

Chapter 29-2

Assisted Human Reproduction

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A. Introduction

EMBRYOS IN STORAGE:



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Quinn & Swain

# What Is Involved in ART ?

- Sperm Donation
- Egg Donation
- Embryo Donation
- Embryo Adoption
- Intrauterine Insemination
- In Vitro Fertilization (IVF)
- Embryo transfer (frozen and tubal)
- Gamete Intrafallopian Transfer (GIFT)
- Gestational Surrogacy
- Traditional Surrogacy
- Gamete Cryopreservation
- Embryo Cryopreservation
- Post-death gamete harvesting
- Post-death conception
- Disposition of Cryopreserved Embryos

# New Family Creation Options

## ■ Donor Egg:

- known or anonymous

## ■ Donor Sperm:

- known or anonymous

## ■ Donated Embryo:

- known or anonymous

## ■ Gestational Carrier:

- the possibility of using a carrier (with clients' sperm & egg; client's sperm & donor egg; client's egg & donor sperm or donor embryo)

## ■ Traditional Surrogate:

- the possibility of using client's sperm or donor sperm with the surrogate's egg

## B. Common Terms of ART

### *In Vitro* Fertilization (IVF)

- Ovaries medically hyper stimulated
- Eggs surgically removed
- Fertilized in laboratory
- Resultant embryos implanted in uterus

### Surrogacy

- Process of a woman carrying a pregnancy with the intention of placing the child with another or others for rearing and parenting.
- Two Types:
  - Traditional or True (TS)
  - Gestational Carrier/Surrogate (GC or GS)

# Surrogacy: Two Types

## Traditional or true (TS)

- A woman who becomes pregnant with her own egg and the sperm of the intended father (or donor sperm), with the intention of placing the child with the IF, or IF & his wife or partner.
- Due to the genetic connection, TS is a birth mother and, in many jurisdictions (especially without ARTs schemes), an adoption by IM or father's partner must occur after birth for IM or partner to be parent.



# Surrogacy (con't)

## Gestational Carrier/Surrogate (GC or GS)

- A woman who becomes pregnant with an embryo genetically unrelated to her, through the intra-uterine placement ('transfer') of an IVF-created embryo, and carries the child for IM, IF or IPs, with intention of placing child w/ them at birth.
- Also referred to as a host womb. Gestational 'Carrier' is preferred term.

## Cryopreservation:

- Freezing for storage.
- Sperm and embryos, and, with growing frequency but less success, eggs and ovarian tissue, may be frozen in liquid nitrogen and saved for future use.
- Tissue in storage is often referred to as “frozen” or “cryopreserved”.

## Eggs:

- Unfertilized female gametes
- Also referred to as: oocytes (eggs prior to ovulation or surgical retrieval), ovum or ova

# Intracytoplasmic Sperm Injection (ICSI)

- Lab procedure where a physician inserts one sperm into the nucleus of an egg in hopes of achieving fertilization.
- This procedure has revolutionized the treatment of male infertility, allowing men with extremely low sperm counts to conceive a child, which was nearly impossible before this technique.

# American Utilization of ART 2007

- 142,435 ART Cycles reported
- 138,198 IVF Cycles in US
- 41,343 Cycles resulting in live birth
- 54,656 children were born

