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UPA (2017): An Improvement—Except Where Genetic Surrogacy Is Concerned

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Introduction

Arguably, no constituency has a greater stake in the status of state parentage laws than the families created by assisted reproductive technology. The Uniform Parentage Act of 2017 ("UPA" or "Act") offers state lawmakers a greatly improved model that incorporates many best practices evolved by the assisted reproductive technology (ART) profession over the past three decades. Unfortunately, the Act singles out one type of surrogacy—genetic or "traditional" surrogacy—with special rules that threaten to undo decades of progress for establishing parental authority of intended parents.

Since its first iteration in 1973, the UPA has offered solutions to state legislatures struggling to adapt to the many challenges posed by rapidly advancing technology and shifting social mores around assisted reproduction. From recognition of the intended father, rather than the sperm donor, as legal parent in 1973 to offering (optional) guidelines for surrogacy agreements and establishing parentage in surrogacy cases in 2002, the UPA has steadily expanded its scope to encompass modern family structures, including families created through ART.

In the wake of the U.S. Supreme Court's recognition of the constitutional marriage rights of same-sex couples in the United States in June 2015,

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along with other ongoing changes in medical technology and societal attitudes, the UPA once again needed an update.[1]

I. Genetic/Traditional Surrogacy Adds Risk for Intended Parents

The Uniform Parentage Act of 2017 succeeds in providing an improved model for states to address some issues related to same-sex parents and assisted reproduction, three-parent families, and de facto parentage. Further, it introduces new gender-neutral definitions and addresses traditional surrogacy for the first time (now redefined as "genetic" surrogacy).

However, in one notable area of genetic surrogacy, it takes a huge step in the wrong direction. Article 8, Part 3 of the UPA sets out "Special Rules for Genetic Surrogacy Agreement." Specifically, Section 814 of the Act gives the surrogate and the surrogate's spouse, if applicable, a seventy-two hour window *after* birth to, in essence, withdraw her consent to the arrangement, revoke the agreement, and keep the child, with virtually no significant penalty for the breach.

Section 814 begins by stating the parties' rights to terminate the surrogacy agreement any time before implantation and following an unsuccessful IVF procedure, which is accepted best practice and mirrored in the American Bar Association's Model Act Governing Assisted Reproduction (ABA Model Act). In other words, the intended parents or surrogate may terminate the agreement any time as long as the surrogate is pregnant or carrying an embryo recently transferred; while carrying an embryo, or once pregnant, the intended parents accept full parental rights and responsibilities under terms of the agreement. However, Section 814(a)(2) then gives the surrogate a full seventy-two hours following birth to "withdraw consent" to the surrogacy agreement and notify the intended parents of her intent to parent the child. It states:

> A genetic surrogate who is a party to the agreement may withdraw consent to the agreement any time before 72 hours after the birth of a child conceived by assisted reproduction under the agreement. To withdraw consent, the genetic surrogate must execute a notice of termination in a record stating the surrogate's intent to terminate the agreement. The notice of termination must be attested by a notarial officer or witnessed and be delivered to each intended parent any time before 72 hours after the birth of the child.

1. Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

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For the intended parents in a genetic surrogacy, the first seventy-two hours of their child's life will surely be tense ones.

The Act continues by providing the surrogate with immunity from any financial penalty for this egregious breach of contract and even from the responsibility to reimburse the intended parents for pre-birth expenditures. The intended parents in this case bear 100 percent of the risk. Subsections (b) and (c) provide:

> (b) On termination of the genetic surrogacy agreement under subsection (a), the parties are released from all obligations under the agreement except that each intended parent remains responsible for all expenses incurred by the surrogate through the date of termination which are reimbursable under the agreement. Unless the agreement provides otherwise, the surrogate is not entitled to any non-expense related compensation paid for serving as a surrogate.
>
> (c) Except in a case involving fraud, neither a genetic surrogate nor the surrogate's spouse or former spouse, if any, is liable to the intended parent or parents for a penalty or liquidated damages, for terminating a genetic surrogacy agreement under this section.

