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MOVING FORWARD WITH NEW YORK'S MODEL COMMERCIAL SURROGACY LAW

The CPSA has brought the offerings of New York law in line with the offerings of New York's medical and fertility community. But where do we go from here?

By BriAnne Copp, Marla Neufeld and Arthur D. Ettinger

With the passage of the sweeping Child-Parent Security Act (the CPSA) in April of 2020, New York catapulted from near-last in the nation to a model statute protecting families created through Assisted Reproductive Technology (ART).

For almost 30 years, despite being largely regarded as a progressive state, a beacon of medical research and development, and one of the flagbearers for the LGBTQ rights movement, New York maintained one of the harshest, most ART-unfriendly laws in the nation. Codified in 1995, not long after the seminal and highly publicized case of Baby M. in neighboring New Jersey (In re Baby M., 537 A.D.2d 1227 (N.J. 1988)), former New York Domestic Relations Law §§121-123 declared all surrogacy contracts "void and unenforceable" and violative of New York public policy regardless of whether the surrogate was compensated, and imposed not only civil penalties for parties to surrogacy contracts, but civil and criminal penalties for professionals facilitating them.

Over virtually the same period of time, the country—and New York in particular—saw substantial growth and development in ART. According to the Center for Disease Control and Prevention, between 1996 and 2020, the use of ART for growing families more than tripled. Sunderam S, Kissin DM, Zhang Y, et al., Assisted Reproductive Technology Survey—United States, 2017, MMWR Surveill. Summ. 2020; 69 (No. SS-9):1-20. DOI. In New York, the rates of conception through ART are more than double the national average, with 5,816 procedures performed per million women aged 15-44, and 3.3% of all children born in 2020 conceived via some form of ART. New York's 40 fertility clinics account for nearly 10% of such clinics nationwide. Id.

Yet prior to the CPSA, which went into effect Feb. 15, 2021, New York remained one of a dwindling number of states hostile to surrogacy contracts (together with only Louisiana, Nebraska and Michigan). Parties in New York looking to use one of New York's numerous fertility clinics and a surrogate to grow their family were left to do so at their own risk. The pre-CPSA risks to surrogacy families were recently highlighted in the Michigan case of Tammy and Jordan Myers, a heterosexual couple who transferred their genetically-related embryos to a surrogate resulting in a twin pregnancy. A Michigan court denied parentage to the genetically-related intended parents finding their surrogacy arrangement unenforceable under Michigan law (similar to former DRL §§122-124). Tammy and Jordan Myers were forced to adopt their biologically-

related children in a complex legal process involving a home visit, personal questions to prove they were fit parents, and a criminal background check with fingerprints—a prospect not unfamiliar to many New York parents. Today, New York has left the ART-unfriendly legal landscape of Michigan and the other outlier states in the dust and leapfrogged from an outright ban on surrogacy contracts to the most comprehensive commercial surrogacy law nationwide. The CPSA has brought the offerings of New York law in line with the offerings of New York's medical and fertility community. But where do we go from here?

As the broadest surrogacy law in the nation, the CPSA establishes rules and guidelines for surrogacy matters in New York, adopts a Surrogates' Bill of Rights (a copy of which must be provided to the surrogate, similar to the Statement of Client's Rights and Responsibilities in Matrimonial Proceedings Pursuant to 22 N.Y.C.R.R. §1200.10-a), establishes legal protections for intended parents, and allows for pre-birth determination of parentage for children born through surrogacy. In addition to the advancements for surrogacy, the CPSA eliminates barriers for second-parent adoption in the state, streamlining yet another path to parenthood for New York families.

But to establish the most expansive coverage and protections for surrogacy participants, the CPSA also contains the most expansive requirements and criteria, leaving plenty of potential pitfalls for unwary parties and inexperienced practitioners.

