

INTERSTATE INTERCOURSE:
HOW MODERN ASSISTED REPRODUCTIVE TECHNOLOGIES
CHALLENGE THE TRADITIONAL REALM OF CONFLICTS OF
LAW

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“The realm of the conflict of laws is a dismal swamp, filled with quaking quagmires, and inhabited by learned but eccentric professors who theorize about mysterious matters in a strange and incomprehensible jargon. The ordinary court, or lawyer, is quite lost when engulfed and entangled in it.”¹

“The rise of these new technologies and therapeutic modalities, including the use of third parties, to assist in creation or gestation of an embryo has created a host of novel legal issues. The resolution of these issues has caused confusion and contradictions in the application of a body of existing statutory and common law.”²

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1. William L. Prosser, *Interstate Publication*, 51 MICH L. REV. 959, 971 (1953).

2. AMERICAN BAR ASS’N, AMERICAN BAR ASSOCIATION MODEL ACT GOVERNING ASSISTED REPRODUCTIVE TECHNOLOGY (2008), available at www.abanet.org/family/committees/artmodelact.pdf [hereinafter “MODEL ART ACT”].

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INTRODUCTION

It is a Conflicts professor's dream hypothetical and a parent's worst nightmare: a woman in one state gives birth to a baby with genetically linked abnormalities after using sperm donated by a donor in a different state and after having pre-implantation genetic diagnosis done by a specialist in a third state.

Farfetched as this may sound, recent medical advances have made this possible. Imagine in this scenario that the woman was unable to conceive and needed donor sperm and the assistance of in vitro fertilization. Perhaps she was concerned about a specific hereditary condition and consulted a nationally prominent genetic specialist who analyzed cells from the embryos and advised her reproductive endocrinologist which embryos to implant. After benefiting from the reproductive technologies available, perhaps the mother discovered after giving birth that her child actually had the genetic defect. This set of facts sets up a potential “wrongful life” or “wrongful birth” suit, which is controversial in and of itself, but facts can easily transform this into a more complicated Conflicts problem. Imagine that the mother and the embryos are in one state. The sperm donor is in another. The genetic specialist is in another. Imagine further that the mother traveled from her state to see a reproductive specialist in a fourth state, where the cells from the embryos were removed and sent to the endocrinologist, but that the mother chose to bring suit in her own state. To perfect the Conflicts conundrum that this creates, imagine the last component: all the states have different laws about whether “wrongful life” suits are allowed, have different standards for negligence suits against reproductive specialists, and are missing any clear legislative guidance on some of the trickier issues of regulation of sperm donors and genetic testing. Whose law should apply?

The courts have cried out for decades for assistance in resolving simpler issues.³ For most courts, the challenge has been the lack of laws in this area.⁴ The American Bar Association, passing a Model Act on assisted reproductive technologies (hereinafter “ART”) in February 2008, described the challenge as follows in a prefatory note:

Since the birth of the first in vitro fertilization (IVF) baby in 1978, extraordinary advances in reproductive medicine have made biological parenthood possible for people with infertility, certain other medical conditions, for individuals who risk passing on inheritable diseases or genetic abnormalities, or for individuals who are effectively infertile due to social rather than medical reasons. Such advances have also been applied to extend reproductive potential by treating post-menopausal women. These advances use technology to enable individuals to have children when for personal

3. See, e.g., *Hodas v. Morin*, 814 N.E.2d 320, 327 n.16 (Mass. 2004) (“As we stated in *Culliton v. Beth Israel Deaconess Med. Ctr.*, . . . and elsewhere, the Legislature is the most appropriate forum to address issues raised by assistive technology in a comprehensive fashion . . .”).

4. See, e.g., *Prato-Morrison v. Doe*, 126 Cal. Rptr. 2d 509, 516 n.10 (Cal. Ct. App. 2002) (“We join the chorus of judicial voices pleading for legislative attention to the increasing number of complex legal issues spawned by recent advances in the field of assisted reproduction. Whatever merit there may be to a fact-driven case-by-case resolution of each new issue, some over-all legislative guidelines would allow the participants to make informed choices and the courts to strive for uniformity in their decisions.”).

reasons they cannot or choose not to do so by means of sexual intercourse. These advances have also been used to retrieve gametes from dead or incapacitated individuals, or to manipulate differentiated cells to produce the equivalent or near-equivalent of a human embryo, capable of implantation in the uterus and gestation to term birth.⁵

New technologies, and ART in particular, always provide challenges to established legal norms.⁶ Rules and tests may need to be rethought in order for the law to address disputes that arise when such technology fails. Moreover, choices—or the appearance of choices—made possible by reproductive technologies will open the door to lawsuits because potential parents feel that they have more control over the number, gender and genetic makeup of their offspring. This article attempts to identify some of the potential problems, and thus, lawsuits, that arise from the use of reproductive technology and to propose some solutions.

This article is organized into four sections. The first section describes ART in detail so that the reader understands the background to the potential problems that may arise. The second section discusses possible problems, lawsuits, and why these types of suits may be particularly problematic in a multistate context. The third section describes current choice of law options and how these might be and have been applied to ART lawsuits. The last section proposes some solutions for resolving multistate ART lawsuits, including the best choice of law approach, and how parties can protect themselves through more proactive choices of law in contract formation.

It is every parent's nightmare that such lawsuits will arise. This means that something has gone wrong, and when it comes to conception and reproduction, the "something wrong" is likely to be serious. It is this mother's hope that such lawsuits will not be needed and that procedures will be performed perfectly. However, given the reality of imperfection and the fact that assisted reproductive technologies are increasingly being applied across state lines, it is at least this professor's dream that this article can help simplify the adjudication of such suits and help lend some predictability to an area that is inherently unpredictable. The goal of analysis is to help clarify a potentially confusing situation and make the procedures and possible lawsuits less nightmarish for parents and the courts, if a little bit less interesting for Conflicts professors.

5. *Preface to MODEL ART ACT*, *supra* note 2.

6. Widespread use of the internet, for example, has added new wrinkles to the laws of personal jurisdiction, and trademark and copyright infringement, among others. *See, e.g.*, Jeremy Gillman, *Personal Jurisdiction and the Internet: Traditional Jurisprudence for a New Medium*, 56 BUS. LAW. 395 (2000). Earlier, industrialization and multi-party distribution chains led to the development of the products liability doctrine in tort law. *See, e.g.*, Friedrich Kessler, *Products Liability*, 76 YALE L.J. 887 (1967).

PART ONE: THE NEW TECHNOLOGIES AND THE LEGAL ISSUES THEY CREATE

I. THE NEW TECHNOLOGIES: AN OVERVIEW OF ART

In order to understand the legal issues involved, it is helpful to have a general background in ART procedures. It is important to note at the outset that ART is not limited in any way to heterosexual married couples. Such use is still frequent,⁷ but, increasingly, “nontraditional” couples or individuals seek to create families through ART.⁸

The easiest way to discuss ART is to focus on the reasons for the procedures. The first group of these reasons focuses on impaired fertility of one or both members of the couple. In the case of heterosexual partners who find themselves unable to conceive naturally, the first step toward ART is a screening and workup of both partners.⁹ This type of screening may inform the physician whether the inability to conceive¹⁰ is due to a female factor,¹¹ a male factor,¹² a combination of both, or some unexplained reason.¹³ In a case of a single prospective parent, or a couple of the same gender, a workup is often done as well, but often there is a clearer answer to what is necessary for the person or couple to conceive.¹⁴

A. Egg Stimulation

In instances where the reason for the inability to conceive is because of insufficient egg production by the female and in instances where a female needs to have some extra stimulation to produce more than a normal number of eggs,¹⁵ the physician will often try to stimulate the egg production itself.¹⁶ The

7. See generally Charles P. Kindregan, *Thinking About the Law of Assisted Reproductive Technology*, 27 WIS. J. FAM. L. 123 (2007).

8. In fact, in *North Coast Women's Care Medical Group, Inc. v. Superior Court*, 81 Cal. Rptr. 3d 708, 712 (Cal. 2008), the California Supreme Court held that patients cannot be denied access to ART because of their sexual orientation.

9. DANIEL KENIGSBURG WITH LAUREN HARTMAN, *THE BABY SOLUTION: YOUR ESSENTIAL RESOURCE FOR OVERCOMING INFERTILITY* 30-53 (2006).

10. Or, for some couples, the inability to carry a fetus to term. SHERMAN J. SILBER, *HOW TO GET PREGNANT* 357-77 (rev. ed. 2005).

11. Female factors can include ovarian cysts, diminished ovarian reserve, blocked or damaged fallopian tubes, uterine fibroids and/or polyps, Asherman's syndrome (in which scarring causes the uterine walls to become stuck together), and endometriosis. KENIGSBURG & HARTMAN, *supra* note 9, at 83-130.

12. Male factors can include low or no sperm production (which may have a variety of causes), retrograde ejaculation (in which semen does not exit the body), and varicoceles (in which an obstruction of venous drainage in the scrotum raises the temperature in the scrotum and damages the sperm). *Id.* at 141-56.

13. See generally *id.* at 83-156.

14. See generally SUSAN WARHUS, *FERTILITY DEMYSTIFIED* 71-92 (2007).

15. For example, to save for an in vitro fertilization cycle.

16. All of this is described very generally for the purpose of this article. In some females, a diagnosis might be made that an attempt to stimulate egg production will not

least invasive method of assisted reproduction is the use of Clomiphene Citrate ("CC").¹⁷ This drug stimulates the production of eggs in a woman's ovaries.¹⁸ This type of assisted reproduction is not usually classified as "assisted reproductive technology" because it is more of a stimulating drug and does not involve the manipulation of eggs or sperm in a lab.¹⁹

B. Intrauterine Insemination

Intrauterine insemination, which is sometimes done in conjunction with egg production stimulation, and/or donor sperm, is a procedure in which a doctor inserts washed and concentrated sperm directly into a woman's uterus to coincide with the time that she is ovulating.²⁰

C. In Vitro Fertilization and Related Procedures

In vitro fertilization (IVF) is the most well known of the ART procedures and the most successful treatment for most causes of infertility.²¹ IVF, which was "born" in the late 1970s at a clinic in England,²² gained in popularity and acceptance over the years.²³ Traditional IVF involved the removal of eggs from a female,²⁴ the production of sperm by the male, and the mixing of the eggs and sperm in a culture dish prior to incubation and fertilization.²⁵ Traditionally, after two days, a fertilized egg or embryo—or, in some instances, several embryos—were put back into the woman's uterus with the hope that it would implant.²⁶ Because not all of the resultant embryos are necessarily transferred and some may remain frozen at the laboratory or in a storage facility, there is currently an important national debate about the proper or allowed uses of those embryos.²⁷ If initially unsuccessful, the IVF procedure may be repeated with the frozen embryos.²⁸

likely succeed because of low hormonal levels in certain areas, or for other health reasons. See generally SILBER, *supra* note 10, at 99-118.

17. See generally DEBRA FULGHAM BRUCE & SAMUEL S. THATCHER, MAKING A BABY: EVERYTHING YOU NEED TO KNOW TO GET PREGNANT 226-28 (2000). This drug is available under the brand names Serophene, Milophene, and the most well known, Clomid. *Id.*

18. *Id.* at 226.

19. *Id.*

20. See WARHUS, *supra* note 14, at 152.

21. SILBER, *supra* note 10, at 198.

22. *Id.* at 197.

23. See *id.* at 197-98.

24. Referred to as "aspiration." See generally BRUCE & THATCHER, *supra* note 17, at 248.

25. SILBER, *supra* note 10, at 199.

26. *Id.*

27. For an excellent discussion of transfer of embryos, see Charles P. Kindregan, Jr. & Maureen McBrien, *Embryo Donation: Unresolved Legal Issues in the Transfer of Surplus Cryopreserved Embryos*, 49 VILL. L. REV. 169 (2004).

28. See WARHUS, *supra* note 14, at 167. For some couples, this is a favorable option because the woman does not need to go through ovarian stimulation or aspiration.

Several other procedures became tied to IVF. First, a procedure known as gamete intrafallopian transfer (GIFT) was used to replace the mixing of eggs and sperm in a Petri dish.²⁹ With GIFT, sperm and eggs were placed directly into the fallopian tube and allowed to fertilize there, with the hope that the fallopian tube would move the embryo down to the uterus at the natural time.³⁰ Although the procedure initially grew in popularity because of a rise in pregnancy rates with GIFT as opposed to traditional IVF, it quickly fell out of favor with most physicians because there was no way to ensure either fertilization or embryo quality and because the placing of sperm and egg into the fallopian tubes required a surgical procedure.³¹ A second related procedure, known as zygote intrafallopian transfer (ZIFT), was a combination of IVF and GIFT; with ZIFT, eggs were still fertilized in a Petri dish, but the zygotes³² were transferred into the fallopian tube rather than being placed in an incubator.³³ Both GIFT and ZIFT fell out of favor as other techniques helped couples achieve pregnancy in less complicated ways.³⁴ Two more related, but even less widely used, procedures are tubal embryo transfer (TET) and Pronuclear Stage Transfer (PROST).³⁵ Both of these procedures differ from IVF, GIFT, and ZIFT in the stage of development at which transfer of the embryo was made.³⁶ The high cost of these procedures, along with their relative lack of success compared to IVF, has made these much less popular than IVF.³⁷

D. ICSI and Related Procedures

Another form of ART, used on its own or in conjunction with IVF, is intracytoplasmic sperm injection (ICSI).³⁸ Developed by American and European doctors in the mid 1990s, ICSI allows men with poor sperm amount or quality to use their own sperm in fertilizing an egg.³⁹ With this procedure, "each egg is individually injected with a single sperm under a microscope using delicate microscopic tools"⁴⁰ so that as long as there is one spermatozoa with DNA, the egg will often become fertilized.⁴¹ This procedure is sometimes used

29. SILBER, *supra* note 10, at 199.

30. *Id.*

31. *Id.* at 200. Interestingly, one of the reasons that GIFT is still occasionally used is because it allows Catholic couples to "follow the papal injunction against IVF. The Catholic church still fully approves GIFT because the papacy prefers that fertilization of the egg take place inside the body rather than in a [P]etri dish." *Id.*

32. The pre-embryonic stage.

33. SILBER, *supra* note 10, at 200.

34. *Id.* at 201.

35. BRUCE & THATCHER, *supra* note 17, at 254-55.

36. *Id.* at 255.

37. *Id.*

38. See SILBER, *supra* note 10, at 247-71.

39. *Id.* at 247.

40. *Id.*

41. *Id.*

in conjunction with sperm aspiration procedures, which are designed to extract sperm from the male reproductive tract.⁴²

The significance of these procedures for the purpose of choice of law analysis is that they allow for the possibility of having reproductive components (sperm, egg, or even cells from eggs) in different locations from the people involved in the procedures, and thus, multiple persons and locations may be involved in a lawsuit where the laws may differ.

E. Third-party Reproduction – and More

The procedures described above are used to make a baby using the genetic materials (sperm and egg) and place for the embryo-fetus to develop (uterus) of two people, whether known to each other or not.⁴³ However, these procedures, combined with other techniques and innovative solutions, have opened the door to “reproduction” done with three or more people rather than two.

1. Ovum (Egg) Donation

For an egg donation, a woman first needs to be identified as a donor.⁴⁴ The menstrual cycles of the donor and recipient are manipulated to be in sync.⁴⁵ The donor takes fertility medications of the kind described above to stimulate the production of multiple eggs.⁴⁶ These eggs are removed from her body and can be fertilized with sperm.⁴⁷ The fertilized eggs can mature in a laboratory for up to five days, at which point some of the fertilized eggs are transferred to the recipient.⁴⁸ While the donor is taking fertility medications, the recipient is taking hormones to prepare her uterus to accept an embryo.⁴⁹ After the embryo is implanted, the woman continues to take hormones to support the pregnancy.⁵⁰

42. See generally BRUCE & THATCHER, *supra* note 17, at 256-57. These procedures include percutaneous epididymal sperm aspiration (“PESA”), microsurgical sperm aspiration (“MESA”), and testicular sperm aspiration (“TESA”). *Id.* at 256.

43. For example, a woman might use her own eggs but sperm from a donor.

44. See generally BRUCE & THATCHER, *supra* note 17, at 257.

45. *Id.*

46. *Id.* A woman will often produce 10 to 20 eggs. *Id.* Although this is not yet done in any reported or known fashion, it is at least theoretically possible that an egg donor could donate eggs to more than one recipient, thus increasing the number of potential parties involved.

47. *Id.* The sperm may be that of the husband of the woman who will carry the fetus, thus creating a reproductive situation with three parties (egg donor, recipient, husband) or it may be that of a sperm donor, which would add that donor as a replacement third party to the reproductive process, but also, if the woman has a spouse, as a fourth party to the formation of their family.

48. *Id.*

49. *Id.*

50. *Id.*

2. Donor Cytoplasm

A newer type of third-party reproduction is a procedure where a donor donates the cytoplasm of her eggs, rather than her eggs themselves.⁵¹ Very simply, the cytoplasm is the component of the egg that makes the machinery of the egg “work.”⁵² In this way, it is distinguished from the nucleus of the egg, which contains most of the genetic material of the egg.⁵³ Technically, this is a form of third-party reproduction⁵⁴ because the components of a third party are used in the reproductive process. However, since the donated cytoplasm is added to the DNA containing the nucleus of the recipient, the resulting embryo is more genetically related to the recipient than an embryo achieved through egg donation.⁵⁵ Regardless, donor cytoplasm is currently under study and usually is not recommended as a procedure to achieve pregnancy.⁵⁶

3. Donor Sperm

Using donor sperm has become a less necessary option for heterosexual couples who can improve sperm quality through other methods, but continues to be an important option for single women and lesbian couples.⁵⁷ It is recommended that those who choose this option use sperm from “a well-selected anonymous donor.”⁵⁸ Sperm is generally chosen from a sperm bank and then used to inseminate the prospective mother or to fertilize the chosen eggs.⁵⁹ It is important for the recipient to choose a reputable sperm bank, as some states do not require licensing of banks while others mandate stringent screening for various diseases prior to donation.⁶⁰

Some sperm donation is done less formally, such as where a friend volunteers to donate a sperm sample. Most guidelines warn women to be very careful of such donations in part because of the health risks that might not be screened out as they would be at a sperm bank⁶¹ and in part because the donor’s claim for parental rights, as discussed later, may depend on whether he is a known donor.⁶²

51. *Id.* at 258. In this procedure, cytoplasm from younger, donor, eggs is transplanted into older or unhealthy eggs.

52. *Id.*

53. *Id.*

54. Or, if other donor components are used, can be “fourth-party” reproduction.

55. It is quite likely the possibility of a genetic connection that makes people want to try this in the first place.

56. BRUCE & THATCHER, *supra* note 17, at 258.

57. KENIGSBERG & HARTMAN, *supra* note 9, at 306.

58. SILBER, *supra* note 10, at 411.

59. KENIGSBERG & HARTMAN, *supra* note 9, at 306.

60. *Id.*

61. *Id.* at 308-09.

62. CHARLES P. KINDREGAN, JR. & MAUREEN MCBRIDE, ASSISTED REPRODUCTIVE TECHNOLOGY: A LAWYER’S GUIDE TO EMERGING LAW AND SCIENCE 36-37 (2006).

4. Surrogacy ("Donor" Uterus)

The component of the surrogacy process that comes from a third party is the uterus used to carry the embryo and then fetus to term.⁶³

A gestational surrogate "carries a pregnancy that is the product of an egg and sperm of two other individuals."⁶⁴ In that way, a gestational surrogate brings a third party to the reproductive process. A traditional surrogate is inseminated with sperm from the male partner of the couple who wants the baby; "the child that results is genetically related to the surrogate and also to the male partner, but not to the female partner of the infertile couple."⁶⁵

5. Donor Embryos

The procedure where embryos that exist are transferred into the uterus of a woman⁶⁶ is the ART procedure that is the most ridden with problems, to the extent that it is even hard to describe without contributing to the debate on it. The discussion on this topic—and the description of this process as "adoption" versus "donation"⁶⁷—highlights the differences of opinion that exist about the precise status of an embryo.⁶⁸ For the purpose of this article, it is not necessary to resolve that controversy or to label this procedure "donation" or "adoption." The focus here remains on the facts that third- (and possibly fourth-) party components (egg or sperm or both) are transferred to a woman whose uterus then carries the fetus to term. The embryos may come from those that remain after an IVF procedure⁶⁹ or may be embryos created in particular for this procedure.⁷⁰ With this procedure, there may be three parties involved in the reproduction: the provider of the sperm for the embryo, the provider of the egg, and the provider of the uterus that houses the embryo.

As a result of all of these advances in the area of assisted reproduction, the number of people involved in making a baby and becoming parents could be as many as five.⁷¹

63. See KENIGSBURG & HARTMAN, *supra* note 9, at 311-16. For an excellent discussion of the legal issues involved in surrogacy, see Lori B. Andrews, *Beyond Doctrinal Boundaries: A Legal Framework for Surrogate Motherhood*, 81 VA. L. REV. 2343 (1995).

64. BRUCE & THATCHER, *supra* note 17, at 260.

65. *Id.*

66. See *id.* at 258.

67. See Jessica L. Lambert, *Developing a Legal Framework for Resolving Disputes Between "Adoptive Parents" of Frozen Embryos: A Comparison to Resolutions of Divorce Disputes Between Progenitors*, 49 B.C. L. REV. 529 (2008).

68. See Kindregan & McBrien, *supra* note 27, at 174-75; see also Tracy Haslett, J.B. v. M.B.: *The Enforcement of Disposition Contracts and the Competing Interests of the Right to Procreate and the Right Not to Procreate Where Donors of Genetic Materials Dispute the Disposition of Unused Preembryos*, 20 TEMP. ENVTL. L. & TECH. J. 195 (2002) (discussing embryos in the context of the debate about abortion).

69. See *supra* notes 27-28 and accompanying text.

70. *Id.*

71. This assumes that there are two intended parents of either the same or different genders. This does not take into account the interests of a surrogate's husband, or the

Type of Conception	Maximum Number of People Involved:
Conception Involving a Man and a Woman	2 (man and woman)
Donor Sperm	3 (two intended parents plus donor)
Donor Egg	3 (two intended parents plus donor)
Traditional Surrogacy	3 (two intended parents plus surrogate, inseminated with sperm from the male)
Gestational Surrogacy	3 (two intended parents plus surrogate)
Donor Embryo	4 (two intended parents plus the two people who donated egg and sperm to create the embryo)
Donor Egg and Donor Sperm	4 (two intended parents plus donors of egg and sperm)
Donor Egg Plus Gestational Surrogate	4 (two intended parents plus egg donor plus surrogate)
Donor Egg Plus Donor Sperm Plus Gestational Surrogate	5 (two intended parents plus egg donor, sperm donor, and surrogate)

Adding the fact that eggs and sperm can be separated geographically from the donors—stored and moved to different locations—and that even cells from embryos can be moved, the potential for interstate conflicts is significant. On top of that, a court may need to adjudicate the behavior of the physicians and specialists involved, who could be in various states, and, if an out-of-state insurance company also has interests in the case,⁷² even more potential arises for interstate conflicts.

II. THE LEGAL PROBLEMS CREATED: LAWSUITS AND LACK OF GUIDANCE

In order to consider the legal issues that arise from the use of ART in a multistate context, it is necessary to first identify the legal issues presented by the use of such technologies regardless of conflicts of law. There is a lack of legislative guidance or regulation on much of what is done.⁷³ The world of ART has been referred to for many years as the “Wild West” of medicine because it uses so many new technologies and reinvents medical procedures in

possibility of a larger blended family where there are more than two intended parents. That, of course, could increase these numbers even more.

