing with children in their law practices. Thus, dealing with custody, parentage, and adoption issues where the "best interests of the child" is typically front and center may not have been a primary focus in many ARTs attorneys' practices.[16] Fertility clinics are frequently involved in these matters, and while medical professionals have their own ethical codes of conduct, they are largely unfamiliar with family law and frequently attempt to structure the legal aspects of these proceedings using medical consent forms to more narrowly address the necessary legal procedures and processes.[17] A new entity has arisen in the ARTs arena: the coordinating or matching program. While such an entity might be considered the loose equivalent to the adoption agency in adoption practice, there are currently no regulations that govern the operation of these entities and no particular licensing requirements. Some of these coordinating programs are run by ARTs attorneys, and some are not; some attorneys represent one or more of the parties in the ARTs processes, while others do not. This situation, coupled with a plethora of jurisdictions, many of which have no statutes, case law, or administrative regulations as to ARTs, make these situations challenging both from a legal and an ethical perspective.[18]

The adoption world and the ARTs world have not always easily co-existed. For example, the American Academy of

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16 There is no empirical data to back up these observations. Unlike the medical profession, which has a more coherent and well developed regulatory structure to its reproductive medicine practice, there is not yet such structure in the legal practice of ARTs.

17 For a discussion of medical consent practice in ARTs, see Katherine Drabiak-Syed, *Waiving Informed Consent to Prenatal Screening and Diagnosis? Problems with Paradoxical Negotiations in Surrogacy*, 39 J.L. MED. & ETHICS 559 (2011).

18 For a discussion of the rise and impact of coordinating programs in the practice of ARTs, as well as related ethical concerns, see Susan L. Crockin, *Who's My Client? Recognizing and Avoiding Conflicts of Interest in ART Law Representation*, 34 FAM. ADVOC. 14 (Fall 2011).

Adoption Attorneys (AAAA) was created in 1989. The AAAA is a selective fellowship of adoption attorneys who must be invited to join that organization after demonstrating significant adoption law expertise and high ethical standards.[19] When many of its members also began building ARTs practices, a movement developed to create an affiliated academy called the American Academy of Assisted Reproduction Attorneys (AAARTA). AAARTA emerged in 2009 as an entity affiliated with AAAA, with many of its members also belonging to AAAA, but some only to AAARTA and not holding themselves out as adoption experts.[20] The birth of AAARTA was not without its challenges, reflecting the uneasy relationship that had been growing between adoption attorneys and ARTs attorneys. Many adoption practitioners felt that ARTs should not be encouraged by adoption attorneys, contending that it detracted from efforts to find parents for hard-to-adopt children, and further, from a sense that the two methods of family creation involved vitally different legal procedures and interests and were ultimately incompatible with each other. Other adoption attorneys felt that there was a clear symbiotic relationship between the two methods of family creation and that the skill sets required of the lawyers and the professionals involved were somewhat similar. ART family building addressed many of the demographic challenges currently facing domestic adoption: fewer infants born outside of marriage being placed for adoption, increasingly draconian international adoption regulations, and the legal complexities in adoption. Moreover, it met the strong desire of many intended parents to have a genetically related child and to preserve family creation options as much as science and medicine will allow. For all these reasons, it seemed inevitable that ARTs were here to stay and many adoption attorneys determined that they would add ARTs to their adoption law practices already focused on family building.[21]

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19 For more information regarding AAAA, including its Code of Ethics and bylaws, see www.adoptionattorneys.org.

20 For more information regarding AAARTA, including its Code of Ethics and bylaws, see www.aaarta.org.

21 *See, e.g.,* Mary Kate Kearney, *Identifying Sperm and Egg Donors: Opening Pandora's Box*, 13 J. L. & FAM. STUD. 215, 223-24 (2011).

Both AAAA and AAARTA have promulgated ethics codes to which their members are required to adhere.[22] The codes aspire to have members practice with the highest ethical standards while navigating the tricky issues at play in both of these areas of practice. Recently, AAARTA formed a committee to substantially revise its ethics code to address issues that have continued to arise and present challenges as the practice of ART has expanded and become more sophisticated. The work of that committee, on which both of the authors sit, has been challenging and has highlighted many basic ethical issues that exist in ARTs cases that are truly unique to the ARTs practice. Other issues also play out in other areas of the law, but because of the unique aspects of ARTs practice and its historical development, those issues present special challenges in the context of ARTs.

In most family law practices, the usual ethical canons come in to play regarding conflicts of interest, diligence in representation, competence, and the like. While it would never occur to most family law attorneys to represent both spouses in a divorce, in ART (and in adoption to some extent) it is not clear if one attorney can represent both the carrier and her spouse and the intended parents, and also operate and/or represent a coordinating facility or an infertility clinic or a donor.[23] Issues arise over whether one of the attorneys can manage the escrow account or the funds that are being transferred. Issues also surface about giving legal advice in jurisdictions other than where the attorney is licensed. The relatively new and unregulated practice of ARTs stands in contrast with adoption where adoption agencies are licensed and regulated by the state, clear procedures are in place to secure knowing and informed consents from birth parents, most states have statutes regulating payments by adoptive parents to adoptive parents, the mental health and social worker professionals are regulated by their own licensing boards, and a

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22 *See supra* notes 19 and 20. For example, both Codes have provisions as to licensure, competence, handling client funds, prohibitions on possessing a financial stake in the success of the ARTs arrangement or the adoption, required advice to clients, the need to avoid conflicts of interest in the representation of various parties involved in the processes, and given the interstate and international aspects of both ARTs and adoption, how to manage such interjurisdictional challenges.

23 Amanda McGarry, *Joint Representation in Surrogacy Agreements: A Professional Ethics Perspective*, 31 J. LEGAL PROF. 321 (2007).

large body of established ethical practices has developed around adoption practice.[24] No such body of ethical principles or agreed upon practices and regulations have yet coalesced in ARTs practice. It is for the most part completely self-regulated; it is a billion dollar industry awash in money;[25] and its ultimate focus is on intended parents determined to have a child using their own genetic material or genetic material that has been carefully selected and vetted by the intended parents. Intended parents with fertility problems can also be vulnerable and in need of solid, ethical representation.

The purpose of this article is to educate family law attorneys, especially those who do not do ARTs cases or have not yet had it become a part of their more typical family law practice, regarding the unique ethical issues that underlie the practice of ARTs. In Part II, we will first address the ethical issues that arise in the handling of embryos and other genetic material. Part III is then an analysis of the ethical issues that are implicated when working with various parties to the ARTs procedures, including intended parents, the gestational carrier and her partner or spouse, if any, donors of genetic material, and the children who are the subject of the procedure. Part IV addresses ethical and legal issues involving same sex couples, whether married or not, which can present unique and significant legal and ethical challenges. Parts V and VI conclude by considering ethical issues in fertility preservation and posthumous reproduction respectively. If nothing else, it is hoped that when family law attorneys are contacted by potential clients or other attorneys for assistance with ARTs cases, the readers of this article will have a better understanding

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24 *See generally* HICKS, *supra* note 5.

25 The payment for various aspects of the ARTs process, and what is often referred to as the "commercialization" of childbirth, is a huge controversy that has fueled much discussion and debate among ARTs practitioners. While payments related to adoption are heavily regulated and a long-standing and universal ban exists on buying and selling babies in adoption proceedings, such regulation and long practice history does not yet exist in ARTs. *See* DEBORA L. SPAR, THE BABY BUSINESS: HOW MONEY, SCIENCE, AND POLITICS DRIVE THE COMMERCE OF CONCEPTION (2006) (reviewed by John A. Robertson, *Commerce and Regulation in the Assisted Reproduction Industry*, 85 TEX. L. REV. 665 (2007)). *See also* Hugh V. McLachlan & J. Kim Swales, *Commercial Surrogate Motherhood and the Alleged Commodification of Children: A Defense of Legally Enforceable Contracts*, 72 LAW & CONTEMP. PROBS. 91 (Summer 2009).

of ethics concerns that should be considered before making referrals to other attorneys, fertility clinics, or coordinating programs.

II. Handling Embryos and Other Genetic Material

A. *Pre-Implantation IVF Embryos: Legal Enigmas and Ethical Quandaries*

IVF embryos, more accurately termed "pre-implantation IVF embryos," are at the heart of any ethical discourse involving the ARTs, and their creation, storage, and ultimate dispositions raise complex and novel legal and ethical issues. This section lays a foundation for considering the ethical aspects that may arise when lawyers are faced with embryo-related legal issues in their practices.

As a starting point, there is no single, accepted legal definition of the term "embryo." A pre-implantation IVF embryo is an embryo created literally "in vitro" or "under glass" and that exists prior in time to being transferred to a woman's uterus. However, courts, legislatures, and regulatory bodies have not only used a variety of terms, but also relied on different moments in time to define a pre-implantation IVF embryo.

Pre-implantation IVF embryos and embryo dispositions also implicate a number of areas of the law, including family, contract, informed consent, and constitutional privacy rights. While the U.S. Supreme Court has long recognized and clearly protected the rights of individuals to make private procreative decisions,[26] IVF separates the woman from the conceptus and thus introduces a novel element into any discussion of procreative rights. While this section will focus on the family law aspects of

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26 A long line of Supreme Court cases has made it clear that governmental intrusion into various aspects of reproduction, contraception, and abortion must be justified by a compelling state interest. Roe v. Wade, 410 U.S. 113 (1973); Eisenstadt v. Baird, 405 U.S. 438 (1972); Skinner v. Oklahoma, 316 U.S. 535 (1942). In perhaps one of the most often quoted passages, the U.S. Supreme Court has ruled, "[i]f 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 a decision whether to bear or beget a child." *Eisenstadt*, 405 U.S. at 453.

procreative rights, it will also note other inextricably intertwined areas of the law and ethical considerations.

B. *Language*

The vocabulary surrounding pre-implantation IVF embryos has engendered heated legal, bioethical, religous, and policy debates that are largely outside the scope of this article.[27] ART practitioners, however, need a working vocabulary to understand and clarify the legal issues that pre-implantation IVF embryos can produce. A myriad of terms can be found in the law, including "embryo," "preembryo," "pre-embryo," or "zygote." Some definitions found in statutes concerned with fetal tampering enacted in the 1970s (in the wake of *Roe v. Wade* but before IVF) defined the term "embryo" interchangeably with that of "fetus."[28] This article strives to use the medically accurate description of "pre-implantation IVF embryo" (or "IVF embryo" for short), signifying an entity formed from an egg and a sperm outside the body that has not yet been transferred to a location for the purpose of implantation and pregnancy (currently a woman's uterus but in the far off future, perhaps an artificial womb). Alternate terms and definitions may appear in state laws, including some addressing fetal homicide, such as in Idaho, where "embryo" and "fetus" are used interchangeably.[29] One notable and unique state statute (Louisiana) defines an embryo as essentially a juridical entity: "an in vitro fertilized human ovum, with certain rights granted by law, composed of one or more living human cells and human genetic material so unified and organized that it will develop in utero into an unborn child."[30] (The Louisiana statute also makes the IVF physician the "guardian" with authority to determine "adoptive implantation" (only to married couples) if the parents "renounce" their claims to frozen embryos.)

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27 Susan L. Crockin & Celine Anselmina Lefebvre, *Sound Bites or Sound Law and Science? Distinguishing "Fertilization" and "Conception" in the Context of Pre-implantation IVF Embryos, ESCR, and "Personhood,"* 3 ETHICS IN BIOLOGY, ENGINEERING & MED.: AN INT'L J. 247 (2012).

28 MASS. GEN. LAWS ch. 112 § 12J (2015).

29 IDAHO CODE § 18-4016 (2003).

30 LA. REV. STAT. § 9:121 (2003).

While Louisiana has been, and remains, an outlier, more recently, so-called "personhood" initiatives have been introduced in a number of states, which in varying language attempt to equate a fertilized human egg with a rights-bearing person.[31] Those laws, without exception, have ultimately been rejected by state voters or legislatures, but continue to be routinely filed and debated.[32]

In the context of assisted reproduction, a pre-implantation IVF embryo results from the fertilization of a human egg in vitro (outside the body) by human sperm, up to a defined period of time after fertilization. Embryos may be created with patients' own gametes (eggs and sperm), with donor sperm, donor eggs, or both. Notwithstanding various legislative pronouncements, from a medical and scientific perspective, fertilization is currently considered to be a chaotic and multi-step process, whereas "conception" has variously been described as the time frame between fertilization and implantation in a woman's uterus, or the process of implantation. Precisely how long an in vitro growing cell mass is considered an embryo versus a pre-embryo, or whether the latter term is a legitimate distinction has long been the subject of debate among scientists as well as legal and ethical scholars.[33]

From a legal perspective, a critical point to keep in mind is that *all* pre-implantation IVF embryos are either used for procreation, cryopreserved (frozen for future potential use), donated for scientific research, or discarded on or before approximately the fifth day of development. After a sperm penetrates an egg, the resulting cell mass begins dividing and reaches the "blastocyst" stage at day five. Until day fourteen, no cell differentiation occurs and "twinning" is still possible; most worldwide approved embryonic research is restricted to this time frame.[34] The terms "IVF embryo," "pre-implantation IVF embryo," and "embryo" are used interchangeably within this article to refer to any and all

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31 Crockin & Lefebvre, *supra* note 27, at 253, 255.

32 *The 'Personhood' Initiative*, N.Y. TIMES, Oct. 27 2011, http://www.nytimes.com/2011/10/28/opinion/the-personhood-initiative.html. For a recent 2015 session filing, see MO HB1033 (2105)

33 Crockin & Lefebvre, *supra* note 27, at 248.

34 Howard W. Jones & L.L. Veeck, *What Is an Embryo?*, 77 FERTILITY & STERILITY 658 (2002).

stages of an embryo prior to that time period that has not yet been transferred to a woman's uterus.

C. *Patient Embryos*

Legal disputes over embryos or children born from frozen embryos can arise in the context of divorce, donation, death of the progenitors, abandonment, and gamete or embryo mix-ups. Legal issues can range from who may use or stop the use of genetic material, to who are considered the parents of any resulting children, to what are the inheritance rights of any such embryos or children.[35] Frozen embryos have seized the public's imagination, but it is helpful to consider that the vast majority of the reportedly 600,000[36] stored embryos in the United States are created by and for infertile patients trying to create their own families, using their own eggs and sperm, and are still under their control for those purposes.[37]

Some patients, including heterosexual couples, same-sex couples, and single parents, will need and utilize donor sperm, eggs, and/or embryos in their efforts to have a child. In addition, so-called "designer embryos" further complicate the issues—referring to either patient embryos that have been selected or deselected following pre-implantation genetic testing (pre-implantation genetic diagnosis (PGD) or pre-implantation genetic selection (PGS)) or embryos created wholly from individually selected donor sperm and donor egg.[38] Designer embryos are discussed in more detail in Section II.*I.* below. From a legal perspective, donor gametes create unique and specific legal issues: attorneys may be involved in representing intended parents or gamete donors in either creating or reviewing a legal donation agreement, or assessing their clients' respective involvement with an IVF program or frozen gamete bank. Attorneys who take on such cases should be familiar with the laws addressing parental status for donors and recipients specifically and parentage gen-

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35 For a discussion of cases raising all of these issues, see CROCKIN & JONES, *supra* note 9, at ch. 1, "Embryo Litigation."

