

# **Legislative Commission on Surrogacy**

## **Report to the Legislature\***

**December 15, 2016**

*\*Report Required by Minnesota Laws 2016, Chapter 189, Article 13, Section 66*

# Table of Contents

I.	Background.....	3
A.	Previous Legislative Activity.....	3
B.	Enabling Legislation.....	3
C.	Task Force Membership.....	4
II.	Commission Meetings.....	5
III.	Procedural History for Adoption of Report.....	7
IV.	Commission Findings.....	8
V.	Commission Recommendations on Surrogacy Legislation.....	11
	APPENDICES.....	15
	Appendix A: Meeting Minutes	
	Appendix B: Overview of Surrogacy Law and Proposed Legislation by Senate Counsel Kathy Pontius	
	Appendix C: Recommended Proposals for the Report Memorandum on Minnesota	
	Appendix D: Minority Report of the Commission	
	Appendix E. Adoption Law by House Research	
	Appendix F. Memorandum on Surrogacy Law by House Research	

# **I. Background**

## **A. Previous Legislative Activity**

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

In 2008, the legislature passed S.F. 2965, which regulated gestational agreements. Governor Tim Pawlenty vetoed the bill and issued a veto letter stating his position that certain significant ethical and public policy issues had not been adequately addressed.

## **B. Enabling Legislation**

The Legislative Commission on Surrogacy was established to develop recommendations on public policy and laws regarding surrogacy. To develop the recommendations, the commission was directed to study surrogacy through public hearings, research, and deliberation.

Topics for study included:

1. potential health and psychological effects and benefits on women who serve as surrogates;
2. potential health and psychological effects and benefits on children born of surrogates;
3. business practices of the fertility industry, including attorneys, brokers, and clinics;
4. considerations related to different forms of surrogacy;
5. considerations related to the potential exploitation of women in surrogacy arrangements;
6. contract law implications when a surrogacy contract is breached;
7. potential conflicts with statutes governing private adoption and termination of parental rights;
8. potential for legal conflicts related to third-party reproduction, including conflicts between or amongst the surrogate mother, the intended parents, the child, insurance companies, and medical professionals;
9. public policy determinations of other jurisdictions with regard to surrogacy; and
10. information to be provided to a child born of a surrogate about the child's biological and gestational parents.

## C. Task Force Membership

### Legislative Commission on Surrogacy Members

The Legislative Commission on Surrogacy consisted of 15 members, appointed as follows: three members of the senate appointed by the senate majority leader; three members of the senate appointed by the senate minority leader; three members of the house of representatives appointed by the speaker of the house; three members of the house of representatives appointed by the house of representatives minority leader; the commissioner of human services or the commissioner's designee; the commissioner of health or the commissioner's designee; and a family court referee appointed by the chief justice of the state Supreme Court. Below is a list of each member of the Commission and the appointing authority for that member.

<b>Members</b>	<b>Appointing Authority</b>
Senator Alice Johnson, Co-Chair	Senate Majority Leader
Representative Peggy Scott, Co-Chair	Speaker of the House
Representative Susan Allen	House Minority Leader
Representative Jon Applebaum	House Minority Leader
Senator Michelle Benson	Senate Minority Leader
Senator Scott Dibble	Senate Majority Leader
Assistant Commissioner Jim Koppel	Department of Human Services
Representative John Lesch	House Minority Leader
Senator Warren Limmer	Senate Minority Leader
Senator Sandy Pappas	Senate Majority Leader
Deputy Commissioner Dan Pollock	Department of Health
Representative Cindy Pugh	Speaker of the House
Senator Carrie Ruud	Senate Minority Leader
Referee Richard Stebbins	Chief Justice, State Supreme Court
Representative Anna Wills	Speaker of the House

## II. Commission Meetings

The meeting minutes, agendas, background papers, and handouts provided at each meeting are all available on the Minnesota [Legislative Commission on Surrogacy website](#).

### A. Meeting One—June 28, 2016

The Commission elected co-chairs Senator Johnson and Representative Scott. Senate Counsel presented an overview on surrogacy law and policies in Minnesota and other states. (See Attached Appendix A for Meeting Minutes) (See Appendix B for Overview provided by Kathy Pontius, Senate Counsel)

### B. Meeting Two—July 19, 2016

The Commission heard testimony on the health and psychological effects and benefits to women who serve as surrogates and the health and psychological effects and benefits on children born of surrogates. (See Attached Appendix A for Meeting Minutes)

### C. Meeting Three—August 16, 2016

The Commission heard testimony related to the different forms of surrogacy and the potential exploitation of women in surrogacy arrangements. (See Attached Appendix A for Meeting Minutes)

### D. Meeting Four—August 30, 2016

The Commission heard testimony related to the business practices of the fertility industry. (See Attached Appendix A for Meeting Minutes)

### E. Meeting Five—September 13, 2016

The Commission heard testimony related to business practice of clinics in the fertility industry. (See Attached Appendix A for Meeting Minutes)

### F. Meeting Six—September 27, 2016

The Commission heard testimony on contract law implications for surrogacy contracts, surrogacy law and the intersection of adoption law, and parental rights statutes. The Commission also heard testimony on health insurance and the informed consent of participants in surrogacy. (See Attached Appendix A for Meeting Minutes)

### G. Meeting Seven—October 11, 2016

The Commission heard testimony related to surrogacy contracts, custody and best interest standards, previous surrogacy legislation in Minnesota, model legislation for

assisted reproduction, and from families who used a surrogate and from women who have been surrogates. (See Attached Appendix A for Meeting Minutes)

H. Meeting Eight—November 15, 2016

The Commission discussed proposed findings and recommendations for the Commission's report to the Legislature. (See Attached Appendix A for Meeting Minutes)

I. Meeting Nine—November 22, 2016

The Commission reviewed proposed recommendations for the Commission's Report to the Legislature. (See Attached Appendix A for Meeting Minutes)

J. Meeting Ten—December 8, 2016

The Commission voted on proposed recommendations for the Commission's Report to the Legislature. The Commission heard testimony from the Department of Health about vital records and birth certificates. (See Attached Appendix A for Meeting Minutes)

### **III. Procedural History for Adoption of Report**

1. Staff generated ideas and recommendations for consideration by the commission members based on committee hearings and testimony and the recommendations provided by members. (See attached Appendix C)
2. The Commission met on November 15, 2016 to begin voting on recommendations for the report but a quorum was not present.
3. The Commission met on December 8, 2016 to vote on the final report based on the recommendations submitted by members. Representative Lesch offered a proposed report and recommendations and the proposal was voted down by a majority of members present (See attached Appendix D, minority report). Senator Johnson, Representative Scott, and Representative Wills offered a proposal that was adopted as the final Majority Report and recommendations.

## IV. Commission Findings

The Commission was provided specific topics for study in the enacting legislation. The topics for study provided a framework for the meetings and testifiers. Many testifiers provided written reports and previously prepared studies and articles, oral and written testimony, and examples of documents used by surrogacy agencies and medical providers such as forms and contract agreements.

Below are the topics the Commission was charged with studying and the findings for each topic.

1. The potential health and psychological effects and benefits on women who serve as surrogates.

The Commission heard from testifiers who had served as surrogates, both altruistic and compensated surrogate mothers. The Commission also heard from testifiers about medical complications for surrogate mothers, the use of egg and sperm donations, and the possible health consequences or fatality during pregnancy, particularly when a surrogate has already had a number of her own pregnancies or had multiple surrogate pregnancies.

The Commission heard testimony on the differences between traditional and gestational surrogacy. In traditional surrogacy the surrogate is carrying a baby she is genetically related to and has donated her egg for the pregnancy. The sperm for a traditional surrogacy can come from the intended father or from a sperm donor. In a gestational surrogacy the surrogate mother is not biologically related to the child. The egg and sperm may be from the intended parents or may come from a donated egg or sperm.

The Commission heard from testifiers about the different psychological effects women suffer in gestational and traditional surrogacy. A particular focus of testimony was the difficulty a traditional surrogate mother has in giving up her own biological child. The Commission heard from many surrogacy agencies, medical practitioners, and attorneys who said they only work with families that are using gestational surrogacy.

2. The potential health and psychological effects and benefits on children born of surrogates.

The Commission heard from parents who had used surrogacy to create their families and heard testimony from children born using surrogacy. The Commission also heard from medical and mental health professionals that work with families using surrogates.



3. The Business practices of the fertility industry, including attorneys, brokers, and clinics.

The Commission heard extensive testimony from agencies providing surrogacy services in Minnesota and other states around the country. The information included business practices of surrogacy agencies such as:

- the requirements for a person to be a surrogate;
- the compensation surrogates receive;
- the types of insurance provided (health insurance and life insurance);
- the use of escrow and trust accounts;
- the types of medical and psychological exams the surrogate and intended parents are required to undergo; and
- the other businesses and professionals the agencies work with.

The Commission also heard from doctors and medical professionals about the medical considerations and best practices used for surrogacy, including:

- the age and fertility of a surrogate;
- the drugs used to facilitate the surrogacy;
- the procedures used to facilitate the surrogacy;
- the dangers and health risks to pregnancy and surrogacy;
- the rate of infertility;
- the possibility for multiple births; and
- the use of elective single transfer embryos.

4. Considerations related to different forms of surrogacy.

The Commission heard from surrogacy agencies, family law attorneys, and medical professionals about the use of traditional and gestational surrogacy. The overwhelming majority of professionals did not assist patients with traditional surrogacy and instead advocated for the use of gestational surrogacy.

5. Considerations related to the potential exploitation of women in surrogacy arrangements:

Testifiers presented testimony both for and against compensation of surrogate mothers. The Commission also heard from testifiers about the need for informed consent from the surrogate mothers and the industry practices that help agencies identify psychologically and physically healthy surrogates. The Commission heard about the ability of surrogates or intended parents to make medical decisions during the surrogacy and how those decisions are memorialized in surrogacy contracts.