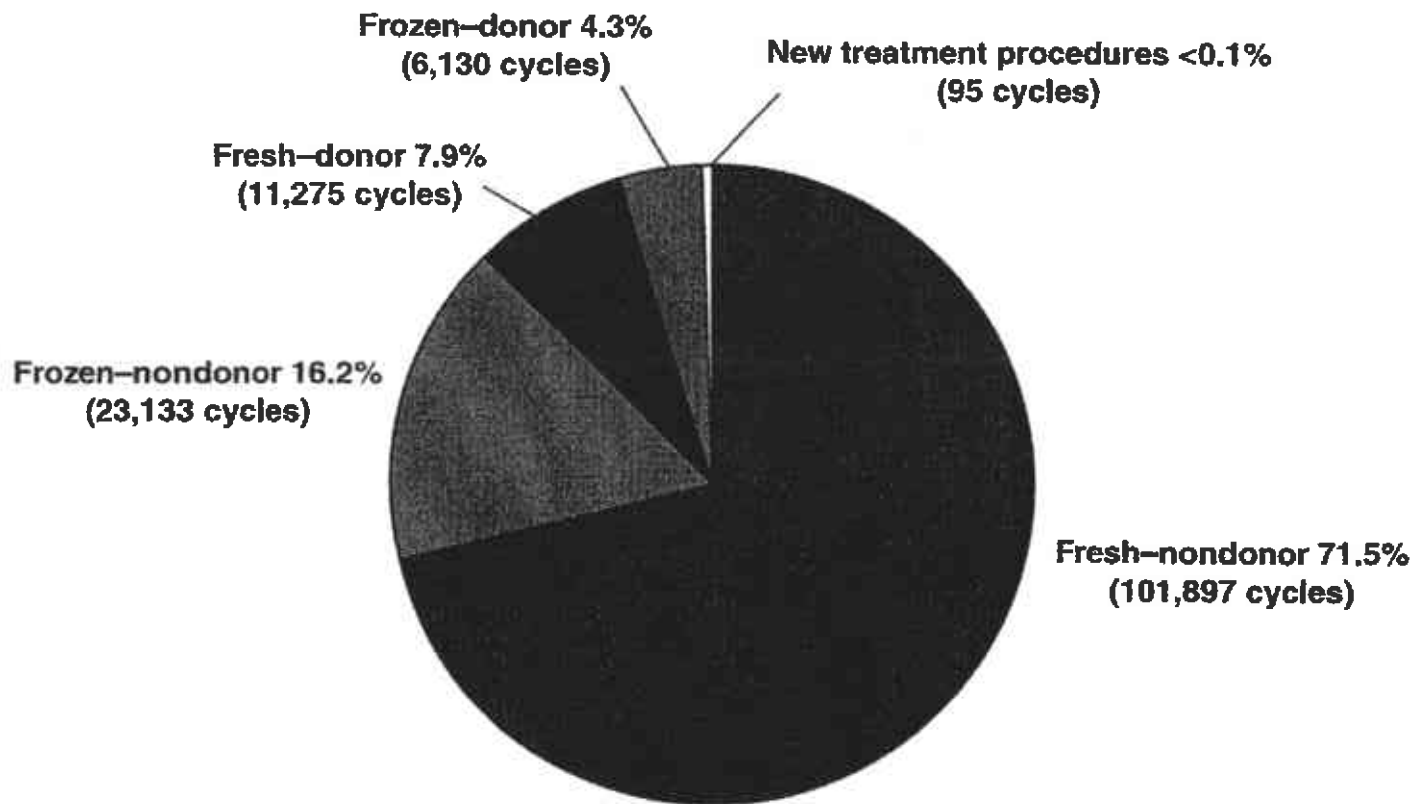
# UBC Centre for Reproductive Health

## IVF Statistics 2007 IVF or ICSI

### Using Own Eggs

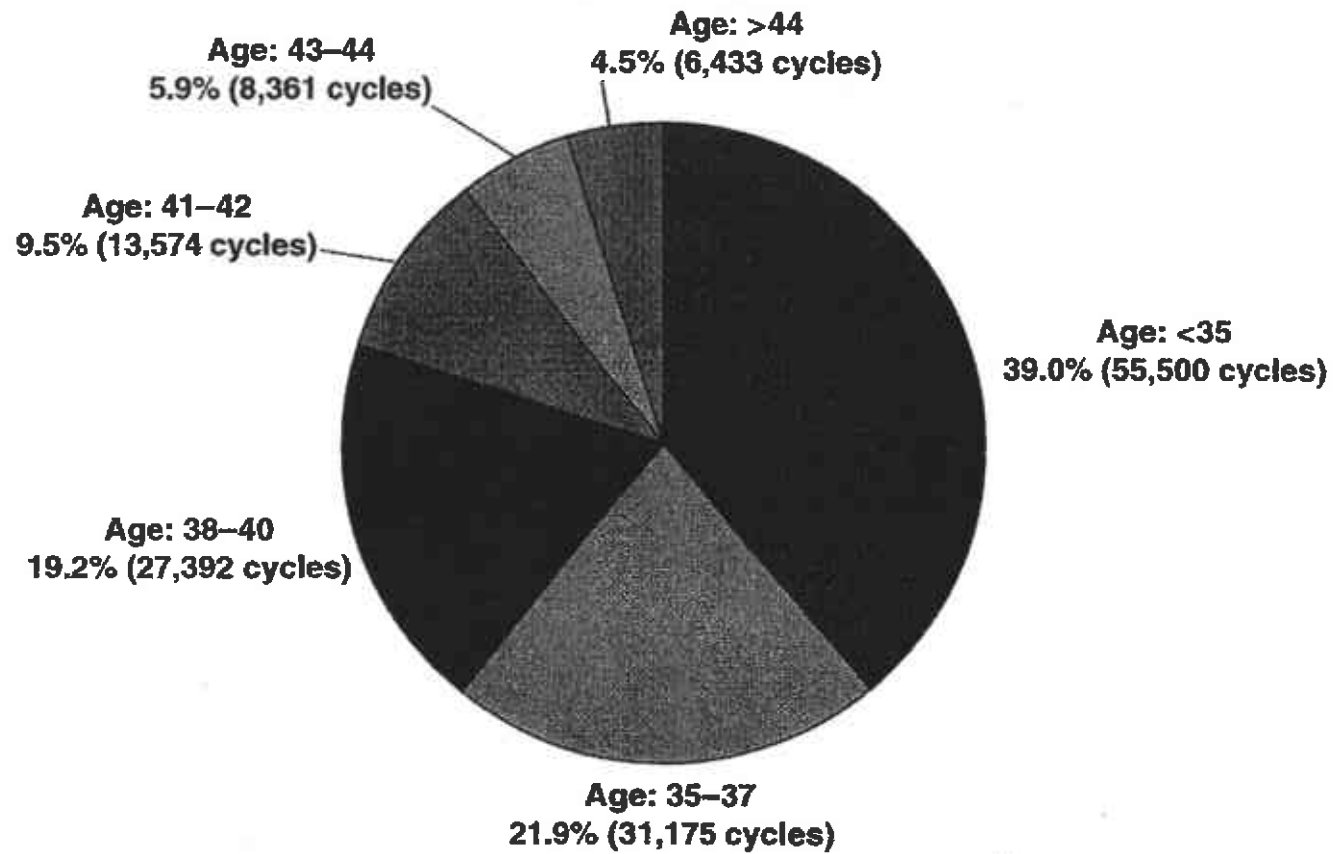
Age	Pregnancy Rate per Retrieval	Pregnancy Rate per Transfer	Average # Embryos Transferred
< 35	44%	47%	2.1
35-39	32%	34%	2.4
>= 40	13%	13%	2.8
All Ages	32%	34%	2.4

**Figure 2**  
Types of ART Cycles—United States, 2007



29-2-13

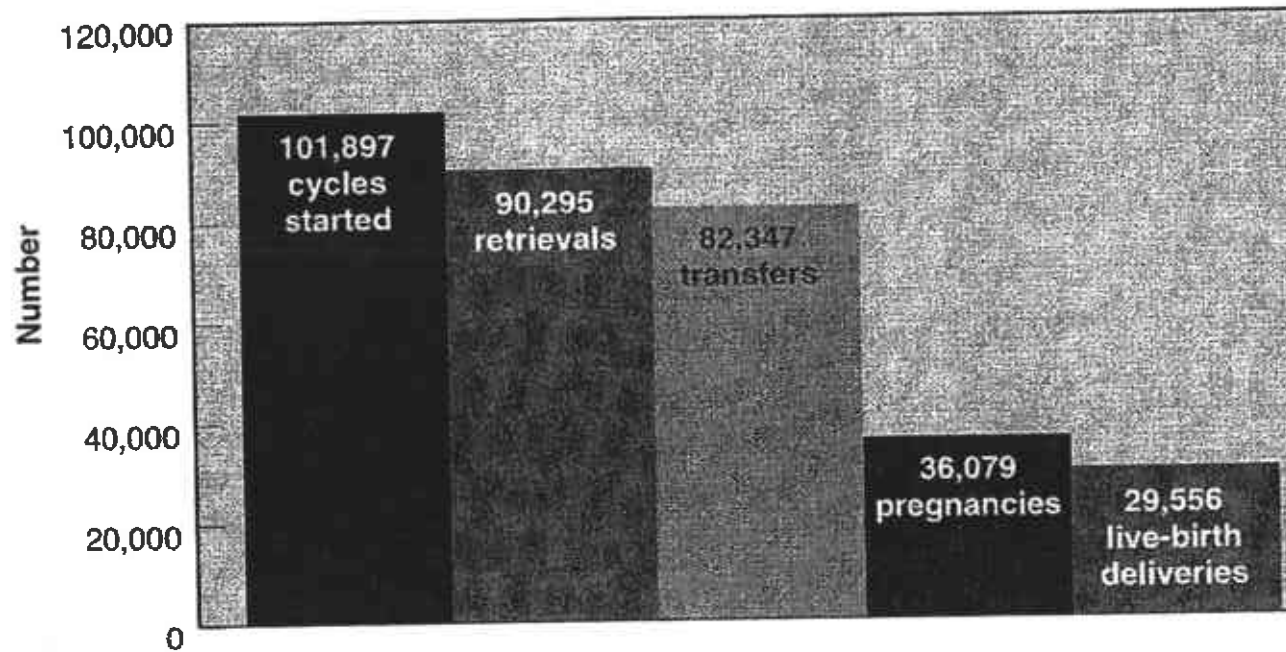
**Figure 3**  
ART Use by Age Group—United States, 2007



