

# CONTENTS

<b>INTRODUCTION</b>	<b>XVII</b>
<b>ACKNOWLEDGMENTS</b>	<b>XIX</b>
<b>1 ASSISTED REPRODUCTION AND THE DIVERSITY OF THE MODERN FAMILY</b>	<b>1</b>
§ 1.1 Assisted Reproduction Technology Today . . . . .	1
§ 1.2 ART and Marriage . . . . .	5
§ 1.3 Evolution of the Family . . . . .	8
§ 1.4 The Right of Privacy, Family Choice, and ART. . . . .	11
§ 1.5 Assisted Procreation and the Modern Family . . . . .	13
§ 1.6 Parentage and ART under the UPA . . . . .	18
§ 1.7 Parentage and the ABA Model Act Governing Assisted Reproductive Technology (2008) . . . . .	22
§ 1.8 The U.P.C. and ART . . . . .	24
§ 1.9 The Difficulty Faced by Some Families in Obtaining ART Services . . . . .	26
§ 1.10 The Need for Legislation . . . . .	28
<b>2 INTRAUTERINE INSEMINATION</b>	<b>31</b>
§ 2.1 Intrauterine Insemination Generally. . . . .	31
§ 2.2 Understanding the Terminology. . . . .	32
§ 2.3 Procreation and Intrauterine Insemination . . . . .	35
§ 2.4 Sperm Donor for Assisted Conception Is Not a Parent . . . . .	37
§ 2.5 The Anonymous Donor . . . . .	38
§ 2.6 The Known Sperm Donor . . . . .	42
§ 2.7 Contracts Exempting Known Sperm Donors from Support Obligations . . . . .	49

VIII CONTENTS

§ 2.8	Consent of the Spouse to Insemination of other Spouse with Donor Sperm . . . . .	51
§ 2.9	Specific Parentage Issues with Same-Sex Partners and Intrauterine Insemination. . . . .	54
§ 2.10	Specific State Statutes Governing Consent of Husband (Legal Spouse) to Use of Donor Sperm . . . . .	55
	Alabama . . . . .	56
	Alaska . . . . .	56
	Arizona . . . . .	56
	Arkansas . . . . .	56
	California . . . . .	57
	Colorado . . . . .	57
	Connecticut . . . . .	57
	Delaware . . . . .	57
	District of Columbia . . . . .	57
	Florida . . . . .	57
	Georgia . . . . .	58
	Hawaii . . . . .	58
	Idaho . . . . .	58
	Illinois . . . . .	58
	Indiana . . . . .	58
	Iowa . . . . .	58
	Kansas . . . . .	58
	Kentucky . . . . .	59
	Louisiana . . . . .	59
	Maine . . . . .	59
	Maryland . . . . .	59
	Massachusetts . . . . .	59
	Michigan . . . . .	59
	Minnesota . . . . .	59
	Mississippi . . . . .	60
	Missouri . . . . .	60
	Montana . . . . .	60
	Nebraska . . . . .	60
	Nevada . . . . .	60
	New Hampshire . . . . .	60
	New Jersey . . . . .	61
	New Mexico . . . . .	61
	New York . . . . .	61

North Carolina . . . . . 61

North Dakota . . . . . 61

Ohio . . . . . 61

Oklahoma . . . . . 61

Oregon . . . . . 62

Pennsylvania . . . . . 62

Rhode Island . . . . . 62

South Dakota . . . . . 62

South Carolina . . . . . 62

Tennessee . . . . . 62

Texas . . . . . 62

Utah . . . . . 63

Vermont . . . . . 63

Virginia . . . . . 63

Washington . . . . . 63

West Virginia . . . . . 63

Wisconsin . . . . . 63

Wyoming . . . . . 64

§ 2.11 ABA Model Act on ART Position on Spousal Consent . . . . . 64

§ 2.12 UPA Position on Right of Spouse to Dispute Parentage . . . . . 65

§ 2.13 Application of Equitable Estoppel or Ratification Theories . . . . . 68

§ 2.14 Consent or Estoppel in Nonmarital Cases . . . . . 71

§ 2.15 Insemination by Intercourse Distinguished . . . . . 73

§ 2.16 No Legal Distinction Between Intrauterine  
Insemination and IVF. . . . . 75