In other words, even if the surrogate keeps the child, the intended parents still have to pay all expenses for the pregnancy with no ability to recover expenses.

Beyond the risk and emotional torment inflicted upon the intended parents, perhaps the most concerning aspect of this "special" rule is that it strikes at the heart of the hard-won principle that the express intent of the parties at the outset of any ART procedure should reliably and predictably govern the ultimate parentage of the resulting child—that the intended parents should be presumed to be the legal parents in any assisted reproduction procedure. After all, were it not for the considerable efforts and expense of the intended parents, the child would never have been conceived in the first place. The mechanisms by which parentage is established in surrogacy have been painstakingly hammered out, as reflected in earlier versions of the UPA and the ABA Model Act.

In fact, Section 804 of the UPA reinforces the presumption that the intended parents, and not the surrogate, are legal parents of the baby, except in the case of genetic surrogacy. This defanging of genetic surrogacy agreements seems to be a step in the wrong direction. By rendering the genetic surrogacy agreement effectively unenforceable should the surrogate change her mind, the 2017 UPA undermines hard-fought

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legal precedent and legislation upholding the authority of all surrogacy agreements. Stripping out the good-faith basis for proceeding, which is what every surrogacy agreement is based upon, why would anyone take the risk of a genetic surrogacy?

One might argue that by undermining the authority of the genetic surrogacy agreement, the UPA is providing the social benefit of disincentivizing genetic surgery. The ugly aftermath of the 1988 *Baby M* case, in which the genetically related surrogate refused to give up the child she bore for a married couple, arguably set back the cause of reproductive freedom for a generation.[2] But one consequence of the *Baby M* case was that the ART profession increasingly moved away from genetic, or traditional, surrogacy in favor of gestational surrogacy, in which the surrogate is genetically unrelated to the child she bears. By making genetic surrogacy legally riskier, does the UPA continue this trend, encouraging intended parents to use gestational surrogacy, with its more complex procedures and higher costs, and discouraging use of genetic surrogacy?

Both types of surrogacy—genetic/traditional and gestational—are intentional. From experience, we know that many intended parents make the decision to try traditional (genetic) surrogacy after one or more rounds of failed in vitro fertilization using egg and/or sperm donors and/or a gestational surrogate, often at the urging of their surrogate. Genetic surrogacy, in which the surrogate is also the egg donor, can be significantly cheaper and less time-consuming.

It is worth noting that in the early 1980s, prior to the *Baby M* case, and in subsequent years, hundreds of babies were born via traditional/genetic surrogacy. Only one, the *Baby M* case, resulted in conflict. After more than four decades since the first "test-tube baby" was born, there are no studies showing that traditional surrogates are any more devastated by the process than gestational surrogates.

Logically, in a genetic surrogacy, the surrogate should be treated as both surrogate and egg donor and vetted as such. Egg donors undergo medical and mental health screenings and are vetted to determine whether they are medically and psychologically suitable candidates to carry a child for prospective parents. Likewise, surrogates undertaking gestational surrogacy are screened for physical and mental health, carefully matched with intended parents, and screened for the psychological capacity to bear a child for another couple. The UPA says, in effect, that those two carefully vetted participants, donor and surrogate, cannot co-exist in the

2. *In re* Baby M, 537 A.2d 1227 (N.J. 1988).

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same person: the surrogate who is also the egg donor is presumed to lose the capacity to give birth to another parent's child. This is, on some level, not only demeaning to those women (essentially the UPA tells genetic surrogates they are not capable of entering into a voluntary, fully informed agreement), it is demeaning and debilitating to the parents who entered into the same agreement on a good faith expectation that the agreement would be honored.

For couples whose bank accounts are depleted from multiple cycles of egg donation and fertilization, genetic surrogacy can offer a less costly solution. But the UPA's "special rules" allowing genetic surrogates to breach the contract without consequence further financially penalizes intended parents who make the difficult, highly personal decision to undertake genetic surrogacy.

