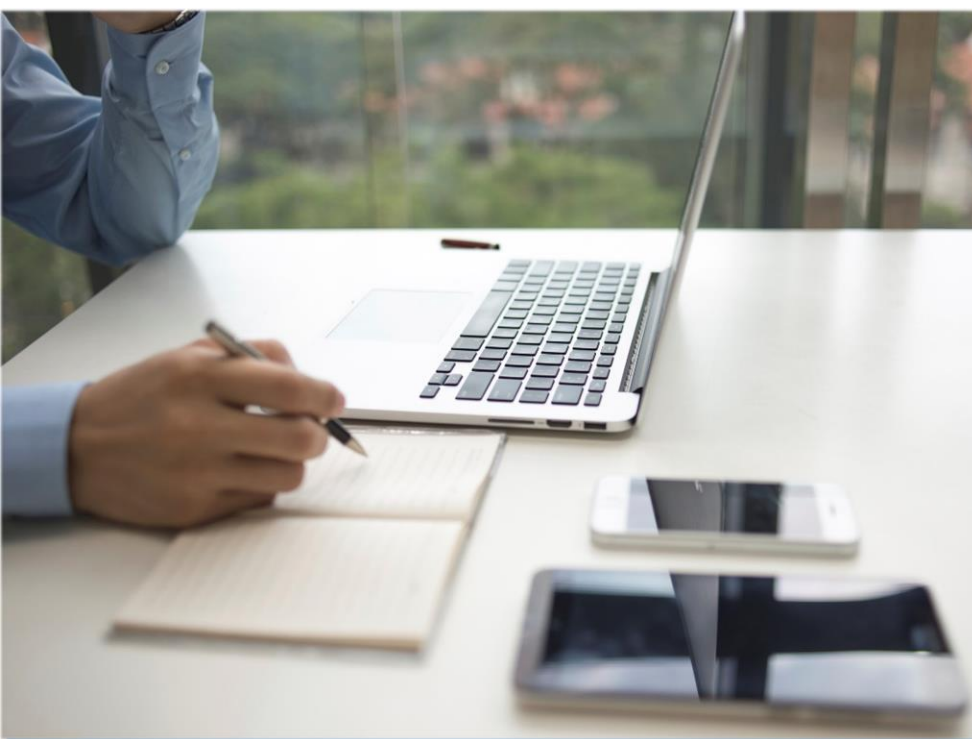




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Assisted Reproductive Technology Contracts Drafting Fundamentals

Presented by:
Colleen Quinn

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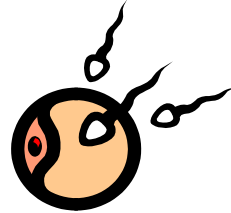
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Assisted Reproductive Technology Contracts: Drafting Fundamentals Clear Law Institute

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Questions?

- We want your questions!!
- But we have a lot to cover!!
- So go ahead and send them to me in the “question” box on your screen
- But they may not get answered until the end – depending on how we are doing on time
- THANKS!!



INTRODUCTION:

- Assisted Reproductive Technologies (“ARTS”) Law is a rapidly developing area of the law
- ARTS law is most closely tied to adoption law but largely rooted in contract law
- Many clients seek to utilize ARTS or adoption due to infertility issues – ART is going up, adoptions are falling in #
- Their goal: a family - to have a child or children to parent
- Many potential intended mothers have tried unsuccessfully to get/stay pregnant: they may have viable eggs or gestational ability
- Many potential intended fathers have tried unsuccessfully to be fathers: they may have viable sperm
- There are thousands of frozen embryos in storage that may not be used by their “owners”

EMBRYOS IN STORAGE:



Outline of Topics

- I. Definitions and Basic Types of Surrogacy: Traditional vs. Gestational
- II. Surrogacy-Friendly Jurisdictions: The Latest Case Law from Around the United States
- III. Prerequisites and Key Contract Provisions for Surrogacy and Gestational Carrier Agreements
- IV. Enforceability of Surrogacy Agreement
- V. When Things Go Wrong – Breach Provisions
- VI. International Surrogacy Considerations

Outline of Topics: III. Prerequisites and Key Contract Provisions for Surrogacy and Gestational Carrier Agreements

- A. Matching Issues
- B. Physical and Mental Screening of Surrogate Mother, Her Spouse/Partner and the Intended Parents
- C. Assisted Reproductive Technology Procedures
- D. Medical Expenses and Risk
- E. General Contract Provisions
- F. Compensation and Expense Issues, "Altruistic" Surrogacy

Outline of Topics: III. Key Contract Provisions for Surrogacy and Gestational Carrier Agreements

- G. Insurance Coverage - Surrogate/Carrier and Child
- H. Obligations of Surrogate/Carrier
- I. Obligations of Intended Parents
- J. Abortion and Selective Reduction Issues
- K. Confidentiality and Future Contact Provisions
- L. Parentage Proceedings
- M. Conditions of Contract Termination
- N. Medical Consent Forms and Hospital Procedures
- O. Legal Representation

Outline of Topics: V. When Things Go Wrong

- A. Contract Breach Provisions
- B. Minor Breach Issues
- C. Dispute Resolution Provisions
- D. Pregnancy Termination/Abortion/Selective Reduction
- E. Birth Defect(s)
- F. Pregnancy Poses a Danger to Surrogate Mother
- G. Too Many Fetuses
- H. Surrogate Mother Does Not Relinquish the Child

I. Definitions and Types of Surrogacy in 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 (with clients' sperm & egg; client's sperm & donor egg; client's egg & donor sperm or donor embryo)
- Traditional Surrogate: the possibility of using client's sperm or donor sperm with the surrogate's egg

THE NEW WORLD OF FAMILY CREATION OPTIONS:

- These possibilities exist even when the Intended Parents live in a state that does NOT recognize* surrogacy/ARTs arrangements or does not have a clear scheme - just like adoptive parents (APs) can adopt from a birth mother entirely in another state, Intended Parents (IPs) can contract with a carrier or donor in a different state (e.g., VA, FL, IL) and the procedure may be completed there
- *Caution where states forbid arrangement for compensation (e.g., Michigan and NY)

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.



Basic Types of Surrogacy: Traditional vs. Gestational

- Traditional or true (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 some jurisdictions (especially without clear ART schemes), an adoption by IM or father's partner must occur after birth for IM or partner to be parent.

Basic Types of Surrogacy: Traditional vs. Gestational

- 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' generally is a preferred term where the parties want to make it very clear that she is a carrier and not to be confused with a true surrogate.

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)
- Surrogacy Program Agreements

Typically Roles for the Attorney

- 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

II. Surrogacy Friendly Jurisdictions

- My Colleague Diane Hinson keeps an up to date summary on her website at:
<http://www.creativefamilyconnections.com/state-map-surrogacy-law-practices>
- That said – state laws constantly are evolving and sometimes are locality dependent
- Always check with local experienced counsel as it is hard to always know the details especially when there is no statutory scheme

II. Surrogacy Friendly Jurisdictions

- Do not rely on reading state statutes – check with an experienced ART attorney as to how things work in practice (by way of example, VA’s statute on the “Status of Children of Assisted Conception” references a court approved contract route but it is rarely used (less than 1% of the time) and VA ART attorneys rely on the parentage and birth certificate statutes as well).

II. Surrogacy Friendly Jurisdictions

- Watch out for states where being involved in the match process for compensated surrogacy (e.g., Michigan) can subject you to liability.
- Watch out for states that do not allow compensated surrogacy.

III. Prerequisites and Key Contract Provisions: A. Matching Issues.

No Cost Items:

- OB-GYN clearance on Carrier-Surrogate
- Carrier-Surrogate have insurance?
- Background forms completed and shared?
- Similar views on abortion & selective reduction?
- Proximity (not applicable to international arrangements)

A. Matching Issues (cont.)

No Cost Items (cont.):

- General agreement on financial or monetary issues (altruistic? quasi-altruistic? Arms-length?)
- Similar views on confidentiality?
- General agreement re level of contact during agreement? After agreement?
- Home visit of Carrier-Surrogate? (and maybe of IPs?)

A. Matching Issues (cont.)

No Cost Items (cont.):

- Does Carrier-Surrogate enjoy being pregnant and have easy pregnancies?
- Carrier have no more than 5 prior pregnancies and 3 prior c-sections (see ASRM guidelines)
- Carrier have supportive spouse-partner?
- Carrier deliver at least one prior child (and more ideally – is done having children for her to raise)?
- Carrier's job conducive to being pregnant? (e.g., cannot be military subject to deployment, firefighter, elite athlete, sky diver, horseback riding instructor, etc.)

A. Matching Issues (cont.)

No Cost Items (cont.):

- Carrier willing to adhere to physical activity restrictions? (e.g., no scuba diving, triathlons, sky diving, water or snow skiing (at least after first trimester), racing, horseback riding, etc.)
- Carrier willing to adhere to ingestion restrictions? (e.g., not just no non-prescribed or illegal drugs or alcohol or tobacco - but not eat raw seafood, fish that might have mercury, etc.)?
- Carrier willing to avoid any body piercings, tattoos, henna, even certain hair dyes?
- Carrier willing to not change kitty litter, avoid second hand smoke, avoid travelling to CDC Zika virus watch places, avoid working around paints/solvents/harmful or toxic cleaning products, agree to hands-free driving equipment?

A. Matching Issues (cont.)

Cost items:

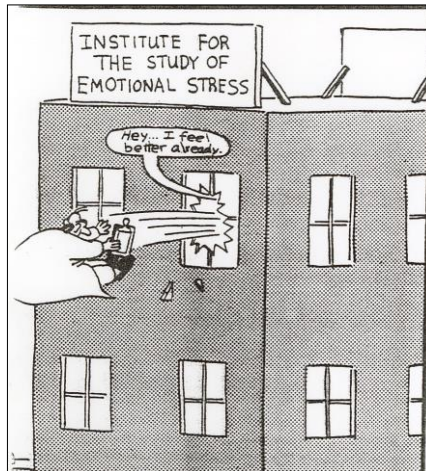
- Screening (physical and mental)
- Group counseling
- Background checks
- Insurance reviewed to confirm no issues with coverage
- Applicable law – now need attorney involvement
- Questionnaires for contract drafting completed?

