

# Gestational Surrogacy and Ethics

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## A Learning Case (based on true events)

- ▶ The patient is a woman in her 20s pregnant with twins(G2P1001). She presented to the hospital at 23 weeks gestation and was admitted for further observation because of cervical dilation. During intake, it was discovered that the patient is a gestational surrogate for biological parents residing in another country; the genetic material is from the out of country parents, and the patient is the gestational surrogate.
- ▶ Ethics was consulted for clarification about who makes decisions for care of fetuses, as well as for the babies after birth, in cases involving gestational surrogacy.

## Discussion Topics

- ▶ Oregon and Gestational Surrogacy
  - ▶ How did we get here?
- ▶ Surrogacy Related Documents
  - ▶ What kind of paperwork should I be on the lookout for?
- ▶ Decision Making in Gestational Surrogacy Cases
  - ▶ Who makes decisions?
- ▶ Ethical Concerns in Surrogacy Cases
  - ▶ What tricky situations might come up?

## Why Oregon?

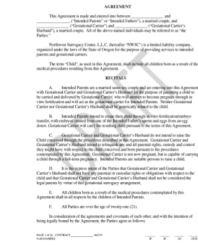


## Oregon: The Surrogacy Mecca

- ▶ Same Sex Couple Friendly
- ▶ Established Surrogacy Businesses/Infrastructure
- ▶ Friendly Legal Landscape
- ▶ Documents (Pre-Birth Orders, Birth Certificates)
- ▶ US Citizenship for Child
- ▶ Ethical Concerns about Exploitation of Gestational Carrier
- ▶ 1<sup>st</sup> World Medical Care
- ▶ Oregon as "Healthy" Place?

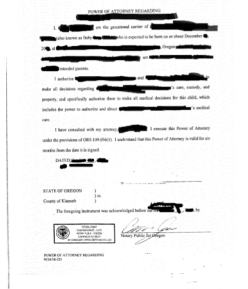
## Surrogacy Documents

- ▶ Surrogacy Contract
- ▶ Lays out terms of gestational surrogacy arrangement
- ▶ Many pages
- ▶ Includes terms of monetary compensation as well as monetary consequences for breach of contract



## Documents

- ▶ Power of Attorney
- ▶ Authorizes appointed parties to make medical decisions for the child after birth
- ▶ Uncertainty over whether:
  - ▶ This document trumps gestational carrier's ability to make decisions (legally mother until adoption)
  - ▶ Can one complete a document of this sort before the child exists?



## Documents

- ▶ Pre Birth Parentage Order by Court
  - ▶ Looks like a court order/judgment
  - ▶ Establishes parentage of Intended Parents prior to birth
- ▶ Birth Certificate
  - ▶ Initial birth certificate filed with office of vital records will usually list the gestational carrier
  - ▶ Intended parents can have gestational carrier's name removed and their names added "easily"

## Gestational Surrogacy and Decision Making

- ▶ Who makes the decisions?
- ▶ Pre birth
  - ▶ Decisions made by gestational carrier
  - ▶ Intended parents can advise gestational carrier
- ▶ After Delivery
  - ▶ Absent paperwork, the gestational carrier is treated as the legal mother
  - ▶ If intended parents have a Parentage Order, they are the legal parents of the child and make decisions for the child
  - ▶ If a POA document is in existence, intended parents can make decisions for the child, but so can gestational carrier. POA can be revoked by gestational carrier at any time.
  - ▶ Gestational carrier retains right to make decisions about her own care

## Questions or Comments?

## Case continued

- ▶ Due to the complex nature of parentage in this case, official paperwork was requested from the biological parents. In response, the biological parents had a Power Of Attorney document drawn up with the gestational surrogate through a proxy lawyer/notary granting decision power over babies. The biological parents were told by the care team that this document would only go into effect only after the birth of the children, as the children did not technically exist yet.
- ▶ A family conference was held involving gestational surrogate, biological parents overseas, medical interpreter, and care team. The patient and the biological parents were informed of the risk of premature birth by the medical team. The biological father of the baby expressed concern about the cost of care for premature babies in the NICU and requested that a DNR be put into place. Both the biological mother and the gestational surrogate remained silent but did not voice any disagreement.

