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Surrogates and Couples Face a Maze of Laws, State by State

By TAMAR LEWIN SEPT. 17, 2014

When Crystal Kelley, a Connecticut woman who had signed a contract to bear a baby for a couple in her state, was five months pregnant, a routine ultrasound showed that the fetus had a cleft palate, a brain cyst and heart defects. The couple for whom she was carrying the baby asked her to have an abortion, offering to pay her \$10,000 to do so.

But instead, Ms. Kelley, a single mother of two, fled to Michigan, where surrogacy contracts are unenforceable. So in June 2012, when she had the baby there, Ms. Kelley was listed on the birth certificate as the mother, although she had no genetic connection to the infant, made with the husband's sperm and an egg from an anonymous donor. The little girl was adopted by a family that had other special-needs children.

While surrogacy is far more accepted in the United States than in most countries, and increasing rapidly (more than 2,000 babies will be born through it here this year), it remains, like abortion, a polarizing and charged issue. There is nothing resembling a national consensus on how to handle it and no federal law, leaving the states free to do as they wish.

Seventeen states have laws permitting surrogacy, but they vary greatly in both breadth and restrictions. In 21 states, there is neither a law nor a published case regarding surrogacy, according to Diane Hinson, a Washington, D.C., lawyer who specializes in assisted reproduction. In five states, surrogacy contracts are void and unenforceable, and in Washington, D.C., where new legislation has been proposed, surrogacy carries criminal penalties. Seven states have at least one court opinion upholding some form of surrogacy.

California has the most permissive law, allowing anyone to hire a woman to carry a baby and the birth certificate to carry the names of the intended parents. As a result, California has a booming surrogacy industry, attracting clients from around the world.

Seeking Middle Ground

In many states, surrogacy remains a political third rail, drawing opposition from anti-abortion groups, opponents of same-sex marriage, the Roman Catholic Church, some feminists, and those who see surrogacy as an experiment that could have unforeseen long-range effects.

The issue has produced some strange bedfellows: In several states, for example, Kathleen Sloan, an abortion rights advocate who is a board member of the National Organization for Women, has worked with Catholic and conservative groups to oppose surrogacy because she sees it as a form of exploitation. But most other feminists have backed off.

“It’s rarer than it was in the ’80s and ’90s to see feminists flat-out opposing surrogacy,” said Sara Ainsworth, director of legal advocacy at the National Advocates for Pregnant Women. “But it’s complex and there’s a lot of discomfort surrounding the issue, so many women’s groups have not taken a formal position.”

In Louisiana, Minnesota and New Jersey, after the state legislatures handily passed bills in the last few years allowing surrogacy in some situations, Republican governors vetoed them.

Many states are now considering certain limits and trying to find middle ground.

“My sense of the big picture is that we’re moving toward laws like the one in Illinois, which accepts that the demand for surrogacy isn’t going away but recognizes the hazards and adds regulations and protections,” said Joanna L. Grossman, a family law professor at the Hofstra University law school.

The Illinois law requires medical and psychological screenings for all parties before a contract is signed and stipulates that surrogates be at least 21, have given birth at least once before and be represented by an independent lawyer, paid for by the intended parents.

The law allows only gestational surrogacy, in which an embryo is placed in the surrogate’s uterus, not the traditional kind, in which the surrogate provides the egg. In addition, it requires that the embryo created in a petri

dish must have either an egg or a sperm from one of the intended parents.

“That eliminates some of the concerns about designer babies,” Professor Grossman said.

Lawmakers in New York, Washington, D.C., and elsewhere are considering measures to allow surrogacy.

But not all states are moving in that direction. In Kansas, for example, there was a hearing in January on proposed legislation that would have imposed a \$10,000 fine, or a year in prison, on those entering into a surrogacy contract. The proposal was shelved after a hearing that was packed with supporters of surrogacy, including women who had been surrogates and parents who brought their children through surrogacy, arguing passionately for the benefits.

