By Lori B. Andrews

Researchers at the University of California at Los Angeles Medical School announced last February 3 the birth of the first child produced by embryo transfer. Sperm from the husband of an infertile woman was used to inseminate a second woman. Five days after the second woman conceived, the embryo was implanted into the infertile woman, who gave birth to a healthy baby nine months later.

In March in Melbourne, Australia, a baby girl was born who had spent two months after conception as a frozen embryo before being implanted in her mother for a normal nine-month pregnancy.

The complicated new technologies that have enabled women to carry a biologically unrelated child or a frozen embryo to term seem tame compared to the legal manipulations that are needed to sort out the rights and responsibilities of those who participate in these new means of conception. With infertility on the rise—and now affecting one in six people—more lawyers are finding themselves advising couples and doctors about the legal ramifications of the new reproductive technologies.

General practitioners face these issues when a couple want to use a sperm donor, hire a surrogate mother or undergo in vitro fertilization rather than pursue a traditional adoption. Corporate lawyers face questions from large medical clinics regarding their liabilities in providing the reproductive services. Even the aid of patent lawyers has been enlisted as the group that developed the embryo transfer technique, Fertility and Genetics Research Inc. of Chicago, tries to patent the procedure.

Lawyers approached by couples or medical institutions that want to undertake one of the new means of conception need to identify any state laws that might restrict the procedure, describe parental rights or establish liabilities when something goes wrong. They also need to know the current medical options.

The medical advances

If the infertile spouse is the husband, the wife can be inseminated with sperm from an anonymous donor. More than 20,000 children are conceived each year in this manner. If the woman has the infertility problem, she can call on a female donor to provide the egg needed for the pregnancy, the womb to gestate the child, or both. Her husband's sperm can be used to inseminate a surrogate mother who, for a fee, will carry the child for nine months and then release the infant for adoption by the infertile woman and her husband. Or, five days after the surrogate conceives, the embryo can be transferred into the womb of the infertile woman.

In vitro fertilization, also known as the "test tube baby technique," is another possibility for infertile couples. The doctor surgically removes an egg from the wife's ovary and puts it in a shallow plastic dish with a special medium and some of the husband's sperm. If fertilization occurs, the doctor implants the embryo in the wife's uterus and she gives birth to a child nine months later. This procedure is used when the woman has blocked fallopian tubes that hamper the passage of her egg to the point of fertilization or when the husband's low sperm count makes it unlikely his sperm will make the long trek for fertilization within his wife's body.

Variations on the procedure are possible. If the wife does not produce eggs or does not want to pass on a genetic defect, another woman's egg can be fertilized in the petri dish and implanted in the wife. (Last November a baby was born in Australia who was conceived in this manner.) Or if the husband is sterile, a donor's sperm can be added to the petri dish to fertilize the wife's egg. With either embryo transfer or in vitro fertilization, the embryo can be frozen between conception and implantation.

Barriers to the new conceptions

Not all of the new conceptions are yet available in every state. Restrictive state laws on fetal research and adoption may create barriers to the techniques.

In the wake of the U.S. Supreme Court's 1973 decision regarding abortion, Roe v. Wade, 410 U.S. 113 (1973), numerous state legislatures felt that in order to maintain respect for human dignity, it was necessary to pass laws restricting or banning research on fetuses. Many of the state laws explicitly define the term fetus to include an embryo or any product of conception. To the extent that in vitro fertilization, embryo transfer or embryo freezing are considered experi-
mental and provide no clear and immediate therapeutic benefit to the embryo, the fetal research laws may present obstacles to the use of these infertility treatments.

Of the 25 states with fetal research laws, 14 cover research only when it is done at a time when abortion is anticipated or subsequent to an abortion. Others cover only research with a fetus that exhibits a heartbeat, spontaneous respiratory activity, spontaneous voluntary muscle movement or pulsation of the umbilical cord. Laws of these two types would not cover in vitro fertilization because the procedure does not involve an abortion and, by the time the fetus exhibits the capabilities, embryo transfer is no longer part of ex utero research but rather is developing in utero in the course of a normal pregnancy.

