DCBA BRIEF

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Cover photo
by Jeffrey Ross

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Banks, Babies, & Bankruptcy

BY SEAN MCCUMBER

Well, it is 2013 and we are still here, so apparently the Mayans were wrong. Though that means that I had the honor of being articles editor this year, it also means that we all have a chance to enjoy another year of scholarly discourse in The Brief. In looking toward that future, I have worked to find some forward-looking articles in the hopes that some advance planning will make your practice better and stronger for your clients. The first article comes from Justin Scheid, covering the issues of foreign bank account reporting requirements and the penalties for failure to do so. He provides insight on navigating the IRS waters to handle these issues for your clients. Heather Ross, a prominent assisted reproduction technology attorney, writes about gestational surrogacy contracts and how to draft solid agreements. She addresses the gaps in the Illinois statute, such as medical autonomy and breaches of the agreement, to ensure that attorneys tailor their agreements to handle each eventuality. Finally, Arthur Rummler, a frequent contributor on all things bankruptcy, has penned an article about rebuilding a client's credit following a bankruptcy discharge. He provides useful tips and guidance for attorneys about the "what next" situations about which clients often inquire. As we move to 2014, clients will continue to seek out expertise and being prepared for the unknown is a fine skill for an attorney to hone. So what if the Mayans were wrong? I heard that Isaac Newton predicted the end of the world in 2060. □

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Gestational Surrogacy in Illinois: Contracting the Unknown

BY HEATHER E. ROSS

Illinois is one of the few states allowing gestational surrogacy without the necessity of court involvement to establish parentage. The Illinois Gestational Surrogacy Act ("Act"), which became effective January 1, 2005, provides specific requirements and safeguards for parties wishing to pursue gestational surrogacy, but alleviates the need for court involvement as long as each requirement of the Act is met.[1] Although the Act contains several specific requirements which the Parties must follow to comply with Illinois law, many issues integral to surrogacy agreements are not addressed. Practitioners are left drafting complex provisions about such issues such as medical autonomy, termination of pregnancy, selective reduction, restrictions on travel, payment structure, breach, etc., without any guidance from the statute. Because there is little, if any, legal precedent in Illinois or other jurisdictions, attorneys must tread carefully when writing these agreements, keeping in mind the dual goal of complying with the parties' intent while not infringing upon constitutional rights of the other parties. Addressing these non-statutory issues in a fair and appropriate manner remains crucial.

Medical Autonomy. Perhaps the most challenging task in drafting surrogacy agreements is preserving the Gestational Surrogate's right to medical autonomy, while addressing the Intended Parent's desire to make medical decisions concerning the fetus. At a minimum, the agreement should detail all health precautions each Party agrees to follow before and during the embryo transfer and after a pregnancy has been confirmed. The language should be specific and clear, as each Party should understand exactly what is required by the physician to maximize the chances of achieving and maintaining a healthy pregnancy.

Typically, the Gestational Surrogate will agree to adhere to all directives from the fertility center and her obstetrician to avoid risk of harm to herself and the fetus, including abstaining from smoking, drinking alcohol, using any medications not authorized by the fertility center or obstetrician, as well as protecting herself from exposure to a communicable disease. [2] The Gestational

1 Several states prohibit surrogacy arrangements altogether, while other states which allow for surrogacy require court intervention, including approval of the gestational surrogacy agreement, pre or post-birth orders, and/or an adoption proceeding, all of which are more time-consuming, expensive and uncertain.

2 Illinois law specifically allows (but does not require) the agreement to include these types of provisions. *See,* 750 ILSC 47/25(d)

Surrogate may agree to take prenatal vitamins for a specified period of time before and throughout the pregnancy, and follow any instruction from the fertility clinic for bed rest or other limitations on her activity after the transfer attempt to maximize her chances of becoming pregnant. There is often language that the Gestational Surrogate will follow all directives to avoid becoming pregnant with a child genetically related to her. If the Gestational Surrogate is married or in a committed relationship, the agreement should include a provision requiring the Gestational Surrogate's Husband/Partner to undergo testing for sexually transmitted diseases[3]. The gamete providers (which may be the Intended Parent(s)) should also be tested for sexually transmitted diseases and should agree to protect themselves from risk of harm during the retrieval and embryo transfer.

