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Surrogacy: From ‘Baby M’ to Today’s ‘Baby-Making Technology’

The law must keep up with the advances in “Baby-Making Technology.”

Public policy is a moving target.

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This is the third in a series of articles that I have co-authored about surrogacy. See *Surrogacy in New York: Boon or Bane?*, N.Y.L.J. (July 17, 2018); *Surrogacy Agreements Approved by New York ... With Provisos*, N.Y.L.J. (July 24, 2020). In this article, I address *Baby M* and its legacy, advances in surrogacy that led to New York's enactment of the Child-Parent Security Act, financial and emotional ramifications of surrogacy, and unintended consequences worldwide.

Over the past three decades, New York's public policy and attitude about surrogacy has come a long way. The story of surrogacy began with a tragedy—the 1980s case of Baby M (*Matter of Baby M.*, 109 N.J. 296 (1988)) where a traditional, or genetic, surrogacy agreement resulted in a tumultuous lawsuit between the traditional surrogate mother (egg donor) who refused to surrender the baby girl upon her birth (the surrogate mother's egg had been inseminated with the intended father's sperm) and the intended parents. In the aftermath of this case, New York enacted legislation in 1992 prohibiting any kind of surrogacy agreement, as did several other states. All surrogacy arrangements were considered violative of New York's public policy, and commercial surrogacy arrangements (where the surrogate is paid) were frowned upon to such an extent that, pursuant to DRL §123, effective in 1993, all parties involved, including the attorneys, could be subject to civil and/or criminal penalties.

Despite that public policy, by a mere two decades later, it was estimated that several thousand babies were born in the United States via gestational surrogacy every year. Clyde Haberman, *Baby M and the Question of Surrogate Motherhood*, The N.Y. Times (March 23, 2014). In April 2020, in a reversal of its prior total ban, the New York State

Legislature passed the Child Parent Security Act (CPSA) (FCA §581 and subsections) (Gov. Andrew Cuomo signed it into law). New York had been one of three states that still banned surrogacy agreements, along with Louisiana and Michigan. With the enactment of the CPSA, commercial gestational surrogacy would be protected by law, and the gestational surrogate could be compensated. While the CPSA did not extend to or cover traditional or genetic surrogacy, changes in our social, legal, and political landscapes over the decades, as well as medical advances in assisted reproductive technology, mandated the relaxation of the ban and the enactment of a law that would permit gestational surrogacy and protect the gestational surrogate.

Surrogacy Terminology/Vocabulary

Before exploring the CPSA and some of the present-day unintended consequences of surrogacy agreements, it is important to understand the different kinds of surrogacy arrangements. Traditional, or genetic surrogacy exists when a surrogate serves as the egg donor and is thus genetically related to the child; it involves the artificial insemination of the surrogate's egg(s) and the sperm of the intended father or sperm donor. With gestational surrogacy, the surrogate is not the egg donor, there is no genetic relationship between the child and the surrogate, and the embryos are created by the egg(s) of the intended mother, or egg donor, which have been fertilized by the sperm of the intended father, or sperm donor. Moreover, commercial, or compensated, surrogacy agreements (whether traditional or gestational) are those that compensate surrogates for both their reproductive care and reasonable direct expenses. Altruistic or uncompensated surrogacy agreements are those that solely compensate surrogates for their direct, pregnancy-related expenses. It is the

traditional, or genetic, surrogacy that is not yet protected by New York law.

New York's CPSA

Effective since Feb. 15, 2021, the CPSA legalizes compensated gestational surrogacy agreements, so long as they follow a strict set of legal criteria. First, the CPSA only applies to surrogacy agreements in which either the surrogate or at least one of the intended parents is a New York resident (FCA §581-402). Next, the CPSA creates a Surrogates' Bill of Rights, including the right to an attorney and health care professional of the surrogate's own choosing, to decide whether to terminate or continue the pregnancy, as well as to compensation and comprehensive health care coverage paid for by the intended parents (FCA §581-602, §581-603). Although the Act provides strict criteria for the eligibility of a person to act as a surrogate, it provides very little for the intended parents, beyond the requirement that each parent be at least 18 years old and that at least one parent be a U.S. citizen, or lawful permanent resident, and a New York resident (FCA §581-402). It is peculiar that despite the lengthy list of criteria that determines the eligibility of a surrogate to enter a surrogacy agreement, the CPSA does not require a determination of fitness or eligibility of the intended parents or a "best interests" analysis, both of which are required in a typical adoption proceeding.