6. The contract law implications when a surrogacy contract is breached.

The Commission heard from attorneys about how surrogacy contracts can be enforced, including the remedies provided for in the contract which included both specific performance and monetary damages. The Commission was also provided with examples of surrogacy contracts.

7. The potential conflicts with statutes governing private adoption and termination of parental rights.

The Commission heard testimony about how current adoption laws and termination of parental rights laws can be used to assist families using a surrogate in Minnesota and about how the process is expensive due to the amount of legal work needed to complete the process. The Commission was provided with background information on Minnesota adoption law and other family laws that affect surrogacy. (See Attached Appendix E)

8. The potential for legal conflicts related to third-party reproduction, including conflicts between or amongst the surrogate mother, the intended parents, the child, insurance companies, and medical professionals.

The Commission heard from attorneys, agencies, and medical providers about the use of third party and in-house psychological counseling, medical evaluations, legal counsel, and the use of for-profit surrogacy agencies. The Commission heard about the use of escrow accounts and trust accounts that can be used for surrogate arrangements. The Commission also heard about the need for informed consent of surrogate mothers when signing surrogacy contracts.

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

The Commission heard testimony about international surrogacy laws and other state laws in the United States from a number of different testifiers. Attached as Appendix F, is a brief overview of international laws and laws on surrogacy in the United States.

10. The information to be provided to a child born of a surrogate about the child's biological and gestational parents.

The Commission heard from testifiers about the best interest of children. This included the need for children to know their biological heritage, both for emotional reasons and for medical reasons.

## V. Commission Recommendations on Surrogacy Legislation

1. The Commission recommends legislation that recognizes the right to contract for a gestational surrogate to carry a child for intended parents and which provides for the enforcement of that contract in a civil action in district court.

The Commission recommends that legislation provide that:

- (a) Gestational surrogacy contracts are enforceable when the contracts comply with the requirements of the law;
  - (b) Traditional surrogacy contracts are governed by Minnesota adoption law, with parental rights determined under Chapters 257 and 518 in the absence of a valid adoption;
  - (c) Pre-birth orders may be issued for valid gestational surrogacy contracts so that birth certificates reflect the intended parents when issued;
  - (d) Gestational surrogacy contracts may be invalidated if they provide for compensation beyond the actual expenses or any additional compensation allowed by law;
  - (e) Traditional surrogates be allowed at least 72 hours after the birth of the child to make a decision about adoption, consistent with the consent requirements under Minnesota adoption law;
  - (f) Invalid gestational surrogacy contracts follow the same procedures as traditional surrogacy;<sup>1</sup> and
  - (g) Birth certificates reflect the intended parents of a child born through gestational surrogacy.
2. The Commission recommends legislation that addresses the requirements for a woman to carry a baby as a surrogate for intended parents, including age and legal mental competency, number of children born prior to surrogacy, and the number of surrogacies the woman has already performed.

The Commission recommends that legislation include requirements for the surrogate, including that the surrogate:

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<sup>1</sup> The Minority Report of the Commission (See Appendix D, page 20, paragraph 8) has a similar recommendation that all traditional and gestational surrogacies that do not comply with statute follow Minnesota Statutes, chapter 257.

- (a) be at least 21 years of age;
  - (b) have at least one live birth prior to the surrogacy;
  - (c) undergo a medical evaluation and have her doctor provide verification that she is healthy enough to undergo a gestational surrogacy;
  - (d) complete a psychological evaluation and provide a summary to the intended parents;
  - (e) meet with independent legal counsel at least twice prior to the embryo transfer;
  - (f) have health and life insurance provided by the intended parents prior to the embryo transfer and through the birth of the child;
  - (g) be a U.S. citizen or legal resident;
  - (h) complete a criminal background check and provide the results to the intended parents; and
  - (i) be financially secure and not on any form of public assistance.
3. The Commission recommends that legislation include requirements for the intended parents, including that the intended parents:
- (a) be U.S. Citizens or legal residents of the United States;
  - (b) be at least 21 years old;
  - (c) complete a psychological evaluation and share the summary with the gestational surrogate;
  - (d) have independent legal counsel;
  - (e) provide a gamete for the child from at least one of the intended parents;
  - (f) complete a criminal background check and provide the results to the gestational surrogate;
  - (g) have a documented medical need for the surrogacy provided by a licensed physician; and
  - (h) have an estate planning document prior to the embryo transfer providing for custody and care of the child in the event the parents predecease the child.

4. The Commission recommends that surrogacy agencies be formed as non-profit corporations and licensed by the Department of Human Services.
5. The Commission recommends that surrogacy contracts have certain basic contract provisions, including:
  - (a) Requiring the intended parents to accept custody and full parental rights of a child or children born of surrogacy at birth;
  - (b) Requiring intended parents to have completed estate planning documents to provide for care and custody of child in the event the intended parents pre-decease the child;
  - (c) Requiring the intended parents provide health insurance and life insurance to the gestational surrogate throughout the pregnancy;
  - (d) Providing that contract terms that limit the gestational surrogate's ability to make medical decisions during the pregnancy are void and unenforceable<sup>2</sup> or that a specific performance remedy for violation of contract provisions is unenforceable;
  - (e) Providing that contract terms that requires the gestational surrogates to consent to the termination of a pregnancy or selective reduction during pregnancy are void and unenforceable;
  - (f) Requiring that the embryo transfer be a single-embryo transfer;
  - (g) Requiring 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; and
  - (h) Allowing the gestational surrogate to choose her own physician and allow the gestational surrogate's activities to be limited when her physician believes those activities may be harmful to the pregnancy.
6. The Commission recommends that legislation address the compensation and benefits that surrogates can receive. The Commission recommends the following alternatives to allow for compensation for surrogates:
  - (a) Prohibiting compensation for gestational surrogacy beyond the actual expenses of the surrogate, including: medical insurance, life insurance, cost of medical care and birth, lost wages, legal expenses, travel expenses, cost of

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<sup>2</sup> The Minority Report of the Commission (See Appendix D, page 19, paragraph 4) indicates that a surrogate's right to consider whether to continue or terminate a pregnancy is a natural extension to choose and must be upheld in future legislation.

clothing, and compensation provided to surrogate or surrogate's family in the event of death or permanent disability; or

- (b) Allowing compensation for a gestational surrogate's expenses, including those expenses allowed under Minn. Stat. 259.55, and allowing for additional compensation of up to \$15,000 for the surrogate's time, effort, pain, or health risks in carrying the pregnancy;
  - (c) Prohibiting compensation for traditional surrogacies beyond what is allowed under Minnesota adoption law;
  - (d) Prohibiting contract terms that limit the recovery of expenses for surrogacy based on the live birth or that prevent a surrogate from recovering costs when a pregnancy is not successful.
7. The Commission recommends that contracts executed and enforced in Minnesota follow Minnesota surrogacy law and that legislation on surrogacy include a statute of limitations for actions for monetary damages by surrogates and intended parents.
8. The Commission recommends that surrogacy legislation allow the Department of Health to keep track of data on the number of children born via surrogacy; to include the intended parents on the birth certificate when a pre-birth order is issued; and to require the birth record to document the name of the gestational surrogate.
9. The Commission recommends that physicians report to the Department of Health on the use of gestational surrogacy, the number of live births, and the health of children born via surrogacy.
10. The Commission recommends that legislature consider addressing the following issues in surrogacy legislation:
- (a) Jurisdiction and procedural issues for the enforcement of surrogacy contracts and custody matters related to children born via surrogacy
  - (b) Remedies for violation of a surrogacy contract, including the availability of or limits on specific performance or monetary damages
  - (c) The duty to support a child for surrogates and intended parents
  - (d) The potential use of escrow accounts for surrogacy contract payments to the surrogate mother or independent third party medical and legal providers
  - (e) Effect of subsequent marriage or dissolution of marriage of surrogate or intended parents.

## **APPENDICES**

Appendix A: Meeting Minutes

Appendix B: Overview of Surrogacy Law and Proposed Legislation by  
Senate Counsel Kathy Pontius

Appendix C: Recommended Proposals for the Report Memorandum on Minnesota

Appendix D: Minority Report of the Commission

Appendix E. Adoption Law by House Research

Appendix F. Memorandum on Surrogacy Law by House Research

**Appendix A**  
**Meeting Minutes**



Legislative Commission on Surrogacy  
June 28, 2016  
Room 2412, Minnesota Senate Building

Meeting Minutes

Members Present

Rep. Applebaum  
Sen. Benson (via telephone)  
Amy Dellwo, DHS (designee for Jim Koppel)  
Sen. Dibble  
Sen. Johnson  
Rep. Lesch  
Sen. Pappas  
Dan Pollock, MDH  
Rep. Pugh  
Rep. Scott  
Referee Stebbins  
Sen. Ruud  
Rep. Wills

Members Excused

Rep. Allen  
Sen. Limmer

Senator Sandy Pappas, President, Minnesota Senate, convened the meeting of the Legislative Commission on Surrogacy at 2:05 PM on Tuesday, June 28, 2016 in Room 2412 of the Minnesota Senate Building.

A quorum was present.

Members and staff introduced themselves.

Election of Chair

Members discussed the election of officers to the Legislative Commission on Surrogacy.

Sen. Dibble moved to elect Sen. Pappas as Chair of the Legislative Commission on Surrogacy.

Rep. Wills moved to elect Rep. Scott and Sen. Johnson as Co-Chairs of the Legislative Commission on Surrogacy.

Rep. Pugh moved to permit Sen. Benson to vote via telephone on the motions before the Commission.

Sen. Pappas, as acting chair, ruled to permit Sen. Benson to vote via telephone.

Sen. Pappas withdrew her name from consideration and recommended the Commission elect Sen. Johnson and Rep. Scott serve as the Commission Co-Chairs.