The CPSA still prohibits "traditional surrogacy," also referred to as "genetic surrogacy," where the surrogate's eggs are used for conception. Only "gestational surrogacy," where the surrogate has no genetic connection to the child, is permitted for enforceable contracts and for compensation.

To enter into a valid New York surrogacy contract, at least one of the intended parent(s) must reside in New York for at least six months prior to execution. Any type of intended parent seeking to pursue surrogacy can legally work with a surrogate in New York; intended parents can be married, unmarried, or single, and of any sexual orientation. Intended parents can also proceed with an embryo created from their own genetic material, or donor egg, donor sperm, or with no genetic connection at all using donated embryos.

A surrogate must be at least 21 years old, a U.S. citizen or permanent resident, and where one intended parent is not a New York resident, a New York resident. The surrogate may not be a genetic parent of the child, and must have satisfactorily completed a medical evaluation prior to entering into the contract. The Department of Health recently issued specific Surrogacy Screening Guidelines, available here.

Under the CPSA, a gestational surrogate has the right to specific protections including the following to be paid by the intended parent(s): (1) comprehensive health insurance policy for medical care relating to the pregnancy until 12 months after the pregnancy ends; (2) a disability policy; (3) a life insurance policy with certain coverage requirements; and (4) separate independent legal counsel for the surrogacy agreement.

The surrogate also has the right to control all decisions regarding her own health and welfare and the pregnancy, as outlined in the Surrogate's Bill of Rights. These rights include the right to select her own health care professionals, to terminate or continue the pregnancy, to decide whether to reduce the number of embryos (or not), and to decide whether to have a caesarian birth. The surrogate's rights to make health and welfare determinations are not waivable, and an agreement attempting to limit or waive these rights is void against public policy. The surrogate also has an absolute right to terminate the surrogacy contract without penalty prior to pregnancy and the contract cannot contain a specific performance remedy.

It has always been a best practice established by the American Society for Reproductive Medicine for intended parent(s) and surrogates to have separate legal representation; however, the CPSA codifies this best practice. The intended parents and the surrogate (and/or the surrogate's spouse) must be represented by separate, independent counsel, at the intended parents' cost. Practitioners should note the specific retainer requirements of the CPSA if engaged by parties to a surrogacy contract. FCA §582-402(a)(6).

The CPSA also prohibits any referral arrangements between counsel and surrogacy agencies, and prohibits attorneys from owning or managing surrogacy agencies and representing parties to their resulting surrogacy contracts.

In fact, New York is the first state to license surrogacy programs (or matching programs) which match intended parent(s) with potential gestational surrogates by establishing licensing requirements for matching programs doing business in New York through the New York Department of Health. The Department of Health issued emergency regulations on February 16, 2021 outlining the requirements for surrogacy agencies, including background checks for owners and officers and mandatory filings.

If the surrogacy contract meets the criteria of the CPSA, the intended parents can obtain a pre-birth parentage order, establishing their parental rights to the child from the moment of the child's birth (and avoiding situations like the Myers family in Michigan).

But parties and counsel are cautioned to ensure familiarity with not just the substance of the contract provisions required under the CPSA, but the timing with which the requirements must be fulfilled. The agreement must be negotiated and executed after the surrogate completes the medical screening but before any treatment procedures relating to the pregnancy. Prior to the execution of the agreement, the required insurance policies must be in place and the compensation contemplated must be in the account of an independent escrow agent.

For nearly 30 years, New York legal professionals have faced civil and criminal penalties for facilitating commercial surrogacy contracts for New York parties. But as of Feb. 15, 2021, each party to a surrogacy contract in New York is expressly required to have separate, independent, New York-licensed counsel. While on its face, this is an opportunity for New York counsel, it is absolutely imperative that New York counsel educate themselves about the nuances of surrogacy contracts and the detailed requirements of the CPSA to avoid potential pitfalls. New York lawyers should look to experienced practitioners from states with a history of surrogacy-friendly legal frameworks to provide guidance and support in this new era for New York law.

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