NYAAFF

New York Attorneys for Adoption and Family Formation

June 5, 2017

To: The Honorable Senator John Bonacic
The Honorable Senator John Flanagan
The Honorable Senator John DeFrancisco
The Honorable Senator Jeffrey Klein

Re: The Child Parent Security Act

Gentlemen:

Kindly accept this letter in support of the Child Parent Security Act from the New York Attorneys for Adoption and Family Formation, Inc. (NYAAFF). The Members of NYAAFF are attorneys licensed to practice law in the State of New York who concentrate their practices in the fields of adoption and family formation. All of the members have many years of experience and are members of the Academy of Adoption and Assisted Reproduction Attorneys (AAAA).[1]

As practicing attorneys in the field of family formation we know first-hand the emotional and legal difficulties that New Yorkers face when trying to build their families through third party reproduction (where a child is conceived through sperm donation, egg donation or embryo donation, or where a woman carries a child for another – all quite common practices in New York).

[1] The Academy of Adoption and Assisted Reproduction Attorneys was formerly known as the American Academy of Adoption Attorneys and the American Academy of Assisted Reproductive Technology Attorneys.

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Unfortunately, current New York law too often leaves children born through third party reproduction with legally insecure parental relationships. Except in very narrow circumstances, New York law fails to clarify that gamete and embryo donors do not have parental rights and New York's current anti-surrogacy laws prevent intended parents from being recognized as their child's legal parents at birth. It is long past time for legislative action to clearly establish the legal rights and responsibilities of persons conceiving children with the assistance of third parties. For these reasons, we strongly support the Child Parent Security Act ("CPSA").

Dramatic medical advances in the treatment of infertility now provide men and women who might not otherwise become parents with the opportunity to have children. Additionally, society now recognizes that there are many different types of families and many single parents and same sex parents are building their families with the assistance of these medical technologies.

As a consequence of these advances, however, parenthood can no longer be defined simply by reference to the act of giving birth or genetics. New York parentage laws have failed to keep pace with these medical and societal advances and are no longer adequate to govern this now far more complex situation.

In Vitro Fertilization ("IVF") egg and embryo donation are increasingly relied on by persons who could otherwise not conceive a child and yet, New York State has absolutely no law addressing the parentage of the large numbers of children conceived using these methods. New York's artificial insemination statute (Domestic Relations Law §73) is inapplicable to a significant percentage of children conceived via artificial insemination and totally fails to address donated sperm used in IVF procedures. Other than DRL §73, there is no statute dealing with gamete or embryo donation. Parentage in these situations is still subject to the common law which relies primarily on genetics as the touchstone of parental rights. This is illogical and counterproductive where genetic material is donated to another for the express purpose of the recipient conceiving a child. Moreover, it leaves the parentage of the intended parent(s) vulnerable to legal challenge.

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Medical technology has also made it possible for people who otherwise would be unable to carry a pregnancy to still achieve their cherished life-goal of becoming parents; however, New York's current anti-surrogacy law frustrates New Yorkers' ability to do so in their home state.

New York's anti-surrogacy legislation (Domestic Relations Law Article 8) was passed in 1993 to address the serious concerns raised by the New Jersey case of *Baby M.* where a "traditional surrogate" received a fee in return for being inseminated and giving birth to a child who was her *genetic* child. Since that time, medical advances have virtually eliminated traditional surrogacy arrangements (where the surrogate is the genetic mother) and the CPSA *does not* apply to such arrangements.

Under current New York law, a child born to a gestational surrogate is born into legal limbo. New York has no statutory definition of who is a child's legal mother. New York's anti-surrogacy statute, presumptively imposes the legal status, and responsibility of mother, on the gestational carrier, regardless of her lack of desire or intention to parent.

The imposition of parental status on a gestational surrogate who has no desire to parent ignores the best interests of children because it deprives the genetic or intended mother, who intends to parent, of the legal status of parent. It does not serve the interests of the child who should have the security of a legal parent at birth; it does not serve the interests of the genetic and or intended parents who want to be responsible for the child; and it does not serve the interest of the gestational carrier who was willing to gestate the child, but has no interest in having parental status thrust on her. Ironically, however, this is exactly the result that New York's ban on enforceable surrogacy agreements achieves.

In addition to voiding any gestational surrogacy agreement, New York's anti- surrogacy law makes it illegal to compensate a surrogate for undertaking to gestate a child for another. Therefore New Yorkers who do not have a friend or family member willing to gestate their child for no compensation, must make agreements (which are legal and enforceable in the vast majority of other states) with surrogates who live out of state. This increases the cost of the process and certainly the stress. It also means that they cannot take advantage of New York's world class medical facilities and they can't use their local professionals, such as physicians, lawyers, and therapists, who they have come to rely upon to

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guide them through these complicated and emotional procedures. Sadly, if their children are born at a distance from New York, many of these families are unable to attend routine pre-natal appointments and they may even miss the birth of their child.

The ban on compensated surrogacy arose out of a concern that there was a potential for women to be exploited and a fear that compensating a woman for gestating a child would somehow demean the act of childbirth and turn children into a commodity. More than twenty years after the *Baby M.* case in 1992, history has proven these fears to be without substance. Medical technology and practices have changed profoundly since the *Baby M.* case. New York's adherence to policies adopted to address outdated practices commonplace at the time of the *Baby M.* case, does not serve the best interests of children.

If New York's current law seeks to protect a woman from having a contractual obligation to relinquish her child, it sweeps too broadly to accomplish this purpose. The CPSA would not allow an enforceable contract where there was a genetic connection between the surrogate and the child and puts in place numerous protections to ensure that the surrogate's decision to enter into any agreement is knowing and voluntary.

Arguments which urge that a woman should not have a right to choose to use her reproductive ability for the purpose of gestating a child for another and to be paid for her unique contribution are unnecessarily paternalistic and out of step with modern notions of a woman's right to control her own body. What is needed is responsible and realistic legislation which protects all of the participants and most importantly the children.

The ABA has proposed a model act to address this need and the most recent version of the Uniform Parentage Act has also been updated to address the legal status of children conceived through third party reproduction. The Child Parent Security Act is consistent with the Uniform Parentage Act, The ABA Model Act and with legislation which has already been adopted in many states across the country. The CPSA establishes clear legal protections for all parties involved in this form of family building and clear legal procedures for securing the parentage of children from the moment of birth.

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Families in New York are profoundly burdened in their ability to take advantage of tried and true medical procedures which would enable them to experience the profound joy of being parents. Children born of assisted reproduction technology should have the right to be certain at birth of who their legal parents are. Under current law, it takes months to obtain a birth order or to complete an adoption. During these months, the legal status of the child and parents are uncertain. The cost to make parentage legally certain is considerable. These failures would be remedied by passing the Child Parent Security Act which would bring New York law in step with the way many thousands of children are being conceived and born in New York today.

We urge you to support the passage of the Child Parent Security Act.

Very truly yours,

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