

**Who's Your Daddy ?**

**Whose Your Mama ?**

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**Chapter 20**

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## I. INTRODUCTION:

Given that one in six couples experience infertility, and domestic adoption is the subject of sensational television and movies, it's not surprising that the simple idea of sexual intercourse to create a baby has taken a backseat to the new medical technological methods of "making babies". The stork is now more likely to be found at something entitled [stork@delivery.com](mailto:stork@delivery.com); or at the very least on a list of websites providing for baby making in the new millennium. Attached as Appendix A is the IVF Summary 1985-1995, presented by "Fertile Thoughts" at [www.fertilethoughts.net](http://www.fertilethoughts.net).

Is it possible to have five mothers? Is it possible to definitively determine parentage by DNA/genetic testing? Do we have sufficient statutory regulation to protect the children born as a result of these modern technological methods? You can find hundreds of websites available to infertile couples -- The American Society for Reproductive Medicine has a website with information on treatments and options. The Fertility Information Resource List is a giant site that offers links including fertility clinics worldwide. In addition, the University of Pennsylvania Center for Bioethics addresses the moral implications of this incredible science.

According to David Magnus, a professor at the University of Pennsylvania Center for Bioethics, "We spend billions of dollars trying to develop industries to prevent pregnancy, at the same time we spend billions of dollars developing industries which make it possible to have children on demand...."

As a result, according to Magnus, "Fertility medicine is running unchecked, for a lot of reasons. There's very little regulation. One of my colleagues pointed out that there is more regulation of the training of circus animals than there is of reproductive technology."

This paper is intended to introduce the reader to the specialized vocabulary involved, the current status of the art nationwide, and proposed legislation to regulate "the circus". The appendices offer quick resources for the practitioner facing the legal aspects of modern baby making.

## II. DEFINITIONS: ART

The umbrella term "assisted reproductive technology" (ART) is the process of causing pregnancy by means other than sexual intercourse, including:

- Intrauterine insemination
- Donation of eggs - IVF
- Donation of embryos - IVF
- In vitro fertilization and transfer of embryos
- Intracytoplasmic sperm injection.

IVF (in vitro fertilization) or the "test-tube baby" process was the original "hope" for infertile couples. Now, in combination with the above techniques, couples have options to fit particular needs and maximize success.

**A. IVF** - In 1978 the first successful IVF birth occurred when Louise Brown became the first "test-tube baby". Generally the eggs are harvested from the intended mother and sperm collected from the intended father. This process has been effective for women over 40 who have not responded well to drug therapy. There is also the concept of "natural cycle IVF" which does not involve fertility drugs to stimulate the ovaries. In most cases, only one egg is retrieved, therefore, there are no extra frozen embryos for future use.

- B. Gamete Intrafallopian Transfer (GIFT) and Zygote Intrafallopian Transfer (ZIFT)** became an option in 1986. Both are low-tech versions of IVF that involve combining the sperm and the egg and then transferring the embryo into the fallopian tube. Generally this method is less expensive. In GIFT, the eggs and sperm are loaded into a catheter and injected into the tubes where fertilization occurs naturally. GIFT is acceptable to some religious groups that otherwise oppose IVF. The disadvantage of both GIFT and ZIFT is that each requires a laparoscopy in order for eggs and sperm (GIFT) or early embryos (ZIFT) to be transferred back to the tubes.
- C. DONOR EGG IVF:** Donor egg IVF allows a woman who cannot otherwise produce eggs to bear a child. The donated eggs are fertilized in a lab with the sperm of the husband of the infertile couple. Resulting embryos are then transferred to the infertile woman's uterus. This process is rapidly becoming the standard form of care for women experiencing premature ovarian failure, genetic disease issues, and for women entering or past menopause.
- D. INTRAUTERINE INSEMINATION** This procedure (IUI) utilizes the sperm preparation techniques from IVF to concentrate the best sperm and place them high in the uterus to increase the chances of fertilization. IUI is often combined with drug therapy to treat unexplained infertility.
- E. MICROINSEMINATION:** Several treatments for male factor problems include this process, whereby incubation of concentrations of sperm with eggs in a tiny amount of fluid increases the success of fertilization. In subzonal insertion (SUZI) a microneedle is inserted in the capsule of the egg and one to several sperm are injected. Since 1992, physicians have utilized a newer technique called intracytoplasmic sperm injection (ICSI) involving the direct insertion of one sperm into the egg.

