

2016 LEGISLATIVE SURROGACY COMMISSION MAJORITY REPORT

ISSUE

Should surrogacy, the process by which a woman gestates another parent's child with the intent to return physical custody of the child to its original and intended legal parent after gestation, be addressed in Minnesota law; if so, how?¹

BACKGROUND/LEGISLATIVE SURROGACY COMMISSION

The Minnesota legislature convened the Uniform Parentage Act (UPA) Task Force in 2001. One of the areas of proposed legislation in the UPA was reasonable regulation of genetic parents' procreation through the use of gestational agreements (surrogacy arrangements). In January of 2002, the Task Force issued its final report. The Task Force specifically recommended additional analysis of public policy issues related to gestational agreements and eventual legislation to address those concerns.

In 2008, the Minnesota Senate and House of Representatives reached consensus and passed legislation through both the House and Senate reasonably regulating gestational agreements. In May of 2008, Governor Tim Pawlenty issued a veto letter regarding that legislation stating his position that certain significant ethical and public policy issues had not been adequately addressed.

In 2016, the Minnesota legislature established a legislative commission to take public testimony, gather information, and further analyze the efficacy of gestational agreements. The commission was comprised of fifteen (15) members, including six (6) members of the Senate, with three (3) each being appointed by the Senate majority and minority leaders, six (6) members of the House of Representatives, with three (3) each being appointed by the speaker of the House and House of Representatives minority leader, the commissioner of human services (or her designee), the commissioner of health (or his designee), and a family court referee appointed by the chief justice of the state Supreme Court. The commission convened on June 1, 2016 and held regular public meetings for the purpose of taking public testimony and gathering relevant information through December 9, 2016.

MEMBERS

Members of the commission were as follows:

Senator Sandra Pappas
Senator Scott Dibble
Senator Alice Johnson*

¹ There are two types of surrogacy, gestational and traditional. In gestational surrogacy, the surrogate who gestates the child is NOT the genetic mother. The intended legal mother's egg (or a donor's) is used to create the embryos that are transferred into the surrogate's uterus. In traditional surrogacy, the surrogate is artificially inseminated with the intended father's sperm, so she is both the gestational carrier and genetic mother of the resulting child.

Senator Michelle Benson
Senator Warren Limmer
Senator Carrie Ruud
Representative John Lesch
Representative Jon Applebaum
Representative Susan Allen
Representative Peggy Scott*
Representative Cindy Pugh
Representative Anna Wills
Deputy Commissioner of Health Daniel Pollock
Assistant Commissioner of Human Services James Koppel
Hennepin County District Court Referee Richard Stebbins

*Commission Co-Chairs

TOPICS FOR STUDY

- I. Potential health and psychological effects and benefits on women who serve as surrogates and children born of surrogacy.
- II. Considerations related to different forms of surrogacy and the potential exploitation of women in surrogacy arrangements.
- III. Business practices of fertility professionals, including medical clinics, attorneys, and coordinating agencies (brokers).
- IV. Contract law implications when a surrogacy agreement is breached; potential conflicts with statutes governing private adoption and termination of parental rights; potential conflicts related to third-party reproduction, including conflicts between or amongst the surrogate mother, the intended parents, the child, insurance companies, and medical professionals.
- V. Public policy determinations of other jurisdictions with regard to surrogacy.

Public testimony was taken on each of the topics/issues listed above. Not all of the commission members were present for all of the meetings/testimony, with various members missing various meetings.

OVERVIEW OF TESTIMONY AND PREAMBLE

There were many fervent and passionate testifiers who appeared before the commission, and we have carefully considered each of their testimony together with its source and context. Of those opposing surrogacy, many of the testifiers coalesced around the Center for Bioethics and Culture (CBC), a conservative organization dedicated to fighting all things related to abortion and third-party reproduction (egg and sperm donors and surrogates) both nationally and globally. Of the opposition's testifiers, seven of ten were from locations outside Minnesota and were affiliated either with the CBC or its affiliated organizations. Although they spoke of surrogacy, it was often in global and over-arching terms encompassing cases and issues that had absolutely nothing to do with surrogacy in Minnesota. While decrying surrogacy as evil, they concurrently admitted they had no hard studies or data to support their negative point of view. All they offered were their intentionally-sought-out anecdotal bad cases. They have collected these few bad cases together to create dark propaganda films about egg/sperm donation and surrogacy that they offered as representative of surrogacy as a whole. We did not find this anecdotal evidence persuasive or compelling.

Of those supporting surrogacy, many of them were actual intended parents and surrogates who lived and had completed the surrogacy process happily in Minnesota. There were also professionals who worked in and had direct experience with surrogacy and its participants right here in Minnesota. Of the twenty-five testifiers in support of allowing compensated surrogacy in Minnesota, twenty were current or past Minnesota residents with direct experience of the process as it actually exists here. Surrogacy supporters offered varied surveys and studies, some scholarly and some experiential, showing that women who choose to offer their services to infertile intended parents in Minnesota are economically stable, educated women who do not want our government to intrude on their free will and independent life choices. Most persuasive and compelling were the fifty-six impassioned and moving letters from Minnesota women who had acted as surrogates in Minnesota extolling the mutual benefits of compensated surrogacy not only to the intended parents they had helped, but to themselves as empathetic human beings.

The majority of commission members takes careful note of the fact that the vast majority of other states and legal policy-making entities (American Bar Association and Uniform Law Commissioners) that have struggled with the exact same issues and policy choices with which we were confronted have come down on the side of allowing and regulating compensated surrogacy in their jurisdictions. In the twenty years since 1995, of the fifteen states that have studied and debated the policies surrounding surrogacy, just as we have, fourteen have passed statutes or decided precedential court cases that allow and affirm compensated surrogacy. One, Louisiana, has allowed only uncompensated surrogacy, and only for heterosexual married couples. The majority finds that Minnesota aligns much more closely with the social values and perspectives of those numerous states allowing surrogacy than with Louisiana, the sole exception. In our own five-state, Midwest area, North Dakota specifically allows compensated gestational surrogacy by statute, Wisconsin has a Supreme Court case that states that even a traditional surrogacy agreement is enforceable (as long as it is not against the resulting child's best interests), and Iowa has a statute specifically exempting surrogacy from its adoption prohibition against baby-selling (thereby acknowledging that compensation is permissible and that surrogacy is NOT baby-selling).

