

10. Florida	491
11. Georgia.....	491
12. Hawaii	491
13. Idaho.....	491
14. Illinois	492
15. Indiana.....	492
16. Iowa.....	492
17. Kansas	492
18. Kentucky	493
19. Louisiana.....	493
20. Maine	493
21. Maryland.....	493
22. Massachusetts.....	494
23. Michigan	494
24. Minnesota.....	495
25. Mississippi	495
26. Missouri	495
27. Montana	495
28. Nebraska.....	495
29. Nevada	496
30. New Hampshire.....	496
31. New Jersey	496
32. New Mexico.....	496
33. New York.....	497
34. North Carolina.....	497
35. North Dakota.....	497
36. Ohio.....	498
37. Oklahoma.....	498
38. Oregon.....	498
39. Pennsylvania	499
40. Rhode Island	499
41. South Carolina.....	499
42. South Dakota.....	499
43. Tennessee	500
44. Texas	500
45. Utah.....	501
46. Vermont	501
47. Virginia	501
48. Washington	501
49. West Virginia.....	502
50. Wisconsin.....	502

462

WILLAMETTE LAW REVIEW

[51:459

PART IV: T

2015]

illegal in a few states, including New York and Michigan.⁹ It is crucial that the parties seeking a surrogacy arrangement make sure that they do so in a jurisdiction that enforces such arrangements, or, at a minimum, engage in a surrogacy arrangement with a clear understanding of the risk that their arrangement may not be enforceable. Attorneys can help the parties assess their risks.

Surrogacy arrangements are becoming more common. They have made parents out of people who thought that parenthood may never be possible. While it is difficult to track the number of families who are working with surrogates, the Council for Responsible Genetics concluded that there were 1,400 babies born from surrogates in 2008.¹⁰ That number was nearly double the number from just four years earlier.

ART.¹⁷

Part I of this article begins with a general overview of a surrogacy arrangement. Part II explains how to navigate the legal risks presented by the laws on surrogacy in each of the fifty states. Part III discusses how to structure a relationship between intended parents and a surrogate through a surrogacy agreement, and provides sample language and contracting advice. Part IV explains how to structure an arrangement between the intended parents and an egg donor.

PART I: THE BASICS

This part discusses the types of surrogacy, the process, and gives estimates of the associated costs. It starts, however, by telling the story of a famous surrogacy arrangement from the 1980s that ended up in the courts when the surrogate decided she wanted to keep the baby. That story is known as the case of *Baby M*. Understanding that story is a starting point to an understanding of how to structure a surrogacy arrangement so that it minimizes the risks of failure.

A. *The Classic Surrogacy Case Study: Baby M*

The famous case of *Baby M* made the world take notice of surrogacy. The case is instructive even today as it illustrates both the nature of the arrangement between the intended parents and the surrogate, and also some of the inherent risks involved with surrogacy. Surrogacy was quite novel thirty years ago. Indeed, the court considering the case referred to surrogacy as “a new way of bringing children into a family.”¹⁸ Despite the novelty of the arrangement, the intended parents and the surrogate were connected through a surrogacy agency.¹⁹

In the *Baby M*

put off having children.²³ When the couple decided to pursue a family, Mrs. Stern learned Whitehead might have multiple sclerosis.²⁴ As a result, Mrs. Stern did not dare to have children naturally due to the associated risks.²⁵ While both Mr. and Mrs. Stern wanted to have children, Mr. Stern had an additional motivation to become a father.²⁶ Mr. Stern's family had been destroyed in the Holocaust, and he fervently wanted to continue his family line.²⁷

Mary Beth Whitehead agreed to be the surrogate mother for the Sterns.²⁸ Mrs. Whitehead was married at the time and already had her own children.²⁹ She decided to be a surrogate even before meeting the Sterns and had unsuccessfully worked with another couple previously.³⁰ The cost of deciding to have a child was explained to Mrs. Whitehead had become a surrogate because of her sympathy for couples who could not have a child, her desire to give the gift of life, and her interest in supplementing her own family's income with the amount that she would earn as compensation.³¹ Mrs. Whitehead charged \$10,000.³² The agency's fee was \$7,500.³³

Both parties signed a contract outlining all of their rights and responsibilities, including Mrs. Whitehead's compensation and the requirement that she give custody of the child to the Sterns immediately after the child's birth.³⁴

After the baby was born, the Sterns named the child Melissa.³⁵ Unfortunately for the Sterns, Mrs. Whitehead decided to keep the child after it was born.³⁶ After the Sterns brought suit against Mrs.

surrogacy agreement should not be allowed to take away the mother's right to decide after birth to keep the child.⁴⁶ To rule otherwise, the court wrote, would be to condone a

- 2. using an egg donor who is not the surrogate and thereby ensuring that the surrogate does not have the rights of a biological parent;*
- 3. making sure that the surrogate has both legal and psychological counseling before proceeding with the arrangement; and*
- 4. using a surrogate who has already had her own child or children and so understands the emotional connection created with the baby through a pregnancy.*

In the United States, as the *Baby M* case demonstrates, surrogacy has been left to each of the states to allow, regulate, or forbid. As a result, surrogacy is treated differently from one state to the next. Some states allow surrogacy and regulate it. Still, there are a few jurisdictions (New York, Michigan, and Washington, D.C.) where surrogacy arrangements are illegal.⁵⁰ Moreover, even if surrogacy is

to grant custody or other parental rights to the surrogate.⁵²

B. Gestational Surrogacy is now Preferred over Traditional Surrogacy.

This section describes the differences between traditional surrogacy and gestational surrogacy, and explains why gestational surrogacy is now the recommended approach for most intended parents. In addition, this section describes some of the medical procedures used in the surrogacy arrangements, specifically artificial insemination (AI) and IVF.

Surrogacy refers to an arrangement where a woman, the surrogate mother, carries a baby for an intended parent or parents. There are two basic types of surrogacy arrangements: traditional surrogacy and gestational surrogacy.

1. Traditional Surrogacy

In a traditional surrogacy arrangement the surrogate provides her egg and the intended parents provide the sperm of either the intended father or a sperm donor. The surrogate in this process is referred to as a traditional surrogate. Since the surrogate's egg is used, the surrogate is actually biologically related to the baby that will be born. This was the situation in the *Baby M* case.

With a traditional surrogacy, the intended parents usually choose to proceed by having the egg fertilized through AI, although a couple may also choose IVF. Both AI and IVF are considered forms of ART. With AI, the intended father's sperm is inserted into the surrogate in an attempt to obtain a pregnancy. With IVF, the ovaries of an egg donor (in a traditional surrogacy setting the egg donor is the surrogate) are hyperstimulated to produce multiple eggs. Doctors then remove those eggs from her body and fertilize them with the intended father's sperm. After fertilization, the doctors transfer one to three of the embryos into the surrogate in the hopes of obtaining a pregnancy. The remaining viable embryos can be frozen for use in

52. See *Johnson v. Calvert*, 851 P.2d 776, 783 (Cal. 1993) (enforcing a gestational surrogacy agreement). The Supreme Court of California found support for its conclusion in *Calvert* in Majorie Maguire Shultz, *Reproductive Technology and Intent-based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 298, 309, 323 (1990). The court quoted Professor Shultz: "Within the context of artificial reproductive techniques, intentions that are voluntarily chosen, deliberate, express and bargained-for ought presumptively to determine legal parenthood."

2015]

SURROGACY

471

the future, donated to another person or couple, donated to medical research, or destroyed.

Gestational & Traditional Surrogacy

2015]

SURROGACY

473

attempt a fresh transfer to avoid any potential harm that freezing can do to an embryo.

Different clinics transfer embryos at different stages in their development, but generally the embryos are transferred to the surrogate between three and five days after they are fertilized. If the embryos are to be frozen, the embryos are normally frozen immediately after successful fertilization and then allowed to develop after thawing to the three or five day mark. There is some clinical debate about whether success rates are higher with a three-day transfer, which allows the newly fertilized eggs to develop in utero), or with a five-day transfer, which allows the transfer of the embryos that appear the most viable at day five).

There is also clinical debate about how many embryos to transfer to the surrogate. Since the general rate of pregnancy from IVF for any fertilized egg transferred averag

2015]

SURROGACY

475

them, they should consider that the main benefit of surrogacy is the ability to have a biologically related child. But they should also consider that surrogacy has its draw

the costs continue to climb.

By contrast, some IVF clinics provide a database of egg donors and, if so, may simply have a form agreement that both the intended parents and egg donor sign. IVF clinics tend not to charge as much for the service of matching an egg donor with intended parents. In contrast to egg donor agreements, which might conveniently come as a form agreement, surrogacy arrangements are more complicated.