36 David I. Hoffman, et al., *Cryopreserved Embryos in the United States and Their Availability for Research*, 79 FERTILITY & STERILITY 1063, 1070 (2003).

37 *Id.*

38 *Id.*

erally in the applicable jurisdiction. The ethical aspects of representation involving donor gametes or embryos is discussed here and more fully in Section II.*D*.

Embryo creation may also foster legal and ethical issues that are largely outside the realm of this article, such as ethically acceptable testing and selection of certain embryos (whether to deselect for certain genetic anomalies or to select in or out for certain traits such as sex, deafness, "DNA matches" for siblings with a genetically related condition or illness), use of sperm or egg donors, and mitochondrial replacement (inaptly referred to by some as "three parent IVF"). A brief discussion of so-called "designer embryos/babies" is found at Section II.*I*.

Once created, pre-implantation IVF embryos also raise issues around continued storage or disposition, who controls those decisions, and ultimately who may or may not be a parent as as result of their use for procreation. Storage issues can raise ethical concerns around control and payment for continued storage or, more dramatically, where sperm, eggs or embryos are mistakenly combined and/or transferred to the wrong patient (so-called "mix-ups"). Dispositional issues can involve decision-making around discard/destruction, donation for procreation or approved research, or abandonment by patients. The ethical issues arising from those categories will be addressed separately.

After IVF treatment, patients may have excess embryos that need to be disposed of. This can include IVF embryos that are either stored at the time of a couple's divorce with no concurrent agreement by the couple regarding their disposition, leftover embryos of an intact couple following completed IVF treatment with a joint decision needing to be made either for donation (for research or procreation) or discard, so-called "abandoned" embryos where patients have left stored embryos without any effective written instructions, or mix-ups—where IVF programs inadvertently combine the wrong gametes or place the wrong embryos into a woman's uterus. Each of those issues raise both legal and ethical concerns.

Also largely outside the scope of this article are the donation of IVF embryos for research or the creation of "research embryos" by separate egg and sperm donors. The latter remains controversial in the United States. Medical advances such as embryonic stem cell research, mitochondrial replacement, and the

possibility of growing eggs from stem cells, all of which currently seldom involve individual lawyers for gamete providers, will certainly present new legal and ethical challenges in the future.

D. *The Legal Status of Embryos*

Despite constitutional law making clear that non-viable fetuses are not legally recognized "persons," for those who believe that life begins at fertilization or conception and those uninterested in the stages of development those terms encompass, issues surrounding IVF embryo dispositions that involve damaging or discarding frozen embryos are problematic. Abortion cases are at least partially distinguishable by the fact that extra-corporeal embryos do not implicate issues of a woman's bodily integrity.

In the context of divorce, a series of well-publicized cases stretching back to 1992 illustrate the unique nature of, and considerations given to, IVF pre-implantation embryos. While many courts may treat embryos as marital property[39] and attempt to assign them to one of the spouses as such, there is also a long recognized and often cited "special respect" due to their "capacity for life," first articulated in 1992 by the Tennessee Supreme Court in *Davis v. Davis*.[40]

Courts have scrutinzed any written documentation, including clinic consent and agreement forms, in attempting to resolve disputes. This line of cases has been analyzed at length by many legal commentators, including one of these authors.[41] A brief summary for the purposes of an ethics discussion here should suffice.

In the context of divorce disputes, starting with the 1992 case of *Davis v. Davis*,[42] a growing number of state appellate courts, including Tennessee, New York, Massachusetts, New Jersey, Washington, and Maryland, have addressed the subject of disposition of pre-implantation IVF embryos. Reciting language from

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39 *In re* Marriage of Witten, 672 N.W.2d 768 (Iowa 2003).

40 842 S.W.2d 588 (Tenn. 1992).

41 Susan L. Crockin et al., *Embryo Law*, *in* ADOPTION AND REPRODUCTIVE TECHNOLOGY LAW IN MASSACHUSETTS 474-81 (Susan L. Crockin ed., MCLE, 2000); Nanette R. Elster, *ARTistic License: Should Assisted Reproductive Technologies Be Regulated?*, *in* ART: TODAY AND BEYOND 266 (Christopher J. De Jonge & Christopher L. R. Barratt eds. 2003);

42 842 S.W.2d 588 (Tenn. 1992).

the AFS Ethics Committee, the *Davis* court ruled that "pre-embryos" inhabit an "interim category" that "entitles them to special respect because of their potential for human life."[43] Although the Davises did not have such an agreement, that court noted that agreements between couples regarding disposition of their pre-embryos "should be presumed valid and should be enforced." Courts have come to varying conclusions over whether an IVF program's cryopreservation form, whether titled an agreement or consent form, is sufficient to bind a decision made by a former intact couple when they subsequently separate and disagree. In *Davis*, however, absent any agreement, the court held in favor of the spouse wanting to avoid procreation, partly on the theory that the other party had other means of achieving parenthood.

Although the post-*Davis* courts have come to differing conclusions based on different fact patterns, until very recently most have trended toward the right not to procreate "trumping" the right to procreate, and otherwise honoring a couple's prior agreement or consent form. In the context of what the Massachsuetts Supreme Judicial Court termed "forced procreation,"[44] almost every state court of last resort has rejected a claim to use pre-implantation IVF embryos by one or the other former spouse that could lead to an unwanted child and child-support obligations. In *A.Z. v. B.Z.*, the Massachusetts Supreme Judicial Court specifically noted that the IVF program's agreement would not bind the couple and that no such agreement could do so without violating public policy.[45]

In the past few years, however, at least two intermediate appellate courts have been swayed by very emotionally charged fact patterns, awarding IVF embryos to the ex-wife, and a similar case is currently pending in Illinois.[46] In perhaps the most compelling of those to date, *Reber v. Reiss*, the court awarded thirteen IVF embryos to a wife who had undergone multiple rounds

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43 *Id.* at 597

44 A.Z. v. B.Z., 725 N.E.2d 1051 (Mass. 2000).

45 *Id.*

46 Szafranski v. Dunston, 993 N.E. 2d 502 (Ill. Ct. App. 2013); Mbah v. Anong, CAD11-11394, CAD10-24995 (consolidated) (Md. Circ. Ct., 7th Jud. Dist., Dec. 21, 2012); Reber v. Reiss, 42 A.3d 1131 (Pa. Super. Ct. 2012), *app. denied*, 62 A.3d 380 (Pa. 2012).

of chemotherapy, had reportedly no future hope of having viable eggs to create a child, and proferred an agreement to pay her husband $1/year in alimony, with an escalator clause should she later seek child support from him, to minimize any risk the child would need to or be able to look to her ex-husband for financial support.[47] The ex-husband had left the marriage during his wife's cancer treatment, fathered a child with another woman, and announced his intention to have more such children with her.[48] The court also refused to recognize the IVF clinic's cryopreservation or storage agreement as an agreement between the former couple to discard the embryos. Courts frequently scrutinze such clinic documentation to discern or reject a couple's intentions.[49]

These cases run counter to high courts in both Massachusetts[50] and New Jersey,[51] which refused to enforce a pre-treatment IVF program's agreement that would have permitted one spouse to use or donate the embryos over a current objection by the other. Relying on a constitutional right to procreative liberty theory, those courts ruled that, notwithstanding any prior agreement, it would be against their public policy to allow a former spouse to attempt to achieve parenthood over the other's objection as it would burden the objecting ex-spouse with unwanted parenthood. In *J.B. v. M.B.*, the New Jersey court applied this policy even where the couple's prior agreement was to donate the embryos to another individual, ruling that even without legal parentage responsibilities, forcing biological parenthood on the ex-wife, who wanted to dispose of the embryos, was an unacceptable burden.[52] Whether that argument might be extended to gamete donors remains to be seen.

Donor gametes may complicate this balancing act, which will become a larger issue as same-sex couples and single intended parents increasingly rely on them for their family building. In 2000, *Litowitz v. Litowitz*[53] involved the first known frozen embryo dispute between a divorcing couple with donor egg-created

47 *Reber*, 42 A.3d 1131.

48 *Id.*

49 *Id.*

50 *A.Z*, 725 N.E.2d 1051.

51 J.B. v. M.B., 783 A.2d 707 (N.J. 2001).

52 *Id.*

53 48 P.3d 261 (Wash. 2002).

IVF embryos. The Washington couple had one child from the embryos, and their agreement provided for discard of excess embryos, but at the time of their divorce the husband wanted to donate them to an infertile couple, while the wife wanted to use them with a gestational carrier to attempt to create a sibling for the couple's first child. The court upheld the couple's prior agreement to discard, notably an outcome that did not force unwanted procreation on either party, even though neither wanted that result at the time of their divorce. As more and more intended parents use donor gametes, courts will face ever more complex fact patterns.

Lawyers advising patients starting IVF treatment or representing them in divorces where frozen IVF embryos are in dispute will need to appreciate the unique nature of IVF embryos and the issues they present. Unlike tangible property, IVF embryos implicate constitutional rights to procreate or to "not-procreate." If donor gametes have been used, there may be additional legal and ethical issues around whether the progenitor (the genetic contributor) has or should have greater claims to disposition, and whether that might shift depending on factual circumstances. For example, same-sex couples will always have one partner who is a progenitor and one who is not, which arguably would shift the dispositional weight toward the progenitor in an embryo dispute case. However, any potential advantage might be impacted if, for example, the couple already have one child or if the non-progenitor's sibling or other close relative or friend had provided the donor gametes if genetic relatedness or personal connectedness of each party is weighted heavily. These and other unknown novel issues are likely to continue to surface as expanding forms of ART family building proliferate.

Another as yet untested issue is whether gamete donors may have a right to change their minds regarding either donated gametes or resulting cryopreserved embryos. Arguably, the New Jersey court's analysis in *J.B. v. M.B.* might support the right of gamete donors to change their minds, blocking any further usage of their gametes or embryos made from them or requiring reconsent if their initial agreement was to donate only to a specific couple.[54] Such an analysis could preclude a couple from donating

[54] *J.B.,* 783 A.2d 707.

excess IVF embryos or even from potentially using them for themselves. As egg freezing comes on line and egg banks are anticipated to become as prevalent as sperm banks, there will also be new issues around who controls genetic material that may have been banked without first being combined into embryos. Some states, such as New York, have tissue bank regulations in place that permit donors to change their minds until an intended parent has started a cycle in reliance on their donation.[55] Others, such as California in the wake of highly publicized embryo mix-ups, may have state laws impacting who may donate and receive embryos, and with what required disclosures.[56] Once again, attorneys considering representing parties involved in these types of issues will want to ensure they know the laws of the applicable jurisdiction or affiliate with counsel who do.

Lawyers representing programs, intended parents, or gamete donors should all appreciate that agreements detailing future dispositional choices with a medical or non-medical program and directly between and among any recipients and donors (where possible) are advisable. They must also recognize and accept the degree of vulnerability as to procreation that any such consents or agreements are likely to have in the face of a contemporaneous objection by one of the genetic creators, and counsel their clients accordingly. This is yet another area of ART law where conflicts of interest issues are likely to exist, and where separate counsel for the parties involved should be strongly contemplated to avoid such issues, even between intended parents if they stand in unequal positions due to marital, health, or genetic status.

E. *Making Choices: Discard, Donate for Research or Family Formation*

1. *Discard*

With the exception of Louisiana, no state prevents a couple from discarding their unused frozen embryos.[57] IVF programs have protocols in place to simply discard upon mutual consent or in some cases offer options for patients who wish to dispose of

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55 N,Y. COMP. CODES R. & REG,S, §§ 52-8.7, 52-8.8 (2000).

56 CAL. PENAL CODE § 367g (2007); CAL. HEALTH & SAFETY CODE § 125315 (2007).

57 *See supra* discussion in text at note 30.

their embryos in other ways, such as providing embryos to a patient for a burial or other personally meaningful ceremony, or a "compassionate transfer" to the woman's uterus during a nonfertile time in her cycle to avoid what may be an otherwise difficult decision to authorize discard or destruction.[58]

Where patients do not agree, court cases have been brought as discussed above, in Section II.*D*.

2. *Donation for Procreation*

Donation for procreation raises issues of how legal parenthood is transferred from donor to recipient. From a family law perspective, it is critical to know what the state of the law is regarding sperm, egg, or embryo donation in the applicable jursidiction. While 35 states and the District of Columbia have sperm donor statutes, only 14 states have donor egg or embryo legislation.[59] These latter laws range from a straightforward mirror image of sperm donation laws relieving a donor of all parental rights and responsibilities to more comprehensive statutory schemes that encompass egg as well as embryo donation, traditional surrogacy, and gestational carrier arrangements. The majority of sperm donor laws, adopted as versions of the Uniform Parentage Act, do not address frozen gametes or embryos, but only the status of a born child.[60] Protections in some statutes may also be limited to married recipients or medically performed inseminations. One relevant distinction between sperm and egg donation is that the latter will of necessity always be performed by a medical professional. Frequently donors and recipients are from different states, creating uncertainty over applicable state law as to control over frozen material or parentage of resulting children. Thus, lawyers representing intended parents or donors will need to be aware of the scope of any applicable laws, as well as the potential choice and conflicts of law principles that might impact the applicability of any existing laws.

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58 Laura Bell, *The Fate of Frozen Embryos*, PARENTING, http://www.parenting.com/article/the-fate-of-frozen-embryos (last visited Mar. 8, 2015).

59 *See, e.g.,* FLA. STAT. ANN. § 742.11-.17 (2013); N.D. CENT. CODE §§ 14-18-01—14-18-07 (2005); OKLA. STAT. ANN. tit. 10, § 556 (2000); VA. CODE ANN. §§ 20-156—165, 32.1-45.3 (2014); WASH. REV. CODE §§ 26.26.705—740 (2015).

60 CAL. FAM. CODE §§ 7600—7606 (2015).

Here too, same-sex couples may present untested factual scenarios. For instance, there are a number of cases where known sperm donors have attempted to assert paternity rights over children born to their former friends—both lesbian couples or single women.[61] As same-sex couples seeking ART treatment continue to become both more prevalent as well as better legally protected under expanding marriage laws, these issues will require more subtle analysis, since the presumption of parentage for each member of a same-sex couple and the sperm donor's status and rights may all vary, depending on the applicable state law.

Embryo donation adds another dimension and may be undertaken anonymously or openly. The authors are not aware of any reported cases on the subject, and anectodally only one where embryo donors and recipients brought competing lawsuits, ultimately settled, over who should control embryos remaining after an initial donation resulted in twins.[62] Virtually no state uses adoption laws and protocols for procreative embryo donation, and only a very few states use the term "embryo adoption"[63]; nonetheless, the term has crept into the public's lexicon, partially fueled by anti-abortion debates.[64] In the majority of states without statutory guidance to clarify that an embryo donor is not a legal parent, or where a single intended parent or nontraditional family may fall outside any existing statutory protections, embryo donation presents unique legal and ethical questions. Given the novelty of these arrangements, lawyers considering representing a party to an embryo donation arrangement will not only want to analyze any applicable or potentially analogous state law, but consider what additional protections

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61 Jason P. v. Danielle S., 226 Cal. App. 4th 167 (2014); In the Interest of K.M.H., 169 P.3d 1025 (Kan. 2007); Kansas v. J.L.S. & M.L.B.S., Case No. 12 D 2686 (Shawnee Cnty., Kan. Jan. 22, 2014), *available at* http://www.shawneecourt.org/DocumentCenter/View/468 (Craigslist donor).