## DNR Orders for Newborns

- ▶ DNR orders not appropriate for newborn children unless child has poor prognosis and survival would mean a severely diminished quality of life
  - ▶ Baby Doe rules say that withholding treatment is only permissible when treatments/procedures (including resuscitation) would only prolong death, the newborn is irreversibly comatose, or if the treatment would be "inhumane"
  - ▶ American Academy of Pediatrics position allows for declining treatment/procedures for high risk infants with likely poor prognosis and survival would mean a diminished quality of life
- ▶ Cutoff at 25 weeks of fetal development for DNR as Standard of Care?
  - ▶ Any week based cutoff should reflect provider consensus about resuscitation and the infants prognosis at X weeks of fetal development.
  - ▶ Any rule should also have enough leeway to accommodate for special cases

## Medical Insurance for Gestational Surrogacy

- ▶ Depending on the medical insurance carried by the gestational surrogate, prenatal care and deliveries related to surrogacy may or may not be covered.
- ▶ Some private plans explicitly rule out paying for surrogacy related pregnancies. This will require the parents to either purchase other forms of insurance to cover the gestational surrogate, or pay out of pocket.
- ▶ Affordable Care Act plans are required to cover all maternity care as an "essential health benefit"
- ▶ Once the child or children are born, the parents will bear the financial responsibility for the care of the children.
  - ▶ Health insurance for the parents may or may not cover the medical expenses incurred by the children during care here in Oregon.
  - ▶ If not, the parents will have to pay those costs out of pocket.

## How much does it all cost?

- ▶ Figures from OPB Story: Total Estimated Cost \$130,000
  - ▶ Surrogate \$30,000
  - ▶ Lawyers+ \$10,000
  - ▶ Doctors, Medical Staff, Egg donor+ \$50,000
  - ▶ Reimburse surrogate expenses: lost wages, health insurance+ \$20,000
  - ▶ Surrogacy Agencies+ \$20,000
- ▶ NICU Stay
  - ▶ "As Managed Care Magazine estimated, the average cost for infants hospitalized in neonatal intensive care units is around \$3,000 per day. While the average cost to an employer of a healthy baby born at full-term, or 40 weeks of gestation, is \$2,830, the average cost for a premature baby is \$41,610. If the baby is born at 26 weeks, the cost can quickly rise to \$250,000 or more."

## Questions or Comments?

## Case Continued

- ▶ The care team informed the parents that they were obligated to attempt resuscitation for infants born at and after 25 weeks gestational age. Given those restrictions imposed by the team, the decision was made by the biological parents for a DNR order if the twins were born before 25 weeks. There was no disagreement from the gestational surrogate.
- ▶ As pregnancy neared 25 week mark, the care team was informed that biological mother was diagnosed with cancer and required hospitalization in her home country. The biological father became distressed and requested immediate induction of labor and provision of comfort care on delivery for the twins. The care team was uncertain whether father's request could be honored for a number of reasons (did he have right to make such a request, what if surrogate mother disagrees, was it allowable if requested). Surrogate mother was reluctant to move forward with what amounted to termination of pregnancy, stating it was against her values. However the surrogate mother also stated her belief that she would be in "violation of contract" with the biological parents should she continue with pregnancy (advice given by surrogate mother's own lawyer).

## Termination of Pregnancy

- ▶ Oregon is the only state to have no state laws restricting termination of pregnancy
  - ▶ Decisions between a provider and patient (and also institution).
- ▶ Right to Abortion protected in Oregon State Constitution
  - ▶ Likely to remain in effect even if Roe v. Wade decision overturned
- ▶ All termination of pregnancy procedures fall under pre-birth
- ▶ All pre-birth decisions are made by the gestational carrier
  - ▶ Fetuses have no rights prior to birth
  - ▶ Rights of the gestational carrier/mother to control what happens to her body trump requests by intended parents
  - ▶ Intended parents can advise gestational carrier, but have no official authority over gestational carrier in per birth matters (other than through monetary incentives/disincentives)

## Ethical Concerns

- ▶ Exploitation
  - ▶ Gestational surrogacy involves large sums of money
  - ▶ Financial considerations can create conflicts of interests, avenues for undue coercion
    - ▶ Ex: Financial penalties for "Breach of contract", financial rewards tied to weeks of pregnancy
- ▶ Potential for values conflicts
  - ▶ Intended parents and gestational carrier bound by money and contract to deliver services/baby, sometimes also with a desire to help
  - ▶ May obscure deep values conflicts between the parties which can arise in crisis situation

## Ethical Concerns Continued

- ▶ Gestational Surrogacy = Selling babies?
  - ▶ Devalues human life? Not necessarily
  - ▶ "A surrogate can be compensated for the wages she loses during the surrogacy process, the time she invests, travel expenses she incurs, the medical risks she accepts and more. Intended parents do not pay their gestational carrier for a baby. This is an important difference, legally and ethically."
- ▶ However, introduces market norms into what was previous a non market relationship
  - ▶ Consider reasons parents normally have children, how they relate to each other, and what values/norms bind them
  - ▶ Now think about how you relate to a plumber, landlord, or other contractor
    - ▶ Parties bound by contract, exchange of services for money, market norms

## Comments? Questions?

Thank You!