Legal Issues Concerning Assisted Reproduction

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DEPARTMENT OF LEGISLATIVE SERVICES
OFFICE OF POLICY ANALYSIS
MARYLAND GENERAL ASSEMBLY

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December 12, 2012

The Honorable Thomas V. Mike Miller, Jr., President of the Senate
The Honorable Michael E. Busch, Speaker of the House of Delegates
Members of the Maryland General Assembly

Ladies and Gentlemen:

This report, *Legal Issues Concerning Assisted Reproduction*, was prepared by the Department of Legislative Services, Office of Policy Analysis, in response to legislative interest in the issue of assisted reproduction.

The report was written by Jennifer K. Botts, Lindsay A. Eastwood, and Lauren C. Nestor and edited by Lauren C. Nestor and Douglas R. Nestor.

I trust that this information will be of assistance to you.

Sincerely,

Warren G. Deschenaux
Director

WGD/LCN/mjp

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Introduction

Louise Brown, the first "test tube baby," was born in 1978 to parents who had tried unsuccessfully to conceive for nine years. Today, millions of children have been born using technology that enables individuals to have children when for personal reasons they cannot or choose not to do so by means of sexual intercourse.

Assisted reproduction refers to any method of achieving pregnancy other than by sexual intercourse. Forms of assisted reproduction include artificial insemination, in vitro fertilization, and surrogacy. Artificial insemination is the process by which sperm is inserted into the vagina or uterus of a woman to cause pregnancy. In vitro fertilization, used in Louise Brown's case, is the process by which oocytes (human eggs) are fertilized with sperm in a petri dish and become embryos outside of the body. The embryos are then transferred into the woman's uterus or frozen by cryopreservation for later use. Surrogacy is a form of third party reproduction in which a woman, the surrogate, contractually agrees to create or maintain a pregnancy for another person or couple. In a "traditional" surrogacy contract, the surrogate is the biological contributor of the egg. In a "gestational" surrogacy contract, the surrogate is not related to the child genetically.

The science of assisted reproduction has vastly outpaced the legal aspects stemming from its use. While the legal implications of a couple using assisted reproduction to aid in the conception of a child using the couple's own genetic material are few, difficult legal issues concerning parentage arise, for example, where third parties contribute genetic material or where a surrogate agrees to gestate a child for the couple.

There are no federal statutes or policies governing the legal aspects of assisted reproduction. State laws vary tremendously from one state to the next, resulting in a significant lack of uniformity. Among those states that have enacted statutes, many have adopted some form of the Uniform Parentage Act promulgated by the National Conference of Commissioners on Uniform State Laws. Other states have taken various individualized approaches, with states at one end of the spectrum providing a detailed framework favorable to the regulation and enforceability of assisted reproduction agreements and states at the other end of the spectrum banning and even criminalizing them. Finally, some states' statutes are silent with regard to the legal implications of assisted reproduction, leaving courts to sort out the thorny issues surrounding the legal parentage of the children on a case-by-case basis, resulting in costly litigation and uncertainty for the parties.

Maryland does not have a comprehensive statute that addresses assisted reproduction agreements but does statutorily address artificial insemination of a married woman and provide

for the posthumous use of donor sperm and eggs. With no statute expressly prohibiting or regulating surrogacy, however, the status of surrogacy agreements in Maryland remains unclear.

This paper will discuss the statutory approaches to regulating assisted reproduction among the states in order to provide interested legislators with the background necessary to determine whether a similar statutory scheme would be beneficial in Maryland.

Maryland Law

Maryland statutory law on the subject of assisted reproduction is limited. Artificial insemination is addressed in the Estates and Trusts Article, which provides that a child conceived by artificial insemination of a married woman with the consent of her husband is the legitimate child of both of them for all purposes. Consent of the husband is presumed.[1] Additionally, Chapter 649 of 2012 prohibits a person from using the sperm or eggs of a known donor after the donor's death for purposes of assisted reproduction without the prior, written consent of the donor.