29-2-14

**Figure 5**

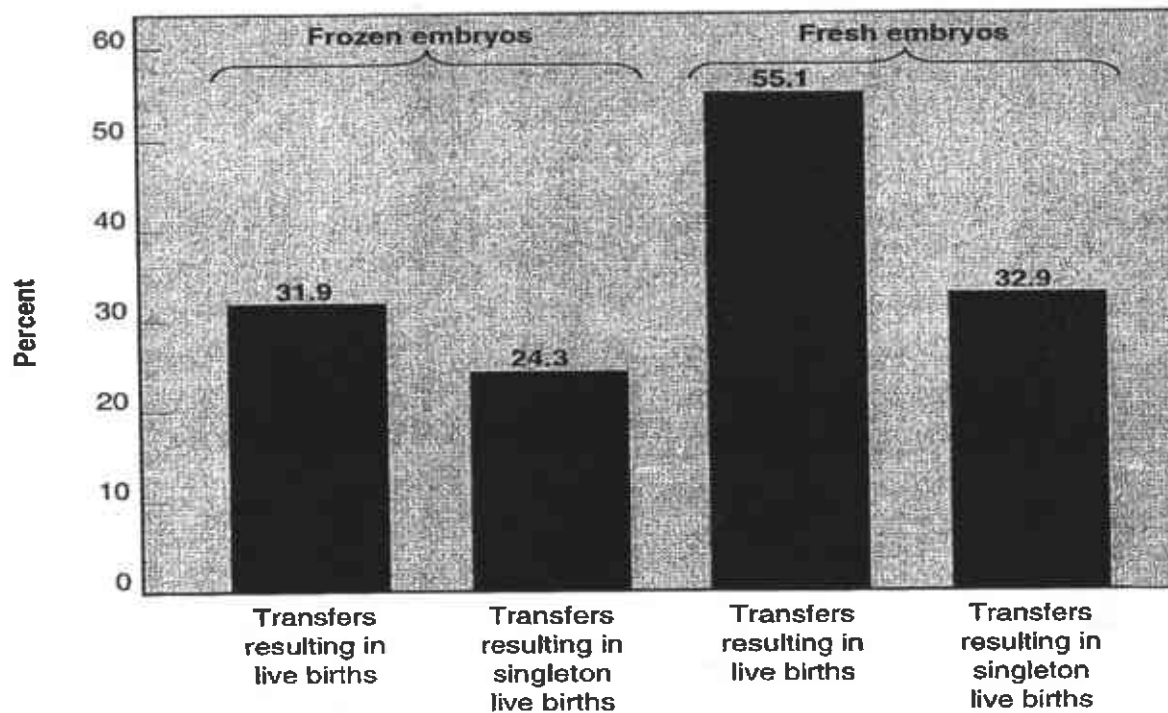
Outcome of ART Cycles Using Fresh Nondonor Eggs or Embryos, by Stage, 2007





**Figure 48**

Percentages of Transfers That Resulted in Live Births and Singleton Live Births for ART Cycles Using Frozen Donor Embryos and ART Cycles Using Fresh Donor Embryos, 2007



# THE PROS

Perceived advantages of using a carrier versus adopting from a birth mother:

- Control over prenatal care & greater involvement in pregnancy
- Child usually genetically related to at least one parent (unless donated embryo)
- Certainty over having a child to raise and no change of mind issues (especially if embryo is not donated and carrier is unrelated to the child)
- Legal parentage issues resolved before birth
- Issues of ongoing contact for child's benefit not as significant without any biological connection to the carrier

# THE CONS

- Primary disadvantage:
  - unless the carrier is a relative or friend who does not request compensation, cost can be prohibitive
- Religious/ethical concerns & restrictions
- By the time the clients come to you, they are sometimes “ARTSed out”
- **Not for the very risk-averse:**
  - regardless of behavior of carrier, even if it constitutes a material breach and/or bad pregnancy outcome is the result, only recourse may be litigation’ with uncertain outcome.
- Use of true surrogate or donated embryo even greater risk.
- Limited success in litigation likely.

## C. Costs

- IVF: \$8000-\$12,000 (regional variations)
- Donor Egg: \$8,000 - \$25,000 (if donor is agency/clinic recruited & paid) (US)
- GC: minimum \$30,000 if GC paid, likely substantially more (US)
- ICSI: additional \$1500-\$2000 for each attempt, in addition to IVF cost

# **Assisted Human Reproduction Act SC 2004, C.2.**

The references to the Act and Regulations in this presentation concern the relationship between the surrogate, donor, and intended parent(s) and not between those persons and the medical community.

# PRINCIPLES

## Section 2

The Parliament of Canada recognizes and declares that

- (a) the health and well-being of children born through the application of assisted human reproductive technologies must be given priority in all decisions respecting their use;

- (b) the benefits of assisted human reproductive technologies and related research for individuals, for families and for society in general can be most effectively secured by taking appropriate measures for the protection and promotion of human health, safety, dignity and rights in the use of these technologies and in related research;
- (c) while all persons are affected by these technologies, women are more than men are directly and significantly affected by their application and the health and well-being of women must be protected in the application of these technologies;

- (d) the principle of free and informed consent must be promoted and applied as a fundamental condition of the use of human reproductive technologies;
- (e) persons who seek to undergo assisted reproduction procedures must not be discriminated against, including on the basis of their sexual orientation or marital status;
- (f) trade in the reproductive capabilities of women and men and the exploitation of children, women and men for commercial ends raise health and ethical concerns that justify their prohibition; and
- (g) human individuality and diversity, and the integrity of the human genome, must be preserved and protected.



