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Planning to resolve: ADR in ART

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ADR can help resolve disputes in ART cases. ADR is not limited to mediation and arbitration. Other types of informal dispute resolution can resolve disputes.

When assisted reproductive treatment cases go off the rails, they can have the next level of bitterness and volatility. There can be a keen sense of betrayal when things don't work out: on the part of the surrogate, that intended parents have not kept their solemn promises; and on the part of the intended parents- that their greatest fear has materialized- that the surrogate has decided not to relinquish the child, or has potentially harmed the child.

Thankfully, those types of cases are rare. It is more common that intended parents will feel anger or disappointment with those helping them on the way through- typically the egg donor agency or surrogacy agency.

Clarity matters: egg donor agency/surrogacy agency agreement

Risk is the four letter word that we advise and think about. We should plan for the worst. It is important to set out in the agency agreement with clarity what is to happen if difficulties arise. Some agreements are very specific- in the event of differences, there is to be mediation, to be paid equally, in a particular county with a named mediation service; failing which there is to be arbitration – again with an arbitrator in that county from that service.

Some agreements are silent as to what is to happen if there are difficulties between the agency and the intended parents. As a result, if difficulties arise, the intended parents are left in the dark as to next steps- and are tempted to go straight to court. Some agreements are vague, "If there are issues between us and you that need to be resolved, then we should negotiate."

Other agreements are similarly unhelpful, specifying that there if are difficulties between the agency and the intended parents, then the parties should engage in arbitration, or occasionally specify court.

Agency agreement checklist

1. Does the agreement contemplate the possibility of difficulties arising between the agency and clients?
2. What method, if any, is proposed for dispute resolution, for example, mediation?
3. Ideally, an agreement specifies informal resolution first, then mediation, then arbitration or court.
4. Does the agreement specify a particular company/person to undertake mediation or arbitration?
5. If so, do your due diligence about the proposed mediator or arbitrator. Are they reputable? Are they perceived as being close to the agency? What are their fees? Especially if your clients are long distance or international, will the practitioner conduct ADR via Zoom or Teams, or only in person?
6. Advise your clients in writing if they insist on signing the agreement, despite your concerns about the ADR clause.

SEEDS

Donor and surrogacy agencies don't have to belong to SEEDS¹, but even if they do, SEEDS ethical standards do not cover dispute resolution between the agency and their clients². However, SEEDS does have an informal resolution process through its Grievance Committee, which may assist. The grievance must have arisen in the last 12 months, is not a matter that is the subject of litigation and has not been resolved by settlement, arbitration or court, and must involve an alleged violation of a SEEDS Ethical Standard. Among other requirements, "The grievance contains no abusive language"³ if the grievance is against a potential SEEDS member, the Grievance Committee will best attempt to assist "in identifying avenues for redress and will maintain the information submitted should the business apply for membership in the future."

BREAKDOWN OF THE RELATIONSHIP BETWEEN INTENDED PARENTS AND THE AGENCY

The dispute between the intended parents and the agency may arise from something outside the agency's control (for example, the behavior of an obstetrician), or directly alleged to be caused by the agency. After re-reading the agency's retainer agreement, it can be helpful to have a frank, calm, conversation with the agency, often with guidance or assistance from co-counsel who knows the agency well. It is often in the agency's interest to resolve disputes with disgruntled clients quickly. Disgruntled clients can and do post negative reviews all over social media⁴.

INTENDED PARENTS AND SURROGATE

Contemplating ADR can be considered in the terms of the agreement, provided that the fundamental roles and responsibilities of the respective parties remains clear. When the relationship breaks down, the dispute can be highly volatile. Usually there are plenty of warning signs- for example, the intended parent who micromanages the surrogate.

Nipping the bud early

1. Ideally, good screening by the agency would have avoided this mess.
2. Active management by the agency of the dispute (preferably by the owner or senior management) as honest broker, while respecting the autonomy of the surrogate and the intended parents.
3. A collaborative approach by the parties' lawyers, preferably by the most senior practitioners, given the matter's extreme sensitivity.
4. Assistance from fertility counselors/experienced social workers, working directly with the parties

Where the parties have matched without a surrogacy agency, the dispute can be much harder to resolve, as the agency's moderating influence is missing.

¹ Society for Ethics in Egg Donation and Surrogacy.

² <https://seedsethics.org/PublishedStandards> viewed 08.06.2023.

³ <https://seedsethics.org/grievances> viewed 08.06.2023.

⁴ Shortly after I was admitted (1987), research indicated that a happy client told 5 others, and an unhappy one told 11 others. Now an unhappy client can tell thousands.

YOU'RE IN COURT- NOW WHAT?

Once a party has filed court proceedings, it can be tricky to persuade them to engage in ADR. They are there to "win". The attitude of the bench is vital. Here are two examples when the surrogate was uncooperative⁵.

CASE ONE

After the birth, the surrogate refused to consent to the post-birth order. On its own motion, the court ordered that the parties attend a very senior fertility counselor for counselling and a report. The parties took part. The process was a mix of on the record mediation and an assessment. The process and report pointed to an inevitable outcome, which assisted resolution.

CASE TWO

The gestational surrogate refused to allow the intended parents to attend the birth. The surrogate then withheld the intended parents' ability to see the child in hospital in any meaningful way. She argued with them (via nurses and the hospital administrator) about how the child was to be fed and clothed. The surrogate took steps to give up the child for adoption. By day 3, the intended parents filed an urgent application, heard on the morning of day 4. The court ordered that the parties attend a fertility counselor for mediation by phone that evening, and adjourned court for 24 hours. The intended parents had been opposed to mediation. Mediation resulted in an agreed order being made on day 5: the child would leave hospital that afternoon with the intended parents.

CONCLUSION

Seek, with clarity, to define the process that will be used to resolve a possible dispute. If a dispute arises, brainstorm, phone a friend, and use all tools available (such as help from a colleague, the agency or from a fertility counsellor as an honest broker or even mediator) to help resolve what seems impossible to resolve. Never give up hope, as it can guide you to generate options that might resolve the dispute.

⁵ Both examples are from Australian jurisdictions, which involve post-birth orders, and where surrogacy agreements are not binding.