Assisted Reproductive Technology Law for Practitioners

Beth Wolfsong
Wolfsong Law PC

Robin Pope
Attorney at Law

Multnomah Bar Association
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Expose Yourself to ART: The Basics of Assisted Reproductive Technology Law in Oregon

Expose yourself to a growing area of law: Learn the basics about family formation law. It is an emerging, collaborative area of law fraught with interesting legal issues. The rights and obligations of Intended Parents, Surrogates and Donors need to be weighed and balanced. This CLE will provide you with the basics to learn the sources of the relevant law, how to protect clients in the process, ensure the fairness of the process and create agreements that help the parties work together to create a life.

PREPARED BY:
Robin Elizabeth Pope, Attorney at Law and Beth S. Wolfsong, Attorney at Law

<table>
<thead>
<tr>
<th>Robin E. Pope, Attorney at Law</th>
<th>Beth S. Wolfsong, Attorney at Law</th>
</tr>
</thead>
<tbody>
<tr>
<td>4500 S.W. Hall Blvd.</td>
<td>9900 S.W. Wilshire St. Suite #100</td>
</tr>
<tr>
<td>Beaverton, Oregon 97005</td>
<td>Portland, Oregon 97225</td>
</tr>
<tr>
<td>(503) 352-3524</td>
<td>(503) 616-8880</td>
</tr>
<tr>
<td>FAX (503) 644-2146</td>
<td>E-mail: <a href="mailto:bethw@wolfsonglaw.com">bethw@wolfsonglaw.com</a></td>
</tr>
<tr>
<td>E-mail: <a href="mailto:robin@robinpope.com">robin@robinpope.com</a></td>
<td></td>
</tr>
</tbody>
</table>

DISCLAIMER:
These materials were produced by Robin E. Pope and Beth S. Wolfsong and are meant to assist attorneys and adoption professionals in understanding some of the issues involved with Assisted Reproductive Technology Law. This is an evolving area of law and medicine, full of complexities, ethical issues and risks, and the facts of each case unique. Practitioners should consult with knowledgeable professionals regarding the current status of the law and medical treatments.
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HOW TO MAKE A BABY IN THE 21st CENTURY

SOURCES OF GENETIC MATERIAL = 4

· Intended Mom
· Intended Dad
· Donor Eggs
· Donor Sperm

METHODS OF FERTILIZATION = 2

· In the Lab
· In the body

METHODS OF GESTATION = 2

· In the Intended Mom
· In a Surrogate or Gestational Carrier

A. INTRODUCTION

In July 1978, the first “test tube” baby, Louise Brown, was born in England. Since that time, the new world of reproductive technology has given us in vitro fertilization, egg donation, frozen embryos, genetic testing of embryos, and other types of medical procedures. This new technology has in turn created a multitude of legal, ethical and social issues. Working in this field gives one a strong sense that boundaries are lacking.

It is our goal to expose you to some of the issues that have arisen and may arise in the future as a result of the advancements in ART law. In Oregon, there has been an interesting interplay between adoption law and the legal handling of the births resulting from these medical technologies.

The number of children being born as a result of assisted reproductive technology keeps increasing. Adoption numbers are declining. In addition, surrogacy has become a gay rights issue.
B. ART TERMINOLOGY. It helps to learn and understand some of the terminology:

**ART:** Assisted Reproductive Technology: Using medical technology to achieve a pregnancy.

**Egg Donor:** A woman who donates her eggs for use by another woman in IVF procedures.

**Embryos:** Created in a lab using sperm and eggs provided by and/or belonging to Intended Parents. May be used fresh or may be frozen for later use in subsequent attempts at pregnancy.

**Embryo Donation:** Embryos belonging to Intended Parents may be donated to another couple so the second couple can attempt to achieve pregnancy through embryo transfer. The child will not be genetically related to the woman giving birth and her spouse/partner.

**Embryo Transfer:** Refers to the procedure contemplated under the agreement whereby existing embryos provided by and belonging to the Intended Parents are medically transferred into the uterus of GC for the purpose of creating a pregnancy for Intended Parents.

