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New York Attorneys for Adoption & Family Formation

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July 3, 2024

TO: Joyce Elie, NYS Department of Finance, Director of Legislative Affairs VIA EMAIL
(Joyce.El@dfs.ny.gov)

Re: Availability of Insurance for Surrogacy in New York

Dear Ms. Elie:

We, the undersigned, are a group of adoption and assisted reproduction attorneys and other adoption and child-welfare professionals from across New York State. We work with adoptive families, families seeking to conceive children through assisted reproduction, donor-conceived children, child welfare agencies, and the court system to protect and advocate for the rights of adoptive and donor-conceived children and their families.

We submit this letter to you in support of making additional insurance options available for those pursuing gestational surrogacy in New York. The Child Parent Security Act (“CPSA”) was clearly created with the intent to protect surrogates and make sure they have appropriate insurance in place during their surrogacy journeys. Unfortunately, under the current insurance laws in New York, many insurance products that would protect surrogates and help reduce financial risks for intended parents are simply not available.

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Medical Insurance

FCA § 581-402(a)(7) requires that a surrogate have medical insurance in place from the time she starts the first embryo transfer cycle until 12 months after the pregnancy ends. There are currently Affordable Care Act (“ACA”) plans and employer medical insurance plans available in New York. However, these policies do not cover any medical complications that surrogates experience from the medical procedures and fertility medications taken as part of the embryo transfer cycle because the cycle itself is excluded from coverage due to the fact that the surrogate does not have an underlying diagnosis of infertility. Although we understand that a NYS regulated insurance plan may not deny coverage for emergency care, many employer plans are self-funded and therefore not NYS regulated health insurance plans and not required to cover emergency care. Also, the surrogate may incur medical expenses which are associated with these medical complications but which would not be considered covered emergency care.

There are policies available in other states that are designed specifically to cover those complications and fill that hole, but they are not currently available in NY¹.

There are also backup maternity policies available that can be implemented if the surrogate’s primary insurance policy is lost during her journey or otherwise turns out to exclude expenses associated with a surrogate pregnancy. This is always a risk with self-funded plans in New York. We have seen many self-funded plans that have unclear exclusions regarding surrogacy (i.e., they refer to surrogacy but do not clearly indicate whether they are excluding costs incurred by intended parents or maternity expenses incurred by the surrogate).² If the parties choose to move forward using such an employer policy but the employer ultimately disagrees with their interpretation of such exclusion and denies their claims, they would benefit from having the ability to trigger a backup maternity policy at that time. Again, these policies are not available in NY.

¹ This policy is officially called an Egg Recipient Complications Insurance policy but is commonly referred to as Surrogate IVF Complications Insurance policy.

² This policy is officially called a Backup Maternity policy but is commonly referred to as Secondary or Contingency Maternity Insurance.



Surrogate Accidental Death Insurance

FCA § 581-402(a)(8) requires that the surrogate have \$750,000 of life insurance or the highest amount she qualifies for if she qualifies for less than \$750,000. There is term life insurance available in New York, but in many cases, surrogates do not qualify for the full \$750,000 of term life insurance due to their medical issues unrelated to their suitability to act as a surrogate, family medical history and/or due to their current income level not supporting that level of life insurance. We have seen many surrogates who do not qualify for term life insurance or who only qualify for a range of smaller amounts (often under \$500,000). There is also an issue with life insurance companies not wanting to issue policies to surrogates because all of the work to get the policy put in place is done on the front end and the insurance companies know that these policies will be cancelled after a year or two and they will not receive the premiums for the full term that justifies the work put in on the front end to get the policy in place.

There are surrogate accidental death insurance policies available in other states that are specifically designed for surrogates that do not require any medical underwriting or income verification to obtain \$750,000 in coverage. These policies cover any type of surrogate accidental death but also any death related to pregnancy, delivery or postnatal complications, which are the added risks the CPSA life insurance requirements seek to protect surrogates from. These policies also allow for a variety of riders and additional coverage that are beneficial to both surrogates and intended parents. Again, these policies and their riders are not available in New York.

In other states where these policies are available, Intended Parents can purchase additional coverage (typically \$50,000 to \$150,000) that will be payable to the intended parents to reimburse them for their expense associated with surrogacy if their surrogate dies and their baby also does not survive. This is not possible with term life insurance. For many intended parents, if this were to occur, they would not have enough funds to attempt another surrogacy journey without this insurance coverage.



Most surrogacy agreements also provide for compensation for the surrogate (in addition to covering medical expenses) in the event she suffers a partial or total hysterectomy. Riders are available to surrogate accidental death policies that will cover this compensation to the surrogate. Since this is not available in New York, New York surrogates are typically offered less compensation for loss of reproductive organs because the Intended Parents cannot obtain insurance for this risk. Surrogates could be better protected if surrogate accidental death policies with this loss of reproductive organs rider were available in New York.

We understand that there are accidental death policies available in New York, but those policies cover only accidental deaths and would exclude deaths related to pregnancy, delivery or postnatal complications, which is the added risk facing surrogates which the statutory requirement for life insurance for surrogates is supposed to protect against. For that reason, these policies are not appropriate for surrogates.

