Advising "Non-Traditional" Families Considering or Involved in Multi-Jurisdictional Surrogacy Arrangements:

By
Richard B. Vaughn*, Esq., National Fertility Law Center, Inc.

Advances in assisted reproduction technology (ART) over the last thirty years have made it possible for many to start a family when it was previously not possible. This is especially so for more "non-traditional" families (single parents, unmarried parents, same sex couples, intended parents beyond their reproductive years). For the non-traditional family, ART provides an increasingly common alternative to family formation. However, social acceptance, public policy and the law – for all families using ART, but especially for non-traditional families using ART - have not kept up with the technology, making their legal considerations all the more complex.

The doctrine of intended parentage is a legal approach to parentage based on the idea that those with procreative intent should be the legal parents. This approach is gaining acceptance in an increasing number of jurisdictions (enabling intended parents in all sorts of family configurations to obtain parental rights). However, most jurisdictions in the U.S. and other countries have not fully adopted this doctrine. Outside of this doctrine, a wide variety of more restrictive approaches to establishing legal parentage for non-traditional families have evolved as a result of jurisdictional public policy considerations, local custom and practice, judicial discretion and a patchwork of case law, limited statutory law and proposed model legislation.

If your case involves "traditional" intended parent families and surrogates, clinics and agencies all in one state, the parental establishment process for your clients will be fairly straightforward. However, family formation through ART is increasingly, if not predominantly, multi-jurisdictional in one way or another, and it is increasingly being used by more non-

traditional families, making your clients' legal approach to parental establishment significantly more complex.

Appreciating the interrelation of these non-traditional family and multi-jurisdictional factors will and knowing when to seek the advice or assistance of lawyers licensed and experienced in the relevant jurisdictions will help your clients: better navigate their options, plan their surrogacy, and properly prepare for their parental establishment process. Such preparation will also go a long way toward ensuring your clients a smooth return home with their newborn child or children.

APPROACHES USED TO ESTABLISH PARENTAL RIGHTS IN SURROGACY CASES IN THE U.S.

The Intended Parentage Doctrine

Since 1993, the courts in California have recognized that intended parents of children produced through surrogacy are the legal parents. In 1993, the California Supreme Court decided in Johnson v. Calvert that an intended mother who provided her own egg for gestation by a surrogate should be considered the natural mother because she had the intent to procreate. Johnson v. Calvert, 5 Cal. 4th 84 (Cal. 1993).

Under this doctrine, even where there is no genetic relationship between the intended parents and the child produced through a surrogate, the intended parents are the lawful parents of the child when a married couple intended to procreate using a non-genetically related embryo implanted into a surrogate. In re Marriage of Buzzanca, 61 Cal. App. 4th 1410 (1998).

Applying this doctrine to same sex intended parent couples, in 2005, the California Supreme Court decided three companion cases involving lesbian couples who had children via

surrogacy, Elisa B. v. Superior Court, Kristine H. v. Lisa R. and K.M. v. E.G., ruling that when a same-sex couple has a child through assisted reproduction, both partners are legal parents, regardless of their gender, sexual orientation, or marital status.

Several jurisdictions have followed in California's footsteps in whole or in part, but many states apply different approaches, and it is important to understand these other approaches to parental establishment.

Other Approaches to Parentage in the United States

Genetics-Based Test

Ohio, for example, explicitly rejects the California intent-based approach and applies a genetics-based test; those who are the genetic parents are considered the natural and legal parents of the child(ren) unless they relinquish or waive their rights. Belsito v. Clark, 644 N.E. 2d. 760, 766 (1994).

Hybrid Procreative and Parenting Intent

Tennessee, on the other hand, has considered both the California intent-based approach and Ohio's genetics-based approach and has fashioned a hybrid approach based on a consideration of: procreative intent of the parties prior to conception and birth; who gave birth; and the lack of another competing party for the role of "parent." In re C.K.G., 173 S.W.3d 714 , 725 (2005).

Parental Conduct Approach

In Pennsylvania, the court has determined that a surrogate assumed legal status as the mother of the child she delivered despite having no genetic connection to the children. However, the Pennsylvania court ultimately determines parentage by giving more weight to the evidence of parental conduct, such as prenatal conduct, gestating, caring for the child(ren), and making

decisions that affect the child(ren) even though the person has no genetic connection to the child(ren) or intent to parent the child(ren). Flynn v. Bimber, 70 Pa. D. & C. 4th 261, 289-309 (2005).