62 Heather Knight, *Donated Frozen Embryos Spawn Dueling Lawsuits*, S.F. CHRON., Apr. 10, 2010, http://www.sfgate.com/news/article/Donated-frozen-embryos-spawn-dueling-lawsuits-3193240.php (reporting on lawsuits filed and ultimately settled by both embryo donor couple and recipient couple).

63 Florida and Georgia (the latter accurately connoting that an adoption may be undertaken following the birth of a child from embryo donation). *See* FLA. STA. ANN. § 742.11 (2009); GA. CODE ANN. § 19-8-41 (2009).

64 *Custody Battle over Adopted Embryos*, CBS NEWS (Apr. 9 2010), http://www.cbsnews.com/news/custody-battle-over-adopted-embryos/.

might be advisable. Anecdotally, issues have arisen around the need to clarify parentage and control over any frozen embryos that are not immediately used to attempt a pregnancy, or control over embryos after recpients separate or divorce. At a minimum, legal agreements with independent counsel for donors and recipients would seem advisable since the donation will involve a transfer of legal parentage, rights, and responsibilities from one set of patients to another. The donation model is currently accepted by the medical profession with professional standards articulated in non-binding ASRM guidelines.[65] Mental health counseling is recommended, because much like other ART arrangements, potential donors and recipients may have very complex motivations and feelings about proposed arrangements.

Heightened sensitivity regarding embryo donation may be appropriate where family and friends are involved. Even more so than gamete donation, family and friend arrangements present some of the most vulnerable clients on both sides, since the desire to help may be genuine and strong, but personal, emotional, or religious views may weigh heavily for or against such desires. Anecdotally, there have been myriad cases where siblings and neighbors approached to donate excess embryos have reported mixed feelings, including guilt about their good fortune and selfishness if they declined to donate excess embryos, while torn over the idea of a full genetic sibling of their child being born to and raised by another, possibly related, family. From a legal ethics perspective, obligations to avoid conflicts of interest and provide zealous representation to one's client should at a minimum require separate legal representation and an analysis of the vulnerabilities and potential protections that might be available to help assure a secure legal parent-child and non-parent-child status if and as desired.

3. *Donation for Research*

Although beyond the scope of this article, another dispositional option for cryopreserved embryos is to donate them for research. For lawyers representing such patients, both IVF and specific research programs should have protocols in place that

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65 Am. Soc'y Reproductive Med., *2002 Guidelines for Gamete and Embryo Donation: A Practice Committee Report*, 77 FERTILITY & STERILITY (Supp. 5) 1 (June 2002).

will address the options and issues. As with most tissue donation, and in contrast to egg and sperm donors, embryo donors are typically not paid for their donations and, under established case law, should not expect to reap any financial rewards that may flow from any research using their donated tissue.[66] Lawyers should also be aware that there may be state laws impacting such donations. In California, for example, the law now requires that individuals who are provided with information about the disposition of embryos be "presented with the option of . . . donating the remaining embryos for research."[67]

F. *The Non-Choice: "Abandoned" Embryos*

Again largely outside the scope of family law aspects of ART practice, family law attorneys should nonetheless be aware of the possibility of embryo "abandonment." Patients may move, die, or simply lose contact with their IVF program. Executed cryopreservation consents or agreements should, but may not, set out default provisions for disposition, potentially leaving IVF programs with decisions about whether to destroy or indefinitely hold embryos for former patients they cannot locate. Recent efforts by the Society of Assisted Reproductive Technology (SART) to create model IVF consents with clear default provisions, will make this problem less acute in the future. For older consents, ASRM has a widely cited ethics opinion that suggests specific steps if embryos are deemed abandoned, including diligent efforts to contact the patients and a five year waiting period.[68] Lawyers representing IVF programs or storage facilities should take extreme care in guiding clients through potential abandonment and diposition issues to ensure the embryos meet all applicable legal and regulatory definitions of "abandoned" and also consider strategically what advice is best for a program at the conclusion of such an analysis. Under no circumstances

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66 *See, e.g.,* Greenberg v. Miami Children's Hosp. Res. Inst., Inc., 264 F. Supp. 2d 1064 (S.D. Fla. 2003); Moore v. Regents of the Univ. of Cal., 793 P.2d 479 (Cal. 1990).

67 CAL. HEALTH & SAFETY CODE § 125300 (West Supp. 2004).

68 Ethics Comm. of the Am. Soc'y for Reproductive Med., "*Disposition of Abandoned Embryos: A Committee Opinion*, 99 FERTILITY & STERILITY 1848 (2013).

should donation of embryos for procreation be undertaken without express consent to do so.

With IVF programs closing or merging, some potentially "abandoned" embryos are also being transported between medical programs. Some IVF programs are also moving some embryos to long-term storage facilities. Until such time as these questions have been addressed in the courts and/or legislatures, an IVF program's responsibility to its patients and liability for its actions appears to be uncertain.

G. *Compensation*

Lawyers involved in gamete or embryo donation arrangements will also want to carefully assess the financial aspect of any such donation. Buying and selling babies is illegal in every state.[69] Similarly, compensation for sperm and egg donation is limited by professional guidelines to reimbursement for the time, effort, and inconvenience associated with donation, although the appropriate amounts of those payments have been the subject of much public scrutiny and debate, and compensation for sperm and egg donors in the thousands of dollars are commonplace. Recent litigation involving egg donation has resulted in one IRS ruling that compensation for commercial egg donors is taxable income, for which 1099s should be issued, and taxes paid.[70] Another closely watched lawsuit involves a group of egg donors who have filed a class action claim against ASRM and SART, arguing that the entities have violated anti-trust laws in capping donor compensation fees for its member clinics at $10,000.[71] The case was filed in 2011, and a limited class was certified in January, 2015.[72] The scope of the class as well as whether there is a Sherman Act violation or what damages may flow from any such violation are as yet unresolved.

In contrast to recruited and compensated egg and sperm donors, embryo donation typically results from infertility patients'

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69 *See, e.g.,* 720 ILL. COMP. STAT. § 525/1 (2003).

70 Perez v. Comm'r, 144 T.C. No. 4 (2015).

71 Kamakahi v. Am. Soc'y for Reproductive Med., U.S. Dist. Ct., N. D. Cal., Class Action Complaint, Case No. 3:11 -CV-1781 (filed Apr. 12, 2011).

72 *Id.* Magistrate Ruling, Feb. 3, 2015, http://www.therecorder.com/id=1202717061348/Court-Agrees-to-Review-Caps-on-Egg-Donor-Fees#ixzz3QtsN2lYl

excess embryos. While reimbursement for legitimate fees or costs that may arise from any additional testing or storage fees associated with the donation process should be permissible, non-binding ASRM guidelines clearly dinstiguish and reject other compensation to embryo donors.[73] Any fees for facilitating such arrangements by a third party should also be carefully scrutinized.

H. *Embryo Mix-ups*

Embryo mix-ups, which include creating embryos using the wrong sperm or egg or transferring the wrong embryo into a patient, are among the most heart-wrenching scenarios the reproductive technologies have spawned. From a legal perspective, there will be issues and potential lawsuits surrounding legal parentage when these mix-ups are discovered, and professional liability for those who caused them. Discussions of reported cases can be found in a number of publications,[74] and when made public, have also frequently been the focus of intense media scrutiny and public interest. Parentage outcomes will vary based on factual circumstances: for example, in one case, a pregnant patient agreed to continue the pregnancy and turn the child over to her genetic parents once the mix-up was discovered.[75] In another case the court was called upon to decide between competing claims of maternity when a married woman was wrongly implanted with both her and her husband's own biological embryo and that of another set of patients.[76] Yet another suit was filed where a single woman, who was supposed to have been implanted with a donor embryo, was mistakenly given that of a married couple who had made embryos from the husband's sperm and a donor egg.[77] On a massive program liability scale, an IVF program at UC-Irvine was shut down in the 1990s after it

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73 Ethics Comm. of the Am. Soc'y Reproductive Med., *supra* note 68, at 1847.

74 CROCKIN & JONES, *supra* note 9, at 25-73; 117-27.

75 McLaughlin, et al. v. Lambert, et al., Cir. Ct. of the Cnty. of Saint Louis, Mo., *available at* http://www.courthousenews.com/2010/04/12/Embryos%20Missouri.pdf (last accessed on Feb. 16, 2015).

76 Perry-Rogers v. Fasano, 276 A.D.2d 67 (N.Y. App. Div. 2000).

77 Robert B. v. Susan B., 109 Cal. App. 4th 1109 (Cal. Ct. App. 2003), *rev. denied*, 2003 Cal. LEXIS 6671 (Cal. 2003).

was uncovered that both gametes and embryos from patients were intentionally mixed and used to create children for at least fourteen patients without any patient knowledge or consent.[78] Criminal prosecutions followed, and at least two of the physician defendants fled the country. The revelations also led to parentage actions where at least one family sued unsuccessfully for parentage or visitation of their genetic children being raised by another family.[79]

The legal theories of parentage, non-parentage, and program liability are beyond the scope of this article. From an ethics perspective, however, lawyers may find themselves involved in advising programs or patients. ASRM ethical opinions and guidelines make clear that there is a duty owed by the physician to all patients and that prompt disclosure regarding gamete or embryo mix-ups is required.[80] When the mistake is apparent early on, either because of immediate recognition and disclosure of the issue at the time of any transfer, or after the birth of the child due to racial differences, the remedial steps will be challenging, difficult, and likely driven by the patient(s) and their counsel. For IVF programs that discover such a mistake later on, or in a less public manner, the process of investigating, determining how such a mistake could have been made, how to prevent such mistakes in the future, how and when to disclose to whom, and whether any steps can ethically be taken to address confidentiality or liability concerns, is likely to be even more daunting. Lawyers called into such situations will need to be mindful of their ethical duties as well as any limitations on their competencies, since ART or family lawyers may be involved initially, but issues will almost certainly give rise to malpractice claims, insurance coverage claims, regulatory compliance disputes, disclosure obligations, and other areas that may be outside the competencies of ART or family lawyers.

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78 Moore v. UCI et al.; Clay v. UCI et al., Orange Cnty., Sup. Ct. Cal.; docket #s752293–7552294 (settlements allowed Aug 1996).

79 Prato-Morrison v. Doe, 103 Cal. App. 4th 222 (Cal. Ct. App. 2002).

80 Ethics Comm. of the Am. Soc'y for Reproductive Med., *Disclosure of Medical Errors Involving Gametes and Embryos*, 96 FERTILITY & STERILITY 1312 (2011).

I. *Pre-implementation Genetic Screening and "Designer Babies"*

When used in combination with IVF, pre-implantation genetic diagnosis (PGD) has not only made detection of genetic anomalies possible, but it has also led to the highly controversial use of ART to make so-called "designer babies," defined as coming from either "donor-donor" IVF embryos or IVF embryos from intended parents that have been screened in or out for specific reasons. Unlike technologies such as donation of sperm, eggs, and even excess unused embryos, all of which have been accepted and practiced for many years, PGD or PGS (pre-implantation genetic *selection,* done to try to identify a "best" embryo as opposed to one that carries a genetic trait) allows patients to not only deselect for serious diseases or genetic anomalies, but also to select embryos that carry particular desired traits, such as gender and even eye color. And unlike the more widely, but far from universally, accepted uses of PGD to screen out genetic diseases, the use of PGS to screen for non-disease traits is both newer and more ethically suspect. Even for genetic anomalies, there are ongoing ethical debates over many potential uses of PGD, including whether it should be restricted to childhood rather than adult-onset, or disabling versus "non-serious" anomalies, and whether or not intended parents' wanting to screen *in* for conditions or traits such as achondroplastic dwarfism or deafness is ethically grounded or suspect. Gender selection for reasons unrelated to disease ("family balancing," for example) continues to be an ongoing debate in international bioethics circles.

The even more heated debate over "designer babies" is notable and the extent to which medical professionals will engage in such practices is unknown.[81] However, one Texas company, Abraham Center of Life, created an uproar in 2007 when it began creating "off the shelf" embryos that "customers" could purchase for implantation after reviewing the backgrounds of the

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81 *See, e.g.,* Girard Kelly, Comment, *Choosing the Genetics of Our Children: Options for Framing Public Policy*, 30 SANTA CLARA HIGH TECH. L.J. 303 (2014); Hannah Lou, Note, *Eugenics Then and Now: Constitutional Limits on the Use of Reproductive Screening Technologies*, 42 HASTINGS CONST. L.Q. 393 (2015); Bonnie Steinbock, *Designer Babies: Choosing Our Children's Genes*, 372 LANCET 1294 (2008).

donors who provided the egg and sperm.[82] Then, in 2009, a fertility clinic in Los Angeles, Fertility Institutes, caused a similar outcry when it announced that it would soon be allowing patients to select desired traits such as eye and hair color.[83] There is widespread disagreement over who should control the use of PGD for reasons other than avoiding disease: some commentators believe that the decision should belong to those who are most directly affected—patients.[84] Others believe that the medical profession should self-regulate through professional societies, which are best suited to deal with rapidly changing technology, exert control over members, and educate all parties involved.[85] Still others believe that PGD should not be used for any purpose because it is essentially the re-embodiment of Nazi-type eugenics, whereby society deals with unwanted conditions by preventing them from ever coming into existence.[86]

The debate becomes even more intense when considering that PGD could conceivably be used to select *in* for traits such as deafness or dwarfism, which general society may regard as disabilities but those with such conditions often do not. There have already been cases in which a child born with prenatal injuries has sued its mother for negligence during pregnancy for, inter alia, jaywalking or using drugs and alcohol.[87] But unlike the nonfeasance and misfeasance in those cases, intentional genetic intervention could be construed as malfeasance, which could lead

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82 Rob Stein, *'Embryo Bank' Stirs Ethics Fears*, WASH. POST (Jan. 6, 2007), http://www.washingtonpost.com/wp-dyn/content/article/2007/01/05/AR2007010501953.html.

83 Allen Goldberg, *Select a Baby's Health, Not Eye Color*, L.A. TIMES (Feb. 17, 2009), http://www.latimes.com/opinion/la-oe-mgoldberg17-2009feb17-story.html.

84 *E.g.*, Ronald Bailey, *The Moral Case for Designer Babies*, REASON (May 17, 2014), http://reason.com/archives/2014/05/17/the-moral-case-for-designer-ba.

85 *E.g.*, Meredith Leigh Birdsall, *An Exploration of "The 'Wild West' of Reproductive Technology": Ethical and Feminist Perspectives on Sex-Selection Practices in the United States*, 17 WM. & MARY J. WOMEN & L. 223, 245 (2010).

