

ACADEMY OF CALIFORNIA ADOPTION-ART LAWYERS (ACAL)

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September 10, 2021

Department of Financial Protection and Innovation
Attention: Sherri Kaufman,
Senior Counsel & Regulations Coordinator
300 S. Spring Street, Suite 15513
Los Angeles, California 90013

BY ELECTRONIC SUBMISSION:
[REDACTED]@DFPI.ca.gov
regulations@DFPI.ca.gov

RE: Proposed Escrow Regulations (PRO 13/13)

Dear Ms. Kaufman and Regulations Coordinator:

The Academy of California Adoption-ART Lawyers (ACAL) is a statewide society of family formation law attorneys with extensive adoption and assisted reproduction expertise. ACAL is a California non-profit corporation, and its members are separate and individual law practitioners. As part of its mission, ACAL encourages fair and balanced family formation laws and regulations. We appreciate the opportunity to provide comments on the Proposed Escrow Regulations (PRO 13/13) noticed on January 4, 2021.

Section 1171.1 of the proposed regulations would expand the definition of "personal property" to include "gametic material" within the definition of escrow, thus enabling the Department of Financial Protection and Innovation (DFPI) to regulate surrogacy transactions. The California Financial Code defines "escrow" as any transaction in which one person, in order to sell, transfer, encumber, or lease real or personal property to another person, delivers a written instrument, money, evidence of title to real or personal property, or other thing of value to a third person to be held until the happening of a specified event or the performance of a prescribed condition, at which time it is delivered to a grantee, grantor or its representative.

According to the Initial Statement of Reasons, the purpose of this Section is as follows:

"The definition of "personal property" does not specify if it includes "gametic material." In 2010, Family Code section 7961, which requires a non-attorney surrogacy or donor facilitator to direct a client to deposit all client funds into either an escrow maintained by an independent escrow company or a trust maintained by an attorney, was enacted. A non-attorney surrogacy or donor facilitator is generally an individual or organization that facilitates surrogacy transactions, where a woman bears and carries a child for another through medically assisted reproduction, or facilitates egg donation transactions, where a woman provides her oocytes to assist another in having a child or children.


The requirement to use an attorney or escrow company to maintain the funds was enacted in response to the number of people providing funds to surrogacy or donor facilitators who subsequently disappeared with the money. There has been uncertainty whether an escrow under Family Code section 7961 is an escrow within Financial Code section 17003. Currently, the companies that make such transactions have been found to be in violation of the Escrow Law provisions because they did not believe such transactions were covered under the Escrow Law. To address this issue, the rulemaking would clarify that because “gametic material” is included in the definition of “personal property,” these transactions fall under the Escrow Law. This would clarify the Department’s role in regulating such transactions and ensure the consumers receive the protection of the Escrow Law.”

While the intent of this section may be to provide consumers with protections against otherwise unregulated surrogacy or donor facilitators, the expansion of the definition of personal property to include gametic material will also apply to attorneys. The Legislature has not authorized the DFPI to regulate attorneys, a function that is reserved for the State Bar of California. In contrast, the legislature has expressly authorized attorneys to handle funds in relation to surrogacy related matters. In part, this is due to the attorney’s knowledge and understanding of surrogacy as well as the state bar regulations governing attorney conduct – which provides an extra layer of protections. In light of this problem and the protections provided by Family Law Section 7961, which states in relevant part that client funds shall be deposited into either an independent bonded escrow depository or a trust account maintained by an attorney, DFPI should consider withdrawing Section 1711.1 from the proposed regulations. Alternately, DFPI could consider clarifying that attorneys regulated by the State Bar of California should be exempted from these rules.

Further, any regulations should specify that gametes are only being defined as personal property for purposes of regulating escrow account holders and not for any other purpose.

On behalf of our members throughout California, we appreciate the opportunity to comment on the proposed regulations and would be happy to provide additional information or clarifications upon request.

Best regards,



Loni J. Klein
President