Contents

Click here to return to Main Contents

Articles

Advising families considering or involved in multi-jurisdictional egg donation and surrogacy arrangements in the US: ethical and safe practices

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Introduction

Advances in assisted reproduction technology (ART) over the last 30 years have made it possible for many to start a family when it was previously not possible. This is true for traditional and more 'non-traditional' families (eg, single parents, unmarried parents, same-sex couples, intended parents well beyond the 'normal' reproductive age, and posthumous reproduction).

Family formation through ART is predominantly multi-jurisdictional, and it is increasingly being used by more non-traditional families. In addition, more and more non-US citizen intended parents are coming to the US, making the clients' legal approach to parental establishment significantly more complex.

The increase in non-US citizen IPs for ART coming here is due to many factors, but mainly it is because such arrangements may not be legal or socially accepted where they are coming from.

The Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (or Hague Adoption Convention) is widely criticised for creating insurmountable cost and time barriers for many would-be adoptive parents. This Convention was well-intentioned and was aimed at dealing with international adoption, child laundering, and child trafficking in an effort to protect those involved from the corruption, abuses and exploitation which sometimes accompany international adoption, but the result has been an over 50% drop in international adoptions due to the significant barriers created (see www.cnn.com/2013/09/16/world/international-adoption-main-story-decline). So many would-be adoptive parents turn to ART. At the same time, ART has become more widely accepted and success rates have steadily improved – leading many to consider this family building option without ever looking at adoption.

Social acceptance, public policy and the law – for all families using ART, but especially for non-traditional families using ART – have not kept up with the advances in technology. This may always be the case. And as more people turn to this method of family building, inevitably, issues and disputes will arise that weren't previously addressed by the law, making the legal considerations all the more complex. Likewise, the more people turn to ART, the more cultural differences and attempts at cutting corners will lead to ethical concerns we will all have to address from time to time.

The ethical issues and questions are seemingly never ending. It starts with the notions of what the technology makes possible and societal reactions to it. From there it grows into people actually using and benefiting from the technology, and then it can morph from here towards viewing ART as more of a fungible commodity – giving rise to questions that quite often seem to push the envelope on what may or could be acceptable.

Ethical issues relevant to stakeholders in cross-border reproductive care

For attorneys, here's how the California Bar Association approaches an attorney's ethical duties.

California Bar – Rules of Professional Conduct

Rule 1–300. Unauthorised Practice of Law

(A) A member shall not aid any person or entity in the unauthorised practice of law.

(B) A member shall not practise law in a jurisdiction where to do so would be in violation of regulations of the profession in that jurisdiction.

Rule 3–110 Failing to Act Competently[1]

(A) A member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence.

(B) For purposes of this rule, 'competence' in any legal service shall mean to apply the (1) diligence, (2) learning and skill, and (3) mental, emotional, and physical ability reasonably necessary for the performance of such service.

(C) If a member does not have sufficient learning and skill when the legal service is undertaken, the member may nonetheless perform such services competently by (1) associating with or, where appropriate, professionally consulting another lawyer reasonably believed to be competent, or (2) by acquiring sufficient learning and skill before performance is required.

In other words, attorneys in the US must not advise on areas of law in which they are not competently experienced. And, as it relates to cross-border reproductive clients, this includes not giving legal advice on the law in jurisdictions where one is not licensed. If an attorney is to give advice on the law in another jurisdiction, such advice should be qualified with a disclaimer that the attorney is not licensed in the other jurisdiction and that the client is advised to get independent, qualified, legal advice from someone licensed in the relevant jurisdiction.

Presumably the other licensed professionals involved in ART have similar rules as well. Counsellors shouldn't counsel in an area where they aren't qualified. Medical practitioners should not give medical advice or perform a medical procedure in an area of medicine with which they are not familiar.

Similarly, most third party reproductive agencies, while not subject to licensing requirements or a trade-association code of ethics, at least in their written retainers, will or should inform their clients that they are not providing legal, insurance, medical or psychological advice and while they may make referrals to such professionals, they cannot guarantee the advice of any of those professionals and cannot guarantee any results.

In the area of legal advice, you must be competent to give advice to the client based on the law that will apply to the clients. In egg donation, most often, the law that applies is the law where the retrieval is taking place. In surrogacy, most often, the law that applies is the law of the state where the birth occurs and this is by far the most critical and complex piece for intended parents because ultimately they want to know their parental rights can be

1 The duties set forth in rule 3–110 include the duty to supervise the work of subordinate attorney and non-attorney employees or agents. (See, eg, *Waysman v State Bar* (1986) 41 Cal.3d 452; *Trousil v State Bar* (1985) 38 Cal.3d 337, 342 [211 Cal.Rptr. 525]; *Palomo v State Bar* (1984) 36 Cal.3d 785 [205 Cal.Rptr. 834]; *Crane v State Bar* (1981) 30 Cal.3d 117, 122; *Black v State Bar* (1972) 7 Cal.3d 676, 692 [103 Cal.Rptr. 288; 499 P.2d 968]; *Vaughn v State Bar* (1972) 6 Cal.3d 847, 857–858 [100 Cal.Rptr. 713; 494 P.2d 1257]; *Moore v State Bar* (1964) 62 Cal.2d 74, 81 [41 Cal.Rptr. 161; 396 P.2d 577].) In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances. (Amended by order of Supreme Court, operative 14 September 1992.)

