Sometimes It Takes Two, Other Times It Takes Three: Parentage Proceedings Under the Child-Parent Security Act

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First introduced in 2012, the Legislature passed the Child-Parent Security Act (CPSA) into law on April 3, 2020.[1] This act, for the first time, legalized gestational surrogacy agreements in New York in which the surrogate has not contributed genetic material. Further, it delineated procedures for establishing parentage for children conceived either as a result of such agreements or through assisted reproduction.[2] The CPSA took effect on Feb. 15, 2021. With its passage, gestational surrogacy is no longer illegal in New York, and the significant legal challenges and inconsistent court rulings that intended parents faced when seeking to establish legal parental rights for their children are eliminated. Parentage proceedings under the CPSA differ from adoption in that if the CPSA requirements are met, the child is legally the child of the intended parents "by operation of law," which is then confirmed with a judgment of parentage.[3] Adoption, on the other hand, creates parental rights where they did not previously exist.[4]

For decades, surrogacy agreements were deemed void and unenforceable by New York State as contrary to public policy. If the surrogacy agreement provided for the surrogate to be compensated, the parties, their attorneys and any other entities involved in the arrangement were also subject to civil and potentially criminal penalties. Furthermore, intended parents were subject to outdated Domestic Relations Law § 73 from 1974, which was before the introduction of in-vitro fertilization. This legislation only covered sperm donation and only conferred parental rights on the intended parents if they were married when the child was conceived using donated sperm. The selective application of the 1974 law left intended parents and unmarried parents vulnerable to losing parentage over their children.

With respect to surrogacy arrangements, the CPSA only applies in cases where the surrogate's own egg is not used to conceive the child. Surrogacy arrangements where the surrogate is biologically related to the child remain unenforceable in New York and are prohibited if the surrogate is being compensated.[5]

New York State Law Pre-CPSA

A surrogacy matter pre-CPSA was the case study for the need for the CPSA and highlighted the unpredictability of the determination of parentage in such arrangements by various courts in the state (and even the same jurisdiction). The case involved a gestational surrogacy in which both the intended father and the intended mother were genetically related to the resulting child.[6]

Initially, the case was before the Queens County Family Court for an uncontested determination and order that the genetically related, intended parents were also the children's legal parents.[7] After the Queens County Family Court refused to enter the requested order, the intended parents petitioned the New York Supreme Court, Queens

County. Surprisingly (or, perhaps, unsurprisingly), the parties achieved opposite results in the two proceedings.

In *Andres A. v. Judith N.*, the family court was asked to enter an uncontested order declaring the genetically related intended mother in a surrogacy arrangement to be her children's legal mother.[8] Unfortunately, the court was faced with pre-CPSA Article 5 of the Family Court Act which, as the court specifically noted, "makes no provision for declarations of maternity."[9] The court refused to enter an order determining the maternity of the intended mother, stating:

> Although the court is not unsympathetic to the plight of the petitioner, Luz A., the court cannot legislate judicially what is not contained within the statute. Accordingly, for the aforementioned reasons petitioner, Luz A.'s petitions for a declaration of maternity . . . are dismissed for lack of subject matter jurisdiction. The court notes that petitioner Luz A. is not without a remedy since she may seek to adopt the two children.[10]

Two years later, the parties petitioned the New York Supreme Court, Queens County and the court was faced with the same case and circumstances in *Arredondo v. Nodelman*.[11] The petitioning intended parents were still seeking an uncontested order declaring that the genetically related, intended mother was the children's legal mother. With no analysis of its jurisdictional authority or limitations, the court simply held:

> The City does not oppose the petition insofar as it seeks to change the name of the mother listed on the children's birth records to Luz Arredondo. No papers have been received from any other party. This Court concludes that Luz Arredondo is the mother of the petitioner children. From the affidavits submitted there is no dispute that the children borne by respondent Nodelman resulted from the eggs of Luz Arredondo which were fertilized by the sperm of her husband Andres Arredondo, and not from the eggs of Nodelman or the sperm of her husband. Indeed, the results of the genetic testing reveal that Nodelman could not be the mother of the children, and that it is highly probable that the Arredondo's are the genetic parents of the children. Accordingly, the petition is granted. This Court declares that Luz Arredondo is the mother of the petitioner children and the respondent City is directed to issue new birth records for the children reflecting that fact.[12]

The *Arredondo* case clearly illustrated the unpredictability of the analysis of any particular surrogacy case in any particular court, including different courts in the same jurisdiction, with the same governing statutes pre-CPSA.

