Etude sur les aspects légaux et la pratique de la gestation pour autrui aux USA

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Cette note a pour objectif d'analyser les différentes situations résultant de la législation et de l'encadrement de la pratique de la GPA aux Etats-Unis. Elle a également pour but de préciser les termes utilisés et de présenter les différentes catégories de GPA, rappelées dans la « Loi Uniforme sur la Parenté de 2002». En résumé, la majorité des états ont statué sur la légalisation de la GPA et l'ont fait à partir du critère de non rémunération de la gestatrice (en dehors du remboursement des frais inhérents à la grossesse).

Préambule :

L'utilisation du vocable « mère porteuse » recouvre des situations médicales et législatives très différentes. La majorité des media se concentrant sur l'aspect sensationnel de la pratique, de nombreuses confusions sont faites entraînant une vision caricaturale. Il convient d'être précis quant au vocabulaire employé.

Définitions :

Gestational Surrogacy : « gestation pour autrui », c'est-à-dire le fait pour une femme de porter pour autrui un enfant à naître qui n'a aucun lien génétique avec elle, ce qui implique de passer par une Fécondation In Vitro. C'est cette absence de lien génétique qui permet de faire jouer la clause de « l'intention » en matière de filiation qui existe dans la plupart des législations des états US.

Traditional Surrogacy : « procréation pour autrui », c'est-à-dire le fait pour une femme de porter pour autrui un enfant à naître qui a un lien génétique avec elle, ce qui implique de passer par une simple insémination de sperme qui n'est pas obligatoirement réalisée par un médecin. C'est cette présence d'un lien génétique avec la gestatrice qui soulève un interdit dans la plupart des législations des états américains ou qui oblige de passer par une procédure d'adoption.

Gestationnal Surrogacy Agreement : « accord de gestation pour autrui » : c'est un accord écrit entre la gestatrice (et son conjoint si elle vit en couple) et les parents intentionnels. Ce document décrit tous les implications, intentions et obligations des deux parties sur le plan médical et familial. Il permet de vérifier que les parties ont été correctement informées sur les différentes conséquences

et modalités de ce processus médical, et de vérifier leur consentement à ces éléments. Sauf exception, comme tout consentement, il n'est pas exécutoire et peut-être révoqué à tout moment. Si les deux parties le souhaitent, cet agrément peut être présenté à un juge qui établira un jugement en parenté sur la base de l'intention reconnue comme élément indéniable de la filiation en l'absence de lien génétique contraire (pour plus de détails, voir le chapitre 8 du »Uniform Parentage Act de 2002 » - « Loi uniforme sur la filiation » mis en annexe). Ainsi, contrairement à l'idée préconçue, la filiation ne relève pas d'un contrat de droit privé, mais bien des dispositions de la loi et du contrôle du juge.

Commercial Surrogacy : GPA où la gestatrice est rémunérée bien au-delà de ses frais et dépenses. Ceci entraîne l'interdiction de cette pratique de GPA dans la plupart des Etats.

Compensated Surrogacy : GPA où la gestatrice est dédommagée de ses frais et dépenses, et des efforts que demande l'état de grossesse. Le montant doit rester inférieur à celui d'un salaire pour ne pas être considéré comme une rémunération. Ceci reste interdit dans une proportion non négligeable d'états.

Uncompensated Surrogacy : GPA où la gestatrice est raisonnablement défrayée de ses frais et dépenses, et ceci peut conditionner la décision du juge pour la filiation. Ceci est la règle pour la plupart des états.

Pour statuer sur la légalité de la gestation pour autrui dans chaque état, il a été pris comme critères la possibilité d'établir et d'appliquer un accord selon ce dernier type de GPA (« uncompensated gestational surrogacy agreement ») et la possibilité d'obtenir un jugement en parenté reconnaissant obligatoirement les parents intentionnels comme les parents légaux de l'enfant à naître par cette procédure.

Cartographie par état :

Les lois et jurisprudences ont été analysées état par état. Dans certains états, les « surrogacy agreements » sont déclarés nuls et les jugements en parenté sont établis sur la base de l'intérêt de l'enfant, c'est-à-dire au nom des parents d'intention sauf exception rarissime. Dans ce cas, la situation juridique n'a pas été classée comme « reconnaissance légale » mais comme ne débouchant pas sur « un statut clair ».

Pour les états qui interdisent les « uncompensated surrogacy agreement », ceci n'empêche pas que des jugements en parenté soient établis sur la base de l'intérêt de l'enfant, d'autant plus que ces jugements peuvent avoir été établis dans un autre état que celui de résidence de la gestatrice. La situation juridique a

été alors classée dans la catégorie « interdiction », même s'il existe une pratique. C'est pourquoi il a été ajouté pour chaque état le nombre de cliniques ayant déclaré au moins une procédure de gestation pour autrui pour l'année 2005 (source : chiffres 2005 de la S.A.R.T (Society for Assisted Reproduction Technology). pour les 422 cliniques de médecine reproductive des USA).

Etats où la GPA est déclarée illégale (9) :

- Arizona (mais 3 cliniques déclarent une pratique de la GPA en 2005)
- Delaware
- District of Columbia
- Indiana (mais 5 cliniques déclarent une pratique de la GPA en 2005)
- Louisiane (mais 1 clinique déclare une pratique de la GPA en 2005)
- Michigan (mais 4 cliniques déclarent une pratique de la GPA en 2005)
- Nebraska (mais 2 cliniques déclarent une pratique de la GPA en 2005)
- New York (mais 7 cliniques déclarent une pratique de la GPA en 2005)
- Dakota du Nord (mais 1 clinique déclare une pratique de la GPA en 2005)

Etats où la GPA est légalisée par une loi et encadrée (14) :

- Arkansas (2 cliniques déclarent une pratique de la GPA en 2005)
- Floride (16 cliniques déclarent une pratique de la GPA en 2005)
- Illinois (13 cliniques déclarent une pratique de la GPA en 2005)
- Nevada (4 cliniques déclarent une pratique de la GPA en 2005)
- New Hampshire
- Nouveau Mexique
- Oregon (4 cliniques déclarent une pratique de la GPA en 2005)
- Rhode Island (1 clinique déclare une pratique de la GPA en 2005)
- Tennessee (1 clinique déclare une pratique de la GPA en 2005)
- Texas (11 cliniques déclarent une pratique de la GPA en 2005)
- Utah (1 clinique déclare une pratique de la GPA en 2005)
- Virginie (7 cliniques déclarent une pratique de la GPA en 2005)
- Washington (3 cliniques déclarent une pratique de la GPA en 2005)
- WestVirginia

Etats où la GPA est légalisée par la jurisprudence et encadrée (11) :

- Alabama (1 clinique déclare une pratique de la GPA en 2005)
- Californie (39 cliniques déclarent une pratique de la GPA en 2005)
- Connecticut (4 cliniques déclarent une pratique de la GPA en 2005)
- Kentucky (1 clinique déclare une pratique de la GPA en 2005)
- Maryland (3 cliniques déclarent une pratique de la GPA en 2005)
- Massachusetts (5 cliniques déclarent une pratique de la GPA en 2005)
- Minnesota (3 cliniques déclarent une pratique de la GPA en 2005)
- New Jersey (8 cliniques déclarent une pratique de la GPA en 2005)
- Ohio (7 cliniques déclarent une pratique de la GPA en 2005)
- Pennsylvanie (8 cliniques déclarent une pratique de la GPA en 2005)
- Caroline du Sud (2 cliniques déclarent une pratique de la GPA en 2005)

Etats où la situation légale de la GPA n'est pas clairement établie (17) :

- Alaska
- Colorado (4 cliniques déclarent une pratique de la GPA en 2005)
- Georgia (3 cliniques déclarent une pratique de la GPA en 2005)
- Hawaii (1 clinique déclare une pratique de la GPA en 2005)
- Idaho (1 clinique déclare une pratique de la GPA en 2005)
- Iowa (1 clinique déclare une pratique de la GPA en 2005)
- Kansas (3 cliniques déclarent une pratique de la GPA en 2005)
- Maine (pas de clinique de la reproduction dans cet état)
- Mississippi
- Missouri (4 cliniques déclarent une pratique de la GPA en 2005)
- Montana (pas de clinique de la reproduction dans cet état)
- Caroline du Nord (2 cliniques déclarent une pratique de la GPA en 2005)
- Oklahoma
- Sud Dakota
- Vermont
- Wisconsin (2 cliniques déclarent une pratique de la GPA en 2005)
- Wyoming (pas de clinique de la reproduction dans cet état)

Conclusion :

Depuis les quelques procès retentissants des années 80 et 90 qui avaient focalisé l'attention des media, il n'y a plus de débat sur la légalisation de la GPA aux USA, la majorité des états l'ayant admise et ayant évolué vers une situation autorisant et encadrant la pratique de la gestation pour autrui pour les couples infertiles. Celle-ci se pratique dans un cadre très majoritairement altruiste, presque tous les états condamnant le versement de sommes d'argent autres que pour rembourser certains frais inhérents à la grossesse.

Les débats résiduels relatifs à la GPA portent plutôt sur :

- l'accès des personnes célibataires ou des couples homosexuels à ces techniques,
- et sur la ségrégation par l'argent du fait de l'absence de système de prise en charge financière par la plupart des assurances médicales.

ANNEXE 1 : Article 8 du « Uniform Parentage Act », 2002

ARTICLE 8
GESTATIONAL AGREEMENT

Comment

The longstanding shortage of adoptable children in this country has led many would-be parents to enlist a gestational mother (previously referred to as a "surrogate mother") to bear a child for them. As contrasted with the assisted reproduction regulated by Article 7, which involves the would-be parent or parents and most commonly one and sometimes two anonymous donors, the gestational agreement (previously known as a surrogacy agreement) provided in this article is designed to involve at least three parties; the intended mother and father and the woman who agrees to bear a child for them through the use of assisted reproduction (the gestational mother). Additional people may be involved. For example, if the proposed gestational mother is married, her husband, if any, must be included in the agreement to dispense with his presumptive paternity of a child born to his wife. Further, an egg donor or a sperm donor, or both, may be involved, although neither will be joined as a party to the agreement. Thus, by definition, a child born pursuant to a gestational agreement will need to have maternity as well as paternity clarified.

