

M I C H I G A N FAMILY LAW JOURNAL

A PUBLICATION OF THE STATE BAR OF MICHIGAN FAMILY LAW SECTION • KENT L. WEICHMANN, CHAIR

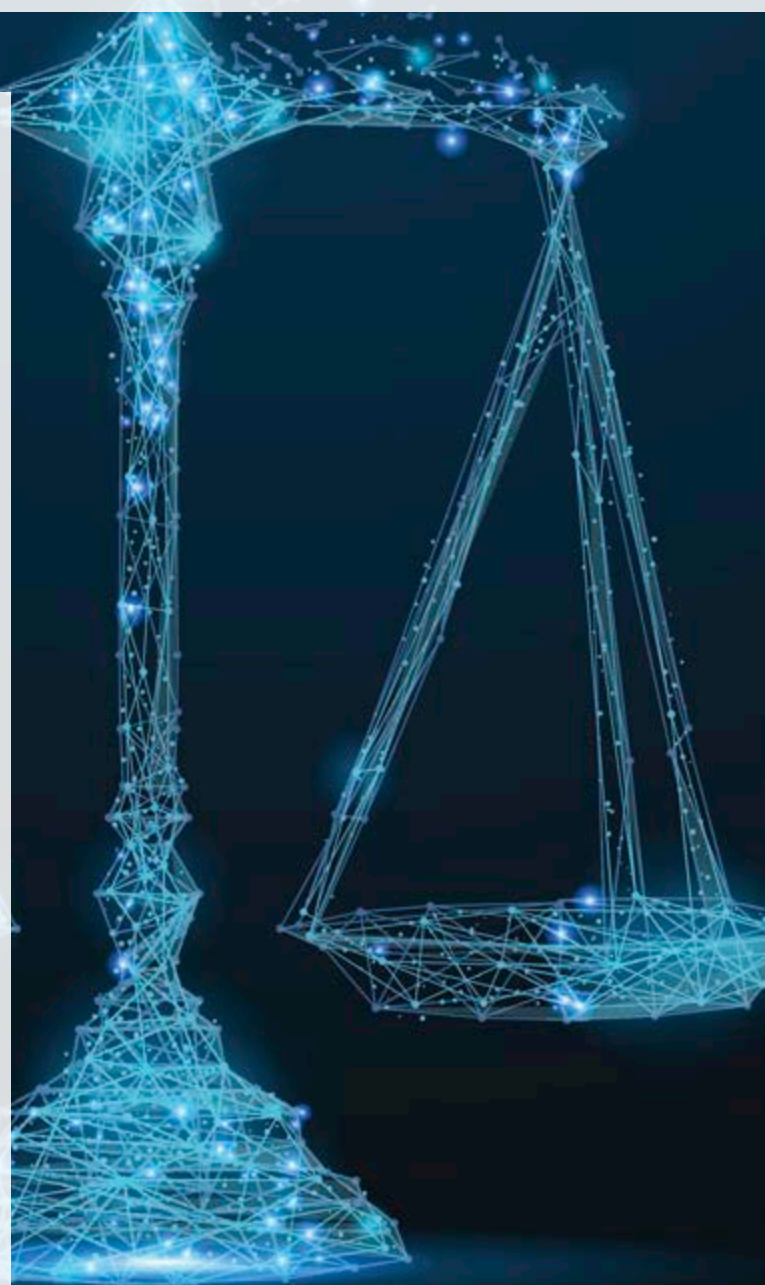
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Technology Special Issue |



ASSISTED REPRODUCTIVE TECHNOLOGY IN MICHIGAN: THE STORY OF THE LEGAL TORTOISE AND THE SCIENTIFIC HARE

BY JOANNE R. LAX AND CHRISTYN M. SCOTT

The science of third-party reproduction, also called donor-assisted reproduction, has far outpaced the confines of Michigan law. As a result, infertile couples, individuals, and same-sex couples using third-party reproduction in Michigan do not always have a clear path to legal parenting. This vacuum in Michigan law presents both a challenge for Michigan attorneys who practice in assisted reproductive technology (ART) and an opportunity for exciting legal creativity.

