NEW YORK LAW JOURNAL

The Child-Parent Security Act Is a Game Changer: Here's What You Need To Know

The CPSA is comprehensive, addressing and securing the legal relationship between children and their parents when the children were conceived through third-party reproduction.

By **Denise E. Seidelman and Alexis L. Cirel** | April 27, 2020

On April 2, 2020, the Child-Parent Security Act (CPSA) passed the New York Legislature as part of Gov. Andrew Cuomo's year 2020 budget package. The CPSA is comprehensive, addressing and securing the legal relationship between children and their parents when the children were conceived through third-party reproduction. The CPSA also discards New York state's antiquated ban on compensated gestational surrogacy, i.e., where the surrogate has no genetic relationship to the child.

The CPSA, which will go into effect in February 2021, will be hugely impactful on the many thousands of New York families having children through third-party reproduction. The statute establishes detailed and clear—and entirely new—legal procedures and requirements for obtaining a judgment of parentage for children born through sperm or egg (collectively, gametes) donation, embryo donation, or with the assistance of a gestational carrier. Failure to comply with these statutory requirements, particularly in the context of surrogacy arrangements, could prevent the intended parents from obtaining a court order recognizing them as the legal parent of their child. Family law practitioners of all kinds in New York, including matrimonial and trust and estates attorneys, will need to have a working understanding of the principles underlying the CPSA to properly protect and advise their clients who have conceived children through third-party reproduction and/or who have cryopreserved embryos that can be used for conception.

Principles Underlying the CPSA

Prior to passage of the CPSA, New York did not have a statutory definition of "parent" and, until recently, courts determined parentage by looking to genetics, the act of giving birth, adoption, or the marital presumption. This restricted view of parentage ill fits and thus distorts third-party reproduction, in those situations where the person(s) genetically connected to the child—an egg, sperm or embryo contributor—has no desire or intention of assuming parental responsibility, as in the case of a donor. The child may also be gestated by a woman who has no genetic connection to the child, and she may, or may not, have the intention to parent the child. The CPSA therefore shifts the traditional paradigm by adopting an intent-based analysis prioritizing pre-conception intent to determine the legal parentage of a child conceived through third-party reproduction, as many courts and legislatures across the country have been doing for years. The New York Court of Appeals applied this analysis in the case of *Brooke S.B.* and it is the basis for determining parentage in the

ABA Model Act on Assisted Reproduction and in the Uniform Parentage Act. Anyone considering having a child through assisted reproduction should be strongly advised to enter into a written agreement, prior to conception, clearly documenting the intentions of all parties involved.

Prior to the passage of the CPSA, intended parents needing the assistance of a compensated surrogate to have a child were required to work with a surrogate who resided and gave birth to the child outside of New York. Those able to form their families through third-party reproduction within the state had to use costly and burdensome adoption proceedings as a mechanism for securing their legal relationship to their intended child. The CPSA replaces that with a simple and novel procedure allowing intended parents to petition the court, prior to birth, for a judgment of parentage declaring them the legal parents of their child. To reflect the reality of the many people having children through third-party reproduction, the CPSA is gender- and marriage-neutral and it provides single intended parents with the ability to obtain an order declaring them the only legal parent of their child.

Overview of CPSA Components and Key Provisions

Definitions. Article 5-C, Part 1 sets forth the precise meaning of the nuanced terms used throughout the Act, an important fulcrum upon which the CPSA rests. For example, depending on a person's intent, a gamete contributor might be an "intended parent" or might be a "donor," all with dramatically different effect.

Judgment of Parentage in Donor and Surrogacy Arrangements. Article 5-C of the CPSA outlines the petition procedure for obtaining a judgment of parentage and it establishes the substantive rules for determining who is the parent of a child conceived through third-party reproduction.

Section 581-202, which applies to donor arrangements, provides that the petition may be brought not only by a person seeking to be recognized as a parent but also by someone seeking to be absolved of parental responsibility on the basis that they are a donor rather than an intended parent. Another provision of Article 5-C repeals Domestic Relations Law Article 73—New York's original artificial insemination statute. Unlike Article 73, the CPSA does not require that an insemination take place under the supervision of a physician, which greatly expands the number of people eligible to obtain a judgment of parentage. The CPSA also provides a single intended parent conceiving with donor gametes the ability to obtain a judgment of parentage declaring them the only legal parent of the child. Prior to passage of the CPSA a single intended parent conceiving with donor sperm had no legal mechanism by which they could obtain a court order terminating the potential rights of the donor. Finally, the CPSA updates New York's Voluntary Acknowledgement of Paternity (VAP) provisions to allow non-genetic intended parents of child(ren) conceived through donor insemination to sign an voluntary acknowledgement of parentage form at the hospital securing their legal relationship to their child without requiring them to petition the court for an judgment of parentage. (Because there are a number of grounds upon which the validity of the VAP can be challenged, it is a good idea for intended parents to also obtain a judgment of parentage. Nevertheless, the ability to sign a VAP will protect the large numbers of families who lack the financial resources or the forethought to petition the court.)

