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**REPORT ON LEGISLATION BY THE
LESBIAN, GAY, BISEXUAL & TRANSGENDER RIGHTS COMMITTEE,
CHILDREN AND THE LAW COMMITTEE,
COUNCIL ON CHILDREN,
FAMILY COURT AND FAMILY LAW COMMITTEE,
HEALTH LAW COMMITTEE,
MATRIMONIAL LAW COMMITTEE AND THE
SEX AND LAW COMMITTEE**

A.2005-A / S.1505-A (Budget Article VII) – Part QQ

Enacts into law major components of legislation necessary to implement the state public protection and general government budget for the 2019-2020 state fiscal year; to amend the Family Court Act, in relation to establishing the Child-Parent Security Act; and to repeal section 73 and article 8 of the Domestic Relations Law, relating to legitimacy of children born by artificial insemination and surrogate parenting contracts.

Child-Parent Security Act

THIS PROVISION IS APPROVED¹

I. INTRODUCTION

The New York City Bar Association supports the Child-Parent Security Act of 2019 (“CPSA” or the “Bill”). The Bill would repeal New York’s prohibition on compensated gestational surrogacy and New York’s alternative insemination statute, replacing it with a comprehensive scheme for recognizing the parentage of children born via surrogacy arrangements and donor conception.

II. SPERM, EGG, AND EMBRYO DONATION: CURRENT NEW YORK LAW AND THE CPSA

a. New York Law Has Taken an Inconsistent and Unpredictable Approach to Family Building with the Assistance of Sperm, Egg, and Embryo Donors

New York’s current donor conception statute, Domestic Relations Law (“DRL”) § 73, to be repealed by the Bill, is a narrow, highly technical statute limited to sperm donation (the statute

¹ See also Section V, *infra* (commenting in support of the Bill’s current provisions and suggesting that further restrictions with respect to residency and court approval are unnecessary and raise concerns).

predates in vitro fertilization technology and therefore does not apply to egg or embryo donation) which bestows an irrebuttable presumption of parentage to intended parents only if they are married as “husband and wife” (the statute has been interpreted in a gender neutral fashion to apply to same sex married couples),² if the insemination procedure is performed by a doctor, and if both spouses execute a notarized consent to the insemination.³ In other words, the statute applies only to a married couple conceiving through sperm donation who meets specific conditions. Families falling outside of that construct do not receive the benefit of the statute.

The statute leaves children born via sperm, egg, and embryo donation to unmarried couples and single women conceiving through donor insemination with a legal ambiguity over which adult(s) constitute their parents. For those children and their intended parents, the available options can be costly and uncertain. One of the biggest uncertainties for such families is the possibility of a known donor who later seeks to assert parental rights to a child of the intended parents or parent. While recent case law holds that incidental contact between the known donor and child are insufficient to convert the donor into a legal parent, older cases have reached (and present the specter of) varying results.⁴ An unmarried partner can obtain parental rights pursuant to a second-parent adoption,⁵ but it is costly and requires a home study, criminal background check, and a child abuse clearance.⁶ An unmarried partner may also obtain parental rights as a de facto parent,⁷ but doing so would almost certainly require litigation. A single woman conceiving a child with anonymous donor sperm is recognized as the child’s only legal parent,⁸ but courts have shown reluctance to recognize donor arrangements for single women in the known donor context.⁹ While New York Courts have afforded a degree of recognition to egg donor arrangements,¹⁰ embryo donation has yet to receive consideration by New York courts, leaving the legal status of children conceived via embryo donation and their intended parents uncertain.

² DRL § 10-a(2); *Wendy G-M. v. Erin G-M.*, 45 Misc. 3d 574, 586-87 (Sup. Ct. Monroe Cnty. 2014).

³ DRL § 73; *Christopher YY. v. Jessica ZZ.*, 2018 N.Y. App. Div. LEXIS 489, at *9-10 (3d Dep’t January 25, 2018).

⁴ *Compare Joseph O. v. Danielle B.*, 2018 N.Y. App. Div. LEXIS 1180, at *7-8 (2d Dep’t 2018) (holding that a known donor is estopped from seeking custody and visitation even where there are incidental post-birth contacts between the donor and child), *with Thomas S. v. Robin Y.*, 209 A.D.2d 298 (1st Dep’t 1994).

