**This article can serve as a resource for the Colorado practitioner who is asked to provide legal advice to a party involved in assisted reproduction.**

## *Legal Aspects of Assisted Reproduction Including Colorado's Recent Legislative Response*

### The Technology of Assisted Reproduction

The science of assisted reproduction has rapidly progressed. It started in the early days with artificial insemination which allowed an infertile husband to use the sperm of a donor, and has now evolved into many other forms. Typically, human eggs are extracted by laparoscopy from the woman's ovaries following hormonal stimulation. The ova or eggs are then artificially fertilized by thawed or fresh sperm in an artificial medium, and allowed to grow into embryos. The zygote or embryo is then implanted into the uterus and allowed to develop. Usually there are multiple embryos or zygotes produced and the excess embryos are frozen in liquid nitrogen, a process known as cryopreservation.[1] The evolution of assisted reproduction has allowed a great many infertile couples to become parents.

### The Parties in Assisted Reproduction

The egg and sperm can come from the intended parents and the embryo is then implanted into the intended mother or surrogate.[2] There are numerous other possible scenarios. The sperm and egg donors, if not the intended parents, can either be anonymous or known. Because of the multiplicity of involved parties the legal issues can proliferate and become convoluted. Each of these individuals has special legal interests to protect. Add to this, the reproductive clinic, the reproductive specialist, the surrogacy agency, the obstetrician, perhaps other physicians, and all of their lawyers, you then have an array of conflicting legal interests.

The science of assisted reproduction typically requires the creation of several embryos in order to result in a successful pregnancy. As a result, it is estimated there are now 400,000 frozen human embryos in storage at fertility clinics throughout the United States.[3] One of the more difficult issues to resolve is the question of embryo ownership when the husband and wife decide to divorce or separate. In addition, legal issues regarding the ownership and use of sperm and human eggs have arisen following the donor's death. The fertility clinics themselves face significant legal challenges in deciding what to do with unclaimed frozen

embryos which the family law practitioner may be called upon to resolve. There are several recent reported decisions regarding these issues. Unfortunately there have been no opinions related to embryo ownership by the Colorado courts.

## C.R.S. § 19-4-106. Assisted Reproduction

Surrogacy continues to be widely used throughout the United States. As reported in the Colorado Lawyer in 2002,[4] there was no reported decision on the legality of surrogacy in Colorado. This continues to be the case. However, on July 1, 2003, C.R.S. § 19-4-106 **Assisted Reproduction**[5] became effective and substantially amended the prior version of this statute which was formerly entitled **Artificial Insemination.**[6] The words "artificially inseminated" were replaced by the words "assisted reproduction" which appear throughout C.R.S. § 19-4-106. This new law provides much needed guidance for the family law practitioner who deals with assisted reproduction issues. But, questions such as the legality of payment to donors and surrogates, the rights of ownership to frozen embryos, and the legal status of surrogates remain largely unanswered by this new law.

It is noteworthy that the legislature did not add "assisted reproduction" to the definitions found in C.R.S. § 19-1-103. Accordingly, except to the extent that a negative implication may be created by the fact that C.R.S. § 19-4-106(9)[7] states that the law "does not apply to the birth of a child conceived by means of sexual intercourse" no further guidance exists. Therefore, the implication is that "assisted reproduction" refers to all commonly accepted procedures including *in vitro* fertilization and the use of donors and surrogates to facilitate human birth.

Nationally, few legislatures have been willing to address the realities and advancements in assisted reproduction, presumably because of the morally charged issues associated with it. The Colorado legislative bucked this trend in 2003 when it passed Senate Bill 79, now codified as C.R.S. 19-4-106. The bill was primarily child support enforcement legislation. The legislative history of C.R.S. 19-4-106 indicates that it was intended to serve the best interests of the children born via assisted reproduction by attempting to define who would be the legal parents with rights and responsibilities. Some confusion has resulted. Originally, the bill sought solely to establish paternity. Thereafter, it was amended to be gender neutral so that it also defined who the legal mother was. This has created ambiguity as discussed below. Regardless, the law only deals with the rights of married individuals leaving other situations without further legislative guidance.

