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## Clarifying the Law of ART: The New American Bar Association Model Act Governing Assisted Reproductive Technology

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\*203 Clarifying the Law of ART: The New American Bar Association Model Act Governing Assisted Reproductive Technology [\[FNa1\]](#)[\[FNa1\]](#)

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## I. Introduction

When the American Bar Association (ABA) formally adopted the Model Act Governing Assisted Reproductive Technology (Model Act) on February 11, 2008, it marked an historic event. For the first time in history, the leading American association of attorneys put its weight behind a comprehensive law to provide governance for an area of legal and medical practice that is largely without legal regulation. [\[FN1\]](#)[\[FN1\]](#) The growing use of assisted reproductive technology [\[FN2\]](#)[\[FN2\]](#) (ART) raised difficult issues surrounding parentage, the interests of children, use of the technology by same-sex \*204 couples and in other nontraditional families, [\[FN3\]](#)[\[FN3\]](#) and the resolution of conflicting interests when the law provided no guidance. This became an increasing and significant problem over the last three decades, causing courts to plead for legislation that would provide guidance to judges, lawyers, physicians, and would-be parents. [\[FN4\]](#)[\[FN4\]](#)

The ABA members who worked for years to achieve this landmark proposed legislation reflect a cross-section of the profession and deserve recognition. [\[FN5\]](#)[\[FN5\]](#) When the project began in 1988, the public was captivated by a dispute between the intended parents of “Baby M” and the traditional\*205 surrogate hired by the couple to carry a child for them. [\[FN6\]](#)[\[FN6\]](#) That type of surrogacy arrangement was “traditional” in the sense that it involved a genetic connection between the birth mother and the child. Since the *Baby M* decision, however, the use of gestational carriers who have no genetic connection to the child they bear has become the norm in surrogacy arrangements. [\[FN7\]](#)[\[FN7\]](#) Whereas the *Baby M* case seemed unique in 1988, the use of different forms of assisted reproduction [\[FN8\]](#)[\[FN8\]](#) or collaborative reproduction [\[FN9\]](#)[\[FN9\]](#) is increasingly common today. The use of fast-paced medical developments, such as cryopreservation of gametes and embryos, in vitro fertilization, embryo transfer, and intracytoplasmic sperm injection, make the need for legislation on assisted reproduction abundantly clear.

The decision of the ABA Family Law Section to create the Committee on Genetics and Assisted Reproductive Technology (the Committee), its work in drafting the Model Act, and the Model Act's approval by the House of Delegates laid the foundation for state governments to consider appropriate legislation. Discussion within the Committee addressed many evolving legal issues that have arisen over the past few decades due to recent advances in medicine and reproductive science. These issues resulted from the increased use of ART in the United States. [\[FN10\]](#)[FN10] Currently, \*206 a wide variety of often-contradictory legal responses to assisted reproduction issues exist. The different and often contradictory legal solutions to the issues presented are an ongoing challenge to judges as they attempt to resolve disputes arising from the use of the technology without any legislative guidelines in place.

The Model Act was also submitted to various professional entities outside of the ABA for their input and opinions. The views of lawyers practicing in the ART field were also sought. It was not possible to incorporate the ideas of every interested professional group or practicing attorney. Given the fifteen-year drafting project and related events in other areas of the law (such as the promulgation of the ART sections of the Uniform Parentage Act by the National Conference of Commissioners on Uniform State Laws), there were practical limitations on the changes that could be implemented in the Model Act as it came up for final ratification. Simply put, political as well as substantive and practical realities affected the final form and content of the Model Act.

The drafting committee understood that the Model Act could not accommodate the often conflicting views of every interested party. As one participant explained, it is impossible for any attorney to read *anything* without wanting to change *something*. Nevertheless, the Model Act can be a catalyst for thoughtful consideration and debate of legislative issues and solutions in the field of ART law. It will serve to educate practitioners and legislators alike on the topics and scope of the legal, medical, and social issues involved. The Model Act may or may not be the final solution of all ART issues, but it is a seminal resource for the intelligent and enlightened discussion of such issues.

## II. Background of the Model Act

As distinguished from a uniform act, this is proposed as a model act. As Marshall J. Wolf, the ABA Family Law Section delegate, explained to the House of Delegates, the Act is “intended to provide model provisions that can be considered in whole or in part by legislative bodies in the states and territories.” [\[FN11\]](#)[FN11] The Act should contemplate possible solutions to problems created by ART that legislators might consider in drafting legislation. Furthermore, the Act also should enable legislative committees considering the issues generated by the Act to seek the input of diverse groups of professionals, including legal scholars, practicing attorneys, medical practitioners, scientists, and ethicists to review these proposals and to seek alternative proposals from such persons.

**\*207** The Model Act deals with parentage issues arising from ART, which are among the most common issues facing the courts today. It takes advantage of the prior work done on parentage standards previously proposed in the Uniform Parentage Act, [\[FN12\]](#)<sup>[FN12]</sup> especially in regard to gestational carrier agreements, [\[FN13\]](#)<sup>[FN13]</sup> although the Model Act added an alternative method of determining such parentage issues by gestational carrier agreements that comply with specific requirements. [\[FN14\]](#)<sup>[FN14]</sup> The Uniform Parentage Act focuses on parentage issues, whereas the Model Act is much broader in its legal proposals relating to existing and emerging reproductive technologies.

The Model Act does not deal with the subject of abortion or the controversy over the use of fetal tissue for stem cell research. Nor does it deal with the potential legal issues arising from future attempts to clone human beings. Indeed, the position of the ABA on cloning was made clear in an earlier resolution opposing reproductive cloning to produce human children. [\[FN15\]](#)<sup>[FN15]</sup> Instead, the Model Act focuses on proposed legislation that deals with methods “of causing pregnancy through means other than by sexual intercourse.” [\[FN16\]](#)<sup>[FN16]</sup>

The Model Act provides a framework by which issues such as parentage, informed consent, donor identity, control of cryopreserved gametes, mental-health consultation, privacy, gamete and embryo donation, insurance, and quality assurance can be addressed and resolved. The novelty and complexity of many of the legal issues arising from ART would benefit from a set of standards that can serve as the basis for a rational and informed legislative inquiry into developing legal regulation and science. The Act will serve as a mechanism to assist in resolving contemporary family controversies that now reach the courts with little legislative guidance or regulation.

As mentioned above, the Model Act also goes beyond purely parentage issues and proposes standards protecting the legal interests of all concerned parties as these technologies are increasingly used to conceive children. It neither advocates nor opposes the use of these technologies, but accepts the reality that many people are using them today and proposes legal solutions and protections for those involved.

### **\*208 III. Why People Use ART**

Understanding why people use ART will help explain why this technology has become so popular and why intended parents, donors, and especially the children produced by it need the protection of the law. The people who use reproductive technology do so for many different reasons. Many people seek medical intervention in the reproductive process to overcome problems of infertility [\[FN17\]](#)<sup>[FN17]</sup> that preclude conception by sexual intercourse. Others use it because they are in a same-sex relationship [\[FN18\]](#)<sup>[FN18]</sup> or have other personal reasons for not having sexual intercourse. The use of a gestational surrogate to carry a child for a woman whose uterus has been removed for medical reasons or on behalf of a man who aspires to parenthood but has no willing female mate reflects two other groups of people who use assisted reproduction. [\[FN19\]](#)<sup>[FN19]</sup>

Some people use ART for purely medical reasons. For example, they use gametes provided by donors because of the diagnosis that they run a substantial risk of offspring with inheritable disease or genetic abnormalities. Still others seek to retain the potential to have children using cryopreserved gametes after they have undergone treatment for some forms of cancer that are likely to adversely affect their fertility.

Additionally, some people use ART to increase potential fertility, or even to continue it beyond death. Somewhat controversial is the use of the technology to extend fertility for post-menopausal women. [\[FN20\]](#)[\[FN20\]](#) Also controversial\*209 is the practice of banking gametes to enable a surviving spouse to have a child in the event of a death. [\[FN21\]](#)[\[FN21\]](#) Some couples that have produced embryos for in vitro fertilization seek to donate unused embryos to others. [\[FN22\]](#)[\[FN22\]](#)

#### **IV. Purpose of the Model Act**

Whatever the motives of those who use ART, the need for greater legal regulation providing a framework for resolving disputes is apparent. The absence of legal standards makes it extremely difficult for lawyers to advise clients about ART and for judges to resolve disputes that arise out of the use of the technology. [\[FN23\]](#)[\[FN23\]](#) The Model Act is intended to provide “a flexible framework that will serve as a mechanism to resolve contemporary controversies, to adapt to the need for resolution of controversies that are envisioned but that may not yet have occurred, and to guide the expansion of ways by which families are formed.” [\[FN24\]](#)[\[FN24\]](#)

In summary, the purpose of the Model Act is to provide a flexible framework of legal rights, obligations, and protections to the stakeholders in ART, as well as to promote the interests of society generally. Those stakeholders include “patients, participants, parents, providers and the resulting children and their siblings.” [\[FN25\]](#)[\[FN25\]](#)

#### **\*210 V. Definitions**

Although other relevant definitions are provided in context throughout this article, a few definitions are provided here as being basic to understanding the Model Act. “Assisted reproduction” is any “method of causing pregnancy through means other than by sexual intercourse. In the foregoing context, the term includes, but is not limited to: (a) Intrauterine insemination; Donation of eggs; Donation of embryos; in vitro fertilization and transfer of embryos; and Intracytoplasmic sperm injection.” [\[FN26\]](#)[\[FN26\]](#)

“‘Collaborative reproduction’ involves any assisted reproduction in which an individual other than the intended parent(s) provides genetic material or agrees to act as a gestational carrier. It can include, but is not limited to: (1) attempts by intended parents to create a child through means of a gestational agreement, with or without the involvement of donors, and (2) assisted reproduction involving donors where a gestational carrier is not used.” [\[FN27\]](#)[\[FN27\]](#)

