

5 Select Review: The Intersection of Clinic Consent Forms, Legal Agreements, and Parentage Laws Applicable to Third Party Reproduction.

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Science must constantly be reminded that her purposes are not the only purposes and that the order of uniform causation which she has use for, and is therefore right in postulating, may be enveloped in a wider order, on which she has no claim at all.

- William James

The interval between the decay of the old and the formation and establishment of the new constitutes a period of transition which must always necessarily be one of uncertainty, confusion, error, and wild and fierce fanaticism.

- John C. Calhoun

The power of the lawyer is in the uncertainty of the law.

- Jeremy Bentham

I. The Constitutional Right to Procreate

J.R. v. Utah, 261 F.Supp.2d 1268 (Utah 2002)

Factual Summary: Husband and wife had a child through gestational surrogacy using their own sperm and egg. Utah would not put their names on the child's birth certificate because the relevant statute stated that the child was legally and automatically the child of the surrogate. The genetic parents sued the state alleging that the statute was unconstitutional and requesting recognition of their legal parentage.

Holding: Utah statute prohibiting surrogacy and stating that a traditional surrogate is the legal mother of any resulting child is unconstitutional as an unreasonable restriction of the intended parents' fundamental right to procreate.

The court stated, "Moreover, the [U.S.] Supreme Court has explicitly recognized that the fundamental right of privacy protected under the Due Process Clause encompasses individual decisions regarding procreation, marriage and parentage. The Carey court stated that 'it is clear that among the decisions that an individual may make without unjustified government interference are personal decisions relating to marriage, procreation, contraception, family relationships, and child rearing and education.' Of all these personal choices, 'decisions whether to accomplish or to prevent conception are among the most private and sensitive.' Thus, the decision to procreate 'is at the very heart of this cluster of constitutionally protected choices.'" (Citations omitted.)

II. Defining and Establishing Legal Parentage - A View from Minnesota

A. The Definition: The "parent and child relationship" is defined as the legal relationship existing between a child and the child's biological or adoptive parents incident to which the law confers or imposes rights, privileges, duties, and obligations. It includes the mother and child relationship and the father and child relationship. Minn.Stat. §257.52 (1980).

B. Avenues to the establishment of legal parentage:

a. **Birth Certificates and Records** - Minn.Stat. §144.218

i. **Adoption** - Upon receipt of a certified copy of an order, decree, or certificate of adoption, the state registrar shall register a replacement certificate in the new name of the adopted person.

ii. **Incomplete, incorrect, and modified certificates** - If a court finds that a birth certificate is incomplete, inaccurate, or false, or if it is being issued pursuant to section 259.10, subd. 2, [the change of name statute] it may order the registration of a replacement certificate, and, if necessary, set forth the correct information in the order.

b. **Administratively by Consent** - Minn.Stat. §257.75

i. **Recognition of parentage** - Once a recognition has been properly executed and filed with the state registrar, if there are no competing presumptions of paternity, a judicial or administrative court may not allow further action to determine parentage regarding the signatory of the recognition.

1. Note - the Recognition of Parentage does not adjudicate custody or parental access rights. Until an order is entered granting custody to another, the mother has sole custody.

ii. **Revocation of Recognition of Parentage** - A recognition may be revoked in a writing signed by the mother or father before a notary and filed with the state registrar within the earlier of 60 days after the recognition is executed or the date of any administrative or judicial hearing relating to the child in which the revoking party is a party to the related action.

c. **Specific Statutory Authority** - Minn.Stat. §257.56

i. **Artificial Insemination** - If, under the supervision of a licensed physician and with the consent of her husband, a wife is inseminated artificially with semen donated by a man not her husband, the husband is treated in law as if he were the biological father of a child thereby conceived. The husband's consent must be in writing and signed by him and his wife.

d. **Judicial Determination of Parentage**

i. This avenue to the establishment of legal parentage varies significantly from State to State.

1. Some States have adopted the Uniform Parentage Act ("UPA"), whereas others have not. Note that there are two versions of the UPA, the first from 1979 and the subsequent version from 2000. Only nine States have adopted the most recent version and of those nine, only two States adopted the Assisted Reproductive Technology provisions therein.

2. Some states provide for court determination of both paternity and maternity, whereas some only enable adjudication of paternity.

3. Some states provide for pre-birth parentage and custody orders, whereas some will not adjudicate until after the birth.

