

LORMAN EDUCATION SERVICES

*SEMINAR NAME: ADOPTION PRACTICE,
PROCEDURE AND PITFALLS IN MICHIGAN*

*SEMINAR DATE: OCTOBER 8, 2003 IN
SOUTHFIELD, MICHIGAN*

SURROGATE PARENTING

*DYKEMA GOSSETT PLLC
JOANNE R. LAX
39577 WOODWARD AVENUE
SUITE 300
BLOOMFIELD HILLS, MICHIGAN 48304*

TELEPHONE: (248) 203-0816

FACSIMILE: (248) 203-0763

EMAIL: JLAX@DYKEMA.COM

COPYRIGHT 2003 BY DYKEMA GOSSETT PLLC ©

SURROGATE PARENTING

I. DEFINITIONS APPLICABLE TO SURROGATE PARENTAGE CONTRACTS.

A. “Surrogate parentage contract” means: “a contract, agreement, or arrangement in which a female agrees to conceive a child through natural or artificial insemination, or in which a female agrees to surrogate gestation, and to voluntarily relinquish her parental or custodial rights to the child. It is presumed that a contract, agreement, or arrangement in which a female agrees to conceive a child through natural or artificial insemination by a person other than her husband, or in which a female agrees to surrogate gestation, includes a provision, whether or not express, that the female will relinquish her parental or custodial rights to the child. MCLA 722.853(i).

1. The surrogate parentage contract can be written or oral.
2. Contracts can be established by the intention of the parties.

B. “Surrogate carrier” means the female in whom an embryo is implanted in a surrogate gestation procedure. MCLA 722.853(f).

C. “Surrogate gestation” means the implantation in a female of an embryo not genetically related to that female and subsequent gestation of a child by that female. MCLA 722.853(g).

1. In classic in vitro fertilization procedures involving a surrogate, the egg and sperm of the intended parents are used to create the

embryo that is implanted into the surrogate. In this way, the resulting child is genetically related to the intended parents, not the surrogate.

2. Particularly with older intended mothers, the egg used to create the embryo may be anonymously donated, or donated from a known third party. The embryo is not genetically related to either the surrogate or the intended mother.
3. Many IVF facilities permit the donation of embryos created by other IVF couples that were frozen but not used for implantation in their attempted pregnancy. In this arrangement, the embryo is not genetically related to either intended parent or the surrogate.

D. "Surrogate mother" means a female who is naturally or artificially inseminated and who subsequently gestates a child conceived through the insemination pursuant to a surrogate parentage contract. MCLA 722.853(i).

1. The surrogate in this situation is both the genetic and gestational mother of the ensuing child.

E. Relevant distinctions in surrogate parentage law:

1. Whether the child is genetically related to the woman who gestates and delivers the child. This will determine the legal steps necessary to create a legal parent/child relationship between the intended parents and the child.

2. Whether the surrogate mother or the surrogate carrier is married. If the surrogate is married, the rights of her husband must be determined and terminated before a legal relationship can be established between the intended parents and the child born of the surrogacy.

II. ILLEGAL CONDUCT.

- A. The Surrogate Parentage Act criminalizes certain conduct in connection with surrogate parentage arrangements. The criminal offense is classified as either a felony or a misdemeanor depending upon the factual circumstances.
- B. A person shall not enter into, induce, arrange, procure, or otherwise assist in the formation of a surrogate parentage contract under which an unemancipated minor female or a female diagnosed as being mentally retarded or as having a mental illness or developmental disability is the surrogate mother or surrogate carrier. MCLA 722.857(1).
 1. Except for the unemancipated minor or mentally ill or developmentally disabled woman serving as the surrogate, anyone involved in one of these surrogate parentage contracts is guilty of a felony punishable by a fine of not more than \$50,000.00 or imprisonment for not more than 5 years, or both.
 2. “Mental illness” and “developmental disability” are defined as they are in the Michigan Mental Health Code, Act No. 258 of the Public

Acts of 1974, being Sections 330.1001 to 333.2106 of the Michigan Compiled Laws.

a. “Mental illness”, generally, means a disturbance of thought or mood that substantially impairs the woman’s ability to function in daily life. Examples of mental illness include schizophrenia, bipolar disorder, borderline personality, and the like.

b. “Developmental disability” means a cognitive impairment manifest from birth that substantially impairs the woman’s ability to function in daily life. Examples of developmental disability include mental retardation, cerebral palsy, or autism.

