

The Use of Prebirth Parentage Orders in Surrogacy Proceedings

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The evolution of legal procedures to implement and ratify the intent of the parties to surrogacy agreements across the United States has been patchwork, at best. Competing social, moral, and political interests regarding the use of third-party reproduction have led to widely varied legal approaches and guidelines across the country, with each state having its own unique legal climate regarding such proceedings. This article discusses the various types of third-party reproduction relationships and why prebirth orders of parentage may be useful in certain surrogacy cases.

The benefits of prebirth parentage orders in surrogacy proceedings.

When a surrogate is used, hospital and state birth record procedures operate to put the surrogate's name on the original birth record as the child's mother simply because she gave birth. If the surrogate is married, her husband's name is also normally put on the original birth record as the father. The surrogate's husband's name can be removed from the birth certificate if the law of the state in which the child is born allows the intended father to substitute his name on the original birth record upon the parent's execution of an acknowledgement of paternity or some similar state-authorized form. There is usually no similar administrative form or procedure available, however, for the intended mother who does not give birth. As a result, the surrogate carrier must cooperatively participate in some sort of legal proceeding either before or after birth to vary this usual course of events and place both intended parent's names on the original or an amended birth record and terminate her presumptive parental rights. One proceeding to accomplish this result is to obtain a prebirth parentage order.

Types of surrogacy relationships and their effect on prebirth parentage orders.

When it comes to determining parentage in surrogacy cases, the majority of jurisdictions have no statutes or case law governing surrogacy agreements or the court proceedings to implement them. To affect the parties' intent in these jurisdictions, attorneys must fashion ad hoc procedures using paternity/maternity and adoption statutes that were never originally intended to apply to surrogacy proceedings.

Typically, in order for the intentions of the parties to surrogacy agreements to be fulfilled, normal presumptions in favor of the child's birth mother (the surrogate) and her spouse, if any, must give way to the intent of the parties that the intended mother and father become the child's sole legal parents on both the child's birth records and in legal effect. Because surrogacy arrangements are varied in nature, the type of surrogacy arrangement into which the parties have entered will often determine which statutory rules and procedures apply in each jurisdiction.

Prior to medical advances in the use and reliability of in vitro fertilization (IVF), the only available technology to initiate a surrogate pregnancy was artificial insemination, which was used to implement a “traditional” surrogacy where the surrogate used her own egg to become pregnant. In a traditional surrogacy, the surrogate is both the child’s birth and genetic mother. The intended mother has no genetic, pre-existing, or presumptive family relationship to the resulting child under most paternity/maternity statutes, so her legal relationship to the child must be established through some sort of adoption proceeding after the child’s birth.

If the intended father’s sperm is used, both he and the surrogate’s spouse have equivalent presumptions as the child’s father. The intended father’s paternity presumption is based on his genetic relationship to the child, and the surrogate’s spouse’s paternity presumption is based on his having been married to the surrogate during the gestation and birth of the child. Under these circumstances, the intended father usually can use his genetic relationship to the child to establish his sole paternity and place his name on the birth certificate pursuant to the state’s relevant paternity/maternity statutes and procedures. Once this is accomplished, the intended mother’s legal relationship with the child can then typically be established through a relatively simple stepparent adoption proceeding. If a donor’s sperm is used, both the intended mother’s and intended father’s legal relationship can technically be established only through a full adoption proceeding.

The surrogate’s genetic relationship to the child in traditional surrogacies virtually always allows her to retain her legal parental rights if she elects to do so. As a result, this type of surrogacy arrangement has become disfavored as other medical options have become available. With the advent of reliable and successful IVF procedures, prospective intended parents can now implement a “gestational,” or IVF, surrogacy in which the surrogate’s egg is not used so that she is not genetically related to the child. A gestational surrogacy can be initiated using either the intended father’s or a donor’s sperm. These various surrogacy arrangements can change the standing of the parties in surrogacy proceedings, as well as the outcome of the proceedings.

Whether a prebirth parentage order is available and appropriate in any particular surrogacy case depends on several factors. Primary among them, however, is the fact that adoption proceedings are historically intended and reserved only for postbirth establishment of parental relationships between children who have already been born and adults who are otherwise legally and genetically unrelated to them. Thus, seeking a prebirth parentage order in either a traditional surrogacy or a gestational surrogacy using a donor where one or both intended parents are genetically unrelated to the child and a postbirth adoption proceeding of some sort is required seems procedurally inappropriate. On the other hand, seeking such an order in a gestational surrogacy using the intended parent’s egg and sperm are genetically related to the child and can establish their legal rights in a single paternity/maternity proceeding seems procedurally appropriate.

Factors to consider before seeking a prebirth parentage order.

Even when a gestational surrogacy in which both intended parents are genetically related to the child is arranged, there are still other factors that must be considered before seeking a prebirth parentage order. First, jurisdictions differ in their approaches to prebirth parentage orders in paternity/maternity proceedings. In some jurisdictions without specific statutes or case law regarding surrogacy, prebirth parentage orders in paternity/maternity proceedings are specifically permitted by statute. In other such jurisdictions, prebirth orders in paternity/maternity proceedings are specifically permitted by statute. In other such jurisdictions, prebirth orders are expressly prohibited by statute. Accordingly, the availability, validity, and long-term effect of such orders will differ. Second, there are jurisdictions with specific enabling or prohibitory statutes governing certain types of surrogacy that have clear substantive and procedural requirements or restrictions as to if, when, and how the parties can obtain a parentage order that reflects their common intent. Finally, the parties' success or failure in obtaining the order may simply depend on whether they are cooperatively stipulating to such relief or are contesting the issuance of the order.