Those who oppose surrogacy here in Minnesota are a very vocal minority with little evidence to support their negative views. We believe the majority of Minnesotans, whether they are part of the process or not, generally accept and support the process of surrogacy as a necessary and appropriate way to build

strong families that equally strengthen our State. The majority does not believe the government should intrude on the free will and consensual mutual agreements that our citizens reach to achieve a very positive collaborative result – helping aspiring parents have healthy children.

The majority of commission members acknowledge that surrogacy is a complex and emotionally-charged social issue. Among those who oppose surrogacy, there is a strong current of religious and moral resistance to involving medical technology and/or third parties in a couple's efforts to procreate. That being said, infertility, including uterine infertility, is a disease, and surrogacy is one medical and social option to successfully treat it. Once the purely emotional overlay is stripped away, the research and data actually accumulated about surrogacy shows that it has been successfully, cooperatively, and safely implemented many, many times in Minnesota and throughout the U.S. for decades subject to only very rare unhappy outcomes. The majority views its task to evaluate and determine the best outcome for the majority of participants and outcomes in surrogacy, not to find a radical, restrictive solution to address only the few cases that turn out poorly. In addition, with proper and reasonable regulation, the majority believes that bad outcomes will be significantly reduced if not completely eliminated. Therefore, we find ourselves in agreement with the sentiments and reasoning set forth in the following two judicial excerpts:

In determining that a gestational surrogate was not the legal mother of the resulting child, the California Supreme Court wrote in Johnson v. Calvert (1993) in terms with which we agree:

Finally, [the surrogate] and some commentators have expressed concern that surrogacy contracts tend to exploit or dehumanize women, especially women of lower economic status. [The surrogate's] objections center around the psychological harm she asserts may result from the gestator's relinquishing the child to whom she has given birth. Some have also cautioned that the practice of surrogacy may encourage society to view children as commodities, subject to trade at their parents' will.

* * *

We are unpersuaded that gestational surrogacy arrangements are so likely to cause the untoward results [the surrogate] cites as to demand their invalidation on public policy grounds. Although common sense suggests that women of lesser means serve as surrogate mothers more often than do wealthy women, there has been no proof that surrogacy contracts exploit poor women to any greater degree than economic necessity in general exploits them by inducing them to accept lower-paid or otherwise undesirable employment. We are likewise unpersuaded by the claim that surrogacy will foster the attitude that children are mere commodities; no evidence is offered to support it. The limited data available seem to reflect an absence of significant adverse effects of surrogacy on all participants.

The argument that a woman cannot knowingly and intelligently agree to gestate and deliver a baby for intending parents carries overtones of the reasoning that for centuries prevented women from attaining equal economic rights and professional status under the law. To resurrect this view is both to foreclose a personal and economic choice on the part of the surrogate mother, and to deny intending parents what may be their only means of procreating a child of their own genes. Certainly in the present case it cannot seriously be argued that [the surrogate], a licensed vocational nurse who had done well in school and who had previously borne a child, lacked the

intellectual wherewithal or life experience necessary to make an informed decision to enter into the surrogacy contract.

We also take note of and recognize the opinion of the United States District Court, District of Utah, in J.R., M.R., and W.K.J. v. UTAH with regard to a citizen's fundamental right to procreate and its protection from legislative interference. In determining that a Utah statute stating that a child born to a surrogate was the surrogate's and her husband's legal child for all purposes to the exclusion of the genetic or intended parents was unconstitutional, the federal district court wrote:

In so ruling, this court also follows decisions of the United States Supreme Court that have consistently "held that the fundamental right of privacy protects citizens against governmental intrusion in such intimate family matters as *procreation, childrearing, marriage, and contraceptive choice,*" cases that "embody the principle that personal decisions that profoundly affect bodily integrity, identity, and destiny should be largely beyond the reach of government."

SUMMARY OF TESTIMONY

- I. TOPIC: Health and psychological effects/benefits to surrogates/children born of surrogacy.
 - a. Kathy Sloan (Connecticut), Executive Director, NOW Connecticut, Matthew Eppinette (California), Executive Director of the Center for Bioethics and Culture (CBC), and Alana Newman (New Jersey), Founder The Anonymous Us Project/Director of the Coalition Against Reproductive Trafficking testified in opposition to implementation and regulation of gestational agreements in Minnesota.
 - i. Ms. Sloan's testimony focused on her assertions that surrogates are put at risk without adequate education and information about the risks of surrogacy for profit; she likened surrogates to prostitutes who are using their bodies to make money; she asserted that surrogacy causes the resulting children to be unaware of their genetic history. (This issue is unrelated to gestational surrogacy since a gestational surrogate does not contribute genetic material to the resulting child. This is only relevant to egg and sperm donation, neither of which were designated topics of consideration by the commission.) She also mentioned that it was emotionally harmful to the child to be taken away from the woman who gestated the child.
 - ii. Mr. Eppinette makes propaganda films for the CBC portraying third-party reproduction (egg donation and surrogacy) as dangerous and unacceptable. He acknowledged that many surrogacies go well, but he said he specifically seeks out and focuses on the "bad" stories because people "need" to hear the negative aspects of surrogacy. He believes surrogacy is dangerous and should be stopped.
 - iii. Ms. Newman was the child of an anonymous sperm donor. She discussed her negative feelings as a result of not knowing who her biological father is. Her husband works for the Catholic Archdiocese, and she spoke of the Catholic

Church's religious-centered social concerns about third-party reproduction. She asserted egg donation is the effort to create a "perfect baby" and has a eugenics component. (Again, these issues are only relevant to egg and sperm donation, which were beyond the scope of the commission's designated task.)