The subject of gestational agreements was last addressed by the National Conference of Commissioners on Uniform State Laws in 1988 with the adoption of the UNIFORM STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT (USCACA). Because some Commissioners believed that such agreements should be prohibited, while others believed that such agreements should be allowed, but regulated, USCACA offered two alternatives on the subject; either to regulate such activities through a judicial review process or to void such contracts. As might have been predicted, the only two states to enact USCACA selected opposite options; Virginia chose to regulate such agreements, while North Dakota opted to void them.

In the years since the promulgation of USCACA (and virtual de facto rejection of that Act), approximately one-half of the states developed statutory or case law on the issue. Of those, about one-half recognized such agreements, and the other half rejected them. A survey in December, 2000, revealed a wide variety of approaches: eleven states allow gestational agreements by statute or case law; six states void such agreements by statute; eight states do not ban agreements per se, but statutorily ban compensation to the gestational mother, which as a practical matter limits the likelihood of agreement to close relatives; and two states judicially refuse to recognize such agreements. In states rejecting gestational agreements, the legal status of children born pursuant to such an agreement is uncertain. If gestational agreements are voided or criminalized, individuals determined to become parents through this method will seek a friendlier legal forum. This raises a host of legal issues. For example, a couple may return to their home state with a child born as the consequence of a gestational agreement recognized in another state. This presents a full faith and credit question if their home state has a statute declaring gestational agreements to be void or criminal.

Despite the legal uncertainties, thousands of children are born each year pursuant to gestational agreements. One thing is clear; a child born under these circumstances is entitled to have its status clarified. Therefore, NCCUSL once again ventured into this controversial subject, withdrawing USCACA and substituting bracketed Article 8 of the new UPA. The article incorporates many of the USCACA provisions allowing validation and enforcement of gestational agreements, along with some important modifications. The article is bracketed because of a concern that state legislatures may decide that they are still not ready to address

gestational agreements, or that they want to treat them differently from what Article 8 provides. States may omit this article without undermining the other provisions of the UPA (2002).

Article 8's replacement of the USCACA terminology, “surrogate mother,” by “gestational mother” is important. First, labeling a woman who bears a child a “surrogate” does not comport with the dictionary definition of the term under any construction, to wit: “a person appointed to act in the place of another” or “something serving as a substitute.” The term is especially misleading when “surrogate” refers to a woman who supplies both “egg and womb,” that is, a woman who is a genetic as well as gestational mother. That combination is now typically avoided by the majority of ART practitioners in order to decrease the possibility that a genetic\gestational mother will be unwilling to relinquish her child to unrelated intended parents. Further, the term “surrogate” has acquired a negative connotation in American society, which confuses rather than enlightens the discussion.

In contrast, term “gestational mother” is both more accurate and more inclusive. It applies to both a woman who, through assisted reproduction, performs the gestational function without being genetically related to a child, and a woman is both the gestational and genetic mother. The key is that an agreement has been made that the child is to be raised by the intended parents. The latter practice has elicited disfavor in the ART community, which has concluded that the gestational mother’s genetic link to the child too often creates additional emotional and psychological problems in enforcing a gestational agreement.

The new UPA treats entering into a gestational agreement as a significant legal act that should be approved by a court, just as an adoption is judicially approved. The procedure established generally follows that of USCACA, but departs from its terms in several important ways. First, non-validated gestational agreements are unenforceable (not void), thereby providing a strong incentive for the participants to seek judicial scrutiny. Second, there is no longer a requirement that at least one of the intended parents would be genetically related to the child born of the gestational agreement. Third, individuals who enter into non-validated gestational agreements and later refuse to adopt the resulting child may be liable for support of the child.

Although legal recognition of gestational agreements remains controversial, the plain fact is that medical technologies have raced ahead of the law without heed to the views of the general public--or legislators. Courts have recently come to acknowledge this reality when forced to render decisions regarding collaborative reproduction, noting that artificial insemination, gestational carriers, cloning and gene splicing are part of the present, as well as of the future. One court predicted that even if all forms of assisted reproduction were outlawed in a particular state, its courts would still be called upon to decide on the identity of the lawful parents of a child resulting from those procedures undertaken in less restrictive states. This court noted:

Again we must call on the Legislature to sort out the parental rights and responsibilities of those involved in artificial reproduction. 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. Even if all the means of artificial reproduction were outlawed with draconian criminal penalties visited on the doctors and parties involved, courts would still be called upon to decide who the lawful parents are and who--other than the taxpayers--is obligated to provide maintenance and support for the child. These cases will not go away. Again we must call on the Legislature to sort out the parental rights and responsibilities of those involved in artificial reproduction. 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.
Buzzanca v. Buzzanca, 72 Cal. Rptr. 2d 280 (Cal. Ct. App. 1998).

SECTION 801. GESTATIONAL AGREEMENT AUTHORIZED.
(a) 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.

(b) The man and the woman who are the intended parents must both be parties to the gestational agreement.
(c) A gestational agreement is enforceable only if validated as provided in Section 803.
(d) A gestational agreement does not apply to the birth of a child conceived by means of sexual intercourse.
(e) A gestational agreement may provide for payment of consideration.
(f) A gestational agreement may not limit the right of the gestational mother to make decisions to safeguard her health or that of the embryos or fetus.

Comment
Source: USCACA §§ 1(3), 5, 9.

The previous uniform act on this subject, USCACA, proposed two alternatives, one of which was to declare that gestational agreements were void. Subsection (a) rejects that approach. The scientific state of the art and the medical facilities providing the technological capacity to utilize a woman other than the woman who intends to raise the child to be the gestational mother, guarantee that such agreements will continue to be written. Subsection (a) recognizes that certainty and initiates a procedure for its regulation by a judicial officer.
This section permits all of the individuals directly involved in the procedure to enter into a written agreement; this includes the intended parents, the gestational mother, and her husband, if she is married. In addition, if known donors are involved, they also must sign the agreement. The agreement must provide that the intended parents will be the parents of any child born pursuant to the agreement while all of the others (gestational mother, her husband, if any, and the donors, as appropriate) relinquish all parental rights and duties.
Under subsection (b), a valid gestational agreement requires that the man and woman who are the intended parents, whether married or unmarried, to be parties to the gestational agreement. This reflects the Act’s comprehensive concern for the best interest of non-marital as well as marital children born as the result of a gestational agreement. Throughout UPA the goal is to treat marital and non-marital children equally.
Subsection (c) provides that in order to be enforceable, the agreement must be validated by the appropriate court under § 803.
Subsection (e) is intended to shield gestational agreements that include payment of the gestational mother from challenge under "baby-selling" statutes that prohibit payment of money to the birth mother for her consent to an adoption.
Subsection (f) is intended to acknowledge that the gestational mother, as a pregnant woman, has a constitutionally-recognized right to decide issues regarding her prenatal care. In other

words, the intended parents have no right to demand that the gestational mother undergo any particular medical regimen at their behest.

(Comment updated December 2002)

SECTION 802. REQUIREMENTS OF PETITION.

(a) The intended parents and the prospective gestational mother may commence a proceeding in the [appropriate court] to validate a gestational agreement.

(b) A proceeding to validate a gestational agreement may not be maintained unless:

(1) the mother or the intended parents have been residents of this State for at least 90 days;

(2) the prospective gestational mother's husband, if she is married, is joined in the proceeding; and

(3) a copy of the gestational agreement is attached to the [petition].

Comment

Source: USCACA § 6(a).

Sections 802 and 803, the core sections of this article, provide for state involvement, through judicial oversight, of the gestational agreement before, during, and after the assisted reproduction process. The purpose of early involvement is to ensure that the parties are appropriate for a gestational agreement, that they understand the consequences of what they are about to do, and that the best interests of a child born of the gestational agreement are considered before the arrangement is validated. The trigger for state involvement is a petition brought by all the parties to the arrangement requesting a judicial order authorizing the assisted reproduction contemplated by their agreement. The agreement itself must be submitted to the court.

To discourage forum shopping, subsection (b) (1) requires that the petition may be filed only in a state in which the intended parents or the gestational mother have been residents for at least ninety days.

SECTION 803. HEARING TO VALIDATE GESTATIONAL AGREEMENT.

(a) If the requirements of subsection (b) are satisfied, a court may issue an order validating the gestational agreement and declaring that the intended parents will be the parents of a child born during the term of the of the agreement.

(b) The court may issue an order under subsection (a) only on finding that:

(1) the residence requirements of Section 802 have been satisfied and the parties have submitted to the jurisdiction of the court under the jurisdictional standards of this [Act];

(2) unless waived by the court, the [relevant child-welfare agency] has made a home study of the intended parents and the intended parents meet the standards of suitability applicable to adoptive parents;

(3) all parties have voluntarily entered into the agreement and understand its terms;

(4) adequate provision has been made for all reasonable health-care expense associated with the gestational agreement until the birth of the child, including responsibility for those expenses if the agreement is terminated; and

(5) the consideration, if any, paid to the prospective gestational mother is reasonable.

Comment

Source: USCACA § 6(b).

This pre-conception authorization process for a gestational agreement is roughly analogous to prevailing adoption procedures in place in most states. Just as adoption contemplates the transfer of parentage of a child from the birth parents to the adoptive parents, a gestational agreement involves the transfer from the gestational mother to the intended parents. The Act is designed to protect the interests of the child to be born under the gestational agreement as well as the interests of the gestational mother and the intended parents.

In contrast to USCACA (1988) § 1(3), there is no requirement that at least one of the intended parents be genetically related to the child born of a gestational agreement.