Uniform Laws Approaches

Considering the variety of approaches to parentage across the U.S., there have been several proposed uniform laws addressing the rights of intended parents through ART. The Uniform Parentage Act (UPA) (originally proposed in 2000 and amended in 2002) essentially replaced the 1998 Uniform Status of Children of Assisted Conception Act (USCACA). The UPA was approved by the National Conference of Commissioners on Uniform State Laws and created a potential means of developing a uniform system for determining parentage in surrogacy cases, but it is not "law" per se and serves as a model act for states to consider in whole, in part, or with state-specific revisions when and if the effort is made to enact such a law in that state. Several states have made such an effort (Alabama, Delaware, New Mexico, North Dakota, Oklahoma, Texas, Utah, Wyoming, and Washington) (Table of Jurisdictions Wherein Act Has Been Adopted, Unif. Parentage Act (West 2000) Refs & Annos), so your clients' parental establishment process will have to proceed in compliance with these statutes.

In 2008, the American Bar Association adopted the Model Act Governing Assisted Reproductive Technology. The ABA Model Act is intended to provide guidance and a framework for resolving controversies by framing the rights and obligations of the various parties to ART arrangements.

International Considerations

In many countries of the world, surrogacy is either illegal or highly restricted, so intended parents from other countries (in traditional and non-traditional families) frequently come to the

U.S. for surrogacy. As a result, the wording of U.S. parentage orders and the way in which U.S. birth certificates are filled out can significantly impact an intended parent's ability to: register and obtain citizenship in their home country for children born through surrogacy in the U.S.; and/or to further perfect their parental rights in their home country (if necessary).

DEVELOPING YOUR CLIENT'S LEGAL STRATEGY: CLIENT INTAKE, SURROGACY CONTRACTS, FAMILY PLANNING DOCUMENTS, AND THE PARENTAL ESTABLISHMENT CASE

Given the various approaches to parental establishment (complete with the restrictions and limitations), careful consideration of the nuances present in multi-jurisdictional cases should be taken into account when advising intended parents on their parental establishment strategy, especially those in "non-traditional" family configurations Attention to these details should be given primarily at the intake stage, when drafting surrogacy contracts, and when drafting estate planning documents to protect the family.

I. CLIENT INTAKE – YOUR INITIAL CONSULTATION ULTIMATELY SETS THE STAGE FOR THE LEGAL STRATEGY IN YOUR CLIENT'S PARENTAL ESTABLISHMENT CASE.

The first step with any client is the initial consultation and client intake. In ART cases, some basic questions should be addressed up front.

A. IS THE CLIENT WORKING WITH AN AGENCY OR ARE THEY INDEPENDENT?

Clients should be advised about the psychological, medical and genetic screenings, insurance for the maternity and the newborn child(ren), fund management (whether through escrow or your client-trust account), and background checks among other issues.

Surrogacy agencies typically manage this part of the clients' process. Some IVF clinics may do this as well (or at least require these steps be completed before proceeding with the medical procedures), but most do not. Therefore, it is especially important with independent clients (those not using an agency) that you find out whether they have received referrals or engaged the necessary professional services to complete these essential first steps. Your clients will likely look to you to provide these referrals or guidance in these matters, but as their lawyer you should also consider not drafting or completing the surrogacy agreement until your independent clients have completed these preliminary steps (or you should only move forward after you have fully advised them and they have waived these standard requirements in writing).

Why is this important? Although it may not impact the legal strategy for establishing parentage for such clients, many of the horror stories we've undoubtedly heard about are the result of clients using family members or friends as their surrogate or donor and/or skipped over one or more of these preliminary requirements (usually because they are trying to save money, or "they know each other well" or they "have a good feeling about this girl"). Encouraging such safeguards at the outset of your clients' surrogacy can prevent conflicts in the future.

B. WHOSE GENETICS ARE BEING USED?

Another important question to ask your clients is whose genetics will be used in their assisted reproduction. For purposes of establishing legal parentage in a surrogacy case, the importance of an intended parent's bio-connection can range from not relevant to critical depending on the jurisdiction.

