Are You a SmARTy Pants? Hot Topics in Insurance, Legislation, and Case Law

Thursday, May 2, 2019

Moderator:
Michael T. Fraser

Speakers:
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Michael Fraser is a 2005 graduate of Stetson University and one-time member of the Stetson varsity tennis team. He graduated with honors from the Shepard Broad Law Center at Nova Southeastern University in Fort Lauderdale, Florida, where, among other things, he served as the Editor-in-Chief of the Nova Law Review.

Following law school, Mr. Fraser was a litigator in Florida until August 2014, when he opened his own law firm in his hometown of Sacramento, California. Mr. Fraser maintains a noted litigation practice, but concentrates his energy on ART law and helping his clients navigate the surrogacy process.

When not practicing law, Mr. Fraser is an avid golfer, tennis player, and volunteer for Guide Dogs for the Blind, having raised guide puppies for the organization.

Virginia S. Hart
Valencia, CA
Virginia Hart is the owner and CEO of ART Risk Financial and Insurance Solutions. ART Risk specializes in providing insurance and financial solutions for Intended Parents that are both cost effective and minimize the risk. Ms. Hart has been an insurance broker for the past 24 years, with the last 15 years specializing in insurance for all aspects of assisted reproduction and family building. She is licensed in all 50 states allowing her to work with clients regardless of location to find the best solution whether it be via commercial insurance, specialty products, or financial management. Ms. Hart is passionate about the role of financial planning and risk management as part of the family building process.

Virginia has spoken at numerous conferences for her expertise in the area of surrogacy an insurance. She has a BA in Communication Studies from University of California, Los Angeles. She lives in Santa Clarita, California with her husband Jim. She is the mother of three children, Sarah, who has grown and flown, Thomas and Anna both of whom attend college in the Northeast.

Maureen McBrien, Esq.
Newton, MA
Maureen McBrien is a family law practitioner at Brick, Jones, McBrien & Hickey LLP in Newton, Massachusetts. In addition to general family law matters, Maureen's practice also involves litigating, mediating and / or acting as a consultant on family law related issues that arise from the use of assisted reproductive technology. Maureen is a co-author with Bruce Hale of the third edition of Assisted Reproductive Technology published by the American Bar Association.

Colleen M. Quinn, Esq.
Richmond, VA
Colleen Marea Quinn has represented thousands of adopting parents, birth parents, adoptees, agencies, intended parents, surrogates, gestational carriers, donors and clinics since 1989. For her work, she has been honored with top “Women Leader in the Law” (in Family Law & Personal Injury 2016-18 by Legal Leaders-American Lawyer and National Law Journal), by “Best Lawyers in America” 2014-19 by US News & World Report, as the “Adoption Attorney of the Year” By Lawyers Monthly magazine 2018, as recipient of the AAAA President’s Award 2018, MRWBA Women of Achievement Award 2017, Richmond NAWBO “Entrepreneur of the Year” award 2016, Virginia State Bar Family Law Service Award 2015, “Top 100 Trial Lawyers” by National Trial Lawyers 2012-18, YWCA Outstanding Woman Award for Law & Government 2011, and much more. After graduating from the College of William and Mary and UVA Law School, Quinn clerked for the Chief Justice of the Virginia Supreme Court, The Hon. Harry L. Carrico. She is a Fellow and Past-President (2016-17) of the Academy of Adoption & Assisted Reproduction Attorneys (“AAAA”) serving on the Board of Trustees (2006-10, 2013-18), on the Family Formation Charitable Trust Board (2016-
18) and in many more positions. She serves/has served: as program chair & speaker for numerous adoption and ART seminars/programs; an expert witness in adoption law and in surrogacy law; a certified Guardian ad Litem; a Fellow of LCA, a member of the LGBT Bar Family Law Institute, VEBA, the ABA ART, Adoption & Alternative Families Committees, ASRM, RESOLVE, AAJ, RBA, VSB and VTLA (serving as Chair/Co-Chair for many Committees).
The Times they are a changin’

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ABA Family Law Conference May 2019

The past decade has seen many changes in insurance as it pertains to Assisted Reproduction Technology, more specifically, surrogacy maternity coverage. The pendulum as swung from very little coverage in the Pre-ACA days, to the early years of the ACA when surrogate maternity friendly plans were abundant, to the current state of the ACA when surrogate maternity friendly plans are becoming scarce. As surrogacy becomes an accepted solution to parenthood what does the future hold for the insurance of the surrogate mothers?

Prior to the Affordable Care Act being enacted plans that covered maternity on the individual market, were difficult, if not impossible to find. Three in four health plans in the non-group insurance market did not cover delivery and inpatient maternity care in 2013. Insurance providers may have imposed a waiting period before maternity benefits would be available. In order to cover the maternity costs and make up for the lack of commercial insurance available, specialty insurance products were introduced into the marketplace. While the plans did cover the risk, and minimize the financial impact to the intended parents, the cost of the plans were quite high and often priced the IP’s out of the market.

CHANGE 1 – THE LAW

The Patient Protection and Affordable Care Act – shortened to the ACA - commonly known as Obamacare was signed into law on March 23, 2010. Three major provisions of the bill positively affected insuring surrogate maternity in the US. The first is that individual insurance is mandated and must be available in all 50 states. The second is no pre-existing conditions. A person could not be declined medical insurance due to past or present medical issues. This allowed insureds who had received infertility treatment in the past (a previous surrogate) or was currently pregnant to enroll in an insurance plan to cover her maternity costs. And lastly, and most importantly, the ACA - 42 U.S. Code § 18022 - listed 10 essential health benefits that must be included in all health plans. One of the 10 minimum essential benefits being maternity coverage for all women. The law made no distinction in coverage for surrogates or non-surrogates, if you were a woman and you had coverage, you had maternity care.

Due to the ACA in 2014 plans were available in 48 states that covered maternity and had no restrictive language regarding covering a member that was acting as a surrogate. It must be noted that within the 48 states there were plans that had restrictive language regarding surrogacy coverage, however, there were other plans that had no restrictions. If maternity is federally mandated covered benefit, then how can surrogacy be excluded? The answer, if the benchmark plan excluded covering surrogate pregnancies, then the ACA plan was written that way and was
approved. This begs the question – did CMS – the portion of the government charged with overseeing the ACA just not understand what this language created – a plan that did not cover maternity for a subset of their members – or did it just slide through? The 2014 benchmark plans were taken from 2012 language – interestingly – some plans most notably Blue Cross Blue Shield of Florida changed their benchmark plan eliminating the language excluding surrogate pregnancy coverage. The ACA did create positive change in the maternity coverage for all women, including surrogates.

CHANGE 2 – AVAILABILITY

In 2014 there was an average of 5 insurers participating in each state. While New Hampshire and West Virginia had only 1 insurer, other states such as New York had 16. In 2015 there was an increase in insurer participation with an average of 6 insurers per state. With the increase in insurers, more surrogates were finding unrestrictive coverage with hospitals and physicians aplenty. In 2016 the average number of insurers was 5.6 ranging from one in Wyoming to 16 in Wisconsin and Texas. In 2017 the trend turned and many high-profile insurers – Anthem, Aetna, Cigna, Humana to name a few – exited the market due to large losses in the individual market. Due to this in 2017 the average number of insureds dropped to 4.3 ranging from one company in Alabama, Alaska, Oklahoma, South Carolina and Wyoming to 15 companies in Wisconsin. Although insurance company profits improved in 2018, insurers left the market place, or greatly restricted their coverage area believed to be due to the legislative and regulatory uncertainty. The average number of companies per state was 3.5 in 2018. This ranged from one company in eight states – Alaska, Delaware, Iowa, Mississippi, Nebraska, Oklahoma, South Carolina and Wyoming to more than 10 insurers in three states, Wisconsin, California, and New York. In 2018 profit margins continued to improve, insurers entered the market or expanded their service area. The average number of insurers in 2019 is 4.0 per state ranging from one carrier in 5 states – Alaska, Delaware, Mississippi, Nebraska and Wyoming to more than 10 in three states – California, New York and Mississippi.

Although there is an average of 4.0 insurance companies per state, many insurers do not participate statewide. Insurance carrier participation in all counties varies greatly within the states. Some insurers may only participate in one county, and rural areas tend to have fewer insurers. On average metro area counties have 2.3 insurers in 2019, compared to 1.8 insurers in non-metro counties. As the availability changed the ability to find health plans to cover a surrogate maternity also changed. When plans were abundant those plans that specifically excluded surrogate pregnancies were inconsequential, as there were insurers with no restriction to be utilized. As plans diminished, so did the choices. Attached Exhibit 1 shows the changes in availability of total insurance plans from 2014 to 2019.

