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LEGAL CONSIDERATIONS IN THIRD PARTY ASSISTED REPRODUCTION ARRANGEMENTS INVOLVING HIV+ INTENDED PARENTS

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INTRODUCTION

The growing accessibility of parenthood for those who once thought having a biologically related child an impossible dream is clearly one of the most remarkable technological advancements of our time. New fertility treatments and advances in assisted reproductive technology continue to make ART more accessible, more affordable, and more effective with each passing day.

Similarly, not that long ago, a diagnosis of HIV infection was essentially a death sentence, accompanied by the dire risk of infecting others. For HIV+ men, fathering a child was believed to be out of the question. Today, improved treatments and other technological advances have made HIV into a manageable, albeit serious, chronic disease.

Likewise, technological advancements have allowed HIV-positive men to become biological fathers. In the late 1990s, the Bedford Research Foundation's Special Program of Assisted Reproduction, or SPAR, (http://sementesting.org/) developed new methods for testing and preserving semen from men with HIV disease that nearly eliminated the risk of infection. In 1999, the first SPAR baby was born. In 2006, surrogacy and egg

donation agency Growing Generations launched its HIV Assisted Reproductive Technologies program, or HART, (http://www.growinggenerations.com/surrogacy-program/intended-parents/hiv/) to offer intended parents with HIV disease the opportunity to become parents via assisted reproductive technology.

The American Fertility Association also has played a leading role in outreach to HIV+ intended parents and public education with its "Dreams to Reality" initiative (http://www.theafa.org/family-building/hiv/), which aims to "provide the most cutting-edge thinking about HIV and parenthood for both patients and the dedicated healthcare professionals who treat them." And it is perhaps enlightening and encouraging to note that, according to the American Fertility Association, **"**The first reports of sperm washing and insemination (IUI) for couples with HIV were published in 1992, and since that time over 5000 treatment cycles worldwide have been published utilizing both IUI and IVF with no reports of infection to the recipient." (http://www.theafa.org/family-building/hiv/).

RELEVANT CASE AND STATUTORY LAW

There is almost no existing case law specific to transmission of HIV infection via assisted reproductive technology. In *Lubowitz v. Albert Einstein Med. Ctr.* 623 A.2d 3 (Pa.Super. 1993) a surrogate sued a Pennsylvania fertility clinic for using placental serum from an anonymous donor that tested positive for HIV for an in vitro fertilization procedure. An embryo created from the plaintiff's egg and her husband's sperm using the contaminated serum was transplanted into the surrogate's body. However, she tested negative for HIV, and the Pennsylvania court ruled in favor of the clinic.

The Health Insurance Portability and Accountability Act of 1996 (HIPAA), 42 U.S.C. § 1320d et seq., protects the confidentiality of patient medical records. The general rule under the HIPAA Privacy Regulations is that covered entities may not use or disclose an individual's protected health information for purposes unrelated to treatment, payment, healthcare operations, or certain defined exceptions without first obtaining the individual's prior written authorization. Covered entities are health plans, health care clearinghouses, and health care providers that transmit any health information in electronic form in connection with a standard HIPAA transaction.

However, some states have enacted laws governing HIV disclosure that pre-empt HIPAA rules. In Massachusetts, for example, a provider is prohibited from disclosing the results of an HIV test or the identity of the test subject without the subject's written, informed consent. The informed consent document must specify the purpose for the release of information; a standard release of medical records will not suffice.

In other parts of the U.S., authorities may pre-empt HIPAA to require release of information about HIV status in certain circumstances. In Arkansas state prosecutors are allowed to subpoena information about HIV status if it is deemed relevant to a legal prosecution. In Idaho, public health officials are allowed to make an exception to HIPAA privacy regulations governing HIV status in the interest of public health.

Laws in several states, including Missouri, Delaware and Illinois, prohibit the donation of bodily fluids, including semen, from HIV+ donors. However, those states' prohibition of sperm donation is assumed to refer to anonymous donation to a sperm bank rather than a scenario in which the sperm of an intended parent is used to conceive a child

via ART. In the latter case the intended parent is not considered to be a donor and has the right to solicit informed consent from a third party, or surrogate.