We also understand that New York Insurance Law § 1113(17) allows credit insurance that can reimburse intended parents for financial loss incurred as a result of the failure of the surrogate to perform under the surrogacy agreement due to death, bodily injury, sickness, disappearance of the surrogate, late miscarriage or stillbirth. However, these policies do not appear to cover the intended parents' costs for the creation of their embryos, the fees paid to their surrogacy program and the insurance premiums they pay for their surrogate's medical and life insurance. These costs can easily exceed \$75,000. These costs would be covered under the added coverage for the intended parents on a surrogate accidental death insurance policy.

Disability Insurance

FCA § 581-403(i)(1)(x) requires that the intended parents pay for a disability policy for the surrogate if she requests it. Unfortunately, there are currently very few options for disability insurance in New York. If the surrogate has already attended surrogacy related medical appointments (which is almost always the case by the time insurance policies are being purchased for her), any private disability policy she applies for will likely exclude any disability relating to



the surrogate pregnancy. Some surrogates have group disability insurance available through their employer, but many are not enrolled and have to wait until open enrollment to enroll. If she is pregnant at that time, any disability relating to the pregnancy is often excluded as a pre-existing condition. Overall, we have seen less than 5% of New York surrogates who have disability insurance available to them that will cover any disability relating to the surrogate pregnancy.

New York has statutory disability benefits, but not all New York surrogates are eligible for this (ex. state workers, self-employed individuals, independent contractors, etc.) and the coverage is only a maximum of \$170 per week.

There are insurance policies available in other states for both short-term and long-term disability specifically for surrogacy but, again, they are not currently available in NY. One type of coverage that is available in other states is a permanent and total disablement rider that can be added to a surrogate accidental death insurance policy, which pays out a lump sum to the surrogate if she suffers a permanent and total disability. For premiums of between \$100 and \$500 these policies pay out \$50,000 to \$250,000 and many intended parents are willing to pay these premiums but could not afford to pay these lump sums without this insurance coverage.

In other states, there are also surrogate bedrest disability³ and hospital indemnity policies available for short term disabilities that occur pre-delivery. Surrogate bedrest disability policies cover the surrogate's lost wages, childcare expenses and housekeeping expenses if she is on doctor ordered bed rest prior to delivery. Hospital indemnity policies cover the surrogate's lost wages, childcare expenses and housekeeping expenses if she is hospitalized with pregnancy complications during the pregnancy. In other states where these policies are available, intended parents are routinely willing to more robustly cover these items for their surrogates, which makes sure that the surrogate does not have out of pocket losses if she ends up on bed rest during her surrogacy journey. However, these policies are not available in New York.

Newborn Insurance

³ This policy is officially called a Bedrest Disability policy but is commonly referred to as Surrogate Bedrest Disability policy.



FCA § 581-203(d)(5) requires that intended parents provide support for the child immediately upon birth of the child, which includes covering medical expenses for the child at the hospital. Depending on the medical insurance carried by the intended parents at the time of their child's birth and where their surrogate gives birth, the intended parents may have out of network coverage or no coverage for their child's hospital bills. If their child has complications after delivery and/or requires a NICU stay, those medical bills can be very large (sometimes over \$100,000). Although this is not a terribly frequent occurrence, the financial impact on those Intended Parents is huge.

In other states there is newborn insurance available that will cover these hospital medical bills for the child regardless of where the delivery occurs. Unfortunately, these policies are not available in New York.

We are asking that the following policies be made available to surrogates and intended parents residing in New York: (1) surrogacy maternity plans; (2) surrogacy maternity back-up plans; (3) IVF complications insurance; (4) surrogate accidental death policies with intended parent coverage, loss of reproductive organs riders, stillbirth riders and permanent and total disablement riders; (5) surrogate bedrest disability policies; (6) hospital indemnity policies; and (7) newborn insurance. These policies will make surrogacy more affordable and better protect all New York residents engaging in surrogacy.

Although not available in New York, the above policies generally can be obtained if either the surrogate or the intended parents reside outside of New York. For this reason, New York intended parents are increasingly requesting to match with a surrogate outside of New York. An important rationale supporting the enactment of the CPSA was the added cost and inconvenience of New York intended parents being forced to work with surrogates out of state. Now, lack of insurance options in New York, is again resulting in intended parents seeking to match with surrogates outside of New York and thereby depriving New York intended parents of the benefits of the comprehensive nature of the surrogacy laws in New York compared to most other states. New York surrogates are also receiving less protection due to the lack of insurance products



available in New York, which is contrary to the intent of the CPSA which sought to make sure surrogates were fully insured and protected throughout their surrogate pregnancy and beyond.

These policies could be made available in New York by the New York State Department of Financial Services approving their use on excess/surplus lines or by a legislation amending the insurance law as was done with Insurance Law §§ 1113(32), 2105(a) and 4103(a)(1) by the CPSA.

Please contact the President of our organization, Kathleen (“Casey”) Copps DiPaola, at **518-436-4170**, or by email at kdipaola@theCDSLAWFirm.com, to discuss how NYAAFF can be involved in helping to protect surrogates and intended parents engaging in gestational surrogacy in New York by expanding the insurance policies available to them.

Thank you for your time and attention.

Kathleen (“Casey”) Copps DiPaola

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