Some agencies offer various types of plans that are similar to insurance. So, for example, at one agency, an intended parent can pay one price for one egg donor committing to donate one cycle of eggs. However, for a significantly higher price, the agency agrees to provide several cycles of donor eggs in the event that the intended parents are unsuccessful with the first or second cycles of donations. Intended parents should check with the agency they are exploring working with and find out about their payment and plan options.

While agencies can provide great resources and assistance throughout the surrogacy arrangement, they are expensive and not a necessity. As mentioned above, many fertility clinics provide databases of egg donors and matching services at a fraction of the agency price. Fertility clinics might also be able to recommend surrogates with whom they have worked in the past. Attorneys who work with surrogacy may well be able to connect intended parents to egg donors or surrogates for little or no fee. Networking with other people who are considering surrogacy or who have gone through a surrogacy arrangement for suggestions of people who might be interested in being surrogates or egg donors may also help.

And intended parents might begin by thinking about asking friends or relatives to be an egg donor or a surrogate. This is an intensely personal issue. Some intended parents are happy to have friends or family members be a part of their journey. A surrogate who is a friend or a relative will likely undertake that role out of love and compassion and not seek extraordinary compensation. This makes the process that much more affordable.

However, some intended parents do not want to have friends or family closely involved in the process. If intended parents do find their own egg donor or surrogate without the help of an agency or clinic, they should be sure to ask them all the difficult questions that an agency or clinic would ask. If the fit is not right for any reason, the intended parents should no

478

WILLAMETTE LAW REVIEW

[51:459

Choosing the right players to work with in a surrogacy

It is crucial to explore both the intended parents' and the surrogate's feelings about abortion. Do those feelings align? It is impossible to compel a surrogate to have an abortion. So, if there are circumstances when the intended parents would want to terminate a pregnancy, it is important that the surrogate is comfortable doing so. Conversely, if the intended parents would never want to terminate a pregnancy, it is important to be sure that the surrogate is comfortable with that.

Choosing the Right Surrogate & Choosing to be a Surrogate

If the intended parents are seeking a surrogate, asking the right questions up front can help find the right surrogate. Likewise, if someone is considering being a surrogate, she should review these questions to make sure the role is right.

- 1. Why do you want to be a surrogate?*
- 2. Have you been a surrogate before?*
- 3. Does your family know you want to do this, and are they supportive?*
- 4. Have you had your own children before?*
- 5. Do you have any physical conditions that might make carrying a baby dangerous to either you or the baby?*
- 6. Do you understand the emotional connection that can occur when a woman carries a baby to term, and are you confident that you can relinquish all parental rights at that point?*
- 7. Are you comfortable carrying twins or even triplets?*

In addition to all the specific questions and issues involved, there is something intangible about the process of choosing the right surrogate. Intended parents really need to meet the person, discuss all of the aspects of a surrogacy arrangement, and feel comfortable trusting the person to carry their child in a healthy way and to relinquish all parental rights after birth. If it doesn't feel right, the intended parents should keep looking for another candidate.

Likewise, someone interested in being a surrogate, should feel entirely comfortable with her intended parents.⁵⁵ The intended parents and the surrogate should have the same set of expectations before getting involved together.

c. The Egg Donor.

Like surrogates, egg donors are also performing a miraculous deed by helping couples who couldn't otherwise have a child. As with surrogates, choosing the right egg donor is crucial and can also be a daunting process. Similarly, choosing to be an egg donor is a complex decision.

A potential egg donor should consider the effort involved in the process. The egg donor will need to take medication to hyperstimulate her ovaries and undergo a medical procedure to extract her eggs. The egg donor may need to travel to the clinic being used by the intended parents. While egg donors are usually anonymous, an intrepid child might indeed be able to track down his or her biological mother.

There are many agencies today, and some IVF clinics, that recruit egg donors and maintain egg-donor databases. Generally, donors are under thirty years old, with younger donors being considered to have more viable eggs. Each database will contain a profile on each egg donor that likely will include pictures; an outline of her physical characteristics; her and her family's medical history; and a variety of answers to questions about her physical attributes, her personality, her talents, and her accomplishments. The pictures displayed might include pictures of the donor as a child, any children the donor has had, and perhaps family members of the donor. Intended parents can access the profiles of those prospective egg

55. I know of one case where a surrogate confessed that her intended parents made her feel very uncomfortable throughout her pregnancy, micro-managing her life down to what she ate on a daily basis.

donors through those databases.

Still, picking the right egg donor is difficult and somewhat overwhelming. Intended parents have to decide what they are really looking for in a donor.

Choosing the Right Egg Donor

Why not choose a beautiful Ivy League graduate who was an athlete, an artist, and a musician?

What that question misses is that there is absolutely no guarantee that the child will have the physical, intellectual, musical, or athletic attributes expressed by their donor. Further, it is not at all clear, for example, that just because an egg donor did not go to college that a child from that donor wouldn't be extremely successful academically, given the right encouragement and support. Moreover, most intended parents simply want a healthy baby who they can love and raise to be the best person that child can be.

Given that intended parents want to have a successful process, it is perhaps even more important than physical characteristics or talents to consider whether the egg donor has actually donated before and whether that donation resulted in a successful live birth. Some agencies will cite statistics with egg donors and give success as measured in the ability to get a surrogate pregnant with the donor eggs. That is not the same as success measured by a live birth, which is what intended parents really want. Many IVF procedures result in a pregnancy that only lasts a few weeks or a few months. The intended parents should ask about the donor's track record for live births and consider using a known donor with a successful track record. Using a first time donor, in fact, involves a greater risk of not being successful.

Questions for Choosing the Right Egg Donor

The search for the right donor is intensely personal. The intended parents need to ask themselves what matters most to them, and consider these questions:

1. Has the donor been a successful donor previously, with donations resulting in a live birth?

2. *Does she have her own healthy children?*
3. *Are her and her family's medical histories acceptable or are there too many medical risks in her background?*
4. *What about her outward physical appearance is important to you? Ethnicity, height, weight, eye color?*
5. *What about demonstrated intelligence?*
6. *Does she have an aptitude for music?*
7. *Is she athletic?*
8. *Is she creative in some other way?*
9. *Is there something special that resonates with you in her responses? A love of certain types of books? Movies?*
10. *Did she have a particularly compelling reason for why she said she wants to be a donor?*

Also ask the agency or IVF clinic providing the donors how they verify the information supplied by the egg donor. It is, of course, possible for an egg donor to falsify information and, for example, report an excellent family medical history when in fact cancer and diabetes run in her family. The intended parents want an agency or clinic that is doing everything it can to fact-check the donors and verify that the information is accurate.

Some agencies and clinics will actually allow a video conference with the egg donor if the intended parents feel that it is important to see how the donor behaves. In that case, the intended parents likely will not be visible to the donor, but the donor will be visible to the intended parents. The intended parents should ask their agency or clinic if this is possible.

d. Choosing the Right Fertility Clinic

If surrogacy is permitted and enforced in the intended parents'

2015]

SURROGACY

483

state, then they should start the process by contacting a few local fertility clinics. If the intended parents are proceeding in another state, then they should choose a few clinics in a city that is convenient for them in that state.

If there is only one intended parent, or if the intended parents are gay, then the intended parents need to make sure that the clinic will work with them. Surprisingly and tragically, some will not. Another

484

WILLAMETTE LAW REVIEW

[51:459]

<i>Surrogate fee and expenses</i>	\$30,000
<i>Agency fee for matching with a surrogate</i>	\$20,000

2015]

SURROGACY

485

have insurance that covers the prenatal care and the delivery. However, many insurance policies do not cover costs of prenatal care and delivery for surrogates. There are specialty insurance policies that intended parents can buy to cover the costs of the prenatal care and delivery for the surrogate. That insurance currently costs about the same as the care for a routine pregnancy and delivery, or is even slightly higher, but extraordinary expenses in case complications arise would be covered by that insurance too.

In sum, the range of costs can vary dramatically depending on the intended parents' situation. The outline of costs above is simply intended to give a rough idea of what intended parents might expect. The intended parents might find that they have additional costs. For example, if they live in a state that doesn't allow surrogacy, then they may need to add in travel expenses to travel to the state where the surrogate lives and will give birth.

