Stephanie M. Brinkley
Brinkley Law Firm, LLC
2023 Super CLE – Hilton Head Bar Association

Parentage is not Child's Play

Assisted Reproductive Technology (ART) is an emerging area of science and law. Many states do not have a statutory framework to address the nuances among reproduction methods including in vitro fertilization, donor conceived children, and surrogacy. As a result, family law practitioners often overlook issues of parental rights and embryo disposition when evaluating divorce, custody, and property rights. It is true, "the devil is in the details" and a trap for the unwary practitioner. Family law attorneys must update intake forms to inquire about these issues and engage in thoughtful dialogue with potential clients who have used ART to create their families.

According to the CDC[1], as of 2019, 26% of married women, ages 15-49 reported trouble getting pregnant or sustaining a pregnancy. Therefore, it is not uncommon for couples to create their family through in vitro fertilization (IVF), gamete donation (egg/sperm/embryo), and or gestational surrogacy. These issues, while undeveloped in the law, are continuing, pervasive, and will not diminish as technology continues to evolve. Therefore, family law practitioners must ask the following questions to evaluate the needs of the client, their family, and future procreative choices.

1. Did the client and their spouse/partner use assisted reproduction technology to create their children?
2. Did the client and their spouse/partner use donor material to create embryos?
3. Did the clients use a gestational carrier to carry their embryo?
4. Does the client have a copy of the clinic consent forms signed at the time of fertility treatment?
5. For same sex couples, did the client or their spouse/partner take any follow up steps to solidify legal parental rights?

Who is the Parent?

In 1986, South Carolina developed the concept of "intent based" parentage with regard to the use of third-party reproduction. In the matter of *In re Baby Doe*, 291 S.C. 389, 392 (1987), the Court confirmed that "courts. . . have assigned the paternal responsibility to the husband based on conduct evidencing his consent to artificial insemination." The case involved artificial insemination via in-vitro fertilization with anonymous donor sperm. Ultimately, the Court considered evidence of father's conduct, not just his genetics, when determining that he had consented to a process that result in the birth of a child and engaged in a course of conduct that showed his intent to parent the child born through assisted reproduction.

[1] Citing the National Survey of Family Growth Survey (https://www.cdc.gov/nchs/fastats/infertility.htm)

In *Doe*, Father appealed a decision by the Family Court that he owed a duty of child support to his child. Father's position was that he could not be declared the legal parent of a child conceived via artificial insemination. *Id*. at 878, 391. The parties had engaged in IVF using donor sperm after learning that due to physical trauma, Father could not have children. Father was involved in the selection of donor sperm and assisted the wife with daily temperature readings. *Id*. Upon birth of the child, Father was named on the birth certificate and for years held the child out as his own. Only upon a breakdown of the marriage did the Father dispute paternity. *Id*. Consequently, the Court validated his paternity of the child based on his express and implied consent to father a child conceived by artificial insemination during the marriage, thus recognizing the conception of "intent-based parentage."

Since the *Doe* decision, science has continued to evolve and is crossing the center lane and coming head on into the family courtrooms. With the introduction of family building by way of assisted reproduction, the legal landscape is changing and the outcomes are often unpredictable and based on the facts of the case.

For couples who have engaged in IVF and gestational surrogacy[2], issues regarding parental rights are almost always addressed prior to conception thanks to professional societies that establish ethical guidelines for medical practitioners. The American Society for Reproductive Medicine has set forth guidelines for the medical community which requires both the Intended Parents and the Gestational Carrier (and her spouse) have independent legal representation, that the parties enter into a legal contract outlining rights and responsibilities before, during, and after the pregnancy, and the issuance of a Letter of Legal Clearance from the Intended Parents' attorney verifying such steps have been taken prior to embryo transfer. Additionally, the respective attorneys work with the parties to file an action with the court to affirm the legal parental rights of the intended parents[3] to the exclusion of the Gestational Carrier and her spouse. The Order of Parentage from the family court will ensure the correct parents are listed on the birth certificate as well as secure their legal rights. The action is based on numerous factors including case law[4], legislative intent, and a "best interest of the child" analysis. Without a family court order, the gestational carrier and her spouse will be placed on the birth certificate, and they will hold all parental rights, which is contrary to the parties' intentions.

