

Covering Medical Expenses Unrelated to a Pregnancy? The Pros and Cons for Intended Parents

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In today's dynamic insurance landscape, it is becoming increasingly common for gestational carriers to need new or additional medical insurance coverage in order to begin their journey. As a consequence of some carriers not allowing concurrent coverage, more and more gestational carriers are faced with the decision of dropping their existing coverage, or giving up on their goal of being a surrogate.

The insurance "problem" has long been the bane of professionals in the surrogacy space. We spend many a happy hour discussing, debating, arguing, and lamenting how we currently obtain coverage for our cases and how it can be done better in the future. One oft-overlooked hypothetical that may be growing increasingly common: what if your gestational carrier is required to drop her existing insurance to help someone else achieve their dream of parenthood?

A major theme of surrogacy contracts is ensuring that the surrogate is "made whole." We take great pains to craft language which ensures any expense the surrogate incurs as part of her conduct contemplated by the agreement are reimbursed. Perhaps the most critical aspect of this is ensuring that the surrogate's pregnancy related medical expenses are accounted for. Either by insurance, intended parents directly, or both. Drilling down, we see that the operative language commonly revolves around "pregnancy related medical expenses." This, plainly, is designed to limit intended parents' liability and ensure they are not stuck paying for a surrogate's broken arm or appendicitis; while at the same time ensuring that the surrogate isn't getting a bill for the prenatal care or delivery.

But what happens if your surrogate's unrelated medical expenses will dramatically change as a result of her becoming a surrogate? For example, say she has Cadillac insurance that covers everything except a ten dollar co-pay; but this policy specifically excludes surrogacy coverage? On top of that, it does not allow concurrent or dual coverage with another policy. Under this scenario, she either drops the existing policy, or she can't be a surrogate and everyone loses. Now your surrogate is on a new surrogacy-friendly plan, but she finds herself needing unrelated medical care with perhaps significant medical expenses that she never would have had before becoming a surrogate? Does the surrogate bear that risk? Do intended parents? This gets even messier when the surrogate's family is involved. What if her initial coverage is the source of her children or spouse's coverage as well?

While this hypothetical may be rare today, it could be more commonplace as the insurance landscape continues to evolve. It presents a difficult question. Opinions may vary. Do intended parents take that additional risk and expense? Does the surrogate? Is that part of the "cost of doing business" for either side? There are arguments to make on both sides, and there is no perfect answer. Whenever insurance carriers find a way to extricate themselves from a liability as a result of a surrogacy agreement, one of our parties must bear that potential expense instead.

Argument in Favor of Requiring Intended Parents to Cover Non-Pregnancy Related Medical Expenses if Surrogate Must Drop Existing Coverage:

One of the defining characteristics of a surrogate's financial compensation is ensuring that the Intended Parents are responsible for all medical expenses resulting from conduct required by the agreement. In some states, such as California, it is even required by statute that Intended Parents cover the surrogate's pregnancy-related medical expenses. Beyond that, ensuring that the surrogate is not negatively financially impacted by her journey is another common theme. If a surrogate faces new or increasing financial costs due to non-pregnancy medical care directly as a result of her participation in a surrogacy agreement, we fail to reach that ideal. It also gives rise to the possibility of a surrogate becoming financially stressed; relying on the surrogacy compensation more than intended, or putting other reimbursement monies towards the medical debt and leaving the surrogate unable to pay for other surrogacy related needs.

Further, most intended parents also want the security of knowing that their surrogate will be financially secure during the pregnancy. Stress on the surrogate and baby because of a lack of sufficient medical coverage, even if not directly related to the pregnancy, can cause anxiety and concern for everyone. Intended parents are often in a more financially secure position than their surrogate. As such, a relatively small increase on intended parent's expenses can have an outsized benefit for the surrogate.

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Finally, surrogates are already assuming a risk by entering into these agreements, all of which are well disclosed and discussed at length by attorneys, medical professionals, and agencies prior to signing an agreement. Adding another level of risk to that situation should be avoided if at all possible. While surrogates certainly have the agency to assume such risks if they are comfortable and informed, the professionals who support these arrangements should always look to minimize the risk on those who are most critical to our success. If we are scaring away surrogates due to financial risk, intended parents will have less chance of finding the right match and proceeding on their journey to parenthood.

Argument Against Requiring Intended Parents to Cover Non-Pregnancy Related Medical Expenses if Surrogate Must Drop Existing Coverage:

Without a doubt, acting as a surrogate is a unique “job” in many ways and one that comes with heightened risk. However, many of the considerations that surrogates weigh in choosing whether to become a surrogate and whether to accept those risks are the same factors that any of us considers when making employment decisions. Whether a job description and/or compensation/benefits structure is a good fit for a job-seeker’s lifestyle, family needs, financial situation, and the like are all relevant consequences, regardless of if someone is considering a position at a bank or considering surrogacy, and individuals prioritize these factors in different ways. Work-life balance may be a driving force for some, while others may sacrifice free time to prioritize a handsome paycheck. The freedom to conduct one’s own cost-benefit analysis and to accept, decline, or negotiate employment terms is inalienable.

Women who act as surrogates enjoy the same autonomy and agency to choose the terms of their livelihood, and to dictate what risks they are willing to assume/what sacrifices they are willing to make, in exchange for what benefits. When compensated surrogacy is practiced ethically, the financial terms of the arrangement are set by arms-length negotiations between parties who are represented by independent legal counsel. So, who is to say that a woman acting as a surrogate cannot decide that a hefty base compensation outweighs the risks of forgoing insurance coverage for non-pregnancy related medical expenses during the term of the surrogacy arrangement?

Finally, the assumed risks associated with surrogacy do not necessarily compel special treatment insofar as intended parents’ obligation for non-pregnancy related medical expenses is concerned. Jobs that come with similarly heightened risks are secured with worker’s compensation coverage, just as surrogates’ risks of reproductive organ loss or medical complications is secured by the policies that intended parents are required to purchase and maintain. Perhaps, just as workers compensation would not cover injury and loss to an employee that occurs outside of the job, so too intended parents should not be obligated to cover surrogate’s potential loss that occurs outside of the realm of the surrogacy?

Conclusions and Recommendations:

While there is absolutely right or wrong answers at this time, it is important to have these discussions in order to have a clear understanding of your policy, as well as set clear expectations for your parents and surrogates. Nobody wants to be deep into a match and discover this is a problem, only to have it break the match. It is also imperative that neither side finds themselves being asked this question late in the game and someone feels pressured into a bad situation just to make the match happen. Ideally, full due diligence on the insurance situation prior to match will eliminate the need for this problem. But if you find yourself talking to a surrogate or intended parents about what is the “standard” on this question, you can be better prepared. Above all, clear and complete disclosure is imperative so all parties can make informed decisions.

We encourage you and your clients to talk with insurance professionals and do your own research on all policies before deciding what is best for their particular situation.