### III. INSURANCE COVERAGE FOR ART

Texas insurance law addresses group, employer provided insurance coverage for in vitro fertilization procedures (see Appendix B). Pursuant to Tex. Ins. Code art. 3.51-6 (2000), section 3A specifically provides that an employer must offer benefits for IVF to the same extent as other pregnancy related procedures.

The Code imposes restrictions on the coverage including but not limited to the following: 1) the patient must be a covered person under the plan; 2) the fertilization of the oocyte must be with the patient spouse's sperm; 3) the patient and spouse must have a five year history of infertility; and 4) the procedure must be performed by a medical facility conforming with the standards of the American College of Obstetrics and Gynecology or the American Fertility Society minimum standards.

### IV. PROPOSED LEGISLATION

The proposed revision of the 1973 Uniform parentage Act addresses parentage issues involving a child conceived as a result of assisted reproduction. The National Conference of Commissioners on Uniform State Laws integrates provisions from the 1989 Conference Uniform Status of Children of Assisted Reproduction (USCACA) which was adopted by only two states. The new proposed UPA does not attempt to moralize or regulate reproductive activities but moreover to provide legal methods to establish parentage and protect the rights of children. (See Appendix C).

### V. GESTATIONAL AGREEMENTS -- WHERE ARE WE?

According to researchers, the first documented surrogacy, that is, a birth to a mother of unrelated egg and sperm material, was in 1984. Today there are over 200 private egg-donation agencies and clinics in the United States. There are advertisements and billboards -- "1-877-BABY-MAKERS" in New York. In California, you can call the Center for Egg Options, and one can answer an ad that reads "Pay your tuition with Eggs." The United States is the only country in the world, which allows the marketplace to govern the trade in gametes and genes.

#### **A Surrogacy Possibilities:**

- Intended mom's egg + intended father's sperm
- Intended mom's egg + donated sperm
- Donated egg + intended father's perm
- Donated egg + donated sperm

Each combination focuses on the intention of the parties involved. Currently, 12 states have either case law or specific statutes that authorize and delineate the regulation of surrogacy or gestational agreements. Fourteen states have statutes prohibiting gestational agreements; the remaining jurisdictions have no regulation either by case law or statute. (See Appendix D the American Surrogacy Center, Inc. [www.surrogacy.com](http://www.surrogacy.com). which is an appendix to Article 8 of the UPA 2000 addressed below.)

#### **1. Uniform Parentage Act revision 2000**

The National Conference of Commissioners on Uniform Sate Law (NCCUSL) revised the 1973 Uniform Parentage Act for submission to the states in 2000. Article 8 on Gestational Agreements (See Appendix E) presents a proposal to address the surrogacy industry and provide established procedures for determining parentage of a child resulting from a contractual gestational agreement under court supervision. Unrecognized surrogacy procedures can and have resulted in protracted litigation. See Appendix F the case involving Jaycee Buzzanca. In that California case, there were five "mothers" seeking custody of a child whose parentage was ultimately resolved three years after her birth. The Buzzanca court decided that parenthood is not a biological category but a conceptual one: its defining characteristic is that of intent.

In another California case, Johnson v. Calvert, the California Supreme Court issued an opinion in the context of gestational surrogacy: that when there are two "natural moms", i.e. one mom is the egg-mom and one is the gestational mom of an embryo created with other mom's egg and donor sperm, the court awarded custody to the social-mom- the intentional mom, as opposed to the contractual gestational mom.

#### **2. Proposed Family Law Council Statute on Gestational Agreements:**

Also attached is HB 12446 the Committee bill sponsored by Toby Goodman for statutory regulation of gestational agreements. The proposed act limits the process to married persons. The act focuses on the intent of the persons involved in order to establish parentage. A court must pre-approve the agreement in order to effectuate the contract. (See Appendix G).