Similarly, the likelihood that the gestational mother will also be the genetic mother is not directly addressed in the new Act, while USCACA (1988) apparently assumed that such a fact pattern would be typical. Experience with the intractable problems caused by such a combination has dissuaded the majority of fertility laboratories from following that practice. *See In re* Matter of Baby M., 537 A.2d 1227 (N.J. 1988).

This section seeks to protect the interests of the child in several ways. The major protection of the child is the authorization procedure itself. The Act requires closely supervised gestational arrangements to ensure the security and well being of the child. Once a petition has been filed, subsection (a) permits--but does not require--the court to validate a gestational agreement. If it validates, the court must declare that the intended parents will be the parents of any child born pursuant to, and during the term of, the agreement.

Subsection (b) requires the court to make five separate findings before validating the agreement. Subsection (b)(1) requires the court to ensure that the 90-day residency requirement of § 802 has been satisfied and that it has jurisdiction over the parties;

Under subsection (b)(2), the court will be informed of the results of a home study of the intended parents who must satisfy the suitability standards required of prospective adoptive parents.

The interests of all the parties are protected by subsection (b)(3), which is designed to protect the individuals involved from the possibility of overreaching or fraud. The court must find that all parties consented to the gestational agreement with full knowledge of what they agreed to do, which necessarily includes relinquishing the resulting child to the intended parents who are obligated to accept the child.

The requirement of assurance of health-care expenses until birth of the resulting child imposed by subsection (b)(4) further protects the gestational mother.

Finally, subsection (b)(5) mandates that the court find that compensation of the gestational mother, if any, is reasonable in amount.

Section 803, spells out detailed requirements for the petition and the findings that must be made before an authorizing order can be issued, but nowhere states the consequences of violations of the rules. Because of the variety of types of violations that could possibly occur, a bright-line rule concerning the effect of such violations is inappropriate. The consequences of a failure to abide by the rules of this section are left to a case-by-case determination. A court should be guided by the Act's intention to permit gestational agreements and the equities of a particular situation. Note that § 806 provides a period for termination of the agreement and vacating of the order. The discovery of a failure to abide by the rules of § 803 would certainly provide an occasion for terminating the agreement. On the other hand, if a failure to abide by the rules of § 803 is discovered by a party during a time when § 806 termination is permissible, failure to seek termination might be an appropriate reason to stop the party from later seeking to overturn or ignore the § 803 order.

(Comment updated December 2002)

SECTION 804. INSPECTION OF RECORDS.
The proceedings, records, and identities of the individual parties to a gestational agreement under this [article] are subject to inspection under the standards of confidentiality applicable to adoptions as provided under other law of this State.

Comment
The procedures involved in this article are exceptionally personal, thereby warranting protection from invasions of privacy. Adoption records provide a suitable model for these records.

SECTION 805. EXCLUSIVE, CONTINUING JURISDICTION.
Subject to the jurisdictional standards of [Section 201 of the Uniform Child Custody Jurisdiction and Enforcement Act], the court conducting a proceeding under this [article] has exclusive, continuing jurisdiction of all matters arising out of the gestational agreement until a child born to the gestational mother during the period governed by the agreement attains the age of 180 days.

Comment
Source: USCACA § 6(e).
This section is designed to minimize the possibility of parallel litigation in different states and the consequent risk of child napping for strategic purposes. The court that validated the gestational agreement will have authority to enforce the gestational agreement until the child is 180 days old. Note that only the parentage issues and enforcement issues are covered; collateral matters, such as custody, visitation, and child support are not covered by this Act.

SECTION 806. TERMINATION OF GESTATIONAL AGREEMENT.
(a) After issuance of an order under this [article], but before the prospective gestational mother becomes pregnant by means of assisted reproduction, the prospective gestational mother, her husband, or either of the intended parents may terminate the gestational agreement by giving written notice of termination to all other parties.
(b) The court for good cause shown may terminate the gestational agreement.
(c) An individual who terminates a gestational agreement shall file notice of the termination with the court. On receipt of the notice, the court shall vacate the order issued under this [article]. An individual who does not notify the court of the termination of the agreement is subject to appropriate sanctions.
(d) Neither a prospective gestational mother nor her husband, if any, is liable to the intended parents for terminating a gestational agreement pursuant to this section.

Comment
Source: USCACA § 7.
Subsection (a) permits a party to terminate a gestational agreement after the authorization order by canceling the arrangement before the pregnancy has been established. This provides for cancellation during a time when the interests of the parties would not be unduly prejudiced by termination. By definition, the procreation process has not begun. The intended parents certainly have an expectation interest during this time, but the nature of this interest is little

different from that which they would have while they were attempting to create a pregnancy through traditional means. In contrast to the next subsection, termination of the agreement does not require "good cause."

Subsection (b) gives the court the right to cancel the agreement for cause, which is left undefined.

Under subsection (c) a party who wishes to terminate the agreement must inform the other parties in writing, and must also file notice with the court. The court must then vacate the order validating the agreement. An individual who does not notify the court of his/her termination of the agreement is subject to sanction.

USCACA § 7(b) specifically dealt with termination of a "surrogacy agreement" by a gestational mother who provided the egg for the assisted conception. This possibility is not repeated in the new UPA because there is only a remote likelihood that an agreement for the gestational mother to furnish the egg will be countenanced. Assisted reproduction, as generally conducted by medical facilities today, disapproves of that practice.

Subsection (d) provides that before pregnancy a gestational mother is not liable to the intended parents for terminating the agreement. Although the new Act does not explicitly provide for termination of the agreement after pregnancy. Several sections deal with this issue under certain described circumstances. Section 801(f) recognizes that the gestational mother has plenary power to decide issues of her health and the health of the fetus. Sections 803(a) and 807(a) direct that the intended parents are in fact the parents of the child with an enforceable right to the possession of the child.

SECTION 807. PARENTAGE UNDER VALIDATED GESTATIONAL AGREEMENT.

(a) Upon birth of a child to a gestational mother, the intended parents shall file notice with the court that a child has been born to the gestational mother within 300 days after assisted reproduction. Thereupon, the court shall issue an order:

(1) confirming that the intended parents are the parents of the child ;

(2) if necessary, ordering that the child be surrendered to the intended parents; and

(3) directing the [agency maintaining birth records] to issue a birth certificate naming the intended parents as parents of the child.

(b) If the parentage of a child born to a gestational mother is alleged not to be the result of assisted reproduction, the court shall order genetic testing to determine the parentage of the child.

(c) If the intended parents fail to file notice required under subsection (a), the gestational mother or the appropriate State agency may file notice with the court that a child has been born to the gestational mother within 300 days after assisted reproduction. Upon proof of a court order issued pursuant to Section 803 validating the gestational agreement, the court shall order the intended parents are the parents of the child and are financially responsible for the child.

Comment

Source: USCACA § 8.

Under subsection (a), the intended parents of a child born pursuant to an approved gestational agreement within 300 days of the use of assisted reproduction are deemed to be the legal parents if the order under § 803 is still in effect. Notice of the birth of the child must be filed by the intended parents. On receipt of the notice, the court shall issue an order confirming that the intended parents are the legal parents of the child and direct the issuance of a birth certificate to confirm the court's determination. If necessary, the court may also order the gestational mother to surrender the child to the intended parents.

Subsection (c) clarifies the remedies available if the intended parents refuse to accept a child who is born as the result of a gestational agreement.

(Comment updated December 2002)

SECTION 808. GESTATIONAL AGREEMENT: EFFECT OF SUBSEQUENT MARRIAGE.

After the issuance of an order under this [article], subsequent marriage of the gestational mother does not affect the validity of a gestational agreement, her husband's consent to the agreement is not required, and her husband is not a presumed father of the resulting child.

Comment

Source: USCACA § 9.

If, after the original court order validates the gestational agreement, the gestational mother marries, the gestational agreement continues to be valid and the consent of her new husband is not required. The new husband is neither a party to the original action nor the presumed father of a resulting child, and therefore ought not be burdened with the status of parent unless he is the genetic father or chooses to adopt the child.

SECTION 809. EFFECT OF NONVALIDATED GESTATIONAL AGREEMENT.

(a) A gestational agreement, whether in a record or not, that is not judicially validated is not enforceable.

(b) If a birth results under a gestational agreement that is not judicially validated as provided in this [article], the parent-child relationship is determined as provided in [Article] 2.

(c) Individuals who are parties to a nonvalidated gestational agreement as intended parents may be held liable for support of the resulting child, even if the agreement is otherwise unenforceable. The liability under this subsection includes assessing all expenses and fees as provided in Section 636.]

Comment

Source: USCACA §§ 5(b), 10.

This section distinguishes between an unenforceable agreement and a prohibited one. Given the widespread use of assisted reproductive technologies in modern society, the Act attempts only to regularize the parentage aspects of the science, not to regulate the practice of assisted reproduction. If individuals choose to ignore the protections afforded gestational agreements by the Act, parentage questions will remain when a child is born as a result of an non-validated gestational agreement. The Act provides no legal assistance to the intended parents. The gestational mother is denominated the mother irrespective of the source of the eggs, and donors of either eggs or sperm are not parents of the child. Notwithstanding the fact that the intended parents in a non-validated agreement may not enforce that agreement, subsection (c) provides that a court may hold the intended parents to an obligation to support the resulting child of the unenforceable agreement.

Under USCACA (1988), agreements that were not approved were declared "void." Under the new UPA, a non-approved agreement is "unenforceable." The result may be virtually the same in some instances. As under the prior Act, the gestational mother is the mother of a child conceived through assisted reproduction if the gestational agreement has not been judicially approved as provided in this article. Her husband, if he is a party to such agreement, is

resumed to be the father. If the gestational mother's husband is not a party to the agreement, or if she is unmarried, paternity of the child will be left to existing law, if any. If the mother decides to keep the child, the intended parents have no recourse. If the parties agree that the intended parents will raise the child, adoption is the only means through which they may become the legal parents of the child will be through adoption.