The Queens County Family Court carefully analyzed the statutory authority granting and governing its power to issue the requested relief and determined, in all probability, that it lacked the jurisdiction to issue the order. When the Queens County Supreme Court analyzed the same facts, it focused not on the law, but on the equity of the matter. It focused on the fact that the parties were all in agreement and that no one was contesting the issuance of the declaration and order. The Supreme Court dealt with the practicality of those circumstances. It was situationally efficient, what the parties wanted, and the Arredondos were raising the children.

The CPSA eliminates the unpredictability, time and expense faced by the family in *Arredonodo* by providing a statutory framework for more predictable legal outcomes for parents with children born via surrogate. If *Arredondo* had arisen today, there would have been a procedure to easily adjudicate it. The CPSA will function to ensure that fewer intended parents will have to litigate these matters, and that lower courts have easier cases to handle. Further, the CPSA provides an avenue for two intended parents, regardless of their gender or sexual orientation, to establish parentage for the children born via surrogate.

Another case that recognized non-genetic parentage in New York is *McDonald v. McDonald*. While the CPSA only recently codified gestational parentage into law in 2021, past court decisions have embraced it under certain circumstances, following the leads of other states. This further proved the need to solidify the increasingly popular common law into statutory law to eliminate uncertainty. In *McDonald v. McDonald*, the Second Department declared that a woman was the legal mother of twins she gestated but was not genetically related to. Ms. McDonald gave birth to twins through IVF, utilizing an egg from a donor and sperm from her husband, Mr. McDonald.[13] The court found that in an instance "where a woman gestates and gives birth to a child from the egg-donation of another woman with the intent to raise the child as her own, the birth mother is the natural mother . . . ," it is the mother's intent that is taken into account, given the increasing number of ways a child can be conceived and carried to term.[14] This line of reasoning, as upheld in *McDonald*, affirmed the necessity for New York's Legislature to bring the statutory laws for gestational surrogacy into congruency

with modern medical advancements, as well as evolving family structures.

The court's decision in *Doe v. New York City Bd. of Health*[15] further demonstrates the efficiency of the CPSA. There, the genetic parents of newborn triplets, joined by the gestational surrogate and her husband, sought a pre-birth judgment that the genetic parents' names appear on the birth certificate.[16] This was not granted, as pre-birth surrogacy agreements were not recognized at that time.[17] Instead, the court granted a judgement post-birth that named the genetic parents on the birth certificate.[18] The court reasoned that although surrogacy agreements prior to the child's birth were not permitted, § 124 of the Domestic Relations Law did not restrict what type of parentage proceeding should be instituted following the birth of a child via surrogate.[19] Thus, the court had the discretion to bypass the traditional adoption process and instead order a post-birth judgment. This method of declaring parentage for genetic parents achieved an efficient, desirable outcome. Fortunately, the CPSA institutionalizes and improves upon this process by creating a streamlined mechanism for a parentage judgment for genetic parents set forth in pre-birth surrogacy agreements.

Parentage Proceedings Under the CPSA in General

The CPSA is contained in the newly created Article 5-C of the Family Court Act and sets forth the judicial procedure for establishing parentage.[20] This statute provides that parentage petitions can be brought in Supreme, Family or Surrogate's court, which may then exercise "exclusive continuing jurisdiction" until the child reaches 180 days old.[21] Disputes regarding parentage may be adjudicated in Family, Surrogate's or Supreme court; however, other disputes regarding surrogacy agreements may be adjudicated only in Supreme Court.[22]

A parentage proceeding may be brought by the child, a parent, a person claiming parentage, a social services agency, a person representing a decedent, minor or incapacitated person, or a "participant."[23] A participant is defined as the contributor of a gamete, intended parent, surrogate or the spouse of an intended parent or surrogate.[24] The proceeding may also be brought by someone seeking to be absolved of parental responsibility on the basis that they are a donor rather than an intended parent.[25] An intended parent conceiving with donor gametes who is single may also obtain a judgment of parentage declaring them the only legal parent of the child.[26] Pre-CPSA, a single intended parent conceiving with donor sperm had no legal mechanism by which they could obtain a court order terminating the potential rights of his or her donor.