“Embryo” is defined as “a cell or group of cells containing a diploid complement of chromosomes or group of such cells (not a gamete or gametes) that has the potential to develop into a live-born human being if transferred into the body of a woman under conditions in which gestation may be reasonably expected to occur.” [\[FN28\]](#)[\[FN28\]](#)

A “gestational carrier” is defined as “an adult woman, not an intended parent, who enters into a gestational agreement to bear a child, whether or not she has any genetic relationship to the resulting child. Both a traditional surrogate (a woman who undergoes insemination and fertilization of her own eggs *in vivo*) and a gestational surrogate (a woman into whom an embryo formed using eggs other than her own is transferred) are gestational carriers.” [\[FN29\]](#)[\[FN29\]](#)

**\*211** A “gestational carrier arrangement” is the “process by which a woman attempts to carry and give birth to a child created through *in vitro* fertilization using the gamete or gametes of at least one of the intended parents and to which the gestational carrier has made no genetic contribution.” [\[FN30\]](#)[\[FN30\]](#) The requirement that at least one of the intended parents must have a genetic connection to the child applies only in a state that enacts a version of Alternative B in the Model Act section on gestational agreements, *i.e.*, self-executing agreements. [\[FN31\]](#)[\[FN31\]](#)

A “participant” is an individual who provides either a biological or genetic component of assisted reproduction, or the term also includes an intended parent and the spouse of an intended parent or spouse of a gestational carrier. [\[FN32\]](#)[\[FN32\]](#) A “patient” is an individual using assisted reproduction under the direction of a provider, including an intended parent. [\[FN33\]](#)[\[FN33\]](#)

The Model Act goes further than most legislative proposals or existing law in the majority of states by providing a broad definition of the word “spouse.” Though unmarried persons frequently use ART and the drafters of the Model Act made every effort to provide for that reality, there are instances when the legal marital status of a person is relevant. In the Model Act, a “legal spouse” is defined as “an individual married to another, or who has a legal relationship to another that this state accords rights and responsibilities equal to, or substantially equivalent to, those of marriage.” [\[FN34\]](#)[\[FN34\]](#) This definition embraces civil unions or registered domestic partnerships recognized in California, Connecticut, New Hampshire, New Jersey, Maine, Vermont, and Washington, as well as same-sex marriage recognized in Massachusetts. Currently, cryopreservation is the technology used to preserve or “freeze” embryos for storage. [\[FN35\]](#)[\[FN35\]](#) This technology is likely to remain the basis of preservation in the future. However, in the event that science succeeds in developing other technologies of preserving gametes and embryos, the drafters of the Model Act chose to use the word “preservation” rather than “cryopreservation.” In the Model Act, **\*212** “preservation” means “maintaining organ, tissue, including, but not limited to, the freezing and storing thereof through cryopreservation, for use in assisted conception.” [\[FN36\]](#)[\[FN36\]](#)

The word “record” is used throughout the Model Act. It refers to information placed in a “tangible medium or stored in an electronic or other medium that is retrievable in perceivable form.” [\[FN37\]](#)[\[FN37\]](#) Many state statutes relating to different subjects use the term “writing,” and while “record” includes written documents or contracts, the latter term includes any permanent retrievable method of storing information.

The word “provider” is also used throughout the Model Act. A “provider” is an individual who is “(a) licensed to administer health care, and (b) who is qualified under this Act to provide ART services, and (c) has a provider-patient relationship with a participant.” [\[FN38\]](#)[\[FN38\]](#) It includes all medical, psychological, or counseling professionals who provide such services and any corporation licensed to provide health care of which a provider is an owner or employee.

## **VI. Informed Consent and Required Disclosures**

The legal rights of patients to control the use, transfer, and disposition of preserved embryos have been litigated in recent years in divorce [\[FN39\]](#)[\[FN39\]](#) and other cases. [\[FN40\]](#)[\[FN40\]](#) The Model Act deals with these issues by providing for written records covering informed consent and binding agreements for such cases. The Model Act creates precise standards governing informed consent; this includes the need for written notice of the potential risks, consequences, and benefits of assisted reproduction; the advisability of seeking legal counsel; and descriptions of other available choices, such as adoption and natural cycling. [\[FN41\]](#)[\[FN41\]](#) Authorization is required for each participant in ART, and the provider is required to document the informed consent for each participant in a record. [\[FN42\]](#)[\[FN42\]](#) The record must be dated and \*213 signed by both the provider and the participant. [\[FN43\]](#)[\[FN43\]](#) Disclosures as to preserved embryos must include information about storage, transfer, donation, and destruction of the embryos. [\[FN44\]](#)[\[FN44\]](#) The Model Act provides for an absolute right of patients to transport embryos from one provider to another. Furthermore, the ART provider must inform the patient of that right. [\[FN45\]](#)[\[FN45\]](#)

The Model Act requires that a provider give intended parents certain specific information before every transfer cycle, i.e., before the placement of embryos or gametes into a woman's body to achieve pregnancy. Such mandatory disclosure includes the results of semen analysis, the number of eggs retrieved, the number of embryos created, the number of embryos preserved, the quality of transferred and preserved embryos, the number of embryos thawed, the number of embryos viable for transfer, and the quality of embryos transferred. [\[FN46\]](#)[\[FN46\]](#) Gamete donors have a right to ask for any adverse health information discovered during the ART procedure, and it must be made known to them upon request. [\[FN47\]](#)[\[FN47\]](#) In addition, egg donors must be told prior to egg retrieval of the health risks and potential adverse effects of ovarian stimulation and retrieval, and given specific information about the fertility drugs to be used in the procedure. [\[FN48\]](#)[\[FN48\]](#)

## **VII. Donors**

A “donor” is defined as “an individual who produces eggs or sperm used for assisted reproduction, whether or not for consideration.” [\[FN49\]](#)<sup>[FN49]</sup> Such a donor is “not a parent of a child conceived by means of assisted reproduction.” [\[FN50\]](#)<sup>[FN50]</sup> The term “donor” does not include an intended parent who provides gametes to be used for assisted reproduction, i.e., an individual who provides gametes to a woman or consents to her having a child for whom they intend him or her to be a parent. [\[FN51\]](#)<sup>[FN51]</sup> The term “donor” does not include a woman who gives birth to a child by means of assisted reproduction except as otherwise provided in Article 6 of the Act, [\[FN52\]](#)<sup>[FN52]</sup> or a parent under Article 6, or an intended parent under Article 7 of the Act. [\[FN53\]](#)<sup>[FN53]</sup> An “embryo donor” is “an individual or individuals with dispositional control \*214 of an embryo who provide(s) it to another for gestation and relinquish(es) all present and future parental and inheritance rights and obligations to a resulting individual or individuals.” [\[FN54\]](#)<sup>[FN54]</sup>

The Model Act requires the screening of embryo donors prior to the donation in accord with any relevant state or federal law and the maintenance of permanent records of the donation. [\[FN55\]](#)<sup>[FN55]</sup> Clinics usually promise anonymity to gamete donors. A significant provision of the Model Act, which is intended to encourage donors to provide gametes for assisted reproduction, assures those donors that they may remain anonymous as long as nonidentifying health information is provided as required by the Model Act. [\[FN56\]](#)<sup>[FN56]</sup> A gamete donor may condition donation on certain disposition limitations as long as that individual sets forth any restrictions in a written record before making the donation. [\[FN57\]](#)<sup>[FN57]</sup> A donor may give permission to release identifying health information but cannot revoke such permission after the transfer of the donated gametes or embryos. [\[FN58\]](#)<sup>[FN58]</sup> “‘Transfer’ means the placement of an embryo or gametes into the body of woman with the intent to achieve pregnancy and live birth.” [\[FN59\]](#)<sup>[FN59]</sup>

The Model Act permits donors to receive reimbursement for economic losses resulting from the retrieval or storage of either embryos or gametes after he or she enters a valid donation agreement. [\[FN60\]](#)<sup>[FN60]</sup> Premiums paid for insurance against economic loss directly resulting from donation can be reimbursed, even if paid before the donation agreement as long as the agreement becomes valid and effective before the gametes or embryos are used in assisted reproduction in accord with the agreement. [\[FN61\]](#)<sup>[FN61]</sup> Compensation to a donor or prospective gestational carrier (i.e., a surrogate) must be reasonable and cannot be conditioned on the quality or genome-related traits of the gametes or embryos, or genotypic or phenotypic characteristics of the donor or child. [\[FN62\]](#)<sup>[FN62]</sup>

### **\*215 VIII. Informed Consent of Incompetent or Deceased Persons**

An issue arising in some courts is the question of the parental status of a deceased or incompetent person whose gametes or embryos are used for assisted reproduction. The issue of the parent-child status of a child born after the death of a parent has particular application in social security and probate cases. The Model Act attempts to bring some clarity to these issues in a number of its provisions by barring gamete or embryo collection from an incapacitated

individual, unless the individual consented in writing prior to the onset of incapacity, or alternatively, an expressly authorized fiduciary consents on his or her behalf. [\[FN63\]](#)[\[FN63\]](#) If consent is alleged but unavailable, a court may make an exception upon a finding that further delay may result in loss of viability. [\[FN64\]](#)[\[FN64\]](#) Lack of a written consent by a deceased or incompetent person creates a presumption of nonconsent. [\[FN65\]](#)[\[FN65\]](#)