Le document complet peut-être consulté à :

www.nccusl.org

http://www.law.upenn.edu/bll/ulc/ulc_frame.htm

ANNEXE 2 : détails des dispositifs légaux par états :

Alabama Surrogacy Law

There is no provision on surrogacy in Alabama state law, but it appears to be permitted.

Summary: Alabama law does not directly address surrogacy, but at least one court has acknowledged the parental rights of non-biological participants in a surrogacy arrangement.

Detail: There is no statutory provision in Alabama law specifically addressing the validity of surrogacy arrangements. However, statutes dealing with placing children for adoption and "baby-buying" specifically indicate that they do not apply to surrogate motherhood. The case law has not specifically dealt with the validity of surrogacy agreements. It would seem, however, that courts will consider a participant in a surrogacy agreement with no biological relationship to the child as a parent in contemplating the best interests of the child. One 1996 case arose in the context of a divorce proceeding between a husband and wife who had been part of a traditional surrogacy (in which the surrogate mother is the biological contributor of the egg). The trial court awarded custody to the wife even though she was biologically unrelated to the child. The husband challenged the decision on the ground that he was the child's only biological parent. The court, however, rejected his request and permitted the child to remain with the wife on the basis of the child's best interest. Although the validity of the surrogacy contract was not addressed, the court did consider the non-biological mother a legal parent.

Alaska Surrogacy Law

There is no provision on surrogacy in Alaska state law.

Summary: The legal status of surrogacy agreements in Alaska is unclear. State law is silent regarding surrogacy and only one reported case of limited importance has touched on the issue.

Detail: The only case dealing with surrogacy in the Alaska courts appears to treat surrogacy as a type of adoption. In one 1989 custody case, the plaintiff was a Chickasaw woman who orally agreed to be inseminated by sperm from her sister's husband to bear a child for them and then signed legal adoption papers upon relinquishing custody. She sought to have the adoption invalidated on the basis that it had not been carried out in accordance with a relevant federal statute (related to Indian governance). The Supreme Court of Alaska rejected her petition, finding that the state adoption law's one-year statute of limitations had passed.

Arizona Surrogacy Law

Arizona law is unclear on the issue of surrogacy agreements.

Summary: The legal status of surrogacy agreements in Arizona is unclear. While Arizona law prohibits both traditional (in which the surrogate mother is the biological contributor of the egg) and gestational (in which the surrogate mother is not the biological contributor of the egg) surrogacy agreements, part of that statute has been ruled unconstitutional by an appellate court.

Detail: Arizona statute forbids "surrogate parent contracts." However, should a surrogacy occur, the law states that the surrogate is the legal mother of the child she carries and, if she is married, there is a rebuttable presumption that her husband is the child's father. The automatic determination of surrogate as legal mother was ruled unconstitutional by an Arizona appeals court. The case law calls into question the validity of the prohibition of surrogacy arrangements. However, because the appellate court opinion may only have struck down one provision of the surrogacy law, and because the Arizona Supreme Court chose not to review the case, the precise scope of the prohibition is unclear. In one case in 1994, a husband and wife entered into a gestational surrogacy agreement. Eggs from the wife were removed, fertilized with the husband's sperm and implanted in the gestational surrogate, who became pregnant with triplets. During the course of the surrogate's pregnancy, the wife filed for divorce and sought custody of the unborn children. The husband argued that he was the biological father of the children and, pursuant to statute, the surrogate was the biological mother, leaving the wife no standing to seek custody. The trial court found the section of statutory prohibition on surrogacy agreements which automatically conferred status as legal mother to the surrogate unconstitutional. The Court of Appeals, Division One upheld the trial court's conclusion, finding that the statute violated the Equal Protection Clause of the Fourteenth Amendment by granting the intended father an opportunity to establish paternity but denying the same chance to the intended mother. Thus, at least in the counties within the jurisdiction of Appellate Division One (Apache, Coconino, La Paz, Maricopa, Mohave, Navajo, Yavapai and Yuma) a purported mother is entitled to rebut the presumption that the

Arkansas Surrogacy Law

The statutes, codified at Arkansas Code Annotated Section 9-10-201 et seq., are monumental deviations from the more familiar laws around the country that mandate that a child conceived through artificial insemination of a married woman shall be deemed to be the child of the woman and her husband. In Arkansas, the child born as the result of artificial insemination pursuant to a surrogacy contract is deemed to be the child of the biological father and his wife

if he is married. If the biological father is not married, the child is deemed to be his child only. The child's birth certificate recognizes the parents as those contemplated in the surrogacy contract. The marital status of the surrogate in either situation is irrelevant. The surrogacy contract controls the outcome of any disputes that might arise.

The Arkansas law has two major advantages not found elsewhere. First, as noted above, the marital status of the surrogate is irrelevant, meaning that there is never a presumption that a married surrogate's husband is the legal father of a child born pursuant to the surrogacy contract. The statutes in other states that create that presumption were enacted for the benefit of married couples seeking to conceive with donor semen when the husband was infertile. The protection of people seeking to use a surrogate mother was never contemplated when those artificial insemination statutes were enacted. Further, the Arkansas law promotes the surrogacy concept in that a subsequent step-parent adoption is not necessary to get the intended mother's name listed on the child's birth certificate instead of the surrogate's name. The birth certificate lists the parents as those intended in the surrogacy contract. This holds true even when the surrogate carries a child for an unmarried woman after being inseminated with semen from an anonymous donor.

There have been no custody battles in Arkansas as the result of a surrogate mother breaching a surrogacy contract. Indeed, the plain language of the statutes suggest that there could be no custody dispute. A number of family court judges have presided over divorces and custody battles between biological fathers and their wives when their children were born through surrogacy. In those cases, the children have been treated the same as if they were the biological product of both parents and custody was awarded to the best parent just as in any divorce. The father's biological tie to the child gave him no more or no less right to seek custody, and likewise, his wife enjoyed the same right.

Some individuals and surrogate mother services have utilized the benefits of Arkansas' law by having their surrogates deliver their child in Arkansas. When this is not feasible, the use of an Arkansas-based surrogacy service can be beneficial to the parties regardless of their states of residence when the surrogacy contract is drawn and executed under the laws of Arkansas. There are currently a few adoption attorneys in Arkansas assisting in arranging surrogacy contracts as well as one attorney-operated surrogate mother service offering surrogate candidates from every region of the country.

California Surrogacy Law

There is no provision on surrogacy in California state law, but it appears to be permitted.

Summary: While California has no law regarding surrogacy, courts have consistently upheld both traditional (in which the surrogate mother is the

biological contributor of the egg) and gestational (in which the surrogate mother is not the biological contributor of the egg) surrogacy arrangements.
Detail: There is no provision in California law on the subject of surrogacy. Courts have looked to the Uniform Parentage Act to interpret several cases concerning surrogacy arrangements. California courts have consistently upheld the intended parents' rights and obligations to their parenthood, whether through a traditional or gestational surrogacy. However some case law indicates that for a woman to even be considered in a parentage dispute, she may have to have either a genetic or gestational relationship to the child. The most recent California surrogacy case, in 2003, has numerous complications that make it irrelevant to individuals seeking guidance in surrogacy agreements (the dispute concerned a fertility clinic's negligence). However, the court's language seems to reinforce the Moschetta case over the Buzzanca case in its rigid application of the California Family Code's genetic or gestational parentage requirement. In one 2000 case, the Court of Appeal held that the "intended parents" reasoning from prior cases applied in the context of a different-sex domestic partnership. The Court upheld the male partner's ability to sue for paternal rights under an artificial insemination agreement with his female partner. The insemination procedure used an anonymous donor and thus the male partner had no genetic relation to the child. One case in 1998 addressed the issue of surrogacy agreements in which the surrogate mother gestates her own ovum fertilized by sperm from an anonymous donor. Neither of the intended parents had a genetic link to the child. The intended/contracting mother sought to be declared the legal mother of the child, and the intended/contracting father sought to be declared unrelated to it (the surrogate mother was not involved). The court found that, in light of the lack of state law on point and of the state interest in establishing parentage, it should view both parents' rights and responsibilities under the most closely related state statute, which it determined to be the law governing infertile fathers consenting to their wives' artificial insemination by an anonymous donor. That statute (Family Code § 7613) says that if a man enters into such an agreement, he is the legal father, despite the lack of genetic relation. Analogously, the court held that when a married couple uses a non-genetically related embryo and sperm implanted into a surrogate, intending to procreate, they are the lawful parents of the child. In one 1996 divorce case, the husband disputed the family court's jurisdiction to award temporary support because the child was the product of gestational surrogacy and was not genetically related to him or his wife. (In this case, an anonymous donor egg and sperm were implanted in the womb of a gestational surrogate, with the intent that the child of the surrogacy be that of the husband and wife.) The husband had signed a surrogacy agreement which named him as the intended father. The Court held that the father's signing of the surrogacy agreement was enough to grant jurisdiction to the family court to order temporary support while parenthood is determined. In one case in 1994, the court refused to recognize a surrogacy

agreement from which the surrogate mother wished to withdraw because of the intended parents' marital instability. The surrogacy agreement could not be considered a valid adoption because it was not consecrated in the presence of a social worker as required by California law. Furthermore, enforcing it as a surrogacy agreement would run counter to established law that the "intended parent" rule only comes into play to "break the tie" between two women, each of whom has either donated the ovum or carried the child. In this case, the intended mother had done neither, and therefore had no legal claim to the child. It is unclear why the court did not look to the donor insemination statute, as it did in a similar case. Although this appeals court chastised the trial court for deciding against the father because it was displeased with his behavior, it appears that the appeal was decided equally on situational particulars (i.e. the surrogate's desire to withdraw from the contract). The California Supreme Court held in 1993 that, in the absence of explicit guidance from the legislature on surrogacy, the judiciary should do its best to apply existing family law. That law asserts a "compelling state interest in establishing paternity for all children," but was promulgated before the possibility of gestational surrogacy and therefore seems to establish the possibility of double maternity. More specifically, Family Code § 7610 says that "the…relationship… [b]etween a child and the natural mother…may be established by proof of her having given birth to the child." This case establishes a rule for "tie-breaking" in this situation, which comes down on the side of surrogacy: the woman who intended to be the mother at the time of the surrogacy agreement should be the one granted custody.

