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September 23, 2020

New York State Department of Health
Division of Legal Affairs
Attn: Kerry-Ann Lawrence
Room 2438 Corning Tower
Albany, New York 12237

Re: Issuance of Birth Certificates for Children Born by New York Surrogates to Out-of-State Parents

Dear Ms. Lawrence:

We, the undersigned, are a group of adoption and assisted reproduction attorneys from across New York State, who work with families, children, child welfare agencies and the court system to protect and advocate for children and families formed through adoption and assisted reproduction. Over the last several years, this organization has been particularly active in lobbying for the passage of the Child-Parent Security Act ("CPSA"), the law which legalized compensated gestational surrogacy in New York State. In fact, the principal drafters of the CPSA are all members of NYAAFF and are therefore signatories to this letter.

Given the recent passage of the CPSA, it is anticipated that the New York State Department of Health ("DOH") will begin to see an increase in the number of applications for birth certificates for children born in New York through gestational surrogacy. We submit this letter to articulate our position on the DOH's policy regarding the issuance of New York birth certificates for children born to New York surrogates. Specifically, we are writing to address the scenario where a child is born in New York (presumably to a New York surrogate) but the intended parents reside in another state. In that scenario, there are many states that would afford the intended parents the right to obtain a pre-birth or post-birth parentage order from their home state which would be provided to the DOH requesting the issuance of a New York birth certificate for the child in conformity with that court order.

Pursuant to Public Health Law ("PHL") § 4138, a new birth certificate shall be issued whenever: "notification is received by, or proper proof is submitted to, the commissioner from or by the clerk of a court of competent jurisdiction or the parents, or their attorneys, or the person himself, of a judgment, order or decree

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relating to the parentage" (PHL § 4138[1][b]). The DOH has previously relied on this provision to issue birth certificates for children born in New York to out-of-state parents who used a New York compassionate (uncompensated) surrogate (*See attached email correspondence with DOH*). Recently, however, the DOH has expressed some hesitance about this policy, and has suggested that it may take the position that, once the CPSA becomes effective on February 15, 2021, it will only issue a New York birth certificate if the out-of-state parentage order and underlying parentage proceeding complied with New York law. This is unworkable for a number of important reasons.

I. Out-of-State Parentage Orders are Entitled to Full Faith and Credit

If the DOH required that out-of-state parentage orders comply with the CPSA as a prerequisite for a New York birth certificate, such a policy would defy the requirement of affording full faith and credit to a sister state court order. "The full faith and credit clause of the United States Constitution (U.S. Const, art IV, § 1) requires that the public acts, records, and judicial proceedings of each state be given full faith and credit in every other state. The purpose of the clause is to avoid conflicts between states in adjudicating the same matters. The doctrine establishes a rule of evidence…which requires recognition of the foreign judgment as proof of the prior out-of-state litigation and gives it res judicata effect, thus avoiding relitigation of issues in one state which have already been decided in another. Absent a challenge to the jurisdiction of the issuing court, New York is required to give the same preclusive effect to a judgment from another state as it would have in the issuing state, and **it is precluded from inquiring into the merits of the judgment"** (*Balboa Capital Corporation v. Plaza Auto Care, Inc.*, 178 AD3d 646, 647 [2d Dep't 2019]; *see also Luna v. Dobson*, 97 NY2d 178 [2001]).

In *Finstuen v. Crutcher*, a case dealing with adoption decrees issued to same-sex adoptive parents, the United States Court of Appeals for the Tenth Circuit held that "final adoption orders by a state court of competent jurisdiction are judgments that must be given full faith and credit under the Constitution by every other state in the nation," and ordered the Oklahoma Department of Health to "issue a revised birth certificate for [the adoptive child] who was born in Oklahoma but adopted in California by a same-sex couple." The Court ruled that "the Full Faith and Credit Clause requires Oklahoma to recognize adoptions – including same-sex couples' adoptions – that were validly decreed in other states," and "there is no roving public policy exception to the full faith and credit due judgments." Likewise, the Full Faith and Credit Clause requires New York to recognize parentage orders issued in other states (whether they comply with New York law or not) and there is no "public policy" exception to this rule. Given that the out-of-state adoption order in *Finstuen* was entitled to full faith and credit,

the Court further held that Oklahoma was required to issue an amended birth certificate for the child pursuant to Oklahoma's policy of issuing amended birth certificates post-adoption.[1]

Here, there is no distinction. New York has a law (PHL § 4138) which provides for the issuance of a new birth certificate upon receipt of a valid parentage order from a court of competent jurisdiction. Lest it run afoul of the Full Faith and Credit Clause, New York is obligated to follow that statute and issue a birth certificate, regardless of what state issued the parentage order.[2] To now enact a policy which does not allow for the issuance of a New York birth certificate despite a valid pre-birth order from another state would result in a New York State agency declining to afford full faith and credit to a sister state court order, something which it does not have the authority to do.

II. Issuing a Birth Certificate is Merely a Ministerial Act

While the DOH's role in a family's surrogacy journey is certainly an important one, the role of the DOH is ministerial: to issue a New York State birth certificate for a New York-born child based on the order or judgment of parentage issued by a court of competent jurisdiction. Respectfully, it is not within the scope of the DOH's authority to review and approve or deny any judgment or order validly issued by a court exercising appropriate jurisdiction, nor is it within their scope to review the underlying judicial proceeding to determine compliance with state law. Just as DOH would never seek to examine an adoption file to ensure compliance with state law before issuing an amended birth certificate based on a validly-issued order of adoption, neither may the DOH examine a surrogacy file when presented with an out-of-state judgment of parentage.