The Model Act is also intended to provide standards for the collection of gametes or embryos from cryopreserved tissue taken from dead persons and makes it clear that prior written consent, given by the person while alive or by an authorized fiduciary that has express authorization from the person, is necessary. An emergency provision exists for removal of gametes when it is alleged that consent was given because viability would have been lost by delay in removal of gametes, for example, from a dead body. [\[FN66\]](#)[\[FN66\]](#) An emergency provision exists to allow for removal of gametes when a delay to obtain permission would result in a loss of viability of the gametes, for example, removal of gametes from a dead body. After such an emergency procedure, approval by a court for use of the gametes or embryos is required. The absence of written consent creates a legal presumption of nonconsent. [\[FN67\]](#)[\[FN67\]](#) If a living person consents in writing to the use of his gametes before placement or use and makes clear that the consent will apply to placement after his death, the Model Act clarifies his parental status. [\[FN68\]](#)[\[FN68\]](#) This is an important purpose of the Model Act since the law in most states does not clarify this except by statute in California [\[FN69\]](#)[\[FN69\]](#) and \*216 in court decisions in a few states. [\[FN70\]](#)[\[FN70\]](#)

### **IX. Mental-Health Consultation**

The Model Act provides for mandatory mental-health consultation of all participants in an assisted reproduction procedure. [\[FN71\]](#)[\[FN71\]](#) “Consultation” means “an initial in-person meeting with a licensed mental-health professional for the purpose of educating the participants about the effects and potential consequences of their participation in any ART procedure.” [\[FN72\]](#)[\[FN72\]](#) The provider also is required to offer additional voluntary counseling to every participant in addition to mandatory counseling. [\[FN73\]](#)[\[FN73\]](#)

The Model Act also defines the necessary qualifications of a mental-health professional to provide mental-health consultation. The consultation must be conducted by a mental-health professional who holds a master's or doctoral degree in psychiatry, psychology, counseling, social work, psychiatric nursing, marriage and family therapy, or a state equivalent, licensed, registered, or certified in the necessary jurisdiction, and where possible, has training in or knowledge of issues involving reproductive physiology. [\[FN74\]](#)[\[FN74\]](#) The Model Act expressly requires that individually identifiable information obtained or created in the course of assisted reproduction treatment be subject to the requirements of medical confidentiality. [\[FN75\]](#)[\[FN75\]](#) The result of a mental-health consultation may not be used to arbitrarily deny any intended parent the right to procreate. [\[FN76\]](#)[\[FN76\]](#)

During the lengthy drafting process of the Model Act, there was specific and detailed

discussion of the purpose and scope of the mental-health evaluations in ART services. Input from some practitioners opposed the inclusion of any mental-health-evaluation requirement. Nevertheless, as a practical matter, virtually every fertility clinic in the United States interprets\*217 the ethical guidelines promulgated by the American Society of Reproductive Medicine (ASRM) to require a psychological evaluation of each participant in any third-party reproduction prior to performing the medical procedures. While this practice may be intended to minimize the potential for a clinic's professional liability, the drafters of the Model Act concluded that it also provides some meaningful protections for the ART participants.

It is difficult to articulate a justifiable reason to assess a prospective parent's fitness to become a parent in advance of his or her reproductive efforts where medical procedures are necessary, but not in any other cases involving sexual, unassisted reproduction. As a result, the final position of the drafters was that the mental-health evaluation was required only to educate and advise the participants about issues and concerns that are unique to third-party reproduction (i.e., control issues over a pregnancy where the gestating woman is not the child's genetic or intended mother, accepting parentage of a child that is not the intended parent's genetic offspring, etc.). As provided in section 301(1), the drafters of the Model Act specifically did *not* intend the mental-health evaluation to be an assessment of the “parental fitness” of the intended parents, which could be arbitrarily used to deny a patient the right to procreate.

### **X. Transfer and Disposition of Embryos**

The Model Act provides standards for parental rights and obligations under embryo agreements, which are increasingly being used today but as to which there is currently little or no law in most jurisdictions. [FN77][FN77] It clearly states a preference for the use of binding agreements executed prior to creation of embryos as the best means of clarifying the rights and obligations of the participants. [FN78][FN78] The Model Act provides that participants should execute an agreement spelling out the intended use and disposition of embryos in the event of divorce, illness, or death, or other changed circumstances, and circumstances in which embryos shall be deemed abandoned. [FN79][FN79] An intended parent may withdraw his or her consent to use of the embryos--even after an agreement--but must give notice in a record to the other parent and the clinic of that person's intent to avoid conception; \*218 the intended parent may not transfer the embryos to another woman to create a child. [FN80][FN80] The Model Act also permits intended parents to agree to donate any unused embryos to other patients so they can have a child. [FN81][FN81] They also can agree to donate unused embryos for approved research by an institutional review board. [FN82][FN82]

An embryo may be deemed “abandoned” when at least five years have elapsed since the embryo was created, when the storage facility has notified interested participants, and when interested participants have formally acknowledged in a record executed prior to the storage facility's acquisition of the embryos that they are aware of the standards governing abandonment. [FN83][FN83] This is a significant proposal, given that the problem of embryos abandoned in storage facilities, including the nonpayment of maintenance costs, is a substantial burden on

storage providers. [\[FN84\]](#)<sup>[FN84]</sup> The storage facility should dispose of the abandoned embryo in accordance with the prior agreement between the participants and the storage facility, and it will not be liable if it complies with section 504 of the Model Act, absent criminal intent, gross negligence, or intentional misconduct. [\[FN85\]](#)<sup>[FN85]</sup>

## **XI. The Model Act and the Uniform Laws**

While most of the provisions of the Model Act provide model legislation for areas not covered by statutory law, the drafters recognized two exceptions covered by existing uniform law proposals. One relates to the parental status of children produced by ART, and the other governs surrogacy arrangements.

It is not the intent of the drafters of the Model Act to conflict with or to supersede the provisions of either the Uniform Parentage Act (UPA) or the Uniform Probate Code (UPC) to the extent either of those proposed laws govern the parental status of children of ART or surrogacy arrangements. [\[FN86\]](#)<sup>[FN86]</sup> In 2002, the UPA was amended to provide greater clarity on such \*219 matters. When the ABA approved the Model Act, the drafting committee was informed that efforts were going to be underway to revise the UPC to provide for the status of posthumously conceived children. It was for this purpose that the drafting committee inserted legislative notes into Articles 6 and 7 of the Model Act, cautioning legislators to consider the uniform laws and to assure that no conflicts exist in their enactments. The amended UPA provisions regarding ART have not been widely enacted at present, and it may be some considerable time before the National Law Commission (ULC) finally proposes a redrafted UPC. For these reasons, the drafters of the Model Act felt that it was important to provide model legislation for consideration of these topics, even if that proposal largely conforms to the UPA, and cautions that if a new UPC is enacted, that it should control.

## **XII. Parental Status and Children of Assisted Reproduction**

Article 6 of the Model Act governs the parental status of children resulting from assisted reproduction. Except for the insertion of some genderneutral language in this provision, Article 6 conforms to the parentage provisions of the UPA. The one significant exception is a provision dealing with the parental status of a deceased individual (a subject discussed earlier in this article; see *supra* notes 66-73). The exception explains that if a state that is considering enacting the Model Act has enacted or enacts a probate code governing the status of children conceived by ART after death of a parent and it conflicts with the Model Act, then the probate code controls.

The parental status provisions of the Model Act apply only to children of ART and do not apply to children conceived by sexual intercourse or to children produced by gestational agreement. [\[FN87\]](#)<sup>[FN87]</sup> (The parentage of children resulting from a gestational agreement are discussed separately hereinafter in the text accompanying notes 97-128.) A donor of gametes or embryos is not considered a parent of a child conceived by assisted reproduction. [\[FN88\]](#)<sup>[FN88]</sup>

However, an individual who provides gametes for or consents to assisted reproduction by a woman with the intent to be the parent of her child is a parent of the resulting child and is not a “donor.” [\[FN89\]](#)[\[FN89\]](#)

**\*220** The Model Act prohibits the legal spouse of a woman who gives birth to a child by assisted reproduction from challenging the parentage of the child, unless that spouse commences a proceeding within two years after learning of the birth of the child and shows that he or she did not consent to assisted reproduction before or after the child's birth. [\[FN90\]](#)[\[FN90\]](#) Even if the legal spouse does not commence a parentage proceeding within two years after learning of the child's birth, a parentage adjudication may be maintained at any time if three requirements are met: (1) the legal spouse did not provide gametes for or consent to the assisted reproduction, (2) the legal spouse and the parent of the child have not cohabited since the likely time of assisted reproduction, and (3) the legal spouse never openly held out the child as his or her own. [\[FN91\]](#)[\[FN91\]](#)

The Model Act provides that if a marriage is dissolved prior to the transfer of eggs, sperm, or embryos, the former spouse of the person who is using ART is not a parent of the resulting child unless the former spouse consented in a record to parentage even in the event of divorce. [\[FN92\]](#)[\[FN92\]](#) Further, an individual may withdraw consent to assisted reproduction in a record prior to placement of eggs, sperm, or embryos and will not be the parent of the resulting child. [\[FN93\]](#)[\[FN93\]](#)

### **XIII. Surrogacy Arrangements**

The use of a gestational carrier to bear and birth a child for the intended parents has become one of the most popular ART procedures. The drafters of the Model Act proposed two alternative laws recognizing a surrogacy arrangement among the participants. [\[FN94\]](#)[\[FN94\]](#)

Alternative A requires a judicially authorized gestational agreement for the determination of ART parentage, whereas Alternative B provides an administrative model that does not require a judicial proceeding for parentage determination if all parties are in compliance. Alternative A is based on a judicial preapproval model. It requires all participants to enter into a written surrogacy agreement and submit the agreement for a judge's express approval prior to the performance of any medical procedures to initiate the pregnancy. This model also requires a second court order after the birth of the child to confirm the parties' continuing agreement and amend the birth records. Alternative B, on the other hand, is based on a self-executing contract\***221** model. It automatically and administratively establishes parentage in the intended parents as long as all parties meet the eligibility and procedural requirements of the Act without any court intervention, approval, or orders. Each of these alternatives will be described separately.

