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Surrogacy Agreements Approved by New York...With Provisos

A in-depth discussion of the newly enacted "Child-Parent Security Act of 2020" recently signed into law. The Act establishes the legal framework for "surrogacy contracts," in New York.

By **Harriet Newman Cohen and Tim James** | July 24, 2020 at 03:00 PM

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Twenty-eight years after it outlawed surrogacy contracts—contracts calling for a woman to carry and bear a child and then (along with her spouse, if any) renounce all parental rights to the child, turning the child over to another individual or couple for adoption, regardless of whether there is payment involved—New York State has turned in a different direction, allowing for legally enforceable surrogacy agreements, subject to strictures intended to address the numerous and diverse concerns that have long fueled opposition to surrogacy.

The Child-Parent Security Act (CPSA) was enacted in April, 2020 and will take effect on Feb. 15, 2021. Encompassing amendments and additions to the Domestic Relations Law (DRL), the Family Court Act (FCA), the Public Health Law, the General Business Law (GBL), the Estates, Powers and Trusts Law, the Social Services Law and the Insurance Law, the CPSA establishes a statutory framework for various forms of assisted reproduction, with a focus on providing legal parentage to "intended parent(s)" without the necessity of adoption proceedings, without the danger of a successful lawsuit brought by a surrogate or donor who has a change of heart, and

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without respect to the gender or (for the most part) marital status of the intended parent(s),while protecting the rights (and limiting the legal liabilities) of surrogates and donors of gametes (eggs and sperm) and embryos, and establishing the legal rights of children born via assisted reproduction. But this article will focus on the CPSA's provisions with respect to surrogacy.

The CPSA's surrogacy provisions are the culmination of a 14-year effort by its lead sponsor in the Assembly, Amy Paulin (D-Scarsdale), to navigate and accommodate the multitude of ethical and social-equity concerns that led to the broad ban on surrogacy contracts enacted in 1992 (DRL §§121-124 ["the 1992 Law"]) and kept that ban in place even as almost all other states allowed such contracts in one form or another. Those concerns included: "baby-selling" (or "baby-buying"); eugenics; informed consent; the physical and emotional health of the surrogate; the potential for exploitation of women, and especially poor women; and the right of the surrogate to control her body and make decisions regarding her own health, including decisions about whether to terminate, partially terminate or continue a pregnancy.

Moreover, as emphasized by the New Jersey Supreme Court, in *Matter of Baby M*, 109 N.J. 396 (1988), which touched on many of those issues, the contract at issue in that case (typical of such contracts) purported to provide for a termination of the parental rights of the surrogate, *without* the statutorily prescribed prerequisites for a termination of parental rights. *Id.* at 425-428.

The *Baby M* case involved what is known as "genetic surrogacy," in which an egg of the surrogate is fertilized by the sperm of a man not her husband (in *Baby M*, the intended father, whose wife was the intended mother), either *in vitro* (followed by implantation in the surrogate's womb) or via artificial insemination. Under the terms of the surrogacy agreement, the intended father was to pay the surrogate $10,000 at the time when she turned Baby M over to the intended parents.

After the child was born, however, the surrogate and her husband (the legally presumptive father of a child born to his wife, who was also a party to the surrogacy contract) refused to consent to the contractually agreed-to adoption by the biological father and his wife (the "intended parents"), and even absconded with the baby from New Jersey to Florida after the intended parents started a court case seeking enforcement of the contract. Ultimately, the New Jersey Supreme Court declared the surrogacy contract void (*Id.* at 443-444), after concluding that "This is the sale of a child, or at the very least, the sale of a mother's right to her child, the only mitigating factor being that one of the purchasers is the father" (*Id.* at 437-438).

But the court affirmed the finding of the trial court that, as between the two biological parents, an award of custody to the biological father was in the best interests of Baby M. *Id.* at 457-459. At the same time, however, the court held that, since there had been no valid termination of the surrogate's parental rights, she was entitled to visitation (*Id.* at 463). The cased received extensive news coverage and provided the impetus for the 1992 legislation that outlawed surrogacy contracts in New York. See H. Cohen and K. Marinaccio, "Surrogacy in New York: Bane or Boon?," N.Y.L.J., July 30, 2018, which discussed an earlier version of the CPSA.