A. Matching Issues.

Parties and Questionnaires for contract drafting should address:

- Number of embryos to be transferred per attempt
- Number of embryo transfer attempts to be made
- How long Carrier-Surrogate will be under contract
- Number of fetuses Carrier-Surrogate is willing to carry to term
- Other issues as set out in this outline and in the sample questionnaires provided

B. Physical, Mental and Background Screening of Surrogate Mother, Her Spouse/Partner and the Intended Parents



ASRM Guidelines

- https://www.asrm.org/globalassets/asrm/asrm-content/news-and-publications/practice-guidelines/for-non-members/recommended_practices_for_utilizing_gestational_carriers-pdfnoprint.pdf
- Are downloadable even for non-members – but encourage you to join!
- Contain the primary standards for screening both intended parents and surrogates and carriers and their spouses-significant others – both medical and mental health screening.
- Know them!

SAMPLE PROVISION RE PROVISION OF MEDICAL HISTORY

The Gestational Carrier represents that prior to signing this Agreement **she made available a medical history, including prior personal medical and obstetrical records and the medical records of any of her children** for review by the Intended Parents or a physician designated by the Intended Parents.

Physical Evaluations

- Needed on Intended Father prior to sperm being preserved to ensure no contagious disease
- Needed on Intended Mother prior to eggs being extracted for same reason
- N/A for donor egg/sperm already screened by the cryo bank
- Needed on spouse or partner of Carrier to ensure no contagious disease
- Needed on Carrier for same reason but also needed to evaluate ability to receive embryo & carry

SAMPLE PROVISION RE EVALUATIONS

The Gestational Carrier represents that she has undergone a complete physical evaluation by a physician licensed ...

...she has undergone a mental health evaluation by a mental health professional

...will provide copies of all reports to the Intended Parents

Sample Provision re Background Checks

The Parties each agree to give to each other directly or through their attorneys, authorization to check any and all references, including background checks, criminal reports, and any other reports of this nature if requested by the other Party. Moreover, each Party represents that he or she has never been subject to a child protective services charge or convicted of a felony or misdemeanor or the offense of driving while intoxicated.

C. Assisted Reproductive Technology Procedures

KNOW THE 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.

Assisted Reproductive Technology (ART)

- All fertility treatment in which eggs and sperm are handled outside the body
- Purpose is to facilitate the conception of a child



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”.

Eggs

- Eggs, which are unfertilized female gametes, may be variously referred to as
 - oocytes-eggs prior to ovulation or surgical retrieval
 - ovum or ova



DE = Donor Eggs

- May be already “banked” that is already retrieved and cryopreserved
- If donor selected whose eggs have not yet been retrieved – then requires retrieval procedure including donor placed on medications to increase ovulation and then ovaries hyper-stimulated and then eggs surgically retrieved – number retrieved can vary

IVF

- *In Vitro* Fertilization
 - Eggs fertilized in laboratory (outside of the womb) with sperm
 - Embryos allowed to grow to blastocysts via cell division
 - Resultant embryos implanted in uterus or frozen



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.

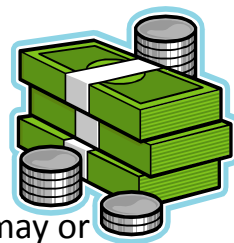
Sperm Injection



Pre-genetic Screening

- PGD = Pre-genetically Diagnosed
- PGS – Pre-genetically Screened
- Either process involves removing a few cells from the embryo for testing
- Process depends on which cells are removed
- Has been shown to reduce incidence of children born with genetic defects

D. Medical Expenses and Risk



- IVF: \$8000-\$12,000 (regional variations – may or may not include the embryo transfer procedure)
- DE (donor egg): \$8,000 - \$25,000 (if donor is via program/clinic recruited & paid)
- ICSI: additional \$1500-\$2000 for each attempt, in addition to IVF cost
- Note shared risk programs for DE and IVF

Medical Risks

- Eggs or sperm will not be viable
- Embryos will not be viable
- Carrier will not qualify – either medically or from from mental health perspective
- Carrier will not get pregnant
- See ASRM guidelines re detailed medical risks
- General risks associated with pregnancy including miscarriage, stillbirth, etc.

Assumption of Risk By GC and GCH Sample Provision:

The Gestational Carrier and Husband of Gestational Carrier agree to assume all risks, including the risk of the Gestational Carrier's death, which are incidental to conception, pregnancy, childbirth and postpartum complications. The Gestational Carrier assumes the risks and complications, as well as any other adverse consequences which could relate directly or indirectly to the course of conduct described in this Agreement. The possible risks and/or complications have been explained to the Gestational Carrier by the physician(s) performing the assisted conception.

Assumption of Responsibility and Risk By IPs Sample Provision— Part 1

The Intended Parents hereby agree to assume legal responsibility for any child born pursuant to this Agreement who is genetically related to at least one of the Intended Parents. The Intended Parents state that they have been advised about the risks of infant abnormalities which may occur as a result of this process, and agree to assume those risks.

Assumption of Responsibility and Risk By IPs Sample Provision— Part 2

If a child is born pursuant to this Agreement with permanent birth damage so serious that it would cause the child's death if not placed on life sustaining treatment equipment and the child's treating physician either recommends that the child not be placed on such equipment or that the child not be resuscitated if he/she should stop breathing, then if the Intended Parents both accept the physician's recommendation, this decision shall be binding. The Gestational Carrier shall have no input in this decision. If the Gestational Carrier is given the right to interfere by the treating physician and authorizes the provision of treatment necessary to prolong the life of the child when the child otherwise would have died, the Intended Parents shall remain obligated to comply with Paragraph 17 of this Agreement, but only for those financial expenses incurred prior to the date the Gestational Carrier rejects the Intended Parents decision and the Gestational Carrier shall be responsible the additional costs associated with such prolonged treatment caused by her interference.

E. GENERAL CONTRACT PROVISIONS

- First, mentor with experienced ARTs practitioner on a case, if possible
- Please do NOT ask other ART attorneys for a copy of their contracts to use
 - law varies from state to state – so the contract will vary from state to state
 - there are malpractice implications
 - asking someone for what may be years and years of their work product



Lesson:

Should you be embarking on this adventure for the first time – find yourself an experienced partner – let them steer (draft the contract and represent one party) while you go along for the ride and help navigate (study up and represent the other party). Even then, you may not know where you ended up – but hopefully you enjoyed the ride.

Most Importantly...

- Attend or sign up for ARTS sessions on contract drafting – like this one!
- Join ART professional groups
- Attend AAAA ART Mid-Year, ABA ART section, ASRM and SEEDs conferences



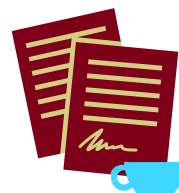
De-Mystify Your Contract: (1) Have a Table of Contents

INDEX TO GESTATIONAL CARRIER AGREEMENT

1. Purpose and Intent	1
2. Representations	1
3. Definitions	3
4. Applicable Law, Jurisdiction, and Venue	4
5. Effective Date	5
6. Physical Examinations, Psychological Evaluations and Background Information	5
7. Home Study	6
8. Counseling	7
9. Conception	7
10. Medical Instructions	9
11. Termination of Parental Rights	11
12. Custody	14
13. Divorce or Separation	14
14. Death of the Intended Parents	14



Have a Table of Contents (cont.)



• Child's Name and Birth Certificate	15
• Health Insurance	16
• Payment of Expenses	19
• Breach of Agreement by the Gestational Carrier	23
• Breach of the Agreement by the Intended Parents	25
• Miscarriage, Consensual Abortion, Stillbirth or Death of the Child Prior to the Transfer of Custody	26
• Assumption of Risk	27
• Assumption of Responsibility	27
• Notification of Labor	28
• Termination of Pregnancy	29
• Genetic Testing and Failure of Intended Genetic Relationship	31
• Gestational Carrier's Residency	33
• Duties of the Husband of the Gestational Carrier	33
• Confidentiality and Continued Contact	34

De-Mystify Your Contract: (2) Have Section Headings

Purpose and Intent. The sole purpose and intent of this Agreement is to provide a means for the Intended Mother and Intended Father to become the parents of a child who is genetically related to the Intended Mother and/or Intended Father. The term “child” used herein shall include children to the extent more than one child comes into being. This purpose will be accomplished through medical procedures using assisted reproductive technology, including the embryo transfer into the Gestational Carrier of embryos formed from the Intended Mother’s eggs with the Intended Father’s sperm.

De-Mystify Your Contract: (3) Have a Logical Order



Chronological is best:

- Intent and purpose, representations, definitions, choice of law
- Preliminary matters – what law to apply? Prerequisite issues (background, screening, etc.)
- Medical instructions; Conception procedures
- Potential Events During the Pregnancy – Divorce, Death, Selective Reduction, Breach, etc.
- Boilerplate

Put the Majority of Boilerplate Provisions at the End – As You Would For Any Contract

- Contractual obligations
- Governing Law
- Choice of forum for disputes
- Notice
- Severability Clause
- Acknowledgement of Advice of Counsel
- Modification, Revision or Amendment
- Changing and Evolving Law
- Termination/ Duration of the Agreement
- Original Agreement
- Entire Agreement



F. Compensation and Expense Issues, "Altruistic" Surrogacy

- a. What payments are lawful? Bonus vs. fee vs. reimbursement of living expenses
- b. How much?
- c. When to be made?
- d. How disbursed (escrow, attorney escrow, direct, PayPal, debit card, electronic transfer, separate checking account)
- e. Will the payments be taxed?
- f. What payments apply to altruistic surrogacy?



Average non-altruistic rates in Virginia (also tend to be the average elsewhere)

- Basic Monthly Allowance for Living and Household Expenses: \$2,000 to \$2,500 per month for 10 months (Total \$20,000 to \$25,000); Proven carrier's \$30,000- \$35,000 or more.
- Legal fees for carrier's attorney: \$1500-\$1700 (contract drafting) \$350-\$600 over course of pregnancy if needed
- Maternity clothes: \$750 to \$1,000 (may be a little more for multiples)
- C-section: \$1,000 to \$2,500; Loss of reproductive organ/uterus: \$2,000- \$10,000
- Invasive procedure: \$250 to \$500
- Upon contract signing and/or taking of medications: \$250 to \$500
- Per embryo transfer: \$300 to \$500 (if successful sometimes credited against first monthly payment)
- Twins: \$2,000 to \$5,000 more; \$1,000 to \$3,000 more for each additional multiple. Often no more than \$6,000 more all in for triplets.

Other payment amounts

- Supplemental living expense allowance often paid if placed on bed-rest, taken out of work – in many states (not Virginia) can be called lost wages
- Childcare, Housekeeping
- Mileage or miscellaneous amount for mileage, parking, tolls, vitamins, etc.
- Life insurance: Optional – anywhere from \$100,000 to \$500,000 in one year term policy in addition to current insurance – intended parents often made the beneficiaries of \$50k to \$75k.