*In Re the Interest of R.C.*[8] in which the Colorado Supreme Court found that a unmarried donor was intended to be the father is an example of previous case law that is not changed by the new statute. In this case, it was found that because the known semen donor and the unmarried recipient had agreed in advance that the donor would be treated as the father of the child, he would be given parental rights. Although not dispositive, the purpose of the new law appears consistent with the result. The goal of both is to ensure that parental responsibility occurs.

Furthermore, the Supreme Court's recognition that the parties' intent is to be considered when coupled with the new law's implicit recognition of the validity of assisted reproduction agreements gives comfort to the parties who are considering assisted reproduction.

C.R.S. 19-4-106 does not change the prior statutory law in that the husband who donates sperm or consents to assisted reproduction[9] by his wife with sperm donated by a man not her husband, is the legal father of the resulting child.[10] Section 106(2) should make the donation of sperm more legally acceptable to Colorado men who wish to donate since it provides: "A donor is not a parent of a child conceived by means of assisted reproduction, except as provided in subsection (3) of this section". Section 106(3) refers only to the husband who provides sperm or consents to assisted reproduction by his wife. C.R.S. §19-1-103(44.5) includes donors of both sperm and eggs to be used for assisted reproduction. C.R.S. § 19-1-103 (44.5) defines a "donor" as "...an individual who produces eggs or sperm, used for assisted reproduction..." However, the definition specifically excludes married individuals who donate their gamete "to be used for assisted reproduction by the wife."

Some confusion results due to the fact that the law added gender equality language concerning donation by the wife after the bill was originally proposed but subsection (3) was not changed thereafter leaving it referring only to the husband's gamete. Section 106(1) also specifically provides as follows: "If under the supervision of a licensed physician and with the consent of her husband, a wife consents to assisted reproduction with an egg donated by another woman, to conceive a child for herself, and not as a surrogate, the wife is treated in law as if she were the natural mother of the child conceived thereby." The language of these two (2) subsections raises numerous issues. For example, does the language mean that a woman who carries a child will always be considered the legal mother of the child? Or, does the reference to "surrogate" implicitly approve of a surrogacy agreement where the wife would be considered the mother and not the surrogate (carrier)? These questions do not appear to be answered by the statute and will have to await appellate interpretation or further clarification from the legislature.

Section 106(4) is another change to the prior law and a substantial step forward to encourage the donation of gametes in the assisted reproduction process. Egg and sperm donors are now explicitly allowed to donate their gametes for use by third parties without a legal requirement to obtain the consent of his/her spouse. It is apparent that the legislature now recognizes and encourages such donation without throwing up a roadblock in the form of spousal consent.

Section 106(5) provides that even if a husband fails to consent in writing to the donation of sperm by another man for use by his wife in assisted reproduction, he can be determined to be the father of the child. This finding is possible under C.R.S. § 19-4-105(2)(a) **Presumption of Paternity.** Under this statute, the husband could be determined to be the father under a variety of statutory considerations such as the nature of the father-child relationship, the age of the child, and the length of time which has passed between the time a parentage action has been brought

versus when a putative father discovered he might not be the genetic father. In other words, even a medical determination through genetic testing that the husband is not the biological father does not guarantee the husband that he will not be determined to be the father of the child. This is consistent with the holding in the case of *N.A.H. and A.H. v. S.L.S.*[11] where the Colorado Supreme Court ruled that when conflicting presumptions of paternity exist that legal fatherhood is not automatically resolved by genetics. The Court held that the best interest of the child was the proper standard to consider as part of the policy and logic analysis in deciding legal fatherhood. This ruling has been generally codified in C.R.S. 19-4-105. Nevertheless, if the husband does not consent in writing to his wife's use of donor sperm in assisted reproduction then he can be determined in a parentage action not to be the father of the child but only if such action is brought within five years after the child's birth.[12] Such a parentage action can be brought by a child, his natural mother, the man presumed to be the father, the state department of human services or county department of social services.

Section 106(7)(a) provides that "if a marriage is dissolved before the placement of eggs, sperm, or embryos, that the former spouse is not a parent of the resulting child". However, the former spouse's consent to assisted reproduction "after" the dissolution (albeit highly unusual) would make him/her the parent of the child. This subsection may be a response to several court decisions where ownership of frozen embryos[13] and parentage issues became a disputed divorce issue. At least one of these cases held (as discussed below) that a divorcing spouse could not be forced into parenthood by allowing the other spouse to use his gametes to create a child against his will.