⁵ *Christopher YY.*, 2018 N.Y. App. Div. LEXIS 489, at *10-11 (observing that DRL § 73 is not the “exclusive means” for a non-biological spouse to obtain parental rights) (citing *Matter of Kelly S. v. Farah M.*, 139 A.D.3d 90 (2d Dep’t 2016); *Laura WW. v. Peter WW.*, 51 A.D.3d 211 (3d Dep’t 2008)); *see also In re Jacob*, 86 N.Y.2d 651 (1995).

⁶ DRL §§ 115-d, 116.

⁷ *Brooke S.B. v. Elizabeth A.C.C.*, 28 N.Y.3d 1 (2016) (holding that if a pre-conception agreement exists between the biological parent and an unmarried partner, the partner may be considered a “parent” entitled to seek custody and visitation); *J.C. v. N.P.*, 2017 NYLJ LEXIS 2831 (Fam. Ct. Nassau Cnty. September 27, 2017) (in the absence of pre-conception intent, biological parent was estopped from denying her unmarried partner’s parental interest).

⁸ *Matter of Michael*, 166 Misc. 2d 973 (Sur. Ct. Bronx Cnty. 1996).

⁹ *E.g., Matter of P.D. v. S.K.*, 17 Misc. 3d 1133(A) (Fam. Ct. Nassau Cnty. 2007); *Matter of Thomas S. v. Robin Y.*, 157 Misc. 2d 858 (Fam. Ct. N.Y. Cnty. 1993), *rev’d* 209 A.D.2d 298 (1st Dep’t 1994).

¹⁰ In *McDonald v. McDonald*, 196 A.D.2d 7 (2d Dep’t 1994), a New York court found that children conceived through egg donation were the legal children of their intended mother despite her lack of genetic connection to the children.

b. The CPSA Would Streamline New York’s Inconsistent and Uncertain Approach to Donor Conception

The CPSA would streamline the legal status of children conceived through sperm, egg, and embryo donation and their intended parents by permitting a donor to waive his/her parental rights in writing. It would also permit a family, whether two parents or one, married or unmarried, different-sex or same-sex, to obtain a judgment of parentage entitled to full faith and credit under the United States Constitution, clarifying the status of the child, the intended parent(s), and the donor nationwide. The parentage judgment would dispense with the need for a second parent adoption and its onerous costs and requirements. Families who nonetheless wanted to complete a second-parent adoption would be permitted to do so.¹¹

III. COMPENSATED SURROGACY: CURRENT NEW YORK LAW AND THE CPSA

a. Current New York Law on Surrogacy Leaves Children, Intended Parents and Surrogates Exposed to Significant Risk

Currently, New York law criminalizes compensated surrogacy agreements.¹² New York law permits compassionate surrogacy, in which one person carries a child for another without any compensation provided to the carrier.¹³ Most commonly, a family member will carry a child for intended parents, but occasionally friends, or even strangers, will agree to be a compassionate carrier. By statute, the intended parents can pay for medical expenses during the entire pregnancy and can provide assistance that would otherwise be permitted by the adoption statute, such as maternity clothing, legal fees, and certain living expenses during the sixty days before the child is born and thirty days after.¹⁴

This regime’s limitations on establishment of legal parentage and payment of expenses leaves children conceived via compassionate surrogacy, their intended parent(s), and a compassionate surrogate in a tenuous legal position and exposes each party to a significant amount of risk. Intended parents, particularly if they have no genetic connection to the child, may not be able to establish their parental rights to a child who would not exist but for their time and effort in bringing about his or her conception. This is especially so if the compassionate surrogate changes her mind in the process or even after the birth and decides to assert her parental rights, sparking lengthy legal battles such as the controversial *Baby M* case, where the New Jersey Supreme Court

¹¹ One reason a family might want to complete a second-parent adoption would be to secure citizenship in a non-biological parent’s home country, if the parent was living in the United States on a temporary basis or maintained dual citizenship. Adoption decrees are afforded more recognition outside of the United States than a parentage judgment, which often has no analogue in other countries.

