

Skellenger Bender

1301 FIFTH AVENUE, SUITE 3401
SEATTLE, WASHINGTON 98101-2605
(206) 623-6501

RITA L. BENDER
rbender@skellengerbender.com

RAEGEN N. RASNIC
rrasnic@skellengerbender.com

JANET M. HELSON
jhelson@skellengerbender.com

LEGAL ISSUES OF SURROGACY, ARTIFICIAL INSEMINATION, EGG DONATION, AND EMBRYO DONATION

Rita L. Bender
Raegen N. Rasnic
Janet M. Helson

Advancing medical technology has made assisted reproduction techniques widely available. Children may be conceived through artificial insemination, either through use of the prospective father's sperm or sperm from a donor, who may be either known or anonymous. In vitro fertilization may involve either sperm or egg from an individual other than the prospective mother or father. Embryos created from the intended parents' sperm and egg, or donor sperm and egg, may be transferred to a surrogate (often called a gestational host or gestational carrier) who will birth the child, although she is not a biological parent. Alternatively, donated embryos may be transferred to the intended mother, who will birth the child.

In some of the assisted reproduction situations described above, an adoption may be necessary under Washington law in order to ensure that both intended parents have a legally recognized relationship with the child or children. In circumstances in which a surrogate, known egg donor, or known sperm donor is used, a private contract – often referred to as a surrogacy agreement or donor agreement – should be prepared prior to the commencement of any medical procedures, to protect the parties.

WHAT IS SURROGACY?

Washington's Uniform Parentage Act ("UPA"), RCW 26.26.210, governs surrogacy. The UPA distinguishes between a "gestational host" (or "gestational surrogate"), who gestates and gives birth to a child not genetically related to her, and a "surrogate mother" (or "traditional surrogate"), who is artificially inseminated, and who is the genetic mother of the child to whom she gives birth.

In both types of surrogacy, a surrogate parentage contract may be used. A surrogate parentage contract is an agreement in which a woman who is not married to the contributor of sperm agrees to conceive a child through natural or artificial insemination, or in which the woman agrees to surrogate gestation, and in either event intends that she will have no parental rights to the resultant child.

DO SURROGACY ARRANGEMENTS REQUIRE AN ADOPTION?

In the event that a child born to a gestational surrogate is the biological child of both the individuals who intend to parent the child (meaning that the intended parents are the source of egg and sperm), the biological parents/intended parents may not be required to complete an adoption proceeding to establish their legal parentage of the child, provided that the surrogate and both the biological parents/intended parents complete and sign the Affidavit and Physician's Certificate form issued by the Washington Department of Health Center for Health Statistics. This form, which also must be signed by the treating physician, is filed with the Center for Health Statistics shortly after the birth. The biological parents/intended parents are considered the legal parents of the child, and a birth certificate bearing the names of the biological parents/intended parents is issued, without the need for an adoption.

In other surrogacy situations (for example, if the child is the biological child of the surrogate, or if the egg donor is a woman other than the surrogate or the intended mother), it will be necessary for one or both the intended parents to adopt the child or obtain a declaration of parentage.

It is important for families contemplating surrogacy arrangements to understand the statutory requirements and limitations, because the facts of a particular situation may affect the determination whether an adoption is necessary. The family anticipating a child through surrogacy should review the circumstances, prior to the commencement of retrieval of eggs, transfer of embryos, or any other medical procedures, if at all possible, and plan for the necessary legal proceedings. A surrogacy agreement should be created and signed prior to the commencement of any medical procedures.

When an adoption is required or advisable, a homestudy may be prepared prior to the birth. The surrogate and biological father of the child (unless the biological father is a sperm donor who is without parental rights pursuant to the Uniform Parentage Act) must sign consents to adoption in compliance with Washington's adoption statute, RCW 26.33. If required, consents may be signed prior to the birth. The parental rights of the surrogate and biological father (if not the intended parent) may be terminated following the passage of 48 hours after the birth of the baby or 48 hours after consents are signed, whichever is later.

Washington's adoption statute permits the filing of a petition for adoption in this state if the adoptive parent, birth parent, or child, resides in the state. The effect in surrogacy arrangements is that if the surrogate resides here, Washington will have jurisdiction to accomplish the adoption, even if the prospective parents are out-of-state residents. In situations in which the Affidavit and Physician's Certificate will be filed with the Center for Health Statistics in lieu of an adoption, such a filing may be accomplished if the birth occurs in Washington.

WHAT LEGAL LIMITATIONS ARE THERE ON SURROGACY?

Washington law prohibits surrogacy agreements in which an unemancipated minor, a woman diagnosed as mentally retarded or who has a mental illness or developmental disability, is to serve as the surrogate.