86 *E.g.*, Dov Fox, *Prenatal Screening Policy in International Perspective: Lessons from Israel, Cyprus, Taiwan, China, and Singapore*, 9 YALE J. HEALTH POL'Y, L. & ETHICS 471, 482 (2009).

87 *See* Brigham A. Fordham, *Disability and Designer Babies*, 45 VAL. U. L. REV. 1473, 1487-90 (2011) (collecting six negligence cases against mothers for a child's prenatal injuries).

to stronger claims such as battery. Conversely, child plaintiffs could argue that they were harmed by a medical professional not offering or a parent not having chosen to take advantage of available genetic interventions. Child plaintiffs have many more potential theories of parental or professional liability: from wrongful birth, life or conception claims, to arguments that genetic intervention is either morally and legally acceptable or wrong because it alternatively benefits or harms, the child, a group of individuals with such disabilities by deselecting new members of those groups, or society in general through added costs and accommodations by including them.[88]

A further complication may involve the implantation of a "donor-donor" designer embryo into a gestational carrier. In such a case, the commissioning (or intended) parent(s) have neither a genetic nor gestational link to the resulting child, which opens up vulnerabilities in parentage should something later not go as planned. Given the lack of uniformity or clarity in the law of parentage in some of these more unique scenarios, the implantation of a donor-donor embryo in a third party creates the possibility of non-parentage, or at the very least, a variety of legal claims to and disputes over parentage.[89] Family lawyers considering such gestational arrangements will want to carefully consider whether *any* legal agreements would be binding or sufficient to protect the various parties involved, including the anticipated child.

The recent approval in the United Kingdom of mitochondrial replacement introduces yet another variation of the role of third parties in ART. Although not yet an approved ART technique in the United States, many medical professionals anticipate its future acceptance and use. Mitochondrial diseases are a type of genetic diseases caused by defects in a woman's mitochondrial DNA, found in the outer part of the egg, but not the nucleus. Mitochondrial diseases can cause a range of illnesses, including early deaths, but this technique allows a woman carrying such a

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88 *See generally* Jacob M. Appel, *Genetic Screening and Child Abuse: Can PGS Rise to the Level of Criminality?*, 80 UMKC L. REV. 373 (2011).

89 *E.g.*, *In re* Marriage of Buzzanca, 72 Cal. Rptr. 2d 280 (Cal. Ct. App. 1998) (reversing, in a case where an infertile couple had a donor embryo implanted in a gestational surrogate but later dissolved their marriage, the trial court's conclusion that the resulting child had no legal parents).

disease to have a healthy, largely genetically related child using the nucleus of her own egg and only the healthy mitochondria from a donor egg.[90] Almost all of the resulting child's DNA comes from its mother and father, with only a miniscule amount of DNA coming from the mitochondria donor—DNA that is not believed to affect traits such as personality, or eye or hair color.[91] Thus, unlike in a full donor egg situation, any offspring will have a genetic connection to its intended mother. Even though mitochondrial replacement has been labeled by some as "three-parent IVF,"[92] it is hard to see how a mitochondrial donor has more of a claim to parentage than a full-egg donor because children of both scenarios have the complete nucleus of only the intended mother and father. Thus, the legal issues of this new technology seem less concerning than the potential ethical aspects being debated if transmission of the DNA of three persons is carried through to future generations. This technology was approved in the United Kingdom in early 2015, but has not been approved in the United States.[93]

Disposition of pre-implantation IVF embryos raises novel issues and challenge existing legal structures, and the law is still developing over who should control and use them for procreation, and the resulting parent-child status for any children born from them. Understanding the legal and ethical dimensions of these issues should assist lawyers in counselling clients facing these issues.

III. Representing the Parties in the Process

The participants in multi-party ARTs arrangements bring a host of complex ethical questions and dilemmas that must be sorted out and carefully considered. Unique ethical considerations arise depending on whom the attorney is representing in the ARTs process, with the possibilities including the coordinating program, the infertility clinic, the intended parent or parents, married or not, the gestational carrier and possibly her spouse or

90 CAL. FAM. CODE § 8617 (West Supp. 2015). Sarah Elizabeth Richards, *Three-Parent IVF Deserves a Chance in the U.S.*, TIME (Feb. 3, 2015), http://time.com/3694832/three-parent-ivf/

91 Richards, *supra* note 90.

92 *Id.*

93 *Id.*

partner, and any donors—whether egg, sperm, or embryo. With one or more of the individuals or entities likely to reside in different states or countries, these cases also present complex jurisdictional, choice, and conflict of law issues. The combinations of circumstances and the unique ethical dilemmas that can arise are almost limitless.[94]

This section will focus on the most widely practiced form of third party ARTs practices: transactional types of representation of ART patients who are either building, or helping others build, families through collaborative ART arrangements. These complex family-building arrangements, often crossing multiple jurisdictions, present the potential for significant conflicts of interest and other ethical challenges. Given the still relative novelty of the field, recognizing and applying ethical rules and principles can be both challenging and critically important.

This section separately examines ethical concerns for lawyers who may represent one or more parties to an arrangement, an IVF program that provides medical services to those participants, a coordinating program, as well as those who may themselves want to establish and run coordinating programs.[95] Especially given the proliferation of coordinating programs, for-profit entities that recruit, match, and coordinate donors and/or gestational carriers with intended parents, ART lawyers need to be alert to potential conflicts of interest and other ethical rules. Some courts and commentators refer to these programs as "brokers," while these entities often self-describe and promote their services as "agencies." The authors have adopted the term "coordinating programs" to more accurately describe the status and services provided. Unlike strictly regulated adoption agencies, there are, as yet, no laws, regulations, licensing requirements or professional guidelines governing these entities or the services

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94 For a general overview of this topic, see McGarry, *supra* note 23.

95 For a general discussion of the history of the regulation of the practice of law in the United States in general, and more particularly, the history leading up to the promulgation of the ABA Canons of Professional Ethics (1908), the ABA Code of Professional Responsibility (1969), and the current set of ethical rules that provides a model one of whose many permutations is used by most states, the ABA Model Rules of Professional Conduct (1983 and subsequent amendments), see RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, LEGAL ETHICS: THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY, 2014-2015 1-15 (2015).

they provide. Lawyers considering providing legal services in this area will want to first carefully analyze the nature of the services they are providing, and to whom, to ensure they have not violated any applicable ethical rules.

For those interested in a wider perspective on ART law, of note is a second form of legal ART practice which goes beyond newly emerging family law collaborative issues. Lawyers may represent patients or IVF/ART medical programs regarding medical treatment, either in the context of a specific patient-program scenario or advising a medical practice as to their policies and procedures. The lawyer's role in these other aspects of ART related treatment is far less clear-cut, and lawyers approached to take on either of these types of ART representation will initially want to assess their competence and comfort level because these issues can be novel and far beyond typical family or business law. Lawyers who determine they do have such expertise will also want to carefully and clearly delineate and document their role in a written retainer agreement, including whom they represent and for what purpose, to explicitly address the additional unique nuances and conflicts within this specialized aspect of ARTs practice.

The following Model Rules are implicated in these types of ARTs proceedings and will be discussed in various degrees of detail in the sections that follow: Rule 1.1 (competance);[96] Rule 1.2 (scope of representation and allocation of authority between client and lawyer);[97] Rule 1.5 (fees);[98] Rule 1.7 (conflict of interest – current clients);[99] Rule 1.8 (conflict of interest - specific rules);[100] Rule 1.10 (conflict of interest – imputed disqualification);[101] Rule 2.4 (lawyer as third-party neutral);[102] Rule 3.4 (fairness to opposing party and counsel);[103] Rule 4.2 (communications with a person represented by counsel);[104] Rule 4.3 (deal-

96 ROTUNDA & DZIENKOWSKI, *supra* note 95, at 87-95.

97 *Id.* at 97-134.

98 *Id*. at 155-228.

99 *Id.* at 329-458.

100 *Id.* at 459-508.

101 *Id.* at 540-71.

102 *Id.* at 757-62.

103 *Id.* at 817-53.

104 *Id.* at 924-59.

ing with unrepresented persons);[105] Rule 4.4 (respect for the rights of third persons);[106] Rule 5.4 (professional independence of a lawyer);[107] and Rule 5.5 (unauthorized practice of law; multijurisdictional practice of law).[108]

A. *Intended Parents*

Lawyers representing intended parents in third party ART arrangements will want to be familiar with a number of the ABA Model Rules, which the vast majority of states have adopted in some form. The four most salient rules are: Rule 1.7 requiring lawyers to avoid conflicts of interest; Rule 1.4 imposing on lawyers an ethical duty to ensure the client has considered all possible outcomes and the implications of any proposed course of action; and Rules 4.2 and 4.3 requiring lawyers to follow clearly established rules regarding communications with represented persons (Rule 4.2) and with unrepresented persons (Rule 4.3). Additional relevant rules, not discussed in this section of this article, include Rules 1.1 (competence), Rule 1.2 (scope of representation and authority), Rule 1.5 (fees), and Rule 1.6 (confidentiality of information).

For any intended parents who use donor sperm or eggs, including every same-sex couple (regardless of whether they also use a gestational surrogate carrier), there may also be unique issues of inherently unequal rights vis-à-vis any frozen embryos. This section briefly discusses how compliance with the Model Rules may affect a lawyer's ability to represent both such intended parents if only one is a progenitor (contributor of genetic material).

Potential conflicts of interest are inherent in any collaborative arrangement, and those involving family or friends should not be exempted from the recommendation or requirement for separate independent counsel in any agreement between or among such parties. Otherwise, the potential for undue influence is unchecked and family members who may wish to help—or who are prevailed upon to do so—may find themselves in arrangements that do not protect their needs or legal interests, or

105 *Id.* at 960-68.
106 *Id.* at 969-89.
107 *Id.* at 1039-55.
108 *Id.* at 1056-128.

do not provide the independent support to consider entering into the arrangement at all. Real life examples are abundant: relatives—including childless young women—persuaded to act as traditional surrogates (i.e. using their own eggs); friends asked to donate "extra" embryos to childless infertile friends; daughters or younger sisters persuaded to act as egg donors; and daughters persuaded to act as gestational surrogate carriers for their mother or father in a second marriage.[109] All may be reluctant to do so, but even more reluctant or unable to express hesitation without an advocate for their interests. Intended parents need to understand, and counsel should explain to them, that separate independent representation and a formal agreement are in everyone's best interests.

When intended parents do not have family or friends willing and able to donate gametes or carry a pregnancy for them, they increasingly turn to the internet and/or coordinating programs to locate them. Coordinating programs may locate and match gestational carriers and intended parents, undertake preliminary, non-medical screening, distribute pro-rata payments to gestational carriers (which should be through escrow accounts), and provide ongoing support. Payments are also made to the gestational carrier (often between $20,000-$35,000 or more) over the course of the pregnancy; and relatively modest professional fees to lawyers to create or review the legal agreements and to obtain a pre or post-birth order establishing the legal parent-child relationship for a child born to a gestational carrier. Each of those stages may raise potential conflict issues, including the practices of some lawyers to simultaneously manage or represent a coordinating program while also representing one of the participants, and holding and distributing escrowed funds. Some lawyers go further, and require parties to use their law firm, and even further, to retain them for unrelated services such as a will. Whether separating a coordinating program owned or managed by an attorney from that attorney's law firm, and separating the services each provides to some of the same parties, provides sufficient autonomy to remove those conflict concerns is unclear. It is difficult to think that a lawyer who has an interest in the outcome of a match, and who supervises the match, can zealously represent a

109 Private practice cases of the co-authors.

party, or that providing advice to a gestational surrogate carrier through the pregnancy while representing the intended parents, meets the Model Rules' requirements noted earlier. At a minimum, all such potential conflicts should be explained thoroughly, documented, and consented to in writing.[110] Even under such circumstances, a potential conflict of interest is easily foreseeable, and the withdrawal required under such circumstances would predictably leave participants without counsel at a vulnerable time.

There is extremely limited case law on the topic of conflicts of interest in ART. Two cases from the 1990s involving traditional surrogacy suggest courts are receptive to recognizing a heightened duty of care to participants by those who recruit and match them.

In *Stiver v. Parker*,[111] a traditional surrogate and her husband brought a negligence suit against Noel Keane, an attorney and owner of a surrogacy matching program, four doctors, and another lawyer, after she was infected after being artificially inseminated with untested sperm of the intended father. The resulting sexually transmitted disease caused her to give birth to a child affected with cytomegalovirus.

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110 The essential elements of Rule 1.7, "Conflict of Interest: Current Clients," prohibits representation that "involves a concurrent conflict of interest," which exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

Notwithstanding such a concurrent conflict of interest, however, Rule 1.7 states that a lawyer may represent a client if:

(1) the lawyer reasonably believes the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

MODEL RULES OF PROF'L CONDUCT R. 1.7 (2014).

111 975 F.2d 261 (6th Cir. 1992).

The Sixth Circuit rejected both the lawyers' arguments that they did not owe the couple a duty of care and the doctors' arguments that they had not violated common obstetrical duty of care standards, finding instead that a "special relationship" had been established within the context of negligence law.[112]

> We conclude that Keane, the surrogacy business designer and broker, and the other defendant professionals who profited from the program, owed affirmative duties to the Stivers and to Malahoff [the intended father], the surrogacy program beneficiaries. This duty, an affirmative duty of protections, marked by a heightened diligence, arises out of a special relationship because the defendants engaged in the surrogacy business and expected to profit thereby. Keane owed a duty to design and administer a program to protect the parties, including a requirement for appropriate testing.[113]

In 1997, a second case, *Huddleston v. ICA*,[114] involved another traditional surrogate suing Noel Keane and the Infertility Center of America (ICA), a different surrogacy matching program he created and ran. The surrogate filed a wrongful death action after the child she had carried for a single father died within weeks of his birth from shaken baby syndrome. The father was convicted and jailed for manslaughter. Huddleston alleged, among other claims, that Keane breached a fiduciary duty to her to properly screen intended parents for suitability to parent. That court, citing the Sixth Circuit's opinion, held 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 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 which the surrogacy and undertaking creates.[115]

These cases suggest that, in light of both the stakes and the risks to which they expose participants, those companies that either run coordinating programs or otherwise recruit parties into ART arrangements have a heightened duty of care to those participants. Taken together with the Model Rules, including the obligation to ordinarily withdraw from all representation if an

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112 *Id.* at 268-73.

113 *Id.* at 268.

114 700 A.2d 453 (Pa. Super. Ct. 1997).

115 *Id.* at 460.

actual conflict arises between jointly represented clients,[116] these precedents may reinforce lawyers' obligations to ensure that all such participants are separately represented, and their interests are adequately protected. Otherwise, even with clear, written disclosure and consents, in the event differences arise, participants could be left with no representation at critical junctures of a collaborative reproductive arrangement.