Keep in mind that some intended parents may view this as a touchy subject, and many same sex male couples may intend to use sperm from both men when fertilizing their donor eggs and may actually choose not to identify the bio dad. Nevertheless, the issue needs to be discussed in the early stages of the legal process especially if the surrogate will deliver in a state where the bio-connection is critical to the legal process.

C. WHERE IS EVERYONE FROM?

The parental establishment process your clients will go through - and the way in which the birth certificate will or can be prepared (or amended) - is determined primarily by the law and process established in the birth state. Additionally, laws in the state or country where the *intended parents* reside may also have an impact on which states are possible locations for your clients to conduct their surrogacy.

1. INTENDED PARENT(S) RESIDENCE

The residence of intended parent(s) ("IP" or "IPs") is not always critical, but it may limit the options available so it is important to factor in to your strategy. For IPs based in the United States, the second and/or step parent adoption laws in their home state may present a problem, especially for your same sex IPs. Many states will require a same-sex second IP or any non-biological IP to complete a second and/or step parent adoption to perfect their parental rights; and many but not all jurisdictions will amend the birth certificate to add a second same-sex parent if that parent has obtained a second parent adoption order.

In some states, this second or step parent can be done in the birth state on the basis that the child can be found there (at the time of filing the adoption petition). Most states, however, have a residency requirement for adoption cases, so some IPs will need to go back home to get this done. The difficulty for same sex intended parents is that not all states will allow same sex

second or step parents to adopt. So, if your clients live in one of these restricted states, they should be matched with surrogates in states which do not require the second parent to adopt or states which will allow the adoption case to proceed in the birth state.

Also, consider and be aware of states that may not recognize adoptions or parentage orders for same sex couples issued by other states. Florida does not allow same sex second parent adoptions, and until recently Florida took the position that it would not, and was not required to, recognize a same-sex second parent adoption order from another state. However, a Federal District Court, in Embry v. Ryan, 11 So.3d 408 (2009), ruled that the State of Florida must give full faith and credit to out-of-state same-sex second parent adoptions. New York does not permit surrogacy, but in September 2010, a New York court enforced and gave full faith and credit to a pre-birth parentage order naming two men as the legal parents (in the midst of a custody and child support dispute where one of the dads tried to argue he wasn't legally bound by the California order because New York does not permit surrogacy). Matter of Support Proceeding, NYLJ 1202474012528, at *1 (Fam., SU, Decided October 4, 2010).

Such rulings may well lead to uniform acceptance of out-of-state same sex adoption orders as well as parentage orders; however, until full faith and credit for all parentage orders is the rule across the land, this is still an issue for your clients to consider. In the meantime, some of your non-bio intended parents, especially those in same sex relationships, may wish to supplement their parentage orders with an adoption order where possible.

Similar considerations exist for international IPs, especially those in non-traditional families. The country of residence for non-U.S. IPs presents a variety of issues to consider. Adoption and immigration rules and procedures are different in each country, creating potential

difficulties and delays in registering/nationalizing their child(ren) or perfecting their parental rights in the home country.

Some countries may not fully recognize the parentage order or birth certificate from the U.S. and may require an additional stepparent adoption process once the IPs returns to their country of residence with their child. The importance of you and your clients researching the applicable international laws beforehand is imperative in such situations.

For instance, when working with clients from the United Kingdom (UK), they should be advised that the UK High Court will not recognize parentage orders of other countries, even if the surrogacy was legal where it was conducted. The Court will consider a parentage order as "evidence" of who they will declare as the legal parents under UK law, but it is not dispositive under UK law, and not all IPs can apply for a UK parental order (e.g., single men).

Depending on the jurisdiction, a client may be required to apply for a local parental order to establish the lawful parentage of the child. Similarly, clients may need to register the child(ren) in their country of residence and the appearance of the birth certificate could impact whether this can be accomplished.

When dealing with IPs not from the U.S., one of the most important things to remember is to advise these IPs to always speak to an attorney from their home country who is experienced in family law and immigration matters. These clients will need advice on whether their home country prohibits or restricts surrogacy, what sorts of parental orders or birth certificates would be recognized, how to bring the child(ren) back to the home country, and how to register and naturalize the child.