A subset of availability is the availability of physicians and hospitals. As many of the name brand insurance carriers left the market, those left had smaller networks. To many, the remaining insurance carriers had inferior networks of providers. The smaller networks offer women fewer choices and therefore less access to care.

CHANGE 3 – EXCLUSIONARY CONTRACT LANGUAGE
The 10 Essential Benefits cover maternity benefits, this is clear and uncontested. However, that has not stopped insurers from placing language in their Evidence of Coverage to exclude maternity coverage for members acting as a surrogate. In 2019 ART Risk found 70 plans that had exclusionary language. There are other plans with known exclusions found in previous years that were not re-reviewed in 2019. The actual number of plans with exclusionary language is well over 100. Below are examples:

**Highmark of Delaware:**
For services for or related to surrogate pregnancy, including diagnostic screening, physician services, reproduction treatments and prenatal/delivery/postnatal services;

**Health First of Florida:**
Maternity services rendered a Covered Person who becomes pregnant as a Gestational Surrogate are excluded from Coverage. This exclusion applies to all expenses for prenatal, intra-partal (care provided during delivery and childbirth), and postpartum (care provided to the mother following delivery and childbirth) maternity/obstetrical care rendered to the Covered Person acting as a Gestational Surrogate.

**Pacific Source – Idaho and Oregon:**
Maternity charges incurred by a covered person acting as a Surrogate Mother are not covered charges. For the purpose of this plan, the newborn of a Surrogate Mother will not be considered an eligible dependent if the Surrogate Mother has entered into a contract or other understanding to which she relinquishes the newborn to intended parents following the birth.

**Blue Cross Blue Shield of North Carolina – New this year!**
Expenses INCURRED by any MEMBER who receives compensation from a third party in exchange for such medical procedure, such as surrogacy-related medical expenses 

**Blue Cross Blue Shield of Idaho** took another approach – they did not exclude a gestational carrier; however, they are excluded due to this clause:
Any services or supplies for which a Member would have no legal obligation to pay in the absence of coverage under the Contract or any similar coverage; or for which no charge or a different charge is usually made in the absence of insurance coverage or for which reimbursement or payment is contemplated under an agreement entered into with a third party.

Other carriers such as Harvard Pilgrim, Fallon Health Plan, BCBS of Kansas City, and Humana have a had exclusionary language for several years.

Equally as troublesome is language that is ambiguous. Does it or does it not exclude coverage for a member acting as a surrogate. In 2019, ART Risk found 93 such policies. Again, this does not include policies found to be ambiguous in previous years. Ambiguous language is language that is subject to interpretation and the policy does not define the terms surrogate pregnancy, or whether it applies to a member acting as a surrogate.
Highmark of Pennsylvania:
For services for or related to surrogate pregnancy, including diagnostic screening, physician services, reproduction treatments and prenatal/delivery/postnatal services;

Blue Cross Blue Shield of South Carolina:
Maternity Care – Benefits are available for all covered female members and are provided for pre- and postnatal care, including the hospitalization and related professional services for at least 48 hours after a vaginal delivery (96 hours following a Cesarean section) or the date of discharge from the Hospital — whichever occurs first. The day of delivery or Surgery is not counted in the 48 hours after vaginal delivery (96 hours for Caesarean Section). Maternity care does not include surrogate parenting; artificial insemination and in-vitro fertilization. Coverage is available under this Policy for a Newborn; please see sections on Eligibility for how to add your child and Covered Services: Newborn Child Coverage for the services and benefits available. Benefits may include services of a midwife and/or provided at a birthing facility. All Providers must be in-Network, licensed or certified as appropriate, and performing services within the license or certification. NOTE: The same exclusion regarding surrogate parenting is also included under infertility.

Ambetter Illinois, Nevada, North Carolina, Kansas, Missouri, Mississippi:
For or related to surrogate parenting

Oscar Health Plans in Arizona, Florida, Michigan and Texas:
Surrogate Mother Charges

It should be noted that exclusions and ambiguous language is found in employer sponsored plans as well. While approximately 80% of employer sponsored plans will cover a surrogate pregnancy, it is becoming more common for employers to include exclusionary language. For Self-Funded plans, exclusionary language is permissible. For those that are fully insured, it is questionable. In 2019 the number of policies with exclusionary or ambiguous language increased. The trend will continue in years to come.

In a dispute regarding ambiguous language, there is much law supporting the thought that the insured will prevail. *Mercycare Insurance Company and MercyCare HMO, Inc. v. Wisconsin Commissioner of Insurance, 328, Wis.2d110, 786, N.W. 2d 785, 790& n.6 (2010)* defines that the language must be clear. Further an insurance carrier must make coverage decisions based on what is in the four corners of the policy. Policies containing vague and ambiguous language may be acceptable to use, however, that does not mean there will not be a battle with the insurance company.

While not a change, it is imperative to pause a minute and ask the question: Can an insurer exclude one of the 10 essential benefits, denying a woman her right to maternity care, an essential benefit? Can an insurer not cover a surrogate pregnancy based on weak language for example, “For or related to surrogate parenting?” that by any argument is vague and ambiguous? If the intent of the ACA is to cover maternity benefits for all, is this language legal according to the law? Section 1557 is the nondiscrimination provision of the Affordable Care Act (ACA). The law prohibits discrimination on the basis of race, color, national origin, sex, age, or disability in certain health programs or activities. Section 1557 builds on long-standing and familiar Federal civil rights laws: Title VI of the Civil Rights Act of 1964, Title IX of the
Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973 and the Age Discrimination Act of 1975. Section 1557 extends nondiscrimination protections to individuals participating in:

- Any health program or activity any part of which received funding from HHS
- Any health program or activity that HHS itself administers
- Health Insurance Marketplaces and all plans offered by issuers that participate in those Marketplaces.

The pregnancy discrimination act of 1978 amends title IX as follows: That section 701 of the Civil Rights Act of 1964 is amended by adding at the end thereof the following new subsection: (k) The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 703(h) of this title shall be interpreted to permit otherwise. This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: Provided, That nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion."

While dealing with the workplace, the ACA was intended to be non-discriminatory. By adding exclusionary language towards surrogate pregnancies, are the plans not discriminatory? And clearly, as this language does apply to employer sponsored plans, can employer sponsored plans discriminate against gestational carriers excluding maternity benefits?

**CHANGE 4: LIEN LANGUAGE**

Lien language does not exclude gestational carriers. What it does is to place a lien on the gestational carrier's earnings to reimburse the health plan for the costs. The health plan will ask for a copy of the gestational carrier's contract. Once the pregnancy is over, the insurance company will ask the insured to reimburse them the appropriate amount based on what the insurance company paid providers for maternity services. All liens and lien language are not created equal. Below are examples of lien language and noted below the language is how the insurance company handles it.

**Kaiser California:**

On page 55, under Exclusions, Limitations, Coordination of Benefits, and Reductions - Surrogacy: "Services for anyone in connection with a Surrogacy Arrangement, except for otherwise-covered Services provided to a Member who is a surrogate. A "Surrogacy Arrangement" is one in which a woman (the surrogate) agrees to become pregnant and to surrender the baby (or babies) to another person or persons who intend to raise the child (or children), whether the woman receives payment for being a surrogate. Please refer to "Surrogacy arrangements" under "Reductions" in this "Exclusions, Limitations, Coordination of Benefits, and Reductions" section for information about your obligations to us in connection with a Surrogacy Arrangement, including your obligations to reimburse us for any Services we
cover and to provide information about anyone who may be financially responsible for Services the baby (or babies) receive."