The status of surrogacy agreements is unclear in Maryland as no statute expressly regulates or prohibits them. In *In re Roberto d.B.,* 399 Md. 267 (2007), the Court of Appeals held that the name of a genetically unrelated gestational host of a fetus, with whom the genetic father contracted to carry in vitro fertilized embryos to term, was not required to be listed on the birth certificate when children are born as a result. The court also noted that "surrogacy contracts, that is, payment of money for a child, are illegal in Maryland" under § 3-603 of the Criminal Law Article, which prohibits the sale of a minor, and § 5-3B-32 of the Family Law Article, which prohibits the payment of compensation in connection with an adoption.[2]

The General Assembly has been grappling with the complicated and controversial issues surrounding the regulation of assisted reproduction, particularly surrogacy, for years. In the mid-1980s, several bills were introduced to both ban and to regulate surrogacy, and all were defeated. During the 1992 and 1994 sessions, the legislature passed identical bills that would have provided that a surrogate parentage contract was void and unenforceable as against State policy.[3] Both bills were vetoed by the governor. Most recently, SB 508/HB 873 of 2012, based on the American Bar Association Model Act Governing Assisted Reproductive Technology (discussed below), would have established specified procedures for the regulation and enforcement of surrogacy agreements.

[1] Maryland Code (2011 Repl. Vol., 2012 Supplement) § 1-206 of the Estates and Trusts Article.
[2] *In re Robert d.B.* at 293.
[3] Senate Bill 251 of 1992 and Senate Bill 171 of 1994.

1973 Uniform Parentage Act

Under the common law, a child whose mother was not married was considered illegitimate. The father of an illegitimate child had no rights or obligations with respect to the child. The child had no right of support, and the unmarried father had no right to custody.

In 1973, the National Conference of Commissioners on Uniform State Laws approved the Uniform Parentage Act (1973 Act), which addressed the status of the non marital child. The 1973 Act identified the birth mother and the natural (genetic) father as the legal parents, except in the case of adoption. Section 2 of the 1973 Act specifically provided, "[t]he parent and child relationship extends equally to every child and every parent, regardless of the marital status of the parent."[4] It also addressed artificial insemination by providing that the consenting husband of the woman artificially inseminated is the legal father of the resulting child, rather than the sperm donor. The remainder of the 1973 Act established procedures for a modern civil paternity action.

Approximately thirteen states have adopted the 1973 Act or similar language.[5]

Uniform Status of Children of Assisted Conception Act (1988)

In 1998, in direct response to the technologies of assisted reproduction such as artificial insemination and in vitro fertilization, the National Conference of Commissioners on Uniform State Laws promulgated the Uniform Status of Children of Assisted Conception Act (USCACA). The USCACA established rules for the legal parentage of children conceived by means other than by sexual intercourse. The USCACA resembled a model act more than a uniform act because it provided two opposing options regarding gestational surrogacy agreements – one option prohibited gestational surrogacy agreements, while the other option regulated them through a judicial review process.[6] The only two states to enact the USCACA selected opposite options; Virginia chose to regulate these agreements, while North Dakota opted to void them.

2000 and 2002 Uniform Parentage Acts

In 2000, the National Conference of Commissioners on Uniform State Laws promulgated the Uniform Parentage Act of 2000 (amended in 2002), which is now the official recommendation of the conference on the subject of parentage. The 2002 Act revises the 1973 Act, modernizes the law for determining the parents of children, and facilitates modern

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[4] Uniform Parentage Act (1973), Section 2.

[5] Alaska, California,* Idaho, Kansas, Massachusetts, Minnesota, Missouri, Montana, Nevada,* New Jersey, North Carolina, Oregon, and Wisconsin. *Statutes in California and Nevada contain additional language regulating surrogacy agreements (see below).

