VORZIMER MASSERMAN

A Professional Law Corporation

23035 Ventura Boulevard, Woodland Hills, CA 91364 Phone: 818.999.1950 Fax: 818.999.1955 Web: www.vmfirm.com

Summary of Amendment to Family Code §7962 Under Assembly Bill No. 2344

California Family Code §7962 provides statutory authority for gestational surrogacy arrangements. The statute sets forth the necessary requirements that must be included in a Gestational Carrier Agreement in order to establish the exclusive parentage of the Intended Parent(s). As of September 26, 2014, an amendment to §7962 passed under Assembly Bill No. 2344 (AB2344) to codify these additional requirements. This amendment requires the Gestational Carrier Agreement to include disclosure of the Intended Parent(s)' financial responsibility for medical expenses associated with the surrogacy arrangement with regards to the gestational carrier and newborn(s) and how they will cover such expenses. The added language specifically found under California Family Code §7962(a)(4), requires:

> "Disclosure of how the intended parents will cover the medical expenses of the gestational carrier and of the newborn or newborns. If health care coverage is used to cover those medical expenses, the disclosure shall include a review of the health care policy provisions related to coverage for surrogate pregnancy, including any possible liability of the gestational carrier, third-party liability liens or other insurance coverage, and any notice requirements that could affect coverage or liability of the gestational carrier. The review and disclosure do not constitute legal advice. If coverage of liability is uncertain, a statement of that fact shall be sufficient to meet the requirements of this section."

The additional statutory requirement seeks to eliminate confusion for all parties involved regarding who is financially liable for medical expenses associated with a surrogacy arrangement, and provides a plan on how such expenses are to be paid before they are even incurred. For the Intended Parent(s), the explicit language in the Agreement reinforces the fact that they are obligated, and establishes and manages their expectations regarding the actual costs of the medical care for both the Surrogate and the newborn baby. In a sense, it provides parents with a guideline on how they are to pay for medical expenses and how insurance programs may play a role in providing coverage or benefits. Meanwhile, the Gestational Carrier can move forward with the surrogacy arrangement comfortably knowing that there is an enforceable agreement that unequivocally holds the Intended Parents liable for medical expenses for both the pregnancy and the newborn(s). This financial disclosure also goes a long way to protect the Surrogate from potential financial liability imposed on her by the doctors or hospitals involved.

This provision specifically addresses medical costs associated with surrogacy and provides information regarding surrogacy costs and insurance coverage for both the Gestational Carrier and newborn(s), which ultimately also provides clarity for the Obstetricians and hospitals. It makes clear who is responsible for such expenses and how health insurance claims are to be assessed with regards to the Gestational Carrier and newborn(s). This is critical because historically, certain agencies, Intended

Parent(s) and even attorneys have attempted to use the Surrogate's insurance policy to cover the charges of a child delivered under a Gestational Carrier Agreement, which is wholly inappropriate and unethical.

Succinctly stated, it is neither proper nor recommended to ever consider using a Gestational Carrier's insurance policy for the coverage of a child she delivered for a third party for three primary reasons. First, it would violate the surrogacy agreement which will now (as of 2015) expressly state that sole legal and financial responsibility for the cost of the newborn rests with the Intended Parent(s). Secondly, it could be construed as insurance fraud that could justify not only the recision of the policy based upon a material misrepresentation, but could conceivably subject all parties to criminal prosecution as well as civil liability. Finally, the pre-birth orders that are routinely secured in surrogacy arrangements will almost always contain language from a Superior Court Judge (or its equivalent depending upon the jurisdiction) mandating that the Intended Parent(s) be financially responsible for all costs of the baby immediately upon birth. Consequently, attempting to submit a claim under the gestational carrier's medical insurance policy could also subject all parties to civil contempt sanctions.

By requiring a disclosure of the manner in which the Intended Parent(s) will cover the medical expenses of their newborn(s) in each and every Gestational Carrier Agreement, medical practitioners will be on notice from the very beginning of how to bill medical claims and who to hold accountable for the costs. More specifically, this provision will make it unequivocally clear that it would be inappropriate to submit a claim under the Gestational Carrier's insurance policy to cover the medical expenses of a child delivered for the Intended Parent(s).

Overall, the amendment to California Family Code §7962 provides clarification and accountability for all parties involved in a surrogacy arrangement, including medical practitioners and hospitals.