On page 56, under Exclusions, Limitations, Coordination of Benefits, and Reductions – “If you enter into a Surrogacy Arrangement and you or any other payee are entitled to receive payments or other compensation under the Surrogacy Arrangement, you must reimburse us for covered Services you receive related to conception, pregnancy, delivery, or postpartum care in connection with that arrangement ("Surrogacy Health Services") to the maximum extent allowed under California Civil Code Section 3040. A "Surrogacy Arrangement" is one in which a woman agrees to become pregnant and to surrender the baby (or babies) to another person or persons who intend to raise the child (or children), whether or not the woman receives payment for being a surrogate. Note: This "Surrogacy arrangements" section does not affect your obligation to pay your Cost Share for these Services. After you surrender a baby to the legal parents, you are not obligated to reimburse us for any Services that the baby receives (the legal parents are financially responsible for any Services that the baby receives). By accepting Surrogacy Health Services, you automatically assign to us your right to receive payments that are payable to you or any other payee under the Surrogacy Arrangement, regardless of whether those payments are characterized as being for medical expenses. To secure our rights, we will also have a lien on those payments and on any escrow account, trust, or any other account that holds those payments. Those payments (and amounts in any escrow account, trust, or other account that holds those payments) shall first be applied to satisfy our lien. The assignment and our lien will not exceed the total amount of your obligation to us under the preceding paragraph. Within 30 days after entering into a Surrogacy Arrangement, you must send written notice of the arrangement, including all of the following information: • Names, addresses, and telephone numbers of the other parties to the arrangement • Names, addresses, and telephone numbers of any escrow agent or trustee • Names, addresses, and telephone numbers of the intended parents and any other parties who are financially responsible for Services the baby (or babies) receive, including names, addresses, and telephone numbers for any health insurance that will cover Services that the baby (or babies) receive • A signed copy of any contracts and other documents explaining the arrangement • Any other information we request in order to satisfy our rights You must send this information to: The Rawlings Group, Surrogacy Mailbox, P.O. Box 2000, LaGrange, KY 40031. You must complete and send us all consents, releases, authorizations, lien forms, and other documents that are reasonably necessary for us to determine the existence of any rights we may have under this "Surrogacy arrangements" section and to satisfy those rights. You may not agree to waive, release, or reduce our rights under this "Surrogacy arrangements" section without our prior, written consent. If your estate, parent, guardian, or conservator asserts a claim against a third party based on the surrogacy arrangement, your estate, parent, guardian, or conservator and any settlement or judgment recovered by the estate, parent, guardian, or conservator shall be subject to our liens and other rights to the same extent as if you had asserted the claim against the third party. We may assign our rights to enforce our liens and other rights.

Due to California Civil Code 3040 Kaiser will collect no more than 33.33% of the surrogate’s compensation. Kaiser of California does not consider reimbursable expenses (mileage, childcare, maternity clothes for example) as income.

Kaiser all other states –
Similar language, the address to send information to will be different. However, no civil code to limit the amount of compensation Kaiser can collect. Therefore, the lien may be placed on 100% of the surrogate’s compensation.

**Friday Health Plans - Colorado**

Surrogacy. In situations where an Enrollee receives monetary compensation to act as a surrogate, the Plan will seek reimbursement for Covered Services you receive that are associated with conception, pregnancy and/or delivery of the child, except that we will recover no more than half of the monetary compensation you receive to act as a surrogate.

Within 30 days after entering a Surrogate Arrangement, Enrollee must send written notice of arrangement, including names, addresses, and telephone numbers of all parties to the arrangement, and a signed copy of any contracts and other documents explaining the arrangement. Failure to notify Plan may result in denial of all Covered Services associated with conception, pregnancy and/or delivery.

For Covered Services related to this Surrogacy Section, Enrollee will pay the applicable cost share obligations.

For the purpose of this section the following definitions apply: “Surrogate Arrangement” is one in which a woman agrees to become pregnant and to surrender the baby to another person or persons who intend to raise the child.

Friday will ask for no more than 50% of the surrogate’s compensation. If medical bills are lower than the 50%, they will collect actual medical bills, if higher than 50% they will cap the reimbursement at 50%

**Medical Mutual – Ohio**

Surrogacy: Medical Mutual will cover Maternity Services as described in this Policy for you if you are acting as a surrogate. However, to the extent that you receive any compensation or payment from any third party, even if the compensation or payment is designated for services other than medical expenses, Medical Mutual has a right to subrogate against that compensation to the extent that it pays maternity claims under this Policy. You are obligated to notify Medical Mutual of any compensation or payment you receive as a result of acting as a surrogate and the benefits payable hereunder are contingent on your cooperation according to this provision. No coverage will be provided for maternity services Incurred by a person not covered under this Policy who is acting as a surrogate for you or any Dependent.

Medical mutual will collect up to 100% of the surrogate’s compensation.

Other plans that include lien language are Regence, Moda, Healthnet. Providence and Wellmark have language in their policies that depending upon how the contract between the gestational carrier and the IP is written would allow a lien to be placed.

**CHANGE 5 – WHO CAN PAY FOR THE POLICY?**

This change is applicable only to ACA policies. This does not apply to group or employer sponsored plans as any payment of premium is deducted by the employer from the employee’s paycheck. Many of the ACA policies do not allow for third party payors. This means that if funds are received from the trust, the agency, or the IP, the insurance company may refuse payment. If that happens the insured (surrogate) would be able to remit payment and the policy would continue. Last year BCBS of Minnesota noticed many payments being made from an agency’s account. The threat was made to cancel all policies back to the date of effectuation. A deal was made that going forward only the policy holder would make payments. This led to a change in the surrogate contracts so that the surrogate is responsible to make her payments. To avoid any further investigation or issues, there is no reimbursement of premium, the surrogate’s base
compensation was increased to cover the cost. While this language has been in the policies for many years the carriers did not enforce the clause. While no fraud is intended, if a carrier wanted to become ugly, they may attempt to claim fraud thereby nullifying the insurance. The questioning of payment is another methodology carriers are using to minimize coverage. The best person to pay for the policy is the insured. There are several methodologies that may be used to make this happen to keep it legal.

CHANGE 6 – MOVING INTO THE NEW DECADE 2020 AND BEYOND

In October of 2017 President Trump signed an executive order changing several key components of the ACA. The executive order expanded the use of short-term health plans, Association plans and Health Reimbursement Accounts. The short-term plans would be valid for up to a year and would not be required to include the 10 Essential Benefits. Maternity is not included in most if not all short-term health plans. However, complications of maternity may be. Each carrier may write their own coverages, as they are not mandated. The Association plans also would not need to include the 10 essential benefits and benefits such as maternity, mental health, prescription drug, etc. may not be included. The anticipated result of these changes is to have individuals opting for less expensive coverage via the short-term plans and to have employers utilizing less benefit rich Association Plans to save money. Without mandated essential benefits, analysts believe that maternity would not be covered in many of these plans, therefore creating a larger pool of women who do not have maternity coverage.

In December of 2017 the Tax Cuts and Jobs Act was signed into law. It repealed the 2019 ACA tax on those who don’t get health insurance removing the individual mandate. It was estimated that 13 million people would drop health care coverage. In the world of surrogacy, this would lead to more uninsured surrogates needing health care for the pregnancy.

Furthering reduction of the Federal role in the ACA, the states now may change the 10 essential benefits. Currently, individual and small group plans sold through the exchanges must cover the essential health benefits in a manner “equal to the scope of benefits provided under a typical employer plan”. The default plan was the largest small group plan available in the state. Beginning in 2020 CMS is allowing states to choose from any of the 50 Essential Health Benefit Benchmark plans used for 2017 plan year. The state could choose the plan that had the most restrictive benefits and language. CMS will also allow states to construct a benchmark plan by replacing one or more of the 10 EHB coverage categories with those used in other states, this move would also allow for more restrictive language and benefits. The rules also allow for states to construct their own essential benefits (to be approved by Health and Human Services) however, the plans still must meet the requirement that the benefits be equal to the scope of benefits provided under a typical employer plan. As most, if not all, employer plans provide for maternity care, this may not change the scope of maternity, however, depending upon the plans used, the argument could be made that to include a lien, limit or exclude care provided to a surrogate is within the scope of benefits for a typical employer plan.

Whether it be through legislation, executive order, or insurance carriers’ internal policies and procedures, there have been changes to the insurance coverages for gestational carriers. In the last two years, the changes have been more on the negative than the positive side. The coming years will bring even more changes as surrogacy continues to grow in the US. In 2014 it is estimated that there were 2200 surrogate births in the US an increase of 89% over the previous 4 years. There are no recent statistics, but I would guess that triple the number would not be far off. Surrogacy is no longer “under the radar” but flying high. As legislation in many states is “getting into the 21st century” the insurance carriers should also get in step with the times and have policy language that reflects the current state of family building.
EXHIBIT 1

Insurer Participation on ACA Marketplaces, 2014-2019

Year
2014

Number of Insurers
- One
- Two
- Three or more

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All

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**SOURCE:** Kaiser Family Foundation analysis of insurer rate filings to state regulators.

**NOTE:** Insurers are grouped by parent company or group affiliation, which we obtained from HHS Medical Loss Ratio public use files and supplemented with additional research.
A portion of my family law practice involves litigating family law related issues that arise from the use of assisted reproductive technology. When tackling one of these cases, it is important to understand the latest ART trends, case law, statutes, and model legislation such as the UPA (2017) and the recent updates to the ABA’s Model Act Governing Assisted Reproduction.

