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The Renaissance of "Traditional" or "Genetic" Surrogacy

Is It Really Adoption?

By: Kathleen ("Casey") Copps DiPaola, Esq.

Typically, when people speak of surrogacy they are referring to gestational surrogacy, whereby a woman (referred to as a gestational surrogate for purposes of this article) agrees to carry a child for another couple or individual (referred to as intended parent(s) for purposes of this article) who will be the parent(s) of the child and the surrogate does not provide the egg used to create the embryo transferred to her uterus. However, there is another type of surrogacy that is still alive and well: traditional or genetic surrogacy. Traditional/genetic surrogacy refers to an arrangement whereby a woman (referred to as a traditional/genetic surrogate for purposes of this article) agrees to carry a child that is intended to be parented by another couple or individual and the surrogate provides the egg used to create the embryo she carries.

There is debate among practitioners in the assisted reproduction field regarding whether traditional/genetic surrogacy is essentially an adoption or at least more akin to an adoption than to gestational surrogacy and, further, whether it should be treated like an adoption, a gestational surrogacy arrangement, or something else. To some extent, the answer to the first part of this question depends on state laws regarding adoption, traditional/genetic surrogacy, and gestational surrogacy. Regardless of how state law treats these traditional/genetic surrogacy arrangements, we, as practitioners, can and should recognize the unique aspects of these arrangements and handle them accordingly.

This article will explore these questions from the perspective of New York law, which was recently completely overhauled with respect to traditional/genetic surrogacy and gestational surrogacy. To understand the significance of where things stand in New York now, it is important to understand the history of this area of law in New York.

In 1955, the NYS Appellate Division Second Department made clear that New York's public policy in the field of adoption was that "[a] child is not a chattel to be bought or sold" and that a birth mother cannot demand or accept any compensation in exchange for placing her child for adoption. In re Adoption of Anonymous, 286 A.D. 161, 166 (2d. Dep't 1955).[1] In 1986, in what appears to be the first reported case involving surrogacy in New York, the Nassau County Surrogate's Court was presented with an adoption petition following the birth of a baby to a traditional/genetic surrogate. Matter of Adoption of Baby Girl L.J., 132 Misc.2d 972 (Sur. Ct. Nassau Co. July 31, 1986). In that case, there was a Surrogate Parenting Agreement entered into by the parties, pursuant to which the traditional/genetic surrogate was artificially inseminated with the sperm of the petitioning adoptive father and was compensated $10,000 for her services. Id. at 973. The Court, although expressing moral and ethical concerns and urging the legislature to take up the issue, ultimately approved the adoption.

A few years later, everything changed when the Mary Beth Whitehead case from New Jersey took center stage on the national scene. In that case, the traditional/genetic surrogate entered into an agreement to be compensated in exchange for being artificially inseminated with the intended father's sperm but then changed her mind and wanted to keep the baby, resulting in protracted custody litigation regarding the resulting child. New Jersey ultimately determined that the surrogacy agreement was void, akin to "baby-bartering" and that the entire practice was "illegal and perhaps criminal." Matter of Baby M., 109 N.J. 396, 425 (N.J. Sup. Ct., 1988). While a heated debate raged in the New York legislature following this case, the Courts in New York followed New Jersey, disallowing adoptions following compensated traditional/genetic surrogacy based on violation of the adoption statutes prohibiting compensation. Matter of Adoption of Paul, 146 Misc.2d 379 (Fam. Ct. Kings Co. Jan. 22, 1990); Matter of Anonymous v. Anonymous, 1991 WL 228555 (Fam. Ct. Bronx Co. Oct. 1, 1991). One Court went as far as to say that "the use of the term 'surrogate' in this context [is] inaccurate and euphemistic. In fact, [she] is the mother of the child." Matter of Anonymous, at *1 n.1.

In 1992, the New York legislature enacted a new Article 8 in the Domestic Relations Law specifically regarding surrogate parenting contracts. N.Y. D.R.L. Article 8, § 121, et. seq. All surrogate parenting contracts were deemed void, unenforceable and contrary to public policy, regardless of whether a traditional/genetic surrogate or gestational surrogate was used. Doe v. N.Y.C. Bd. Of Health, 5 Misc.3d 424, 426 (Sup. Ct. N.Y. Co. Aug. 19, 2004). It was further deemed illegal to engage in, induce, arrange, or assist with such an arrangement if the surrogate (traditional/genetic or gestational) was compensated, with the possibility of fines up to $10,000 and felony charges. Interestingly, this law made no distinction between traditional/genetic surrogacy and gestational surrogacy but rather indicated that compensation was the greater evil in the world of surrogacy.