- iv. Each of the above witnesses relied on selected anecdotal cases and situations without giving the commission any evidence that the bad outcomes they decried were frequent or wide-spread. Each of them asserted and agreed that, in their minds, there are no reliable studies or reports that gather and present the true outcomes of surrogacy for the participants.
- b. Erika Fuchs (Texas, formerly Minnesota), Assistant Professor, Center for Interdisciplinary Research in Women's Health, The University of Texas Medical Branch, Malina Simard-Halm (California), a child born of surrogacy, Abby Bergman (California), a child born of sperm donation, Elinor Poole-Dayana (New York), a child born of surrogacy, Steven H. Snyder (Minnesota), a reproductive attorney and past chair of the American Bar Association Assisted Reproductive Technology Committee, Ann Estes (Minnesota), a gestational carrier (surrogate), and Shawnee Krueger (Minnesota), a gestational carrier, testified in support of the implementation and regulation of gestational agreements in Minnesota.
- i. Ms. Fuchs testified that she had conducted and published valid research on the demographics and informed consent of surrogates. In sum, she states that the vast majority of surrogates were informed of medical (92.6%) and psychological (89.7%) risks of pregnancy and that her study showed that surrogates were NOT uneducated or generally from low income households (all had high school diplomas, and 68.1% had obtained a college degree or higher; 74.9% >\$50,000 household income).
 - ii. Mss. Simard-Halm, Bergman, and Poole-Dayana testified in moving fashion as to how they had meaningful, happy, successful childhoods as children resulting from third-party reproduction with no adverse physical or emotional outcomes.
 - iii. Mr. Snyder testified that extremely few bad outcomes have resulted from surrogacy agreements nationally (<.005% have any conflict between the parents and surrogate) and that virtually all of those would be prevented by compliance with proper regulatory standards such as mandatory psychological evaluations of all participants, independent legal representation, proper medical screening, etc. Mr. Snyder stated that no party under a gestational agreement can legally force a surrogate to have an abortion, and he presented another survey conducted of Minnesota surrogates indicating that they were NOT uneducated (average education level of high school plus three years of college) or poor (average personal income of approximately \$40,000 and household income of approximately \$100,000). Mr. Snyder testified that he had conducted more than 300 surrogacy parentage proceedings, none of which resulted in any conflict among the parties as to parentage or other adverse outcomes. He stated there

have been two litigated surrogacy cases in Minnesota, both of which would have been prevented if they had complied with the requirements of the 2008 legislation that was vetoed.

- iv. Mss. Estes and Krueger were representative of approximately 30+ surrogates who attended the meeting and were in support of implementation and reasonable regulation of compensated surrogacy agreements. The surrogates in attendance all stood up at one point in their testimony and, by show of standing, indicated that all but one had at least some college education. They were all happy, smiling, personable women. Mss. Estes and Krueger emphasized that they were well-informed about the process before they started it, that they were NOT tricked or coerced into being surrogates, and that the surrogacy process was a very wonderful and rewarding experience for them (and the rest of the many other surrogates in the room). They both supported the payment of reasonable payment of expenses and compensation for time and effort to any woman who assumed the risks and made the personal and family commitment to be a surrogate.
- c. Over the course of the meetings, various documents were submitted on this topic. One was a study by Kim Bergman, a California psychologist specializing in surrogacy, which concluded:

These results suggest that gestational surrogates who are willing and selected to work with prospective [intended parents] are higher functioning psychologically than a comparison group of women their same age. These surrogates are more resilient, less predisposed to experience negative emotions, and higher in social responsibility. Their primary motivations include desire to help others and enjoyment of pregnancy itself. Their decisions involve a process of thinking about and researching surrogacy over time, contemplating their own ability to handle it well, and concluding that the timing is right because they already have their own children.

Another was the only longitudinal study of the long-term effects of surrogacy on the resulting children and the children of the surrogates themselves by Susan Golombok, a researcher from The University of Cambridge in the U.K., which concluded:

. . . the findings from the few studies of surrogacy that currently exist indicate that families formed in this way are generally functioning well, suggesting that the absence of a gestational link between the parents and the child does not jeopardize the development of positive family relationships or positive child adjustment.

Despite fears to the contrary, it appears that [the children of the surrogate's own family] were not adversely affected by their mothers' involvement in surrogacy. Indeed, the large majority were positive about this and felt proud of their mother for helping a woman who was unable to have children.

- d. Numerous letters were submitted over the first two meetings, among which were:
- i. A letter from the Minnesota National Organization for Women stating NOW has taken no position on the implementation of regulation of surrogacy. NOW is neither opposed to nor supportive of surrogacy since its membership has numerous members with different and opposing views on the subject.
 - ii. A letter from the Minnesota Medical Association stating surrogacy is an ethical medical standard for care and regulation of the medical procedure should come from medical experts, not the legislature.
 - iii. A letter from the Minnesota Section of the American Congress of Obstetricians and Gynecologists in response to a letter from Matthew Anderson, M.D., an obstetrician who asserted surrogates do not take reasonable steps to care for their surrogate pregnancies, stating:

In conclusion, there may be isolated anecdotal reports of complications for either a gestational surrogate or a child born from a surrogacy arrangement. However, the medical literature finds that gestational surrogates who participate in supervised surrogacy arrangements that meet medical and mental health standards face no increased risks to either their physical or mental health.

- iv. A letter from the American Society for Reproductive Medicine that stated:

Neither gestational surrogates nor the children they carry experience statistically significant increased physical or mental health risks. The underlying medical procedures used in surrogacy have been done over a million times for over 30 years. Today, one of every 100 babies in the U.S. is born as a result of assisted reproductive technology and were there alarming evidence of adverse health outcomes in the children of the women utilizing the treatment, it would be apparent. This is not the case. In fact, the overwhelming weight of evidence demonstrates that these therapies are safe and effective for the parents and children.

- v. A letter from RESOLVE, The National Infertility Association, stating:

[The RESOLVE organization's] goal is simple and transparent – we want Minnesotans to have access to all family building options and we want to make sure that all professional guidelines and standards of care are followed each and every time. We don't want to see access denied or even narrowed, but if we can make the process better for everyone, that is our goal.