The vote was taken on the Wills motion. THE MOTION PREVAILED. Sen. Johnson and Rep. Scott were elected Co-Chairs of the Legislative Commission on Surrogacy.

Sen. Johnson assumed the gavel.

#### Presentation on Status of Surrogacy in Minnesota

Kathy Pontius, Senate Counsel, presented an overview on legislative activity and court cases on surrogacy in Minnesota. Ms. Pontius also provided an overview on surrogacy laws and policies in other states.

#### Discussion on Commission Duties

Rep. Scott reviewed the Commission duties and topics for study from *Minnesota Session Laws 2016 Chp. 189, Art. 13, Sec. 66, Subd.5*. Members discussed the topic list and recommended additional information, topics and potential testifiers they would like to come before the Commission.

#### Scheduling

Members discussed setting a meeting schedule for the Commission and provided input on meeting times.

#### Public Testimony

Former Representative Kathy Tingelstad addressed the Commission.

There being no further business, the meeting adjourned at 3:23 PM.

Legislative Commission on Surrogacy  
July 19, 2016  
Room 2412, Minnesota Senate Building

Meeting Minutes

Members Present

Sen. Johnson, Co-Chair  
Rep. Scott, Co-Chair  
Rep. Allen  
Sen. Benson (via telephone)  
Jim Koppel, DHS  
Sen. Dibble  
Rep. Lesch  
Sen. Limmer  
Sen. Pappas  
Dan Pollock, MDH  
Sen. Ruud  
Rep. Wills

Members Excused

Rep. Applebaum  
Rep. Pugh  
Referee Stebbins

Rep. Scott, Co-Chair, called the meeting of the Legislative Commission on Surrogacy to order at 1:03 PM on Tuesday, July 19, 2016 in Room 2412 of the Minnesota Senate Building.

A quorum was present.

Rep. Lesch moved approval of the minutes from the June 28, 2016 meeting. THE MOTION PREVAILED.

The following people provided testimony on the health and psychological effects and benefits on women who serve as surrogates and on the health and psychological effects and benefits on children born of surrogates.

- Kathy Sloan
- Matthew Eppinette, Executive Director of the Center for Bioethics and Culture
- Alana Newman, the founder of The Anonymous Us Project and director of the Coalition Against Reproductive Trafficking

- Erika Fuchs, Assistant Professor, Center for Interdisciplinary Research in Women's Health, The University of Texas Medical Branch
- Malina Simard-Halm, child born of surrogacy
- Abby Bergman, child born of surrogacy
- Elinor Poole-Dayana, child born of surrogacy
- Steven H. Snyder, Attorney at Law, LLC
- Ann Estes, gestational carrier
- Shawna Krieger, gestational carrier

There being no further business, the meeting adjourned at 3:23 PM.

Legislative Commission on Surrogacy  
August 16, 2016  
Room 2412, Minnesota Senate Building

Meeting Minutes

Members Present

Sen. Johnson, Co-Chair  
Rep. Scott, Co-Chair  
Rep. Allen  
Sen. Benson (via telephone)  
Sen. Dibble  
Sen. Pappas  
Dan Pollock, MDH  
Rep. Pugh  
Sen. Ruud  
Referee Stebbins  
Rep. Wills

Members Excused

Rep. Applebaum  
Jim Koppel, DHS  
Rep. Lesch  
Sen. Limmer

Sen. Johnson, Co-Chair, called the meeting of the Legislative Commission on Surrogacy to order at 10:09 AM on Tuesday, August 16, 2016 in Room 2412 of the Minnesota Senate Building.

A quorum was present.

Sen. Johnson reviewed the proposed work plan for the Legislative Commission on Surrogacy.

Rep. Scott moved approval of the minutes from the July 19, 2016 meeting. THE MOTION PREVAILED.

The following people provided testimony related to the different forms of surrogacy and the potential exploitation of women in surrogacy arrangements.

- Dr. Deborah Simmons (fertility psychologist)
- Dr. Lisa Erickson (fertility physician)
- Krystal Lehmke (surrogacy agency representative)
- Gary Debele (surrogacy attorney)

- Andrea Hendrickson (surrogate)
- Samantha Levine (surrogate - traditional)
- Harold J. Cassidy (attorney)

There being no further business, the meeting adjourned at 12:30 PM.

Legislative Commission on Surrogacy  
August 30, 2016  
Room 10, State Office Building

Meeting Minutes

Members Present

Sen. Alice Johnson, Co-Chair  
Sen. Michelle Benson, Substitute Co-chair  
Rep. Susan Allen  
Sen. Scott Dibble  
Jim Koppel, DHS  
Rep. John Lesch  
Sen. Warren Limmer  
Sen. Sandy Pappas  
Dan Pollock, MDH  
Rep. Pugh (via telephone)  
Rep. Wills

Members Excused

Rep. Peggy Scott, Co-Chair  
Rep. Jon Applebaum  
Sen. Carrie Ruud  
Referee Stebbins

Sen. Benson, substitute Co-Chair, called the meeting of the Legislative Commission on Surrogacy to order at 1:04 PM on Tuesday, August 30, 2016 in Room 10 of the State Office Building.

A quorum was present at 1:12 PM.

Sen Dibble moved approval of the minutes from the August 16, 2016 meeting. **THE MOTION PREVAILED.**

The following people provided testimony related to the business practices of the fertility industry: attorneys and brokers:

- June Carbone, Professor of Law – University of Minnesota
- Teresa Collett, Professor of Law – University of St. Thomas
- Joe Langfield, Human Life Alliance
- Steve Snyder, Attorney & surrogacy agency representative
- Kim Bergman (via telephone), surrogacy agency representative
- Krystal Lehmke, surrogacy agency representative

There being no further business, the meeting adjourned at 3:09 PM.

Legislative Commission on Surrogacy  
September 13, 2016  
Room 2412, Minnesota Senate Building

Meeting Minutes

Members Present

Sen. Johnson, Co-Chair  
Rep. Scott, Co-Chair  
Sen. Benson (via telephone)  
Sen. Dibble  
Jim Koppel, DHS  
Dan Pollock, MDH  
Rep. Pugh  
Sen. Ruud  
Referee Stebbins  
Rep. Wills

Members Excused

Rep. Allen  
Rep. Applebaum  
Rep. Lesch  
Sen. Limmer  
Sen. Pappas

Sen. Johnson, Co-Chair, called the meeting of the Legislative Commission on Surrogacy to order at 10:05 AM on Tuesday, September 13, 2016 in Room 2412 of the Minnesota Senate Building.

A quorum was present.

Sen. Dibble moved approval of the minutes from the August 30, 2016 meeting. THE MOTION PREVAILED.

The following people provided testimony related to the business practices of clinics in the fertility industry:

- Jennifer Lahl, R.N., M.A., CBC President, Center for Bioethics and Culture (via telephone)
- Nikolas Nikas, President, CEO and General Counsel, Vice President, Bioethics Defense (via telephone)
- Brian Shelton, Chief Operating Officer, Colorado Center for Reproductive Medicine



- Monica McKinnon, R.N., Third Party/Donor Coordinator, Colorado Center for Reproductive Medicine
- Julie Berman, Board Chair, RESOLVE

Members then discussed the Commission's work plan and timeframe for completing their report. Deputy Commissioner Pollock recommended moving the initial discussion of the Commission's report to October.

There being no further business, the meeting adjourned at 11:38 AM.

Legislative Commission on Surrogacy  
September 27, 2016  
Room 10, State Office Building

Meeting Minutes

Members Present

Sen. Alice Johnson, Co-Chair  
Rep. Peggy Scott, Co-Chair  
Rep. Susan Allen (via telephone)  
Sen. Michelle Benson  
Sen. Scott Dibble  
Ralph McQuarter, DHS (designee for Jim Koppel)  
Rep. John Lesch  
Sen. Warren Limmer  
Dan Pollock, MDH  
Referee Stebbins  
Rep. Wills

Members Excused

Rep. Jon Applebaum  
Sen. Sandy Pappas  
Rep. Cindy Pugh  
Sen. Carrie Ruud

Rep. Scott, Co-Chair, called the meeting of the Legislative Commission on Surrogacy to order at 1:02 PM on Tuesday, September 27, 2016 in Room 10 of the State Office Building.

A quorum was present.

Sen. Johnson moved approval of the minutes from the September 13, 2016 meeting. **THE MOTION PREVAILED.**

Rep. Scott reviewed a revised work plan for the Legislative Commission on Surrogacy. The October 25, 2016 meeting was cancelled and rescheduled for November 15, 2016. The November 10, 2016 meeting was cancelled and rescheduled for November 22, 2016.

Rep. Scott provided general comments regarding the format for the Commission's report to the Legislature.

Gary A. Debele (Berg, Debele, Desmidt & Rabuse, P.A.) and Jody Ollyver DeSmidt (Berg, Debele, Desmidt & Rabuse, P.A.) provided testimony on contract law implications when a surrogacy contract is breached;

potential conflicts with statutes governing private adoption and termination of parental rights; potential for legal conflicts related to third-party reproduction, including conflicts between or amongst the surrogate mother, the intended parents, the child, insurance companies, and medical professionals; and information provided to a child born of a surrogate about the child's biological and gestational parents.

The following people provided testimony on information provided to a child born of a surrogate about the child's biological and gestational parents:

Erica Strohl, parent that used a surrogate

Jill Wolfe, parent that used a surrogate

Cindy Rasmussen, parent that used a surrogate

Charles C. Coddington III (M.D., FCOG, CPE, FACPE, Professor of Obstetrics and Gynecology, Mayo Medical School Division of Reproductive Endocrinology and Infertility Mayo Clinic) provided testimony on policies and processes related to assisted reproductive technologies and gestational carriers.

There being no further business, the meeting adjourned at 2:47 PM.