¹² “Surrogate parenting contracts are hereby declared contrary to the public policy of this state, and are void and unenforceable.” DRL § 122. Such contracts are illegal in New York and those in violation are subject to fines. DRL § 123.

¹³ *Id.*

¹⁴ DRL § 123.

left intact a carrier's parental rights and ordered that the child was to have visitation with the carrier – a realistic possibility in a New York compassionate case if an egg donor were used to conceive the child.¹⁵

Gestational carriers face even greater uncertainty.¹⁶ In a state that recognized enforceable surrogacy arrangements, a carrier would have a mechanism to require intended parents to accept parental responsibility for the child, without regard to physical or other impairments. In New York, however, the surrogate is considered the child's legal parent and her spouse, if she is married, would be recognized as the child's second legal parent, meaning that a carrier might find herself forced to accept complete or shared parental responsibility for a child to whom she never intended to be a parent and to whom she has no genetic relation. The prohibition on providing expenses could have the additional effect of placing a compassionate carrier in serious and perhaps ruinous economic hardship if she were placed on physician-ordered bed rest for part of the pregnancy. In a compensated arrangement, the intended parents would typically be obligated to reimburse her lost wages. In New York, those payments would violate the law. Even if her regular monthly expenses were met, her family would be without her contribution to the household income during that period and would face that economic hardship. A typical compensated arrangement also would include a life insurance policy for the carrier in the event she died as a result of the pregnancy she carried for the intended parents. New York does not permit this type of benefit to the carrier either. It is no wonder that so few women in New York are willing to carry a pregnancy for another given these risks.

The available options to remedy or ameliorate the foregoing concerns are limited, inadequate and expensive. In order to establish the legal parentage of the intended parents, an intended father would be required to initiate a paternity action so long as he was the child's genetic father. As for the intended mother, in *T.V. v. N. Y. State Dept. of Health*, the Appellate Division Second Department acknowledged the availability of a maternity action and permitted an intended mother who was the child's genetic parent to obtain a declaration that she, not the gestational carrier, was the child's legal mother.¹⁷ Unlike an intended genetic parent, an intended parent who has no genetic relation to the child must go through an adoption proceeding in order to terminate the gestational carrier's legal rights so that he or she can gain legal parentage to the child.

b. The Prohibition of Compensated Surrogacy Forces Intended Parents to Travel Out of State to Pursue Surrogacy

New York's criminalization of compensated surrogacy forces New York families pursuing compensated surrogacy to travel to other states, incurring significant travel costs and limiting their

¹⁵ *In re Baby M*, 537 A.2d 1227 (1988).

¹⁶ In gestational surrogacy, an embryo genetically unrelated to the carrier is transferred to her uterus and she carries the child to term. In "traditional surrogacy," the carrier both provides the egg which is used to conceive the child and carries the pregnancy. Gestational surrogacy has become more the norm, and "traditional surrogacy" is now quite rare.

¹⁷ 88 A.D.3d 290 (2d Dep't 2011).

ability to form a relationship with their child's carrier.¹⁸ In the United States, carriers and intended parents are rarely anonymous; instead, they are expected to meet each other and form a relationship. Typically, they would meet at the time they are matched in order to confirm that the relationship is a good fit.¹⁹ Often, intended parents are present at the time of the embryo transfer.²⁰ Most intended parents try to attend as many medical appointments with the carrier's obstetrician as possible, but at a minimum they will attend the ultrasound at the 20th week of the pregnancy, and then return for the birth of the child.²¹ Having to travel long distances can impede the relationship between the surrogate and the intended parents, which is necessary to build trust among the parties. Further, New York families may also find themselves traveling to states where surrogacy is not adequately supported in the law, leaving them exposed to significant legal and financial risks.²²

c. The CPSA Would Permit Compensated Surrogacy with Appropriate Safeguards for Gestational Surrogates and Intended Parents

In its current form, the CPSA replaces New York's statutory ban on compensated surrogacy and replaces it with a comprehensive scheme for recognizing surrogacy arrangements, while protecting the interests of the carrier and the parents. The Bill requires independent legal counsel for the carrier and carrier's spouse, if married, and the intended parents, medical evaluations, health insurance for the carrier, placement of any compensation in an independent escrow account, and a commitment that the intended parents will accept custody and financial responsibility of the child immediately upon birth.