The facts are always unique, and never fit the law precisely. Below are synopses of cases in which I have been involved, wherein I offer a few takeaways, highlighted in **bold**.

**Marital Status: Why it matters.**

A client’s marital status can really complicate matters in assisted reproduction. A male from the Dominican Republic contracted with an egg donor and surrogate. Embryos created with his sperm and donor egg were implanted and a child was born in Boston. He obtained a pre-birth order of parentage prior to the child’s birth naming him the sole legal parent. He did not disclose his marital status to the Court. However, when reviewing the forms in the hospital created to establish the birth record at the time of his daughter’s birth, he noticed that it represented that his marital status was “single” and he was honest about the discrepancy. He was actually married, but separated and a divorce action was pending. His wife had nothing to do with the process of his contracting with a surrogate and egg donor to have a child and he did not realize that she would need to be involved. The Department of Public Health refused to honor the pre-birth order of parentage to list the father as the sole legal parent given that he was married. The Department insisted that the intended father and surrogate be listed as the child’s parents on the birth certificate, despite that result being against the wishes and intent of the parties. As a result, no birth certificate issued and the child was left in limbo. The Court initially refused to compel the Department to honor the pre-birth order and first required the intended father’s wife to file an affidavit disclosing her non-participation in the process. The court then afforded the requested relief that the birth certificate reflect the father as the sole legal parent by construing the state’s artificial insemination statute in a gender neutral manner. Pursuant to M.G.L. c. 46, § 4B, a child born to a married woman as a result of artificial insemination with the consent of her husband, shall be considered the legitimate child of the mother and such husband. Construing this statute in a gender neutral manner, since the intended father’s wife did not consent to, or participate in, the assisted reproduction process that resulted in the birth of the child here, the Court found that she was not the child’s legal parent. Thus, the intended father’s wife rebutted the presumption of legal parentage, and the pre-birth order was enforceable. The child at issue here did not have a birth certificate for several months, resulting in her father getting stuck in Boston and not being able to travel with the child to his home country for a period of several months.

The moral of this story is that we should **always inquire as to the client’s marital status and not make any assumptions in this regard.** If a client is married, the spouse needs to be a part of the process, regardless of how long they have been separated and even if a divorce action is pending.

**ART clients who divorce: What should we be asking and addressing?**

Along the same lines, **we should always ask divorcing parties the following question: have you ever participated in any manner in assisted reproduction?** If the answer is yes, inquire further and address parentage issues in the Separation Agreement, and allocate surplus cryopreserved embryos...
between the parties as may be applicable. We should also be advising our clients to inform the clinics in writing that a divorce is pending and that they do not authorize the use of their gametes.

Penelope came to me ecstatic and desperate all at once. She was divorced from a physically abusive husband in 2002. No attorneys were involved and the Separation Agreement was basic and simple and said nothing about embryos. The couple was childless, having gone through rounds and rounds of IVF with their own gametes to no avail. Her husband moved on and had a biological child of his own. Penelope did not share the same fortune but held out hope when the clinic contacted her in 2012 informing her that four cryopreserved embryos continued to exist. She had wrongly assumed they were destroyed or discarded. To her dismay, the clinic would not release them to her or allow to her contract with a surrogate to use them without her ex-husband consent. Litigation ensued and the ex-husband defaulted, resulting in an award of the embryos to Penelope.

Birth Certificates: Getting It Right.

Melanie came to me to defend against a Motion to Correct Birth Record, filed by her decedent husband’s brother, the executor of his estate. The couple was from Sudan but lived for a time in Massachusetts. Melanie’s husband, Roger, was HIV positive. He was also a successful businessman in Africa and owned some valuable land and assets there. He had two biological children from a prior marriage. Melanie and Roger created embryos with donor gametes. Roger was on a business trip in Africa, and was killed in a plane crash there. After his death, Melanie conceived twins with their embryos. Both parties were listed on the twins’ birth certificates. Roger’s heirs needed to be determined due to his own assets as well as a wrongful death lawsuit against the airline and as a result, a dispute arose as to whether the twins were his heirs at law. The executor needed to get his name off the birth certificate, upon which document the Sudanese court was relying to determine parentage. I helped Melanie convince the Court to keep Roger’s name on the twins’ birth certificates. The Court determined that this situation did not fall within any part of the statute that allowed for the amendment of birth records. It demonstrates that while birth certificates in this country are usually only considered an indicium of parentage, internationally, they may hold more weight so it is important that they are accurate and amended as may be necessary.

Estate Planning: Providing for children conceived through ART

Melissa and Josh were high school sweethearts who married very young. Just after they got married, Josh was diagnosed with cancer and advised to cryopreserve his sperm prior to undergoing chemotherapy treatments. Josh did so and while in remission the couple attempted to conceive a child through intrauterine insemination. This attempt was unsuccessful but they continued to try. Josh passed away the day after Thanksgiving while Melissa was in the midst of another IUI cycle. Ironically, the insemination attempt that occurred the morning of Josh’s funeral resulted in Melissa getting pregnant with Josh’s child. This child was born within nine months of Josh’s death. Melissa applied for social security survivor benefits for the child based on Josh’s earnings record. She was denied because the child was posthumously conceived. The case proceeded to the Nebraska Supreme Court where I argued that the manner and timing of conception should be considered a distinction without a difference in a case where the child technically could have been naturally conceived in which case she would have been considered his heir at law and eligible for social security survivor benefits. Unfortunately, the Court strictly construed the statute requiring a child to be conceived during the lifetime of the decedent and the child was denied benefits. See Amen v. Astrue, 284 Neb. 691 (2012). Melissa was later involved in trying to amend Nebraska’s statute in this regard to allow children conceived within a certain timeframe of the decedent’s death to be considered heirs at law. Parties to assisted reproduction should have estate planning documents providing for children conceived through assisted reproduction during their lifetimes and posthumously if that is their intent. With such an express declaration, such children are likely to be considered heirs at law for inheritance and social security purposes.
Two major recent developments in the area of Assisted Reproductive Technology are the 2017 update to the Uniform Parentage Act (UPA), which had last been updated in 2002, and the 2019 rewrite of the ABA’s 2008 Model Act Governing Assisted Reproductive Technology (Model Act).

These developments are important as the UPA and the Model Act provide guidelines for state legislatures to consider when enacting laws related to parentage and surrogacy.

**Uniform Parentage Act [2017]**

The following is paraphrased from the prefatory note to the Uniform Parentage Act (2017):

Originally promulgated in 1973, the 1973 UPA ensured that “all children and all parents have equal rights with respect to each other,” regardless of the marital status of their parents. UPA (1973) § 2, Comment. The UPA was first revised in 2002. The 2002 version added provisions permitting a non-judicial acknowledgment of paternity procedure that is the equivalent of an adjudication of parentage in a court and added a paternity registry. UPA (2002) also included provisions governing genetic testing and rules for determining the parentage of children whose conception was not the result of sexual intercourse. Finally, UPA (2002) included a bracketed Article 8 to authorize surrogacy agreements.

UPA (2017) made five major changes to the UPA, summarized below:

1. UPA (2017) seeks to ensure the equal treatment of children born to same-sex couples. UPA (2002) was written in gendered terms, and its provisions presumed that couples consist of one man and one woman. For example, Section 703 of UPA (2002) provided that “[a] man who provides sperm for, or consents to, assisted reproduction by a woman as provided in Section 704 with the intent to be the parent of her child, is a parent of the resulting child.” UPA (2017) addresses this by amending provisions throughout the act so that they address and apply equally to same-sex couples. These changes include broadening the presumption, acknowledgment, genetic testing, and assisted reproduction articles to make them gender-neutral.

2. Second, the UPA (2017) includes a provision for the establishment of a de facto parent as a legal parent of a child. Most states recognize and extend at least some parental rights to people who have functioned as parents to children but who are unconnected to those children through either biology or marriage. Some states recognize such people under a variety of equitable doctrines – sometimes called de facto parentage, or in loco parentis, or the psychological parent doctrine. Other states extend rights to such people through broad third-party standing statutes. And, more recently, states have begun to treat such people as legal parents under their parentage provisions. New Section 609 provides a process for the establishment of parentage by those who claim to be de facto parents.

3. Third, UPA (2017) includes a provision that precludes establishment of a parent-child relationship by the perpetrator of a sexual assault that resulted in the conception of the child. The United States Congress adopted the Rape Survivor Child Custody Act in 2015, which provides incentives for
states to enact “a law that allows the mother of any child that was conceived by rape to seek court-ordered termination of the parental rights of her rapist with regard to that child, which the court shall grant upon clear and convincing evidence of rape.” In 2017, at least 17 state legislatures were considering bills to enact such statutes. New Section 614 provides language to implement the federal law.