#### **3. Illinois Statute on Gestational Agreements:**

Recently, Illinois enacted a statutory scheme for establishing parentage as a result of gestational agreements. (See Appendix H)

## **B. STATE OF THE ART:**

One need only read a newspaper or pick out a website to find out how to facilitate the creation of a child, absent intercourse. The advertisements are enticing and the articles are fascinating. A few selected articles are attached, which demonstrate that modern science is more creative than science fiction. (See Appendix I)

Finally, one must consider the impact of creating a category of high tech orphans when there is no process for readily determining parental responsibility. Law must catch up with medical science to protect children's rights.

For a survey on other states' case law in this area, see Heidi Cox's article "Surrogacy", Advanced Family Law Course, 1998.

**Summary of IVF REGISTRY, 1985 - 1995: number of ART centers reporting to the REGISTRY stimulation cycles- initiated, live deliveries, and live delivery rates as a percentage of stimulation cycles initiated for-the three most common forms of ART.**

**Clinic-specific success rate data are available at the Center for Disease Control and Prevention Website.**

| Year | Centers | IVF     |            |       | GIFT   |             |        | ZIFT (PROST) |             |      |
|------|---------|---------|------------|-------|--------|-------------|--------|--------------|-------------|------|
|      |         | Cycles  | Live Deliv | %     | Cycles | Live Deliv. | %      | Cycles       | Live Deliv. | %    |
| 1985 | 30      | 3921    | 210*       | 5.3*  | 56     | 2*          | 3.6*   | ---          | ---         | ---  |
| 1986 | 41      | 4867    | 253*       | 5.2*  | 466    | 45*         | 9.7*   | ---          | ---         | ---  |
| 1987 | 96      | 11806** | 977        | 8.3** | 2663** | 358         | 13.4** | ---          | ---         | ---  |
| 1988 | 135     | 17411** | 1637       | 9.4** | 3929** | 639         | 16.3*- | 385          | 71          | 18.4 |
| 1989 | 160     | 18211   | 2062       | 11.3  | 4372   | 833         | 19.1   | 1048         | 150         | 14.2 |
| 1990 | 180     | 19079   | 2314       | 12.1  | 4439   | 832         | 18.7   | 1624         | 215         | 13.2 |
| 1991 | 215     | 24671   | 3194       | 12.9  | 5452   | 1176        | 21.6   | 2104         | 357         | 17.0 |
| 1992 | 249     | 29404   | 4164       | 14.2  | 5767   | 1264        | 21.9   | 1993         | 386         | 19.4 |
| 1993 | 267     | 31900   | 5047       | 15.8  | 4992   | 1178        | 23.6   | 1792         | 380         | 21.2 |
| 1994 | 249     | 26961   | 4844       | 18.0  | 4212   | 1041        | 24.7   | 926          | 233         | 25.2 |
| 1995 | 281     | 36035   | 6754       | 18.7  | 3741   | 896         | 23.9   | 1078         | 263         | 24.4 |

Note: IVF= In-Vitro Fertilization, trans-cervical embryo transfer; GIFT = Gamete Intra-Fallopian Transfer; ZIFT = Zygote Intra-Fallopian Transfer.

\* The 1985 - 1986 IW REGISTRY reported the number of newborns, rather than the number of live deliveries. The numbers in the table reflect a downward correction for estimated number of multiple births based on the 1987 IVF REGISTRY multiple birth rate of 17.2% following IVF and 28.5% following GIFT.

\*\*The 1987 and 1988 IVF REGISTRY's report the total number of stimulation cycles but not the number of stimulation cycles for each type of procedure. The numbers in the table reflect a correction for estimated number of canceled cycles prior to oocyte retrieval (26.1 % in 1987, and 22.0% in 1988), which was assumed to be equivalent for IVF, GIFT, and ZIFT.

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By Goodman

H.B. No. 1246

A BILL TO BE ENTITLED

AN ACT

relating to the adoption of the Uniform Parentage Act regarding gestational agreements.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Chapter 160, Family Code, is amended by adding Subchapter I to read as follows:

SUBCHAPTER I. GESTATIONAL AGREEMENTS

Sec. 160.751. DEFINITION. In this subchapter:

- (1) "Fetus" means an individual human organism from fertilization until birth.
- (2) "gestational mother" means a woman who gives birth to a child conceived under the terms of a gestational agreement.