# PROHIBITED ACTIVITIES

## Section 6

### Payment for surrogacy

- (1) No person shall pay consideration to a female person to be a surrogate mother, offer to pay such consideration or advertise that it will be paid.

## Acting as intermediary

- (2) No person shall accept consideration for arranging for the services of a surrogate mother, offer to make such an arrangement for consideration or advertise the arranging of such services

## Payment to intermediaries

- (3) No person shall pay consideration to another person to arrange for the services of a surrogate mother, offer to pay such consideration or advertise the payment of it.

## Surrogate mother – minimum age

- (4) No person shall counsel or induce a female person to become a surrogate mother, or perform any medical procedure to assist a female person to become a surrogate mother, knowing or having reason to believe that the female person is under 21 years of age.

## Validity of agreement

- (5) This section does not affect the validity under provincial law of any agreement under which a person agrees to be a surrogate mother.

# PROHIBITED ACTIVITIES

## Section 7

### Purchase of gametes

- (1) No person shall purchase, offer to purchase or advertise for the purchase of sperm or ova from a donor or a person acting on behalf of a donor.

### Purchase or sale of embryos

- (2) No person shall
  - (a) purchase, offer to purchase or advertise for the purchase of an *in vitro* embryo; or
  - (b) sell, offer for sale or advertise for sale an *in vitro* embryo.

## Purchase of other reproductive material

- (3) No person shall purchase, offer to purchase or advertise for the purchase of a human cell or gene from a donor or a person acting on behalf of a donor, with the intention of using the gene or cell to create a human being or of making it available for that purpose.

## Exchanges included

- (4) In this section, “purchase” or “sell” includes to acquire or dispose of in exchange for property or services.

# PROHIBITED ACTIVITIES

## Section 8

Use of reproductive material without consent

- (1) No person shall make use of human reproductive material for the purpose of creating an embryo unless the donor of the material has given written consent, in accordance with the regulations, to its use for that purpose.

## Posthumous use without consent

- (2) No person shall remove human reproductive material from a donor's body after the donor's death for the purpose of creating an embryo unless the donor of the material has given written consent, in accordance with the regulations, to its removal for that purpose.

## Use of *in vitro* embryo without consent

- (3) No person shall make use of an *in vitro* embryo for any purpose unless the donor has given written consent, in accordance with the regulations, to its use for that purpose.

# CONTROLLED ACTIVITIES

## Section 12

(not yet proclaimed in force as of the preparation of this presentation on June 10, 2010.)

### Reimbursement of expenditures

- (1) No person shall, except in accordance with the regulations and a licence,
  - (a) reimburse a donor for an expenditure incurred in the course of donating sperm or an ovum;
  - (b) reimburse any person for an expenditure incurred in the maintenance or transport of an *in vitro* embryo; or
  - (c) reimburse a surrogate mother for an expenditure incurred by her in relation to her surrogacy.



## Receipts

- (2) No person shall reimburse an expenditure referred to in subsection (1) unless a receipt is provided to that person for the expenditure.

## No reimbursement

- (3) No person shall reimburse a surrogate mother for a loss of work-related income incurred during her pregnancy, unless
  - (a) a qualified medical practitioner certifies, in writing, that continuing to work may pose a risk to her health or that of the embryo or foetus; and
  - (b) the reimbursement is made in accordance with the regulations and a licence.

# PRIVACY AND ACCESS TO INFORMATION

## Section 14

- 14(1) Information to be collected by licensees
- 14(2) Requirements of this Act to be conveyed

## Section 15

- 15(1) Disclosure of information restricted
- 15(2) Disclosure required
- 15(4) Information to persons undergoing procedures

# OFFENCES

## Section 60

Liability for a person who contravenes any of sections 5 to 9 (maximum fine of 500,000 and /or up to 10 years imprisonment)

## Section 61

Liability for a person who contravenes any section of this Act other than 5 to 9 or any regulations (maximum fine of 250,000 and /or up to 5 years imprisonment)

## Section 65

### Summary of Key Regulations

- (1)(a) defining “donor”, in relation to an *in vitro* embryo;
- (e) For the purposes of subsection 12(1), respecting the reasonable expenditures that may be reimbursed under a licence;
- (g) respecting the number of children that may be created from the gametes of one donor through the application of assisted reproduction procedures; respecting the collection, use and disclosure of health reporting information, including the health reporting information collected under subsection 14(1) and disclosed under section 15;
- (p) respecting the counselling services referred to in paragraph 14(2)(b);
- (q) respecting the providing of information under paragraph 14(2)(d);
- (s) for the purposes of paragraph 15(2)(d) or 18(5)(b), specifying the provisions of any federal or provincial law;

## E. REGULATIONS

### Interpretation

1.(1) The following definitions apply in these Regulations.

“Act” means the *Assisted Human Reproduction Act*.

“common-law partner”, in relation to an individual, means a person who is cohabitating with the individual in a conjugal relationship at the relevant time, having so cohabited for a period of at least one year.

“third party” means

- (a) In relation to human reproductive material,
  - (i) an individual who is not the donor of the human reproductive material or the spouse or common-law partner of that donor, or
  - (ii) a couple in respect of whom neither spouse or common-law partner is the donor of the human reproductive material; and
  
- (b) In relation to an *in vitro* embryo,
  - (i) an individual who is not the donor of the *in vitro* embryo under subsection 10(1), or
  - (ii) a couple who is not the donor of the *in vitro* embryo under subsection 10(1).

- (2) The term “spouse” does not include a person who, at the relevant time, lives separate and apart from the person to whom they are married because of the breakdown of their marriage.
- (3) The written consent of a donor must be signed by the donor and attested by a witness.

