

## THE PRACTICE OF ART LAW FROM A PRACTITIONER'S PERSPECTIVE: HOW LAW AND SCIENCE INTERSECT IN THE REAL WORLD

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MS. ERICKSON:

First I want to thank Katie Alexander and the rest of the Journal for inviting all of us here today.

I will tell you this area of law that I practice and that Sanford also practices every day is really a happy kind of law. Believe me it is out there, it is not adversarial, at least most of the time it is not. It is a happy form of law.

In fact when I go into court I talk to the other attorneys, because I practice actually in Family Court, I talk to the other attorneys and they are actually causing divorces to happen, helping divorces to happen. And one of the things they always say to me is, man, I would love to have your job, and I said well, you can. He said, well, not really, and I said, do you know why you want my job, is because I make families into great families.

It is the truth. And it is sad because I go to work every day and I enjoy it and I come home every night and enjoy it. And that's one of the reasons I've been in this area of law for such a long time.

I will tell you I practice some other forms of law and I did not have this much passion, and it is not just from what I've gone through in my own experience or because of my twin nephews, which you will end up seeing a picture because I have to show everybody a picture of them, but you will see for other reasons.

So from a practitioner's perspective, practicing law in the world of ART is very different from what's out there. There really are not a lot of laws that really help guide us in what we're doing each day, which I am going to talk to you a little bit about.

One of my philosophies, especially because of what I do, is that my philosophy is really all families are traditional, some just take different paths - whether it is through surrogacy, adoption, egg donation, embryo donation and sperm donation - to become a family. And that's what's so important, because we do so many things, we're involved in so many different aspects of helping people create a family.

And another thing to remember as you are law students, or at least most of you are, is that this area of law also involves such things as constitutional law, sometimes tort law, a lot of contract law, family law, just to name a few.

So if you want to get into a field where you're practicing a lot of things that you've learned in law school this is really one of them. It is not focused just on criminal law. It is not focused just on contract law like some attorneys have to. So that's another reason it is so exciting and so challenging, because I will tell you and I am sure Sanford's going to tell you this too, it never fails every single day I learn something new. I have a new case that comes before me, and again, like my book says, I just have to go shake my head and say what were you thinking?

So it is important for us practitioners to get out and educate people because medical science is advancing at a much greater pace than the law can keep up. And I am sure we all see that. And it continues to outpace the law. And what is happening is we have individuals, whether it is single women or single men, gay couples or married couples, that they will take a lot of risks in order to essentially create their family, because they are really vulnerable.

And some of you may have had children, some may not, they know they want—you want to have children in the future, but I will tell you that desire to have a child is so deep within you and it really will make you forget about any risks that are out there. They are often overlooked and they are often even minimized - oh, and that's not going to happen to me, I am using my sister as a surrogate; that is not going to happen to me, I am going to use so and so as my sperm donor. But let me tell you there is a lot of risk involved in doing—creating a family in this way.

And I am not saying it cannot be done it just needs to be done the right way. And it needs to be done the right way from the beginning. And as you will see in some of the cases I talk about towards the end is that a lot of people will just put all the risks aside and then they'll see what happens, and at the end when we

already have a pregnancy or we have a birth that's when they realize how vulnerable they are and the risks that are out there.

So of course we have a little old woman in the shoe.

And of course this is what a lot of people say, some days I just curse that fertility treatment. Okay? And we all know a lot of people do. But from the day that a couple or individual walks into a clinic they start out with their very first piece of information that is going to affect them essentially legally, and that is the consent forms. And I will guarantee you just like when you go for a medical procedure and you just skim through it, you do not even read it. I know I do not have to sign. If I go in for the procedure I'll make sure, you know, an arbitration clause is there.

The one thing that people overlook is that, and something that has come before the Courts quite a bit, is the fact of what do you do with all these embryos? And I know that there's a lot of people that advocate donate to research, donate it to another couple, some people leave them on ice, some people choose to thaw them.