Some agreements provide for more specific required or prohibited activities. For example, the Intended Parent(s) may request the Gestational Surrogate eat only organic food, or not eat certain kinds of fish. Because the state law where the child is born will govern parentage, agreements often contain language restricting the ability of the Gestational Surrogate to leave the state where she has agreed to deliver or to travel more than a certain distance from the planned delivering hospital after she reaches a certain stage of pregnancy.

Practitioners should be careful in drafting language limiting the Gestational Surrogate's activities as such limitations run the risk of infringing upon her constitutional rights. The Supreme Court frowned upon the notion of restricting a pregnant woman's activities in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[4] holding that a husband's consent could not be required in order for his wife to obtain an abortion, and noting in dicta that, "if the husband's interest in the fetus' safety is a sufficient predicate for state regulation, the State could reasonably conclude that pregnant wives should notify their husbands before drinking alcohol or smoking."[5]

Language setting forth required medical treatment or procedures raises even more complex issues. Although surrogacy agreements typically include language requiring the Gestational Surrogate to submit to medical procedures (i.e., ultrasound, amniocentesis, Cesarean section, etc.), the US Supreme Court has held that a person has a constitutionally protected right to refuse unwanted medical treatment or procedures.[6] Thus it is unclear what happens in the event the Gestational Surrogate refuses to have a Cesarean section despite her obstetrician's recommendation, or refuses an abortion after testing reveals a severe fetal anomaly.

The US Supreme Court has held that parents have a constitutionally protected fundamental liberty interest in procreating and making decisions about how to raise their children.[7] If this interest is found to extend to decision making with respect to a fetus, it could potentially override a Gestational Surrogate's right to medical autonomy. Although the right of Intended Parent(s) to

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3 Testing is required by the U.S. Food and Drug Administration for participants to third party reproductive arrangements. *See,* 21 CFR 1271, *et.al.*

4 *Planned Parenthood v. Casey,* 505 U.S. 833, 898 (1992).

5 *Id.* At 898.

6 *Cruzan v. Director, Mo. Health Department*., 497 US 261 (1990)(Supreme Court stated that this right derives from the Fourteenth Amendment, which provides that no State shall "deprive any person of life, liberty, or property, without due process of law.") *See, also, In re Estate of Longeway,* 123 Ill. 2d 33, 549 N.E. 2d 292 (1989) (Supreme Court of Illinois found that a 76-year-old woman rendered incompetent from a series of strokes had a right (by request of her guardian) to the discontinuance of artificial nutrition and hydration, treating artificial nutrition and hydration as medical treatment.)

7 *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (striking down legislation allowing for sterilization, Court found that "marriage and procreation are fundamental to the very existence and survival of the race"). *See also, Santosky v. Kramer*, 455 U.S. 745, 753-54 (1982)(natural parents have a fundamental liberty interest in "the care, custody and management of their child"). *See also, Stanley v. Illinois*, 405 U.S. 645, 652, (1972)(the right to conceive and raise one's children is deemed essential and the "basic civil rights of man"), citing *Skinner v. Oklahoma*, 316 U.S. 535 at 541.

protect a fetus gestated by a third party has not yet been addressed by legislation or case law, the US Supreme Court has considered whether a state could have an interest in protecting fetal life. *Roe v Wade*[8] is the landmark decision granting a pregnant woman, along with her physician, the right to make decisions with respect to her pregnancy, including the right to terminate prior to fetal viability. However, *Roe* also recognized that a state could have a compelling interest in the potential life of a fetus ("if the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother.")[9]

