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COVER STORY

Tangle of contract terms inside a surrogacy boom



Tom Kurtz / Special to the Daily Journal

Stephanie M. Caballero helps parents from Brazil, France, China and Spain negotiate the process for surrogacy in California, a go-to state for international clients.

By **Melanie Brisbon** / Daily Journal Staff Writer

Attorney Stephanie M. Caballero, whose twins were born through a surrogate, has spent the last decade helping others become parents and advising clients on the legal aspects of surrogacy, an assisted reproduction method that has become increasingly popular in the U.S., especially for international families.

Caballero and many other California-based attorneys who practice third-party reproductive law have seen an uptick in the number of clients seeking surrogacy in the U.S. from abroad.

"When I first started my practice, it was mainly clients from the U.S.," Caballero said. "Now I have couples from all over the world — Brazil, France, China and Spain."

California has become the go-to place for international clients seeking to become parents through surrogacy, according to legal experts. Last year there were 334 reported surrogate births in California compared to seven in 2005, according to voluntary data compiled by the California Department of Public Health from hospital birth clerks.

"California is definitely the leader in terms of reproductive rights and protec-

tions for intended parents and even the rights of surrogates," said Lori Meyers, of Meyers & O'Hara LLP.

Attorneys suggest one reason the state has become popular with individuals looking to have children through surrogacy is the California surrogacy statute, which allows intended parents to become legal guardians of the child prior to birth, regardless of marital status and sexual orientation.

Complicated surrogacy laws abroad have thwarted many families from trying the method in their home countries. In Ireland, for example, surrogacy contracts are not enforceable, so the surrogate mother is considered the legal parent of the child. Surrogacy is still illegal in most of Europe, but last year the European Court of Human Rights ordered all European countries

to recognize children born to surrogate mothers living abroad.

Some countries including Russia, Ukraine and India have legalized surrogacy, but intended parents are still drawn to the U.S. for its sophisticated medical technology and reliable health care regulations.

"They come here because of the medical procedures here like [in vitro fertilization]," Caballero said. "They feel very confident in the medical process here in the U.S."

Surrogacy may be legal in the U.S., but proper legal procedures must still be followed, for example, both the surrogate and the intended parents must have their own legal counsel.

Then there's the enormous number of contracts required to make the deed legally sound. There's a contract between the intended parents and the surrogate, a contract between the intended parents and the physicians, as well as a contract between the intended parents and the surrogacy agency.

Attorneys can get a judgement of parentage from the state court, which declares the intended parents the legal guardians of the child before he or she is born. But once the child is born, the birth certificate could present another problem.

"In California, whoever [is] giving birth is the mother," said Ideal Legal Group founder Evie Jeang, who specializes in international family law. "If you don't get the pre-birth order before that child is born, you are not the legal parent."

If the surrogate's name is on the birth certificate, she said, the client has to go through a potentially lengthy adoption process.

The variance in health care systems between the U.S. and the client's home country can also throw a wrench in the deal process, attorneys say.

"For foreign couples, their biggest challenge is how to pay for the newborn's medical expenses," said Milena O'Hara at Meyers & O'Hara. "Most of the time they only have their national insurance, which will not cover their child born through surrogacy in their

country, let alone born in another country."

International clients seek to have their children born in the U.S. for many reasons, chief among them the benefits of being American citizens. As U.S. citizens they can travel to their parent's home country with a U.S. passport, and some countries later allow the parents to apply for the child's citizenship in their home countries, Meyers said.

For countries like China, children are allowed to come back to the U.S. and receive tuition benefits, Jeang said.

California is not the only state to see an increase in the number of births by surrogate, which is only one use of in vitro fertilization. According to the most recent data from the Society for Assisted Reproductive Technology, or SART, 380 of its member clinics reported 174,962 in vitro fertilization cycles or attempts to conceive, which resulted in the birth of 63,286 babies. That's an increase of nearly 10,000 attempts from the previous year, resulting in 2,000 more babies, though a spokesperson noted most of these procedures were not intended for surrogacy. Babies born from assisted reproductive technology make up more than 1.5 percent of the total children born in the U.S., according to SART.

Experts say that surrogacy is also becoming recognized as an alternative to some of the other ways for foreigners to have an American-born child.

Earlier this month, Homeland Security raided 37 locations in Southern California that were allegedly being used as illegal "birth tourism" businesses for wealthy Chinese women. Pregnant women were coached to apply for tourist visas for the U.S., lying about the real intention of their visit, so that their children could be born here.

"I'm actually getting more phone calls because of that [raid]," Jeang said, adding this upward trend is bound to continue.

"I think it's a great medical advancement that people should be aware of," she said. "I think it's really important for women and for couples to know that they have that option."