

Ramifications of Medical Science

By K. Dean Kantaras and Gabriella Torres

In 1993, the Florida legislature amended and enacted several statutes to address the use of Assisted Reproductive Technology, which is defined as procreative procedures involving the laboratory handling of human eggs or pre-embryos. These statutes continue to serve an important role in the definition and regulation of the determination of parentage for children born using these procedures as opposed to traditional coital methods of conception. Among these are in vitro fertilization (IVF), sperm donation, egg donation, and surrogacy.

In Florida, with the exception of gestational surrogacy, when a married couple conceives a child through the use of artificial or in vitro insemination, donated eggs, or pre-embryos, there is an irrebuttable presumption that the child belongs to the husband and wife, provided that both parties have consented in writing to the use of the assisted reproductive technology. This means that so long as both parties have agreed to conceive a child with the help of one of these methods, the child belongs to those parties under the law regardless of any biological relationship to one of the parties.

Gestational surrogacy, on the other hand, requires the use of a third party's body to carry the pregnancy to term and therefore is subject to its own particular rules. This is when the egg, sperm, or both, of a commissioning couple is mixed in vitro, or outside of a woman's body in an artificial environment and implanted in another woman's body, the gestational surrogate.

While gestational surrogacy does not require the use of the commissioning mother's egg, it does require that the egg implanted into the surrogate is not an egg from her own body. Therefore, even if the commissioning couple uses a donor egg, that egg cannot belong to the same person who will carry the pregnancy. This ensures that the gestational surrogate will not be



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the biological mother of the child that is born. When a surrogate uses her own egg to become pregnant, she is considered a traditional surrogate. The use of a traditional surrogate may create complications for all parties involved and make affirming parentage after the child is born extremely difficult.

A couple who wishes to use a gestational surrogate should pay careful attention to the Florida Statutes that outline the requirements for entering into a gestational surrogacy contract and subsequent legal proceedings required to affirm parentage.

First, there must be a binding and enforceable gestational surrogacy contract in place before engaging in the surrogacy. Next, the contracting parties need to be at least 18 years of age and the commissioning couple, also known as the intended parents, must be married. Lastly, the use of a gestational surrogate is only permitted when a licensed physician can state with reasonable medical certainty that the commissioning mother cannot carry

a pregnancy to term, or that attempting to do so would cause risk to the physical health of the mother or health of the fetus.

Additionally, since most of these procedures require cryogenic preservation of human tissue, parties should carefully consider and enter contracts outlining the parameters for storage and disposal of any samples they create in the event of divorce, break up, or death.

In the event one party passes away, the safest way to be sure that the samples are used in accordance with their wishes is to include them in a will. This provision should state whether another person, such as a spouse or partner, should take possession of the samples and whether any children born after their death using these samples, should be permitted to make a claim on the estate.

The decision to reproduce is a fundamental right. Courts have determined that under the Equal Protection Clause, gender specific language in statutes like these should not be construed as disallowing same sex couples to engage in these methods of procreation. The decision on when and how to build a family rests with those making it. For those looking to grow theirs using one of these procedures, be sure to consider all of the potential legal issues that may arise, preferably before the newest member of the family arrives. ❖

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