4. Fourth, UPA (2017) updates the surrogacy provisions to reflect developments in that area. States have been particularly slow to enact Article 8 of UPA (2002). Eleven states adopted versions of UPA (2002). Of these 11 states, only two – Texas and Utah – enacted the surrogacy provisions based on Article 8 of UPA (2002). The fact that very few states enacted Article 8 is likely the result of a confluence of factors. Accordingly, UPA (2017) updates the surrogacy provisions to make them more consistent with current surrogacy practice and thereby more likely to be adopted by state legislatures.

5. Finally, UPA (2017) includes a new article – Article 9 – that addresses the right of children born through assisted reproductive technology to access medical and identifying information regarding any gamete providers. Based on data from 2015, the CDC reports that “approximately 1.6% of all infants born in the United States every year are conceived using ART.” Accordingly, it is increasingly important for states to address the right of children to access information about their gamete donor. Article 9 does not require disclosure of the identity of a gamete donor, but it does require gamete banks and fertility clinics to ask donors if they want to have their identifying information disclosed when the resulting child attains 18 years of age. It does require disclosure of non-identifying medical history of the gamete donor.

The Model Act [2019]

The Model Act Governing Assisted Reproductive Technology, first promulgated by the ABA in 2008, has also undergone substantial revisions. The Resolution adopting the 2019 overhaul to the 2008 Model Act was recently approved by the ABA Section of Family Law.

As set forth in the Report section of the Resolution, the major revisions to the Model Act [2008] are as follows:

1. Model Act [2019] includes new definitions and gender/sexual orientation neutral language throughout the Act – New defined terms have been added to the Model Act [2019] and definitions have been updated throughout to allow for gender-neutral terminology. These updates leave behind the outdated notion that families are created only by two, heterosexual parents, and render the Act equally applicable to children of all individuals building families through ART.


4. Model Act [2019] Adds Parental Establishment Provisions via Traditional/Genetic Surrogacy Which Were Not Addressed in the 2008 Act - The Model Act [2019] substitutes “genetic surrogate” (a surrogate who contributes the surrogate’s own eggs in a surrogacy arrangement) for the more commonly used, but vague, term “traditional surrogate.” Addressing parentage through genetic surrogacy for the first time, the Model Act [2019] requires a judicial pre-approval process for genetic surrogacy along with a final, post-birth order confirming parentage assuming all parties are still in agreement. If agreement between the parties is lacking, or compliance with the Act is lacking, the Model Act [2019] requires parentage to be determined in accordance with existing parentage presumptions and procedures under applicable state law. Further, the provisions of the Model Act [2019] provide intended parents a right to reimbursement and/or damages if a surrogate breaches the surrogacy agreement.

5. Model Act [2019] Includes Baseline Best Practice and Eligibility Requirements for all Surrogacy - The Model Act [2019] also includes best-practice baseline requirements for both types of surrogacy in regard to eligibility and proper medical screening and education for surrogates and intended parents, as well as establishing foundational requirements that must be present in written surrogacy agreements.
ART: Are you a SmARTy Pants? Hot Topics in Insurance, Legislation, and Case Law

ABA Family Law 2019 Spring CLE Conference
Dominican Republic, May 2, 2019
By Colleen M. Quinn and Kate Miceli
Adoption & Surrogacy Law Center
At Locke & Quinn
quinn@lockequinn.com

AUTHOR DISCLAIMER AND NOTE: This outline is intended to supplement the materials provided by the other presenters and is intended to cover legislation and case law in the United States and abroad generally for the time period 2016 to the present. An effort has been made to capture as much as possible but this outline does not guarantee that all updates for that time period have been included. Many thanks go to all of the ART practitioners who posted updates on the ABA and other listserves - many of these updates came from those postings and we have tried to give credit as noted.

I. CASE LAW - UNITED STATES

- **Alabama and U.S. Supreme Court – VL v. EL, et al., 136 S. Ct. 1017 (2016).**
  - Same sex couple separated and bio mom tried to deny non bio mom parentage rights
  - Children had been adopted from GA
  - AL Sup Court did not give full faith and credit to GA parentage order granting both women parental rights but SCOTUS reversed

  - Court of Appeals – b/c of Obergefell AZ courts must construe AZ's paternity statute in a gender neutral way

- **Arkansas and U.S. Supreme Court – Pavan v. Smith, 136 S. Ct. 2075 (2017).**
  - Two sets of same sex female couples had children through IVF with anon sperm donor
  - Non bio parents sought to have names put on birth cert, Dept of Public Health said no
  - Circuit court said it was unconstitutional, Dept of Public Health appealed
  - SCOTUS reversed saying no, res judicata, and saying Obergefell only applied to marriage, not parenting
  - Decision will require court order for both spouses in a married same sex couple to be entered onto birth cert

- **California – CM v. MC, 7 Cal. App. 5th 1188 (Cal. 2017).**
  - Surrogate had contract with bio father to carry triplets
  - Then she decided she wanted to keep them + wanted rights as kid's mother
  - He objected, trial court entered in his favor as did appeals court b/c of the legislative provisions specifically addressing this area of law

  - Same-sex couple had twins through a surrogate
  - One was U.S. citizen, one was Israeli-citizen – they were living in Canada b/c U.S. citizen had joint Canadian citizenship and could sponsor his husband to legal residence
Applied for US citizenship for the children and DOS only recognized the child born with US citizen sperm, other child was given a tourist visa to come into the country

DOS forced the parents to get DNA tests to prove the blood relationships – claimed son w/o US citizen parent’s blood lacked a “biological or adoptive relationship” to the US citizen parent

DOS considered child “born out of wedlock”

Holding – Child should have been granted citizenship from birth + nothing in federal citizenship law to support the DNA test that was performed

Summary of case -- https://www.clearinghouse.net/detail.php?id=16417

- **Colorado – In re Marriage of Rooks v. Rooks, 429 P.3d 579 (Colo. 2018).**
  - Divorced couple couldn’t agree what to do with frozen embryos
  - Holding: Courts must attempt to balance the interests of both parents when deciding fate of embryos
  - Courts should first look at any pre-existing agreement expressing spouse's intent regarding disposition in event of divorce
  - In absence of agreement, balance both parties' respective interests such as parties' ability or inability to become a genetic parent through other means, parties reason for IVF, emotional/financial/logistical hardship/any demonstrated bad faith to use embryos as unfair leverage in divorce proceedings
  - Opinion here: https://www.courts.state.co.us/userfiles/file/Court_Probation/Supreme_Court/Opinions/2016/16SC906.pdf

- **Hawaii – LC v. MG and Child Support Enforcement Agency, 430 P.3d 400 (Haw. 2018)***
  - Child was conceived through artificial insemination, LC sought divorce shortly after child born (LC not bio related to child)
  - In divorce proceedings, wife of child’s bio mom sought an order disestablishing her as legal parent of the child who was born during their same-sex marriage
  - Holding: Wife was presumed to be a legal parent of child (UPA) born during parties’ same-sex marriage + spouse cannot rebut the statutory marital presumption of parentage by C&C evidence a lack of consent to the other spouse’s artificial insemination procedure

  - Court said both females could be placed on birth cert of their child (they were married)
  - Said it violated DPC and EPC b/c equal rights were not extended to same sex married couples

- **Iowa – PM and CM v. TB and DB, 907 N.W.2d 522 (Iowa, 2018).**
  - Issue – Whether gestational surrogacy contracts are enforceable under Iowa law
  - Quick facts: couple hired surrogate, surrogate wanted more $ during pregnancy and when they didn’t pay up she refused to honor agreement. Babies were born premature. One died, one lived. Intended parents sued for custody of surviving child. District court terminated surrogate’s parental rights. Surrogate appealed.
  - Holding – Affirm lower court, gestational contract stands. K is legally enforceable in favor of bio father
- Kansas – *State, ex. rel, Secretary Dept of Children and Families v. WM*, No. 2012DM2686 (District Court of Kansas, Shawnee County, 2016).
  - Same sex unmarried female couple found donor on CL and became pregnant w/o lawyer
  - Did not comply with sperm donation statute
  - Non carrying parent applied for social security
  - Couple separated after child was born
  - They were asking for sperm donor to pay child support + non carrying parent sought an order declaring her the parent
  - Holding: Sperm donor doesn’t have to pay child support + Non carrying parent is considered a parent of the child

  - Non-bio same sex unmarried partner shall be presumed to be parent of their partner’s bio child under Mass paternity statute

  - Missouri Ct of Appeals held frozen embryos are not children for purposes of dissolution of marriage statute
  - Embryos are “special category of property” because technically in MO life begins at conception