Laws that ban research on fetuses in a more general manner, however, might preclude the practice of in vitro fertilization. In Michigan, for example, there can be no research on a live human embryo if its life or health may be jeopardized. The Minnesota statute forbids experimenting on a living human conceptus, including one conceived outside the body, unless the experiment protects the conceptus’s health or life or scientific evidence has shown that sort of experimentation to be harmless. Three other states have similar language.

Embryo transfers

The laws restricting fetal research present an even greater barrier to embryo transfer, potentially prohibiting the process in at least 16 states. A greater number of statutes would extend regulation to this procedure rather than to in vitro fertilization because many of these laws prohibit fetal research in connection with an abortion. Under most of these laws the definition of abortion would seem to encompass the flushing technique used in embryo transfer. Hence, where in vitro fertilization is untouched by statutes that limit their scope to research on the fetus aborted or intended to be aborted, embryo transfer after in vivo (in the body) fertilization would appear to fall within the prohibitions.

The fetal research laws are also broad enough in some states to put restraints on a woman whose ovum are fertilized and transferred. Laws in five states prohibit a woman from selling a fetus for experimentation. In an additional nine states statutes reach even women who merely give away or permit someone to use a live fetus.

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Because of the potentially broad reach of the fetal research statutes, some doctors who wish to offer procedures like in vitro fertilization have asked their attorneys general or prosecutors for an opinion regarding the conditions under which the techniques are legally permissible. The district attorney for the Boston area rendered an opinion in Massachusetts in May 1983 that in vitro fertilization would not violate the Massachusetts fetal research statute if all the fertilized eggs were reimplanted in the woman. The laws also might be vulnerable to a constitutional challenge based on the couple's fundamental right to privacy to make procreative decisions.

Couples wishing to hire a surrogate mother run into an even greater legal barrier. In at least 24 states paying a mother in connection with her giving up a child for adoption is forbidden. A 1981 Michigan Court of Appeals case, Doe v. Kelly, 307 N.W.2d 438, held that this law prohibits payment to a surrogate mother in connection with an adoption. In the Michigan case a man wanted to pay his secretary $5,000 to be artificially inseminated with his sperm in order to bear a child for him and his wife.

The Michigan court held that the couple's fundamental right to make procreative decisions encompassed the right to bear a child with the aid of a third party—the surrogate. The court held, however, that this constitutional right did not give the surrogate the right to bear a child for pay and use the adoption laws to transfer the child to the contracting couple.

How lawyers can help

Lawyers circumvent restrictive laws in their own states by arranging for the surrogate adoptions to take place in states that do not prohibit payment, states that provide streamlined procedures for a "stepparent adoption" (that is, one in which the spouse of a biological parent adopts the child) or states that allow the mother to terminate her parental rights with the biological father, then gain custody of the child.

A Kentucky court has given a nod of approval to the latter approach to the surrogate arrangements. On Oct. 26, 1983, in Kentucky v. Bersheer, No. 81-819, the Franklin Circuit Court held that the surrogate arrangement did not fall within the prohibition on the sale of babies. "While this may appear true at a cursory glance," said the court, "there is a fundamental conceptual problem—how can a natural father be characterized as either adopting or buying his own baby?"

In addition to restrictions in some states for the couple or doctor, lawyers should be aware of statutes that limit their own involvement in the new conceptions. In some surrogate programs the lawyer serves as a matchmaker between couples and the women who will bear their children. Yet Arizona (Rev. § 8-126(D) (1974)) prohibits lawyers from receiving a fee for helping place a child for adoption, and Nevada (Rev. Stat. § 127.240(1) (1981)) forbids lawyers from arranging to place a child for adoption without securing a license as a child placement agency.

Because of the uncertain legal status of the new reproductive technologies, cautious lawyers advise clients in intimidating detail about the potential roadblocks on their quest for a child.

The retainer agreement of William Handel of Los Angeles lays out the various criminal laws that surrogate motherhood may violate: California Penal Code Section 181, the anti-slavery law; Section 273, the prohibition on payment in connection with an adoption; and so forth. The agreement warns, "The possible adverse consequences to the adopting couple are too numerous and complex to state, but it is possible, for an example, that the surrogate might clearly breach the agreement, and yet the adopting couple may be ordered to pay child support and medical expense or child support for a child they don't get."