In *Adoption of Baby Girl L.J.*, 132 Misc.2d 972 (Surr. Ct. Nassau Co. 1986), a pre-*Baby M.* case, the genetic surrogacy agreement in question also involved a $10,000 fee to the surrogate, but the surrogate and the intended parents were united in support of the requested adoption by the biological father and his wife, so the court was not being asked to *enforce* the surrogacy agreement. The court expressed concern about the "moral and ethical considerations" raised by the agreement (*Id.* at 973-974), but granted the adoption, observing that "The reality is that the child is in being and of necessity must be reared by parents" (*Id.* at 974), and finding that approval served the child's best interests (*Id.*). The court raised the issue of whether it should prohibit the $10,000 payment to the surrogate provided for in the contract, but concluded that the "new era of genetics" was "not contemplated…by the New York Legislature when it enacted [Social Services Law §374(6)] prohibiting payments in connection with an adoption," and, therefore, "Current legislation does not expressly foreclose the use of surrogate mothers or the paying of compensation to them under parenting agreements." *Id.* at 978.

But by the time *Adoption of Paul*, 146 Misc.2d 379 (Family Ct. Kings Co. 1990) was decided, two years after *Baby M*, the winds were blowing in a different direction. As in *Baby M* and *Baby Girl L.J.*, *Adoption of Paul* involved a genetic surrogacy agreement that called for a payment of $10,000 fee to the surrogate (apparently, the going rate in that era). As in *Baby Girl L.J.*, there was no change of course by the surrogate, who was prepared to consent to an adoption by the biological father and his wife, so the court was not faced with a request to *enforce* the agreement. But the court expressly rejected the reasoning of *Baby Girl L.J.*, which it described as the "only…reported New York case squarely in point" (*Id.* at 381), instead following *Baby M*:

> My analysis of the clear language of the statutes governing adoption, together with the policy of this State as articulated in caselaw, leads me to the conclusion, as stated by the New Jersey Supreme Court in *Baby M.*, that the contract at Bar provides for "the sale of a child, or, at the very least, the sale of a mother's right to her child" in contravention of the law of this State. Such contracts are, therefore, void under the law of the State of New York as it exists at present.

Adoption of Paul, 16 Misc.2d at 384-385. (Citation omitted.)

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Accordingly, the court stated, it would accept the surrogate's judicial consent to the adoption of Paul "only if [she] will swear under oath before this court that she has not and will not request, accept or receive the $10,000 promised to her in exchange for the surrender of her child," rendering her "free of the intimidation inherent in her contractual commitment to give up her child" and therefore able to grant a consent that was "truly voluntary and motivated exclusively by Paul's best interests." *Id.* at 385.

The court likewise conditioned approval of the adoption on the receipt of affidavits by the biological father and his wife "evidencing their intent not to pay any compensation or thing of value to any party in exchange for the child." *Id.*

The 1992 Law was sweeping in its prohibition, barring both genetic surrogacy (defined above) and "gestational surrogacy," in which the surrogate carries to term an egg from *another* woman, fertilized *in vitro* by the sperm of a man not the surrogate's husband, with the intent of relinquishing the newborn baby to the intended parent(s), regardless of whether the surrogate was to be paid for her services or was acting purely with a charitable intent to facilitate parenthood for the intended parents. All such agreements were "hereby declared contrary to the public policy of this state and…void and unenforceable." DRL §122.

But the 1992 Law's bark was worse than its bite, at least with respect to the parties to the agreement. It provided no sanction for entering into a surrogacy agreement where no payment was involved. Giving or receiving payment for a surrogate's services was expressly forbidden (DRL §123[1]), but the only penalty faced by the parties to an agreement calling for payment was "a civil penalty not to exceed five hundred dollars" (DRL §123[2]).

Moreover, DRL §124(1) specified that in any legal proceeding between the surrogate (referred to in the statute as the "birth mother") and one or more of the child's genetic parents or grandparents "regarding parental rights, status or obligations" with respect to the child, "the court shall not consider the birth mother's participation in a surrogate parenting contract as adverse to her parental rights, status, or obligations."

And the 1992 Law contained no requirement akin to that imposed by the court in *Adoption of Paul*, which required, as a condition of its approval of the proposed adoption by the intended parents, that the surrogate swear that she would not request or accept the promised $10,000 payment and that the intended parents swear that they would not make any payment to the surrogate "in exchange for the child."

The 1992 Law reserved its harshest consequences exclusively for "[a]ny other person or entity who or which induces, arranges or otherwise assists in the formation of a surrogate parenting contract for a fee, compensation, or other remuneration or otherwise violates this section," subjecting such violators to a civil penalty of up to $10,000, along with forfeiture to the state of any payments received, and providing that such a person or entity who violates that prohibition *after* having previously

been penalized for such a violation "shall be guilty of a felony." This disincentivized agencies, lawyers and doctors especially from participating in paid surrogacy agreements.