4. Some states allow same-sex partners to be listed as parents on birth certificates, some do not.

ii. In Minnesota, the 1979 version of the UPA is codified by Minn.Stat . Ch. 257.

1. The Minnesota statutes create various presumptions for parentage:

- a. The woman who gave birth;
- b. The man married to the birth mother;
- c. The man and/or woman having a genetic relationship with the child;
- d. Persons who duly execute a Recognition of Parentage.

2. Competing presumptions continue to exist until a court proceeding is initiated and the court issues an order determining the parentage.

- a. There is no time limitation on when a parent or child can bring a court action to determine parentage.

3. Minnesota provides for determination of paternity and maternity.

4. Minnesota does not provide for pre-birth parentage or custody orders.

5. The Minnesota Department of Health, Division of Vital Statistics, will issue birth certificates with same-sex parents listed.

iii. Issues Related to Courts' Procedures for Establishing Legal Parentage:

1. Anonymous v. Known donors. Terminology will remain "anonymous" until the legal climate is settled and conforms to the concept of "parentage by intent." After the terminology and concept evolves, what will follow?

2. Technology will continue to empower self-determination. In 2004, a teen conducted an Internet search of genetic/birth records to find her "anonymous" sperm donor father. See also the website donorsiblingregistry.com.

3. The judicial branch will be called upon to address the public policy issues surrounding ART which remain unresolved by the legislative authorities.

- a. In 2008, donor children in British Columbia sought a class action order "prohibiting the destruction, disposal, redaction or transfer out of British Columbia of Gamete Donor Records by any person . . . "

- b. In 2010, the mother of donor offspring filed suit seeking identity of and child support from the donor.

4. Query whether the policy statement of ASRM - "Donors also should be informed that donation will ordinarily sever all legal rights and duties to rear or have contact with any resulting children (or even to know if they exist)" - reflects the emerging case law, *infra*.

III. Case Law Regarding the Establishment of Parentage Via Judicial Determination

A. Dantzig v. Biron, 2008 WL 187532 (Ohio App. 4 Dist. 2008) (Appeal denied.)

Factual Summary: A single man from New York used the eggs of an anonymous donor in California to complete a gestational surrogacy with a surrogate in Ohio. The intended father requested a court order in Ohio establishing him as the child's father, and he presented DNA evidence that he was the genetic father and the surrogate was not the genetic mother. The father did not identify or join the egg donor as a party. Ohio law required that all necessary parties by

joined in the court proceeding, specifically stating,

" . . . [t]he natural mother, each man presumed to be the father . . . and each man alleged to be the natural father shall be made to the action . . . or, if not subject to the jurisdiction of the court, shall be given notice of the action pursuant to the Rules of Civil Procedure and shall be given an opportunity to be heard."

(citations omitted). Because the father did not join or give notice to the egg donor, the court dismissed his paternity action for failure to join a necessary party

Holding: An anonymous egg donor is a "natural mother" and is a necessary party in a proceeding to determine the parentage of a child born to a single intended parent through gestational surrogacy.

B. Robert B. v. Susan B., 135 Cal.Rptr.2d 785 (Cal.App.6th 2003)

Factual Summary: Husband and wife created embryos with the eggs of an anonymous donor in order to have their own child gestated by the wife. The physician mistakenly placed the embryos into the uterus of another woman who gave birth to a child as a result. The husband and wife brought a parentage action to establish themselves as the parents of the child. Birth mother counterclaimed that the husband in this situation was just a sperm donor and had no rights. Court ruled that (1) husband was not the donor because of his lack of intent to be donor, (2) birth mother was the legal mother because she gave birth and there was no other presumptive mother, and (3) husband's wife was not an interested party under the UPA because she was neither the genetic nor the birth mother.

Holding: When embryos created with husband's sperm and the egg of an anonymous donor for use by husband and his wife to have a child are mistakenly placed into the uterus of another woman who gives birth, the husband and the woman who gives birth are the parents, and the husband's wife has no standing to assert maternity. Wife's standing as "intended mother" has no effect under the terms of the UPA.