  - Issued decision saying married lesbian couples are entitled to second parent adoption for security of their children

  - Quick facts – couple tried IVF. Were unsuccessful. Husband filed for divorce and sole custody of remaining frozen embryo + moved to enjoin wife from using/destroying embryo. Husband signed document revoking his consent for wife to use his genetic material. Supreme Court granted injunction preserving the status quo and had “special referee” determine the husband did not have a right to revoke his consent. Court of Appeals now reverses saying general rules of K law apply
  - Holding: traditional rules of K interpretation law apply, consent agreement to freeze embryos said either party can withdraw at any time so husband can withdraw

  - Quick facts: Real estate tycoon wanted a son to inherit his fortune/business (only had daughters) so tried IVF to have a son. Failed twice with anon donor. Cory Sause had already frozen some of her eggs. Sause and Schnitzer start dating. She offered him some
of her eggs. Couple wrote up contract. Schnitzer disavowed any rights and responsibilities for embryos that were female. Son (Schnitzer Sperm + Sause egg + surrogate carrier) was born December 2015. Schnitzer petitioned Oregon Court for only his name to be on birth certificate b/c of the K language. Sause says she gave up some rights but not right to be considered the boy’s mother.
  o Holding: Multnomah County Circuit Judge says Sause is legal mother of the child (for context: she was allowed to see the baby on the day of his birth but has been barred since then)
  o Schnitzer has asked Oregon Supreme Court to intervene
  o Articles about case here: 
    https://www.oregonlive.com/portland/2017/12/judge_jordan_schnitzer_is_not.html?at
    h=077f01ebf903a66f5b7b661ce18f56a1; https://abovethelaw.com/2016/03/i-want-to-
    put-a-baby-in-you-the-schnitzer-case-taking-sex-selection-to-a-whole-other-level/
    o Quick facts: CG and JH were same-sex couple living together. JH gave birth to a kid conceived through intrauterine insemination with anonymous sperm donor. JH = bio mom. CG = no bio connection + did not adopt. Lived together for 5 years after birth, then separated. CG filed for legal + partial physical custody of child b/c she acted in loco parentis while they were together. Trial court issued opinion sustaining JH’s prelim objection.
    o Holding: Former partner was not a parent who had standing to seek custody + trial court not required to consider existence of bond btw child and former partner as decisive factor in whether they stood in loco parentis
    o Opinion: On Westlaw (link too long to post here)
    o Court ruled it’s unconstitutional to fail to issue birth cert listing both bio and non-bio married same sex partners
    o South Carolina Department of Health had insisted on formal adoption of child by non-bio partner
    o Court found this unconstitutional b/c if they were opposite sex couple, both names would have been listed
  • Texas – In the interest of PS, No. 02-16-00008-CV (Tex. Ct. App., 2016). 
    o Man verbally agreed to provide sperm to a friend
    o Was used for artificial insemination
    o He didn’t qualify as donor so became the parent
    o Holding: Upheld trial court and said Bio dad did not provide sperm through physician so he is the father b/c he doesn’t meet definition of a donor
    o Issue: Whether person not biologically related to a child (and has not legally adopted) + is not married to child’s legal parent may be the child’s legal parent
    o Couple was together seven years. Had one adopted child. Adopted a second child but only defendant was adoptive parent (agency wouldn’t do same-sex adoption)
    o Plaintiff had every responsibility as a parent and was referred to by kids as mom
They broke up and had an informal custody agreement in place for 3 years until defendant stopped following it

- Plaintiff filed suit saying she was de facto parent
- **Holding:** Court rules in favor of plaintiff + de facto parents – Court provided a narrow exception for a party with no bio or legal connection to a child seeks custody. If couple has mutual intent to co-parent an adoptive child – non-bio/adopt parent may petition for custody based on mutual agreement to raise child as co-parents

**THIS CASE INSPIRED VERMONT LEGISLATION SEE IN LEG SECTION**


**Virginia – Patel v. Patel, Case No. CL16000156-00, Mecklenburg County Circuit Court (2017).**

- Wife had breast cancer, so they decided to preserve eggs through IVF
- Discussed in the lobby of their appointment what would happen if they divorced (they had previously separated)
- Initially they said the wife could elect what to do with the embryos but it was later decided the embryos would be destroyed upon divorce
- They had to do the procedure a second time because not enough eggs were harvested and they again indicated they wanted the embryos destroyed upon divorce
- The couple separated and disagreed what should happen to the embryos (wife wanted them to have children as cancer had made her infertile, husband wanted them destroyed)
- The Court applied a Balancing Approach and awarded the embryos to the wife


- Court certified a class of plaintiffs who conceived kids through artificial insemination who seek to challenge constitutionality of several Wisconsin statutes saying they discriminate against same sex parents (ex. Right to same sex couples to be listed on the birth cert)

**II. STATUTORY/ LEGISLATIVE – UNITED STATES**

**Arizona** – Custody of disputed embryos must be given to the party who intends to help them “develop to birth”. Senate Bill 1393 – Went into effect July 1, 2018


**Indiana** – Icky doctor in the 1970’s and 80’s was artificially inseminating patients when they thought it was a sperm donor. Bill was introduced to prevent this kind of fertility fraud (Senate Bill 239). Bill has not passed yet

- See bill text here: http://iga.in.gov/legislative/2018/bills/senate/239#document-93502c3f

**Indiana** – Gestational surrogacy bill (House Bill 1369). Would allow contracts for gestational surrogacy (IN does not currently recognize contracts for surrogacy but practice is legal). House passed, moving to Senate.

- See bill text here: http://iga.in.gov/legislative/2019/bills/house/1369
- **Louisiana** – HB 1102 (signed into law in 2016) – restricts enforceable gestational surrogacy agreements to those in which a married couple engages a surrogate + uses their own gametes. So, no same-sex couple falls under that definition. They cite “state interests” for discriminating against LGBTQ parents.
  - See bill text here: https://legiscan.com/LA/amendment/HB1102/id/40917

- **New Jersey** – S482 “New Jersey Gestational Carrier Agreement Act” (signed into law May 30, 2018) – allows gestational surrogacy in NJ, modeled after best practices developed by ASRM, SART and AAAA
  - See bill text here -- [https://www.njleg.state.nj.us/bills/BillView.asp?BillNumber=S482](https://www.njleg.state.nj.us/bills/BillView.asp?BillNumber=S482)

- **Oregon** (via Robin Pope)
  - 2017 ORS 109.065 – Establishing parentage of a person or child
  - 2017 ORS 109.239 – Revised sperm donor statute – Not sure how it changed
  - 2017 ORS 109.243 -- The relationship, rights and obligation between a child conceived as a result of assisted reproduction and the mother’s spouse shall be the same to all legal intents and purposes as if the child had been naturally and legitimately conceived by the mother and the mother’s spouse if the spouse consented to the performance of assisted reproduction.
  - 2017 ORS 109.247 Application of law to children resulting from assisted reproduction. Except as may be otherwise provided by a judicial decree entered in any action filed before October 4, 1977, the provisions of ORS 109.239 to 109.247, 677.355 to 677.365 and 677.990 (3) apply to all persons conceived as a result of assisted reproduction. [1977 c.686 §7; 2017 c.651 §6]

- **Vermont** – H562 “Vermont Parentage Act” (Effective 7/1/2018)
  - Modernized Vermont’s law on parentage
  - Prevents law from discrimination on basis of marital status or gender in parentage
  - Was created after Vermont Supreme Court cited for the 3rd time that Vermont’s parentage laws were unclear for determining the outcome of a case
  - Can be considered a parent if you are giving birth to a child, adopting a child, signing voluntary acknowledgement of parentage of a child, being a de facto parent of a child, consenting to assisted reproduction or a gestational carrier agreement
  - Can be considered a de facto parent if you show by C&C evidence that they have fully undertaken the parental role by living with the child for a significant period of time, been a consistent caretaker of the child, developed/bonded/formed a relationship with child, accept full/permanent responsibilities as a parent w/o financial compensation

- **Virginia** - HB1789 - updates Virginia “Status of Children of Assisted Conception” statute found at Virginia Code 20-156, et. seq. (effective July 1, 2019) (drafted by Colleen Quinn)
  - Makes the statute gender neutral and eliminates husband-wife language
  - Allows single Intended Parents to use surrogates
- Allows for donor embryos to be used with a carrier under the statute thus no longer requiring that an adoption be done in Virginia
- Clarifies that only a genetic surrogate (true or traditional) can void a contract and keep the child