Legislative Commission on Surrogacy  
October 11, 2016  
Room 2412, Minnesota Senate Building

Meeting Minutes

Members Present

Sen. Johnson, Co-Chair  
Rep. Scott, Co-Chair  
Rep. Allen  
Sen. Benson (via telephone)  
Sen. Dibble  
Jim Koppel, DHS  
Rep. Lesch  
Sen. Pappas  
Dan Pollock, MDH  
Rep. Pugh  
Rep. Wills

Members Excused

Rep. Applebaum  
Sen. Limmer  
Sen. Ruud  
Referee Stebbins

Sen. Johnson, Co-Chair, called the meeting of the Legislative Commission on Surrogacy to order at 10:07 AM on Tuesday, October 11, 2016 in Room 2412 of the Minnesota Senate Building.

A quorum was present.

Sen. Dibble moved approval of the minutes from the September 27, 2016 meeting. THE MOTION PREVAILED.

Margaret E. Swain, Director, American Academy of Assisted Reproductive Technology Attorneys, provided testimony on legislation related to gestational carrier agreements.

Meryl Rosenberg, American Academy of Assisted Reproductive Technology Attorneys, provided testimony on the best interest of the child standard and its applicability to gestational surrogacy.

Kathy Tingelstad, former legislator, provided testimony on the past, present and future of surrogacy in

Minnesota and presented an overview of the legislation she authored in 2008, SF 2695, related to gestational carrier arrangements.

Steve Snyder, Steven H. Snyder & Associates, provided testimony on state laws across the country related to surrogacy, the American Bar Association's Model Act Governing Assisted Reproductive Technology, a draft of revisions to the Uniform Parentage Act, and the Gestational Carrier Act.

The following people provided testimony on the information to be provided to a child born of a surrogate about the child's biological and gestational parents:

Trish Ciro, parent that used a surrogate

Laura Dumont, parent that used a surrogate

Cathy Denker, surrogate

There being no further business, the meeting adjourned at 12:31 PM.

Legislative Commission on Surrogacy  
November 15, 2016  
Room 10, State Office Building

Meeting Minutes

Members Present

Sen. Alice Johnson, Co-Chair  
Rep. Peggy Scott, Co-Chair  
Rep. Susan Allen  
Jim Koppel, DHS  
Rep. John Lesch  
Sen. Sandy Pappas  
Dan Pollock, MDH  
Rep. Cindy Pugh  
Referee Stebbins  
Rep. Wills

Members Excused

Rep. Jon Applebaum  
Sen. Michelle Benson  
Sen. Scott Dibble  
Sen. Warren Limmer  
Sen. Carrie Ruud

Rep. Scott, Co-Chair, called the meeting of the Legislative Commission on Surrogacy to order at 1:11 PM on Tuesday, November 15, 2016 in Room 10 of the State Office Building.

A quorum was present.

Rep. Pugh moved approval of the minutes from the October 11, 2016 meeting. **THE MOTION PREVAILED.**

Rep. Scott provided general comments regarding the remaining meetings of the Commission.

Rep. Scott spoke to the issue of members voting via telephone. She noted that legislative staff had indicated that voting via telephone was not permitted under the legislative open meeting law. Discussion ensued. It was determined to look further into this issue prior to the next meeting.

Kathy Pontius, Senate Counsel, presented an overview of Surrogacy Commission Issues and Recommendation Options.

Dr. Lisa Erickson provided testimony related to age requirements of both surrogates and intended parents.

Patricia Benham provided testimony related to international adoption.

Gary Debele, Berg, Debele, Desmidt & Rabuse, P.A., provided testimony related to international adoption, surrogacy contract requirements and residency requirements.

Steve Snyder, Steven H. Snyder & Associates, provided testimony related to residency requirements and the Uniform Parentage Act.

Rep. Scott called a recess at 2:33 PM.

Rep. Scott called the meeting back to order at 2:59 PM.

David Smolin, Harwell G. Davis Professor of Constitutional Law and Director of the Center for Children, Law and Ethics at the Cumberland School of Law, presented on surrogacy, international law and standards, and parentage contracts.

There being no further business, the meeting adjourned at 3:27 PM.

## **Legislative Commission on Surrogacy**

November 22, 2016

Room 1100, Minnesota Senate Building

### **Meeting Minutes**

#### Members Present

Rep. Peggy Scott, Co-Chair

Sen. Michelle Benson

Rep. John Lesch

Sen. Warren Limmer

Dan Pollock, MDH

Rep. Cindy Pugh

Rep. Wills

#### Members Excused

Sen. Alice Johnson, Co-Chair

Rep. Susan Allen

Rep. Jon Applebaum

Sen. Scott Dibble

Jim Koppel, DHS

Sen. Sandy Pappas

Sen. Carrie Ruud

Referee Stebbins

Rep. Scott, Co-Chair, called the meeting of the Legislative Commission on Surrogacy to order at 10:14 AM on Tuesday, November 22, 2016 in Room 1100 of the Minnesota Senate Building.

A quorum was not present.

Deputy Commissioner Dan Pollock, Minnesota Department of Health, provided a handout and discussed the differences related to Birth Certificates vs Birth Records.

Rep. Scott and Rep. Wills discussed their portions of the Recommended Proposals for the Report by the 2016 Joint Commission on Surrogacy. Those members present had no objections to the recommendations made by Representatives Scott and Wills, with noted changes. Recommendations made by Senator Johnson will be discussed at the next meeting.

Dr. Lisa Erickson provided testimony related to previous obstetrical issues covered by a psychological assessment and the number of prior births a surrogate may have had and the risk associated with exceeding 5 deliveries.

Steve Snyder, Steven H. Snyder & Associates, provided testimony related to the Uniform Parentage Act and issues related to the surrogate not following physician recommendations and how that would apply to the surrogacy contract.

The next meeting is to be held on December 8, 2016 at 1:00 PM in Room 200 of the State Office Building.

The meeting adjourned at 12:01 PM.



**Legislative Commission on Surrogacy**  
December 8, 2016  
Room 200, Minnesota Senate Building

**Meeting Minutes**

Members Present

Rep. Peggy Scott, Co-Chair  
Sen. Alice Johnson, Co-Chair  
Sen. Michelle Benson  
Jim Koppel, DHS  
Rep. John Lesch  
Sen. Warren Limmer  
Dan Pollock, MDH  
Rep. Cindy Pugh  
Referee Stebbins  
Rep. Wills

Members Excused

Rep. Susan Allen  
Rep. Jon Applebaum  
Sen. Scott Dibble  
Sen. Sandy Pappas  
Sen. Carrie Ruud

Rep. Scott, Co-Chair, called the meeting of the Legislative Commission on Surrogacy to order at 1:04 PM on Thursday, December 8, 2016 in Room 200 of the State Office Building.

A quorum was present.

Rep. Pugh moved approval of the November 22, 2016 meeting minutes. THE MOTION PREVAILED.

Sen. Benson moved approval of the November 15, 2016 meeting minutes. THE MOTION PREVAILED.

Rep. Lesch moved adoption of the Sen. Pappas/Rep. Lesch proposed report as the majority report. THE MOTION DID NOT PREVAIL.

Rep. Lesch called division. The vote was taken with a show of hands: 4 in favor and 6 opposed. THE MOTION DID NOT PREVAIL.

Rep. Scott moved that all the recommendations included in the Rep. Scott, Rep. Wills, and Sen. Johnson's Recommended Proposals for the Report by the 2016 Joint Commission on Surrogacy be included in the Legislative Commission on Surrogacy majority report. THE MOTION PREVAILED.

Rep. Lesch called division. The vote was taken with a show of hands: 6 in favor and 4 opposed. THE MOTION PREVAILED.

Molly Crawford, State Registrar for the Office of Vital Records, presented on birth records as related to surrogacy.

The meeting adjourned at 2:16 PM.

## **Appendix B**

# **Overview of Surrogacy Laws and Proposed Legislation by Senate Counsel Kathy Pontius**

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

## **Baby M Case**

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

## **Traditional vs. Gestational Surrogacy**

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

## **Legislative Activity in Minnesota**

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

## **2008**

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

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

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

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

## **2010**

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

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

## **2013 - 2014**

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

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

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

## **2015**

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

### **Minnesota Case Law**

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

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

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

## Key Policy and Legal Issues to Consider

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

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

Other policy issues include:

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

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

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

**Appendix C**  
**Recommended Proposals for the Report**  
**Memorandum on Minnesota**

## **Surrogacy Commission Issues and Recommendation Options**

### Alternative Approaches to Validity and Effect of Surrogacy Contracts

- 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.
  
- 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.
  
- 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.
  
- 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.
  
- 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.



## Gestational Surrogate Requirements

- Age requirements (minimum 21 or \_\_\_\_\_?).
- 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.
- Medical and psychological evaluation.
- Independent legal counsel of own choosing (but paid for by intended parents?) or at least one initial consultation with independent legal counsel.
- 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.

## Intended Parents Requirements

- Age requirements (minimum 21 or maximum \_\_\_\_\_?).
- Must have resided in Minnesota for at least one year before contract is executed.
- Psychological evaluation.
- Independent legal counsel
- Must procure or provide gametes that will result in embryo.
- 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.

- At least one of intended parents must be genetic mother or father (unless have completed background study and report?)
- Disqualify individual (who is not genetic parent?) convicted of crime listed in section 518.179.
- 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.

### Surrogacy Agencies

- Establish regulations or requirements governing surrogacy agencies – licensure?
- 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.
- 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.
- 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.

### Surrogacy Contract Requirements

- 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.
- 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?).

### Compensation for Surrogacy Services

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

### Procedural Requirements; Court Review and Validation and Establishment of Parentage

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

## 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.
- Surrogate may be required to undergo medical examinations, treatments, and fetal monitoring procedures that physician recommends for success of pregnancy.
- Surrogate may be required to abstain from activities her physician (or intended parents?) reasonably believes to be harmful to pregnancy (smoking, drinking, etc.).
- Surrogate has right to use services of physician of her choosing.

## 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.
- 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.
- Specify jurisdiction and choice-of-law requirements.