Prospective gestational surrogate carriers are typically screened by coordinating programs for non-medical, social criteria prior to receiving legal representation to negotiate a legal agreement with their matched intended parents. Some programs go further and advise these women as to reasonable or customary fees, and on issues such as insurance coverage and compensation for specific matters such as lost wages and bed rest. Once a "match" has been made, based partly on such information, and it is time to enter into a legal contract with a set of intended parents, the coordinating program frequently represents the intended parents as legal counsel, and refers the carrier to a particular or small group of attorneys who charge a relatively modest flat fee (paid by the intended parents) to represent her for any potential contract negotiations. If, however, the terms have been previously discussed and determined, and the role of the attorney is fundamentally reduced to a "review" of a contract without the ability or adequate remuneration to negotiate any terms, it is not difficult to see where concerns such as the *Stiver* and *Huddleston* courts noted over potential conflicts of interest, duties, and inadequate representation may arise. While Model Rule 1.2(c) allows lawyers to limit the scope of their represrentation, a lawyer for a gestational carrier may have limitations placed on him or her sufficient to trigger concerns over unreasonable"limited representation," the rule states that, "A lawyer may limit the scope of representation if the limitation is reasonable under the circumstances and the client gives informed consent."[117]

Or, a lawyer who owes a duty to a coordinating program and one of the participants may not feel comfortable informing either the intended parents or the carrier of a "worst case scenario"

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116 MODEL RULES OF PROF'L CONDUCT, R. 1.7, comment(4) (2014).

117 MODEL RULES OF PROF'L CONDUCT R. 1.2(c) (2014).

resulting from the other party's conduct when it might jeopardize closing "the match" or subsequently maintaining the relationship. A failure to candidly discuss all potential outcomes with a client is a breach of the duty to communicate under Rule 1.4.[118] If on the other hand, the gestational carrier is not the attorney's client, she may be an unrepresented party requiring the application of strict ethical rules on communications with unrepresented parties.[119] Further complicating the picture, once any legal agreement is reached, whatever legal representation the gestational carrier has had typically ends and she is, once again, relying upon the coordinating program not only to coordinate her cycle but also to answer any concerns or questions she may have throughout the pregnancy. If issues arise, her recourse is to turn to the coordinating program, which may have also represented the intended parents on the contract, or to seek counsel independently, often without the financial resources to readily do so.

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118 Rule 1.4 states that "a lawyer shall reasonably consult with the client about the means by which the client's objectives are to be accomplished" and also that "a lawyer shall explain a matter to the extent reasonably necessary to make informed decisions regarding the representation." Comment 5 to the Rule elaborates that "the client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so" and also clarifies that "the guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation." MODEL RULES OF PROF'L CONDUCT R. 1.4 (2014).

119 Rule 4.2 states that "[i]n representing a client, a lawyer shall not communicate about the Subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order." MODEL RULES OF PROF'L CONDUCT R. 4.2 (2014).

Rule 4.3 states that, "[i]n dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such person are or have a reasonable possibility of being in conflict with the interests of the client." MODEL RULES OF PROF'L CONDUCT R. 4.3 (2014).

The next time a gestational carrier *may* have counsel again is if a coordinating program decides she should have legal representation in connection with obtaining a pre or post-birth order determining legal parentage. It will almost always be advantageous to obtain a pre-birth order of legal parentage if available in a jurisdiction, since pre-birth determinations ensure the establishment of legal parenthood at the earliest possible time, with legal, financial, and health related decisions and responsibilities for the child placed on the intended parents and not on the gestational carrier and her family. Many coordinating programs do not provide counsel to the gestational carrier for this legal step, and again frequently represent the intended parents for this purpose. While this can be characterized as a money-saving measure, it also may raise a serious conflict of interest—even if all parties want the child to go to the intended parents. Without legal representation, gestational carriers have little if any ability to influence how and when these legal proceedings occur. The clearest example of where this can provide serious conflicts of interest issue arises in gestational carrier arrangements with international intended parents.

International collaborative arrangements, or "cross-border reproductive care," are increasingly common and can present singular ethical challenges. International patients often come to the United States when their own countries restrict either the ART procedures that can be offered or compensated, or the categories of patients to whom they can be provided. Legal issues can be more complicated, including compensation, import or export issues surrounding gametes, insurance coverage for the birth and baby of a child born in the United States to international parents—especially if health problems arise, reliably protective escrowed funds for carrier fees and expenses, appropriately timed and obtained pre-birth orders of parentage, and immigration and citizenship issues for the returning family. News accounts in the past few years have included babies born in the United States and other parts of the world to gestational carriers who were barred from entering into their genetic and/or intended parents'

home countries due to inconsistent laws and immigration policies or denied citizenship.[120]

The myriad countries and laws involved in cross-border reproductive care are too many and varied to be included within the scope of this article, but lawyers practicing collaborative cross-border ART will want to ensure they either fully understand these issues and the variable international vulnerabilities that may arise depending on the home country of their clients, or refer their clients to expert immigration counsel. A recent voluntary professional guideline promulgated by ASRM recommends ongoing representation for a gestational carrier.[121]

In addition to citizenship issues for foreign intended parents working with U.S. gestational carriers, there can also be significant financial, legal, and ethical issues and risks that need to be addressed, and the parties' respective vulnerabilities protected. In some cases, international intended parents have essentially abandoned children born with anomalies by refusing to come pick up their biological children, leaving a gestational carrier vulnerable both legally and financially. In most states, contracts make clear that a gestational carrier is not to be considered the legal mother of the child she gives birth to, that a birth order will be sought and obtained to solidify the intended parents' legal parentage, and that the intended parents are financially responsible for any uninsured maternity, birth, or neonatal expenses. International intended parents, however, may not be able to secure affordable or any health insurance for the child since they will not have a family health plan within the United States. There have been attempted "end-runs" that raise serious conflicts of interest concerns, including delaying obtaining a birth order until *after* the child's birth, in order to bill the maternity and birthing expenses to a gestational carrier's health insurance policy. Intended parents have also had an American relative take temporary legal guardianship of the child and thus have that relatives'

120 *See, e.g.,* Mennesson v. France, App. No. 65192/11 (Eur. Ct. H.R. June 26, 2014), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-145389.

121 Prac. Comm. of the Am. Soc'y for Reproductive Med. & Practice Comm. of the Soc'y for Assisted Reproductive Tech., *Recommendations for Practices Using Gestational Carriers: A Committee Opinion*, 103 FERTILITY & STERILITY e1 (Jan. 2015).

health insurance cover the child until he or she is able to leave the United States.

A gestational carrier who is considered the legal mother of the child may be responsible for even more than the child's medical costs, including physical and legal custody should intended parents fail to return to the United States to claim the child. This could happen because they separate during the pregnancy or the child is born with a genetic or birth anomaly and they no longer want the child and essentially abandon him or her by failing to come to the United States. Each of these real life scenarios raise significant legal issues and vulnerabilities for gestational carriers, including the potential for "claw-backs" from insurance companies, loss of insurance based on fraud claims, or having the responsibility of caring for or placing for adoption a child who is no longer wanted by its parents. For the majority of coordinating programs that do not encourage, require, or have intended parents cover the costs of separate legal representation for gestational carriers after the initial contract, these scenarios raise serious conflicts of interest. Requiring ongoing legal representation for a gestational carrier, from contract through birth orders, would avoid conflicts of interest and serve to protect a gestational carrier's evolving and ongoing interests. Although not an international arrangement, the ongoing Sherri Shepherd-Lamar Sally surrogacy case illustrates the potential vulnerability for participants when things do not go as planned.[122] In that case, intended parents separated during a surrogate pregnancy, with the intended mother refusing to proceed with a pre-birth parentage proceeding, arguing the donor egg nature of the surrogacy meant she was not the legal mother, and that the contract was void as against public policy in Pennsylvania, where the contract was drafted. The gestational carrier was named as the mother of the child, and the state of California has reportedly filed a notice as

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122 *See* Jessica Grose, *The Sherri Shepherd Surrogacy Case Is a Mess. Prepare for More Like It*, SLATE, Apr. 28, 2015, http://www.slate.com/blogs/xx_factor/2015/04/28/sherri_shepherd_surrogacy_case_there_s_little_consensus_on_the_ethical_dimensions.html (reporting on a judicial ruling that actress Sherri Shepherd, who had hired a surrogate to carry a baby conceived with a donor egg and her then-husband's sperm, was the legal mother of the eight month old child; Sheppard had argued that her former husband had tricked her into the surrogacy arrangement to obtain child support from her). *See also infra* text at note 132.

to its intent to garnish her wages after the father placed the child on medical assistance.

As that case demonstrates, albeit in an unusual way, conflicts of interest may arise if only one intended parent has provided gametes, and the intended parents may thus have inherently unequal bargaining power, such as when only one provides gametes to create an embryo. Such conflicts may occur in conjunction with the use of a gestational carrier, injecting further ethical challenges into an attorney's representation of both intended parents. Similar issues may arise with same-sex couples who will always be affected by any progenitor/non-progenitor discrepancy in rights when seeking out IVF services.

The inherent differences in genetics may or may not pose a discrepancy in rights as between a progenitor and non-progenitor,[123] but they introduce variables to which practitioners should be sensitive. For example, married couples in particular may approach an embryo disposition agreement or a corollary agreement with a gestational carrier, unaware that they may or may not possess equal rights in determining the embryos' fate. It should be the lawyer's ethical duty to communicate to these couples that there may be a significant disparity between the rights of a gamete contributor and a non-progenitor[124] and to explain how this might affect the enforceability of a contract between them, a dispositional agreement with a fertility clinic, or any other ancillary agreements or documents addressing control of IVF-created embryos. Explaining the implications of any proposed course of action as well as all possible outcomes as mandated by Rule 1.4 may put an attorney in the awkward position of informing a married couple that they are not necessarily viewed legally as one united front with equal interests. Compliance with ethical guidelines under the Model Rules would re-

123 See *In re Marriage of Witten*, 672 N.W.2d 768 (Iowa 2003), for one of the few courts to consider the respective rights of a divorcing couple where donor gametes were used, finding the difference irrelevant; but see, *Robert B. v. Susan B.*, 109 Cal. App. 4th 1109 (Cal. Ct. App. 2003), where the wife of a married couple who had created embryos using the husband's sperm and donor egg was found to have no maternity claims to a child born as a result after a mix-up to an unrelated single woman. The court instead found the husband to be the legal father and the woman who delivered the child after what she believed was an intentional, anonymous embryo donation to be the legal mother.

124 *See* MODEL RULES OF PROF'L CONDUCT R. 1.4 and 1.7.

quire discussing unfortunate outcomes, such as the potential for divorce, which could implicate the unequal rights to the embryos of the intended parents. A lawyer approached by a progenitor/non-progenitor couple should only represent a couple after thoroughly explaining the potential for adverse interests between the spouses clearly in a retainer and potentially reiterating the inequality within any agreement signed by the couple. Recognizing that a married couple might be unwilling to obtain bifurcated representation (both for reasons of cost and a desire to maintain marital unity), a lawyer should pay keen attention to the applicable state's common law and public policy that might render a contractual provision regarding embryo dispositions as between the couple unenforceable[125] and carefully explain any relevant precedent to the clients as part of the consent-procuring process.

While the ARTs bring novel challenges in defining and protecting newly possible families and those who assist them, established legal and ethical rules and principles surrounding conflicts of interest are clearly applicable. Those rules, together with established precedent, must guide lawyers in this field just as they do in any other. While some forms of families made possible through assisted reproductive technologies may be novel, our responsibilities and obligations as attorneys helping to create them are not.

B. *Gestational Carriers*

As with intended parents, representing gestational carriers in ARTs matters presents several significant ethical challenges. Carriers come into the process with varying motivations and levels of experience. Many do it for altruistic reasons—wanting to help a family member, a friend, or a complete stranger build a family when they are otherwise unable to do so biologically and without the assistance of reproductive medicine. Others present a clear financial incentive, entering into the ARTs process as a way to earn some money by in effect selling a service to someone who is in need of the service. For many carriers it is a one-time action to help someone in need. Others have been engaged in the pro-

125 *See, e.g., A.Z.*, 725 N.E.2d 1051 (invalidating a consent form as to husband's relinquishment of control over embryos to wife as "forced procreation" and against public policy). Note that this case did not involve donor gametes.

cess multiple times, know what to expect, and may even have clear expectations as to compensation, the legal process, essential terms they will insist on having in their contracts, expectations as to how medical care and delivery will occur, and how the entire process will be handled. As with every other area of the law, there are now sample contracts on the Internet, coordinating facilities advertise their services, and carriers engage in dialogue with each other on blogs and through other forms of electronic media. In assessing the ethics of carrier representation, lawyers will need to have a good understanding of the carrier's experience and level of understanding of the process.

The provisions from the ABA Model Code of Professional Conduct cited in the previous section dealing with representation of intended parents would apply with equal force and relevance in representing gestational carriers and their spouses or partners. Among the Rules with the greatest applicability in representing carriers are Rule 1.1 (competence), including the need to understand complex medical procedures, draft complex and detailed contracts covering all manner of topics and legal subjects,[126] and the ability by the attorney to put in place a process to have parentage determined in whichever jurisdiction is deemed most appropriate; Rule 1.2 (scope of representation) in terms of sorting out legal and procedural decisions that the lawyer needs to make from the personal decisions that the carrier and her spouse/partner need to consider, and any limits on the scope of legal services being offered and provided; Rules 1.5 (fees) and 5.4 (professional independence) in the face of issues about charging for the service and the payment by the intended parents of fees incurred by the carrier and her spouse/partner,[127] and the possible imposition of

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126 For a discussion of drafting considerations in gestational carrier contracts, see Paul G. Arshagouni, *Be Fruitful and Multiply, by Other Means, if Necessary: The Time Has Come to Recognize and Enforce Gestational Surrogacy Agreements*, 61 DEPAUL L. REV. 799 (2012); Adam Quinlan, *Recognizing Gestational Surrogacy Contracts: "Baby-Steps" Toward Modern Parentage Law in Maine After* Nolan v. Labree, 65 ME. L. REV. 807 (2013).

127 For a discussion of complex compensation issues that exist when working with gestational carriers, see Sara L. Ainsworth, *Bearing Children, Bearing Risks: Feminist Leadership for Progressive Regulation of Compensated Surrogacy in the United States*, 89 WASH. L. REV. 1077 (2014); Kellye T. Testy, *Forward: Compensated Surrogacy in the Age of* Windsor, 89 WASH. L. REV. 1069 (2014).

fees caps by the intended parents; Rule 1.7 (conflict of interest), which raises especially complex issues if the attorney for either the intended parent or the coordinating program or even lawyers connected with the fertility clinic are attempting to give legal advice to the carrier and her partner or spouse; Rules 3.4, 4.2, and 4.4 (fairness to opposing party and counsel; prohibitions on communications with unrepresented persons; respect for the rights of third persons) can come into play in terms of the carrier's attorney's interaction with other parties and facilities involved in the process, and finally, because of the frequently interstate and international nature of these matters, Rule 5.5 (unauthorized practice of law and multijurisdictional practice of law) is of significant concern.