Click here to return to Main Contents

established. Of course in cross-border reproduction, another extremely important legal jurisdiction is where the intended parents reside and where they intend to register the child as a citizen.

What follows is a brief summary of the US law relating to establishing parental rights in surrogacy matters.

Approaches used to establish parental rights in surrogacy cases in the US

The doctrine of intended parentage in the US is a legal approach to parentage based on the idea that those with procreative intent should be the legal parents. This approach is gaining acceptance in an increasing number of jurisdictions (enabling intended parents in all sorts of family configurations to obtain parental rights). However, a few jurisdictions in the US and in fact most other countries have not fully adopted this doctrine. Outside this doctrine, a wide variety of more restrictive approaches to establishing legal parentage in the US for non-traditional families have evolved as a result of jurisdictional public policy considerations, local custom and practice, judicial discretion and a patchwork of case-law, limited statutory law and proposed model legislation.

Appreciating the interrelation of these multi-jurisdictional factors and knowing how these factors apply to the wide variety of family building situations, or knowing when to seek the advice or assistance of lawyers licensed and experienced in the relevant jurisdictions, will help your clients: better navigate their options, plan their surrogacy, and properly prepare for their parental establishment process. Such preparation will also go a long way towards ensuring your clients a smooth return home with their newborn child or children.

The intended parentage doctrine

In 1993, the courts in California recognised that intended parents of children produced through surrogacy are the legal parents. The California Supreme Court decided in *Johnson v Calvert* that an intended mother who provided her own egg for gestation by a surrogate should be considered the natural mother because she had the intent to procreate (*Johnson v Calvert*, 5 Cal 4th 84 (Cal 1993)).

Under this doctrine, even where there is no genetic relationship between the intended parents and the child produced through a surrogate, the intended parents are the lawful parents of the child when a married couple intended to procreate using a non-genetically related embryo implanted into a surrogate (*In re Marriage of Buzzanca*, 61 Cal App 4th 1410 (1998)).

Applying this doctrine to same-sex intended parent couples, in 2005, the California Supreme Court decided three companion cases involving lesbian couples who had children via surrogacy, *Elisa B v Superior Court*, *Kristine H v Lisa R* and *KM v EG*, ruling that when a same-sex couple has a child through assisted reproduction, both partners are legal parents, regardless of their gender, sexual orientation, or marital status.

Several jurisdictions have followed in California's footsteps in whole or in part, but many states apply different approaches, so it is important to briefly review a few of the other approaches to parental establishment.

Other approaches to parentage in the US: genetics-based test

Ohio, for example, explicitly rejects the California intent-based approach and applies a genetics-based test; those who are the genetic parents are considered the natural and legal parents of the child(ren) unless they relinquish or waive their rights (*Belsito v Clark*, 644 NE 2d 760, 766 (1994)).

Hybrid procreative and parenting intent

Tennessee, on the other hand, has considered both the California intent-based approach and Ohio's genetics-based approach and has fashioned a hybrid approach based on a consideration of: procreative intent of the parties prior to

conception and birth; who gave birth; and the lack of another competing party for the role of 'parent' (*In re CKG*, 173 SW 3d 714, 725 (2005)).

Parental conduct approach

In Pennsylvania, the court has determined that a surrogate has a presumed legal status as the mother of the child she delivered despite having no genetic connection to the children. However, the Pennsylvania court ultimately determines parentage by giving more weight to the evidence of parental conduct, such as prenatal conduct, gestating, caring for the child(ren), and making decisions that affect the child(ren) even though the person has no genetic connection to the child(ren) or intent to parent the child(ren) (*Flynn v Bimber*, 70 Pa D & C 4th 261, 289–309 (2005)). Additionally, the Superior Court of Pennsylvania ruled in November 2015, that a gestational carrier contract can be enforced in Pennsylvania. This is the first time an appellate court has specifically ruled on the enforceability of a gestational carrier contract in Pennsylvania. This decision now clarifies the law for the many people who use ART in Pennsylvania to form their families (*In Re Baby S*: www.pacourts.us/assets/opinions/Superior/out/J-A28015–15o%20-%201024461805731818.pdf?cb=1).

Uniform laws approaches

Considering the variety of approaches to parentage across the US, there have been several proposed uniform laws addressing the rights of intended parents through ART. The Uniform Parentage Act (UPA) of 2000 (as amended in 2002) essentially replaced the 1998 Uniform Status of Children of Assisted Conception Act (USCACA). The UPA was approved by the National Conference of Commissioners on Uniform State Laws and created a potential means of developing a uniform system for determining parentage in surrogacy cases, but it is not 'law' per se and serves as a model act for states to consider in whole, in part, or with state-specific revisions when and if the effort is made to enact such a law in that state. Several states have made such an effort (Alabama, Delaware, New Mexico, North Dakota, Oklahoma, Texas, Utah, Wyoming, and Washington) (*Table of Jurisdictions Wherein Act Has Been Adopted, Unif Parentage Act* (West 2000) Refs & Annos), so your clients' parental establishment process in those states will have to proceed in compliance with these statutes.

