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A LEGAL UPDATE

## INFORMATION CONCERNING CHANGES TO WASHINGTON LAW ON SURROGACY AND SURROGACY AGREEMENTS<sup>1</sup>

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January 2019

Washington's new Uniform Parentage Act (UPA), now codified as RCW chapter 26.26A, was significantly revised as a result of the Legislature's passage of ESSB 6037. The amendments, which take effect January 1, 2019, include the following significant changes to Washington law governing surrogacy and assisted reproduction:

### Surrogacy

The new UPA recognizes two types of surrogacy: 1) "Gestational Surrogacy," where the person who intends to give birth under a surrogacy agreement will become pregnant by assisted reproduction using a different person's eggs, and 2) "Genetic Surrogacy," where the person who intends to give birth under a surrogacy agreement will become pregnant by assisted reproduction using her own eggs. "Assisted reproduction" refers to methods of creating pregnancy without sexual intercourse, including artificial insemination, intrauterine insemination, in vitro fertilization, and embryo transfer.

The new UPA puts in place specific requirements for intended parents and surrogates. The requirements include minimum ages for the surrogate and intended parents and requirements for medical evaluations, mental health consultations, and independent legal representation.

The new UPA also puts in place specific requirements for the content of the surrogacy agreement and the procedure for entering into the surrogacy agreement. Important examples of some of the required content include: (1) information regarding how the intended parents will cover the surrogacy-related expenses of the surrogate and medical expenses of the child (even if the statement is that such information is unknown); (2) the agreement must permit the surrogate to make all health and welfare decisions regarding herself and her pregnancy, including the choice to terminate the pregnancy; and (3) a statement that each intended parent is jointly and severally liable to provide financial assistance to any and all children born, regardless of number, gender, or mental or physical condition. If all of these specific requirements are met, the surrogacy agreement must be enforced by the court. If any of the requirements are not met, the agreement may not be enforceable.

A person who does not live in Washington can enter into a surrogacy agreement in Washington. A surrogacy agreement is valid and enforceable in Washington as long as at least one party resides in this state or if any of the medical procedures or mental health consultations occurs here.

The new UPA allows intended parents to pay monetary compensation to a gestational or genetic surrogate in exchange for her services. There are specific requirements for the manner in which compensation may be paid and the ways in which surrogacy programs may operate in Washington.

In gestational surrogacy cases, the new UPA allows Washington courts to issue pre-birth parentage orders declaring the intended parents to be the legal parents of the child born to the woman acting as surrogate, upon birth. Following the birth, the intended parents may apply for a birth certificate identifying them as the child's legal parents

Pre-birth parentage orders are not available in genetic surrogacy cases. Genetic surrogacy contracts must be submitted to the court for pre-approval before any medical procedures associated with the surrogacy have taken place. Parentage orders declaring the intended parents to be the legal parents of the child born to the woman acting as genetic surrogate may only be entered after the birth, following a waiting period specified in the statute. Once the parentage order is entered, the intended parents may apply for a birth certificate identifying them as the child's legal parents.

### **Assisted Reproduction**

The new UPA does not impose additional restrictions or requirements for egg donor, sperm donor, or embryo donor arrangements under Washington law. The statute continues to clearly state that a donor is not a parent of a child conceived and born from the donated eggs, sperm, or embryos.

If a child conceived through assisted reproduction (not including surrogacy) is born to unmarried parents, a new, gender-neutral "Voluntary Acknowledgment of Parentage" will be used to confirm the non-biological parent's status. Under certain conditions, if an unmarried, non-biological party fails to consent in a record as required, the party's parental status may subsequently be confirmed by a court. If the child is born to a couple who are married or in a state registered domestic partnership, both spouses or partners will continue to be presumed to be the child's legal parents.

The new UPA requires sperm banks, egg donor programs, and fertility clinics to collect identifying information from donors, and to store that information. The donor must be given a choice to indicate, in writing, whether they agree that children born from their donated

eggs or sperm can be provided with that identifying information when the child turns 18.



<sup>1</sup> This is a publication of Skellenger Bender, PS, which summarizes general information concerning Washington state law. No action should be taken on the basis of this publication without advice based upon your specific circumstances, provided by an attorney who is licensed to practice in your state.



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