§ 2.17 Intrauterine Insemination by Persons under Confinement . . . . . 76

§ 2.18 Posthumous Reproduction by Intrauterine Insemination . . . . . 77

§ 2.19 Ownership of or Access to Cryopreserved Sperm . . . . . 80

§ 2.20 Liability Issues and Intrauterine Insemination . . . . . 82

§ 2.21 Conclusion . . . . . 85

**3 IN VITRO FERTILIZATION 87**

§ 3.1 The In Vitro Fertilization Procedure . . . . . 87

§ 3.2 Legal Regulation of IVF. . . . . 91

§ 3.3 Gamete Intrafallopian Transfer Distinguished from IVF. . . . . 94

§ 3.4 Intrauterine Insemination Distinguished from IVF . . . . . 94

§ 3.5 Preimplantation Genetic Diagnosis of Embryos . . . . . 95

§ 3.6 Multiple Embryo Implantation. . . . . 97

§ 3.7 Cryopreservation . . . . . 98

§ 3.8 Cryopreserving Embryos in Anticipation  
of Loss of Fertility . . . . . 100

§ 3.9 Multiple Legal Issues Arising out of IVF. . . . . 101

§ 3.10 Checklist of the Purposes and Uses of IVF . . . . . 103

§ 3.11 Legal Status of the Egg or Sperm Donor  
When IVF Is Used for Assisted Conception . . . . . 104

§ 3.12 Custody, Visitation, and Support Disputes  
Arising from IVF . . . . . 106

§ 3.13 Divorce and Decision-Making about the Embryos  
Produced for IVF . . . . . 107

§ 3.14 Conclusion . . . . . 112

**4 CRYOPRESERVED EMBRYOS 113**

§ 4.1 Cryopreserved Embryos. . . . . 113

§ 4.2 Embryo Donation . . . . . 115

§ 4.3 Embryo “Adoption” . . . . . 118

§ 4.4 Statutes and Case Law Relevant to Embryo Donation. . . . . 121

§ 4.5 The Intended Parent Theory . . . . . 125

§ 4.6 Public Policy Considerations . . . . . 127

§ 4.7 Embryo Creation . . . . . 128

§ 4.8 Donation for Research . . . . . 129

§ 4.9 Disposition of Embryos in Divorce Proceedings . . . . . 130

§ 4.10 Conclusion . . . . . 136

**5 SURROGACY 137**

§ 5.1 Surrogacy Generally. . . . . 137

§ 5.2 Traditional (or “Genetic”) Surrogacy. . . . . 138

§ 5.3 Gestational Surrogacy . . . . . 139

§ 5.4 Surrogacy Laws in the United States . . . . . 142

    Alabama. . . . . 145

    Alaska . . . . . 146

    Arizona . . . . . 146

    Arkansas . . . . . 148

    California. . . . . 149

    Colorado . . . . . 152

    Connecticut . . . . . 152

Delaware . . . . .	155
Florida . . . . .	156
Georgia . . . . .	158
Hawai'i . . . . .	158
Idaho . . . . .	158
Illinois . . . . .	158
Indiana . . . . .	160
Iowa . . . . .	161
Kansas . . . . .	162
Kentucky . . . . .	164
Louisiana . . . . .	164
Maine . . . . .	165
Maryland . . . . .	165
Massachusetts . . . . .	166
Michigan . . . . .	169
Minnesota . . . . .	171
Mississippi . . . . .	172
Missouri . . . . .	172
Montana . . . . .	172
Nebraska . . . . .	173
Nevada . . . . .	173
New Hampshire . . . . .	175
New Jersey . . . . .	175
New Mexico . . . . .	177
New York . . . . .	177
North Carolina . . . . .	180
North Dakota . . . . .	180
Ohio . . . . .	181
Oklahoma . . . . .	182
Oregon . . . . .	182
Pennsylvania . . . . .	183
Rhode Island . . . . .	184
South Carolina . . . . .	184
South Dakota . . . . .	184
Tennessee . . . . .	184
Texas . . . . .	186
Utah . . . . .	187
Vermont . . . . .	188
Virginia . . . . .	189

