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An inside look at the legalities of surrogacy BY STEPH WEBER

After many years lagging behind most of the nation, New York, thanks to a recent law, has made it easier to expand a family through gestational surrogacy. The Child-Parent Security Act, which took effect in 2021, created a path for establishing parental rights for those using assisted reproductive technology to have children.

Before that, New York was one of only a few states that forbade hiring someone to carry a child, says Alexis L. Cirel, a family law attorney and partner at Warsaw Burstein. “I devoted many professional years to changing that through lobbying and participating in the new legislation,” she adds, including serving on Gov. Andrew Cuomo’s leadership committee. “Now, it’s a very surrogacy-friendly state.”

Intended parents often contact an attorney once they decide to pursue surrogacy and need help navigating the ins and outs of the process. Others may first seek the services of a surrogacy matching agency, then retain counsel once a potential match presents and they need someone to review the agency’s lengthy contract.

Because surrogacy laws vary by state and surrogates often live in a different state than the

intended parents, Cirel says an attorney will want to evaluate the laws in both locations to ensure there are no barriers to establishing the parents’ legal rights upon birth. “Being able to do so can depend on whether the intended parents are married, a same-sex couple, or using donor egg or sperm,” she says.

Even when the regulations are favorable, everyone should enter the arrangement on the same page. The contracts, called gestational surrogacy agreements, must be agreed to before a surrogate undergoes treatment. “Think of it as a business agreement, where everything is clear, so everybody knows what their responsibilities and duties are and how their expectations will be met,” says Elizabeth A. Douglas, an attorney experienced in surrogacy at Douglas Family Law Group. “That contract assigns what the expectations are, so you can’t now have a hope that’s not memorialized in writing. So you’re going to be disappointed if you haven’t been clear with what you want and hope to achieve.”

That’s why experts say surrogacy agreements should be highly detailed to your needs—potentially including lifestyle provisions such as

the preferred diet of the surrogate—and should address the wide range of scenarios that can pop up. For example, radius clauses restricting how far the surrogate can travel from the delivery hospital after a specific gestational week may prevent the legal fallout of surprise labor in another not-so-surrogacy-friendly state, says Cirel. She also likes to include dispute resolution provisions, such as when to obtain a second or third medical opinion if the health of the surrogate or baby is at risk.

Another essential legal document is the pre-birth parentage order, typically completed in the second trimester and provided to the delivery hospital with the surrogacy agreement. Its intent is to contribute to a smooth transition following the birth. “This makes it very clear that the child is the intended parents’ child and that the surrogate has no responsibility or legal custodial rights,” says Douglas.

Although the intended parents may make certain requests when matching, the surrogate retains significant autonomy to negotiate the contract’s terms. She can decline to carry a multiple pregnancy, which happens more frequently in assisted reproductive procedures like in vitro fertilization. And if an embryo splits, resulting in twins, triplets, or more, “the surrogate—not the intended parents—has the right to selectively reduce,” Douglas says.

Surrogates receive mental health counseling and support plus legal advice from a separate attorney, all paid for by the intended parents, who will also need the financial bandwidth to cover medical treatments, the surrogate’s compensation, and other unexpected expenses as well, says Douglas.

Sometimes a match simply doesn’t work out, so either party may terminate the relationship any time before embryo transfer. Even though it’s a potentially uncomfortable topic, experts say there’s good reason to have these situations detailed in the agreement with clear terms on contract termination.

Ultimately, the contract offers some guardrails and reassurances, Cirel says, but intended parents must accept the unknown. “Even when you do your best to memorialize everybody’s intentions at the outset, it’s a delicate balance of trust and relying on some legal safety nets. You won’t be able to police everything the surrogate does.” 