- e. ***Conclusion: Despite the anecdotal reports of some bad outcomes and unsupported fears of surrogacy opponents, the factual data that does exist, coupled with the experience***

of those who are actually familiar with and have scientifically studied surrogacy and its participants, shows that there is no significant occurrence of adverse health or psychological effects on the surrogates, the resulting children, or the surrogate's own children.

- II. TOPIC II: Considerations related to different forms of surrogacy and the potential exploitation of women in surrogacy arrangements.
- a. Dr. Deborah Simmons (Minnesota), a licensed marriage and family therapist, Dr. Lisa Erickson, M.D. (Minnesota), Krystal Lemcke (Minnesota), a surrogacy agency owner, Gary Debele (Minnesota), a reproductive attorney, and Andrea (Minnesota) and Samantha (Minnesota), two former surrogates, testified in support of the implementation and regulation of gestational agreements in Minnesota.
- i. Dr. Simmons testified that she is a member of the American Society of Reproductive Medicine's Mental Health Professionals' Group and has conducted more than 200 mental health consultations with prospective surrogates here in Minnesota. She stated she is a "gatekeeper" for the surrogacy process, and she purposefully and intentionally screens out and prevents women who are poor, uneducated, or otherwise unsuitable for the surrogacy process from becoming surrogates. She refuted the idea that there was any separation anxiety experienced by properly-screened surrogates, and she emphasized that she thoroughly educates each surrogate about the full nature and psychological risks of surrogacy. Out of 200 surrogates screened, she is only aware of one that had any conflict with the intended parents over parentage of the child. She specifically referenced the Golombok study as accurately indicative of the positive outcomes of surrogacy in general.
- ii. Dr. Erickson testified about the drug protocol and procedures for preparing for and conducting an embryo transfer in a surrogacy arrangement. She said the effects of the drugs and the pregnancy are no different than a normal pregnancy with no significant adverse effects on the surrogate.
- iii. Ms. Lemcke testified that, in addition to the psychological and medical screenings that surrogates undergo, her agency further vets and screens them, resulting in only about 6% of applicants for surrogacy actually being approved to participate in the process. Those that are eventually approved are fully educated, willing, and suitable to proceed.
- iv. Mr. Debele testified that he had successfully been involved in 300 surrogacy cases, none of which resulted in any conflict/litigation between the parties. Mr. Debele explained the interrelationship of Roe v. Wade and the pregnancy termination provisions of standard surrogacy agreements, stating no one can require a surrogate to have an abortion against her will. He went through some standard provisions of surrogacy agreements, etc.
- v. Andrea specifically stated that she represented the views of more than 50 surrogates who had presented letters to the commission stating that, to a person, none of them had been coerced into or exploited by the surrogacy process. They had each entered it willingly and voluntarily and were affirmed by and happy with the process and outcome. The surrogates also emphasized that they were

educated, independent adults and could understand and decide whether to accept any possible health risks associated with surrogate pregnancy on their own; they did not need the government “protecting” them from themselves. Andrea emphasized that surrogates do a lot of research online, talk to and are supported by other surrogates, and that she would like uniformity of the law regulating, but allowing, compensated surrogacy. Samantha added that she also had a very satisfying and rewarding experience as a traditional surrogate (one who used her own egg). She had four children of her own, but said the traditional surrogacy was different, and she didn’t emotionally connect to or adversely react to giving the child to the parents she had helped.

b. Harold Cassidy (New Jersey), an attorney who works with and through the Center for Bioethics and Culture, testified in opposition to implementation and regulation of gestational agreements in Minnesota.

i. Mr. Cassidy seeks out and represents women who are affected by abortion and reproductive issues, seeking to assert pro-life and anti-reproductive rights outcomes. He asserts that surrogacy is unconstitutional and that surrogacy agreements have inherent harms that cannot be overcome. His argument regarding the unconstitutionality of surrogacy was recently rejected by a court in California.

c. Conclusion: Based on the cumulative factual information presented in the testimony from the first two meetings, it is clear that, subject to rare anecdotal instances, surrogacy is a stable and suitable process for family building that does not exploit or endanger its participants. Suitable regulation to make the process consistent and suitable for the positive outcomes possible through surrogacy is desirable.

III. Business practices of fertility professionals, including medical clinics, attorneys, and coordinating agencies (brokers).

a. Judy Carbone (Minnesota), University of Minnesota professor of law, Teresa Collett (Minnesota), University of St. Thomas professor of law, Joe Langfeld (Minnesota), Deputy Director, Human Life Alliance, Jennifer Lahl (California), President of the Center for Bioethics and Culture, and Nikolas Nikas (Arizona), General Counsel of the Bioethics Defense Fund (litigation arm of the Center for Bioethics and Culture), testified in opposition to implementation and regulation of gestational agreements in Minnesota.

i. Ms. Carbone testified about general terms of surrogacy contracts and the kinds of disputes that could arise. She believes that regulation of the coordinating agencies is a necessary part of appropriate surrogacy regulation.

ii. Ms. Collett testified about the terms of surrogacy contracts and the possible exploitation of surrogates when they are asked to perform selective reductions. She pointed out various provisions from a generic contract that she asserts could lead to negative/coercive enforcement issues against the surrogate.