72. See, e.g., *St. Paul Fire & Marine Ins. Co. v. Jacobson*, 826 F. Supp. 155 (E.D. Va. 1993), *aff’d*, 48 F.3d 778 (4th Cir. 1995), discussed *infra*; see also *Am. Econ. Ins. Co. v. Schoolcraft*, 551 F. Supp. 2d 1235 (D. Colo. 2007), discussed *infra*.

73. KINDREGAN & MCBRIEN, *supra* note 62, at 24-25.

unique ways.⁷⁴ Because of this, lawsuits have arisen on a variety of issues, and the differences in how these issues get resolved indicate both their intrinsic difficulty and the lack of uniformity in the approaches themselves. In other words, it is both the lack of legislation *and* inconsistency in judicial decisions that creates problematic, conflicting situations.

A. *Lawsuits Resulting from Failures in the Technology Itself, or Physician Malpractice*

The first category of lawsuits arising from ART includes those that stem from allegations of malpractice. These types of lawsuits are akin to many medical malpractice suits, though they can extend beyond that as well, due to the lack of regulations and medical standards in this area. This category includes several different types of cases.

One group of cases involves insemination using the wrong sperm.⁷⁵ For example, in one case, parents and their child, who was born through in vitro fertilization, brought suit against the clinic, clinic owner, doctors, and embryologist alleging medical malpractice and negligence.⁷⁶ The couple, Nancy and Thomas Andrews, had intended to use Thomas's sperm to fertilize Nancy's egg, but instead sperm from another man was used.⁷⁷ When baby Jessica Andrews was born, she appeared to be of African or African American descent while the father is white and her mother is from the Dominican Republic.⁷⁸ According to their suit, one of their doctors originally told them nothing was wrong and that Jessica would "get lighter over time."⁷⁹ When that didn't happen, the couple bought a home DNA kit that confirmed that Thomas Andrews was not the child's biological father.⁸⁰ The trial court found that the Andrews couple could not recover for the emotional distress they experienced when they were deprived of the chance to have their own genetic child, saying that the birth of a healthy child is not a cognizable injury under New York law.⁸¹ However, the court allowed their emotional distress claim for the pain they suffered over uncertainty as to whether their genetic material had been improperly given to others, as well as their fear that Jessica's genetic father might someday seek custody.⁸² The trial court dismissed Jessica's claims for emotional distress, finding that defendants owed no duty of care to her because

74. LORI B. ANDREWS, *THE CLONE AGE: ADVENTURES IN THE NEW WORLD OF REPRODUCTIVE TECHNOLOGY* 219-20 (1999).

75. See, e.g., *Harnicher v. Univ. of Utah Med. Ctr.*, 962 P.2d 67 (Utah 1998); see also *Andrews v. Kelz*, 838 N.Y.S.2d 363 (N.Y. Sup. Ct. 2007).

76. *Andrews*, 838 N.Y.S.2d at 365.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.* at 365-66.

81. *Id.* at 368-69.

82. *Id.* at 369.

their alleged negligence took place before she was even in utero.⁸³ However, the court found that the Andrews couple was entitled to summary judgment in their negligence claim against the embryologist on the grounds of *res ipsa loquitur* because their circumstantial evidence of negligence was strong and unrebutted by the embryologist.⁸⁴

In a similar case, parents brought suit after the medical center allegedly used sperm from a donor other than the one the couple had selected in order to perform in vitro fertilization.⁸⁵ The couple, David and Stephanie Harnicher, sought recovery for negligent infliction of emotional distress, but the court, affirming a grant of summary judgment to the hospital, determined that the couple had failed to state a claim for negligent infliction of emotional distress primarily because the couple stated in depositions that they had not suffered any bodily harm as a result of the sperm mix-up.⁸⁶ The Harnichers apparently had hoped to be able to have their own genetic child, but when that appeared unlikely, their doctor suggested they use a mix of donor sperm and David's sperm.⁸⁷ The couple agreed but argued that they only agreed to the use of sperm from one donor, No. 183, who physically resembled David and had the same blood type.⁸⁸ Essentially, if the children were not David's, they never wanted to know about it.⁸⁹ However, after Stephanie gave birth to triplets, the couple discovered the children were genetically neither David's nor donor 183's.⁹⁰ The high court majority described the Harnichers' claim as one for "the destruction of a fiction" that David was the children's father and refused to recognize that as a basis for a suit for malpractice or negligent infliction of emotional distress.⁹¹

In another situation, several lawsuits sprang from allegations that a fertility specialist, Dr. Jacobson, had inseminated patients with *his own* sperm.⁹² The main issue in one of the cases was whether a couple could testify

83. *Id.* at 370.

84. *Id.* at 372-73.

85. *Harnicher v. Univ. of Utah Med. Ctr.*, 962 P.2d 67, 68 (Utah 1998).

86. *Id.* at 71.

87. *Id.* at 68.

88. *Id.*

89. *Id.* at 74 (Durham, J., dissenting).

90. *Id.* at 68.

91. *Id.* at 72. Note, however, that two justices dissented, finding that evidence of mental distress on the Harnichers' part should have been enough for the case to go forward. *Id.* at 77 (Durham, J., dissenting). The dissenters point out that the Harnichers specifically contracted with the medical center for children who would appear to be David's; because the children do not appear to be David's, the Harnichers did suffer an injury, which should have been compensable. *Id.* at 74-75 (Durham, J., dissenting).

92. See *St. Paul Fire & Marine Ins. Co. v. Jacobson*, 826 F. Supp. 155, 157 (E.D. Va. 1993), *aff'd*, 48 F.3d 778 (4th Cir. 1995); see also *James v. Jacobson*, 6 F.3d 233 (4th Cir. 1993) (holding that a couple whose children were Dr. Jacobson's genetic offspring because the wife had been inseminated with Jacobson's own sperm could proceed anonymously in their medical malpractice suit against the doctor).

anonymously,⁹³ but another case involved an insurance dispute related to the activities described in the above suit, namely, Jacobson's insemination of his patients with his own sperm.⁹⁴ St. Paul, the insurance company that insured Jacobson and the clinic where he worked, sought a declaratory judgment that it did not have to indemnify Jacobson or the clinic.⁹⁵ The insurer had provided a professional liability policy to the clinic and Jacobson.⁹⁶ The insurer argued that Jacobson lied on an insurance application,⁹⁷ that it was against public policy to have a duty to defend Jacobson for his own intentional misconduct,⁹⁸ and that his activities did not constitute "professional services."⁹⁹ The court rejected all of those arguments and granted summary judgment in favor of Jacobson and the clinic.¹⁰⁰ The court found that Jacobson did not lie on the application when it asked whether he was aware of "any pending claims or activities (including request for medical records) that might give rise to a claim in the future."¹⁰¹ Jacobson said yes, but was referring to an unrelated suit and did not disclose any of his activities in inseminating patients with his own sperm.¹⁰² The court said this was at most a "non-disclosure," not a misrepresentation, and so the response did not bar coverage.¹⁰³ The court also found that the activities clearly arose out of Jacobson's professional services because they had to do with insemination.¹⁰⁴ And while the court said there are public policy considerations that bar coverage for intentional wrongdoing, it said there were countervailing policy concerns here, where the injured patients would ultimately benefit from the coverage extended to Jacobson.¹⁰⁵ Further, the insurance policy could have included a bar for intentional or criminal wrongdoing, but did not.¹⁰⁶

Another famous medical malpractice ART case involved a Doctor Stone, who was on the faculty of a state university hospital and was sued as part of an alleged "egg-stealing" scheme.¹⁰⁷ The allegations were that Stone and other doctors affiliated with his reproductive clinic took human eggs and implanted them in female patients without the egg donor's consent.¹⁰⁸ The appellate court reversed the trial court's finding that the Regents of the University were obligated to defend Stone in the suit brought by patients Susan and Wayne

93. *James*, 6 F.3d at 234.

94. *St. Paul*, 826 F. Supp. at 157.

95. *Id.*

96. *Id.*

97. *Id.* at 158.

98. *Id.* at 162.

99. *Id.* at 161-62.

100. *Id.* at 165.

101. *Id.* at 159.

102. *Id.* at 158.

103. *Id.* at 159.

104. *Id.* at 161-62.

105. *Id.* at 164-65.

106. *Id.* at 165.

107. *Stone v. Regents of Univ. of Cal.*, 92 Cal. Rptr. 2d 94, 96 (Cal. Ct. App. 1999).

108. *Id.*

Clay, ruling there was evidence to support the Regents' conclusion that Stone was not entitled to a defense because he was not acting within the scope of his employment at the time of the alleged scheme.¹⁰⁹ The court noted that Stone had been a tenured professor for 18 years with a renowned fertility clinic; as such, his conduct in allegedly stealing eggs was so "startling and unusual" that it would be unfair to impose the risks of his conduct on the university.¹¹⁰

Other cases have focused on issues such as lack of consent in an insemination procedure¹¹¹ and illness resulting from the procedure itself.¹¹² In one such case, punitive damages were upheld, which is somewhat atypical in these types of cases.¹¹³ In that case, life partners Kelly and Caroline Chambliss sued their fertility clinic and nurse, seeking compensatory and punitive damages after Kelly became violently ill when the clinic inseminated her with unwashed sperm in violation of its own safety procedures.¹¹⁴ The jury ruled in their favor, and the appeals court affirmed.¹¹⁵ On appeal, the defendants argued that evidence was insufficient to support an award of punitive damages.¹¹⁶ But the court disagreed, noting that the nurse admitted she violated the safety protocol in several ways, including by failing to examine the sperm sample under a microscope prior to the insemination.¹¹⁷ As such, there was sufficient evidence for the jury to find that the nurse acted willfully and wantonly.¹¹⁸

Yet other medical malpractice type cases involving ART have, not surprisingly, focused on the duties of the insurance company.¹¹⁹ One case was an insurance dispute over whether the American Economy Insurance Co. was required to defend and indemnify a doctor and clinic sued for allegedly failing to screen a donor egg for cystic fibrosis, resulting in the birth via in vitro fertilization of a baby girl suffering from the disease.¹²⁰ In the underlying action, the child's parents brought suit against their doctor and the clinic where he practiced; that suit was eventually settled with the dismissal of the complaints against the named doctors and the clinic's agreement to go to

109. *Id.* at 101-02.

110. *Id.* at 102.

111. See *Kerns v. Schmidt*, 641 N.E.2d 280, 286 (Ohio Ct. App. 1994) (holding that a husband could maintain a private right of action against a doctor who negligently failed to obtain the husband's consent to a nonspousal artificial insemination); but see *Shin v. Kong*, 95 Cal. Rptr. 2d 304, 307 (Cal. Ct. App. 2000) (holding that a father and husband could not bring a tort claim against a physician who had performed an artificial insemination on his former wife without his consent because he was never a patient himself).

112. See *Chambliss v. Health Sci. Found.*, 626 S.E.2d 791 (N.C. Ct. App. 2006).

113. *Id.* at 795.

114. *Id.* at 793-94.

115. *Id.* at 794, 796.

116. *Id.* at 794.

117. *Id.* at 794-95.

118. *Id.* at 795.

119. *Am. Econ. Ins. Co. v. Schoolcraft*, 551 F. Supp. 2d 1235 (D. Colo. 2007).

120. *Id.* at 1237-38.

arbitration on the issue of damages.¹²¹ The arbitration award to the parents exceeded the available insurance coverage under the clinic's professional liability policy, which is why the parties were looking to American Economy's commercial general liability policy.¹²² American Economy filed suit seeking a declaration that it had no duty to defend or indemnify the clinic because the accusations in the Goff/Taylor suit fell into the professional services exclusion in the policy.¹²³ The court agreed, finding the allegations were all related to the provision of medical services in an in vitro fertilization procedure, as well as genetic screening and counseling.¹²⁴

B. *Lawsuits from Improper Genetic Diagnosis*

Another type of ART medical malpractice case is that of improper genetic diagnosis.¹²⁵ These types of cases are unique to ART because ART makes certain types of pre-implantation diagnosis possible, or at least easier to perform.¹²⁶ Problems also arise because the possibility of diagnosis that would have been unavailable without ART raises the parents' expectations that they will have a child free of genetic "defects."¹²⁷

These types of cases are difficult in and of themselves because of the proof issues involved,¹²⁸ but also because they confront courts with the issue of whether to allow recovery for "wrongful life,"¹²⁹ a controversial, and, importantly for this article, conflicting topic¹³⁰ for the states and courts.

121. *Id.*

122. *Id.* at 1238.

123. *Id.* at 1239-40.

124. *Id.* at 1242-44.

125. See, e.g., *Paretta v. Med. Offices for Human Reprod.*, 760 N.Y.S.2d 639 (2003), discussed *infra*, notes 131-37 and accompanying text. For an interesting discussion of possible parental liability, see Kirsten Rabe Smolensky, *Creating Children with Disabilities: Parental Tort Liability for Preimplantation Genetic Interventions*, 60 HASTINGS L.J. 299 (2008).

126. SILBER, *supra* note 10, at 323-56.

127. These heightened expectations may also create a climate more conducive to lawsuits.

128. For example, it is very hard to prove exactly how, when, and where the negligence occurred.

129. See, e.g., *Paretta*, 760 N.Y.S.2d at 641; see also *Brown v. Wyatt*, 202 S.W.3d 555 (Ark. Ct. App. 2005) (holding, in a husband and father's suit for the doctor's failure to obtain his written consent to his wife's insemination, that the plaintiff could not recover for negligence and the tort of "outrage" and also noting that the husband was essentially seeking to recover for "wrongful birth," which was not recognized under Arkansas law).

130. Compare *Harbeson v. Parke-Davis, Inc.*, 656 P.2d 483 (Wash. 1983) (allowing siblings born with birth defects to recover damages for medical treatment from doctors who failed to research the possible effects of a seizure drug) and *Turpin v. Sortini*, 643 P.2d 954 (Cal. 1982) (ruling that a deaf child could recover damages from doctors who failed to warn her parents of a hereditary disorder prior to her conception), with *Walker v. Mart*, 790 P.2d 735 (Ariz. 1990) (refusing to allow "wrongful life" action where doctors failed to diagnose the risk of severe birth defects in utero that would have prompted the mother to have an abortion; the court held that bringing a child into the world cannot be an injury to that child).

For example, in one case, parents of a child born with cystic fibrosis brought suit against health care facilities and doctors involved in an in vitro fertilization procedure performed on the wife using a donor egg and the husband's sperm.¹³¹ The couple alleged that the defendants failed to warn them that the egg donor was a carrier of cystic fibrosis and failed to test the father to determine if he was a carrier of the disease.¹³² Cystic fibrosis is inherited from both parents, and the child was born with the disease, requiring several surgeries and treatment for the rest of her life.¹³³ The parents brought a number of claims against the defendants, seeking, among other things, recovery for emotional distress and expenses related to the child's care and treatment.¹³⁴ The court dismissed all claims brought on the child's behalf, agreeing with the defendants that it would amount to a "wrongful life" claim, which New York law does not recognize.¹³⁵ The court also rejected the emotional distress claims brought by the parents, but found that they could pursue recovery for the expenses they incurred caring for their sick child possibly even including the wife's lost wages for having to leave her job to care for their daughter.¹³⁶ The court also left open the possibility of recovery for punitive damages against the defendants for gross negligence.¹³⁷

In a similar case, parents and son sued their doctor, fertility clinic, and a genetic testing lab after the son was born with cystic fibrosis.¹³⁸ In 1993, the parents had a daughter with cystic fibrosis, so they turned to the defendants to try to ensure their next child would be born without the genetic disorder.¹³⁹ Although their doctor sent cells from their embryos to be genetically tested, the test results were apparently erroneous, and the mother was implanted with an embryo (the son) that had the genetic mutation for cystic fibrosis.¹⁴⁰ The son himself brought a negligence claim against the defendants, but the court dismissed it on the grounds it was a "wrongful life" claim not cognizable under Massachusetts law.¹⁴¹ The court stated that determining such a claim would require comparing the value of an impaired life with the value of nonexistence.¹⁴²

131. *Paretta*, 760 N.Y.S.2d at 639, 641.

132. *Id.* at 641-42.

133. *Id.*

134. *Id.* at 642.

135. *Id.* at 645-46.

136. *Id.* at 647.

137. *Id.*

138. *Doolan v. IVF Am. Inc.*, No. 993476, 2000 WL 33170944 (Super. Ct. Mass. Nov. 20, 2000).

139. *Id.* at *1.

140. *Id.* at **1-2.

141. *Id.* at **3-4.

142. *Id.* at *2. The court dismissed Thomas's claim for the financial expense of his treatment but said that his parents might be able to recover those costs. *Id.* at *3. The court also dismissed the parents' claim for loss of consortium due to their child's illness. It found that in order to make such an award, it would have to compare their relationship with their

C. *Lawsuits That Arise from New Situations That ART Creates*

In some instances, the new technologies themselves may create a situation where litigation is more likely. In this group are the variety of lawsuits where the suit itself is not about a mistake, malfunction, or malpractice; these lawsuits occur when a dispute arises about parentage¹⁴³ or the rights of a surrogate and/or biological parents who use a surrogate,¹⁴⁴ or inheritance issues for ART offspring and posthumous use of sperm.¹⁴⁵

1. Parentage

Parentage disputes are not unique to ART, of course, but the possibility of ART certainly raises the potential issues that can cause such disputes.

Robert B. v. Susan B. is a fairly typical parentage dispute case.¹⁴⁶ The case involved a dispute over two-year-old Daniel B. who was born to Susan B., a single woman, after a fertility clinic wrongly implanted in her embryos that were meant for Robert and Denise B., a married couple.¹⁴⁷ The appellate court affirmed the trial court's ruling that Susan was Daniel's mother and Robert was his father, while Denise was dismissed for lack of standing.¹⁴⁸ In May 2000, Robert and Denise had gone to the clinic and contracted to use an anonymous egg donor's egg, which was fertilized with Robert's sperm.¹⁴⁹ At the same time, Susan wanted to find a donor egg and sperm from two strangers and to use the resultant embryos for her own IVF procedure.¹⁵⁰ When she became pregnant, Susan assumed that was what happened, but several months after she gave birth, she learned she had mistakenly received embryos intended for Robert and Denise.¹⁵¹ After an initial attempt at visitation among the three failed, Robert and Denise brought a parentage suit.¹⁵² The trial court dismissed Denise from the case and awarded temporary custody to Susan and temporary visitation to Robert.¹⁵³ On appeal, Susan argued that her case should be deemed similar to those involving sperm donors, in which the donor is not deemed the child's natural father, but, interestingly, the appeals court rejected that argument

actual son to the relationship they would have had with a hypothetical healthy son had the defendants not been negligent. *Id.* at **4-5. The court said this would be too speculative a basis on which to award damages. *Id.* at *5.

143. *Infra* notes 146-98 and accompanying text.

144. *Infra* notes 199-239 and accompanying text.

145. See *Hecht v. Superior Court*, 20 Cal. Rptr. 2d 275 (Cal. Ct. App. 1993), discussed *infra* notes 255-60 and accompanying text.

146. See *Robert B. v. Susan B.*, 135 Cal. Rptr. 2d 785 (Cal. Ct. App. 2003).

147. *Id.*

148. *Id.* at 790.

149. *Id.* at 786.

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.* at 786-87.

because Robert never intended to be a sperm donor.¹⁵⁴ The appeals court likewise rejected Denise's argument that she should have standing in the suit because she was the intended mother of Daniel; here, the appeals court agreed with the trial court that Denise lacked standing because she had no genetic or gestational relationship to Daniel.¹⁵⁵

In another case, a mother of twins brought a parentage suit against her former long-term boyfriend seeking child support for children conceived through artificial insemination by an anonymous donor.¹⁵⁶ The Illinois Supreme Court found the Parentage Act did not bar Alexis Mitchell's claims for child support based on common law theories of oral contract or promissory estoppel.¹⁵⁷ The court said that the best interests of children would be served by recognizing that "parental responsibility may be imposed based on conduct evincing actual consent to the artificial insemination procedure."¹⁵⁸ In sum, if former boyfriend Raymond Banary's conduct led to the birth of the children, he should be made to support them.¹⁵⁹

Other parentage cases have involved issues relating to obligations of parents for child support, both for opposite- and same-sex couples.¹⁶⁰ Sadly, but not surprisingly, the parentage cases have been tougher for the same-sex petitioners, as exemplified in a Massachusetts case where the biological mother of a child born through artificial insemination sought child support from her former domestic partner, with whom she had been living at the time she conceived the child.¹⁶¹ The Probate and Family Court judge found the couple had an implied agreement to create a child, which the domestic partner had breached, but made no determination as to support.¹⁶² The Supreme Judicial

154. *Id.* at 787.

155. *Id.* at 788-89.

156. *In re Parentage of M.J.*, 787 N.E.2d 144 (Ill. 2003).

157. *Id.* at 151-52.

158. *Id.* at 152.

159. *Id.* Cf. *Brown v. Brown*, 125 S.W.3d 840, 843-44 (Ark. Ct. App. 2003) (holding, in a parentage dispute over twins born via artificial insemination, that while a husband never consented to an insemination procedure in writing, as required by Arkansas law, the children his wife bore while they were married were legally his because he allowed his name to be used on the birth certificate and recognized the children as his own until his former wife began talking about divorce), and *Lane v. Lane*, 1996-NMCA-23, 121 N.M. 414, ¶23, 912 P.2d 290, 296 (holding, in an insemination case, that a husband who did not sign a consent for insemination was still legally the father because he manifested his consent to the insemination through his actions and words).

160. See, e.g., *Jackson v. Jackson*, 739 N.E.2d 1203, 1213 (Ohio Ct. App. 2000) (holding that an ex-husband had a duty to support twins born to his former wife during their marriage as a result of artificial insemination. The court noted that although the husband did not consent in writing to the procedure, the ex-wife had met her burden of showing that he orally consented to the procedure); see also *T.F. v. B.L.*, 813 N.E.2d 1244 (Mass. 2004).

161. *T.F.*, 813 N.E.2d at 1244.

162. *Id.* at 1246.

Court agreed that there had been an implied contract to create a child, but found it unenforceable under Massachusetts law.¹⁶³

In contrast, a California court held that a California statute explicitly stated that there can be no paternity claim from a sperm donor who is not married to a woman who becomes pregnant via the donated semen, so long as that semen is provided to a licensed doctor.¹⁶⁴ The court determined that the law makes no exception for a sperm donor known to the woman in question, even if he is a sexual partner of the woman, and thus denied the paternity claim of a man who was the sperm donor and genetic father of a child born to his lover, who was challenging paternity.¹⁶⁵

Generally, husbands are unable to escape paternity when their sperm is involved in the fertilization of an egg that eventually leads to a baby.¹⁶⁶ For example, in a case where a former husband filed a paternity suit over a child born to his ex-wife through in vitro fertilization performed after their divorce, the appellate court affirmed the court's holding in the former husband's favor.¹⁶⁷ The couple, Donald McGill and Mildred McGill Schmidt, had sought IVF treatment during their marriage, but it did not work.¹⁶⁸ Four of their pre-embryos were frozen, but their divorce decree did not address what would happen to the stored pre-embryos.¹⁶⁹ Three months after the divorce, McGill accompanied Schmidt to the clinic where she attempted IVF again, this time successfully.¹⁷⁰ However, the parties disagreed as to McGill's rights.¹⁷¹ McGill said they agreed he would be the father while his ex-wife said he donated the pre-embryos to her.¹⁷² In finding McGill to be the children's legal father, the

163. *Id.* at 1251; *but see id.* at 1254 (Greaney, J., dissenting) (three dissenting justices would have ordered the domestic partner to pay child support). *See K.M. v. E.G.*, 117 P.3d 673 (Cal. 2005) (holding that a woman who donated her eggs to her former lesbian partner was a parent of the twin girls her partner gave birth to via in vitro fertilization because the provision of the Uniform Parentage Act preventing sperm donors from being considered the father of children so born did not apply here).

164. *Steven S. v. Deborah D.*, 25 Cal. Rptr. 3d 482, 487 (Cal. Ct. App. 2005).

