



The Capital District WOMEN'S BAR ASSOCIATION

A Chapter of the Women's Bar Association of the State of New York

Winter 2017 Newsletter

WHAT IS ART LAW ANYWAYS? (HINT: IT HAS NOTHING TO DO WITH ARTWORK)

By Kathleen Copps DiPaola, Esq.



As many of you may know, one of the main focuses of my practice is adoption law. Unfortunately, there has been a nationwide decrease in the number of adoptions in recent years. This is almost certainly due in part to several countries closing their doors to international adoptions by US citizens and stricter rules under the Hague Adoption Convention. However, it may also be due in part to the rise of ART law, which stands for Assisted Reproductive Technology law. This area of law includes sperm donation, egg donation, embryo donation/adoption and surrogacy/gestational carrier arrangements. New York has very little statutory and case law pertaining to these areas of law but that has not prevented these arrangements from being undertaken.

Most people think of sperm donation as occurring through an anonymous donation and insemination at a clinic. If that's the case and the couple is married, there is a statutory section (DRL § 73) that applies and provides a presumption that the child born is the child of the married couple. However, it is also very common for the sperm donor to be known and even, sometimes, for the donation to be done at home (I'll let your imagination fill in the details on that). In that context, it is important to have an agreement that sets forth the intention of all parties. It is unclear whether a New York court would enforce such an agreement, but at the very least it sets forth the parties' intentions at the time of the donation which should be relevant to the court in determining the best interest of the child. To protect the parties' intentions, an adoption is necessary after the child is born. I have personally experienced a case where an agreement and an adoption were not completed and years later the donor asserted parental rights. The court treated him as it would any other birth father, which led to extensive litigation that would have been unnecessary had the proper steps been taken initially.

Due to the fact that a medical procedure is required for egg donation, this type of donation is done exclusively through clinics. Although there is no statutory or case law addressing this type of donation, the New York State Department of Health has a section on their website entitled "Becoming An Egg Donor" which permits compensation of egg donors. In cases where the intended mother gives birth to a child conceived via donor egg, the mother and her spouse, if any, are on the child's birth certificate. However, an agreement between the donor and recipients/intended parents is needed in this context too because there is no law in New York that specifies the rights of an egg donor and it is therefore unclear what the rights of the respective parties would be if parentage was ever contested by an egg donor.

Embryos (generally left over after a couple or individual has completed their IVF efforts) can also be donated via an agreement but the law in New York is, again, unsettled with respect to the rights of the respective parties. Embryos can also be adopted. An embryo adoption follows the framework of an adoption of a child and involves matching by an agency after the intended parents undergo criminal and child abuse clearances and a home study. The adoption can also involve an agreement regarding post-adoption contact. Couples or individuals who do not donate or adopt out their embryos also need to consider how they will be treated in the event of a divorce or upon their passing.

Surrogacy can be divided into two categories: (1) traditional surrogacy which involves a surrogate carrying a child she is genetically related to; and (2) gestational carrier arrangements which involve a carrier carrying a child is not genetically related to. New York has criminal sanctions for participating in surrogacy for compensation which effectively limits gestational carrier arrangements in New York to compassionate ones, generally between family or close friends where only the medical and legal expenses of the gestational carrier are paid. This law, DRL § 123, was enacted in response to the Mary Beth Whitehead case of the 1980's (109 N.J. 396) that involved a custody battle between a traditional surrogate and the intended/biological father and intended mother. Science has come a long way since then and traditional surrogacy is generally frowned upon within this field. Additionally, in depth medical, mental health, criminal and child abuse screenings of gestational carriers and intended parents are routinely undertaken before matching.

After a baby is born in New York pursuant to a gestational carrier arrangement, an adoption must be completed unless the baby is genetically related to both of the intended parents. In that case, a paternity/maternity proceeding can be maintained in Supreme Court in lieu of an adoption. See T.V. v. N.Y. State Dep't of Health, 88 A.D.3d 290 (2d Dep't 2011).

The Child-Parent Security Act, currently pending before the New York legislature, would fill all of the holes in New York ART law, provide protective requirements such as legal representation for all parties and appropriate screenings and make clear the rights and obligations of all parties involved with respect to children born pursuant to ART. This law would also repeal the ban on compensated gestational carrier arrangements. The main argument against compensation is that it leads to exploitation of women. I am admitted in Vermont where I have represented many compensated gestational carriers and I have never found this to be the case. They are educated, intelligent, compassionate women who have already had their own children and are helping others to create their family not out of need for the compensation, but primarily for altruistic reasons with the benefit of being able to save for their own children's college, pay for a down payment on a house or pay off student loans in exchange for the sacrifice they are making for the intended parents.

Kathleen "Casey" Copps DiPaola, Esq. of Copps DiPaola, PLLC focuses her practice in adoption law, assisted reproductive technology law(egg/sperm/embryo donation and gestational carrier/surrogacy agreements), family/matrimonial law, real estate, not-for-profit/for-profit/religious corporation formation and operations, estate planning, probate, employment law and name changes.