## CONSENT GIVEN UNDER SUBSECTION 8(1) OF THE ACT

2. This Part applies in respect of a consent given under subsection 8(1) of the Act to make use of human reproductive material for the purpose of creating an embryo.
3. Before a person makes use of human reproductive material for the purpose of creating an embryo, the person shall have a document signed by the donor of the material stating that, before consenting to the use of the material, the donor was informed in writing that



- (a) subject to paragraph (b), the human reproductive material will be used in accordance with the donor's consent to create an embryo for one or more of the following purposes, namely,
- (i) the donor's own reproductive use,
  - (ii) following the donor's death, the reproductive use of the person who is, at the time of the donor's death, the donor's spouse or common-law partner,
  - (iii) the reproductive use of a third party,
  - (iv) improving assisted reproduction procedures, or
  - (v) providing instruction in assisted reproduction procedures;

- (b) if the human reproductive material is to be removed from the donor's body after the donor's death, the material will be used in accordance with the donor's consent to create an embryo for one or more of the following purposes, namely,
  - (i) the reproductive use of the person who is, at the time of the donor's death, the donor's spouse or common-law partner,
  - (ii) improving assisted reproduction procedures, or
  - (iii) providing instruction in assisted reproduction procedures;

(c) if the donor wishes to withdraw their consent, the withdrawal must be in writing;

(d) the withdrawal is effective only if the person who intends to make use of the human reproductive material is notified in writing of the withdrawal

(i) in the case of human reproductive material to be used to create an embryo for a purpose mentioned in paragraph (a) or (b), other than subparagraph (a)(iii), before the material is used, and

(ii) in the case of human reproductive material to be used to create an embryo for the purpose mentioned in subparagraph (a)(iii), before the third party acknowledges in writing that the material has been designated for their reproductive use;

- (e) the number of *in vitro* embryos created with the human reproductive material may be in excess of the immediate reproductive needs of the individual or couple for whom they were created;
- (f) if the human reproductive material is used to create *in vitro* embryos for a third party's reproductive use and there are *in vitro* embryos in excess of the third party's reproductive needs, the excess *in vitro* embryos will be used in accordance with the third party's consent and, if the use is providing instruction in assisted reproduction procedures, improving assisted reproduction procedures or other research, the consent of the donor in accordance with section 4;

- (g) if the human reproductive material is used to create *in vitro* embryos for the reproductive use of the person who, at the time of the donor's death, is the donor's spouse or common-law partner and there are *in vitro* embryos in excess of the spouse or common-law partner's reproductive needs, the excess *in vitro* embryos will be used in accordance with the spouse or common-law partner's consent and, if the use is providing instruction in assisted reproduction procedures, improving assisted reproduction procedures or other research, the consent of the donor in accordance with section 4;

- (h) if the human reproductive material is used to create *in vitro* embryos for the reproductive use of a third party who is a couple, along with human reproductive material from an individual who is a spouse or common-law partner in the couple, the use of the *in vitro* embryos will be subject to the consent of that individual alone if, prior to the use of the *in vitro* embryos, the individual is no longer a spouse or common-law partner in the couple; and
- (i) if the donor consents to the human reproductive material being used to create an *in vitro* embryo for the purpose of providing instruction in assisted reproduction procedures or improving assisted reproduction procedures, no additional consent from the donor is required to permit the use of the embryo for that purpose.

4.(1) Before a person makes use of human reproductive material for the purpose of creating an embryo, the person shall have the written consent of the donor of the material stating that the material may be used for one or more of the following purposes:

- (a) the donor's own reproductive use;
- (b) following the donor's death, the reproductive use of the person who is, at the time of the donor's death, the donor's spouse or common-law partner;
- (c) the reproductive use of a third party;

(d) improving assisted reproduction procedures;  
or

(e) providing instruction in assisted reproduction procedures.

(2) A donor's consent stating that the donor's human reproductive material may be used for a purpose mentioned in paragraph (1)(b) or (c) shall also state whether any *in vitro* embryos that are not required for that purpose may be used for providing instruction in assisted reproduction procedures, improving assisted reproduction procedures or other research.




- 5.(1) If a donor wishes to withdraw their consent, the withdrawal must be in writing.
- (2) The withdrawal is effective only if the person who intends to make use of the human reproductive material is notified in writing of the withdrawal

- (a) in the case of human reproductive material to be used to create an embryo for a purpose mentioned in paragraph 4(1)(a), (b), (d) or (e), before the material is used; and
- (b) in the case of human reproductive material to be used to create an embryo for the purpose mentioned in paragraph 4(1)(c), before the third party acknowledges in writing that the material has been designated for their reproductive use.

## CONSENT GIVEN UNDER SUBSECTION 8(3) OF THE ACT

- 10.(1) Subject to section 15, in this Part, “donor” means the following individual or individuals for whose reproductive use an *in vitro* embryo is created:
- (a) the individual who has no spouse or common-law partner at the time the *in vitro* embryo is created, regardless of the source of the human reproductive material used to create the embryo; or
  - (b) subject to subsection (3), the couple who are spouses or common-law partners at the time the *in vitro* embryo is created, regardless of the source of the human reproductive material used to create the embryo.

- (2) If the donor is a couple, the consent of each spouse or common-law partner must be compatible in order for the consent of the donor to comply with the requirement of this Part.
- (3) In the case of an *in vitro* embryo created using human reproductive material from only one of the individuals in the couple that was the donor of the embryo at the time it was created, that individual becomes the donor of the embryo under paragraph (1)(a) if, before the use of the embryo, the individual is no longer a spouse or common-law partner in the couple.

- 
11. This Part applies in respect of a consent given under subsection 8(3) of the Act to make use of an *in vitro* embryo.
  12. Before a person makes use of an *in vitro* embryo, the person shall have a document signed by the donor of the embryo stating that, before consenting to the use of the embryo, the donor was informed in writing that:

(a) the *in vitro* embryo will be used in accordance with the donor's consent for one or more of the following purposes, namely,

- (i) the donor's own reproductive use,
- (ii) the reproductive use of a third party,
- (iii) improving assisted reproduction procedures,
- (iv) providing instruction in assisted reproduction procedures, or
- (v) a specific research project, the goal of which is stated in the consent;

(b) if the donor wishes to withdraw their consent, the withdrawal must be in writing; and

(c) the withdrawal is effective only if the person who intends to make use of the *in vitro* embryo is notified in writing of the withdrawal

(i) in the case of an *in vitro* embryo to be used for the purpose mentioned in subparagraph (a)(i), before the use of the embryo,

(ii) in the case of an *in vitro* embryo to be used for the purpose mentioned in subparagraph (a)(ii), before the third party acknowledges in writing that the embryo has been designated for their reproductive use,

(iii) in the case of an *in vitro* embryo to be used for the purpose mentioned in subparagraph (a)(iii), before the later of the following occurrences, namely,

(A) the person acknowledges in writing that the *in vitro* has been designated for improving assisted reproduction procedures, and

(B) the beginning of the process of thawing the *in vitro* embryo for the purpose of improving assisted reproduction procedures,



(iv) in the case of an *in vitro* embryo to be used for the purpose mentioned in subparagraph (a)(iv), before the later of the following occurrences, namely,

(A) the person acknowledges in writing that the *in vitro* embryo has been designated for providing instruction in assisted reproduction procedures, and

(B) the beginning of the process of thawing the *in vitro* embryo for the purpose of providing instruction in assisted reproduction procedures, and

(v) in the case of an *in vitro* embryo to be used for the purpose mentioned in subparagraph (a)(v), before the latest of the following occurrences, namely,

- (A) the person acknowledges in writing that the *in vitro* embryo has been designated for research,
- (B) the beginning of the process of thawing the *in vitro* embryo for the purpose of research, and
- (C) the creation of a stem cell line using the *in vitro* embryo.