California Family Code §7962 is amended to read:

> **7962**. (a) An assisted reproduction agreement for gestational carriers shall contain, but shall not be limited to, all of the following information:
>
> (1) The date on which the assisted reproduction agreement for gestational carriers was executed.
>
> (2) The persons from which the gametes originated, unless anonymously donated.
>
> (3) The identity of the intended parent or parents.
>
> (4) Disclosure of how the intended parents will cover the medical expenses of the gestational carrier and of the newborn or newborns. If health care coverage is used to cover those medical expenses, the disclosure shall include a review of the health care policy provisions related to coverage for surrogate pregnancy, including any possible liability of the gestational carrier, third-party liability liens or other insurance coverage, and any notice requirements that could affect coverage or liability of the gestational carrier. The review and disclosure do not constitute legal advice. If coverage of liability is uncertain, a statement of that fact shall be sufficient to meet the requirements of this section.
>
> (b) Prior to executing the written assisted reproduction agreement for gestational carriers, a surrogate and the intended parent or intended parents shall be represented by separate independent licensed attorneys of their choosing.

(c) The assisted reproduction agreement for gestational carriers shall be executed by the parties and the signatures on the assisted reproduction agreement for gestational carriers shall be notarized or witnessed by an equivalent method of affirmation as required in the jurisdiction where the assisted reproduction agreement for gestational carriers is executed.

(d) The parties to an assisted reproduction agreement for gestational carriers shall not undergo an embryo transfer procedure, or commence injectable medication in preparation for an embryo transfer for assisted reproduction purposes, until the assisted reproduction agreement for gestational carriers has been fully executed as required by subdivisions (b) and (c) of this section.

(e) An action to establish the parent-child relationship between the intended parent or parents and the child as to a child conceived pursuant to an assisted reproduction agreement for gestational carriers may be filed before the child's birth and may be filed in the county where the child is anticipated to be born, the county where the intended parent or intended parents reside, the county where the surrogate resides, the county where the assisted reproduction agreement for gestational carriers is executed, or the county where medical procedures pursuant to the agreement are to be performed. A copy of the assisted reproduction agreement for gestational carriers shall be lodged in the court action filed for the purpose of establishing the parent-child relationship. The parties to the assisted reproduction agreement for gestational carriers shall attest, under penalty of perjury, and to the best of their knowledge and belief, as to the parties' compliance with this section in entering into the assisted reproduction agreement for gestational carriers. Submitting those declarations shall not constitute a waiver, under Section 912 of the Evidence Code, of the lawyer-client privilege described in Article 3 (commencing with Section 950) of Chapter 4 of Division 8 of the Evidence Code.

(f) (1) A notarized assisted reproduction agreement for gestational carriers signed by all the parties, with the attached declarations of independent attorneys, and lodged with the superior court in accordance with this section, shall rebut any presumptions contained within Part 2 (commencing with Section 7540), subdivision (b) of Section 7610, and Sections 7611 and 7613, as to the gestational carrier surrogate, her spouse, or partner being a parent of the child or children.

(2) Upon petition of any party to a properly executed assisted reproduction agreement for gestational carriers, the court shall issue a judgment or order establishing a parent-child relationship, whether pursuant to Section 7630 or otherwise. The judgment or order may be issued before or after the child's or children's birth subject to the limitations of Section 7633. Subject to proof of compliance with this section, the judgment or order shall establish the parent-child relationship of the intended parent or intended parents identified in the surrogacy agreement and shall establish that the surrogate, her spouse, or partner is not a parent of, and has no parental rights or duties with respect to, the child or children. The judgment or order shall terminate any parental rights of the surrogate and her spouse or partner without further hearing or evidence, unless the court or a party to the assisted reproduction agreement for gestational carriers has a good faith, reasonable belief that the assisted reproduction agreement for gestational carriers or attorney declarations were not executed in accordance with this section. Upon motion by a party to the assisted reproduction agreement for gestational

carriers, the matter shall be scheduled for hearing before a judgment or order is issued. Nothing in this section shall be construed to prevent a court from finding and declaring that the intended parent is or intended parents are the parent or parents of the child where compliance with this section has not been met; however, the court shall require sufficient proof entitling the parties to the relief sought.

(g) The petition, relinquishment or consent, agreement, order, report to the court from any investigating agency, and any power of attorney and deposition filed in the office of the clerk of the court pursuant to this part shall not be open to inspection by any person other than the parties to the proceeding and their attorneys and the State Department of Social Services, except upon the written authority of a judge of the superior court. A judge of the superior court shall not authorize anyone to inspect the petition, relinquishment or consent, agreement, order, report to the court from any investigating agency, or power of attorney or deposition, or any portion of those documents, except in exceptional circumstances and where necessary. The petitioner may be required to pay the expense of preparing the copies of the documents to be inspected.

(h) Upon the written request of any party to the proceeding and the order of any judge of the superior court, the clerk of the court shall not provide any documents referred to in subdivision (g) for inspection or copying to any other person, unless the name of the gestational carrier or any information tending to identify the gestational carrier is deleted from the documents or copies thereof.

(i) An assisted reproduction agreement for gestational carriers executed in accordance with this section is presumptively valid and shall not be rescinded or revoked without a court order. For purposes of this part, any failure to comply with the requirements of this section shall rebut the presumption of the validity of the assisted reproduction agreement for gestational carriers.