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via email

October 16, 2016

Standing Committee on Social Policy
Room 1405, Whitney Block Queen's Park
Toronto, ON M7A 1A2
Email: kkoch@ola.org
ATTENTION KATCH KOCH, CLERK

Dear Mr. Koch,

Re: Bill 28, All Families Are Equal Act (Parentage and Related Registrations Statute Law Amendment), 2016

I am a health lawyer in Ontario and an Adjunct Professor of Health Care Law at York University. As part of my practice I draft surrogacy agreements and represent intended parents seeking declarations of parentage in court. I also provide legal advice to surrogates. I would therefore like to take this opportunity to provide my comments on Bill 28.

Section 10(9) of the Bill states that:

A surrogacy agreement is unenforceable in law, but may be used as evidence of,
(a) an intended parent's intention to be a parent of a child contemplated by the agreement; and
(b) a surrogate's intention to not be a parent of a child contemplated by the agreement.

While this appears reasonable, it fails to recognize the reality that surrogacy agreements in Ontario address *significantly* more than parentage. Surrogacy agreements typically exceed 25 pages. They are drafted by the intended parents' lawyers and reviewed by surrogates' independent counsel. They are revised several times before being signed by the parties. They are a culmination of hours of work and careful consideration by intended parents, surrogates and surrogate's partners. They are not merely templates but a fundamental step in most surrogacy relationships.

There is a lot of information in a standard surrogacy contract that has nothing to do with who is a parent, but helps minimize the risk of potential conflicts. For example:

- What should happen if the fetus appears to have a serious abnormality? Should the surrogate terminate the pregnancy? Would she be willing to? Is that what the intended parents would want?
- What kinds of expenses will the intended parents reimburse the surrogate for? Will the intended parents pay a babysitter to watch the surrogate's children while she visits the

obstetrician? Will they purchase disability or life insurance to protect the surrogate's family in case she suffers a disability or death as a result of the pregnancy?
- What should happen if the surrogate becomes brain dead during the pregnancy? Should the surrogate be kept on life support until the child can be safely delivered?
- What do the parties want to happen if the first embryo transfer fails or the pregnancy ends in a miscarriage? Do they plan to try again?
- How many embryos will be transferred? Is the surrogate prepared to carry multiples?
- Who will be in the room during the delivery of the child? Is the surrogate comfortable with the intended parents being present?
- If the intended parents died or separated during the pregnancy, who should the surrogate give the child to after the birth?
- Are the parties intending to announce the pregnancy on social media? Do the intended parents want the surrogate to refrain from using their names or vice versa?
- Does the surrogate want to use an obstetrician or midwife, and are the intended parents comfortable with her decision?

In addition, the parties make important representations and warranties in surrogacy agreements regarding their health (e.g. that all relevant medical information has been disclosed). The parties are motivated to be honest and keep their promises knowing a court may enforce the agreement (and, for that matter, knowing that a court will review the materials during the declaration of parentage process which is being eliminated under this Bill).

Intended parents and surrogates take great risks when entering a surrogacy relationship and place enormous amounts of trust in each other that they will uphold their end of the bargain. The law would better serve them if they knew the surrogacy agreement could be enforceable. In fact, I am certain potential surrogates will think twice about becoming a surrogate if surrogacy agreements are unenforceable. This will create additional barriers to people becoming parents as it is already very challenging to find a surrogate.

Surrogacy arrangements operate in a climate of uncertainty; the agreements are an opportunity to clarify and protect the parties' rights and interests. There is no need for Bill 28 to state that surrogacy agreements are unenforceable. It would not further advance the underlying goals of the Bill but may in fact frustrate them.

For example, intended parents could choose not to reimburse a surrogate on bed-rest for lost wages despite promising otherwise. The surrogate may have no income from employment, but would continue to incur costs and carry the pregnancy to term. It surely cannot be the intention that a surrogate could be financially exploited and have no remedy. Likewise, what if a surrogate disregarded her commitment to abstinence prior to an embryo transfer and became pregnant with her own child? Should the intended parents not be entitled to enforce the agreement and seek reimbursement for the significant medical costs they incurred?

Section 10(9) of Bill 28, as written, could lead to disastrous unintended consequences and lay a foundation for exploitation.

Further, this Bill respectfully contradicts itself because while it proposes that surrogacy agreements not be enforceable in law, it also makes surrogacy agreements a condition of registering births in section 10(2).

This Bill would be improved if section 10(9) was simply amended as follows:

A surrogacy agreement ~~is unenforceable in law, but~~ may be used as evidence of,
(a) an intended parent's intention to be a parent of a child contemplated by the agreement; and
(b) a surrogate's intention to not be a parent of a child contemplated by the agreement.

Finally, on a related note, I propose that the "consent in writing" referred to in section 10(3) be amended to encompass an oversight mechanism to ensure that the requirements of surrogacy agreements and independent legal advice ("ILA") are in fact fulfilled. It is proposed that the consent consist of a standardized prescribed form that must be signed by the parties' lawyers; or at the very least, the parties ought to be required to insert the information of the lawyers who provided the ILA (although the latter is more susceptible to fraud).

At this stage the amendment to the Bill could simply be as follows (see underlines):

Section 10 (3):
(3) Subject to subsection (4), on the surrogate providing to the intended parent or parents consent in writing in the prescribed form, relinquishing the surrogate's entitlement to parentage of the child,
(a) the child becomes the child of each intended parent and each intended parent becomes, and shall be recognized in law to be, a parent of the child; and
(b) the child ceases to be the child of the surrogate and the surrogate ceases to be a parent of the child.

OR

(4) The consent referred to in subsection (3) must not be provided before the child is seven days old and shall be in the prescribed form.

Thank you for your consideration. Please do not hesitate to contact me if you have any questions or would like me to elaborate in person or in writing.

Kind regards,

Lisa Feldstein

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