[2] A gestational surrogate is often referred to as a gestational carrier. According to the American Society for Reproductive Medicine, "[A] Gestational Carrier is a woman who agrees to have a couple's fertilized egg (embryo) implanted in her uterus. The gestational carrier carries the pregnancy for the couple . . .The carrier does not provide the egg and is therefore not biologically (genetically) related to the child.

[3] "Intended Parent" is defined by the ABA as an individual, married or unmarried, who manifests the intent to be legally bound as the parent of a child resulting from assisted or collaborative reproduction.

[4] *MidSouth Insurance Co. v. John Doe, et al.*, 274 F.Supp.2d 757, 17 (2003) (holding surrogacy agreements are valid and enforceable) and *In re Baby Doe, 291 S.C. 389, 392 (1987)*) (establishing intent based parentage).

Establishing Parentage Through Gestational Surrogacy

For South Carolina families created through gestational surrogacy, where a woman agrees to carry a pregnancy for intended parents but has no genetic link to the baby, establishing parentage is a straightforward process. While our legislature has not provided a clear statutory framework specific to parentage via third party reproduction, there exists legislative policy and statutory guidance for the family court to exercise jurisdiction and affirm parental rights.

South Carolina is a family oriented stated. While our legislature has not specifically addressed the issue of parentage through surrogacy and in vitro fertilization, such matters routinely focus on the best interest of a child whose interests must be protected by this Court. Consequently, under S.C. Code §20-1-710, it is the intent of the South Carolina Legislature to "promote strong families, for the family is the cradle of an ordered and vibrant republic. Self-government depends upon civic virtue, and civic virtue depends upon healthy families. The purpose of this act is to emphasize the importance of families to the success and well-being of our State."

That being said, parentage via gestational surrogacy can be affirmed based statutory guidance: An affidavit from the reproductive endocrinologist should be filed with the complaint verifying that the gestational surrogate and her husband have no genetic link to the child. *See* S.C. Code Ann. § 63-17-60(A)(9) (2008) (establishing that the family court may accept relevant and competent evidence). The intended parents should attach a voluntary acknowledgment of paternity/maternity stating that they agree to assume all parental rights and responsibilities for the resulting child. *See* S.C. Code Ann § 63-17-40(A) (2008) ("The parties may submit themselves to the jurisdiction of the court by a settlement or voluntary agreement which must be filed with a summons and complaint."); *see also* S.C. Code Ann. § 63-17-10(C)(5) (2008) (providing that any person claiming to be the father may bring an action for paternity); S.C. Code Ann. § 63-17-50(A) (2008) (directing that a verified acknowledgment of paternity creates a legal finding of paternity); S.C. Code Ann. § 63-3-530(B) (2014) (establishing the family court's jurisdiction to hear and determine matters related to paternity); S.C. Code Ann. § 63-17-10(D) (2008) (establishing the right of a man claiming paternity to bring that action prior to the birth of the child though all "proceedings" must be stayed until after birth). Under Section 63-17-10, any hearing on a paternity claim must be stayed until after birth; however, a pre-birth consent order that is issued without a hearing is not generally considered to be a "proceeding" and, therefore, is permissible. *See also* S.C. Code Ann. § 63-17-40(A) (2008) ("The court must encourage settlements and voluntary agreements and must examine and approve them *whenever they are warranted*. Upon a finding of fairness the court shall approve, *without a hearing*, settlements and voluntary agreements which are reduced to writing, signed by the parties, and properly verified.") (emphasis added). Additionally, s*ee* S.C. Code Ann. § 63-17-40(A) (2008) ("The parties may submit themselves to the jurisdiction of the court by a settlement or voluntary agreement which must be filed with the summons and complaint."); S.C. Code Ann. § 63-3-510(A)(1) (2019) (directing that the court has exclusive jurisdiction concerning the child living in the geographical limits of South Carolina and whose custody is subject to controversy). The

final order should direct that the gestational surrogate and her husband have no parental rights to the child, and that the intended parents are the legal parents. *See also* S.C. Code Ann. § 63-3-530(A)(4) (2014) (directing that the family court has jurisdiction to hear and determine actions for termination of parental rights, whether in connection with an action for adoption or apart). The Final Order of Parentage should also cite the legal precedent of *In re Baby Doe*, 291 S.C 389, 353 S.E.2d 877 (1987) (declaring parental rights and responsibilities based not on genetics, but on the intent of the parent).