Intended parents would be able to obtain a judgment of parentage for a child conceived with the assistance of a gestational carrier without regard to their genetic connection to the child, their marital status, sexual orientation, or whether they are partnered or single. The ability of intended parents who have no genetic connection to their child to obtain a parentage judgment is important to single women, families utilizing donated embryos, and individuals who are not able to produce eggs or sperm for a variety of medical reasons.

¹⁸ Paul G. Arshagouni, *Be Fruitful and Multiply, by Other Means, if Necessary: The Time Has Come to Recognize and Enforce Gestational Surrogacy Agreements*, 61 DePaul L. Rev. 799 (2012).

¹⁹ Heather Jackson, *Labor of Love* 72-113 (2016).

²⁰ *Id.*

²¹ Eric Rosswood, *Journey to Same-Sex Parenthood* 98-102, 109-12 (2016).

²² See generally *Gestational Surrogacy Law Across the United States: State-by-State Interactive Map for Commercial Surrogacy*, Creative Family Connections, <http://www.creativefamilyconnections.com/#!/surrogacy-law-by-state/f49jq> (describing the varying legal treatment of gestational surrogacy among the states). (All websites cited in this letter were last visited on February 25, 2019.)

IV. MOST STATES PERMIT GESTATIONAL SURROGACY ARRANGEMENTS

As of 2019, forty-eight states and the District of Columbia permit the practice of compensated gestational surrogacy, by statute, case law, or judicial practice.²³ New York joins only Michigan in prohibiting the practice.²⁴ The current trend is toward permitting compensated gestational surrogacy. In recent years, New Jersey, Vermont, Washington, Maine, New Hampshire, Nevada, and the District of Columbia have enacted laws permitting or codifying the practice in those jurisdictions.²⁵ And in 2018, the Iowa Supreme Court announced a decision supportive of the intended parents' rights in the event of a custody dispute over the child.²⁶

The developments in reproductive medicine, the transition from traditional to gestational surrogacy as the prevailing practice, and the experience of other states lay the foundation for New York to revisit the legal treatment of the practice.²⁷

²³ *Gestational Surrogacy Law Across the United States: State-by-State Interactive Map for Commercial Surrogacy*, Creative Family Connections, <http://www.creativefamilyconnections.com/!surrogacy-law-by-state/f49jq>

²⁴ The Michigan Surrogate Parenting Act, MCL §§ 722.855 and 722.857 makes all surrogacy contracts, agreements, or arrangements “void and unenforceable as contrary to public policy” and subject to criminal penalties.

²⁵ New Jersey Gestational Carrier Agreement Act, N.J. Stat. 9:17-60, *et seq.* (signed by the governor on May 30, 2018); Vermont Parentage Act of 2018, Act 162 (H.562) (signed by the governor on May 22, 2018); 2018 Wash. Sess. Laws Chap. 6 (enacting the 2017 Uniform Parentage Act including compensated surrogacy provisions, signed by the governor on March 6, 2018); Maine Parentage Act, Me. Rev. Stat. tit. 19-A, §§ 1931-1939; N.H. Rev. Stat. Ann. § 168-B; Nev. Rev. Stat. §§ 126.500-126.810; D.C. Code §§ 16-401-16-412.

²⁶ *P.M. v. T.B.*, 2018 Iowa Sup. LEXIS 14 (February 16, 2018).