In 2008, the American Bar Association adopted the Model Act Governing Assisted Reproductive Technology. The ABA Model Act is intended to provide guidance and a framework for resolving controversies by framing the rights and obligations of the various parties to ART arrangements.

International considerations

In many countries of the world, surrogacy is either illegal or highly restricted, so intended parents from other countries (in traditional and non-traditional families) frequently come to the US for surrogacy. As a result, the wording of US parentage orders and the way in which US birth certificates are filled out can significantly impact an intended parent's ability to: register and obtain citizenship in their home country for children born through surrogacy in the US; and/or to further perfect their parental rights in their home country (if necessary).

Developing your client's legal strategy: client intake, surrogacy contracts, family planning documents, and the parental establishment case

Given the various approaches to parental establishment (complete with the restrictions and limitations), careful consideration of the nuances present in multi-jurisdictional cases should be taken into account when advising intended parents on their parental establishment strategy in the US, especially those in 'non-traditional' family configurations. Attention to these details should be given primarily at the intake stage, when drafting surrogacy contracts, and when drafting estate planning documents to protect the family.

Click here to return to Main Contents

(I) Client intake – your initial consultation ultimately sets the stage for the legal strategy in your client's parental establishment case

The first step with any client is the initial consultation and client intake. In ART cases, some basic questions should be addressed up front.

(A) Is the client working with an agency or are they independent?

Clients need to be educated about the psychological, medical and genetic screenings, insurance for the maternity and the newborn child(ren), fund management (whether through escrow or your client-trust account), and background checks among other issues. Additionally, international clients going to the US are typically unfamiliar with the US medical delivery system and our legal system, and they tend to be cautious about the financial exposure that they have in what is admittedly a very expensive process. They need to be fully aware of all aspects of the investment they are making in the US. As you are their legal adviser, you have an ability to direct their education in the system and plan contingencies for their voiced concerns.

Surrogacy agencies typically manage this part of the clients' process. Some IVF clinics may do this as well (or at least require these steps be completed before proceeding with the medical procedures), but most do not. Therefore, it is especially important with independent clients (those not using an agency) that you find out whether they have received referrals or engaged the necessary professional services to complete these essential first steps. Your clients are likely to look to you to provide these referrals or guidance in these matters, but as their lawyer you should also consider not drafting or completing the surrogacy agreement until your independent clients have completed these preliminary steps (or you should only move forward after you have fully advised them and they have waived these standard requirements in writing).

Why is this important? Although it may not impact the legal strategy for establishing parentage for such clients, many of the horror stories we've undoubtedly heard about are the result of clients using family members or friends as their surrogate or donor and/or skipping over one or more of these preliminary requirements (usually because they are trying to save money, or 'they know each other well' or they 'have a good feeling about this girl'). Encouraging such safeguards at the outset of your clients' surrogacy can prevent conflicts in the future.

(B) Whose genetics are being used?

Another important question to ask your clients is whose genetics will be used in their assisted reproduction. For purposes of establishing legal parentage in a surrogacy case, the importance of an intended parent's bio-connection can range from not relevant to critical, depending on the country.

Keep in mind that some intended parents may view this as a touchy subject. Nevertheless, the issue needs to be discussed in the early stages of the legal process, especially if the surrogate will deliver in a state where the bio-connection is critical to the legal process and/or the baby will return home with the new parents to another country.

(C) Where is everyone from?

The parental establishment process your clients will go through – and the way in which the birth certificate will or can be prepared (or amended) – is determined primarily by the law and process established in their home country. Additionally, laws in the state where the child will be born will have an impact on how you package your surrogacy and establish parentage.

(1) Intended parent(s) residence and citizenship

We live in a global society. Our clients may be couples where one partner is a citizen of one country, the other a citizen of a second country; they are legal residents of a third, but split their time among a fourth country; and they are considering a permanent move to a fifth.

It is not enough to know where our clients live, we have to ask where they hold citizenship – and whether they hold citizenship in multiple countries, and we have to ask where they intend to establish citizenship for the resulting child.

We need to consider whether our clients will or may be committing a criminal offence in any of these jurisdictions if they engage in surrogacy, where and how the baby will obtain citizenship, and how the baby will obtain a legal immigration status in the jurisdiction where the family plans to reside.

There needs to be a plan in place before there is a pregnancy – because otherwise it could be too late.

Although the law of the birth state must be followed to establish parentage, it must be considered in conjunction with the country of residence and citizenship of intended parent(s) ('IP' or 'IPs'), because the IPs' home jurisdiction may limit the options available, so it is important to factor in to your strategy.

It is always imperative for your clients to speak with a local attorney regarding their legal options prior to or concurrent with your intake. It is also imperative, then, for your client to waive the attorney client privilege, in writing, so that you can speak with that local attorney.

For international IPs, the second and/or step-parent adoption laws in their home country may present a problem, especially for same-sex IPs. Many states will require a same-sex second IP or any non-biological IP to complete a second and/or step-parent adoption to perfect his or her parental rights; and many, but not all, jurisdictions will amend the birth certificate to add a second same-sex parent if that parent has obtained a second parent adoption order.

