

Illinois Becomes Surrogacy Friendly

By H. Joseph Gitlin

Illinois has become surrogacy friendly, and may become the magnet state for surrogacy arrangements with the passage of the Illinois Gestational Surrogacy Act which takes effect January 1, 2005. The new Act has no residency requirements for the intended parents and a birth certificate will be issued without the need for court proceedings. HB 4962. The laws of other states are not as surrogacy friendly as under the new Illinois Act.

In traditional surrogacy the egg of the surrogate is fertilized by the intended father's sperm through artificial insemination. In gestational surrogacy the egg of the surrogate is not involved. She is merely the gestator for the embryo (fertilized egg) which has been transferred into her uterus. The egg and sperm are fertilized in vitro, the so called test tube. The positions of most states, as detailed below, are not friendly to surrogacy.

The problematic legal issue in traditional surrogacy has been if a fee is paid to the surrogate for her services. If the judge applies the adoption model the compensation might be decided to be "baby buying" because a traditional surrogacy requires an adoption to terminate the surrogate's parental rights and to establish the intended parents as legal parents. Under the new Illinois act a reasonable compensation of the gestational surrogate is specifically allowed.

The Illinois Gestational Surrogacy Act states there must be attached to the gestational surrogacy contract an Illinois physician's affidavit stating that either intended parent, or both, have a medical need for the gestational surrogacy. In every surrogacy arrangement in which I have been involved there was either an infertility problem by one or both of the intended parents, or the intended mother could not carry and deliver a child (e.g. no uterus). Will a physician view age as a medical problem? I suppose that if the age is marginal for producing viable genetic material the physician might categorize it as a "medical need," but not so if the infertility is a geriatric problem.

The Act requires a written contract and prescribes the minimum requirements for the contract, including that the gestational surrogate has given birth to at least one child, is at least 21 years of age, has undergone a medical and psychological evaluation and has consulted with independent legal counsel.

A parent child relationship may be legally established before the birth of the child if the attorneys representing both the gestational surrogate and the intended parents certify that the parties entered into the agreement with the intent to satisfy the provisions of the Act prescribing the requirements of the gestational surrogacy contract. The attorneys' certificate is to be on a form prescribed by the Illinois Department of Public Health and filed with the Department. Of course there is an advantage to pre-birth establishment of parenthood, especially in dealing with control of the child immediately after the birth, removing the child from the hospital, insuring the child etc. Thus representation by attorneys has clear advantages.

The reasons Illinois may become a magnet state for surrogacy are: (1) the relatively simple procedure for obtaining a birth certificate, (2) the medical procedure should be performed in Illinois, and (3) the parent-child relationship can be legally established before birth. The Gestational Surrogacy Act states that the intended parents must satisfy the requirements of sections 5 and 6 of the Illinois Parentage Act of 1984 (the prior law relating to gestational surrogacy). Section 6(a)(1)(E) of the prior law states that an Illinois physician must make the certifications of the biological relationship of all parties to the surrogacy contract to the child.

Though other states have codified gestational or traditional surrogacy procedures, none has made obtaining a birth certificate as easy as the Illinois statute. New Hampshire, Texas, Virginia and Florida all have statutes regulating surrogacy. Neither Florida nor New Hampshire have pre-birth procedures whereby the intended parents may be listed on the original birth certificate of the child. Florida requires

the intended parents to seek expedited affirmation of parental status through the courts three days after the birth of the child. Though New Hampshire law allows the intended parents to be listed on the first birth certificate, the birth certificate may not be completed for 72 hours following the birth of the child. During those 72 hours, the gestational mother may notify the physician and the intended parents that she intends to keep the child. If she does so, then the gestational mother will be listed as the mother on the birth certificate.

Virginia, on the other hand, does have a pre-birth procedure whereby the intended parents can have the surrogacy contract affirmed and be listed on the first birth certificate immediately after the birth of the child. The procedure, however, is fairly invasive and expensive. The parties to the contract, including the intended parents, the surrogate, and the surrogate's husband, must jointly file a petition for court approval of the surrogacy contract. After the filing, the court must appoint a guardian ad litem for the child and an attorney for the surrogate mother. The court will then order a home study of the intended parents' household by the social services department. Once the result of the home study is filed, the court finds that the intended parents meet the state's standards for adoptive parents, and the court finds that the surrogacy contract meets 12 other requirements, the court may approve the surrogacy contract for a period of 12 months. The Virginia statute allows for alternate post-birth procedures for establishing the parentage in the case of surrogacy. Comparing the Illinois pre-birth procedures to those of Virginia is like comparing the local corn maze to the mythical Labyrinth.