Altruistic Surrogacy

- Usually GC-Surrogate does not come out of pocket
- IPs can still expect to pay at least \$5k or so for GC-surrogate for:
 - Co-pays and deductibles or non-covered amounts for medical care (unless high deductible plan – then could be more)
 - Maternity clothes
 - Attorney fees
 - Travel, Mileage, parking, tolls, childcare, vitamins, other miscellaneous costs

Quasi-Altruistic Surrogacy

- GC-Surrogate does not come out of pocket like Altruistic Carrier-Surrogate
- But also gets \$5,000 to \$10,000 towards living expenses
- Also called Quasi-compassionate



SAMPLE PROVISIONS RE PAYMENTS

- All medical, hospitalization, pharmaceutical and laboratory expenses...
- Payment of up to \$750 for up to three months after birth for any counseling
- Payment of reasonable attorneys' fees, not to exceed
- Payment of the cost of genetic parentage testing
- Payment for the initial and any subsequent transfer and implantation of the embryos
- Payment for maternity clothes

SAMPLE PROVISIONS

- Within 10 days of confirmation of pregnancy, payment/reimbursement of ____ for the first month, and ____ per month for the next nine (9) months
- Payment/reimbursement of \$____ at birth of the child and payment of \$____ per additional child
- Payment/reimbursement of \$____ in the event the Gestational Carrier must deliver by C-section rather than vaginal delivery.
- Reimbursements for travel, child care, housekeeping, hotel stay and related meals

Payments



- When will they be paid?
- Is a receipt or proof of payment needed?
- Will they be paid through an escrow agent (adds minimum of \$1,000 on up to costs or more – and may not be insured) or directly by the Intended Parents?
- How will the Surrogate or Gestational Carrier know the money will be there?

Sample Provision for Setting Aside the Funds Where Escrow Agent Not Used



Intended Parents shall place the minimum sum of \$25,000 in a separate checking account upon execution of this Agreement to fulfill the financial obligations set forth herein. Intended Parents shall provide the Gestational Carrier a copy of such bank statement and shall make arrangements with the bank for a statement to be sent on a monthly basis to the Gestational Carrier's address evidencing that the funds are still in the account to cover the amounts set forth in this Agreement. The Intended Parents shall electronically transfer any amounts due directly to the Gestational Carrier's chosen bank (or may transfer through PayPal).

Sample Provision re Tax Liability



All parties recognize that any amounts paid are viewed as reimbursements for reasonable medical and ancillary costs and expenses under Virginia law and in no way are to be construed as compensation or a fee for services or the like. However, while all payments under this Agreement are to be construed solely as reimbursements, and therefore not subject to taxation, no definitive tax opinion has been or is being offered by Intended Parents' attorney or Gestational Carrier's attorney on the taxation of such expenses or reimbursements. Accordingly, Intended Parents/Gestational Carrier agree(s) to indemnify and hold harmless the Gestational Carrier/Intended Parents from any tax implications, if any, of the amounts paid to her under this Agreement.

G. Insurance Coverage Issues

- Coverage for ART procedures under IP's health insurance policy
- Coverage for pregnancy under GC or surrogate's health insurance policy
- Disability insurance coverage for GC-surrogate
- Life insurance coverage for GC-surrogate
- Health insurance coverage for the child under IP's health insurance

Medical Expenses: IP Medical Insurance for ART

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



Medical Expenses: GC Health Insurance

- Prenatal and delivery charges have historically been covered by GC's insurance, but charges for the infant are separate. Watch for exclusions!
- Coverage specifically for IPs to insure GCs (ART Risk, New Life) is approximately \$24,000 +



SAMPLE PROVISION RE HAVING COVERAGE

Health Insurance Coverage. Gestational Carrier represents that her health/medical insurance will provide maternity coverage to her for the pregnancy envisioned under this Agreement and Gestational Carrier understands that such continued coverage is a material aspect of this Agreement. Accordingly, Gestational Carrier will take no action or inaction to jeopardize such coverage. Intended Parents understand that Gestational Carrier's policy will cover all medical bills relating to necessary medical tests and examinations associated with the pregnancy and any pregnancy-related complications. However, if the insurance company declines to pay for a necessary pregnancy-related medical expense that is a covered expense, and provided that the Gestational Carrier first makes a reasonable, good faith effort to have these expenses paid by her insurance company and all remedies have been exhausted for such denial, then the Intended Parents will pay such expenses. The Intended Parents are not financially responsible for any otherwise covered medical expense under this Agreement.

Sample Provision re Proving Coverage

The Gestational Carrier will provide the Intended Parents and their attorney with documents proving that such a health insurance policy is in full force and effect prior to signing this Agreement, as well as a copy of the policy itself for review by Intended Parents' attorney.

Sample Provision re Change in Coverage

The Gestational Carrier agrees to notify the Intended Parents of any change in her health insurance status in sufficient time to make alternative arrangements for health insurance coverage. When applicable, if there is ever a period during which the Gestational Carrier or the Gestational Carrier's Husband has a lapse in health insurance coverage (i.e. due to a lapse in employment) so that the Gestational Carrier is not covered by health insurance, the Intended Parents will be financially responsible for the least of any of the following at their discretion: (a) any non-covered pregnancy-related medical expenses, (b) the employer portion of the insurance premium (if applicable), (c) the difference in the cost of the Gestational Carrier's insurance premium payments at the time of the change in employment that would necessitate COBRA payments to continue coverage and the actual COBRA payments (cost of COBRA less current premium payments being made by Gestational Carrier or Gestational Carrier's Husband), or (d) the entire insurance premium for a new policy to cover maternity benefits (this would apply in the event that both Gestational Carrier and Husband have a new job or no job or where no maternity benefits were available under available medical insurance). Under all circumstances, the Intended Parents remain financially responsible for uncovered pregnancy related expenses.

Sample Provision re Change in Coverage (cont.)

The Gestational Carrier agrees that she will not make any change in her health insurance policy, provider, or status without prior written notification to and approval by the Intended Parents. If, without reasonable justification or excuse, the Gestational Carrier fails to maintain her health insurance in full force and effect, or if she makes unauthorized changes, then she, not the Intended Parents, will be financially responsible for any additional medical expenses incurred as a result of such failure.



Sample Provision re Carrier's Duty to Submit Claims

The Gestational Carrier shall submit all medical bills related to this Agreement to the insurance company, and shall provide copies of any rejected claims to the Intended Parents. In the event that the insurance company rejects all or part of a claim for which the Gestational Carrier would be financially responsible, the Intended Parents may, in their sole discretion, advance monies to the Gestational Carrier to enable her to make payment with respect to amounts rejected by the insurance company, subject to the provisions of sub-paragraph (E) above, regarding the Gestational Carrier's pursuing her insurance company. If any benefits are received directly by the Gestational Carrier for whom she has already received payment from the Intended Parents, she shall promptly transfer these benefits to the Intended Parents.

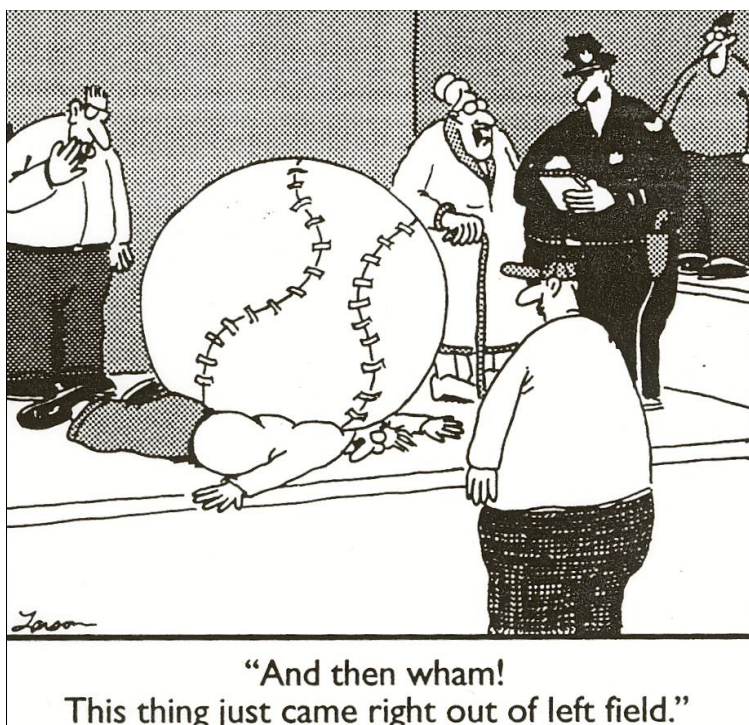


Sample Provision re Carrier's Duty to Fight Denied Claims

If the Gestational Carrier's insurance company declines to pay any pregnancy related medical expense, the Gestational Carrier shall, at the request of the Intended Parents, aggressively pursue all claims, demands, or rights against the insurance company, including cooperating with any attorney hired on her behalf, to receive any remedies or payments to which the Gestational Carrier may be entitled. The Intended Parents will be financially responsible for all reasonable legal expenses incurred in pursuing any such claims on behalf of the Gestational Carrier and upon the Gestational Carrier's written notification and approval of such legal expenses required to pursue any such claims.

SAMPLE PROVISION RE IPs NOT BEING INSURERS

Notwithstanding the foregoing, nothing in this Agreement shall be construed to create a legal obligation to pay on the part of the Intended Parents for services clearly covered under the Gestational Carrier's health plan. The Intended Parents are in no way to be characterized as Guarantors of medical payments, and the parties do not intend that there be any third party beneficiaries of or to this Agreement.



Sample Provision re Purchase of Life Insurance for GC-Surrogate

Intended Parents shall reimburse the Gestational Carrier for the purchase of a one year term, or supplemental, death and disability insurance policy in the face amount of \$250,000 for the Gestational Carrier, commencing as soon as possible after execution of this Agreement and prior to the first attempt at embryo transfer procedure envisioned under this Agreement. Gestational Carrier will specify the Intended Parents as the beneficiaries of \$50,000 of such policy which may not be changed and may specify anyone of her choosing as the beneficiary for the remaining \$200,000 of such life insurance policy, which latter beneficiary the Gestational Carrier may change at any time. Such policy will be purchased by the Gestational Carrier with the Intended Parents advancing the cost of the premium for such policy within five days of Gestational Carrier's execution of this Agreement.

Who Covers the Baby?