2015]

SURROGACY

487

States that take this approach have often stated in their statutes that compensated surrogacy arrangements are void because they violate the public policy of that state.⁶² Indeed, someone may be willing to be a surrogate for free if she is a good friend or relative of the intended parent(s). Uncompensated surrogacy arrangements still generally allow the intended parent(s) to pay for the surrogate's expenses in connection with the arrangement.⁶³

Some advisors will recharacterize paid surrogacy arrangements as uncompensated arrangements by categorizing the pay as reimbursement for living expenses or foregone wages in order to

5. California

The California Family Code provides that paid and unpaid surrogacy agreements are valid and enforceable, subject to statutory requirements.⁷⁷ Several cases also indicate that surrogacy agreements are enforceable in California. In 1993, the Supreme Court of California decided that a surrogacy agreement is enforceable in California.⁷⁸ In that case, the court wrote: “A woman who enters into a gestational surrogacy arrangement is not exercising her own right to make procreative choices; she is agreeing to provide a necessary and profoundly important service without any expectation that she will raise the resulting child as her own.”⁷⁹

In 2005, the Supreme Court of California decided three companion cases that involved lesbian couples who engaged in surrogacy agreements as a means of reproduction.⁸⁰ The Court held that both people in a same-sex relationship can be the presumptive parents of a child born as a result of a surrogacy agreement even though one person is not the child’s biological parent.⁸¹

6. Colorado

Colorado statutory law does not directly address the issue of surrogacy, and there are no published decisions that deal directly with enforceability of surrogacy agreements. The only Colorado statute addressing the issue of surrogacy governs the parental rights of children conceived through assisted reproduction.⁸² That statute, however, explicitly excludes children born as a result of a surrogacy arrangement from coverage under that particular law.⁸³ However, practice indicates that arrangements are routinely upheld in Colorado.

7. Connecticut

Connecticut statutory law does not directly address the

77. CAL. FAM. CODE §§ 7960–62 (West 2015).

78. *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993).

79. *Id.* at 787.

80. *Elisa B. v. Superior Court*, 117 P.3d 660 (Cal. 2005); *K.M. v. E.G.*, 117 P.3d 673 (Cal. 2005); *Kristine H. v. Lisa R.*, 117 P.3d 690 (Cal. 2005).

81. *See* *Elise B.*, 117 P.3d. at 670 (concluding that even though one of the women was not the child’s biological mother, she was still the presumptive parent because she “actively participated in causing the child[] to be conceived with the understanding that she would raise the child[] as her own together with the birth mother . . .”).

82. COLO. REV. STAT. § 19-4-106 (2009).

83. *Id.* § 19-4-106(1).

enforceability of surrogacy agreements. The Connecticut General Statutes do, however, provide that if a birth was subject to a surrogacy agreement, then the Connecticut Department of Public Health is permitted to create a replacement birth certificate for the child that names the intended parents as the child's parents rather than the surrogate.⁸⁴

In *Vogel v. Kirkbride*, the Superior Court of Connecticut, Judicial District of New Haven, upheld a gestational surrogacy agreement.⁸⁵ In 2003, the Superior Court of Connecticut, Judicial District of Hartford, held that a parental designation created in a surrogacy agreement from another jurisdiction was enforceable because it neither violated state law nor contravened state policy.⁸⁶ Thus, while the enforceability of surrogacy agreements is unclear under Connecticut law, the 2003 decision indicates that a surrogacy agreement, wherein the parties choose to be governed by the laws of a state in which surrogacy agreements are clearly enforceable, would be enforced by the Connecticut courts.

8. Delaware

Surrogacy agreements are expressly legal and enforceable under Delaware law.⁸⁷ The Delaware Code provides that the purpose of the laws governing surrogacy is “to establish consistent standards and procedural safeguards for the protection of all parties to a gestational carrier agreement in [Delaware]”⁸⁸

9. District of Columbia

Surrogacy agreements are expressly prohibited by statute in Washington, D.C. The statute provides that “[a]ny person or entity who or which is involved in, or induces, arranges, or otherwise assists in the formation of a surrogate parenting contract for a fee,

2015]

SURROGACY

491

both.”⁸⁹

10. Florida

Surrogacy agreements are expressly legal and enforceable under Florida law.⁹⁰ Florida has the additional requirements that the intended parents must be married, and that “the commissioning mother cannot physically gestate a pregnancy to term; the gestation will cause a risk to the physical health of the commissioning mother; or the gestation will cause a risk to the health of the fetus.”⁹¹ The statute also requires the intended parents to be married.⁹²

11. Georgia

There is no legal authority in Georgia governing the enforceability of surrogacy agreements. The Georgia statutes are silent on the subject and there are no instructive published Georgia opinions.

12. Hawaii

There is no legal authority in Hawaii governing the enforceability of surrogacy agreements. The Hawaii statutes are silent on the subject and there are no instructive published Hawaii opinions.

13. Idaho

Surrogacy agreements are not specifically addressed by Idaho statutory or published case law. However, a 1986 opinion by the Supreme Court of Idaho indicates that surrogacy agreements might be enforceable in Idaho courts.⁹³ In that case the court held that biological relation is one factor in determining the best interest of the child, but biological relation is not to be treated as a presumption in favor of granting custody to natural parents in custody disputes.⁹⁴

89. D.C. CODE § 16-402(a)–(b) (2001).

90. FLA. STAT. § 742.15 (2012).

91. *Id.* § 742.15(1)–(2).

92. *See* *Lowe v. Broward Cnty.*, 766 So.2d 1199, 1206 (Fla. Dist. Ct. App. 2000).

93. *Ex rel. Steve B.D.*, 723 P.2d 829 (Idaho 1986).

94. *Id.* at 835.

14. Illinois

Surrogacy agreements are expressly legal and enforceable under Illinois statutory law.⁹⁵ The Illinois statutes governing surrogacy agreements set forth a rigid set of requirements for both the surrogate and the intended parents for the purpose of protecting all parties involved.⁹⁶ The Illinois statutes governing surrogacy agreements represent best practices with regard to state laws concerning surrogacy agreements.

15. Indiana

The Indiana Code expressly provides that surrogacy agreements are void, unenforceable, and against the public policy of the state of Indiana.⁹⁷

16. Iowa

The law governing surrogacy agreements in Iowa is unclear. The Iowa Code does not speak directly to the enforceability of surrogacy agreements. The Code does, however, exclude surrogacy from laws forbidding purchase or sale of individuals.⁹⁸ Based on this exclusion, it is reasonable to infer that surrogacy agreements are not against the public policy of Iowa and may be enforceable.

17. Kansas

There is no binding authority governing the enforceability of surrogacy agreements in Kansas. However, the Attorney General of Kansas has issued two opinions suggesting surrogacy agreements are against the public policy of Kansas.⁹⁹

95. 750 ILL. COMP. STAT. 47/25 (2005).

96. *Id.*

97. IND. CODE § 31-20-1-1, (2) (1997).

98. IOWA CODE § 710.11 (2008) (“A person commits a class ‘C’ felony when the person

2015]

SURROGACY

493

18. Kentucky

There is little binding authority governing the enforceability of surrogacy agreements in Kentucky. A 1980 opinion from the Kentucky Attorney General, however, indicated that compensated surrogacy agreements are against the public policy of Kentucky.¹⁰⁰ A 1986 opinion from the Kentucky Supreme Court suggested that uncompensated surrogacy agreements are not void as against the

compensated surrogacy agreements are illegal in Maryland.¹⁰⁴ The enforceability of uncompensated surrogacy agreements is unclear.

22. Massachusetts

Massachusetts statutory law does not speak directly to the enforceability of surrogacy agreements. Opinions by the Massachusetts Supreme Judicial Court indicate that surrogacy agreements are enforceable in Massachusetts. In 2001, the genetic parents in a surrogacy agreement sought a prebirth order directing the hospital to enter the names of the intended parents as the parents of the unborn twin children.¹⁰⁵ The court granted injunctive relief and upheld the terms of the surrogacy agreement.¹⁰⁶ The court also called on the Massachusetts legislature to address questions related to the validity of surrogacy agreements. The court opined that the Massachusetts legislature needs to provide a “comprehensive set of laws that deal with the medical, legal, and ethical aspects of [surrogacy agreements].”¹⁰⁷

2015]

SURROGACY

495

section defines “surrogate parentage contract” as “a contract, agreement, or arrangement in which a female agrees to conceive a child through natural or artificial insemination, or in which a female agrees to surrogate gestation, and to voluntarily relinquish her parental or custodial rights to the child”¹¹²

24. Minnesota

Minnesota does not have any instructive published cases on surrogacy. But in *In re Baby Boy A.*, an unpublished appellate court opinion, a court does uphold a choice-of-law provision in a surrogacy agreement, and enforces the agreement under the law of Illinois, indicating that such enforcement is not against the public policy of Minnesota.¹¹³ The state does also not have any statutory law governing surrogacy.