**Gestational Carrier or Gestational Surrogate:** Also referred to as the “GC” or “GS”; this is the woman who intends to receive embryos which are the product of genetic material provided and belonging solely to the Intended Parents and then to bear and give birth to a child or children for the Intended Parents. She is not genetically related to the child.

**Gestational Carrier or Surrogate Agreement:** Written Contract entered into between Intended Parents and the Gestational Carrier or Surrogate.

**Intended Parent(s), Intended Mother, Intended Father:** The person(s) who is/are the prospective genetic and/or sole intended parent(s) of a child or children contemplated by the agreement.

**IVF Procedure:** Refers to a procedure by which oocyte (eggs) retrieved from the Intended Mother or, if necessary, from a third-party egg donor other than GC, are fertilized in the laboratory by the sperm of the Intended Father or, if necessary, by sperm provided by a third-party donor. Resulting embryos may be the subject of an embryo transfer procedure under the agreement.

**Sperm Donor:** A man who donates sperm for use in IVF or TDI procedures.

**TDI or Therapeutic donor insemination, formerly known as AID (Artificial insemination by donor):** This involves the use of donor sperm to fertilize a woman’s egg, typically through artificial insemination.

**Traditional Surrogate:** Woman who is artificially inseminated with sperm from a man who is not her husband. The surrogate is thus genetically and biologically related to the resulting child.

/////
C. TRADITIONAL SURROGACY VERSUS GESTATIONAL SURROGACY

Traditional surrogacy refers to situations where the surrogate is the genetic mother of the child, meaning it is her egg that was utilized to help create the pregnancy. In a gestational surrogacy, there is no genetic relationship between the surrogate and the child: a donor egg is fertilized in a medical facility using in vitro fertilization. The resulting embryo is then transferred to the surrogate.

The current trend in surrogacy law is to move away from traditional surrogacy. This is in part due to advances in medical technology, which make gestational surrogacy a more viable option. In addition, many attorneys and Intended Parents want to avoid the heightened vulnerability and potential for conflict and legal risk associated with traditional surrogacy.

D. LEGAL ISSUES

1. General Legal Issues

Our constitutional right to privacy protects our reproductive decisions. The U.S. Supreme Court has found that the right to procreate and enjoy reproductive autonomy is a fundamental right. See, e.g., Planned Parenthood of Southeast Pennsylvania v. Casey, 112 S. Ct. 2791, 60 U.S.L.W. 4795 (1992); Stanley v. Illinois, 405 US 645 (1972); Eisenstadt v. Baird, 405 US 438 (1972); Griswold v. Connecticut, 381 US 479 (1965); and Skinner v. Oklahoma, 316 US 535 (1942).

A central legal issue in this area of law is how states clarify the parental rights of persons respecting the children born through use of ART. While the rights of sperm donors have long been defined by statute in many jurisdictions, including Oregon, there are few laws to guide us when it comes to egg donors, surrogates and gestational carriers.

Other legal issues arising in this area include the termination of parental rights, presumptions of paternity and maternity, determination of paternity and maternity, adoption, employment issues (e.g., is the surrogate an employee of the Intended Parents), child support, ownership of embryos, and issues involving international law when the Intended Parents are from another country.

2. Sperm Donation Issues

Therapeutic Donor Insemination, also known as TDI, has been available as a reproductive technique since at least the 1950’s. Historically TDI has been used by couples experiencing male infertility, couples where the genetic background of the male is an issue, single women, and non-traditional couples wanting a child who is biologically the child of one of the couple.

Oregon law has long addressed the use of donor sperm. ORS 109.239 et seq. This statue specifically allows married opposite sex couples and single women to avail themselves of the process of donor insemination. For married couples using TDI, the child is legally presumed to be the child of the husband.
Since 2009, the protections of this statute extend to same sex female couples, provided they otherwise meet the requirements of the statute. However, it is still prudent for the non-birth mother to adopt the child.

A single woman using TDI will be the legal parent of the child; the child will have no legal father. There is no need for an adoption.