C. Rice v. Flynn, 2005 W.L. 2140576 (Ohio App. 9 Dist. 2005)

Factual Summary: A single man from Ohio contracted under Ohio law with a gestational surrogate from Pennsylvania to have children using an anonymous egg donor. The surrogate delivered triplets in Pennsylvania and disapproved of genetic father's interaction with the children in the hospital. The surrogate took the children home and claimed rights as the children's legal mother. Pennsylvania courts initially awarded the surrogate parentage and custody. Father then brought suit in Ohio, identified the egg donor, and joined her in the proceeding so she could contest the surrogate's parental rights based on the donor's genetic relationship to the children. The Ohio court ruled that it was not bound by the decisions of the Pennsylvania courts regarding parentage and also ruled that the egg donor had a right to litigate her status as the legal parent of the children. The court stated,

Under the Belsito test, a court first determines genetics and then determines if the genetic parents waived or relinquished parental rights. In the case **sub judice**, Rice and Flynn have been found to be the genetic parents, but no finding has been made as to whether either one of them waive or relinquished parental rights. Accordingly, a hearing must be held to address the second prong of the Belsito test. [2]

Holding: "Anonymous" Egg donor had legal standing to assert her claim to maternity of triplets born to a gestational surrogate based on donor's genetic relationship to the children.

D. K.M. v. E.G., 13 Cal.Rptr.3d 136 (Ca.App. 2004)

Factual Summary: A lesbian partner egg donor initiated a parentage action pursuant to the UPA.

The Court determined that the action was not one to enforce a contract, reasoning that the determination of parentage does not rest upon a binding agreement between the parties. To the contrary, California Family Code section 7632 states: "Regardless of its terms, an agreement between an alleged or presumed father and the mother or child does not bar an action under this chapter [on determining parent and child relationship]." Although that provision refers to an agreement by the alleged father, the Court concluded that the statute should apply equally to an agreement by a woman alleged to be the child's second mother. "The clear purpose of Family Code section 7632 is to preclude parents from foreclosing a judicial determination of parentage." (Citations omitted.)

Holding: A lesbian partner who provided the egg for the IVF pregnancy of her partner is an "interested person" under the Uniform Parentage Act for the purposes of bringing a legal action to obtain a judicial declaration of her status as a parent.

E. Lewis v. Schneider, 890 P.2d 148 (Colo. June 30, 1994)

Summary: Woman was raised by her mother and her mother's husband as the child of their marriage after the husband married the mother while she was pregnant. After woman reached age of majority, woman learned another man was her genetic father. When her genetic father died, the woman obtained genetic tissue from his corpse, performed DNA testing, and established herself as decedent's genetic child. In holding that she could inherit from the decedent's intestate estate together with decedent's other children, the court stated:

In reaching this conclusion, the personal representative assumes that, because both § 15-11-109 and the Uniform Parentage Act deal with paternity issues, the two statutory schemes must be read together. Further, the personal representative's argument assumes that reading the statutes together requires the time limitations contained in the Uniform Parentage Act to be superimposed on § 15-11-109. We are not persuaded.

Holding: A genetic child of a decedent can establish genetic paternity for inheritance purposes posthumously even though the child thereby has two legal fathers.

F. Jacob v. Schultz-Jacob v. Frampton, 923 A.2d 473 (Pa.Super. 2007)

Holding: A known sperm donor who became voluntarily economically involved in the lives of two children born to a lesbian couple with the use of his donated sperm is equitably estopped from denying a child support obligation to the children upon the separation of the two lesbian parents.

G. LaChapelle v. Mitten, 607 N.W.2d 151 (Minn. 2000)

Holding: A known sperm donor and a lesbian partner whose adoptive rights the court has vacated can both still assert parental rights as child's legal parents in order to maintain a relationship with the child against the child's genetic mother's wishes.

IV. Case Law Regarding the Intersection of the Avenues for Establishing Parentage

In the Matter of the Adoption of Sebastian, 879 N.Y.S.2d 677 (April 9, 2009)

Factual Summary: Child's genetic mother was a legally married lesbian who sought to establish parentage via adoption. The Court noted that several avenues existed for the genetic mother. She could be listed on the child's birth certificate. She and her wife could execute a statutorily prescribed acknowledgment of paternity. Third, the genetic mother could seek a judicial order of parentage. Only the last avenue presumptively would be subject to Full Faith and Credit. The Court noted that it,

. . . lacks jurisdiction to confer legal parentage in any way other than by granting the adoption requested by the parties. And, although it is true that an adoption should be unnecessary

because Sebastian was born to parents whose marriage is legally recognized in this state, the best interests of this child require a judgment that will ensure recognition of both Ingrid and Mona as his legal parents throughout the entire United States.