Sec. 160.752. SCOPE OF SUBCHAPTER; CHOICE OF LAW. (a) Notwithstanding any other provision of this chapter or another law, this subchapter authorizes an agreement between a woman and the intended parents of a child in which the woman relinquishes all rights as a parent of a child conceived by means of assisted reproduction and that provides that the intended parents become the parents of the child.

(b) This subchapter controls over any other law with respect to a child conceived under the terms of a gestational agreement under this subchapter.

Sec. 160.753. ESTABLISHMENT OF PARENT-CHILD RELATIONSHIP.

(a) Notwithstanding any other provision of this chapter or another law, the mother-child relationship exists between a woman and a child by an adjudication confirming the woman as a parent of the child born to a gestational mother under the terms of a gestational agreement if the

gestational agreement is validated under this subchapter or enforceable under other law, regardless of the fact that the gestational mother gave birth to the child.

(b) The father-child relationship exists between a child and a man by an adjudication confirming the man as a parent of the child born to a gestational mother under the terms of a gestational agreement if the gestational agreement is validated under this subchapter or enforceable under other law.

Sec. 160.754. STANDING TO MAINTAIN PROCEEDING. An intended parent under this subchapter may maintain a proceeding to adjudicate parentage, subject to any time limitations to commence the proceeding.

Sec. 160.755. GESTATIONAL AGREEMENT AUTHORIZED. (a) A prospective gestational mother, her husband if she is married, each donor, and each intended parent may enter into a written agreement providing that:

(1) the prospective gestational mother agrees to pregnancy by means of assisted reproduction;

(2) the prospective gestational mother, her husband if she is married, and each donor relinquish all parental rights and duties with respect to a child conceived through assisted reproduction; and

(3) the intended parents will be the parents of the child.

(b) The intended parents must be married to each other. Each intended parent must be a party to the gestational agreement.

(c) A gestational agreement does not apply to the birth of a child conceived by means of sexual intercourse.

(d) A gestational agreement:

(1) may provide for payment of consideration; and

(2) may not limit the right of the gestational mother to make decisions to safeguard her health or the health of an embryo or fetus.

Sec. 160.756. PETITION TO VALIDATE GESTATIONAL AGREEMENT. (a) The intended parents and the prospective gestational mother under a gestational agreement may commence a proceeding to validate the agreement.

(b) A person may maintain a proceeding to validate a gestational agreement only if:

(1) the prospective gestational mother or the intended parents have resided in this state for the 90 days before the date the proceeding is commenced;

(2) the prospective gestational mother's husband, if she is married, is joined as a party to the proceeding; and

(3) a copy of the gestational agreement is attached to the petition.

Sec. 160.757. HEARING TO VALIDATE GESTATIONAL AGREEMENT; ENFORCEABILITY. (a) A gestational agreement is enforceable only if validated as provided by this section.

(b) The court may validate a gestational agreement as provided by Subsection (c) only if the court finds that:

(1) the parties have submitted to the jurisdiction of the court under the jurisdictional standards of this chapter;

(2) the medical evidence provided shows that the intended mother is unable to carry a pregnancy to term and give birth to the child or is unable to carry the pregnancy to term and give

birth to the child without unreasonable risk to her physical or mental health or to the health of the unborn child;

(3) unless waived by the court, an agency or other person has conducted a home study of the intended parents and has determined that the intended parents meet the standards of fitness applicable to adoptive parents;

(4) each party to the agreement has voluntarily entered into and understands the terms of the agreement;

(5) the prospective gestational mother has had at least one previous pregnancy and delivery and carrying another pregnancy to term and giving birth to another child would not pose an unreasonable health risk to the child or the physical or mental health of the prospective gestational mother;

(6) the parties have adequately provided for which party is responsible for all reasonable health care expenses associated with the pregnancy, including providing for who is responsible for those expenses if the agreement is terminated; and

(7) the consideration, if any, to be paid to the prospective gestational mother is reasonable.

(c) If the court finds that the requirements of Subsection (b) are satisfied, the court may render an order validating the gestational agreement and declaring that the intended parents will be the parents of a child born under the terms of the agreement.