Jurisdictions differ with respect to whether a state's interest in protecting fetal life can override a women's right to medical autonomy.[10] Upholding a women's right to refuse a Cesarean delivery at thirty-five weeks gestation despite the physician's recommendation that the fetus was not receiving adequate oxygen, the Illinois appellate court held that "a woman is under no duty to guarantee the mental and physical health of her child at birth, and thus cannot be compelled to do or not do anything merely for the benefit of her unborn child."[11] Although several jurisdictions have followed this reasoning,[12] it is not universal. For example, in *Jefferson v. Griffin Spalding County Hospital Authority*[13], the Georgia Supreme Court authorized the hospital plaintiff to perform a Cesarean delivery where the mother's refusal at 39 weeks gestation based on religious grounds would almost with certainty cause a fetal death.

The above cases dealt with situations where the expectant parents refused treatment based on religious or moral grounds. Would the outcome have been different if the expectant mother intentionally caused harm to her child in utero (i.e., by taking drugs)? Can she be forced by the state to obtain treatment, or be involuntarily committed to a drug rehabilitation program? The answer to this question may depend on where the pregnant mother resides. Although the majority of courts around the country have held that a state's abuse and neglect statute does apply to a pregnant women's fetus, there are exceptions to this national trend. [14] Following the majority of state decisions, the Wisconsin Supreme Court allowed petitioner's writ of habeas corpus after petitioner was taken into protective custody upon recommendation of her obstetrician that her drug use would severely impair her unborn child. Overturning the appellate court, and releasing the petitioner from protective custody, the Court found that the state's abuse and neglect statute does not confer jurisdiction over a pregnant woman's viable fetus.[15] Deviating from the national trend, however, the South Carolina Supreme Court allowed prosecution of a pregnant woman under its child abuse statute.[16]

Nothing in the Illinois Act suspends a Gestational Surrogate's constitutional rights, and it is hard to imagine an Illinois court enforcing a contract that purports to do so. Especially because Illinois has some of the strongest and most explicit case law in the country confirming a pregnant woman's right to refuse any and all healthcare

8 *Roe v. Wade*, 410 U.S. 113 (1973).

9 *Id.* at 163-164.

10 As assisted reproductive technology practitioner Deborah Wald noted in her brief survey of a surrogate's constitutional right to medical and procreative choice, "when state courts have ordered competent pregnant women to undergo invasive medical procedures against their will, the decisions have almost invariably involved situations where the refusal of treatment was clearly and undeniably placing a viable fetus at severe risk". *Surrogacy and a Pregnant Woman's Constitutional Right to Medical and Procreative Choice* – A Brief Survey, by Deborah Wald, esq. and Katherine Black, J.D. Candidate.

11 *In re Baby Doe,* 632 N.E.2d 326, 332, 260 Ill.App.3d, 392 (1st Dist. 1994).

12 *In re Fetus Brown* 294 Ill.App.3d 159, 171, 689 N.E.2d 397, 405 ("State may not override a pregnant women's competent treatment decision, including refusal of recommended invasive medical procedures, to potentially save the life of a viable fetus"); See also, *In re A.C.* (D.C. Court of Appeals 1990) 573 A.2d 1235(rights of the fetus should not be balanced against the rights of the mother); *Taft v. Taft* 388 Mass. 331 (1983)(it is a violation of a pregnant woman's constitutional right to privacy to order her to have her cervix stitched to prevent a miscarriage).

13 247 Ga. 86 (1981); *See also, Crouse Irving Memorial Hospital, Inc. v. Paddock*, 485 N.Y.S.2d 443 (1985) (blood transfusions ordered over religious objection to save the mother and fetus).