For example, if a child were born in New York to a New York birth mother, then adopted by adoptive parents in North Carolina, the New York DOH would not seek to review the North Carolina adoption records to ensure that the adoption complied with New York law (which, of course, it would not) before issuing an amended birth certificate. Rather, upon confirmation that the child was lawfully adopted in another state (pursuant to that

[1] This decision was affirmed by the United States Supreme Court in 2016 (*V.L. v. E.L.*, 136 S.Ct. 1017 [2016] ("A State may not disregard the judgment of a sister State because it disagrees with the reasoning underlying the judgment or deems it to be wrong on the merits")).

[2] In *Adar v. Smith*, a same-sex couple legally adopted a Louisiana-born child in New York (565 US 942 [2011]). They sought to have the child's Louisiana birth certificate amended pursuant to their New York adoption order. The Louisiana Registrar of Vital Records refused to amend the birth certificate, citing to the fact that, at the time, Louisiana law did not allow same-sex couples to legally adopt. The case went up to the United States Supreme Court who ultimately decided that, while "enforcement measures do not travel with the sister state judgment" for full faith and credit purposes, where the second state (in this case, New York) has a law which creates a mechanism for the issuance of a revised birth certificate upon receipt of a valid sister state order (i.e. PHL § 4138[1][b]), such mechanism must be followed.

state's adoption statute), the DOH would issue the child an amended birth certificate listing the child's adoptive parents. The same must be true for children born through gestational surrogacy.

III. This Policy Would Create a Host of Practical Problems, Preventing Children from Obtaining Birth Records

In addition to the reasons described above, this policy (even if it were lawful) would also create massive practical problems for New York surrogates and the out-of-state families they work with. If the surrogacy agreement and parentage proceeding were conducted pursuant to another state's law, it is almost certain that the intended parents' home state will have at least some requirements that are different from those contained in the CPSA.

For example, the CPSA requires that the intended parents obtain a life insurance policy for the surrogate with a minimum value of $750,000 and that such policy take effect prior to embryo transfer. If the intended parents obtained a $500,000 life insurance policy for the surrogate, or the life insurance policy took effect upon confirmation of pregnancy, rather than embryo transfer (because that is authorized by the intended parents' home state), that alone could result in the DOH refusing to issue a birth certificate for that child. Because the CPSA requires that many things occur at certain points in time during the surrogacy journey (i.e. health insurance must be in place prior to starting medications in anticipation of embryo transfer), there would be no possible way to go back and fix that after the fact, potentially resulting in a permanent bar on that child obtaining a birth certificate.

To provide a concrete example: under the CPSA, the intended parents are required to have a Will in place naming a guardian for the child prior to embryo transfer. In Vermont, there is no statutory requirement that an intended parent create a Will as part of the surrogacy process. If the Vermont intended parents did not create a Will (as they are not required to under Vermont law), they would still be able to obtain a valid pre-birth parentage order for their child from a Vermont state court, but they would not be able to obtain a New York birth certificate listing them as their child's parents, as the Vermont parentage proceeding did not fully comply with the CPSA. As a result, the surrogate (and her spouse, if applicable) would presumably be listed as the child's parent(s) on his or her birth certificate (despite having no legal or genetic ties to the child, nor any intent to be parents whatsoever), and the intended parents would be forced to undergo an adoption proceeding (including compliance with ICPC)[3] just to be listed on their child's birth certificate – something that is totally contrary to the spirit and

[3] Because the intended parents reside out of state, they would be required to stay in New York after the child was born until the surrogate signed a consent to the adoption (which must occur post-birth) and they cleared ICPC; meaning that they would not be able to return home with their child until potentially days or weeks after birth.

intent of the CPSA and the notion of surrogacy in general. Clearly, this is not the policy that was intended when enacting the CPSA.

Furthermore, it is not administratively feasible for the DOH to act in this supervisory role, policing out-of-state courts' compliance with New York law. If that were the case, when an application came in, the DOH would not only have to review the parentage order, but would also have to review the entire surrogacy agreement, the parentage petition, any consent forms filed with the out-of-state court and potentially review the transcripts of any out-of-state court proceedings to make a determination as to whether the entirety of the surrogacy arrangement complied with New York law.[4] Aside from the administrative impossibility of this task, most states require that these records be sealed so the DOH could not even access these records without a court order even if it wanted to. This would be an impossible feat and was certainly not the intent of the CPSA.

IV. Conclusion

While we respect and applaud the DOH's dedication to ensuring all appropriate legal protections are afforded to surrogates in this State, the CPSA was designed to provide a framework for *courts* to determine questions of parentage. Once parentage has been determined by a court (whether a New York court or a court of a sister state), it is not the role of the DOH to second guess or question that determination. Rather, it is the (crucial) role of the DOH to issue a New York birth certificate for the subject child according to New York's longstanding statutory policy codified in PHL § 4138(1)(b).

Please contact the President of our organization, Kathleen ("Casey") Copps DiPaola, at **518-436-4170,** or by email at kdipaola@theCDSLawFirm.com to discuss this matter in greater detail. Thank you for your time and attention.

Kathleen ("Casey") Copps DiPaola

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[4] This is precisely what the Full Faith & Credit clause seeks to prevent: relitigation of issues in one state that have already been determined in another.