Washington . . . . . 192  
Washington, DC . . . . . 195  
West Virginia . . . . . 196  
Wisconsin . . . . . 197  
Wyoming . . . . . 198  
§ 5.5 Conclusion . . . . . 198

**6 REGULATION OF ASSISTED REPRODUCTIVE TECHNOLOGY 199**

§ 6.1 Statutory Regulation Generally . . . . . 199  
§ 6.2 Legal Definitions of Infertility . . . . . 202  
§ 6.3 Required Medical and Health Insurance Coverage . . . . . 204  
§ 6.4 Reporting Requirements. . . . . 210  
§ 6.5 Religious Exemptions . . . . . 211  
§ 6.6 Standards of Practice . . . . . 211  
§ 6.7 Compulsory Revelation of Success Rates . . . . . 212  
§ 6.8 Medical Evaluation of Gamete Donors or Recipients . . . . . 213  
§ 6.9 Statutory Regulation of Surrogacy . . . . . 214  
§ 6.10 Taxation Issues in Assisted Reproduction . . . . . 217  
§ 6.11 Medical Ethics Standards. . . . . 222  
§ 6.12 International Regulation. . . . . 224  
§ 6.13 Conclusion . . . . . 227

**7 POSTHUMOUS REPRODUCTION 229**

§ 7.1 Posthumous Reproduction Generally. . . . . 229  
§ 7.2 Preserving the Possibility of Posthumous Reproduction . . . . . 232  
§ 7.3 Inheritance . . . . . 236  
§ 7.4 Who Is a Child or Issue? . . . . . 237  
§ 7.5 Uniform Laws and Posthumous Children . . . . . 239  
§ 7.6 The ABA Model Act and Posthumous Reproduction . . . . . 242  
§ 7.7 Specific State Laws Defining the Inheritance Rights  
of Posthumously Conceived Children . . . . . 243  
§ 7.8 Court Decisions Involving Posthumously  
Conceived Children . . . . . 247  
§ 7.9 Conclusion . . . . . 252

<b>8</b>	<b>CELLULAR MANIPULATION: REPRODUCTIVE CLONING, MRT, AND CRISPR</b>	<b>253</b>
§ 8.1	The Future of Assisted Reproduction . . . . .	253
§ 8.2	Human Cloning . . . . .	255
§ 8.3	Explanation of Cloning Methods . . . . .	256
§ 8.4	The American Bar Association’s Position on Reproductive Cloning. . . . .	257
§ 8.5	Laws Governing Human Cloning. . . . .	258
§ 8.6	Human Cloning and Public Policy . . . . .	265
§ 8.7	Mitochondrial Replacement . . . . .	267
§ 8.8	Gene Editing. . . . .	269
§ 8.9	The Chimera Issue . . . . .	270
§ 8.10	The Feasibility of Maintaining Bans on Human Cloning and Genetic Manipulation . . . . .	271
§ 8.11	Conclusion . . . . .	273
<b>9</b>	<b>STANDARDS OF CARE: LAW, LIABILITY, AND ASSISTED REPRODUCTIVE TECHNOLOGY</b>	<b>275</b>
§ 9.1	The Potential for Injury in Use of Assisted Reproductive Technology. . . . .	275
§ 9.2	Consent Issues . . . . .	277
§ 9.3	Wrongful Life Theories and the Damages Dilemma. . . . .	279
§ 9.4	Damage Claims for Wrongful Birth. . . . .	285
§ 9.5	Failure to Warn Theories . . . . .	286
§ 9.6	Negligence Theories. . . . .	288
§ 9.7	Intentional Misconduct. . . . .	291
§ 9.8	Deceptive Advertising . . . . .	295
§ 9.9	Checklist of Breach of Duty Theories . . . . .	297
§ 9.10	Breach of Contract Theories . . . . .	299
§ 9.11	Evolution of Standards. . . . .	300
§ 9.12	The ABA Model Act Governing Assisted Reproductive Technology and Standards of Liability . . . . .	301
§ 9.13	Discrimination . . . . .	302
§ 9.14	Legal Malpractice. . . . .	303