## 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.
- Specify circumstances, if any, under which either birth certificate or other record would indicate that there was a surrogate.
- Right of child to obtain access to information, similar to adoption record process.
- Special considerations regarding access to donor family medical history information.

## Remedies and Enforcement

- Surrogate and intended parents entitled to all remedies available at law or equity (subject to express terms of contract?)
- Include limitations on types or amount of damages.
- 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.
- 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.

## Miscellaneous Issues

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

**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.

## 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?<sup>1</sup>

### 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\*

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<sup>1</sup> 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.]

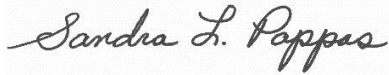
11. The intended parents should not be required to be genetically-related to the embryo/resulting child.
  - a. Infertility is often a combination of factors resulting in the absence of a genetic link of one or both intended parents to the resulting child.
  - b. There are more than 500,000 stored embryos 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:



**Sen. Sandra Pappas**



**Rep. John Lesch**



**Rep. Susan Allen**



**Rep. Jon Applebaum**



**Sen. Scott Dibble**



**Referee Richard Stebbins**  
Fourth Judicial District Court



**Assistant Commissioner James Koppel,**  
Minnesota Department of Human Services



**Deputy Commissioner Dan Pollock,**  
Minnesota Department of Health

## **Appendix D**

### **Minority Report of the Commission**

**(Proposed majority report offered by Rep. Lesch on 12/8/16.)**

## 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?<sup>1</sup>

### 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\*

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<sup>1</sup> 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



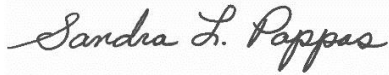
of one's own; "any constitutional interests [the gestational surrogate] possesses in this situation are something less than those of a mother." J.R., et al. v. Utah, supra.]

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:



**Sen. Sandra Pappas**



**Rep. John Lesch**



**Rep. Susan Allen**



**Rep. Jon Applebaum**



**Sen. Scott Dibble**



**Referee Richard Stebbins**  
Fourth Judicial District Court



**Assistant Commissioner James Koppel,**  
Minnesota Department of Human Services



**Deputy Commissioner Dan Pollock,**  
Minnesota Department of Health

**Appendix E**  
**Adoption Law by House Research**

# Research Department

Patrick J. McCormack, Director

600 State Office Building  
St. Paul, Minnesota 55155-1298  
651-296-6753 [FAX 651-296-9887]  
[www.house.mn/hrd/](http://www.house.mn/hrd/)



# Minnesota House of Representatives

August 26, 2016

TO: Representative Scott

FROM: Mary Mullen and Lynn Aves, House Research Department

RE: Minnesota Adoption Laws

You recently requested information about Minnesota's adoption laws related to information being presented to the Legislative Commission on Surrogacy. Below is information on Direct Adoptive Placement which is the process of private adoption, and is one of the common avenues for a parent who had a child via surrogate. A private adoption allows the parents to obtain full legal rights, custody, and an amended birth record after the birth of child via surrogacy. There is also information below about step-parent adoption, another option for establishing parentage when a child is born via surrogacy and the person's spouse is a biological parent to the child. Not mentioned below are paternity actions, which can be brought when a father is the biological parent of a child and born to a woman he is not married to. This action would establish paternity, determine custody, and allow the father to be listed on the birth certificate and is governed by Minnesota Statutes, section 257.541.

## **Direct Adoptive Placements**

Direct adoptive placement laws govern a private adoption which is usually arranged between the biological parents and adoptive parents. These agreements are created by an adoption lawyer and proceed through an adoption proceeding in juvenile court. These adoptions are necessary in surrogacy agreements in Minnesota because there is no law on surrogacy. The adoption allows the adopted parents to assume custody and responsibility for the child and then be listed as the parents on the child's birth certificate.

**Who may adopt.** Any person who has resided in the state for one year or more may file a petition to adopt. The one year requirement may be waived by the court if it is in the best interest of the child. (Minn. Stat. § 259.22, subd. 1) The prospective adoptive parent must file with the court an affidavit of intent to remain in the state for at least three months after the child is placed in the home. (Minn. Stat. § 259.47, subd. 3).

**Adoption study.** An adoption study must be completed and filed with the court prior to placement of the child with the prospective adoptive parent. (Minn. Stat. § 259.47, subd. 3) The adoption study must include:

- a background study;
- a medical and social history and assessment of current health;
- an assessment of potential parenting skills;
- an assessment of ability to provide adequate financial support; and
- an assessment of the level of knowledge and awareness of adoption issues.

An approved adoption study, completed background study and written report must be completed before the child is placed in the prospective adoptive home. An adoption study is valid for one year. (Minn. Stat. § 259.41)

**Background study.** The background study must be completed on any person living in the prospective adoptive parent's home who is over the age of 13 and must include the following:

- a review of information related to names of substantiated perpetrators of maltreatment of vulnerable adults that have been received by the commissioner of human services;
- a review of the commissioner's records related to maltreatment of minors in licensed programs and from findings of maltreatment of minors in county social service information systems;
- information from juvenile courts;
- information from the Bureau of Criminal Apprehension, including whether a background study subject is registered or required to register as a predatory offender;
- information from the child abuse and neglect registry for any state in which the background study subject has resided for the past five years; and
- information from the national crime information databases, when the background study subject is 18 years of age or older.

(Minn. Stat. §§ 259.47, subd. 3; 259.41; 245C.08; and 245C.33)

**Preadoptive custody order.** Before a child is placed in a prospective adoptive home, the placement must be approved by the court in the county where the prospective adoptive parent resides. The order shall state that the prospective adoptive parent's right to custody is subject to the birth parent's right to custody until the consents to the child's adoption become irrevocable. The prospective adoptive parent shall file a notice of intent to file an adoption petition and submit a written motion seeking an order of temporary preadoptive custody. The notice and motion must be served by the prospective adoptive parent on any parent whose consent is required. The motion for the preadoptive custody order may be filed up to 60 days prior to placement.

The motion must include:

- the adoption study;
- affidavits from the birth parents indicating their support of the motion, but if the father does not submit an affidavit, then the mother must submit an affidavit of her good faith efforts to locate the birth father or an affidavit stating the grounds exempting her from making efforts to locate the father;
- an itemized statement of expenses that have been paid and an estimate of expenses that will be paid by the prospective adoptive parent in connection with the prospective adoption;
- the name of counsel for the parties;
- a statement from the birth parents that they have provided the required social and medical history, have received a written statement of their legal rights, and have been notified of their right to receive counseling; and
- the name of the agency to supervise the adoptive placement and complete the postplacement assessment.

(Minn. Stat. § 259.47, subd. 3)

**Postplacement assessment; supervision.** When a petition for adoption is filed, the agency supervising the placement shall conduct a postplacement assessment and file a report with the court within 90 days of receipt of the adoption petition. The assessment and report must evaluate the home of the petitioners, whether placement with the petitioners meets the needs of the child, the environment of the home, and the antecedents of the child to be adopted. The report must address, at a minimum:

- the level of adaptation by the prospective adoptive parents to parenting the child;
- the health and well-being of the child in the home;
- the level of incorporation by the child into the prospective adoptive parents' home, extended family, and community; and
- the level of inclusion of the child's previous history, such as cultural or ethnic practices, or contact with former foster parents or biological relatives.

If the report recommends that the court not grant the petition to adopt, the agency completing the report must provide a copy to the local social service agency in which the prospective adoptive parent resides. The agency or local social service agency may recommend that the court dismiss the petition to adopt. If the local social service agency determines that continued placement endangers the child, the agency shall seek a court order to remove the child from the home.

(Minn. Stat. § 259.53, subds. 1 and 2)

**Finalization of adoption.** No petition for adoption shall be granted until the child has lived three months in the proposed home. (Minn. Stat. § 259.53, subd. 4) There is a ten day revocation period after consent for adoption has been given. (Minn. Stat. § 259.24, subd. 6a)

**Adoption Payments.** There are limits to payments from the adoptive parents to the biological parents. The limits are for certain expenses such as the cost of living and medical care and prohibit gifts from the adoptive parents to the biological parents. (Minn. Stat. § 259.55)

## **Step-Parent Adoption**

This adoption process terminates the rights of one parent to allow the other parent's spouse to become the legal adoptive parent of the child. The parent whose rights are terminated by the adoption must provide their consent for the adoption. Some of the requirements of a private adoption are waived, or can be waived by motion and order of the court. The rights between the biological spouse who is already the parent of the child are not altered by the proceeding.

- The residence requirement (three months in the home) and the preadoption investigation can be waived by the court in a step-parent adoption. (Minn. Stat. §259.53, subd. 5)
- The adoptive parent still must complete a background check. (Minn. Stat. § 259.41, subd. 1, para. (b))
- The post-placement assessment and report can be waived by motion and approval by the court.
- The parent does not have to get a complete social and medical history of the child (Minn. Stat. § 259.43)

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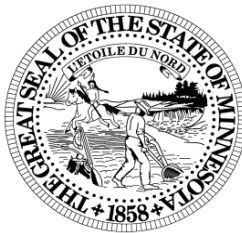
**Appendix F**  
**Memorandum on Surrogacy Law by House**  
**Research**



# Research Department

Patrick J. McCormack, Director

600 State Office Building  
St. Paul, Minnesota 55155-1298  
651-296-6753 [FAX 651-296-9887]  
www.house.mn/hrd/



# Minnesota House of Representatives

September 15, 2016

TO: Representative Peggy Scott  
Co-Chair of the 2016 Legislative Commission on Surrogacy

FROM: Mary Mullen, Legislative Analyst

RE: Surrogacy Law in the United States

## Surrogacy Law Overview

Surrogacy, both gestational and traditional, is a practice governed by the civil and criminal laws in each state. Only some states have passed a law specifically aimed at regulating surrogacy. Some states have parentage laws, adoption laws, custody laws, and other existing laws that affect the rights of the parties to a surrogacy agreement—including laws on egg and sperm donors and child trafficking. But many states have a patchwork of laws that affect the parental rights and ability of parties to contract for a surrogacy. Unlike Canada<sup>1</sup> and many European countries,<sup>2</sup> there is no federal law on surrogacy in the United States.