“Allow us to create life where there would otherwise only be absence and loss,” testified Lynlee Weber, who bore six children — including two sets of twins — in four surrogacies.

Another supporter, Dr. David Grainger of the Center for Reproductive Medicine, referred to the Bible, saying that the bill would have criminalized “the most important pregnancy the world has known” — Mary’s pregnancy with Jesus.

Only three people testified against surrogacy.

Women who have been surrogates described the rewards of helping someone start a family, earning money through an arrangement that allows them to stay home and raise their own children (prices vary by region, but surrogates usually receive \$20,000 and up), and maintaining relationships with the babies they brought into the world and the couples raising them, through visits and letters.

Like Ms. Weber in Kansas, some are eager to be surrogates as often as their doctors will let them: Six pregnancies is a common limit. Ms. Weber, 32, who has a 12-year old daughter, first carried a baby for a single man in Europe. Then came a couple in the East Village of New York City, then another in Los Angeles.

“The whole process of growing new people is cool, even if it’s not particularly comfortable,” Ms. Weber said. “My daughter’s grown up thinking it’s really cool that Mommy can grow a baby for someone who can’t have babies.”

Her surrogacies provided a social network, too, through a support group of other women in Wichita carrying babies through the same surrogacy agency.

“We’d get together and talk,” she said, “and when somebody’s intended parents came to town, they’d take us all out to dinner.”

With her last surrogate pregnancy, in 2009, Ms. Weber had complications and knew it was her last. So she went back to school for a master’s degree in social work, with the aim of counseling on fertility issues.

Weighing the Risks

One of the strongest opponents of surrogacy is Jennifer Lahl, president of the Center for Bioethics and Culture in California, who testified for the Kansas legislation and lobbied Gov. Bobby Jindal to veto the Louisiana bill.

She sees the practice as rife with risk: Informed consent, she said, is not really possible in a relatively new field. So little is known about the risks of the hormonal stimulation undergone by egg donors and surrogates, she added. In addition, the emerging field of epigenetics is yielding new discoveries about how conditions in the womb affect a child’s later development.

“This is part of the American entrepreneurial approach,” Ms. Lahl said. “We design things, put them out there, they can be dangerous, and then have to ratchet them back to add safety limits. I see assisted reproductive technology, which is relatively new, as a space where we’re starting to see the harms.”

Ms. Lahl’s new film, “Breeders: A Subclass of Women?” features four women who served as surrogates describing wrenching experiences. One is Gail Robinson, a Texas woman who agreed to carry a baby for her brother and his partner. In the course of the pregnancy, she had a serious falling-out with her brother and suffered life-threatening eclampsia. Ms. Robinson, who had never had a child of her own, ended up seeking custody of the twin girls she carried and was declared a legal parent, along with the partner, despite her lack of genetic connection to the twins.

In Louisiana this spring, it seemed that there would soon be a law allowing some couples to use a surrogate to carry their baby — but only heterosexual couples who did not need donor eggs or sperm.

After drawn-out negotiations between State Representative Joseph P. Lopinto III, a Republican from Metairie, and the Louisiana Family Forum, the

state's leading conservative group, both sides told a legislative committee in March that they had a workable compromise. Even the Catholic bishops, who sat in on the negotiations, said they would not seek a veto because the law was so narrow.

“Sure, I personally would have liked something broader, but Louisiana is never going to be California,” Mr. Lopinto said. “We weren't trying to start a surrogacy industry here. I just don't think it's right that people in Louisiana should have to go out of state to start a family.”

Surrogacy was not an obvious cause for Mr. Lopinto, who votes with the Louisiana Family Forum so often that his office is festooned with awards from the group. But he and his wife had struggles with infertility; they used in vitro fertilization for their two children.

“Infertility can hit anyone, and I want people to know it's not something to be ashamed about,” he said. “You think you have this perfect life, and then, suddenly, you're talking Clomid,” he said, referring to a common fertility drug.