The Act further specifies that the surrogacy agreement be executed prior to both the surrogate taking any medication to support the embryo transfer and the intended parent(s) executing a will that designates a guardian for any children resulting from the surrogacy agreement (FCA §581-403). In addition, the surrogate must undergo a medical evaluation related to the anticipated pregnancy prior to the execution of the

surrogacy agreement (FCA §581-402). If a surrogacy agreement is properly executed subject to the criteria established by the CPSA, the intended parents legally become the child's parents at birth, and neither the surrogate nor the surrogate's spouse has any parental rights to the child (FCA §581-406).

The Prohibitive Costs of Surrogacy

Although the CPSA does create a streamlined process for establishing parentage through commercial gestational surrogacy agreements in New York, the costs of in-state surrogacy render it financially out of reach for many people. At Circle Surrogacy in New York, according to its website, *excluding any costs related to IVF*, the cost for surrogacy is \$148,750 whereas the cost for surrogacy plus egg donation is \$172,750. Of this total fee, the surrogate's compensation can range from \$30,000 to \$60,000 per pregnancy, depending on the benefits the surrogate receives, such as legal counsel and life insurance. The cost of most surrogacy arrangements in the United States falls somewhere between \$100,000 and \$200,000. Beth Braverman, *How Much Surrogacy Costs and How To Pay for It*, U.S. News & World Rep. (June 2, 2022). The high cost of surrogacy in the United States has sent many intended parents searching elsewhere—to Ukraine in particular. The high costs appear to reflect a new public policy, namely, that surrogacy is not “baby-selling,” and that the restrictions on payments that are enforced with respect to adoptions to discourage “baby-selling” are not applied to surrogacy agreements.

Ukraine has become a hot spot for international surrogacy as a result of the way its surrogacy laws are written and its more affordable cost (\$18,000 for the surrogate's compensation; a teacher in Ukraine earns less than a quarter of that per year; around \$40,000 for the total costs) relative

to that of surrogacy in the United States. Susan Dominus, *It's a Terrible Thing When a Grown Person Does Not Belong to Herself*, The N.Y. Times (May 4, 2022); see also Christine Chung, *Parents Relying on Ukraine Surrogates Desperately Seek Their Newborns*, The N.Y. Times (March 11, 2022). First, it is important to note that Ukrainian law only allows married, heterosexual couples, who either medically cannot carry a child or have undergone four unsuccessful rounds of IVF, to enter into legally binding commercial surrogacy agreements. Article 123, Family Code of Ukraine, 2022. Queer couples and single parents interested in surrogacy must look to other countries, such as Colombia, the Netherlands, and Denmark, or find surrogates closer to home.

When an American couple works with a Ukrainian surrogate, they either travel to Ukraine once or twice throughout the surrogacy process. If the couple plans to do IVF, they travel to Ukraine for several weeks to conceive the embryos that will be implanted in their surrogate. They then return for the birth of the baby and can stay in touch with the surrogate throughout the pregnancy if they choose. Intended parents who instead use donors or programs with shipped biological material are only required to go to Ukraine for the birth of their child.

Beyond the actual financial costs of surrogacy, the costs of surrogacy also include deep emotional investment in the process. The war in Ukraine coupled with the ongoing pandemic has yielded heightened emotional costs—and, in turn, unintended consequences—that are far greater than those most intended parents and surrogates would experience but for these unfortunate circumstances.

In March 2022, it was estimated that approximately 800 couples around the world were expecting babies born to surrogates in Ukraine. Isabel Coles, *Ukraine Is a World Leader in Surrogacy, but Babies Are Now Stranded in a War Zone*, Wall St. J. (March 12, 2022). Since Russia's invasion of Ukraine, surrogacy agencies, intended parents, surrogates, and even surrogate-born children in Ukraine have faced consequences they could have never foreseen. Typically, Ukrainian surrogates, especially those working with New Jersey-based Delivering Dreams International Surrogacy Agency, contractually agree to move from their home to apartments in either Kyiv or Lviv about halfway through the pregnancy to ensure routine access to their agency's clinics and the best medical care. Although surrogates contractually agree to this move, there was no way to anticipate that they would have no choice but to move much earlier into their pregnancy, with much shorter notice, without their families, possibly out of Ukraine, more than once, in the middle of a war. Susan Dominus, *'It's a Terrible Thing When a Grown Person Does Not Belong to Herself'*, The N.Y. Times (May 4, 2022).