Domestic Relations Law Article 8 (New York's existing anti-surrogacy statute) was amended to apply only to genetic surrogacy arrangements, wherein the surrogate provides the egg used in conception

(as distinct from “gestational” surrogacy arrangements, which are permitted under the CPSA). Section 581-203 sets forth the procedures for obtaining a judgment of parentage for children born pursuant to a surrogacy agreement. The petition, in that case, may be filed any time after the surrogacy agreement has been executed by all parties. The petition must be signed by both the attorney(s) representing the intended parents and the attorney(s) representing the “Person Acting as Surrogate” (hereafter, the “surrogate”), and all signing attorneys must certify that the substantive requirements governing the surrogacy arrangement have been met. This part of the Act dictates that where a court finds that the surrogacy agreement complies with statutory requirements, the court “shall” issue a judgment of parentage declaring the intended parents the legal parents at the time of birth and further declaring that the surrogate and any gamete donors are not the child’s parents.

“Child of Assisted Reproduction.” Article 5-C, Part 3 sets forth the substantive rules for distinguishing between donors and intended parents where the child is conceived through assisted reproduction. It provides that a donor *is not* a parent where there is proof of “donative intent” as defined in the statute, whereas an individual who contributes an egg(s) or sperm for, or who “consents to” assisted reproduction “with the intent to be a parent of the child with the consent of the gestating parent,” *is* a parent of the resulting child for all legal purposes. Where the gestating parent is married, this requisite “consent” is presumed; where the gestating parent is not married, “consent” must be in a record indicating the mutual agreement of the intended parents to conceive and parent a child together or, in the absence of such a record, supported by clear and convincing evidence of a mutual intent to parent.

Importantly, the statute also contains a limitation on spouses’ dispute of parentage. It provides that neither spouse may challenge the marital presumption of parentage of a child conceived by assisted reproduction during the marriage unless the court finds by clear and convincing evidence that one spouse used assisted reproduction without the knowledge and consent of the other spouse. However, a married individual may use assisted reproduction and the marital presumption will not apply under certain circumstances, including if the spouses are living separate and apart pursuant to a decree or judgment of separation or pursuant to a written agreement of separation, or if they have been living separate and apart for at least three years prior to the use of assisted reproduction.

Surrogacy Agreements. Article 5-C, Part 4 outlines the requirements for an enforceable surrogacy agreement. It sets forth the eligibility requirements for the intended parents and the surrogate as well as detailed requirements as to the terms of the agreement, including (but certainly not limited to) that all parties have been represented throughout the contractual process and the duration of the contract and its execution by independent legal counsel of their own choosing, paid for by the intended parent(s). These requirements are designed to protect the interests of the surrogate as well as the integrity of the process. Because surrogacy agreements are typically lengthy, allowing courts to rely on the attorney certification (that the requirements of the Act have been met) will significantly ease the burden on the courts, expedite the judicial process, and hopefully result in the judgment of parentage being issued and becoming effective immediately upon the child’s birth. Where the surrogacy agreement fails to meet all of the requirements of Part 4 due to a technical or non-material deviation from the requirements of the Article, the court may still enforce the agreement if it finds that the agreement is in substantial compliance with statutory requirements. If the surrogacy agreement does not meet the material requirements of this Article, the agreement is not enforceable and the

court will determine parentage based on the intent of the parties, taking into account the best interests of the child.

Embryo Disposition Agreements. It is particularly incumbent on matrimonial attorneys to familiarize themselves with the CPSA provisions relating to embryo disposition agreements (§ 581-306). There are many thousands of New Yorkers who have created embryos with a former partner or spouse, which embryos remain cryopreserved across the state and country. These embryos should be treated in a similar manner to marital property to be divided at the time the marriage is dissolved. It should be no surprise that disputes may arise when one of them wishes to use the embryos to have a child after the dissolution of their relationship. In some situations, one party does not want to have a child or does not want to have a child with the other party. In other situations, the non-consenting person does not want to be burdened with parental responsibility but has no objection to his/her former partner using the embryo for conception. Prior to the CPSA, existing New York law did not provide an avenue for absolving the former spouse/partner of parental responsibility.

Section §581-306 provides spouses/partners with joint dispositional control of embryos the ability to enter into an agreement transferring legal rights and dispositional control of the embryo to only one of them. The agreement must be in writing and each person must have been represented by separate legal counsel before the agreement was signed. If the couple is married, transfer of legal rights and dispositional control can only occur after they are divorced. The person who transfers dispositional control of the embryo is not a parent of any child born thereafter *unless* they sign a writing, prior to the medical embryo transfer, stating that they want to be a parent.

Posthumous Conception. CPSA §581-307 addresses the parentage of children conceived and born after the death of the intended parent who provided that genetic material. Where the genetic parent signed a record consenting to be a parent, were assisted reproduction to occur posthumously, the decedent will be recognized as the child's parent provided the record complies with the trusts and estates law. Failure to do so will result in the child being denied the decedent's benefits.

Other Miscellaneous Changes to Existing Law. To insure that surrogacy and egg donation matching programs and IVF clinics employ best practices, and that participants are giving fully informed consent to undergo these medical procedures, the legislators amended the New York General Business Law by adding a new Article 44, which mandates that all matching programs operating in New York must be licensed by the state. It also charges the Department of Finance and the Department of Health with the duty to create regulations imposing best practices on professionals working in the field. Finally, the legislators amended the New York Public Health Law by adding a new article 25-B, which mandates the creation of a voluntary tracking registry to gather data on the long-term impact of surrogacy and egg donation arrangements.

Final Thoughts

The CPSA is a game changer, bringing New York into the 21st century. As with any legislation, it was the subject of negotiation and compromise, but the final result provides New Yorkers with a workable construct that recognizes today's complexity of parentage and the need to accommodate

those complexities while protecting all concerned. Although the act is detailed, it is also thorough and well-conceived. Studious professionals should have no problem guiding participants through the process and achieve the dream of family.

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