14 *See, In the Matter of J.B.C.*, 18 P.3d 342, 347-48 (Okla.2001) (holding that a fetus is not a "child" for purposes of the Oklahoma Children's Code); *In the Matter of the Appeal in Pima County Juvenile Severance Action No. S-120171*, 183 Ariz. 546, 905 P.2d 555, 557 (Ct.App.1995) (finding that mother's ingestion of alcohol during pregnancy could not be the basis for a finding of abuse because a fetus is not a "child" under the state child severance statute), review denied, 1996 Ariz. LEXIS 10 (Ariz. January 26, 1996); *State v. Stegall*, 2013 ND 49, 828 N.W.2d 526, 2013 N.D. LEXIS 52 (2013)(S.C. North Dakota)(A pregnant woman is not criminally liable for endangerment of a child for prenatal conduct that ultimately harms a child born alive. If the legislature had expressly intended to criminalize endangerment of a child to include an unborn child it would have done so).

15 See, *Wisconsin ex rel. Angela M.W. v. Kruzicki*, 209 Wis. 2d 112, 561 N.W.2d 729 (1997).

16 *Whitner v. State* 492 S.E.2d 777 (S.C. 1997)(the term 'person' in the criminal statute includes a viable fetus; pregnant mother can be found criminally liable for endangering the fetus by virtue of her drug use); *See also, Ankrom v. State*, 2011 Ala. Crim. App. LEXIS 67 (Ala. Crim. App. Aug. 26, 2011)we do not see any reason to hold that a viable fetus is not included in the term "child," as that term is used in § 26-15-3.2, Ala. Code 1975.

during pregnancy, as discussed infra. Interestingly, however, although the Act provides that the Gestational Surrogate shall choose her physician (in consultation with the Intended Parents); it does not specifically state that a Gestational Surrogate maintains medical autonomy. In fact, the Act allows Parties to include contractual provisions that a Gestational Surrogate agree to fetal monitoring, testing and treatment recommended by her physician. Other state statutes have explicitly addressed the Gestational Surrogate's right to make medical decisions. The Texas surrogacy statute states that "a gestational agreement may not limit the right of the gestational mother to make decisions to safeguard her health or the health of an embryo".[17] The Florida statute attempts to provide protection for both the Gestational Surrogate's medical autonomy and the fetus, stating that "the commissioning couple agrees that the gestational surrogate shall be the sole source of consent with respect to clinical intervention and management of the pregnancy" ***and*** that "the gestational surrogate agrees to submit to reasonable medical evaluation and treatment and to adhere to reasonable medical instructions about her prenatal health."[18] This language difference could open the door to an argument that an Illinois Gestational Surrogate is permitted to contract away her right to medical autonomy.

17 Texas Family Code Annotated 160.754(f).

Although the issue of medical autonomy has not been addressed in the context of a surrogacy arrangement, and the enforceability of such contractual provisions is unknown, addressing these issues in the surrogacy agreement may well be the drafting lawyer's most important role. Inclusion is of vital importance, as only through the process of discussion and negotiation can parties to surrogacy arrangements determine whether they are an appropriate match. A Gestational Surrogate who is opposed to amniocentesis or a Cesarean section should not be matched with Intended Parent(s) who want these procedures. Obviously, the parties are much better off discovering any disagreements early on in the process (ideally even before contract drafting), rather than having a dispute arise during the pregnancy. The attorney's job is to ascertain what limitations or procedures his or her clients would like included (or for the Gestational Surrogate – what she is comfortable with), while advising of the legal uncertainty with respect to enforceability.

Characterizing Payment Provisions. Another challenging task for drafting gestational surrogacy agreements is how to draft payment provisions. Most important, every agreement should contain a statement that any payment to the Gestational Surrogate is not payment for the child him/herself, as child commodification (or baby-buying) is illegal in every state in the United States.