Following the enactment of this law, both types of uncompensated surrogacy arrangements continued in New York, despite the agreements being unenforceable. Starting in 1994, intended parents who were both genetically related to the child (i.e., one provided sperm and the other provided the egg)

[1] The current prohibition on compensation of a birth mother in an adoption is found at N.Y. S.S.L. § 374(6) and the criminal penalties for violation of this prohibition are found at N.Y. S.S.L. § 389(2).

were able to establish their parentage through declarations of maternity and paternity based on the genetic connection to the child. Arredondo v. Nodelman, 163 Misc.2d 757 (Sup. Ct. Queens Co. Nov. 16, 1994); Doe, 5 Misc.3d 424; T.V. v. N.Y.S. Dep't of Health, 88 A.D.3d 290 (2d Dep't 2011). Obviously, this was not available in traditional/genetic surrogacy arrangements, but it was also not available in gestational surrogacy arrangements where donor embryos, egg and/or sperm was used, and a post-birth adoption proceeding was still required.

As time passed, the Court decisions involving surrogacy arrangements started focusing more on the intent of the parties. For example, in Renee P.-F. v. Frank G., the Court found that the non-genetic intended father in a traditional/genetic surrogacy arrangement had standing to file for custody of the child based on the pre-conception agreement to conceive and raise the child together.[2] 161 A.D.3d 1163, 1165 (2d Dep't 2018); see also T.V., 88 A.D.3d at 305 (citing favorably to the California case of Johnson v. Calvert, 5 Cal. 4th 84, which determined a contest between a gestational surrogate and genetic intended parents based on the intent of the parties); Matter of John, 174 A.D3d 89, 98 (2d Dep't 2019) (relying on the surrogacy agreement for evidence of the parties' intent in a traditional/genetic surrogacy case, despite the fact that the agreement was unenforceable).

Finally, in 2020 the New York legislature passed the Child Parent Security Act (effective February 15, 2021), which overhauled all of New York's laws on assisted reproduction and surrogacy. This new law represents a paradigm shift from parentage based on biology to parentage based on intent. Pre-birth or post-birth parentage orders can now be obtained when a child is conceived using donated embryos, egg and/or sperm and when a gestational surrogate is used, regardless of whether either or both of the intended parents have any genetic connection to the child and regardless of whether the gestational surrogate is compensated.

However, despite this new focus on intent over biology, traditional/genetic surrogacy agreements remain void and unenforceable regardless of whether the traditional/genetic surrogate is compensated, and the potential monetary penalties and criminal charges remain possible if she is compensated. The result is that in traditional/genetic surrogacy arrangements, an adoption proceeding is still needed after the baby is born.[3]

Does this make sense? When you look at it from the perspective of the process the intended parents must go through, I think the answer is a firm "no." Under this statutory scheme, two intended parents, neither of whom are genetically related to the child, but who use a gestational surrogate can obtain a pre-birth order of parentage which requires absolutely none of the screening involved in an adoption

[2] This rule of standing in custody cases came from the case of Brooke S.B. v. Elizabeth A.C.C., 28 N.Y.3d 1 (2016), whereby the New York Court of Appeals found that when a same sex female couple entered into a pre-conception agreement to conceive and raise a child together, the non-biological, non-adoptive partner had standing to seek custody and visitation.

[3] In the case where an unmarried traditional/genetic surrogate is used but the sperm comes from one of the intended parents, that intended parent can sign a voluntary acknowledgment of parentage and then the other intended parent can pursue a step or second parent adoption of the child. N.Y. P.H.L. § 4135-b(1)(b)(i).

proceeding. In contrast, if a genetic intended father and a second non-genetic intended parent use a traditional/genetic surrogate, they must go through all of the screening involved in an adoption (criminal checks, child abuse/neglect check, medical approval, financial disclosure, home study, etc.). Even a single genetic intended father would have to go through this adoption process for his own child in order to remove the traditional/genetic surrogate from his child's birth certificate. Regardless of your position on whether any type of screening should be performed on genetic and/or non-genetic intended parents, it makes no sense for intended parents who do have a genetic connection to the child to be required to submit to more screening than those that do not – which is the outcome of the current statutory scheme.

When you look at this issue from the perspective of the surrogate, I think the answer is still "no" but the inquiry is certainly more nuanced. A traditional/genetic surrogate indisputably has more of a connection to the child than a gestational surrogate. However, she arguably has more in common with a gestational surrogate than with a birth mother in the adoption context. The only real difference between the two types of surrogates is the genetic connection to the baby, but if the traditional/genetic surrogate wishes to "donate" her egg, this should be permissible with the proper safeguards (medical and psychological counseling) in place. New York law already allows women to donate their eggs for compensation and the justification for not allowing them to donate their eggs when they are also acting as the surrogate seem paternalistic – much like New York's laws on surrogacy in general prior to the recent amendments.