### **XIV. Surrogacy Under Alternative A of the Model Act**

Alternative A of Article 7 of the Model Act provides that the prospective gestational carrier, her legal spouse (if any), and any donors may enter into a gestational agreement with the intended parents by which all acknowledge the intended parents as the legal parents of the resulting child. [\[FN95\]](#)[\[FN95\]](#) In the agreement, the donors, the prospective gestational carrier, and her spouse waive their parental rights and duties. [\[FN96\]](#)[\[FN96\]](#) This alternative follows a litigation model and requires judicial validation of the agreement in order to be enforceable. It is based in substantial part on the UPA Article 8, which provides for judicially validated gestational agreements. [\[FN97\]](#)[\[FN97\]](#) The intended parents must then file a petition to commence a court proceeding to have the gestational agreement validated. [\[FN98\]](#)[\[FN98\]](#) However, the Model Act attempts to limit forum shopping by requiring that the petitioning intended parents must have been residents of the state for at least ninety days before filing the petition. [\[FN99\]](#)[\[FN99\]](#) The court will validate the agreement and declare the intended parents to be the legal parents of a child born by the procedure upon a finding that the residency requirements have been met, that the carrier's legal spouse is joined in the proceeding, that a home study has been done, unless it is waived by the court, that the intended parents have met suitability requirements as set out by a child-welfare agency, that adequate provisions have been made for medical expenses, and that any consideration to be paid to the gestational carrier is reasonable. [\[FN100\]](#)[\[FN100\]](#) The court that hears and determines these matters has exclusive, continuing jurisdiction of all matters growing out of the gestational agreement for up to 180 days after the birth of the child under the jurisdictional standards determined by the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). [\[FN101\]](#)[\[FN101\]](#)

**\*222** Alternative A has no time limitations as to how long a court may take in evaluating a proposed surrogacy agreement or issuing an order approving it. It also gives the presiding judge discretion as to whether to approve any agreement, thereby creating at least the possibility that similarly situated parties in front of two differently inclined judicial officers may receive different results in their approval process for no apparent or substantive reason. Finally, Alternative A requires a home study of all intended parents unless the judge expressly waives it. [\[FN102\]](#)[\[FN102\]](#)

Because many infertile couples have struggled with numerous and very expensive medical efforts to have a child for years, they typically sense that they are running out of time and financial resources to successfully become parents. The drafters of the Model Act realized that the requirements of Alternative A introduce inherent and potential unexpected delays and additional expense to this already extended process of becoming a parent. For example, intended parents could enter into an agreement with a potential surrogate, have it successfully approved by the court after months of time and thousands of dollars in attorney's fees, only to have the surrogate change her mind prior to the medical procedures or simply fail to become pregnant after the agreement is approved. The result would be that the intended parents would have wasted time and money in the preapproval process with nothing to show for it, and they would then have to start the entire process over again and double their delay and legal expenses with a subsequent surrogate candidate. For these and other reasons, many ART practitioners opposed the inclusion of the judicial preapproval requirements of Alternative A in the Model Act.

However, the drafters of the Model Act chose to include Alternative A in recognition of the facts that the UPA endorses it and that some legislatures may wish to approve a surrogacy law, but only if judicial approval is involved.

Alternative A of the Model Act provides that each of the parties to the agreement may terminate it, even after approval by the court, as long as notice is given in a record before the gestational carrier becomes pregnant, and on filing of the record with the court, the preapproval judgment will be vacated. [\[FN103\]](#)<sup>[FN103]</sup> A decision by the prospective gestational carrier or her spouse to terminate the agreement as provided in the Model Act does not create any liability to the intended parents. [\[FN104\]](#)<sup>[FN104]</sup>

Once a child is born to the gestational carrier, Alternative A of the Model Act requires the intended parents to file notice with the court that validated the gestational agreement within 300 days after assisted reproduction\***223** for a confirmation of parentage, an order of surrender of the child to the intended parents, and a direction to the appropriate agency to name the intended parents on the child's birth certificate. [\[FN105\]](#)<sup>[FN105]</sup> Nevertheless, if there is an allegation that the child is not the result of assisted reproduction, [\[FN106\]](#)<sup>[FN106]</sup> the court shall order genetic testing to determine parentage. [\[FN107\]](#)<sup>[FN107]</sup> If the parties fail to secure a judicial validation of the gestational agreement as provided in Alternative A of the Model Act, the agreement will be unenforceable and the parent-child relationship will be determined under other laws governing parentage, although the intended parents may be held liable for the support of the resulting child. [\[FN108\]](#)<sup>[FN108]</sup>

### **XV. Surrogacy Under Alternative B of the Model Act**

Alternative B of Article 7 of the Model Act is based on a theory of a self-enforcing gestational agreement. Unlike Alternative A, this section is not based on the UPA but provides an alternative approach to surrogacy that does not require judicial approval. It is similar to Illinois law, [\[FN109\]](#)<sup>[FN109]</sup> which creates a right for the intended parents, gestational carrier, and her spouse to agree contractually in writing that the resulting child of the arrangement is the legal child of the intended parents immediately upon birth. [\[FN110\]](#)<sup>[FN110]</sup> The gestational carrier and the intended parents must meet certain eligibility requirements in order for the agreement to be valid. For example, the carrier must be at least twenty-one years of age, have given birth to at least one child, have completed a medical and mental-health evaluation, undergone legal consultation, and have coverage under a health insurance policy whether the policy was procured by herself or by the intended parents on her behalf. [\[FN111\]](#)<sup>[FN111]</sup>

Although there have been reported cases of a gestational carrier becoming pregnant when all the gametes were provided by sperm and egg donors, rather than by one or both of the intended parents, [\[FN112\]](#)<sup>[FN112]</sup> the protections\***224** of Alternative B of the Model Act are only available if at least one of the intended parents has contributed gametes from which the embryo is produced. [\[FN113\]](#)<sup>[FN113]</sup> This requirement may be controversial, but it may make Alternative B more acceptable to state legislators because it preserves a genetic connection to

one or both of the intended parents.

Alternative B was inserted to provide an option other than the judicial preapproval model inherent in Alternative A. Some ART practitioners believe that Alternative B offers a more streamlined, user-friendly administrative model to establish parentage in surrogacy arrangements. This may be a viable alternative to the judicial preapproval model, and it may even be the start of a trend toward a contractual-administrative model for surrogacy arrangements. This alternative essentially codifies the prevailing standards of care implemented in surrogacy arrangements by the ASRM and other professional groups in the form of eligibility and procedural requirements for the participants. As long as all eligibility requirements are met and procedural safeguards are implemented, the intended parents become the legal parents of the resulting child for all intents and purposes immediately upon the child's birth without any prior or subsequent court proceedings. This model is not only faster and less expensive for the parties, it also results in greater judicial economy and consistency of results than Alternative A. Which model suits the needs and policies of any particular jurisdiction is up to the jurisdiction's legislature at the time of enactment.

The intended parents in a gestational arrangement agreement under Alternative B must show a medical need for the arrangement as evidenced by a qualified physician's affidavit attached to the agreement. [\[FN114\]](#)<sup>[FN114]</sup> The intended parents also must have completed a mental-health evaluation and undergone legal consultation with independent legal counsel. [\[FN115\]](#)<sup>[FN115]</sup> In addition to these eligibility requirements, the agreement will only be enforceable if it is in writing; is executed prior to any medical procedure in furtherance of the arrangement; is witnessed by two disinterested parties; provides for agreed reasonable compensation (if any) for the gestational carrier, which has been placed in escrow prior to the start of the procedure; and is executed only after all the parties have obtained separate and independent legal counsel. [\[FN116\]](#)<sup>[FN116]</sup>

Once all of these requirements have been met, each attorney representing\***225** the intended parents and the gestational carrier must certify, prior to the birth of the child or within twenty-four hours of the birth, on forms provided by the state, that the gestational agreement is in compliance with all statutory requirements. In addition, hospital and state employees shall complete birth records and a birth certificate showing that the intended parents are the legal parents of the child. [\[FN117\]](#)<sup>[FN117]</sup> This certification under Alternative B establishes the parent-child relationship of the intended parents as of the time of the birth of the child and without the need for further judicial proceedings. The Model Act prohibits a court from ordering specific performance of an agreement that requires the carrier to be impregnated against her wishes, notwithstanding her having executed the agreement. [\[FN118\]](#)<sup>[FN118]</sup> If a dispute arises in which noncompliance with the agreement is alleged, the court shall determine the rights and liabilities of the parties based on evidence of their original intent. [\[FN119\]](#)<sup>[FN119]</sup>

The Model Act also provides for the power of the relevant state regulatory agency to adopt rules for medical and mental health evaluations in accord with guidelines published by ASRM,

the Society of Assisted Reproductive Technology (SART), or the American College of Obstetricians and Gynecologists (ACOG). [\[FN120\]](#)[\[FN120\]](#) An action to invalidate a gestational agreement for failure to comply with the statute or to challenge the parentage of the intended parents must be commenced within twelve months of the birth of the child. [\[FN121\]](#)[\[FN121\]](#)

### **XVI. Payments to Donors and Gestational Carriers**

A few states ban compensation to gestational carriers, making it potentially more difficult to find women willing to act as surrogates. [\[FN122\]](#)[\[FN122\]](#) Donors of gametes, such as sperm, are not restricted by law from receiving compensation.