- iii. Mr. Langfeld is an abortion opponent. Although he offered no data or statistics to support his position, he holds the personal belief that surrogacy may increase the opportunities for abortions within the context of surrogacy arrangements.
 - iv. Ms. Lahl testified it should not be acceptable for any person to shift the risks of pregnancy to another person, even with that person's consent; regulation of the process of surrogacy cannot remove the health risks; commerce should be taken out of surrogacy as it is in organ donation because surrogacy is not a "job."
 - v. Mr. Nikas testified surrogacy affects many other professionals who all profit from the process: agencies, attorneys, physicians, financial managers, counselors, insurance agents, etc. He is opposed to creating an "industry" of professionals to profit from reproduction.
- b. Kim Bergman (California), co-owner of Growing Generations, a surrogacy agency in California, Steven H. Snyder (Minnesota), a reproductive attorney and surrogacy agency owner in Minnesota, Krystal Lemcke (Minnesota), a surrogacy agency owner in Minnesota, Brian Shelton (Minnesota), Chief Operations Officer of the Minnesota clinic location of the Colorado Center for Reproductive Medicine, Monica McMillan (Minnesota), R.N. at the Minnesota clinic location of the Colorado Center for Reproductive Medicine, and Julie Berman (Minnesota), of RESOLVE: The National Infertility Association, testified in support of the implementation and regulation of gestational agreements in Minnesota.
- i. Ms. Bergman testified that surrogates are screened appropriately by the agencies they are matched through. The agencies provide thorough medical, psychological, and legal screening and support. She stated surrogates are generally fully educated and aware of the risks of surrogacy and that reasonable regulation to make such screening consistent and mandatory would benefit the process.
 - ii. Mr. Snyder affirmed the testimony of Ms. Bergman as to the proper education and screening of surrogates by coordinating agencies. Mr. Snyder stated that the coordinating agencies were the only entities in the process that oversaw the entire process of otherwise disconnected professionals to insure a stable and successful outcome among the parties. He also acknowledged that agencies are largely unregulated at this time. He presented to the commission the American Bar Association Model Act to Govern Assisted Reproductive Technology Agencies as an appropriate format for a statute to appropriately regulate such entities, and he welcomed such reasonable regulation.
 - iii. Ms. Lemcke explained the complex and multi-faceted services that coordinating agencies provide to parents and surrogates as they go through the surrogacy process. There are many services and an extended timeline for delivery of those

services that justify the existence and use of such entities in the surrogacy process for reasonable fees for their very real services.

- iv. Mr. Shelton testified patients are not “recruited” and come to the clinic of their own desire for children and treatment. He affirmed the existing, but self-regulating, standards for surrogate screening and education, including separate attorneys. He discussed clinic fees and confirmed that clinics don’t make any more money on surrogate programs.
- v. Ms. McMillan testified CCRM does not do selective reductions and practices only single embryo transfer. CCRM does not find or match surrogates with parents. That happens either through family members or coordinating agencies. She has never encountered anyone who lacked informed consent or was reluctant about the process.
- vi. Ms. Berman briefly highlighted Dr. Bruce Campbell’s letter that states he has not seen a bad medical outcome in assisted reproduction in 23 years.

c. Conclusion: The process of surrogacy is a complex coordination of medical, psychological, legal, financial management, insurance, and administrative coordination elements. In order to be stable and reliable, each of these components is necessary, and each is entitled to receive reasonable and ethical fees for their very real and necessary services in our social and economic system, including the surrogate. Additional legislative regulation of surrogacy practices to properly implement the process is desirable and appropriate.

IV. Contract law implications when a surrogacy agreement is breached; potential conflicts with statutes governing private adoption and termination of parental rights; potential conflicts related to third-party reproduction, including conflicts between or amongst the surrogate mother, the intended parents, the child, insurance companies, and medical professionals.

- a. Gary Debele (Minnesota), a reproductive attorney, Jody DeSmidt (Minnesota), a reproductive attorney, Erica Strohl (Minnesota), Jill Wolfe (Minnesota), and Cindy Rasmussen (Minnesota), parents through surrogacy, and Charles Coddington III, M.D. (Minnesota), testified in support of the implementation and regulation of gestational agreements in Minnesota.
 - i. Mr. Debele/Ms. DeSmidt testified together about issues typically negotiated and addressed in surrogacy contracts. If there are any conflicts with adoption/termination statutes, they would be averted by proper regulation. When breached, a surrogacy contract is subject to all normal contract remedies, including specific performance and monetary damages, if any. They highlighted that parentage processes are not uniform around the state from county to county and that regulation would help simplify and make the surrogacy process more stable, predictable, and affordable. Mr. Debele also referenced the American Academy of Assisted Reproductive Technology Attorneys’ (AAARTA’s) ethical

code as a good basis for ethical guidelines in the surrogacy process to avert conflicts among the parties and bad outcomes. They have not had any cases with conflicts among the parties or professionals in their office over hundreds of cases.

- ii. Mss. Strohl, Wolfe, and Rasmussen testified that surrogacy was a wonderful outcome and path to parentage for them. They discussed their screening and contracting processes and stated all parties, specifically including the surrogates, were in concert and cooperative throughout the process. Ms. Wolfe also stated children should know about their origins, and all three said that their children did know the surrogate who gave birth to them.
- iii. Dr. Coddington testified that surrogacy was just one tool available to address infertility, and Mayo has used it successfully. He knew of no cases in which any parent decided mid-pregnancy that they did not want the child. He emphasized that infertility is a disease and warrants medical treatment, including surrogacy.

b. Conclusion: Even without regulation, surrogacy cases in Minnesota overwhelmingly proceed smoothly with little conflict in the vast majority of cases, often because of the standards, structure, and requirements imposed by coordinating agencies, as noted previously. Regulations mandating reasonable standards for psychological and medical screening, legal representation, and administrative procedures would make the process uniform, reliable, and even less subject to conflict.

V. Public policy determinations of other jurisdictions with regard to surrogacy.

- a. David M. Smolin (Alabama), Cumberland School of Law Professor of Law, testified in opposition to the implementation and regulation of gestational agreements in Minnesota.
 - i. Professor Smolin testified that there is no binding U.S. Supreme Court precedent confirming that there exists a constitutional right to procreate via assisted reproduction generally and surrogacy in particular, arguing that intended parents do not have constitutional protection of their right to procreate using surrogate mothers. When questioned about the federal district court case in the district of Utah that held that the use of surrogacy WAS included in a person's constitutionally protected right to procreate, he replied that that case was unpublished and carried no precedential weight. Professor Smolin conceded that the U.S. Supreme Court has not yet ruled that surrogacy is or is not encompassed within a person's constitutional right to procreate, but that the only (unpublished) federal court case that has addressed the issue to date has held in favor of that right, indicating at least a likelihood that future cases may move in that direction.
- b. Margaret Swain (Maryland), chairwoman of the American Academy of Assisted Reproductive Technology Attorneys (AAARTA), Meryl Rosenberg (Maryland), a reproductive attorney, Kathy Tingelstad (Minnesota), former member of the House of

Representatives, and Steven H. Snyder (Minnesota), a reproductive attorney, testified in support of the implementation and regulation of gestational agreements in Minnesota.