Sperm donors typically remain anonymous. Reputable clinics screen donors for infectious and genetic diseases, STD and AIDS. There are no legal guidelines requiring disclosure of the genetic background of the donor to the person(s) using the donor sperm.

Under Oregon law, there is a procedure requiring consent of the parties using TDI. By consenting, the spouse is bound by the presumption that the resulting child is his or her legal child. Should the couple ever divorce, both parents would be legally obligated to support the child.

Under current Oregon law, when TDI is used by same sex female couples, the non-birthmother should adopt the child in order to be considered the child’s legal parent in all jurisdictions. It is a fairly uncomplicated process.

Not surprisingly, the Oregon sperm donor statute is silent as to egg donors.

Oregon law on sperm donation - ORS 109.239 ARTIFICIAL INSEMINATION

ORS 109.239 Rights and obligations of children resulting from artificial insemination; rights and obligations of donor of semen. If the donor of semen used in artificial insemination is not the mother’s husband:

(1) Such donor shall have no right, obligation or interest with respect to a child born as a result of the artificial insemination; and

(2) A child born as a result of the artificial insemination shall have no right, obligation or interest with respect to such donor. [1977 c.686 §5]

Note: 109.239 to 109.247 were enacted into law by the Legislative Assembly but were not added to or made a part of ORS chapter 109 or any series therein by legislative action. See Preface to Oregon Revised Statutes for further explanation.

109.243 Relationship of child resulting from artificial insemination to mother’s husband. The relationship, rights and obligation between a child born as a result of artificial insemination and the mother’s husband shall be the same to all legal intents and purposes as if the child had been naturally and legitimately conceived by the mother and the mother’s husband if the husband consented to the performance of artificial insemination. [1977 c.686 §6]

Note: See note under 109.239.
109.247 Application of law to children resulting from artificial insemination. Except as may be otherwise provided by a judicial decree entered in any action filed before October 4, 1977, the provisions of ORS 109.239 to 109.247, 677.355 to 677.365 and 677.990 (3) apply to all persons conceived as a result of artificial insemination. [1977 c.686 §7]

Note: See note under 109.239.

3. Egg Donation Issues

Where’s the statute? There is little law governing this rapidly growing area of reproductive technology. When Oregon’s sperm donor statute was passed, it was specific to sperm donation. Egg donation was not available as a medical technique at that time. Therefore, the safer course is to assume that Oregon has no law governing the donation of eggs and determination of parentage. At this time, those rights are created through written agreement and consent.

The physical act of egg donation is a more complex and riskier procedure than sperm donation. The donor is required to take fertility drugs to increase the number of eggs to be harvested. Donors may be anonymous or they may be known to the recipient. Anonymous donors are more apt to be screened for disease and genetic background, similar to the screening of sperm donors. They are paid a fee.

Egg donors should sign a consent which details the risks of the procedure and outlines the rights and responsibilities of the donor and recipient as to any children born as a result of this procedure. Consents entered into between anonymous egg donors and recipients usually include a provision agreeing to no contact between donor, recipient and the child(ren) born. Egg donors should consult with legal counsel about their rights and responsibilities, as should recipients.

Other issues come up, such as whether or not there should be an adoption by the recipient parent(s), the child’s right to know about the donor, the age of the woman receiving the donated eggs, and what happens to frozen donated eggs.

The general rule in Oregon hospitals is that the woman giving birth to a child is the mother of that child. She is listed on the child’s birth records and birth certificate as its mother. It is likely that couples using donated eggs with husband’s sperm, and where wife carries the fetus, will not have the wife adopt the child. After all, her name is on the birth records and the birth certificate.

Provided the egg donor gave consent and rights and duties were allocated between the parties, this approach parallels that used when a child is born using donor sperm. Husbands are not required to adopt those children; one wonders why wives would be treated differently when using donor eggs.

Considering the lack of statutory protection in Oregon, people availing themselves of egg donation should consult with a knowledgeable attorney regarding the legal issues and attendant legal risks. Consultation with a therapist familiar with assisted reproductive technology is also wise, as there are ethical and moral issues to consider.
Practice Note: IRS recently ruled that payments to an egg donor represented taxable income to the donor. See Perez v. Commissioner, 144 T.C. 4 (2015).