Holding: Adoption was the sole means by which genetic mother could legally establish parentage of child born to her wife, and was the sole means by which the rights and obligations thereto could be fully protected.

V. Legal Effect of Clinic Consents

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

Factual Summary: A couple had a child through IVF during their marriage. When they divorced, their preserved embryos remained in existence. The wife wanted the embryos destroyed. The husband stated that it was against his religious belief to destroy the embryos. The couple did not have a formal, unambiguous agreement expressing their clear intent regarding the use and disposition of the embryos. In the absence of such an agreement, the court ruled that the party who does not want to procreate should prevail. The Court went on to note that even if such an agreement did exist, such an agreement regarding the use and disposition of embryos signed at the time of the IVF procedure is only enforceable subject to the right of either party to change his or her mind up to the time of the use or disposition of the stored embryos.

Holding: In the absence of a clear and binding agreement regarding the use and disposition of stored embryos, the court will not violate the wife's fundamental right not to procreate by forcing her to become a genetic parent against her will.

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

Factual Summary: A couple attempted procreation through IVF during their marriage. The wife had the husband sign consent forms in blank that she later filled out giving her sole authority over the use and disposition of any embryos created. After the couple divorced, the wife attempted to use her sole authority to use the embryos to create a pregnancy. The husband found out about her efforts only through a notification he received from his health insurer. Husband sought injunctive relief preventing wife from using the embryos. The court concluded that, even if the consent form were a contract, it would not be enforced. The court based its ruling on the fact that a drastic change had intervened since the consent form was signed, and further stated that it was against public policy to force a person to become a parent against his or her will.

Holding: Neither a clinic consent form nor judicial power should be used to force a person to procreate against his or her will.

C. Litowitz v. Litowitz, 48 P.3d 261 (Wash. 2002), *cert. denied*, 537 U.S. 1191 (U.S. 2003)

Factual Summary: A couple used IVF with donor eggs and husband's sperm to have children via a surrogate. The couple signed an agreement at the clinic stating that they retained rights as to the disposition of the eggs. If the eggs were not used after five years, they would be destroyed. The egg donor contract provided,

All eggs produced by the Egg Donor pursuant to this Agreement shall be deemed the property of the Intended Parents and as such, the Intended Parents shall have the sole right to determine the disposition of said egg(s). In no event may the Intended Parents allow any other party the use of said eggs without express written permission of the Egg Donor.

After having one child with the assistance of a surrogate, the couple started a divorce action. The husband wanted the eggs donated to another infertile couple, but the wife wanted to have another child using a surrogate. The court granted enforcement of the agreement and gave the non-genetically related intended mother equal rights as to the use and disposition of the eggs. The

inquiry did not end there. The Court observed as to husband's rights that,

The Court of Appeals correctly concluded the egg donor contract, at any rate, did not prevent Respondent [husband] from donating the preembryos to another couple. The court indicated Respondent would not need written permission from the egg donor to donate the preembryos because the egg donor contract only required written permission for transfer of the donated eggs. The court correctly observed that the eggs no longer existed as they were identified in the egg donor contract because they were later fertilized by Respondent's sperm and their character was then changed to preembryos. [I]t is doubtful that the egg donor would have a remaining contractual right once the eggs have been fertilized and become preembryos.

The court went on to reason that the nature of donated eggs as property, and the terms of the parties' agreement regarding the donation, changed when the eggs were fertilized. Due to the absence of a subsequent agreement addressing disposition of preembryos, the original storage agreement was deemed enforceable such that the preembryos would be destroyed upon expiration of the five year term.

Holding: Even where only one of two intended parents is genetically related to the stored embryos, both intended parents retain equal rights to control the use and disposition of the stored embryos.

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

Holding: An agreement as to the use and disposition of stored embryos that is entered into at the time of the IVF procedure is enforceable and binding on the parties subject to the right of either party to change his or her mind about disposition up to the point of use or destruction of any stored embryo.

[1] The author gratefully acknowledges Steven H. Snyder, Esq. for his substantial assistance with the preparation of these materials.

[2] **Belsito v. Clark , 644 N.E.Rep.2d 760 (Ohio C.C.P. 1994)**