- **Washington** – SB 6037 “Uniform Parentage Act” (Effective 1/1/2019)
  - Updated Washington’s Uniform Parentage Act
  - Strengthened LGBTQ + non-bio parent protections
  - Maintained protections for rape survivors
  - Repeals Washington’s criminal ban on compensated surrogacy
  - Provides protections for women acting as surrogates

### III. ART Case Law and Legislative Update – International


- sets out precautions and requirements for US citizens attempting to do ART abroad

- **Australia** – March 19, 2018
  - Western Australian Supreme Court ruled that women can export her deceased partner’s sperm interstate so she can get pregnant
  - She was also told she did not need the permission of a regulator to do this

- **Australia** – December 2016 - Family Court registers US pre-birth surrogacy order
  - First time ever – Family Court of Australia has registered US surrogacy order
  - Means a US order can be enforced in Australia and parents of the child as recognized in the US order as recognized as parents in Australia
  - **Unsure if this is the case Stephen was talking about**

- **Cambodia** – Bans Surrogacy - Nov 2016
  - 2016 – Cambodia has banned surrogacy + commercial sperm donation + requires clinics providing IVF to receive permission from the Health Ministry
  - Australian surrogacy advocate who was promoting surrogacy in Cambodia has been arrested and is being held for suspicion of child trafficking and falsifying docs

- **Cambodia** – Illegal surrogacy practice leads to arrests – December 2018
  - Country has been doing raids on surrogate mothers
  - 32 women were charged with human trafficking for carrying babies of Chinese nationals – were only released because they agreed to keep the children
1. From her email: A donor is not a parent by virtue of donating using assisted reproduction.
2. A donor is not a parent by virtue of sex, provided there is a preconception written agreement.
3. In a surrogacy situation, a birth can be registered in the names of up to 4 people without the need to get a declaration of parentage. This includes same sex intended parents. This applies ONLY if there is a pre-conception written agreement, with opposing sides having independent legal advice, and the surrogate must sign a consent no earlier than 7 days post-birth.
   Number 3 is a little bizarre, given number 4, below:

4. A surrogacy agreement is unenforceable in law, but may be used as evidence of: a) an intended parent’s intention to be a parent of a child contemplated in the agreement; and b) a surrogate’s intention to not be a parent of that child.
5. A declaration of parentage can be obtained if there is no pre-conception written agreement. Some people may opt to forego a pre-conception agreement, and instead pursue the declaration in order to save costs (i.e., not pay ‘upfront’ in case the surrogate does not get pregnant).
6. A lesbian non-birth parent no longer needs to adopt her partner’s child or pursue a parental order and will be legally recognized as the other parent.
7. There are some wonderful things, and some, shall be way, challenging things, in this legislation. We’ll keep you posted!
8. I’d like to clarify point #5, as all clinics require a preconception written agreement, the intended parents will need one, but in order to save legal costs up front, what they might forego is ensuring there is independent legal advice on both sides, especially if it’s a sibling journey and they have already done an initial agreement. Thanks everyone!

**COMMENTS FROM SARA COHEN (See below)**

There are some fabulous things about this law, such as clarity that a donor is not a parent, and changes to hetero normative presumptions of parentage. Re multi-parent families- Ontario law already allowed multi-parent families (one of the main differences now is the lack of a need to have court involvement to make that happen).

The surrogacy piece in this legislation is perhaps more controversial. Like all other provinces, this legislation does not distinguish between gestational or traditional surrogacy. Now, all surrogacy agreements in Ontario are unenforceable (whereas gestational agreements had been enforced in the past). An agreement is necessary, but after 7 days after birth is of no force and effect. A surrogate cannot consent to not being a parent until after 7 days after the birth. And, there is no longer any judicial (or other) oversight over parentage through surrogacy in Ontario. Basically, if the parties sign that they entered into a preconception surrogacy agreement, and had independent legal advice and then sign that the parents want to be the parents and the surrogate doesn’t, that is all that is necessary for a birth certificate to name the intended parents as the parents (no one else needs to certify anything).
There are differing perspectives but mine is that this legislation is a mixed bag especially because of the surrogacy piece.

Interestingly, the legislation also allows sperm donation through sex if there is a preconception agreement.

- **Czech Republic – Constitutional Court recognizes same-sex couple's parenthood (July 2017)**
  - July 24, 2017 – Court recognized same-sex couple’s parenthood which was already valid in a foreign country
  - Czech and Dane were married in US, had 2 kids via surrogate, were considered parents under CA law + on birth certificate
  - Parents had been trying to get both their names on the Czech birth certificate but were rejected by Czech Supreme Court
  - **Ruling is only applicable for parents originating abroad – Czech same-sex couples are still unable to adopt children as a couple or adopt the partner’s child

- **France – Gay rights wins in surrogacy and parenting July 2017 + September 2018**
  - Surrogacy is illegal in France and courts had refused to recognize partner of bio father as one of child’s parents
  - July 2017 – Court of Cassation refused to automatically recognize two parents listed on foreign birth certs as parents BUT ruled father’s partner could apply to adopt the child
  - September 18, 2018 – Paris Court of Appeal granted the plenary adoption (instead of simple) application filed by a partner of a bio father of twins born through surrogacy in Canada (Credit to Caroline Mecary – their attorney)

- **Germany – High Court recognizes American parentage judgment –October 2018**
  - Twins were delivered by gestational carrier in Colorado to intended parents who lived/were citizens of Germany
  - Parentage judgment was granted to intended parents – sought to have that judgment recognized in Germany
  - Lower courts in Germany wouldn’t recognize judgment b/c they said surrogacy was against public order in Germany (said intended parents could be legal guardians and that was sufficient) – said parents intentionally circumvented German law
  - **Holding** – German Supreme Court reversed and ruled in favor of intended parents saying they were legal parents of the twins – best interest of child + children shouldn’t be punished b/c their parents chose surrogacy
  - **FIRST RULING WHERE GERMAN SUPREME COURT RECOGNIZED AN AMERICAN PARENTAGE JUDGMENT THAT ESTABLISHED A GERMAN INTENDED PARENT’S RIGHTS
  - Link: [https://www.growinggenerations.com/surrogacy-resources-for-intended-parents/international-surrogacy-changes/](https://www.growinggenerations.com/surrogacy-resources-for-intended-parents/international-surrogacy-changes/)

- **Hong Kong – Creative solution to confusing parenting problem – September 2017**
  - Husband = Chinese national born in HK but moved to Canada/has Canadian citizenship
• Wife = Canadian citizen
• Both are HK permanent residents
• Without any legal advice/help – used their own gametes + hired 2 surrogates in India – had 2 kids born on the same day in a hospital in India
• Kids got birth certs in India + Canadian embassy issued temporary passports for children – kids were allowed to enter HK on visitor visa
• HK eventually approved permanent ID cards for children based on genetic link to husband
• Wife files for divorce and judge says there is a lack of parental order (b/c of provisions of Parent and Child Ordinance)
• Husband sought parental order and High Court couldn’t do it b/c wife wouldn’t consent (feared this would affect her ability to take kids to Canada)
• **Holding** – Court invoked wardship jurisdiction – kids were made wards of the court to fill the gap in the law

**India – Banned commercial surrogacy (Dec 2018)**
• Surrogacy Regulation Bill of 2016 bans all foreign applications
• India had become known as a “rent a womb” country and fertility tourism hotspot
• Surrogate mothers now must be a close relative and recipients must be an interfile couple who have been married for 5 years (effectively this bans options for gay couples, unmarried couples, single parents)
• Supporters say it will end exploitation of low-wage women
• Opponents say it will push the business underground + don’t like definition of close relative

**Israel – Court ruled you can’t refuse to write an adoptive parent’s name on child’s birth certificate because of parent’s sex (Dec 2018)**
• Two gay men jointly adopted a son
• Tried to get a birth cert but ministry wouldn’t write both men’s names as boy parents on the cert
• Court held Ministry couldn’t refuse to write both names on birth cert because of their sex because it also affects child’s right to be recognized as their child

**Italy – (BAD CASE) Paradiso and Campanelli v. Italy 2017**
• Elderly couple couldn’t conceive child (naturally or with IVF) and couldn’t adopt a child in Italy (shortage of kids eligible for adoption)
• Went to Moscow and did a surrogate (used anon sperm and egg) – this is legal in Russia but illegal in Italy
This was a problem because the child was not genetically related to them and Italy started investigating them (forgery on birth certificate + bringing a child to Italy that was not theirs).

Child was taken from them for 2+ years and given to foster family who planned to adopt it.

**Holding** (European Court of Human Rights) – Case was referred to the Grand Chamber in 2017 (original holding in 2015) – Court said national interests to prevent illegality and protect public order prevailed over applicants right to private life.