Simply stated, a signed release allowing the disclosure of the intended parent's HIV status and documentation of full disclosure and informed consent of the surrogate will be essential for third party IVF clinics working with HIV+ intended parents.

INFORMED CONSENT IN THE LEGAL CONTEXT

Obtaining a surrogate's fully informed consent is also essential for the parties involved in 3rd party assisted reproduction arrangements and the attorneys representing them. Despite the absence of case or statutory law specific to assisted reproduction with HIV+ intended parents, both HIV privacy laws and criminal laws related to HIV status would dictate that a surrogate be fully informed of the intended father's HIV status and that the surrogate's informed consent is documented.

Third-party ART agreements involving HIV+ intended parents should address this in the surrogate's assumption of risk provisions whereby she states that (1) she has been fully informed or had the opportunity to speak with medical professionals about the risks of infection (even though it is minimal/non-existent) and (2) that she agrees not to bring any claims against the intended parent or parents should she suffer any harm as a result of such risk.

However, be alert!!!

Although HIPAA generally applies to the medical professionals' obligation to protect patients' privacy, attorneys also owe their clients a duty of confidentiality and must be careful to only disclose information with clients' permission. Therefore, ART

attorneys must think carefully about where the client's health information is disclosed in the legal documents, how those documents ultimately will be used, and who will have access to them.

Establishing the parental rights of the intended parents via surrogacy agreement is usually handled in the courts, where the proceedings can sometimes be public record and are not sealed, so protecting the privacy of the intended parents requires additional vigilance. Will the court see these records, and, if so, will their contents be protected, or will they become public record? In some cases, documents are reviewed by the state attorney general's office, or are reviewed by an attorney representing the state "vital records" office before the parentage case is filed in court. On occasion, hospital personnel or the doctor attending the birth might ask to see the surrogacy agreement.

Considering the fact that there may be times and places in the legal work necessary for 3rd party ART arrangements where the intended parent's HIV status could become public, it is strongly recommended that the assumption of risk provisions in this context should be put into a separate "disclosure and release of liability waiver" which does not get disseminated in any fashion, rather than including the disclosure and waiver in the surrogacy agreement itself which may, potentially, be disseminated.

The waiver should affirm that the surrogate (and the surrogate's spouse, if appropriate) has been informed that an intended parent has tested positive for HIV, and that all the medical procedures associated with the surrogacy agreement, including the transplantation of an embryo "wherein the male sperm contributor is known to be HIV I/II antibody reactive" and the accompanying risks to the surrogate, including transmission of the disease and death, have been thoroughly explained by a physician.

The waiver should also include the surrogate's agreement to assume all medical, financial and psychological risks, and to release the intended parent from any legal liability arising out of any transmission of the HIV I/II virus as a result of the surrogate's participation in the surrogacy and the contemplated embryo transfer procedure(s).

In some cases, the disclosure and waiver agreement may include the client's agreement to reimburse the surrogate for a period of time after the surrogacy for any medical expenses resulting from her contracting HIV as a result of the embryo transfer, and/or an agreement to purchase supplemental health insurance coverage for the surrogate. Such clauses serve as additional assurance to the surrogate, in addition to the statistically negligible risk of infection and the proven safety of the procedure.

CONCLUSION

As the number of successful outcomes has grown, so has public awareness and acceptance of the concept of HIV+ men becoming parents via ART, similarly to the growing acceptance of adoption by LGBT parents, single intended parenting, and ART itself. But there are still many parts of the United States and other countries where ART involving an HIV-positive father is not accepted. Even where the technology and programmatic support exists, many men with HIV are unaware that biological parenting is a possibility for them. Healthcare professionals and advocacy organizations are working to publicize the availability of this option for HIV+ men and their families. By ensuring that all parties are fully informed and proper legal agreements in place, we can help ensure it will be a positive, safe and private solution for all parties.