In contrast to restrictions, such as bans on compensating gestational carriers, the Model Act allows all donors who have entered into a valid **\*226** agreement to be reimbursed for costs associated with the storage or retrieval of gametes or embryos. [\[FN123\]](#)[\[FN123\]](#) Premiums paid for insurance against economic losses directly resulting from retrieval or storage of gametes or embryos may also be reimbursed even if the premiums have been paid before the donor entered into a record agreement as long as the agreement to do so is valid and effective before the gametes or embryos are used in assisted reproduction. [\[FN124\]](#)[\[FN124\]](#)

The most significant provision in the Model Act regarding compensation to donors and gestational carriers is that which makes reasonable compensation expressly legal. Section 802 of the Model Act permits both donors and gestational carriers to be reasonably compensated if an agreement is negotiated in good faith. [\[FN125\]](#)[\[FN125\]](#) Compensation, however, cannot be conditioned on the purported genome-related traits of the gametes or embryos or the actual genotypic or phenotypic characteristics of the donor or of the resulting child. [\[FN126\]](#)[\[FN126\]](#)

### **XVII. Infertility and Insurance Coverage of ART**

Infertility is a common reason for people to seek use of assisted reproduction in order to procreate children. Some insurance policies provide ART coverage only for infertile insured persons. The Model Act defines infertility as “(a) Resulting from a disease or condition that causes abnormal function of the reproductive system, the inability to: (i) conceive after attempts at conception by unprotected sexual intercourse have been made for at least one year; (ii) sustain a pregnancy to live birth; or (b) The presence of another condition recognized by accepted medical standards as a cause of the inability to achieve or sustain a pregnancy or live birth; or (c) The desire to achieve pregnancy by means other than sexual intercourse.” [\[FN127\]](#)[\[FN127\]](#) Acceptance of a common definition of infertility would be helpful since there is a widely varying definition in the insurance laws of the states. [\[FN128\]](#)[\[FN128\]](#)

The Model Act requires any health plan that provides coverage for assisted reproductive services to provide “prominently positioned” notice **\*227** to enrollees of the scope and extent of that coverage. [\[FN129\]](#)[\[FN129\]](#) Further, a health insurer may require a participating physician in the treatment of infertility to be board certified in obstetrics and gynecology or in both obstetrics

and gynecology as well as in reproductive endocrinology, and have a practice composed substantially of infertility cases. [\[FN130\]](#)[FN130] Alternatively, the health insurer may require that the participating physician be board certified in both andrology and urology by the American Board of Urology. [\[FN131\]](#)[FN131]

### **XVIII. Regulation of ART Providers and Donor Registries**

Article 10 of the Model Act provides qualifications to which ART providers, clinics, and storage facilities must adhere by creating specific standards regarding adequately trained personnel, the maintenance of equipment and records, and the participation in proficiency testing and inspection. [\[FN132\]](#)[FN132] This would constitute a substantial step toward ensuring quality of providers, given that such ART services are not regulated by law but only by the standards of medical specialties and trade groups.

The Model Act also encourages the creation of donor and collaborative reproductive registries. [\[FN133\]](#)[FN133] Donor and collaborative reproduction registries, which maintain contact, and medical and psychosocial information about donors, carriers, and ART-resulting children, should adhere to certain standards for information disclosure. They must establish procedures for disclosing nonidentifying information while protecting the anonymity of donors, for disclosing identifying information after proper consent is obtained, for properly maintaining and updating donor medical information, for disclosing nonidentifying medical and psychosocial information to the resulting child, and for retaining all records until the resulting child has reached the age of forty. Further, the registries should establish whether a resulting child is authorized to contact a program. [\[FN134\]](#)[FN134] Except as may be otherwise provided by federal or state law, health-care providers in an enacting state are required to comply with the standards established for donor and collaborative registries in that jurisdiction. [\[FN135\]](#)[FN135]

### **XIX. Management of Health Information**

All ART providers must maintain permanent addresses so that patients may contact them. They must participate in a national donor and collaborative\***228** reproductive registry so that intended parents and donors can provide the program with address information, collect and maintain medical and genetic information, and maintain an accurate record of the disposition of all gametes and embryos. [\[FN136\]](#)[FN136] Medical information may be disclosed only to an interested party or resulting child with proper authorization; however, aggregate, nonidentifiable data may be disclosed for quality assurance purposes. Further, each program should test for sexually transmitted diseases in gamete providers and gestational carriers and screen for genetic disorders in gamete and embryo donors in compliance with the appropriate governmental regulatory authority and the standards established by the ASRM and SART. Finally, the program shall establish a procedure for the proper labeling of embryos and gametes.

The Model Act provides an enforcement mechanism by providing that a participant whose ART information has been used or disclosed in violation of the Act and has sustained economic

loss or personal or emotional injury because of this may recover compensatory damages, reasonable attorney's fees, and costs of litigation against a liable provider. [\[FN137\]](#)[\[FN137\]](#) The provider's failure to account for all embryos, the misuse or theft of embryos, or unauthorized disposition of embryos shall subject the provider or storage facility to possible criminal and civil penalties as provided under applicable law. [\[FN138\]](#)[\[FN138\]](#)

Reported cases suggest that ART procedures sometimes go awry as a result of negligence. For example, a clinic impregnated a woman with unwashed sperm. [\[FN139\]](#)[\[FN139\]](#) A clinic has also fertilized a woman's eggs with the wrong man's sperm, rather than her husband's sperm. [\[FN140\]](#)[\[FN140\]](#) Another clinic destroyed or lost a couple's embryos. [\[FN141\]](#)[\[FN141\]](#) In yet another case, a couple's embryo was implanted in another woman by mistake. [\[FN142\]](#)[\[FN142\]](#) In still another \*229 example, cryopreserved embryos were rendered unusable due to exposure to contaminated albumin. [\[FN143\]](#)[\[FN143\]](#) Tort law often has failed to compensate such claims for procreative injury arising out of ART services. [\[FN144\]](#)[\[FN144\]](#)

While the Model Act does not preclude the application of common law contract or tort theories to determine liability of ART providers of services or products, it does create a presumption of proper care when the services or products are provided in accord with governmental regulations or statute and with recognized professional ethical standards. The Model Act declares that licensed providers who render services in compliance with current practice and ethical guidelines or applicable state or federal regulations or statutes will be presumed to meet accepted standards of care. [\[FN145\]](#)[\[FN145\]](#) This presumption is rebuttable upon a showing that an issue relating to a standard of care is not covered in the practice and ethical guidelines or a showing that regulatory or statutory standards exist, but there has been a breach of the common-law standard of care on that particular issue. [\[FN146\]](#)[\[FN146\]](#) If a cause of action is initiated more than six years after the birth of the ART child or more than two years after the resulting injury could reasonably have been detected, whichever is greater, the action will not be allowed if the defendant raises the limitations defense. [\[FN147\]](#)[\[FN147\]](#)

## **XX. Conclusion**

The authors believe that the legislatures of the various states should consider enactment of the provisions of the ABA Model Act Governing Assisted Reproductive Technology. The lack of governing statutory law on this important matter in most states, along with conflicting and often contradictory law announced by many courts, have created a void that the Model Act could effectively fill. The many potential parents and those who seek to collaborate with them or provide services to them, as well as the children conceived by these reproductive technologies, deserve greater legal certainty. The Model Act is the most comprehensive proposal to date that can achieve that goal.

[\[FN1\]](#). The Model Act Governing Assisted Reproduction Technology (Model Act) was approved by the American Bar Association (ABA) on February 11, 2008.

[FNaa1]. Charles P. Kindregan, Jr., is Distinguished Professor of Law at Suffolk University Law School and served as the chair of the ABA Section of Family Law Reproductive and Genetic Technologies Committee (the Committee), 2004-2007.

[FNaaa1]. Steven H. Snyder practices reproductive law in Maple Grove, Minnesota, and is the current chair of the ABA Section of Family Law Reproductive and Genetic Technologies Committee. The authors express their thanks to Heather Warnken and Jennifer Porcaro for their assistance on the preparation of this article.

[FN1]. Remarkably, some forms of assisted reproductive technology (ART) were used for decades seemingly without causing legal controversy. The first report of intrauterine insemination in the United States occurred in 1866, as noted in [Johnson v. Super. Ct.](#), 101 Cal. App. 4th 869, 881 (2002). In 1962, the ABA JOURNAL published one of the first articles dealing with the potential legal ramifications of ART. See generally W. Barton Leach, *Perpetuities in the Atomic Age: The Sperm Bank and the Fertile Decedent*, 48 A.B.A. J. 942 (1962) (noting that posthumous reproduction using gametes of deceased persons could disrupt the law of perpetuities).

[FN2]. “Assisted reproduction” means the technology of “causing pregnancy through means other than by sexual intercourse.” MODEL ACT GOVERNING ASSISTED REPROD. TECH. § 102(1) (2008) [hereinafter MODEL ACT]. Examples include intrauterine insemination, egg donation, embryo donation, in vitro fertilization, embryo transfer, and intracytoplasmic sperm injection. See generally CHARLES P. KINDREGAN, JR., & MAUREEN MCBRIEN, *ASSISTED REPRODUCTIVE TECHNOLOGY: A LAWYER'S GUIDE TO EMERGING LAW AND SCIENCE* (2006) (providing examples of ART). As the definition makes clear, non-ART reproduction involves intercourse; however, a few cases involve transfer of sperm by oral sex followed by insemination, and such cases are excluded from ART. See, e.g., [Phillips v. Irons](#), No. 1-03-2992, 2005 WL 4694579 (Ill. App. Ct. Feb. 22, 2005) (female self-inseminated using sperm kept in her mouth following oral sex).