In some states, this second or step-parent can be done in the birth state on the basis that the child can be found there (at the time of filing the adoption petition). Most states, however, have a residency requirement for adoption cases, so some IPs will need to go back home to get this done. The difficulty for same-sex intended parents is that many countries will not allow same-sex second or step-parents to adopt. So, if your clients live in one of these restrictive countries, they should be matched with surrogates in states which do not require the second parent to adopt or states which will allow the adoption case to proceed in the birth state.

Also, consider and be aware of countries that may not recognise adoptions or parentage orders issued by US courts.

Some countries may not fully recognise the parentage order or birth certificate from the US and may require an additional step-parent adoption process once the IPs returns to their country of residence with their child. The importance of you and your clients researching the applicable international laws beforehand is imperative in such situations.

For instance, when working with clients from the UK, the clients should be advised that the UK High Court will not recognise parentage orders of other countries, even if the surrogacy was legal where it was conducted. The UK High Court will consider a US parentage order as 'evidence' of who could be declared as the legal parents under UK law, but it is not dispositive under UK law.

Depending on the jurisdiction, a client may be required to apply for a local parental order in their home country to further establish the lawful parentage of the child. Similarly, clients may need to register the child(ren) in their country of residence, and the appearance of the birth certificate could impact whether this can be accomplished.

Adoption and immigration rules and procedures are different in each country, creating potential difficulties and delays in registering/nationalising their child(ren) or perfecting their parental rights in the home country.

When dealing with IPs from outside the US, one of the most important things to

Click here to return to Main Contents

remember is to advise these IPs to always speak to an attorney in their home country who is experienced in family law and immigration matters. These clients will need advice on whether their home country prohibits or restricts surrogacy, what sorts of parental orders or birth certificates would be recognised, how to bring the child(ren) back to the home country, how to register and naturalise the child, and whether they will need to go through any additional parentage action in the home country.

Surrogacy is illegal in many countries, so caution must be taken not to raise any red flags, which may mean taking back a 'normal' looking birth certificate (ie, one with a surrogate listed in the 'mother' box). In Italy, two men cannot be on the birth certificate, which may require the surrogate to be left on it. Currently, Spain will accept a court order of parentage for IPs conducting a surrogacy in a foreign country, so your Spanish IPs should not be matched in a state where there are no parentage orders (eg, Illinois, Vermont and Washington State), unless of course there is an alternative method of obtaining a parentage order.

If the IPs live or will seek citizenship for the child in a country where surrogacy is prohibited, it would be counterproductive for the IPs to work with a surrogate in a state or country where they may be required to go back home to complete a second parent adoption.

Also, international IPs should consider arriving in the US before the birth occurs to avoid raising red flags back home if the home country restricts or criminalises surrogacy. The dates stamped on their passports may create a problem for them if they reflect arrival in the US after the birth.

Language or phrasing is also a consideration during contract drafting for international IPs. Words which we take for granted in the US (ie, compensation) may work in one country and not another. Thus there may be a balancing of the contract language necessary to get parentage confirmed in the US, versus that needed to get parentage recognised elsewhere.

Based on advanced consideration of all the issues your IPs may face in their own country, your IPs can properly plan their parental establishment strategy in the surrogate's jurisdiction in a way that does not obstruct, conflict with, or hinder their process when they return home.

(2) Surrogate's residence/birth state

The law and process of the birth state, however, has by far the most significant impact on how your client(s) obtain a court order of parentage and how the birth certificate will or can be prepared (or amended).

If your client has not selected a surrogate, reviewing the issues outlined in this article with the client prior to surrogate selection can help prevent problems at the time the parentage order is sought and the IP returns home.

(a) Procedures vary by jurisdiction

Some states have similar procedures across the state, but in others, the custom and practice may vary by county, by district/branch courts within the county, and even by judge. Consider the law and process in the county where the surrogate resides and where the birth hospital is located. Consider whether one of these counties is an easier place to obtain your order. Also, if you have a complicated case, or a unique situation, or same-sex IPs, consider whether another (more favourable) county would, in compliance with any local or state rules, accept a filing based on the parties' stipulation to jurisdiction in that county.

In the applicable jurisdiction(s), determine whether the parentage process is completed pre-birth, post-birth, or through a combination of pre-birth and post-birth procedures. Find out whether this matters to the IPs.

You should also consider whether the applicable jurisdiction will enter an order to seal the records, as most clients consider these matters to be extremely private, sensitive and personal.

Also, consider your clients' social and cultural background when advising them on their parental establishment strategy. Some intended parents may prefer an adoption order (if possible) if adoption is considered more socially acceptable than surrogacy.

Whether the parentage application is filed pre- or post-birth or both, typically you will need to file some or all of the following documents: an application; a stipulated petition; a memorandum of points and authorities; affidavits of support from all parties, attorneys, and doctors involved; and a proposed order of parentage. Some jurisdictions require judicial council forms as well. Find out whether your international clients will need to present the court order to any government agency or court once they've returned home; in some countries, if the word surrogacy or surrogate appears in the order, it may cause additional problems for the parents in getting their parent-child relationship recognised back home.

Knowing what documents are required in the filing, and how and when the surrogate's presumed rights get terminated or relinquished is essential for a smooth process.