The charts below attempt to summarize the law in each state related to surrogacy. Unfortunately, this is an area of law that is difficult to describe and research because states have taken different approaches, and in many instances, have not passed a law on surrogacy. In those states, the question of whether or not surrogacy is allowed or how a surrogacy agreement will be enforced by the courts is often in question. Some states have laws that regulate how a sperm or egg donation can occur, but will be silent on whether or not a surrogacy agreement will be upheld, or

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<sup>1</sup> Canada has a federal law regulating egg donation and allowing surrogacy but prohibiting payments for carrying a baby. See Canada's Assisted Human Reproduction Act, S.C. 2004, c. 2 (or the "AHRA").

<sup>2</sup> A number of European countries ban surrogacy, some ban egg donation, and others heavily regulate the practice of egg/sperm donation and surrogacy.

if the agreements may allow for payments to the surrogate. Other states regulate surrogacy, and some states ban surrogacy, or ban surrogacy under certain circumstances.

Because this area of law is not located in any one area of a civil or criminal code, and because much of it comes from court cases that are fact specific, it is difficult to describe the state of the law in many places. This chart is intended to provide a summary of surrogacy law in each state—providing either the state’s public policy, statutes, or case law based on the information that is currently available. Much of the legislation in this area is recent and ongoing, some states have repealed laws or passed new laws in 2016, and many states have ongoing litigation in this area. This area of law is likely to continue to evolve and change as more states move to address surrogacy contracts or state’s change their existing laws and polices related to surrogacy.

The Uniform Parentage Act (2002) is mentioned in the tables below. This uniform law was drafted by the Uniform Laws Commission. The act includes model laws on the establishment of paternity and maternity, adoption, and contains a section on surrogacy. Portions of the Uniform Parentage Act have been adopted by Alabama, Delaware, Illinois, Maine, New Mexico, North Dakota, Oklahoma, Texas, Utah, Washington, and Wyoming.<sup>3</sup>

## **International perspectives**

While the United States does not have a federal policy on surrogacy, a number of other countries have a national policy either banning or regulating surrogacy. Canada has a federal law that prohibits some surrogacy payments, also called “commercial surrogacy.” (See footnote 1 above) The Canadian provinces can also pass legislation banning or regulating surrogacy and some have passed legislation in that area. Australian states have acted individually to regulate surrogacy and altruistic surrogacy is generally allowed.<sup>4</sup> Israel and South Africa both allow surrogacy but regulate it. Israel requires government approval of surrogacy contracts and the practice is heavily regulated. The United Kingdom allows altruistic surrogacy, but surrogacy agreements will not be upheld by the court, instead the court will look at the best interest of the child to determine custody and parentage.<sup>5</sup>

France, Germany, Italy, Spain, and Switzerland all have laws that make surrogacy illegal or make the contracts void.<sup>6</sup> India is in the process of passing a national law making surrogacy illegal for foreigners and only allowing altruistic surrogacy for heterosexual couples with a medical need. There is a high court decision in Pakistan that surrogacy is not permitted. Thailand regulates surrogacy and bans foreigners from coming to the country for surrogacy.

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<sup>3</sup> Uniform Laws Commission, <http://www.uniformlaws.org/Act.aspx?title=Parentage%20Act>

<sup>4</sup> Alex Finkelstein, Sarah Mac Dougall, Angela Kintominas, Anya Olsen, “Surrogacy Law and Policy in the U.S.: A National Conversation Informed by Global Lawmaking” Report of the Columbia Law School Sexuality & Gender Law Clinic (2016)

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

## States That Have a Law on Surrogacy

This chart lists states that have a law on surrogacy—either allowing it, restricting it to certain situations, or regulating it. Many of these statutes are specific to surrogacy or are located in the state’s adoption law. State’s that have a statute that is widely considered to be actively *banning* surrogacy in most situations are listed in the next chart. It can be difficult to categorize whether or not a law is banning surrogacy in some situations or all situations, so this categorization can be subjective. For that reason, these two charts should be read together.

	Summary of Law	Notes	Court Decisions	Statute
<b>Arkansas</b>	State statute allows for surrogacy and appeals court has upheld surrogacy agreements.	Biological father is the father; intended mother in a surrogacy is the mother of the child; court order needed to amend birth record.		Ark. Code R. 9-10-201 to 202 (1989)
<b>California</b>	Courts have upheld gestational and traditional surrogacy agreements. Statute requires both parties to be represented by an attorney; allows pre-birth orders.	CA adopted parts of the Model Act on Assisted Reproductive Technology, previously approved by the American Bar Association.	<i>Johnson v. Calvert</i> , 851 P.2d 776 (1993) and <i>In re Marriage of Buzzanca</i> , 77 A.L.R. 5th 776 (Cal. App. 1998)	Cal. Family Law Code § 7960 – 7962 (2013)
<b>Connecticut</b>	Gestational and traditional surrogacy are allowed, pre-birth court orders can be issued for gestational surrogacy.	Intended parents can both be listed on the birth certificate when there is a gestational surrogacy.	<i>Raftopol v. Ramey</i> , 12 A.3d 783 (Conn. 2011)	Conn. Gen. Stat. §7-48a (2011)
<b>Delaware</b>	Law allows for gestational surrogacy, makes intended parents legal parents, allows pre-birth orders but the order is stayed until the child’s birth.	Provides age, health, mental health, and other requirements for gestational carrier, including legal counsel; requires mental health and legal counsel for intended parents; provides requirements for written agreement.		Del. Code Ann. tit. 8, § 8-801 to 813 (2013)

	Summary of Law	Notes	Court Decisions	Statute
<b>Florida</b>	Law allows for surrogacy agreements, gestational surrogacy requires a showing that the intended mother be unable to maintain a pregnancy or deliver a child.	Traditional surrogacy is under the adoption statute; must be approved by the court; the biological mother has 48 hours after the birth to change her mind; both traditional and gestational surrogacy related as to who can be a surrogate, requires evaluations and limits the types of payments allowed.		Fla. Stat. §§ 63.212 to 63.213; 742.15 to 742.16 (2007)
<b>Illinois</b>	Statute governs the process of surrogacy allowing gestational surrogacy but prohibiting the birth mother from being related to the child (prohibiting traditional surrogacy); requires one of the intended parents to be related to the child; parent-child relationship can be established before birth.	Medical and psychological screenings for all parties (surrogate and intended parents) before a contract is signed and stipulates that surrogates be at least 21, have given birth at least once before and be represented by an independent lawyer, paid for by the intended parents. The law allows only gestational surrogacy, one intended parent's gamete must be used.		750 Ill. Comp. Stat. 45/6 (2009) 750 Ill. Comp. Stat. 47/10 to 47/70 (2009) 410 Ill. Comp. Stat. 525/12 (2009)
<b>Maine</b>	Law allows for gestational surrogacy arrangements; allows for pre-birth orders; allows birth certificate to reflect intended parents; traditional surrogacy allowed between family members or can be done with a post-birth adoption.	Provides requirements to be a surrogate including age, mental and physical evaluation; having one child already; legal representation; requires evaluation and legal representation for intended parents.		Me. Stat. tit. 19A, §§1931 to 1938 (2016)

	<b>Summary of Law</b>	<b>Notes</b>	<b>Court Decisions</b>	<b>Statute</b>
<b>Nevada</b>	Surrogacy law allows gestational surrogacy for married, heterosexual couples; requires both intended parents to supply genetic material.	Only allows payments for the living and medical expenses related to the birth.		Nev. Rev. Stat. Ann. §126.045 (West 2007) (repealed 2013)
<b>New Hampshire</b>	Law allows traditional or gestational surrogacy so long as one parent has provided a gamete but require the egg come from the intended mother or the birth mother (prohibits using a donated egg).	Requires the intended parents to be married; allows the surrogate 72 hours after the birth to decide to keep the child; requires home studies; age restrictions; residency requirements; payment can only be for costs associated with pregnancy; prohibits fees to arrange surrogacy.		N.H. Rev. Stat. Ann. §§ 168-B:1 to B:32 (LexisNexis 2010)
<b>North Dakota</b>	Law allows gestational surrogacy, prohibits traditional surrogacy.	If traditional surrogacy, the birth mother has rights to the child and her husband may be declared the father; if gestational surrogacy then intended parents (with or without biological ties to the child) are parents.		N.D. Cent. Code §§14-18-01; 05; 08 (West 2016)  N.D. Cent. Code §14-19-01; §14-20-01 (West 2016)
<b>Tennessee</b>	Law defines surrogacy; courts uphold surrogacy agreements both traditional and gestational, but require a mother to adopt otherwise gestational mother remains the mother, also requires second parent or step-parent adoption in some cases.		In re Baby, 447 S.W.3d 807 (Tenn. 2014), Tennessee Supreme Court (2014); in traditional surrogacy still have to follow normal termination of parental rights provisions after the birth of the baby;	Tenn. Code Ann. §36-1-102(50) (West 2016) (defines surrogate births but does not regulate surrogacy)

