

**THE NEW WORLD OF FAMILY CREATION OPTIONS FOR SAME-SEX
COUPLES UNDER VIRGINIA LAW: AN OVERVIEW OF ADOPTION AND
ASSISTED REPRODUCTIVE TECHNOLOGY (ART) ARRANGEMENTS**

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**I. ADOPTION IN VIRGINIA GENERALLY CAN ONLY BE DONE BY ONE
PARTNER**

- Only a single person or a married couple (defined as a man and a woman) can adopt
- One partner of a same-sex couple can adopt as a single parent provided that the home study agency signs off on the home study
- Usually, but not always, the home study agency writes the report indicating that the non-adopting partner is a “room-mate” (separate bedrooms are usually a “must”)
- Any adult in the home must have a background check
- If adoption is done as a single parent adoption – the best protection for the other partner in Virginia is for a Joint Custody and Guardianship Order to be procured and to have reciprocal Wills-Trusts and Advanced Medical Directives drafted
- The couple may consider establishing residence in another state (like Maryland) for at least six months in order to accomplish a second parent adoption
- May be possible for a Virginia couple to do an entire adoption in another same-sex friendly state whereby both become parents – but it has to go through the interstate (ICPC) approval process as a single parent adoption in order to come home
- Virginia ICPC generally will let babies go out of Virginia for same-sex placements but will not let them into Virginia for same-sex placements; Va ICPC will only let them in as single parent placements
- If the same-sex couple is lawfully married (via marriage in another state) - it could preclude one adopting as a single parent

II. INTRODUCTION TO ARTs

- Assisted Reproductive Technologies (“ARTS”) Law is an emerging area of the law
- ARTS law is most closely tied to adoption law but largely rooted in contract law
- Involves the use of donor sperm, donor egg and/or donor embryos
- Often involves the use of a host womb
- There are thousands of frozen embryos in storage that may not be used by their “owners”

THE NEW WORLD OF FAMILY CREATION OPTIONS:

- Donor Egg: known or anonymous
- Donor Sperm: known or anonymous
- Donated Embryo: known or anonymous
- Gestational Carrier: the possibility of using a carrier (who does not contribute her own egg)
- Traditional Surrogate: the possibility of using client's sperm or donor sperm with the surrogate's egg

Families from Assisted Reproductive Technologies

- Whose parts? What are the Options?
- IM egg + IF sperm into gestational carrier
- Donor egg + IF sperm into IM or carrier
- Donor sperm + IM egg into IM or carrier
- Donor egg + Donor sperm = Donor embryos into IM or carrier
- IF or Donor sperm into true surrogate
- White carrier + Asian donor parts = Asian twins
- Black carrier + Caucasian donor parts = Caucasian child

The Most Common Agreements:

- Egg Donor Agreement (Female Egg Donor donates directly to the Intended Parent(s) or the Clinic – can be known or anonymous)
- Sperm Donor Agreement (Male Egg Donor donates directly to the Intended Parent(s) or the Clinic – can be known or anonymous)
- Embryo Donor Agreement (Note that “embryo adoptions” are the exception not the norm; Male and Female donors donate their embryo directly to the Intended Parent(s) or the Clinic)
- Surrogacy and Gestational Carrier Agreements
- Agreements with the Fertility Clinics (which can encompass any of the above but typically are informed consents, financial agreements, and embryo preservation agreements signed with the clinic and/or medical provider and not agreements between the involved parties)

Typically Roles for the Attorney:

- To map out how the arrangement is going to occur – from beginning to end
- To review the agreement on behalf of a party
- To negotiate the agreement on behalf of a party
- To draft (and negotiate) the agreement on behalf of a party
- To handle the adoption, birth certificate amendment, parentage order, pre- or post-birth order, or other court or governmental proceeding to resolve parentage issues

III. ARTs TERMINOLOGY:

Certain words have achieved “term of art” status in the realm of reproductive technology law. Conversations among the various professionals are punctuated

with these words and an alphabet soup of abbreviations. Knowledge of these basic terms and proper use of them is crucial.