4. Embryo donation

Not surprisingly, Oregon law is also silent on the issue of embryo donation. This is a newer and less frequently encountered aspect of ART. Embryo donation typically occurs when a couple has extra frozen embryos after going through a successful in vitro fertilization.

Couples using donated embryos should first seek counsel from a knowledgeable attorney who can draw up a detailed agreement for them. Both the donors and the recipients should consult with independent legal counsel to help them understand their rights and responsibilities as to any child(ren) born using donated embryos. Remember, the child(ren) will be the genetic child(ren) of the donors yet may have a biological connection to the recipient (unless a gestational carrier is used).

A significant legal issue is the question of who owns and controls the embryos that have been created by a couple. This issue has arisen when the couple divorces while still having frozen embryos they have not used. One spouse may want to use the embryos in the future, while the other wants to avoid any legal responsibility for any child using those embryos. In some instances, it may be that person’s last chance to have a biological child.

In the context of a divorce, the Oregon Court of Appeals, in Dahl and Angle, 222 Or App 572, 194 P3d 834 (2008), rev. den., the appeals court held that a contract to dispose of the embryos is property. The husband wanted to use the embryos to create a pregnancy; the wife did not. She asked that they be thawed and destroyed or donated for scientific use. The wife won, based on the contract the spouses had signed with the infertility clinic during the marriage.

Since in Oregon it is the child’s right to support, not the parent’s, it is unlikely that Oregon courts would uphold an agreement that one spouse would be relieved of any duty of child support should the other spouse want to use the frozen embryos following divorce.

Ownership of embryos may also become an issue between the couple creating the embryos and the clinic assisting them. Allegations have been made against a California clinic that they took eggs from unknowing and non-consenting couples and used the eggs to create embryos for other couples.

The legal argument is that a couple owns their eggs and sperm until they knowingly agree to other “ownership”. Consent for use must occur prior to any use.

The practitioner should check applicable state law to determine if the sale of eggs or embryos is prohibited or restricted by applicable state law.

Embryo donation carries with it numerous thorny ethical issues, such as the telling of the child, concern about siblings being raised in different families, and the use of frozen embryos for research purposes.
5. Surrogacy

A traditional surrogate is a woman who contributes the egg(s), is inseminated with sperm from a man not her husband, and carries the fetus through gestation. Traditional surrogates have both a genetic and biological tie to the child(ren) born.

In Oregon, a child born to a traditional surrogate should be adopted by the Intended Parents. If husband’s sperm is used, it may be possible to do a step parent adoption, file a paternity proceeding or use a Joint Declaration of Paternity in order to establish the biological father as the legal father of the child. Otherwise, it is prudent to have both husband and wife adopt the child. A home study may be required in cases involving a surrogate. Circumstances where DHS may waive the home study are set forth in the Oregon Administrative Rules.

Gestational surrogates/carriers, on the other hand, are not genetically related to the child they carry and birth. An embryo created using egg and sperm from wife and husband (or donors) is implanted in the gestational carrier. Legal issues arise because, in Oregon, the woman giving birth is presumed to be the mother of the child.

A few states have begun using a process called determination of parentage, with accompanying parentage orders. This process allows a parent-child relationship to be established before the birth of the child provided certain conditions are met. Certifications by the gestational carrier, her husband, the biological parents (or donors) and the physician are typically required. The biological parents end up with a judicial determination of parentage that can then be used at the hospital and with Vital Records to establish them as the parents of the child(ren) from birth forward.

While Oregon law does not specifically allow for such a process, we have been using Oregon’s Declaratory Judgment statute to obtain a Declaratory Judgment that declares the legal relationships between the child and the intended parents and declaring that the surrogate, and her spouse if she is married, are not the legal parents. It can be entered pre or post birth.

Apart from ORS 163.537, there are no Oregon statutes specifically dealing with the issues of surrogacy and gestational carriers. There is a now dated Attorney General’s Opinion discussing the issue of surrogacy. See Opinions of the Attorney General Vol. 46 p. 220 (1989).