**10 ASSISTED REPRODUCTION CONTRACTS AND DOCUMENTS 305**

§ 10.1 Assisted Reproduction Contracts Generally . . . . . 305

§ 10.2 The Contents of the Contract . . . . . 306

A. Generally . . . . . 306

B. Gamete Donor Contracts . . . . . 309

C. Contracts for Surrogacy . . . . . 310

D. Other Contracts. . . . . 313

§ 10.3 Consent to Use of Gametes and Parentage. . . . . 313

§ 10.4 Assisted Reproduction Involving Family Members. . . . . 315

§ 10.5 Agreements on Expenses . . . . . 316

§ 10.6 Breach of Contract . . . . . 319

§ 10.7 Representing Parties to the Agreement . . . . . 320

§ 10.8 Legality of Assisted Reproduction Contracts. . . . . 323

§ 10.9 Choice of Applicable Law . . . . . 326

§ 10.10 Utility of Assisted Reproduction Contracts . . . . . 328

§ 10.11 Fertility Clinic Contracts . . . . . 330

§ 10.12 Establishing Parentage in Gestational Surrogacy Cases . . . . . 332

§ 10.13 Checklist of Contents to Obtain Pre-Birth  
     Order of Parentage . . . . . 335

§ 10.14 Judgments of Parentage . . . . . 337

§ 10.15 Potential Hurdles to Obtaining a Pre-Birth  
     Order of Parentage . . . . . 337

§ 10.16 Estate-Planning Documents . . . . . 340

§ 10.17 Document Checklist. . . . . 342

§ 10.18 Conclusion . . . . . 345

**11 THE AMERICAN BAR ASSOCIATION’S MODEL ACTS  
 GOVERNING ASSISTED REPRODUCTIVE TECHNOLOGY 347**

§ 11.1 The ABA Model Act on ART Generally . . . . . 347

§ 11.2 The ABA Model Act on ART Compared  
     to the Uniform Laws . . . . . 350

§ 11.3 What the ABA Model Act on ART Addresses . . . . . 351

§ 11.4 The ABA Model Act on ART and the Uses of ART . . . . . 352

§ 11.5 Purpose of the ABA Model Act on ART . . . . . 354

§ 11.6 Terminology of the ABA Model Act on ART . . . . . 355

§ 11.7 Informed Consent and the Required Disclosures. . . . . 358

§ 11.8 The Status of Donors . . . . . 359



§ 11.9 Use of the Gametes of Incompetent or Deceased Persons . . . .	362
§ 11.10 Mental Health Consultation of All Participants . . . . .	363
§ 11.11 Disposition of Embryos . . . . .	365
§ 11.12 The Status of Children of Assisted Reproduction . . . . .	366
§ 11.13 Surrogacy Arrangements . . . . .	367
§ 11.14 Infertility and Insurance Issues . . . . .	373
§ 11.15 Regulating Providers of ART Services. . . . .	374
§ 11.16 The ABA Model Act Governing Assisted Reproductive Technology Agencies . . . . .	376
<b>GLOSSARY</b>	<b>381</b>
<b>INDEX</b>	<b>391</b>