

Surrogacy Commission June 28, 2016 Presentation Notes: Overview of Court Cases and Legislative Activity in Minnesota; Key Policy Issues

Baby M Case

Baby M was a 1988 New Jersey Supreme Court case that gave rise to recognition and consideration of surrogacy arrangement issues in Minnesota and around the country. It involved a traditional surrogacy arrangement under which the surrogate was also the biological mother and the husband of a married couple was the biological father. The mother decided to keep the child after the birth and litigation ensued. The New Jersey Supreme Court ruled that surrogacy contracts were void as against public policy and refused to enforce the contract. However, the married couple then brought a custody action based on the fact that the husband was the biological father and ultimately was awarded custody of the child based on a traditional best interests of the child analysis.

Traditional vs. Gestational Surrogacy

In a traditional surrogacy case, like Baby M, the surrogate is the biological mother. Gestational surrogacy involves in vitro fertilization under which the surrogate is not the egg donor and therefore not biologically related to the baby (intended mother or a third party may be the donor). Under current practice, experts discourage the use of traditional surrogacy, given the greater likelihood that the surrogate will become attached to and emotionally bond with the child. Also, if a court does not uphold a surrogacy agreement and there is a custody battle, the surrogate mother will have a much weaker claim to assert parental rights if she is not the biological mother.

Legislative Activity in Minnesota

The Baby M case generated a lot of legislative activity in Minnesota and around the country, most of which involved bans on surrogacy. In 1988, the Minnesota Senate Judiciary Committee held hearings on two different proposals dealing with surrogate parent agreements. One was a fairly straightforward bill stating that a contract for surrogate parenting would be void and unenforceable. An alternative bill included provisions prohibiting advertising, arranging agreements, receiving compensation for relinquishment of a child, and paying a fee for a child. The bills were laid over after committee discussion.

2008

In the years following the Baby M case and the initial response, there was not significant legislative activity in Minnesota. In general, concerns regarding “baby selling” and the

exploitation of women were alleviated by the growing acceptance and use of in vitro fertilization and advances in reproductive technologies that would allow surrogates to give birth to a child with whom they have no biological connection. At the same time, use of surrogacy or gestational carrier arrangements was occurring in the absence of governing law.

In 2008, the legislature passed **S.F. 2965**, which would have established a legal framework for gestational carrier (surrogacy) arrangements and contracts. The bill was vetoed by Governor Pawlenty. Key points of the legislation included an amendment to the artificial insemination statute to include all forms of assisted reproduction and eligibility requirements for gestational carriers and intended parents. For example, a gestational carrier would have to be at least 21 years of age, given birth to at least one child, completed medical and mental health evaluations, undergone legal consultation, and obtained appropriate health insurance coverage. At least one intended parent must have contributed sperm or egg that results in an embryo, parents must have a medical need for the arrangement evidenced by a physician, and must have completed a mental health evaluation and undergone legal consultation. Technical requirements for a gestational carrier contract were included, as well as provisions governing the duty to support and establishment of the parent-child relationship under the Parentage Act.

In his veto message, Governor Pawlenty acknowledged that surrogate arrangements and contracts are currently occurring without specific statutory guidelines. However, the bill was controversial and there were bipartisan objections. Although he agreed that certain legal parameters may be needed, significant ethical and public policy issues were not adequately addressed.

2010

In 2010, the legislature considered **S.F. 436 (H.F. 890)**, which took a narrower approach that only modified the Uniform Parentage Act to establish parameters applicable in assisted reproduction cases without directly addressing surrogacy contracts and arrangements. The bill passed the House floor but remained on general orders in the Senate at the end of the session.

Laws 2010, chapter 334, also took a limited approach addressing the status of a child of assisted reproduction for purposes of intestate succession and probate law. It added a number of relevant definitions to **section 524.1-201** and operative provisions governing the status of a child conceived by assisted reproduction in **section 524.2-120** for purposes of the existence of a parent-child relationship. However, the law explicitly states that it does not affect Minnesota law regarding gestational agreements. See **section 524.1-121**.

2013 - 2014

In 2013, the Senate considered **S.F. 370**, a bill sponsored by the MSBA that included more limited amendments to the Paternity Act that would have given intended parents under an express written agreement standing to establish paternity and assert rights under the statute. The bill was heard by but failed to pass the Senate judiciary committee, which received testimony from opponents that it essentially codified the legitimacy of surrogacy agreements without

establishing parameters. The House companion (**H.F. 291**) passed the policy committees in 2013 and 2014 but remained on the House floor.

