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SUBMISSIONS

The Whittier Journal of Child & Family Advocacy (WJCFA) welcomes the submission of articles for publication and is interested in professional and student-written articles dealing with various issues faced by children and families in the legal system. It also accepts short statements relating to personal experiences that are crucial in children's lives. The WJCFA is currently accepting submissions for future issues.

Submissions are considered on a rolling basis and may be submitted by U.S. Mail or electronically in Microsoft Word or WordPerfect format. Submissions must be typed, double-spaced with footnotes, and should conform to *The Bluebook: A Uniform System of Citation* (20th ed.). The author's name, professional and/or academic affiliation, mailing address, e-mail address, and telephone number must appear on the first page.

Please send all submissions to the Solicitations Editor's attention

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The Complexities of International ART

10 Must-Knows about International ART Clients

BY

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In many parts of the world compensated surrogacy – and sometimes even uncompensated surrogacy – is illegal and criminal, which means that people necessarily have to go out of the country to build their families this way. While surrogacy is legal in much of the United States, some Americans also go abroad because they see it as a more affordable option.

Our clients face an array of conflicting laws regarding immigration, citizenship and parentage, making international surrogacy journeys very difficult.

The focus of my talk is on clients from outside the US coming to the US to undertake surrogacy.

Here are 10 things to be aware of when working with clients from other countries to help them avoid obstacles and prevent problems down the road, broken down into 3 Categories:

keys to the clients' understanding of the ART process; and keys to the clients' parental rights here/there and getting home; and keys to YOUR understanding of the clients' legal needs.

3 KEYS TO THE CLIENTS' UNDERSTANDING OF THE ART PROCESS

Rule 1: Don't believe everything you read on the internet.

It is imperative upon us who engage in the practice of surrogacy that we publicize issues of concern and emphasize that those contemplating surrogacy ought to **get legal advice before they start** the process – **not advice from their friends or the people they have talked to on the internet** or other intended parents who have avoided going to lawyers or who have some too-good-to-be-true story. It may be that their friends were very fortunate and had a dream run by somehow walking through a minefield and avoiding stepping on any of the mines. Or, more likely – they didn't get all the information about the case or they heard it from a friend on an online forum (the friend is probably not a lawyer and probably didn't relay the story accurately or fully).

Let your clients know not to believe everything they read on the internet, because if they get stuck then they'll get stuck big time: they may not be able to obtain travel documents for their child (visa or passport) and their home country may not recognize the intended parents as legal parents.

Conversely, there are some **horror stories** on the internet of cases gone wrong, terribly wrong. Usually there is much more to the story than what gets published. You should inform yourself about these cases because they come up when the client walks through the door with a list of questions about horrible scenarios. Giving them more of the facts of what actually happened, and reassuring them that these are truly the outlier cases, will help you distinguish those terrible situations from theirs and also help you educate them about how to go about their assisted reproduction process properly!

Rule 2: Tomāto/Tomăto & Culture

Probably one of the most common yet easiest issues to overcome, but nevertheless frustrating, is that of language and culture differences. When your client is not an English speaker or English is not their native language, then things can become quite interesting.

When clients come from all parts of the world to the US, cultural differences impact the perspective they are coming from ...and can often drive the kinds of questions they are asking. Sometimes where they are from impacts the general questions they have. Sometimes, where they are from might be why they are asking specific questions if a bad case or court ruling (or a good one) occurs in their part of the world. Sometimes it might be easy to think they are asking a very bizarre question...making you wonder if they are right for this process, or if they are the type of client you want to take on. Patience and a good translator is a virtue.

[Anecdote: Chinese client who asked if surrogate could guarantee twins; also wanted a guaranteed cost for a surrogacy case which is difficult to do when the typical surrogacy has many variable expenses (ex. Lost wages due to bed rest when you don't know how much bed rest any particular surrogate will need during the pregnancy.)

Confidentiality and secrecy are also sometimes influenced by culture in terms of what is accepted or taboo in their country, and you might feel they are disproportionately interested in or demanding anonymity or confidentiality. This could lead you to distrust them...or it could lead you to accept something on face value that you should be looking into.]

Aside from being a potential hurdle to the client's initial understanding of the ART legal process, cultural differences can

sometimes be a factor, which can impact your work on your client's behalf.

[Anecdote: Clients from Turkey who named emergency contacts in the surrogacy contract who were never informed that the clients/intended parents were going through surrogacy.

Anecdote: And on a more humorous note, I had a client Italy – so concerned about privacy and confidentiality that she wore a fake baby bump which changed and grew throughout the time of the surrogate pregnancy, but she came to the U.S. and was outside my office building smoking.]

Also, when it comes to the written documents that are necessary in the US process, you need to know the client fully understands what he/she is signing. Additionally, many of these documents are signed under oath and under penalty of perjury, making it more critical that there is some assurance they understand what they are signing. Some courts will require a statement to the effect of the client's grasp of the English language and/or that an acceptable translator was engaged on behalf of the clients.

Rule 3: Insurance is the single biggest financial wildcard

People who come from countries where the government pays for medical care are shocked as to the need for health insurance in the United States and sometimes obtain inadequate or inappropriate coverage. The number one stumbling block for foreign families undertaking surrogacy in the US is the cost of health insurance and medical care for the surrogate and the resulting children.

Clients from other countries also need to keep in mind the insurance issues once the child is born. For example, when a

child is born in The UK, Canada and Australia through surrogacy, the child is entitled to coverage under the government health care system from birth.

When a child is born in the US through surrogacy, the child is a US citizen but may or may not be entitled to US-based health insurance for the time the child is still in the US. Options and opinions vary greatly here, and it is essential that the clients be advised to seek expert insurance advice.

