

EXECUTIVE SUMMARY:

The Oregon Supreme Court's recent decision in *In re Parentage of S.D.S.* highlights the importance of having clear and unambiguous contracts between intended parents, gestational surrogates and gamete donors when using assisted reproductive technology.

FACTS:

Real estate mogul and ultra-high net worth philanthropist, Jordan Director Schnitzer ("Schnitzer"), a divorced father of two daughters, turned to assisted reproductive technology to fulfill his desire to have a son. After a number of unsuccessful surrogacy attempts using donor eggs, Schnitzer and his then-girlfriend, Cory Noel Sause ("Sause"), executive at and heir to her family's Coos Bay barge and tugboat company, agreed to create embryos using Schnitzer's sperm and Sause's eggs.

In addition to Sause signing a standard "Informed Consent for Egg (Oocyte) Donation" form and Schnitzer signing a standard "Directed Sperm Donor Consent" form at the fertility clinic, Schnitzer and Sause signed a separate agreement prepared by Schnitzer's business attorney that purported to provide Schnitzer with legal custody of any male embryos and to provide Sause with legal custody of any female embryos (the "Embryo Agreement").

In February 2015, Schnitzer entered into an agreement with a gestational carrier and her husband. Sause was not asked to be a party to the agreement. A male embryo was transferred to the gestational carrier, and she became pregnant. On December 22, 2015, the gestational carrier gave birth to a baby boy.

The day after the child's birth, Schnitzer petitioned for a declaratory judgment of parentage in Circuit Court. A stipulated judgment was subsequently signed by Schnitzer, the gestational carrier, the carrier's husband, and the judge, naming Schnitzer the sole and exclusive legal parent and sole genetic parent of the child.

Two months later, Sause moved to intervene, alleging that she was the biological mother of the child and a necessary party to the parentage proceeding. After her motion was denied, Sause petitioned the court for a filiation determination or, alternatively, a declaratory judgment, establishing her as a parent of the child. Schnitzer answered that petition and also petitioned for another declaratory judgment establishing him as the sole legal parent.

The trial court found in favor of Sause, concluding that she was a legal parent of the child based on her undisputed genetic connection, together with a series of affirmative steps Sause had taken consistent with her claim to parentage. A divided Court of Appeals reversed. This appeal followed.

COMMENT:

In concluding that Sause was not a legal parent of the resulting child, and that there was no Oregon or federal law providing Sause with parental rights – despite Sause's unambiguous biological relationship to the child – the Oregon Supreme Court reversed the trial court's judgment by holding that Schnitzer was the sole legal parent of the child and remanding the case back to the trial court to determine the extent of Sause's nonparental rights, if any, under the Embryo Agreement between Schnitzer and Sause.

In *Lehr v. Robertson*, 463 US 248 (1983), the U.S. Supreme Court considered whether a biological parent was entitled to due process in terminating parental rights based solely on his biological connection with the child. In that case, a single woman gave birth to a daughter, and months later married a man who was not the biological father of her child. Years later, the married couple filed a petition for adoption of the child by the woman's husband. The biological father intervened, arguing that the adoption without notice to or consent by him was a violation of his due process rights under the Fourteenth Amendment. The Court ultimately held that the due process clause requires some custodial, personal, or financial relationship with the child in order to entitle a parent to a constitutional right to prior notice and an opportunity to be heard; mere biological connection is not enough. This has been referred to as the "'biology-plus' standard for creating constitutionally protected parental interests." *In re Parentage* at 588.

The Oregon Supreme Court's finding that biological connection is not relevant in establishing parentage *in the case of assisted reproductive technology* is significant. Sause had argued that, under the "biology-plus" standard, she was both the biological parent of the child and had taken certain steps in furtherance of her maternal role. The Court, however, in reversing both the trial and appellate court on this issue, explained that *Lehr* did not apply. In *Lehr*, the Court considered the claim of a party whose legal parentage was based on being the natural parent of the child, and the "biology-plus" standard was adopted in considering whether that legal parentage required due process protections before being terminated. Here, however, the Oregon Supreme Court held that there was no state or federal basis for legal parentage in the first place. Therefore, the "biology-plus" standard was not applicable, and Sause had no other state law basis (including biological relatedness) for claiming legal parentage.