[FN3]. For analysis of the evolving procreative realities of nontraditional families, see generally Sara S. David, [Turning Parental Rights into Parental Obligations: Holding Same-Sex, Non-biological Parents Responsible for Child Support](#), 39 NEW ENG. L. REV. 921 (2005); Courtney G. Joslin, [The Legal Parentage of Children Born to Same-Sex Couples: Developments in the Law](#), 39 FAM. L.Q. 683 (2005); John A. Robertson, *Gay and Lesbian Access to Assisted Reproductive Technology*, 55 CASE WESTERN RES. L. REV. 323 (2004); Sanja Zgonjanin, [What Does It Take to Be a \(Lesbian\) Parent?](#), 16 HASTINGS WOMEN'S L.J. 251 (2005); [Changing Realities of Parenthood: The Law's Response to the Evolving American Family and Emerging Reproductive Technologies](#), 116 HARV. L. REV. 2052 (2003); Note, [Reproductive Technology and the Procreation Rights of the Unmarried](#), 98 HARV. L. REV. 669 (1985).

[FN4]. For example, California appellate court judges joined “the chorus of judicial voices pleading for legislative attention to the increasing number of complex legal issues spawned by

recent advances in the field of artificial reproduction.” [Prato--Morrison v. Doe, 103 Cal. App. 4th 222, 232 n.10 \(2002\)](#) (noting that legislative guidelines would help participants in ART to make informed choices); *see also* [Hodas v. Morin, 814 N.E.2d 320, 327 n.16 \(Mass. 2004\)](#) (noting that the legislature is the most appropriate forum to comprehensively address the kinds of issues raised by ART).

[FN5]. A number of people devoted numerous hours to the evolution of the Model Act, and without their efforts, it would not have been developed. The project that eventually led to the drafting of the Model Act was initiated during the Committee chairmanship of H. Joseph Gitlin of Illinois, who served as chair from 1987 until 2000. Under his successor as chair, Dr. Bruce Wilder of Pennsylvania, the effort to draft the Model Act took on increased emphasis; Dr. Wilder served as chair until 2004. Charles P. Kindregan, Jr., of Massachusetts chaired the committee until 2007, during which time a complete draft of the Model Act was finished and approved by the ABA Family Law Section. Steven H. Snyder of Minnesota became the chair in August 2007 and guided the final draft through negotiation with other entities and oversaw its final approval with amendments by the ABA House of Delegates on February 11, 2008. Over the course of a decade and a half, ABA members such as Susan L. Crockin of Massachusetts, Ami Jaeger of New Mexico, Theresa Erickson of California, and Maureen McBrien of Massachusetts made substantial contributions to the drafting process. Michael Kerr of the National Conference of Commissioners on Uniform State Laws (NCCUSL) also worked on this project and provided expertise on a number of drafting issues. The ABA Sections on Real Property, Probate and Trust Law, Health Law, Science and Technology, Individual Rights and Responsibilities, Family Law, and Young Lawyers, as well as interested individuals from other legal and medical groups also contributed in varying degrees to the evolution of the Model Act.

[FN6]. *See generally* *In re Baby M*, [537 A.2d 1227 \(N.J. 1988\)](#) (ruling that a surrogate carrier whose own egg was fertilized by intrauterine insemination with the intended father's sperm was the legal mother, and her preconception agreement to turn over any child so conceived to the intended parents was contrary to public policy and not enforceable); Judith Aren, [Baby M Reconsidered, 76 GEO. L.J. 1741 \(1988\)](#) (using *Baby M* as basis for arguing that the law should discourage surrogacy contracts).

[FN7]. The Model Act defines a “gestational carrier” as “an adult woman, not an intended parent, who enters into a gestational agreement to bear a child.” MODEL ACT § 102 (17). Although, as noted in the text, many make a distinction between a “traditional surrogate” whose own egg is fertilized and a “gestational surrogate” who carries an embryo produced with an egg of another woman, the drafters of the Model Act note but do not use that distinction in defining a “gestational carrier.” *Id.* In a gestational carrier arrangement as provided in Alternative B in Article 7 of the Model Act, at least one of the intended parents must have made a genetic contribution to the child birthed by the gestational carrier. *Id.* at MODEL ACT § 702(2)(a).

[FN8]. *See supra* note 2 for a definition of assisted reproduction and some examples.

[FN9]. While the term collaborative reproduction is sometimes used to mean assisted reproduction, the Model Act defines it to mean “any assisted reproduction in which an individual other than the intended parent(s) provides genetic material or agrees to act as a gestational carrier.” MODEL ACT § 102(5).

[FN10]. A report of the Center for Disease Control indicated that 122,872 ART procedures were started in 2003, resulting in 43,503 pregnancies and 48,758 infants born. VICTORIA CLAY WRIGHT ET AL., DIV. OF REPROD. HEALTH, NAT'L CTR. FOR CHRONIC DISEASE PREVENTION & HEALTH PROMOTION, ASSISTED REPRODUCTIVE TECHNOLOGY SURVEILLANCE--UNITED STATES, 2003 tbl.2 (2003), <http://www.cdc.gov/mmwr/preview/mmwrhtml/ss5504al.htm#tab2> (providing state-by-state reports on ART, as required by the federal Fertility Clinic Success Rate and Certification Act of 1992, [Pub. L. No. 102-493, 106 Stat. 3146 \(1992\)](#)).

[FN11]. Marshall J. Wolf, to the ABA House of Delegates in Support of the Model Act (Feb. 11, 2008).

[FN12]. The UNIF. PARENTAGE ACT, 9B U.L.A. 355 (2000), was amended in 2002 to deal with parentage issues created by assisted reproduction.

[FN13]. The drafters of the Model Act incorporated a legislative note in Articles 6 and 7, stating that the Model Act is not intended to conflict with or supersede provisions of the Uniform Parentage Act or the Uniform Probate Code. MODEL ACT arts. 6-7 (Legislative Note).

[FN14]. *See id.* at art. 7 (Alternative B). This alternative will be discussed in more detail subsequently in this article.

[FN15]. House of Delegates Vote (Aug. 10, 2004). The cloning resolution was drafted and proposed by the same ABA Family Law Section Committee that later drafted the Model Act. While opposing the use of cloning to create human beings, the resolution also made clear that if such children are reproduced, they are entitled to all the rights of other human persons.

[FN16]. MODEL ACT § 102(1).

[FN17]. “Infertility treatment” is defined in the Model Act as “any medical treatment reasonable and necessary for an intended parent to achieve a live birth.” *Id.* at § 102(17); *see generally* [Levin v. Levin, 645 N.E.2d 601 \(Ind. 1994\)](#) (husband was sterile); [Lane v. Lane, 912 P.2d 290 \(N.M. Ct. App. 1996\)](#) (husband had vasectomy); [J.B. v. M.B., 783 A.2d 707 \(N.J. 2001\)](#) (wife unable to become pregnant but could produce eggs for in vitro fertilization).

[FN18]. There are many reported decisions involving children conceived by ART for same-sex parents. *See generally* [K.M. v. E.G., 117 P.3d 673 \(Cal. 2005\)](#) (female partner donated egg to her same-sex partner); [Elisa B. v. Super. Ct., 117 P.3d 660 \(Cal. 2005\)](#) (child support issue arose

from same-sex partnership decision to have one partner conceive a child); [A.H. v. M.P., 857 N.E.2d 1061 \(Mass. 2006\)](#) (child conceived in same-sex relationship when one female partner used donor sperm); Melanie B. Jacobs, [Micah Has One Mommy and One Legal Stranger: Adjudicating Maternity for Non-biological Lesbian Coparents](#), 50 *BUFF. L. REV.* 341 (2002) (noting lack of legal recognition as to coparents in lesbian relationships); Sara S. David, [Turning Parental Rights into Parental Obligations: Holding Same-Sex Non-biological Parents Liable for Child Support](#), 39 *NEW ENG. L. REV.* 921 (2005) (discussing parental status of persons in same-sex relationships).

[FN19]. See generally [J.F. v. D.B., 879 N.E.2d 740 \(Ohio 2007\)](#); [J.F. v. D.B., 941 A.2d 718 \(Pa. Super. Ct. 2008\)](#) (man commissioned a surrogate to carry children for him); [P.G.M. v. J.M.A., No. A07-452, 2007 WL 4304448 \(Minn. Ct. App. Dec. 11, 2007\)](#) (HIV positive gay man used a genetically related surrogate to have a child).

[FN20]. One report stated that a sixty-seven-year-old Spanish woman became pregnant by in vitro fertilization and delivered twins. Thomas Catan, *World's Oldest Mum Seeks Younger Man to Help with Twins*, *THE AUSTRALIAN*, Jan. 29, 2007, <http://www.theaustralian.news.com.au/story/0,20867,21134363-2703,00.html>.

[FN21]. See generally Charles P. Kindregan, Jr., & Maureen McBrien, [Posthumous Reproduction](#), 39 *FAM. L.Q.* 579 (2005) (discussing the use of gametes of deceased persons for ART procedures). For example, a New Jersey court noted that a deceased man had during his life banked gametes with the intent that the mother could bear his child after his death. See *In re Estate of Kolacy*, 753 *A.2d* 1257, 1260 (N.J. Super. Ct. Ch. Div. 2000) (holding that court should determine legal status of posthumously conceived child even if deceased parent's estate has no assets to distribute).

[FN22]. See generally Susan B. Apel, [Cryopreserved Embryos: A Response to "Forced Parenthood" and the Role of Intent](#), 39 *FAM. L.Q.* 663 (2005) (criticizing embryo disposition decisions for misusing the intended parent theory); Charles P. Kindregan, Jr., & Maureen McBrien, [Embryo Donation: Unresolved Legal Issues in the Transfer of Surplus Cryopreserved Embryos](#), 49 *VILL. L. REV.* 169 (2004) (discussing the various unresolved legal issues arising from the transfer of embryos); Jaime E. Conde, [Embryo Donation: The Government Adopts a Cause](#), 13 *WM. & MARY J. WOMEN & L.* 273 (2006) (noting the Bush administration's financial support for and promotion of embryo adoption).