- Make it clear in the Agreement that the Intended Parents cover the baby's medical costs and will have insurance coverage
- This poses problems with Intended Parents who do not have health insurance including foreign IPS
- This can pose more issues if Carrier-Surrogate is on Medicaid
- Check with Art Risk and New Life Agency for newborn coverage options



H. Obligations of Surrogate/Carrier

- Duty to get appropriate medical care and follow medical instructions
- Duty to stay in same state and in provider network
- Duty to communicate with the IPs and let them attend medical visits; notify re going into labor
- Duty to not subject the fetus-child to harm
- Duty of confidentiality
- Duty to turn the child over to the IPs
- Duty to sign appropriate releases, hospital forms, parentage paperwork
- Duty to not get divorced or marry

GC Obligation to Follow Medical Instructions

Snapshots



"And once we transfer the embryo, aspirate the follicles, and align your ovulation with the doctor's golf schedule, voilà -- nature's little miracle."

SAMPLE PROVISION AS TO CONCEPTION

Gestational Carrier and Husband of Gestational Carrier agree not to engage in sexual intercourse for a period of two weeks prior and two weeks subsequent...and not to take any other action which will result in Gestational Carrier's pregnancy through means other than the embryo implantation contemplated by this Agreement

SAMPLE PROVISION AS TO PRE-NATAL CARE AND BEHAVIOR (EAST COAST VERSION)

Gestational Carrier agrees to adhere to all usual and customary medical instructions given to her by her attending obstetric physician and to maintain her physical health in accordance with the attending obstetric physician's directions. The Gestational Carrier agrees to make the necessary changes to her lifestyle to minimize risks of harm to the unborn child, including requesting any temporary changes in her present employment situation necessary to remove her from the presence of chemicals and conditions considered by any federal or state occupational safety agency to be harmful to pregnant women; to abstain from any high risk sexual conduct which may result in contraction of a sexually transmitted disease by the Gestational Carrier or any unborn child, and to abstain from the legal but potentially harmful use of chemicals including, but not limited to, alcohol, nicotine, excessive caffeine, and any medication not recommended by her attending obstetric physician (whether prescription medication or over the counter drugs). Gestational Carrier further agrees to limit her exposure to cigarette smoke, cleaning supplies, x-rays, and cat litter and refrain from strenuous exercise, to the extent that exercise is contrary to her attending physician's advice.

Pre-Natal Care & Behavior (West Coast)

- Adds avoidance of hair dyes, tattoos, tanning salons, foods with mercury like tuna, mackerel, etc.
- Provides carrier eat organic foods – may have supplemental allowance for organic foods



Pre-Natal Care (cont.)

When in doubt about a particular substance or conduct, the Gestational Carrier agrees to discuss with her physician the conduct and will abide by the physician's decision. Gestational Carrier to the best of her ability will maintain proper nutrition and take her pre-natal vitamins daily as recommended by her obstetrician. Gestational Carrier and Gestational Carrier's Husband agree to take no action(s) that will harm the health and viability of the fetus and subsequent child and further agree to affirmatively take any and all efforts that will protect the health and viability of the fetus and subsequent child.

SAMPLE PROVISION AS TO LIFE SUPPORT

In the event that the Gestational Carrier is placed on life support and the pregnancy remains viable, it is her intention to be kept on life support until the child is delivered or the pregnancy is no longer viable.

- Need to address who pays for the cost of care not covered by insurance – IPS usually do

Other Medical Care Provisions:

- Will take medications and injections as prescribed
- Will appear for the embryo transfer or insemination
- Will follow pre-natal exam schedule and instructions
- Will consult with and keep Intended Parents apprised
- Will keep medical appointments
- Willing to have cesarean section and other invasive procedures
- Willing to undergo in utero testing like amniocentesis
- Will follow doctor's instructions and limitations re travel
- Will follow instructions re travel and avoiding Zika virus

Duty of GC and GCH to Turn Child Over



The Gestational Carrier and Husband of Gestational Carrier further agree that because they are entering into this Agreement with the intention of providing a service to the Intended Parents, it is in the best interest of the child for the Gestational Carrier and Husband of Gestational Carrier to permit the Intended Parents to exercise all of their rights and privileges with regard to the child from the moment of birth, including while the child is still in the hospital and to permit the Intended Parents to be designated as the persons authorized to care for the child in the hospital and to physically take the child from the hospital. The Gestational Carrier agrees that she will not nurse the child but that, if requested by the Intended Parents, and at the sole option of the Gestational Carrier, the Gestational Carrier may provide breast milk for the child.

Delivery in State of Residency of the Carrier



All parties understand that the Gestational Carrier resides in the state of Virginia and will deliver in the state of Virginia. Gestational Carrier understands that delivery of the child in Virginia is a material provision of this Agreement and, absent a family emergency and with clearance from her attending physician that she is not at risk of delivering or at risk of injuring the fetus(es), agrees not to travel outside of the state of Virginia during the last two months of pregnancy.

Notification of Labor



Notification of Labor Sample Provision:



The Gestational Carrier and Husband of Gestational Carrier agree to notify the Intended Parents as soon as the Gestational Carrier begins to go into labor, or, if not physically possible, as soon thereafter as it becomes physically possible. If the Gestational Carrier is scheduled in advance to give birth on or about a designated date (especially to be induced which Gestational Carrier agrees to do provided that it is medically recommended), she and the Husband of Gestational Carrier agree to notify the Intended Parents as soon as possible about this decision and provide them the time on which and the place at which the delivery is scheduled. The purpose of this notice is to permit the Intended Parents to be present at the birth and to be available to care for the child as soon after birth as possible.

I. Obligations of Intended Parents

- Duty to ensure timely payments are made to the GC-Surrogate
- Duty to communicate
- Duty of confidentiality
- Responsibility to take the child – see sample Assumption of Responsibility & Risk provisions
- Responsibility to cover the child's medical costs
- Cannot divorce
- Need to plan for possible death or disability

Addressing the Divorce or Separation of Intended Parents



Sample Provision:

In the event of separation or divorce between Intended Mother and Intended Father **prior** to any embryo transfer, no procedures shall take place pursuant to this Agreement. In the event Intended Mother and Intended Father separate and/or divorce after a successful embryo transfer, any resulting child shall remain, as intended, the child of Intended Mother and Intended Father. However, Intended Parents understand that, if they are not married at the time of the child's birth, or have never been married, then the likely circumstance is that only the Intended Father will be listed on the birth certificate and there is no guarantee that the Gestational Carrier will then be removed from the birth certificate.

After any embryo procedure resulting in a pregnancy Intended Parents agree that, although they may separate, they will remain married through the birth of any child and through the birth certificate amendment process.

Addressing the Death or Disappearance of the IPs



Sample Provision: Addressing the Death of Intended Parents Before Conception

In the event of the death of both Intended Parents prior to an embryo transfer, this Agreement shall be null and void. Any existing embryos formed via Intended Mother's eggs and Intended Father's sperm, or otherwise owned by the Intended Parents, shall be disposed of as set forth in any agreement that Intended Parents entered into with the attending fertility specialist and/or clinic. In the event of the death of either Intended Parent prior to embryo transfer, either Intended Father or Intended Mother may agree to proceed with the embryo transfer procedure contemplated under this Agreement.

Sample Provision: Addressing the Death of Intended Parents After Conception

In the event of the death of either parent after an embryo transfer, then the surviving parent shall remain as intended the legal parent of the child. In the event of the death of both of the Intended Parents after an embryo transfer resulting in the Gestational Carrier's pregnancy under the terms of this contract, then all of the parties hereto expressly agree that the Gestational Carrier and Gestational Carrier's Husband will place the child for adoption with _____ who reside at _____ and can be contacted at _____ (and who are related to the Intended Parents in that _____) who shall be the Guardian(s) of such child. If _____ are not available or able to take the child, then the Gestational Carrier and Gestational Carrier's Husband will place the child for adoption with _____ who reside at _____, who can be contacted at _____ and who are the _____ of Intended _____. Intended Parents agree to make such funding provisions as are necessary to ensure that the financial obligations of the Intended Parents under this Agreement are fulfilled in the event of the deaths of both of them and that the Child may be adopted and all presumptive parental rights of the Gestational Carrier and her Husband severed. Moreover, should the Gestational Carrier become pregnant, **then Intended Parents shall ensure that, as of the Gestational Carrier's fourth week of pregnancy, they have reciprocal Last Wills and Testaments** in place with Guardianship provisions naming the designated guardians and shall provide proof of such documents being in place to the Gestational Carrier.

J. Abortion and Selective Reduction Issues



Abortion-Selective Reduction Due to Health Risk Sample Provision:

Gestational Carrier agrees that she will not abort or attempt to abort any embryo, fetus or child she carries pursuant to this Agreement, including any one or more of multiple embryos, fetuses or children, unless there are found to be more than two viable fetuses or embryos or, if in the professional medical opinion of a physician approved by the Intended Parents or her own independent obstetrician, such action is necessary to protect a serious risk to the Gestational Carrier's own physical health or poses a serious risk to one or more of the other embryos or fetuses in utero. If there is a dispute regarding the need for an abortion due to a serious health risk, and provided that there is sufficient time to seek a second opinion, then the parties agree they will seek the opinion of another physician chosen by the Gestational Carrier's attending obstetric physician. In the case of an emergency situation, no second opinion shall be required; however, every reasonable effort will be made to notify the Intended Parents prior to the procedure being done. In any event, provided that at least one involved physician indicates that there is a serious health risk to the Gestational Carrier, then the Gestational Carrier shall have the sole right to decide whether or not to abort.

If the Gestational Carrier violates the terms of this Paragraph, the Intended Parents' financial responsibility to the Gestational Carrier shall cease and the Intended Parents may terminate this Agreement effective immediately. The material breach provisions set forth herein shall then apply.

Abortion-Selective Reduction When Testing Reveals Abnormalities – Sample Provision:

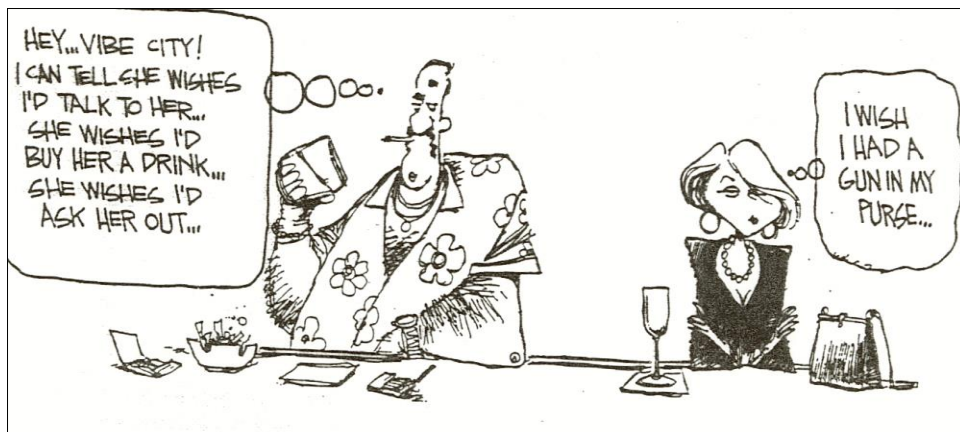
While pregnant, and if requested to do so by the Intended Parents, the Gestational Carrier agrees to undergo amniocentesis or such other tests designed to detect genetic and congenital defects as selected and conducted by her attending obstetric physician or a specialty obstetric physician approved by the Intended Parents. The Gestational Carrier understands that it is her responsibility to speak with her physician about the risks of amniocentesis or other tests prior to the performance of those tests. Only if such testing reveals that there is a very significant and probable chance that any of the fetuses or embryos will be born with a such a serious mental, physical, genetic or congenital defect, deformity or disability that they will need to be placed on life support or will have no chance at any meaningful existence, and if requested to do so by the Intended Parents, the Gestational Carrier agrees to selective reduction or abortion of the identified fetus or embryo (unless such reduction or abortion will subject the Gestational Carrier to criminal prosecution or to a serious health risk and only after consulting with Intended Parents and any legal counsel of their choice to verify such potential criminal liability).