- **Italy – first time two fathers recognized as legal parents of child (IVF) Feb. 2017**
  - Italian court (Appeals Court in Trento) recognized both men in a couple as legal fathers of their surrogate children.
  - Children were conceived through IVF and born to a surrogate who lives in Canada.
  - First time in Italy’s history a child was legally recognized as having two fathers.
  - Alexander Schuster – Italian lawyer who worked on the case.

- **Italy – Parentage of child through surrogacy should be determined on case-by-case basis – Dec 2017**
  - Italian Constitutional Court ruled custody should not automatically be awarded to genetic mother or non-genetic mother in surrogacy disputes but should be decided on BIOC.

- **Netherlands – IVF for gay couples -- Nov. 2018**
  - At least two IVF clinics are starting to offer services to gay couples next year.
  - They are in Leiderdorp and Elsendorp.
  - Fertility center in Zwolle and a teaching hospital in Amsterdam is considering offering IVF treatment to gay couples with a surrogate.
  - Now couples will no longer have to go abroad to do surrogacy.

  - In 2008 – couple tried IVF at private clinic – got pregnant and froze four remaining embryos.
  - Place where they froze their embryos had a criminal investigation against them + all genetic material was seized.
  - People were told they could retrieve their embryos if they proved they were theirs but were turned away.
  - Got court orders which were rejected.
  - **Holding** – High Court said their orders were admissible, taking the embryos violated Article 8, said State should pay applicants damages.
  - Link – FULL CASE IN COMPLEX FOLDER.

- **Singapore -- Gay man couldn’t adopt child he had through surrogacy – Dec 2017**
Gay Singaporean man had child via surrogate in the US (he is bio father)
Singapore District Judge rejected his bid to adopt child (now 4 years old)
Had tried to adopt with his partner of 13 years but they wouldn’t recommend child for adoption by a gay couple
IVF in Singapore is confined to married couples + Singapore does not condone surrogacy

**Thailand – Baby trafficking case – Feb. 2018**
- Japanese native (Mitsutoki Shigeta) has fathered 13 children through surrogacy using several different agencies (surrogacy is now illegal in Thailand)
- Clinics became suspicious when he said he wanted to father 1000+ children
- 13 of these children have been living in a state home but he was just given custody (overall has 19 children)
- Court said no ill intent or trafficking on his part so they awarded him custody as he is bio father
- Thailand has been raiding clinics after 2015 law passed limiting surrogacy to Thai couples and banning commercial surrogacy

**United Kingdom – Three parent embryos now allowed to fight disease – Dec 2016**
- Government regulators allowing creation for three-parent embryos to combat disease

**United Kingdom – Single people can now have child via surrogate – Jan 2019**
- Remedial order grants single people in UK same rights as couples to become legal parents of surrogate-born children
- Link: [https://www.bionews.org.uk/page_140662](https://www.bionews.org.uk/page_140662); [https://www.nataliegambleassociates.co.uk/blog/2019/01/03/uk-surrogacy-law-embraces-single-parents-from-today/](https://www.nataliegambleassociates.co.uk/blog/2019/01/03/uk-surrogacy-law-embraces-single-parents-from-today/)

**United Kingdom – Online platform for surrogacy – Feb 2018**
- Dedicated to UK surrogacy and giving out practical, accurate public info for surrogates and parents
- Was collaborated with Department of Health
ART: Are you a SmARTy Pants? Hot Topics in Insurance, Legislation, and Case Law -- SUPPLEMENT

ABA Family Law 2019 Spring CLE Conference
Dominican Republic, May 2, 2019
By Colleen M. Quinn and Kate Miceli
Adoption & Surrogacy Law Center
At Locke & Quinn
quinn@lockequinn.com

AUTHOR DISCLAIMER AND NOTE: This outline is intended to supplement the materials provided by the other presenters and is intended to cover legislation and case law in the United States and abroad generally for the time period 2016 to the present. An effort has been made to capture as much as possible but this outline does not guarantee that all updates for that time period have been included. Many thanks go to all of the ART practitioners who posted updates on the ABA and other listserves - many of these updates came from those postings and we have tried to give credit as noted.

I. Case Law – United States
     o Torres diagnosed with breast cancer, she and her boyfriend (Terrell) went to clinic to have 7 embryos formed and frozen (married 4 days later)
     o Once treatment complete, Torres was cleared to become pregnant but she found out Terrell was having an affair and divorce proceedings commenced
     o Torres wanted to implant embryos without Terrell’s consent but family court said the embryos should be donated to a third party for implantation
     o AZ Court of Appeals overruled lower court and said Torres should be allowed to use the embryos to attempt to become pregnant
     o AZ Court of Appeals held a contract between the parties will govern, unless it doesn’t give the answer, then the courts will balance party interests (and must give special consideration to whether the prospective parent wants or doesn’t want to have the child)

II. Case Law – International
   • France – April 10, 2019 – parentage of child born abroad through surrogacy
     o Comments from Robin Fleischner: This decision finds that a child born through gestational surrogacy abroad to a married, heterosexual French citizen couple, using the husband’s sperm and donor egg, does not have the right to have the child’s intended mother on the child’s birth certificate in France. The intended mother has the right to petition for adoption, which is a matter of the discretion of the court.
     o Comments from Bruce Hale: Thanks for the synopsis, Robin - I read this decision slightly differently. While the prior decisions in this case found no right for the intended mother to have legal parentage in France based on the US-adjudicated parentage (and therefore no right to have the US birth certificate domesticated in France), this decision clarifies
that the country must nevertheless have a legal remedy for the recognition of the intended mother's parentage, and that an adoption process is a valid remedy.

III. Sperm Retrieval Cases and Literature

- **In re Matter of Daniel Thomas Christy, Johnson** (Case No. EQCV068545 Sept. 13, 2007).
  - Parents of Daniel Christy, who was on life support, had to seek court declaration that extracting sperm for his fiancée's future use was lawful
  - Court used UAGA provisions to permit parents to make a gift after their son’s death of his sperm
  - Professor Sheldon Kurtz (principal author of AUGA 2006) submitted an affidavit in the case saying this was exactly the UAGA’s intent

- **Israel – Sperm Retrieval Case**
  - Liat Malka had a low egg reserve, wanted to find a sperm donor to create an embryo
  - Found a YouTube video of Julia and Vlad Pozniansky seeking legal permission to release their 25-year-old sons sperm that had been cryogenically frozen before he died from cancer
  - Malka eventually had a child using Pozniansky’s sperm and provides the paternal grandparents with visitation

- **Peter Zhu Sperm Retrieval Case** (New York State Supreme Court, March 2019)
  - West Point cadet, Peter Zhu, died in a skiing accident
  - His parents, Monica and Yongmin, petitioned the court for an order to retrieve his sperm as the hospital wouldn’t complete the procedure without a court order
  - Cited Zhu’s desire for children expressed throughout his life plus the cultural significance of preserving the family name
  - The Court granted the order
  - See articles about case here (not exhaustive): [https://www.armytimes.com/news/your-army/2019/03/05/the-parents-of-a-west-point-cadet-who-died-in-a-skiing-accident-retrieve-his-sperm/?utm_source=facebook.com&utm_medium=social&utm_campaign=Socialflow+ARM&fbclid=IwAR3Lu3rz68GvqSXrG91Ko87jsGo28CBQVgOMm2RmKiW8m5g7P7_1YGSS4c](https://www.armytimes.com/news/your-army/2019/03/05/the-parents-of-a-west-point-cadet-who-died-in-a-skiing-accident-retrieve-his-sperm/?utm_source=facebook.com&utm_medium=social&utm_campaign=Socialflow+ARM&fbclid=IwAR3Lu3rz68GvqSXrG91Ko87jsGo28CBQVgOMm2RmKiW8m5g7P7_1YGSS4c); [https://www.washingtonpost.com/nation/2019/03/05/their-only-son-died-unexpectedly-court-order-retrieve-his-sperm-means-his-legacy-could-live/?utm_term=.1b15d19aa2c1](https://www.washingtonpost.com/nation/2019/03/05/their-only-son-died-unexpectedly-court-order-retrieve-his-sperm-means-his-legacy-could-live/?utm_term=.1b15d19aa2c1)

- **Savannah Law Review: The Walking Dead: Reproductive Rights for the Dead** by Ellen Trachman and William E. Trachman
  - See article here: [https://www.savannahlawschool.org/wp-content/uploads/volume3number1-article06.pdf](https://www.savannahlawschool.org/wp-content/uploads/volume3number1-article06.pdf)