In a 1994 Oregon Court of Appeals case, the appellate court allowed the adoption of twins born to a surrogate, even though she had been paid a fee beyond her medical expenses. *In re Adoption of Baby A and Baby B*, 128 Or App 450 (1994). Reversing the trial court, which had not allowed the adoption because of the fee paid to the surrogate, the Court of Appeals found that no fee had been paid to locate the children, the surrogate was not withdrawing her consent and she would have entered into agreement even if no fee was paid. This case appears to indicate a willingness on the part of the Oregon Court of Appeals to uphold certain surrogate agreements.

In Oregon, couples using a surrogate or gestational carrier should take care to consider the following:

- Obtain separate, knowledgeable legal counsel for the surrogate/carrier and the couple.
- Enter into a detailed contract/agreement regarding their respective rights and responsibilities for any child(ren) born. The contract/agreement should determine the rights and duties of all parties and state their intentions in regard to any payments to the surrogate/carrier.

- The contract/agreement should detail remedies should the surrogate/carrier change her mind and want to keep the child(ren).

- If the surrogate/carrier is married, be sure her spouse is a party to the contract/agreement and that there is a remedy in case he or she fails to sign the necessary documents for parentage establishment.

- Be aware of Washington law regarding payments to surrogates/carriers and consult with Washington counsel.

- Obtain informed consent from all parties.

- Adoption of the child may be necessary. Oregon, through DHS, is requiring that children born to traditional surrogates be adopted by the person or couple using the surrogate.

- DHS has developed procedures for requesting waiver of the home study and placement report in surrogate and gestational carrier adoptions.

6. Establishment of Parentage

- Methods - adoption, declaratory judgment, pre-birth orders (in other states), paternity, step parent/2nd parent adoption.

  Tip: Get copies of documents: Gestational Carrier/Surrogate Agreement, written agreements with medical clinic, egg/sperm donor agreements, parentage documents.

- Timing

- Financial obligations - see agreement

- Legal obligations - need to see written agreement

- Birth certificates

- Full faith & credit

7. Estate Planning Considerations

Estate planning is a critical way to protect a person’s wishes regarding the distribution of their property during their incapacity, or following their death. Planning can potentially eliminate conflict and confusion by articulating the decedent’s specific instructions. Estate planning practitioners must pay close attention to words chosen and definitions used when it comes to planning for families who use assisted reproductive technology.
For example, a general reference to “my children” seems clear but could lead to confusion. Many state intestacy statutes define “children” as “natural or adopted”. Such a narrow definition could inadvertently exclude some or all of the testator’s children. Identifying children or grandchildren by name, or including a broader and more inclusive definition of children in the testamentary instrument could help protect the testator’s intent. For example:

All references in this Will to “my children” are references to my children, Jenny Smith and Johnny Smith, as well as to any children 1) subsequently born to me or adopted by me, or declared to be my children by legal proceeding, 2) born to or adopted by my spouse, or declared to be my spouse’s children by legal proceedings during our marriage, or 3) children considered by law to be my children as a result of my marriage, with my spouse, Jinny Smith.

In this sample paragraph, you see an attempt to include current living children who are specifically named, and future children where the parent-child relationship is created or recognized through adoption proceedings, declaratory judgment proceedings, or under a state’s marriage laws. Lawyers should, of course, use their own training and experience, as well as the specific facts at hand, to create custom definitions.

Here’s another example of a broader definition of “descendants”:

The term “descendants” means any one or more persons who follows in direct descent (as opposed to collateral descent) from a person, such as children, grandchildren, or great-grandchildren. Further, all children or descendants deemed to be children or descendants of the person indicated by virtue of an adoption, Declaratory Judgment or other judgment of parentage, or by virtue of a civil union, domestic partner registration, or same-sex marriage entered into by the person indicated shall be considered children or descendants for the purpose of this instrument.

Another issue that comes up with estate planning and assisted reproduction is the issue of what happens to unused cryopreserved genetic material when the donor or owner of the genetic material dies? Courts have been called upon to make determinations in divorce and there are a growing number of cases involving disposition of the material after death.