Colorado Surrogacy Law

There is no provision on surrogacy in Colorado state law.

Summary: There are no provisions in Colorado law or reported or published cases dealing with the issue of surrogacy.

Connecticut Surrogacy Law

There is no provision on surrogacy in Connecticut state law, but it appears to be permitted.

Summary: While Connecticut law is silent with regard to surrogacy agreements, courts have addressed cases involving such agreements and upheld their terms.
Detail: No Connecticut appellate court has explicitly indicated that surrogacy contracts are valid, but cases involving such agreements have been adjudicated and parenting arrangements contemplated by those agreements have been

upheld. Additionally, a state superior court has upheld a surrogacy agreement. The Connecticut Supreme Court, in *Doe v. Doe*, decided a custody dispute in 1998 between a husband and wife over a child born to a surrogate mother through a traditional surrogacy agreement (in which the surrogate mother is the biological contributor of the egg). Based on a state statutory presumption that it is in the best interests of the child to be in the custody of a biological parent, the Court held that even though the wife was not biologically related to the child, her role in raising the child was enough to overcome the presumption. However, the Court explicitly stated that it was not addressing "whether, or to what extent a surrogate contract, by which the surrogate obligates herself to surrender the child to the child's father and his spouse, is enforceable." The Connecticut Supreme Court found in the 1998 case of *Doe v. Roe*, that a trial court had subject matter jurisdiction to approve an adoption agreement that includes a surrogate mother's consent to termination of parental rights. The surrogate mother had argued that the contract was void because it was against public policy. Nevertheless, the Court explicitly stated that it was not deciding the validity of surrogacy contracts.

In a 2002 case, *Vogel v. McBride*, a gay male couple had contracted with a surrogate to deliver an embryo developed from an egg fertilized by one of the men's sperm. The superior court ordered the hospital to place the names of both men on the birth certificate. The court went on to state, "The egg donor agreement and the gestational carrier agreement [were] valid, enforceable, irrevocable and of full legal effect" under the laws of Connecticut.

Delaware Surrogacy Law

There is no provision on surrogacy in Delaware state law, but it appears to be prohibited.

Summary: While Delaware law does not address surrogacy agreements, at least one court has ruled those agreements are against the public policy of the state.

Detail: While the Delaware Supreme Court has not ruled on the legality or enforceability of surrogacy contracts, a lower court held that a "contractual agreement to terminate parental rights … is against the public policy of this [s]tate and may not be enforced by the [c]ourt." One 1988 case did not involve a surrogacy agreement, but rather concerned an adoptive father who sought to terminate all parental rights over his wife's biological son through a "Property Division Agreement" after a divorce. The court noted that the Delaware Legislature had not "provide[d] for termination of parental rights by contractual agreement of the parents," and analogized the case to the well-publicized Baby M surrogacy case in New Jersey. It held that "the receipt of money in connection with an adoption is barred by Delaware law," and termination of parental rights through contractual agreement is forbidden.

District of Columbia Surrogacy Law

District of Columbia law prohibits surrogacy agreements.

Summary: District of Columbia law prohibits surrogacy agreements.
Detail: Under D.C. law, both traditional (in which the surrogate mother is the biological contributor of the egg) and gestational (in which the surrogate mother is not the biological contributor of the egg) surrogacy agreements are prohibited and unenforceable. Violation of the statute is punishable by a fine of up to $10,000, as much as one year in jail, or both.

Florida Surrogacy Law

Florida law permits surrogacy agreements for married couples only.

Summary: Florida law explicitly allows both gestational (in which the surrogate mother is not the biological contributor of the egg) and traditional (in which the surrogate mother is the biological contributor of the egg) surrogacy agreements, but neither is available to unmarried same-sex couples.
Detail: The gestational surrogacy statutes impose strict requirements on the contracts, among them limiting involvement to "couple[s that] are legally married and are both 18 years of age or older." The law governing traditional surrogacy arrangements, referred to as preplanned adoption agreements, connects those contracts to state adoption law. Florida law explicitly prohibits “homosexuals” from adopting. This law was upheld by the 11th Circuit Court of Appeals. In one case in 2000, the Florida Court of Appeals noted that the right to enter into surrogate-parenting agreements is reserved for married couples only and is one of the many rights not given to domestic partners. While the ruling concerned only the Broward County Domestic Partnership Act, Florida courts would likely interpret other county domestic partnership laws in a similar way.

Georgia Surrogacy Law

There is no provision on surrogacy in Georgia state law.

Summary: There are no provisions in Georgia law or reported or published cases dealing with the issue of surrogacy.

Hawaii Surrogacy Law

There is no provision on surrogacy in Hawaii state law.

Summary: There are no provisions in Hawaii law or reported or published cases dealing with the issue of surrogacy.

Idaho Surrogacy Law

There is no provision on surrogacy in Idaho state law, but it appears to be permitted.

Summary: There are no provisions in Hawaii law or reported or published cases dealing with the issue of surrogacy.

Illinois Surrogacy Law

Illinois law permits surrogacy agreements.

Summary: Illinois law provides for gestational surrogacy (where the surrogate mother is not biologically related to the child she is carrying), but does not address traditional surrogacy (in which the surrogate mother is the biological contributor of the egg).

Detail: According to Illinois law, a parent and child relationship may be established voluntarily by consent of the parties when: (1) the surrogate mother certifies she is not the biological mother; (2) the husband of the surrogate mother certifies he is not the biological father; (3) the biological mother certifies she donated the egg; (4) the biological father certifies he donated the sperm; and (5) a licensed physician certifies in writing that all of the above is true.

Indiana Surrogacy Law

Indiana law prohibits surrogacy agreements.

Summary: Indiana law declares surrogacy contracts unenforceable as against public policy.

Detail: State law declares surrogacy contracts "void and unenforceable." Specifically, the law lists several broad contractual terms that, if any is included, void a surrogacy agreement. Such forbidden terms include requiring the surrogate to provide a gamete (a mature sexual reproductive cell) to conceive a child, become pregnant herself or waive her parental rights or duties — provisions typically at the heart of any meaningful traditional (in which the surrogate mother is the biological contributor of the egg) or gestational (in

which the surrogate mother is not the biological contributor of the egg) surrogacy agreement.

Iowa Surrogacy Law

There is no provision on surrogacy in Iowa state law.

Summary: Iowa has no laws that specifically address the enforceability of surrogacy contracts. The state law prohibiting the purchase or sale of an individual specifically states that it does not apply to surrogate mother arrangements.

Kansas Surrogacy Law

There is no provision on surrogacy in Kansas state law, but it appears to be prohibited.

Summary: Kansas has no laws regarding surrogacy, but two attorney general opinions indicate that surrogate parenting agreements are unenforceable in the state.

Detail: One opinion of the state attorney general in 1996 addressed whether a surrogate fee would be considered a professional service governed under the provision of state law which addresses fees in adoption proceedings. The statute permits reasonable fees for "legal and other professional services rendered in connection with the placement or adoption." The opinion stated that surrogate motherhood does not fit into the definition of "professional service." Though this opinion indicates that a contract providing a fee for bearing a child for another may be unenforceable, it noted that it is permissible to provide reasonable living expenses for the mother during pregnancy. Another opinion in 1982 stated that a surrogate parent contract would be void as against public policy. The attorney general noted that the "commercialization of motherhood" had not been legitimated by the Kansas legislature, and that these contracts would be unenforceable public policy until they receive legislative approval.

Kentucky Surrogacy Law

There is no provision on surrogacy in Kentucky state law, but it appears to be permitted.

Summary: There is no statutory provision in Kentucky directly addressing the validity of surrogacy agreements, but an attorney general opinion and case law indicate uncompensated agreements may be permissible. In addition, anecdotal evidence indicates that some same-sex couples have successfully parented through surrogacy arrangements.

Detail: There is no provision in Kentucky law on the subject of surrogacy. An attorney general opinion cautions against, at least, compensated agreements. In 1980, the attorney general concluded that “contracts involving surrogate parenthood are illegal and unenforceable in the Commonwealth.” He based his opinion on the existence of statutory provisions barring the sale of children and requiring voluntary consent for adoption, as well as “strong public policy against the buying and selling of children.” Case law indicates approval for uncompensated surrogacy agreements, but it is unclear how precisely a court would evaluate any surrogacy contract where money is involved. In one 1986 case, the Kentucky attorney general sought to revoke the corporate charter of an agency that arranged surrogacy contracts. The attorney general argued that surrogacy contracts arranged by the company violated Kentucky statutes that barred the sale of a child for purposes of adoption and that invalidated a mother’s consent to adoption prior to the birth of a child. However, the Kentucky Supreme Court held that fundamental differences between traditional surrogacy contracts (in which the surrogate mother is the biological contributor of the egg) and the practices that were the focus of the baby-selling laws took surrogacy contracts outside the scope of those laws. The Court reasoned that surrogacy arrangements are made prior to the conception of the child; the prospective birth mother is thus not concerned about the results of an unwanted pregnancy or the financial burden of raising a child, but with assisting an infertile couple. Baby-selling statutes thus differentiated, the court found that it was not up to the courts to "cut off [procreative] solutions offered by science." The implication is that the courts would uphold an uncompensated surrogacy agreement, however no such case has arisen before the courts.

Louisiana Surrogacy Law

Louisiana law prohibits surrogacy agreements.

Summary: Louisiana law holds any traditional surrogacy contract (in which the surrogate mother is the biological contributor of the egg) void and unenforceable, but does not address uncompensated agreements or gestational surrogacy (in which the surrogate mother is not the biological contributor of the egg) arrangements.

