

Alternative Family Formation: Untangling Definitions & Addressing Important Legal Considerations in New Jersey

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Entertainment headlines recently announced the joyous arrival of Nicole Kidman and Keith Urban's new baby. What made the birth so newsworthy was not necessarily the baby's famous parents, but the fact that the child was born by using a gestational carrier. However, in Hollywood, the Kidman/Urban family is not alone. Numerous other famous couples, including Sarah Jessica Parker and Matthew Broderick, Elton John and husband David Furnish, have also used forms of surrogacy to create their families. These celebrity events have brought increased attention to the options available to couples and individuals wishing to start a family. As a result, more people are coming forward to share their personal stories, and a healthy dialogue on the topic of alternative family formation has been reignited. Family formation law varies significantly from state to state. A recent decision in a gestational carrier case in New Jersey demonstrates that the law is continuing to evolve.

Many Ways to Make a Family

The "traditional" family (one mom, one dad and a couple of kids) is no longer the norm in the United States, for a variety of reasons. Couples and individuals, heterosexual and same-sex, are starting families later in life. Couples in second marriages are blending their families and having their own children. Individuals who choose not to marry are also becoming parents. Fortunately, assisted reproductive technologies have enabled many to attain their dream of parenthood, despite difficult or challenging circumstances.

Traditional Surrogate

A traditional surrogate is a woman who is impregnated by artificial insemination using the

sperm of either the intended father, sperm donated anonymously, or sperm donated from a friend or relative. The surrogate mother's pregnancy involves her own egg, meaning that she is genetically related to the child she carries, and intends to surrender the child to another parent or couple.

Gestational Carrier

When in-vitro fertilization was discovered, a new type of surrogacy arrangement was born: the gestational carrier. A gestational carrier is a woman who carries an embryo conceived through the process of in-vitro fertilization. A gestational carrier's pregnancy does not involve her own egg. Rather, the egg belongs to the intended mother or is donated from another woman. Accordingly, the child is not genetically related to the gestational carrier. People who choose a gestational carrier arrangement but do not have the option of using their own egg often use an egg donated anonymously or an egg donated from a known friend or relative. Similarly, if couples or individuals do not have the option of using their own sperm, donated sperm is an option.

Legal Considerations in New Jersey

Because there are specific laws in New Jersey regarding alternative family formation, it is important to consult an attorney as the first step in the process. In New Jersey the *In re Baby M* case established that no pre-birth surrogacy contract is enforceable and no compensation can be paid to a surrogate for serving as a surrogate. On February 23, 2011, the New Jersey Appellate Division placed further restrictions on surrogacy and gestational carrier arrangements. In *In the Matter of the Parentage of A Child by T.J.S. and A.L.S.* the Court held that an infertile wife who conceived a child with her husband through the use of a

gestational carrier had no constitutional or legal basis to be recognized as the child's mother at birth. This ruling means that under this circumstance a wife must adopt her husband's biological child in order to have her parental rights recognized and her name put on the child's birth certificate.

Pre-birth Agreements

Those considering any type of surrogacy arrangement should protect themselves with a pre-birth agreement, which is a legal contract that details a wide range of issues. Pre-birth agreements typically cover:

- obligations and expectations with regard to donation
- availability of medical history and personal medical information about the gestational carrier
- surrogate/gestational carrier's compensation and expenses, including lost wages, legal fees, child care and maternity clothes
- medical insurance coverage
- liability for complications
- location of delivery
- life insurance
- identity and confidentiality
- control over medical decisions during the pregnancy

- who is allowed to be present at doctor's visits and during the birth
- parental rights
- obligations with respect to future contact and/or medical information
- the rights of the child

Everyone, not just high-profile Hollywood celebrities, should work with an attorney when considering assisted reproductive technologies and when drafting an agreement. In appropriate circumstances, where allowed under state law, intended parents should also make every effort to obtain a court order determining legal parentage for the child, either before the birth or shortly thereafter, depending on the circumstances. Such an order attempts to direct the hospital where the child is born and/or the appropriate state department of vital records to place the intended parents' names on the birth certificate of the child delivered by the surrogate or gestational carrier, whether directly or through adoption.

Although these arrangements largely result in happy and mutually satisfying results, it is critical that all parties involved in alternative family formation arrangements contact an attorney to discuss how to formally memorialize their agreement. This is especially important in New Jersey, where there is case law addressing contracts involving surrogates and gestational carriers, and establishing the parameters of, and restrictions on, such relationships.

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