Abortion-Selective Reduction Due to Agreed Limitation on Number of Fetuses to Carry to Term

If there are more than two viable fetuses or embryos or it is medically determined that too many embryos or fetuses exist that may present a health risk to either/or the Gestational Carrier and/or the child, the number may be reduced to a smaller number that can be successfully and healthily carried to a full term pregnancy and healthy birth. In such event, the Gestational Carrier shall undergo the medical procedures for selective reduction at the request of the Intended Parents and only after consultation of the Intended Parents and the Gestational Carrier with the attending physician. The Gestational Carrier agrees to carry up to two fetuses provided there is no serious risk to the Gestational Carrier's health or to the health and viability of the fetuses.

K. Confidentiality and Contact Provisions – Including Future Contact

- What are the parties expectations with regard to confidentiality? No one going the media is the norm – but do IPs or GC want to blog?
- What are the expectations with regard to contact over the course of the pregnancy?
- What are the expectations with regard to future contact?



CONFIDENTIALITY SAMPLE PROVISION – Part 1

The Gestational Carrier and Husband of Gestational Carrier acknowledge that **confidentiality concerning the issues of assisted reproductive technology is in the best interest of any child** or children resulting from the assisted conception proposed herein. Accordingly, the Gestational Carrier and Gestational Carrier's Husband agree not to reveal the procedures set forth herein to any person except to members of their immediate family, immediate friends and/or co-workers, the Intended Parents' immediate family and friends, and to such legal or medical personnel as are required to have this knowledge in order to comply with the terms of this contract or to finalize the legal proceedings in connection herewith.

CONFIDENTIALITY SAMPLE PROVISION – Part 2

This proceeding, any pleadings, and any reports created as a result of this contract and legal proceeding to establish parentage of any resulting child shall be confidential and **shall not be a public record**, except to the extent the parties may agree in writing, or as may required by a court, or as may be required under Virginia law to furnish evidence or a copy of this Agreement to any medical providers.



CONFIDENTIALITY SAMPLE PROVISION – PART 3

The parties hereto agree that they **will not provide nor allow their agents to provide any information to the public news media** or any other individual or group except upon mutual consent and agreement of all parties to this Agreement.

Gestational Carrier and Husband of Gestational Carrier agree that **it is the sole right of the Intended Parents to advise the child** of any of the terms of this Agreement or of the Gestational Carrier relationship or procedure.

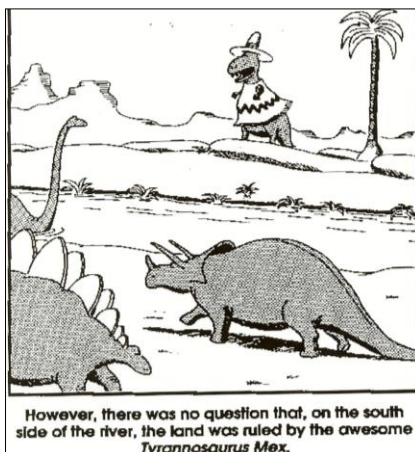
SAMPLE PROVISION (can be more detailed)

The Gestational Carrier agrees to allow the Intended Parents to accompany her to all medical visits and to be present at the delivery of the child, provided that her personal physical privacy is not compromised. Gestational Carrier agrees to provide to the Intended Parents by phone, e-mail and/or mail all information obtained from these and other medical examinations and tests which take place during the period this contract is in effect. She further agrees to keep good communication with the Intended Parents regarding the pregnancy and the development thereof.

SAMPLE PROVISION Re Continued Contact

After the birth and relinquishment of the child, and after the birth certificate amendment procedure occurs, any **continued contact** between the Intended Parents and the Gestational Carrier and Gestational Carrier's Husband shall be at the election and agreement of Gestational Carrier and the Intended Parents.

L. Parentage Proceedings



Before Contract Drafting – Start with the End in Sight

- Map out how and where parentage will occur.
- Contact an attorney in the other state who practices ARTS law before you do anything else!!
- Simply trying to keep the work for yourself can get you in a heap of trouble



WATCH OUT FOR THE UNAUTHORIZED PRACTICE OF LAW!!

- Drafting an agreement under the law of a state in which you are not licensed can result in legal malpractice
- Always associate a reputable and experienced attorney in the “other” state
- When dealing with more than one state – always make sure you understand the law of the other state

SAMPLE PROVISION RE CHOICE OF LAW AND JURISDICTION

Governing Law and Jurisdiction. The parties hereto acknowledge that this Agreement **shall be governed by the law of the Commonwealth of Virginia** in effect on the date of the signing of this Agreement. Intended Parents, Gestational Carrier and Husband of Gestational Carrier **expressly submit to the personal jurisdiction of the Commonwealth of Virginia** with regard to the enforceability of this Agreement and agree that all parties personally will come to or be in Virginia for the embryo transfer procedure and the delivery. The parties agree that this "Gestational Carrier Agreement" is to be construed as a Surrogacy Agreement as provided for under Virginia Code § 20-156, et. seq.

Choice of Law – Have a Basis for Personal Jurisdiction

- The Parties represent and acknowledge that Virginia law shall govern this Agreement and that, given that the involved parties are using a fertility clinic located in Virginia and physically will come to Virginia for the embryo transfer, that Virginia and the courts of Virginia have personal jurisdiction over them for any matters that arise under this Agreement.

Examples of What Can Happen When the ARTs Attorney Fails to Coordinate with an ARTs attorney in the other state

- The other state may fail to give full faith and credit to the contract or Pre-Birth Order
- The other state may forbid the payments that were made to the carrier and prevent the birth certificate from being amended
- The parties may spend a lot more money, time and effort when an easier procedure could have been followed
- The parties may have avoided more adverse tax treatment

AAAA CODE OF ETHICS PROVISIONS -16. REPRESENTATION in ART MATTERS and AVOIDANCE of CONFLICTS of INTEREST:

(b) A Fellow may represent a Party in an ART Matter if:

(1) The representation is in accordance with all applicable laws and ethics rules pertaining to competence, the unauthorized practice of law, and multijurisdictional practice, including the laws and rules of the jurisdiction in which the Fellow is licensed to provide legal services and the laws and rules of any other jurisdiction in which the Fellow provides legal services; and,

(2) The Fellow is licensed in at least one of the following jurisdictions: A) the jurisdiction of the Child's expected birth; B) the jurisdiction in which at least one Party resides; or C) the jurisdiction in which the medical procedures in furtherance of the ART Matter are expected to take place.

(3) A Fellow who is not licensed in one of the jurisdictions described in 16(b)(2) may provide legal services in a jurisdiction where that Fellow is not licensed to practice law if such legal services are undertaken as co-counsel with, or in consultation with, a lawyer licensed to practice in that jurisdiction.

TO SUMMARIZE:

- Avoid and address the ethical issue of the unlicensed practice of law (practicing law in state in which not licensed) by ensuring that an attorney in every involved state and/or country is consulted.
- Start with the end in sight – address in the beginning how parentage will be established at the end. Make sure everyone understands the road map.
- Make sure qualified and competent ART attorneys are engaged – including immigration and foreign counsel for international cases.

Sample contract provisions: Limits of licensed practice



The Parties further acknowledge that _____, Esq., counsel for Intended Parents, is not licensed to practice law in the State of Virginia. Intended Parents further acknowledge that _____, Esq. is licensed to practice law in the State(s) of _____ and is advising Intended Parents based on general contract principles and not specifically with regard to the laws of the State of Virginia. Gestational Carrier's attorney Colleen M. Quinn is licensed to practice in Virginia and the parties understand and agree that Quinn will review the Agreement to assure the Agreement's compliance with Virginia law.

OR

Acknowledgement of Advice of Counsel. Each party acknowledges that he or she fully understands this Agreement and its legal effect and has had the benefit of legal counsel. Each party has discussed each and every provision in detail with all the possible ramifications which may be associated with these provisions. The Intended Parents have been represented by Colleen Quinn, Esq. who is licensed to practice in Virginia, but is not licensed in California, and who has ensured that this Agreement is compliant with Virginia law and has advised her clients under her general knowledge of assisted reproductive technology law and principles of contract law. The Gestational Carrier and the Husband of the Gestational Carrier have been represented by _____. Esq. who is licensed in California, but is not licensed in Virginia, and has reviewed this Agreement to ensure its compliance with California law and has advised her clients under her general knowledge of assisted reproductive technology law and principles of contract law.



Parentage and Birth Certificate Process – Contract terms

- Need parties to agree on the possible ways of establishing parentage
- Need parties to agree on genetic testing if needed or as backup
- Need disclaimers and parties to acknowledge which attorneys are licensed in what states
- These usually are somewhat state specific and should be drafted accordingly.



Parentage:

- Some states permit Pre-Birth Orders – by statute or common law
- Some states have post birth certificate amendment procedures (like VA) or may also allow for a PBO from another state to be domesticated and given full faith and credit (like VA)
- In some states the Parentage Act may have to be used post-birth with evidence of parentage like DNA results or doctor's affidavit (sometimes in conjunction with a step-parent adoption for the non-genetic parent)
- In some cases an adoption may have to occur – Esp if the Carrier is carrying donor embryo

Sample contract provisions: Parentage options

Termination of Parental Rights. At such time either prior to the birth of the child or subsequent to the birth of the child, as shall be appropriate, Gestational Carrier and Husband of Gestational Carrier shall execute any necessary documents and/or participate in any proceeding or procedure necessary to terminate any parental right she or he may have in and to the child born as a result of the assisted conception or to consent to the adoption of said child, whichever shall be appropriate, and agree to sign all pleadings, consents, orders and affidavits and attend any scheduled Court hearing(s), if necessary, either prior to or after the birth to finalize such procedures and/or proceedings. All parties agree to furnish all information requested by Intended Parents' attorney as expeditiously as possible, including in advance of the birth.