The Oregon Supreme Court also found that, "[a]s the use of ART has increased . . . so has the need for the enforcement of contracts between intended parents, gestational surrogates, and gamete donors for the sake of determining parentage or nonparental, contractual rights." In today's society, where families are sometime created and built in complex ways, the rights, duties and intentions of all parties hinges on their contractual arrangements with each other.

The flip side of the enforcement of contracts defining parentage and parental rights, however, is the need for such contracts to be clear and unambiguous. Here, the Embryo Agreement contained woefully vague language surrounding the parties' intent. The Embryo Agreement purported to supersede any Donation Agreement that either party had executed with the fertility clinic. Furthermore, the contract lacked parity in the terms describing (i) Schnitzer's limitation with respect to any female embryos and offspring and (ii) Sause's limitation with respect to any male embryos and offspring. Sause had argued that this was intentional, and reflected the parties' intentions (i.e., that Schnitzer's complete waiver with respect to female embryos and offspring was materially different from Sause's waiver of custody of any male embryos). Schnitzer had argued this was a mere drafting oversight. Without clear contracts, the rights of each party are ill defined. That could lead to confusion over whether a party is a parent or a donor. This, in turn, could have far reaching ramifications both in the context of family relations and in the context of inheritance, which is not a consideration in the case at hand, but easily could have been had the facts been different.

Section 109.239 of the Oregon statutes, effective January 1, 2018 (*after* the date of the declaratory judgment in this matter), provides that "If the donor of gametes used in assisted reproduction is not the mother's spouse: (a) The donor shall have no right, obligation or interest with respect to any child conceived as a result of the assisted reproduction; and (b) Any child conceived as a result of the assisted reproduction shall have no right, obligation or interest with respect to the donor." While the

statute provides that a donor has no parental rights or obligations it leaves open the manner of establishing that someone is, in fact, a donor. That is especially true where the parties attempted to supersede the standard Donation Forms with their own Embryo Agreement.

By contrast, New York's Child Parent Security Act (codified in Article 5-C of the Family Court Act) provides in section 581-302 that "A donor is not a parent of a child conceived by means of assisted reproduction where there is proof of donative intent under subdivision (d) of section 581-202 of this article."

Section 581-202(d) provides as follows:

- (d) The following shall be deemed sufficient proof of a donor's donative intent for purposes of this section:
 - (1) in the case of an anonymous donor or where gametes or embryos have previously been released to a gamete or embryo storage facility or in the presence of a health care practitioner, either:
 - (i) a statement or documentation from the gamete or embryo storage facility or health care practitioner stating or demonstrating that such gametes or embryos were anonymously donated or had previously been released; or
 - (ii) clear and convincing evidence that the gamete or embryo donor intended to donate gametes or embryos anonymously or intended to release such gametes or embryos to a gamete or embryo storage facility or health care practitioner; or
 - (2) in the case of a donation from a known donor, either:
 - a. a record from the gamete or embryo donor acknowledging the donation and confirming that the donor has no parental or proprietary interest in the gametes or embryos. The record shall be signed by the gestating intended parent and the gamete or embryo donor. The record may be, but is not required to be, signed:
 - (i) before a notary public, or
 - (ii) before two witnesses who are not the intended parents, or
 - (iii) before a health care practitioner; or
 - b. clear and convincing evidence that the gamete or embryo donor agreed, prior to conception, with the gestating parent that the donor has no parental or proprietary interest in the gametes or embryos.

The law of assisted reproductive technology is still evolving and it is important for estate planners to be aware of how their clients are forming their families and to take adequate steps to ensure that their wishes are documented in accordance with applicable state law. Whether or not someone is a parent or a donor can impact inheritance rights as well as the interpretation of will and trust

documents. Where a client has acted as a donor, the planner may also wish to expressly provide that any children born as a result of such donation are not to be considered children of the testator or grantor. In some cases, state law may provide certain default rules in determining whether a parental relationship has been established and for what purpose (child support, custody, adoption, inheritance, etc.). But in any case where a parental relationship is created through ART, the parties thereto should be represented by separate counsel experienced as to issues of ART, family law and estate planning, who can ensure that clients are able to give informed consent to the contractual terms in any donor or parentage agreement.