[6] Uniform Parentage Act (2002), Prefatory Note.

methods of testing for parentage. Additionally, the new Act recodifies the prior USCACA, but follows the option that regulates gestational surrogacy agreements.

The provisions of the 2002 Act relating to assisted reproduction are found mainly in Articles 7 and 8. Article 7 applies to children of assisted reproduction. Under this article, if a child is conceived as the result of assisted reproduction, the donor (whether sperm or egg) is not a parent of the resulting child. The donor may neither sue to establish parental rights, nor be sued and required to support the resulting child. A father-child relationship is created between a man and the resulting child if the man provides sperm for, or consents to, assisted reproduction by a woman with the intent to be the parent of her child. The husband of a wife who gives birth to a child by means of assisted reproduction may not challenge his paternity of the child unless (1) within two years after learning of the birth of the child he commences a proceeding to adjudicate his paternity; and (2) the court finds that he did not consent to the assisted reproduction, before or after the birth of the child. If an individual who consented in a record to be a parent by assisted reproduction dies before placement of eggs, sperm, or embryos, the deceased individual is not a parent of the resulting child unless the deceased individual consented in a record that if assisted reproduction were to occur after death, the deceased individual would be a parent of the child.

Article 8, which governs surrogacy agreements, is based on the USCACA option that legalized surrogacy agreements and permitted the payment of consideration to the gestational mother. This article is optional, and the rest of the Act could be enacted by a state without its inclusion. Under Article 8, a prospective gestational mother, her husband if she is married, a donor or the donors, and the intended parents may enter into a written agreement providing that (1) the prospective gestational mother agrees to pregnancy by means of assisted reproduction; (2) the prospective gestational mother, her husband if she is married, and the donors relinquish all rights and duties as the parents of a child conceived through assisted reproduction; and (3) the intended parents become the parents of the child. A "gestational mother" is defined as either a woman who, through assisted reproduction technology, performs the gestational function without having any genetic relationship to the child or a woman who is both the gestational and the genetic mother.

The intended parents and the prospective gestational mother may commence a proceeding in court to validate the gestational agreement, and the court may issue an order validating the agreement and declaring that the intended parents will be the parents of any child born during the term of the agreement. A gestational agreement that is not judicially validated is not enforceable. Upon birth of a child to a gestational mother, the court must confirm that the intended parents are the parents of the child and direct that a birth certificate be issued naming the intended parents as the parents of the child. The 2002 Act also provides for the termination of gestational agreements before the pregnancy has been established.

Approximately 13 states have adopted the 2002 Uniform Parentage Act or language with a similar effect.[7] Only six states, however, have adopted the provisions governing gestational agreements.[8]

Other Statutory Approaches

Approximately six states have adopted one-of-a-kind statutes governing assisted reproduction.[9] Statutory variations in these states include addressing only the issue of child support and not parentage[10] or providing protection only to egg donors.[11] New York and Tennessee have adopted language that is similar to the 1973 UPA by referencing only married individuals who employ the technique of artificial insemination. However, rather than establishing that a sperm donor is not the father of a child born using artificial insemination in specified circumstances, as is provided in the 1973 UPA, these statutes deem the resulting child to be the legitimate child of the husband and wife.

Statutes in approximately seven additional states contain unique provisions relating to surrogacy, as discussed below.[12] Approximately eight states do not have statutory language addressing assisted reproduction in any manner.[13]

Surrogacy

The subject of surrogacy under the law has been particularly controversial and complicated. Unlike artificial insemination, which involves the would-be parents and possibly a sperm donor, a surrogacy agreement typically involves at least three parties: the intended parents and the woman who agrees to bear a child for them through the use of assisted reproduction. Additionally, an egg donor or sperm donor or both may be involved.

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[7] Alabama, Colorado, Connecticut, Delaware, Florida, Illinois, New Hampshire, New Mexico, Ohio, Texas, Utah, Washington, and Wyoming.