- (a) “Assisted Reproductive Technology” or “ARTs”
 - All fertility treatment in which eggs and sperm are handled outside the body
 - Purpose is to facilitate the conception of a child

- (b) “IVF” = *In Vitro* Fertilization
 - Ovaries medically hyperstimulated
 - Eggs surgically removed
 - Fertilized in laboratory
 - Resultant embryos implanted in uterus

- (c) “Artificial insemination”
 - Female artificially inseminated – meaning sperm injected via some artificial means
 - Does that include home insemination kits? It can and – depending on state law – usually does.

- (d) “Surrogacy”
 - As used in ART, the process of a woman carrying a pregnancy with the intention of placing the child with another or others for rearing and parenting
 - Often is used as a general term although a “true” surrogate carries her own eggs

- (e) “Surrogate” = Two Types
 - Traditional or True Surrogate (TS)
 - A woman who becomes pregnant with her own egg and the sperm of the intended father (or donor sperm), with the intention of placing the child with the IF, or IF & his wife or partner. Due to the genetic connection, TS is a birth mother and, in many jurisdictions (especially without ARTs schemes), an adoption by IM or father’s partner must occur after birth for IM or partner to be parent.
 - Gestational Carrier/Surrogate (GC or GS)
 - A woman who becomes pregnant with an embryo genetically unrelated to her, through the intra-uterine placement (“transfer”) of an IVF-created embryo, and carries the child for IM, IF or IPs, with intention of placing child w/ them at birth. Also referred to as a host womb. Gestational ‘Carrier’ is preferred term to distinguish from a True Surrogate.

- (f) Cryopreservation
 - Freezing for storage. In ART, sperm and embryos, and, with growing frequency but less success, eggs and ovarian tissue, may be frozen in liquid nitrogen and saved for future use. Tissue in storage is often referred to as “frozen” or “cryopreserved.”

- (g) “Eggs” = which are unfertilized female gametes, may be variously referred to as

- oocytes-eggs prior to ovulation or surgical retrieval
- ovum or ova

(h) “ICSI” = Intracytoplasmic Sperm Injection: in the lab, inserting one sperm into the nucleus of an egg in hopes of achieving fertilization. This procedure has revolutionized the treatment of male infertility, allowing men with extremely low sperm counts to conceive a child, which was nearly impossible before this technique.

IV. FINANCIAL ISSUES.

Cost Estimates for ART:

- IVF: \$8000-\$12,000 (average medical cost, regional variations, does not include storage)
- Donor Egg: \$5,000 - \$10,000 to donor (if donor is agency/clinic recruited & paid, higher for clinic fees and the extraction procedure)
- GC: minimum \$15,000 if GC paid, can range from \$15,000 to \$75,000 but usually \$18,000 to \$30,000 on average just for the carrier – does not include clinic and legal fees
- ICSI: additional \$1500-\$2000 for each attempt, in addition to IVF cost

Medical Insurance for ART

- For fertility procedures: insurance may or may not cover ART, if in a non-mandated state. Insurance rarely covers if insured is using donated gametes.

Health Insurance for Gestational Carriers

- Prenatal and delivery charges have historically been covered by GC’s insurance, but this is changing and exceptions are being written into contracts.
- Coverage specifically for IPs to insure GCs is approximately \$10,000 +

Helpful Information for Clients

- Patient/Client Support Groups
 - AFA: American Fertility Association
 - RESOLVE
- ASRM: American Society for Reproductive Medicine
- SART: Society for Assisted Reproductive Technology

V. VIRGINIA’S STATUTES.

VIRGINIA’S ARTs STATUTE – Section 20-156, et seq.

