

Memorandum

TO: The Drafting Committee, UPA Revisions
FROM: Susan Crockin, JD, as representative of SART and ASRM (Society of Assisted Reproductive Medicine and American Society of Reproductive Medicine)
[principal, Crockin Law & Policy Group; adjunct professor, Georgetown U. Law Center; Scholar, O'Neill Institute for Nat'l & Global Health Law; affiliate faculty, Kennedy Institute of Ethics]
DATE: March 8, 2016
RE: Input prior to Drafting Meeting

To the Committee:

Thank you for the invitation and opportunity to participate as an observer in this important process involving updates to the Uniform Parentage Act, on behalf of SART and ASRM, the national leading professional organizations delivering ART medical services, where I serve on its Model Informed Consent committee, and an ad hoc Donor Registry committee, and am a founding member of its Legal Professional Group.

By way of professional background on these issues, since 1988 I have practiced ART and adoption law exclusively, having opened one of the 1st legal practices in the US devoted exclusively to family building through adoption and ART in Boston, MA. Since that time, I have worked continuously in the field, representing hundreds of intended (and adoptive) parents, gamete donors and gestational surrogates; multiple IVF and ART medical programs; and sperm and more recently egg banks, and surrogacy programs. I worked as a volunteer drafting the Massachusetts infertility mandate legislation (1987-88), and have been involved in many of the ground breaking ART cases in that state, including the 1st pre-birth order gestational surrogacy cases and two of the earliest same-sex co-parent adoptions (including I believe the first gay male couple's co-parent adoption). I was also a very early participant in efforts to draft the ABA Model ART Act, and am a founding member of the national American Academy of ART Attorneys (AAARTA).

Academically, I have written and lectured extensively on the legal and ethical aspects of the ARTs, including textbooks and peer-reviewed articles and a national column, "Legally Speaking®," for over 25 years on legal ART related developments. I currently teach ART law at Georgetown Law Center; and am developing an ethics based ART curriculum in affiliation with Georgetown's Kennedy Institute of Ethics.

With that background, I would offer the following observations as to the proposed changes to the UPA:

- **Definitions:** I would propose the following for consideration:
 - Assisted reproduction: "Assisted reproduction means a method of achieving, or attempting to achieve, a pregnancy through artificial

insemination or embryo transfer, and includes gamete and embryo donation. Assisted reproduction does not include any pregnancy attempted or achieved through sexual intercourse.” (Note: this is a slightly revised version of the newly proposed definition to the IL legislature, adding “attempt” concept).

- Donor: “means an individual who participates in an assisted reproduction arrangement by providing gametes for the purpose of procreation by one or more intended parents without the intent to be a parent and who disclaims any rights or responsibilities as to any embryos or child resulting from his or her donated gametes or embryos.” [Note: this may require revisiting any options donors have to withdraw consent to donate or direct any redonation; both of which could be addressed in a separate provision.]
- Surrogacy: “gestational carrier” or “gestational surrogate”, as discussed more fully below
- **Marital presumption:** I favor full gender neutrality; otherwise as currently drafted the law arguably presumes the husband of a gestational carrier is a father; courts have had to, but should not be required to, address and distinguish surrogacy as not intended to fall under marital presumption.
 - I would favor incorporating a variation of WA law: “person presumed parent of child if the person and the mother or father of the child are married to each other...”
- **Surrogacy:** As I believe there will be major discussions surrounding any updated Article 8 I have not included general points, although I would strongly endorse there being clear distinctions between, and distinct, varying levels of protections applied to, gestational and traditional surrogacy respectively
 - Traditional surrogacy, with its combination of genetic and gestational roles for a traditional surrogate, is unique in ART, and too closely aligned to a birth mother to allow binding pre-conception or pre-birth agreements. Arguments that have suggested she can be viewed as an egg donor and gestational surrogate, with separate protections be set up accordingly, are not persuasive
 - Terminology: Recommend “gestational carrier” (preferred) or “gestational surrogate;” not gestational mother
 - Eliminate any court hearing for pre-agreement approval; overly burdensome, and many arrangements will not proceed to transfer or pregnancy.
 - Recommend separate, independent counsel for parties per ASRM Guidelines
 - Endorse mental health consultation for both GC and IPs
 - Endorse deletion of homestudy requirement
 - Review needed of other terminology (replace “safeguard” w/“manage” health

- **Donor anonymity/non-anonymity:** I have attached at the end of this memo a proposed draft based upon, and updating, the WA model law that was distributed to the committee. Edits are to include gamete banks (fertility clinics are rapidly being replaced in this space); include an explicit right to withdraw a nondisclosure affidavit; clarify record keeping responsibilities; and include potential filing with a future national registry. Noted, but not addressed, are medical updates by donors. It is worth noting that the WA law has been widely reported as resulting in large numbers of donors being recommended to sign, and signing, the affidavit of non-disclosure and thus the law is reportedly not accomplishing its intended purpose.
- **Miscellany:**
 - ART births not involving surrogacy, including home inseminations raise concerns about parties' intentions re: parentage and non-parentage, and create vulnerabilities for both donors and recipients, as noted by other observers. I endorse a non-medical requirement, but believe a written legal agreement should be encouraged and incentivized in the Act. A written legal agreement between donor(s) and IP(s), preferably represented by separate, and independent legal counsel, would go a long way to eliminating "he said/she said" type disputes. Such an agreement could potentially carry a presumption of parentage and non-parentage, and the absence of such an agreement remove that presumption as an incentive to participants.
 - Concur that public health records can be an important source of information, including morbidity and mortality rates, but care should be taken not to ensure that any such record-keeping not impact determinations of parentage or unnecessarily record identifying information of 3rd parties such as gamete donors who wish to remain unidentified in public records. Both issues were paramount in Massachusetts during the Culliton v. BIDMC litigation, with which I was involved both as an amicus and as counsel in the predecessor case, Smith v. Brown, that resulted in a per curium decision.

Thank you for the opportunity to participate as an observer and for this opportunity to offer some preliminary observations in anticipation of the committee meeting.

SLC
3/9/16