

Rep. Scott, Rep. Wills, and Sen. Johnson’s Recommended Proposals for the Report by the 2016 Joint Commission on Surrogacy

I. Alternative Approaches to Validity and Effect of Surrogacy Contracts

- A. Permit surrogacy contracts and establish rights of parentage, subject to requirements governing:
 - (1) who may be a surrogate or intended parent under a gestational carrier arrangement, evaluations and background studies of the parties;
 - (2) legal consultation;
 - (3) terms of contracts, including payment of expenses and allowable compensation, and execution of contracts.

- B. Allow issuance of pre-birth orders under Parentage Act or specify use of declaratory judgment action to establish parentage in cases involving assisted reproduction technology.

- C. Provide that surrogacy contracts are void and unenforceable with respect to a determination of parentage or enforceable only to extent contract provides for payment of surrogate’s expenses related to pregnancy.

- D. Follow direct adoptive placement model governing background studies and reports; birth mother consent requirements; placement of child in prospective home; and allowable payments and expenses.

- E. Address enforceability of contracts or arrangements that don’t comply with all of the statutory requirements and effect on paternity proceedings:
 - (1) Uniform Parentage Act allows enforcement if the court considers noncompliance with law to be nonsubstantial;
 - (2) specify requirements that are substantial;
 - (3) allow court to modify terms of contract to conform to law and protect interests of surrogate;
 - (4) if contract not valid because surrogate is genetic mother, consent requirements of direct adoptive placement law apply.

REP. SCOTT RECOMMENDATIONS FOR SECTION I., paragraphs A-E:

- 1a. Permit gestational surrogacy contracts and allow them be enforced through the courts when they follow the requirements under law.

1b. Prohibit the enforcement of traditional surrogacy contracts and require them to follow the Minnesota adoption laws, with the default being parental rights are determined under Chapters 257 and 518.

1c. Allow pre-birth orders to be issued for valid gestational surrogacy contracts and allow birth certificates to reflect the intended parents when issued.

REP. WILLS RECOMMENDATIONS FOR SECTION I., paragraphs A-E:

1d. Permit gestational surrogacy contracts and allow them to be enforced through the courts when they follow the requirements under law and do not provide for compensation beyond actual expenses.

1e. Prohibit the enforcement of traditional surrogacy contracts and require them to follow the Minnesota adoption laws, with the default being parental rights are determined under Chapters 257 and 518. Allow traditional surrogates 72 hours after the birth of the child to make a decision about adoption. Require invalid gestational surrogacy contracts to follow the same procedures as traditional surrogacy.

1f. Allow birth certificates to reflect the intended parents of a child born through gestational surrogacy.

II. Gestational Surrogate Requirements

- A. Age requirements (minimum 21 or _____?).
- B. Given birth to at least one child (unless altruistic surrogacy?); not the genetic mother of the child she will carry; legally or mentally competent to enter into the contract; limit on surrogacies she has already performed.
- C. Medical and psychological evaluation.
- D. Independent legal counsel of own choosing (but paid for by intended parents?) or at least one initial consultation with independent legal counsel.
- E. Health and life insurance coverage:
 - (1) policy available either through surrogate or intended parents or sufficient funds available in escrow account;
 - (2) require escrow account in all cases to cover expenses regardless of availability of insurance.

REP. SCOTT RECOMMENDATIONS PART II. Paragraphs A-H:

II.a. Require the surrogate to be:

- (1) at least 21 years of age,
- (2) have had at least one live birth prior to the surrogacy,
- (3) undergo medical and physical evaluation and have her doctor provide verification that she is healthy enough to undergo a gestational surrogacy,
- (4) complete a psychological evaluation and provide a summary to the intended parents,
- (5) meet with independent legal counsel at least twice prior to embryo transfer,
- (6) require the gestational surrogate to have health and life insurance provided prior to the embryo transfer through the birth of the child by the intended parents, and
- (7) require the gestational surrogate to be a U.S. citizen or legal resident.