In 2014, the Senate judiciary committee passed **S.F. 2627**, which included the Paternity Act amendments that failed in 2013 and also added provisions governing gestational surrogacy arrangements and contracts, similar to the bill vetoed in 2008. A significant difference from the vetoed bill is that it was limited to gestational carrier agreements (surrogate couldn't be biologically related). There was no House companion. Both bodies had operative language addressing Paternity Act issues but in different vehicles that were not enacted.

2015

S.F. 1704 (H.F. 2025) was introduced. It would establish requirements for gestational surrogacy arrangements and contracts without amending the Parentage Act. No hearings were held by either body.

Minnesota Case Law

There are only two Minnesota Court of Appeals cases that have addressed surrogacy contracts or agreements and neither opinion directly considered the legality of agreements under Minnesota law.

The first case is an unpublished Minnesota Court of Appeals opinion from 2007, *In re the Paternity and Custody of Baby Boy A*. A single, gay man from New York used in vitro fertilization and a gestational surrogate from Minnesota to have a child. The surrogate was not biologically related to the child. The parties signed a gestational surrogacy agreement containing their intentions and provided that it was governed by Illinois law. When the surrogate decided to maintain parental rights, the man sued for a determination of parentage and custody. The main issue in the case was whether the court properly applied Illinois law in enforcing the agreement. The Court of Appeals concluded that application of Illinois law was proper and the agreement would not violate the public policy of Minnesota by injuring an established societal interest. The court observed that there is no Minnesota legislative or judicial law that prohibits these agreements and they do not violate articulated public policy. It noted that by this opinion, it neither condemns nor condones gestational surrogacy.

The second case is a 2010 Minnesota Court of Appeals opinion, *ALS v. EAG*. This involved a woman who entered into a traditional surrogacy contract with two men. She surrendered the child, but later tried to assert her rights as a parent under the Parentage Act. Although the Court of Appeals used a parentage analysis to conclude that she was the child's legal and biological mother, it upheld a district court determination that it would be in the child's best interests for the biological father to have sole legal and physical custody. The mother also asked the court to rule that the traditional surrogacy agreement was unenforceable and void as against public policy, which the court declined to do. It observed that there is no legislation or case law in Minnesota establishing the legal effect of traditional or gestational surrogacy arrangements and that this involves questions of public policy best resolved by the legislature. Regardless, because the enforceability of surrogacy contracts was not addressed by the district court, the question was not properly before the Court of Appeals.

Key Policy and Legal Issues to Consider

Perhaps the first key policy issue to consider is the legality of agreements. Approaches could include:

- parentage act amendments – recognize existence of agreements for purposes of establishing paternity without specifying requirements for agreements
- prohibiting all surrogacy agreements
- distinguish traditional surrogacy versus gestational surrogacy agreements (allow agreements only if surrogate is not biologically related to child)

Other policy issues include:

- compensation of surrogate (permit compensation only for expenses of confinement related to the pregnancy versus other types of compensation)
- parameters governing parties to agreements, including medical and mental health evaluations and medical need for assisted reproduction; characteristics of the gestational carrier and intended parents; legal consultation requirements; and health insurance or medical expense coverage.

In addition, more specific technical contractual requirements may be included (such as requiring contracts to be in writing, witnessed, executed by all parties, including any spouses of an intended parent and gestational carrier; execution before medical procedure is begun). The regulatory approach and remedies should be addressed. A few states criminalize violation of statutes, use of agreements, or other provisions. Failure to comply with statutory requirements may make a contract void and unenforceable and therefore the court would default to general paternity law, as it has in some of the cases. A specific performance remedy may be excluded but the parties could be allowed to recover and pursue other remedies available under law, without more specificity (this was the approach in Minnesota bills previously discussed), or damages and remedies could be explicitly laid out.

In reviewing laws of other states, there is not a uniform approach and it tends to be a patchwork quilt based on the issues just discussed, ranging from providing that agreements are void and unenforceable or certain types of agreements are unenforceable, as well as variations in the level of specificity and requirements that are included in the statute. Most of the law is statutory, although some of it is based on court cases that have either found agreements to be enforceable or void as against public policy.