



The ART of Surrogacy

In an Age of Assisted Reproductive Technology (ART) A Savvy Attorney Is Needed to Navigate Complex Laws That Vary by State

PHILADELPHIA (March 2009) - In today's brave new world of assisted reproductive technology (ART), surrogacy and same-sex parenting, even the definition of "parent" becomes murky - increasing the need for savvy attorneys with specialized expertise in this complex area of law.

"The outcome of an individual surrogacy case can vary wildly depending on which states are involved," says Dorothy K. Phillips, a Philadelphia-area attorney who specializes in surrogacy, custody, paternity and child support law. "There are so many nuances these days that the attorney has a huge responsibility to draft an iron-clad surrogacy contract and to educate everyone – from the biological parents, sperm/egg donors and surrogates to the judges themselves – as to how the law views specific circumstances."

The Uniform Parentage Act (UPA) of 2002 has gone a long way in helping courts clarify such relevant issues as whether surrogacy contracts are enforceable – but not all states have adopted the UPA, and others have only incorporated some of its provisions.

"Many more couples, whether married, heterosexual, or gay, are turning these days to anonymous sperm and egg donors and surrogates to help them have a child," points out Phillips, who has been named a "Super Lawyer" and one of the top 50 female attorneys by *Philadelphia Magazine*. "Of course they need to have an enforceable contract to make it clear that third party donors and surrogates don't have parental rights or child support obligations. It's the attorney's job to explain and structure an agreement that meets relevant state guidelines."

The laws are easier to interpret when matters involve a couple who has used in-vitro fertilization to

produce a child from their own egg and sperm – making them the clear biological parents but ones who may have to contend with a surrogate who changes her mind and decides she wants to keep the baby. People may remember the Baby M case from New Jersey. The issues get even more complex when a surrogate is engaged to carry a child formed from egg and sperm provided by outside donors, especially when they live in different states. Phillips posits the situation where the parents seeking the baby are Pennsylvania residents. The sperm donor is from New Mexico and the egg donor is from Massachusetts. The surrogate, a New Jersey resident, wants to keep the baby. The rights in such a situation must be addressed from the very beginning in a surrogacy contract to avoid the problems at the birth of the child. “That is a circumstance which is extremely complicated, but there are many similar situations that underline why it’s so important to draft an airtight surrogacy contract,” advises Phillips. “There must be very specific definitions concerning the parents and their rights, the surrogate and her rights, who is responsible for what at different times during the pregnancy and what happens after the birth – especially if there are medical problems.”

Phillips, a former family therapist, believes the Pennsylvania legislature should adopt the UPA because many gay parents are opting for surrogacy – something that presents a new slant to this body of emerging law. Two male partners living abroad wanted to have a friend living in Pennsylvania donate her eggs and carry their baby as a surrogate. After contacting Phillips, they quickly realized they’d have to consider some weighty issues. Should sperm from one partner or the other – or both – be used, and how would that impact their parental rights should they split up in the future? And what if the surrogate later decided she wanted to keep the baby? In what State should the surrogate give birth? New Jersey or Pennsylvania? New Jersey has adopted the UPA; Pennsylvania has not.

“People contemplating a surrogacy situation have to be careful,” adds Phillips, a frequent author and lecturer with offices in Philadelphia, Montgomery County, and in Haddonfield, N.J. “If a couple’s surrogate comes from a different state, they need to make sure their lawyer is familiar with the laws of that State.”

The recent controversy over the fertility doctor who implanted numerous eggs resulting in the birth of octuplets brings into clear focus another complication of ART – selective reduction of fertilized eggs. Surrogates and biological parents alike must be aware of each other’s beliefs and attitudes toward selective reduction and address that issue (as well as other issues such as potential medical problems, health insurance and financial responsibilities) early on in the contract.

Phillips notes the hard truth: “If a surrogate doesn’t have the same apparent interests and expectations as the biological parents at the outset, it’s better not to enter into any agreement with that surrogate in the first place. In these kinds of emotional matters,” she says, “it’s hard enough to predict what might happen, but heartbreaking problems can at least be minimized by making sure that parents, surrogates, doctors and hospital personnel are all crystal clear as to everyone’s rights and responsibilities.”

“Because many people who opt for surrogacy have dealt with the frustration of infertility and the trauma of miscarriage and the emotional and financial toll of fertility treatments, they are often too willing to overlook things they shouldn’t,” notes Phillips. “All they know is they want to get from Point A to Point Z. An experienced attorney who has dealt with the surrogacy situation has to counsel about possible issues which may arise, giving them all of the pros and cons of surrogacy and preparing an agreement that everyone understands is binding.”

For more information on this area of law, visit <http://www.mydivorceattorney.com> or contact Phillips at 215-568-7757.

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