Section 106(7)(b) allows a former spouse to withdraw his or her consent to assisted reproduction at any time before placement of eggs, sperm or embryos. This section of the law can be problematic since it applies only if the marriage is already dissolved. It does not address the embryo ownership issue that is present before issuance of the decree of dissolution. The reproductive clinic should therefore ensure that the husband and wife clearly designate in writing their agreed upon choice regarding disposition of frozen embryos in the event of separation or divorce (as well as death and disability). This choice should be made before the cryopreservation of their embryos and included as part of a detailed consent form signed by both spouses in order to participate in cryopreservation.

Section 106(8) deals with the situation that arises when a spouse dies before placement of the eggs, sperm or embryos. Such a deceased spouse is not deemed to be the parent of the child born as the result of assisted reproduction unless he/she consented in writing that he/she would be the parent of such a child. This statutory change is likely the result of case law around the county which has struggled with determining parentage under various posthumous scenarios. For example, in the 1993 case of *Hecht v. Superior Court*[14], the California Court of Appeals wrote a lengthy opinion regarding the rights of an unmarried woman to the sperm of her boyfriend who had committed suicide and who had specified that his sperm should go to his girlfriend for the use of procreation. The Court upheld the

right of posthumous artificial insemination. This appears consistent with Section 106(8). Nevertheless, although it may be medically possible for the grief stricken wife or girl friend in Colorado to harvest the sperm of her deceased partner in order to have a child by him, such a child would have no legal relationship to his or her biological father absent the decedent's prior written consent.

**Legal Proceedings**

The practitioner must consider whether a legal action should be brought as a result of a child who is born by assisted reproduction. In view of C.R.S. § 19-4-106 when the wife delivers a child with a donor egg and/or donor sperm, no legal action will probably by necessary. The statute declares the husband and wife to be the parents and Vital Records will likely issue a birth certificate indicating such without the need for a court order.

When a traditional surrogate or gestational carrier is involved it will probably be necessary to bring a parentage action (and possibly a step-parent adoption action) to obtain a judicial declaration that the intended parents are the legal parents. To the extent that Section 106 is clear in declaring that the husband and wife are the legal parents only a parentage action is necessary. Under Colorado's Uniform Parentage Act (UPA), such an action may be brought either pre-birth or after the child's birth. Although, prior to the enactment of the new language in Section 106, most Colorado courts have interpreted the law as requiring a step parent adoption when a donated egg was used, such an action is now only necessary to the extent that Section 106 is ambiguous or not construed to declare the intended mother to be the legal mother. This issue will arise where a surrogate is used as the UPA states that a woman who gives birth to a child may be presumed to be the mother.[15] Thus, a step- parent adoption by the intended mother may be necessary when the surrogate gives birth.

**The Financial Aspects of Assisted Reproduction**

It is well known that donors of sperm and eggs, as well as traditional surrogates and gestational carriers can command a high price for their gametes and services. C.R.S. § 19-1-103(44.5) may give implicit approval to the payment of consideration in so far as it provides that "Donor" is an individual "...who produces eggs or sperm for assisted reproduction, *whether or not for consideration...*" (Emphasis added). To the extent that this statute is construed to address only the fact that a "Donor" is not the legal parent of the child there is no direct case law or statute that indicates whether public policy or criminal law prohibits the payment of compensation for donation or surrogacy services.

C.R.S. § 18-6-402 **Trafficking in children** requires that the practitioner pause for caution since conviction under this criminal statute is a class 3 felony. In summary it prohibits selling children. Since substantial monetary consideration is frequently paid to a surrogate by the intended parent(s) the issue then becomes whether the giving

and receipt of such consideration constitutes the sale or exchange of a child in violation of this statute. This risk applies to the Intended Parents, the Surrogate, and perhaps others who facilitated the surrogacy arrangement including the parties' attorneys and the surrogacy agency. It is hard to construe this law as prohibiting the fee paid for donation. Furthermore, to the extent that a gestational carrier has no genetic link to the child she is not selling someone who belongs to her. Accordingly it has been assumed that only when a traditional surrogate (*i.e.* artificial insemination) is employed does a concern arise as to whether or not the same is a violation of this criminal statute. Even in this instance it may be argued that she is selling a service and not a child. Regardless, disclosure of this issue by the practitioner should be made to all parties involved. If directed by the parties a motion for declaratory judgment under Rule 57(b), C.R.C.P. that the payment of financial consideration to a surrogate is legally acceptable under C.R.S. § 19-4-106 (and perhaps other statutes) may be considered. To the authors' knowledge, as of today, no such action has been brought in Colorado.