Payment provisions should specify the exact amount of payments being made, whether they are contingent on certain events and when each payment will be earned. For a compensated arrangement, the Gestational Surrogate will often be entitled to base compensation, which is a set fee the Gestational Surrogate will earn for attempting to carry the child to term. Practitioners differ on when a Gestational Surrogate should earn her base payments. Some agreements provide ten (10) equal monthly payments, commencing at fetal heartbeat and ending at delivery, while others provide for a larger percentage of base compensation being

18 2011 Florida Statute 742.15(2) (a) and (b).

paid later in the pregnancy premised on the notion that the Gestational Surrogate's pain and suffering increases throughout gestation. Although larger payments earned after delivery are also used to ensure the Gestational Surrogate will not change her mind and will cooperate in parenting proceedings, this very notion raises the concern of child commodification and surrogacy coercion. Any language suggesting that the Gestational Surrogate is being paid for "turning over the child" should be avoided.

Because most women do not gestate exactly 40 weeks, the agreement should also address whether the Gestational Surrogate is entitled to all of her base compensation should she deliver pre-term. The agreement should set forth a cut-off date, after which the Gestational Surrogate will receive the full amount even if she delivers prior to 40 weeks (most provide she will receive the full amount if she delivers after week 34 for a singleton and week 32 for multiples). If she delivers prior to these agreed upon dates her payments may be prorated to the day she delivers or her recovery time post-delivery. Some attorneys base her final payment on whether the child survives after delivery, and in such circumstances, no matter how early the delivery, if the child survives, the Gestational Surrogate is entitled to full compensation. Practitioners should be aware that tying payment to the outcome of the pregnancy or whether (or for how long) the child survives creates enforceability issues. Rather than being compensated for her 'time and inconvenience' or 'pain and suffering' her payment is based solely on tendering the child him/herself – again raising the issue of child commodification.

The agreement should set forth all other payment/reimbursement terms agreed upon by the Parties. This may include additional payments for multiples, maternity clothes, medical procedures, life insurance, estate planning fees, attorney fees, pre-natal vitamins, travel, health club, etc. Often payments are contingent on the occurrence of an event – e.g. payments for procedures (transfer or mock cycle, invasive procedure, miscarriage, selective reduction, termination, genetic testing) or additional expenses for physician ordered bed rest (child care, lost wages, housekeeping). All payments and expense reimbursements should specify the amount of payment allowed and if it is an expense reimbursement how the amount will be calculated and what proof the Gestational Surrogate must provide for reimbursement (receipts, paystubs, mileage logs, etc.)

As required under the Illinois Act, whenever a Gestational Surrogate is entitled to payments an independent escrow account should be set up prior to commencing any medical procedures in furtherance of the surrogacy arrangement. The Intended Parent(s) should be required to fund the escrow with all payments that are known amounts at the time of the embryo transfer (i.e., base compensation; maternity allowance; estate planning fees; monthly incidental allowance). The agreement should set forth a minimum balance in the escrow and Intended Parent(s) should agree to fund the escrow if necessary should it dip below the minimum. The agreement should also provide that the escrow cannot be closed until all of Gestational Surrogate's payments (including compensation and expense reimbursement) have been satisfied.

"Because the right to procreate, or not to procreate and the right to terminate, or not to terminate... raises constitutional issues which have not been addressed by courts in the context of surrogacy arrangements, a well drafted penalty provision may be a Party's only ability to obtain relief should the other Party breach his/her obligations under the agreement."

Breach. Because the right to procreate, or not to procreate and the right to terminate, or not to terminate (or selectively reduce) raises constitutional issues which have not been addressed by courts in the context of surrogacy arrangements, a well drafted penalty provision may be a Party's only ability to obtain relief should the other Party breach his/her obligations under the agreement. As such, the necessity of including breach and penalty provisions cannot be understated. Yet the issue remains as to what penalties are deemed acceptable – what if they infringe a Party's constitutional rights or are overly coercive? These issues remain highly contentious between practitioners and among parties to surrogacy arrangements.

