

Don't Look Now: Five Frequently Overlooked Provisions in the Surrogacy/Gestational Carrier Agreement and Why They Matter

Understandably, parties to a surrogacy contract tend to focus primarily on the payment and reimbursement provisions of the contract. But other, less obvious, provisions can have substantial and far-reaching effects. Following is a partial list of important provisions that may be overlooked.

1) Prenatal Care and Medical Instructions for the Surrogate/Breach

What is the surrogate allowed and not allowed to do? What happens if she transgresses? What rights should the intended parents have if the surrogate acts in a way forbidden by the agreement and drinks a glass of wine, forgets to obtain advance doctor's permission before taking a non-prescription pain pill, eats tuna, forgets to notify intended parents in advance of an obstetrician appointment, etc. Should it matter whether the transgression caused any actual harm to the fetus or the child? How can we tell? How can we balance the surrogate's need to be human, and perhaps make an unwitting and harmless mistake, with the intended parents' interest in minimizing health risks to their child?

2) Behavioral Prohibitions on the Surrogate

Some contracts require the pregnant surrogate to avoid "dangerous" or "risky" activities and situations. The problem: What does "dangerous" or "risky" mean? Does it extend to riding in or driving a car? What if the surrogate inadvertently finds herself in a dangerous situation, through no fault of her own? The contract needs to address these issues and to be as specific (and fair) as possible about what is forbidden and the consequences of a breach.

3) Parentage testing

Most contracts allow intended parents to require parentage testing of a child born as the result of surrogacy. Unfortunately, many contracts are vague or one-sided about what happens if a parentage test reveals that the child is genetically related to the surrogate. The meaning and consequences of this situation should be carefully considered and balanced, and remedies should be crafted that satisfy everyone's interests.

4) The Surrogate's Medical Expenses

One of the most difficult issues in surrogacy contracts is determining the extent to which intended parents should be responsible for the uninsured costs associated with any medical harm sustained by a surrogate as the result of the pregnancy or delivery. The injured surrogate has an interest in not adding the financial burden of medical expenses to her physical suffering and her family's inconvenience. Intended parents want to know that their liability for the surrogate's medical expenses is not potentially unlimited. There are no easy solutions to the tension between these two legitimate

interests and creativity and compromise are often necessary to resolve the issue. In any event, all parties should enter into the surrogacy agreement knowing exactly what their rights and obligations will be in this regard, and understanding the risks involved.

5) Health Insurance for the Surrogate

Who is responsible for obtaining and paying for the surrogate's health insurance? What are the parties' responsibilities in the event the insurer refuses or fails to pay for the surrogate's medical costs? What are the consequences of a surrogate's failure to maintain her insurance coverage? Again, these are difficult questions involving competing interests. Parties should consider and discuss these issues carefully with their respective attorneys.

Of course, there are other important (and often overlooked) issues in surrogacy contracts, including: What are intended parents' rights if they are not satisfied with the results of any psychological or other tests given to the surrogate; and when must those rights be exercised? Can a gestational carrier require that the intended parents or donors be tested and, if so, how and when does she obtain the test results? What's the best mechanism for seeing that the gestational carrier gets paid? What is the involvement and role of any facilitator or agency? Who chooses the gestational carrier's attorney, and are there limits on the fees paid to that attorney?

Many of these issues have no easy answers. In all cases, the objective should be to address and balance the concerns and the needs of all parties, and to arrive at contract language that is fair to all concerned.