25. Mississippi

There is no legal authority in Mississippi governing the enforceability of surrogacy agreements. The Mississippi statutes are silent on the subject. And there are no instructive published p7

26. Missouri

There is no statutory or case law controlling the enforceability of surrogacy agreements. There is no choice-of-law provision in the Missouri surrogacy statute. The Missouri statute provides that the law of the state of the surrogate parent's residence shall apply to the enforceability of a surrogacy agreement. There is no choice-of-law provision in the Missouri surrogacy statute. The Missouri statute provides that the law of the state of the surrogate parent's residence shall apply to the enforceability of a surrogacy agreement.

pursuant to a surrogacy agreement.”¹³⁷

39. Pennsylvania

Pennsylvania law on surrogacy agreements is unclear. Pennsylvania statutory law does not address the enforceability of surrogacy agreements. In 2006, the Superior Court of Pennsylvania overturned a lower court’s decision granting custody of children born as a result of a surrogacy agreement to the gestational carrier.¹³⁸ That case involved a “biological father seeking custody of his children from a third party gestational carrier who [was] not the children’s biological mother, and who took the children from the hospital in direct defiance of [the] [f]ather’s wishes after she completely changed her mind about how matters would proceed.”¹³⁹ The court invalidated the lower court’s ruling based on the gestational carrier’s ability to show standing.¹⁴⁰ The court “declin[ed] to rule on the propriety of surrogacy contracts generally; it reasoned that [t]hat task is for [Pennsylvania’s] legislators.”¹⁴¹

40. Rhode Island

There is no legal authority in Rhode Island governing the enforceability of surrogacy agreements. The Rhode Island statutes are silent on the subject and there are no instructive published Rhode Island opinions.

41. South Carolina

There is no legal authority in South Carolina governing the enforceability of surrogacy agreements. The South Carolina statutes are silent on the subject and there are no instructive published South Carolina opinions.

42. South Dakota

There is no legal authority in South Dakota governing the enforceability of surrogacy agreements. The South Dakota statutes are silent on the subject and there are no instructive published South

137. *Id.* § 163.537(2)(d).

138. *J.F. v. D.B.*, 897 A.2d 1261, 1265 (Pa. 2006).

139. *Id.* at 1280.

140. *Id.*

141. *Id.*

500

WILLAMETTE LAW REVIEW

[51:459]

Dakota opinions.

43. Tennessee

Surrogacy agreements are likely enforceable under Tennessee law. In 2014 the Supreme Court of Tennessee wrote that “the public policy of [Tennessee] does not preclude

2015]

SURROGACY

501

45. Utah

The Utah statute governing the enforceability of surrogacy agreements expressly provides that compensated and uncompensated surrogacy agreements are enforceable if they conform to strict requirements.¹⁴⁶ The statute also requires that: “The intended parents shall be married, and both spouses must be parties to the gestational agreement.”¹⁴⁷

46. Vermont

There is no legal authority in Vermont governing the enforceability of surrogacy agreements. The Vermont statutes are silent on the subject. And there are no instructive published Vermont opinions.

47. Virginia

The Virginia statute governing the enforceability of surrogacy agreements expressly provides that “[a] surrogate, her husband, if any, and prospective intended parents may enter into a written agreement whereby the surrogate may relinquish all her rights and duties as parent of a child conceived through assisted conception, and the intended parents may become the parents of the child.”¹⁴⁸ That statute defines “intended parents” as “a man and a woman, married to each other . . .”¹⁴⁹ This means that only heterosexual married couples can be intended parents under Virginia’s Code. Furthermore, the Code expressly provides that compensated surrogacy agreements are void and unenforceable.¹⁵⁰

48. Washington

The Revised Code of Washington expressly provides that “[n]o person, organization, or agency shall enter into, induce, arrange, procure, or otherwise assist in the formation of a surrogate parentage contract, written or unwritten, for compensation.”¹⁵¹ In cases of an

surrogate mother pursuant to a surrogate parentage contract, and there is a dispute between the parties concerning custody of the child, the party having physical custody of the child may retain physical custody of the child until the superior court orders otherwise. The

2015]

SURROGACY

503

51. Wyoming

There is no legal authority in

related disputes, if the parties do not use a choice-of-law provision in their agreements, then it is still likely that the law of the state where they proceed will apply simply based on general choice-of-law rules.¹⁶³ It is always best to be clear in the agreements so that there is no doubt. If the intended parents specify the law of the pro-surrogacy state where they are going to proceed and they in fact do proceed there, then there should be little risk of any other law being applied. After the surrogate successfully delivers a child or children for the intended parents, the intended parents will need to assert their parental rights in that state and they will want the courts of that state to apply their laws to the surrogacy arrangement.

Managing a surrogacy arrangement at a distance involves more costs and potentially more effort since every appointment will involve either travel or discussions over the phone or internet. Still, the risks of a surrogacy arrangement going sour and having the relevant courts not support the intended parents and enforce the agreement are too great to ignore. As shown with the *Baby M* case, surrogates do sometimes decide that they want to keep custody of the child or children born.¹⁶⁴ If a surrogacy agreement is not enforced, then the surrogate may indeed have a chance to get custody of the child.¹⁶⁵ The intended parents will also likely have to pay child support to the surrogate. Intended parents should be careful to avoid this awful scenario by proceeding in a jurisdiction that supports surrogacy.

Managing the law is all about managing risk. In fact, most surrogacy arrangements do not end up in court, and intended parents may not have any problems even if they do proceed in a jurisdiction that does not clearly support surrogacy (as long as it is not a state where surrogacy is illegal). Even if the surrogate does contest custody and the intended parents' state will not enforce the surrogacy agreement, the intended parents may well still be awarded full custody if it is in the best interests of the child. This was the end result of the *Baby M* case. If intended parents proceed with

163. The common law doctrine of *lex loci contractus* requires that, when determining the construction, validity, enforceability, or interpretation of a contract, the court applies the law of the jurisdiction where the contract was made. *See, e.g.*, *Cunningham v. Feinberg*, 107 A.3d 1194 (2015) (discussing common law's choice-of-law rules in contracts). *See* Susan Frelich Appleton,

gestational surrogacy (the surrogate is not the biological parent), then custody will likely be awarded to the intended parents because one of them is a biological parent.¹⁶⁶

As a result, the risk may be acceptable if the intended parents proceed in their home state even if the state that does not clearly support surrogacy. Again, if the intended parents do live in one of the states where surrogacy is not supported, then they should consult an attorney to get specific advice on how to manage the legal risks.

2. Proceed Under the Laws of a Pro-Surrogacy State

If proceeding in a state other than the one where the intended parents live seems daunting, or if the intended parents want to use a surrogate who lives in their home state, then an alternative option is to add a choice-of-law clause to the agreement that uses the law of a pro-surrogacy state to govern the agreement. In this situation, a court may apply the law of that pro-surrogacy state if there are any challenges to the agreement. For example, in the case of *In re Baby Boy A.*, a Minnesota state court evaluated a surrogacy agreement that contained a choice-of-law clause that used Illinois law.¹⁶⁷ In an unpublished opinion, the Minnesota court honored that choice-of-law clause and enforced the surrogacy agreement.¹⁶⁸

2015]

SURROGACY

507

was not reported by the court, which means that the court's decision is not precedent for Minnesota courts.¹⁷¹

Despite the case's lack of precedential value, the case's facts are instructive. Although *In re Baby Boy A.* is more recent than the *Baby M* case, it has a similar fact pattern. In both cases the surrogate decided to keep custody of the child after the child was born, despite having entered into a gestational surrogacy agreement where she agreed to give custody to the intended father.

The facts of the *In re Baby Boy A.* case are even more outrageous than the facts of *Baby M.* In *In re Baby Boy A.*, a single gay man, J.M.A., sought to have a biological child with the help of a surrogate.¹⁷² The intended parent lived in New York City. He asked his sister Mary, who lived in Minnesota, to be his surrogate. She declined but brought the idea up to her daughter, the intended parent's niece, who also lived in Minnesota. The niece then contacted J.M.A. and volunteered to

b029 Tc 0slc3so lTuib2a-300.6(a)-2. D(it(er, t)8.7(n)4(stat) t)10(i)m inte4-3.

clause, applied Illinois law, and enforced the surrogacy agreement.¹⁷⁶ J.M.A. was determined to be the father, and he was given custody of the child.

The case is instructive for several reasons. First, it is an example

transaction involved.¹⁸² If there is no such relationship, then courts may not honor the choice-of-law provision. Because some courts will look for a connection to the jurisdiction chosen for the applicable law, the safest approach is to do something substantial in connection with the surrogacy arrangement in that state beyond just choosing its law. As with proceeding physically in that state, this may include using a clinic in that state, or using an agency, surrogate or egg donor from that state.

