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Parentage Problem Solving for Families in the Age of Surrogacy

On Feb. 15, 2021, New York's Child-Parent Security Act (CPSA) becomes fully effective, creating a process that legitimizes surrogacy and providing a new basis for determining the parentage of children born by means of assisted reproductive technology and/or surrogacy. Alton L. Abramowitz describes some of the new provisions in this edition of his Divorce Law column.

By **Alton L. Abramowitz** | February 09, 2021

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An article in the New York Times written by Maria Cramer and published on Jan. 31, 2021, titled *Couple Forced To Adopt Their Own Children After a Surrogate Pregnancy* could not have been more provoking, disturbing and timely because it highlights some of the hurdles heretofore faced by married couples (and individuals) in their efforts to add children to their family while utilizing the services of a surrogate mother. The article describes the plight of Jordan and Tammy Myers, a Michigan couple with an eight-year-old child, who now have newborn twins that were delivered by a surrogate. Two Michigan judges denied the Myerses' requests to be declared the legal parents of their twins, despite affidavits from the surrogate and her husband, and from the fertility doctor, all attesting to the fact that the Myerses are the twins' biological parents. "Michigan law does not

automatically recognize babies born to surrogates as the legal children of their biological parents." As a result, the Myerses are now engulfed in a formal adoption process, which included fingerprinting and which will also include "home visits by a social worker, personal questions about their own upbringing, their approach to parenting and criminal background checks." In the interim, the surrogate and her husband are listed as the parents on the birth certificates of the twins, and "temporary permission" had to be given by the surrogate in order to enable the Myerses to take the twins to their home from the hospital where they were born.

The article also points out: "Under Michigan law, paying a woman to act as a surrogate is a felony punishable by up to five years in prison and a $50,000 fine," and that "[a]ny agreement a woman makes to act as a surrogate and then relinquish parental or custodial rights to the child are 'void and unenforceable'". The only remedies available to the biological parents in Michigan require them to resort to court proceedings "to be recognized as the legal parents or go through the adoption process." Similar problems have been faced by parents in other states with laws similar to Michigan's, as have parents in the state of New York up to this point.

The timing of the above-discussed article could not have been more prescient because on Feb. 15, 2021, New York's Child-Parent Security Act (CPSA) becomes fully effective, creating a process that legitimizes surrogacy and providing a new basis for determining the parentage of children born by means of assisted reproductive technology (ART) and/or surrogacy.

Newly created Article 5-C of New York's Family Court Act (FCA) sets out most of the salient provisions of the CPSA, which also includes corresponding amendments to the Domestic Relations Law (DRL), the Public Health Law, the Social Service Law, the Insurance Law, etc.

Although official forms for the processes and procedures necessitated by the CPSA have yet to be promulgated by the New York State Office of Court Administration (OCA), it is likely that such forms will soon be publicly available from OCA to attorneys, prospective parents, surrogates, etc., in order to enable them to comply with the requirements of the CPSA.

Part I of FCA Article 5-C contains "general provisions", and FCA Section 581-101 provides a statement of the "purpose" of that Article as follows: "… to legally establish a child's relationship to his or her parents where the child is conceived through assisted reproduction except for children born to a person acting as surrogate who contributed the egg used in conception." This Section further states that "t]his article and all governmental measures adopted pursuant thereto should comply with existing laws on reproductive health and bodily integrity."

FCA §581-102 provides the essential definitions that attorneys must master in order to properly represent clients in the assisted reproduction and surrogacy arenas. Section 581-201 et seq. contain the prerequisites for obtaining a judgment of parentage for children covered by the provisions of the CPSA. Importantly, it should be noted that proceedings for a judgment of parentage are governed by New York's Civil Practice Law and Rules (CPLR). Like many other statutes involving "special proceedings", §§581-202 and 581-203 specify what a petition for a judgment of parentage must contain, along with the necessary provisions that must be set forth in a judgment of parentage.

Part 3 of Article 5-C addresses parentage obtained by assisted reproduction and not as the result of "sexual intercourse" and includes provisions relating to the donation of gametes, i.e., sperm and eggs, as well as agreements relating to that process.

Remember the Myerses? Part 4 of Article 5-C provides New York's solution to their dilemma by "authorizing" surrogacy agreements. It sets forth the required provisions that must be included in a surrogacy agreement, the formalities of the agreement, the rights and obligations of the surrogate and of the intended parents, a provision requiring the intended parents to provide a policy of disability insurance upon the surrogate's request, child support obligations of the intended parents, etc. Of particular and related significance is Part 5 of Article 5-C where the provisions relating to the compensation of donors and surrogates are found.

The "Surrogates' Bill of Rights" found at Part 6 of Article 5-C contains some of the most far reaching, compassionate and important provisions for the protection of the surrogate. These provisions take precedence over "any surrogacy agreement, judgment of parentage, memorandum of understanding, verbal agreement or contract to the contrary," and also provide that "any written or verbal agreement purporting to waive or limit any of the rights [of the surrogate] is void as against public policy." Part 6 gives the surrogate "the right to make all health and welfare decisions regarding them-self and their pregnancy," the right to "independent legal counsel of their own choosing … to be paid for by the intended parent(s)," the right to "comprehensive health insurance" and medical costs paid for by the intended parent(s) that include coverage for "behavioral health care and the cost of psychological counseling to address issues resulting from their participation as a surrogate," the right to life insurance paid for by the intended parents in the minimum amount of $750,000 with the beneficiaries to be chosen by the surrogate, and the right to cancel the surrogacy agreement prior to becoming pregnant.

Although there is not enough space in this column for a comprehensive, paragraph by paragraph review of the detailed provisions of the CPSA, the family law practitioner and other lawyers whose practices become enmeshed with issues of surrogacy and ART are urged to familiarize themselves with the details of the CPSA and to refer to it in addressing the myriad rules and requirements emanating from that complex statute.

Lastly and most importantly, attorneys practicing in this area of the law should always keep in mind the words of former U.S. Senator Jim DeMint: "One of the greatest titles in the world is parent, and one of the biggest blessings in the world is to have parents to call mom and dad."

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