Therefore, as you can see, while a straightforward statute regarding parentage through surrogacy does not yet exist in South Carolina, there is a judicial framework that promotes families, provides for the best interests of children born through assisted reproduction, and finalizes the parental rights of parents who have traversed unimaginable emotional and financial hardship to pursue their Constitutional right of procreation.

No Donor Statute – The Third Person in Third Party Reproduction

When does ART and parentage get tricky? Enter the donor. South Carolina lacks a donor statute. This means for heterosexual and homosexual parties engaging in third party reproduction, the use of an egg or sperm donor creates an additional legal conundrum to be addressed. For states which have a donor statute, this means that if the donation is made in compliance with the statute, a donor's legal parental rights are automatically terminated. No further court action is necessary to terminate their rights. However, the absence of a donor statute in South Carolina means that *only a family court can effectively terminate the parental rights of a donor*. In gestational surrogacy cases, this is often done simultaneously with the action to affirm rights of the Intended Parents. It can be done by either production of a donor consent form signed at the clinic, a known donor agreement entered into between the parties, and/or a review of the Responsible Father Registry which will support an action to terminate parental rights by the family court.

Conflicts and questions regarding parentage rights of a donor usually develop where the parties have used a known donor to create their family. Especially where familiar relationships lead to selfless donation for a struggling couple, but the ongoing relationship between the adults can muddy the legal waters in regard to parental rights and responsibilities. For example, in the case of *Jacob v. Schultz-Jacob v. Frampton*, 923 A.2d 473 (Pa. Super. 2007) the court held that a known sperm donor who became voluntarily economically involved in the lives of two children born to a lesbian couple with the use of his donated sperm is equitably estopped from denying a child support obligation to the children upon the separation of the two lesbian parents. Therefore, anytime a donor is used in the creation of an embryo, a practitioner needs to investigate what steps were taken, if any, to terminate the rights of the donor. If no action was taken, the donor's legal rights continue to exist until terminated by a family court. This may be good news or bad, depending upon your client's position.

Embryo Ownership – Yours, Mine, and Ours

Consequently, litigation involving legal ownership of embryos created during a marriage are on the rise. With odds stacked against professional women who have sacrificed their motherhood for an established career, a growing number of couples are taking proactive measures to secure their future parental rights through the creation and storage of embryos. Whether a result of forward thinking or a natural consequence of the IVF process, cryopreservation of embryos is an insurance policy for the next generation. However, what happens if the relationship breaks down? Who owns the embryos? It depends.

While the issue of embryo ownership has not yet been litigated in South Carolina, other jurisdictions have taken varied approaches. Currently, there are four different analyses commonly applied by family courts:

1. **Balancing the Interests** – When there is no controlling embryo disposition agreement between the parties, the court should balance the interests of the parties and find that the right to avoid conception should prevail absent exigent circumstances of the opposing party. *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992).

2. **Prior Written Agreement** – When the progenitors of embryos freely enter into an agreement regarding embryo disposition, the court should uphold the agreement. *Kass v. Kass*. 696 N.E.2d 174 (N.Y. 1998).

3. **Contemporaneous Mutual Consent -** Regardless of a pre-existing embryo disposition agreement between the parties, a court may find that such an agreement is valid "subject to the right of either party to change his or her mind about disposition up to the point of use or destruction of any stored embryos.'" *In re Marriage of Whitten*, 672 N.W.2d 768 (2003).

4. **Exigent Circumstances –** When embryo litigation ensues, if a party can show that the embryos represent their only opportunity to have a biological child due to exigent circumstances, such as infertility due to cancer treatment, the right to procreate will outweigh the opposing parties' right to avoid procreation. *Reber v. Reiss*, 42 A.3d 1131 (2012).