A parentage proceeding must be brought by a verified petition in either Supreme Court, Family Court or Surrogate's Court and a parentage judgment may be made prior to the child's birth but will not take effect until the child is born.[27] Notice of a parentage order must be sent to the New York State Department of Health, or if the child was born in New York City, notice goes to the New York City Department of Health.[28] The records of a parentage proceeding must be kept sealed, but the parties and the child have the right to inspect and copy the record, and copies may be made available to the New York State Office of Temporary and Disability Assistance, a Title-IV-d child support agency in another state and local support collection units if necessary for the provision of child support services. [29]

The forms for parentage proceedings in Surrogate's Court can be found on the Surrogate's Court forms webpage.[30]

Surrogacy Parentage Proceedings

A parentage petition resulting from a surrogacy agreement may be brought any time after execution of the surrogacy agreement. Such petition may be commenced: (1) in any county where an intended parent resided any time after the surrogacy agreement was executed; (2) in the county where the child was born or resides; or (3) in the county where the surrogate resided any time after the surrogacy agreement was executed.[31]

The petition must be verified and must include: (1) a declaration that the person acting as surrogate or at least one of the intended parents has been a New York resident for at least six months at the time the surrogacy agreement was executed; (2) a certification from the attorney representing the person acting as surrogate that the requirements of Family Court Act Art. 5-C, Part 4 have been met; and (3) a statement from all parties to the surrogacy agreement that they knowingly and voluntarily entered into the surrogacy agreement and that the parties are jointly requesting the judgment of parentage.[32] If the attorneys' statements do not indicate full compliance, the court may enforce the agreement if it finds "substantial compliance," or may adjudicate parentage in accordance with the child's "best interests."[33]

A person may be eligible to act as a surrogate if: (1) she is at least 21 years of age; (2) she is a United States citizen or lawful permanent resident and, where at least one intended parent is not a resident of New York for six months, was a New York resident for at least six months; (3) she has not provided the egg used to conceive the resulting child; (4) she has completed a medical evaluation by a licensed health practitioner; (5) she has given informed con-

sent after being informed of medical risks by a licensed health care practitioner; (6) she has been represented by independent legal counsel, along with her spouse, if applicable; (7) she has or will obtain comprehensive medical insurance; (8) that the intended parent(s) shall procure and pay for a life insurance policy for the surrogate that takes effect prior to taking medication or beginning any embryo transfers; and (9) any other criteria deemed appropriate by the Commissioner of Health.[34] The surrogate's spouse must also provide informed consent unless they have lived apart for three years or are living apart pursuant to a decree, judgment or separation agreement acknowledged in the manner of a deed.[35]

At least one intended parent in a surrogacy agreement must be a United States citizen or lawful permanent resident and a New York State resident for at least six months. Intended parents must be represented by independent legal counsel.[36] An intended parent may be a single adult or, if a couple, may be married or in an intimate relationship.[37] An intended parent may execute a surrogacy agreement without his or her spouse if they have lived apart for three years or if they are living separately pursuant to a decree, judgment or separation agreement acknowledged in the manner of a deed.[38] If the intended parents are providing compensation, the funds must be placed in escrow and the agreement must also delineate how medical expenses will be covered.[39]

The surrogacy agreement must include an acknowledgment that the surrogate has received a copy of the "Surrogate's Bill of Rights," and must provide that the surrogate has the right to: (i) make all health and welfare decisions regarding the pregnancy; (ii) utilize medical personnel of her choosing; (iii) be represented by independent legal counsel paid for by the intended parents and; (iv) to provide or be provided with comprehensive health and life insurance policies.[40] The agreement must also provide that the intended parent or parents must assume custody and responsibility for support of all children resulting from the pregnancy, responsibilities that are not assignable, and it must obligate them to execute a will prior to the embryo transfer delineating a guardian for all such children.[41] The agreement may be terminated on notice by the surrogate or the intended parent or parents prior to any pregnancy resulting from the embryo transfer.[42]