Thus, the courts have typically not viewed participation in a legally proscribed surrogacy contract as grounds for denying adoption, or legal recognition of parentage, to intended parents. *See*, *e.g., Matter of John*, 174 A.D.3d 89, 94 (2d Dept. 2019) (Scheinkman, P.J.) ("the fact that a child was born as the result of an unenforceable surrogacy agreement does not foreclose an adoption of the resulting child, upon the surrogate's consent"); *Matter of Frank G. v. Renee P.F.*, 142 A.D.3d 928, 930 (2d Dept. 2016) ("Although the surrogacy contract is not enforceable against [the surrogate]...it is evidence of the parties' unequivocal intention that Frank and Joseph become the parents of the children"); *T.V. v. New York State Department of Health*, 88 A.D.3d 290 (2d Dept. 2011) (where the genetic [and intended] parents entered into a gestational surrogacy agreement with a friend, and Family Court granted the genetic father an order of filiation, Supreme Court erred in dismissing the genetic mother's request for an order declaring her the child's mother, notwithstanding absence of a statutory provision for declaration of maternity); *In re Adoption of J.J.*, 44 Misc.3d 297 (Fam. Ct. Queens Co. 2014) ("where a surrogacy contract exists and an adoption has been filed to establish legal parentage, such surrogacy contract does not foreclose an adoption from proceeding.... The court is not being asked to enforce the surrogacy contract"); *Doe v. New York City Board of Health*, 5 Misc.3d 424 (Sup. Ct. N.Y. Co. 2004) (where genetic [and intended] parents entered into gestational surrogacy agreement with sister of genetic mother, but no adoption had taken place, ordering that Board of Health issue [second] birth certificates for each of the triplets at issue, naming the intended parents as the parents of each child and sealing the first birth certificates for the children, naming only the surrogate as a parent). Where adoption was at issue, such cases frequently cited *Matter of Jacob*, 86 N.Y.2d 651 (1995) and its teaching that adoption statutes, in keeping with their "legislative purpose," must be construed "in harmony with the principle that adoption is a means of securing the best possible home for a child" (*Id.* at 657-658 [citation omitted]).

The CPSA legalizes only *gestational* surrogacy agreements between the intended parent(s) and the surrogate (and her spouse, if any, who is waiving any parental rights with respect to a child born to his/her spouse). The prohibitions and penalties set forth in DRL §§122 and 123 in the 1992 Law remain, but they now apply only with respect to *genetic* surrogacy agreements, which remain proscribed, even where no payment is involved. It is not entirely clear why this distinction was made—allowing agreements for a surrogate to carry a fertilized egg to term on behalf of the intended parent(s), but only if the egg was donated by another woman, and not by the surrogate herself—but it seems likely that it is a residual legacy of the *Baby M* case, intended to avoid the potential for the courts to be placed in the position of enforcing a surrogacy contract against a woman who is *both* the biological mother and the gestational mother of the baby in question.

This exclusion from the legalization provisions of the CPSA is emphasized in the new Family Court Act (FCA) §581-401(b) and §581-402(c)(3). In an interview for this article, Assembly Member Paulin commented that, as a practical matter, this limitation is unlikely to have much of an impact on the availability of surrogacy as an option, as genetic surrogacy has become very rare.

The CPSA, in the new FCA §581-403(a), requires that a surrogacy agreement be set forth in a writing signed by the intended parent(s), the surrogate, and the surrogate's spouse, if any (unless the surrogate and the spouse are legally separated or have been living separate and apart for at least three years pursuant to a written separation agreement).

The CPSA contains numerous requirements intended to address the longstanding concerns about surrogacy mentioned above.

Concerns about "baby-selling" and eugenics are addressed in the new FCA §§581-501 and 581-502, concerning "reimbursement" and "compensation" of surrogates and donors of gametes or embryos.

Per §581-502(a), compensation may be paid to surrogates and donors "based on medical risks, physical discomfort, inconvenience and the responsibilities they are undertaking," but not "to purchase gametes or embryos or for the release of a parental interest in a child." Per §581-502(b), the compensation "must be reasonable and negotiated in good faith between the parties" and payments to a surrogate "shall not exceed the duration of the pregnancy and [a] recuperative period of up to eight weeks" after the birth[s]. Per §581-502(e) "Compensation to an embryo donor shall be limited to storage fees, transportation costs and attorneys' fees."

In addition, §581-501 provides that an egg or sperm donor may be reimbursed "for economic losses incurred in connection with the donation which result from the retrieval or storage of gametes or embryos."§581-502 (c) and (d) are obviously intended to eliminate, or at least discourage, eugenic considerations. Subsection (c) specifies that "Compensation may not be conditioned upon the purported quality of genome-related traits of the gametes or embryos, while subsection (d) contains the same prohibition with respect to "actual genotypic or phenotypic characteristics of the donor or any resulting children."