[FN23]. The Model Act was submitted to the ABA House of Delegates with the following written comment as to the need for such legislation: "The recommended Model Act would provide legislative guidance regarding the emerging legal problems created by the increasing resort to reproductive technologies by persons seeking to become parents by non-sexual means, the various persons who collaborate with them, and the children who are the product of assisted reproduction. States currently have little or no law governing these matters, leaving lawyers who advise participants, as well as donors, patients, and intended parents in a state of ignorance in

regard to status, rights and responsibilities.” James Preston, Chair, ABA Family Law Section, Report to the House of Delegates (Aug. 2007).

[\[FN24\]](#). MODEL ACT Prefatory Note.

[\[FN25\]](#). *Id.*

[\[FN26\]](#). *Id.* at § 102(1).

[\[FN27\]](#). *Id.* at § 102(5).

[\[FN28\]](#). *Id.* at § 102(11). The question of what is an embryo is somewhat confusing, so the definition provided in the Model Act may offer clarification. What the Model Act calls an embryo is sometimes also called a “preembryo,” a “zygote.” or a “pre-implantation embryo” in court decisions and literature. Cryopreservation of the entity in the process of in vitro fertilization would technically occur prior to the stage when the medical literature considers it sufficiently developed to be called an embryo, but the drafters of the Model Act felt that as defined, the use of the simple word “embryo” would be more practical. For different views, see generally Susan Crockin, [What Is an Embryo?: A Legal Perspective](#), 36 CONN. L. REV. 1177 (2004); Howard W. Jones, *and Just What Is a Pre-embryo?*, 52 J. FERTILITY & STERILITY 189 (1989); Howard W. Jones, *What Is an Embryo?*, 77 J. FERTILITY & STERILITY 658 (2002).

[\[FN29\]](#). MODEL ACT § 102(17). Some people make a distinction between a carrier who has a genetic connection to the child (“traditional surrogate”) and one who does not (“gestational surrogate”). In [J.F. v. D.B.](#), 879 N.E.2d 740 (Ohio 2007), the court ruled that a gestational surrogacy agreement does not violate public policy and stated *in dicta* that the legal position of a traditional surrogate whose own egg is used to produce the pregnancy may be different from that of a gestational surrogate; the Model Act would eliminate this distinction and treat both examples as being gestational carriers. In most reported decisions and much of the literature, a gestational carrier is frequently referred to as a “surrogate.” The [UNIF. PARENTAGE ACT § 102\(11\) \(2000\)](#) uses the term “gestational mother.” The drafters of the Model Act employ the term “carrier” in order to avoid the negative connotations that some people associate with words such as “surrogate” or “surrogate mother.”

[\[FN30\]](#). MODEL ACT [§ 102\(18\)](#).

[\[FN31\]](#). *Id.* at art. 7 (Alternative B).

[\[FN32\]](#). *Id.* at § 102(27).

[\[FN33\]](#). *Id.* at § 102(28).

[\[FN34\]](#). *Id.* at § 102(21).

[\[FN35\]](#). Cryopreservation of an embryo means that after fertilization and preliminary treatment, the embryo is suspended in an aqueous medium, and a cryopreservant is used to substitute for water as the embryo dehydrates. The embryo is then cooled off at about negative 80 degrees centigrade and transferred to storage in liquid nitrogen where it cools to negative 196 degrees centigrade.

[\[FN36\]](#). MODEL ACT [§ 102\(9\)](#).

[\[FN37\]](#). *Id.* at § 102(32).

[\[FN38\]](#). *Id.* at § 101(31).

[\[FN39\]](#). Decisions resolving divorce disputes over disposition of embryos reflect different solutions. *See generally* [Davis v. Davis, 842 S.W.2d 588 \(Tenn. 1992\)](#) (favoring contract enforcement, but stating that if no contract exists, the court should consider reproductive rights choice); [A.Z. v. B.Z., 725 N.E.2d 1051 \(Mass. 2000\)](#) (rejecting contract theory); [J.B. v. M.B., 783 A.2d 707 \(N.J. 2001\)](#) (generally favoring party wishing to avoid parentage); [Kass v. Kass, 696 N.E.2d 174 \(N.Y. 1998\)](#) (enforcing contract to donate embryos for research); [Roman v. Roman, 193 S.W.3d 40 \(Tex. App. 2006\)](#) (enforcing contract that in event of divorce, the embryos should be discarded).

[\[FN40\]](#). *See generally* [York v. Jones, 717 F. Supp. 421 \(E.D. Va. 1989\)](#) (dispute between clinic and patients over right to transfer cryopreserved embryos).

[\[FN41\]](#). MODEL ACT art. 2.

[\[FN42\]](#). *Id.* at § 202.

[\[FN43\]](#). *Id.* at § 202(1)(b).

[\[FN44\]](#). *Id.* at § 203.

[\[FN45\]](#). *Id.* at § 203(2).

[\[FN46\]](#). *Id.* at § 203(3).

[\[FN47\]](#). *Id.* at § 203(4).

[\[FN48\]](#). *Id.* at § 203(5).

[\[FN49\]](#). *Id.* at § 102(10).

[\[FN50\]](#). *Id.* at § 602.

[\[FN51\]](#). *Id.* at § 603.

[\[FN52\]](#). Article 6 of the Model Act defines the status of a child of assisted reproduction. *Id.* at art. 6.

[\[FN53\]](#). Article 7 of the Model Act governs gestational agreements. *Id.* at art. 7.

[\[FN54\]](#). *Id.* at § 102(10).

[\[FN55\]](#). *Id.* at § 503. *See generally* [Puretta v. Med. Offices for Human Reprod.](#), 760 N.Y.S.2d 639 (Sup. Ct. 2003) (holding that plaintiffs could recover for pecuniary expenses for child).

[\[FN56\]](#). MODEL ACT § 204(1). *But see* Michelle Dennison, *Revealing Your Sources: The Case for Non-anonymous Gamete Donation*, 21 J.L. & HEALTH 1 (2008) (arguing that gamete donors should not be anonymous and that children of ART should have a legal right to know the identity of their genetic parent).

[\[FN57\]](#). MODEL ACT § 204(3).

[\[FN58\]](#). *Id.* at § 204(2).

[\[FN59\]](#). *Id.* at § 102(36).

[\[FN60\]](#). *Id.* at § 801(1).

[\[FN61\]](#). *Id.* at § 801(3). Other economic losses that occur before the donor enters into a valid donation agreement are not subject to reimbursement. *Id.* at § 801(2).

[\[FN62\]](#). *Id.* at § 802.

[\[FN63\]](#). *Id.* at § 205(1).

[\[FN64\]](#). *Id.* at § 205(2).

[\[FN65\]](#). *Id.* at § 205(3).

[\[FN66\]](#). *Id.* at § 205(2).

[\[FN67\]](#). *Id.* at § 205(3).

[FN68]. *Id.* at § 607.

[FN69]. An exception is [CAL. PROB. CODE § 248.5](#) (West 2007), which, for purposes of inheritance, deems such a posthumous child to have been born during the parent's lifetime if he or she consented in writing during life and designated a specific person to have the authority to use the gametes, as long as the child is in utero within two years of the parent's death. Contrary to the California statute, North Dakota prohibits a posthumously conceived child from inheriting. See [N.D. CENT. CODE § 14-18-07 \(2007\)](#). Most states have no statute dealing with this issue directly, but enactment of the Model Act would change that.

[FN70]. See generally [Gillett-Netting v. Barnhart, 371 F.3d 593 \(9th Cir. 2004\)](#) (holding that posthumously conceived children are dead father's legitimate children); [Woodward v. Comm'r of Soc. Sec., 760 N.E.2d 257 \(Mass. 2002\)](#) (concluding that posthumous children conceived after father's death are his legal heirs); *In re Estate of Kolacy*, [753 A.2d 1257](#) (stating that even if no assets were left in father's estate, the legal status of his posthumous children should be established); *Finley v. Astrue*, No. 07-627 [2008 WL 96775 \(Ark. Jan. 10, 2008\)](#) (holding that child resulting from embryo implanted in mother after father's death was not legal heir of father under state's intestacy law).

[FN71]. MODEL ACT § 301(1). A bracketed provision, which is an optional proposal for consideration of legislators, would make the counseling accord with the standards of the American Society of Reproductive Medicine (ASRM) and the Society of Assisted Reproductive Technology (SART).

[FN72]. *Id.* at § 102(7).

[FN73]. *Id.* at §§ 301(2), 302 (setting out additional counseling requirements).

[FN74]. *Id.* at § 301(3).

[FN75]. *Id.* at § 401.

[FN76]. *Id.* at § 301(1).

[FN77]. For a summary of the law governing the use of cryopreserved embryos, see generally Charles P. Kindregan, Jr., & Maureen McBrien, *Assisted Reproductive Technology: A Lawyer's Guide to the Emerging Law and Technology* ch. 4 (2006); Susan Crockin, *The "Embryo" Wars: At the Epicenter of Science, Law, Religion and Politics*, [39 FAM. L.Q. 599 \(2005\)](#).

[FN78]. MODEL ACT § 501.

[FN79]. *Id.* at §§ 501(1), 501(3)(a)-(b) (requiring parties to agree on use of the embryos in the event of divorce, illness, incapacity, or death and to clarify which intended parent may control

the embryos).

[\[FN80\]](#). *Id.* at § 501(3)(c).

[\[FN81\]](#). *Id.* at § 502(1). The other patients can be known or anonymous.

[\[FN82\]](#). *Id.* at § 502(2).

[\[FN83\]](#). *Id.* at § 504.

[\[FN84\]](#). No one really knows how many embryos are in storage worldwide, but an estimate of about 500,000 in the United States alone seems realistic, if somewhat conservative. *See* Kindregan, Jr., & McBrien, *supra* note 22, at 170-72 (discussing surplus unused embryos).