Detail: Louisiana law finds traditional surrogacy agreements "contrary to public policy" and thus “absolutely null.”

Maine Surrogacy Law

There is no provision on surrogacy in Maine state law.

Summary: There are no provisions in Maine law or reported or published cases dealing with the issue of surrogacy.

Maryland Surrogacy Law

Maryland is a surrogacy "friendly" state.

Summary: It doesn't have any statutes permitting, prohibiting, or regulating surrogacy. The only laws governing a surrogacy arrangement are the terms of the surrogacy contract written by the people who are involved.

Detail:

Not only are there no laws specifically addressing surrogacy, but there are also no appellate court opinions addressing the subject. There is one opinion in a county circuit court which received considerable attention in Maryland legal publications. The judge wrote a lengthy analysis which can be summed up in one critical statement:

"...the Court holds that it is for the Legislature, not the courts, to decide whether surrogacy contracts are illegal in this state."

A bill was passed in l992 which would have had an adverse impact on surrogacy, but was vetoed by the Governor. The Governor wrote a letter to the President of the Maryland Senate explaining his veto. The closing sentences capture the thrust of his remarks:

"...I am unclear as to what actual effect the bill would have, other than perhaps to discourage infertile couples from pursuing the option that surrogacy provides. The creation of a family is a personal decision I think best left to the individuals involved."

No bill has been passed by the Legislature since, and none was even introduced.

In gestational surrogacy cases, the courts have been helpful in granting orders to ensure that the birth certificates for children born in Maryland to gestational carriers reflect the correct parentage, regardless of the residency of the surrogate, or the intended parents, or the donor if any. While Maryland has no specific laws addressing surrogacy, there has been a small but significant change in the Maryland Rules approved by the Maryland Court of Appeals regarding court procedures in adoption cases. Rule 9-103 provides the requirements that must be included in an adoption petition. One of the requirements is that the petition must state how the child was identified or came to be in the custody of the person asking to adopt. That provision goes on to require the names of the "intermediaries or surrogates" and "a copy of any surrogacy contract." This is significant because it is the first time the words "surrogates" and "surrogacy contracts" have ever been affirmatively stated in Maryland law.

Massachusetts Surrogacy Law

Massachusetts law permits surrogacy agreements.

Summary: Massachusetts is generally favorable to surrogacy agreements.
Detail: State courts have generally treated surrogacy contracts favorably. Massachusetts treats traditional surrogacy agreements, in which a surrogate mother is artificially inseminated, differently from gestational surrogacy, in which she has no genetic relationship to the child but carries an egg from the intended mother that was fertilized by the intended father. In one case in 2001, the Supreme Judicial Court granted a joint request from a paid gestational mother, a genetic mother, and a genetic father to have the genetic parents listed as the parents on the baby's birth certificate. While this is further indication of the judiciary's openness to surrogacy agreements, the Court did not give a ringing endorsement of the enterprise. The Court emphasized that current state law did not address gestational surrogacy agreements, and set forth criteria under which lower courts may review requests for atypical birth-certificate assignations in surrogacy cases. Those criteria are: (a) the plaintiffs are the sole genetic sources; (b) the gestational carrier agrees with the orders sought; (c) no one, including the hospital, has contested the complaint or petition; and (d) by filing the complaint and stipulation for judgment, the plaintiffs agree that they have waived any contradictory provisions in the contract. The Court also noted that a factor indicating positive disposition in these cases is that the gestational mother is related to one of the genetic parents. In one 1998 case, a surrogate mother decided in the sixth month of her pregnancy to keep the child. The court found that two elements must exist to validate a surrogacy agreement: (1) the surrogate mother's consent to the surrogacy must last until four days after the birth and (2) the surrogate mother must receive no compensation. Other conditions might be important in deciding the enforceability of a surrogacy agreement, among them (a) that the surrogate mother's husband give his informed consent to the agreement in advance; (b) that the surrogate mother is an adult and has had at least one successful pregnancy; (c) that the surrogate mother, her husband, and the intended parents have been evaluated for the soundness of their judgment and for their capacity to carry out the agreement; (d) the intended mother be incapable of bearing a child without endangering her health; (e) the intended parents be suitable persons to assume custody of the child; and (f) all parties have the advice of counsel. The Court does emphasize that no agreement is per se valid: "the mother and father may not … make a binding best-interests-of-the-child determination by private agreement. Any custody agreement is subject to a judicial determination of custody based on the best interests of the child." While all of the other conditions listed above need not exist to validate the surrogacy, it is not entirely clear how a judge would

apply them to a gay male couple as intended parents. Because the best of interests of the child is the final determination, however, a judge could certainly find such a couple to be the best environment for the child of the surrogacy.

Michigan Surrogacy Law

Michigan law prohibits compensated surrogacy agreements. Also the contracts are void and unenforceable.

Summary: Michigan law strongly prohibits surrogacy agreements.
Detail: Michigan has one of the strictest laws prohibiting surrogacy contracts, not only holding them unenforceable, but also imposing fines and jail time on anyone who enters into such a contract (up to five years and $50,000 for some). Case law has upheld the validity of this law. In one case in 1992, several would-be participants in surrogacy arrangements challenged the law, arguing that the state had no compelling interest in prohibiting surrogacy. The court disagreed and found three compelling interests: preventing children from becoming commodities, serving the best interests of children and preventing the exploitation of women. Further clarifying the surrogacy statute, the court noted that any agreement involving conception and relinquishment of parental rights by the surrogate is void. In one 1981 case, individuals involved in compensated surrogacy agreements challenged the constitutionality of Michigan statutes barring the exchange of money or other consideration in connection with adoption and related proceedings. In a very short opinion, the Court concluded that state regulation of adoption in this manner does not infringe individuals' federal constitutional due process right to procreation.

Minnesota Surrogacy Law

There is no provision on surrogacy in Minnesota state law, but it appears to be permitted.

Summary: There is no provision in Minnesota law on the subject of surrogacy. While the state legislature has considered surrogacy bills, it has yet to pass one. But at least one court has acknowledged the parental rights of non-biological participants in a surrogacy arrangement.
Detail: A New York lawyer who made an agreement with his niece that she would bear a child for him through gestational surrogacy won a ruling from Minnesota's Court of Appeals on the 11th of December 2007, approving custody and full parental rights.
He entered into a legal contract with his sister's daughter, under which he provided sperm to fertilize a donated egg in a test tube that was then implanted in his niece, who carried the fetus to term. As part of such agreements, the woman agrees in advance she is not the legal mother and will not attempt to

assert any parental rights, but will surrender the child after its birth. After her insemination, for two months in mid-2005, the woman lived in her uncle's New York apartment, during which time they had a "falling out" and the niece demanded an additional $120,000 in compensation, threatening to abort the child if she did not get it. He refused to go along with this.
The woman returned to Minnesota, and drafted a new agreement spelling out additional compensation, but her uncle would not sign it. When she gave birth in December, she did not notify him and named the child.
Her uncle, of course, soon learned of the birth, and quickly filed a paternity action in the Hennepin County District Court in Minneapolis. He was awarded temporary custody and naming rights, and in August 2006, that court declared him the sole legal parent. His niece appealed.
The court of appeals found that the gestational surrogacy agreement met all the standard requirements for a contract, and that the only issue was whether it was consistent with public policy. Looking, as did the trial judge, to the Illinois law that governed, the appeals court concluded a statute in that state making such agreements enforceable made it difficult for the woman to lodge a public policy argument against her uncle. From the standpoint of Minnesota law, the trial judge noted that though there was no statute expressing authorizing enforcement of surrogacy agreements, there was also none forbidding it. In addition, the state explicitly protects the rights of individuals using "assisted-reproduction technology."
Minnesota law presumptively finds a woman who gives birth to a child to be the legal parent unless there is "clear and convincing evidence" to the contrary. The judge noted that genetic testing showed with 99.9 percent certainty that the lawyer was the genetic father and that the gestational carrier. was not the genetic mother.

Mississippi Surrogacy Law

There is no provision on surrogacy in Mississippi state law.

Summary: There are no provisions in Mississippi law or reported or published cases dealing with the issue of surrogacy.

Missouri Surrogacy Law

Missouri state law is unclear on surrogacy.

Summary: The legal status of surrogacy agreements in Missouri is unclear.
Detail: Missouri has no laws directly regarding surrogacy. However, the crime of “trafficking in children” (a felony) includes payment for “delivery or offer of delivery of a child … for purposes of adoption, or for the execution of consent to

adopt or waiver of consent to future adoption or consent to termination of parental rights." A compensated surrogacy agreement might run afoul of this law. For a theory on the legitimacy of gestational surrogacy agreements (in which the surrogate mother is not the biological contributor of the egg) under Missouri law, see *Yvonne M. Warlen, Note, The Renting of the Womb: An Analysis of Gestational Surrogacy Contracts Under Missouri Contract Law, 62 UMKC L. Rev. 583 (1994).*

Montana Surrogacy Law

There is no provision on surrogacy in Montana state law.

Summary: There are no provisions in Montana law or reported or published cases dealing with the issue of surrogacy.

Nebraska Surrogacy Law

Nebraska law prohibits surrogacy agreements.

Summary: Nebraska law declares surrogacy contracts void and unenforceable, but may allow uncompensated agreements.
Detail: Existing state law defines unenforceable surrogate contracts as "a contract by which a woman is compensated for bearing a child of a man who is not her husband," thus leaving open the possibility of uncompensated surrogacy arrangements. Nebraska law also explicitly imposes "all the rights and obligations imposed by law" upon the biological father party to a surrogacy agreement. Because surrogacy contracts usually involve the biological father, this would leave custody jointly in the hands of the intended father and the gestational mother.

Nevada Surrogacy Law

Nevada law permits surrogacy agreements for married couples only.