13.(1) Before a person makes use of an *in vitro* embryo, the person shall have the written consent of the donor of the embryo stating that the embryo may be use for one or more of the following purposes:

- (a) the donor's own reproductive use;
- (b) the reproductive use of a third party;

- (c) improving assisted reproduction procedures;
- (d) providing instruction in assisted reproduction procedures; or
- (e) a specific research project, the goal of which is stated in the consent.

(2) Before a person makes use of an *in vitro* embryo for a purpose mentioned in paragraph (1)(c), (d) or (e), the person must also have the written consent, in accordance with section 4, of the persons whose human reproductive material was used to create the embryo, unless those persons have already consented to that use as the donor of the embryo.

14.(1) If a donor wishes to withdraw their consent, the withdrawal must be in writing.

(2) The withdrawal is effective only if the person who intends to make use of the *in vitro* embryo is notified in writing of the withdrawal

- (a) in the case of an *in vitro* embryo to be used for the purpose mentioned in paragraph 13(1)(a), before the use of the embryo;
- (b) in the case of an *in vitro* embryo to be used for the purpose mentioned in paragraph 13(1)(b), before the third party acknowledges in writing that the embryo has been designated for their reproductive use;

(c) in the case of an *in vitro* embryo to be used for the purpose mentioned in paragraph 13(1)(c), before the later of the following occurrences, namely,

(i) the person acknowledges in writing that the *in vitro* embryo has been designated for improving assisted reproduction procedures, and

(ii) the beginning of the process of thawing the *in vitro* embryo for the purpose of improving assisted reproduction procedures;

(d) in the case of an *in vitro* embryo to be used for the purpose mentioned in paragraph 13(1)(d), before the alter of the following occurrences, namely,

(i) the person acknowledges in writing that the *in vitro* embryo has been designated for providing instruction in assisted reproduction procedures, and

(ii) the beginning of the process of thawing the *in vitro* embryo for the purpose of providing instruction in assisted reproduction procedures; and

(e) in the case of an *in vitro* embryo to be used for the purpose mentioned in paragraph 13(1)(e), before the latest of the following occurrences, namely,

(i) the person acknowledges in writing that the *in vitro* embryo has been designated for research,

(ii) the beginning of the process of thawing the *in vitro* embryo for the purpose of research, and

(iii) the creation of a stem cell line using the *in vitro* embryo.

(3) If the donor is a couple, the consent of the donor may be withdrawn by either spouse or common-law partner.



15. For the purpose of sections 12 to 14, in the case of an *in vitro* embryo created for a purpose mentioned in paragraph 4(1)(d) or (e), the persons whose reproductive material was used to create the embryo are the donor of the embryo and the document and consent provided by them are under sections 3 and 4 in respect of the use of their human reproductive material for the purpose of creating the embryo constitute, respectively, the document and consent required under section 12 and subsection 13(1) with respect to the use of the embryo.

## F. CHALLENGES TO THE ACT

- Quebec challenged the Constitutional Validity of sections 8-19, 40-53, 60, 61 and 68 of the Act.
- The Court of Appeal of Quebec declared that the sections in issue exceeded the authority of Parliament to enact this legislation.
- At time of preparing this presentation the decision of the Supreme Court of Canada was pending.
- New Brunswick, Saskatchewan and Alberta supported Quebec before the Supreme Court of Canada.

- Quebec argued that the Province had exclusive authority to regulate the field of reproductive medicine for its residents.
- As part of the legislative framework in Quebec it is intended to subsidize these procedures under the Quebec medical insurance coverage.
- Under the Act individuals must pay their own expenses without any government financial contribution.

- Issues intended parents and others involved in reproductive technology procedures may face:

- **Reproductive tourism** – travel to inexpensive locales – i.e. India

- Encouraging the maximum number of embryos to be transferred

- **Multiple births**

- Increased **medical risks**

- **Significant costs** to the intended parents

- Driving the surrogacy arrangement and financial terms **underground**

## G. Reproductive Technology Agreements

### (1) Surrogacy

#### Recitals

- concise and factual background of the parties
- the specific purpose of the agreement
  - i.e. to create a child from the genetic material of the intended parents or donor to be used by the intended parents
- reference to the Act and its inherent uncertainty because there are few, if any, court decisions
- reimbursing the surrogate for expenses is not a fee or consideration under the Act
- assumption of health risks by the surrogate

## Terms

- Testing, screening and counselling – parties follow all requirement of fertility clinic
- Harvesting (from donor, surrogate or intended mother)
- Embryo creation
- Transfer procedure
- Pregnancy
  - conduct of surrogate
  - involvement of intended parents
  - sharing of information
  - medical testing
- Selective reduction
- Termination of pregnancy
- Medical treatment of offspring

## ■ Parents

- intended parents entitled to custody upon birth
- intended parents make all health decisions upon birth
- intended parents choose name of offspring
- surrogate releases custody rights
- intended parents release surrogate of any financial responsibility of offspring

## ■ Intended parents' death or separation prior to birth

- appointment of guardian
- custody arrangement between intended parents

## ■ Birth registration

- adoption
- declaration of parentage

## ■ Financial arrangements

- payment of surrogate's expenses
- no guidance under the Act as section 12 not in force
- practical guidance is payment of appropriate expenses, while appreciating that these cannot be so great as to appear to be a fee

## ■ Surrogate's expenses may include:

- lost wages
- additional money for multiple birth or caesarean section
- life insurance coverage
- child care



## ■ Arbitration provision

- simple, quick and inexpensive dispute resolution
- agreement is confidential between parties

## ■ Agreement usually in place for maximum of one year

## ■ Assumption of medical risks by surrogate

## ■ Independent legal and health advice

## ■ Governing law – usually the Province in which the surrogate resides

## ■ Schedules

- definition section
- medical tests of surrogate and intended parents
- maximum expenses (receipted) and timing of payment
- arbitration provisions