The Science of Third Party Reproduction

Third-party reproduction is broadly defined as any technique in which either DNA or gestation is provided by someone who is not the person or couple who intend to parent the child. This comes in several forms that vary in their medical and legal complexity.

Artificial insemination with donor sperm is the oldest such technique. Reportedly, it was initially used in humans in the mid-1890s.¹ The use of frozen donated sperm emerged in the 1970s along with the establishment of commercial sperm banks.² Sperm donors can be known to the intended parents or anonymous, but more legal issues exist with known donors than anonymous donors.

Egg donation was first used in the United States in the early 1980s.³ In this procedure, the donor takes oral and injectable medications to control her ovulation cycle and stimulate egg production. When medically appropriate, eggs are surgically removed from the donor's ovaries. The removed eggs are combined with sperm (either the intended father's or a donor's) through in vitro fertilization (IVF) to create pre-embryos. The pre-embryos are then implanted in a female to gestate.

Initially, eggs were donated contemporaneously with the creation of the pre-embryos. Recently, however, technological advances have allowed donated eggs to be frozen, like sperm, for future creation of pre-embryos. Either way, the resulting pre-embryos can be transferred immediately into the female or themselves frozen for future implantations. Like sperm donors, egg donors can be known or anonymous.

Surrogacy emerged in the mid-1970s.⁴ It comes in two varieties.

The earliest form is known as traditional surrogacy. In this variety of surrogacy, the surrogate mother is also the genetic mother of the child. In traditional surrogacy, a surrogate mother is artificially inseminated with sperm from the intended father or a donor and gestates a child that will be parented by the intended father and his spouse. While this form of surrogacy is presently disfavored because of its legal and social complexity, it is no more or less lawful in Michigan than the second form of surrogacy – gestational surrogacy.

In gestational surrogacy, eggs and sperm are combined in vitro to create a pre-embryo that is then implanted in the gestational carrier. Often the eggs and sperm come from the intended parents, but they can also be donated by someone other than the gestational carrier. The gestational carrier has no genetic relationship to the child she carries, but contributes the nine months of gestation. Upon birth, the intended parents take custody of the child and become the legal parents to the exclusion of the gestational carrier.

Either form of surrogacy is only lawful in Michigan if the surrogate is not compensated for her services.⁵

Embryo donation (sometimes erroneously called embryo adoption) rounds out the presently available forms of third-party reproduction. Couples or individuals may not need to use all of the pre-embryos that they created and froze as part of an ART procedure (third party or otherwise). These couples or individuals may elect to donate some of these pre-embryos to someone else (the intended parents in the donation process) so that the recipients can themselves parent a child.

The hallmark of third-party reproduction is that the intended parents do not perform both the genetic and gestational function of establishing a pregnancy. Occasionally they perform neither function. But distinguish these situations from so-called “three parent babies,” in which a single child has three genetic parents. An evolving technique known as mitochondrial DNA replacement permits DNA from two women to be combined in a single egg or embryo. The technique is

intended to prevent the resulting child from having serious, sometimes life limiting diseases caused by defective mitochondrial DNA in the intended mother's egg. Mitochondrial DNA replacement raises serious ethical and legal questions beyond those raised in more commonly used varieties of third-party reproduction because of the third genetic parent and because the changes to the DNA are passed down to the child's future progeny. For these reasons, mitochondrial DNA replacement is not yet lawful in the United States even though it is lawful in some other countries.

The Legalities of Third-Party Reproduction

Egg and Sperm Donation

With a well-drafted contract, the legal parenting of people using sperm or egg donation can be reasonably protected from the third-party donor. No Michigan statute or case expressly permits such contracts, but by the same token, no Michigan statute or case restricts or prohibits them either.

Married heterosexual couples have additional protection through a Michigan statute. MCL 333.2824 states: "(6) A child conceived by a married woman with consent of her husband following the utilization of assisted reproductive technology is considered to be the legitimate child of the husband and wife."