165. *Id.* at 487-88.

166. *See, e.g., In re O.G.M.*, 988 S.W.2d 473 (Tex. App. 1999). *See also In re Baby Doe*, 353 S.E.2d 877, 878-89 (S.C. 1987) (holding that a husband was responsible for child support to a child born to his wife as a result of artificial insemination even without written consent. If the husband agrees to the insemination with the understanding that the child will be treated as his own, he is the legal father; his consent can be express or implied); *K.S. v. G.S.*, 440 A.2d 64, 68 (N.J. Super. Ct. Ch. Div. 1981) (noting that some states require written consent to insemination, but finding that public policy considerations required a strong presumption of consent and a strong burden on the father attempting to show that he revoked the consent); *but see In re Marriage of Witbeck-Wildhagen*, 667 N.E.2d 122 (Ill. App. Ct. 1996) (finding no obligation without written consent), discussed *infra* notes 176-79 and accompanying text.

167. *In re O.G.M.*, 988 S.W.2d at 473.

168. *Id.* at 474.

169. *Id.*

170. *Id.* at 474-75.

171. *Id.* at 475.

172. *Id.*

trial court relied on several factors, including that he was named the father on the birth certificate, that the pre-embryos were conceived while the couple was married, that McGill was present when the IVF took place, and that O.G.M. would only have one parent if he were denied paternity.¹⁷³ The appeals court found that evidence sufficient.¹⁷⁴

In direct contrast to this, an Illinois court interpreted the Illinois Parentage Act, which is modeled on section 5 of the Uniform Parentage Act¹⁷⁵ to require a husband's written consent to artificial insemination before he could be held to a duty of child support.¹⁷⁶ In a case where a husband was not the biological father of the child, where he had made it clear that he did not want a child, and where his wife was inseminated without his knowledge, the court denied the mother's claim for child support when the couple divorced.¹⁷⁷ The court found that the legislature intended that the husband's written consent be a prerequisite to the creation of a parent-child relationship and that, in this particular case, there was no other statutory or equitable basis to hold the husband responsible for the child.¹⁷⁸ The court recognized the boy had a need of support but said the husband also had a right to decide not to become a parent.¹⁷⁹

In sum, a husband who becomes a father through his wife's insemination with someone else's sperm continues to be responsible for child support even after the couple splits up.¹⁸⁰ In contrast, a man who is merely a sperm donor, who relinquishes his rights, and/or has no relationship to the mother, is usually not found to be the legal father or held to paternity obligations.¹⁸¹ In fact, the rights and duties of sperm donors are different from those of egg donors, surrogates, and marital partners; these rights are discussed more fully later in the article.¹⁸²

One rather unique case relating to parentage was brought by a girl born through artificial insemination against the doctors and clinic involved, alleging that their failure to certify the signature of her mother's then-husband deprived the girl of a legal father.¹⁸³ The girl's mother underwent artificial insemination in 1992 and her then-husband signed a consent form, but the doctors did not

173. *Id.* at 478.

174. *Id.*

175. *In re Parentage of M.J.*, 787 N.E.2d 144, 149 (Ill. 2003).

176. *In re Marriage of Witbeck-Wildhagen*, 667 N.E.2d 122, 125 (Ill. App. Ct. 1996).

177. *Id.* at 125-26.

178. *Id.* at 125.

179. *Id.* at 125-26.

180. *People v. Sorenson*, 437 P.2d 495, 499 (Cal. 1968) (noting that the child would not have been born without the father's participation).

181. See *Lamaritata v. Lucas*, 823 So. 2d 316, 319 (Fla. Dist. Ct. App. 2002) (finding that under Florida law sperm donors relinquish all parental rights and that in this case the parties also had a contract providing that the donor would have no parental rights).

182. See *infra* notes 240-60 and accompanying text.

183. *Alexandria S. v. Pac. Fertility Med. Ctr. Inc.*, 64 Cal. Rptr. 2d 23 (Cal. Ct. App. 1997).

certify his signature as required by state law.¹⁸⁴ In the couple's divorce proceedings, the husband testified that their marriage was already falling apart at the time of the insemination; he said he signed a form authorizing the procedure so his wife could be a mother but denied signing any consent form that would make him the legal father of the child.¹⁸⁵ After the dissolution, the court found the husband was not legally obligated to support the daughter and she brought suit against the doctors through her mother.¹⁸⁶ Her negligence action claimed her mother would not have been inseminated if she had not thought that the husband would take responsibility for the child.¹⁸⁷ She also claimed the clinic's negligent misrepresentation resulted in her birth.¹⁸⁸ The appeals court affirmed the dismissal of the suit, declining to recognize a tort for the deprivation of a legal parent on public policy grounds.¹⁸⁹ The court stated that to recognize such a theory would invite suits from children with non-traditional parents, such as single or gay parents.¹⁹⁰ The court declined to find that illegitimacy is an injury under the law.¹⁹¹

What makes ART parentage cases most challenging, and what leads to conflicts in the laws, is that some courts do not use uniform parentage laws to decide these types of cases.¹⁹² One recent case dealt with the difficult issue of how to determine parentage when an unmarried couple decides to undergo in vitro fertilization using donor eggs, the sperm of the male partner, and the uterus of the female partner.¹⁹³ In this case, a couple underwent in vitro as described, and the female partner gave birth to triplets.¹⁹⁴ Later, the relationship turned sour, and the woman filed a petition in the lower court to establish parentage and obtain custody and child support.¹⁹⁵ The man, in turn, argued that she lacked standing to seek that relief because she was not the genetic mother of the children and sought sole custody himself.¹⁹⁶ The Tennessee Supreme Court, ruling on a case of first impression in that state, found that Tennessee's parentage laws did not apply to the situation at issue here, where there was no marriage or surrogacy contract.¹⁹⁷ In a narrowly crafted opinion, the court held

184. *Id.* at 24-25.

185. *Id.* at 25.

186. *Id.* at 25-26.

187. *Id.* at 30.

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.* Interestingly, and related to the discussion, *supra* note 130 and accompanying text, on wrongful life, the court also found that Alexandria was essentially bringing a "wrongful life" suit, which was not cognizable under California law because she was born healthy. *Id.* at 30-31.

192. See, e.g., *In re C.K.G.*, 173 S.W.3d 714 (Tenn. 2005), discussed *infra*.

193. *Id.* at 716.

194. *Id.* at 718.

195. *Id.*

196. *Id.* at 718-19.

197. *Id.* at 722-23.

that the woman was the legal mother due to: (1) the intent of both partners that she become a parent; (2) her adoption of the legal responsibilities of parenthood; (3) her having given birth to the children; and (4) the fact that there was no controversy between her and the genetic mother of the children, an anonymous egg donor who had waived her parental rights.¹⁹⁸

2. Surrogacy

Surrogacy cases have been in the spotlight for almost twenty years, since the famous case of Baby M.¹⁹⁹ Disputes over surrogacy have concerned issues of parentage, as above, and conflicts over who should be deemed the parent. As this section will address, some disputes arise when the surrogate seeks to keep the child or children to whom she gave birth; some, more surprisingly, arise in situations where the genetic or intended parents *and* the surrogate herself agree that the parents should have the child, but other parties, or the courts, intervene.

Some courts have been confronted with the issue of a surrogate who seeks to have her name removed from a birth certificate.²⁰⁰ In one such case, despite concerns that a child would be “motherless,” the court allowed a surrogate to do just that, noting that in light of Maryland’s Equal Rights Amendment, the state’s parentage laws should be read to allow women as well as men to deny their parentage of a child; as such, a gestational carrier of a child should be able to receive a court order dictating that she is not the child’s parent.²⁰¹

Some laws about surrogacy itself have been challenged in the courts.²⁰² For example, a biological mother of triplets born via gestational surrogate challenged the constitutionality of an Arizona law that declared the surrogate to be the legal mother of children born to her.²⁰³ The law, Arizona Revised Statutes section 25-218(B), prohibited surrogacy agreements.²⁰⁴ However, it allowed that the genetic father of a child so born would have a chance to establish paternity.²⁰⁵ No such provision was made for the mother.²⁰⁶ In

198. *Id.* at 730. The dissent, focusing on the language of Tennessee law, noted that intent and gestation should not be used as factors to determine parentage because the laws instead rely on genetics, marriage, or adoption; while Cindy could adopt the children, the dissent would not find that she was their legal mother. *Id.* at 736 (Birch, J., dissenting).

199. *In re Baby M.*, 537 A.2d 1227 (N.J. 1988) (finding that a surrogacy agreement conflicted with New Jersey laws prohibiting payment for adoptions because of a public policy against baby bartering and that the agreement itself was in “total disregard of the best interests of the child”, but still allowing the biological parents legal rights because it was in the baby’s best interest to remain with them given that their family life was more stable). An excellent discussion of these issues is found in Amy M. Larkey, *Redefining Motherhood: Determining Legal Maternity in Gestational Surrogacy Arrangements*, 51 *DRAKE L. REV.* 605 (2003).

200. *In re Roberto d.B.*, 923 A.2d 115, 117-20 (Md. 2007).

201. *Id.* at 124-25.

202. *Soos v. Superior Court*, 897 P.2d 1356 (Ariz. Ct. App. 1994).

203. *Id.* at 1358.

204. *Id.* at 1359.

205. *Id.*

affirming the trial judge's finding of unconstitutionality, the court said the interest of the genetic mother in proving maternity was equal to the father's interest in proving paternity, and thus the law could not stand without affording the mother a means to prove maternity.²⁰⁷

In other states, surrogacy laws have been upheld.²⁰⁸ One suit was brought by prospective surrogate mothers and infertile couples challenging Michigan's Surrogate Parenting Act, which prohibited surrogacy agreements.²⁰⁹ The Michigan appellate court affirmed the constitutionality of the law, although it interpreted the law differently from the trial judge.²¹⁰ The plaintiffs contended that the law violated the due process guarantee of freedom from government interference in matters of procreation.²¹¹ The appeals court disagreed and, reciting some of the most commonly used arguments against surrogacy agreements, found that the state had a compelling interest in forbidding surrogacy agreements to (1) prevent children from becoming commodities; (2) protect the best interests of the child, which are not preserved by surrogacy agreements; and (3) prevent the exploitation of women.²¹² The court held that the law forbade surrogacy agreements involving (1) conception, either through natural or artificial insemination of, or surrogate gestation by, a female; and (2) the voluntary surrender of her parental rights to the child.²¹³ The court also noted a recent legislative amendment that created a presumption that every surrogacy contract includes a provision by which the surrogate agrees to give up her parental rights but did not comment on the constitutionality of the law as amended.²¹⁴

In addition to differences in the laws themselves, the differences in the judicial resolution of surrogacy cases illustrate both the potential legal issues that ART creates and the differences in the state courts' disposition of those cases.²¹⁵

The easiest cases and those where there has been the most consistency are cases 1) from states that allow surrogacy agreements²¹⁶ and 2) where there is no

206. *Id.*

207. *Id.* at 1361. *Accord J.R. v. Utah*, 261 F. Supp. 2d 1268 (D. Utah 2002) (holding unconstitutional a challenged provision of Utah law mandating that a surrogate mother is, for all legal purposes, deemed the mother of a child born through such an agreement because the law was an undue burden on the biological mother's fundamental right to bear and raise her own children).

208. *See, e.g., Doe v. Attorney Gen.*, 487 N.W.2d 484 (Mich. Ct. App. 1992). *See also* the chart in Part D, 1, *infra*, for a more detailed description of the laws of each state.

209. *Id.* at 485.

210. *Id.* at 486.

211. *Id.*

212. *Id.* at 486-87.

213. *Id.* at 488-89.

214. *Id.* at 489.

215. Here, the focus is on different cases, each of which was just a single-state case and did not involve conflicts issues. Later, the article examines surrogacy disputes that touch upon several states, which requires the courts to determine which (differing) law will apply.

216. *See* table on surrogacy laws, *infra*.

challenge to the biological parents' request to have legal parentage. For example, in one Connecticut case, a married Venezuelan couple entered into a gestational surrogacy agreement with a Connecticut couple to have the Connecticut wife carry the Venezuelan couple's genetic child and then turn over the child to the Venezuelan couple.²¹⁷ The Venezuelan couple was able to obtain a declaration of parental rights over the child (including being named as the parents on the birth certificate) in large part because neither the Connecticut couple, nor the state department of health, nor the hospital where the child was to be born objected.²¹⁸ The court noted that a number of other Connecticut superior courts had recognized gestational surrogacy agreements, and state laws allowed for replacement birth certificates, which appeared to reflect a public policy in favor of the court having authority to issue orders regarding surrogate parentage.²¹⁹ The court reviewed the surrogacy agreement but found it to be fair and reasonable and entered an order naming the Venezuelan couple the legal and biological parents of the baby.²²⁰

In one New York case, a couple was unable to obtain a pre-birth order declaring the biological mother of triplets—and not the surrogate who had carried them—to be the legal mother, but was able to obtain such an order after the babies' birth.²²¹ Interestingly, in cases similar to this one, even states that do not allow for surrogacy agreements and might not enforce an agreement itself do allow for parentage declarations for the biological parents *if the surrogate does not dispute the request*.²²² However, even in cases where there is no challenge to the biological mother's claim of legal parentage, some courts have been reluctant to allow the biological mother to be listed as the legal parent.²²³

In some cases where the surrogate seeks to keep the child, courts have been reluctant to "enforce" the surrogacy agreement by giving legal rights to the biological parents instead of the surrogate. However, in other cases, even where the surrogate seeks to keep the baby and even where the state may have a policy against surrogacy agreements, courts have granted the biological parents legal rights if it is in the "best interests" of the child.²²⁴ If nothing else,

217. *De Bernardo v. Gregory*, No. FA074007658S, 2007 WL 4357736, at *1 (Conn. Super. Ct. Nov. 7, 2007).

218. *Id.* at **3-4.

219. *Id.* at **2-3.

220. *Id.* at **3-4.

221. *Doe v. N.Y. City Bd. of Health*, 782 N.Y.S.2d 180 (N.Y. Sup. Ct. 2004).

222. *See id.* at 183.

223. *See, e.g., Andres A. v. Judith N.*, 591 N.Y.S.2d 946 (N.Y. Fam. Ct. 1992) (holding, in a case where petitioners were a husband and wife who had twins via gestational surrogacy and brought an uncontested petition to be declared the mother and father of the twins, that the court lacked subject matter jurisdiction but noting that *the biological mother could move to adopt her children*). The opinion also notes that, in 1992, the New York legislature passed a law making surrogacy contracts void, but that law was not at issue here. *Id.* at 948.

224. *See, e.g., In re Baby M*, 537 A.2d 1227 (N.J. 1988), discussed *supra* note 199.

it can be said that there is very little consistency in how the courts have handled surrogacy-related legal disputes.

To the extent that there has been any consistency amongst the various state courts in resolving tricky parentage issues with surrogates, it has been with the use of the "intent" test.²²⁵ In 1993, the California courts reviewed a case of first impression in that state where a husband and wife sought a legal declaration that they were the parents of a child born to a gestational surrogate.²²⁶ The Supreme Court affirmed the trial and appellate courts' holding in favor of the genetic parents but analyzed the case under the Uniform Parentage Act,²²⁷ which it acknowledged was not designed to resolve surrogacy disputes.²²⁸ Nonetheless, the court said the law provided a framework for determining a child's natural mother: the woman who gives birth to a child is presumptively the natural mother.²²⁹ However, the UPA allows genetic mothers to prove their natural parentage through genetic testing, which in this case showed the wife to be the genetic mother of the child.²³⁰ Noting that although under the UPA both the surrogate and the genetic mother had proven "maternity," the court employed a tie-breaker based on the intent of the parties, noting that it was the genetic parents who intended to bring a child into the world and raise it.²³¹ As such, it affirmed the ruling of the lower courts. The court also determined that surrogacy contracts were not inconsistent with California public policy,²³² which two concurring justices found went a step too far.²³³

In a different kind of case in which the intent test was employed, a New York court rejected a father's argument that he was the only "parent" of children born via egg donation, finding that his wife, who had carried and given birth to the couple's twins with the intent of raising them, was the natural mother.²³⁴

In yet another situation in which the intent test was used, a California court was faced with a situation where a husband and wife agreed to have an embryo genetically unrelated to either of them be implanted in a surrogate, who

225. See generally *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993).

226. *Id.* at 777-78.

227. Discussed *infra* notes 597-602 and accompanying text.

228. *Johnson*, 851 P.2d at 779.

229. *Id.* at 780.

230. *Id.* at 781.

231. *Id.* at 782.

232. *Id.* at 783-85.

233. *Id.* at 787-88. A dissenting justice would have employed a best interests of the child standard to determine who should be the child's legal mother. *Id.* at 789, 799-800 (Kennard, J., dissenting). That justice also mentioned model legislation by the National Conference of Commissioners on Uniform State Laws, the Uniform Status of Children of Assisted Conception Act, which would have required court approval of surrogacy agreements for them to be valid. *Id.* at 793-94. The dissent also criticized the majority opinion as a "sweeping endorsement of unregulated gestational surrogacy." *Id.* at 798.

234. *McDonald v. McDonald*, 608 N.Y.S.2d 477 (N.Y. App. Div. 1994).

would carry the child and give birth for them.²³⁵ However, after the pregnancy, the couple broke up and the court had to decide who were the legal parents of the child: the wife wanted the court to declare her the legal mother of the child; the husband contended he was not the legal father.²³⁶ The trial court, after accepting a stipulation that the surrogate and her husband were not the legal parents of the child, determined further that the husband and wife were *also* not the legal parents, so the child effectively had no legal parents.²³⁷ The appeals court sharply disagreed and reversed.²³⁸ The appeals court relied in part on the “intended parents” analysis of *Johnson* and held that the child would not have been born but for the actions of the husband and wife.²³⁹

3. Lawsuits Related to Sperm Donation

Lawsuits regarding sperm donation are of course linked to parentage suits²⁴⁰ and also demonstrate the wide variety of both legal issues and methods for resolving them that ART creates. In particular, these suits are important because sperm donation—use of sperm from a bank, for example—can easily be done across state lines and thus has the potential for creating conflicts of law situations.²⁴¹

In one case, a mother sought child support from a known sperm donor—her former lover—while she was married to another man.²⁴² Both the trial and appeals courts found an agreement between the mother and the donor releasing him from any obligation to pay child support to be unenforceable on public policy grounds essentially because the right to support belongs to the child and cannot be waived by the parents.²⁴³ The Supreme Court reversed, finding the agreement was similar to what occurs in a standard artificial insemination procedure and was therefore enforceable.²⁴⁴ The Supreme Court invoked the Uniform Parentage Act,²⁴⁵ which provides that sperm donors have no parental

235. *In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d 280, 282 (Cal. Ct. App. 1998).

236. *Id.* at 282-83.

237. *Id.* at 283.

238. *Id.* at 282.

239. *Id.* at 288-89. Essentially, the court applied the rules of artificial insemination to situations where a husband consents to the insemination of his wife and is usually deemed the legal father. *Id.* at 285-87. The appeals court found the same should be true when a husband and wife contract with a surrogate to carry a child on their behalf, regardless of whether they are genetically related to the child. *Id.* at 288.

240. Discussed *supra* notes 146-98 and accompanying text.

241. See, e.g., *Guardianship of I.H.*, 834 A.2d 922 (Me. 2003) (relying on California common law in part to address a question of whether a donor to a California sperm bank must receive notice when the sperm is used to inseminate a woman in Maine, and the woman and her lesbian partner subsequently petition to become the child’s legal parents).

242. *Ferguson v. McKiernan*, 940 A.2d 1236 (Pa. 2007).

243. *Id.* at 1238.

244. *Id.* at 1245-48.

245. Discussed *infra* notes 597-602 and accompanying text. Note that it has not been adopted in Pennsylvania, which was the grounds for the dissent of one of the justices.

rights or responsibilities.²⁴⁶ The court noted that the sperm donor and the mother "imbue[d] the transaction with the hallmarks of institutional, non-sexual conception" by entering into the agreement outside the context of a romantic relationship and hiding the donor's identity as the genetic father.²⁴⁷ As such, the court found that the principles that normally apply to sperm donation should apply, and the donor should not be made to pay support.²⁴⁸

In a case where the sperm donor brought suit to establish paternity over a child, a California Appellate court affirmed a lower court's finding that the donor was the child's legal father and that he should have visitation rights.²⁴⁹ The court relied on California's version of the Uniform Parentage Act, which provides that if a sperm donation is made to a licensed doctor for use in artificial insemination, the law treats the donor as if he were not the natural father of the child so conceived.²⁵⁰ Here, the mother—a nurse—did not rely on the law's provisions but instead had the donor make the donation directly to her and inseminated herself.²⁵¹ The court made clear that it was not passing judgment on traditional versus non-traditional families, but was instead ruling on the particular circumstances of this case, including the failure to conduct the insemination through a physician.²⁵²

In direct contrast to this, an Oregon court held that under Oregon law, sperm donors have no rights or obligations to children born through artificial insemination, regardless of whether a doctor is involved in the insemination.²⁵³ However, that court noted that if, as in the situation before them, the donor could establish that he and the mother in fact had an agreement whereby he should have the rights and responsibilities of fatherhood, and that he relied on that agreement in donating his semen, then the state could not absolutely bar a biological father's efforts to assert the rights and responsibilities of fatherhood.²⁵⁴

An entirely different case illustrates a new situation in sperm donation: the posthumous use of sperm.²⁵⁵ In a 1993 California case, the former girlfriend of

Ferguson, 940 A.2d at 1250. The lack of uniform acceptance of the Uniform Parentage Act may also lead to tricky conflicts situations.

246. *Ferguson*, 940 A.2d at 1243.

247. *Id.* at 1246.

248. *Id.* at 1247-48.

249. *Jhordan C. v. Mary K.*, 224 Cal. Rptr. 530 (Cal. Ct. App. 1986).

250. *Id.* at 533 (citing CAL. CIV. CODE § 7005).

251. *Id.* at 532.

252. *Id.* at 537-38.

253. *McIntyre v. Crouch*, 780 P.2d 239 (Or. Ct. App. 1989).

254. *Id.* at 243-45. See also *In re R.C.*, 775 P.2d 27 (Colo. 1989) (remanding a case for further proceedings to determine if there was an agreement between the mother and the donor).

255. No doubt familiar to viewers of the TV show *Ugly Betty* (ABC television broadcast). For a thorough and interesting analysis (of the case, not the show), see Lori B. Andrews & Nanette Elster, *Regulating Reproductive Technologies*, 21 J. LEGAL MED. 35, 53-54 (2000).

a man who committed suicide got into a dispute with his surviving adult children over the disposition of his frozen sperm.²⁵⁶ The man had left a rambling suicide note in which he indicated his wish that his girlfriend have his child after he died; he also bequeathed his frozen sperm to her in his will, but his children contested the validity of that document.²⁵⁷ The trial court ordered the destruction of his sperm, but the appellate court vacated that order and remanded for findings of fact on issues including the validity of the will and whether the man intended to father a child posthumously with his girlfriend.²⁵⁸ The court rejected the adult children's arguments that the public policy of California prohibited both the artificial insemination of unmarried women and post-mortem artificial insemination.²⁵⁹ The court assumed, for the sake of argument, that there was evidence to establish intent of parenthood, holding that if the man and woman intended to conceive a child after his death, there was no state interest sufficient to prevent them from doing so.²⁶⁰

4. Lawsuits over Embryos

Cases involving embryos are, of course, unique to ART and have arisen in both a medical malpractice context and in cases where there is a dispute about the use and/or disposition of the embryos.²⁶¹

One representative case in the medical malpractice context involved a couple who went to a fertility clinic and underwent in vitro fertilization, which resulted in the birth of a healthy son.²⁶² However, the couple brought suit against the clinic, alleging that on the day before the successful implantation, the embryologist negligently dropped a tray containing nine embryos, destroying all but one.²⁶³ The couple sought damages for negligence, bailment, and wrongful death although they later acknowledged a wrongful death claim did not exist for the destruction of embryos.²⁶⁴ The clinic filed a motion to dismiss, alleging that the plaintiffs had failed to file the expert's report required in cases of medical negligence.²⁶⁵ The trial court denied the motion, but the

256. *Hecht v. Superior Court*, 20 Cal. Rptr. 2d 275, 275-76 (Cal. Ct. App. 1993).