1. *Competent Representation*

Rule 1.1 requires a lawyer to provide competent representation to a client, and this includes legal knowledge, skill, thoroughness, and preparation reasonably necessary for representation. Gestational carrier contracts are some of the most complex and high-stakes contracts that attorneys will be called upon to draft, and most family law attorneys have little experience with drafting complex contracts. Adoption attorneys rarely draft such contracts, and even in complex divorces involving businesses and complicated financial assets, related contracts are often drafted by business lawyers.[128] In these matters an attorney for a carrier will need to understand medical consent forms and procedures, medical insurance contracts, constitutional rights surrounding reproduction, estate planning concerns, and nuanced jurisdiction, choice of law, and parentage proceedings law. Some situations will require or be made more secure through an adoption, and the carrier and her spouse/partner will need to be guided through that adoption process. Outside of purely legal considerations, there will be discussions about the mental health and medical considerations of the parties involved and the purpose of certain background checks that the carrier

128 For a discussion of intent-based parentage and contract drafting considerations, see Dara E. Purvis, *Intended Parents and the Problem of Perspective*, 24 YALE J.L. & FEMINISM 210 (2012).

and her spouse/partner must pass.[129] Those concepts and procedures also need to be understood. Competence is critical and family law attorneys seeking to undertake this kind of representation need to understand and appreciate its challenging complexities.

The carrier not only has constitutionally protected rights of conception and abortion, but also rights to medical care and privacy and the right to consent or not consent to various medical procedures. If health issues arise during the pregnancy, who will decide the course of care? If the carrier goes on bed rest or has employment limitations, will the intended parents pay for lost income, provide funds for the care of her other children, housekeeping, and any other expenses that the carrier and her family incur as a result of the pregnancy? These are issues that will require much discussion and negotiation as contracts are drafted. The carrier and her spouse or partner, if any, will have to address contract compliance in the event of death or divorce. They may have to have estate plans executed, and who will pay for those and when will they need to be completed? The carriers and spouse/partner presumably have an interest in having no legal or financial responsibility for children born of the process, and that is often the single most important legal concern for the intended parents. Contractual provisions usually obligate the carrier and her spouse or partner, if any, to cooperate with consents and other legal requirements if an adoption is needed or to fully engage in the legal process to establish parentage. But what if the intended parents do not follow-through on their obligations, or what if the carrier during the course of pregnancy decides that the intended parents are not fit parents? The issues could not be more complex.

2. *Scope of Representation*

Rule 1.2 deals with scope of representation and allocation of authority between client and lawyer, providing that the lawyer must abide by a client's decisions concerning objectives of representation, whereas a lawyer should take the lead on procedural

129 For a discussion of background checks and other screenings that go on relative to gestational carriers and other participants in the ARTS process, see Kayte K. Spector-Bagdady, *Artificial Parentage: Screening Parents for Assisted Reproductive Technologies*, 14 MICH. ST. U. J. MED. & L. 457 (2010).

aspects of the representation. A lawyer need not endorse a client's political, economic, social, or moral views of particular activities, but still must give good, competent representation to carry out the client's objectives. A lawyer can only limit the scope of representation with informed consent given by the client. Finally, a lawyer shall not assist the client in undertaking any illegal or inappropriate courses of action. In this area of practice, the interests and objectives of the carrier and her partner or spouse are complex both morally as well as legally. The laws in each state and country vary considerably in terms of what is affirmatively allowed in medical processes and payment for services, what is either prohibited or even criminalized, or most commonly, not addressed at all, in which case a careful consideration is needed as to what goals and outcomes can legally and procedurally be pursued. In sum, it will be critical for the attorney to know these legal limitations and to balance those with objectives sought by the gestational carrier and any spouse or partner.

3. *Fees and Caps*

Rules 1.5 and 5.4 deal with fees and professional independence of the attorney. These issues are significant when representing a gestational carrier and a spouse or partner. As ARTs remains a relatively new and developing area of the law, there are not clear guidelines on how attorneys' fees are to be charged in this area. Much like in the adoption area, there are clear prohibitions on buying and selling children, and in ARTs, the legal prohibitions on buying and selling genetic material, bodily organs, and related items that are heavily regulated in the medical field are implicated. While ethical views on paying a carrier to carry a child may be strong, the legal strictures on the practice are not so clear.[130] This is also the case when setting attorney fees for representation. Should one charge a flat fee or hourly rates? How large a retainer should be requested? As in adoption, it is frequently the intended parent, like the adoptive parents, who pays all the attorney's fees and costs incurred by the birth parent in the adoption and the donor or carrier in the ARTs matter.

130 *See, e.g.,* Hillary L. Berk, *The Legalization of Emotion: Managing Risk by Managing Feelings in Contracts for Surrogate Labor*, 49 LAW & SOC'Y REV. 143 (2015).

Where challenges can arise and where these ethical rules come fully into applicability are when the intended parents—either through their attorney or through policies mandated by a coordinating program—seek to put caps or limits on the fees that will be paid or the specific services that will be provided and compensated. While such limits are not per se prohibited,[131] they do have to be considered in light of ethical rules that provide the payment of fees by someone other than the client cannot cause one's professional independence to be in any way adversely affected. These concerns must be carefully attended to.

4. *Conflicts of Interest*

Rules 1.7, 3.4, 4.2, and 4.4 all deal with conflicts of interest and ethical considerations as attorneys interact with other parties and entities involved in a legal dispute or transaction. Because of the sheer number of interested parties in these matters, all of whom on the surface seemingly have a common goal, there is significant dispute in the ARTs legal community as to the proper scope of representation and the viability of multiparty representation. The same issue has cropped up in the past in estate planning and adoption, and to some extent even in family law practice. Adoption practitioners have long debated whether one attorney could represent both the birth parents and the adoptive parents as everyone was on the same page in terms of the end goal: the adoption of the subject child. In estate planning practice, it is not uncommon to have one attorney represent a married couple in their estate planning. And what divorce lawyer has not been contacted by a divorcing couple who have worked out the terms of their divorce and want only one lawyer to be their advisor and their scrivener for the drafting of the final divorce decree?

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131 MODEL RULES OF PROF'L CONDUCT R.1.8(f) provides that:

A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client gives informed consent;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(3) information relating to representation of a client is protected as required by Rule 1.6 (Confidentiality).

In the ARTs arena, there are attorneys who represent, own and/or operate coordinating programs, and then attempt to represent either the intended parents or, less frequently, the carrier. Some attorneys view that as perfectly acceptable with appropriate disclosures, and some clients prefer that as a way to keep fees down and make the process efficient. Many attorneys, however, are deeply troubled by that practice, and some clients, especially carriers, have expressed confusion in those arrangements as to who exactly is advocating for them and representing their interests, especially if and when the interests between the parties diverge on any particular issues.

The ethics rules cited above are clear in textual verbiage, if not in actual practice and application. According to Rule 1.7 (a), a concurrent conflict of interest exists if there is significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person, or by a personal interest of a lawyer. A lawyer with a financial interest in the operation and success of a coordinating program has an interest that may diverge from the carrier and her spouse/partner and also possibly from the intended parent. A lawyer representing a fertility clinic would experience the same sort of possible divided loyalties and conflicting interests. The other cited rules require lawyers to be candid with the court and other attorneys as to their interests in the transactions and litigation. Lawyers are not to have direct communication with represented parties, without specific consent from their counsel, and these kinds of multiple representations certainly create some confusion in that regard. Lawyers are also required to take necessary steps to protect the rights of third persons that could be affected by the action, and here again, this obligation becomes murky when a lawyer is representing more than one of the participants in an ARTs proceeding, whether that person or entity is directly involved as a carrier or intended parent or providing supportive services and direction as a fertility clinic or coordinating program.

As these few examples indicate, and there are certainly many more that one could come up with simply by reading the lengthy contracts that get drafted in these situations, the intended parents are in a potentially adverse position to the carrier and her partner/spouse in terms of competing interests that need

to be negotiated. Just like any other contract negotiation or family court proceeding, people have potentially divergent interests, no matter how agreeable, accommodating, and aligned the interests may seem at the outset. Adding to this mix is the interest of the coordinating program to get the job done, to maintain its reputation for future work, and to minimize costs for itself and whichever client it is representing, thereby increasing its own profit margin. Similarly, donors of genetic material may have interests that are adverse to both any carrier and the intended parents. The minefield of these competing interests certainly highlights the critical need for separate, independent legal representation throughout the negotiation of the contract, as well as during the process leading to any establishment of legal parentage and birth.

Ultimately, these authors have found that the best practice is for attorneys involved in ARTs proceedings to only represent one participant to the process. Attorneys who represent either a coordinating program or a fertility clinic should only represent that entity. If they prepare the contracts or the consent forms, they should insist, or at least strongly encourage, that the donors, the carrier and her spouse/partner, and the intended parents all have their own separate attorneys who will review the documents and negotiate any needed provisions on their client's behalf. As is often the case, donors or carriers may be related to the intended parents and want to help the intended parents save some money in what has no doubt been a very expensive ordeal dealing with infertility issues. The authors have been involved in cases of brothers being reluctant but emotionally torn potential sperm donors, sisters and friends being egg donors and gestational carriers, daughters asked by their mothers to be their egg donor or gestational carrier during a second marriage, and neighbors asking for their friend's "extra embryos." All of these participants may insist that they do not need their own attorneys. We submit, however, that sometimes these may be the situations with the most deep seated and unspoken conflicts of interest and pressure is being brought to bear on the participants; these are also the situations where the value of separate, independent representation is perhaps most critical.

5. *Unauthorized Practice of Law/ Multijurisdictional Considerations*

Because all areas of law in recent years have become more national and international in focus, this ethical concern has been the topic of much discussion by the ABA's ethics committees, giving rise to substantial revisions to the Model Code. This is an especially complex and prevalent ethical concern in ARTs. Because of the enormous variance from state to state and country to country in the legal clarity and support of ARTs, and given the mobility of our population, it is not unusual to have intended parents, gestational carriers, coordinating programs, donors of genetic material, and fertility clinics all located in different states and countries. Do the participants all need separate attorneys in each jurisdiction? Which jurisdiction's laws are going to govern the contract? The subsequent parentage action? Rule 5.5 does not give clear answers, but does indicate that lawyers must exercise extreme caution to avoid practicing in jurisdictions without appropriate authorization, credentials, or supervision. This means local rules as to temporary appearances, pro hac vice motions, and affiliation with local counsel must be carefully considered. Misrepresentations to parties regarding legal competence in that jurisdiction must be avoided.

It is common for carriers to live in—and plan to deliver in—a different state or even country from the intended parents, donors of genetic material, the fertility clinic, and the coordinating program. Carriers have an interest in knowing which laws will be applied in both the contract and the post-birth legal work. They have an interest in having legal representation competent in the jurisdiction whose laws will apply. Intended parents and coordinating programs have an interest in keeping costs down, and having competent legal representation in the appropriate jurisdiction, which can be expensive, is often an area where costs are rigorously contained, leading to significant ethical concerns. A practical solution that has developed is to have at least one participant in each jurisdiction that is affected by the procedure have legal representation by an attorney who understands ARTs practice in that jurisdiction. That may or may not be adequate under the circumstances. Full disclosures need to accompany the representation as to licensure status, competency, and the identity of the lawyer's client.

As an example of what can go wrong for gestational carriers, a recent high profile story out of Hollywood involved celebrity Sherri Shepherd who hired a gestational carrier to carry a pregnancy resulting from a donor's egg that was fertilized with her husband's sperm. When the surrogate was six months along in the pregnancy, Shepherd had a change of heart and advised the carrier that she would have nothing to do with the baby. The carrier, who has no genetic ties to the child and is a single mother with her own children and limited financial resources, was then in the unfortunate position of having her name put on child's birth certificate and having to help pay for the delivery and related costs. When the child's father put the child on state medical assistance, the carrier had her wages garnished as a non-custodial parent. The state indicated that she would have to pursue Ms. Shepherd for child support and that they would have to go by what was on the birth certificate, not what was intended by the parties as evidenced by their contracts. One wonders whether the carrier having competent counsel could have gone into court during the pregnancy to obtain an order preventing the carrier's name from going on the birth certificate. This high profile case highlights the legal challenges that can exist for carriers and the need for good and ethical legal representation.[132]

Ultimately, carriers and their spouses, partners, or immediate families have their own unique interests in any ARTs procedure. These interests deserve to be protected through truly independent counsel. Attorneys who are well versed in the ethics provisions dealing with avoiding conflicts of interest, maintaining client confidences, zealous representation, and competence in all of the areas of law impacted by these cases or an ability to connect the carrier with competent professionals where the attorney representing the carrier is not competent. Proper referrals to other professionals outside of the law is critical, as is staying current on medical procedures and developments in the field.

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132 Brennan Williams, *Shepherd's Surrogate Slams Her for Acting Like 'Baby Is Non-Existent,'* HUFFINGTON POST (Jan. 30, 2015), http://www.huffingtonpost.com/2015/01/30/sherri-shepherds-surrogate-jessica-bartholomew-breaks-silence_n_6581112.html.

C. *Donors*

Sperm donation, both known (between family or friends) and anonymous or commercial, has been available for much longer than egg donation, which requires an IVF procedure to procure eggs. Thus, sperm donation has a body of law built up that the true ART procedures do not. There is case law from numerous jurisdictions involving parentage, inheritance, and even whether sperm may be left by an intestate document.[133] More than 35 jurisdictions have adopted a variation of the Uniform Parentage Act which states that a sperm donor is not a parent.[134] Some of these laws require the recipients be married, or that a physician do the insemination procedure, or that the consents be in writing.[135] What these laws fail to address, typically, is the state of any cryopreserved sperm or embryos created from them, an unresolved issue that is similar to that involving cryopreserved or frozen eggs and embryos. Thus, even if the parent-child status of a child born from donor sperm may be legally clear, there are other ambiguous legal and ethical issues surrounding sperm donation, and a legal agreement with independent counsel may provide the same type of welcome clarity as in other third party ART arrangements.

In contrast to egg donation, from a medical perspective, sperm donation does not require any assisted reproductive technology procedure, or indeed any medical procedure at all. A sperm donor may never be a patient, or have a doctor-patient relationship, and thus there may be no medical setting in which to impose a requirement for consent or agreement. In contrast, egg donation will always require medical intervention and a retrieval procedure that, together with the medications to stimulate the ovaries to increase retrievable eggs, ensures that she is and should be treated as a patient in her own right. This involvement

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133 *See, e.g.*, Hecht v. Superior Ct., 20 Cal. Rptr. 2d 275 (Cal. 1993); *see generally Paternity and Sperm Donation*, *in* CROCKIN & JONES, *supra* note 9, at 132-87.

134 Model 2002 Uniform Parentage Act, § 7.

135 *See, e.g.,* Maria E. Garcia, *In with New Families, Out with Bad Law: Determining the Rights of Known Sperm Donors Through Intent-Based Written Agreements*, 21 DUKE J. GENDER L. & POL'Y 197, 206-10 (2013) (noting the varieties of state statutory approaches, such as California and Kansas permitting donors to retain parental rights if there is a written agreement).

provides an opportunity for requirements or protocols, including mental health screenings and counseling that may help ensure that any arrangements are entered into knowingly and voluntarily. A myriad of informal sperm donor arrangements, discussed below, attest to the lack of uniformity and the resulting vulnerability of participants to these arrangements.[136]

When recipients do not have or do not want to approach family or friends for so-called "altruistic" gamete donation, matching donor gamete programs or commercial banks exist with some of the same issues as in surrogacy matching programs. Donor egg coordinating programs have proliferated over the last several years, and sperm banks have existed for much longer to provide anonymous, screened, and banked gametes from compensated donors. With commercial sperm banks, intended parents often choose a donor from an online "catalogue" and buy frozen quarantined sperm which can be shipped to their physician's office. Until recently, egg donation required a live match so to speak between recipients and donors, with a carefully and precisely coordinated ovulation and transfer protocols. Recent medical advances in egg freezing and thawing, which are no longer considered "experimental" by ASRM, are rapidly becoming state-of-the-art and will likely move commercial egg donation more closely in line with sperm bank donation.