Many IPs will tell you they want a pre-birth order because they think this will secure their rights sooner, but they may not understand that the pre-birth order is typically is not effective until the birth actually occurs. The post-birth process generally involves a hearing, typically within 3–5 days of birth and yields the same results, depending on the state. In either event, the parentage process will typically terminate the presumed rights of the surrogate (and her husband if she is married), establish the IPs' parental rights, and direct the office of vital records on how to fill out the birth certificate.

As noted above, remember that some jurisdictions will not grant parental rights to a non-bio parent. Depending on the birth state, the non-bio parent may need to complete some alternative form of parentage (second or step-parent adoption) to confirm his/her parental rights. Some birth jurisdictions will hear the second parent adoption, while others have a residency requirement, which means the non-bio IP would need to return home to obtain an order of adoption. And remember, not all countries allow second parent adoptions, especially for a same-sex parent, so if you don't already know if your client's home jurisdiction will allow this, you will need to advise your client to speak to an attorney in his or her home jurisdiction.

If the second parent adoption is required, find out what the requirements are for completing this process. Some birth states or countries require a home study and background checks, including comprehensive background checks. If so, you need to plan for the added cost and time needed to complete the process and prepare the IPs accordingly. Some states have these requirements but may waive them under certain circumstances (for surrogacy related filings, where the adoption is by consent, the court may waive some of the usual adoption requirements, but often there is no guarantee of such a waiver.)

(b) How can the birth certificate be filled out?

Ask the IPs what their goals are when it comes to the birth certificate and plan accordingly, but also explain to your clients that the court order is what grants parental rights, not the birth certificate.

If you are representing a same-sex couple, have them consider whose name(s) they wish to go on the birth certificate. Most often, they will want both of their names be on the birth certificate, so you will need to know if both IPs can be listed on it immediately, or in the future in an amended birth certificate, or if only one name is permitted. If only one name is permitted, does it have to be a bio-parent or will the jurisdiction allow them to pick one parent to be listed?

In the case of a single male, in some circumstances, the surrogate may have to remain on the birth certificate (usually for single international intended fathers). For

Click here to return to Main Contents

instance, in a single international male intended parent case, the father's home country may only accept a 'normal' birth certificate; ie, with a 'mother' listed. This may also be necessary if the client is going to try and obtain a passport from the home country for the child(ren) to return home with the IPs. In this situation, because she appears on the birth certificate, the surrogate would sign the passport application along with the intended/legal father, and she should also sign a letter of consent for the IP to travel with the newborn. If so, will the court allow the parent to obtain multiple versions of the birth certificate? Most surrogates will not want to remain on the birth certificate, so a parentage action will typically be necessary to – at a minimum – formally terminate her presumed 'rights', and ideally the court will allow the intended (and now legal) father to request an amended birth certificate removing the surrogate from the birth certificate; so you need to know if this is possible in the applicable jurisdiction.

The same birth certificate issues may apply in the case of same-sex male couples – ie, they may need an initial birth certificate listing a mother. You'll need to know whether the court will grant an order allowing, and whether vital records will be able to prepare multiple versions of the birth certificate upon request – removing the surrogate and listing one dad or two.

For same sex female couples, the initial birth certificate typically will list at least one of the intended mothers and this would not present a problem for most intended/legal mothers upon return home. However, you will still need to know ahead of time whether your same-sex female couples can return home with two women on the birth certificate or whether they can amend the birth certificate to later add the second mother if necessary or preferred.

(c) How long does it take to obtain the birth certificate(s)?

Whether the parental establishment process is pre- or post-birth, ultimately your clients will want to know how long it will take to get the birth certificate. For international clients, this will impact how long it will take to get a passport for the child(ren), which is required for the child(ren) to travel back home. International intended parents must make the necessary preparations to stay in the state or country after birth as long as necessary to obtain all the required documentation in the applicable jurisdiction; on average, this is about 3 weeks.

This may also impact your representation agreement as language may necessitate your office walking some clients through the social security and/or passport process. Remember, however, that a social security number is not required to obtain a US passport for an infant and many international clients are confused about the purpose of and need for a social security number. In fact, if your international clients need to leave the surrogate on the birth certificate, or if they apply too early or let the hospital process the social security application, the surrogate's name may be associated with the social security number application, and you will have a very hard time removing it after it is issued. That is why it is best for international IPs to wait until they have the new birth certificate with both their names on it before using that certificate to apply for the social security number. If a client approaches you with a short timeline, you can suggest that they file for a social security number after they return home, but of course they will still need a US passport for the baby to travel internationally and return home with the new parent(s).

(d) What is the relationship/status of the IPs?

Depending on the jurisdiction, the relationship status of the IPs may impact the parental establishment process and the way in which the birth certificate can be filled out.

- *Heterosexual married*: Some US states will not issue a parentage order unless the intended parents are married (eg, Utah, Oklahoma).
- *Married (gay or straight)*: All US states

must recognise same-sex marriage now, but some of the birth certificate offices (typically called 'vital records' in the US) require a non-genetic intended parent to complete a post-birth adoption process to list the non-bio parent on the birth certificate, despite the legally recognised marriage. Some states still will not list a same-sex couple on a birth certificate, but this may change over time in the near future.

