

P E N N S Y L V A N I A LAW WEEKLY

Surrogacy: Choice, Not Chance

Since Pennsylvania has no surrogacy laws, lawyers must protect parties

By Dorothy K. Phillips
Special to the Law Weekly

Many couples today find that they either cannot become pregnant or cannot carry a pregnancy to term. Some decide to use a surrogate to have their child.

Perhaps you recall the highly publicized case *In Re Baby M.*, 537 A.2d 1227 (N.J. 1988), which involved an agreement between a surrogate mother and the intended parents. This matter went to the Supreme Court of New Jersey and was the first reported contested case involving a compensated traditional surrogate who did not want to give up her parental rights. Since that time, various states have addressed surrogacy either through statute, case law or both. There are approximately 19 jurisdictions without statutes or case law involving surrogacy. Pennsylvania is one of those states. *J.F. v. D.B.*, 66 Pa. 4<>th 1; 2004 Pa. D&C LEXIS 21 (2004) at 19.

It is important to understand the language of surrogacy before a discussion ensues. The first type of surrogacy is known as traditional surrogacy wherein the surrogate uses her own egg to become pregnant. The intended father's sperm or a donor's sperm may be used. In this instance, the intended mother has no genetic nexus to the resulting child. In such a situation, the intended mother must adopt the child after it is born and, assuming that the intended father's sperm was used, the intended father and the husband of the surrogate are equally presumed to be the father of the child. Under the doctrine of a child of a married person is presumed to be a child of the marriage, *Barnard v. Anderson*, 763 A.2d 592 (Pa. Super. 2001), the surrogate's husband is presumed to be the father. The intended father has the genetic connection to the child, having donated the sperm, and therefore the genetic tie establishes paternity. However, the intended mother, who may be the wife of the genetic father, must adopt the child, which usually can be handled as a stepparent adoption. In the above fact situation, if a donor's sperm was used, both the intended mother and father must adopt the child after birth. It is this type of situation where the surrogate provides the ovum, which has potential complications in the event that the surrogate mother wants to keep the child.

A better situation is known as gestational surrogacy. In this type of surrogacy, the egg comes from the intended mother or by using a donor egg. The intended father can provide the sperm or there can be donor sperm. The one thing that is clear in this fact situation is that there is no genetic nexus between the surrogate mother and the child.

In the fact situation whereby the egg is donated, the intended mother has no nexus at all with

P E N N S Y L V A N I A LAW WEEKLY

the child. The surrogate mother, because she gives birth to the child, is presumed to be the child's mother. This, of course, is assuming that the egg donor is anonymous. In this instance, the intended mother must adopt the child. Once again, on these facts, the surrogate's husband is presumed to be the father because he is married to the legal mother of the child, as in *Barnard v. Anderson*. If the intended father was the sperm donor, he and the husband of the surrogate mother both share a presumption of paternity.

The best fact situation is gestational surrogacy where the egg of the intended mother and the sperm of the intended father are used. The surrogate, in that instance, is simply a carrier of the fertilized egg and has no genetic connection to the child. While the surrogate mother and her husband will share a legal presumption of maternity/paternity with the intended parents, a testing of the intended parents will show the genetic connection. In this instance, there is generally a surrogacy agreement and, assuming there are no differences, the child will be the genetic child of the intended parents and maternity and paternity can be established genetically. In the event that there is a disagreement between the surrogate mother and the intended parents, courts generally sustain the rights of the genetic parents to the child over the rights of the surrogate. Therefore, the preferred situation is a gestational surrogacy arrangement whereby the intended mother and father are the egg/sperm donors because in the event of a disagreement, the court will generally rule for the genetic parents.

It seems cumbersome to have a gestational surrogacy whereby the surrogate and her husband are placed on the birth certificate and then the birth certificate is amended to reflect the names of the intended mother and father, the genetic parents. Over the years since the *Baby M* case, many intended parent couples have sought a pre-birth parentage order. This type of order is where the intended parents are genetically related to the child and can prove that they are the parents under the appropriate maternity/paternity statutes of a given state. If the law of a jurisdiction permits a pre-birth order or is silent on the issue, the securing of a pre-birth order eliminates the surrogate from the birth certificate and places the genetic parents on from the outset. Since 1995, the Pennsylvania Department of Health has had an assisted conception birth registry, which provides a pre-birth certificate to the intended parents.

There are states where pre-birth parentage orders are permitted by statute, while other jurisdictions prohibit such orders. In California, for instance, there are no surrogacy statutes but pre-birth parentage orders are permitted. There are other states which specifically prevent and prohibit any kind of pre-birth order. Pennsylvania has no laws governing surrogacy and therefore could be a benign jurisdiction with regard to surrogacy because there are no statutes prohibiting surrogacy, surrogacy agreements, or pre-birth orders.