- i. Ms. Swain testified that proper regulation of surrogacy is desirable, and that surrogacy should be an available medical and legal process for aspiring intended parents. She said that most conflicts among and within professionals could be reconciled, and that AAARTA allowed attorneys who owned coordinating agencies to also represent one of the parties with proper disclosure of that representation to all parties.
- ii. Ms. Rosenberg testified and submitted two legal presentation papers she had authored. The first addressed the “best interests of the child” standard in surrogacy, for which, she stated, there was no applicable existing legal precedent in the U.S. until after a child is born. Even after a child is born, a child’s best interests is only relevant in a dispute between actual legal parents of the child, and a surrogate is generally not considered a child’s legal parent with custody rights to assert. She stated the child’s best interests in a surrogacy is to have an identified and predictable home/parent, which militates in favor of making surrogacy agreements enforceable and confirming the intended parents’ legal parentage immediately upon birth. The second addressed the constitutional right to procreate, which she stated was rooted in and stated in U.S. Supreme Court case precedent. She specifically stated that surrogacy and adoption should not be compared or conflated, and that the two processes should not be regulated in the same way.
- iii. Ms. Tingelstad testified about her long legislative history with the issue of surrogacy in the Minnesota legislature as a State Representative at that time, working successfully with all the stakeholders in the process. She spent hundreds of hours between the 2001 Task Force report and passage of a surrogacy statute through both the Senate and House in 2008 with bi-partisan support crafting a reasonable regulatory scheme for surrogacy in Minnesota. Ms. Tingelstad urged the commission not to let an opportunity to reasonably regulate surrogacy pass by, and also urged temperate and balanced discussion and consensus on the thorny social and political issues that it raises. She responded to questions from the commission stating that she supported reasonable compensation to surrogates for their gestational services as well as the work of coordinating agencies to facilitate safe and successful surrogacy programs for all participants. Ms. Tingelstad also responded that, since traditional surrogacy is happening, it also should be regulated. Ms. Tingelstad is not necessarily opposed to criminal background checks on prospective parents through surrogacy.
- iv. Mr. Snyder testified about the contents of the proposed surrogacy statute that Senator Pappas and Representative Lesch authored and introduced during the 2016 legislative session and its various terms and effect. He also gave a summary of statutes passed in other states since 1993 (the date of the California decision on surrogacy in Johnson v. Calvert). Virtually all states, subject to isolated

exceptions, that have addressed surrogacy since then have affirmed and regulated it, allowing reasonable compensation to the surrogates as part of the process. He testified also that existing statutes do not address or bar the services of coordination agencies or require substantial screening of intended parents. Two major policy organizations, the Uniform Law Commissioners and the American Bar Association, have also addressed surrogacy in proposed laws that each affirm and regulate the process while allowing compensation to be paid to the surrogate. Wisconsin, North Dakota, and Iowa each have one or more statutes or cases that facilitate and/or make surrogacy legal and enforceable in those states.

c. Conclusion: The developing trend of the majority of U.S. jurisdictions and two influential legal policy-making entities, the American Bar Association and Uniform Law Commissioners, regarding surrogacy is to allow and regulate compensated surrogacy.

ISSUES FOR DISCUSSION

1. Should surrogacy arrangements be allowed and regulated in Minnesota?
2. Should surrogates be allowed to receive reasonable compensation for their gestational services?
3. Should coordinating agencies be allowed to facilitate surrogacy arrangements, and should they be allowed to receive reasonable compensation for their services?
4. Should language be included in the regulations limiting the parties' right to agree to pregnancy termination provisions in their gestational agreements?
5. Should the regulations allow and apply to traditional surrogacy?
6. Should there be a limit in the regulations as to how many embryos a doctor can transfer to initiate a surrogate pregnancy?
7. Should all parties to a surrogacy arrangement be required to be residents of the State of Minnesota and/or the United States?
8. How should parentage in non-compliant surrogacy arrangements be established?
9. Should parents entering into surrogacy arrangements be subjected to the same kind of screening as intended parents adopting a child?
10. Should the best interests of the child be considered in the provisions of any regulations?

11. Should the regulations require the intended parents to be genetically-related to the embryo?

RECOMMENDATIONS

1. Surrogacy arrangements should be allowed and regulated in Minnesota.
 - a. All U.S. citizens have a constitutionally-protected right to procreate. This likely includes the use of assisted and third-party reproduction.
 - b. The credible evidence submitted by medical authorities and academic researchers shows that there are no unreasonable adverse health or psychological effects of surrogacy on the surrogate, intended parents, or their respective children.
 - c. Adult women are capable of assessing and accepting the physical and psychological risks of surrogacy without government intrusion.
 - d. The State of Minnesota should not intrude on the fundamental rights of surrogates and aspiring parents to knowingly, freely, and voluntarily enter into contracts to assist intended parents in procreating.

The majority supports the recommendation that gestational carrier arrangements meet national standards that require independent legal representation of all parties, mental health evaluations of all parties, verification that the prospective surrogate is medically capable of safely carrying a child to term, and provision of insurance coverage to the gestational carrier.