From a family lawyer's perspective, the ethical concerns will be trying to ensure that comprehensive and sensitive agreements have been reached about a donor's being forthcoming about medical and family history, any agreements for future contact either for medical emergencies or social reasons (often considered "open" donation with many different degrees of openness being possible), and that payments are reasonable, properly structured, and any escrowed funds are held securely and in accordance with state ethics rules. Coordinating programs that seek large up-front fees and/or do not securely escrow client funds or donor fees should be carefully scrutinized and potentially avoided.

Another concern for lawyers assisting clients will be any medical program's consent forms. Often well-intended, programs may not have appropriate customized consents for non-tradi-

136 *See, e.g., In re* K.M.H., 169 P.3d 1025 (Kan. 2007) (deciding that a Craigslist sperm donor could gain access to his children born to a lesbian couple).

tional intended parents and their gamete donors. There have been a number of cases involving same-sex couples or single patients where the partner providing the sperm or eggs has been mistakenly labeled a "donor" or where a donor has not been clearly defined as such. Supplemental consents may be needed and medical programs, while reluctant to change standard consent forms, may welcome a carefully drafted supplemental consent that clarifies the intentions of the various participants.

Another ethics caution for those family lawyers involved in a client's egg or sperm donation arrangement: state law may protect some, but not all, recipients. Same-sex couples have long been vulnerable, as have their donors, when family constellations and expectations change. Family and friend donors have asserted or attempted to assert paternity claims to children they helped lesbian couples create,[137] a state has gone after a sperm donor recruited from Craigslist to step into the shoes of a parent when the child would otherwise need state support (Craigslist donor),[138] a former lesbian partner attempted to characterize the genetic mother and her former partner as only an egg donor citing standard medical consent forms the couple had signed,[139] and in California a movie star, Jason Patric, persuaded the court that his post-birth behavior as a parent was sufficient to legally recognize him as the parent of his ex-girlfriend's child even if they had an oral agreement that he would be a donor at the time of the donation. For lawyers considering taking on one of these cases for either a donor or intended parent, clearly establishing parental and non-parental status in a written agreement, which is in conformity with the applicable state's public policy and any statutory or case law, is paramount. When donors and any intended parent are in different jurisdictions, it will also be critical to do a conflicts and choice of law analysis, and include a choice of law provision that has a reasonable expectation of being enforced. Even if the more favorable law may be in the donor's state, the

137 Thomas S. v. Robin Y., 209 A.D.2d 298 (N.Y. App. Div. 1994).

138 Kansas v. W.M., Case No. 12 D 2686 (Dist. Ct. Shawnee Cnty., Kan. Jan. 22, 2014), http://www.shawneecourt.org/DocumentCenter/View/468.

139 K.M. v. E.G., 117 P.3d 673 (Cal. 2005).

state where the child is to be born and live is more likely the state law that will determine parent-child status.[140]

From a practical ethics perspective, such lawyers should also caution their clients—donors or any intended parent—of the unknown and potentially unknowable aspects of some of these arrangements.

D. *Children*

The children who are the result of these ARTs procedures present some interesting questions and challenges from an ethical perspective. In some sense, as with adoption history and practice, the children's interests in these matters have long been overlooked entirely or presumed to be adequately addressed in terms of the rights and interests of the adoptive parents who are presumed to be acting in the "best interests" of the child. This same notion plays out in garden variety family law situations where attorneys deal with custody issues in the context of divorce or parentage proceedings. Do the children have rights and interests separate and apart from the parents who are fighting over them and taking actions that will significantly impact the child's future?[141]

In the adoption area, there has been significant agitation, and indeed litigation, by adopted children to find out the identity of their biological parents. They have raised concerns about being involuntarily removed from their families, cultures, and coun-

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140 Jason P. v. Danielle S., 226 Cal. App. 4th 167 (2014). For a general discussion of rights and obligations of donors, see J. Brad Reich & Dawn Swink, *You Can't Put the Genie Back in the Bottle: Potential Rights and Obligations of Egg Donors in the Cyberprocreation Era*, 20 ALB. L.J. SCI. & TECH. 1 (2010).

141 For a good discussion of general concepts and issues regarding children's rights and how to balance children's and parents' rights, see Melinda A. Roberts, *Parent and Child in Conflict: Between Liberty and Responsibility*, 10 NOTRE DAME J.L. ETHICS & PUB. POL'Y 485 (1996). For discussion of the concept of best interests of the child, the history of childhood, and a history of the children's rights movement in general, see MARY ANN MASON, FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS: A HISTORY OF CHILD CUSTODY IN THE UNITED STATES (1994); Gary A. Debele, *A Children's Rights Approach to Relocation: A Meaningful Best Interests Standard*, 15 J. AM. ACAD. MATRIMONIAL LAW. 75 (1998); Gary A. Debele, *Custody and Parenting by Person's Other than Biological Parents: When Non-Traditional Family Law Collides with the Constitution*, 83 N.D. L. REV. 1227 (2007).

tries of origin, and when they have pursued this information and the identity of birth parents and birth family members, they have met significant barriers couched in terms of privacy interests and rights of the birth parents that trump the child's right to this information. In this age of medical care based on genetics and one's DNA chain, as well as notions of cultural identity and preservation, these issues have taken on even greater significance.

While adoption had its origins, at least in the United States, as a process shrouded in secrecy, and for a long time a view even by social workers and child development specialists that secrecy was healthier for the child held sway, that has long changed and adoptions are now much more open with many adoptions now involving ongoing contact between the biological parent and the adopted child after the adoption. Certainly similar if not the same concerns exist in assisted reproduction, and in many respects ART practice seems to be repeating the history of adoption practice in terms of historic development, although in a slightly different fashion. Many sperm donors wish to, and actually do, remain anonymous. There have been, however, celebrated cases where that confidentiality has been breached, usually in the name of setting a child support award. More interesting, though, have been efforts by the children born of ART to locate and reach out to egg and sperm donors, as well as carriers (although the latter are less likely to be anonymous or to carry relevant genetic information). The children want to know who their genetic parents are, whether they have genetic siblings, and who gave birth to them. It is natural that people want to know their genetic and biological origins, not only for medical reasons, but just as a part of innate human curiosity as to our origins. Unlike with birth mothers in adoptions, with carriers, any hope of anonymity is impossible, but parties do spill ink in contracts addressing what, if any, post-birth involvement the carrier and her family will have with the child, with some contracts even providing prohibitions on telling anyone about the process or having any future contact with the subject child. It should also be noted that there is little uniformity of language in this discussion, with donors considered "genetic parents" or biological donors" and gestational carriers referred to as "gestational mothers" or "full surrogates" (as distinguished from traditional surrogates who use their own eggs). As the "children" grow up, and mental health

experts will remind us that while they will not be children forever, they will always be "donor conceived offspring." Some registries developed to facilitate communication between donor conceived offspring consider those from the same egg or sperm donor to be "half-siblings."[142]

Academics and ethicists have begun writing about the rights of children in these processes, raising concerns about possible exploitation of children and the long-range impact both medically and socially of genetic anonymity.[143] Law review articles and books have been written by scholars who believe that assisted reproduction, especially as it is currently practiced in the United States, is an overly commercial and under-regulated enterprise run by business lawyers and greedy fertility doctors who have well-heeled clients with significant funds to spend on designer babies.[144] In addition to concerns about carriers being exploited, increasingly worries are being raised about whether anyone is looking out the for the best interests of the children in terms of screening intended parents as to their fitness to parent children (some suggest there should be something comparable to an adoption home study and review by licensed social workers who would assess the fitness and appropriateness for the child of the intended parents) and mental health screenings for the carriers regarding fitness to participate in the process in a healthy fashion that is fair and non-exploitive. A larger concern is expressed about no governmental or professional entity maintaining records of this exchange of genetic material to make sure siblings are not dating or marrying siblings and making sure we are not becoming a society of in-bred children, or that critical genetic in-

142 *See* https://donorsiblingregistry.com.

143 For a good discussion of how the family law concept of "best interests of the child" could be implemented in ARTs screening procedures, see Richard F. Storrow, *The Bioethics of Prospective Parenthood: in Pursuit of the Proper Standard for Gatekeeping in Infertility Clinics*, 28 CARDOZO L. REV. 2283 (2007); for a discussion that deals with the interests and rights of children in ARTs, see J. Herbie Difonzo & Ruth C. Stern, *The Children of* Baby M, 39 CAP. U. L. REV. 345 (2011). For an article that considers the concept of motherhood in the context of ARTs and advocates that rather than looking at intent, gestation, or genetics, we should consider the best interests of the child when determining parentage, see Ilana Hurwitz, *Collaborative Reproduction: Finding the Child in the Maze of Legal Motherhood*, 33 CONN. L. REV. 127 (2000).

144 *See* SPAR, *supra* note 25.

formation is not lost instead of shared for health purposes, or simply to be able to answer questions of donor conceived persons. There has always been a concern about the accuracy of birth certificates, but now with many combinations of genetic and biological connections for children born of ARTs, indicators of our relatedness based on marital status and parentage presumptions are no longer sufficient.

Protecting the "best interests" of children has always been fraught with challenges for a variety of reasons. First, any list of factors that are to be considered in legal proceedings is always controversial. There is no real agreement from jurisdiction to jurisdiction as to what criteria are most important, just as there is significant variance between people and cultures as to what good parenting is. In addition to the challenges of defining the concept, putting it in place has also presented challenges. Making children parties to contracts and legal proceedings, or subject to them without being parties, has always been controversial. The ABA has models governing legal representation of children based on a view that children are considered among clients whose ability to make adequately considered decisions in connection with their representation is impaired by disability.[145] Representing a disabled client requires particular care by the law and engaging in such representation and maintaining a lawyer-client relationship presents unique challenges and requires special training and experience.

Many of the concerns regarding the welfare of children in ARTs cases stems from experience with children in the adoption realm, or perhaps even in custody litigation that goes on in divorce and parentage proceedings. The concern by children's advocates is that children are dramatically impacted by court proceedings that affect their placement and welfare, yet they are typically not parties and frequently their voices are not effectively heard or taken into account in these proceedings that are largely about them. Many ARTs practitioners would argue, however, that the legal position of children in ARTs cases is dramati-

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145 *See* MODEL RULES OF PROF'L CONDUCT R. 1.14 and the American Bar Association, Section of Family Law Standards of Practice for Lawyers Representing Children in Custody Cases (2003), *available at* http://www.americanbar.org/content/dam/aba/migrated/domviol/pdfs/0908/Standards_of_Practice_for_Lawyers_Representing_Children.authcheckdam.pdf.

cally different from that involved in divorce, custody, and adoption situations. In ARTs, it is a contractual relationship that is giving rise to the conception of the future child. A person may or may not have standing to even be considered a parent under the applicable laws, and if there is no standing, it is argued, that person should not be able to assert interests in the child or on behalf of the child based on a best interest of the child analysis. If the law makes genetics or biology determinative of parentage, or if intent becomes the controlling factor of parentage based on written contracts that are enforceable in that jurisdiction, ARTs practitioners raise those considerations as further justification for the concept of the best interests of the child having no significant role in these proceedings.

No matter how vigorously ARTs practitioners argue to the contrary, there will continue to be the view that regardless of how parentage is determined or regardless of the genetic or biological connections, the child has independent rights and interests that need to be considered, and indeed, protected. The ethics of this issue will no doubt continue to evolve as courts, legislatures, and individual parties continue to grapple with ARTs in all of its many varieties and permutations.

IV. Same Sex Parents

Other sections of this article have already alluded to the significant impact the entire area of assisted reproduction is having on same sex couples. Indeed, one could reasonably speculate that not only have the rapid advances in reproductive medicine been driving the explosion of ARTs as a tool for building families, but the increased demand to build families by same sex couples, in addition to single persons wanting families and heterosexual couples experiencing infertility, have also fueled the development.[146]

At the present time, same sex parentage is certainly a legal minefield, largely as a result of the long standing opposition to same sex marriage and the general refusal by American society

146 For a good general discussion about family formation trends among same sex couples, see J. Herbie DiFonzo & Ruth C. Stern, *Looking to the Future: Breaking the Mold and Picking up the Pieces: Rights of Parenthood and Parentage in Nontraditional Families*, 51 FAM. CT. REV. 104 (2013).

to extend the same legal rights and protections that married heterosexual couples and unmarried heterosexual couples enjoy to same sex couples. Now as the majority of states affirmatively allows same sex couples to marry and state and federal courts are striking down prohibitions on same sex marriage, the legal treatment of same sex couples is changing dramatically and on a nearly daily basis.[147] But the law is not yet uniform and completely supportive, so when family law attorneys work with same sex couples in assisted reproduction, great care is required both in terms of legal requirements and practices, as well as handling the unique ethical issues that may arise.

In representing same sex intended parents, one must fully understand what legal rights both parties have to any children born of an assisted reproduction process. Care must be given as to whether the parties have conflicting interests based on their genetic and biological ties to the children, and their legal status to one another, to determine if and how this may impact their respective standing as to legal parentage. Litigation in these cases can be horrific if there was an unresolved conflict between the parties and the lawyers were not aware of, nor did they alert the client to, the possible conflicts and complex set of potential problems. Determinations need to be made regarding whether the parties should be encouraged to marry and whether the parentage should be affirmed through an adoption rather than simply relying on any applicable marital presumption. Estate planning should be carefully considered with an eye to the impact of the marriage statutes and other legal considerations. If same sex couples refuse to marry or are unable to marry, is a second parent adoption viable and secure in your jurisdiction? Given the more established right to full faith and credit for a legally undertaken adoption, the more secure advice is likely to undertake an adoption following birth. As yet unresolved issues may arise about any gamete donor's rights to notice or more; based on sperm donor laws, one would logically infer that a donor should have no rights, but this again remains an area that

147 For a general discussion of these trends in the context of the analysis of one state's statutory enactment allowing same sex couples to marry, see Gary A. Debele, *Family Law Issues for Same-Sex Couples in the Aftermath of Minnesota's Same-Sex Marriage Law: A Family Law Attorney's Perspective*, 41 WM. MITCHELL L. REV. 157, 162 (2015).

needs careful analysis and thoughtful steps. Full faith and credit issues regarding same sex parentage proceedings remain a difficult situation as long as there is no final, national determination as to the viability of same sex marriages, same sex adoptions, and same sex parentage determinations, and attorneys should proceed both deliberately and cautiously.[148] For many years, practitioners representing same-sex couples have often advised they proceed with an adoption to legally secure their rights. Obtaining an adoption decree of a child born to you or your partner may seem incongruent, but it allows the overlay of protection of established laws that are not dependent on the still fluid state of same-sex marriage from state to state. In the international arena, things are even more ethically and legally complex.