Assisted Reproduction Parentage Proceedings

A parentage petition resulting from a child conceived through assisted reproduction may be brought in court: (1) if the intended parent or child resides in New York state, in the county where the intended parent resides any time after pregnancy is achieved or in the county where the child was born or resides; or (2) if the intended parent and child do not reside in New York state, up to 90 days after the birth of the child in the county where the child was born,[43] the petition must be verified and include: (a) a statement that the intended parent has been a New York resident for a least six months or if an intended parent is not a New York resident, that the child was or will be born in New York within 90 days of filing; (b) a statement from the gestating parent that the gestating intended parent became pregnant as a result of assisted reproduction; (c) if the intended parent is non-gestating, a statement from both the gestating and non-gestating intended parent that the non-gestating parent consented to assisted reproduction pursuant to Family Court Act § 581-304; and (d) proof of donative intent.[44]

Donative intent may be demonstrated by a statement from the gamete storage facility or health care practitioner where the donor is anonymous. The statement must recite that such gametes or embryos were anonymously donated or had previously been released or by clear and convincing evidence that the gamete or embryo donor intended to donate or release such gametes or embryos to a gamete or embryo storage or health care practitioner.[45] Where the donor is known, the donor's intent may be demonstrated by a statement signed by the donor and gestating parent confirming that the donor "has no parental or proprietary interest in the gametes or embryos" or by providing the donor with at least 20 days' notice prior to the date set for the proceeding to determine the existence of donative intent.[46] Notice must be made by personal service or by registered or certified mail if personal service cannot be effected.[47] The court must find parentage of an intended parent if the allegations in the petition are determined by the court to be true.[48]

Amendments to the Estates, Powers and Trusts Law as a Result of the CPSA

Estates, Powers and Trusts Law (EPTL) 4-1.2 and 4-1.3 were amended as a result of the enactment of the CPSA. The amendments to these sections reflect a shift from proof of genetic paternity and allow a parent and child to establish "parenthood." Parenthood now includes a "non-gestating intended parent," as in a parent who has a contract with a surrogate to carry the child to be raised by the intended parent.[49]

EPTL 4-1.2 addresses rights of non-marital children to inherit from their parents and their parents right to inherit through them. The proofs of parenthood parallel those that would have been required under the original statute. These include (1) a signed acknowledgment of parentage by the intended parent; (2) an adjudication of parentage during

the intended parent's lifetime; or (3) an adjudication by clear and convincing evidence based upon a genetic marker test or by the intended parent "openly and notoriously" acknowledging the child during his or her lifetime.[50]

EPTL 4-1.3 addresses inheritance by children conceived after the death of an intended parent. It was amended to eliminate the terms "genetic parent" and "genetic child" and instead uses "intended parent." To be considered a genetic child of an intended parent, express consent must be in a written instrument executed not more than seven years prior to the intended person's death and, if the assisted reproduction occurred after the intended parent's death, the child was in utero no later than 24 months after the death or was born no later than 33 months after the death.[51]

If the child was conceived using genetic material of the intended parent, it must further be established that: (1) the intended parent authorized a person to make decisions regarding the genetic material after death not more than seven years before the death of the intended parent; (2) that the person so authorized gave written notice to the intended parent's fiduciary that the intended parent's genetic material was available for the purpose of conceiving the intended parent's child and such notice was given via certified mail, return receipt requested, or by personal delivery within seven months from the date of issuance of letters testamentary or administration, or if no letters have been issued within four months of the intended parent's death, such notice shall be given to a distributee of the intended parent within seven months of death; and (3) the person so authorized to make decisions about the use of the intended parent's genetic material must record such authorization in the Surrogate Court granting letters, or if no letters have been granted, in the Surrogate Court having jurisdiction to grant letters within seven months of the intended person's death.[52]

If the formal requirements of EPTL 4-1.2 and 4-1.3 are met, the child may inherit in intestacy from the "intended parent," and be included in gifts to the intended parent's "issue" under a will.[53] If someone other than the intended parent makes a gift to "issue" of the intended parent, the child may be included in that class.[54] For purposes of the anti-lapse statute, the child is considered the intended parent's issue.[55] The possibility of a post-conceived child will not invalidate a bequest for perpetuities purposes.[56] The child is not included as an afterborn child under EPTL 5-3.2.[57]