2. Surrogates should be allowed to receive reasonable compensation for their gestational services.
 - a. The heavy weight of actual research and experience shows that surrogates in the U.S. and Minnesota are financially-stable, educated women who are not subject to coercive financial exploitation.
 - b. The State of Minnesota should not foreclose the personal and economic choice of a woman to enter into and accept reasonable compensation for gestational services.
 - c. Physicians, attorneys, psychologists, insurance companies, and others are entitled to receive compensation for the services they provide in connection with assisted reproduction, including surrogacy. There is no reason the surrogate should be restricted or treated differently.
 - d. The vast majority of other states and policy-making bodies such as the Uniform Law Commissioners and the American Bar Association that have enacted or proposed legislation to regulate surrogacy have determined that surrogates may receive reasonable compensation.

The majority is unaware of any other medical procedure in Minnesota in which prices or compensation for private sector services are set by the government. It is odd to suggest that Minnesota government would intervene in the private negotiations of adults for a service to be provided. Any such restriction would discourage women from acting as surrogates, thereby severely limiting or eliminating surrogacy in Minnesota and deprive Minnesotans the opportunity to have a child. The majority opposes any restrictions on compensation.

3. Coordinating agencies should be allowed to facilitate and administer surrogacy programs and charge a reasonable fee for their services as for-profit entities.
 - a. Surrogacy agencies perform a wide array of necessary administrative and coordinating services that no other professional provides to make the surrogacy process stable, safe, and successful for the participants.
 - b. Without surrogacy agencies, most aspiring parents would be unable to locate, identify, or properly screen prospective surrogates, thereby severely limiting their procreative options and liberty.
 - c. All other professionals providing medical, legal, psychological, and other services to facilitate the surrogacy process are permitted to charge a reasonable fee for their services.
 - d. Surrogacy agencies perform similar, but different and far more extensive services, as adoption agencies, and adoption agencies charge comparable fees for their services.
 - e. There is no articulated or factual basis for requiring coordinating agencies to be non-profit entities in this elective reproductive process.

Other professional entities serving infertile Minnesota families, such as infertility clinics, mental health clinics, law firms, and hospitals, are allowed to choose whether to incorporate as a non-profit or for-profit corporation. For example, hospitals in Minnesota may incorporate as non-profit or for-profit corporations. Both serve patients and must meet state licensure standards, but it is left to them to determine how to legally structure their business. The same should apply to surrogacy agencies. The majority does not believe the government should be dictating what corporate structures are most appropriate to serve clients. Instead, it should be fostering a regulatory environment that serves the needs of infertile Minnesotans and their offspring.

4. Surrogacy regulations should not limit or reference a woman's right to make her own procreative decisions in respect to pregnancy termination.
 - a. A woman's right to choose is governed by Roe v. Wade and should not be restricted in any way during the surrogacy process.
 - b. The collective and primary goal of both the intended parents and the surrogate is the live birth of a healthy child.
 - c. As a result, disputes involving pregnancy termination in surrogacy are rare.

Prohibiting the parties from negotiating and implementing reasonable agreements as to the management and termination of a surrogate pregnancy not only restricts a surrogate's right to choose in violation of Roe v. Wade, it also prevents the intended parents from obtaining the surrogate's consensus not to unnecessarily terminate the healthy pregnancy of the intended parents' child. Allowing the surrogate the right to consider and choose if or when to continue or terminate a surrogate pregnancy is a natural extension of her own exercise of her right to choose as established under Roe v. Wade and should be preserved.

5. Traditional surrogacy should be included and treated the same as gestational surrogacy for regulatory purposes.

- a. Traditional surrogacies will occur.
 - b. Parties entering into traditional surrogacy arrangements should be even more strongly encouraged to adhere to the same statutory procedures and safety mechanisms as any other surrogacy.
 - c. Traditional surrogacy can be safely conducted without harm to the parties if properly regulated.
 - d. It is safer to regulate traditional surrogacy than leave it unregulated.
6. The number of embryos transferred to initiate a surrogate pregnancy should not be regulated.
- a. The State of Minnesota should not statutorily interfere with the doctor/patient relationship.
 - b. Physicians are the best source of assessment and regulation of the optimal treatment protocol for their patients.
 - c. There are many other assisted reproduction procedures outside of surrogacy that involve transfer of embryos, and there are no legislative limitations on the number of embryos transferred in those other procedures.
7. All parties to a surrogacy arrangement should not be required to be Minnesota or U.S. residents.
- a. Such a requirement would prevent a family member sibling living in Minnesota from offering to carry a surrogate pregnancy for her other family member who lives in a different state or country.
 - b. Such a limit may have implications in burdening the federal right to regulate interstate commerce regarding fertility clinics and others involved in the surrogacy process.
 - c. No other actual or proposed surrogacy legislation in any other state limits surrogacy to only parties within a single state.
 - d. There should be no limitation on the right of parties to a gestational agreement to exercise their choice-of-law within their contractual agreements.

There is a suggestion to restrict surrogacy contracts to persons that have resided in Minnesota for at least one year or are U.S. residents. Thanks to the Mayo Clinic, Minnesota is an international destination for patients seeking medical care. No patients coming to Minnesota for medical care currently subject to a one-year residency or a citizenship standard for obvious reasons. No testimony or evidence was presented to the commission indicating any adverse incidents or outcomes in any Minnesota surrogacy arrangement that related to the residence or citizenship of the parties involved. As a result, the majority opposes rationing recognized medical treatments in Minnesota to certain classes of people and believes any patient seeking medical treatment for infertility should be allowed to receive that treatment without government restrictions as to residence or citizenship.

8. Parentage in surrogacies that do not comply with the statutory requirements should be established pursuant to the other provisions of the parentage act, Minnesota Statutes, Chapter 257.
- a. Non-compliant surrogacies will occur, even if unintentionally.

- b. As in J.R., et al. v. Utah, above, the state may not constitutionally automatically require the surrogate or her spouse to remain the child’s legal parents without further analysis.
- c. The existing parentage statutes that would govern parentage would be centered on existing parental presumptions and the best interests of the child, the appropriate standard to resolve such parentage issues..
- d. We should not (and perhaps cannot) impose criminal or other legal sanctions for non-compliance.