REP. WILLS RECOMMENDATIONS PART II. Paragraphs A-H:

II.b. Require the gestational surrogate to be at least 21 years of age.

II.c. Require the gestational surrogate have had at least one live birth prior to the surrogacy.

II.d. Require the gestational surrogate to be a U.S. Citizen.

II.e. Require the gestational surrogate to complete a criminal background check and provide the results to the intended parents.

II.f. Require the gestational surrogate to be financially secure and not on any form of public assistance.

III. Intended Parents Requirements

- A. Age requirements (minimum 21 or maximum _____?).
- B. Must have resided in Minnesota for at least one year before contract is executed.
- C. Psychological evaluation.
- D. Independent legal counsel
- E. Must procure or provide gametes that will result in embryo.
- F. Before contract is executed, intended parents must have completed background study and report in the manner provided for adoptions under Minnesota Statutes, section 259.41:
 - (1) in all cases; or
 - (2) if neither intended parent is genetic mother or father.

Results must be shared with all parties to contract.

- G. At least one of intended parents must be genetic mother or father (unless have completed background study and report?)
- H. Disqualify individual (who is not genetic parent?) convicted of crime listed in section 518.179.
- I. Medical need for surrogacy verified by physician. Medical need may include need for same-sex couples to use surrogate due to biology or infertility or women engaged in a hazardous occupation or an occupation that requires exposure to potentially harmful chemicals or substances.

REP. SCOTT RECOMMENDATIONS FOR SECTION III. Paragraphs A-I:

III.a. Recommend that the intended parents be:

- (1) a U.S. Citizens or legal residents of the United States,
- (2) that they be at least 21 years old,
- (3) that they complete a psychological evaluation and share the summary with the gestational surrogate,
- (4) that they have independent legal counsel,
- (5) that at least one intended parent provide a gamete for the child,
- (6) that the intended parent complete a criminal background check and provide the results to the gestational surrogate,
- (7) that there be a medical need for the surrogacy documented by a licensed physician, and
- (8) that the intended parents have an estate planning document prior to the embryo transfer providing for custody and care of the child in the event the parents pre-decease the child.

REP. WILLS RECOMMENDATIONS FOR SECTION III. Paragraphs A-I:

III.b. Require that the intended parents be U.S. Citizens or legal residents of the United States

III.c. Require that the intended parents be at least 21 years old

III.d. Require that the intended parents complete a background check and share the results with the gestational surrogate

IV. Surrogacy Agencies

- A. Establish regulations or requirements governing surrogacy agencies – licensure?
- B. Must be formed as a nonprofit corporation under Minnesota Statutes, chapter 317A, a nonprofit limited liability company under Minnesota Statutes, section 322B.975, or similar law of this or another state.
- C. Surrogacy agencies would include agencies engaged in various administrative services related to surrogacy arrangements and contracts, such as provision of names and information and screening of surrogate candidates; assistance in selection and matching of surrogates and intended parents; facilitation of medical testing and referrals, legal representation and insurance; coordination of fertility treatment, financial services, and other services during pregnancy and birth.
- D. Surrogacy agencies would not include medical treatment facilities and licensed health care providers to the extent they perform gestational carrier treatment and assisted reproduction medical services that don't involve administrative services related to surrogacy arrangements and contracts.

REP. SCOTT RECOMMENDATIONS SECTION IV. Paragraphs A-D:

IV.a. Recommend that surrogacy agencies be formed as non-profit corporations and licensed by the Department of Human Services.

V. Surrogacy Contract Requirements

A. Technical requirements:

- (1) in writing and executed before commencement of medical procedures to initiate pregnancy;
- (2) executed by surrogate and intended parents and spouses, if married;
- (3) surrogate and intended parents represented by separate, independent legal counsel, or joint counsel if surrogate has at least one initial consultation with independent legal counsel;
- (4) written acknowledgment of receipt of information regarding agreement;
- (5) signatures of all parties notarized or witnessed by two disinterested, competent adults.

