

January 4, 2016; U.S. Surrogacy Laws Differ

Medical advances have altered the way a human life can be brought into this world. Traditionally, birth resulted only after a sexual union between a man and a woman. Today, a woman's egg can be fertilized in her womb through artificial means completely negating the need for a sexual act. More amazingly, a woman's egg can be fertilized in a test tube and then reinserted into her uterus to develop naturally. Or, the embryo can be implanted into another woman's uterus and carried to term by a female with absolutely no genetic connection to the child.

A surrogacy situation arises when a woman, called a surrogate, carries an embryo for an intended mother. A traditional surrogacy exists when the surrogate is also the egg donor. A gestational surrogacy arises when the egg comes from a donor other than the surrogate. In either situation, the sperm may, or may not, come from the intended father.

Under either type of surrogacy, upon the child's birth, the surrogate is expected to surrender the baby and all legal rights to the intended parents. Almost always, the surrogate and intended parents enter into a contract that puts this understanding into writing. A surrogate who is paid for her services is called a professional surrogate, while one who provides such services for free (other than the medical costs) is known as a voluntary surrogate.

Surrogacy offers the potential of parenthood to heterosexual couples who can't naturally conceive a child, to same-sex couples, and to single persons of both genders. But these expanded parenthood possibilities raise many complex legal questions. In the U.S., where each state and territory may have different surrogacy laws, the situation is even more complicated. As a result, the U.S. presents a complex legal jigsaw puzzle of frequently competing and contradictory laws addressing the matter of surrogacy.

A few examples will help highlight some of the legal complexities.

The first U.S. surrogacy case was filed in 1987 in New Jersey. William and Elizabeth Stern entered into a traditional surrogacy contract with Mary Beth Whitehead. Mary Beth's egg was inseminated with William's sperm. After giving birth to a baby girl, Mary Beth refused to turn her over to the Sterns and they filed a lawsuit. They argued that Mary Beth had violated the terms of their contract.

The New Jersey Supreme Court ruled the surrogate contract invalid saying it offended "public policy." They held that Mary Beth was the baby's biological and legal mother because she gave birth to the child and was genetically related to her. However, the Court awarded custody of the baby to the Sterns finding that such an arrangement was in the baby's best interest. Mary Beth was granted visitation rights.

In the early 1990s, California residents Mark and Crispina Calvert contracted with Anna Johnson to carry their child. Crispina's egg was fertilized with Mark's sperm and the egg was implanted in Anna. The relationship between the couple and Anna soured. Anna told the Calverts she would not honor the contract and that she intended to keep the baby. They filed suit against her.

In 1993, the California Supreme Court ruled that because Anna had no biological connection to the child, the surrogacy contract was binding and Mark and Crispina were determined to be the biological and legal parents. The court refused to give Anna any visitation rights with the child.

In late November, an appellate court in Pennsylvania ruled against actress Sherri Shepard, a former member of The View talk show, in a surrogacy case. In 2014, Shepard and her then husband, Lamar Sally, had contracted with a surrogate to carry an embryo created from a donor's egg and Sally's sperm. Midway through the pregnancy, the couple split and Shepard disavowed the child upon his birth. Sally assumed physical custody. In a subsequent lawsuit, the judge ruled that Shepard had willingly signed the surrogacy contract and was therefore the child's legal mother. She was ordered to pay Sally child support.

So, what do these cases tell us about the legal state of surrogacy in the U.S.? Simple. It's a mess. Some states don't allow any type of surrogacy. Some states even criminalize it. Numerous states allow gestational surrogacy, but ban traditional surrogacy. A few states allow commercial surrogacy. Many others don't. While some states permit same-sex couples and singles to enter into surrogacy contracts, others prohibit such contractual arrangements.

Where does Guam stand on the matter of surrogacy? As far as I can tell, our laws are silent on the matter. We need to do something – fast. What will happen when a surrogacy case comes to Guam? Next week, I'll speculate on the matter.