257. *Id.* at 276-77.

258. *Id.* at 279, 289 n.9, 291.

259. *Id.* at 284-89. On this issue, the adult children argued in part that a child being born after their father's death would be psychologically unhealthy for the adult children, as well as a potential financial burden to the estate and/or society. *Id.* at 290.

260. *Id.* at 289.

261. See Susan L. Crockin & Nanette Elster, *Cryopreserved Embryos: Understanding and Making Choices*, 18 AM. J. FAM. L. 61 (2004); Noel Fleming, *Navigating the Slippery Slope of Frozen Embryo Disputes: The Case for a Contractual Approach*, 75 TEMP. L. REV. 345 (2002); Jill Madden Melchoir, *Cryogenically Preserved Embryos in Dispositional Disputes and the Supreme Court: Breaking Impossible Ties*, 68 U. CIN. L. REV. 921 (2000).

262. *Inst. for Women's Health, P.L.L.C. v. Imad*, No. 04-05-00555-CV, 2006 WL 334013 (Tex. App. Feb. 15, 2006).

263. *Id.* at *1.

264. *Id.* at **1, 2 n.1.

265. *Id.* at *1.

appeals court reversed.²⁶⁶ The couple claimed that because they were only alleging simple negligence, no report was required, but the appeals court disagreed and found that the couple was in fact alleging health care liability claims, for which expert testimony would be required.²⁶⁷

Additional, and sometimes more complicated, cases have arisen over the negligent destruction of embryos.²⁶⁸ For example, one couple sued a clinic for negligently destroying or losing five frozen pre-embryos that the clinic agreed to store.²⁶⁹ The couple brought several claims, including wrongful death, negligent loss of irreplaceable property, breach of fiduciary duty, and breach of a bailment contract.²⁷⁰ The trial court dismissed all counts, but the court of appeals reversed as to all counts *except the wrongful death claim*.²⁷¹ The court agreed there could be no wrongful death action because a pre-embryo would not be categorized as a "person" under Arizona's wrongful death law.²⁷² The court allowed the couple to pursue their claims for the negligent loss or destruction of the pre-embryos, relying on Restatement (Second) of Torts section 323, which applies to people who fail to take reasonable care after having agreed to protect another's person or property.²⁷³ The appeals court also found that the trial court acted too quickly in dismissing the breach of fiduciary duty count on the basis that it was barred by the state's medical malpractice law.²⁷⁴ Further, the court found that there was a valid bailment contract between the couple and the clinic and determined that the couple should be allowed to proceed with their claim that the clinic had breached it.²⁷⁵

Other cases have involved spousal disputes over the use and disposition of frozen embryos.²⁷⁶ For example, in a Massachusetts divorce case, the husband

266. *Id.* at **1, 3.

267. *Id.*

268. See *Jeter v. Mayo Clinic Ariz.*, 121 P.3d 1256 (Ariz. Ct. App. 2005); see also *Frisina v. Women & Infants Hosp. of R.I.*, No. CIV. A. 95-4037, 2002 WL 1288784 (R.I. Super. May 30, 2002) (denying plaintiffs' claims for negligent infliction of emotional distress under Rhode Island law but permitting recovery for emotional distress *due to breach of contract*, where hospital's in vitro fertilization clinic lost or destroyed their frozen pre-embryos).

269. *Jeter*, 121 P.3d at 1258.

270. *Id.* at 1258-59.

271. *Id.* at 1259.

272. *Id.*

273. *Id.* at 1272.

274. *Id.* at 1274-75.

275. *Id.* at 1275-76.

276. See, e.g., *A.Z. v. B.Z.*, 725 N.E.2d 1051 (Mass. 2000). See also *In re Marriage of Witten*, 672 N.W.2d 768 (Iowa 2003) (holding that any agreement between the parties would be enforced, unless one of them later changed his or her mind and informed the clinic in writing of that change. The court also declined to apply a balancing of the parties' interests to determine what should happen with the pre-embryos, in order to leave the decision up to the couple). These cases also have the potential to raise multiple conflicts issues since it has become more common for couples to use clinics that are out of state, and/or to store frozen embryos in out-of-state facilities.

sought and obtained from a Probate and Family Court judge a permanent injunction preventing his wife from trying to become pregnant via frozen pre-embryos made with the couple's genetic material and held at a fertility clinic the couple had utilized while married.²⁷⁷ At issue was the agreement²⁷⁸ the couple had with the clinic as to what should happen to the frozen pre-embryos.²⁷⁹ Both had signed a consent form indicating that if the couple separated, the embryos would be returned to the wife for implantation.²⁸⁰ The Supreme Judicial Court, however, agreed with the trial judge that the husband's interests in avoiding parenthood outweighed his former wife's interest in having additional children.²⁸¹ In deciding this issue of first impression, the court found that the consent form was primarily meant to govern the couple's relationship with the clinic and not to be a binding agreement between the spouses if they later disagreed about the disposition of the pre-embryos.²⁸² The court also found that the consent form used the word "separation," not "divorce," and was not necessarily meant to govern a divorce proceeding.²⁸³ Further, even if the agreement had been unambiguous, public policy would prevent the court from forcing someone to become a parent against his will.²⁸⁴ As such, the court found that prior agreements to enter into parenthood should not be enforced when one of the parties changes his or her mind.²⁸⁵

As with most legal issues concerning embryos, religion and ethics become important to the courts.²⁸⁶ In a Tennessee case, a couple divorced and disagreed about the disposition of their frozen embryos; the wife wanted to donate them to another couple while the husband wanted them to remain frozen.²⁸⁷ The Tennessee Supreme Court reversed the trial court's decision that the pre-embryos were "children in vitro" who should be allowed a chance to be born.²⁸⁸ The court then noted that the couple had never made an agreement about what should happen to the embryos; if they had, it would have been enforced.²⁸⁹ Absent such an agreement, however, the court looked to the relative interests of

277. *Id.* at 1052.

278. See *infra* notes 483-91 and accompanying text for a discussion of such agreements.

279. A.Z., 725 N.E.2d at 1053.

280. *Id.* at 1054.

281. *Id.* at 1057-58.

282. *Id.* at 1056-57.

283. *Id.* at 1057.

284. *Id.* at 1057-58.

285. *Id.* at 1059. See also *J.B. v. M.B.*, 783 A.2d 707 (N.J. 2001) (noting that in the event of a disagreement about the use of pre-embryos, the party wishing to avoid procreation would ordinarily prevail; however, that analysis could change if one of the parties was infertile, which was not the case here).

286. See, e.g., *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992).

287. *Id.* at 589-90.

288. *Id.* at 594.

289. *Id.* at 597-98.

the parties.²⁹⁰ In this case, the husband had grown up without a close relationship with his parents and was opposed to having any of his children grow up without both of their parents.²⁹¹ He opposed the wife donating the pre-embryos because the couple who received them might divorce, so children the husband considered to be his own could grow up in a single-parent home.²⁹² The court found that his interests in avoiding parenthood outweighed his former wife's interest in donating the pre-embryos.²⁹³ Importantly, the court noted that ordinarily, the party seeking to avoid procreation will prevail,²⁹⁴ as least as long as the other party has reasonable alternative means of becoming a parent.²⁹⁵

In a case with a similar issue, a divorced couple disagreed as to what should happen to two frozen pre-embryos produced during an attempt at in vitro fertilization.²⁹⁶ The wife wanted to implant the pre-embryos in a surrogate mother and raise any resulting child herself.²⁹⁷ The trial court applied a "best interests of the child" standard in refusing that request and ordered the embryos be given to the husband.²⁹⁸ The high court found the trial court's characterization of the pre-embryos as a child to be questionable but declined to get into the philosophical issue of how the pre-embryos should be categorized.²⁹⁹ Instead, the court decided the case on the basis of the contract the couple had with the California-based fertility clinic.³⁰⁰ The contract provided that the pre-embryos would be thawed, but not allowed to undergo further development after five years.³⁰¹ Those five years had passed, and the court said it was not even aware of whether the pre-embryos were still in existence.³⁰² If they were, however, the terms of the contract would govern and the pre-embryos would be thawed (essentially destroyed).³⁰³

290. *Id.* at 603-04.

291. *Id.*

292. *Id.* at 604.

293. *Id.*

294. *Id.* An interesting corollary to this is the use of technologies or surgeries to **prevent** pregnancy. This could be thought of as "anti-reproductive" technologies. It is worth discussing these procedures as well because these, too, give rise to lawsuits and can create conflicts issues.

295. *Id.*

296. *Litowitz v. Litowitz*, 48 P.3d 261 (Wash. 2002).

297. *Id.* at 264.

298. *Id.*

299. *Id.* at 269.

300. *Id.* at 268-69.

301. *Id.* at 268.

302. *Id.* at 269.

303. *Id.* at 270-71. A dissenting judge contended the majority misread the contractual provision ordering the thawing of the pre-embryos and that it did not apply here. Further, the dissenting judge said the majority's decision would call for the destruction of "unborn human life," even though both parties wanted the pre-embryos to be implanted, although they could not agree on who would receive them. *Id.* at 272-74 (Sanders, J., dissenting).

In a terrible mix-up in New York, an embryologist mistakenly implanted into a woman's uterus two embryos: one was genetically hers, but the other belonged to another couple.³⁰⁴ Several lawsuits arose.³⁰⁵ One suit was brought by the genetic parents of the embryo implanted in the woman.³⁰⁶ The court rejected the defendants' arguments that the parents' malpractice claim had to be dismissed because it sought recovery for emotional harm caused by the creation of a human life.³⁰⁷ The court distinguished this case from a typical "wrongful life" case with the difference being that the plaintiffs were deprived of experiencing pregnancy, parental bonding, and the birth of their child.³⁰⁸

The second suit was brought against the same defendants by the woman who carried the "twins;" she sued the embryologist for negligence over the mistaken implantation into her uterus of an embryo genetically belonging to another couple.³⁰⁹ The plaintiff alleged she suffered physical and emotional injuries, including having to undergo a C-section for the twin birth and having to make difficult decisions as to whether to carry to term a fetus that was not genetically hers.³¹⁰ Both the trial and appeals court found that the woman stated a cause of action and the appeals court allowed her to recover as well.³¹¹

The third suit was brought by the genetic parents of the mistakenly implanted "twin," seeking custody of him from the birth mother.³¹² The trial court awarded custody to the genetic parents while granting the birth parents visitation, and both sides appealed.³¹³ The appellate court affirmed the award of custody to the genetic parents but found that the birth parents lacked standing to seek visitation.³¹⁴ The court relied on the fact that the birth parents knew of the mistaken implantation not long after it occurred but refused to correct the mistake by immediately turning the child over to his genetic parents after birth.³¹⁵ The boy's "twin," though he had shared a womb with him, was not genetically related to the boy and also lacked standing to seek visitation.³¹⁶ The court also noted the public policy of New York to give parents broad rights to

304. *Fasano v. Nash*, 723 N.Y.S.2d 181 (N.Y. App. Div. 2001); *Perry-Rogers v. Fasano*, 715 N.Y.S.2d 19 (N.Y. App. Div. 2000); *Perry-Rogers v. Obasaju*, 723 N.Y.S.2d 28 (N.Y. App. Div. 2001).

305. *Fasano v. Nash*, 723 N.Y.S.2d at 181; *Perry-Rogers v. Fasano*, 715 N.Y.S.2d at 19; *Perry-Rogers v. Obasaju*, 723 N.Y.S.2d at 28.

306. *Perry-Rogers v. Obasaju*, 723 N.Y.S.2d at 28.

307. *Id.* at 29.

308. *Id.*

309. *Fasano v. Nash*, 723 N.Y.S.2d at 181.

310. *Id.*

311. *Id.*

312. *Perry-Rogers v. Fasano*, 715 N.Y.S.2d 19, 19 (N.Y. App. Div. 2000).

313. *Id.* at 22-23.

314. *Id.* at 24-25.

315. *Id.* at 25.

316. *Id.*

exclude visitation, even by those people who have raised the child in question as their own.³¹⁷

In this case, as in others, the facts could have just as easily crossed state lines and been complicated by differences in the laws. Thus, it is important to turn next to a discussion of those differences, and an explanation of the choice of law approaches used to resolve them.

D. *Conflicting Laws: 50 State Reviews*

To the extent that there is any legislative guidance in ART cases, it is found on the state level. With many states changing their laws as technologies evolve, there is great potential for inconsistency within a single state, not to mention across state lines. The laws vary widely about all of the issues discussed in the sections above, but two areas in particular warrant a more detailed description because there has been legislation to address them: surrogacy and disposition of embryos.

1. Surrogacy

State laws on surrogacy vary greatly: some expressly prohibit and some expressly allow surrogacy agreements; some states have provisions that would imply permission or forbidding of such contracts; and some have no provisions at all. The chart below details the legal situation in each state:

State	Law	Comments
Alabama	ALA. CODE § 26-10A-33 designates who is allowed to place children for adoption and makes it a crime for others to do so. Importantly, it specifies that surrogate motherhood is not covered by the law. ³¹⁸ Alabama has adopted a modified version of the Uniform Parentage Act	No laws specifically authorize surrogacy, but it is exempted from the law criminalizing baby-selling. The Alabama version of the UPA leaves it to Alabama courts to decide whether and under what conditions surrogacy agreements are valid. If a surrogacy agreement is held invalid, an intended parent who provided his/her own genetic material for implantation should still be able to prove paternity, but intended parents who rely on donated eggs/sperm will not be able to do so.

317. *Id.* at 25-26.

318. *See* ALA. CODE § 26-10A-33 (LexisNexis 1992). *See also* § 26-10A-34(c) (noting that "[s]urrogate motherhood is not intended to be covered by this section" (which criminalizes payments to a parent to consent to an adoption)).

319. § 26-17-101 *et. seq.* (LexisNexis Supp. 2008).

320. § 26-17-103(d).

	("UPA"), effective January 1, 2009. ³¹⁹ However, Alabama chose not to adopt Article 8 of the UPA, which authorizes surrogacy agreements. ³²⁰	
Alaska	No statutes on surrogacy.	
Arizona	Law prohibiting surrogacy contracts was found at least partially unconstitutional in <i>Soos v. Superior Court</i> . ³²¹	<i>Soos</i> was an appellate court decision; the Arizona Supreme Court denied review. ³²²
Arkansas	ARK. CODE ANN. § 9-10-201(b), dealing with artificial insemination and the status of the individuals includes parentage presumptions for children born through ART to surrogates. ³²³ ARK. CODE ANN. § 9-10-201(c)(1) provides a similar provision regarding the status	Surrogacy contracts seem to be allowed. The parentage presumptions are as follows: "A child born by means of artificial insemination to a woman who is married at the time of the birth of the child shall be presumed to be the child of the woman giving birth and the woman's husband except in the case of a surrogate mother, in which event the child shall be that of: (1) the biological father and the woman intended to be the mother if the biological father is married; or (2) the biological father only if

321. *Soos v. Superior Court*, 897 P.2d 1356, 1361 (Ariz. Ct. App. 1994). The portion of the law found unconstitutional provided: "[a] surrogate is the legal mother of a child born as a result of a surrogate parentage contract and is entitled to custody of that child." ARIZ. REV. STAT. ANN. § 25-218(B) (2007). The court based its decision on the fact that a biological father of a child born through surrogacy could prove his parentage, but the biological mother was not permitted to do the same, which violated the Equal Protection clause of the U.S. Constitution. *Soos*, 897 P.2d at 1361.

322. *Id.*, rev. denied (July 11, 1995).

323. ARK. CODE ANN. § 9-10-201(b) (LexisNexis Supp. 2008).

	of unmarried surrogates. ³²⁴ ARK. CODE ANN. § 9-10-201(c)(2) provides that the woman giving birth will be listed on the birth certificate, but in the case of surrogate mothers a substituted birth certificate can be issued upon order of the court. ³²⁵	unmarried; or (3) the woman intended to be the mother in cases of a surrogate mother when an anonymous sperm donor's sperm was utilized for the artificial insemination. ³²⁶
California	CAL. FAM. CODE § 7648.9 mentions surrogacy agreements in the context of saying that a law allowing paternity judgments to be set aside does not apply to children conceived via surrogacy agreements. ³²⁷ Courts have said, however, that the determination of maternity in surrogacy situations is governed by the same principles as those governing paternity in the Uniform Parentage Act. ³²⁸	No provisions specifically dealing with the validity of surrogacy contracts, but they have been allowed by the courts. California uses the "intent test" to determine parentage of children born via a gestational surrogacy agreement. ³²⁹
Colorado	No statutes on surrogacy.	
Connecticut	No statutes on	It is unclear whether Connecticut

324. § 9-10-201(c)(1).

325. § 9-10-201(c)(2).

326. § 9-10-201(c)(1).

327. CAL. FAM. CODE § 7648.9 (West Supp. 2009).

328. See § 7600 *et. seq.* (West 2004).

329. *Johnson v. Calvert*, 851 P.2d 776, 782 (Cal. 1993).

	surrogacy.	courts deem surrogacy agreements enforceable. ³³⁰
Delaware	No statutes on surrogacy.	
District of Columbia	Surrogacy agreements are prohibited, and any person involved in any such agreement is subject to civil and criminal penalties. ³³¹	D.C. CODE § 16-401(4), defines surrogacy agreements as follows: (4) "Surrogate parenting contract" means any agreement, oral or written, in which: (A) A woman agrees either to be artificially inseminated with the sperm of a man who is not her husband, or to be impregnated with an embryo that is the product of an ovum fertilization with the sperm of a man who is not her husband; and (B) A woman agrees to, or intends to, relinquish all parental rights and responsibilities and to consent to the adoption of a child born as a result of insemination or in vitro fertilization as provided in this chapter." ³³²
Florida	Married couples are permitted to use a gestational surrogate under certain circumstances, such as when the "commissioning mother" cannot carry to term or to do so would create a health risk to the mother or the child. ³³³	The statute reads, in part, "[p]rior to engaging in gestational surrogacy, a binding and enforceable gestational surrogacy contract shall be made between the commissioning couple and the gestational surrogate. A contract for gestational surrogacy shall not be binding and enforceable unless the gestational surrogate is 18 years of age or older and the commissioning couple are legally married and are both 18 years of age or older." ³³⁴
Georgia	No statutes on surrogacy.	

330. See Leslie I. Jennings-Lax, *Surrogacy—The Law in Connecticut*, 79 CONN. B.J. 59, 65-66 (2005).

331. D.C. CODE ANN. § 16-402 (LexisNexis 1997).

332. § 16-401(4).

333. FLA. STAT. ANN. § 742.15(2) (West 2005).

334. § 742.15(1).

Hawaii	No statutes on surrogacy.	
Idaho	No statutes on surrogacy.	
Illinois	Gestational surrogacy agreements are allowed by statute. ³³⁵ The law contains requirements for both the surrogate and the intended parents. ³³⁶	
Indiana	Surrogacy agreements are deemed void and contrary to public policy. ³³⁷	IND. CODE § 31-20-1-1, provides "that it is against public policy to enforce any term of a surrogate agreement that requires a surrogate to do any of the following: (1) Provide a gamete to conceive a child. (2) Become pregnant. (3) Consent to undergo or undergo an abortion. (4) Undergo medical or psychological treatment or examination. (5) Use a substance or engage in activity only in accordance with the demands of another person. (6) Waive parental rights or duties to a child. (7) Terminate care, custody, or control of a child. (8) Consent to a stepparent adoption under IND. CODE § 31-19 (or IND. CODE § 31-3-1 before its repeal)." ³³⁸ <i>See also</i> IND. CODE § 31-20-1-2

335. 750 ILL. COMP. STAT. ANN. 47/1 *et seq.* (West 1993).

336. 750 ILL. COMP. STAT. ANN. 47/20 § 20(b). The gestational surrogate must be at least 21, have given birth to at least one child, and have had medical and mental health evaluations. At least one of the intended parents must have a medical need for surrogacy. Surrogacy agreements also must be in writing and the parties must be represented by separate counsel. 750 ILL. COMP. STAT. ANN. 47/20 § 20(a).

337. *See* IND. CODE §§ 31-20-1-1 to -2 (LexisNexis 2007).

338. *See* § 31-20-1-1.

339. § 31-20-1-2.

		Void agreements. "A surrogate agreement described in section 1 of this chapter that is formed after March 14, 1988, is void." ³³⁹
Iowa	No specific laws dealing with surrogacy, but it is specifically exempted from statute making it a crime to sell another person. ³⁴⁰	IOWA CODE § 710.11 provides that: "A person commits a class "C" felony when the person purchases or sells or attempts to purchase or sell an individual to another person. This section does not apply to a surrogate mother arrangement." ³⁴¹
Kansas	No statutes on surrogacy.	
Kentucky	Traditional surrogacy agreements (where the surrogate is genetically related to the child) appear to be void. ³⁴²	No Kentucky law addresses <i>gestational</i> surrogacy agreements.
Louisiana	Contracts for traditional surrogate motherhood are void. ³⁴³	Louisiana laws do not directly address gestational surrogacy agreements. However, the Vital Records Law appears to allow gestational carriers who are genetically related to a biological parent of the child. The law provides in part that "[i]n the case of a child born of a surrogate birth parent who is related by blood or affinity to a biological parent, the biological parents proven to be the mother and father by DNA testing shall be considered the parents of the child." ³⁴⁴
Maine	No statutes on surrogacy.	
Maryland	No statutes on surrogacy.	A Maryland Attorney General's opinion has declared surrogacy contracts that involve a payment of a

340. IOWA CODE ANN. § 710.11 (West 2003).

341. *Id.*

342. KY. REV. STAT. ANN. § 199.590(4) (LexisNexis Supp. 2007).

343. LA. REV. STAT. ANN. § 9:2713 (2005).

344. § 40:34B(1)(j) (Supp. 2009).

		fee to the birth mother to be illegal and unenforceable under Maryland law. However, the same opinion said the payment of a surrogacy fee would not necessarily be a bar to an adoption because the decision on whether to grant an adoption petition depends on the best interests of the child. ³⁴⁵
Massachusetts	No statutes on surrogacy.	A traditional surrogacy contract was held unenforceable by the Massachusetts high court in <i>R.R. v. M.H.</i> ³⁴⁶
Michigan	Surrogacy contracts are declared void and contrary to public policy, and criminal penalties are set forth for those who participate in them. ³⁴⁷ The law applies to both gestational and traditional surrogacy agreements. ³⁴⁸	
Minnesota	No provisions specifically addressing surrogacy.	There is a provision of Minnesota law that allows an action to declare a mother-child relationship, similar to a paternity action. ³⁴⁹
Mississippi	No statutes on	

345. 85 Md. Op. Att'y Gen. 348, 348 (2000).

346. *R.R. v. M.H.*, 689 N.E.2d 790 (Mass. 1998), discussed in more detail *infra* at notes 530-41 and accompanying text.

347. See MICH. COMP. LAWS ANN. § 722.851 *et seq.* (West 2002).

348. See § 722.859, which states:

(1) A person shall not enter into, induce, arrange, procure, or otherwise assist in the formation of a surrogate parentage contract for compensation.
 (2) A participating party other than an unemancipated minor female or a female diagnosed as being mentally retarded or as having a mental illness or developmental disability who knowingly enters into a surrogate parentage contract for compensation is guilty of a misdemeanor punishable by a fine of not more than \$10,000.00 or imprisonment for not more than 1 year, or both.
 (3) A person other than a participating party who induces, arranges, procures, or otherwise assists in the formation of a surrogate parentage contract for compensation is guilty of a felony punishable by a fine of not more than \$50,000.00 or imprisonment for not more than 5 years, or both.

