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February 19, 2020

The Honorable Liz Krueger
Capitol Building
Albany, NY 12247

The Honorable Didi Barrett
Capitol Building
Albany, NY 12248

The Honorable Danny O'Donnell
Capitol Building
Albany, NY 12248

RE: S7717

Dear Senator Krueger, Assemblymember Barrett and Assemblymember O'Donnell:

We, the undersigned, are a group of adoption and assisted reproduction attorneys and other child-welfare professionals from across New York State, who work with families, children, child welfare agencies and the court system to protect and advocate for the rights of adoptive children and those seeking to expand their families through the use of assisted reproduction, and the donors and surrogates who help them do so. We submit this letter in strong opposition to Senate Bill S7717, which relates to judgments of parentage for children born through assisted reproduction and surrogacy. For the reasons more fully set forth below, we strongly urge you to oppose this bill.

Senate Bill S7717 ("S7717"), introduced by Senator Liz Krueger and Assembly Members Didi Barrett and Daniel O'Donnell, is a variation on the Child-Parent Security Act ("CPSA"), which is co-sponsored by Senator Brad Hoylman and Assembly Member Amy Paulin. We are in

full support of the passage of the CPSA, and believe it is a long overdue update to New York law. However, the variations to the CPSA suggested by S7717 are extremely alarming and guaranteed to lead to disastrous consequences if adopted.

The primary difference between the CPSA and S7717 is the inclusion of the "Acknowledgement of Interim Parental Responsibility" provisions. S7717 would require that the person acting as surrogate and the intended parent(s) execute a written acknowledgment, during pregnancy, that declares that the intended parent(s) must share parental responsibility for the child with the person acting as a surrogate, and must share all decision-making responsibility for the child, from the moment of birth. This shared parental responsibility would continue until such time as the person acting as a surrogate executes *another* written declaration, no sooner than eight days following the birth of the child, renouncing their "parental rights" and consenting to the issuance of a judgment of parentage in favor of the intended parents. If the person acting as surrogate does not sign such a declaration, the court would be prohibited from issuing an order of parentage for the intended parents. This means that the person acting as surrogate, *although she has no genetic connection to the child whatsoever*, could change her mind up to eight days following the birth of the child, and elect to be treated as the child's legal parent. This is totally inconsistent with the spirit and intent of gestational surrogacy.

This disastrous result would be the case even if both intended parents contributed genetic material to create the embryo which resulted in the birth of the child in question. Take, for example, the following scenario: a married heterosexual couple each contribute their own gametes (sperm and egg) to create the embryo that is transferred to the uterus of the person acting as a surrogate. Both of the intended parents would be the genetic parents of the resulting child, and the person acting as a surrogate would have no genetic connection to the child whatsoever. S7717 would nonetheless afford the person acting as a surrogate parental rights and would not permit a judge to issue an order of parentage to the intended parents (the genetic parents) if the person acting as a surrogate refused to relinquish these "parental rights." It is unclear from reading S7717 what the result in that situation would be: *Whether the person acting as surrogate would be the exclusive parent of the child (despite the clear intention of the parties entering into the arrangement and the genetic relationship between the child and the intended parent(s))? Whether the two genetic parents and the person acting as surrogate would all three be the legal parents of the child? If the person acting as surrogate was married, would that mean that all four of them (the genetic parents, the person acting as surrogate and her spouse) would all be deemed the child's legal parents?* At best, the bill is unclear and confusing. At worst, the bill is a recipe for disaster, undoubtedly leading to complicated and emotional litigation to determine questions of parentage.

S7717 also provides that, although the intended parent(s) and person acting as surrogate would share parental responsibility and decision-making responsibility for the child following birth, the intended parent(s) are fully financially responsible for the child, to the exclusion of the person acting as a surrogate. This creates a number of potential practical issues. For example:

- If the person acting as a surrogate is still a legal "parent" to the child, there will likely be complications for the intended parent(s) attempting to add the child to their health insurance after birth, given that the child has another "legal" parent.
- How will medical and health-related decisions for the child be made in the event that the intended parent(s) and the person acting as a surrogate disagree?
- If there is a disagreement, can the person acting as a surrogate direct medical treatment over the objection of the intended parent(s), and will the intended parent(s) then be required to pay for such treatment?
- Can the intended parent(s) be forced to accept parental responsibility for the child if the person acting as a surrogate refuses to relinquish her "parental rights" and they are not given any parental rights?

None of these questions are answered by S7717.

S7717 also requires that, in order for the intended parent(s) to become the child's legal parent(s), they must submit to medical examinations and have background checks and a home study completed, even if they are the genetic parents of the child. There is no basis or justification for these requirements, which follow an adoption model, and they are unduly burdensome and discriminatory to same-sex couples and couples with fertility issues who have no choice but to build their families through assisted reproduction.

S7717 also lists various eligibility requirements for a person acting as a surrogate (i.e., she must be between the ages of 21 and 35, she must have previously delivered at least one child, she must not have previously delivered more than three children, etc.). These requirements (many of which are medical in nature) appear to be totally arbitrary, inconsistent with guidelines established by the American Society for Reproductive Medicine and are determinations that should be made on a case by case basis by patients and their physicians, not by the legislature.

S7717 also legalizes compensated "genetic surrogacy" in addition to compensated "gestational surrogacy," while the CPSA only legalizes compensated "gestational surrogacy." In genetic surrogacy, the person acting as a surrogate uses her own ovum (egg) to create the fetus and is therefore genetically related to the resulting child. In gestational surrogacy, the person acting as a surrogate has no genetic relationship to the child at all. Under current New York law, both types of compensated surrogacy are prohibited and are considered to be void and unenforceable.

This public policy came to be largely as a result of the 1986 New Jersey case of Mary Beth Whitehead (*In re Baby M.*). *Baby M.* was a case involving genetic surrogacy, where the person acting as a surrogate (Mary Beth Whitehead) was inseminated by the intended father and became pregnant – meaning, she was biologically related to the child she was carrying. The parties agreed that, upon the birth of the child, Mary Beth would relinquish the child and her parental rights to the intended father and his wife. However, days after the child was born, Mary Beth changed her mind and wanted to pursue parental rights to the child. The court held that, under these circumstances, the surrogacy agreement was invalid because it was contrary to public policy, and declared Mary Beth to be the child's legal mother, given her biological connection to the child.

The CPSA makes clear that this type of surrogacy – genetic surrogacy (where the child is conceived using ovum provided by the person acting as surrogate) – remains contrary to the public policy of New York State and remains unenforceable. S7717 inexplicably legalizes compensated genetic surrogacy, in sharp contrast to longstanding public policy in this State.

Bill S7717 injects problematic and inflammatory provisions into the CPSA. This bill would be detrimental to intended parents and persons acting as surrogates (and their families) and would certainly be contrary to the best interests of children born through assisted reproduction and surrogacy. New York desperately needs to create a legal framework within which gestational surrogacy can occur. That legal framework should be the CPSA which has been thoughtfully drafted and reworked over the last decade to address the concerns of a multitude of different groups. Sadly, Bill S7717 seems to be nothing more than an attempt to distract from this important legislation and prevent it from being passed during this legislative session.

New York Attorneys for Adoption & Family Formation
By: Kathleen ("Casey") Copps DiPaola, Esq.
President
1 Marcus Blvd., Suite 200
Albany, New York 12205
Phone: (518) 436-4170
Fax: (518) 436-1456
kdipaola@theCDSLawFirm.com

cc: Governor Andrew Cuomo

Members of the New York State Senate

Members of the New York State Assembly