

A Medical Practitioner's Guide to the Child Parent Security Act

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(Legally Speaking author, Susan Crockin, testified twice in support of the legislation).

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A Medical Practitioner's Guide to the Child Parent Security Act

The New York Child Parent Security Act (CPSA), which recently passed the New York Legislature and was signed into law on April 3, 2020, will go into effect on Feb 15, 2021. The CPSA is comprehensive, addressing the parentage of all children born through third-party reproduction, with the exception of traditional or genetic surrogacy (where the surrogate uses her own egg). It specifically overturns New York's long-standing ban on compensated gestational surrogacy. References in this article to "surrogate" refer exclusively to gestational surrogates.

It took the New York Legislature almost a decade to devise a construct that would meet the advances in medical science and enable New York physicians to employ their skills to help form families with the aid of willing surrogates. This article will assist medical practitioners to navigate the rules adopted by the Legislature to ensure protection of all concerned.

BACKGROUND

Passage of the CPSA was the result of a monumental long-term effort undertaken by a core group of New York attorneys, New York reproductive endocrinologists, and the Protecting Modern Families Coalition. The Act is notable for the detailed protections afforded surrogates,

the requirement that surrogacy programs (the term chosen to most accurately reflect businesses that locate and match surrogates and intended parents) doing business in New York be licensed, and the mandatory regulatory reporting requirements imposed on surrogacy programs and “assisted reproduction service providers.” Many of the detailed provisions were included to address the strong opposition to surrogacy and egg donation voiced by some influential members of the “progressive wing” of the New York Assembly. Those opposed to legalizing surrogacy argued that these arrangements have the potential to exploit economically vulnerable women, commodify the act of childbirth, and take advantage of surrogates and egg donors who they believe are not being adequately informed of the short and long-term medical and psychological risks associated with these procedures. The Legislature addressed these (and other) concerns by adopting protections for surrogates, some of which must be administered by medical professionals.

No doubt, some surrogacy programs and physicians will view the CPSA’s statutory requirements as overly restrictive and burdensome. Those of us who have been working to update New York’s parentage laws for almost a decade believe that, while there are still a few kinks in the legislation to work out, the CPSA incorporates best ethical practices and will likely serve as a model for parentage legislation across the country.

Assisted Reproduction

The CPSA provisions relating to assisted reproduction, which primarily apply to children born through gamete or embryo donation, establish substantive rules for determining when someone is an intended parent and the procedural requirements for obtaining a judgment of parentage. Those provisions provide that, where the intentions of the parties are clearly documented, the intended parents and/or the donor can obtain a court order recognizing their respective legal relationship to the child. In the absence of clear documentation, the legal procedure will be more complex and the ultimate outcome uncertain.

Medical practitioners should be aware of the basic tenets relating to children conceived through assisted reproduction which include:

- A single woman, inseminated with donor sperm, can obtain an order declaring her the only legal parent of the child.
- Intended parents do not have to be married to one another to obtain a judgment of parentage.
- Married couples engaging in assisted reproduction are both presumed to be the legal parents of the child, unless they are living separate and apart: pursuant to a decree or judgment of separation, a written agreement of separation, or for at least three years prior to the assisted reproduction.
- Where an unmarried couple engages in assisted reproduction, the consent to the assisted reproduction should be in a record indicating the mutual agreement of the intended parents to conceive and parent a child together.
- There is no requirement that the insemination take place by or under the supervision of a healthcare provider.

SURROGACY AGREEMENTS

The procedural requirements for surrogacy arrangements address the documentation required to establish that the surrogate and intended parents were eligible to participate in the surrogacy arrangement and that the surrogacy agreement complies with strict statutory requirements. The petition can be filed with the court any time after the surrogacy agreement has been executed. Where the attorneys certify that there was strict compliance with statutory requirements, the judgment of parentage should be issued by the court.

Eligibility of Gestational Carriers

- At least 21 years of age
- A United States citizen or a lawful permanent resident
- A NY State resident for at least six months where at least one intended parent is not a resident
- Has not provided the egg used in conception
- Has completed a medical evaluation with a healthcare practitioner
- Has given fully informed consent
- Has been represented by independent legal counsel in negotiating the contract, its execution and throughout the duration of the contract (presumably through delivery)
- Has a comprehensive health insurance policy (as detailed in the statute) that takes effect prior to taking any medication or “commencing any treatment to further the embryo transfer.” The insurance policy must have a term that extends throughout the duration of the pregnancy and for 12 months after the birth of the child, a stillbirth, a miscarriage, or termination of the pregnancy.
- Has a life insurance policy (the details of which are set forth in the statute) that takes effect prior to taking any medication or the commencement of medical procedures to further the embryo transfer

Eligibility of Intended Parents

- At least one intended parent is a United States citizen or a lawful permanent resident.
- At least one intended parent has been a New York State resident for least six months.
- Has been represented by independent legal counsel in negotiating the contract and throughout the duration of the contract
- Can be either single, married or intimate partners
- Adult spouses must jointly enter into a surrogacy agreement unless they are living separate and apart pursuant to: a decree or judgment of separation or pursuant to a written agreement of separation; or they document that they have been living separate and apart for at least three years prior to execution of the surrogacy agreement.