For example, IPs from the UK and Germany may well need to find a single surrogate. Surrogacy in France is illegal, so caution must taken not to raise any red flags, which may mean

taking back a “normal” looking birth certificate (i.e., one with a surrogate listed in the mother box). In Italy, two men cannot be on the birth certificate, which may require the surrogate to be left on it. A single man in Greece cannot be on the birth certificate, thus, the surrogate must be left on there for the IP to get back in. Spain will accept a court order of parentage for IPs conducting a surrogacy in a foreign country, so your Spanish IPs should not be matched in a state where there are no parentage orders (e.g., Washington State). If the IPs live in a country where surrogacy is prohibited, it would be counterproductive for the IPs to work with a surrogate in a state or country where they may be required to go back home to complete a second parent adoption. International IPs should also consider arriving in the U.S. before the birth occurs to avoid raising red flags back home if the home country restricts or criminalizes surrogacy. The dates stamped on their passports may create a problem for them if they reflect arrival in the U.S. after the birth.

Based on advanced consideration of all the issues your IPs may face in their own home state or country, your IPs can properly plan their parental establishment strategy in the surrogate's jurisdiction in a way that does not obstruct, conflict with, or hinder their process when they return home.

2. SURROGATE'S RESIDENCE / BIRTH STATE

By far the most significant impact, however, on how your client(s) obtain a court order of parentage and how the birth certificate will or can be prepared or amended is the law and process of the birth state.

If your client has not selected a surrogate, reviewing the issues outlined below with the client prior to surrogate selection can help prevent problems at the time the parentage order is sought and the IP returns home.

a. Procedures Vary By Jurisdiction

Some states have similar procedures across the state, but in others, the custom and practice may vary by county. Consider the law and process in the county where the surrogate resides and where the birth hospital is located and/or whether another (more favorable) county would accept a filing based on the parties' stipulation to jurisdiction in that county.

In the applicable jurisdiction(s), determine whether the parentage process is completed pre-birth, post birth, or through a combination of pre-birth and post-birth procedures. Find out whether this matters to the IPs.

You should also consider whether the applicable jurisdiction will enter an order to seal the records, as most clients consider these matters to be extremely private, sensitive and personal.

Also, consider your clients' social and cultural background when advising them on their parental establishment strategy. [One IP, going through a surrogacy, once told me she preferred to get an adoption order if possible because adoption was considered more socially acceptable than surrogacy.]

Whether the parentage application is filed pre- or post-birth or both, typically you will need to file an application, a stipulated petition, a memorandum of authorities and affidavits of support from all parties, attorneys, and doctors involved, along with a proposed order of parentage. Knowing what documents are required in the filing, and how and when the surrogate's presumed rights get terminated or relinquished is essential for a smooth process.

Many IPs will tell you they want a pre-birth order because they think this will secure their rights sooner, but they may not understand that while the pre-birth order is available prior to the birth it typically is not effective until the birth actually occurs. The post-birth process generally

involves a hearing, typically within 3-5 days of birth and yields the same results, depending on the state. In either event, the parentage order will terminate the presumed rights of the surrogate (and her husband if she is married), establish the IPs parental rights, and direct the office of vital records on how to fill out the birth certificate.

As noted above, remember that some jurisdictions will not grant parental rights to a non-bio parent. Depending on the birth state, the non-bio parent may need to complete some alternative form of parentage (second parent or stepparent adoption) to confirm his/her parental rights. Some birth jurisdictions will hear the second parent adoption, while others have a residency requirement, which means the non-bio IP would need to return home to obtain an order of adoption. And remember, not all states/countries allow second parent adoptions, especially for a same-sex parent, so if you don't already know if your client's home jurisdiction will allow this, you will need to advise your client to speak to an attorney in their home jurisdiction.

Find out what the requirements are for completing the second or stepparent adoption in the birth state. Some birth states or countries require a home study and background checks, including Adam Walsh Background checks (as is the case in Minnesota, among other states). If so, you need to plan for the added cost and time needed to complete the process and prepare the IPs accordingly. Some states have these requirements but may waive them under certain circumstances (for surrogacy related filings, the adoption is by consent and as such the judge may waive the requirement, but often there is no guarantee of such a waiver.)

b. How Can the Birth Certificate Be Filled Out?