But these informed consents that you're signing at the physician's office are very important. And why is that? Because you can be like one of my clients who ended up in front of the U.S. Supreme Court. We never had a chance to argue it because the writ was denied, which was good for my client. But he and his wife decided to create embryos to have a baby. The night before they went in for a transfer—let me back up a little bit.

The embryos are—the eggs are first retrieved from a woman, the sperm then fertilizes it and then the embryo grows in the dish or in glass or in a test tube as people think. And then at three or five days afterwards that embryo is then transferred into the woman.

Now in the case of *Roman v Roman*, the woman was ready to go, they had retrieved the eggs, they've fertilized them and made them embryos. The night before the transfer he said to her, honey, I do not love you, I do not want to do this.

Now he has a right to do that, because that is his life. He decided, maybe it was that moment he thought, oh, my God, I am going to have a child with this woman and I do not really love her. So he stopped the procedure from happening. And what it ended up causing and what it still continues to cause today is a huge battle first on a state level, then on a federal level over these embryos. The doctor was even sued for failing to turn them

over to her.

But needless to say, it was a continual battle between these two individuals over their right to procreate or his right not to procreate.

So what I want people to understand is that even when you go to an IVF clinic and you are using all of your own genetics, you're using your own uterus, you have to understand that in the issues of divorces or even in the issues of death these embryos are being controlled potentially by this informed consent.

The other thing that is really important is the donation of eggs and sperm. I am sure that you've seen a lot of things on the news very negative about egg donation. There are things in the news regarding sperm donation and how some of the sperm donors are being found to have to pay child support.

Well, that is in a case again where counsel was not used, the sperm was transferred over in a cup, hand it over, here you go, you're my buddy, you are my friend, here you go.

So again the need for legal counsel is not so that I can make a paycheck, it is really to protect these people from having to go to litigation. Because one of the things that Sanford and I can tell you is that the whole goal of being a reproductive practitioner is really the aim is to create a transaction in such a way that we keep litigation from happening. And so if everything is kind of done the right way we really can either keep litigation from happening or at least we can help guide the courts facing what we have done along the way.

There's so many issues in what we do every day. People do something called forum shopping, I am sure you've heard of that, but this is really someone will go to Sanford in New York and get an egg donor, they will come to me in—or San Diego to have the surrogate, but they live in Arizona. So we now have people from all over or we have people coming from all over the world. I have clients from Hong Kong, clients from Greece, clients from France, anywhere you can imagine. So there are a lot of issues that are involved as far as that is concerned.

We also have issues regarding gestational carriages, who is the mother? And they regard – there are so many definitions of parentage across the United States in terms of surrogacy.

In fact in your state here in New York, you are not allowed to use a gestational carrier - if I am correct - under certain circumstances or in those circumstances for example.

So it is very different state-to-state. It makes it very difficult

for couples to understand how they can structure their transaction, or so you would call it, for surrogate. Because there are so many definitions of what it means to be a parent. Is it a genetic tie? Is it a gestational tie? Is it of the best interest of the child or is it based on the contract, the intent of the contract, like we do in California? I find that to be a very simple honest way to deal with things. You just go into a contract beforehand, you intend to do something, everybody should come out at the end doing exactly what was intended.

And let us not even get into the issue of co-parenting between gay and lesbian couples, that can often create a huge mess if lawyers are not involved helping them in making sure the right things are done.

We also have the issue of recognition of who is the parent when it involves a gay couple. In California we can get two men on a birth certificate, the problem is a birth certification is really only evidence of parentage. They can go back to another state and that other state may not even recognize that birth certificate technically. So you can have issues. Come back to New York, will they accept it? Even New York now it is, it probably would be accepted, but in some states it is not. So there is unequal treatment in many ways.

And then we have the issue of the embryos themselves. The courts across the country have been kind of divided. There are some states that treat an embryo as a human being, Louisiana, I believe Texas, and there's another state.

And then there are some case— court cases that actually treated them as property. But the ASRM, and a lot of us practitioners really, they are—embryos are really deserving of some sort of special respect and protection, but they do not quite reach the level of a human being. I mean, they are not—they may never become a human being they have the potential for life, but they are not actually life. And that is really the issue that is at stake here for that situation.