## (2) Donor Agreements (known)

- ❖ Egg
- ❖ Semen
- ❖ Embryo

### Recitals

- factual background of the parties
- purpose of the donation – i.e. to allow recipient to create a child to be raised by the recipients
- recognition of risk of health
- reference to the Act and prohibition of payment for genetic material
- parties and professionals do not warrant that genetic material will be viable and free of defect
- recognition of custody and parental rights

## Terms

- Definitions
- Screening and testing
- Donor's conduct – refraining from use of drugs, alcohol, tobacco and harmful activities
- Procedure – varies depending on genetic material to be donated
- Custody, control and use of genetic material vests to recipients
- Only recipients to use without written consent of donor
- Death of recipient
  - if one dies – survivor retains right
  - if both die – reverts to donor

- Parental right exclusively to recipient
- Donor is released of any financial responsibility
- No contact between donor and offspring
- Requirement to notify if children born to donor or recipient
- Risks
  - donor assumes all health risks associated with donation
  - recipient assumes all health risks for offspring and carrier (including if it is the recipient)
- Financial
  - recipient pay all expenses associated with donation
  - no fees paid to donor
- Change in circumstances – medical information provided in perpetuity
- Term – usual is maximum 12 months
- General contract terms

## H. Birth Registration

# Legal Concept of 'Parent'

- Same sex couples: both parties can be legal parents
- A birth woman is not necessarily the mother of a child
- Intended Parents may be:
  - Single individuals
  - Married couples
  - Unmarried couples
  - Same-sex couples
  - Older parents
- A child may have a:
  - Birth mother
  - Genetic mother
  - Intended mother
  - Genetic father, and a
  - Intended father

## (1) Adoption

- Birth registration in name of surrogate and intended father if he provided semen
- Birth registration in name of surrogate if only donor semen regardless of donor egg
- After adoption birth registration issued in name of intended parent or parents
- Adoption is governed separately by each province or territory
- Less expensive than Declaration of Parentage
- About 10% of clients choose adoption, as intended parent prefer to have Birth Registration issued at first instance in their names

## (2) Declaration of Parentage

- Application to a Court to declare intended parent(s) are parent(s) of offspring
- Leading case
  - Rypkema v British Columbia Supreme Court [2003] BCJ No. 2721
    - intended parents challenged the validity of section 3 of the British Columbia Vital Statistics Act, which prevented naming themselves as the parents of an offspring born to gestational carrier
    - the gestational carrier consented to the application

- the Court allowed the application and found that the intention of the parties was the paramount consideration
- the Province of British Columbia neither consented nor opposed the application
- the Court reviewed cases in Canada and the United States
- the Court determined that it had jurisdiction to make binding determination of maternity, as it was clear that it had jurisdiction to make order of paternity



- Court applications are based upon the affidavits of the intended parents and the surrogate, all of which are provided to the Vital Statistics Agency, and a medical opinion letter regarding the reproductive technology procedures
- the Registration of Birth is completed in the names of the intended parent or parents
- Declarations are granted (at least in British Columbia) even if there is donated genetic material
- Declarations are granted to heterosexual, gay and lesbian couples or individuals

# Canadian cases cited in *Rypkema*

*R.S. and L.C. v. J.C. and M.C.* [2003] BCSC

- Facts:
  - Two couples in conflict regarding custody and access for baby A
  - RS and wife LC entered into a voluntary arrangement with JC to be artificially inseminated, and RS and LC were the intended parents
  - Baby A is biological child of surrogate JC and RS
  - JC changed her mind during pregnancy, and wants to raise the child with her new husband
  - JC alleges that
    - she was too young to consent (age 18) to the surrogacy arrangement
    - RS and LC voided the agreement by not following through on a promise of \$15,000 payment for the surrogacy
  
- Psychologist recommended at minimum, the intended parents should have joint custody/guardianship and
  
- Settled on a 50/50 basis
  - Intended parents have child for 4 night each week (including weekend)
  - Surrogate has child for three nights each week

### S.C.B.C. Action No. L043056

- Court granted a Declaration of Parentage declaring that a gay couple were the parents of a child born through a traditional surrogacy in which one partner was the biological father of the child

### *L. v. P.* No. 0101-22025 [Queen's Bench of Alberta]

- Applicant, L, entered into a surrogacy agreement with P. P acted as a surrogate mother to a child created by the genetic material of the applicants
- Applicants applied to Court for an order declaring L to be the mother of a child pursuant to s. 64 of the *Domestic Relations Act*, R.S.A. 1980, c. D-37.
- Court granted a declaration of parentage in favour of applicant mother

### *J.C. v. Manitoba* [2000] M.J. No. 482

- Genetic parents, the birth mother and her spouse all applied before the birth of the child for a declaration compelling hospital staff to complete documentation showing that the genetic parents were the natural and legal parents
- Application was opposed
- Court declined to grant such a declaration since the gestational carrier would be giving 'birth' within the meaning of the legislation
- Court noted that a declaration of parentage could be made after the preliminary step of giving 'birth' under the Manitoba legislation

# *Trociuk v. British Columbia (Attorney General)*

[2003] SCC 34

- Mother filled out and submitted the statement of live birth on her own, and marked the father as “unacknowledged by the mother” pursuant to ss. 3(1)(b) and 4(1)(a) of the BC *Vital Statistics Act*
- Under s. 3(6)(b) of the *Act*, the father is precluded from having the registration altered.
- Held ss. 3(1)(b) and 3(6)(b) of the *Vital Statistics Act* unconstitutional
  - Violates s. 15(1) of the *Charter* because they constitute a discrimination on the basis of sex
  - The impugned provisions are not saved under s. 1 as they do not impair the rights of fathers as little as reasonably possible

## *J.R. v. L.H.* [2002] O.J. No. 3998

- Applicants sought a declaration that they were the biological parents of twins born through a gestational carriage agreement, and for an order directing the Registrar General to register a Statement of Birth consistent with that declaration
- Court noted that s 1 of the *Vital Statistics Act* of Ontario defined 'birth' as the "complete expulsion or extraction from its mother of a fetus..." and therefore the respondent is "clearly the birth mother"
- Court ordered the Registrar General to register the applicants as the birth parents consistent with the declaration

*Gill v. British Columbia (Ministry of Health)* 40  
C.H.R.R. D/321 [ 2001]

- Complainant filed complaint with BC Human Rights Commission that the *Vital Statistics Act* discriminated against the complainants because they refused to register the same sex partner of the birth mother on the birth registration form as she had no biological relationship with the child
- Human Rights Tribunal ordered the Director to amend the birth registration form to provide the opportunity for identifying as a co-parent, a non-biological parent who is the co-parent of a mother or father