Again, this area of law is complicated. It is best for intended parents to discuss these issues with their attorney to make sure they are proceeding prudently and managing the legal risks.

C. *Illinois: A Model Statute Reflecting Best Practices*

As discussed above, one way to manage legal risk is to either proceed in a state that is pro-surrogacy or have the relevant agreements governed by the law of a pro-surrogacy state. This section will explore the Gestational Surrogacy Act of Illinois, a pro-surrogacy law that went into effect in 2005.¹⁸³ The Act reflects best practices in structuring the surrogacy arrangement.

The Act makes clear that the intended parent or parents are the parents of the child born to a surrogate “immediately upon the birth of the child.”¹⁸⁴ Note here that the Act does not discriminate against single people embarking on a surrogacy arrangement to become a parent, nor does it require the intended parents to be married.¹⁸⁵ There are, however, certain requirements that potential intended parents must meet.¹⁸⁶ The statute also prohibits the surrogate and her husband from being considered the parents of the children.¹⁸⁷

The Act has strict requirements for who can be a surrogate and for what the intended parents must do in order to qualify for the protection of the statute.¹⁸⁸

182. See, e.g., *Nedlloyd Lines B.V. v. Superior Court*, 834 P.2d 1148, 1151–52 (Cal. 1992). See generally RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 187 (1971).

183. 750 ILL. COMP. STAT. 47/1 (2005).

184. *Id.* § 15(b)(1)–(6).

185. *Id.* § 20(b)(1)–(4).

186. *Id.*

187. *Id.* § 15(b)(6).

188. *Id.* § 20(a)–(b).

510

WILLAMETTE LAW REVIEW

[51:459

Requirements for the Surrogate¹⁸⁹

The Act requires that the surrogate:

with the surrogate who likely does not want to have any more children of her own.

Also, similar to the requirement for the surrogate, it is important that the intended parents understand the terms of the surrogacy agreement. This includes an understanding of what they are promising to pay the surrogate, whether and when a pregnancy may be terminated, and how they will

5. be witnessed by two competent adults.

The formal requirements for the surrogacy agreement are designed to make sure that the intentions of the parties to the surrogacy arrangement are clearly set forth and recorded in a written contract.¹⁹⁷ The writing requirement for a contract is generally referred to as a statute of fraud.¹⁹⁸ This requirement is designed to prevent fraud. A contract that is memorialized in writing gives objective evidence of the precise intentions of the parties. It also ensures that the parties review all of the terms and conditions contemplated.

It is also important for all of the details of the arrangement to be worked out before any medical procedures take place. If the parties cannot come to a mutual agreement, then they should never begin medical procedures.

Once again, having separate attorneys representing each of the parties ensures that each party understands their commitments and is able to negotiate for the terms they want and need. If the intended parents place money in an escrow account, then that also assures the surrogate that there will be suffici

2015]

SURROGACY

515

the health of the child or children that the surrogate will carry.²⁰³ In addition, the Act provides express statutory authorization for the intended parents to compensate the surrogate.²⁰⁴ The Act allows not only reimbursement of the surrogate's expenses, but also "reasonable compensation" for her service.²⁰⁵

The key to the Act is that if all of the requirements of the statute are met, then the intended parents are deemed to be the parents of the children born to the surrogate at the time of their birth.²⁰⁶ Further, custody automatically vests in the intended parents immediately upon birth.²⁰⁷ Thus, no court involvement is necessary to amend or restate any birth certificate. Even if there is not strict compliance with every requirement of the statute, the Act instructs courts attempting to determine parental rights and custody to consider the intent of the parties set forth in the surrogacy agreement.²⁰⁸

2015]

SURROGACY

517

prefatory clauses usually do not contain the promises that a court would need to enforce. However, prefatory clauses provide useful background information that a court may use to establish the intent of the parties. Sample prefatory clauses are shown below.

Example 3-1: Prefatory Clauses

Whereas: the Intended Parents are unable to have natural children of their own and seek to work with a surrogate to have one or more biologically related children; and

Whereas: the Surrogate is sympathetic to the needs of the intended parents, and seeks to help the intended parents have one or more children by embarking on the surrogacy arrangement described herein; and

Whereas: as a result the Intended Parents are incredibly appreciative of Surrogate's willingness to help and commit to compensate her as outlined in this agreement; and

practices dictate that contracts should be written in plain English. This means that contract drafters should write every sentence in plain English so that the agreement is easy to read.

Another tension that exists in contract drafting is the tension between being brief and including too much detail. A brief contract is less inclusive, but it may be easier for a reader to understand. A detailed contract is more thorough, but it may be more difficult for the reader to understand. There is a middle ground that provides a balance between brief and detailed contracts. Every attorney has his or her own approach to striking this balance. For example, some attorneys prefer to detail the risks associated with pregnancy and surrogacy arrangements at the beginning of the contract. This detail may even be in the prefatory clauses.

As mentioned, one of the functions of the contracting process is to make sure the parties understand what they are committing to do. Parties sometimes rely too heavily on their attorneys and do not always read through the entire contract. For that reason, drafters often set forth any major issues during the first few pages of the contract.

These major issues will also be set forth in greater detail further into the agreement. Thus, how much detail and how much discussion to put into the prefatory clauses is a question of balance. Drafters should highlight important details up front to be sure that the intent of the parties is fully clear. However, the detail of the arrangement can be left for the later sections.

T

2015]

2015]

SURROGACY

521

- *that she is of a certain age (over 21 in any event);*
 - *that she is either single or married (if married, the spouse will generally be required to sign on to the agreement);*
 - *that she is competent to execute the agreement and fully understands the nature of the surrogacy arrangement;*
 - *she is healthy and, at least to the best of her knowledge, can carry a child through pregnancy to birth;*
 - *that she has had one or more children of her own previously;*
 - *whether she has had any miscarriages or other problems with carrying a child to full term and birthing that child;*
- *that she fully understands the risks, both medical and psychological, associated with being a surrogate, becoming pregnant and carrying and birthing a child, including, in the extreme, complications from the pregnancy that could even lead to her own death;she rkssonv04.1211rs.999 1 ful(g an)mpa had*

make sure that everyone has the same common understanding of the agreement.

As much as the intended parents want certain representations from the surrogate, the surrogate will also likely want the intended parents to make certain representations as well. Some of these representations may also be required by the relevant law. For example, the Illinois Gestational Surrogacy Act also requires intended parents to receive psychological and legal counseling before entering into the arrangement. If, as is often the case, the intended parents provide the initial draft of the agreement, then the surrogate and her attorney may well ask for additional representations to be made by the intended parents beyond those already included in that first draft. The surrogate enters into the arrangement at least in part based on the veracity of these representations. Thus, if any were untrue, then legally her obligations under the agreement may also be avoided. Below are sample representations of the intended parents.

2. Representations of the Intended Parents

Example 3-3: Representations of the Intended Parents

The surrogate will want the intended parents to attest to a variety of

- *that if anything should happen to them, including death, and they were not capable of raising any child born as a result of the surrogacy, that they have appointed another named person to be the parent of such child or children and that person has agreed;*
- *that they fully understand the risks, both medical and psychological, associated with surrogacy, including the fact that IVF is not always successful, nor does every pregnancy result in a live birth, due to no fault of the surrogate;*
- *that they have received psychological counseling about the obligations and risks associated with surrogacy;*
- *that they have received legal counseling about their risks, rights, and obligations as they pertain to surrogacy generally, and also as they are described in the surrogacy agreement; and*
- *that they are financially capable of funding their obligations hereunder, have set up an escrow for payments for the surrogate, and understand that overall costs may end up surpassing any initial estimates.*

D. Medical Testing and Agreement to Share Information

After the definitions and representations, the next part of the contract addresses the early stages of what actually happens in a surrogacy arrangement. This section discusses the rights and obligations of the parties with respect to preliminary medical testing.

1. Medical Testing of the Surrogate

In any surrogacy arrangement, one of the first medical steps is the medical and psychological examinations of the surrogate and the intended parents to ensure that they are fit for their role. The intended parents will want certain assurances about the surrogate and the surrogate will want certain assurances about the intended parents.

The intended parents will want to know, to the fullest extent possible, that the surrogate is medically fit to respond to the prescribed medications, become pregnant, and carry children through

to a live birth. In addition, the intended parents will want to be sure that the surrogate is not using narcotics or other drugs that may affect the health of any embryo or fetus. Further, the intended parents will want to know that the surrogate does not have any diseases or infections that could be transmitted to a child carried by her.

Accordingly, the surrogate will likely agree in this section to submit to all relevant medical examinations and tests designed to give the intended parents the assurances they need.