Summary: Nevada law prevents unmarried people from entering surrogacy agreements.
Detail: Existing state law restricts the adopting parties of a surrogacy agreement to people "whose marriage is valid" under Nevada law. The statute defines "intended parents" as "a man and a woman, married to each other." Given this specific language, it is unlikely that a GLBT individual or couple would be permitted to enter into an enforceable surrogacy agreement.

New Hampshire Surrogacy Law

New Hampshire law permits surrogacy agreements for married couples only.

Summary: New Hampshire law appears to prohibit GLBT individuals and couples from entering into surrogacy agreements.
Detail: According to existing state law, "'Intended parents,' including an 'intended father' and 'intended mother,' means people who are married to each other, and who enter a surrogacy contract with a surrogate by which they are to become the parents of the resulting child." Given this specific language, it is unlikely that a GLBT individual or couple would be permitted to enter into an enforceable surrogacy agreement.

New Jersey Surrogacy Law

New Jersey law permits surrogacy agreements.

Summary: New Jersey permits only uncompensated gestational surrogacy agreements (in which the surrogate mother is not the biological contributor of the egg).
Detail: Surrogacy cases in New Jersey have created a fairly well-defined common law rule that prohibits traditional surrogacy arrangements (in which the surrogate mother is the biological contributor of the egg) and allows only uncompensated gestational surrogacy arrangements. One case in 2000 addressed the rights of intended parents in a gestational surrogacy arrangement in which the surrogate mother gave birth to a child with no genetic connection to her. The intended mother's sister agreed to carry the baby, and the intended parents sought to compel the state attorney general to put their names on the birth certificate. The court found that the agreement was enforceable because it did not involve compensation and the surrogate was not subject to a binding agreement before birth. In gestational surrogacy arrangements, the intended parents must wait 72 hours after the birth before the surrogate can surrender custody. But under New Jersey law, the birth certificate does not have to be filed for five days. Thus, a two-day window exists during which intended parents can be placed on the birth certificate. In perhaps the most famous surrogacy case in the nation, In *Re Baby M*, the New Jersey Supreme Court in 1988 invalidated a traditional surrogacy agreement, which provided a $10,000 fee to the surrogate mother. The Court barred the use of money in an adoption placement and further held that no one could contractually abandon their parental rights.

New Mexico Surrogacy Law

New Mexico law permits surrogacy agreements.

Summary: New Mexico law appears to allow surrogacy agreements, but only if uncompensated.
Detail: New Mexico law forbids "payment to a woman for conceiving and carrying a child" but allows payment for medical and other similar expenses incurred "by a mother or the adoptee."

New York Surrogacy Law

New York law prohibits surrogacy agreements.

Summary: New York law holds surrogacy agreements void and unenforceable.
Detail: Under New York law, surrogacy contracts are contrary to public policy. Case law also reflects that position. However, at least one court has recognized the rights of intended parents in an assisted reproduction situation absent a contract. In one 1994 divorce proceeding, a husband sought sole custody of the two children of the marriage on the basis that his wife was their gestational, but not genetic, mother. The wife had undergone an in vitro fertilization procedure in which she was impregnated with an anonymous donor egg fertilized with her husband's sperm. The Court followed the analysis of the California Supreme Court in a similar case, Johnson v. Calvert (see California entry for summary). Accordingly, the Court found the gestational mother to be the legal mother of the children, based on the intent of the parties regarding parentage. The Court did not mention or consider the statutory ban on surrogacy in this case. In one case in 1990, decided before the statutory ban on surrogacy agreements was passed, a married couple had entered into an extensive contract with a surrogate, including a $10,000 "surrogate fee." The Court found the surrogate's commitment to relinquish the child she carried could not be truly voluntary because of the financial inducement. While the Court went on to find that its conclusion might be altered by a sworn statement by the surrogate that the child's best interests lie with the contracting couple, this option is probably foreclosed by the subsequent passage of the law voiding surrogacy agreements.

North Carolina Surrogacy Law

There is no provision on surrogacy in North Carolina state law, but it appears to be permitted.

Summary: North Carolina has no laws directly regarding surrogacy. However, other laws appear to allow surrogacy arrangements that do not include payment beyond the surrogate's medical and related expenses.
Detail: State adoption law generally forbids compensation for consent to adopt or relinquishment of parental rights. However, the law provides for exceptions to this rule, among them payment for a mother's medical and related expenses

during pregnancy, and allows that payment to be contingent on the relinquishment for adoption.

North Dakota Surrogacy Law

North Dakota law prohibits surrogacy agreements.

Summary: North Dakota law holds surrogacy contracts to be void and unenforceable.
Detail: According to existing state law, any surrogate agreement is void. The surrogate mother is deemed the legal mother of any child born as a result of a surrogacy, and her husband, if there is one, is considered the legal father.

Ohio Surrogacy Law

Ohio state law is unclear on surrogacy, but it appears to be permitted.

Summary: Ohio law does not address the validity of surrogacy agreements, but their mention in other statutes indicates some degree of legislative acceptance. At least one court has acknowledged the parental rights of non-biological participants in a surrogacy arrangement.
Detail: Ohio laws regarding artificial insemination "do not deal … with surrogate motherhood." Ohio case law on surrogacy is unsettled. Ohio courts have addressed surrogacy arrangements several times, but the state Supreme Court has never definitively ruled whether surrogate-parenting contracts are enforceable. One 2001 case involved a man who entered into an oral agreement with his sister to carry a child for him and his same-sex partner. The sister was inseminated by an anonymous donor, but during the pregnancy began to have doubts about the arrangement. The court determined that the surrogate was the legal mother of the child for the following reasons: the child's lack of biological connection to the male couple, the lack of a written agreement and lack of certification of the verbal agreement by a family agency or court, and the fact that biological parents may be denied custody only in the case of abandonment, valid contractual relinquishment of custody, or total inability to provide care or support. The court ruled explicitly that even if a determination is made that a biological parent has forfeited his or her rights or that his or her custody would be detrimental to the child, the burden is still on the party seeking parental rights to prove, by a preponderance of the evidence, that granting custody to the biological parent would still be unsuitable. The court found it possible "for a parent to contractually relinquish their rights to custody and still reacquire custody based on the non-parent's inability to show parental unsuitability." Nowhere in the decision did the court discuss the adoptive parents' sexual

orientation as an issue in the decision. In fact, the judge's opinion outlines how the brother's partner might have gone about adopting the child had the surrogacy arrangement been legitimate. Thus, it seems the potential for same-sex couples in Ohio to use surrogacy arrangements exists, provided the contracts are entered into legally. Contributing some of the genetic material would also probably strengthen a case brought for custody for the intended parents. In another case, the Ohio Court of Appeals held in 1999 that genetic testing of a child conceived through a traditional surrogacy arrangement (in which the surrogate mother is the biological contributor of the egg) was required to identify the child's father. Two couples had created a written agreement under which the wife of one couple was to be inseminated by the husband of the other couple and relinquish custody of the child to the biological father and his wife after the birth. The surrogate mother reneged on the agreement, and invoked O.R.C. Ann. 3111.37, a statute establishing that a child born from artificial insemination to a married woman is the natural child of her husband. The court held that the statute contemplated a procedure performed by a physician utilizing an anonymous sperm donor and did not apply in this case. Nevertheless, the court found genetic testing to determine paternity was in the best interest of the child in this case and referred the determination of parentage (after such testing) back to the lower court. In 1994, a lower court held that the intended parents in a gestational surrogacy agreement (in which the surrogate mother is not the biological contributor of the egg) were the natural and legal parents of the resulting child. However, the court noted that "as a matter of public policy, the state will not enforce or encourage private agreements or contracts to give up parental rights." Because the decision came from a trial court, the language is not binding on other courts and may relate only to compensated agreements. After a complicated custody battle, in 1992 the Court of Appeals eventually denied custody to the intended mother in a traditional surrogacy agreement because she had no biological tie to the child, nor any recognizable legal tie because the surrogacy contract was an oral agreement and thus unenforceable. The court did not discuss how it would have ruled on a written contract, but concluded that the legality of surrogacy agreements in Ohio is "unsettled and open to considerable scrutiny."

But on Dec. 20, 2007, the Ohio Supreme Court held that the surrogacy contract at issue (involving a surrogate who was not genetically related to the child she carried to birth) was not against public policy. J.F. v. D.B., 2007 WL 4531973 (Ohio Dec. 20, 2007). It is important to note that the court was careful to limit its analysis to the issue at hand and specifically stated that this did not resolve the issue of surrogacy contracts involving women who were genetically related to the child.

In this case the biological father contracted with a gestational surrogate to carry eggs implanted from a nonparty donor. The surrogate contract stated that the surrogate would be paid $20,000 for her services, require her to relinquish her

parental rights and permitted the bio father to avoid child support payments from the surrogate if she was awarded custody.
The court noted that no statute directly controlled the issue and all of the statutes referred to by the surrogate (trying to invalidate the contract to avoid claim of breach of contract & damages) related to inducement of payment for adoption.
The court noted that adoption is not the same thing as gestational surrogacy and dismissed these statutes are off-point.

Oklahoma Surrogacy Law

There is no provision on surrogacy in Oklahoma state law, but it appears to permitted.
Summary: Oklahoma has no laws directly addressing surrogacy, but an attorney general opinion indicated that surrogacy agreements run afoul of state law against "trafficking in children." However, a surrogate parenting agreement that only provides compensation for medical and other basic expenses may be permitted.
Detail: The state Attorney General concluded that surrogate parenting contracts that provide compensation to affect the adoption of a child violates state law prohibiting trafficking in children, which includes the "acceptance, offer or payment of compensation in connection with the transfer of legal or physical custody or adoption of a minor child." State adoption law permits the payment of reasonable medical expenses for the birth mother and minor to be adopted, and it is possible that such reimbursement would be acceptable in the surrogacy context without violating the child trafficking law.

Oregon Surrogacy Law

Oregon law permits surrogacy agreements.