There are three cases in Pennsylvania which in some way address surrogacy. The first case was *Huddleston v. Infertility Center of America Inc.*, 700 A.2d 453 (Pa. Super. 1997). This matter involved an appellant surrogate mother who appealed the decision of the trial court which found that she lacked standing for wrongful death and survival actions against the fertility center. The Superior Court reversed that portion of the judgment, which dismissed the wrongful death and survival action for damages. The second case was *S.A. v. C.G.R.*, 856

P E N N S Y L V A N I A LAW WEEKLY

A.2d 1248 (Pa. Super. 2004), whereby a child who was born in 1998 was the natural child of the father and a surrogate mother. There was a contractual agreement between father and his wife and the surrogate. The Montgomery County and the Superior Courts both agreed that father's wife stood in loco parentis to the child and would not deny her rights with regard to custody of the child.

The most comprehensive analysis of the subject is a lower court case, *J.F. v. D.B.*, which arose in the Court of Common Pleas of Erie County. D.B. agreed to become a gestational surrogate for Surrogate Mothers Inc. (SMI). J.F. and E.D., Ohio residents, wanted to become the parents. There was a surrogacy contract. On Nov. 19, 2003, D.B. gave birth to premature triplets in Erie, Pa. The intended parents expressed interest in the triplets, but failed to learn the techniques necessary for monitoring the infants. The gestational surrogate, D.B. and her husband learned how to monitor and care for the triplets and D.B. decided to take the boys home. On Dec. 11, 2003, J.F., the Ohio resident, filed a complaint for sole custody of the triplets, together with a Motion for Special Relief. The court granted temporary custody to D.B. and visitation five days a week for J.F. and E.D., the Ohio residents. J.F. and E.D. visited the children only a few times and returned the children in dirty clothing. Thereafter, D.B., the surrogate, filed an answer and counterclaim for custody. The Erie County court, in the absence of surrogacy parenting Statutes, relied on the principles of contract law and public policy. It found the terms of the surrogacy contract void as against public policy. Since J.R., the egg donor, was not a party to the court action and since E.D. was not genetically related to the children and was not even J.F.'s wife, the Court found that D.B., the surrogate who carried them in her womb and gave birth to them and cared for them was the one person who had assumed "maternity" and therefore, she was awarded the status of the legal mother of the triplets. J.F. of Ohio was the genetic father of the triplets.

After the Erie County decision, the egg donor, Jennifer Rice of Texas, filed in Ohio to establish a parent-child relationship with the triplets. The matter went up on appeal to the Ohio Court of Appeals. *Rice v. Flynn*, Ohio Ct. App. No. 22416 (2005), which on Sept. 7, 2005, held that although Pennsylvania has continuing jurisdiction over parenting determinations, Ohio was not bound to give full faith and credit to the Pennsylvania decision on parent-child relationships because Pennsylvania failed to give notice to Rice, the egg donor. After Ohio's trial court rendered its decision, the Pennsylvania court terminated the rights of the donor, Rice. On appeal, Ohio's Court of Appeals held that the Pennsylvania's termination of Rice's parental rights was subsequent to the Ohio trial and therefore not part of its Record. The Ohio case was remanded for a finding of whether Rice (egg donor) or Flynn (sperm donor) had waived or relinquished their parental rights. The Ohio story is not finished, pending the outcome of the remand. Does Pennsylvania have to honor the Ohio decision? Time will tell.

Legislation concerning surrogacy was proposed in Pennsylvania in 1987, 1991, 1995 and 1997. None survived the judiciary committee. It may well be then that surrogacy can present a positive situation in Pennsylvania because there are no laws which prohibit surrogacy agreements, surrogacy, or pre-birth orders. In *J.F. v. D.B.*, Judge Shad Connelly of Erie

P E N N S Y L V A N I A LAW WEEKLY

County did extensive research concerning other jurisdictions after discovering he was dealing with a case of first impression in Pennsylvania.

Pennsylvania is an open jurisdiction. Good legal advice and careful drafting of surrogate contracts together with no prohibition against surrogacy would seem to provide fertile ground for persuasive advocacy in a surrogacy situation. ●

Dorothy K. Phillips is the founder and managing partner of Dorothy K. Phillips & Associates in Philadelphia. She focuses her practice on domestic relations law. A former family therapist, she is a frequent author and lecturer on a variety of family law issues.

For more information contact Dorothy K. Phillips, Esq at (215) 568-7757.