The provision appears to be borrowed from concepts in adoption law, which typically allows a birth mother a window of time after birth in which to change her mind about giving her baby up for adoption. In the event that happens, the would-be adoptive parents have no avenue to recover their legal and preparation expenses. The UPA's seventy-two hour window in which the surrogate is allowed to change her mind about the parentage of her baby is an adoption model improperly spliced onto surrogacy. The provision poses an additional barrier only for people who want to undertake traditional surrogacy, and not for those who undertake gestational surrogacy. Instead of working to make traditional surrogacy a safer alternative by providing reasonable guidelines and best practices, this section of the UPA demonizes it and makes it riskier.

The demonization of genetic/traditional surrogacy is a misstep for the UPA, threatening to undermine the recognition of intended parents as legal parents in a surrogacy and creating a double standard for gestational and genetic surrogates.

II. Court Preapproval of Genetic Surrogacy Agreements

In addition to the seventy-two hour immunity clause the UPA establishes for genetic surrogacies, genetic surrogacy agreements also must be approved in court before assisted reproductive procedures begin—a requirement that is not applied to gestational surrogacy agreements. Subsection (a) provides:

> (a) Except as otherwise provided in Section 816, to be enforceable, a genetic surrogacy agreement must be validated by the [designated court]. A proceeding to validate the agreement must be commenced before assisted reproduction related to the surrogacy agreement.

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If the court finds that the genetic surrogacy agreement meets qualifying criteria of the Act and all parties understand and are participating voluntarily, it issues an order validating the agreement. This extra step required only for genetic surrogacy agreements also adds considerable effort and cost incurred by the intended parents, who still run the risk their surrogate will change her mind within seventy-two hours of their baby's birth. In the event that pregnancy is not achieved, intended parents might have to repeat the preauthorization process with a second surrogate and new agreement, which is a significant burden not borne by intended parents who opt for gestational surrogacy.

Although the UPA does provide an avenue to have the genetic surrogacy agreement authorized after a confirmed pregnancy is achieved or even after birth of the child, there is something positive to be gained in genetic surrogacy cases by having all parties think very carefully about the process and have their surrogacy agreement validated by a court prior to any medical procedures. Allowing the genetic surrogate to later change her mind within seventy-two hours after birth essentially renders the court preapproval process both pointless and useless, and that risk, along with the costs involved in going to court for this preapproval, will essentially discourage intended parents from seeking the preapproval outlined by the UPA and encourage them instead to only seek court approval later in the process.

III. Mental Health Screening for Surrogates

The 2017 UPA also missed the mark in its eligibility criteria for potential surrogates. Appropriately, Section 802 requires that a surrogate must be at least twenty-one years old and have at least one child of her own. The section outlines required screenings the surrogate must undergo, but with regard to mental health and psychological well-being, the UPA only requires that a surrogate undergo a "mental health consultation." This falls short of a true "mental health evaluation" in which a surrogate is fully assessed by a mental health professional for her readiness to accept the obligations and sacrifices inherent in carrying a pregnancy for someone else and then delivering the child she has carried to the intended parents at the end of the day. In failing to require that the surrogate meet the higher bar of undergoing a mental health evaluation, the UPA has quite frankly missed the mark in protecting the best interests of intended parents, surrogate, and child.

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IV. Gender-Neutral Definitions

The legalization of same-sex marriage in the United States has required widespread changes to vital records documents and official firms. The 2017 UPA makes a start at staying apace of social change by replacing the gender-specific terms "Mother" and "Father" with the gender-neutral term "Parent." However, the Act falls short in adaptation of gender nonbinary terminology and fails to address scenarios such as a female-to-male transgender individual in a surrogate or donor role.

V. Conclusion

The UPA offers state lawmakers a template for parentage laws. While it is less specific to ART than the ABA Model Act, the UPA's goal to demystify and standardize laws across jurisdictions is critically important to U.S. parents and families. The 2017 update shows good progress toward legal equality for ART families; however, the penalization of genetic surrogacy by adding risk and imposing additional legal procedures on intended parents is a step in the wrong direction that should be remedied in future updates.

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