C. A person shall not enter into, induce, arrange, procure, or otherwise assist in the formation of a surrogate parentage contract for compensation. MCLA 722.859(1).

1. “Compensation” means a payment of money, objects, services, or anything else having monetary value except payment of expenses incurred as a result of the pregnancy and the actual medical expenses of a surrogate mother or surrogate carrier. MCLA 722.853(a).

a. No court decisions define the term “expenses incurred as a result of the pregnancy”.

- b. This language differs from the language in the Michigan Adoption Code allowing payment of “living expenses”, which are not required to be “incurred as a result of the pregnancy”.
 - c. Query whether the payment of expenses pursuant to the Surrogate Parentage Act are more restricted than permissible payments in an adoption. Given the legislative history of the Surrogate Parentage Act, the answer is likely “yes”.
2. A “participating party” (other than an unemancipated minor female or a female diagnosed as being mentally retarded or as having a mental illness or developmental disability) who knowingly enters into a surrogate parentage contract for compensation is guilty of a misdemeanor punishable by a fine of not more than \$10,000.00 or imprisonment for not more than 1 year, or both.
- a. The crime requires knowledge that the party is entering into a surrogate parentage contract for compensation.
 - b. "Participating party" means a biological mother, biological father, surrogate carrier, or the spouse of a biological mother, biological father, or surrogate carrier, if any. This means that the criminal penalty impacts all four direct participants in any surrogate relationship.

3. A person other than a participating party who induces, arranges, procures, or otherwise assists in the formation of a surrogate parentage contract for compensation is guilty of a felony punishable by a fine of not more than \$50,000.00 or imprisonment for not more than 5 years, or both. MCLA 722.859(3).
 - a. This criminal act has no knowledge requirement.
 - b. This criminal penalty applies to the attorney or other person who “brokers” the surrogate parentage contract.
 - c. This criminal penalty is a felony as opposed to the misdemeanor penalty for the participants in the surrogate parentage arrangement.

D. Every surrogate parentage contract is presumed to include a clause whereby the surrogate mother or surrogate carrier agrees to terminate her parental rights to the child born of the surrogacy, whether that clause is expressly stated in the contract or not. MCLA 722.853(i). Accordingly, any compensation in a surrogate parentage contract that does not fit the definition of “expenses incurred as a result of the pregnancy” or “medical expenses of the pregnancy” is a prohibited surrogate parentage contract, subjecting the participants and the “broker” to criminal penalties. For this reason, surrogate parentage contracts must be very carefully negotiated and drafted. Compensation must be strictly limited to lawful expenses.

1. This criminalization of surrogate parentage contracts for compensation was intended to shut down the commercialized surrogate parenting programs.
2. Surrogate parentage contracts without prohibited compensation are lawful in Michigan; family or friends frequently serve as surrogates.

III. ENFORCEABILITY OF SURROGATE PARENTAGE CONTRACTS.

A. Surrogate parentage contracts are not enforceable in Michigan. MCLA 722.855.

1. They are declared void and against public policy.
2. This is true whether the surrogate parentage contract is for compensation or not.
3. The significance of this is that if the surrogate mother or surrogate carrier decides not to terminate her parental rights, no court will force her to do so on the basis of the contract.
4. Given the unenforceability of the surrogate parentage contract, the participating parties must enter into these relationships on the basis of trust.

B. If a surrogate mother or surrogate carrier decides not to terminate her parental rights, the custody of the child born of the surrogate parentage contract will be determined by a court using the best interest of the child standard. “Best interest of the child” is interpreted the same as in a

divorce action pursuant to the Child Custody Act, Act No. 91 of the Public Acts of 1970, being section 722.23 of the Michigan Compiled Laws.