No person, organization, or agency may enter into or assist in the formation of a surrogate parentage contract, written or unwritten, for compensation¹. A surrogate parentage contract which is entered into for compensation, whether executed in the State of Washington or in another jurisdiction, is void and unenforceable in the State of Washington. If a family enters into a surrogacy contract to be performed in another state where surrogacy compensation is legal, they may find themselves unable to complete an adoption, if an adoption is required to establish their legal parentage of the child. The surrogacy arrangement would be void and unenforceable in Washington, whereas the state of execution may lack jurisdiction to grant an adoption for nonresident parents.

Although a surrogate may not be compensated for her services, payment of expenses incurred as a result of the pregnancy, including court approved living expenses, as well as medical expenses and payment of reasonable attorneys fees, are permissible under the adoption statute. As a result of these statutory provisions, surrogacy arrangements in Washington may more frequently be entered into between relatives or close friends, than between unrelated volunteers. There is no prohibition against strangers serving as surrogates, so long as any payments do not violate the statute.

WHAT ISSUES SHOULD PERSONS CONSIDERING SURROGACY CONSIDER?

Persons wishing to enter into surrogacy agreements should consider a variety of issues: Will the surrogate agree to maintain her health and follow doctor's advice during the pregnancy? Is there an issue as to choice of medical treatment or how much involvement the prospective parents will have in prenatal decision making? In the event of an abnormality in the developing fetus, what involvement may each of the parties have in considerations as to termination of the pregnancy? If the surrogate requires time off from work during the pregnancy and thereafter, have the prospective parents agreed to assist her with living expenses? Has medical insurance coverage been obtained for the surrogate prior to the conception or embryo transfer? What contact and involvement will the surrogate and the prospective parents have with each other during the course of the pregnancy? What contact, if any, will the surrogate have with the child after the birth? Will there be contact after the prospective parents assume custody of the child?

The list of issues is not meant to be exhaustive; it is simply suggestive of some of the questions and concerns which the parties to the agreement may wish to identify and discuss. The surrogacy agreement can include any commitments which both sides wish to make to each other, so long as the commitments are legal. However, some agreements may lend themselves to enforcement, while others are more aspirational in character. For instance, an agreement to pay medical expenses would be an enforceable contract term. On the other hand, a commitment to get sufficient rest during the pregnancy may be difficult to enforce.

HOW WOULD CUSTODY AND PARENTING DISPUTES BETWEEN THE SURROGATE AND PROSPECTIVE PARENTS BE RESOLVED?

After the birth of the baby, if there is a dispute between the parties to a surrogacy agreement concerning custody, the party having physical custody of the child may retain such custody pending a judicial decision. In such a circumstance, the award of legal custody will be

¹ Although untested in our Courts, this section probably means that no surrogate or agency arranging a surrogacy can be paid a fee for acting as a surrogate or brokering such services.

based upon the parenting plan provisions which apply in dissolution of marriage actions. If an adoption is planned, the adoption might not proceed if there can be no termination of the surrogate's parental rights. Custody would be resolved between the surrogate and the prospective parents. It is unclear under Washington law whether a gestational host who is not the biological mother of the child she births would have rights to the child in the event of a custody dispute. Despite that ambiguity, Washington requires termination of the parental rights of a gestational surrogate as part of an adoption proceeding, unless the intended parents are the child's biological parents (the source of egg and sperm) and the intended parents, surrogate, and physician complete the Affidavit and Physician's Certificate for filing with the Center for Health Statistics, as described above.

Obviously, careful selection of the surrogate, and examination with her of the issues, are the best assurances the prospective parents can obtain that the arrangements will go smoothly. Where the Affidavit and Physician's Certificate may be employed, the process is extremely simple, and a new birth certificate usually issues within weeks of the birth. Where adoption is the appropriate route, most families have experienced easy finalization of the adoption following the birth of their child.

WHAT LEGAL ISSUES ARE OF CONCERN IN SITUATIONS OF ARTIFICIAL INSEMINATION?

Adoption is not necessary to establish the parental rights of the intended father of a child conceived through artificial insemination using donor sperm, provided that the intended father is married to the mother of the child. Washington's Uniform Parentage Act, RCW 26.26.011(3)(c) and RCW 26.26.705, provide that a donor of sperm for the purposes of assisted reproduction is not treated in law as the father of the resultant child. The UPA also provides that the father-child relationship may be established between a man and a child by a man's having consented to assisted reproduction by his wife, resulting in the child's birth. RCW 26.26.101(e). In this circumstance, the statute does not require adoption of the child by the husband. However, if the partner of the mother is not her husband, the statute does not recognize the partner as a parent. In this case, the parent-child relationship between the child and the mother's partner must be established through adoption.

The issues concerning selection of a donor, if he is known, will be somewhat similar to selection of a surrogate. Is he a stable person who is likely to cooperate with the legal process to accomplish the termination of his parental rights incident to an adoption? Are there health issues to be explored in advance?

