

Overseas Gestational Arrangements and Texas Surrogacy Law

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Childless couples considering surrogacy are increasingly going overseas to find a surrogate. Many travel to Anand, a small town in Gujarat, the Indian state that gave the world Mahatma Gandhi.¹ Like Gandhi, Anand is famous for starting revolutions that have implications world-wide. In the seventies, Anand launched dairy cooperatives that have made India the largest milk producer in the world. Today, Anand is spearheading surrogacy arrangements, which like medical tourism are projected to grow into a \$6 billion industry.² Why? Because the rest of the world is mired in controversy regarding the subject of surrogacy. Some countries ban commercial surrogacy arrangements while others provide rights to the surrogate for a period after the child is born raising fears in the parents that they may have to contend with a surrogate who may change her mind.³ In the meantime, pragmatic couples in Anand view surrogacy arrangements as a means of providing for their families while bringing joy to a childless couple.⁴ In that sense Anand is aptly named, because Anand means joy.

Texas Surrogacy Law

Unlike couples in other countries or even in other states who trek to Anand or elsewhere to enter into informal surrogacy arrangements, Texas offers couples a means of legally validating such arrangements.⁵ Therefore, it is interesting to study how the Texas surrogacy law affects a Texas couple's arrangement with a surrogate mother from another country to carry their child for them.⁶

A Texas couple planning to have a child by a surrogate would be the "intended parents" under Texas surrogacy law, and the surrogate would be the "gestational mother" who agrees to carry a child for the intended parents by means of "assisted reproduction."⁷ Here, "assisted reproduction" entails using eggs other than those of the gestational mother's.⁸ Interestingly, the Anand model is similar, in that the doctor in Anand insists on a gestational surrogacy where the surrogate is not the egg donor.⁹ Only the eggs of the intended parent or an anonymous donor are

¹ Anuj Chopra, *Childless Couples Look to India for Surrogate Mothers*, CHRISTIAN SCIENCE MONITOR, Apr. 3, 2006.

² Henry Chu, *Wombs for Rent, Cheap*, L.A. TIMES, Apr. 19, 2006.

³ See Chopra, *supra* note 1.

⁴ *Id.*

⁵ Several states are silent about surrogacy agreements, others prohibit them, while like Texas, five other states permit agreements for married couples only. *Surrogacy Laws by State*, available at <http://allaboutsurgacy.com/surrogacylaws.htm> (last viewed Nov. 20, 2006).

⁶ The Texas surrogacy law applies to a child born of assisted reproduction. See, e.g., TEX. FAM. CODE ANN. § 160.700 et seq (West 2006) & TEX. FAM. CODE ANN. § 160.750 et seq (West 2006).

⁷ TEX. FAM. CODE ANN. §§ 160.102 (9), 160.102 (2), & 160.751.

⁸ TEX. FAM. CODE ANN. § 160.754 (c)

⁹ Texas law does not permit the surrogate mother's eggs to be used in the assisted reproduction procedure. See, e.g., TEX. FAM. CODE ANN. § 160.754 (c); See also Chopra, *supra* note 1.

used to ensure that gestational mothers have no genetic relationship to the child. The anonymous donors are paid. Texas law permits the intended parents to pay the donor.¹⁰

Under the Anand model, the doctor is equally selective about both gestational mothers and the intended parents. The gestational mother must be married, have children of her own, and be willing both to have embryos implanted in her and to give the child back to the intended parents.¹¹ The childless couples selected as intended parents must be married, and the woman must either be infertile or unable to carry a child to term.¹² Similarly, under Texas law, only married couples are permitted to be intended parents.¹³

Validated Gestational Surrogacy Agreement

In Anand, only some of the terms of the informal gestational surrogacy arrangements have surfaced. The intended parents pay for medical expenses. In addition, intended parents pay the gestational mother anywhere between \$2,800 to \$5,000 – a huge sum in a country where the annual per capita income is around \$500.¹⁴ On the other hand, in Texas, the law requires a written agreement which each intended parent, each donor, the prospective gestational mother and her husband, if she is married to be parties to the agreement, must all sign.¹⁵ The agreement requires the prospective gestational mother to relinquish all rights to the child and affirmatively states that the intended parents will be the parents of the child.¹⁶