The same additional protection is less clear for unmarried individuals or couples, or even married same-sex-couples. Unmarried individuals and couples (of any sexual orientation) are not within the coverage of MCL 333.2824 at all. If these hopeful parents desire additional protection beyond the donation contract, they can seek an individualized court order. Married same-sex couples are in a grey area with respect to the application of MCL 333.2824. Common sense and solid legal arguments suggest that the marriage equality decision in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), should extend the protection of MCL 333.2824(6) to same-sex couples. But to date, neither the Michigan legislature nor any Michigan court has clarified whether the terms "married woman" and "husband" in the statute can be read as a gender-neutral term like "spouse." The Michigan Law Revision Commission has recommended simple textual changes to many laws that use the terms "wife," "married woman," and "husband" in order to conform Michigan law to the *Obergefell* decision, but it has yet to do so for MCL 333.2824. The Commission claimed that this law raises policy issues that need to be carefully addressed by the Legislature. Until such clarification, same-sex-couples who want additional protection beyond the terms of a sperm or egg donation contract may opt to seek an individualized court order.

Surrogacies

The Michigan Surrogate Parenting Act⁶ unambiguously states that surrogate parenting contracts are "void and unenforceable."⁷ Accordingly, no Michigan court can force a party to a surrogate parenting contract to comply with its terms. Intended parents therefore have virtually no recourse

if either a traditional surrogate or gestational carrier reneges on the surrogacy arrangement before or after a pregnancy is established. Furthermore, the Surrogate Parenting Act states that all issues of custody of a child involved in a surrogate parenting contract will be decided using "the best interest of the child" standard.⁸ No reported Michigan decision has applied that familiar test to the unfamiliar territory of surrogacy.

Importantly, surrogate parenting contracts are illegal and subject to criminal enforcement in Michigan if the surrogate is compensated for her services.⁹ Carved out of this are payments to reimburse "expenses incurred as a result of the pregnancy" and "medical expenses," which are not defined as "compensation" and are thus lawful to pay to a surrogate.¹⁰ As a result of this limitation on compensation, most (but not all) surrogacies in Michigan involve family or friends of the intended parents who have a natural rationale for serving without compensation. Some intended parents are lucky enough to find a previously unknown surrogate with the inherent compassion to act altruistically – but it is essential that the ART attorney carefully educate all parties about the prohibition in the Surrogate Parenting Act and even police compliance throughout the IVF procedure and gestation. The criminal penalties associated with involvement in a surrogate parenting contract for compensation fall upon the attorney as well as the parties.¹¹

Despite the limitations in the Surrogate Parenting Act, appropriately constructed surrogacies are both lawful and successful in Michigan. The arrangement must not involve compensation, and the parties must understand that courts will not enforce the terms of their arrangement if someone breaches. Successful surrogacies in Michigan work because of the parties' personal commitment to each other and because of the willingness of many judges to establish legal parenting for an arrangement that is properly constructed. Judicial intervention is required because the surrogacy agreement cannot be self-executing due to the restrictions in the Surrogate Parenting Act.

Some judges in Michigan use their declaratory and equitable powers to enter "pre-birth orders" declaring parentage and custody, when the parties all agree and there is thus no need for enforcement of a surrogate parenting contract. But others reject this approach in the absence of clear legislative standards, and require that the parties use a relative or direct placement adoption process under the Adoption Code.¹² Some factual circumstances require a combination of these approaches. But in the end, the intended parents involved in a properly constructed surrogacy can obtain the status of legal parents regardless of the approach taken.

Unquestionably, infertile couples, individuals, and same-sex couples in Michigan would benefit from a revision and modernization of our surrogacy law. Our neighboring state, Illinois, has an efficient and effective statute addressing legal parenting resulting from surrogacies which has worked well since its enactment.¹³ Maine has also developed a comprehensive approach to legal parenting in all kinds of ART procedures.¹⁴ Both of

these jurisdictions, among others that have addressed surrogacies, could be a model for the Michigan legislature.

Embryo Donation

MCL 333.2824(6) provides protection to a married couple using embryo donation to establish a pregnancy. Most dictionaries define “conceive” to mean “become pregnant.”¹⁵ Although the intended parents did not produce and fertilize an egg to create a child, the intended mother becomes pregnant through the ART process of transferring the donated cryopreserved pre-embryo into her uterus for gestation, birth and parenting. A carefully constructed contract between the donor and intended parents supplements the statute by resolving issues not legislatively addressed.