Now, when we talk about the reality of ART practitioners a lot of people think of this - that has got to be the most disgusting picture I have ever seen, but I have to show it. I just love showing this picture. But see, you have to remember you have things like this, things out of control, that doctor's actually in the process of being—is on trial for losing his license. He has been kicked out of the ASRM and we will have to see how that all works out. But this is what people see regarding IVF. This is

what the common perception in the media is now is because of the Octomom.

But what I want people to really take away from all of this is that people are really trying to create families. They are doing, creating families in many different ways the law never actually intended. And that is a sad thing because these couples and individuals really need some guidance whether it is on a federal level or on a state level.

I mean I actually propose that the states come up with some sort of uniform—everybody follows it the same way. And I do not know if that is actually going to ever happen because there are too many differences in politics, but I think that would be helpful for people going into this.

But I do want to show you a picture, and I promised you I would, of my two beautiful nephews sitting there. They were created with an egg donor, a sperm donor and a gestational carrier. So they are not related to our family in any way, shape or form. There are many different medical reasons for my brother and his wife, but I will tell you these are the two most precious little boys I have ever met in my life. And I think I almost like them more than my kids because my kids are older and they do not like me anymore, so . . . .

*(Laughter)*

And I had to show this picture too because I thought it would be interesting. The Statue of Liberty pregnant.

Where do we go from here? I mean it is . . . You know, I saw that picture and I thought, hmm, I do not know what I think of it, but because of all the fertility tourism and so many people coming from overseas, I think this is the way the Europeans are starting to see us as let's come to America and have their babies.

And I would actually leave it back to the picture of my nephews. That is a much better picture.

So what do we really do? We have to do everything we can to educate patients, consumers - as we also call them and that is what they are - and make sure they understand and—how much time do I have left? I want to talk about a few cases?

Three minutes? Okay. So I will give you just a couple of quick cases. I am sure that most of you have heard of the Baby M case. We will stay correct from the beginning. There was no psychological screening of the surrogate. It was a huge mess. Ultimately the Court ended up giving the surrogate mother visitation. She was genetically related, but the thing to note in

this case is when the Baby M actually grew up and turned 18 years old she actually terminated that woman's rights to her as her mother and allowed the woman who intended to be her mother to actually be her mother on her birth certificate. So that gives you a little bit of insight on what probably the Court should have done.

But we have an interesting case that just came on in Minnesota believe it or not. It was a same sex couple, they responded to an ad online. First mistake, okay? She offered to be a traditional surrogate. Second mistake. That means she is genetically related to the child. So the surrogate goes and downloads a contract offline. Third mistake. She offers them, the parents to sign. They make no revisions, no attorney, nothing. So they sign it. Then she was not psychologically screened. This is now the fifth mistake.

But again you have to understand this is a long-term committed couple relationship that really wanted a baby and they do not have any other way to do that. And some people will say, oh, you can just adopt, but it is really not that simple. First of all, adoption is a very long waiting period. Secondly, for gay couples it is often very difficult to be able to even adopt a child.

So then besides all those other mistakes, they then in their home do something called in-home inseminations where, you know, they pass the cup through the door and I am assuming a turkey baster is used. So then we do not even have a physician involved.

So then at the end the baby is born and she wants custody of the baby. Well, after a long protracted litigation that actually went up to I believe the Appellate Court, it is true, she ended up to be defined as the mother. However, thankfully because of the trial court she lied so much and she made threats against these guys, et cetera, et cetera, they ended up being the ones raising—having primary custody of the child.

So in the end it worked out, if you want to call it that, after years and years in litigation and fighting and money spent in ways you didn't want to, and really they went online to save a little money. So just remember that.

I mean our job here is to educate people and make them see that there's really a lot of different ways to make a family. They are wonderful as you can see. Beautiful babies. But we have to make sure that they know what they are doing. And again, the whole point here is that the law really is not quite there yet. It

will get you these babies, but the law's not always right there.

So make sure that, you know, if you speak to clients they need to really speak with an attorney, speak with their doctor and speak with a psychologist, because it is the best advice I can give you.