Many parents were unable to pick up their newborns due to the uncertainties of war. Not only would it be dangerous for them to travel to Ukraine to meet and take home their baby, but it would also be dangerous for some newborns to leave the bomb shelters they were kept in for safety. Some parents have had to wait as much as nine months to meet their baby for the first time. Danielle Braff, *Desperately Seeking Surrogates*, The N.Y. Times (April 2, 2022).

Once the war began, surrogates, intended parents, and their agencies all tried to come up with solutions to problems no one could ever have anticipated. Intended parents now had to reconcile their wishes to ensure

the safety of their baby while also respecting the self-autonomy of the surrogate. Likewise, surrogates had to do their best to respect the wishes of the intended parents while also trying to do what was best for their own families' safety and wellbeing. As for the agencies, they were stuck in the middle of this enigma. Agencies were responsible for ensuring that their surrogates were safe, and their clients pacified and reassured—all without falling into the trap of orchestrating what could look eerily similar to human trafficking. Moreover, agencies had to navigate international parentage laws, such that in the event a surrogate gave birth outside of Ukraine, the intended parents would still retain all parental rights to the baby.

Surrogacy After 'Dobbs'

The potential future of surrogacy in light of the recent Supreme Court decision in *Dobbs v. Jackson Women's Health Organization*, No. 19-1392, 597 U.S. __ (2022), which overruled *Roe v. Wade*, 410 U.S. 113 (1973), is uncertain in the states that will outlaw abortion. Although neither the *Dobbs* majority nor anti-abortion activists seem to be targeting IVF procedures or surrogacy at the moment, the legislation that has the potential to be enacted in such states in the future could affect surrogacy, since *Dobbs* assigns the authority to regulate abortion to the states. *Id.* at 69.

New York is a state in which abortion will remain lawful. Otherwise, New York's CPSA's Gestational Surrogates' Bill of Rights which gives surrogates the right to make any and all health and welfare decisions for themselves and their pregnancy—including choosing whether to terminate the pregnancy and whether to keep or reduce the number of fetuses or embryos (FCA §581-602), would run afoul of the law. Since, according to

the *Dobbs* majority, life begins at fertilization, would the ability to choose whether to terminate the pregnancy remain a right? If surrogates are not entitled to the right to make decisions about their body and pregnancy, even if they are carrying someone else's baby, we could cross into a realm of unconstitutional indentured servitude—where the surrogate is not only bound by the pregnancy, but also by the surrogacy agreement and the intended parents' wishes.

Moreover, if state laws simply ban abortion beginning at conception, but do not distinguish between conception in a womb and conception in a lab, the consequences of these laws may affect IVF by placing restrictions on the disposal, retention, and genetic testing of frozen embryos. Jan Hoffman, *Infertility Patients and Doctors Fear Abortion Bans Could Restrict IVF*, *The N.Y. Times* (July 5, 2022). The enactment of such laws could result in the prosecution of physicians and their patients for embryo destruction, should frozen embryos either not survive being thawed for implantation, or discarded frozen embryos be destroyed.

Conclusion

The law must keep up with the advances in “Baby-Making Technology.” Public policy is a moving target. The *Baby M* case was decided more than 30 years ago. We have moved on. Today, families created with the help of surrogates are no longer curiosities. Men can arrange for a gestational surrogate or a traditional surrogate to carry the egg that has been fertilized by his sperm. He can have a biological child. Women who cannot or do not wish to carry a pregnancy can do the same with their embryos. Surrogacy has even made its way into fiction, such as *The Latecomer*, which tells the story of a New York City family that created four frozen embryos through IVF, three of which led to triplets who were then leaving

for college, and the fourth of which—the “latecomer”—was implanted into a surrogate 18 years after it was initially frozen. Jean Hanff Korelitz, *The Latecomer*, Celadon Books (2022). As for the new technologies generally, a CDC report released in 2017 revealed that one million babies born in the United States between 1987 and 2015 were the result of assisted reproductive technology. The CDC also reported, based on preliminary 2020 data, that of four million births per year, close to 2%, or up to 80,000 births were the result of assisted reproductive technology.

My first article on surrogacy posited that legalizing surrogacy presented a dilemma because it could open a Pandora’s Box of unintended consequences. This article has discussed some of those unintended consequences. However, we have all seen the joy experienced by “intended parents” in creating their yearned-for family, and the surrogate in helping to create that family. The benefits of creating a family abundantly outweigh the burdens. Surrogacy provides multitudes with the ability to have families. There is no dilemma.

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