Requirements of Surrogacy Arrangement

- The surrogacy agreement must be signed by all participants before the surrogate takes any medication or commences any medical procedures in the furtherance of embryo transfer.
- The surrogate has the right to make all health and welfare decisions regarding herself and her pregnancy.
- The surrogate has the right to utilize the services of a healthcare practitioner of her own choosing.
- The surrogate has the right to terminate, reduce or continue the pregnancy.
- The surrogate has the right to request and receive counseling to be paid for by the intended parents. The intended parents and the surrogate have the right to terminate the agreement any time before the surrogate achieves a pregnancy.

ADDITIONAL PROVISIONS IMPACTING MEDICAL PROFESSIONALS

Changes in the General Business Law and Public Health Law

Article 44 of the New York General Business Law

Article 44 provides that all Surrogacy Programs (broadly defined to include an “agency, agent, business, or individual engaged in, arranging, or facilitating transactions contemplated by a surrogacy agreement”) operating in New York must be licensed by the State. Fertility clinics and gamete banks doing business in New York (referred to as “assisted reproduction service providers”) will also be subject to the regulations to be promulgated by the Department of Health. Finally, Article 44 prohibits any attorney representing a party, or IVF clinic providing services to a party, from owning, managing or making payments to the Surrogacy Program that matched the parties.

Article 25-B of the Public Health Law

The Public Health Law was amended by adding Article 25-B to address the issue of whether Surrogates and Donors are providing fully informed consent and to gather data regarding the long-term impact of surrogacy and assisted reproduction.

The Commissioner of the Department of Health is charged with promulgating regulations mandating:

- The development and distribution of informational material in printed form and on the Department’s website relating to gestational surrogacy;
- The establishment of a voluntary central tracking registry to gather information on:
 - the number of times a person has acted as a surrogate;
 - health information of the person acting as surrogate; and
 - other information deemed appropriate by the Commissioner; and

- The development of guidelines, procedures or protocols, in consultation with the American College of Obstetricians and Gynecologists and the American Society for Reproductive Medicine

The Commissioner of the Department of Health in consultation with the transplant council is charged with promulgating regulations which will mandate:

- The development of guidelines and procedures for obtaining fully informed consent from potential donors;
- The development and distribution of informational material relating to the donation of ova;
- The establishment of a voluntary central tracking registry of ova donor information to gather information on:
 - number of ova and the number of times ova have been donated from a single donor;
 - health information of the donor at the time of the donation; and
 - other information deemed appropriate by the Commissioner, to assist physicians in screening potential surrogates

These regulations will obviously be important, and there will be a notice and comment period announced when they are proposed.

Additional Statutory Provisions Impacting IVF Clinics

Embryo Disposition Agreements:

Of note for New York medical professionals, included within the CPSA are specific provisions addressing the enforceability of embryo disposition agreements between intended parents. These provisions provide spouses/partners with the opportunity to enter into an agreement transferring legal rights and dispositional control of the embryo(s) to one of them. The agreement is effective only if it is in writing and each person was represented by separate legal counsel. If the couple is married, transfer of legal rights and dispositional control occurs only after they divorce. The person who transfers dispositional control of the embryo is not a parent of any child born thereafter UNLESS, before the embryo is implanted, they state in writing that they want to be a parent.

While clinic embryo disposition forms may provide the basis for determining the ownership of embryos, those forms will not discharge the relinquishing party from parental responsibility for any child(ren) born from those embryos. Consequently, New York physicians should consider revising their documentation to reflect this distinction. Physicians may also want to advise their patients of the opportunity to enter into an enforceable agreement releasing the relinquishing party from parental responsibility and of the need to retain independent legal counsel for that purpose.

Posthumous Conception Arrangements:

Medical practitioners should alert their patients as to the important issue of posthumous conception. The CPSA is consistent with existing New York law in requiring that those patients wishing to be legally recognized as the parent of any posthumously conceived child(ren) must execute a document, in conformity with the NY Trust and Estates Law, expressing that intention. Again, clinics should review existing clinic documents to determine whether changes to those forms are necessary or advisable.

Voluntary Acknowledgement of Paternity/Parentage (“VAP”)

New York’s VAP provisions have been updated to allow non-genetic intended parents of child(ren) conceived through donor insemination (married or single) to sign at the hospital a Voluntary Acknowledgement of Parentage form securing their legal relationship to their child. This is a simple, no-cost option which will go far to protect the rights of the non-gestating parent.

Traditional (Genetic) Surrogacy

The CPSA only applies to gestational surrogacy. Traditional, genetic compensated surrogacy agreements continue to be prohibited, severely sanctioned (indeed, criminal) and unenforceable.

CONCLUSION

The CPSA is an important step forward for New Yorkers. Regulations intended to protect all concerned are notionally beneficial. The law is new. It is amenable to fine tuning, particularly before underlying regulations are adopted. Medical and legal professionals will need to work together to ensure that the implementing regulations are workable and serve to create a framework which allows all concerned to take advantage of medical advances taking place in the area of family formation.

Signed into law 4/3/2020, as part of Governor’s 2021 budget <https://www.governor.ny.gov/news/governor-cuomo-announces-highlights-fy-2021-budget>

A column highlighting recent court decisions affecting the assisted reproductive technologies and the families they create, written by Susan L. Crockin, J.D. and guest authors who offer unique perspectives and expertise on significant legal topics.