- Virginia’s ARTs statute, located at Virginia Code section 20-156, et. seq., has a donor component in its definitions stating that a donor has no parental rights
- Thus it is important to have a well-drafted sperm or egg donor agreement for donor egg or sperm (or both for donor embryo)
- Virginia’s ARTs Statute only permits the use of a gestational carrier or surrogate (who can be unmarried) by a married couple (defined as a man and a woman) in order to take advantage of the statutory scheme

- However, no Virginia law forbids or precludes a contract from being entered into with a single person
- The enforceability of a contract outside the statutory scheme is unknown
- Under Virginia's ARTs statute, if a gestational carrier or surrogate is married – then she is the presumed mother and her husband is the presumed father
- The presumption that her husband is the father must be rebutted by DNA test result evidence under Virginia's parentage statute

VIRGINIA'S PARENTAGE STATUTE – Section 20-149.1 et seq.

- Virginia's Parentage Statute allows parentage to be determined by clear and convincing evidence established by DNA testing
- If a gestational carrier or surrogate is unmarried – she can list the Intended Father whose sperm has been used on the birth certificate

SAME-SEX ARTS OPTIONS FOR WOMEN:

- For Women – IVF with either known or anonymous sperm – use Virginia's ARTs statute with Sperm Donor Agreement
- Father is listed as “unknown” on the birth certificate
- The woman who gives birth is the presumed mother
- Same-sex partner can only obtain rights in Virginia via Joint Custody and Guardianship Order and reciprocal Wills-Trusts-Advanced Directives
- Second parent adoption would have to be done in another state in order to give non-birthing parent full parental rights
- Legal Outcome is unknown but one partner could carry other partner's egg and donor sperm
- Sperm donor has no parental rights with Sperm Donor Agreement
- Woman giving birth is the presumed mother but can be rebutted with clear and convincing evidence of DNA testing
- Outcome in Virginia at this time probably is that Court would only allow for one mother on the birth certificate – but given open minded judge – who knows?

SAME-SEX ARTS OPTIONS FOR MEN:

- Gestational Carrier may be used with donor egg (the use of a Traditional Surrogate is **not** advised) and sperm is that of the Intended Father
- If GC is unmarried, then IF may be placed on the birth certificate
- If GC is married, then Order of Parentage must be obtained via DNA testing to place IF on the birth certificate
- The issue then is getting the GC off of the birth certificate:
 - Can be accomplished by IF's partner doing a second parent adoption in a state that permits second parent adoptions (like DC or MD)
 - May possibly be accomplished by obtaining an Order of Parentage in Virginia (or state of IF's residence with a viable parentage statute) through the use of DNA testing that shows by clear and convincing evidence that the GC is not the biological mother and that the biological mother is

unknown (this is not a known outcome at this time though and it would depend heavily on the judge)

- Virginia law not clear if single parent adoption could be done to get GC off the birth certificate

REMOVAL OF GESTATIONAL CARRIER FROM BIRTH CERTIFICATE ALLOWED IN MARYLAND UNDER EPA

In re: Roberto d. B., 399 Md. 267, 923 A.2d 115,
2007 Md. LEXIS 269 (2007).

Facts: Roberto d. B., an unmarried male, initiated IVF on 12/18/2000, using his sperm, donor eggs and a gestational carrier. The procedure resulted in two fertilized eggs & a twin pregnancy. The carrier delivered twin children on Aug. 23, 2001.

Unless a court order otherwise provides, ...hospital reports the gestational carrier as “mother” of the child to Maryland Division of Vital Records; however, neither intended father nor carrier wanted gestational carrier’s name to be listed on birth certificate. A joint petition was filed with the Circuit Court for Montgomery County, asking it to issue an “accurate” birth certificate, i.e., one that did not list the gestational carrier as the children’s mother. The Circuit Court refused to remove the name and rejected the petition.