Ethical questions are raised about whether lawyers should even be advising clients to enter into contracts, such as those with a surrogate mother, that may violate existing laws. An ethics opinion of the Association of the Bar of the City of New York, No. 81-67, warned lawyers that if surrogate mother contracts are illegal, they must refuse to draft them. If lawyers conclude that surrogate contracts are merely voidable or unenforceable, however, there is no ethical violation if the clients are warned of the risks.

Whose child is it anyway?

Even in states where the new reproductive technologies are clearly allowed, the legal status of the child may be in limbo. When in vitro fertilization
using the husband’s sperm and wife’s egg is undertaken, it is clear that the resulting child is legally their own. But when a third party’s sperm, egg or womb is used, legal parenthood is more difficult to determine.

When artificial insemination with donor sperm first came into widespread use in the 1950s, courts held the child to be illegitimate. Thirty years ago an Illinois case, Doornbos v. Doornbos, 23 U.S.I.W. 2308 (1954), aff’d 139 N.E.2d 844 (1956), held that even if her husband had consented, a woman who underwent artificial insemination by donor was guilty of adultery.

More recent court rulings, in contrast, hold that if a married woman is artificially inseminated with the consent of her husband, the child is the legal child of that couple. In 25 states there are specific statutes to that effect.

In 11 states statutes specifically provide that a man is not the legal father if he furnishes sperm for artificial insemination of a woman who is not his wife. While these laws were devised to get anonymous sperm donors off the custodial hook, they present a barrier to surrogate motherhood, in which the sperm donor does indeed wish to be the legal father.

Another barrier to the parental rights of the man who contracts with a surrogate mother to provide a child for himself and his wife is the legal presumption, in effect in at least 18 states, that the legal father of the child is the surrogate’s husband.

George and Sheila Syrkowski visited the Dearborn, Mich., offices of Noel Keene on March 2, 1981, to select a surrogate mother from among his files. Three weeks later the woman they chose, Corinne Appleyard, was successfully impregnated by Syrkowski’s sperm. For the fee of $10,000, she carried the child and then turned the baby over to the Syrkowskis for adoption after its birth in November 1981.

After the birth, Syrkowski filed suit to establish his paternity. Appleyard submitted an affidavit saying that she and her husband had abstained from sex during the time she was artificially inseminated with Syrkowski’s sperm.

The Wayne County Circuit Court ruled that when the state’s paternity act was passed in 1956, it was not intended to determine the paternity of a child born to a surrogate mother. “This court cannot circumvent by judicial fiat the legislative process by enlarging the intended scope of the paternity act to encompass circumstances never contemplated thereby,” wrote Judge Roman S. Gribbs. “The social wisdom and legal recognition of such agreements are matters of legislative concern and not for judicial pre-emption.” His ruling was affirmed by the Michigan Court of Appeals last year in Syrkowski v. Appleyard, 333 N.W.2d 90.

In March 1983 a Jefferson County (Kentucky) Circuit Court judge handed down a similar opinion raising the need for new laws to sort out the parental rights in the surrogate mother situation. “Under the present facts,” wrote the judge in In Re Baby Girl, 9 Family Law Reporter 2248 (1983), “it is much like trying to fit a square peg into a round hole.”

Because the law currently recognizes the woman who gives birth as the child’s legal mother, the woman who gives birth after embryo transfer or in vitro fertilization using a donor egg presumptively would have parental rights to the child. But what would happen if the genetic mother—the one who provided the eggs—wants the child back? This arrangement might in fact be part of the original agreement.

A woman with a medical condition that precludes carrying a child to term or even a busy female litigator may hire a woman to carry her baby for her. The first woman’s egg would be fertilized with her husband’s sperm (either in the normal manner in her body or through in vitro fertilization) and then transferred to the woman who agrees to be a carrier. But if the carrier changes her mind and decides to keep the baby, the genetic parents will have a difficult time getting custody of their child under the current laws.

When something goes wrong

Lawyers serve not only to facilitate the use of the new reproductive technologies but also to seek a remedy when the arrangements go awry. Potential problems include a sperm donor, embryo donor or surrogate who wants custody of the child or the birth of a child who has been harmed by the procedure.