- *Domestic partnership/civil union*: For many years there has been an open question as to whether domestic partnerships or civil unions would qualify as a 'marriage' in those states that require IPs to be married, but because the US now has marriage equality, most states will not recognise a domestic partnership or civil union as a marriage.
- *Unmarried IP couple*: Some states will allow a parentage order for an unmarried IP couple, others (as noted above) might require an adoption process for the non-bio parent in an unmarried IP couple.
- *Single*: Is the IP using her or his own genetics or donated gametes? Some states will allow a parentage order for single intended parents using all donated gametes, and some will require such IPs to adopt. If an adoption is required, one must carefully consider the potential implications resulting from the ICPC (Interstate Compact for the Placement of Children) if the IP is from another state in the US, or the Hague Convention if the IP is from another country.

The impact of the relationship status of the intended parent(s) is a key factor in the parental establishment process. This gives rise to ethical quandaries when the relationship status isn't what the IP said it was or when the relationship status changes during the surrogacy (such as IPs splitting up during the pregnancy), so the attorney should take great care to get proof of marital status to the extent it can be provided or verified.

(II) Drafting surrogacy agreements – special issues to consider for multi-jurisdictional arrangements

Drafting surrogacy agreements for multi-jurisdictional arrangements requires customised attention to several contractual provisions, including, among others: disclosures, warranties and representations; assumption of risks; and the governing law of the contract.

(A) Disclosures / warranties / representations

Non-traditional intended parent families should state up front whether they are single, married, unmarried, gay, etc. This may sound obvious and redundant if the parties have met already, independently or through an agency, but disclosing this in the written agreement signed by all parties will only help to support the voluntary nature of the agreement.

(B) Assumptions of risk

As with any medical procedure, there are certain health risks relating to surrogacy that should be encompassed in the surrogacy agreement – particularly in the assumption of risk and waiver/indemnity clauses. The agreement should state that the surrogate has the obligation to inform herself, and to assume, the usual risks of complications, disease transmission, and death (among others) inherent in IVF, pregnancy and childbirth.

However, specifically addressing the risks to the surrogate of working with non-traditional families should be included as well. For example, if the surrogate is working with a single intended mother of advanced age using her own eggs, she should be advised of the higher chances of pregnancy complications and/or miscarriage from the doctor, but this could also be stated in the agreement. Another example of specific additional risks, albeit minimal to non-existent, would be when a surrogate in working with HIV positive IPs. In such a case, you may want to consider being specific about this and include it in assumption of risk provisions (or as a separate disclosure) rather than lumping it

Click here to return to Main Contents

generally with 'disease transmission'. Some jurisdictions require submitting the contract for validation or as an exhibit attached to the parentage petition. Of course, many HIV positive IPs may be sensitive about such a disclosure in a potentially public document (ie, if the court won't seal the records), so putting the HIV positive disclosures in a separate written document or medical consent form might be an alternative approach for such IPs.

(C) Controlling provisions and governing law in multi-jurisdictional arrangements

Governing law – in multi-jurisdictional arrangements, your clients will most often have a choice in what state law they wish to govern the interpretation of the agreement. The law of the surrogate's state is the most common choice, but the law wherever there is a nexus (the location of the IPs, the clinic or the surrogacy agency) can provide other options. Additionally, the parties may be able to choose the law of a different (more favourable) state even if there is no nexus with that state.

The parties may choose one forum over another because it is more developed in the particular area of the law affecting their arrangement or because they are more familiar with that forum state's laws. In either event, the choice of law gives the parties some predictability regarding the enforceability of the agreement.

Parties to a contract may choose the law of a state without a nexus to the matter as the governing law of their contract so long as that choice of law does not trample upon the public policy of a state with a materially greater interest in the matter. See for example, *Expansion Pointe Properties Ltd Partnership v Procopio, Cory, Hargreaves & Savitch, LLP*, 152 Cal App 4th 42 (2007); and *Hodas v Morin*, 814 NE 2d 320 (2004). Even if this is possible, when considering another state's law to govern the agreement, keep in mind that the parentage rights are still established in the birth state, so the agreement should be drafted to comply with any specific or unique requirements of the birth state.

LANGUAGE TO MEET THE MORE CONSERVATIVE JURISDICTION

Another key point to consider in multi-jurisdictional arrangements is that even if your choice of law provision states that the law of a more favourable jurisdiction will apply to the interpretation of the contract, consider also using language in other provisions which will satisfy the more conservative jurisdiction, especially if the more conservative jurisdiction will have any reason to look at the underlying surrogacy agreement.

As just one example, many countries and several US states restrict surrogacy to only non-compensated surrogacy and will allow non-compensated surrogacy or will allow reimbursement of a surrogate's 'reasonable living expenses' (language similar to that seen in adoption statutes). If your clients need to return home to a more conservative jurisdiction and have to do anything further to confirm their parental rights (such as in a second parent adoption for a non-bio parent; or UK intended parents who may be required to obtain an additional parental order from the UK courts), they may also need to present the underlying surrogacy agreement for review. In such cases, it would assist your clients if you draft the contract as a non-compensated arrangement or clearly identify the payments as reimbursements for distinct items, ie, medical/rent/food/transport.