Summary: Oregon law appears to allow only uncompensated surrogacy arrangements.
Detail: The statute prohibiting "buying or selling a person" has an explicit exemption for "fees for services in an adoption pursuant to a surrogacy agreement." This appears to codify the conclusion of a 1989 opinion issued by the attorney general, which indicated that the state may invalidate any agreement in which money is exchanged for the right to adopt a child, particularly when the birth mother contests it. The case law confirms that if a surrogate mother is compensated for her consent to adoption under a surrogacy contract, the contract is unenforceable. However, it appears that a surrogacy arrangement in which the compensated surrogate mother would have carried the baby with or without pay would be upheld. In one case in 1994, the Oregon Court of Appeals upheld an uncontested surrogacy arrangement, refusing to invalidate the agreement even

though payment to the surrogate mother exceeded her pregnancy-related expenses. The Court emphasized that the facts indicated the surrogate would have entered into the agreement even without compensation and that she was not seeking to withdraw her consent for the adoption of the child. However, this case was decided before the statutory provision discussed above was passed by the legislature.

Pennsylvania Surrogacy Law

Pennsylvania state law is unclear on surrogacy.

Summary: The case law regarding surrogacy is ambiguous in Pennsylvania. It appears that a compensated surrogacy agreement would be held unenforceable. However, an arrangement established through a legally recognized agency appears to be legal. The validity of informal arrangements is less certain.
Detail: One case in 1997 did not involve a surrogacy contract, but rather a paternity dispute (apparently between a current husband and an extramarital male sexual partner) and the allocation of parental support duties. The court observed that the husband attempted to make a deal with the other man to obtain property in exchange for continued support of the child. In condemning this action as "odious and demeaning to the nature of child care and responsibility," the court referenced a New Jersey case, *In Re Baby M.*, which held compensated surrogacy contracts invalid under that state's laws. The court concluded, "[w]e do not tolerate purchasing children for adoption and the bargaining over parenting rights and duties … in exchange for financial consideration is reprehensible. Any agreement reached thereby would have been unenforceable." Another 1997 case, *Huddleston v. Infertility Center of America*, involved a negligence action brought against a fertility clinic and did not directly relate to the validity of surrogacy arrangements. However, implicit in the decision was that state law permitted surrogacy arrangements through this particular agency.

To assist couples and individuals build families through gestational surrogacy, the Pennsylvania Department of Health has implemented the Assisted Conception Birth Registration. Managed by the Department of Health's Vital Records Office, the registry allows for the intended parent(s) to be listed on the birth certificate, thus circumventing the need for adoption after the child is born. This procedure requires the submission of a "Supplemental Report of Assisted Conception" form (obtained from the Vital Records Office), and a court order directing that the birth record to reflect the name(s) of the intended parent(s). To obtain a court order, the intended parent(s) must submit a detailed request to a court in the county where the birth will occur.
However, this procedure only applies to gestational surrogacy and does not apply if the egg donor is also the surrogate carrier (i.e. where traditional

surrogacy is involved.). Also, the procedure requires that the child be born in Pennsylvania, and that either the intended parent(s) or the surrogate carrier be Pennsylvania residents.
It is important to recognize that the Assisted Conception Birth Registration is not authorized by state law and is not binding on Pennsylvania courts. Individual judges have complete discretion when deciding whether or not to issue a pre-birth order or enforce an agreement between the intended parent(s) and surrogate carrier.

Rhode Island Surrogacy Law

There is no provision on surrogacy in Rhode Island state law, but it appears to be permitted.

Summary: Rhode Island has no laws regarding surrogacy directly, but there appears to be some legislative approval for at least some forms of surrogacy.
Detail: The state law prohibition on cloning has an explicit exception for the assisted reproductive technologies used in gestational surrogacy (in which the surrogate mother is not the biological contributor of the egg).

South Carolina Surrogacy Law

South Carolina state law is unclear on surrogacy.

Summary: There are no existing provisions in South Carolina law regarding surrogacy. The limited case law indicates an acceptance of surrogacy contracts, although it only addresses those involving married, heterosexual couples.
Detail: One 2003 case before a federal district court did not deal directly with the validity of a surrogacy agreement, but rather the status of the child of that agreement with regard to an insurance policy. The husband of the surrogate sought coverage for the child of the surrogacy under his insurance policy's coverage of a "natural child." The court gave great deference to the terms of the surrogacy contract and the stipulations by the parties therein regarding the legal status of the adults and child involved. (The court found that the child of the surrogacy was not the "natural child" of the surrogate's husband, based largely on statements to that effect in the surrogacy contract.) While the court's holding does not go to the legitimacy of surrogacy arrangements in South Carolina directly, the court clearly assumed that such an arrangement was not contrary to state law when it showed such deference to its terms.

South Dakota Surrogacy Law

There is no provision on surrogacy in South Dakota state law.

Summary: There are no provisions in South Dakota law or reported or published cases dealing with the issue of surrogacy

Tennessee Surrogacy Law

Tennessee law permits surrogacy agreements for married couples only.

Summary: Tennessee law appears to give surrogacy contracts legal consequence, but claims neither to approve nor forbid them. However, state law defines a "surrogate birth" to occur only when the surrogate is gestating a fetus for a married couple.
Detail: State law defines "surrogate birth" as either an arrangement by which a surrogate agrees to carry the embryo of two married people or by which she agrees to carry a child to be parented by a married couple. The law also indicates that if such an agreement is in place, there is no need for a formal adoption proceeding. The state court system also seems disposed to granting force to reproductive agreements. In one 1992 case, the Tennessee Supreme Court held that "in disputes as to embryos, any prior agreement would be honored." This decision did not specifically address surrogacy, but the Court's willingness to adjudicate a case involving embryos intended for surrogacy suggests a judiciary approval of such contracts in Tennessee.

Texas Surrogacy Law

Texas law permits surrogacy agreements for married couples only.

Summary: Texas law explicitly allows but heavily regulates surrogacy agreements, and it appears to exclude same-sex couples.
Detail: Among other constraints, existing state law requires intended parents to be married to each other. A court must validate a surrogacy contract for parental rights to attach to the intended parents upon birth of the child; a contract not validated by the court is unenforceable.

Utah Surrogacy Law

Utah permits Gestational Surrogacy for married couples

Summary: Utah permits Gestational Surrogacy for married couples.
Detail: Governor Jon Huntsman has signed into law a surrogacy law that permits court-approved contracts and sets out procedures for obtaining birth certificates for children born to gestational carriers. The law is limited in its application to married infertile couples and carriers who are not using their own

eggs. Prior to this, Utah law prohibited any form of surrogacy and any traditional surrogate or gestational carrier, regardless of whether she was a genetic parent, was required to go on the child's initial birth certificate. Despite some opposition in the House of Representatives, the law passed and goes into effect July 1, 2005. Utah Uniform Parentage Act, 2005 General Session, Utah Code Annotated 78-45g-801.

Vermont Surrogacy Law

There is no provision on surrogacy in Vermont state law, but it appears to be permitted.

Summary: Surrogacy agreements are likely available to GLBT individuals and couples in Vermont, but this is not entirely clear.

Detail: There is no case law dealing directly with surrogacy, but at least one case has indicated an acceptance of such agreements in Vermont. In the groundbreaking 1999 case that led to the creation of civil unions in Vermont, the state itself argued that restricting marriage to different-sex couples would serve the important goal of minimizing complications in surrogacy agreements, suggesting a basic acceptance of such agreements. The Court's holding granting the state-level benefits and responsibilities of marriage to same-sex couples likely includes that acceptance of surrogacy.

Virginia Surrogacy Law

Virginia law permits surrogacy agreements for married couples only.

Summary: Virginia law explicitly approves of uncompensated surrogacy, but it appears to exclude same-sex couples from participation in these arrangements.

Detail: Virginia statutes impose numerous restrictions on surrogacy contracts, including limiting formation of such agreements to a surrogate and "intended parents" defined as "a man and a woman, married to each other."

Washington Surrogacy Law

Washington law permits surrogacy agreements.

Summary: Washington allows uncompensated surrogacy arrangements but deems illegal and unenforceable any agreement involving any payment to the surrogate mother other than medical and legal expenses.

Detail: State law specifies that compensated surrogacy arrangements are void and unenforceable as against public policy, and is punishable as a gross misdemeanor. A custody dispute between the surrogate mother and the intended parents is resolved according to a multi-pronged balancing test codified in Washington law, largely based upon the child's relationship with each parent. A

parent-child relationship can be established by a valid surrogate parentage contract or an affidavit and physician's certificate wherein an egg donor or gestational surrogate sets forth her intent to be the legal parent of the child. A 1989 opinion from the attorney general confirmed this assessment of state law, and also indicated that a surrogate parenting agreement is not enforceable if the surrogate withdraws her consent to relinquish her child before court approval of the consent.

West Virginia Surrogacy Law

There is no provision on surrogacy in West Virginia state law, but it appears to be permitted.

Summary: West Virginia has no laws directly addressing the legality of surrogacy contracts.
Detail: State law prohibiting the purchase or sale of a child specifically mentions that "fees and expenses included in any agreement in which a woman agrees to become a surrogate mother" are not prohibited by the statute, suggesting that surrogacy arrangements may be enforceable.

Wisconsin Surrogacy Law

Wisconsin state law is unclear on surrogacy.

Summary: Wisconsin law does not directly address the legality of surrogacy contracts.
Detail: In the statute pertaining to the collection of vital statistics, the law states that the surrogate mother's name is to be added to the birth certificate until "a court determines parental rights," at which time a new birth certificate with names of the intended parents may be issued, but the statute does not lay out the factors a court should consider in making that decision.

Wyoming Surrogacy Law

There is no provision on surrogacy in Wyoming state law.

Summary: There are no provisions in Wyoming law or reported or published cases dealing with the issue of surrogacy.

Ces documents peuvent être consultés sur les sites de :
Human Rights Campaign
All about surrogacy
National Fertility Law