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For those wanting kids, legal risk never too high

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Couples who decide to use a surrogate to become parents usually do so armed with contracts and great expectations.

Surrogacy contracts have become increasingly detailed, many including provisions for psychological testing and contingency plans for miscarriage or birth defects.

Yet experts say such contracts cannot ensure that all will go smoothly. The problem: a patchwork of state laws and the inevitable risk of a change of heart in an emotional process.

California is a popular state for surrogacy agreements because it has a string of court rulings favoring intended parents, says attorney Thomas Pinkerton, who specializes in assisted reproduction law. But even there, he says, surrogacy agreements turn on risk tolerance.

Contracts are only as good as a judge's decision to enforce them, and judges must read them in tandem with state laws relating to children. Despite the risks, Pinkerton's practice keeps growing.

"The need to be a parent is so strong that the risks are not going to keep people from doing this," he said. "I have a whole range of clients, from those who say, 'Do I have to read this contract?' to parents who agonize over every word. I have no one who says, 'Oh, gee, this is too much legal risk for us, I am just not going to have kids.' "

Pinkerton has never gone to court to enforce a contract but cites close calls. One Florida surrogate balked at traveling to California at an arranged date in her third trimester, as her contract required. Another surrogate carrying triplets refused to terminate two fetuses, as requested by the would-be parents and previously arranged in her contract.

A former general counsel for the Federal Communications Commission, attorney Diane Hinson re-invented her career in 2002 and opened surrogacy agency Creative Family Connections in Maryland. She ensures each surrogate has her own lawyer and drafts extensive contracts. But her clients are told there are limits.

"There is no court in the world that will force a woman to do something with her body," Hinson said. "You can write the contract so she is in breach of contract, so she's got [to pay] money damages, but that is absolutely the bottom line. What we try to do is minimize the risk, but we can't eliminate it, and we always tell people that."

It might be impossible to account for every surrogacy situation, but the law - says a former Minnesota Court of Appeals judge and lawmaker of 24 years - must try.

In 2000, Jack Davies served on a national committee updating the Uniform Parentage Act, a model law for states to copy. The panel included provisions on surrogacy.

"Legislation should reflect what is happening in the real world," he said. "The alternative of just prohibiting it is not going to work because people then are going outside the law to do it, and the kids born of these contracts are in sort of a limbo land."

The proposed new law

Senate Bill 14, sponsored by Sen. Lyle Hillyard, R-Logan, would allow Utah judges to approve gestational surrogacy contracts when:

- * The surrogate and intended parents are Utah residents.
- * The surrogate has undergone at least one pregnancy and is capable of undertaking another.
- * The intended parents are married and the wife is unable to bear a child.

Such contracts must:

- * Not limit the right of the surrogate to make decisions to safeguard her health and the baby's health.
- * Cover the surrogate's health expenses; any payment to her must be "reasonable."
- * Include an agreement by the gestational surrogate, and her husband if she is married, to relinquish all rights to the child. The intended parents must assume all responsibility for the child.
- * Allow the surrogate, her husband and the intended parents to terminate the agreement after it has been signed, but not after an embryo is transferred.

Web link to proposed law:

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* <http://www.le.state.ut.us/~2005/htmdoc/sbillhtm/sb0014.htm>

For an analysis of states' surrogacy laws:

* The Human Rights Campaign, <http://www.hrc.org>

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