Conclusion

The CPSA provided a necessary update to New York's body of law regarding gestational surrogacy and parentage of "intended parents." Under the CPSA, the process for parents seeking to establish a legal declaration of parentage of their children born through gestational surrogacy is now statutorily supported and attainable. Additionally, safeguards that ensure the rights concerning the health and well-being of the surrogate are also in place. The CPSA does not require a complete overhaul of Surrogate's Court proceedings; however, there are some important changes to note. First, Surrogate's Court has jurisdiction over parentage proceedings, but issues regarding surrogacy agreements are only within the jurisdiction of New York Supreme Court, and, second, children born via gestational surrogacy may inherit from their "intended parents," assuming the requirements of EPTL 4-1.3 are met. In all, the CPSA creates a 21st century approach to recognizing non-traditional family structures in light of the common practice of in-vitro fertilization and gestational surrogacy. This updated legislation recognized that families are made in different ways, and those families are entitled to a path of recognition.

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Endnotes

1 At the time of passage, New York was one of three states (the other two were Michigan and Louisiana) prohibiting commercial surrogacy.

2 *See* Laws of 2020, chapter 56, Part L (effective Feb. 15, 2021).

3 N.Y. Family Court Act §§ 581-406; 581-203 (FCA).

4 N.Y. Domestic Relations Law § 110 (DRL).

5 FCA §§ 581-401.

6 *See* generally *Andres A. v. Judith N.*, 591 N.Y.S.2d 946 (Fam. Ct., Queens Co. 1992).

7 *Id.*

8 *Id.*

9 *Id.* at 949.

10 *Id*. at 950.

11 622 N.Y.S.2d 181 (Sup. Ct., Queens Co. 1994).

12 *Id.* at 182.

13 *McDonald v. McDonald*, 196 A.D.2d 7, 12 (2d Dep't 2005).

14 *Id*. (quoting *Johnson v. Calvert*, 851 P.2d 776, 782 (Cal. 1993)).

15 782 N.Y.S.2d 182 (N.Y. Sup. Ct., New York Co. 2004).

16 *Id.*

17 *Id.* at 183.

18 *Id.* at 185.

19 *Id.* at 184.

20 FCA §§ 581-101, 581-201(a).

21 *Id.* § 581-206.

22 *Id.* § 581-409.

23 *Id.* § 581-201(c).

24 *Id.* § 581-102 (o).

25 *Id.* § 581-202.

26 *Id.*

27 *Id.* § 581-201(b).

28 *Id.* §§ 581-202(g); 581-203(d).

29 *Id.* § 581-205.

30 *See* http://ww2.nycourts.gov/forms/surrogates/parentage.shtml.

31 FCA § 581-203(a).

32 *Id.* § 581-203(c).

33 *Id.* §§ 581-203(e); 581-407.

34 *Id.* § 581-402(a).

35 *Id.* § 581-403(a)(2).

36 *Id.* § 581-403(e).

37 *Id.* § 581-403(a)(2)(i).

38 *Id.* § 581-402(b).

39 *Id.* § 581-403(f), (g).

40 *Id.* §§ 581-403, 581-602, 581-603, 581-604.

41 *Id.*

42 *Id.* §§ 581-405, 581-607.

43 *Id.* § 581-202(a).

44 *Id.* § 581-202(c).

45 *Id.* § 581-202(d).

46 *Id.* § 581-202(d), (e).

47 *Id.* § 581-202(e).

48 *Id.* §§ 581-202(c), (g).

49 EPTL § 4-1.2(a)(1).

50 *Id.* § 4-1.2(a)(2)

51 *Id.* § 4-1.3(b)(2).

52 *Id.* § 4-1.3(c). There is a template for the written instrument set forth in EPTL § 4-1.3(d).

53 *Id.* § 4-1.3(b).

54 *Id.* § 4-1.3(g).

55 *Id.* § 3-3.3; *see Id.* § 4-1.3(h).

56 *Id.* § 4-1.3(i).

57 *Id.*