The CPSA devotes extensive attention to ensuring "informed consent" by the parties —and especially by the surrogate.

To begin with, whereas one may normally enter into a legally binding contract at the age of 18 (General Obligations Law §3-101[1]), the new FCA §581-402(a)(1) requires that a surrogate (but not the other parties to the agreement) must be at least 21 years old to enter into a binding surrogacy agreement. In addition, the CPSA has provisions to ensure that all parties receive appropriate legal advice, and that the attorneys providing such advice are free of financial conflicts of interest; that the surrogate receives advice about the potential medical consequences; and that the surrogate is able to receive psychological counseling with respect to the potential emotional consequences.

Pursuant to the new FCA §581-402 (a)(6), the surrogate and her spouse (if any) must be represented "throughout the contractual process and the duration of the contract" by independent legal counsel of their choosing, whose fees shall be paid by the intended parent(s) (except that, where the surrogate is not to be compensated, she may waive the right to have the intended parent(s) pay for such legal representation).

Per the new FCA §581-402(b), the intended parent(s) must likewise be represented by independent legal counsel throughout the entire process. To ensure the integrity of the legal advice received by the parties, the new GBL §§1403(b) and © provide that a surrogacy program (as defined in the new GBL §1400[c]) "[m]ay not be owned or managed, in any part, directly or indirectly, by any attorney representing a party to the surrogacy agreement" and "may not pay, or receive payment, directly or indirectly, to or from" any such attorney. (These prohibitions presumably apply to a surrogacy program that played a role in bringing together the parties to the surrogacy agreement in question.)

To assure that a prospective surrogate understands the potential health and mental-health implications of entering into a surrogacy agreement, the new FCA §581-402(a)(4) requires that she have "completed a medical evaluation with a health care practitioner relating to the anticipated pregnancy" prior to entering into the agreement, and the new FCA §581-402(a)(5) requires that she

> has given informed consent for the surrogacy after the licensed health care practitioner inform[s] [her] of the medical risks of surrogacy[,] including the possibility of multiple births, risk of medications taken for the surrogacy, risk of pregnancy complications, psychological and psychosocial risks, and impacts on their personal lives[.]

The CPSA also seeks to ensure that the surrogate will have necessary physical and mental health care. The new FCA §581-402(a)(7) specifies that the surrogate, prior to any medication or treatment to facilitate the surrogacy, shall "obtain a comprehensive health insurance policy"—to be paid for by the intended parent(s)—whose coverage includes not only care directly related to the surrogacy and pregnancy, but also "major medical treatments, hospitalization and behavioral health care," with such coverage to extend until one year after the birth of the contemplated child(ren) or one year after the pregnancy otherwise ends. The intended parents are also to pay for any unreimbursed medical costs related to the pregnancy incurred during the same time period. A surrogate who is not receiving compensation may waive the requirement that the intended parent(s) pay for such insurance and/or such unreimbursed costs. The new FCA §581-605 specifies that the surrogate has the right to have an insurance policy that "covers behavioral health care and will cover the cost of psychological counseling to address issues related to their participation in a surrogacy."

The CPSA is also protective of the personal autonomy of the surrogate, heading off disputes about whether the contract gives the intended parent(s) the right to a say in decisions related to the pregnancy. The new FCA §§581-403(i)(v), (vi) and (vii) require that a surrogacy agreement must "permit the [surrogate] to make all health and welfare decisions regarding [herself] and [her] pregnancy[,] including[,] but not limited to, whether to consent to a cesarian section or multiple embryo transfer;" must "permit the [surrogate] to utilize the services of a health care practitioner of [her] choosing;" and "shall not limit the right of the [surrogate] to terminate or continue the pregnancy or reduce or retain the number of fetuses or embryos [she] is carrying."

As shown above, much of the CPSA is devoted to establishing and safeguarding the rights of the surrogate. For the intended parent(s), however, there is also a big payoff as is articulated in the new FCA §581-406:

> Upon the birth of a child conceived by assisted reproduction under a surrogacy agreement that complies with [CPSA requirements], *each intended parent is, by operation of law, a parent of the child and neither the [surrogate] nor the [surrogate's] spouse is a parent of the child*.

(Emphasis added)

Much has changed in family law since the 1992 law was enacted. Our divorce laws have changed. Our marriage laws have changed. The possibilities for formation of legally recognized families have changed—especially for members of the LGBT community, but, more broadly, for those who have longed to start families but have faced biological, societal or legal barriers. The CPSA will contribute to the breaking down of such barriers.

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