C.R.S. § 19-5-213 **Compensation for placing child prohibited** is another statute which should be considered when reviewing payment arrangements to surrogates. This criminal misdemeanor statute prohibits a person from offering, giving, receiving or charging money or other consideration in connection with a "relinquishment *and* adoption." (Emphasis added). Arguably this statute does not apply to surrogacy arrangements since step parent adoptions may no longer be considered a necessary action in view of the new language found in C.R.S. § 19-4-106. Furthermore, one could argue that since relinquishment does not apply to step parent adoption and the reference to relinquishment and adoption is in the conjunctive, the statute does not apply. Finally, since gestational carriers do not have a genetic link to the child it could be asserted that no parental rights are present to barter making the statute inapplicable. The statute, however, should cause the greatest concern for the family law practitioner when a traditional surrogate is used. In this situation, the surrogate has a genetic relationship to the child she delivers. If a stepparent adoption follows by the intended mother with a corresponding termination of the surrogate's rights it is arguable that the statute is applicable.

Another financial issue involves the possibility that the compensation paid is taxable. The primary question is whether or not the fees received by the surrogate or gestational carrier constitute taxable income. The argument by the Internal Revenue Service would be that payment received is for services rendered and therefore taxable. Often the agreements provide that payment to the surrogate is not for services rendered but are excluded from income as compensation for personal injuries or sickness pursuant to Section 104(2) of the Internal Revenue Code.[16] The fact that this section of the statute is limited to "damages" for the personal injuries or illness weakens the likelihood of this argument succeeding. The good news for intended parents is that in a recent private letter ruling[17], the IRS determined that compensation to an egg donor together with the costs of agency and attorneys fees, and other costs are deductible medial expenses under Section 213 of the Internal Revenue Code.

## Frozen Embryos and Divorce

There are at least five reported decisions (none in Colorado) which deal with the disposition of frozen embryos in the divorce setting.[18] In the *Davis* case, the Tennessee Supreme Court upheld the husband's right to "procreational autonomy" in the absence of a prior dispositional agreement with his wife. The ex-wife wished to donate the frozen embryos to an infertile couple. But the Court would not impose fatherhood on the ex-husband absent his prior agreement. Because no dispositional agreement had been entered into at the time of the *in vitro* fertilization, this couple endured years of litigation.

In the Massachusetts Supreme Court case of *A.Z. v. B.Z,* the Court would not enforce a prior dispositional agreement which stated that in the event of divorce the pre-embryos would go to the wife for implantation. In this case, several years had passed since the agreement was signed and there was some evidence that the husband always signed a blank consent form. The lesson learned from this case is that the reproductive clinic should allow the parties a sufficient period of time to review the consent form. It should also note the parties' joint decision regarding disposition in the event of death, divorce or disability. The form should memorialize that the parties were advised and given sufficient time to obtain counseling and advice regarding their dispositional choice.

The 1998 New York court of appeals decision in *Kass v. Kass,* is perhaps the most reasoned of all five decisions. Here the Court held in a matter of first impression that a dispositional agreement between progenitors or gamete donors should be presumed valid and binding, and enforced in the event of a dispute. In this case, the parties had agreed that in the event of divorce, the "pre zygotes" should be donated to an IVF program for research. A skilled practitioner would recognize that such an agreement is problematic since the use of frozen embryos for research that is federally funded is prohibited.[19] It is also advisable to check state law to determine if embryo research is prohibited. Regardless, the *Kass* decision is helpful precedent to the practitioner who drafts a careful dispositional agreement for the husband and wife who own excess cryopreserved pre-embryos.