Like sperm and egg donation, MCL 333.2824(6) does not provide clear protection for individuals, unmarried couples or even married same-sex couples using embryo donation. As discussed above, individualized court orders can provide additional protection beyond the donation contract, if the parties desire this.

Cross Jurisdictional Issues

In any third-party reproduction, it is important to understand the law in the donor’s or surrogate’s home state, the state where an IVF clinic is located, and state where the child will be born. Some states have specific requirements that must be followed in order to protect intended parents’ legal parentage. Thorny conflict of laws issues arise when Michigan intended parents want to work with a surrogate in a state that permits compensation, or vice-versa. Often the best practice is to consult an ART attorney in the non-Michigan state or states.

Disputes Between Intended Parents

Couples who freeze pre-embryos for future pregnancy attempts can find themselves battling over custody of the pre-embryos when their relationship dissolves. The Michigan courts seem to prefer consensual, contractual resolutions to these disputes.¹⁶

But not every couple is prescient enough to address future dispositional issues at the time that the pre-embryos are created, and some couples are unable to achieve consensus in the heat of a divorce. Based upon the above cases, ART attorneys should not only be concerned with the initial donor contract, but also with the documents and consent forms that the intended parents sign at their IVF clinics regarding disposition of cryopreserved pre-embryos. These are the ART equivalent of pre-nuptial agreements, with all their attendant emotional stressors and complexity. Couples can often benefit from ART counseling generally available through their IVF clinics.

Additionally, some of these issues can be avoided by freezing eggs and sperm separately, rather than creating pre-embryos. If the relationship dissolves, each party can take possession and control of their own genetic material and subsequently use it as they please.

Conclusion

Michigan is long overdue for a modernization of its laws dealing with third-party reproduction. Unless and until that happens, Michigan ART attorneys need to hone their drafting and advocacy skills to best protect their clients in an uncertain legal environment.

About the Authors

Joanne R. Lax started her legal career at Dykema Gossett PLLC in 1978 after graduating magna cum laude from the University of Michigan Law School, and has practiced at Dykema ever since. She combines health care law with her ART/adoption practice. She has assisted hundreds of individuals in Michigan and across the country to build their families through surrogacy, gamete donation, and embryo donation, as well as through adoption. For more information, go to https://www.dykema.com/professionals-joanne_lax.html.

Christyn Scott is a seasoned litigator with years of courtroom experience in both state and federal courts. Christyn enjoys working with clients who utilize a surrogate to complete their family, and has appeared before numerous judges around the state to obtain favorable outcomes for her clients in this area of the law. For more information, go to https://www.dykema.com/professionals-Christyn_Scott.html.

Endnotes

- 1 Wendy Kramer, *A Brief History of Donor Conception*, The Huffington Post (May 10, 2016, 03:29 AM; updated Dec. 06, 2017), https://www.huffingtonpost.com/wendy-kramer/a-brief-history-of-donor-conception_b_9814184.html.
- 2 *Id.*
- 3 *Id.*
- 4 *From the Bible to Today: The History of Surrogacy*, Surrogate.com, <https://surrogate.com/about-surrogacy/surrogacy-101/history-of-surrogacy/> (last visited Jan. 24, 2018).
- 5 MCL 722.859.
- 6 MCL 722.851 *et seq.*
- 7 MCL 722.855.
- 8 MCL 722.861.
- 9 MCL 722.859.
- 10 MCL 722.853(a).
- 11 MCL 722.859(3).
- 12 MCL 710.21 *et seq.*
- 13 *See* 750 ICLS 41/1, *et seq.*
- 14 *See* Sec. 1.19-A MRSA, c. 61.
- 15 *See* Merriam-Webster.com, <https://www.merriam-webster.com/dictionary/conceive?src=search-dict-bed> (last visited on Jan. 24, 2018).
- 16 *See Stratford v. Stratford*, No. 300925, 2012 Mich. App. LEXIS 605 at 3-4 (*unpublished*, Feb. 16, 2012); *Bohn v. Ann Arbor Reprod. Med. Assocs., P.C.*, No. 213550, No. 213551, 1999 Mich. App. LEXIS 2210 (*unpublished*, Dec. 17, 1999); and *Karungi v. Ejalu*, No. 337152, 2017 Mich. App. LEXIS 1514 (*unpublished*, Sep. 26, 2017).