[\[FN85\]](#). MODEL ACT § 504(3). Because of reports of criminal misappropriation of embryos in a clinic, California enacted a statute making theft of embryos a crime punishable by three to five years of imprisonment and a fine of up to \$50,000. [CAL. PENAL CODE § 367g \(2007\)](#).

[\[FN86\]](#). MODEL ACT Prefatory Note. Until recently, maternity was determined by who gave birth; a legal presumption as to paternity was determined by marriage to the birth mother, and determination of parentage was achieved by a judgment based on genetic markers in accord with the state's parentage statute or by a decree of adoption. Except as to adoption, the growing use of ART has thrown these traditional tests into confusion when applied to children produced by this technology. In ART cases, there has been greater use of other normative models for determining parentage in addition to biology, including contracts and social relationships. *See generally* Angela Campbell, [Conceiving Parents Through Law, 21 INT'L J.L. POL'Y & FAM. 242 \(2007\)](#) (noting inconsistencies in legal determination of parentage of ART children and urging the development of a better normative framework both in theory and in accord with the experiences lived by children).

[\[FN87\]](#). MODEL ACT § 601. The status of parents and children produced by gestational agreements are provided for in Article 7 the Model Act. *Id.* at art. 7.

[\[FN88\]](#). *Id.* at § 602.

[\[FN89\]](#). *Id.* at § 603. The gamete provider who intends to be a parent should consent in a record under section 604(1), but section 604(2) allows a finding of paternity even if there is a recorded consent when the gamete provider lived with the intended parent for two years following the birth, resided with the child, and openly held out the child as their own. *Id.* at § 604(1)-(2).

[\[FN90\]](#). *Id.* at § 605(1).

[\[FN91\]](#). *Id.* at § 605(2).

[\[FN92\]](#). *Id.* at § 606(1).

[\[FN93\]](#). *Id.* at § 606(2).

[\[FN94\]](#). *Id.* at art. 7.

[\[FN95\]](#). *Id.* at § 701(1) (Alternative A).

[\[FN96\]](#). *Id.* at § 701(1)(b).

[\[FN97\]](#). See generally John J. Sampson, [Preface to the Amendments to the Uniform Parentage Act \(2002\)](#), 37 FAM. L.Q. 1 (2003) (analyzing 2002 amendments to the UNIF. PARENTAGE ACT art. 8).

[\[FN98\]](#). MODEL ACT § 702(1) (Alternative A).

[\[FN99\]](#). *Id.* at § 702(2)(a). In contrast, a Massachusetts court in [Hodas v. Morin](#), 814 N.E.2d 320 (Mass. 2004), accepted jurisdiction to issue a prebirth order, even though neither the intended parents nor the gestational carrier were residents of that state; the child was scheduled to be born in a Massachusetts hospital.

[\[FN100\]](#). MODEL ACT § 703 (Alternative A).

[\[FN101\]](#). UNIF. CHILD CUSTODY JURISDICTION & ENFORCEMENT ACT § 201 (1997), 9(1A) U.L.A. 657 (1999).

[\[FN102\]](#). MODEL ACT § 703(2)(b) (Alternative A).

[\[FN103\]](#). *Id.* at § 706. Under section 706(2), the court may also terminate the gestational agreement for good cause.

[\[FN104\]](#). *Id.* at § 706(4).

[\[FN105\]](#). *Id.* at § 707(1).

[\[FN106\]](#). Such an allegation could be that the child is not the result of the implanted gametes but rather is the result of sexual acts between the prospective gestational carrier and her spouse or some other man.

[\[FN107\]](#). *Id.* at § 707(2).

[\[FN108\]](#). *Id.* at § 709.

[FN109]. [750 ILL. COMP. STAT. 47/5 \(2005\)](#). The Illinois legislation is discussed in Nancy Ford, *The New Illinois Gestational Surrogacy Act*, [93 ILL. B.J. 240 \(2005\)](#); Debra J. Braselton & Maxine Kunz, *Non-traditional Families and Alternative Family Building: Securing Parental Rights for Intended Parents*, 20 DCBA BRIEF 30 (Dec. 2007).

[FN110]. MODEL ACT § 701(2)(a) (Alternative B). A child who is not procreated in accord with the statute is presumed to be the child of the birth mother. *Id.* at § 701(1).

[FN111]. *Id.* at § 702.

[FN112]. *See generally* [Buzzanca v. Buzzanca, 72 Cal. Rptr. 2d 280 \(Ct. App. 1998\)](#) (holding that because embryos were produced by male and female gametes provided by donors, neither the intended parents nor the gestational carrier had any genetic connection to the child).

[FN113]. MODEL ACT § 702(2)(a) (Alternative B).

[FN114]. *Id.* at § 702(2)(b). The most obvious example of such a medical need is some form of infertility, such as an inability to produce a pregnancy or to carry a pregnancy to term.

[FN115]. *Id.* at § 702(2)(c)-(d).

[FN116]. *Id.* at § 703(2)(a)-(f).

[FN117]. *Id.* at § 705.

[FN118]. *Id.* at § 709(2).

[FN119]. *Id.* at § 709(1).

[FN120]. Some members of the drafting committee expressed concerns about including reference to standards proposed by private nongovernmental groups.

[FN121]. MODEL ACT § 711 (Alternative B).

[FN122]. Florida bans compensated surrogacy but permits unpaid surrogacy arrangements. [FLA. STAT. § 742.15 \(2008\)](#). Kentucky bans compensated surrogacy. [KY. REV. STAT. ANN. § 199.590\(4\) \(West 2008\)](#). Louisiana bans compensated surrogacy, but allows unpaid surrogacy arrangements. [LA. REV. STAT. ANN. § 9:2713 \(2008\)](#). Washington denies enforcement of surrogacy agreements involving payment to the gestational carrier. [WASH. REV. CODE § 26.26.240 \(2008\)](#). Several states that prohibit payments as part of the transfers of children specifically exempt payments to surrogates from this ban. *See, e.g.,* [ALA. CODE §§ 26-10A-34\(a\)-\(b\) \(2008\)](#); [IOWA CODE § 710.11 \(2008\)](#); [W. VA. CODE § 48-22-803\(e\)\(3\) \(2008\)](#).

[FN123]. MODEL ACT § 801(1). Actual economic losses occurring before the donor enters a valid agreement cannot be reimbursed, except for premiums paid for insurance against economic losses directly resulting from retrieval or storage of gametes or embryos for donation. *Id.* at § 801(2).

[FN124]. *Id.* at § 801(3).

[FN125]. *Id.* at § 802(1).

[FN126]. *Id.* at § 802(2)-(3).

[FN127]. *Id.* at § 901(1). The Model Act prohibits the denial of insurance coverage for those forms of infertility set out in (a) or (b) of this section.

[FN128]. *See* CHARLES P. KINDREGAN, JR., & MAUREEN MCBRIEN, ASSISTED REPRODUCTIVE TECHNOLOGY: A LAWYER'S GUIDE TO EMERGING LAW AND SCIENCE §§ 6.2-6.3 (2006) (reviewing concepts of infertility and state insurance laws governing ART).

[FN129]. MODEL ACT § 902.

[FN130]. *Id.* at § 903(a)-(b).

[FN131]. *Id.* at § 903(c).

[FN132]. *Id.* at § 1001.

[FN133]. *Id.* at § 1002(1).

[FN134]. *Id.*

[FN135]. *Id.* at § 1002(2).

[FN136]. *Id.* at § 1003.

[FN137]. *Id.* at § 1101(2).

[FN138]. *Id.* at § 1101(3).

[FN139]. *See generally* [Chambliss v. Health Sci. Found., Inc., 626 S.E.2d 791 \(N.C. Ct. App. 2006\)](#) (allowing recovery of compensatory and punitive damages by patient and her female life companion for injury caused by unwashed sperm).

[FN140]. See generally [Harnicher v. Univ. of Utah Med. Ctr.](#), 962 P.2d 67 (Utah 1998) (denying recovery when clinic used wrong sperm to produce pregnancy); [Andrews v. Keltz](#), 838 N.Y.S.2d 363 (Sup. Ct. 2007) (allowing parents' claims for emotional distress when sperm of unknown donor was used, rather than husband's, on theory of fear that plaintiff's genetic materials may have been used for others and that the child's natural father could interfere with their rights as the child's parents).

[FN141]. See generally [Jeter v. Mayo Clinic Arizona](#), 121 P.3d 1256 (Ariz. Ct. App. 2005) (denying recovery on wrongful death of embryos but allowing contract claim for failure to properly store embryos).

[FN142]. See generally [Creed v. United Hospital](#), 600 N.Y.S.2d 151 (App. Div. 1993) (denying recovery for emotional harm arising from misplanted embryo); [Perry-Rogers v. Obasaju](#), 723 N.Y.S.2d 28 (App. Div. 2001) (allowing medical malpractice recovery against clinic for misplanted embryo); [Perry-Rogers v. Fasano](#), 715 N.Y.S.2d 19 (App. Div. 2000) (custody dispute between couple who generated the embryo for their own use and the woman who received it by mistake but gestated along with her own genetic child).

[FN143]. See generally [Doe v. Irvine Scientific Sales Co., Inc.](#), 7 F. Supp. 2d 737 (E.D. Va. 1998) (denying recovery for infliction of emotional distress and economic loss when contaminated albumin destroyed embryos).

[FN144]. See generally Joshua Kleinfeld, [Tort Law and In Vitro Fertilization: The Need for Legal Recognition of "Procreative Injury,"](#) 115 YALE L.J. 237 (2005) (arguing that while tort claims arising out of ART services usually fail because law does not recognize the injury as compensable, this should be changed by recognizing procreative injury).

[FN145]. MODEL ACT § 1201(1).

[FN146]. *Id.* at § 1201(2).

[FN147]. *Id.* at § 1201(3).

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