In the event that the child is born in Florida or Arizona, then the Intended Parents may seek to have a pre-birth Order obtained in Florida or Arizona or, alternatively may choose to have an Order of Parentage as to Intended Father entered in Massachusetts along with a step-parent adoption by Intended Mother. If the child is born in Virginia and is genetically related to at least one of the Intended Parents, it is expected that, three days after birth, the Gestational Carrier and her Husband will execute the necessary consent and birth certificate amendment forms furnished by counsel for the Intended Parents and will return those forms immediately so that the forms can be filed as soon as possible after birth with the Department of Vital Statistics in Richmond, Virginia. Gestational Carrier and Husband of Gestational Carrier agree to sign such documents as quickly and as immediately as the law allows for following delivery.



Sample Provision re Genetic Testing

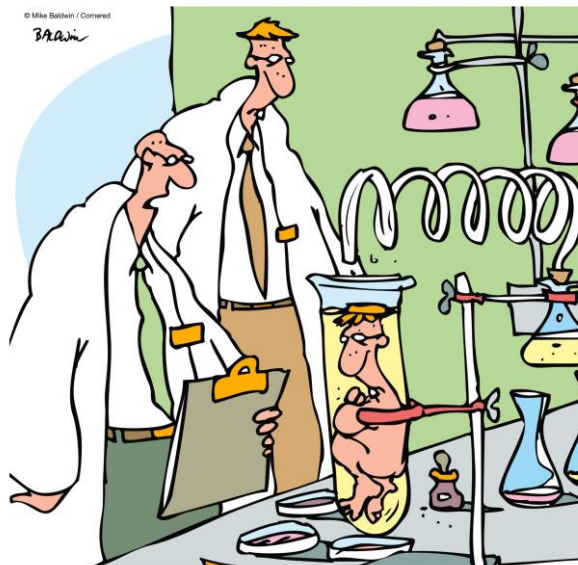
The Intended Parents and the Gestational Carrier and the Gestational Carrier's Husband each agree to provide a blood, saliva or tissue sample to a Laboratory, selected by the Intended Parents, at the cost of the Intended Parents, as may be scheduled by them, at any time after the signing of this contract. These samples may be collected and preserved for the purpose of genetic testing to determine parentage. They may be collected prior to the birth, and may be collected prior to the assisted conception, if necessary in the event of the unavailability of one of the parties from whom samples are required, and/or so as to not delay the genetic testing. Each of the parties who provides a sample hereby unconditionally consents to the use of the sample for the purpose of determining parentage of any resulting child, which consent, evidenced by that person's signature hereon, shall survive death or incapacity.



Sample Provision re Carrier and Husband are the Genetic Parents

In the event that genetic testing reveals that the Gestational Carrier and the Gestational Carrier's Husband are the genetic parents of any resulting child, and neither of the Intended Parent is genetically related to the resulting child, then the Gestational Carrier and Gestational Carrier's Husband agree to and shall:

- (1) Take custody of any resulting child and assume all attendant parental rights and responsibilities therefore; and
- (2) Pay and/or reimburse the Intended Parents for any and all of the expenses incurred or owed by them, whether or not payment for such expenses has been made, in connection with the assisted conception and this contract for assisted conception, including but not limited to all of the medical costs, including those for the assisted conception itself, the cost of the genetic testing, any and all counseling costs, any and all reasonable ancillary expenses paid or reimbursed on behalf of the Gestational Carrier as well as any and all legal and medical expenses and costs incurred by the Intended Parents hereto; and
- (3) The Intended Parents shall not be required to accept placement of any such resulting child for adoption.



"Well, it certainly looks like your DNA. How many times have I told you to wear gloves before touching anything?"

Sample Provision: Lab Error – No One is the Genetic Parent

In the event the genetic testing reveals that none of the parties to this Agreement is a genetic parent to the resulting child (conceivably due to laboratory error), then the Gestational Carrier and Gestational Carrier's Husband shall not be required to take custody of such child. The Intended Parents may make any other custodial arrangements for the child as they believe is in the child's best interest which may include adopting the child with the consent of the Gestational Carrier and Husband of Gestational Carrier. Upon such event, this agreement shall terminate and Intended Parents shall make only those payments to the Gestational Carrier as are lawful pursuant to Virginia adoption law or pursuant to the law of the state in which the child is born.

M. Conditions of Contract Termination

- Fertility doctor does not recommend continued attempts.
- Number of attempts (usually up to 3-4) or length of agreement (usually 12-18 months) has been completed.
- Carrier miscarries, has stillbirth, abortions or the like and does not wish to proceed
- Carrier may no longer qualify (e.g., is diagnosed with a health condition, etc.)
- Any party suffers life-changing event (death of a spouse, etc.)

N. Medical Consent Forms and Hospital Procedures

- Carrier-Surrogate agrees to execute any applicable medical consent; health care power of attorney, advanced medical directive and other forms including any hospital forms and report of birth or birth certificate application forms
- Typically the hospital process is included in the Agreement – including who will be present at the delivery and who will hold the baby first, etc.

Sample Provision re Signing Releases

The Gestational Carrier agrees to execute any appropriate releases, including HIPAA releases, that will permit all records from the medical and mental health evaluations described herein to be made available to the Intended Parents, their physicians, and, if necessary, to any court who reviews this matter, provided that the disclosure to these Parties does not result in a disclosure of confidential information of the Gestational Carrier to any unauthorized third parties or the public.

Sample Provision re Birth:

- Gestational Carrier agrees to allow the Intended Parents to attend any medical appointments or visits and for one or both to be present at the delivery of the child provided that her physical privacy is not compromised. If three individuals are permitted by the hospital to be with the Gestational Carrier during the delivery, the parties acknowledge that they shall be the Husband of Gestational Carrier and both Intended Parents, provided that the Gestational Carrier's physical privacy is not compromised. If only two individuals are permitted by the hospital to be with the Gestational Carrier during the delivery, the parties acknowledge that they shall be the Husband of Gestational Carrier and either Intended Parent, provided that the Gestational Carrier's physical privacy is not compromised. If only one individual is permitted by the hospital to be with the Gestational Carrier during the delivery, the parties acknowledge that that individual shall be the Husband of the Gestational Carrier. The parties agree that the Intended Parents or whichever Intended Parent that is in the delivery room will be the first to hold the child and that the Intended Parents will immediately be the ones to care for the child. It shall be up to the Intended Parents as to whether the Gestational Carrier and her Husband will hold the child while in the delivery room. However, if there is a medical emergency or any serious medical issue with the Gestational Carrier, all parties agree that her Husband shall have the first and primary right to be in the emergency or delivery room.

O. Legal Representation



"And if you don't have an attorney, we've got millions of them."

Both Sides must have Legal Representation During Contract Drafting & Throughout the Course of the Arrangement

WHY?

- AAAA Ethics Code
- ASRM guidelines
- ABA Model Act

AAAA ETHICS CODE - 16. REPRESENTATION in ART MATTERS and AVOIDANCE of CONFLICTS of INTEREST:

(a) In every ART Matter in which a Fellow represents a Party, the other Party(ies) must also have independent legal counsel except:

(1) in an uncontested process to establish parentage in which no actual conflict of interest exists or is likely to arise among the Parties to that proceeding, so long as the unrepresented Party is informed of a right to independent legal counsel;

(2) A Fellow may represent (i) both Intended Parents, (ii) a Donor and Donor's spouse or partner or (iii) a Surrogate and Surrogate's spouse or partner provided that there is no actual conflict of interest and the potential conflict of interest has been disclosed and waived.

ASRM Guidelines

- IPs must have ongoing legal counsel by an appropriately qualified legal practitioner who is experienced with third-party reproduction and licensed to practice in the relevant state or states, or in the event of an international arrangement, in addition to any relevant states, in the IP's home country.
- GCs must have ongoing legal counsel by an appropriately qualified legal practitioner who is experienced with third-party reproduction and licensed to practice in the relevant state or states, or in the event of an international arrangement, in addition to any relevant states, in the IP's home country.
- Separate, ongoing legal counsel and representation for the GC and IPs.

AMERICAN BAR ASSOCIATION MODEL ACT GOVERNING ASSISTED REPRODUCTIVE TECHNOLOGY (February 2008)

Section 703(2):

(c) Each of the gestational carrier and the intended parent or parents shall have been represented by separate, independent counsel in all matters concerning the gestational carrier arrangement and the gestational agreement;

(d) Each of the gestational carrier and the intended parent or parents shall have signed a written acknowledgment that he or she received information about the legal, financial, and contractual rights, expectations, penalties, and obligations of the gestational agreement;

SAMPLE CONTRACT PROVISION – Represented Party

Acknowledgement of Advice of Counsel. Each party acknowledges that he or she fully understands this Agreement and its legal effect and has had the benefit of legal counsel. Each party has discussed each and every provision in detail with all the possible ramifications which may be associated with these provisions. Each party acknowledges that this Agreement may at some time be subject to approval by a Court and may be subject to the Court's interpretation. All parties believe that the terms of this Agreement are necessary in the best interests of the child. Each party acknowledges that he or she is signing this Agreement freely, voluntarily, and knowingly, being fully informed of the possible ramifications, and that no party has reason to believe that the others did not freely, voluntarily, and knowingly execute this Agreement. All parties acknowledge that this Agreement, in some instances, may represent compromises of positions.

IV. Enforceability of Surrogacy Agreement



Breach provisions should be enforceable

There is very limited law in the area of contractual breach of ART agreements. Instead, general principles of contractual breach must be consulted. Remedy and damage provisions as a general rule must be proportionate to the nature of the breach. Thus, it generally is advisable to make a distinction between material and non-material breach provisions. Moreover, as with breach in any contractual situation – notice and cure provisions should be included as well as mediation provisions. Specific state law should be examined to determine the extent of enforceability.

Enforceability of Breach Provisions

- Is it reasonable to think that a judge will require a carrier to keep the genetic child of the IPS because she exercised her Constitutional right and has refused to abort? ***Probably not.*** Is it reasonable to think that a judge would require her to pay back to the Intended Parents the monies she received if she had agreed to abort but refused and the baby came out fine? ***Probably not.***

Enforceability



Thus – it is not advisable to place into contracts provisions that probably will not be enforced (like carrier must keep Intended Parents genetic child) and only advisable to have provisions that are likely to be enforced.

