

ART LAW - an untested field – Rita Keevil (Consultant)

ART Law is not concerned with Monet or Banksy, it is concerned with the most marvelous of creations – the child.

38 years ago Louisa Brown was born – the world’s first test tube baby, but as is usual... medical science is way ahead of the law: creating solutions for the misery of infertility and conundrums for lawyers.

Artificial Reproductive Technology (“ART”) involves the uses of gametes (sperm or ova) outside of the human body in order to achieve pregnancy; most commonly by assisted insemination, in vitro fertilisation, and gestational carriers.

The permutations of the acquisition and use of gametes are endless and change as rapidly as science and human behaviour. Control over these elements is now common in many jurisdictions and a donation agreement will generally exclude any claim to parental rights. However, assisted insemination of a woman requires no medical expertise and cannot be regulated unless by statute. In a 2011 New Jersey case a man who provided his semen directly to a female for assisted insemination was declared the child’s legal father and was obliged to take on all the legal duties of a father.

In vitro fertilisation (IVF) requires extracting sperm and ova from a man and a woman and combining them in the laboratory and implanting in the woman. Issues as to parentage of the resulting child may arise if donated gametes are used.

In surrogacy a woman carries the child for another; often she is also the genetic mother. In an attempt to avoid such a surrogate claiming the child to be hers a carefully worded contract would be essential, especially in the absence of legislation, to oblige the surrogate to relinquish the child.

A few thorny examples: it is a common procedure to retrieve sperm from a man in a vegetative state or who has died. It is also possible, although more difficult to retrieve ova from a woman in the same circumstances. A child may result from gametes retrieved. Are medical professionals bound to follow the instructions of the next of kin? May the gametes be given to third persons to give birth to a child for whom the deceased biological parent’s Estate is responsible?

If genetic material has been retrieved or preserved how long should the executor of the Estate wait to see if a child results? Does that child have rights of inheritance? There are conflicting judgments from the USA on the issue and the issue has not been raised in our Courts, to our knowledge.

Infertility issues can be a source of stress and conflict in a marriage and is a common cause of breakdown. In current times, couples who have turned to IVF for help will often have genetic material stored; that is pre-embryos kept in a laboratory.

In a recent matter the couple divorced. The laboratory was not informed and the wife had pre-embryos implanted. The twins born as a result were undoubtedly the biological children of the divorced man and woman, although implanted and born without the father's knowledge or consent. The matter was settled out of Court with the father taking on parental duties.

The Court of Appeal will hear a matter on this issue next month and we hope to report back with its findings.