

International Surrogacy, Fertility Tourism and the American Bar Association

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I was delighted to be invited to speak at the American Bar Association's Family Law Fall Conference in Montreal, Canada in October 2009 and give an English law perspective on international surrogacy arrangements. I joined a panel of experts in one of the assisted reproductive technology sessions from Canada, the US and India discussing the legal issues and problems associated with fertility tourism when infertility crosses international borders.

ABA Conference

The annual ABA Family Law Conference took place at the Hilton Bonaventure Hotel in Montreal from 7–10 October 2009. Lawyers from throughout the US and Canada attended

this highly regarded educational and networking event which offered sixteen training programs ranging from divorce taxation and the Hague Convention to assisted reproductive technology ("ART"), a tour of Montreal city, a black tie dinner dance event and numerous evening reception events and committee meetings.

The ABA has, in recent years, accepted assisted reproduction law and practice as part of mainstream family law. Reflecting this, the ABA conference offered three separate ART training sessions. In addition to the fertility tourism session, it ran a session on real life problem ART cases and the difficult ethical issues these raised and a session focusing on US ART legislative models. These sessions were well attended by leading ART lawyers across North America and sparked some thought provoking debate on some of the challenges US ART lawyers face in their daily work.

This prestigious conference had its own distinct character. Training sessions typically started early in the morning between 7.30 and 8.30 am, followed by working lunch sessions and more structured evening networking events on a ticketed basis. Training notes were electronically downloaded on an individual basis in advance. There was also a graduated delegate badge system, with speakers, committee members and other leading experts given additional colourful tabs to add to their badges and their credentials, which were encouraged to be worn prominently at all times.

ART and fertility tourism session

Judith Daar, associate dean at Whittier Law School and clinical professor at UCI College of Medicine opened the panel session and gave an excellent overview entitled *Accessing Reproductive Technologies: The Role of Fertility Tourism*. She explained how infertility crosses geographical and political boundaries and contextualised some of the difficulties fertility patients encounter from country to country, including cost, laws and policy restrictions.

Janet Bomza, barrister and solicitor of the Bomza Law Group, a Canadian and US immigration law firm, gave a practical lesson on the implications of Canadian immigration law affecting people participating in assisted reproductive processes in Canada.

Shirley Levitan, a lawyer with Dickson Macgregor Appell in Toronto, provided a summary of federal assisted reproduction law in Canada and how this is applied in practice, highlighting the different practical approaches from state to state.

Vinay Menon of Menon and Associates in Mumbai explained the history and evolution of assisted reproduction law in India, the Indian court system and the current status of surrogacy law in India.

David Paruch of Troy, Michigan USA gave a thoughtful overview of US immigration law and how it applies to children born following assisted reproduction treatment.

I explained some of the complex legal difficulties associated with international surrogacy arrangements involving British fertility patients and the legal minefield they face in terms of navigating a safe path home to the UK after their child's birth and obtaining legal recognition as parents under English law. The potential attraction of the US for some British fertility patients seeking to build a family through surrogacy is the more permissive legislative environment compared with legal restrictions in England and Wales and a shortage of donor eggs. The US ART lawyers therefore grappled with the complex application of English laws on parenthood and the inter-relation with immigration law governing citizenship and nationality.

It was clear that many US ART lawyers struggled with the extra-territorial application of English law on parenthood as it applies to British couples invoking the jurisdiction of the English family court on their return home and the prescriptive nature of English parental order applications. There was a widespread feeling that US orders and birth certificates recognising British commissioning parents as legal parents should be automatically recognised by English law. There was also palpable concern about the legal difficulties highlighted in the case of *X & Y (Foreign Surrogacy)* [2008] EWHC 3030 (Fam), being the first published case in the English High Court to deal with a foreign commercial surrogacy arrangement involving a British couple.

ART committee meeting

Following the fertility tourism training session, I was invited to participate in the ABA ART committee meeting, run by leading US ART lawyers, and I was privileged to subsequently be voted an honorary member. The committee meeting lent itself well to lively debate about ART law and practice.

Whilst commercial surrogacy and egg donation is permitted in a number of US states, US state laws have varying degrees of legal process in ART, particularly in surrogacy cases. The lack of US federal ART legislation and the patchwork approach in practice, together with the largely unregulated ART sector was recently brought into focus following the "Octomom case" and sensationalist headlines of maverick practice by a high profile US ART medic and certain rogue ART agencies. The US ART lawyers were keen to maintain their high sector standards and discussed ways of ensuring future best practice. The committee members were also keen to discuss the UK codification of fertility law and the government regulation of fertility practice through its watchdog the Human Fertilisation and Embryology Authority

and my experience of this in practice by way of a direct comparison.

Montreal

Montreal is a delightful city and it was an excellent venue for the conference. Montreal is well served with hotels, bars and restaurants and good shopping opportunities. It is located against a stunning backdrop of mountains and it has an impressive night skyline.

Montreal boasts very different and distinct areas, including the historical old port with its horses and carriages, cobbled streets and famous Basilica which was the venue for Celine Dion's marriage. There is a vibrant artistic community and the old quarter has many different art galleries with breathtaking oil, mixed media and watercolour paintings and ceramics, a wide selection of ethnic art and a distinctly French feel. Newer areas of the city enjoy wide boulevards and eye-wateringly high skyscrapers and these feel far more North American in character.

Montreal also has a substantial underground city, housing shops, cafes, restaurants, offices and other amenities which link in with the city's underground metro travel and hotel network. It is possible to spend whole days underground in Montreal, which is perhaps not a bad idea given that in the depth of winter temperatures can plummet to minus 40 degrees.

Summary

The increasingly global issues faced by ART practitioners and fertility patients and the acute lack of international harmonisation of fertility laws and policies continues to cause serious problems in practice. Good communication and better understanding of complex and often diametrically opposed international laws and political environments is vital in order to minimise the legal pitfalls and help fertility patients build their families when they cross geographical and political boundaries.

I was made to feel incredibly welcome by the US ART lawyers and I learned a lot about their work and dedication to helping people create and expand their families. Their frank and honest discussions about the strengths and weaknesses of their sector and their commitment to remaining at the forefront of ART practice was commendable. Whilst they lack codification of ART law and unification of practice to the degree that we enjoy here in the UK, they remain global leaders in practically helping people build families and deal with the associated legal issues. Our regulated ART framework leads the world in terms of best practice, but we have a long way to go before we can demonstrate the same level of practical experience as the US ART legal community. Food for thought indeed.