349. See MINN. STAT. ANN. § 257.71 (West 2007).

	surrogacy.	
Missouri	No statutes on surrogacy.	Trafficking in children is a crime, but it's not clear if surrogacy would fall under this law. ³⁵⁰ See MO. REV. STAT. § 568.175, which notes that a "person . . . commits the crime of trafficking in children if he . . . offers, gives, receives or solicits any money, consideration or other thing of value for the delivery or offer of delivery of a child to another person . . . for purposes of adoption or a consent to termination of parental rights" ³⁵¹ However, note that "[a] crime is not committed under this section if the money, consideration or thing of value or conduct is permitted under chapter 453, RSMo, relating to adoption." ³⁵²
Montana	No statutes on surrogacy.	
Nebraska	Surrogacy contracts are void and unenforceable, at least when there is compensation involved. ³⁵³	
Nevada	Couples married under Nevada law are allowed to enter into gestational surrogacy agreements as long as the agreements follow specific requirements, including specifying the rights of all involved. ³⁵⁴	
New Hampshire	Surrogacy agreements are	

350. See MO. ANN. STAT. § 568.175 (West 1999).

351. § 568.175.1.

352. § 568.175.2.

353. NEB. REV. STAT. § 25-21,200 (1995).

354. NEV. REV. STAT. ANN. § 126.045 (LexisNexis 2004).

	allowed under certain circumstances, including those in which all the parties involved are age 21 or older and in which the intended mother is medically unable to bear a child. At least one of the intended parents must supply the sperm or the egg. The intended parents must be a married couple. ³⁵⁵	
New Jersey	No statutes on surrogacy.	A traditional surrogacy contract providing for termination of a mother's parental rights was found void by the New Jersey Supreme Court in <i>Matter of Baby M.</i> ³⁵⁶
New Mexico	No laws specifically addressing surrogacy.	N.M. STAT. § 32A-5-34 (1978), relating to adoption, allows for certain fees to be paid to a mother but "[a]ny person who makes payments that are not permitted pursuant to the provisions of this section is in violation of the Adoption Act and subject to . . . penalties." ³⁵⁷
New York	Surrogate parenting contracts, both gestational and traditional, are contrary to public policy, void, and unenforceable. ³⁵⁸	N.Y. DOM. REL. LAW § 123 specifies civil and criminal penalties. ³⁵⁹
North Carolina	No statutes addressing surrogacy.	
North Dakota	Traditional surrogacy agreements	See N.D. CENT. CODE, § 14-18-05: "Any agreement in which a

355. See N.H. REV. STAT. ANN. § 168-B:1 *et seq.* (LexisNexis 2001).

356. *In re Baby M.*, 537 A.2d 1227, 1240 (N.J. 1988).

357. N.M. STAT. § 32A-5-34(C) (1978).

358. See N.Y. DOM. REL. LAW § 122 (McKinney 1999).

359. N.Y. DOM. REL. LAW § 123 (McKinney 1999).

	(surrogacy through ART) are void, but gestational surrogacy agreements are allowed. ³⁶⁰	woman agrees to become a surrogate or to relinquish that woman's rights and duties as parent of a child conceived through assisted conception is void. The surrogate, however, is the mother of a resulting child and the surrogate's husband, if a party to the agreement, is the father of the child. If the surrogate's husband is not a party to the agreement or the surrogate is unmarried, paternity of the child is governed by chapter 14-20."³⁶¹ <i>See also:</i> N.D. CENT. CODE § 14-18-08, which notes: "A child born to a gestational carrier is a child of the intended parents for all purposes and is not a child of the gestational carrier and the gestational carrier's husband, if any."³⁶²
Ohio	No statutes on surrogacy.	Ohio law allows a woman to bring an action to determine her parentage using the same standards as paternity actions. ³⁶³
Oklahoma	No statutes on surrogacy.	An Oklahoma Attorney General's opinion said that a surrogacy contract that provides for compensation beyond the statutory limits for an adoption would violate the state's anti-child-trafficking law. ³⁶⁴
Oregon	No laws specifically dealing with surrogacy; however, the law making it illegal to buy or sell a child exempts fees	<i>See</i> OR. REV. STAT. § 163.537: "(1) A person commits the crime of buying or selling a person under 18 years of age if the person buys, sells, barter, trades or offers to buy or sell the legal or physical

360. *See* N.D. CENT. CODE, §§ 14-18-05, -08 (Supp. 2007).

361. *Id.*

362. *See also* § 14-18-08.

363. *See* OHIO REV. CODE ANN. § 3111.17 (LexisNexis 2008).

364. 1983 Okla. AG LEXIS 41, **1, 7.

	paid in a surrogacy agreement. ³⁶⁵	custody of a person under 18 years of age. (2) Subsection (1) of this section does not: (a) Prohibit a person in the process of adopting a child from paying the fees, costs and expenses related to the adoption as allowed in ORS 109.311. (b) Prohibit a negotiated satisfaction of child support arrearages or other settlement in favor of a parent of a child in exchange for consent of the parent to the adoption of the child by the current spouse of the child's other parent. (c) Apply to fees for services charged by the Department of Human Services or adoption agencies (d) Apply to fees for services in an adoption pursuant to a surrogacy agreement. (e) Prohibit discussion or settlement of disputed issues between parties in a domestic relations proceeding. (3) Buying or selling a person under 18 years of age is a Class B felony.³⁶⁶
Pennsylvania	No statutes on surrogacy.	
Rhode Island	No statutes on surrogacy.	
South Carolina	No statutes on surrogacy.	
South Dakota	No statutes on surrogacy.	
Tennessee	Surrogate agreements	See TENN. CODE ANN. § 36-1-102:

365. See OR. REV. STAT. § 163.537(2)(d) (2007).

366. See § 163.537.

	are not explicitly authorized, but a statute says that adoption by the intended parents is not necessary in the case of surrogacy, and defines "surrogate birth." ³⁶⁷	"(48)(A) 'Surrogate birth' means: (i) The union of the wife's egg and the husband's sperm, which are then placed in another woman, who carries the fetus to term and who, pursuant to a contract, then relinquishes all parental rights to the child to the biological parents pursuant to the terms of the contract; or (ii) The insemination of a woman by the sperm of a man under a contract by which the parties state their intent that the woman who carries the fetus shall relinquish the child to the biological father and the biological father's wife to parent; (B) No surrender pursuant to this part is necessary to terminate any parental rights of the woman who carried the child to term under the circumstances described in this subdivision (48) and no adoption of the child by the biological parent(s) is necessary; (C) Nothing in this subdivision (48) shall be construed to expressly authorize the surrogate birth process in Tennessee unless otherwise approved by the courts or the general assembly." ³⁶⁸
Texas	Gestational surrogacy agreements are allowed, but regulated. ³⁶⁹ The intended parents must be married to each other, the gestational surrogate's own eggs must not be used, and the agreement must	

367. See TENN. CODE ANN. § 36-1-102(48) (2005).

368. *Id.*

369. See TEX. FAM. CODE ANN. § 160.751 *et seq.* (Vernon 2008).

	not seek to control the surrogate mother's decisions regarding her health and the health of the embryo. A gestational surrogacy agreement must be validated by the court. An agreement that is not validated is unenforceable under the law. ³⁷⁰	
Utah	Gestational surrogacy agreements are authorized under certain circumstances. ³⁷¹ The intended parents have to be married and the parties to a gestational surrogacy agreement have to be twenty-one or older. The agreement must be validated by the court, and the intended mother must be unable to bear a child without a risk to her health or to the health of the child. The gestational surrogate's egg cannot be used in the procedure. A surrogacy agreement that is not validated by the court is unenforceable. Payment to the	

370. *Id.*

371. *See* UTAH CODE ANN. § 78B-15-801 *et seq.* (2008).

	surrogate is allowed. ³⁷²	
Vermont	No statutes on surrogacy.	
Virginia	Gestational surrogacy contracts are allowed if approved by the court, and if a number of requirements are met, including that the intended parents are married to each other. <i>See</i> VA. CODE ANN. § 20-156 to §20-165, and in particular VA. CODE ANN. § 158. ³⁷³	Importantly, Virginia has a statutory choice of law provision which states that Virginia law controls surrogacy disputes brought in Virginia courts. ³⁷⁴ VA. CODE ANN. § 20-157
Washington	Gestational surrogacy agreements are allowed if there is no compensation involved. <i>See</i> WASH. REV. CODE §§ 26.26.210-.260. ³⁷⁵ "Any person, organization, or agency who intentionally violates any provision of <u>RCW 26.26.210</u> through <u>26.26.260</u> shall be guilty of a gross misdemeanor." ³⁷⁶	Note that WASH. REV. CODE § 26.26.021 includes a a choice-of-law provision governing surrogacy agreements. "(1) This chapter governs every determination of parentage in this state. (2) The court shall apply the law of this state to adjudicate the parent-child relationship. The applicable law does not depend on: (a) The place of birth of the child; or (b) The past or present residence of the child." ³⁷⁷ Further, Washington extends its law even to surrogacy agreements entered into in other states: "A surrogate parentage contract entered into for compensation, whether executed in the state of

372. *Id.*

373. *See* VA. CODE ANN. §§ 20-156 to -165 (2008).

374. § 20-157.

375. *See* WASH. REV. CODE ANN. §§ 26.26.210-.260 (West 2005).

376. § 26.26.250.

377. § 26.26.021.

		Washington or in another jurisdiction, shall be void and unenforceable in the state of Washington as contrary to public policy." ³⁷⁸
West Virginia	No specific provision on surrogacy, but it is exempted from the statute making baby-selling a crime. ³⁷⁹	<i>See</i> W. VA. CODE § 48-22-803: "(a) Any person or agency who knowingly offers, gives or agrees to give to another person money, property, service or other thing of value in consideration for the recipient's locating, providing or procuring a minor child for any purpose which entails a transfer of the legal or physical custody of said child, including, but not limited to, adoption or placement, is guilty of a felony and subject to fine and imprisonment as provided herein. (b) Any person who knowingly receives, accepts or offers to accept money, property, service or other thing of value to locate, provide or procure a minor child for any purpose which entails a transfer of the legal or physical custody of said child, including, but not limited to, adoption or placement, is guilty of a felony and subject to fine and imprisonment as provided herein (d) A child whose parent, guardian or custodian has sold or attempted to sell said child in violation of the provisions of this article may be deemed an abused child as defined by section three, article one, chapter forty-nine of this code. The court may place such a child

378. § 26.26.240.

379. *See* W. VA. CODE ANN. § 48-22-803 (LexisNexis 2004).

		in the custody of the department of health and human resources or with such other responsible person as the best interests of the child dictate. ³⁸⁰
Wisconsin	No specific statutes on surrogacy.	The law dealing with registration of births mentions surrogacy. ³⁸¹
Wyoming	No statutes on surrogacy.	

2. Embryo Disposition

The laws of embryo disposition are similarly varied and address a variety of areas: "advanced written directives prior to the creation of frozen embryos; embryo disposition in the event of divorce or death involving a couple that has donated eggs, sperm or had embryos in vitro fertilized; options for disposition of unused embryos, including storage, disposal, donation to scientific research and adoption."³⁸²

Here is a state-by-state summary of these laws:

State	Embryo Law	Comments
Alabama	No laws regarding embryo disposition.	
Alaska	No laws regarding embryo disposition.	
Arizona	No laws specifically deal with storage or disposal, but experimentation on human embryos is prohibited. ³⁸³	
Arkansas	No laws deal with storage or disposal of embryos, but human cloning is prohibited. ³⁸⁴	

380. *Id.*

381. *See* WIS. STAT. § 69.14 (2007-08).

382. National Conference of State Legislatures, *State Laws on Frozen Embryos*, <http://www.ncsl.org/programs/health/embryodisposition.htm> (last visited Apr. 20, 2009).

383. ARIZ. REV. STAT. § 36-2302(A) (2003).

384. ARK. CODE ANN. § 20-16-1002(1) (2005).

California	Doctors must obtain informed consent for use of donated sperm and eggs. That consent should specify the disposition of any unused genetic material.³⁸⁵ Human cloning is prohibited.³⁸⁶ It is illegal to use embryos, eggs, or sperm in ways other than those indicated by the patient on a written consent form.³⁸⁷ Violators face three to five years in prison and a \$50,000 fine. Written consent not required by donors to sperm banks.³⁸⁸	Embryos cannot be sold for use in research, but only donated.³⁸⁹ The law governing disposition of human embryos requires that infertility patients be told they have the option of storing unused embryos, donating them to another individual, donating them for research, or discarding them. Doctors must give each partner a form setting forth advance directives regarding the disposition of embryos.³⁹⁰
Colorado	COLO. REV. STAT. § 19-4-106 governs disposition of embryos in the case of death or divorce.³⁹¹	“(7)(a) If a marriage is dissolved before placement of eggs, sperm, or embryos, the former spouse is not a parent of the resulting child unless the former spouse consented in a record that if assisted reproduction were to occur after a dissolution of marriage, the former spouse would be a parent of the child. (b) The consent of a former spouse to assisted reproduction may be

385. See CAL. BUS. & PROF. CODE §§ 2260(a), (b)(2) (West Supp. 2009).

386. CAL. HEALTH & SAFETY CODE § 24185(a) (West 2006).

387. CAL. PENAL CODE § 367g(a) (West 1999).

388. §§ 367g(c), (d).

389. CAL. HEALTH & SAFETY CODE §§ 125320(a), (c) (West 2006); § 125350 (West Supp. 2009).

390. §§ 125315(a)-(b) (West 2006).

391. COLO. REV. STAT. ANN. §§ 19-4-106(7)(a)-(b), (8) (West Supp. 2008).

		withdrawn by that individual in a record at any time before placement of eggs, sperm, or embryos. (8) If a spouse dies before placement of eggs, sperm, or embryos, the deceased spouse is not a parent of the resulting child unless the deceased spouse consented in a record that if assisted reproduction were to occur after death, the deceased spouse would be a parent of the child.”³⁹²
Connecticut	Human cloning is criminalized.³⁹³ The law also provides: “(c)(1) A physician or other health care provider who is treating a patient for infertility shall provide the patient with timely, relevant and appropriate information sufficient to allow that person to make an informed and voluntary choice regarding the disposition of any embryos or embryonic stem cells remaining following an infertility treatment. (2) A patient to whom information is provided pursuant to subdivision (1) of this subsection shall be presented with the option of storing, donating to another person, donating for research purposes, or otherwise disposing of any	The statute also specifies that: “A person who elects to donate for stem cell research purposes any human embryos or embryonic stem cells remaining after receiving infertility treatment, or unfertilized human eggs or human sperm shall provide written consent for that donation and shall not receive direct or indirect payment for such human embryos, embryonic stem cells, unfertilized human eggs or human sperm. (4) Any person who violates the provisions of this subsection shall be fined not more than fifty thousand dollars or imprisoned not more than five years, or both. Each violation of this subsection shall be a separate and distinct offense.”³⁹⁵

392. *Id.*

393. CONN. GEN. STAT. ANN. § 19a-32d(b) (West Supp. 2009).

	unused embryos or embryonic stem cells." ³⁹⁴	
Delaware	Delaware law provides that if a couple divorces before the placement of sperm, eggs, or embryos, the former spouse is not a parent of the resulting child unless he or she consented in a record that if reproduction occurred after divorce, he or she would be a parent of the child. Consent to assisted reproduction can be withdrawn in a record at any time before the placement of the eggs, sperm or embryos. That person is then not considered a parent of the child. ³⁹⁶	<i>See also</i> DEL. CODE ANN. tit. 13, § 8-707, which provides that if an individual who consented to be a parent by assisted reproduction dies before placement of eggs, sperm, or embryos, the deceased individual is not a parent of the resulting child unless the deceased individual consented in a record that if assisted reproduction were to occur after death, the deceased individual would be a parent of the child. ³⁹⁷
District of Columbia	No laws regarding embryo disposition.	
Florida	Disposition of embryos is governed by FLA. STAT. § 742.17, which focuses on the agreement between the couple and the physician, and absent that, leaves the decision about embryo disposition to the couple. ³⁹⁸	The Florida statute also provides that "[a] child conceived from the eggs or sperm of a person or persons who died before the transfer of their eggs, sperm, or preembryos to a woman's body shall not be eligible for a claim against the decedent's estate unless the child has been provided for by the decedent's will." ³⁹⁹

394. §§ 19a-32d(c)(1)-(2).

395. §§ 19a-32d(c)(3)-(4).

396. DEL. CODE ANN. tit. 13, §§ 8-706(a)-(b) (Supp. 2006).

397. § 8-707.

398. FLA. STAT. ANN. §§ 742.17(1)-(2) (West 2005).

399. § 742.17(4).

Georgia	No laws regarding embryo disposition.	
Hawaii	No laws regarding embryo disposition.	
Idaho	No laws regarding embryo disposition.	
Illinois	No laws regarding embryo disposition.	
Indiana	No laws addressing embryo disposition.	Human cloning is criminalized in IND. CODE § 35-46-5-2, which does not apply to in vitro fertilization. ⁴⁰⁰
Iowa	No laws regarding embryo disposition.	
Kansas	No laws regarding embryo disposition.	
Kentucky	No laws regarding embryo disposition.	
Louisiana	Louisiana defines an embryo as a human being, bans research on human embryos, and bans the sale of embryos. The law gives embryos the legal status to sue. It also provides that if the intended parents renounce their parental rights to the embryos, then they are available for "adoptive implantation." The intended parents can renounce their parental rights in favor of another married couple, but "only if the other couple is willing	

400. IND. CODE ANN. §§ 35-46-5-2(a), (c)(1) (LexisNexis Supp. 2008).

	and able to receive the in vitro fertilized ovum. No compensation shall be paid or received by either couple to renounce parental rights." ⁴⁰¹	
Maine	No laws regarding embryo disposition.	
Maryland	Disposition of unused embryos is governed by MD. ANN. CODE art. 83A, § 5-2B-10, which provides that: "(a) A health care practitioner licensed under the Health Occupations Article who treats individuals for infertility shall: (1) Provide individuals with information sufficient to enable them to make an informed and voluntary choice regarding the disposition of any unused material; and (2) Present to individuals the option[s] [including] . . . [s]toring or discarding any unused material; [and d]onating any unused material for clinical purposes in the treatment of infertility." ⁴⁰²	
Massachusetts	Under Massachusetts law, doctors must provide in	

401. LA. REV. STAT. ANN. §§ 9:121, :122, :124, :126, :130 (2008). The law also provides that disputes regarding the custody of embryos shall be resolved based on the best interest of the embryo, and actually gives inheritance rights to embryos that develop into live births. Donated embryos do not retain inheritance rights from their genetic parents. §§ 9:131, :133.

402. MD. CODE ANN., ECON. DEV. §§ 10-438(a)(1)-(2) (LexisNexis 2008).

	vitro fertilization patients with information so that they can make an informed choice regarding the disposition of embryos or gametes remaining following treatment.⁴⁰³ The doctor must also give the patient the options of storing, donating to another person, donating for research purposes, or otherwise disposing of or destroying any unused embryos.⁴⁰⁴	
Michigan	No laws specifically address embryo disposition, but non-therapeutic research on live human embryos is banned under Michigan law.⁴⁰⁵	Human cloning is banned.⁴⁰⁶ Under Michigan law: (1) A person shall not use a live human embryo, fetus, or neonate for nontherapeutic research if, in the best judgment of the person conducting the research, based upon the available knowledge or information at the approximate time of the research, the research substantially jeopardizes the life or health of the embryo, fetus, or neonate. Nontherapeutic research shall not in any case be performed on an embryo or fetus known by the person conducting the research to

403. MASS. ANN. LAWS ch. 111L, § 4(a) (LexisNexis Supp. 2008).

404. *Id.*

405. MICH. COMP. LAWS § 333.2685(1) (West 2001).

406. § 333.16274(1) (West 2008).

		be the subject of a planned abortion being performed for any purpose other than to protect the life of the mother. (2) For purposes of subsection (1) the embryo or fetus shall be conclusively presumed not to be the subject of a planned abortion if the mother signed a written statement at the time of the research, that she was not planning an abortion. ⁴⁰⁷
Minnesota	No laws addressing embryo disposition.	
Mississippi	No laws regarding embryo disposition.	
Missouri	No laws regarding embryo disposition.	No state funds can be used to research human cloning under Missouri law. ⁴⁰⁸
Montana	No laws regarding embryo disposition.	
Nebraska	No laws regarding embryo disposition.	
Nevada	No laws regarding embryo disposition, but an aborted embryo cannot be used for a commercial purpose. ⁴⁰⁹	
New Hampshire	No laws regarding embryo disposition.	
New Jersey	People undergoing fertility treatment must be informed	The law regulates donation for research:

407. §§ 333.2685(1)-(2) (West 2001).

408. MO. REV. STAT. § 1.217 (West 2000).

409. NEV. REV. STAT. ANN. § 451.015 (LexisNexis 2005).

	of their options for unused embryos. ⁴¹⁰ The law provides that embryonic stem cell research is allowed in New Jersey. ⁴¹¹ It also provides that the physician must provide the patient(s) information and choices about the disposition of the embryos. ⁴¹²	"A person shall not knowingly, for valuable consideration, purchase or sell, or otherwise transfer or obtain, or promote the sale or transfer of, embryonic or cadaveric fetal tissue for research purposes pursuant to this act; however, embryonic or cadaveric fetal tissue may be donated for research purposes in accordance with the provisions of subsection b. of this section or other applicable State or federal law." ⁴¹³
New Mexico	No laws regarding disposition of embryos.	
New York	Informed consent for donors to reproductive tissue banks is required. ⁴¹⁴	The informed consent must include "notification of all currently known ways in which the donor's reproductive tissue and resulting embryos may be used. If the reproductive tissue bank accepts reproductive tissue with restrictions on the manner in which embryos created may be used, the consent also shall include a statement that the reproductive tissue bank has informed the donor that it will make a good faith effort to ensure that the donor's restrictions are

410. N.J. STAT. ANN. §§ 26:2Z-2(b)(1)-(2) (West 2007).

411. § 26.2Z-2(a)(1).

412. §§ 26.2Z-2(b)(1)-(2).

413. § 26.2Z-2(c)(1).

414. N.Y. COMP. CODES R. & REGS. tit. 10, § 52-8.8(a) (2007).

		respected, but that it cannot guarantee that the recipients of the reproductive tissue will abide by the donor's restrictions."⁴¹⁵ Also, embryos may only be created via donor tissue at the request of a specific patient who wants to use the embryos herself.⁴¹⁶
North Carolina	No laws regarding embryo disposition.	
North Dakota	No laws specifically govern disposition of embryos, but the law does govern parentage determinations of children born via assisted reproduction after death or divorce. North Dakota law provides that if a marriage is dissolved before the placement of sperm, eggs, or embryos, the former spouse is not a parent of the resulting child unless he or she consents in a record that he or she would be a parent if assisted reproduction occurred after divorce.⁴¹⁷ N.D. CENT. CODE §14-20-64 also provides that consent to reproductive technology can be withdrawn in a record at	<i>See also</i> N.D. CENT. CODE § 14-20-65, which provides that if a person who consented in a record to assisted reproduction dies before it is performed, he or she is not a parent of a resulting child unless the deceased spouse agreed in a record that he or she would still be a parent even if reproduction occurred after death.⁴¹⁹

415. § 52-8.8(a)(3).

416. § 52-8.7(h).

417. N.D. CENT. CODE §14-20-64(1) (Supp. 2007).

418. §14-20-64(2).