The crucial difference between a birth mother and a traditional/genetic surrogate is that a birth mother finds herself pregnant (via sexual intercourse) and then makes a determination not to parent her child. In contrast, a traditional/genetic surrogate, exactly like a gestational surrogate, makes an educated decision to *become* pregnant via assisted reproduction for the sole purpose of carrying a child to be parented by the intended parent(s). The importance of a pre-conception agreement regarding who is a parent of a child was the crux of the landmark decision in Brooke S.B. v. Elizabeth A.C.C., 28 N.Y.3d 1 (2016), which granted standing for custody and visitation to a non-genetic, non-adoptive parent. In that case, the genetic/gestating mother agreed to conceive and parent a child with her same-sex partner. When she later changed her mind, the Court relied on their pre-conception agreement to enforce her ex-partner's parental rights. This demonstrates the importance and enforceability of a pre-conception agreement regarding who is a parent, even over the objection of the genetic/gestating parent. Admittedly, this scenario is somewhat different because the genetic/gestating mother was not being denied her parental rights by also recognizing her ex-partner's parental rights. However, it is still an important indication that a woman who gestates a child she is genetically related to, can enter into a pre-conception agreement regarding the parentage of that child.

Although traditional/genetic surrogacy arrangements in New York are forced into the adoption model, the relevant statutes themselves recognize the differences between traditional/genetic surrogates and birth mothers. The new surrogacy laws in New York refer to a woman acting as a surrogate who is using her own egg as a "genetic surrogate" (see N.Y. D.R.L. § 121(1)) rather than as a "birth parent," which is the term used throughout the adoption statutes (see N.Y. D.R.L. Article VII). Additionally, the provision about acceptable expenses for a genetic surrogate includes all expenses allowable for a birth parent plus expenses associated with artificial insemination or in vitro fertilization. N.Y. D.R.L. § 123(1).

Continuing to treat traditional/genetic surrogacy differently than gestational surrogacy and not allowing enforceable agreements and pre-birth orders of parentage may have unintended negative consequences. Since traditional/genetic surrogacy agreements are void and unenforceable and these arrangements are not eligible for the pre-birth or post-birth parentage orders available under the New York Child Parent Security Act, there is no incentive to follow all of the time consuming and expensive procedures set forth in that Act (i.e., medical screening, psychological screening, life insurance, medical insurance, legal representation, access to ongoing counseling, etc.) that are meant to safeguard the parties and the process – when arguably those safeguards are even more critical in traditional/genetic surrogacy cases. It seems that the more appropriate way to handle these arrangements would be to require these safeguards (and maybe even more). The other potential unintended consequence of the current statutory scheme is that it may discourage arrangements whereby a friend or family member of the intended parents acts as a traditional/genetic surrogate and thereby prevent certain prospective intended parents from being able to use surrogacy to build their family based on financial constraints and the substantially higher cost of the gestational surrogacy process.

Requiring an adoption after a traditional/genetic surrogacy journey to establish parental rights the way in which they were intended by the parties also presents the problem that nothing can be done to force the intended parents to honor their commitment to the traditional/genetic surrogate and to the child to follow through with filing an adoption petition if they no longer wish to do so. The agreement is void and unenforceable and there is no legal proceeding available to compel an adoption, so the traditional/genetic surrogate would remain the legal parent and be forced to choose to either parent or place the child for adoption with someone else (or else potentially face neglect charges by social services). This situation could conceivably arise due to changed circumstances in the lives of the intended parents such as changes in health, finances or marital status or due to a mental of physical disability the child is born with.

Even if the laws of the state(s) in which you practice force the parties in traditional/genetic surrogacy arrangements to pursue an adoption proceeding to secure the parental rights of the intended parent(s), it is important that we, as practitioners, respect the differences between traditional/genetic surrogates and birth mothers. We should make sure that the parties go through all of the clearances and take all of the other steps that would normally be required for a surrogacy journey. We should draft a surrogacy agreement or memorandum of understanding for the parties, even if we know that it will be void and unenforceable because there is something unquestionably important about having the parties read in black and white the terms of what they are planning to undertake. And we should not be referring to these women as mothers, genetic mothers, birth mothers, surrogate mothers, biological mothers, or any similar term when the intent of all parties is that this woman is not and will not be a parent/mother to the resulting child. This is true in our agreements/memorandums of understanding and also the paperwork submitted to the Court (whenever possible). As we all know, this is an ever-evolving area of law and any given case could be the one that ends up in litigation that ends up changing the legal landscape regarding traditional/genetic surrogacy, so it is critical that we properly address the unique nature of these cases in every way possible.