Example 3-4: Testing on Surrogate

Surrogate's Agreement to Submit to Testing. The Surrogate agrees to submit to any and all medical testing deemed prudent or required by any Responsible Physician.

2. Medical Testing of the Intended Parents

As with any contract, there should be parallel rights and responsibilities of all the parties where applicable. In a surrogacy contract, the surrogate will likely want to make sure that the intended parents are healthy and able to raise the children to adulthood. The surrogate will also likely want to make sure that whoever is contributing genetic material to the embryo implanted in her will not be putting her health at risk. As a result, the contract should include a clause similar to the clause set forth above where the intended parents agree to any and all relevant medical tests.

Example 3-5: Testing on Intended Parents

Intended Parents' Agreement to Submit to Testing. The Intended Parents agree to submit to any and all medical testing deemed prudent or required by any Responsible Physician.

3. Psychological Counseling for All Parties

Certain state statutes (including the Illinois Act) require psychological evaluations of the surrogate and the intended parents. The contract needs to have a section where the parties agree to submit to this testing. Any previous clauses may also contain reference to psychological testing or one clause may be used to capture all of these commitments.

2015]

SURROGACY

527

Example 3-6: Testing on All Parties

The Parties' Agreement to Submit to Testing. The Surrogate and the Intended Parents agree to submit to any and all medical tests that any Responsible Physician deems prudent or required. In addition, the

related to the impregnation, pregnancy, and the birth of the child.

1. Medical Procedures and Assumption of Risk

Once the preliminary testing is done, almost all of the medical procedures and obligations are those of the surrogate. In this stage there are no parallel commitments of the intended parents. Instead, the surrogate agrees to undergo the embryo transfer, pregnancy, and birthing process. The intended parents will likely want to know that the surrogate does acknowledge the risks of those procedures and will not hold them responsible for those risks.

One of the variables involved in the procedure is how many pre-embryos the parties are willing to transfer to the surrogate. Since success rates for IVF are often lower than fifty percent, many intended parents transfer two or three pre-embryos into the surrogate in hopes that at least one will be successful. Of course, the risk of transferring two or three pre-embryos is becoming pregnant with

agreement.²¹¹

Example 3-10: Behavioral Restrictions

Behavioral Restrictions. The Surrogate also agrees to follow the behavioral guidelines of any Responsible Physician in order to assure the highest degree of success with the procedures. This includes taking any medication as it is prescribed, attending appointments, allowing testing and blood draws. It also includes refraining from sexual intercourse for a certain amount of time before and after the embryo transfer. It further includes refraining from behavior that could harm the Child. This includes smoking cigarettes, drinking alcohol or taking certain proscribed drugs throughout the process, beginning a certain amount of time before the embryo transfer and

2015]

SURROGACY

531

cycles. If both parties are still happy after the first cycle so that they want to go through a second or third cycle then they can agree to continue at that point.

Tales from the Field: Behavioral Violations and Subsequent Cycles

In one situation, the parties to a surrogacy agreement had committed in advance to work together for at least two embryo transfer cycles. The first cycle was abandoned because the surrogate did not regularly take the medications as prescribed by the physician. As a result, the intended parents decided not to work with the surrogate for a second cycle.

At that point, the surrogate demanded that they do so since they had agreed to that in their contract. The intended parents did not oblige since they viewed the surrogate's behavior as a breach, voiding any obligation on their part. Nonetheless, having that clause gave the surrogate a potential argument to pressure the intended parents to continue to work with her against their better instincts.

If the parties decide that they want to commit to at least two cycles in advance then the contract language needs to reflect this decision.

Example 3-11: Number of Cycles

Number of Cycles: The parties agree to work together through a

terminate a pregnancy. It is crucial that the parties agree on this because courts cannot compel a surrogate to have an abortion. Thus, if the intended parents believe that there are certain extreme medical conditions that would lead them to want to terminate the pregnancy, then they need to be able to make that decision and have the surrogate follow their wishes. Even if the terms in the agreement are not specifically enforceable by courts, including the expectations of the parties in the agreement serves as a prompt for their conversation about the possibility of terminating the pregnancy.

If the intended parents believe there are circumstances when they would want to terminate the pregnancy and the surrogate expresses some hesitation about following their wishes, the intended parents may want to work with a different surrogate to avoid the chance that the surrogate's hesitation develops into full-blown resistance after three months of pregnancy. If the surrogate does not terminate the pregnancy, at least one of the intended parents will still be the biological parent and will likely

2015]

SURROGACY

533

of insemination. If such a request is made, then the Responsible Physician will identify the embryos with the lowest chance of survival and will terminate that or those embryos, allowing the most viable to remain and develop. Understanding that such a provision is not specifically enforceable, the Surrogate agrees to respect and follow the wishes of the Intended Parents in this regard.

In any event, the parties agree that if any Responsible Physician advises that continuing to be pregnant with multiples puts the Surrogate's life or health at risk, then the Surrogate shall have the right to decide to terminate any or all of the embryos at any time.

G. Birth Procedures, Rights, and Obligations

After discussing the preliminary testing and issues related to the pregnancy, the next stage to consider is the actual birthing of the child and the separation of the child from the surrogate at birth. It is in connection with this stage that the parties should affirm the intended parents' commitment to acknowledge full parental responsibility and take custody. The surrogate should likeat fo(1.6(t)012.1h.gr59(o81eti)811 o)7.disy. sssl(11.9(ed)3(

2015]

SURROGACY

535

committed to raising the child or children. This also means that parties need to contemplate the notion that a child born may actually have health concerns, birth defects, or a debilitating disease.

The logical conclusion of the intended parents having full parental rights upon birth is that they also have the unfettered right to make medical decisions on behalf of their child immediately at birth. This is not necessarily true. Parties need to address this in the agreement since, in many states, the surrogate, as a birth mother, will be considered to be the legal mother until a court rules otherwise. This means that the surrogate will have the legal right to make healthcare decisions for any child she delivers.

Example 3-14: Intended Parents Responsible for Child

Intended Parents Commit to Full Parental Responsibility. The Intended Parents commit to take full parental responsibility and custody of any child born through the surrogacy process immediately upon the birth of such child. This commitment shall be unwavering, regardless of any medical condition or affliction that may affect any such child.

Surrogate [and her partner or spouse] agree[s] not to assert any claim to parental rights or custody and agrees to cooperate to the fullest extent to support and enforce the parental rights of the Intended Parents, including cooperating in any necessary legal proceedings.

any child born is indeed a child of the intended parents.

For example, the parties may agree that if the child is not related to the intended parents, but is genetically linked to the surrogate, then the surrogate would have the first right to parent the child and the intended parents would have no obligation to assert parental rights. If the child is not genetically linked to either the intended parents or the surrogate, as the case would be if the incorrect embryos were implanted in the surrogate, then the parties may agree that the intended parents would have the first right to become the legal parents of the child, but would not be obligated to do so. If the intended parents decline that option, then the surrogate would have the option to assert her legal parental rights. If neither the intended parents nor the surrogate wants to be the legal parents, then the child could be put up for adoption. Below are sample clauses that contemplate the situation where the child is unrelated to the intended parents.

Example 3-15: Unrelated Child

Child Born Unrelated to Intended Parents (a) If the child is not genetically linked to either the intended parents or the surrogate, as the case would be if the incorrect embryos were implanted in the surrogate, then the parties may agree that the intended parents would have the first right to become the legal parents of the child, but would not be obligated to do so. If the intended parents decline that option, then the surrogate would have the option to assert her legal parental rights. If neither the intended parents nor the surrogate wants to be the legal parents, then the child could be put up for adoption. Below are sample clauses that contemplate the situation where the child is unrelated to the intended parents.

2015]

SURROGACY

537

3. Changed Circumstances for the Intended Parents

The parties need to discuss and come to an agreement concerning what would happen if there is a change of circumstances with the intended parents.²¹²

2015]

SURROGACY

539

receive very much for her efforts if early payments are small. Thus, the parties will need to negotiate a payment schedule that seems fair to all parties.

The payment schedule should be keyed to clear milestones so that all of the parties understand when payment is due. If the intended parents are paying the surrogate through escrow, then the escrow agent who will disburse the payments needs to know exactly when amounts are due. The sample language below presents one possible schedule for payments.

Example 3-17: Base Compensation

Base Compensation. The Intended Parents agree to pay Surrogate for her services a base compensation of [\$25,000].

Timing of Base Compensation Payments. The base compensation is payable according to the following schedule.

limit on those expenses to ensure that they are manageable. The sample language below covers expenses and reimbursements.

