

Roadblocks to Surrogacy

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For individuals and couples struggling with infertility, it takes a village to have a child through third-party assisted reproduction. Surrogacy provides intended parents with the precious hope of a family, but natural stressors and roadblocks along the way are to be expected.

Cost

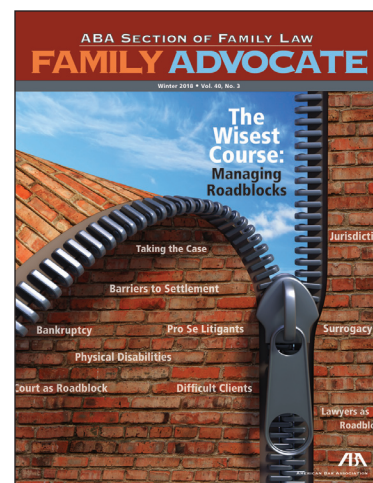
The high cost of surrogacy can be prohibitive to intended parents. With cumulative costs for agency fees, in vitro fertilization (IVF), legal assistance, egg donor and surrogate compensation, medical costs, and other expenses ranging from \$70,000 to \$175,000 or more, surrogacy may simply not be a viable path to parenthood. For intended parents who are not able to pay such costs from on-hand reserves, options include loans (home equity, bank, reproductive clinic, and family); family gifts; and other sources. Interest rates may prove prohibitive for many. Tax deductions for the medical cost of infertility diagnosis and treatment are permitted, but a deduction for compensation paid to a gestational carrier typically is not. When a client does not have a uterus, is lacking a functioning uterus, or is male and can not have a child without the assistance of someone's uterus, it would seem that surrogacy should be considered a medical expense and thus a permissible tax deduction.

Genetics and Third-Party Assistance

Hetero couples will use their own ova and sperm or donated ova and/or sperm. Will one parent or both parents whose genetic material isn't used feel any less a parent? Will the intended mother feel any less a mother if she is unable to carry her child? Grief issues connected to infertility and the loss of control in infertility treatment will be a source of emotional pain for many. Psychological support is always of key importance as intended parents go through infertility treatment.

Gay couples will often need both an egg donor and a surrogate. They may choose to form and transfer embryos using one intended father's sperm or both intended fathers' sperm, or they may choose to transfer the best embryo to the surrogate's uterus regardless of genetics. Gay couples hoping for twins may elect to simultaneously transfer embryos from both intended fathers. Deciding whose genetic material to use may be a difficult choice. The same-sex intended fathers may have chosen surrogacy over adoption in order to have a genetic connection to a child, but, in the end, one intended father will not be genetically related to each child. Again, psychological support is key.

Intended parents who need an ova donor will choose either a known or an anonymous donor. They must consider whether their donor will want to meet children born through donation in the future or whether she will provide medical information if requested. Intended parents may ask a friend or family member to donate ova, and they must therefore consider whether a known donor will be able to maintain boundaries with respect to the parents of a child born through her donation. Gay intended parents sometimes commit to reciprocal donations with lesbian intended parents planning to form their families. How will such families relate or interact with each other in the future, if at all?



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Adoption versus Surrogacy

Domestic or international adoption is another path to parenthood. Cumulative costs for adoption range from \$30,000 to \$90,000 or more. Such costs are financially prohibitive for many hopeful intended parents struggling with infertility. Moreover, the adverse psychological impact of a birth mother changing her mind and not ultimately relinquishing a baby to her chosen adoptive parent or parents has emotional consequences far beyond what most parents could possibly bear. This alone can make having a child through surrogacy a preferred choice regarding family formation decisions, since nonrelinquishment in surrogacy is rare.

Health Concerns

The high level of medical and psychological screening required of all participants in third-party reproduction arrangements, including potential surrogates and their partners, ova or sperm donors, and intended parents, supports the premise that, typically, no one is healthier to proceed with a pregnancy than a surrogate. The surrogate must have a history of a normal, term pregnancy without preterm labor, gestational diabetes, preeclampsia, and other pregnancy complications. She is asked to take on the normal risks of pregnancy. The American Society for Reproductive Medicine (ASRM) recommends transferring only one embryo to avoid pregnancies with multiples, which are automatically deemed “high risk” pregnancies. The medical screening process also weeds out a multitude of communicable diseases such as cytomegalovirus (CMV), rubella, hepatitis, and HIV and other sexually transmitted diseases.