Holding on Appeal: The Court agrees that the statute controlling new birth certificates only addresses “parentage,” without limitation. It does not preclude the courts from issuing an order authorizing a birth certificate that does not list the mother’s name. This Court has found that any action by the State, without a substantial basis, that imposes a burden on, or grants a benefit to one sex, and not to the other, violates the *Maryland Equal Rights Amendment*. *Griffin v. Crane*, 351 Md. 133, 149, 716 A.2d 1029, 1037 (1998). **The paternity statutes in Maryland must be construed to apply equally to both males and females. Because there is sufficient evidence that the State would not object to the removal of the gestational carrier’s name from the birth certificate, and because such a result would not be inconsistent with the current statutes controlling the issuance of birth certificates, we hold that it is within a trial court’s power to order the MDVR to issue a birth certificate that contains only the father’s name.**

NOTE: VERY PROBLEMATIC IS THE LANGUAGE BY THE COURT, IN DICTA (IN PASSING), PRONOUNCING THAT “SURROGACY CONTRACTS ARE ILLEGAL IN MARYLAND.”

SAME-SEX ARTS OPTIONS FOR MEN (cont.):

- If Gestational Carrier carries donated embryo (need to have underlying sperm and egg donor or embryo donor agreement(s) enforceable under the law of the applicable state) – then an adoption must take place
- If adoption done in Virginia – adoption could only be as to one single parent

- If GC places to couple outside of Virginia – could be a same-sex placement if permitted in the couple’s home state
- Enforceability of the underlying Gestational Carrier Agreement is unknown

VI. OTHER ARTS ISSUES

COORDINATION WITH MEDICAL PROVIDERS

- Obtain and review copies of all Medical Provider documents – ideally review before clients sign
- Donors, Carriers and Surrogates should be adequately:
 - Counseled
 - Screened (physically and psychologically)
 - Adequate background information obtained

RED FLAGS

- Carrier not wanting estranged husband to be part of the agreement
- Carrier is single, older, no children (especially for true surrogate)
- Intended Parent(s) want(s) to micro-manage the pregnancy
- Parties not getting adequate medical, psychological and background clearance particularly on the Carrier
- Carrier not wanting representation
- Parties trying to utilize joint representation

THE PROS and CONS of Using a Carrier via ARTS vs Adoption

Perceived advantages of using a carrier vs adopting from a birth mother:

- Control over prenatal care & greater involvement in pregnancy
- Child usually genetically related to at least one parent (unless donated embryo)
- Certainty over having a child to raise and no change of mind issues (especially if not donated embryo, carrier is unrelated to the child and at least one Intended Parent is genetically related)
- Issues of ongoing contact for child’s benefit may not be as significant when the child has no biological connection to the carrier
- The primary disadvantage: unless the carrier is a relative or friend who does not request compensation, cost can be prohibitive
- Still unsettled law depending on type of arrangement
- If in a state where there is no law, enforceability of contract may be questionable
- Not for the very risk-averse: regardless of behavior of carrier, even if it constitutes a material breach and/or bad pregnancy outcome is the result, only recourse may be litigation with uncertain outcome.
- Use of true surrogate or donated embryo even greater risk. Limited success in litigation likely.

THINK DOWN THE ROAD: SIMILAR IDENTITY ISSUES FOR CHILDREN OF ADOPTION AND ART

- Should they be told and if so, when & how?

- Will ongoing contact agreements be possible & beneficial?
- What search options will these children have?
- What registries will exist?
- Are these factors addressed in the contracts?
- Should cord blood be saved?
- Will these children feel different from their peers?
- Potential for inadvertant consanguinity
- Donor children of same donors dating?

And... More Ethical Considerations for Thought

- Child's right to genetic heritage/medicals
- Also, unique to ART and at issue for child-centered concerns
 - Designer babies
 - Dilution of gene pool with frequent donor parts used (especially sperm)
 - Limiting transferred embryos (Octomom)
- What limits on designer babies?
- What if they are not exactly as ordered or fall out of fashion?