(D) The financial arrangements

Quite beyond the financial language used in the contracts to allow the various courts to rely upon and accept them as conforming to local law, there are the financial arrangements themselves. How do we provide assurances to the myriad of persons and organisations that our clients have the financial wherewithal to pay all of the medical fees and expenses as well as all contractually guaranteed reimbursements to the gestational surrogate?

Some of these are, we believe, obvious. The fees paid to an agency, the attorney and the reproductive endocrinologist and

reimbursements to the surrogates are easy. An estimate is provided, contracts are drawn up and signed, and funds are either wired or not.

Medical fees for the surrogate and the child(ren) are not so obvious. Is the surrogate insured without a surrogacy exclusion, insured with a surrogacy exclusion, uninsured with a cash pay option or registered with a government subsidised programme?

How will the baby's post-birth expenses be paid? Is the surrogate's attorney requesting proof of insurance to cover the baby or a substantial deposit into trust pending finalisation of the baby's expenses and release of her/his client from any financial liability? Does the jurisdiction where birth occurred permit the child to be enrolled in a 'child only' medical plan? Does the jurisdiction where birth occurred permit the child to be added to the surrogate's insurance policy until the legal parentage is transferred to the intended parents by court order?

Will the hospital engage in pre-birth discount negotiations for a cash pay? Will or can the hospital deny access solely on financial insecurity? Does the hospital have rights to seek a judgment against the IPs and collect? Is there any trickle down liability that could affect the agency or other representatives of the IPs? Is there any trickle down liability to the surrogate – the bills may be in her name – or the entities and professionals who represented her?

The continuing instability in the global financial markets has trickled down to the hospital business offices. There is a greater incentive for a hospital to file a collection action as the size of the bills increases. With a client who is not present to defend, a default judgment is probable and collections could be the next step.

Because an agency and/or the surrogate's attorney may have liability exposure following such a judgment, it is important to understand how a foreign collection would proceed.

Common requirements for recognition and enforcement

Proper notice; subject matter and personal jurisdiction; final and binding judgment; and no violation of the 'recognising' country's public policy.

Special notice procedures

Some countries require that the foreign litigant serve the 'local' party in accordance with procedures not commonly employed in the US.

Lack of jurisdiction

For example, Brazil, Switzerland and France will not enforce a judgment against their nationals unless there is a 'clear indication' that the national intended to submit to the foreign court's jurisdiction. Needless to say, the definition of 'clear indication' will vary as the jurisdiction and fact pattern change.

Treaty requirements

Several countries, including most of the Nordic countries, the Netherlands and Saudi Arabia, will not recognise a foreign judgment absent the existence of a convention or treaty covering judgments between the 'rendering' and 'recognising' jurisdictions.

Public policy concerns

Some foreign courts view certain features of US law including jury awards, punitive damages, treble damages, and/or long-arm jurisdiction as contrary to their own public policy.

Reciprocity

A number of nations require reciprocity of treatment of their courts' judgments in the courts of the nation that rendered the judgment to be enforced. For some nations (eg, Belize and Singapore), the requirement may be met only where its government has formally concluded that reciprocity exists

Click here to return to Main Contents

between the courts of the two nations, creating a bar to enforcement where no such finding has been made.

Counsel should retain and consult with a local lawyer in the jurisdiction in which the US ruling is to be enforced to ensure that the US judgment aligns with the requirements of the nation in which the judgment is to be enforced.

Take away message: the IPs may likely be pursued in their home country and should be aware that skipping out on the bills is not only a breach of contract and unethical, it may also subject them to liability. Likewise, surrogates should be advised that if bills end up in their names, there's no guarantee a collection action against the IPs in a foreign country will be successful.

(E) Selective reduction and/or abortion

With multi-jurisdictional arrangements, there are policy, cultural and religious differences that can complicate decision-making for a reduction or abortion. Where a French couple will elect an abortion if their personal physician believes there to be an anatomic, physiological or cognitive disability, an Italian couple may not.

What if the surrogate does not agree to selective reduction or abortion and is now in violation of the contract terms? There is little chance that a US court order will be granted in such an instance. Likewise, if the surrogate moves to terminate over the objection of the intended parents, there is probably no legal remedy to prevent that termination.

As such, the only remedy to these situations will be financial recourse through a breach of contract action. The client will have to be provided clear direction that the act of termination is separate and apart from the terms of the contract, but that the probability for a court ruling to terminate or not terminate is remote.

Is a breach action enough? It is more probable than not, that a contract action against a surrogate will end up with a non-collectible judgment. What if intended parents refuse to take custody of a child born following a surrogate's refusal to terminate? The intent of *all* parties must be clearly communicated, understood, and memorialised in writing. This intent has to be thoroughly explored during intake, psychological evaluations, contract reviews and medical consenting. Clearly then, a team approach is an asset to the attorney and it can also translate into greater security for the clients.

(III) Estate planning documents to protect the family and the parent(s)

With perseverance and a little luck, your clients will be creating families, so you should be discussing estate planning documents to help protect their new family. Such family planning documents can help provide clear instructions of the IPs wishes regarding the care and custody of their child(ren), their healthcare, and other general expressions of authority if something should happen to them.