SAMPLE PROVISION RE CHANGING LAW

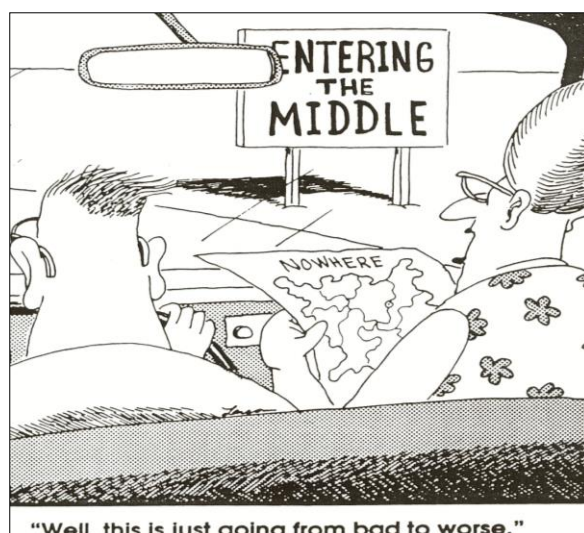
In the event that guidelines are promulgated by relevant legislation or judicial decision(s) which regulate or purport to regulate gestational parenting or which would govern some or all of the provisions of this Agreement, **the Parties hereto shall forthwith adopt amendments** to this Agreement, which will result, in the opinion of counsel for the Intended Parent's and for the Gestational Carrier, in this Agreement complying with such guidelines.

DO NOT SAY AREA OF LAW IS UNCERTAIN

- Have your Agreement read that you **KNOW** what the law is and the parties intend to rely upon it.
- Do **NOT** state that the law is uncertain, unchartered, unknown, cannot predict the outcome, etc. – put that in your retainer letter instead
- We want certainty in contract drafting and interpretation (even if the law is mud).



V. When Things Go Wrong



Outline of Topics: V. When Things Go Wrong

A. Contract Breach Provisions

B. Minor Breach Issues

C. Dispute Resolution Provisions

D. Pregnancy Termination/Abortion/Selective Reduction

E. Birth Defect(s)

F. Pregnancy Poses a Danger to Surrogate Mother

G. Too Many Fetuses

H. Surrogate Mother Does Not Relinquish the Child

A. Contract Breach Provisions

- Distinguish Between Material Breach and Non-Material or Minor Breach
- Have Notice & Cure Provisions
- Have Reasonable Dispute Resolution Provisions – from joint counseling to mediation
- Make sure the choice of law and the forum court for any legal action is clearly stated in the contract

Material Breach. The Gestational Carrier **materially** breaches this Agreement if she:

- (1) Aborts the pregnancy in violation of Paragraph ___ even though it is set forth therein that it is her Constitutional right to do so.
- (2) Fails to abort the pregnancy after a request by the Intended Parents and without a valid reason for not doing so as provided in Paragraph ____ even though it is set forth therein that it is her Constitutional right to do so.
- (3) Fails to undergo selective reduction after a request by the Intended Parents and without a valid reason for not doing so as provided in Paragraph ____ even though it is set forth therein that it is her Constitutional right to do so..
- (4) Acts in a manner that is recklessly unfavorable to the well being of the child or fetus by failing to follow the directions of the attending obstetric physician, or by any physician retained by the Intended Parents as set forth herein, or violates the provisions of paragraph ____ of this Agreement, and such failure , to a reasonable degree of medical probability , results in the child having significant and severe physical, mental or emotional deformities [*ideally define these – what is or is not included? Down's Syndrome? Spina Bifida?, etc.*] as a result of the breach.

Material Breach (cont)

- (5) Without a compelling and reasonable excuse or justification, fails to appear at the precise date and time set for any embryo transfer, is not properly ready for the procedure in accordance with the supervising physician's instructions, or chooses not to complete the procedure. If the Gestational Carrier has a compelling and reasonable justification or excuse for failing to appear or not being ready or not completing the procedure, but agrees to appear for a rescheduled procedure, and does appear and is ready and completes the procedure at the next scheduled transfer, then she will not be in breach. If she fails to appear for a second time, regardless of excuse, it is a breach.
- (6) Fails to transfer custody of the child to the Intended Parents as required under this Agreement.

Remedies for Material Breach By Carrier

(1) In the event that the Gestational Carrier materially breaches this Agreement as set out above in paragraph (A)(1) (abortion), paragraph (A)(4) (injury to child), and/or paragraph (A)(5) (failure to show up a second time) then Gestational Carrier shall pay or reimburse the Intended Parents for all expenses incurred and amounts paid by the Intended Parents to the Gestational Carrier pursuant to Paragraphs ____ through ____ as well as all of the Intended Parents' expenses associated with the assisted reproductive arrangement. Such expenses include, but are not limited to, all travel expenses, medical expenses, psychological expenses, all reasonable legal expenses, and any expenses incurred by the Intended Parents in proceeding with the assisted reproduction process that resulted in this specific pregnancy. Intended Parents also shall be entitled to receive any and all attorney fees and costs expended in seeking their remedies set out herein for material breach.

Remedies for Material Breach cont.

(2) In the event that the Gestational Carrier materially breaches this Agreement as set out above in paragraph (A)(2) (failure to abort) and (A)(3) (failure to selectively reduce, and the child who was to be aborted or selectively reduced is found to not have any infant abnormalities ***[define these]*** as previously were detected and the basis for the Intended Parent's request for such abortion/selective reduction, and so long as the child (a) is not related to the Gestational Carrier or her Husband and (b) the Gestational Carrier and her Husband relinquish custody of such child to the Intended Parents, then no material breach shall have been deemed to have occurred.

Material Breach cont.

However, In the event that the Gestational Carrier materially breaches this Agreement as set out above in paragraph (A)(2) (failure to abort) and (A)(3)(failure to selectively reduce, and the child who was to be aborted or selectively reduced **does have** any infant abnormalities [*define these*] as previously were detected and were the basis for the Intended Parent's request for such abortion/selective reduction then Gestational Carrier shall pay or reimburse the Intended Parents for all expenses incurred and amounts paid by the Intended Parents to the Gestational Carrier pursuant to Paragraphs ____ through ____ as well as all of the Intended Parents' expenses associated with the assisted reproductive arrangement. Such expenses include, but are not limited to, all travel expenses, medical expenses, psychological expenses, all reasonable legal expenses, and any expenses incurred by the Intended Parents in proceeding with the assisted reproduction process that resulted in this specific pregnancy. Intended Parents also shall be entitled to receive any and all attorney fees and costs expended in seeking their remedies set out herein for material breach.

Food for Thought



- **COMMENT:** What if the Gestational Carrier carries one healthy baby to term and refuses to selectively reduce the baby detected with Down's Syndrome that the Intended Parents wanted her to selectively reduce? Should she still get "paid" for the healthy baby? What would a judge probably do?
- **COMMENT:** Would a judge likely enforce a provision that required the Gestational Carrier to pay for all the **consequential damages** associated with a child that she refused to abort or selectively reduce that had to be placed on life support? That needed round the clock care?

Breach By Intended Parents

- (1) Fail or refuse to reimburse the Gestational Carrier any of the expenses and reimbursement amounts set forth herein after at least five (5) days have passed beyond the scheduled date of payment and within five (5) days after written notice of such breach has been provided by the Gestational Carrier.
- (2) Refuse to accept the child immediately following birth, unless a medical test before or after birth confirms that the Gestational Carrier and/or her Husband are the biological parents.
- (3) Fail to fulfill any material duty or obligation under this Agreement.

Remedies for Breach By Intended Parents

If the Intended Parents breach this Agreement as described herein, subject to the Notice, Cure and Dispute Resolution provisions in subparagraph C below, the Gestational Carrier may seek a specific performance action to order that the Intended Parents specifically perform their obligations under this Agreement and the Court may require the Intended Parents to pay any reasonable legal fees and/or costs incurred by the Gestational Carrier in seeking such an award of specific performance. Moreover the Court may order that the Intended Parents take immediate custody of such child and then the Intended Parents are responsible for raising such child or making such other disposition including placing the child for adoption.

B. Minor Breach Issues



- Is it reasonable to think that a judge will require a carrier to pay back ALL the monies she has received AND pay as damages to the IPS ALL the money they have expended on the ART arrangement (doctors, lawyers, insurance, storage, etc.) because she “breached” the contract by having a couple of glasses of wine? ***Probably not.***

Law of Liquidated Damages

Note that repayment of all monies paid to the carrier plus all monies expended by the Intended Parents is similar to a liquidated damages provision. Liquidated damages provisions generally are unenforceable if the liquidated damages are not a reasonable estimate of the prospective damages. Whether this stipulated sum is a penalty generally depends on whether the sum is reasonable and in proportion to the damage that will probably result from the breach.

Liquidated Damages

- For example, Virginia courts will not enforce liquidated damages clauses when there is a gross difference in the amounts between the actual damage and the stipulated damages. *See Dahlgren Limited Partnership v. Board of Supervisors*, 240 Va. 200, 396 S.E.2d 651 (1990).
- Therefore it is important to distinguish between material and non-material breach.

Non-Material Breach

Any breach of this Agreement not set forth in paragraph A above shall be considered a non-material breach. In the event of a non-material breach, the Intended Parents shall be entitled to terminate this Agreement with no further payments being made to the Gestational Carrier if no embryo transfer has occurred or if an embryo transfer has occurred but not resulting in any pregnancy. If a non-material breach occurs after the Gestational Carrier achieves a pregnancy as envisioned under this Agreement, then the Intended Parents shall not be required to make any further payments under this Agreement unless and until the breach is cured. Moreover, if the breach is not cured or not capable of being cured, then the Gestational Carrier shall not receive any reimbursements or payments by the Intended Parents during the period of the breach and the Intended Parents shall be entitled to any actual damages that may be shown including attorney fees and costs.

C. Dispute Resolution Provisions

As a prerequisite to taking any legal action or if any dispute arises between the parties under this Agreement, and so long as time is not of the essence, all parties agree that, for each such dispute or breach, they shall, within five (5) days of the notice of the breach or dispute and upon written notice by the other party, attend one joint counseling session with a counselor experienced in dispute resolution in an attempt to resolve the dispute short of litigation. The parties also may agree to mediate the issue instead of having a joint counseling session.

Notice and Cure Provision Re Carrier-Surrogate



If the Gestational Carrier (and/or her Husband as applicable) commits a breach, whether material or non-material, then the Intended Parents shall send written notice to the Gestational Carrier (and/or her Husband) of such breach and, unless time is of the essence, allow five (5) days for the Gestational Carrier (and/or her Husband) to cure or remedy such breach. If such breach is not cured, or not capable of being cured, then Intended Parents may seek legal action, including an action for specific performance or damages, as applicable, and, should they prevail, may recover their legal fees and costs incurred in taking such legal action.