In Arkansas despite the rather liberal laws regarding surrogacy, the state statute still requires that the initial birth certificate list the gestational mother as the mother of the child, but later a substituted certificate of birth may be issued upon order of the court. Arkansas Code 9-10-201(c)(2).

The Texas statute, like Virginia, requires the intended parents to seek approval of the court before they can be listed as the parents of the resulting child on the birth certificate. This procedure is intended to be completed before the birth of the child, thereby allowing the intended parents to be listed as the legal parents on the original birth certificate. Although court intervention is still required, Texas is closer to Illinois regarding the intended parents' ability to be listed as the parents of the child on the original birth certificate.

Though California has not passed surrogacy legislation, it has been the battle ground for a number of surrogacy cases and has developed a body of case law that has influenced courts across the country. *Johnson v. Calvert*, the Supreme Court of California's first foray into surrogacy law, established the intended parents rule, whereby the party intending to bring about the birth of the child was the child's "natural mother." *Johnson v. Calvert* involved a surrogate mother who had no genetic relationship to the child. The surrogate in *Johnson v. Calvert* was implanted with an egg from the intended mother which was fertilized by the intended father's sperm. The California court ruled against the gestational surrogate and in favor of the intended parents. California's landmark decision, *In re Marriage of Buzzanca*, 72 Cal.Rptr.2d 280 (Ct. App. 4th 1998) reiterated the rule that the parties intending to be the parents at the time of the surrogacy contract are the legal parents of the child and extended the intended parents' doctrine to gestational surrogacy where neither of the intended parents was genetically related to the resulting child. Despite the court decisions, though, because of the lack of a statute and legal certainty, Illinois remains a more attractive option for forum shopping potential intended parents.

On the opposite coast from California, New Jersey was the forum of the most famous surrogacy case, *In re Baby M*. The New Jersey high court followed the adoption model and held that the surrogacy contract was invalid because the surrogate was being paid money. The New Jersey court, however, ruled in favor of the intended parents by giving them custody of the child but granting the surrogate and genetic mother, Marybeth Whitehead, visitation.

In a mix of policies Massachusetts is another state that appears to be surrogacy friendly. Yet Illinois seems to be a better choice for couples wishing to enter into surrogacy contracts with certainty. Lacking a statute, Massachusetts is surrogacy friendly through its case law. The courts have even ordered the creation of an atypical birth certificate. *Culliton v. Beth Israel Deaconess Medical Center*, 756 N.E.2d

1133 (Mass. 2001). Despite the favorable case law, the certainty and simple procedures offered by the Illinois statute may make parties to a surrogacy come to Illinois.

Michigan and Utah, moving in the opposite direction of Illinois, banned surrogacy completely. Despite the ban on surrogacy, the state's have implemented a method for determining the parents of a child resulting from surrogacy. Rather than looking to the intentions of the parties, the court will determine parentage by the best interest of the child. Other states, including Alabama, have used the same best interest test when faced with a custodial dispute between a biological father and the intended mother following the birth of a child by surrogacy, even though the child is not genetically related to the intended parent. A Pennsylvania trial court recently awarded custody to gestational surrogate mother after determining that the contract was void for failing to designate a legal mother. Applying the best interests of the children test, the Pennsylvania trial court stated the children must have two parents and the failure to designate a mother made the surrogacy contract void. Once the trial court found the contract to be void, it declared the gestational mother the legal mother and awarded her custody of the children on the basis of the best interests of the children. Though opponents to surrogacy argue that the best interests of the children often take a back seat to the desires of the contracting adults, when the surrogacy agreement falls apart, courts often rely on the best interests of the children to determine parentage and custody.

Arguably, other states are more liberal regarding surrogacy, however, no other state has as simple a procedure for approval of the surrogacy agreement and the creation of a birth certificate listing the intended parents as the parents of the resulting child. Similarly, states with case law favoring surrogacy still fail to provide the certainty most parties desire and provide no procedure for obtaining a birth certificate listing the intended parents. Though not as liberal as some other forums, Illinois, by providing certainty and simplified procedures, has become one of the most surrogacy friendly states.

Conclusion

As word spreads around the nation about the advantages of having a child through surrogacy in Illinois, lawyers practicing family law in Illinois will be called upon to assist couples who want to be parents through surrogacy. It behooves these lawyers to learn surrogacy law. Learning the law part of surrogacy should not be difficult for lawyers, but to represent clients in surrogacy matters the lawyer also needs to understand the mechanics of human reproduction and especially Assisted Reproductive Technology (A.R.T.), which includes in vitro fertilization (IVF) procedures. It is these scientific aspects which will be more difficult for lawyers.

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