Heterosexual Couples Using ART & Parentage

While there are common legal issues for heterosexual couples and same sex couples, heterosexual couples using IVF (the most common form of fertility treatment) typically have more legal protections for children born of their union. Under the common law, a woman who gives birth to a child is deemed to be the legal and natural mother and if she is married, her husband is the legal father. Furthermore, in accordance with case law, a husband who consents to artificial insemination of his wife will be deemed the legal father of any subsequently born

child. *In re Baby Doe*, 291 S.C. 389, 353 S.E.2d 877 (S.C. 1987). Moreover, *Baby Doe* also supports a finding of intent-based parenting based on the action of a non-genetic parent in a married heterosexual relationship. Therefore in South Carolina, common law and case law protect the legal rights (and responsibilities) of married fathers to any child born by his wife naturally, or as a result of assisted reproduction (IVF). However, not every case is clear cut.

In 2015 the same sex community celebrated as *Obergerfell* established the marital privilege for their now recognized unions. However, what *Obergerfell* did not do, was simultaneously convey the right of parentage to married same sex couples who have children born during their marriage. *Carson v. Heigel 3:16-cv-00045 MGL (D.S.C. 2017)*, established the right for married same sex couples to have both names listed on the birth certificate for any children born during the marriage. However, a birth certificate operates much like a driver's license. It is a form of identify to which any of the facts can be challenged. For this reason, it is a mistake for same sex parents to solely rely upon a birth certificate as an affirmation of their equal parental rights.

For unmarried same sex couples, the parental rights of the non-genetic parent are just as fragile as the that of unwed fathers. In *Abernathy v. Baby Boy*, 313 S.C. 27, 437 S.E.2d 25 (1993), the South Carolina Supreme Court embraced the concept of "biology plus action." The Court held that "opportunity interest is constitutionally protected only to the extent that the biological [father] who claims protection wants to make the commitments and perform the responsibilities which give rise to a developed relationship, because it is only the combination of biology and custodial responsibility that the Constitution ultimately protects." *Id.* at 28, 31.

An Expression of Intent

While *Abernathy* established that it takes biology plus action to affirm the rights of an unwed father, the earlier case of *Baby Doe* embraces the concept of parentage through assisted reproduction. The combined effect of these two cases makes clear that despite biology, it is the evidence of intention plus action which allows a non-genetic partner to assert legal parental rights to a child born during the same sex relationship. For this reason, the facts of the case will strongly persuade the court based on conduct. For example:

- Did the non-genetic partner make any monetary contributions towards the fertility treatment process?
- Did the parties enter into a legal agreement, prior to conception, expressing their intention to become equal parents?
- How did the parties sign the fertility clinic forms?
- Did the non-genetic partner petition the court, post birth, for an affirmation of parentage or second parent adoption?
- Did the non-genetic partner engage in a continuous role of parenting the child(ren);

- Did the non-genetic partner regularly or substantially provide financial support, of any means, to the child(ren).

Without evidence that the parties planned to create life and hold the child out as a product of their union, the non-genetic parent can potentially walk away from all responsibilities for raising the child should the marriage not survive. This would leave the biological parent with no means of additional financial support for raising the child. For the non-genetic parent, it could mean no rights of custody or visitation with the child they long to parent. In either scenario, the child is robbed of love and support from two parents, which is contrary to public policy. Therefore, evaluate the facts and help your clients tie up any lose ends that may exist. If no post birth actions were taken through the courts, you will likely need to get creative in your pleadings to protect your client's interests.

Ignorance is Bliss – Or Is It?

If no steps are taken to affirm the parental rights of the non-genetic spouse in a same sex marriage, how might the court decide parental rights? Several other jurisdictions have addressed the issue of same sex parentage. While each case was decided after intense fact-based analysis, there is a recurrent theme of "biology plus action" and "intent-based parenting," which guides the courts in their final ruling.