# US Cases cited in *Rypkema*

- Several states, including Maine, Massachusetts, Texas and Pennsylvania, have created court procedures that permit genetic parents to be listed on birth certificates of children born to gestational carriers
- *Soos v. Superior Court in and for Country of Maricopa*, 182 Ariz. 470 (Ct. App. Div. 1 1994)
  - Biological parents by means of IVF entered into a contract with a gestational surrogate resulting in a pregnancy of triplets
  - During the pregnancy, the wife filed a petition for dissolution of the marriage and shared custody of the unborn children. She challenged the constitutionality of the statute after her husband asserted that the surrogate was the legal mother and therefore the wife had no standing to request custody
  - Court held that an Arizona statute was unconstitutional. The statute violated the equal protection clause of the 14<sup>th</sup> Amendment to the Federal Constitution when it allowed a biological father to prove paternity and automatically granted a surrogate mother the status as legal mother, but did not allow any means for a biological mother, who donated the eggs, to prove maternity

■ *Johnson v. Calvert* (1993) 5 Cal.4<sup>th</sup> 84

- Court affirmed a lower Court ruling that a gestational surrogacy contract was legal and enforceable, when it held that the gestational surrogate had no parental rights to a child born to her
- The court reasoned that there are two distinct ways to prove maternity using the existing California Law Code
  1. by proof of giving birth to the child
  2. by proving genetic consanguinity (blood tests)
- When two women can so prove they are the mother, the one who intended to “bring about the birth of a child that she intended to raise as her own – is the natural mother under California law.”



## Canadian Cases citing *Rypkema*

- *MD v LL* [2008] OJ No. 907 March 10, 2008 follows *Rypkema* and extends it by providing:
  - the Courts have inherent jurisdiction to make Declaration in favour of intended parents
  - a declaration that the surrogate and inferentially a known donor is not a parent
- British Columbia and Ontario will permit a declaration that the surrogate and a known donor are not a parent

- *B.A.N. and R.C.N. v. J.H.* [2008] BCSC 808 follows and extends Rypkema only in situations of universal consent
  - Application for a declaration of parentage in which there was a known egg donor granted
  - Matters are identical to Rypkema except that only one of the intended parents is a genetic parent

*T.(K.G.) v. D.(P.)*, 2005 BCSC 1659 cites Rypkema

- Lesbian Couple in dispute as to whether one partner, who did not give birth to the child, is entitled to rights as parent of the child born to the other partner
- Application for the child to be adopted jointly was dismissed

# I. Current Issues

## Intention Cases – California Trilogy

- ***K.M. v. E.G.* (Aug. 22, 2005, S125643)**
  - K.M. donated eggs to her registered domestic partner, E.G. to use for IVF
  - At time of donation K.M. signed standard form relinquishing any claim to any resulting offspring
  - K.M. later decides she wants to be considered a mother to the twins and E.G. opposes
  - Court held in favor of K.M.; the sperm-donor-provision should not be used to deny her status as parent since she supplied the eggs to her partner for the purpose of producing children that would be raised jointly
- ***Kristine H v. Lisa R.* (Aug. 22, 2005, S126945)**
  - Pregnant mother and same-sex partner filed a Complaint to Declare Existence of Parental Rights so that the partner not giving birth would be listed on the birth certificate; court issued the requested judgment
  - Couple separated two years later and birth mother is estopped from vacating her ex-partner's parental status
- ***Elisa B. v. Superior Court* (Aug. 22, 2005, S125912)**
  - Both partners in a lesbian couple were artificially inseminated with sperm from the same anonymous donor
  - The two women separated when their children were toddlers; one partner, Elisa, stopped providing financial support and denied being the “parent” of her ex-partner's twins
  - Elisa had not given birth to, or legally adopted, either child, nor was she married to the birth mother
  - Court held that Elisa is also a parent; analogized to the “presumed father” scenario

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## Contra Intention Cases

*Baby M*, 109 N.J. 396, 537 A.2d 1227 (1988)

- Facts:
  - Traditional surrogacy arrangement
  - After delivering the child; surrogate claimed parental right
- Holding: surrogate awarded some parenting time with child

*A.G.R.v. D.R.H. & S.H.*, Docket # FD-09-001838-07 (N.J. Superior Ct., 2009)

- Facts:
  - Gay male couple, DRH and SH, entered into gestational surrogacy agreement with DRH's sister, AGR.
  - Surrogate sought a declaration of her legal status as a parent
- Holding:
  - Court found that surrogacy agreements in New Jersey are invalid regardless of the biological relationship of the surrogate mother
  - This is not accepted across the United States
  - A trial of the issues is currently before the courts in New Jersey

\*Please refer to Gayle Raphanel's portion of the presentation for more detailed information

# Regulation of Sperm and Egg Donations

- Inconsistency in the United States
  - Third party donors are unequivocally not legal parents
  - Donors are not legal parents only if donation was made through a physician, donor was unknown, or the recipient is married
- Litigation with respect to Sperm donor consent
  - for use of sperm by a friend or relative, and
  - without involving a physician, and
  - no written contract
  - Policy considerations: discouraging donations versus not leaving a child with only one legal parent

29-2-92

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# Litigation:

- Typically between intended parents rather than surrogate and intended parent(s)
  - Ie. Divorced spouses disputing parental rights when one spouse did not contribute genetic material
- Alleged breach of surrogacy agreements (limited to date)

# J. Looking Forward

## ■ I. Intended Parent Concerns

- Can a non-resident of a province obtain an adoption or a Declaration?
- Some provinces, for example Alberta, only permit residents to apply for a Declaration of Parentage
- Some provinces want DNA evidence to establish the genetic link between the child and the intended parent (i.e. Ontario)
- British Columbia allows a Declaration in any circumstances (even if there is no genetic link) and to date the Courts have not required DNA evidence
- Not all of the provinces will make Declarations – i.e. Quebec where surrogacy is illegal

- Provinces and territories only permit their residents to adopt
- Saskatchewan has recently passed legislation (in force since August 31, 2009) to provide for presumption of parentage and to obtain a Declaration of Parentage
- Many provinces and territories are considering legislation to provide presumption of parentage and Declarations
- Will there be pre-birth orders as are permitted in California?
- Are donors and recipients (whether known or not) protected by an agreement, so claims cannot be made against them?



- Likely to see increase in legislation as ART continues to evolve
- ART is already a 3 billion per year industry in the United States.
- Eventually, the law will catch up with medical science