Explain to your clients that the court order is what grants parental rights, not the birth certificate, but ask the IPs what their goals are when it comes to the birth certificate and plan accordingly.

If you are representing a same sex couple, have them consider whose name(s) they wish to go on the birth certificate. Most often, they will want both of their names be on the birth certificate, so you will need to know if both IPs can be listed on it immediately, or in the future in an amended birth certificate, or if only one name is permitted. If only one name is permitted, does it have to be a bio-parent or will the jurisdiction allow them to pick one parent to be listed?

In the case of a single male, in some circumstances, the surrogate may have to remain on the birth certificate (usually for single international intended fathers). For instance, in a single international male intended parent case, the father's home country may only accept a "normal" birth certificate; i.e., with a "mother" listed. This may also be necessary if the client is going to try and obtain a passport from the home country for the child(ren) to return home with the IPs. In this situation, because she appears on the birth certificate, the surrogate would sign the passport application along with the intended/legal father, and she should also sign a letter of consent for the IP to travel with the newborn. If so, will the court allow the parent to obtain multiple versions of the birth certificate? Most surrogates will not want to remain on the birth certificate, so a parentage action will typically be necessary to – at a minimum - formally terminate her presumed "rights", and ideally the court will allow the intended (and now legal) father to request an amended birth certificate removing the surrogate from the birth certificate – so you need to know if this is possible in the applicable jurisdiction.

The same birth certificate issues may apply in the case of same-sex male couples – they may need an initial birth certificate listing a mother. You'll need to know whether the court will grant an order and whether vital records will be able to prepare other versions of the birth certificate upon request – removing the surrogate and listing one dad or two.

For same sex female couples, the initial birth certificate typically will list at least one of the intended mothers and this would not present a problem for most intended/legal mothers upon return home. However, you will still need to know ahead of time whether your same sex female couples can return home with 2 women on the birth certificate or whether they can amend the birth certificate to later add the second mom if necessary or preferred.

c. How Long Does it Take to Obtain the Birth Certificate(s)?

Whether the parental establishment process is pre- or post-birth, ultimately your clients will want to know how long it will take to get the birth certificate. For U.S. clients, this is not crucial as they will be able to return home without the birth certificate.

However, for international clients, this will impact how long it will take to get a passport for the child(ren), which is required for the child(ren) to travel back home. International intended parents must make the necessary preparations to stay in the state or country after birth as long as necessary to obtain all the required documentation in the applicable jurisdiction; on average this is about 2-3 weeks.

D. **WHAT IS THE RELATIONSHIP/STATUS OF THE IPS?**

Depending on the jurisdiction, the relationship status of the IPs may impact the parental establishment process and the way in which the birth certificate can be filled out.

Heterosexual Married. Some states will not issue a parentage order unless the intended parents are a married heterosexual couple (e.g., Utah, Oklahoma, and Florida).

Married (gay or straight). Some states that allow same sex marriage (Massachusetts) give married IP couples (gay or straight) the benefit of a pre-birth parentage process but un-married IP couples must go through a post-birth adoption process to confirm rights for a non-bio IP. Thus, some gay couples may consider marrying under Massachusetts law (or other

states/countries). However, other states won't put a same sex couple, married or unmarried, on a birth certificate (Kansas, Ohio, and Texas).

Domestic Partnership/Civil Union. There is an open question as to whether domestic partnerships or civil unions would qualify in those states that require IPs to be married. Some states, like Massachusetts, are specific in the requirement for "marriage" and civil unions or domestic partnerships do not qualify. Nevada, which requires IPs to be married, recently passed a domestic partnership law which became effective October 1, 2009, giving domestic partners all the rights of married couples in that state. As a result, same sex couples wishing to work with a surrogate in that state may want to consider registering their partnership as a domestic partnership in Nevada (and there are no residency requirements for such registration). In states that have not specifically addressed this issue, it is arguably open for interpretation (or challenge), and your clients may not want to take that risk.

Unmarried IP Couple. Some states will allow a parentage order for an unmarried IP couple, others (as noted above) might require an adoption process for the non-bio parent in an unmarried IP couple. Other states won't put a same sex couple, married or unmarried, on a birth certificate (Kansas, Ohio and Texas).