[8] Florida, Illinois, New Hampshire, Texas, Utah, and Washington.

[9] Arizona, Arkansas, Kentucky, New York, Oklahoma, and Tennessee.

[10] *See Ariz. Rev. Stat. § 25-501*, which provides that "[a] child who is born as a result of artificial insemination is entitled to support from the mother as prescribed by this section and the mother's spouse if the spouse either is the biological father of the child or agreed in writing to the insemination before or after the insemination occurred.

[11] *See Okla. Stat. Ann. tit. 10 § 24-555*, which provides that "[a]n oocyte donor shall have no right, obligation, or interest with respect to a child born as a result of a heterologous oocyte donation from such donor." There is no corresponding provision for sperm donors.

[12] Indiana, Iowa, Louisiana, Michigan, Nebraska, South Carolina, and West Virginia.

[13] Georgia, Hawaii, Maine, Mississippi, Pennsylvania, Rhode Island, South Dakota, and Vermont.

Surrogacy Permitted by Statute

Approximately eleven states have statutory language specifically permitting some form of surrogacy, with many providing a detailed regulatory framework.[14] Despite the evolution of uniform acts on the subject, there are significant differences in the statutory treatment of surrogacy among these states. For example, although statutes in Utah and Texas, which regulate surrogacy agreements, are derived from Article 8 of the 2002 Uniform Parentage Act (which permitted both traditional and gestational surrogacies), both prohibit a surrogate from using her own eggs.

Additionally, the extent to which gestational agreements are regulated differs among these states. For example, while Nevada's statute delineates only minimal requirements for a surrogacy contract, such as specifying the parentage of the child, the custody of the child in the event of a change of circumstances, and the responsibilities and liabilities of the contracting parties, Illinois' statute requires a properly executed agreement to contain significantly more specificity, including a requirement that (1) all parties be represented by separate counsel; (2) the agreement provide the right of a surrogate to select her own physician after consultation with the intended parents; (3) the surrogate's husband, if married, be a party to the agreement; and (4) an independent escrow agent be used if any compensation to the surrogate is provided for in the agreement.

Requirements for the qualifications of surrogates and intended parents also vary among the states that regulate surrogacy agreements. For example, Florida law requires the couple commissioning the surrogacy to be legally married and requires a licensed physician to determine that (1) the commissioning mother cannot physically gestate a pregnancy to term; (2) the gestation will cause a risk to the physical health of the commissioning mother; or (3) the gestation will cause a risk to the health of the fetus. A gestational surrogate is also prohibited from using her own eggs and must be at least 18 years old. Illinois requires gestational surrogates to be at least 21 years old, have already given birth to at least one child, and to complete a medical and mental health evaluation in addition to undergoing a consultation with independent legal counsel. Nevada specifically permits only married individuals to enter into a contract with a surrogate and further requires that the egg and sperm used to impregnate the surrogate come from the intended parents.

The majority of the states that regulate surrogacy do not allow for compensation to the surrogate mother beyond typical medical expenses. For example, Florida restricts the commissioning couple to paying only reasonable living, legal, medical, psychological, and psychiatric expenses of the gestational surrogate that are directly related.

[14] Arkansas, California, Florida, Illinois, Nevada, New Hampshire, North Dakota, Texas, Utah, Virginia, and Washington.

Surrogacy Is Void/Prohibited

At least seven states prohibit surrogacy in some instances or declare such agreements to be void and/or unenforceable.[15] In Louisiana, compensated, traditional surrogacy agreements are void; however, its statute does not address uncompensated or gestational surrogacy agreements. Although Arizona prohibits surrogacy agreements, there is a rebuttable presumption that a surrogate is the legal mother of a child born as a result of a surrogacy agreement and, if the surrogate is married, her husband is presumed to be the father. Michigan law goes even further by providing that surrogacy is a felony, punishable by five years imprisonment and/or a $50,000 fine.