As recently as September of 2021, the Idaho Supreme Court affirmed the district court and effectively denied parentage to the non-genetic parent of children born durn a same-sex marriage in the case of *Gatsby v. Gatsby*, Docket 47710, (Idaho Sup. Ct.). In the divorce action, the non-genetic spouse sought to assert her rights of parentage to a child born during their marriage. The parties had married in 2015 and proceeded to use a known donor and completed an artificial insemination agreement downloaded from the internet. The child was born in 2016, both women were listed on the birth certificate, they held the child out as their own, and they jointly cared for the child. In 2017, the genetic mother filed for divorce and claimed that her spouse had "no legal claim to any custody or visitation" of the minor child. *Id*. The trial court agreed but more specifically denied the non-genetic mother's right of parentage based on the following facts 1) the Petitioner/Appellant did not have a biological relationship with the child; 2) the Petitioner failed to adhere to statutory requirements under the Artificial Insemination Act; 3) the Petitioner failed to take remedial steps including the filing of voluntary acknowledgement of paternity or second parent adoption; and 4) the Petitioner did not have standing to file for custody or visitation, and even if she did, it was not in the child's best interest. The supreme court affirmed holding "we affirm the district court's ruling upholding the magistrate court's decision that [non-genetic mother] does not have parental rights to the child because she did not comply with the AIA. Additionally, we affirm the district court's determination that the magistrate court did not err in concluding that awarding sole custody to [genetic mother] was in the child's best interest." *Id*.

Nevada has also addressed the issue of same sex parentage in *St. Mary v. Damon*, 309 P.3d 1027, 129 Nev. Adv. Op 68 (Nev. 2013). The *St. Mary* case provides a great example for how same sex couples should navigate parentage when engaging in third party reproduction. The parties in *St. Mary* provide the most evidence of "intent to parent," as opposed to the aforementioned cases. St. Mary and Damon were romantically involved as a same sex couple and decided to have a child together created from donor sperm. Damon provided the egg and St. Mary gestated the child. The parties executed a co-parenting agreement which set forth that they sought to "jointly and equally share parental responsibility, with both of [them] providing support and guidance." *Id*. at 1030. The agreement also provided that if their relationship ended, they would each work to ensure that the other maintained a close relationship with the child, share the duties of raising the child, and make a 'good faith effort to jointly make all major decisions affecting' the child." *Id*. Once the child was born in June of 2008, only St. Mary was listed on the birth certificate. St. Mary signed an affidavit declaring Damon the biological mother and Damon filed an ex parte action in 2009 to amend the birth certificate to add her name. *Id*. As a result, both women are listed on the child's birth certificate thereafter. *Id*.

When the relationship ended the same year, St. Mary filed an action for custody, visitation, and child support. *Id*. The court determined that both women were the legal mothers of the child based on St. Mary's right as a birth mother and Damon's right created by biology *plus* evidence of their joint intent to raise the child together. Consequently, the court held their co-parenting agreement enforceable and consistent with "Nevada's policy of encouraging parents to enter into parenting agreements that resolve matters pertaining to the child's best interests." *Id*. at 1036.

Comparatively, in *Partanen v. Gallagher*, 475 Mass. 632 (2016), 59 N.E.3d 1133, the Massachusetts Supreme Court reversed the trial court's dismissal of Plaintiff's claim, asserting parental rights to children born during the parties' relationship. The supreme court decided that despite the lack of marriage and no evidence of preconception intent to parent, the non-genetic mother of children born during a same sex unmarried partnership was able to assert parental rights on the basis of a statutory presumptive parent claim. The Plaintiff asserted that the parties knowingly and voluntarily participated with in vitro fertilization, held the children out as their own, and joint raised the children for several years until their separation. The court held that a biological relationship is not required to assert parental rights. *Id*. "[T]he State's interest in the welfare of the child and the integrity of the family. . . , resulting from years of living together in a purported parent/child relationship, is considerably more palpable than the biological relationship of actual [genetic connection] and should not be lightly dissolved." *Id*. (quoting *In re: Guardianship of Madelyn B.*, 166 N.H. 453, 461 (2014)). The evidence supported a finding that the women knowingly engage in assisted reproduction, held the children out as one of their union, and jointly cared for the children until their separation. For those reasons, as well as a best interest of the child analysis, the court reversed the trial court's dismissal and remanded the matter to the Probate and Family Court.