	Summary of Law	Notes	Court Decisions	Statute
			<p><i>In re C.K.G., C.A.G., &amp; C.L.G.</i></p> <p>173 S.W.3d 714 (Tenn. 2005); non-bio mother needs to adopt after birth but upholding surrogacy arrangement.</p>	
<b>Texas</b>	Law allows surrogacy (modeled after Uniform Parentage Act of 2002); gestational surrogacy only; agreement must be validated by the court to be enforceable.	Only gestational surrogacy allowed; intended mother must be unable to carry a child; restrictions on who can be a surrogate; intended parents must be married and do a home study; residence requirements.	The law is considered too difficult to use and surrogate families have sued to have the law repealed or amended.	Tex. Fam. Code §§160.751 to .763 (2007)
<b>Utah</b>	Law allows gestational surrogacy (modeled after Uniform Parentage Act of 2002); requires one of the intended parents to provide a gamete; agreement must be validated by a court to be enforceable.	Only gestational surrogacy allowed; intended mother must be unable to carry a child; restrictions on who can be a surrogate; intended parents must be married and do a home study; residency requirements; surrogate must not be on Medicaid or other state assistance; reasonable payment allowed.		Utah Code Ann. §§78-15-801 to -809 (West 2016)  Utah Code Ann. § 76-7-204 (1995) (repealed) (held unconstitutional by <i>J.R. v. Utah</i> , 261 F.Supp.2d 1268 (D. Utah 2002))
<b>Virginia</b>	Surrogacy allowed by statute; allows intended parents to be legal parents if contract approved by the court (pre-birth petition); in certain	Court approval of surrogacy agreement includes: a home study; surrogate must be married; medical evaluation and counseling; intended	Difficult to execute so many parents file for an amended birth certificate after the birth.	Va. Code Ann. §§ 20-156 to 165 (West 2016)

	Summary of Law	Notes	Court Decisions	Statute
	cases an adoption is necessary (if contract voided or never approved by a court).	mother unable to have a child; one parent genetically related; intended parents must keep child regardless of disability or appearance; requires a GAL for the child; no compensation beyond reasonable medical.		and Va. Code Ann. §32.1-257; §64.2-102; §64.2-204 (West 2016)
<b>Washington</b>	Law allows gestational surrogacy but must be uncompensated, violations result in criminal penalties.	Intended parents can establish parentage through a surrogacy contract that is not void; compensation beyond actual medical costs and legal fees are void; as are contracts with minors and the disabled.		Wash. Rev. Code §§26.26.010 to .060 (West 2016)

### States With Statutes That Ban Surrogacy

These states and the District of Columbia expressly prohibit at least one type of surrogacy, if not both traditional and gestational surrogacy, in statute. A few of them have criminal penalties for creating a surrogacy agreement, being a broker to a surrogacy agreement, or allowing payment for surrogacy when it is prohibited by law. Despite the fact that there is a statute banning surrogacy in some circumstances, the use of a surrogate in these states may still occur or be approved by a court in some instances.

	Summary of Law	Notes	Court Decisions	Statute
<b>Arizona</b>	State statute prohibits surrogacy agreement for traditional or gestational surrogacy, paid or	Some pre-birth parentage orders are granted if both parents are biologically related to the child, in all other cases an adoption or step-parent adoption is	<i>Soos v. Superior Court in and for County of Maricopa</i> , 897 P.2d	Ariz. Rev. Stat. § 25-218 (2007) (held unconstitutional by <i>Soos</i> ) (new version

	Summary of Law	Notes	Court Decisions	Statute
	unpaid, agreements still made but unenforceable.	needed after the birth of the child; surrogate can get custody rights in a dispute.	1356 (Ariz. Ct. App. 1994)	proposed in 2016 AZ S.B. 1087 (NS))
<b>District of Columbia</b>	Statute prohibits surrogacy agreements, imposes fines and potential criminal consequences.	Up to a \$10,000 fine and up to one year in prison.		D.C. Code §16-401 to 402 (2007)
<b>Indiana</b>	Surrogacy contracts are void and unenforceable.	Despite the prohibition some courts still grant pre-birth orders (to determine maternity or paternity) for gestational surrogacy, but difficult if one parent not genetically related to the child.		Ind. Code. § 31-20-1-1 (2007)
<b>Kentucky</b>	Traditional surrogacy arrangements are void; does not allow compensation for adoption or surrogacy.	Does not specifically prohibit gestational surrogacy.	<i>Surrogate Parenting Associates, Inc. v. Com. ex rel. Armstrong</i> , 704 S.W.2d 209 (Ky. 1986)	Ky. Rev. Stat. Ann. § 199.590 (2013)
<b>Michigan</b>	Allows unpaid surrogacy; but surrogacy contracts are unenforceable and no one can be paid to be a surrogate; law provides for criminal penalties.	Punishable by a misdemeanor \$10,000/up to one year in jail; inducing or arranging an agreement is a felony; birth mother may get custody rights.	<i>Doe v. Attorney General</i> , 487 N.W.2d 484 (Mich. App. 1992)	Mich. Comp. Laws §§ 722.851 to 722.863 (2007)
<b>Nebraska</b>	Surrogacy contacts are void; compensation is not allowed; but biological fathers are parents.	Father can obtain rights through parentage action, mother can do step-parent adoption.		Neb. Rev. Stat. § 25-21,200 (2007)



	Summary of Law	Notes	Court Decisions	Statute
<b>New York</b>	Surrogacy contracts are void and unenforceable, provides criminal penalties.	Civil penalty up to \$500; misdemeanor to arrange the contracts up to \$10,000 or more; birth mother can fight for custody.		N.Y. Dom. Rel. Law §§ 121 to 124 (McKinney 2010)

### States With No Statute

This chart lists states that do not have a surrogacy statute and includes both states that have a favorable decisions in the courts upholding surrogacy agreements and unfavorable decisions, or where the court has required surrogate parents to proceed with adoptions of children in surrogacy cases. Many of these states (even where the contract is upheld) still require an adoption and a subsequent court action to amend a birth record. Some of these states only have one or two court decisions. These states may have a statute that determines: how parentage is established, the rights of an egg or sperm donor, and regulations on payment for adoption or the relinquishment of a child that could impact surrogacy contracts.

	Summary of Law	Notes	Court Decisions	Statute
<b>Alabama</b>	At this point, the law remains unclear. Based on commentary to the Ala. Code, as well as the <i>Brasfield</i> decision, the law appears to favor surrogacy.	Has adopted a version of the Uniform Parentage Act, but has not passed the gestational or surrogacy provisions.	Ct of Appeals upheld agreement granting non-bio mother rights. <i>See Brasfield v. Brasfield</i> , 679 So. 2d 1091 (Ala. Civ. App. 1996).	Ala. Code § 26-10A-33, 34(c) (2009), law regulating who can place children for adoption specifically exempts that surrogacy.
<b>Alaska</b>	Gestational surrogates can use post-birth adoption, some pre-birth parentage recognition has also been allowed.		Ct upheld agreement, considers surrogacy similar to adoption.	No statute, limited case law.

	Summary of Law	Notes	Court Decisions	Statute
<b>Colorado</b>	No laws prohibit or regulate gestational or traditional surrogacy. Manifestation of parental rights would likely require adoption.	Can get a post-birth decree for parentage and to amend a birth record.  Has adopted a form of the Uniform Parentage Act.	Courts have upheld surrogacy agreements.  <i>In re S.N.V.</i> , 284 P.3d 147 (Colo. App. 2011) (holding that biological father’s wife had standing to pursue action to establish her legal maternity, even though she was not the biological mother of child).	Colo. Rev. Stat. Ann. § 19-4-122 (West 2016) (any interested party can bring an action to establish mother/child relationship).  Colo. Rev. Stat. Ann. § 19-4-106 (West 2016) (assisted reproduction statute; woman is treated as the natural mother if she accepts an egg from another woman to conceive a child for herself).  Colo. Rev. Stat. Ann. § 19-4-104 (West 2016) (parent and child relationship created automatically between child and natural mother through proof of birth).
<b>Georgia</b>	Case law is limited.			Ga. Code. Ann. § 19-7-21 (West 2016) (artificially inseminated children are presumed legitimate if both spouses agree in writing).
<b>Hawaii</b>	Unclear how Hawaii would deal with surrogacy contracts. Manifestation of parental rights would likely require adoption.	Has adopted parts of the Uniform Parentage Act.	Courts have upheld agreements.	Haw. Rev. Stat. Ann. § 584-3 (West 2016) (parent-child relationship is established through proof of birth, or through proof of adoption).

	Summary of Law	Notes	Court Decisions	Statute
<b>Idaho</b>	Surrogacy is not prohibited by statute or case law.	Adoption is needed to create parentage.	Courts have upheld agreements.	No Statute Idaho Code. §32-1001, <i>et seq.</i> (West 2016) (title dealing with parent-child relationships. Does not address surrogacy).
<b>Iowa</b>	Surrogacy is not prohibited by statute or case law.	Requires a post-birth case to terminate biological parents rights and create rights for the intended parents via adoption.	Courts have upheld agreements.	Criminal statute on sale of humans specifically exempts surrogacy arrangements. Iowa Code Ann. §710.11 (West 2016). Law allows parents from surrogacy to be added to the birth certificate. Iowa Admin. Code § 641-99.15(144) (West 2016)
<b>Kansas</b>	No law for or against surrogacy; can do post-birth adoption or step-parent adoption; laws against payment.	Attorney general opinion that contracts should be voidable.	<i>Frazier v. Gouschaal</i> , 296 Kan. 730 (2013) (co-parenting agreement between mother and same sex partner was enforceable, so far as it is in the child's best interest).  In re. K.M.H., 285 Kan. 53 (2007) (holding a statute requiring that absent a written agreement to the contrary, a sperm donor does not have paternal rights, constitutional).	Kan. Stat. Ann. § 23-2301 (West 2016) allows artificial insemination for husband and wife.  Kan. Stat. Ann. § 23-2208 (West 2016) (presumption of paternity statute; held to be constitutional in K.M.H).  Kan. Stat. Ann. § 23-2207 (West 2016) (parent child relationship may be proven by adoption or proof of natural birth).