The purpose of regulating surrogacy arrangements is to encourage the participants to conduct them safely with reasonable protections for all parties. Establishing a simple, predictable, reliable, cost-effective establishment of the intended parentage in all cases that comply with the statutory requirements is compelling motivation for them to do so. Non-compliance should not, however, necessarily prevent the parties from establishing parentage as a court finds reasonable under the circumstances of each case. There are existing parentage, termination of parental rights, and adoption statutes all centered around the best interests of the resulting child that have and will continue to apply in cases in which parentage is not established under any new surrogacy regulations. These existing statutes are adequate protection for the parties and the child, and there should be no other penalty or disqualification of any party as a prospective legal parent based solely on non-compliance with any proposed regulatory scheme for surrogacy.

- 9. Intended parents through surrogacy should not be screened like adoptive parents.
 - a. Adoption is the process of receiving parental rights over another person’s child and is not a constitutionally protected right.
 - b. Surrogacy is procreation of the intended parents’ own child, and procreation is very likely a constitutionally-protected right.
 - c. Preventive screening in the context of surrogacy would be an undue burden on the intended parents’ constitutionally protected right to procreate.
 - d. Surrogacy is not like and should not be regulated like adoption:

[“Other courts considering the question of surrogacy in the context of adoption proceedings have found that “[gestational surrogacy differs in crucial respects from adoption and so is not subject to the adoption statutes.” *Johnson v. Calvert*. In *Culliton v. Beth Israel Deaconess Medical Center*, the Massachusetts Supreme Court distinguished gestational surrogacy from traditional surrogacy, in which the birth mother also contributed her own genetics, and concluded that “[a]s is evident from its provisions, the adoption statute was not intended to resolve parentage issues arising from gestational surrogacy agreements.” J.R., et al., v. Utah, supra.]

[“Gestational surrogacy differs in crucial respects from adoption and so is not subject to the adoption statutes. The parties voluntarily agreed to participate in *in vitro* fertilization and related medical procedures before the child was conceived; at the time when [the surrogate] entered into the contract, therefore, she was not vulnerable to financial inducements to part with her own expected offspring. As discussed above, [the surrogate] was not the genetic mother of the child. The payments to [the surrogate] under the contract were meant to compensate her for her services in gestating the fetus and undergoing labor, rather than for

giving up "parental" rights to the child. Payments were due both during the pregnancy and after the child's birth. We are, accordingly, unpersuaded that the contract used in this case violates the public policies embodied in Penal Code section 273 and the adoption statutes. For the same reasons, we conclude these contracts do not implicate the policies underlying the statutes governing termination of parental rights." Johnson v. Calvert, supra.]

Fertile couples are not required to be investigated by the State before having procreative sex. It is most incongruous that Minnesotans with a diagnosed medical condition would have government employees that are not medical professionals licensed by the Board of Medical Practice in their home to assess whether a recognized medical treatment is appropriate for them. No state in the country investigates couples seeking to have children. If it is in the interest of the State to investigate infertile couples seeking to become parents, then it is surely equally in the interest of the State to investigate fertile couples seeking to become parents. The majority opposes any requirement that infertile patients be singled out for government investigations.

There appears to be significant confusion as to the differences between adoption and gestational surrogacy, which is unfortunate, because they are two very different things. Adoption is a process whereby persons assume the parenting of a child from that child's biological or legal parents, who transfer all rights and responsibilities to the adoptive parents. Adoption is about child welfare, and transferring parental rights for a living human being. Gestational Surrogacy occurs when the intended parents care for their own child who was borne by the gestational carrier surrogate solely for the purpose of becoming the child of the intended parents. From planned conception to birth, a child born from surrogacy is the child of the intended parents, which in no way equates to a child that is adopted. They are completely different situations, and the majority believes that there should be no references to adoption in any discussion of surrogacy.

10. The best interests of the child should not affect placement of the child upon birth with his/her intended parents.
 - a. The child's overall best interests are best served by having a predetermined, predictable, undisputed home and legal parents immediately upon birth.
 - b. A child's best interests is only used to determine legal parentage and/or custody between two parents with an existing and equal right to be called a parent.
 - c. The surrogate is not intended to and does not function in the legal capacity as the child's legal mother at any point in the surrogacy process.

["The California Supreme Court in *Johnson v. Calvert* acknowledged that both the genetic/biological mother and the gestational surrogate birth mother had submitted credible evidence of a mother and child relationship under California's version of the Uniform Parentage Act. Given those relationships, the court turned to the intent of the parties to the surrogacy agreement to determine that the natural and legal parents of the child were those who intended to bring about the birth and raise the child as their own-the genetic/biological mother and father. However, the court rejected the claim that the gestational surrogate was exercising "her own right to make procreative choices; she is agreeing to provide a necessary and profoundly important service without (by definition) any expectation that she will raise the resulting child as her own." To the *Calvert* court, the choice to gestate and deliver a baby for the genetic parents pursuant to a surrogacy agreement is not the constitutional equivalent of the decision whether to bear a child

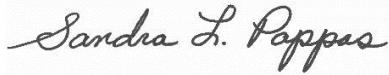
of one's own; "any constitutional interests [the gestational surrogate] possesses in this situation are something less than those of a mother." J.R., et al. v. Utah, supra.]

11. The intended parents should not be required to be genetically-related to the embryo/resulting child.
 - a. Infertility is often a combination of factors resulting in the absence of a genetic link of one or both intended parents to the resulting child.
 - b. There are more than 500,000 stored embryos in the U.S., and we should facilitate the donation and use of those stored embryos in various forms of infertility treatment, including surrogacy.

Surrogacy occurs when a couple is infertile, and oftentimes it is both the male and female who have medical conditions rendering them infertile. In those cases, donor egg and donor sperm, or donor embryo, may be needed to achieve pregnancy, with the donated egg donated from someone other than the gestational carrier. Requiring that one of the intended parents be genetically related discriminates against couples with both male and female factor infertility, and the majority opposes this discriminatory requirement.

ENDORSEMENT

This report and the recommendations therein are supported by the undersigned members of the commission:



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Rep. John Lesch



Rep. Susan Allen



Rep. Jon Applebaum



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