419. §14-20-65.

	any time before placement of eggs, sperm, or embryos. The individual who withdraws consent is not a parent of a resulting child. ⁴¹⁸	
Ohio	If an individual who produced genetic material to create an embryo dies, the other genetic parent may consent to donate the embryo and then shall have no parental rights or responsibilities. ⁴²⁰	
Oklahoma	Embryos may be donated from one married couple to another. ⁴²¹ The donors are then relieved of parental rights and responsibilities, and the donees are considered the parents of the resulting child. ⁴²²	
Oregon	No laws regarding embryo disposition.	
Pennsylvania	No laws regarding embryo disposition.	
Rhode Island	No laws specifically regarding embryo disposition, but experimentation on embryos is prohibited. ⁴²³	Human cloning is prohibited. ⁴²⁴
South Carolina	No statutes regarding embryo disposition.	

420. OHIO REV. CODE ANN. § 3111.97(D) (LexisNexis 2008).

421. OKLA. STAT. ANN. tit 10, § 556(A)(1) (West 2007).

422. §§ 556(B)(1)-(2).

423. R.I. GEN. LAWS § 11-54-1(a) (2008).

424. § 23-16.4-2(a).

South Dakota	No statutes specifically dealing with dispositions of embryos, although research on embryos is banned. ⁴²⁵	Research that destroys a human embryo is prohibited and punished as a misdemeanor. ⁴²⁶ Research that subjects an embryo to substantial risk of harm is also punished as misdemeanor under S.D. CODE ANN. § 34-14-17, which also prohibits the sale or transfer or transfer of embryos for use in nontherapeutic research. ⁴²⁷ Human cloning is criminalized. ⁴²⁸
Tennessee	No laws regarding embryo disposition.	
Texas	No laws specifically govern embryo disposition, but parentage is governed under TEX. FAM. CODE ANN. § 160.706, which provides that if a marriage ends before assisted reproduction takes place, the former spouse is not a parent of the resulting child unless the former spouse consented in a record kept by a licensed physician that if assisted reproduction were to occur after a divorce the former spouse would be a parent of the child. The law also provides that the consent of a former spouse to assisted reproduction can be withdrawn in a record kept by a licensed physician at	TEX. FAM. CODE ANN. § 160.707 provides that if a spouse dies before the placement of embryos, the deceased spouse is not a parent of the resulting child unless the spouse consented in a record kept by a licensed physician that if assisted reproduction were to occur after death the deceased spouse would be a parent of the child. ⁴³⁰

425. S.D. CODIFIED LAWS ANN. §§ 34-14-16 to -17 (2004).

426. § 34-14-16.

427. § 34-14-17.

428. § 34-14-27.

	any time before the placement of the embryos. ⁴²⁹	
Utah	No laws specifically govern embryo disposition, but parentage is governed under UTAH CODE ANN. § 78B-15-706, which provides that in the case of a divorce prior to the placement of an embryo, the former spouse is not a parent of the resulting child unless the former spouse consented in a record that if assisted reproduction were to occur after a divorce, the former spouse would be a parent of the child. That consent can be revoked in a record prior to use of the embryos. ⁴³¹	<i>See also</i> UTAH CODE ANN. § 78B-15-707, which provides that a deceased spouse is not the parent of a child born via assisted reproduction unless the deceased spouse agreed in a record to be the parent of the child if assisted reproduction occurred after death. ⁴³²
Vermont	No statutes regarding embryo disposition.	
Virginia	No laws specifically govern embryo disposition, but parentage is governed under VA. CODE ANN. § 20-158, which provides that “any person who dies before in utero implantation of an embryo resulting from the union of his sperm or her ovum with another gamete, whether or not the other gamete is that of the person’s spouse, is not the parent of any resulting child unless (i) implantation	In cases of divorce, “any person who is a party to an action for divorce or annulment commenced by filing before in utero implantation of an embryo resulting from the union of his sperm or her ovum with another gamete, whether or not the other gamete is that of the person’s spouse, is not the parent of any resulting child unless (i) implantation occurs before notice of the filing can reasonably be

429. TEX. FAM. CODE ANN. §§ 160.706(a)-(b) (Vernon 2008).

430. § 160.707.

431. UTAH CODE ANN. §§ 78B-15-706(1)-(2) (2008).

432. § 78B-15-707.

	occurs before notice of the death can reasonably be communicated to the physician performing the procedure or (ii) the person consents to be a parent in writing executed before the implantation.” ⁴³³	communicated to the physician performing the procedure or (ii) the person consents in writing to be a parent, whether the writing was executed before or after the implantation.” ⁴³⁴
Washington	No laws specifically relate to embryo disposition, but parentage determinations are governed by WASH. REV. CODE § 26.26.725, which provides that if there is a divorce prior to placement of an embryo, the former spouse is not a parent of the resulting child unless the former spouse has consent to parentage in a record. Consent may be revoked in a record before the placement of the embryo. ⁴³⁵	If a spouse dies before placement of an embryo, the deceased spouse is not a parent of the resulting child unless the deceased spouse consented in a record that if assisted reproduction were to occur after death, the deceased spouse would be a parent of the child. ⁴³⁶
West Virginia	No laws regarding embryo disposition.	
Wisconsin	No laws regarding embryo disposition.	
Wyoming	No laws specifically govern disposition, but parentage of children born via assisted reproduction is governed by WYO. STAT. ANN. § 14-2-906, which says that if a marriage is dissolved before placement of embryos, the former spouse is not a	

433. VA. CODE ANN. § 20-158(B) (2008).

434. § 20-158(C).

435. WASH. REV. CODE ANN. §§ 26.26.725(1)-(2) (West 2005).

436. § 26.26.730.

	parent of the resulting child unless the former spouse consents to parentage in a record. That consent can be withdrawn prior to placement of the embryo. ⁴³⁷	
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PART TWO: THE MAIN CONFLICTS OF LAW APPROACHES AND HOW THEY FAIL TO ADEQUATELY ADDRESS THE COMPLEXITIES OF ART

I. THE APPROACHES

There are four leading approaches to conflicts of law:

1. Vested Rights (First Restatement) (used in about 13 states);⁴³⁸
2. Governmental Interest Analysis (used in about 3 states);⁴³⁹
3. Better Law (used in about 5 states);⁴⁴⁰
4. Most Significant Relationship (Second Restatement) (used in about 27 states).⁴⁴¹

This section describes each approach with a general overview; the next section analyzes each approach in more detail in the context of the cases that have relied on them to decide choice of law ART issues.

A. *Vested Rights (First Restatement)*

The oldest approach to conflicts of law is known as the “First Restatement” or “vested rights” approach.⁴⁴² Under this approach, the court is charged with determining where the rights of the parties “vested.” The approach itself requires three steps: first, the court has to determine what area of law is involved—essentially find the right box to fit the lawsuit. This assessment requires a determination of whether the issue is substantive or

437. WYO. STAT. ANN. §§ 14-2-906(a)-(b) (2007).

438. See Symeon C. Symeonides, *Choice of Law in the American Courts in 2006: Twentieth Annual Survey*, 54 AM. J. COMP. L. 697, 713 (2006). This list presents them in roughly chronological order. Of course, it is simplifying the approaches a bit to say that there are only four since there are additional partial solutions that have been proposed. For the purpose of this article, these four approaches will be the focus because they are the most widely used generally and because they are the ones that have been used to solve ART cases.

439. *Id.*

440. *Id.*

441. *Id.*

442. This approach was described in the RESTATEMENT (FIRST) OF CONFLICTS OF LAW (1935).

procedural⁴⁴³ and a characterization of the issue to select its topical area.⁴⁴⁴ Second, the court must find the rule for that particular area of the law: the Restatement itself provided all of these rules. Finally, the court applies the rule to that set of facts, to localize the case to a particular location.

Under the First Restatement, one of the paramount concerns is territoriality.⁴⁴⁵ It is the “where” of the vesting of the rights that is important. However, in order to determine where the rights vested, the court needs to know *when* they vested.⁴⁴⁶ Once this is determined, it is then usually a fairly straightforward process to apply the law of that state.⁴⁴⁷

B. Governmental Interest Analysis

The next approach to appear was interest analysis. Developed by Professor Brainerd Currie in the late 1950s, this approach seeks to determine areas where a choice of law is needed.⁴⁴⁸ One innovation of this approach is that the court does not need to determine at the outset the area of law with which it is concerned; instead, the court needs to examine the law involved and see whether a state has an interest in having its law applied.⁴⁴⁹ Another

443. If the issues are procedural, the court will use its own law. For a classic discussion of this, see Walter Wheeler Cook, “Substance” and “Procedure” in the Conflict of Law, 42 YALE L.J. 333 (1933).

444. For example, whether the case is about a tort or a conflict.

445. This is comparable to other legal developments where territory was paramount. Compare, for example, the notions of *Pennoyer v. Neff*, 95 U.S. 714 (1877) with later developments in jurisdiction.

446. The “where” aspect of a “when”-type territorial approach can be seen, for instance, in a case about validity of a contract. Under vested rights, the court will use the law of the place **where** the contract was formed. However, in order to know **where** that occurred, the court must determine **when** it was formed: in other words, the court must determine the last act necessary for contract formation. (This when/where confuscation is akin to the current (2009) season of the television show, “Lost”).

447. Although, as with anything in Conflicts, the application is not problem-free. First, the court will use its own laws to “localize” a case, which means that if the rule asks for the place of contract formation, the court will use its own rules for what is needed to have a contract. Second, the issue of *renvoi*—the bane of students’ existence—may arise: *renvoi* raises the possibility that if a forum must use some other state’s law, instead of just applying the substantive law which applies to the case, the court will actually use the other state’s *choice of law approach*, and go through a second choice of law process (which may lead in some other substantive law being applied). See *In re Schneider’s Estate*, 96 N.Y.S.2d 652 (N.Y. Sur. Ct. 1950).

448. See Brainerd Currie, *Married Women’s Contracts: A Study in Conflict-of-Laws Method*, 25 U. CHI. L. REV. 227 (1958).

449. In teaching this topic, this author asks students to draw a line between the facts of the case and the law involved. Then, they look at the law and figure out its purpose while covering up the facts. I ask them to think about what facts they would want to see in that state’s column—what events needed to have occurred in the state—in order for that law to apply. For example, if the law at issue is a “guest statute” type situation, as many cases have been, the students must consider the policy involved. A “guest statute” regulates conduct between a plaintiff and a defendant where an auto accident is involved. The statute might try to prevent ungrateful guests from recovering from host drivers and/or might seek to prevent

innovation is that the court is asked to make a choice of law only where there is a real conflict, thus eliminating from consideration cases where there appears to be a conflict, but there is not.

C. *Better Law*

The third major approach that appeared chronologically is the “better law” approach or, as some courts call it, the “choice influencing factors” approach.⁴⁵⁰ Developed by Professor Robert Leflar in the late 1960s, this approach lists five factors that the court needs to consider:

1. Predictability of Results;
2. Maintenance of Interstate and International Order;
3. Simplification of the Judicial Task;
4. Advancement of Forum’s Governmental Interest; and
5. Application of the Better Rule Of Law.⁴⁵¹

The court is free to pick and choose among these five factors, but most courts using this approach choose it because it allows for the court to select a law that it has deemed to be the “better” law.⁴⁵²

D. *Most Significant Relationship (Second Restatement)*

The Second Restatement approach is the most widely used of the four approaches.⁴⁵³ Its focus is to seek out the state that has the “most significant relation” to the case, using a number of *topic-specific* factors and, if the court chooses, a *presumption* for that area of law. The court may also consult a list of policy principles to determine which law should apply and/or to break a tie in

collusive lawsuits between passenger and driver. They might suggest that collusive lawsuits are problematic because the driver’s insurance company might be defrauded. Students next examine what facts should be looked for in that state that are relevant to that purpose. The students then list possible connections that would give the state an interest in the case: if the driver is from that state, if the driver’s insurance company is in that state, if the accident occurred in that state. The state’s interest is directly proportional to the number of connections. The students must then uncover the connections they have listed in that state’s column: driver from state, passenger from state. Then, they do the same for the other state (or states) involved in the suit and put a check mark by every state that has an interest. They then step back and look at their results. If they find that only one state is “interested,” they see that it is a “false conflict.” If two or more states are “interested,” it is a true conflict, and a secondary analysis is needed. If no state is interested, it is technically an “unprovided for case,” and the forum would simply apply its own law. This is depicted nicely in WILLIAM M. RICHMAN & WILLIAM L. REYNOLDS, *UNDERSTANDING CONFLICT OF LAWS* (2d ed. 1993).

450. Robert A. Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267 (1966); Robert A. Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 CAL. L. REV. 1584 (1966).

451. Leflar, *Choice-Influencing Considerations in Conflicts Law*, *supra* note 450, at 282.

452. See, e.g., *Milkovich v. Saari*, 203 N.W.2d 408 (Minn. 1973).

453. See Symeonides, *supra* note 438, at 713.

the fact-specific factor analysis. A fuller explanation of this approach appears below. This outline provides the basic steps of the approach:

1. Determine area of law:
 - a. substance or procedure,
 - b. characterize.
2. Count up the Law Specific Factors:

For Torts:

 - a. Is there a presumption?
 - b. Look to factors in Section 145 to find most significant relationship:
 - 1) place of injury;
 - 2) place of conduct causing injury;
 - 3) domicile, residence, etc.;
 - 4) place where relationship, if any, is centered.

For Contracts:

 - a. Is there express choice of law in the contract?

If yes, will apply unless:

 - 1) no relationship to chosen state, or
 - 2) public policy prevents its application.
 - b. Is there a presumption?
 - c. Look to factors in Section 188 to find most significant relationship:
 - 1) place of contracting;
 - 2) place of negotiation;
 - 3) place of performance;
 - 4) location of subject matter;
 - 5) domicile, residence, etc. of the parties.
 - d. Consider relevant Section 6 Principles:
 - 1) needs of interstate system;
 - 2) policies of forum;
 - 3) policies of other states;
 - 4) justified expectations;
 - 5) basic policies underlying this field of law;
 - 6) certainty, predictability & uniformity;
 - 7) ease in determination.
 - e. Localize: apply the law of the state chosen.

II. HOW THE APPROACHES MISHANDLE ART CASES

There have not yet been many cases where there is a choice of law argument made,⁴⁵⁴ but enough have arisen to permit analysis, and as the above discussion demonstrates, there is certainly potential for many more to arise.

454. This is different from the many interstate cases that have arisen. The cases noted in this section are those where there was the potential for the law of more than one state to apply, and one of the parties made that argument. In some of the cases described above, the potential was there, but the argument was never made.

Like single state cases, interstate cases have involved surrogacy agreements, disposition of embryos, and parentage issues. Several of these cases warrant additional discussion because they illustrate particular issues that arise and problems with the choice of law approaches. Cases have been decided under a variety of the approaches, and, as the analysis below demonstrates, some cases have been decided in states that use a particular approach, but were not necessarily decided *using* that approach.

A. Cases Decided in States That Use the Vested Rights/First Restatement Approach

1. Kansas⁴⁵⁵

A recent case from Kansas indicates the difficulties that the First Restatement approach poses for ART conflicts.⁴⁵⁶ The mother of twins impregnated by artificial insemination sought termination of the donor's parental rights.⁴⁵⁷ The donor opposed the action and sought a declaration for visitation and joint custody.⁴⁵⁸ The issue was complicated by the fact that the two were friends but had not made a written contract to govern the donation or the parental rights of the donor.⁴⁵⁹ The trial court dismissed the donor's suit, and he appealed; the Kansas Supreme Court affirmed.⁴⁶⁰

There were several issues on appeal, including whether Kansas or Missouri law should govern the dispute.⁴⁶¹ Both parties were Kansas residents, the agreement to donate sperm was made in Kansas, and the twins were born and lived there.⁴⁶² The only action that occurred in Missouri was the actual insemination.⁴⁶³ This chart illustrates the multistate connections in this case:

State	MISSOURI	KANSAS
Connections to State	Insemination procedure took place.	Mother Donor Sperm provided (no contract) Children born

455. Kansas uses the vested rights approach. Symeonides, *supra* note 438, at 713.

456. *In re K.M.H.*, 169 P.3d 1025 (Kan. 2007).

457. *Id.* at 1029.

458. *Id.*

459. *Id.*

460. *Id.* at 1030, 1044.

461. *Id.* at 1031-32.

462. *Id.* at 1032.

463. *Id.*

Law	No statute barring a presumption of paternity for a known sperm donor to an unmarried woman; paternity could be proved by genetic test.	"The donor of semen provided to a licensed physician for use in artificial insemination . . . is treated in law as if he were not the birth father of a child thereby conceived, unless agreed to in writing by the donor and the woman." ⁴⁶⁴
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As soon as the children were born, the mother filed a petition in Kansas to establish that the donor did not have any parental rights; the donor responded with a paternity action that acknowledged his financial responsibility for the babies and claimed his parental rights (joint custody, visitation, and others).⁴⁶⁵ The two actions were consolidated, and when the court heard the case, the parties presented a choice of law conflict.⁴⁶⁶ The mother argued that Kansas law should apply because the contract was performed there when the insemination occurred; the donor sought the more favorable (for him) Missouri common law, which would presume paternity when the sperm donor is known to the unmarried woman.⁴⁶⁷ Missouri has no statute on this, but Kansas law requires that "the donor of semen provided to a licensed physician for use in the artificial insemination of a woman other than the donor's wife is treated in law as if he were not the birth father of a child thereby conceived, unless agreed to in writing by the donor and the woman."⁴⁶⁸ Due to this harsher treatment of the donor, the mother argued that Kansas law should apply.⁴⁶⁹

The Kansas Supreme Court's finding that Kansas law should apply⁴⁷⁰ was not surprising; as the court noted, and as the above chart indicates, almost all of the connections, and certainly all of the significant connections, were with the state of Kansas.⁴⁷¹ The court noted that in contracts cases Kansas uses the First Restatement rule of *lex loci contractus*:⁴⁷² here, Kansas would be the place of contracting because that is where the contract was made.⁴⁷³ The court also noted that Kansas has a slight preference for the *lex fori* approach, and that the courts should apply Kansas law unless there is a "clear showing that another state's law should apply."⁴⁷⁴

464. KAN. STAT. ANN. § 38-1114(f) (2000).

465. *K.M.H.*, 169 P.3d at 1029.

466. *Id.* at 1029-30.

467. *Id.* at 1030.

468. KAN. STAT. ANN. § 38-1114(f) (2000).

469. *K.M.H.*, 169 P.3d at 1030.

470. *Id.* at 1032.

471. *Id.*

472. I.e., "the law of the state where the contract is made governs." *Id.* at 1031-32.

473. *Id.*

474. *Id.* at 1032.

Surprisingly, the court also cited Section 287 of the Second Restatement of Conflicts, which provides that “legitimacy”⁴⁷⁵ is determined by the law of the state with the most significant relationship to child and parent.⁴⁷⁶ These three elements together all pointed to Kansas law, which did not support the donor’s motion for parentage.⁴⁷⁷ The court noted that “the parties are Kansas residents. Whatever agreement that existed between the parties was arrived at in Kansas, where they exchanged promises supported by consideration, and [the donor] literally delivered on his promise by giving his sperm to [the mother]. The twins were born in Kansas and reside in Kansas. The only fact tying any of the participants to Missouri is the location of the clinic where the insemination was performed.”⁴⁷⁸ Thus, the court denied the father’s motion for parentage.⁴⁷⁹

Even more surprisingly, the Kansas Supreme Court seemed to meld the choice of law and constitutional concerns; the court used a “most significant relationship” analysis as a proxy for the standard constitutional inquiry of whether the state has a legitimate interest in applying its own law.⁴⁸⁰ Thus, the analysis was still conducted following the vested rights approach, and the result reached was not surprising given the balance of factors, but the court employed an analysis that seems overly cumbersome given the basic facts of this case. As will be discussed below in Part III, this case could have been much easier.

2. Georgia⁴⁸¹

In a Georgia case the court was asked to decide whether a Florida insemination contract was contrary to Georgia’s public policy.⁴⁸² A Florida woman had entered into a contract in Florida with a Florida man, in which the man agreed to provide her with semen to be used in her attempt at artificial insemination.⁴⁸³ The woman conceived two children via artificial insemination using the man’s sperm, but one of them died at birth.⁴⁸⁴ After having the second child, the woman moved to Georgia, where she filed a petition for determination of paternity and child support against the man. He sought

475. Legitimacy did not seem to be the exact issue in this case.

476. *Id.* at 1032.

477. *Id.*

478. *Id.*

479. *Id.* at 1044. The court noted further that, in this case of first impression, Kansas’ law, including the “opt out” provision by which a sperm donor could assert his parental rights via a written contract, is constitutional. *Id.* at 1039-42. The court focused on the fact that until the donation is made, the would-be father has complete control to insist on his rights via a written agreement. *Id.* at 1041. Two justices dissented on the ground that parenthood is a fundamental right which cannot be waived by failure to obtain a written agreement as required by statute. *Id.* at 1046-47 (dissenting opinion).

480. *See id.* at 1032.

481. Georgia uses the vested rights approach. Symeonides, *supra* note 438, at 713.

482. *Brown v. Gadson*, 654 S.E.2d 179 (Ga. Ct. App. 2007).

483. *Id.* at 180.

484. *Id.*

dismissal arguing that the agreement entered into by the parties relieved him of the duties of parenthood, including child support.⁴⁸⁵ The trial court granted the motion for dismissal; the appeals court affirmed.⁴⁸⁶ The primary issue on appeal was whether the insemination contract entered into in Florida was contrary to Georgia's public policy.⁴⁸⁷ The appeals court held that it was not.⁴⁸⁸ The agreement, entered into in October 2003, provided that the man would provide his sperm to a fertility clinic in Tampa, Florida, and in return the woman relinquished her rights to hold him "legally, financially[,] or emotionally responsible for any child" resulting from the insemination.⁴⁸⁹ In finding that the agreement did not violate Georgia's public policy, the court noted that the Georgia Supreme Court had found that biological paternity does not equal the responsibility to provide support in cases of artificial insemination.⁴⁹⁰ Further, the agreement was authorized by Florida law.⁴⁹¹

B. Cases Decided in States That Use the Governmental Interest Approach

1. New York⁴⁹²

The issue of posthumous children has already arisen in an interstate context.⁴⁹³ For example, in one "only in these times" kind of case, a man created trusts for the benefit of the issue of his eight children but specifically excluded adopted grandchildren as trust beneficiaries.⁴⁹⁴ His daughter and her husband hired a surrogate who would be impregnated with the husband's sperm and a donor egg; this was done, and twins were born in California.⁴⁹⁵ With the surrogate's consent, the daughter and her husband obtained a judgment of parental relationship from a *California* court and then filed a declaratory judgment action in New York to determine whether the twins were excluded as trust beneficiaries because of the trust language against "adoptions."⁴⁹⁶

485. *Id.*

486. *Id.* at 179.

487. *Id.* at 180.

488. *Id.*

489. *Id.*

490. *Id.*

491. *Id.*

492. New York's choice of law approach is difficult to classify. Dean Symeonides puts New York in the "combined modern" column of his choice of law chart. Symeonides, *supra* note 438, at 713.

493. See *In re Doe*, 793 N.Y.S.2d 878 (N.Y. Sur. Ct. 2005); *c.f. supra* note 145 (discussing posthumous use of sperm); see also Kindregan, *supra* note 7, at 123 for an excellent discussion of this case.

494. *In re Doe*, 793 N.Y.S.2d at 879.

495. *Id.* at 880.