B. Substantive requirements:

- (1) must include general provisions governing arrangement, agreement, and paternity rights and obligations;
- (2) provide for health and life insurance for surrogate, paid for or provided by intended parents or pursuant to self-insuring escrow account;
- (3) provide for payment by intended parents of reasonable expenses of surrogate, including medical, legal, or other professional expenses related to arrangement or contract, medically necessary travel expenses, and lost wages;
- (4) escrow account requirements for anticipated expenses and required payments;
- (5) specify circumstances under which agreement can be terminated and include notice to parties (prohibit termination of contract once gestation has begun?);
- (6) limit on number of embryos to be implanted (no more than one?).

REP. SCOTT RECOMMENDATIONS FOR SECTION V. Paragraphs A-B:

V.a. Require in the terms of the contract that the intended parents will accept custody and full parental rights of the child upon birth.

V.b. Require the intended parents to have completed estate planning documents to provide for care and custody of the child in the event the intended parents pre-decease the child.

V.c. Require that the intended parents provide health insurance and life insurance to the gestational surro

V.d. Provide that the contract terms that limit the gestational carrier's ability to make medical decisions during the pregnancy are void and unenforceable.

V.e. Provide that a contract term that requires the gestational carrier to consent to the termination of a pregnancy is void and unenforceable.

V.f. Require that all embryo transfers for gestational surrogacies be single-embryo transfers.

REP. WILLS RECOMMENDATIONS FOR SECTION V. Paragraphs A-B:

V.g. Provide that contract terms that limit the gestational carriers ability to make medical decisions during the pregnancy are void and unenforceable.

V.h. Provide that a contract term that requires the gestational carrier to consent to the termination of a pregnancy is void and unenforceable and no specific performance contract provisions may be enforced by the court.

V.i. Require that all embryo transfers for gestational surrogacies be single-embryo transfers.

V.j. Require that prior to signing a gestational surrogacy contract the gestational surrogate must be provided a list of potential risks and side-effects for hormone treatment and pregnancy with a non-genetically related child

V.k. Require that the gestational surrogate be able to choose their own physician and may be required to abstain from activities that the gestational surrogate's physician believes may be harmful to the pregnancy.

VI. Compensation for Surrogacy Services

- A. Prohibit compensation beyond payment of birth parent expenses authorized under Minnesota Statutes, section 259.55 (adoption law).
- B. Prohibit contingent agreements.
- C. Permit reasonable compensation for value of services, based on time, effort, risk, pain and suffering, and inconvenience.
- D. Monetary cap on compensation, if any.

REP. SCOTT RECOMMENDATIONS PART VI. Paragraphs A-D:

VI.a. Prohibit compensation for gestational surrogates beyond the actual expenses related to medical insurance, life insurance, cost of medical care and birth, lost wages, legal expenses, travel expenses, cost of clothing, and compensation provided to surrogate or surrogate's family in the event of death or permanent disability.

VI.b. Prohibit compensation for a traditional surrogate that goes beyond what is allowed in Minnesota adoption law.

REP. WILLS RECOMMENDATIONS PART VI. Paragraphs A-D:

VI.c. Prohibit compensation for gestational surrogates beyond the reasonable expenses including: medical insurance, life insurance, cost of medical care and birth, lost wages, legal expenses, travel expenses, cost of clothing, and compensation provided to surrogate or surrogate's family in the event of death or permanent disability.

VI.d. Contract terms cannot limit the recovery of expenses for the gestational surrogate based on the live birth of a child and must allow the gestational surrogate to recover costs incurred regardless of the success of the pregnancy

VI.e. Prohibit compensation for a traditional surrogate that goes beyond what is allowed in Minnesota adoption law.

SEN. JOHNSON'S RECOMMENDATION FOR PART VI. Paragraphs A-D

VI.f. Require compensation for birth parent expenses allowable under MS section 259.55. Permit additional compensation of up to \$15,000 for value of time, effort, pain, or health risks associated with pregnancy.

VII. Procedural Requirements; Court Review and Validation and Establishment of Parentage

- A. Attorney certification process.
- B. Court review and validation – additional or alternative process; Uniform Parentage Act model requires validation before medical procedures initiated.
- C. Best interests of child standard may be relevant in certain cases.