In instances in California and Ohio surrogate mothers have decided to keep the children they bore. There may be future cases in which surrogates, embryo
donors or women who are carrying another couple's embryo decide to abort rather than bring the pregnancy to term.

Although lawyers draft elaborate contracts to prevent participants in new reproductive techniques from changing their minds, they admit that these contracts probably will not stand up in court. Judges will be reluctant to order specific performance. Lawyers look to other ways to protect the couples—such as structuring the payment schedule of surrogates, so that the bulk of the payment comes later in time to minimize clients' out-of-pocket loss if the surrogate changes her mind, or advising the surrogate or donors that they could be sued for intentional infliction of emotional distress if they breach the contract.

Shoddy screening practices may lead to harm to the client or the child. Women have undergone artificial insemination with donor sperm to conceive a child but ended up instead with a venereal disease or a child with a genetic defect. University of Wisconsin researchers in a 1979 survey of artificial insemination practitioners found only 29 percent of the doctors performed blood tests on donors, and most of these tests were for infectious rather than genetic disorders. In addition, the survey found that 70 percent of doctors keep no records of the identities of the sperm donors, so it is not readily possible to identify a donor who has passed on a disease or defect and to cease using him. One of the researchers, Sander Shapiro, says that in the five years since the survey practices have not changed much.

Because the environment of the developing fetus strongly influences its health, the activities of the surrogate mother or carrier also could potentially harm the child. For example, a Michigan couple arranged to have a surrogate mother, a woman from Tennessee, artificially inseminated in October 1977. The woman was an alcoholic, and in 1978 she gave birth to a child with fetal alcohol syndrome who needed medical treatment.

Physician's negligence

The birth of an unhealthy child could lead to suits against the physician for not appropriately screening a donor, surrogate or carrier or to suits against those participants for concealing diseases or defects. Negligence with respect to the new reproductive technologies will be more clearly defined once a decision is reached in Malahoff v. Stiver, No. 83-4734, a lawsuit to be heard this summer in federal district court in Detroit.

Surrogate mother Judy Stiver of Lansing gave birth to a child in January 1983 with microcephaly (a disorder indicating possible mental retardation). Alexander Malahoff, the man who had contracted for the child, decided he no longer wanted it and told the hospital to withhold treatment from the child. The surrogate mother said she felt no maternal bond to the baby.

Michigan legislator Richard Fitzpatrick pointed to the Stiver-Malahoff case as the type of tragedy that can happen when there are no rules or regulations. "For weeks the baby was tossed back and forth like a football—with no one having responsibility," he said. "The state had to step in and become the guardian for the child."

Then, in an action that Boston University health law professor George Annas said makes the soap operas appear pallid, Stiver, her husband and Malahoff underwent blood tests to establish the child's paternity and went on TV's "Phil Donahue Show" to await the results. During the show Donahue announced the verdict—that Malahoff was not the father. Stiver had not been told to abstain from intercourse with her husband before the insemination; the child was genetically theirs.

Malahoff reacted by suing Stiver for not producing the child he ordered. The Stivers have sued the doctor, lawyer and psychiatrist of the surrogate program for not advising them about the timing of sex. The Stivers also have taken Malahoff to court for violating their privacy by making the whole thing public. A recent amendment to the Stivers' complaint claims that the child's illness was not passed on by his genetic parents but a virus transmitted by Malahoff's sperm.

The need for new laws

It is now possible for a child to have up to five parents: an egg donor, a sperm donor, a surrogate mother who gestates the fetus and the couple who raise the child. Yet many of the participants in what University of Texas law professor John Robertson calls "collaborative reproduction" are insufficiently protected by the current laws. As a result, the Washington, D.C., City Council is considering a bill regulating sperm banks, and Michigan's Fitzpatrick is drafting a law that will describe the rights or responsibilities of all the parties to the new conceptions. In the past three years bills have been introduced in 12 states to regulate surrogate motherhood.

Lawyers need to look ahead

Lawyers' input will be crucial as legislatures consider regulating the new reproductive technologies. In this area of legal and medical overlap, it is clearly a time for lawyers, as well as doctors, to be looking ahead.
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