

Surrogacy Commission Issues and Recommendation Options

Alternative Approaches to Validity and Effect of Surrogacy Contracts

Comments provided by Senator Pappas in red

- 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.

Yes.

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

No. Declaratory judgments are not a valid mechanism to establish parentage

- 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.

No. Compensated surrogacy arrangements should be allowed and properly regulated.

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.

No. Adoption and surrogacy are two distinctly different events.

- 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 non-substantial;
 - (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.

No. If the requirements of the statute are not followed, parentage will not be established administratively (and efficiently and inexpensively) as set forth in the surrogacy statute. This is substantial motivation for compliance with the statute.

Gestational Surrogate Requirements

- Age requirements (minimum 21 or _____?).

Yes as to minimum age of 21.

No as to imposition of maximum age.

- Given birth to at least one child, 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.

Yes. There should be a requirement that the surrogate have successfully had at least one full-term, successful live birth.

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No as to any other requirements since they will be adequately determined and assessed by the other requirements of the statute for medical, psychological, and legal consultation/screening. Any additional specific requirements in the statute are unnecessary.

- Medical and psychological evaluation.

Yes. These should be required by the statute.

Independent legal counsel of own choosing (but paid for by intended parents?) or at least one initial consultation with independent legal counsel.

Yes. Independent legal representation should be required and paid for by the intended parents.

- 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.

Yes to insurance coverage.

Yes to an escrow requirement.

Intended Parents Requirements

- Age requirements (minimum 21 or maximum _____?)

Yes to minimum age of 21.

No to any maximum age.

- Must have resided in Minnesota for at least one year before contract is executed.

No. Such a requirement would preclude related, family-member intended parents who live in different states/countries from working with one another. Would support 90 days unless waived by the court if in the best interests of the child.

- Psychological evaluation.

Yes.

- Independent legal counsel.

Yes.

- Must procure or provide gametes that will result in embryo.

Yes.

- 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

No. As stated above, surrogacy and adoption are not the same process, and the two should not be compared or conflated.

At least one of the intended parents must be genetic mother or father (unless have completed background study and report?)

No.

- Disqualify individual (who is not genetic parent?) convicted of crime listed in section 518.179.

No. May be an unreasonable limitation on a person's right to procreate.

- 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.

Yes. Surrogacy "for convenience" should not be permitted.

Surrogacy Agencies

- Establish regulations or requirements governing surrogacy agencies—licensure?

Yes. It is appropriate to regulate and, perhaps, license coordinating agencies that facilitate surrogacy arrangements for surrogates and intended parents.

- 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.

No.

- 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.

Yes.

- 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.

Yes.

Surrogacy Contract Requirements

- Technical requirements:
 - (1) in writing and executed before commencement of medical procedures to initiate pregnancy;
Yes.
 - (2) executed by surrogate and intended parents and spouses, if married;
Yes.
 - (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;
Yes, as long as completely independent counsel for negotiating/executing the gestational carrier agreement.
 - (4) written acknowledgment of receipt of information regarding agreement;
No. Separate counsel and signature on agreement constitutes sufficient acknowledgement.
 - (5) signature of all parties notarized or witnessed by two disinterested, competent adults.
Yes.

Substantive requirements:

- (1) must include general provisions governing arrangement, agreement, and paternity rights and obligations;
Yes.
- (2) provide for health and life insurance for surrogate, paid for or provided by intended parents or pursuant to self-insuring escrow account;
Yes.
- (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;
Yes.
- (4) escrow account requirements for anticipated expenses and required payments;

Yes. Escrow company must be separate entity not owned or controlled by any of the professionals involved.

- (5) specify circumstances under which agreement can be terminated and include notice to parties (prohibit termination of contract once gestation has begun?);

Yes. No termination once gestation has commenced.

- (6) limit number of embryos to be implanted (no more than one?).

No. This is medical advice that is individual to each patient, and the attending physician should determine any such limitations.

Compensation for Surrogacy Services

- Prohibit compensation beyond payment of birth parent expenses authorized under Minnesota Statutes, section 259.55 (adoption law).

No.

- Prohibit contingent agreements.

Yes.

- Permit reasonable compensation for value of services, based on time, effort, risk, pain and suffering, and inconvenience.

Yes.

- Monetary cap on compensation, if any.

No.

Procedural Requirements; Court Review and Validation and

Establishment of Parentage

- Attorney certification process.

Yes.

- Court review and validation—additional or alternative process; Uniform Parentage Act model requires validation before medical procedures initiated.

No.

- Best interests of child standard may be relevant in certain cases.

No. There is absolutely no legal precedent for consideration of a child's best interests unless there is an existing child.

Surrogate Control of Medical Decisions and Treatment

- 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.
Yes as to control of the pregnancy.
No as to limitation on contractual remedies.
- Surrogate may be required to undergo medical examinations, treatments, and fetal monitoring procedures that physician recommends for success of pregnancy.
Yes.
- Surrogate may be required to abstain from activities her physician (or intended parents?) reasonably believes to be harmful to pregnancy (smoking, drinking, etc.).
Yes.
- Surrogate has right to use services of physician of her choosing.
Yes, subject to the intended parents' right to choose the fertility physician who is treating them and initiating the pregnancy, and subject to the intended parents' right to get a second opinion regarding any treatment the surrogate's selected obstetrician recommends that affects the health and welfare of their child during gestation, with the ability to obtain a third, tie-breaking, binding opinion if the two initial physician's disagree.

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

- Probate law and intestate succession—need to address interplay between any new law regarding surrogacy contracts and existing law in Minnesota Statutes, chapter 524.
Yes.
- Require or allow intended parents to address inheritance rights of a child in the event of death of intended parents before birth or priority of relatives and others in any subsequent adoption proceeding.
Yes. Intended parents should be required to do estate planning for the guardianship and inheritance rights of the gestating and resulting child. Designated guardians will assume legal custody of the child pursuant to estate guardianship principles and subject to existing right to adopt, if desired and permitted.
- Specify jurisdiction and choice-of-law requirements.
No. There are already jurisdiction and choice-of-law statutes and principles in place.

Birth Records and Information

- 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.

Yes. If properly certified by the parties' respective attorneys.

- Specify circumstances, if any, under which either birth certificate or other record would indicate that there was a surrogate.

No. Birth records are reflective of the child's legal parents, not the nature or source of their gestation.

- Right of a child to obtain access to information, similar to adoption record process.

No.

Special considerations regarding access to donor family medical history information.

No. Surrogacy is different than sperm or egg donation. Gestational surrogacy does not involve the surrogate as a donor.

Remedies and Enforcement

- Surrogate and intended parents entitled to all remedies available at law or equity (subject to express terms of contract?)

Yes.

- Include limitations on types or amount of damages.

No.

- 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.

No. ***There should be no specific performance that can require the surrogate to become impregnated against her will.***

- 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.

Yes. Uniform Parentage Act extends this period to 2 years.

Miscellaneous Issues

- Terminology and definitions-gestational carrier versus surrogate, etc.

Yes.

- Update artificial insemination statute in Minnesota Statutes, section 257.56, to reflect other forms of assisted reproduction.

Yes.

- Duty to support a child.

Yes. Intended parents immediately upon birth.

- Effect of subsequent marriage or dissolution of marriage of surrogate or intended parents or death of intended parent.
Yes. These issues should be addressed.