	Summary of Law	Notes	Court Decisions	Statute
<b>Louisiana</b>	No law on surrogacy, previous statute repealed in 2016.	Need post-birth adoption; vital records cannot be changed without court order, pre-birth orders are not granted; adoptions cannot be finalized for six months; surrogate may be listed as mother on birth certificate.		La. Rev. Stat. Ann. § 9:2713 (2005) ( <b>repealed 2016</b> ). Contract for surrogate motherhood; nullity.
<b>Maryland</b>	No law allowing or banning surrogacy, but case law has allowed a single father to remove the gestational surrogate from the birth certificate. Maryland adoption law likely prohibits commercial surrogacy.	Does not apply Uniform Parentage Act; no donor egg or sperm statutes.	<i>In re Roberto D.B.</i> , 399 Md.267 (2007) Payment of money for children in the form of surrogacy contracts are illegal; whether or not surrogacy is allowed is a policy for the legislature to decide; gestational carriers do not need to be listed as the mother on birth certificates even when no other mother is available.	Md. Code Ann., Family Law, § 5-3B-32 (West 2016) Prohibiting payment for adoption. Applied in <i>In re Roberto</i> to a surrogacy contract.
<b>Massachusetts</b>	Case law allows surrogacy but created criteria for valid agreement, including: ability of gestational mother to object after birth; age, other qualifications; and the court prohibited payment	Courts have allowed intended parents to be put onto the birth record if gestational carrier and hospital do not oppose.	<i>R.R v. M.H.</i> , 689 N.E.2d 790 (Mass. 1998); and <i>Culliton v. Beth Israel Deaconess Med. Ctr.</i> , 756 N.E.2d 1133 (Mass. 2001).  <i>A.H. v. M.P.</i> , 857 N.E.2d 1061 (Mass. 2006) (private agreement alone does not	

	<b>Summary of Law</b>	<b>Notes</b>	<b>Court Decisions</b>	<b>Statute</b>
	above pregnancy related expenses.		suffice to create parental rights).	
<b>Minnesota</b>	No statute or case law banning surrogacy or payment; requires step-parent, second parent, and private adoption; birth record changes through adoption.		<i>ALS v. EAG</i> (Minnesota Court of Appeals, unpublished decision, 2010) traditional surrogacy case where mother given custody rights.	Minn. Stat. § 257.56, husband of woman who uses donated sperm is the father, donor cannot be the father; Minn. Stat. § 257.62, donor of egg or sperm cannot be adjudicated the parent.
<b>Mississippi</b>	No law for or against gestational or traditional surrogacy; little case law in this area; surrogacy would require a post-birth adoption.	Does not apply Uniform Parentage Act.		
<b>Missouri</b>	Little in the way of relevant case law on the subject.	Does not apply Uniform Parentage Act.		
<b>Montana</b>	Unclear how Montana would view surrogate contracts. Manifesting of parental rights would likely require adoption.	Has adopted a version of the Uniform Parentage Act. Does not provide specific guidance on surrogates.		Mont. Code Ann. § 40-6-104 (West 2016) (parent-child relationship created by birth, or through adoption).  Mont. Code Ann. § 40-6-106 (West 2016) (sperm donor does not automatically have paternal rights of the child).

	Summary of Law	Notes	Court Decisions	Statute
<b>New Jersey</b>	No law against surrogacy, but agreements do not have to be upheld by the court.	<i>In re Baby M</i> , 537 A.2d 1227, 109 N.J. 396 (N.J. 1988), case has been upheld for both traditional and gestational surrogacy agreements. See <i>A.G.R. v. D.R.H &amp; S.H</i> , No. FD-09-001838-07 (N.J. Sup. Ct. Ch. Div., Dec. 13, 2011) (available <a href="#">here</a> ).	No statute—Governor has vetoed two laws passed by legislature to allow gestational surrogacy agreements.	No statute, but the adoption statute allows a post-birth adoption for children born via surrogacy.
<b>New Mexico</b>	New Mexico statute does not authorize or prohibit surrogacy, but based on the <i>Mintz</i> decision, the law appears to favor the preservation of the rights of natural parents.	Traditional surrogacy would require a standard post-birth adoption proceeding; gestational surrogacy may require adoption to put second part on the birth certificate. Strict law on payment to another for adoption, may affect compensated surrogacies.	<i>Mintz v. Zoernig</i> , 145 N.M. 362 (N.M. App. Ct. 2008) (holding that sperm donor in artificial insemination has parental rights in children, and must pay child support to the mother, because the sperm donor purported to be the children’s father, and had regular visitation).	N. M. Stat. Ann. § 40-11A-801 (West 2016) (New Mexico does not authorize or prohibit surrogacy contracts).  N.M. Stat. § 40-11A-702 (2013) Egg and sperm donors are not parents of child conceived through assisted reproduction.
<b>North Carolina</b>	No law addressing surrogates. Courts are free to rule based on policy. See <i>Miller</i> , 65 Alab. L. R. 1375.	Law does not speak to surrogates, however laws exist to prevent the payment for adoption.		N.C. Gen. Stat. Ann. §§ 48-10-102 and 103 (West 2013).
<b>Ohio</b>	Gestational surrogacy likely to be upheld.		<i>J.F. v. D.B.</i> , 879 N.E.2d 740 (Ohio 2007); court found nothing prohibiting gestational surrogacy and	

	Summary of Law	Notes	Court Decisions	Statute
			upheld contract between parties; indicated that the rights of parents in a traditional surrogacy arrangement would likely be different.	
<b>Oklahoma</b>	Court could uphold agreements where only medical expenses are paid by intended parents; gestational surrogacy allowed but usually need an adoption; same-sex (second parent) adoption not allowed.			Trafficking laws prohibit payment in custody or adoption cases. Okla. Stat. Ann. § 21-866 (West 2016).  Law protects sperm, egg, and embryo donors from obligations. Okla. Stat. Ann. §§ 10-552; 10-555; 10-556 (West 2016).
<b>Oregon</b>	No law specifically allowing or prohibiting surrogacy.	The courts will uphold surrogacy agreements, allow for compensation, allow paternity to be amended, allow the birth certificate to be changed.		46 Or. Op. Atty. Gen. 221 (Or.A.G.), 1989 WL 439814 (concluding that there is no specific statute addressing surrogacy in the state, but that the state will not enforce the exchange of money for the right of adoption).
<b>Pennsylvania</b>	No state statute but the Superior court has upheld a gestational surrogacy agreement; may require post-birth adoption or step-parent adoption; traditional		<i>J.F. v. D.B.</i> , 897 A.2d1261 (Sup. Ct. Penn. 2006), Court upheld gestational carrier agreement.	

	Summary of Law	Notes	Court Decisions	Statute
	surrogacy requires adoption after surrogate surrenders parental rights post-birth, and traditional surrogacy can only be altruistic.			
<b>Rhode Island</b>	Allows both forms of surrogacy contracts. While a specific statute does not exist clarifying this, the determination of a parent-child relationship is within the jurisdiction of the state's family court, which generally favors the agreements. <i>See, Rubano.</i>	Rhode Island appears to allow all kinds of surrogacy contracts. <i>See e.g. Rubano v. DiCenzo, 759 A.2d 959 (R.I. 2000).</i>  R.I has adopted a form of the Uniform Parentage Act.	<i>Rubano v. DiCenzo, 759 A.2d 959 (R.I. 2000).</i>	23 R.I. Gen. Laws § 23-3-10. (Birth registration)
<b>South Carolina</b>	No law permitting or banning surrogacy but adoption law prohibits payments; gestational surrogacy agreements have been upheld by the court, but may require post-birth adoption.	The state legislature has not yet acted on a law clarifying the state's stance on surrogacy contracts; no law on donor egg and sperm.	<i>Mid-South Ins. Co. v. Doe, 274 F.Supp.2d 757 (Dist. S.C. 2003)</i> determined who the natural parent was for purposes of the medical insurance, upheld terms of gestational carrier agreement.	S.C. Code § 63-9-310(F)(1); no payment for relinquishment of a child; medical costs allowed.
<b>South Dakota</b>	No law prohibiting or regulating gestational or traditional surrogacy.	There is little in the way of case law or legislative action to indicate the state's current legal view on surrogacy contracts.	<i>Estes v. Albers, 504 N.W.2d 607 (S.D. 1993)</i> (holding that, in general, anonymous semen donors are excluded from the rights and	



	Summary of Law	Notes	Court Decisions	Statute
			responsibilities of parenthood).	
<b>Vermont</b>	No law prohibiting or regulating gestational or traditional surrogacy, parents will need a post-birth adoption. Despite the state regulation on payment associated with adoption, the language may or may not impact surrogacy contracts.			Vt. Stat. Ann. tit. 15A, § 7-103 (West 2016) (describing allowable payment with regard to adoption).  Vt. Stat. Ann. tit. 15A, § 7-105 (West 2016) (describing prohibited payments in adoption proceedings).
<b>West Virginia</b>	No law prohibiting or allowing surrogacy.	Bio parents can be listed on the birth certificate, non-bio parents need to do an adoption or step-parent adoption.	<i>Kessel v. Leavitt</i> , 511 S.E. 2d 720, 778 (Circuit Court did not lack personal jurisdiction to enjoin biological mother from placing child up for adoption).	Law against Human Trafficking exempts surrogacy fees and costs. W. Va. Code Ann. § 61-2-14h (West 2016)
<b>Wisconsin</b>	Supreme Court held that surrogacy agreements are not counter to public policy and can be upheld so long as determination in custody and parenting time decisions are not counter to the best interest of the child.		<i>Rosecky v. Schissel (In re Paternity of F.T.R.)</i> , 833 N.W.2d 634 (Wis. 2013).	No statute, but egg and sperm donors are not parents of the child.

	<b>Summary of Law</b>	<b>Notes</b>	<b>Court Decisions</b>	<b>Statute</b>
<b>Wyoming</b>	Law provides that donors are not parents; law specifically does not prohibit surrogacy.	Not very many cases, hard to tell if a pre-birth order would be approved, or if adoption would still be necessary.		Wyo. Stat. Ann. §§ 14-2-403(d); 14-2-902 to 905 (West 2016)

MM/jf