“Best interests of the child” means the sum total of the following factors to be considered, evaluated, and determined by the court:

1. The love, affection, and other emotional ties existing between the parties involved and the child.
2. The capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any.
3. The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.
4. The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.
5. The permanency, as a family unit, of the existing or proposed custodial home or homes.
6. The moral fitness of the parties involved.
7. The mental and physical health of the parties involved.
8. The home, school, and community record of the child.
9. The reasonable preference of the child, if the court considers the child to be of sufficient age to express preference.

10. The willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents.
 11. Domestic violence, regardless of whether the violence was directed against or witnessed by the child.
 12. Any other factor considered by the court to be relevant to a particular child custody dispute.
- C. During the pendency of the custody determination, the party having physical custody (typically the surrogate mother or surrogate carrier) is entitled to keep physical custody until the court directs otherwise. MCLA 722.861.

IV. ESTABLISHING THE LEGAL PARENT CHILD RELATIONSHIP BETWEEN THE INTENDED PARENTS AND THE CHILD OF THE SURROGACY.

- A. Surrogate mother situations.
1. Generally, the intended father in surrogate mother situations is also the biological father of the child that the surrogate mother is carrying.
 2. Marital status of the surrogate mother:
 - a. If the surrogate mother is unmarried, the name of the intended father can be shown on the child's birth certificate through the Acknowledgement of Parentage Act, MCLA 722.1001, et. seq. Execution of an Acknowledgement of Parentage document serves as a declaration of paternity

sufficient for a court to order child support, parenting time, and even custody in appropriate cases.

- b. If the surrogate is married, the child is presumed to be the child of the surrogate and her husband if the husband consented to the artificial insemination that created the pregnancy. MCLA 333.?????. In order to avoid this presumption, the husband is advised to execute a document denying consent to the artificial insemination. In addition, it is often necessary to obtain a judicial determination that the child is a child “born out of wedlock” – e.g. a child born during the marriage but not the issue of that marriage. Such a determination enables the intended/biological father to execute an Acknowledgement of Parentage to be recognized as the lawful father of the child. However, the Paternity Act has been construed in *Girard v Wagenmaker*, 437 Mich 231 (1991), to preclude a putative father from bringing a suit to declare his paternity of a child born during a marriage; query the best way to accomplish the declaration that the child is born out of wedlock in these situations.
3. If the rights of the surrogate mother’s husband are determined and eliminated, and if the surrogate mother and the intended father

3. If the surrogate carrier is not married, the process is simplified because there is no presumed legal father.
4. If the surrogate carrier is married, it is necessary to obtain a declaration that the child is a child born out of wedlock, an order establishing paternity and an order establishing maternity. There is no established procedure in Michigan for accomplishing this, but most attorneys apply the Paternity Act, citing *Syrkowski v Appleyard*, 420 Mich 367 (1985).

agree in writing, the ensuing child can be placed in the custody of the intended father without a court order. However, if it is necessary to have a court order that the child is born out of wedlock in order to defeat the rights of a husband of the surrogate mother, the Paternity Act also permits the court to enter an order declaring custody in the intended father.

- B. If the intended father is married, his wife is the step-mother of the child. In order for her to gain a legal parent-child relationship with the child born of the surrogacy, she must complete a step-parent adoption.
- C. Surrogate carrier situations:
 - 1. In many surrogate carrier situations, the intended parents are the genetic parents of the child born as a result of the surrogacy. Although it is possible to use a similar method as a surrogate mother situation in order to establish the legal rights of the intended parents to the child, this is cumbersome and somewhat illogical.
 - 2. It is sometimes possible to obtain “pre-birth” orders using the Paternity Act to declare the child to be the lawful child of the intended parents, and to have a birth certificate issued in the names of the intended parents. This simplifies the process and the intended parents can leave the hospital with the child without further legal involvement.