(d) The court may validate the gestational agreement at the court's discretion. The court's determination of whether to validate the agreement is subject to review only for abuse of discretion.

Sec. 160.758. INSPECTION OF RECORDS. The proceedings, records, and identities of the parties to a gestational agreement under this subchapter are subject to inspection under the same standards of confidentiality that apply to an adoption under the laws of this state.

Sec. 160.759. EXCLUSIVE, CONTINUING JURISDICTION. Subject to Section 152.201, a court that conducts a proceeding under this subchapter has continuing, exclusive jurisdiction of all matters arising out of the gestational agreement until the date a child born to the gestational mother during the period covered by the agreement reaches 180 days of age.

Sec. 160.760. TERMINATION OF GESTATIONAL AGREEMENT. (a) Before a prospective gestational mother becomes pregnant by means of assisted reproduction, the prospective gestational mother, her husband if she is married, or either intended parent may terminate a gestational agreement validated under Section 160.757 by giving written notice of the termination to each other party to the agreement.

(b) The court, on a showing of good cause, may terminate a gestational agreement.

(c) A person who terminates a gestational agreement shall file notice of the termination with the court. A person having the duty to notify the court who does not notify the court of the termination of the agreement is subject to appropriate sanctions.

(d) On receipt of the notice of termination, the court shall vacate the order rendered under Section 160.757 validating the gestational agreement.

(e) A prospective gestational mother and her husband, if she is married, may not be liable to an intended parent for terminating a gestational agreement if the termination is in accordance with this section.

Sec. 160.761. PARENTAGE UNDER VALIDATED GESTATIONAL AGREEMENT. (a) On the birth of a child to a gestational mother under the terms of a validated gestational agreement, the intended parents shall file a notice of the birth with the court not later than the 300th day after the date assisted reproduction occurred.

- (b) After receiving notice of the birth, the court shall render an order that:
- (1) confirms that the intended parents are the child's parents;
  - (2) requires the gestational mother to surrender the child to the intended parents, if necessary; and
  - (3) requires the bureau of vital statistics to issue a birth certificate naming the intended parents as the child's parents.
- (c) If a person alleges that a child born to a gestational mother did not result from assisted reproduction, the court shall order that scientifically accepted parentage testing be conducted to determine the child's parentage.

Sec. 160.762. EFFECT OF GESTATIONAL MOTHER'S MARRIAGE AFTER VALIDATION OF AGREEMENT. If a gestational mother is married after the court renders an order validating a gestational agreement under this subchapter:

- (1) the validity of the gestational agreement is not affected;
- (2) the gestational mother's husband is not required to consent to the agreement; and
- (3) the gestational mother's husband is not a presumed father of the child born under the terms of the agreement.

Sec. 160.763. EFFECT OF GESTATIONAL AGREEMENT THAT IS NOT VALIDATED. (a) A gestational agreement that is not validated as provided by this subchapter is not enforceable, regardless of whether the agreement is in a record.

(b) The parent-child relationship of a child born under the terms of a gestational agreement that is not validated as provided by this subchapter is determined as otherwise provided by this chapter.

(c) A party to a gestational agreement that is not validated as provided by this subchapter who is an intended parent under the agreement may be held liable for the support of a child born under the terms of the agreement, even if the agreement is otherwise unenforceable.

(d) The court may assess filing fees, reasonable attorney's fees, fees for genetic testing, other costs, and necessary travel and other reasonable expenses incurred in a proceeding under this section. Attorney's fees awarded by the court may be paid directly to the attorney. An attorney who is awarded attorney's fees may enforce the order in the attorney's own name.

SECTION 2. (a) This Act takes effect September 1, 2001.

(b) The change in law made by this Act applies to a motion or other request for relief made in a parentage or paternity proceeding that is commenced on or after the effective date of this Act. A motion or request for relief made in a parentage or paternity proceeding commenced before the effective date of this Act is governed by the law in effect at the time the proceeding was commenced, and the former law is continued in effect for that purpose.

SECTION 3. This Act takes effect only if the 77th Legislature, at its regular session, enacts a bill adopting the Uniform Parentage Act and that bill becomes law. If that bill does not become law, this Act has no effect.