Example 3-18: Expenses and Reimbursements

Expense and Reimbursement Payments. The Intended Parents also agree to pay directly, if possible, or else to reimburse Surrogate for, any and all out-of-pocket expenses related to the surrogacy arrangement that are not covered by any applicable insurance. These expenses include, but are not limited to, expenses for:

- medical testing;*
- psychological counseling;*
- any medications or vitamins recommended or required by any Responsible Physician;*
- [if Surrogate has other children] any child care required by surrogate to facilitate her service and attendance at appointments, not to exceed a total of [\$1,000];*
- reasonable costs for maternity clothes, not to exceed a total of [\$1,000]; and*
- any actual lost wages resulting from work surrogate is required to miss because of the pregnancy (as certified by any Responsible Physician), not to exceed [\$5,000].*

Timing of Expense and Reimbursement Payments. Any such expense or reimbursement payment is due at the time when it is incurred.

3. Additional Compensation

The parties should think through the financial implications of any complications that may arise during the course of the pregnancy, like carrying multiples, having a miscarriage, or a mandatory Cesarean section for the delivery. These complications also include any health problems that the surrogate may acquire as a result of the surrogate agreeing to help the intended parents. The intended parents should expect to assist the surrogate with additional compensation if

2015]

SURROGACY

541

those complications arise. The sample clauses below address additional compensation for the surrogate.

Example 3-19: Additional Compensation

Additional Compensation. Intended Parents shall provide surrogate with additional compensation in the following amounts for the events listed:

\$1,000 – for an abortion requested by the intended parents, or recommended or required by any Responsible Physician;

\$1,000 – for any selective reduction requested by the Intended Parents or recommended or required by any Responsible Physician;

\$1,000 – for a caesarian section recommended or required by any Responsible Physician;

\$5,000 – for each additional child beyond one if there are multiple live births;

\$5,000 – for a partial or full hysterectomy recommended or required by any Responsible Physician as a result of the surrogacy.

Timing of Additional Compensation. Any such compensation is due to Surrogate whenever the event that triggers the compensation occurs.

All of these expenses can be quite significant, and potentially exceed an additional \$10,000 or more. The intended parents will want to review all of these provisions closely to make sure that they are comfortable with these additional payments if incurred.

4. Escrow Arrangements

Parties may want to establish a payment system that involves an escrow account managed by an escrow agent. That account will be funded in advance by the intended parents. This reassures the surrogate that the costs will be covered and paid when due. The escrow agent will make payments from that account upon proof that the payment is due. Any amount remaining in the account at the

conclusion of the surrogacy arrangement will revert back to the intended parents.

The downside to the escrow arrangement is that it adds an additional layer of complexity to the relationship between the surrogate and the intended parents. There will also be a fee associated with establishing and maintaining an escrow account of approximately \$1,000 or more. If an escrow arrangement is desired, the parties will likely need to negotiate and execute a more detailed escrow agreement. This process will take time and increase the parties' attorneys fees. The money put into escrow should be sufficient to cover all the potential costs of the intended parents, including expenses, reimbursements, and additional compensation that may become due. The sample provision below addresses the use of an escrow account.

Example 3-20: Possible Escrow

Escrow. The parties agree to establish an escrow account that will be managed by, X, as the escrow agent. The Intended Parents will fund the escrow account with [\$40,000] to cover any and all possible payments to surrogate. The escrow agent will make disbursements from the escrow account to the surrogate when presented with proof that the amount is due and owing. The escrow agent will notify the intended parents of any such disbursement, giving them 5 business days to contest such payment before payment is actually made. Any fees associated with the escrow will be payable by Intended Parents.

5. Medical and Life Insurance

Insurance can help cover the medical costs and expenses associated with surrogacy. However, many insurance policies do not cover surrogacy. In this case, the intended parents may opt to pay all of the costs and expenses themselves. There is a risk that the expenses will skyrocket if there are extraordinary medical complications.

a. Insurance Covering Surrogacy

To address this situation, there are now insurance companies that offer medical coverage that pays for the medical costs and expenses incurred by a surrogate, including amounts triggered by extraordinary medical complications. The cost for that kind of insurance is currently roughly around \$20,000. That amount is likely more than

the out-of-pocket expenses associated with a routine pregnancy and delivery. Still, the intended parents may wish to consider purchasing a policy to cover themselves in the event of extraordinary medical expenses.

b. Life Insurance

In addition, it is now common for surrogates to request that intended parents purchase life insurance that would cover the life of the surrogate and pay her family in the event of her death. While death is highly unlikely, life insurance gives the surrogate added comfort that insurance would help provide for her family if she were to die.

I. Miscellaneous Provisions

Finally, as with any contract, there are boilerplate provisions that are typically found at the end of the contract. Most of these provisions are not worth negotiating and are not unique to a surrogacy arrangement. For example, there will likely be a severability clause. There will also likely be a provision simply identifying addresses of the parties for purposes of any communications. As straightforward as these provisions are, the parties should read all of the boilerplate clauses and discuss them with their attorney to make sure they understand the implications of each. However, some so-called boilerplate provisions are unique to surrogacy and are worth considering here.

1. Choice of Law and Venue

A section about which state's law will govern the parties' agreement and which venue will hear any disputes should be included in these provisions. Choice-of-law and venue provisions are important in most contracts, and are all the more important with surrogacy arrangements since not all jurisdictions support and enforce surrogacy agreements.

In addition to the choice-of-law provision, a contract can contain a choice-of-venue provision. Parties should expressly agree that certain courts should and can take jurisdiction over any dispute arising under the contract. With a surrogacy arrangement, the courts of the place where the birth will occur should take jurisdiction over the matter. The sample clause below addresses choice-of-law and venue issues.

Example 3-21: Choice of Law and Venue

Choice of Law and Venue.

intended parents and I simply helped those parents to have them.”

She had worked through an agency to connect with her intended parents but felt very strongly that what she and the agency were doing was all about helping people start or build their families and not about the money involved. In fact, in at least one situation when the intended parents did not get pregnant with her first donation, she was prepared to donate again and waive any fee. However, those intended parents decided to try a different donor in hopes of increasing their chances of success.

In the first seven donations she was anonymous. The intended parents had seen her profile and pictures, but never knew her name or how to contact her. Likewise, she did not know the names or contact information of her intended parents

But for the current donation she was proceeding as an “open donor.” In other words, she is being open about who she is to the intended parents and they are open with her about who they are. She was

par(- Tw 14.5Lik)1efeorl.5Likart(t)JTJ11.8oa2143.999(xnl.3525 Tw 14.187 -d[(any 248(ild ,

biologically related children; and

Whereas: the Egg Donor is sympathetic to the needs of the intended parents, and seeks to help the intended parents have one or more children by embarking on the egg-donation arrangement described herein; and

Whereas: as a result, the Intended Parents are incredibly appreciative of Egg Donor's willingness to help and commit to compensate her as outlined in this agreement; and

Whereas: the parties understand that all the medical procedures associated with this egg donation arrangement, including hyperstimulation of the ovaries and egg retrieval are inherently risky; and

Whereas: notwithstanding those risks, the parties to this agreement herein set forth with specificity their mutual intention that the Egg Donor (i) take medication to hyperstimulate her ovaries, (ii) submit to a procedure to retrieve her eggs; and (iii) donate those eggs to the intended parents for their use as described herein;

Whereas: the Intended Parents will take full parental responsibility for, and custody of, any children born with the donated eggs; and the Egg Donor [and her partner or spouse] waive any parental rights that they may have to the children so born;

Now therefore, the parties agree

B. Definitions

Readers should pay careful attention to the definition section of an egg-donor agreement because, as with surrogacy agreements, rights and obligations are often determined through those defined terms.

they may also freeze any resulting embryos, donate them at no cost to another person or couple to use them to become parents, donate them at no cost for scientific research, or allow them to be destroyed.

Notice with this definition that the parties specified what the donated eggs can be used for. This is one of the major issues confronting egg donors and intended parents. Egg donors may only want their eggs to be used by the particular intended parent or parents who they are familiar with through their agency. The egg donor may not know the identity of the intended parents, but she would likely want to have a general understanding about who the intended parents are. For example, the egg donor may want to know whether the intended parents are financially stable, well educated, and able to provide for any children who are produced out of the agreement. The egg donor may also not agree to allow the intended parents to donate her eggs.

There is a market for unused frozen embryos where intended parents with excess frozen embryos sell them to subsequent intended parents as a way to hedge the costs associated with surrogacy.²¹⁵ Note that selling embryos is not a *Permitted Use* in the sample definition above. In that definition, only subsequent donations of unused embryos were allowed, but not sales of unused embryos. It is important for the parties to pay careful attention to the definitions because they may address major rights and obligations of the parties.