²⁷ Furthermore, social science research supports the recognition of gestational surrogacy as a legally permissible practice in New York. *See* New York State Task Force on Life and the Law, *Revisiting Surrogate Parenting: Analysis and Recommendations for Public Policy on Gestational Surrogacy* (2017), https://www.health.ny.gov/regulations/task_force/reports_publications/docs/surrogacy_report.pdf (relying on the available research on surrogates and the resulting children, as well as the experience of the vast majority of American states, the Task Force majority concluded that compensated gestational surrogacy is ethically acceptable with appropriate safeguards for all of the participants in the arrangement). *See* Susan Golombok et al., *Children Born Through Reproductive Donation: A Longitudinal Study of Psychological Adjustment*, 54 *Journal of Child Psychology and Psychiatry* 653, 657 (2013) (longitudinal research conducted in the United Kingdom, which followed children conceived via gestational surrogacy from birth to age ten and concluded that the children's psychological development was within the country's normal range); Katherine H. Shelton et al., *Examining differences in psychological adjustment problems among children conceived by assisted reproductive technologies*, 33 *International Journal of Behavioral Development* 385–392, 385-92 (2009) (A study of more than 700 children ages 5-9 years old, concluded that children conceived with assisted reproductive technologies, whether they are genetically related or unrelated to their parents or born by gestational surrogacy, do not differ in their levels of psychological adjustment nor do they appear to be at great risk of psychological adjustment problems in middle childhood compared to children conceived without assisted reproductive technologies.); Vasanti Jadva, Susan Imrie & Susan Golombok, *Surrogate Mothers 10 Years On: a longitudinal study of psychological well-being and relationships with the parents and child*, 30 *Human Reproduction* 373, 373-79 (2014) (In a study conducted ten years after the birth of the surrogacy child, surrogate mothers scored within the normal range for self-esteem and did not show signs of depression or regret about their surrogacy. In fact, many tended to form a stronger bond with the intended parents than with the child and reported being fulfilled by the ability to help a childless couple.)

V. COMMENT: REJECT RESIDENCY AND PRE-EMBRYO TRANSFER COURT APPROVAL REQUIREMENTS

Some have suggested that the Bill be modified to include a requirement that the carrier and intended parents be New York residents,²⁸ and a requirement that the carrier agreement be ratified by a court prior to the embryo transfer occurring.²⁹ We have concerns about these two recommendations.

It has been suggested that the residency requirement would prevent New York from becoming a destination for international and out-of-state families, and would ensure that participants have ties to the community. As currently drafted, the Bill requires either the intended parents or the surrogate to be a resident of New York, ensuring that the parties have a sufficient nexus to the state and ameliorating this concern. The proposal would also prevent a New York woman from carrying a child for a relative or friend who lives in another state or country, a cruel unintended consequence of the requirement.³⁰

Requiring “pre-implantation” or “pre-transfer” court approval raises serious questions. The process of obtaining medical, psychological, and legal clearance of a surrogacy arrangement itself takes between three and six months. If the parties then must wait for judicial review and approval of the arrangement, an additional delay of weeks or months will be introduced into the process. Not all surrogacy arrangements result in a successful pregnancy, meaning that scarce judicial resources will be used to review agreements that may be fruitless. In surrogacy arrangements in which an egg donor is used to conceive the child, as many as twenty percent of those arrangements do not result in a successful pregnancy; and if an intended mother is using her own eggs, the number of arrangements that do not result in a successful pregnancy can be much higher, depending on her age, egg quality, and other factors. The desire to ensure that a match is successful, coupled with not wanting to waste time and money on a pre-transfer court order should the attempt not result in a successful pregnancy, could motivate some families to forego attempts with an intended parent’s egg in favor of a donor. If the idea is to avoid any confusion as to parentage, then a parentage order can be obtained after a successful pregnancy, but prior to the child’s birth. Even in states that do not permit a pre-birth determination of parentage, hospitals, health insurance carriers, and others typically recognize the parentage and legal responsibilities of the intended parents.

²⁸ E.g., New York State Task Force on Life and the Law, *Revisiting Surrogate Parenting: Analysis and Recommendations for Public Policy on Gestational Surrogacy* (2017), n. 27, *supra*.

²⁹ *Id.*

³⁰ No state that permits gestational surrogacy requires that both the intended parents and the surrogate reside in the state for 6 months. See Finkelstein, Dougall, Kintominas & Olsen, *Surrogacy Law and Policy in the U.S.*, Columbia Law School Sexuality and Gender Law Clinic, https://web.law.columbia.edu/sites/default/files/microsites/gender-sexuality/files/columbia_sexuality_and_gender_law_clinic_-_surrogacy_law_and_policy_report_-_june_2016.pdf.

VI. CONCLUSION

The City Bar supports the Bill and urges its swift passage.

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Reissued March 2019