The Texas agreement has built-in safeguards requiring the exchange of all relevant medical information between the intended parents and the surrogate.¹⁷ In addition, the agreement must state that the physician performing the assisted reproduction procedure has advised all parties of the risks and success rates of the procedure.¹⁸ Above all, the agreement may not limit the gestational mother's right to make decisions about her health and the health of the embryo.¹⁹ In Anand, the gestational mother and her family often move from their home to another town or village to avoid being ostracized by their neighbors for carrying a baby for a third party.²⁰ The doctor is thus the only contact for the intended parents. The doctor is paid by the intended parents, is free to implant up to five embryos to increase the chances of success, and may use pre-natal check-ups as an opportunity to reinforce to the gestational mother that she is giving the child back to the intended parents.²¹ Under such an agreement, there are few safeguards built into the arrangement to protect the health of the gestational mother.

¹⁰ TEX. FAM. CODE ANN. § 160.102 (6).

¹¹ See Chopra, *supra* note 1.

¹² *Id.*

¹³ TEX. FAM. CODE ANN. § 160.754 (4)(b).

¹⁴ See Chu, *supra* note 2.

¹⁵ TEX. FAM. CODE ANN. § 160.754 (a).

¹⁶ TEX. FAM. CODE ANN. §§ 160.754 (a) (1), 160.754 (a) (2).

¹⁷ TEX. FAM. CODE ANN. § 160.754 (a) (4).

¹⁸ TEX. FAM. CODE ANN. § 160.754 (d).

¹⁹ TEX. FAM. CODE ANN. § 160.754 (g).

²⁰ See Chopra, *supra* note 1.

²¹ *Id.*

Post-Birth Adoption, Immigration and Other Procedural Requirements

Texas law allows the intended parents to validate the agreement and, once the child is born, have the court authorize a birth certificate to be issued naming the intended parents as the parents of the child.²² Intended parents contemplating a gestational agreement with a surrogate in another country would be able to validate the agreement in a Texas court as long as the intended parents or the prospective gestational mother and her husband are residents of the state.²³

Even though the intended parents may have a validated agreement under Texas law, the local laws of the gestational mother's jurisdiction will govern their ability to bring the child home. For example, under Indian law, the parents may get legal custody as guardians once the gestational mother has abandoned her rights to the child, and will later have to adopt the child in Texas.²⁴ In order to be appointed guardians of the child, the intended parents will have to hire a local Indian lawyer to navigate their way through the local legal system.²⁵ In addition, the intended parents will have to meet age and procedural requirements before they can be declared parents suitable for adopting the child.²⁶ Once the intended parents are appointed guardians of the child, they have to comply with the immigration laws of their own country to bring the child home to Texas.²⁷

A global economy is bringing together two desperate groups of people as parties to paid surrogacy agreements. Instead of criticizing or criminalizing such agreements, advanced countries should offer solutions for infertile couples, such as affordable insurance coverage for fertility treatments. Anand, on the other hand, should launch another revolution to uplift its women so that they can contribute to their family incomes by means other than through paid surrogacy agreements.

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²² Intended parents may file a petition to validate the agreement and once the child is born under such an agreement file a notice of birth to have the court require the bureau of vital statistics issue the birth certificate. *See, e.g.*, TEX. FAM. CODE ANN. §§ 160.754 (e), 160.760.

²³ TEX. FAM. CODE ANN. §§ 160.754 (e), 160.760.

²⁴ The State Department's website gives an overview of the procedures involved. *See, e.g.*, *Intercountry Adoption: India*, available at http://travel.state.gov/family/adoption/country/country_398.html (last viewed Nov. 28, 2006).

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*