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SURROGACY

Laws on surrogacy vary from state to state, which can lead to confusion, emotional trauma, and costly court proceedings that can affect parental rights or compensation for the surrogate mother. This brief provides an overview of the issues relating to surrogacy, both ethical and legal, and a summary of current policies and state laws.

INTRODUCTION

Surrogacy is a term used when a woman, a surrogate mother, agrees to carry a pregnancy for intended parents. This can occur through traditional surrogacy or gestational surrogacy. Traditional surrogacy occurs when the surrogate becomes pregnant through either natural or artificial means, and the fetus is genetically related to the surrogate. The insemination process can use either the intended father's sperm or donor sperm.

Gestational surrogacy involves transferring an embryo created by in vitro fertilization (IVF) into the surrogate mother, but the fetus is not genetically related to the surrogate. The transferred embryo is created by one of many ways:

- Using the sperm and egg of the intended parents.
- Using the intended father's sperm and a donor egg.
- Using the intended mother's egg and donor sperm.
- Using a donor embryo, unrelated to either intended parent.

Many states began addressing surrogacy after the famous custody case of "Baby M" in 1988. In this case, William and Elizabeth Stern entered into a surrogacy agreement with Mary Beth Whitehead. Using William's

sperm, Mary Beth was inseminated and became a traditional surrogate for the Sterns. All parties agreed that once the baby was born, Mary Beth would give up her parental rights to the child, and the Sterns would be recognized as the legal parents. However, when the baby was born, Mary Beth changed her mind and wanted to keep the baby. The case reached the New Jersey Supreme Court, which held the surrogacy agreement was void because it conflicted with state statutes and violated public policy, but granted the Sterns legal custody of the child. However, the court also granted Mary Beth broad visitation rights.

As a consequence of the Baby M case, some states have prohibited traditional surrogacy or prevented traditional surrogacy contracts from being enforced. Gestational surrogacy has become the preferred surrogacy method because it reduces the concerns about severing relationship ties with a child's genetic mother.

Since federal law does not address surrogacy, sometimes the fragmentation of state policies can lead to unusual circumstances. For example, if a woman signs a surrogacy contract agreeing to carry a fetus for another couple in a state that allows such contracts, the surrogate mother could change her mind and go to a state, like Michigan, where surrogacy contracts are unenforceable. Many state legislatures have attempted to address surrogacy contracts, some of which have been successful.

Although the science of IVF and surrogacy can be daunting to those who seek to utilize this type of reproductive assistance, perhaps more daunting is the process involved

with contract obligations for the surrogate mother and the intended parents. Surrogacy contract laws vary widely from state to state; in some states, surrogacy contracts are explicitly prohibited. In states that allow surrogacy contracts, those contracts may address medical expenses, surrogate compensation, parental rights, and any requirements for the surrogate or intended parents.

ISSUES OF CONCERN

Recent media interest has focused on surrogacy contract obligations and whether such contracts can be enforced. The differences in surrogacy contract laws across the country have generated a lot of confusion and anxiety for those who wish to pursue parenthood using surrogacy. In the most extreme cases, intended parents went through the process of hiring a surrogate and undergoing IVF but were left without a child because the surrogate mother fled to a state where surrogacy contracts are unenforceable. Advocates of surrogacy support the reduced conflict, predictability, and the prevention of exploitation that legislation can bring.

Although cases involving a complete breakdown of a surrogacy agreement are seemingly rare, many state legislators are beginning to examine state laws and introducing legislation that would provide the framework to prevent negative outcomes. However, not all legislation has favored surrogacy. As the attention on surrogacy and contract enforcement has grown, other issues have emerged: the rights of the surrogate mother and informed consent, the definition of the parent-child relationship, and how to resolve potential disagreements between the surrogate and the intended parents.

For the last several years, bioethicists have debated the rights of the surrogate mother, specifically how those rights affect informed consent. The process by which a patient's health care provider discloses information about a medical procedure so that the

patient can make an informed decision about receiving treatment is informed consent. The information is generally related to a full description of the procedure; alternatives, if any, to the procedure; and any possible risks and benefits associated with the patient's final decision.