496. *Id.*

The court focused less on which law to use and more on whether New York could refuse to recognize California's grant of parentage.⁴⁹⁷ The court found that it could not.⁴⁹⁸ Noting that California's decision should be upheld in New York, the court went on to say that California's decision to declare the genetic father and his wife the "parents" of the twins was different, under California law, than a declaration of parentage *through adoption*, because it was done under the power of a statute different from the one that allows adoptions.⁴⁹⁹

C. Cases Decided in States That Use the Better Law Approach

1. Minnesota⁵⁰⁰

Recently, a Minnesota court was confronted with a complicated situation⁵⁰¹ that involved both paternity and maternity disputes, as well as a conflicts of law issue.⁵⁰² A gay New York man⁵⁰³ with HIV⁵⁰⁴ wanted to have a child.⁵⁰⁵ Because of his circumstances, he felt his only option was to use in vitro fertilization with sperm washing and a gestational surrogate.⁵⁰⁶ His niece, a Minnesota college student, offered to assist him.⁵⁰⁷ He discussed the process with her and found sample surrogacy agreements online, one of which he used as the basis for their contract.⁵⁰⁸

The opinion of the court indicates that the man sent the agreement to his niece, and it appears—though does not state—that she signed it in

497. *Id.* at 881-82. This is similar to the focus of the *Miller-Jenkins* cases, discussed *infra* notes 576-96 and accompanying text.

498. *Id.* The court cited *Baker v. General Motors*, 522 U.S. 222, 233 (1998) for the proposition that public policy is not a bar to Full Faith and Credit. Interestingly, the public policy objection is often used in the argument that states do not have to recognize same-sex marriages entered into in other states. See Patrick J. Borchers, *Baker v. General Motors: Implications for Interjurisdictional Recognition of Non-Traditional Marriages*, 32 CREIGHTON L. REV. 147 (1998).

499. *In re Doe*, 793 N.Y.S.2d at 881.

500. Minnesota uses the Better Law approach. Symeonides, *supra* note 438, at 713.

501. *In re Paternity & Custody of Baby Boy A.*, No. A07-452, 2007 WL 4304448 (Minn. Ct. App. Dec. 11, 2007).

502. *Id.* at *1.

503. He was an attorney, which may explain the sophistication and choice of law provision of the contract. *Id.*

504. The court is careful to note that he was in "excellent" health with a "normal life expectancy." *Id.* at *1 n1. It leaves the reader to wonder whether had he been in poor health, the court would have used some other factor—perhaps the interest of the child—to decide not only parentage but also which law should govern.

505. *Id.* at *1.

506. *Id.*

507. *Id.*

508. *Id.*

Minnesota.⁵⁰⁹ More importantly, the contract that both parties signed provided that: 1) it was to be governed by Illinois law; 2) the niece would carry the man's genetic child (using his sperm and an egg from an anonymous donor); and 3) she would give up any rights to the child.⁵¹⁰ The man agreed to pay her medical expenses and later orally agreed to pay her \$20,000 for her services as a surrogate.⁵¹¹

The uncle and niece traveled to Illinois where his sperm was used to fertilize an egg that belonged to an anonymous donor.⁵¹² They then traveled to New York, back to the man's home, where the niece spent a few months.⁵¹³ However, at some point during the pregnancy the niece demanded more money and the two had a falling out.⁵¹⁴ The niece returned to Minnesota, where the child was born, and the man—the genetic father—filed a paternity suit in Minnesota.⁵¹⁵

The trial court used the better law approach,⁵¹⁶ found that Illinois law applied *under this approach*, and upheld the validity of the agreement.⁵¹⁷ Thus, it declared the plaintiff as the father and denied the defendant's alleged parental rights.⁵¹⁸ The defendant appealed, arguing, *inter alia*, that the court should have applied Minnesota law, which presumably would have warranted a different finding.⁵¹⁹ Perhaps the niece hoped to use to her advantage the divergence in the laws and, specifically, Minnesota's silence on surrogacy agreements;⁵²⁰ without a specific law to allow them, she might have successfully argued that there should be no way to prove that such an agreement is valid and enforceable and no way to overcome the presumption that the birth mother is the legal parent of the child.

The Minnesota Court of Appeals held that Illinois law governed and affirmed.⁵²¹ The trial court had made a factual finding that the niece had not only not been coerced but had proposed the arrangement and refused her uncle's offer to hire her an attorney.⁵²² Importantly, the court found that the

509. *Id.* at *2. For the Better Law approach—unlike the First or Second Restatement—the question of where a contract was made is not relevant, so it may be that the court did not need to discuss that issue.

510. *Id.* at **1-2.

511. *Id.* at *2.

512. *Id.*

513. *Id.*

514. *Id.*

515. *Id.*

516. The appellate decision refers to this approach as "choice-influencing factors." *Id.* at *3.

517. *Id.*

518. *Id.* at *1.

519. *Id.* at *3.

520. *Id.* ("Minnesota law does not address . . . GSAs.").

521. *Id.*

522. *Id.* at **1-2.

Illinois choice of law clause was not an attempt to evade Minnesota law⁵²³ and that Minnesota law neither addresses nor prohibits gestational surrogacy agreements.⁵²⁴ Thus, the court could decide the case using Illinois law.⁵²⁵ Under Illinois law, the court found that while the Illinois Gestational Surrogacy Act would allow for enforcement of such an agreement, the Act was inapplicable because it had gone into effect after the agreement.⁵²⁶ However, the Illinois Parentage Act allowed for the rebuttal of a presumption that the birth mother was the legal mother and under this Act, such an agreement could be recognized and enforced when, as in this case, the plaintiff could bring sufficient evidence.⁵²⁷ Thus, the appeals court found the gestational surrogacy agreement was legally enforceable and did not violate the public policy of Minnesota.⁵²⁸ For choice of law concerns, it confirmed the (sometimes disputed) notion that the parties could contract for the law that they wanted to apply.

D. Cases Decided in States That Use the Most Significant Relationship Approach/Second Restatement

1. Massachusetts⁵²⁹

Massachusetts has had several cases that involve choice of law issues and choice of law agreements.⁵³⁰ In a relatively early case, a father (R.R.) brought suit against a surrogate mother (M.H.) seeking to establish his paternity and arguing that she had breached their surrogacy contract.⁵³¹ Both parties were married to other people at the time of the surrogacy agreement; R.R.'s wife was infertile while M.H. said her family was complete and she wanted to help another couple have a child.⁵³² R.R. and M.H.—who lived in Rhode Island—

523. This attempt could be enough to invalidate an express choice of law provision. *Id.* at *3.

524. *Id.* See also Symeon C. Symeonides, *Choice of Law in the American Courts in 2007: Twenty-First Annual Survey*, 56 AM. J. COMP. L. 243, 301 (2007) ("Although Minnesota law was silent on surrogacy agreements, certain statutes seemed to contemplate them by, for example, protecting the rights of individuals who use assisted-reproduction technologies, or providing a procedure for recognizing the father of a child conceived by artificial insemination.").

525. *In re Paternity and Custody of Baby Boy A.*, No. A07, 2007 WL 4304448, *3 (Minn. Ct. App. Dec. 11, 2007).

526. *Id.* at *7.

527. *Id.* at **7-8.

528. *Id.* at **8, 5-6.

529. Which uses the Second Restatement in most cases. See Symeonides, *supra* note 438, at 713.

530. See *R.R. v. M.H.*, 689 N.E.2d 790 (Mass. 1998); *Hodas v. Morin*, 814 N.E.2d 320 (Mass. 2004), both discussed *infra*.

531. *R.R.*, 689 N.E.2d at 790.

532. *Id.* at 791.

were put in contact through New England Surrogate Parenting Advisors and entered into the surrogacy agreement in November 1996.⁵³³

The agreement provided that M.H. would be artificially inseminated with R.R.'s sperm and would give custody of the child to R.R. after birth.⁵³⁴ She was to receive \$10,000 in compensation, which she would be required to repay if she refused to let the father take the child home from the hospital.⁵³⁵ In her sixth month of pregnancy, M.H. changed her mind and decided to keep the child.⁵³⁶ Although a custody agreement had been worked out by the time the case reached the Supreme Judicial Court, the court, in a case of first impression, reviewed the trial judge's determination that the father was likely to prevail on his claim that the surrogacy agreement was enforceable.⁵³⁷

The court first determined that Massachusetts law would govern, *even though the agreement provided that Rhode Island law would govern its interpretation*.⁵³⁸ This court found that Massachusetts law applied because the child was conceived and born in Massachusetts and the mother was a Massachusetts resident.⁵³⁹ The court held that surrogacy agreements could be valid under certain circumstances but also that any custody agreement is subject to a judicial determination of what is in the best interests of the child.⁵⁴⁰ Using Massachusetts' adoption law as a guidepost, the court further found that the surrogacy agreement was unenforceable because the agreement was induced by money and because the surrogate mother agreed to give up the baby before her birth.⁵⁴¹

Another case from Massachusetts and one that probably best illustrates the use—and problems—of the Second Restatement is *Hodas v. Morin*.⁵⁴² The plaintiffs were a married couple from Connecticut who had entered into a gestational surrogacy agreement with a New York resident and her husband wherein the New Yorker would serve as a surrogate for their genetic child.⁵⁴³ The chart below can help illustrate the facts of *Hodas*.

533. *Id.* at 792.

534. *Id.* at 793.

535. *Id.*

536. *Id.* at 793-94.

537. *Id.* at 793.

538. It is not completely unheard-of for courts, even those using the "modern" Second Restatement approach, to ignore party choice of law provisions in a contract. Interestingly neither side had asked the court to use Rhode Island law, *id.* at 795, quite possibly because Rhode Island has no statute or case law on this issue.

539. *Id.*

540. *Id.* at 795-96.

541. *Id.* at 795. No consent would be valid before the fourth day following the baby's birth. *Id.* at 796.

542. *Hodas v. Morin*, 814 N.E.2d 320 (Mass. 2004).

543. *Id.* at 322.

State	Connecticut	NY	Massachusetts
Connections to the state	P's (couple) Provided gametes Implantation	Surrogate	Hospital designated Baby to be, and was, delivered Massachusetts law specified in contract
Law in that state	No stated position on gestational carrier agreements; allows for birth certificates to name someone other than the birth mother	Strong policy against such agreements (would expressly forbid it)	Provides for pre-birth orders naming the genetic parents as the child's parents so that they do not have to subsequently adopt the child; Would uphold agreement *Note: case law; no statute on point.

The agreement specified that the child would be born at a Massachusetts hospital, apparently because it was the halfway point between the couples' residences but also because Massachusetts law provides for pre-birth orders naming the genetic parents as the child's parents so that they do not have to subsequently adopt the child.⁵⁴⁴ The couple, *with no objection from either the surrogate and her husband or the hospital*, went to court in Massachusetts to obtain such an order.⁵⁴⁵ The probate and family court judge, apparently concerned about forum shopping, dismissed Hodas's complaint.⁵⁴⁶ The Supreme Judicial Court vacated that order and remanded with directions that the genetic parents be named on the child's birth certificate.⁵⁴⁷

The court's ruling primarily dealt with a choice of law issue; the court had to decide whether to respect the choice of non-Massachusetts residents to have that state's law govern their contract.⁵⁴⁸ The court noted that Connecticut apparently had no stated position on "gestational carrier agreements" but that New York had a strong policy against such agreements.⁵⁴⁹

The court said that where the parties express an intent as to the governing law for their contract, Massachusetts courts would generally abide by that choice.⁵⁵⁰ More specifically, the court applied the Restatement (Second) of

544. *Id.*

545. *Id.* at 321.

546. *Id.*

547. *Id.* at 327.

548. *Id.* at 324.

549. *Id.*

550. Even though the court did not in *R.R. v. M.H.*, discussed *supra*. The *Hodas* court distinguished *R.R. v. M.H.* as follows: "That case concerned a surrogacy agreement where

Conflicts of Laws, which presumes that the law chosen by the parties applies unless

- (a) the chosen state has no substantial relationship to the parties or transaction and there is no other reasonable basis for the choice, and
- (b) application of the law of the chosen state would be contrary to the fundamental policy of a state with a materially greater interest than the chosen state and is the state whose laws would apply in the absence of a choice of laws by the parties.⁵⁵¹

The court concluded that Massachusetts had a substantial relationship to the transaction because the child was to be born there and the gestational carrier had obtained prenatal care at the Massachusetts hospital.⁵⁵² Although the agreement was contrary to New York's public policy, the court doubted that New York's law would have applied in the absence of the contract provision because parts of the transaction took place in New York, Massachusetts, and Connecticut.⁵⁵³

The court noted generally that "[t]he gestational carrier agreement implicates the policies of multiple States in important questions of individual safety, health, and general welfare."⁵⁵⁴ Like many courts before, this court asked the legislature to provide more guidance in the area of ART.⁵⁵⁵

The court explained the difficulty posed not just by the parties' connections to various states, but also by the significant differences in the laws:

Complicating matters is the fact that the laws of Connecticut, New York, and Massachusetts, the three States that potentially could govern the agreement, are not in accord. In Connecticut . . . gestational carrier agreements are not expressly prohibited by, and perhaps may be contemplated by, the recently amended statute governing the issuance of birth certificates. New York . . . has expressed a strong public policy against all gestational carrier

the genetic mother (not married to the father) carried the child, was required to consent to the father's custody of the child prior to birth, and was to be paid \$10,000 for being a gestational carrier The gestational carrier was a Massachusetts resident, the child was born in Massachusetts, and the genetic father and his wife were residents of Rhode Island Although the gestational carrier contract provided that 'Rhode Island Law shall govern the interpretation of this agreement,' we applied Massachusetts law to invalidate the contract as contrary to Massachusetts public policy." *Id.* at 325 n.10 (citations omitted).

551. *Id.* at 325 (citing RESTATEMENT (SECOND) OF CONFLICTS § 187).

552. *Id.*

553. *Id.* at 326.

554. *Id.* at 324.

555. "Until and unless the Legislature speaks to the contrary, the Commonwealth's paramount concern to protect the best interests of children requires that parties seeking prebirth declarations of parentage or a prebirth order follow the procedures set out in *Culliton v. Beth Israel* [765 N.E.2d 1133 (Mass. 2001)]." *Id.* at 327 n.16.

agreements. Massachusetts . . . recognizes gestational carrier agreements in some circumstances.⁵⁵⁶

The court engaged in the laborious analysis of the Second Restatement approach. Under this approach, the party choice of law approach will usually establish the “most significant relationship” to the case.⁵⁵⁷ The *Hodas* court acknowledged this as well.⁵⁵⁸ However, as allowed by the Second Restatement, the court went on to conduct an additional analysis, to look for a connection to the state *beyond that of the law chosen by the parties*.⁵⁵⁹

The specific provision of the Second Restatement on party choice of law notes the following:

The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either (a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties’ choice, or (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.⁵⁶⁰

The *Hodas* court interpreted and used § 187(2) as a two-tiered analysis, first checking to see whether Massachusetts has a “substantial relationship” to the transaction, and second checking whether applying Massachusetts law would violate a fundamental policy of that state.⁵⁶¹

556. *Id.* at 324 (internal citations omitted).

557. See generally RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1971).

558. 814 N.E.2d at 324-25 (“As a rule, ‘[w]here the parties have expressed a specific intent as to the governing law, Massachusetts courts will uphold the parties’ choice as long as the result is not contrary to public policy.’ *Steranko v. Inforex, Inc.*, 5 Mass. App. Ct. 253, 260, 362 N.E.2d 222 (1977), citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1971). See *Morris v. Watsco, Inc.*, 385 Mass. 672, 674, 433 N.E.2d 886 (1982) (‘Massachusetts law has recognized, within reason, the right of the parties to a transaction to select the law governing their relationship.’).”).

559. *Hodas*, 814 N.E.2d at 325 (“The Restatement similarly presumes that the law the parties have chosen applies, unless “(a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties’ choice, or (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state” and is the State whose law would apply under § 188 of the Restatement “in the absence of an effective choice of law by the parties.” RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2)).

560. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2)).

561. *Hodas*, 814 N.E.2d at 325.

On the first prong, the court found that the parties' chosen law—that of Massachusetts—could govern because Massachusetts had a “substantial relationship” to the transaction.⁵⁶² The court noted, “that substantial relationship is anchored in the parties' negotiated agreement for the birth to occur at a Massachusetts hospital and for a Massachusetts birth certificate to issue, and bolstered by the gestational carrier's receipt of prenatal care at a Massachusetts hospital in anticipation of delivery at that hospital.”⁵⁶³

What is interesting is that the court did not give a presumption to the chosen law, but instead looked for a substantial relationship despite the fact that the law had been provided. This makes this court's analysis under the Second Restatement more cumbersome than it needed to be: it could have relied more easily on the chosen law. Moreover, in an excellent legal move, the attorneys involved may have anticipated that Massachusetts would look for a connection beyond just the law of Massachusetts being chosen and *for that reason* decided that the baby should be born in Massachusetts. This demonstrates a “best practice” for lawyers, to be sure, but certainly creates a confusing and counter-intuitive solution for the actual parties involved.

On the second prong, the court noted, “it is a close question whether applying the parties' choice of law would be ‘contrary to a fundamental policy’ of another state with a materially greater interest.”⁵⁶⁴

Certainly the interests of New York and Connecticut are material and significant, for the contracting parties reside in these States. Nevertheless, the interests of New York and Connecticut may be at cross-purposes here. New York, the home of the gestational carrier and her husband, expressly prohibits gestational carrier agreements in order to protect women against exploitation as gestational carriers and to protect the gestational carrier's potential parental rights. . . . New York has thus expressed a “fundamental policy” on a matter in which it has a great interest. Connecticut . . . is silent on the question of gestational carrier agreements, but in any event does not expressly prohibit the plaintiffs from entering into such an arrangement. Massachusetts also has interests here, including interests in “establishing the rights and responsibilities of parents [of children born in Massachusetts] as soon as is practically possible” and “furnishing a measure of stability and protection to children born through such gestational surrogacy arrangements.”⁵⁶⁵

562. *Id.*

563. *Id.* The court noted under Restatement section 187 comment f, the “place of partial performance considered to be sufficient to establish a reasonable basis for the parties' choice of law.” *Id.*

564. *Id.*

565. *Id.* at 325-26. The court in *Hodas* was careful to note: “We are concerned here only with those portions of the gestational carrier agreement that pertain to the choice of Massachusetts law and the complaint to establish parentage and for a prebirth order. We

Even more surprisingly, the court then went on to consider the factors of Section 188 of the Second Restatement, which are usually used in the absence of a specific choice of law provision. The court found the analysis of these factors inconclusive, noting that:

For example, the “place of contracting” and the “place of negotiation” . . . are both unknown, although presumably these activities took place in New York or Connecticut, or both. The “place of performance,” . . . arguably is the intended place of birth (Massachusetts), or the place of prenatal care (at least partly in Massachusetts), or the place where the pregnancy evolved (New York), or the place where the genetic carrier was inseminated (Connecticut), or any combination of these. The location of the “subject matter of the contract,” . . . is equally difficult to determine, and the final consideration, the “domicil” of the parties (New York or Connecticut) . . . in this case is not helpful.⁵⁶⁶

This analysis indicates precisely the problem with the Second Restatement approach: too many of the factors cannot be analyzed when discussed in the context of an ART situation. One solution to this may be to have more presumptions in the Restatement itself—for example, to have a presumption that states that in a surrogacy contract, the “place of performance” is the place of birth—but any such presumption would likely be arbitrary. Moreover, as with all presumptions, such a presumption could defeat the advantage of flexibility in reasoning that the Second Restatement provides. These concerns are addressed further in the next section.

In *Hodas*, after all of that reasoning, the court concluded that whether New York had an interest or not “it is doubtful that the principles of § 188 would result in application of New York law to this particular contact.”⁵⁶⁷ Given that, the court finally concluded that the judge should have applied the law of Massachusetts—the law chosen by the parties—to decide the case.⁵⁶⁸

2. Illinois⁵⁶⁹

In a case that reached a somewhat opposite result from *Hodas*, an Illinois court used the Second Restatement and decided that a dispute should have been

have not been asked to express an opinion—nor do we do so—on the validity, construction, or enforceability of any other provision of the gestational carrier agreement.” *Id.* at 324 n.7.

566. *Id.* at 326 (internal citations omitted).

567. *Id.*

568. *Id.* at 327. The court, it should be noted, felt comfortable in its conclusion and reasoning: “Although the judge in her decision prudently raised the issue of forum shopping in declining to consider the complaint, we are satisfied that, in the circumstances of this case, the parties’ choice of law is one we should respect. We are also satisfied that our established conflict of laws analysis will work to prevent misuse of our courts and our laws.” *Id.*

569. Illinois uses the Second Restatement. *Esser v. McIntyre*, 661 N.E.2d 1138, 1141 (Ill. 1996). See Symeonides, *supra* note 438, at 713.

determined under Florida law, *despite the fact that the parties had stipulated that the question would be decided under Illinois law*.⁵⁷⁰ The case concerned the parentage of a child born during the marriage of an Illinois couple after the wife was artificially inseminated while the couple was living in Florida.⁵⁷¹ The wife later brought a divorce action in Illinois seeking support for the child, but the husband denied parentage of the son.⁵⁷² The trial court awarded child support, finding that John was estopped from denying parentage of the child; the appeals court affirmed, but the high court reversed.⁵⁷³ The court noted that Florida and Illinois have somewhat different statutes regarding the parentage of children born via artificial insemination, and the court found the use of Illinois law here was customary to typical choice of law rules, which state that the law governing legitimacy will be the law of the state which has the most significant relationship to the child and parent.⁵⁷⁴

E. Case Decided In Two States

1. Virginia⁵⁷⁵ and Vermont⁵⁷⁶

One of the most recent, and quite controversial, cases to illustrate a conflicts issue springing from ART is a parentage case that arose from a same-sex relationship.⁵⁷⁷ Two women—Janet and Lisa—were partners in a lesbian relationship from 1998 to 2003.⁵⁷⁸ For most of that time, they lived in Virginia, but they entered into a civil union, as allowed under Vermont law,⁵⁷⁹ in 2000.⁵⁸⁰ They returned to Virginia after that, and in 2002 decided to have a child together and went through intrauterine insemination; Lisa was inseminated with

570. *In re Marriage of Adams*, 551 N.E.2d 635 (Ill. 1990).

571. *Id.*

572. *Id.* at 635-36.

573. *Id.* at 637, 640.

574. *Id.* at 639.

575. Virginia uses the First Restatement approach. See Symeonides, *supra* note 438, at 713.

576. Vermont uses the Second Restatement approach. See *id.* See also *Myers v. Langlois*, 721 A.2d 129, 130 (Vt. 1998), cited in *Miller-Jenkins v. Miller-Jenkins*, 912 A.2d 951, 971 (Vt. 2006).

577. *Miller-Jenkins v. Miller-Jenkins*, 637 S.E.2d 330 (Va. Ct. App. 2006), appeal after remand No. 0688-06-04, 2007 WL 1119817 (Va. Ct. App. Apr. 17, 2007), *aff'd* 661 S.E.2d 822 (Va. 2008), *cert. denied*, 129 S. Ct. 726 (2008). See also *A.K. v. N.B.*, No. 2070086, 2008 WL 2154098 (Ala. Civ. App. May 23, 2008) (finding that Alabama would not reconsider a California judgment in which a natural mother tried to appeal a decision that had granted visitation rights with a child conceived through ART to her former lesbian partner); note that Alabama uses the Vested Rights Approach. See Symeonides, *supra* note 438, at 713.

578. *Miller-Jenkins*, 661 S.E.2d at 824.

