

BOOK REVIEW:

Robert L. Klitzman, M.D., *Designing Babies: How Technology is Changing the Ways We Create Children* (Oxford University Press, 2020)

Dr. Robert L. Klitzman delivered the Joanne Ross Wilder Speaker Series lecture at the annual AAML national meeting in Chicago on November 11, 2021. His presentation was entitled “Designing Families: New Technologies and their Critical Legal Implications.” The lecture was based on this book and was intended to give family law practitioners an overview of how these new technologies pose challenges to the intersection of health, law, and ethics, suggesting that these issues have key implications for family law attorneys. The concepts discussed in the lecture were similar to what was covered in this book, albeit with more detail and supporting authority in the book. Ultimately, this book raises critically important issues that broader society must consider as more and more families are created using the medical technologies and legal practices and procedures at play in assisted reproduction technology. It provides a rich overview of the significant ethical issues that confront all of the professionals and their patients/clients who use assisted reproduction to build their families.

The book was not written specifically for the legal profession, whether lawyers representing clients pursuing family formation through assisted reproduction or judicial officers who enforce the contracts and determine legal parentage. Legal issues are only lightly touched upon in the book, and some of the impressions given of the legal issues at play may be out of date or lacking in nuance and understanding. Ultimately, based on the content of the book and the methodology of the analysis, I suspect the book was primarily intended to educate consumers of assisted reproduction rather than medical or legal professionals. But it certainly does analyze in a helpful way the ethical, social, and policy concerns at the heart of assisted reproduction, raising also the economic, moral, and social challenges that frequently arise in assisted reproduction.

The source materials for the book flow mostly from extensive interviews Dr. Klitzman conducted over an extended period

of time with intended parents, doctors, and other non-legal professionals involved in assisted reproduction. He states that he interviewed and surveyed “hundreds of infertility treatment providers,” polled doctors about their knowledge, attitudes and behaviors, and examined “hundreds of ART websites.” But, the majority of the information in the book was based most extensively on interviews with thirty-seven individuals — seventeen physicians from various kinds of medical practices in a variety of geographic locations, ten infertility care providers, and ten patients who used assisted reproduction. It may be a rather small and randomly selected population upon which to support sweeping observations as to the medical and ethical issues that are covered by the book, but it does provide interesting perspectives. Dr. Klitzman quotes extensively from these thirty-seven interviewees throughout the book, along with providing statistics, random facts, and general thoughts and observations by these thirty-seven interviewees. While the book is richly footnoted to various studies and articles, many were published more than ten years ago — and in a field changing as rapidly as assisted reproduction, some of the references were a bit out of date. For example, he asserts that many fertility doctors are still implanting more than one embryo in each transfer, that only a handful of states currently allow compensated surrogacy, or that assisted reproduction is only occurring in a few states. Attorneys well versed in this area will probably take issue with these observations.

The book is divided into five sections — most of which are focused around the notion of “choices” that all patients and treating professionals are faced with as they go about their task of building families through assisted reproduction. Given that the focus of the book is on the inherent ethical issues at play in these matters, it makes for a compelling structure to focus on the many choices that must, and indeed, are being made at every step along the process of creating children using assisted reproduction. The first section provides an overview of the medical aspects and history of assisted reproduction, also explaining how many persons experience the need for assisted reproduction — with much of this based on the individual stories of the thirty seven persons who were interviewed for the book. The second section is the longest and most comprehensive part of the book,

consisting of ten chapters that touch upon the myriad choices that persons wending their way through the assisted reproduction process must consider and make. These include what treatments to pursue, how to obtain eggs and sperm for the process, the ways assisted reproduction is being used to avoid certain diseases in planned-for children, using the process to determine the sex and other characteristics of the intended child, whether to pursue the birth of twins and other multiples or whether to simply avoid the entire assisted reproduction process and build a family through adoption instead. This section is a rich and detailed look at these multiple important and complex topics — but the observations made and conclusions drawn are heavily dependent and influenced by the views and experiences of the thirty-seven individuals interviewed for the book.

The third section discusses how patients choose doctors and how doctors choose patients when working in the area of assisted reproduction. As one would expect, these decisions are very patient and situation specific, with these individuals interviewed holding a variety of views and approaches to this topic. The fourth section addresses how patients and providers decide how to spend resources, cope with the issues in play, and how they make their decisions and respond to the large religious and metaphysical issues that arise in assisted reproduction. The fifth and final section seeks to pull all of these anecdotes and observations together to discuss the implications of family formation through assisted reproduction for education, research, and public policy.

Overall, the book portrays a rather bleak and concerning view of assisted reproduction. It seems to suggest that many intended parents using this process for building a family are doing it with limited professional guidance and all while they are distraught by their challenges to build their families in the face of longstanding infertility or simply an inability to procreate in same-sex relationships. The author seemingly suggests that many patients do not fully understand their medical and legal options, they are taken advantage of financially or they are faced with insurmountable financial challenges given the great costs of these procedures and limited medical insurance coverage to help pay for the processes. The author assumes that donors and gestational carriers are taken advantage of and are as ill-informed as intended parents. Many medical professionals are portrayed as

ethically anguished by what they are called upon to do in their reproductive medicine practices and that many are making ethically questionable decisions. He suggests that there is rampant selling of genetic material, doctors implanting more embryos than can safely be done, and unethical decisions are being made as to selective reduction, abortion, sex and trait selection. Unscrupulous agencies are taking advantage of intended parents, donors and carriers. Underlying all of these concerns is the author's view that what is needed is more regulation by governments, stricter ethical standards and guidelines by hospital boards, and more public awareness of what is going on. As an attorney who practices in this area, I do not find things to be this dark. While there are certainly concerning practices occurring by unscrupulous lawyers, medical personal and agencies, for the most part my clients seem highly informed as to their options and interests and most of the professionals I work with are honest and ethical. Entities such as the American Society of Reproductive Medicine (ASRM) and the Academy of Adoption and Assisted Reproduction Attorneys (AAAA) have ethics codes that apply to and are enforced against their members. Such groups work tirelessly to improve the practice in assisted reproduction – medically, legally, and ethically.

Family law attorneys reading this book may be frustrated by the lack of much content or analysis of the legal issues involved in assisted reproduction. Perhaps this is a result of the author being a medical doctor with an interest in ethics. There is no discussion of the detailed contracts that the parties enter into that address such topics as donations and the use of genetic material, gestational carrier arrangements, and the preservation and storage of unused genetic material. Usually these contracts are detailed and painstakingly drafted, most often with all parties represented by legal counsel. Also, there is no discussion of the significant nuances and variations from state to state in how parentage is being legally established in those states. Contrary to the impression given by this author, assisted reproduction is happening in some form or another in every state, the law is continuing to evolve, and lawyers, facilitating agencies, and courts are fully engaged in the process and attempting to provide guidance and protection to the participants. It is unfortunate that this message is not conveyed in this book. Nevertheless, lawyers and

judges can certainly benefit from reading the book as it does raise important ethical considerations that arise throughout the assisted reproduction process and that we as attorneys need to always keep in the forefront of our practices. Encouraging discussions and awareness of these issues across our society is a good thing and this book adds to that process.

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