In the *Litowitz* case decided by the Washington Supreme Court in June 2002, the Court required the husband and wife to petition the court for instructions if unable to reach a mutual decision regarding the disposition of pre-embryos. Although the parties had reached agreement on disposition as part of the pre-embryo cryopreservation contract, and directed that their pre-embryos be allowed to thaw after being in cryopreservation for five years, the parties could not agree on disposition at the time divorce proceedings began. Interestingly, the dispositional agreement did not cover the divorce contingency. Also, the wife was not a progenitor and therefore her rights were strictly by contract. The Court ultimately relied upon the parties' prior agreement regarding disposition. Perhaps the most interesting aspect of this case concerned the egg donor agreement which stated

that the intended parents would not allow any other party the use of the eggs without the express written permission of the egg donor. The Court ruled that the egg donor contract does not relate to the pre-embryo which resulted from subsequent sperm fertilization of the eggs. In effect, the rights of the egg donor (concerning the eggs that are fertilized) disappear upon creation of a pre-embryo or zygote. This language should be incorporated into egg donor contracts to avoid any question about the egg donor's future interest in pre-embryos.

Extended divorce litigation over the ownership rights to cryopreserved pre-embryos can be avoided. A detailed and well thought out consent to cryopreservation with detailed dispositional choices can avoid future problems. The parties should be given adequate time to consider disposition and their rights to counseling and legal advice should be included in detail as part of the consent form.

## Conclusion

C.R.S. § 19-4-106 has removed some uncertainty regarding the legal status of donors and intended parents who utilize assisted reproduction. The practitioner should review this statute as the starting point in researching legal issues related to assisted reproduction. Surrogacy, however, remains to a large extent uncharted territory particularly with respect to payment issues and the legal rights and status of surrogates. The use of a gestational carrier should present fewer legal hurdles than a traditional surrogate who has a genetic relationship with the child. The legislature and courts will hopefully continue to give legal definition to the rapidly expanding technology of assisted reproduction and the rights and obligations related to it. This article has addressed primarily the legal aspects of assisted reproduction regarding infertile couples. However, it should be remembered there is another body of assisted reproduction law which is developing with respect to single parents, and lesbian/gay couples and their rights and obligations.

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1. Stedman's Medical Dictionary 637 (26th ed. 1995

2. The surrogate can be either the "traditional surrogate" who has a genetic relationship to the child or the "gestational carrier" who does not have a genetic relationship to the child.

3. May 8, 2003 Washington Post article by Rick Weiss

4. 31 Colorado Lawyer 1, Growing Role of Surrogacy, January 2002, Willoughby and Campbell

[5] S.B. 03-079, 2003 First Regular Session

[6] Senate Bill 03-79 was written as a child support related bill and issues related to surrogacy were not specifically addressed.

[7] C.R.S. § 19-4-106(9) states "This section does not apply to the birth of a child conceived by means of sexual intercourse." Therefore, by implication, assisted reproduction can include all forms of assistance to reproduction including the use of surrogates.

[8] In Re the Interest of R.C., *775 P.2d 27 (Colo. 1989)*

[9] The words "artificial insemination" have been eliminated in C.R.S. § 194-106(1) and replaced by the words "assisted reproduction".

[10] C.R.S. §19-4-106(3)

[11] N.A.H. and A.H. v. S.L.S., *9 P.3d 354 (Colo Sup Ct 9/11/2000)*

[12] C.R.S. §§ 19-4-106(6) and 19-4-107(1)(b)

[13] The reported decisions, without differentiation, refer to embryos, pre-embryos, pre-zygotes and zygotes, as all having the same meaning, i.e. fertilized eggs.

[14] *Hecht v. Superior Court, 20 Cal. Reptr. 2d 275 (June 17, 1993)*

[15] C.R.S. § 19-4-104 states in part: "The parent and child relationship may be established between a child and the natural mother by proof of her having given birth to the child...."

[16] 26 U.S.C.A. § 104(2)

[17] IRS Private Letter Ruling 200318017, 5/2/03, Section 213(a)

[18] *Litowitz v. Litowitz, 48 P.3d 261 (Wash Sup Ct 6/13/2002);Davis v. Davis, 842 S.W.2d 588 (Tenn.1992); Kass v. Kass, 696 N.E. 2d 174 (N.Y. 1998); A.Z. v. B.Z., 725 N.E. 2d 1051 (Mass. 2000); J.B. v. M.B.,783 A.2d 707 (N.J. 2001)*

[19] President George W. Bush, Address to the Nation (Aug. 9, 2001), at http://www.whitehouse.gov/news/releases/2001/08/20010809-2.html.