579. VT. STAT. ANN. tit. 15, § 1201 *et seq.* (LexisNexis 2002).

580. *Miller-Jenkins*, 661 S.E.2d at 824.

anonymous donor sperm and carried and gave birth to their daughter, I.M.J.⁵⁸¹ Shortly thereafter, they moved to Vermont, but split up in 2003.⁵⁸² Lisa took their daughter and moved back to Virginia.⁵⁸³

In November 2003, Lisa filed a petition in a Vermont court seeking to dissolve their civil union and to gain custody of their daughter; the court dissolved the union and granted Lisa custody and Janet visitation rights.⁵⁸⁴ Not content with this, on July 1, 2004,⁵⁸⁵ Lisa filed a petition in a Virginia court seeking sole custody.⁵⁸⁶ Six days later, Janet filed a motion in a Vermont court “seeking enforcement of the Vermont custody order and a determination that Lisa was in contempt.”⁵⁸⁷

The Vermont court entered an order that it had continuing jurisdiction over the custody dispute, but the Virginia court entered an order awarding temporary sole custody to Lisa.⁵⁸⁸ Since this case was proceeding simultaneously in Vermont and Virginia, Janet continued her appeals in Vermont. “Subsequently, the Vermont Supreme Court affirmed the opinion of the lower court, specifically holding that, because Vermont had continuing custody jurisdiction under the Parental Kidnaping Prevention Act (PKPA),⁵⁸⁹ Virginia lacked jurisdiction to entertain Lisa’s parentage action. Thus, Vermont did not have to recognize the Virginia judgment, which itself had improperly denied recognition to the previous Vermont judgment.”⁵⁹⁰

Lisa continued her case in Virginia, and the Virginia Court of Appeals held that the Vermont order should stand.⁵⁹¹ In June 2008, the Virginia Supreme Court held that the biological mother could not appeal the Virginia Court of Appeals’ reinstatement of the Vermont child custody order and that the non-biological mom, and former partner, should thus continue to have visitation rights.⁵⁹²

581. *Id.*

582. *Id.*

583. *Id.*

584. *Id.*

585. As one website explains, “[o]n July 1, 2004, the Virginia Affirmation of Marriage Act became law. That law states that Virginia is prohibited from recognizing out-of-state civil unions. Unhappy with the ruling of the Vermont court, Lisa filed in Virginia on July 1 because she hoped that a Virginia judge would use the Affirmation of Marriage Act to strip Janet’s parental rights.” EQUALITY VIRGINIA, FAQ: *MILLER-JENKINS V. MILLER-JENKINS*, http://www.equalityvirginia.org/site/DocServer/Miller_Jenkins_FAQ7.15.08.pdf?docID=361 (last visited Apr. 20, 2009).

586. *Miller-Jenkins*, 661 S.E.2d at 824.

587. *Id.*

588. *Id.*

589. 28 U.S.C. § 1738A (2006).

590. Symeonides, *supra* note 524, at 302.

591. *Miller-Jenkins v. Miller-Jenkins*, 637 S.E.2d 330, 337-38 (Va. Ct. App. 2006).

592. *Miller-Jenkins*, 661 S.E.2d at 827. This holding was based on the law of the case doctrine; because Lisa had failed to perfect her appeal from the prior Virginia Court of Appeals ruling, she was barred from challenging that ruling in a subsequent appeal. *Id.* at

One of Lisa's arguments in the Vermont Supreme Court was that Janet could not be considered a parent of I.M.J. because she lacked a biological relationship with the child.⁵⁹³ The court rejected that argument, relying in part on a string of cases giving parental status to the husbands of women who are inseminated by anonymous donors.⁵⁹⁴ The court also noted that a growing number of courts have recognized parental rights for same-sex partners of those who adopt children or conceive via artificial insemination.⁵⁹⁵ Lisa did not preserve for appeal an argument that Janet's parental status should have been determined under Virginia law, and the Vermont Supreme Court, using its choice of law approach, found that Vermont law applied:

We have a similar response to Lisa's argument that Janet's parental status must be determined under Virginia law. Again, the argument was not preserved below. In any event, we also reject this argument. We have adopted the "most significant relationship" test of the Restatement (Second) of Conflict of Laws § 287 (971) in determining choice of law questions. As we held in the first section, the Vermont court had jurisdiction to adjudicate custody and visitation of IMJ under both the PKPA and the UCCJA. Although these acts primarily determine jurisdiction, their provisions are such that they establish the state with the most significant relationship to a child custody or visitation dispute. Accordingly, we conclude that where jurisdiction is exercised consistent with the PKPA and UCCJA, the law of the forum state is applicable. In this case, Vermont had jurisdiction under both statutes, and, accordingly, Vermont law applies here.⁵⁹⁶

The significance of *Miller-Jenkins* is not just in how the case proceeded but in the fact that the court separated any discussion of recognition of civil unions from its analysis of whether a custody agreement (made upon the dissolution of such a union) would stand. Moreover, the decision of the courts—in particular, Virginia's and the U.S. Supreme Court's decision not to accept *certiorari* on this case—comfortingly reinforce the basic principle that the PKPA and the Full Faith and Credit clause will continue to require courts to recognize parentage and custody determinations made in other states. Unfortunately, cases where a decision *has already been reached* are only a small part of the panoply of cross-border ART cases. Additionally, even if we can answer the question of recognition of judgments, the original court

826. Lisa's petition for certiorari to the U.S. Supreme Court was recently denied. 129 S. Ct. 726 (2008).

593. *Miller-Jenkins v. Miller-Jenkins*, 912 A.2d 951, 965-68 (Vt. 2006).

594. *Id.* at 970.

595. *Id.* at 972.

596. *Id.* at 971 (internal citations omitted).

oftentimes must still make a difficult decision. For that reason, the next section suggests some solutions to those very difficult determinations.

PART THREE: SOLUTIONS TO ART CONFLICTS AND COMPLEXITIES

As discussed above, ART poses problems for a variety of legal models because it breaks up the traditional units of “person” and “family” into smaller components than those traditionally contemplated by the choice of law approaches. The laws differ widely on many of the issues, and no choice of law approach is precisely tailored to solving this problem. This raises the question of what can be done, and this section analyzes several solutions.

I. UNIFORM LAWS

The obvious way to eliminate choice of law problems is to eliminate conflicts themselves. Put simply, if the laws are uniform, then conflicts among them simply won’t arise. Thus, laws like the Uniform Parentage Act⁵⁹⁷ and the ABA’s recent Model ART Act⁵⁹⁸ could—and should—be useful in preventing conflicts issues.

Unfortunately, neither Act has yet—or seems likely to—solve the wide range of issues that confront the courts. The history of the UPA has been very mixed. The UPA in its current form indicates revisions and a complicated history. It has been controversial and not all of its provisions have achieved even close to uniform adoption. For example, one of its provisions would clarify problems with surrogacy:

Article 8 of the UPA (2000), which has since been revised in 2002, attempts to clarify legal parenting of a child born as the result of a gestational agreement. Article 8 recognizes that conception through surrogacy is here to stay so, unlike the USCACA, it does not give states the option of outlawing surrogacy outright.⁵⁹⁹

The article goes on to point out the exact difficulty of this section and the UPA overall by noting that “any state remains free not to enact the UPA (2000), to enact it without Article 8, or to enact it with a modified version of Article 8.”⁶⁰⁰

Recent articles have outlined other problems with the Act, including, *inter alia*, its problems in addressing the rights of stepmothers⁶⁰¹ and its lack of

597. See Uniform Parentage Act (1973), 9B U.L.A. 377 (2001 & Supp. 2006).

598. MODEL ART ACT, *supra* note 2.

599. Robert E. Rains, *What The Erie “Surrogate Triplets” Can Teach State Legislatures About The Need To Enact Article 8 Of The Uniform Parentage Act (2000)*, 56 CLEV. ST. L. REV. 1, 33 (2008).

600. *Id.*

601. Megan S. Calvo, *Uniform Parentage Act—Say Goodbye to Donna Reed: Recognizing Stepmothers’ Rights*, 30 W. NEW ENG. L. REV. 773 (2008).

attention to issues of assisted reproductive technology and the complicated problems this creates.⁶⁰²

The lack of comprehensive coverage in, and lack of uniform adoption of, the UPA indicate that this act itself does not—and cannot—solve ART problems or conflicts. In partial response to this gap, and to address other issues that the UPA does not even contemplate, the ABA House of Representatives, after much discussion, finally passed the ABA Model Act Governing Assisted Reproductive Technology (“ART Act”) in February 2008.⁶⁰³ In the ART Act, the ABA notes,

It is the purpose of this Act to give assisted reproductive technology (ART) patients, participants, parents, providers, and the resulting children and their siblings clear legal rights, obligations, and protections. These goals are accomplished by establishing legal standards for the use, storage, and other disposition of gametes and embryos by addressing societal concerns about ART, such as clarifying issues of health insurance coverage for the treatment of infertility and by establishing legal standards for informed consent, reporting, and quality assurance.⁶⁰⁴

The ART Act is quite comprehensive in scope. It covers areas from informed consent,⁶⁰⁵ mental health consultations,⁶⁰⁶ and privacy⁶⁰⁷ to the needed topics of payment to donors and gestational carriers,⁶⁰⁸ health insurance,⁶⁰⁹ and quality assurance.⁶¹⁰ It also delves into the difficult topics of embryo transfer and disposition⁶¹¹ and the status of children of assisted reproduction and the sperm and egg donors.⁶¹² The ART Act, however, does note that *it* may actually conflict with provisions of the UPA, and urges caution:

It is not the intent of this Act to conflict with or supersede provisions of the Uniform Parentage Act or applicable intestacy provisions of the Uniform Probate Code. Accordingly, any state or territory considering adoption of this Act should review its statutes to determine if those uniform acts have been adopted in that jurisdiction

602. Mary Patricia Byrn, *From Right to Wrong: A Critique of the 2000 Uniform Parentage Act*, 16 UCLA WOMEN'S L.J. 163 (2007).

603. See MODEL ART ACT, *supra* note 2.

604. *Preface* to MODEL ART ACT, *supra* note 2.

605. MODEL ART ACT, *supra* note 2, art. 2.

606. *Id.* art. 3.

607. *Id.* art. 4.

608. *Id.* art. 8.

609. *Id.* art. 9.

610. *Id.* art. 10.

611. *Id.* art. 5.

612. *Id.* art. 6.

and, if so, to refer to those existing provisions rather than enacting this Article 6.⁶¹³

However, when it focuses on gestational agreements, the ART Act actually contains two alternatives.⁶¹⁴ One requires a judicial proceeding, while the other does not. Here, too, there is the possibility of deference to the UPA, just as in Article 6. The ABA explains it as follows:

Since the gestational agreement provisions of the Uniform Parentage Act are bracketed and, therefore, optional, an alternative procedure to determine parentage in a gestational surrogacy arrangement is offered that does not require a judicial proceeding if, and only if, the parties comply with all of the other procedural protections of the statutory alternative. The judicial preauthorization model is offered as Alternative A, and the administrative model is offered as Alternative B.⁶¹⁵

Again, the possibility of alternatives on a difficult topic makes the ART Act instantly less able to create uniformity.

The history of the UPA and other acts also indicates that states are not likely to adopt the Act, or all portions of it, or adopt it in a uniform fashion. The possible inconsistencies between the UPA and the ART Act may also breed confusion and will likely ensure that conflicts will remain. Further, even if states adopt similar provisions of the ART Act, there are likely to be differences in interpretation and application.⁶¹⁶ Moreover, states may be reluctant to consider a Model Act in an area as sensitive and emotionally and politically loaded as this one.⁶¹⁷ Regardless of whether any Model Acts are adopted, the need for sound choice of law principles to decide disputes will remain. It is quite possible that greater uniformity in the laws will contribute to the interstate aspect of ART.

II. PARTY CHOICES TO MINIMIZE CONFLICTS

Another possible solution is to allow patients and doctors to contract for specific choices of law to apply to their interactions. Choice of law provisions in contracts generally are now quite common; however, the idea of contracting for a choice of law clause in anticipation of a tort action is a newer idea. There

613. *Id.* legislative note.

614. *Id.* art. 7.

615. *Id.* at 188.

616. The lessons learned with the UPA indicate this, if nothing else.

617. One need only look at the arena of same-sex marriages to see the issues that arise. For an excellent discussion of that issue, see Mark E. Wojcik, *The Wedding Bells Heard Around the World: Years From Now, Will We Wonder Why We Worried About Same-Sex Marriage?*, 24 N. ILL. U. L. REV. 589 (2004). Moreover, the topics discussed throughout the ART Act—surrogacy, embryo-disposition, etc.—indicate that states do not naturally tend toward a uniform approach to these very difficult questions.

have been several approaches to allowing for party autonomy in torts cases. One is to let parties choose a state's law in their contract; this is analyzed below. Another option is the idea of letting the parties choose the law to govern their dispute post-occurrence, but pre-litigation.⁶¹⁸ The reason that the latter does not need much discussion is because it is still used extremely rarely and assumes that parties can agree. In some ways, this is no different than having one party allege that a particular law should apply and having the other party not contest that particular issue.

The idea of choice of law provisions in medical contracts as potentially governing tort actions is not unique to ART. There is no reason why such provisions cannot be more commonplace, except for several concerns. First, such provisions so clearly anticipate litigation that they may make both the doctor and the patient uncomfortable. Second, such provisions create extra legal work that the attorneys for the doctor (or her insurer) must do in advance, and these might not be easy choices to make. They could be straightforward if the doctor practices in a state whose laws favor the medical profession, but if she does not practice in such a state and the contract includes a provision that another state's law should govern, that may be confusing for everyone involved. It may even strike the patient as somewhat suspicious. A related concern is the information provided to a patient; most patients in general, and certainly most ART patients, do not bring their lawyers with them to the doctor's office. Any extra-legal language may make the patient nervous, and anything unexpected could exacerbate those nerves. Finally, as with any "adhesion contract," where the parties cannot bargain for the choice of law, there is the concern that the choice of law provision might not even be upheld.⁶¹⁹

The choice of law solution has the potential to work particularly well in surrogacy contracts, where there is a clear contractual relationship that can be established between the parties. It would be trickier, though possible, to include choice of law provisions in the quasi-contractual forms that people who are going through ART often complete in their doctor's office.⁶²⁰

In place of including a specific choice of law provision, the contract could more accurately and informatively spell out the rights of the parties involved, at least describing the laws that exist in the state where the procedure is being done. However, if a suit is eventually brought in another jurisdiction, that other forum may choose to use its own law rather than the rules spelled out in the contract, thus creating more confusion for everyone involved.

III. STRANGE BEDFELLOWS: A GOVERNMENTAL INTEREST SOLUTION FOR

618. See, e.g., *In re Marriage of Adams*, 551 N.E.2d 635, 637, 639 (Ill. 1990).

619. See, e.g., *Siegelman v. Cunard White Star Ltd.*, 221 F.2d 189, 193-95 (2d Cir. 1955). In the area of jurisdiction, there is the same concern. See, e.g., *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991).

620. See KINDREGAN & MCBRIEN, *supra* note 62, at 313-17 for a discussion of fertility center contracts and forms.

ART CONFLICTS

The traditional approaches to conflicts of law are grounded in a notion of territoriality. It is important to understand where an event occurred and where the parties rights "vested" because it is that location that is said to have the power of having its law apply. The difficulty with this approach in the realm of ART is that it is not always possible to determine what the critical event is that gave rise to the lawsuit, and even if that is possible to determine, it is not always possible to pinpoint *where* it occurred.

The First and Second Restatements share the same problems. It is difficult in both to assess some critical issues when analyzing an ART case, for example:

- Where is the "domicile" of an embryo?
- Where is place of injury? Of negligence?
- How are ART cases to be characterized? Are embryo cases "torts" or "property?" Is a case about surrogacy one of contract or family law?

These questions are possible to answer, but ensuring that all courts answer them uniformly would require additional components to the approaches that they do not presently have.

The better law approach is criticized for being inconsistent, unpredictable, giving too much power to judges, and fostering forum shopping (since a court is most likely to apply its own law).⁶²¹ As far as research indicates, this approach has not been used yet to resolve a conflicts of law issue involving ART.

An interesting—though controversial and potentially problematic—idea is to have courts faced with an ART case use the better law approach. Here, there is not the same need to determine where the parties rights vested nor is it necessary to assess any of the other myriad factors required by the Second Restatement. Under this approach, a court would be free to determine which law was "better." However, in other areas of law there are concerns that this approach substitutes judges for lawyers and improperly allocates quasi-legislative power to the courts; these concerns would be magnified in an area as loaded with religious, ethical, and emotional issues as ART.⁶²² It is hard to imagine a court in Alabama deciding that its surrogacy law was worse than the surrogacy law in Vermont and thus using the other state's law. Thus, it is far more likely that here, as in the better law approach generally, courts would tend to use forum law to decide most conflicts, which would at least be predictable pre-litigation but would no doubt lead to forum shopping and potentially unfair results.

621. Note that Leflar himself realized that a forum would most likely choose its own law: "[t]he idea that the forum's own law is the best in the world . . . is unfortunately but understandably still current among some members of our high courts." Leflar, *Choice-Influencing Considerations in Conflicts Law*, *supra* note 450, at 298.

622. The same reasons for why it is difficult to create uniformity apply here as well.

Of the four, the governmental interest approach is quite possibly the best solution to ART conflicts. It is precisely this last issue discussed above—the state’s strong interest in developing its own laws about such important and difficult family law issues—that makes the interest analysis the best of the modern approaches. Recall that the idea behind this approach is that the court should choose the law of the state that has a real interest in the case, thus eliminating many cases that *seem* to pose a conflict because there are connections to many states but really do not. With ART cases, the idea that a state can evaluate the laws themselves and determine if they are meant to apply will actually mean that different laws will be considered, but only laws that are meant to apply to that particular factual situation will be used.

This approach is not without critics; the concerns raised are that it is inconsistent and that it may give too much weight to forum law.⁶²³ Moreover, many teachers of this subject find it difficult to explain to students how the canon of simply reevaluating a state’s own interest is a satisfactory way of resolving a true conflict. It may be best to say that in a true conflict situation, a court should make the effort to determine which state has the greater interest in the case by looking at the laws of that state and determining if those laws are really meant to apply to this type of factual situation.⁶²⁴

Of course, suggesting the use of the governmental interest approach for ART cases assumes the possibility that a court may pick and choose a choice of law approach depending on the case at hand. Obviously, the criticism of such an idea is that it is confusing for courts and litigants. However, even this kind of subject-based, seemingly piecemeal approach, is better than the different approaches used by different states, and would provide more certainty—at least in this particular area of law.

CONCLUSION

Despite the passage of the Model Act, ART issues will continue to become more and more complicated as the new technologies continue to develop, become more widely used, and become more widely used across state lines. The need for clear legislative guidance is apparent, and alongside that, the courts need to review and reconsider how they approach interstate cases themselves.

The field of Conflicts of Law inspired two great legal thinkers—separately—to write poetry about its complexity. To their efforts, this author

623. Note that Currie himself also realized that the approach created two categories where forum law would, or should, be chosen: “Currie had shown how to identify and resolve false conflicts. But his true conflicts and unprovided-for cases presented problems he believed could not be solved. For both these intractable kinds of conflicts he suggested as a default position that the forum fall back on its own law.” Louise Weinberg, *Theory Wars in the Conflict of Laws*, 103 MICH. L. REV. 1631, 1643 (2005) (reviewing SYMEON C. SYMEONIDES, *THE AMERICAN CHOICE OF LAW REVOLUTION IN THE COURTS: TODAY AND TOMORROW* (2005)).

624. This is different from solving a true conflict merely by applying forum law.

adds her addition to the poem considering the particular problems created by ART.

CONFLICT OF LAWS

FIRST VERSE (1914)⁶²⁵

CONFLICT OF LAWS with its peppery seasoning,
Of pliable, scarcely reliable reasoning,
Dealing with weird and impossible things,
Such as marriage and domicil, bastards and kings,

All about courts without jurisdiction,
Handing out misery, pain and affliction,
Making defendant, for reasons confusing,
Unfounded, ill-grounded, but always amusing

Liable one place but not in another
Son of his father, but not of his mother,
Married in Sweden, but only a lover in
Pious dominions of Great Britain's sovereign.

Blithely upsetting all we've been taught,
Rendering futile our methods of thought,
Till Reason, tottering down from her throne,
And Common Sense, sitting, neglected, alone,

Cry out despairingly, "Why do you hate us?
Give us once more our legitimate status."
Ah, Students, bewildered, don't grasp at such straws,
But join in the chorus of Conflict of Laws.

Chorus

625. James A. McLaughlin, the Robert L. Shuman Professor of Law at West Virginia University College of Law wrote in a 1991 law review article: "[t]he late Thurman Arnold, one of the more iconoclastic of the legal realists (he wrote *The Folklore of Capitalism* (1937) and *The Symbols of Government* (1935), but who, after a stint in Academia as Dean at West Virginia University College of Law, Professor at Yale Law School, and judge on the federal bench, founded the Washington law firm of Arnold, Fortas and Porter) waxed poetic when it came to Conflict of Laws as dished up by Joseph Beale (at Harvard law school). In Arnold's autobiography, *Fair Fights and Foul, A Dissenting Lawyer's Life* (1965), he remembers a poem written at the Harvard Law School in 1914, to which I have added a second verse, hopefully in something of the spirit of Arnold's original. Here is Arnold's doggerel with my addition." James Audley McLaughlin, *Conflict of Laws: The New Approach to Choice of Law: Justice in Search of Certainty, Part Two*, 94 W. VA. L. R. 73, 108 n.65 (1991). The first two verses—Arnold's and McLaughlin's—were cited by Judge Raker of the Maryland Court of Appeals court when he dissented in *American Motorists Insurance Co. v. ARTRA Group, Inc.* noting that "[t]oday, the majority fails to shed new 'light' on the murky maze of Conflict of Laws." 659 A.2d 1295, 1313 (Md. 1995).

Beale, Beale, wonderful Beale,
 Not even in verse can we tell how we feel,
 When our efforts so strenuous,
 To over-throw,
 Your reasoning tenuous,
 Simply won't go.

For the law is a system of wheels within wheels
 Invented by Sayres and Thayers and Beales
 With each little wheel so exactly adjusted,
 That if it goes haywire the whole thing is busted.

So Hail to Profanity, Goodbye to Sanity,
 Lost if you stop to consider or pause,
 On with the frantic, romantic, pedantic, effusive, abusive, illusive,
 conclusive,
 Evasive, persuasive Conflict of Laws.⁶²⁶

SECOND VERSE (1991)⁶²⁷

If Arnold thought reason had gone from its throne
 Clear back in '14, O now how he'd groan
 For Babcock and Jackson had a terrible row
 And seeds of new policy surely did sow.

The seeds were from plants nursed in academia's groves
 And from '20 to '60 grew in great droves;
 But, once out of the classroom and into the courts
 The profuse little seedlings grew into sports.

Though the new growth was reason supplanting mere rites
 When growing in Academe's neat little sites;
 In real rows the neat rows fit nothing quite right,
 And we often get darkness instead of new light.

But if light be our metaphor, mixed as it is,
 Old light was dimmer and fuzzy as fizz;
 Nothing it showed but shadow to fools
 Who mistake simple outlines for the sureness of rules.

Now New light makes "sense" always the goal

626. THURMAN ARNOLD, FAIR FIGHTS AND FOUL 21-22 (1965), cited in James A. McLaughlin, *Conflict of Laws: The New Approach to Choice of Laws: Justice in Search of Certainty, Part Two*, 94 W. VA. L. REV. 73, 108 n.65 (1991).

627. This was added by Professor McLaughlin. *See, id.*

And explores each case nuance with the Restated tools
So, Lawyers, relax, break up the old straws,
And join in the chorus of Conflict of Laws.

THIRD VERSE (2008)⁶²⁸

Now in the “oughts” we have troubles galore-
As each new procedure has conflicts in store.
Restatements pervasive but reason long gone,
As courts cry for guidance and find there is none.

“Born” to a father, a child of two mothers,
With surrogate sisters and twins who’re not brothers;
California’d reverse but New York would affirm
A suit against posthumous donors of sperm.

We’ve redefined meanings of “person” and “parent”
With “interstate intercourse” nothing’s apparent.
Despite Model Acts made to make it all fine,
An embryo’s cells can now cross a state line.

So we ask for more “light” on the Restated rules
Shine upon petri dish, medical tools;
Help unconfuse what was once elemental
And judges might find what is truly “parental.”

As humans, in hope, employ ART,
Let resolution be bright as can be.
So parents and children will not have a cause
To join in the chorus of Conflict of Laws.

628. The author has humbly added this for consideration.