In *D.M.T. v. T.M.H.*, 129 So.3d 320 (2013), the Florida Supreme Court addressed parentage in a lesbian relationship applying the concept of "biology plus action." In that case, the court held that "an unwed biological father has an inchoate interest that develops into a fundamental right to be a parent protected by the Florida and United States Constitution *when he demonstrates a commitment to raising the child by assuming parental responsibilities*. It is not the biological relationship per se, but rather 'the assumption of the parental responsibilities' which is of constitutional significance." *Id*. at 328 (citing *Matter of Adoption of Doe*, 543 So.2d 741, 748 (Fla. 1989)(emphasis added). In deciding to acknowledge the maternity of the egg provider, T.M.H., the court held that regardless of signing an "Egg Donor" consent form with the clinic, her subsequent conduct in receiving joint counseling for parenthood, holding the child out to the public as her own, and actively parenting the child for years gave rise to a protected right of parentage. The court expressly stated that "a biological connection gives rise to an inchoate right to be a parent that ***may develop*** into a protected fundamental constitutional right based on the ***actions*** of the parent." *Id*. at 338 (citing *Baby E.A.W.*, 658 So.2d at 966-67)(emphasis added). With this foundational reasoning, the court held,

> In this case, the biological connection between mother and daughter is not in dispute. See D.M.T., 79 So. 3d at 789. Additionally, T.M.H. and her former partner D.M.T. demonstrated an intent to jointly raise the child through their actions before and after the child's birth, and T.M.H. actively participated as a parent for the first several years of the child's life. Importantly for constitutional purposes, T.M.H. also assumed full parental responsibilities until her contact with her child was suddenly cut off.

Id.

California has also addressed same sex parentage in the case of *K.M. v. E.G.*, 119 P.3d 673 (2005). In *K.M.*, lesbian partners engaged in cross egg fertilization with the use of anonymous donor sperm. K.M. agreed to donate her eggs to E.G. E.G. accepted with the condition that only she be acknowledged as the legal mother. She stated she would not even think about K.M. adopting the children, "for at least five years until she felt the relationship was stable and would endure." *Id*. K.M. signed the standard egg donor consent forms at the clinic, effectively relinquishing her parental rights. However, after birth of the twin children, the women actively parented the children, holding them out as their own and embracing each other's families for the children. They continued to co-parent for 6 years until the relationship ended and E.G. moved to Massachusetts with the twins. A custody dispute ensued.

The California Supreme Court evaluated the claim of parentage by K.M. under California Family Code Section 7613, which is modeled under the Uniform Parentage Act (not adopted by South Carolina), and held that E.G.'s genetic connection constitutes "evidence of a mother and child relationship." *Id.* at 71. Under Section 7613(b), "the donor of semen provided to a licensed physician and surgeon for use in artificial insemination of a woman *other than the donor's wife* is treated in law as if he were *not the natural father* of a child thereby conceived" *Id.* (emphasis added). After an analysis of the facts in light of section 7613, the court concluded that, "A woman who supplies ova to be used to impregnate her lesbian partner, with the

understanding that the resulting child will be raised in their joint home, cannot waive her responsibility to support that child. Nor can such a purported waiver effectively cause that woman to relinquish her parental rights." *Id*. at 72. Key factors in the court's reasoning appear to be evidence of the parties' legal status as registered "domestic partners" and their express joint intent to raise the child in their home at the time of the donation. The court viewed their relationship as akin to marriage and therefore afforded K.M. the status of parent, regardless of the signed donor consent forms and in light of their express joint intent to raise the children in their home.

While the issue of parental rights for same sex parents has not yet been litigated in South Carolina, our family court may look to the cases above as persuasive case law to make their decision. These cases, along with relevant facts surrounding pre-conception intent, can sway the court in either direction. Therefore, as a family law attorney, it pays to have your client provide copies of any clinic consent forms, pre-conception agreements, cancelled checks for fertility services, birth announcements, the birth certificate, etc. to either establish or dispel any claim of intent to parent by the non-genetic parent.

As you can see, parental rights are not child's play. While science is developing at lighting speed, the family courts are doing their best to protect the integrity of families built through ART, which includes a myriad of infertility treatment options. However, with the changing nature of legally recognized relationships coupled with the advancements in family building options leave underlying parental rights vulnerable. Therefore, have the conversation, ask the hard questions, and be prepared to give your client a homework project to secure as many factual documents as possible to support their position and arm you, their advocate.