One Lopinto pregnancy, he said, came around the time that a friend, State Senator Gary Smith, and his wife, Katherine, were expecting a child with an out-of-state surrogate, so the two couples went through the process together. Mr. Smith had introduced his own surrogacy bill last year, bringing his two children — one from a woman in California, the other from a Nevada surrogate — to the Capitol to help make the issue real to his colleagues.

“We've never been secretive about it, and we feel blessed to have our own biological children,” Mr. Smith said. “We call our surrogates aunts, and we will never forget the gift they've given us. I just think it's a shame that we couldn't do it in Louisiana.”

The Louisiana bill, like some others, would only have allowed “altruistic” surrogacy, in which the surrogate, usually carrying a baby for a friend or relative, receives no compensation beyond the reimbursement of expenses.

Some legislators favor that approach, feeling that it avoids commercializing the market for babies, and some women are eager to carry a child for an infertile sibling or close friend. But many lawyers and doctors say such arrangements are actually the most likely to fall apart, given the difficulty of maintaining comfortable boundaries and the risk of intrusiveness, or coercion, souring relationships that seemed solid.

“It crosses a lot of lines to bring family members into your reproductive life,” said Dr. Michael Feinman, a Los Angeles fertility doctor. “If the surrogate or the donor is a relative and something goes amiss, it can affect family relationships forever after.”

Mr. Lopinto said he was trying to reach a compromise everyone could support, even if it opened the door to surrogacy just a crack.

“It was just a start,” he said. “I tried to meet all the objections. One sticking point was whether you could use an egg donor, and I understand their position that surrogacy makes a two-person relationship into a three-person relationship, and if you add an egg donor, that’s a four-person relationship, and that’s too much,” he said. “I said, ‘If we agree to that, will you support the bill?’ And they agreed.”

For gay couples, who always need egg donors, his bill would have been worse than none: Without the law, a surrogacy contract that involved an egg donor would have been unenforceable, but not illegal. The bill, though, would have prohibited any surrogacy outside the narrow bounds of the compromise.

“I understand their unhappiness, and I wish we could have been more inclusive,” Mr. Lopinto said.

Political Choices

But that was not what doomed the legislation. Rather, it was the politics of abortion: As Governor Jindal positioned himself as a possible presidential candidate, national groups like the Family Research Council lobbied against the bill. In a letter asking the governor to veto it, the council said it had “a significant lack of pro-life protections” for embryos created through in vitro fertilization.

“The bill would provide state sanction for the laboratory creation of living human embryos, such creation being an integral part of the stipulated surrogacy process, but without legal protections for the young human beings who are created,” it said.

And the weekend before the legislative session ended, when Mr. Jindal asked Gene Mills, president of the Louisiana Family Forum, whether he would advise a veto, Mr. Mills said he would. Mr. Jindal vetoed the bill, just as he had Senator Smith’s bill the previous year.

“Despite the good intentions and hard efforts of the author, this legislation still raises concerns for many in the pro-life community,” his veto

letter said. “Thus I cannot in good conscience sign the bill.”

At the hearing in March, Mr. Mills had announced that he and Mr. Lopinto had “found territory we can agree on” and that in the future, the law might be celebrated as a wise policy compromise.

Asked about this after the veto, Mr. Mills said he had not broken his agreement with Mr. Lopinto, but had learned that the legislation was flawed.

“My counsel said there were problems with the bill, and I have to listen to counsel,” Mr. Mills said. “The legal community throughout pro-life America thought we had not done what we intended. There was disagreement about whether we had actually limited compensation enough, and concerns about the creation and destruction of excess embryos.”

Mr. Lopinto had a different view of Mr. Mills’s turnabout.

“At the end of the day, he was being a good soldier,” Mr. Lopinto said. “He did what he had to do to give the governor the way out he wanted.”

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