Most agreements will provide for the injured party to seek any and all relief available to them at law or in equity. But what does this mean? What relief is available? If the Gestational Surrogate refuses to terminate or reduce the pregnancy due to a severe genetic abnormality in violation of the terms of the agreement do the Intended Parent(s)

have a remedy? It is hard to imagine a court that would force a woman to undergo an abortion. Can the Intended Parent(s) refuse custody of the child? Most practitioners would agree that Intended Parent(s) should never be allowed to refute their parenting obligation to the child – no matter what the circumstances or health of the child. Perhaps the Gestational Surrogate agrees to forego additional compensation should she fail to terminate in breach of the agreement. Perhaps she agrees to return compensation and expense reimbursement already paid. Can she be held responsible for the financial care of the child throughout the child's life? Be careful in drafting penalty provisions. A coercive remedy may infringe the Gestational Surrogate's ability to make constitutionally protected decisions regarding her personal liberty. If she does not want to abort, but knows she cannot afford to pay for the child's future health care so she aborts out of fear and coercion – have her constitutional rights been infringed upon? What if she then sues the Intended Parent(s) for coercion and violation of her constitutional rights – are they opening themselves for liability?

What if a Gestational Surrogate threatens to terminate against the wishes of the Intended Parent(s) and in breach of the agreement? Do the Intended Parent(s) have a cause of action for emotional distress? The parties may agree by contract that the Gestational Surrogate will return all payments made to date – including expense reimbursement. Although this may impede her ability to make a free choice, if her health is not at stake does she have a constitutionally protected right to terminate a fetus to which she has no genetic relationship and which she agreed to carry? Because Illinois' surrogacy statute bans specific performance to require a Gestational Surrogate to participate in an embryo transfer attempt, an Illinois arrangement should never provide this type of remedy for breach in a surrogacy arrangement. Most practitioners believe that breach provisions should never allow Intended Parent(s) to disavow parentage or require the Gestational Surrogate to become the legal parent of the child should she refuse to terminate a pregnancy (even if there is a genetic defect). The sole reason for the surrogacy arrangement is to provide Intended Parent(s) the opportunity to have a child through surrogacy to which they will be the legal parents. Language allowing the Gestational Surrogate to maintain parenting rights to the child (under any circumstances) drastically undermines the intent of the agreement. Moreover, depending on the state law it may not be possible. For example, under Illinois law Intended Parent(s) are the legal parents of the child immediately at the time of birth. A breach provision allowing the Intended Parent(s) to disavow parentage for Gestational Surrogate's failure to terminate is a legal impossibility. The Gestational Surrogate would have to first terminate the Intended Parent's rights, and then adopt the child. It is unlikely any court would enforce a contractual provision requiring a party (let alone a Gestational Surrogate who entered into the arrangement with the sole intent not to parent) to 'adopt' a child.

"Agreements that impose financial penalties for breaching termination/ selective reduction clauses are also problematicas such language raises issues of coercion, eroding the Gestational Surrogate's constitutional right to personal liberty and freedom to make medical decisions about her body."

Agreements that impose financial penalties for breaching termination/selective reduction clauses are also problematicas such language raises issues of coercion, eroding the Gestational Surrogate's constitutional right to personal liberty and freedom to make medical decisions about her body. Does a Gestational Surrogate who does not reduce solely because she fears the financial penalty have a cause of action against the Intended Parent(s) if she suffers a severe health consequence during the pregnancy or delivery (a risk she assumes under the agreement)? Is this a risk Intended Parent(s) are willing to take? Most of these questions are unknown. Outcomes will likely vary depending on what state law applies and the factual circumstances of each case. The attorney's role is to make sure the client understands the potential risks, consequences and enforceability issues surrounding the inclusion of remedies for breach of the gestational surrogacy agreement. Drafting a clear and concise agreement, not only as to breach of the agreement, but also as to the defined statutory requirements, as well as other silent issues, will ensure that the parties' intentions are properly reflected, and the attorney has done the job well. □