Miscellaneous References to Surrogacy

Statutes in several states reference surrogacy without specifically permitting or prohibiting the practice. For example, New Mexico law appears to ban compensated surrogacy agreements, but does not specifically authorize or regulate surrogacy.[16] In Iowa, South Carolina, and West Virginia, surrogacy is a specific exception to the prohibitions against the sale of an individual. Tennessee statutory language provides that "[n]othing shall be construed to expressly authorize the surrogate birth process in Tennessee unless otherwise approved by the courts or the general assembly."[17]

American Bar Association Model Act

In 2008, the American Bar Association Section of Family Law's Committee on Reproductive and Genetic Technology drafted the Model Act Governing Assisted Reproductive Technology. The model act seeks to give participants and the resulting offspring of assisted reproduction clear legal rights, obligations, and protections by establishing legal standards for the use, storage, and other disposition of gametes and embryos. The committee hoped to address societal concerns about assisted reproduction, such as clarifying issues of health insurance coverage for the treatment of infertility and establishing legal standards for informed consent, reporting, and quality assurance. The sections relating to parentage were intended, as much as possible, to be consistent with and to track the corresponding provisions of the 2002 Uniform Parentage Act.

Among its most significant provisions, Article 7 of the model act proposes two options for handling surrogacy arrangements. The first would require court approval of any surrogacy agreement in which neither of the intended parents has a genetic link to the resulting child. The second, an administrative model, would require no judicial involvement as long as at least one of

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[15] Arizona, Indiana, Kentucky, Louisiana, Michigan, Nebraska, and New York.

[16] *See NM STAT.* § 32A-5-34, which provides that "[n]othing in this section shall be construed to permit payment to a woman for conceiving or carrying a child."

[17] *See Tenn. Code Ann.* § 36-1-102.

the intended parents has a genetic link to the resulting child and all of the parties submit to eligibility and procedural requirements, including a mental health evaluation, a legal consultation, and health insurance coverage.

To date, no state has adopted the model act.

Conclusion

Advancements in the science of assisted reproduction have enabled more individuals to conceive children than was formerly possible. While issues regarding the parentage of children are few when a couple uses their own genetic material to conceive a child, the legal status of children born by means of assisted reproduction becomes increasingly complicated and, as a result, litigation is more likely to ensue when multiple parties (*e.g.*, an egg donor, a sperm donor, a surrogate, and a couple who contracts with a surrogate) are involved in the conception and birth of a child.

Statutory approaches to assisted reproduction vary widely among the states. While many states have adopted a version of the Uniform Parentage Act, few of those have adopted its provisions governing the more complicated issues surrounding surrogacy agreements. State statutes that do address surrogacy differ significantly in their approaches, with some statutes comprehensively regulating surrogacy agreements and others prohibiting them. Finally, some states have failed to enact legislation concerning assisted reproduction, leaving the legal consequences of assisted reproduction agreements in question.

In Maryland, in the absence of specific statutory guidance, when the parties to an assisted reproduction agreement disagree, courts are forced to determine the legal parentage of the children on a case-by-case basis. The resulting lack of uniformity creates a state of legal limbo for parties to any such agreements in the future. As a California court noted:

> No matter what one thinks of artificial insemination, traditional and gestational surrogacy (in all of its permutations) and --as now appears in the not-too-distant future, cloning and even gene splicing--courts are still going to be faced with the problem of determining lawful parentage. A child cannot be ignored…These cases will not go away…Courts can continue to make decisions on an ad hoc basis without necessarily imposing some grand scheme. Or, the Legislature can act to impose a broader order which, even though it might not be perfect on a case-by-case basis, would bring some predictability to those who seek to make use of artificial reproductive techniques.[18]

[18] *Buzzanca v. Buzzanca*, 72 Cal. Rptr. 2d 280 (Cal. Ct. App. 1998).