Single. Is the IP using her or his own genetics or donated gametes? Some states will allow a parentage order for single intended parents using all donated gametes, and some will require such IPs to adopt. Therefore, consider the potential implications resulting from the ICPC (Interstate Compact for the Placement of Children) or the Hague Convention if the IP is from another state or country.

II. DRAFTING SURROGACY AGREEMENTS – SPECIAL ISSUES TO CONSIDER FOR NON-TRADITIONAL INTENDED PARENT FAMILIES AND MULTI-JURISDICTIONAL ARRANGEMENTS

Drafting surrogacy agreements for non-traditional families and in multi-jurisdictional arrangements requires customized attention to several contractual provisions, including, among others: disclosures, warranties and representations; assumption of risks; and the governing law of the contract.

A. DISCLOSURES / WARRANTIES / REPRESENTATIONS.

Non-traditional intended parent families should state up front whether they are single, married, unmarried, gay, etc. This may sound obvious and redundant if the parties have met already, independently or through an agency, but disclosing this in the written agreement signed by all parties will only help to support the voluntary nature of the agreement.

B. ASSUMPTIONS OF RISK

As with any medical procedure, there are certain health risks relating to surrogacy that should be encompassed in the surrogacy agreement – particularly in the assumption of risk and waiver/indemnity clauses. The agreement should state that the surrogate has the obligation to inform herself, and to assume, the usual risks of complications, disease transmission, and death (among others) inherent in IVF, pregnancy and childbirth.

However, specifically addressing the risks to the surrogate of working with non-traditional families should be included as well. For example, if the surrogate is working with a single intended mother of advanced age using her own eggs, she should be advised of the higher chances of pregnancy complications and/or miscarriage from the doctor, but this could also be stated in the agreement. Another example of specific additional risks, albeit minimal, would be when a surrogate in working with HIV+ IPs. In such a case, you may want to consider being specific about this and include it in assumption of risk provisions (or as a separate disclosure) rather than lumping it generally with "disease transmission." Some jurisdictions require

submitting the contract for validation or as an exhibit attached to the parentage petition. Of course, many HIV+ IPs may be sensitive about such a disclosure in a potentially public document (i.e., if the court won't seal the records), so putting the HIV+ disclosures in a separate written document might be an alternative approach for such IPs.

C. CONTROLLING PROVISIONS AND GOVERNING LAW IN MULTI-JURISDICTIONAL ARRANGEMENTS

Governing Law - In multi-jurisdictional arrangements, your clients will most often have a choice in what state law they wish to govern the interpretation of the agreement. The law of the surrogate's state is the most common choice, but the law wherever there is a nexus (the location of the IPs, the clinic or the surrogacy agency) can provide other options. Additionally, the parties may be able to choose the law of a different (more favorable) state even if there is no nexus with that state.

The parties may choose one forum over another because it is more developed in the particular area of the law affecting their arrangement or because they are more familiar with that forum state's laws. In either event, the choice of law gives the parties some predictability regarding the enforceability of the agreement.

Parties to a contract may choose the law of a state without a nexus to the matter as the governing law of their contract so long as that choice of law does not trample upon the public policy of a state with a materially greater interest in the matter. See, e.g., Expansion Pointe Properties Ltd Partnership v. Procopio, Cory, Hargreaves & Savitch, LLP, 152 Cal.App. 4th 42 (2007); and Hodas v. Morin, 814 N.E.2d 320 (2004). Even if this is possible, when considering another state's law to govern the agreement, keep in mind that the parentage rights are still

established in the birth state, so the agreement should be drafted to comply with the birth state's requirements.

Language to Meet the More Conservative Jurisdiction – Another key point to consider in multi-jurisdictional arrangements is that even if your choice of law provision states that the law of a more favorable jurisdiction will apply to the interpretation of the contract, consider also using language in other provisions which will satisfy the more conservative jurisdiction, especially if the more conservative jurisdiction will have any reason to look at the underlying surrogacy agreement.

As just one example, many countries and several U.S. states restrict surrogacy to only non-compensated surrogacy and will allow non-compensated surrogacy or will allow reimbursement of a surrogate's "reasonable living expenses" (language similar to that seen in adoption statutes). If your clients need to return home to a more conservative jurisdiction and have to do anything further to confirm their parental rights (such as in a second parent adoption for a non-bio parent; UK intended parents who have obtain an additional parental order from the UK courts), they may also need to present the underlying surrogacy agreement for review. In such cases, it would assist your clients if you draft the contract as a non-compensated arrangement.