Often the owners of the genetic material will enter into a contract with the cryobank or infertility clinic indicating their dispositional desires. Typical choices included destruction of the genetic material, donation for research, or donation to a specific person for use in creating a pregnancy, or even saving it in case their children need genetic material for medical purposes.

In addition to the contract with the clinic, should the person also make provisions in his or her estate plan? Should they consider a revocable living Trust for the preserved genetic material? On the one hand, making a specific bequest in a Will or Living Trust could provide clarity and certainty. On the other hand, it could raise additional questions:

• Would the child(ren) born from the genetic material be considered heirs or beneficiaries of the estate entitled to a share of the inheritance?
• Would the child(ren) be entitled to support from the estate?
• What about Social Security benefits?

Courts are grappling with these issues, and there is a movement underway with the American Bar Association to create and encourage states to adopt uniform rules. Until such time, however, practitioners should be cognizant of these additional complexities that individuals and families face.

E. PROS AND CONS OF ART

• Acceptance of diagnosis
• Grief, loss, coping
• Making a treatment plan
• Financial impact
• Legal issues

F. INFERTILITY COUNSELING ISSUES

• Managing grief and loss
• Improving coping and decision-making skills
• Stress reduction strategies
• Marital conflict resolution - Building bridges when couples differ
• Coping with miscarriage, failed treatment cycles, and lack of support
• Moving from infertility to adoption - psycho social issues
• Preparing to be adoptive parents
• First time older parents issues (over 40)

G. PAYMENT FOR SERVICES

• Adoptions require disclosure of payments per ORS 109.311; No need to disclose any such payments in a Declaratory Judgment action.
• What do we call the payments to the Gestational Surrogate?
  • Lost wages?
  • Compensation for services provided?
  • What could we call these payments?
  • Advance payment for damages for physical illness resulting from pregnancy?
• Tax consequences: Is the Gestational Surrogate an employee or an independent contractor? Must she claim the fees paid to her as income? Will a 1099 be issued to her? Does her fee take into account the possibility that she will have to pay income tax?

H. ETHICAL ISSUES ASSOCIATED WITH ART

• Donor-conceived children
• Medical history
• Explanation to children of their genetic origins
• Do you tell? If yes, when, how and whom?
• Privacy v. secrecy
• Confidentiality v. openness
• Decisions about unused embryos
• Sibling/friend egg/sperm donation
• Who gets custody of the embryos in the divorce?
• Is there donation after death?
• Payment to the surrogate or gestational carrier for services provided
• Age of the family unit
• Pre-implantation genetic manipulation
• Clinic success rates
• Rights and duties of a couple using ART to create a child, then later divorcing
• Use of independent legal counsel
• Appropriateness of donors and recipients
• Genetic history of donors
• Psychological aspects of ART
• Should there be laws to define boundaries in this private area?
• How do we minimize the risk of abuse while being able to utilize the benefits of ART?

/////
I. HOW TO HELP THE PROCESS GO SMOOTHLY

1. Use of independent legal counsel for the Intended Parents and the Surrogate
2. Familiarity with the legal issues, applicable law, contract provisions
3. Avoid being a “rubber stamp”
4. Bring a collaborative approach to your work, while still being a strong advocate for your client(s)
5. Screening of clients
6. Familiarity with surrogacy agencies and IVF clinics
7. Counseling for the surrogate and the IPs
8. Allowing surrogate funds for communicating with her attorney during the pregnancy

J. INTERNATIONAL SURROGACY CONSIDERATIONS

1. Ability to communicate effectively (language issues)
2. Law of other country re: ART and parentage
3. Develop list of attorneys in other countries who practice ART law
4. U.S. Passport for child
5. Oregon birth certificate; multiple copies; obtain apostille from Secretary of State’s office
6. Establishment of parentage; need to be careful and not cause issues for Intended Parents when they return home
7. Medical insurance for child
8. Costs; Fees; transfer of funds
9. Require Intended Parents to consult with knowledgeable attorney in their home country
10. Clarify your role and duties via retainer agreement