C. Representations

Both the intended parents and the egg donor will want certain assurances from their counterparty before entering into the transaction. These representations are quite analogous to the representations that the parties make in a surrogacy agreement. For example, both parties will want to know whether the other party fully understands their commitments and the risks associated with the process. The parties may insist that each party has undergone psychological and legal counseling in connection with the egg donation.

215. See I. Glenn Cohen & Eli Y. Adashi, *Made-to-Order Embryos for Sale—A Brave New World?*, 368 NEW ENG. J. MED. 2517 (2013) (examining the risks associated with the sale of “made-to-order” embryos).

1. Representations of Egg Donor

One important representation that the intended parents should consider is whether the egg donor has been a successful donor previously. Success is measured by resulting childbirth. One of the primary reasons intended parents may choose a particular donor is because she has a successful history of donating.

The other reason why intended parents may choose one egg donor over another is related to her profile. Generally egg donors fill out profiles by supplying information about themselves including their physical attributes, talents, hobbies, medical history, and information about their family medical history. Profiles generally include a variety of pictures of the donor at different ages and possibly members of her family, including any children she has had.

Intended parents will want assurances that the information in the profile is accurate and not misleading. Agencies and IVF clinics that find donors for intended parents generally try to verify the information supplied, but a representation in the egg-donor agreement can supplement any agency or clinic's effort to verify that information.

Representations of the Egg Donor

The intended parents will want the egg donor to attest to a variety of facts. Some of these may include:

- *[if true] that she has been a successful egg donor previously in that [out of x donations y] donations have resulted in a live birth;*
- *that the information in her Donor Profile is accurate and not misleading in any way;*
- *that she fully understands the risks, both medical and psychological, associated with being an egg donor, including possible infections, and, in the extreme, complications that could even lead to her own death;*
- *that she has received psychological counseling about the obligations and risks associated with egg donations; and*
- *that she has received legal counseling about her risks, rights, and obligations as they pertain to surrogacy generally, and also as they are described in this Egg Donor Agreement.*

2. Representations of the Intended Parents

Similarly, the egg donor will want to know that they are working with intended parents who are competent enough to enter into the arrangement and who understand all the risks, including the fact that egg donations do not always result in live births even after appropriate fertilization and implantation into a gestational surrogate. The egg donor will want to ensure that the intended parents understand that the egg donor's responsibilities are limited to her donation. The box below contains some sample representations of the intended parents.

Representations of the Intended Parents

The egg donor will want the intended parents to attest to a variety of facts. Some of these may include:

- *that the intended parent is either a single person or that they are part of a couple, married or otherwise (if part of a couple the partner or spouse will generally be required to sign on to the agreement);*

execute any additional documents necessary to assure that access.

Termination Upon Unsatisfactory Results. If any of the results of the medical, psychological, or genetic testing is unsatisfactory to the Intended Parents, this agreement will terminate and the Intended Parents will have no further obligations due or owing.

E. Medical Procedures, Behavior Restrictions, and Assumption of Risk

Once the preliminary testing is done, the medical procedures begin. These include hyperstimulation of the ovaries to produce multiple eggs, sometimes as many as twenty, and egg retrieval. In accord with the earlier representation, the egg donor must affirmatively acknowledge that she understands all the related risks and still agrees to undergo the procedures. Sample clauses regarding an egg donor's submission to the medical procedures are listed below.

Example 4-4: Submission to Medical Procedures

Medical Procedures. The Egg Donor agrees to undergo all the procedures related to the Egg Donation, including taking medication to hyperstimulate her ovaries and thstimu-3.2v(TJ211 T6 0.1m(E)Tw -14.22 35 Td[(5 and)

Example 4-5: Behavioral Restrictions

Behavioral Restrictions. The Egg Donor also agrees to follow the behavioral guidelines of any Responsible Physician in order to assure the highest degree of success with the procedures. This includes taking any medication as it is prescribed, attending appointments, allowing testing and blood draws. It also may include refraining from sexual intercourse for a certain amount of time before the Egg Donation or using a particular kind of contraception. Any violation of this provision will be deemed a material breach of the agreement by the Egg Donor and will allow the Intended Parents the option to terminate their obligations hereunder. Any child the Egg Donor may conceive due to hyperstimulation of her ovaries will be the child of the Egg Donor and the Intended Parents will have no parental responsibility for such child.

F. Parental Rights and Obligations

The agreement between the parties that any child born from the donated eggs will be the child of the intended parents and not the egg donor or the egg donor's spouse is central to the surrogacy arrangement. Thus, there are two sets of commitments that must be

any claim to parental rights or custody. Egg Donor [and her partner or spouse] also agrees to cooperate to the fullest extent to support and enforce the parental rights of the Intended Parents, including cooperating in any necessary legal proceedings.

G. Permitted Uses

Defining the permitted uses for the donated eggs and any resulting embryos is not sufficient alone to create a binding commitment between the parties. Thus, there must be specific section addressing the permitted uses. This section will likely follow the section explaining parental rights. The language need not use specifically defined terms, but it must identify what the egg donor is willing to accept as the permitted uses for her donation. The possibilities include the following: the fertilization and then implantation of the resulting embryo into a gestation surrogate in an attempt to have a resulting child or children; the cryopreservation of any resulting embryos not used immediately upon their creation; the donation at no cost for scientific research or donation at no cost to another potential intended parent; the sale to another intended parent; or destruction of the resulting embryos. Some form agreements include all of the above options and require the parties to initial the acceptable choices. A negotiated agreement, on the other hand, will

Sample clauses on compensation are below.

Example 4-8: Fees and Expenses

Base Compensation. The Intended Parents agree to pay the Egg Donor for her services base compensation of [\$10,000]. [This amount is payable to the Agency or IVF Clinic and should be paid together with the Agency Fee or the IVF Clinic Fee.]

Timing of Base Compensation. The Base Compensation is due upon execution of this Egg Donor Agreement.

1. Expense and Reimbursement Payments

The intended parents often make financial commitments to pay for any and all medical costs and any other out-of-pocket expenses that the egg donor may have, including legal fees. It is also not uncommon for intended parents to find an egg donor who does not live in the state where the IVF clinic is located. Thus, the intended parents typically pay for or reimburse the egg donor for travel expenses for the donor and a companion. The egg donor may also ask the intended parents to pay for medical costs related to any complication caused as a direct result of the egg donation. These expenses and reimbursements can significantly increase the overall costs of egg donation. Below are two sample clauses regarding expenses and reimbursements.

Example 4-9: Expenses and Reimbursements

Expense and Reimbursement Payments. The Intended Parents also agree to pay directly, if possible, or else to reimburse Egg Donor for, any and all out-of-pocket expenses related to the Egg Donation that are not covered by any applicable insurance. These expenses include, but are not limited to, expenses for:

-

- *medical fees for any complications that are directly caused by the Egg Donation;*
- *reasonable legal fees payable to her attorney;*
- *[if Egg Donor has other children] any child care required by Egg Donor to facilitate her service and attendance at appointments, not to exceed a total of [\$200]; and*
- *[if Egg Donor will travel from another city] any reasonable travel expenses for herself and one companion, including coach airfare if Egg Donor will fly to accommodate the Intended Parents' choice of IVF Clinic, two nights at a three star hotel or better, and a \$100 per diem for miscellaneous expenses and meals.*

2015]

SURROGACY

557

that certain medical situations may arise for a child born from the egg donation. For example, the parties need to consider when it would be helpful for the child to be able to contact the egg donor to obtain information about her family's medical background or request a blood, organ, or tissue donation from the egg donor or someone in the egg donor's family. In the egg-donor agreement, the egg donor may agree to be contacted in that event.

Further, any child born from an egg donation may simply want to meet their egg donor at some point. The parties may agree on what happens in this circumstance, like perhaps allowing the child to meet the donor when the child reaches a predetermined age. The sample language set forth below addresses the possibility of contact for medical purposes or for a method to meet if agreed upon by all parties.

Example 4-10: Confidentiality

Confidentiality. The parties agree to proceed with the Egg Donation anonymously and not to seek out the identity of their counterparties. If any of the parties inadvertently learn the identity of a counterparty, they agree to keep such identity confidential.

Notwithstanding the foregoing, if any Child born as a result of the Egg Donation has a medical need to contact the Egg Donor, then the Intended Parents or such Child may attempt such contact through the Agency or the IVF Clinic. In such case, the Agency or the IVF Clinic will contact Egg Donor who shall cooperate to allow the contact to the extent such contact is medically important for the Child.

If any Child born as a result of the Egg Donation is simply curious, the Intended Parents will ensure

y