III. ESTATE PLANNING DOCUMENTS TO PROTECT THE FAMILY AND THE PARENT(S)

With perseverance and a little luck, your clients will be creating families, so you should be discussing estate planning documents to help protect their new family. Such family planning documents can help provide clear instructions of the IPs wishes regarding the care and custody

of their child(ren), their healthcare, and other general expressions of authority if something should happen to them.

For gay couples in particular, they do not have the automatic protections (i.e., fully recognized legal rights) afforded to married couples, and even if they can be legally married in one state or country, their rights may not be recognized in other jurisdictions. Therefore, in the absence of fully legislated and automatic protections, these documents, which are clear, written expressions of their authority, are all the more important. For single intended parents, having estate/family planning documents is also critical because there is not a second parent to immediately step in if the single parent is suddenly unable to care for the child(ren) whether due to death or incapacity. A brief summary of the family planning documents to be considered is below.

A. SURROGATE'S TEMPORARY DESIGNATIONS, POWERS OF ATTORNEY, AND AUTHORIZATION FOR IP TO CONSENT TO MEDICAL TREATMENT.

Court orders of parentage become effective immediately at birth (if they were obtained pre-birth) or a few days after birth (if the birth occurs in a state requiring a post-birth application for the order). Having the surrogate sign a temporary guardianship designation, power of attorney, and authorization for the IPs to consent to medical treatment for the child(ren), will help provide some measure of protection for your clients' rights during the surrogacy and up until the court order becomes effective. Such documents help bridge the gap between the surrogacy agreement and the time the final court orders are issued, whether in the birth state or the IPs home state/country. These surrogate designations may also be required by a hospital to discharge the child into the care of IPs.

B. INTENDED PARENT(S) GUARDIANSHIP DESIGNATIONS.

If anything should happen to the IPs during the surrogacy process or after birth, proper guardianship designations will ensure that their children are under the care of someone trusted. Such documents give the IPs piece of mind that their children will be placed with and taken care of by a person or persons of their choice.

C. ADVANCED HEALTHCARE DIRECTIVES / HEALTHCARE POWER OF ATTORNEY.

Advanced health care directives designate someone with authority to make healthcare decisions for another. Your clients are now about to be responsible for a family, making it all the more important that they have such documents in place.

D. GENERAL DURABLE POWER OF ATTORNEY.

Your clients may also want to designate someone with authority to administer their assets, handle their legal and other matters, including the surrogacy, if they are unable to do so themselves due to incapacity or other reasons.

E. WILL OR LIVING TRUST.

The above family planning documents are much less complex than a full estate plan involving a will or a trust or both and they can form the building blocks of a larger estate planning portfolio. Such documents also help protect your clients' families and parental designations prior to the execution of their wills or living trusts. For these reasons, it is advisable to have your clients consider these documents early in their process, but ultimately your clients should consider drawing up a comprehensive estate plan involving wills and/or trusts.

If your client already has a will or living trust, advise them to review the documents to be sure there is no conflicting language affecting inheritance relating to their new family. Having a will or a living trust will minimize the chances of their estate going through the prolonged process of probate and disputes amongst family members

CONCLUSION

The advancements in ART, particularly in the United States, have opened up family building opportunities for many people from all over the country and the world, especially for single parents, unmarried parents, same sex couples and intended parents beyond their reproductive years. As a result, the meaning of family has progressively changed with it. However, although the laws in the United States are more permissive than the laws of most countries in this regard, the legal process and procedures required to confirm parental rights through surrogacy are generally trailing behind the science, presenting different obstacles for different types of intended families.

In addition, there will inevitably be obstacles to anticipate and handle when advising clients on their multi-jurisdictional surrogacy arrangements.

It may seem daunting, especially when your clients' surrogacy arrangements require you to be knowledgeable on an array of legal issues from different perspectives and to take into account the laws of several different jurisdictions, but in the end it is a chance to participate in an extraordinary event in your clients' lives – the formation of their family. With the right tools and information to take your clients from merely intended parents to legal parents, you will find that advising clients on these complex surrogacy agreement matters is especially rewarding and meaningful.