Some argue that it is impossible for a surrogate mother to provide informed consent because of the unknown emotional consequences giving up a child may bring. That is, a surrogate has no way of knowing how she will bond with the fetus.

The decision to be a surrogate may be a financial one because some states allow surrogates to be compensated for their services. Some have argued that surrogacy amounts to selling babies or renting wombs for profit, which exploits women who agree to be a surrogate because they need another source of income. As a result, some states allow only compassionate surrogacy, meaning the surrogate mother cannot be paid to carry a child.

Before the development of alternative reproductive technology, society traditionally defined motherhood as either a genetic relationship or a social one, such as by adoption, fostering, or stepparenting. Critics argue that surrogacy has created ambiguity by adding another relationship: gestational motherhood. For example, if intended parents hire a surrogate and use donor eggs, three different women could claim a relationship to the child. Without the proper legal framework, there is a possibility of conflict among the intended parents, the surrogate mother, and the egg donor. By prohibiting traditional surrogacy, some states have removed a surrogate's genetic relationship with a child, but it still leaves the door open for ethical dilemmas for gestational surrogates who bond with a fetus during gestation.

Disagreements between intended parents and surrogate mothers go beyond legal battles of custody. Parties must also consider what will happen if a fetus has genetic

abnormalities. Who will decide whether the child is terminated before birth? Should the surrogate have a say in whether she will undergo an abortion? Can the surrogate adopt the child as her own after giving birth if the intended parents no longer want it? Some of these questions can be addressed using surrogacy contracts in states where they are upheld. However, states that do not enforce contracts may simply resort to letting the courts decide the outcome, leaving surrogates and intended parents with uncertainty about what will happen if gestational complications arise.

STATE SURROGACY LAWS

According to LexisNexis, research comparing access to surrogacy among the 50 states has generally concluded that states fall into one of seven categories:

1. Criminalized surrogacy contracts and no surrogacy practiced.¹
2. Prohibitions against surrogacy contracts, but surrogacy is still practiced.²
3. Surrogacy allowed, but restrictions are provided and must be met. For example, the parents must be married or the intended mother must prove infertility.³
4. Surrogacy allowed and regulatory structure exists to facilitate enforcement of contracts.⁴
5. Surrogacy allowed, but statutory provisions do not provide much guidance for enforcement.
6. Surrogacy allowed, but no statutory framework exists and the practice is mostly governed by case law.
7. No statutory provisions or case law exist to support or prohibit surrogacy.

WISCONSIN LAW AND LEGISLATION

The Wisconsin Statutes are relatively silent about whether surrogacy contracts can be enforced. There has been no surrogacy-

specific legislation introduced at the state level. However, a decision by the Wisconsin Supreme Court in *Rosecky v. Schissel* concluded that such a contract can be enforced as long as it does not go against the best interests of the child.

Section 69.14 (1) (h), Wisconsin Statutes, states that a child born to a surrogate mother shall have the surrogate mother's information on the child's birth certificate. If the court determines parental rights over the child, the clerk of court shall report the court's determination to the state registrar. Once the registrar receives the report, a new birth certificate must be issued.

ENDNOTES

¹D.C. Code § 16-402.

²Ariz. Rev. Stat. Ann. § 25-218; Ind. Code Ann. § 31-20-1-1; La. Rev. Stat. Ann. § 9:2713; Mich. Comp. Laws §§ 722.855 to 722.859; Neb. Rev. Stat. § 25-21, 200; and N.Y. [Dom. Rel.] Law §§ 121 to 124.

³Fla. Stat. §§ 742.11 to 742.16; N.H. Rev. Stat. Ann. §§ 168-B:1 to 168-B:21; Nev. Rev. Stat. Ann. §§ 126.500 to 126.810; Tex. [Fam.] Code § 160.754; Utah Code Ann. § 78B-15-801; Va. Code Ann. § 20-158; W. Va. Code § 61-2-14h; and Wash. Rev. Code 26.26.101 and 26.26.210 to 26.26.914.

⁴Cal. [Fam.] Code §§ 7960 to 7962; and 750 Ill. Comp. Stats. §§ 47/1 to 47/75.