VIII. Surrogate Control of Medical Decisions and Treatment

- A. Surrogate retains right to control medical decisions during pregnancy. Contract terms that limit payments to surrogate or cancel insurance for failure to terminate a pregnancy are void and unenforceable.
- B. Surrogate may be required to undergo medical examinations, treatments, and fetal monitoring procedures that physician recommends for success of pregnancy.
- C. Surrogate may be required to abstain from activities her physician (or intended parents?) reasonably believes to be harmful to pregnancy (smoking, drinking, etc.).
- D. Surrogate has right to use services of physician of her choosing.

REP. SCOTT RECOMMENDATIONS FOR SECTION VII. Paragraphs A-C:

See Recommendations for Section V

IX. Relation to Other Laws; Inheritance Rights; Death of Intended Parents

- A. Probate law and intestate succession – need to address interplay between any new law regarding surrogacy contracts and existing law in Minnesota Statutes, chapter 524.
- B. Require or allow intended parents to address inheritance rights of child in the event of death of intended parents before birth or priority of relatives and others in any subsequent adoption proceeding.
- C. Specify jurisdiction and choice-of-law requirements:
 - (1) Do not specifically address; default to common law and any applicable provisions of Uniform Child Custody Jurisdiction and Enforcement Act or Interstate Compact on Placement of Children;
 - (2) Defer to choice of law provision in surrogacy contract;
 - (3) Provide that Minnesota law always applies based on specified contacts with state (location where contract executed; residence of surrogate or intended parents; child born in Minnesota);
 - (4) Include purpose or public policy statement with any restriction on application of choice of law based on contract or general law.

REP. WILLS RECOMMENDATIONS FOR SECTION IX. Paragraphs A-C:

- IX.a. Require that contracts executed in Minnesota and enforced in Minnesota courts must apply Minnesota law.
- IX.b. Provide a statute of limitations for actions between gestational surrogate and intended parents.

X. Birth Records and Information

- A. If surrogacy contract certified or validated by court (or recognized in subsequent paternity proceeding governing enforceability of contract) intended parents names appear as parents on original birth certificate.
- B. Specify circumstances, if any, under which either birth certificate or other record would indicate that there was a surrogate.
- C. Right of child to obtain access to information, similar to adoption record process.
- D. Special considerations regarding access to donor family medical history information.

REP. SCOTT RECOMMENDATIONS FOR SECTION X. Paragraphs A-D:

X.a. Require the birth record to record the use of gestational surrogate and for the Department of Health to keep track of data on the number of surrogates and children born to surrogates.

X.b. Require the Department of Health to list the intended parents on the birth record when a pre-birth order has been issued.

REP. WILLS RECOMMENDATIONS FOR SECTION X. Paragraphs A-D:

X.c. Require the birth record to record and document the use and name of the gestational surrogate and for the Department of Health to keep track of data on the number of surrogates and child born to surrogates, subject to the terms of HIPPA and other data practices provisions.

X.d. Require physicians to report to the Department of Health on the use of gestational surrogacy, the number of live births, and the health of the children born via surrogacy.

X.e. Require the Department of Health to list the intended parents on the birth record when a pre-birth order has been issued.

XI. Remedies and Enforcement

- A. Surrogate and intended parents entitled to all remedies available at law or equity (subject to express terms of contract?)
- B. Include limitations on types or amount of damages.
- C. No specific performance remedy available in all cases or for specific contract terms, such as breach by surrogate of term that requires her to be impregnated.
- D. Action to invalidate or enforce a surrogacy contract or challenge rights of parentage established under law must be commenced within 12 months of birth of child.

XII. Miscellaneous Issues

- A. Terminology and definitions-gestational carrier versus surrogate, etc.
- B. Update artificial insemination statute in Minnesota Statutes, section 257.56, to reflect other forms of assisted reproduction.
- C. Duty to support child.
- D. Effect of subsequent marriage or dissolution of marriage of surrogate or intended parents or death of intended parent.