As there is a presumption that the child will reside in the home country of your client, they will need to draw up family planning documents there, in addition to what might be briefly addressed through the surrogacy agreement. Family planning documents here in the US during the surrogacy may also be helpful to avoid situations where the child is not cared for in the event the intended parents are unable to get to the hospital quickly enough, or in the event they've died or become incapacitated. Similarly, guardianship/power of attorney documents from the surrogate to the intended parents may be helpful in situations where the child is born before the court order is issued.

(A) Surrogate's temporary designations, powers of attorney, and authorisation for IP to consent to medical treatment

Court orders of parentage become effective immediately at birth (if they were obtained pre-birth) or a few days after birth (if the birth occurs in a state requiring a post-birth

application for the order). Having the surrogate sign a temporary guardianship designation, power of attorney, and authorisation for the IPs to consent to medical treatment for the child(ren) will help provide some measure of protection for your clients' rights during the surrogacy and up until the court order becomes effective. Such documents help bridge the gap between the surrogacy agreement and the time the final court orders are issued, whether in the birth state or the IPs home state/country. These surrogate designations may also be required by a hospital to discharge the child into the care of IPs. Recognise, however, that there may be overlap between the birth and the appearance of your client at the hospital caused by an unexpected birth and late arrangements for air travel.

(B) Intended parent(s) guardianship designations

If anything should happen to the IPs during the surrogacy process or after birth, proper guardianship designations will ensure that their children are under the care of someone trusted. Such documents give the IPs piece of mind that their children will be placed with and taken care of by a person or persons of their choice. These designations will be generated through the IP's local counsel in their country. As a practical matter, however, there are no reported cases demonstrating how such documents will be received in the US or in other countries.

(C) Advanced healthcare directives/healthcare power of attorney/temporary guardianship designations

Advanced health care directives designate someone with authority to make healthcare decisions for another. Your clients are now about to be responsible for a family, making it all the more important that they have such documents in place. While these sorts of documents may be more commonplace in the US, they are not as common in other countries; but discussing these issues with your international clients will help them be better prepared. Likewise, especially for intended parents who do not live relatively close to where the birth will occur, temporary guardianship designations should be put in place in the event the birth occurs and the intended parents cannot get to the hospital right away. In some cases, it may take intended parents 2 days to get to the hospital if they live in far reaches of the globe.

(D) General durable power of attorney

Your clients may also want to designate someone with authority to administer their assets, handle their legal and other matters, including the surrogacy, if they are unable to do so themselves due to incapacity or other reasons.

(E) Will or living trust

The above family planning documents are much less complex than a full estate plan involving a will, or a trust, or both, and they can form the building blocks of a larger estate-planning portfolio. Such documents also help protect your clients' families and parental designations prior to the execution of their wills or living trusts. For these reasons, it is advisable to have your clients consider these documents early in their process, but ultimately your clients should consider drawing up a comprehensive estate plan involving wills and/or trusts. Having a will or a living trust will minimise the chances of their estate going through the prolonged process of probate and disputes amongst family members.

If your client already has a will or living trust, advise them to review the documents to be sure there is no conflicting language affecting inheritance relating to their new family.

And very importantly, your clients' estate planning documents should address the use and disposition of any cryopreserved embryos they may have remaining in storage!

(IV) Language

When working with international clients, it is very important to be mindful of the

Click here to return to Main Contents

impact that different languages and dialects can have on your client's understanding of the process they are going through here and the documentation they are signing and agreeing to. Also, remember that web-based translating services will usually be inadequate for such critical situations, and in general, whether through a web translating service or not, legal terms of art tend to be translated poorly. Finally, we need to remember that dialectic differences apply as well to writing styles.

The better international reproductive law practice understands that everyone assumes the other understands their native language, and that contracts in the client's native language go far towards cementing your relationship with the client as well as insuring that the client fully understands the promises being made.

Whether you have people on staff or on contract who can interact with international clients in their native language, it is of utmost important that you set out a standard procedure for administering the non-English speaking client's contact with your law firm or agency, regardless of the method of communication. Each client should feel comfortable that when they email, call, Skype or write, the person they are corresponding with understands their needs and concerns perfectly.

Conclusion

The advancements in ART, particularly in the US, have opened up family building opportunities for many people from all over the country and the world. This is also especially true for single parents, unmarried parents, same-sex couples, intended parents beyond the 'normal' reproductive years and posthumous reproduction. As a result, the meaning of family and family building has progressively changed with it. However, although the laws in the US are more permissive than the laws of most countries in this regard, the legal process and procedures required to confirm parental rights through surrogacy are generally trailing behind the science, presenting different obstacles for different types of intended families.

In addition, there will inevitably be additional obstacles to anticipate and handle for clients their involved in multi-jurisdictional surrogacy arrangements, especially for intended parents from other countries coming to the US for their surrogacy.

Likewise, the more people turn to ART, the more ethical concerns we will all have to address from time to time, including those arising from cultural differences and the commoditisation of our services.

It may seem daunting, especially when your clients' surrogacy arrangements require you to be knowledgeable and prepared on an array of legal and ethical issues from different perspectives and different jurisdictions, but in the end and for the most part, we are privileged to be a part of an extraordinary event in our clients' lives – the formation of their family. With the right tools and information to take your clients from merely intended parents to legal parents, you will find that advising clients involved in these complex surrogacy arrangements is especially rewarding and meaningful.