The variance from country to country on how same sex parentage, adoption, and marriage, including the resulting citizenship of any offspring from an ARTs procedure, rivals the complexity of the state of the law in the United States at the present time, and family law practitioners who are asked to advise clients in this area need to proceed with extreme caution, including formally affiliating with specialized counsel in the applicable jurisdiction(s), which may include the client's home country, or explicitly stating and potentially limiting the scope of their represent to exclude, for example, immigration and citizenship issues.

V. Fertility Preservation

Fertility preservation presents unique legal and ethical issues. It may be contemplated or done in the face of life or fertility threatening illnesses or treatments, or undertaken to avoid concerns over age-related diminished fertility. It may involve preserving sperm, eggs, embryos, or ovarian tissue, for married,

148 There has been nothing short of an explosion of academic writing on this topic in recent years. For example, see the following: Linda S. Anderson, *Legislative Oppression: Restricting Gestational Surrogacy to Married Couples Is an Attempt to Legislate Morality*, 42 U. BALT. L. REV. 611 (2013); Catherine DeLaira, *Ethical, Moral, and Economic Legal Barriers to Assisted Reproductive Technologies Employed by Gay Men and Lesbian Women*, 4 DEPAUL J. HEALTH CARE L. 147 (2000); Robert Zimmer, Jr., *The Surrogacy Minefield: Legal Challenges and Opportunities for Prospective LGBT Parents and Their Attorneys*, 35 WHITTIER L. REV. 311 (2014).

partnered, or single adults, or minors. Each scenario raises distinct concerns.

Fertility preservation in the face of a serious illness, may require time sensitive, if not urgent, decisions with sometimes unrecognized legal repercussions. Given increasingly treatable cancers and growing survival rates for pediatric cancer patients, "oncofertility" has been a rapidly growing area of both medical awareness and treatment.[149] Being able to freeze sperm, eggs, embryos, or ovarian tissue prior to treatment, may mean the difference between biological parenthood and childlessness for many. For patients about to undergo chemotherapy, however, time may be of the essence and delaying treatment a significant concern. The need to move quickly to preserve fertility without compromising survival or treatment outcomes requires knowledgeable and astute medical personnel. For a male patient, the issues may be simpler, as sperm freezing can be done without medical intervention or preparation. For women, egg or embryo freezing will require an IVF cycle, an astute oncologist to quickly refer prior to treatment, and a potentially difficult and sensitive patient decision as to whether to freeze embryos or eggs. Until recently, frozen embryo pregnancy rates were considered more reliable, with frozen eggs considered to provide a lower chance of a successful pregnancy. That may be changing with rapid improvement in egg freezing and thawing technology and techniques. Given cases involving disputes over frozen embryos, from a strictly legal perspective, egg freezing would protect a women from a man later attempting to veto her using frozen embryos he helped create, and avoid disputes over whether the man was a donor or an intended parent, or whether even if an intended parent, the circumstances favor the woman's use over his later objection. Both in the United States and other countries, numerous courts have ruled against a woman's right to use frozen embryos over a concurrent objection by the male, even if the embryos were created to ensure her future fertility. As noted in Section II.*D.*, above, a few lower courts in the United States have, in

149 *See, e.g.,* Alison W. Lorne, et. al., *Fertility Preservation for Patients with Cancer: American Society of Clinical Oncology Clinical Practice Guideline Update*, 31 J. CLIN. ONCOLOGY 2500 (July 1, 2013), http://jco.ascopubs.org/cgi/doi/10.1200/JCO.2013.49.2678; the Oncofertility Consortium, http://oncofertility.northwestern.edu (last visited June 22, 2015).

recent years, awarded embryos to a wife,[150] and an Illinois case pending as of publication, raises these exact facts—with a female doctor claiming an oral agreement with her ex-boyfriend to use embryos they quickly created before her treatment, while he is pointing to an IVF consent form requiring joint consent which he is now refusing to provide. For lawyers approached to assist in these cases, joint representation should be considered impossible because the entire purpose of any prior joint legal agreement was to ensure an outcome in the face of a change of mind by one of the parties. For a lawyer advising a client facing these issues, given existing case law, it would be difficult to provide any certainty as to future access to embryos.

Motivation aside, males have always had an easier time preserving their fertility than females. So long as a man can produce sperm or have it surgically retrieved, he can have sperm frozen for future use prior to fertility compromising treatment. A separate issue and one where lawyers will be of potentially great value for men or women, is the documentation needed to clearly state under what circumstances, including any posthumous use, they are consenting to their genetic material being used, and what legal relationship they desire to have to any resulting offspring, if consistent with law and public policy.

For women, egg freezing not only eliminates legal vulnerability regarding frozen embryos, it has also very recently become an openly available option for young, healthy women who either have the financial resources to undertake this relatively expensive option or work for one of a growing number of companies that may offer to underwrite those costs. Facebook and Google announced their intention to do just that in 2014, and others are likely to follow suit.[151] Ethical concerns include whether women who may never need frozen eggs are being targeted to undergo a potentially unnecessary, expensive procedure, whose actual costs and success rates may not be made clear. For example, while the process may cost $10,000, that figure may not include either the

150 *See* Mbah v. Anong, CAD11-11394, CAD10-24995 (consolidated) (Md. Circ. Ct., 7th Jud. Dist., Dec. 21, 2012); *Reber*, 42 A.3d 1131; Szafranski v. Dunston, 993 N.E. 2d (Ill. Ct. App. 2013).

151 Paresh Dave, *Apple, Facebook Add Egg Freezing to Employee Benefits Report Says*, L.A. TIMES, Oct. 14, 2014, *available at* http://www.latimes.com/business/technology/la-fi-tn-apple-facebook-egg-freezing-20141014-story.html.

multiple cycles if recommended to preserve enough eggs for future fertility, or the cost of continued storage, thaw, fertilization, and transfer. In this rapidly improving environment, it is also unclear whether newer and better techniques may be available in the near future that may offer a higher success rate. Elective egg freezing is an area receiving a significant amount of publicity, and is likely to become more widespread as techniques improve and costs are reduced or covered by third parties.

For minor patients, fertility preservation decision-making can be complicated. If infertility is an often emotional experience, a child with a life-threatening condition may challenge any parent into considering fertility preservation options not only for their child's benefit, but for themselves should their child die. Anecdotal reports of grieving parents seeking to preserve their dying or deceased child's genetic material, or seeking to use it after their death,[152] are sadly increasingly common. For programs looking for guidance, the legal "substituted judgment" concept will be applicable, but will need to be applied carefully to avoid responding to parental desires as opposed to the child's own believed desires or best interests as articulated and protected by their parent.

Substituted judgment issues may arise, and jurisdictions vary on the legal requirements for a parent to give consent on behalf of a minor child. The core principle, however, should remain that the judgment being substituted for the child's is intended to be that which he or she, if mature and able to reach his own judgment, would make on his or her own — not on another's behalf. For this reason, some medical practices that preserve minors' genetic material do not allow a donation option, unless and until the patient reaches the age of majority and has reconsented.

VI. Posthumous Reproduction and Retrieval

Where death was once the end of life, cryopreserved embryos or gametes can enable some form of life to continue for

152 Jo MacFarlane & Stephen Adams, *British Mum, 59, in Bid for World Medical First: I'll Give Birth to Baby of My Dead Daughter*, DAILY MAIL (U.K.), Feb. 22, 2015, http://www.dailymail.co.uk/news/article-2963277/British-mum-59-bid-world-medical-ll-birth-baby-dead-daughter.html.

those who have access to stored genetic material. Genetic material is most often, but not always, stored by a patient as sperm, eggs, or embryos at the time of the patient's death. State law will govern both the use of that genetic material and the resulting parent-child legal status of any offspring created from it. Ideally, a patient will have left clear consent as to what should be done with his or her genetic material in the event of death. However, such instructions are often inadequate, whether because they have not been comprehensively drafted in light of the rushed circumstances, because of competing claims, or because state law or policy does not support the directive. Widows and other family members have sought posthumous use of frozen gametes or embryos under myriad fact patterns.[153]

Given the ethics focus of this article, the legal issues will be highlighted only briefly. To begin, access to genetic material is a separate, if ultimately related, issue to the legal parent-child status of any resulting child. The former should ideally be governed by informed consent documentation as well as by any legal agreements by the deceased regarding disposition of his or her genetic materials. For instance, a sperm donor should have very different dispositional documents than an intended father. An intended mother entering into IVF will potentially have different legal instructions than a young girl freezing eggs to preserve her fertility options before undergoing potentially reproductively destructive chemotherapy. In the event of the minor's death in the latter case, it may well be that legal ethics (or medical advisory ethics boards) would not support allowing a parent to make a substituted judgment decision for their child, since there is little if any actual benefit that can be noted for the deceased patient, and a potential conflict for the grieving parent to use the gametes. Thus, in some programs, no option is given to minor patients to donate for posthumous procreation, although they are permitted to change their options upon reaching maturity.[154]

Any lawyer working in this area should be aware of the case law involving parental status for a deceased genetic contributor. In *Astrue v. Capato,* the U.S. Supreme Court reviewed a split

153 For a more comprehensive discussion of these varied scenarios, see Michael R. Soules, *Commentary: Posthumous Harvesting of Gametes—A Physician's Perspective*, 27 J.L. MED. & ETHICS 362 (1999).

154 Private practice of co-author.

among the circuits on when a posthumously conceived person is the legal descendant of a decedent. The Court clarified that whether a person born from a deceased's gametes or embryos would be considered to be that individual's legal child (and entitled to federal benefits as such) turned entirely on state law.[155] For instance, in Massachusetts there is a three prong test to determine the legal parentage of a child born through posthumous reproduction: (1) did the offspring result from the deceased's genetic material, (2) did the deceased intend to have their genetic material so used, and (3) did the deceased intend to be a parent of any resulting child.[156] Alternatively, some states have a time frame that cuts off such rights or other limitations regardless of intention.[157]

Posthumous "retrieval" of gametes from a deceased's body adds another layer of complexity to posthumous reproduction, and many such cases have been anecdotally reported across the country. Virtually all involve sperm, because eggs only mature in nature one at a time, on a specific timetable, and thus are not readily retrievable at or immediately following death as is possible with sperm. In such circumstances, many medical professionals express a preference to remove sperm, cryopreserve, and let the interested parties work out through the courts whether or not they will have access to the material, rather than making the decision to not retrieve sperm and consequently losing the opportunity to do so at a later date.[158]

The complex ethical issues in such scenarios are apparent. Who controls access to a deceased's genetic material, for what purpose, and the resulting legal status of any offspring created from it, are difficult, and almost always emotionally laden, questions to answer. Lawyers brought into such cases will want to investigate whether they can comfortably represent a party who seeks access to a deceased's genetic material or wishes to deny it to another. Such cases can (and have) involved a mother and a

155 Astrue v. Capato, 132 S. Ct. 2021 (2012).

156 Woodward v. Comm'r of Soc. Sec., 760 N.E.2d 257 (Mass. 2002).

157 CAL. PROB. CODE § 249.5 (West 2015).

158 Carson Strong et al., *Ethics of Postmortem Sperm Retrieval,* 15 HUM. REPRODUCTION 739 (2000).

son-in-law in conflict over a comatose woman's eggs,[159] a mother and father wishing to preserve their son's sperm so his girlfriend or they can potentally use it to create a grandchild for themselves, a parent's desire to preserve their nine-year-old's sperm via masturbation by a member of the medical team within a week of his death, and so on. In one often reported case, the sperm of a man who committed suicide was partially awarded to his then-girfriend and partially to his ex-wife on the theory that the sperm was property and and this division was deemed consistent with an intestate division.[160] And in one recent case, a Texas court awarded embryos to a two-year-old boy whose parents had died with embryos in the freezer, adding that the boy could decide what to do with the embryos when he reached eighteen years of age.[161]

The ethical dimensions of representing clients involved in issues of posthumous reproduction or posthumous retrieval are somewhat unique from those involving other aspects of ART. The ASRM Ethics Committee has issued an opinion that, absent an explicit directive, requests to use frozen gametes from a widow, partner, or other parties should not be honored.[162] Lawyers may be asked to record the wishes of a patient facing life-threatening treatment concerning the prospect of posthumous reproduction. In such circumstances, applicable jurisdictional rules may be outcome determinative. For example, Massachussetts and New Hampshire have different approaches to posthumous parentage.[163] Lawyers may also be called in after the fact of death to try to ascertain whether and how to distribute genetic material. In any such fact pattern, emotions are almost certain to run high, facts may be difficult to ascertain, and laws from multiple jurisdictions may be relevant; lawyers should exercise extreme

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159 David M. Greer et.al., *A Request for Retrieval of Oocytes from a 36-Year-Old Woman with Anoxic Brain Injury*, 363 N. ENG. J. MED. 276 (July 15, 2010).

160 Hecht v. Sup. Ct., 16 Cal. App. 4th 836 (1993).

161 Report and Recommendations of Master in Chancery, In the Estate of Yenenesh Abayneh Desta, Deceased, No. PR 12-2856-1, Prob. Ct. No. 1, Dallas County, Texas.

162 Ethics Comm. of the Am. Soc'y of Reproductive Med., *Fertility Preservation and Reproduction in Cancer Patients*, 83 FERTILITY & STERILITY 1622 (2007).

163 *See Woodward*, 760 N.E.2d 257.

caution in deciding whether and how to represent individuals in such circumstances.[164]

VII. Conclusion

It is clear that the world of ART has dramatically changed the process of family creation and as a result, the very nature of the legal issues with which family law attorneys must grapple. While many family law attorneys will never undertake representation of a party in an ART proceeding, rest assured that some aspects of ARTs will inevitably creep into their cases. This could come about, for example, by clients wanting some basic legal understanding of the legal process as they deal with infertility or consider doing an adoption and run into the demographic and other legal challenges that make that process available but confounding to more and more people. Clients will also come to family law attorneys with stored (cryopreserved) embryos or other genetic material that could be the subject of complex litigation in a divorce proceeding either because of its intrinsic meaning to both parties or as a bargaining tool for the one to whom it is of irreplaceable value. Society will assume that because ART involves legally creating families, family law attorneys will be the legal professionals whose advice is sought. It would behoove family law attorneys to not only have a basic understanding of the legal concepts and issues in play in ARTs cases, but also of the novel, complex, and indeed, interesting, ethical issues that are embedded in these situations. The ethics issues can range from the mundane and obvious, such as the issues surrounding competency in the face of ever changing medical developments in the areas of reproductive medicine and changing ways to establish parentage, to the complex, such as conflicts of interest where there are multiple parties and entities involved and pressure to limit the numbers of attorneys involved, to the esoteric, such as dealing with novel and nuanced choice of law questions and how to handle multi-jurisdiction representation. Hopefully this article will equip a family law attorney with a basic under-

164 For further discussion of posthumous conception from an international perspective, see Maya Sabatello, *Posthumously Conceived Children: An International and Human Rights Perspective*, 27 J.L. & HEALTH 29 (2014).

standing of these issues and how best to spot these issues so as to better assist clients in finding their way towards a good and ethical resolution in ARTs matters.