Although the UPA provides that a donor is not considered the parent of a child conceived through assisted reproduction (RCW 26.26.705), the statute's interaction with Washington's adoption statute, RCW 26.33, has yet to be interpreted by the courts. The UPA does not distinguish between known and unknown donors. However, some Washington superior courts require termination of the "parental rights" of a known donor, by means of a consent to termination and adoption, if the insemination was accomplished outside the fertility clinic setting. The known donor's rights can be terminated in the context of a second parent or stepparent adoption. (An unmarried woman who utilizes a known donor to conceive through artificial insemination cannot obtain termination of the known donor's rights unless her partner is in a position to adopt the child; thus, it is most important for single women contemplating such an arrangement to consider the legal risks they may face.)

The parties to a known sperm donor arrangement may enter into a contractual agreement in which the donor agrees that he does not intend to parent the child and in which he agrees to execute any documents necessary to effectuate the termination of his parental rights and an adoption, should one be necessary. Entry into such a contract with a known sperm donor serves as some insurance to intended parents, the second parent in the context of a woman who is not married to her partner, or for a single woman who intends to parent the child without a partner. (A married woman who uses a sperm donor can rely upon the statutory donor provisions and an adoption is not necessary.) Entry into a contract with the sperm donor is absolutely necessary when artificial insemination is performed without the assistance of a physician, as the UPA contemplates that the parties acknowledge that the donor will not parent the child, and that the child was not conceived by means of sexual intercourse.

WHAT ARE THE LEGAL ISSUES IN EGG DONATION?

Donor eggs are sometimes used for creating embryos for transfer to the intended mother or a gestational host, with sperm contributed for fertilization by the intended father or a donor. The Uniform Parentage Act provides that an egg donor, like a sperm donor, is not considered the parent of a child conceived through assisted reproduction. 26.26.705. If the child is born to the intended mother, she will be named on the child's birth certificate, and no adoption of the child is necessary in order to establish the intended mother's legal parentage.

Like sperm donors, egg donors may be known or unknown. Unlike surrogates, they may be compensated for their services. It is strongly advised that intended parents enter into a contract, which is prepared and signed prior to the commencement of medical procedures to retrieve the donor's eggs, spelling out the rights and responsibilities of the donor and intended parents. In that agreement, the donor acknowledges that she will not have any legal rights to the eggs once retrieved, or to any child who may be born as the result of the use of her eggs. Financial obligations are spelled out in the contract as well.

WHAT ARE THE LEGAL ISSUES FOR EMBRYO DONATION?

As between the two intended parents who acquire ownership of eggs or resulting embryos, there may be issues of the right to use or dispose of the material in the event of a future dispute. The Washington Supreme Court's decision in *Litowitz v. Litowitz* made clear that the courts will honor and enforce the agreements of intended parents regarding the disposition of the embryos. We advise all clients who will be creating embryos through assisted reproduction to have a brief contract between themselves which provides for the use or disposition of any remaining embryos in the event of future disagreement between them, death of either, or separation or divorce.

Intended parents may choose to donate their unused embryos to another family or individual seeking to begin a family. Washington law currently does not directly address the issues presented by embryo donation. The UPA does not address whether the resulting child or children should be adopted by either or both the intended parents/recipients of embryo donation. Where the embryo donors are also the source of the egg and sperm, or when anonymous donors gave up all claim to their sperm or eggs, it may not be necessary to undertake an adoption. Alternatively, the intended parents might choose to obtain a declaration of parentage under Washington's parentage statute. We advise clients who wish to donate embryos or receive

donated embryos to consult with a knowledgeable attorney and then to enter into a detailed contract spelling out the rights and intentions of the donors and recipients/intended parents with respect to the embryos as well as the resulting children.

CONCLUSION

With the increased use of advanced technology in assisted pregnancies, more and more families will be able to realize their dream of parenthood. Families must consider the legal consequences of the medical choices they are making. They should plan for the legal process by which the infant born to them will be legally acknowledged as their child. The birth of this long awaited child should not be clouded by anxiety or legal uncertainty.

Our law firm is very proud of the work which we have done over the years upon the adoption of children and the legal issues of assisted reproduction. Rita L. Bender and Raegen N. Rasnic have served as the attorneys in more than a thousand adoptive placements, as well as for parties to surrogacy contracts, egg donor and insemination agreements, and for embryo donors and recipients. Our years of experience in this area of law, and the work we have done with so many clients, have provided us with unique understanding of the legal and social aspects of adoption and assisted reproduction. We would be pleased to meet with any family who has contemplated an adoption, surrogacy, donor arrangement, or an artificial insemination, or is presently in the midst of such a pregnancy.