KEYS TO THE CLIENTS' PARENTAL RIGHTS HERE/THERE, AND GETTING HOME

Rule 4: What is legal here may result in jail there.

There is a common misconception that because commercial surrogacy is legal in California, it is legal for anyone from anywhere in the world to pursue surrogacy it here. In reality, there could be criminal penalties that result. As one example, in three jurisdictions in Australia, it is illegal to engage in commercial surrogacy outside of Australia, and can result in up to 3 years of jail time. Paying an egg donor can result in 15 years of jail time in some Australian states. These Australian states are not outliers – quite a few countries have comparable laws. [FRENCH CASE 12 years ago: JUST recently addressed by ECtHR Summer 2014.]

Takeaway: You need to inform yourself...but also refer your client to an attorney in the relevant country and COLLABORATE with that attorney.

Rule 5: Citizenship and residence are not the same.

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 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 dual (or multiple) citizenship.

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 offense in any of these jurisdictions, 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.

Rule 6: In different parts of the same state or country, different rules might apply.

Many people from other parts of the world believe that surrogacy happens in the US only in California. Of course that's good for California and California ART attorneys and professionals. Those of us who practice in California know that within the state there are variations from county to county in how Parentage cases are handled, and even sometimes from judge to judge in how surrogacy is treated here. It can be the same in other states, and outside the US as well.

Others assume that if surrogacy is legal in California, it must be legal in all fifty states. Surrogacy is not legal in all 50 states, and each state has different rules and procedures for dealing with surrogacy. Clients will at some point come to you with a match in another state or questions about it – you can't assume that the law is the same in every state and you should

seek the advice of, or refer them to, an attorney who is licensed and knowledgeable about ART law in the other state.

It's also commonly and incorrectly assumed in the US, including by attorneys, that surrogacy rules throughout other countries with federal systems, like Australia, Canada and Mexico, are the same. They're not! They have local variants.

We need to be aware of the very strong likelihood of local variations in all states and countries. So ask questions, do your research, and either get advice from colleagues or know well enough to refer the client to your colleagues in the relevant jurisdiction.

And finally, be aware that in many countries, laws relating to parentage and citizenship for children resulting from assisted reproduction are developing and changing on a regular basis. What was extremely complicated a year ago in Germany is now, hopefully, going to be much easier due to a ruling in December 2014 by the German Supreme Court. The Swiss courts are about to rule on a case next month that has been appealed by the government from the lower courts. The ECtHR ruled in June 2014 (France) and January 2015 (Italy). A year ago you could conduct surrogacy in Thailand and now you can't. India previously allowed all intended parents and now it is only open heterosexual married couples who have been married for 2 years or more and have a letter from their government stating that what the couple wants to do in India would be legal where they are from.

Rule 7: A birth certificate may not make you a parent.

Just because someone is genetically a parent does not make them a parent at law when ART is involved. Furthermore, just because someone is named on the birth certificate doesn't guarantee that this person is a legal parent. In the US a birth certificate is only proof of identity and citizenship – not

parentage. However, that same birth certificate may be recognized by the local school and Social Security office. Some countries may give no weight whatsoever to US birth certificates or parentage orders and require the intended parents to go through an entirely new set of parentage proceedings upon their return home.

And even if we can get a gay couple, or a single dad on a BC here, some countries might not accept this for purposes of registering the child back home.

Rule 8: You may be a parent for some purposes but not others.

Countries – and jurisdictions within countries – rely on a combination of birth, genetics and intent to determine who is a parent. For example, The Australian Department of Immigration and Citizenship when interpreting the Australian Citizenship Act has largely relied on genetics, but Australian courts have also looked at intent and the reality of who was parenting a child. The US State Department relies primarily on genetics, but also will consider whether a woman gave birth to the child even with the assistance of an egg donor, when considering citizenship transmission to children born outside of the United States.

But, in some countries, transmitting citizenship does not mean you are recognized as a legal parent. For example, in Australia, a genetic parent who is not the birth parent of the child or married to (or a partner of) a birth parent of the child, is not a parent for state law purposes, and may not be a parent under the Family Law Act. The consequences of not being a legal parent can affect determinations of custody or visitation, obligations to pay child support, and inheritance.

KEYS TO YOUR UNDERSTANDING OF THE CLIENT'S LEGAL NEEDS

Rule 9: The Clients' U.S. Lawyers, Agencies, Doctors, Mental Health and other professionals should work as a team.

Given the complexities of cross-border surrogacy, international clients will benefit greatly from a seamless, team approach to the legal issues involved. We should, as far as we can, encourage and welcome collaboration between the clients' different lawyers (and if possible the other players - surrogacy agency, donor agency, doctors, etc.).

One way to tie the pieces together is for you, as the legal advisor, to include at least the agency and sometimes the other service providers in essential communications.

Rule 10: International Legal Network: No one may know what happens there (or here).

Keep in mind that because surrogacy is not legal in much of the world, or it is new and not well understood in a growing number of countries, or so few lawyers (if any) are undertaking surrogacy work in other countries, often it is very difficult to determine the state of law. All too often clients assume that the answer must be known and it must be obvious; but that is usually not the case in most countries.

It is essential that we engage and network with other lawyers and professionals in other countries so that there is a system of knowledge about surrogacy and the laws concerning surrogacy throughout the world. For the most part this means networking with other family and immigration lawyers. You should reach out to them directly for the client, or, if you don't

have a contact, many of the highly experienced ART attorneys here in the U.S. can put you in touch with one or more international colleagues.

The cost of collaboration is minimal – a few phone calls and emails. But the benefits can be huge because issues can be identified quickly, and problems with establishing legal parentage and citizenship for the children can be prevented.