HIV-positive status can create a roadblock to surrogacy. While significant strides have been made to reduce the overall rate of new HIV infections, the virus still disproportionately affects the gay community. In addition to the health ramifications, judgmental attitudes prevalent in the broader society may also be difficult to manage. While sperm-washing allows HIV-positive individuals to become parents without transmitting the virus to the surrogate or child, the medical risks and stigma related to HIV transmission can deter surrogates from working with an HIV-positive intended parent.

Legal Concerns

All parents having children through surrogacy worry that legal recognition of their parenthood may fail and that they will end up without their children. Surrogacy law is a patchwork of judicial decisions and legislation across the United States, particularly for same-sex couples. Depending on the state, surrogacy laws can be particularly problematic for intended parents using an ova or embryo donor. Intended parents must work with their legal counsel to identify the best states for the legal establishment and protection of their parental rights.

Additional legal issues arise with respect to children born through surrogacy in the United States but who return with their parents to foreign home countries. Establishing the resulting child’s citizenship in a home country may require that the child’s birth certificate list a “mother’s” (surrogate’s) name, exclude a “mother’s” (surrogate’s) name, include only one intended father’s name, or provide two intended fathers’ names. Best practice requires legal counsel involvement and legal representation as needed in the intended parents’ home country.

In the United States, legal trends have been moving in favor of same-sex parents. The 2016 Supreme Court decision in *V.L. v. E.L.*, 136 S. Ct. 1017, found that a same-sex parent adoption order must be given full faith and credit in all fifty states. This ruling offers comfort to intended parents with valid parentage orders for their surrogate-

born children, especially if they are returning to or visiting a state less friendly to same-sex parents. Similarly, the 2017 Supreme Court decision in *Pavan v. Smith*, 37 S. Ct. 2075, ruled that states, in issuing birth certificates, may not treat same-sex married couples differently from other parents. Nevertheless, reproductive law counsel may recommend a “belts and suspenders” legal approach and advise the nongenetic parent to adopt his or her child to ensure against all potential present and future parental rights challenges.

Siblings

Modern families are formed in many ways. A family today may consist of a combination of biologic, step-, foster, adoptive, donor-conceived, and surrogate-born children. How such children and parents relate to each other is a reflection of the emotional health of the family, but even children and parents in healthy relationships may struggle with sibling relationships related to family formation.

Social Awareness and Parental Legitimacy

Approximately one in five U.S. couples struggles with infertility. Even though infertility is surely a health issue, most insurance companies do not pay for more than diagnostic testing and minimal costs, if any, of infertility treatment. While people are generally becoming more aware of family formation possibilities through surrogacy, it is not yet mainstream in society.

Would-be parents are increasingly turning to gestational surrogates to help them fulfill their dreams of having children. The Centers for Disease Control (CDC) and the Society for Assisted Reproductive Technology (SART) report that the number of infants born to gestational surrogates almost doubled between 2004 and 2008 from 738 babies born to nearly 1,400. In 2011, SART tracked 1,593 babies born in the United States to gestational surrogates. The total number of babies born to gestational surrogates could be slightly higher because some clinics handling these procedures are not reporting to SART.

Intended parents are sensitive to the views of others who do not understand their uniquely formed families. Questions posed by others may reflect judgments about the parental legitimacy of those having children with the assistance of a surrogate. Friends, family, and strangers may pose questions that are at best insensitive and, at worst, cruel. Gay and lesbian couples may be asked, “Whose baby is it?” or “Who is the bio-parent?” The answer is rarely anyone’s business.

A number of important, personal questions, however, must be addressed by intended parents within the confines of their family relationships. For example, for same-sex parents, deciding on the name their child will call each parent (Dad, Papa, Father, Mom, Mama, Mother) may give rise to feelings of lessened parental legitimacy and importance if one parent does not have a genetic connection to his or her child or does not carry the child. In addition to the resulting issues of perceived parental legitimacy, intended parents must also consider whether they want a future relationship with their surrogate, whether they want their child to meet their surrogate, and what it all means with regard to their family dynamics. Intended parents must also consider when and how to tell their surrogate-conceived child about his or her wonderful and unique birth story.

Conclusion

Surrogacy is a complex but wonderful journey to parenthood. There are roadblocks, to be sure, but these can be overcome. Just as it takes a village to raise a child, it takes a village to have a child through surrogacy and third-party reproductive assistance.

If we continue to work together to remove roadblocks on the path to that amazing village, all parents and children will benefit. **FA**

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