Notice and Cure for IPs

In the event that the Intended Parents commit a breach under this paragraph, the Gestational Carrier shall send written notice of such breach to the Intended Parents and provide them with five (5) days to cure or remedy such breach. If such breach is not cured or remedied, then Gestational Carrier may proceed to take legal action, including an action for specific performance and, should she prevail, may recover her reasonable legal fees and costs incurred in taking such legal action. Moreover the Court may order that the Intended Parents take immediate custody of the child and that the Intended Parents are responsible for the child or making such other disposition including placing the child for adoption.

Dispute Resolution for IP Breach

As a prerequisite to taking any legal action or if any dispute arises between the parties under this Agreement, and so long as time is not of the essence, all parties agree that, for each such dispute or breach, they shall, within five (5) days of the notice of the breach or dispute and upon written notice by the other party, attend one joint counseling session with a counselor experienced in dispute resolution in an attempt to resolve the dispute short of litigation. The parties also may agree to mediate the issue instead of having a joint counseling



General Counseling Provision



For those minor issues that do not appear to rise to the level of a breach – for example, the Intended Parents are micro-managing the pregnancy and spending an inordinate amount of time on the phone with the Gestational Carrier, the following contractual provision can be helpful to include:

Moreover, during the course of this Agreement, any party may request in writing up to 10 (ten) times, and no more than once every two weeks, that all parties submit to a conflict counseling session by a mental health counselor qualified in conflict resolution. Such a request may be made if there is/are any issue(s) that arise that cannot be resolved solely by attorney intervention. Additional counseling sessions may be conducted by mutual agreement of all parties. Such counseling session(s) shall be paid for by the Intended Parents unless covered by the health insurance of any party.

When Things Go Wrong (cont.)

D. Pregnancy Termination/Abortion/Selective Reduction

E. Birth Defect(s)

F. Pregnancy Poses a Danger to Surrogate Mother

G. Too Many Fetuses

Abortion & Birth Defects: Surrogate mom refuses to abort fetus with birth defects

- Crystal Kelley was offered \$10,000 to abort the child she's holding in this photo.



Surrogate mom refuses to abort fetus with birth defects

- When a Connecticut couple learned their surrogate mother was carrying a fetus with developmental disabilities, they offered her \$10,000 to have an abortion, reported [CNN](#).
- Crystal Kelley, 29, demanded \$15,000 to undergo a procedure that she claimed went against her religious beliefs.
- The unnamed couple refused and a legal battle over the surrogacy contract and the child's fate followed.
- In August 2011, Kelley had signed an official contract with a surrogacy agency saying that she'd agree to abort if the fetus had a severe abnormality. Now she was carrying a disabled child, but she didn't want to honor the agreement.
- Determined to give the fetus a chance at life, Kelley fled Connecticut for Michigan, where under state law the surrogacy contract would be disregarded and she would be recognized as the legal guardian.
- In Ann Arbor, she gave birth to a child with severe medical conditions.
- The child was adopted by another family and has survived numerous surgeries.

Advice to Clients

In your retainer letter or other document – not in the contract - please be sure to advise your Intended Parent clients about the risk of the carrier moving to another state or foreign country and the difficulty in enforcing the contract should that happen.



Breach Provision

- IPs will stop all payments upon breach – see notice and cure provisions already discussed.
- IPs can attempt to seek specific performance – but unlikely court will order carrier-surrogate to abort or not abort.
- Also unlikely court will enforce length of contract and carrier – surrogate's obligation to stay under contract
- Best to have breach of contract provisions that will be upheld by a court.
- Chance of collecting realistically is a problem.

Birth Defects

While pregnant, and if requested to do so by the Intended Parents, the Gestational Carrier agrees to undergo amniocentesis or such other tests designed to detect genetic and congenital defects as advised and conducted by her attending obstetric physician or a specialty obstetric physician approved by the Intended Parents. The Gestational Carrier understands that it is her responsibility to speak with her physician about the risks of amniocentesis or other tests prior to the performance of those tests. All parties agree that the Gestational Carrier will not be asked, and may not choose to abort any child in utero or child because of genetic or congenital defects. Moreover, all parties indicate that they do not believe in abortion and the only circumstance in which the Gestational Carrier may be asked to abort is if the child is determined to have such incredibly significant and severe abnormalities as to have no meaningful chance of existence and, if the child were to survive, would cost the Intended Parents significant, substantial and unreasonable expense. If the Gestational Carrier aborts in violation of this paragraph, which she has the Constitutional right to do, then she will still be deemed to be in breach of this Agreement and the material breach provisions set forth in this Agreement will apply

Pregnancy a Danger to Surrogate – Surrogate's life always takes priority- sample language

- Gestational Carrier agrees that she will not abort or attempt to abort any embryo, child in utero or child she carries pursuant to this Agreement, including any one or more of multiple embryos, child(ren) in utero or children, unless, in the professional medical opinion of a specialty obstetric physician approved by the Intended Parents or her own independent obstetrician, such action is necessary to protect against a serious risk to the Gestational Carrier's own physical health or poses a serious risk to one or more of the other children in utero. In such event, absent an emergency as discussed below, she will discuss the matter with the Intended Parents and any attending and specialty physicians beforehand.
- If there is a dispute regarding the need for an abortion or selective reduction due to a serious health risk, and provided that there is sufficient time to seek a second opinion, then the parties agree they will seek the opinion of another physician chosen by the Intended Parents (including any specialty obstetric or high risk physician chosen by the Intended Parents). In the case of an emergency situation, no second opinion shall be required; however, every reasonable effort will be made to notify the Intended Parents prior to the procedure being done. In any event, provided that at least one involved physician indicates that there is a serious health risk to the Gestational Carrier, then the Gestational Carrier shall have the sole right to decide whether or not to abort. Gestational Carrier agrees, provided there is time to do so without physically endangering her, to discuss this matter with the Intended Parents if possible prior to any such procedure being performed.

Too Many Fetuses



- Note ASRM recommendations re number of embryos to be transferred – only one high quality embryo
- Try to get parties to keep the number in the contract to no more than two being transferred at most subject to the advice and recommendation of the attending fertility specialist
- If carrier-surrogate will not carry more than one or two – really need the parties to address selective reduction issues with mental health professional and in group counseling prior to contract drafting.

Too Many Fetuses - sample language – part 1

- Gestational Carrier agrees that she will not abort or selectively reduce or attempt to abort or selectively reduce any embryo, child in utero or child she carries pursuant to this Agreement, including any one or more of multiple embryos, child(ren) in utero or children, unless, in the professional medical opinion of a specialty obstetric provider approved by the Intended Parents or by her own independent obstetrician, such action is necessary (1) to protect against a serious risk to the Gestational Carrier's own physical health, or (2) poses a serious risk to one or more of the other children in utero, or (3) the Gestational Carrier is determined to be carrying more than two fetuses, or (4) if the child is detected to have major fetal abnormalities or deformities, including but not limited to Down's Syndrome or other physical, intellectual or developmental disabilities, as discussed further below. In such event, absent an emergency as discussed below, the Gestational Carrier will discuss the matter with the Intended Parents and any attending and specialty physicians beforehand.

Too Many Fetuses - sample language part 2

- If there is a dispute regarding the need for an abortion or selective reduction, and provided that the attending physician agrees that there is sufficient time to seek a second opinion, then, if requested by the Intended Parents, the parties agree they will seek a second opinion including that of another physician chosen by the Intended Parents. If the two opinions are oppositional, and the Parties cannot reach consensus, then all Parties agree that if there is time, then a third and final opinion will be sought from the Chief of Obstetrics at the delivery hospital or his/her designee. All Parties agree to abide by this final opinion. However, in the case of an emergency situation placing the Gestational Carrier at risk (i.e. if the attending physician believes that the Gestational Carrier's life or health is in danger) and where time is of the essence, no second opinion shall be required; however, every reasonable effort will be made to notify the Intended Parents prior to the procedure being done. In any event, provided that at least one involved physician indicates that there is a serious health risk to the Gestational Carrier, then the Gestational Carrier shall have the sole right to decide whether or not to abort. Gestational Carrier agrees, provided there is time to do so without physically endangering her, to discuss this matter with the Intended Parents if possible prior to any such procedure being performed.

Too Many Fetuses - sample language part 3

- All parties agree that the Gestational Carrier has agreed to carry up to two fetuses that develop from the transferred embryo and will not be asked to reduce unless she is carrying more than two (2) or her life or health are in danger as noted above.
- If the Gestational Carrier violates the terms of this Paragraph, the Intended Parents' financial responsibility to the Gestational Carrier shall cease and the Intended Parents may terminate this Agreement effective immediately and all breach provisions shall apply.

H. Surrogate Mother Does Not Relinquish the Child

- Should not happen if all prerequisites and especially mental health clearance done
- Intended Parents ideally need to follow notice and cure provision first.
- If possible – follow dispute resolution process
- If all else fails seek Specific Performance
- In most states will not be successful if Carrier is a true surrogate and absent enforceable Pre-Birth Order in place

Specific Performance

In the event that the Gestational Carrier materially breaches this Agreement as set out above in paragraph (A)(6) (refusal to transfer the child), then the Intended Parents shall be entitled to seek specific performance and enforcement of the terms of this Agreement to require the Gestational Carrier to give them custody of the child. During such time period the Intended Parents are not required to reimburse the Gestational Carrier or make any payments required under this Agreement and shall be entitled to any and all attorney fees and costs incurred in seeking such specific enforcement.

VI. International Surrogacy Considerations

- Go way beyond the scope of this outline
- Need to consult with counsel in the other country – or have foreign IPs do so
- Translators are critical – ensuring translation of contract is key
- Distance from carrier-surrogate is a factor
- Health insurance for child huge factor
- Protection for surrogate if IPs do not come for child

A. RED FLAGS



- Carrier not wanting estranged husband to be part of the agreement
- Carrier is single, older, no children (especially for true surrogate)
- Intended Parents want 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

B. STICKY WICKETS

- Permissible payments/fees – how characterized?
- Governing law and jurisdiction over the parties
- Whether underlying egg donor/sperm donor rights properly terminated
- Religious/abortion/selective reduction issues
- Integrating/ensuring consistency with medical provider/facility agreements
- Will insurance cover the pregnancy? What happens if carrier loses the insurance coverage?
- Hospital's treatment of the Intended Parents
- Tax issues



THE END

