

March 21, 2024

VIA E-EMAIL

SUPPORT FOR SF 3504 AND SUBSEQUENT AMENDMENTS TO SAME

(SEE ALSO HF 4564/3567/3567A3/3567DE1)

Hearing on March 22, 2024

TO: Members of the Senate Judiciary and Public Safety Committee

I write in support of the above referenced bills that have been introduced in both the Senate and House of Representatives addressing several aspects of assisted reproduction. Because of my upcoming trial schedule, it is unlikely that I will be able to appear at this week's hearing where this legislation will be considered. I ask that this written submission be considered by the Committee in lieu of my live testimony.

I am an attorney licensed in the state of Minnesota since 1987. I have practiced exclusively in the area of family law since 1991. A significant portion of my practice has involved me in all aspects of assisted reproduction, including the drafting of artificial insemination contracts, egg donor, sperm donor, and embryo donor contracts, gestational and genetic surrogacy contracts, and pleadings needed for the parentage proceedings involving all of these assisted reproduction processes. In my legal work, I have represented donors of genetic material, recipients of genetic material, intended parents, and surrogates, as well as having advised fertility clinics, surrogacy agencies, and related professionals working in the area of assisted reproduction. In addition to being a shareholder with the Minneapolis-based law firm of Messerli & Kramer, P.A. and the chair of its Family Law Practice Group, I am a fellow in the Academy of Assisted Reproduction and Adoption Attorneys and an adjunct professor at the University of Minnesota Law School where I teach the Family Law Capstone course, which includes units on assisted reproduction.

More than a year ago I convened a group of several other attorneys who also practice extensively in the area of assisted reproduction, along with the owner of a local surrogacy agency, to consider the need for the enactment of a comprehensive statute in our state addressing assisted reproduction. Our purpose was to meet on a regular basis in order to consider the portions of the Uniform Parentage Act of 2017 (UPA 2017) that specifically addressed parentage resulting from assisted reproduction and that we all felt provided a very good model for such comprehensive assisted reproduction legislation. Assisted reproduction has been occurring in Minnesota for many years, despite the only statutory provision addressing any aspect of this process being a rather antiquated artificial insemination statute found in Minn. Stat. § 257.56. We have only one appellate court decision in Minnesota that has directly addressed parentage in the assisted reproduction context;

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this was a nonprecedential Minnesota Court of Appeals decision that resolved a dispute between a gestational surrogate and an unmarried intended parent who had also contracted with an egg donor. In this case, the Minnesota Court of Appeals acknowledged the lack of statutory law in Minnesota addressing surrogacy arrangements, but went on to enforce the contract between the parties and indicated that such contracts were not against the public policy of this state. In re the Paternity and Custody of Baby Boy A., No. A07-452, 2007 WL 4304448 (Minn. Ct. App. Dec. 11, 2007). While the Minnesota Supreme Court has declined to weigh in on the substantive law regarding assisted reproduction in general and surrogacy specifically, it has issued a procedural directive called “Court Administration Process 330.20: Assisted Reproductive Technology.” This CAP provides some guidance to district court administrators as to the court filing process in assisted reproduction cases, including directing where the cases should be filed and how the cases should be captioned and processed administratively, but it explicitly does not offer any substantive guidance as to the law that will be applied in these matters, including how or when parentage shall be established.

This lack of statutory authority and judicial direction addressing assisted reproduction generally and surrogacy specifically has left many unanswered questions for practitioners, courts, and individuals seeking to build their families using various assisted reproduction processes. Among the major issues causing both confusion and significant variance between the courts in the state is whether parentage in these cases can be adjudicated before a child is born. Some courts find that parentage can only be established in assisted reproduction situations under the Parentage Act (Chapter 257), and that this can only occur after the child is born and following a post-birth hearing. Other courts in Minnesota allow for pre-birth adjudication outside of the Parentage Act and without a hearing based on written submissions for a declaratory judgment, written stipulations by the parties, and an affidavit from the fertility doctor overseeing the medical process. Hospitals and parties prefer to have parentage in these cases established before birth, but not all courts will allow that to occur. The law is also unsettled surrounding the parental rights and responsibilities for parties using artificial insemination, in vitro fertilization, and donors of genetic material, especially when the parties are not married or the transfers occur outside of a medical facility.

All of these aspects of assisted reproduction are part of highly planned efforts at family formation. They do not fit well in the currently existing Parentage Act which was put in place many decades ago to address unplanned and often unwanted pregnancies resulting from sexual intercourse outside of marriage. The primary legal concern in those situations is often establishing parentage so child support can be assessed and determining custody and parenting time in this unplanned context. Those are not the primary concerns in these assisted reproduction situations where all aspects of the pregnancy are planned and contracted for. It is time for Minnesota law to catch up with the realities of assisted reproduction that has been occurring in Minnesota for several decades without clear legal guidance.

Based on mine and my colleagues’ collective experience in this area of practice, we have opted to propose and support something similar to Articles 7, 8, and 9 of the UPA 2017 as the best solution to address this legal void in Minnesota. The full UPA 2017 addresses all aspects of establishing parentage resulting from both sexual intercourse and assisted reproduction. While we find much to be admired in this model statute that addresses all types of parentage determinations, our informal work group opted to focus our energies on parentage determinations only in the context

of assisted reproduction and to propose that all statutory provisions addressing assisted reproduction be put into a separate, stand-alone statute that would just address parentage in the context of assisted reproduction. That is what the above-referenced bills now under consideration by this Committee do.

These statutory provisions would repeal the artificial insemination provisions in Minn. Stat. § 257.56 and put them in a new Chapter 257 E that would address not only artificial insemination between married and unmarried parties, but other aspects of assisted reproduction. They would address in vitro fertilization and the donation of genetic materials occurring as part of an assisted reproduction process. They would also address gestational surrogacy, including provisions addressing the required content of the underlying contracts, legal representation for the parties, enforceability of the contracts, and allowing specifically for pre-birth determinations of parentage if the statutory requirements are complied with. The proposed legislation would also address the need for agencies and fertility clinics to collect donor information in these various assisted reproduction processes that could be made available in specified circumstances to children born of these processes when they become adults. The House bill currently also addresses genetic surrogacy (where the surrogate is using her own egg and is thereby a genetic parent as opposed to a gestational surrogate who is carrying someone else's egg) and the Senate bill does not; our informal work group would support a bill that omits genetic surrogacy.

As this proposed legislation is based on the assisted reproduction provisions of the UPA 2017, it has been carefully and thoughtfully drafted by experienced practitioners, judicial officers, and academics from across the country. Ultimately, this bill simply codifies, unifies, and protects already existing practices that have long been used by practitioners in this area of law across the state in the absence of a clear statutory process specifically applicable to assisted reproduction. The clarity of law and practice that this proposed legislation would bring to the many citizens of this state who are building families through various assisted reproduction processes is now needed more than ever given the uncertainty of reproductive rights and practices in our current legal and political landscape. This legislation should not be considered controversial or a significant deviation for what is currently happening in the area of assisted reproduction. Rather, it will simply codify widely existing practice, bringing both uniformity and protections for the courts, attorneys, intended parents, donors, surrogates, doctors, and agency owners who are already engaged in these processes, but who desperately need these protections and guidelines that this legislation would provide.

I respectfully request that the members of this Committee carefully consider and support this legislation.

Very truly yours,

/s/ Gary A. Debele

Gary A. Debele
Attorney