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SENATE BILL NO. 69

FLOOR AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by Senator McEachin
on January 25, 2010)

(Patron Prior to Substitute—Senator McEachin)

A BILL to amend and reenact §§ 20-160, 20-161, 20-162, and 20-165 of the Code of Virginia, relating to surrogacy.

Be it enacted by the General Assembly of Virginia:

1. That §§ 20-160, 20-161, 20-162, and 20-165 of the Code of Virginia are amended and reenacted as follows:

§ 20-160. Petition and hearing for court approval of surrogacy contract; requirements; orders.

A. Prior to the performance of assisted conception, the intended parents, the surrogate, and her husband shall join in a petition to the circuit court of the county or city in which at least one of the parties resides. The surrogacy contract shall be signed by all the parties and acknowledged before an officer or other person authorized by law to take acknowledgments.

A copy of the contract shall be attached to the petition. The court shall appoint a guardian ad litem to represent the interests of any resulting child and shall appoint counsel to represent the surrogate. The court shall order a home study by a local department of social services or welfare or a licensed child-placing agency, to be completed prior to the hearing on the petition.

All hearings and proceedings conducted under this section shall be held in camera, and all court records shall be confidential and subject to inspection only under the standards applicable to adoptions as provided in § 63.2-1245. The court conducting the proceedings shall have exclusive and continuing jurisdiction of all matters arising under the surrogacy contract until all provisions of the contract are fulfilled.

B. The court shall hold a hearing on the petition. The court shall enter an order approving the surrogacy contract and authorizing the performance of assisted conception for a period of twelve months after the date of the order, and may discharge the guardian ad litem and attorney for the surrogate upon finding that:

1. The court has jurisdiction in accordance with § 20-157;

2. A local department of social services or welfare or a licensed child-placing agency has conducted a home study of the intended parents, the surrogate, and her husband, *if any*, and has filed a report of this home study with the court;

3. The intended parents, the surrogate, and her husband, *if any*, meet the standards of fitness applicable to adoptive parents;

4. All the parties have voluntarily entered into the surrogacy contract and understand its terms and the nature, meaning, and effect of the proceeding and understand that any agreement between them for payment of compensation is void and unenforceable;

5. The agreement contains adequate provisions to guarantee the payment of reasonable medical and ancillary costs either in the form of insurance, cash, escrow, bonds, or other arrangements satisfactory to the parties, including allocation of responsibility for such costs in the event of termination of the pregnancy, termination of the contract pursuant to § 20-161, or breach of the contract by any party;

6. The surrogate is ~~married~~ and has had at least one pregnancy, and has experienced at least one live birth, and bearing another child does not pose an unreasonable risk to her physical or mental health or to that of any resulting child. This finding shall be supported by medical evidence;

7. Prior to signing the surrogacy contract, the intended parents, the surrogate, and her husband, *if any*, have submitted to physical examinations and psychological evaluations by practitioners licensed to perform such services pursuant to Title 54.1, and the court and all parties have been given access to the records of the physical examinations and psychological evaluations;

8. The intended mother is infertile, is unable to bear a child, or is unable to do so without unreasonable risk to the unborn child or to the physical or mental health of the intended mother or the child. This finding shall be supported by medical evidence;

9. At least one of the intended parents is expected to be the genetic parent of any child resulting from the agreement;

10. The husband of the surrogate, *if any*, is a party to the surrogacy agreement;

11. All parties have received counseling concerning the effects of the surrogacy by a qualified health care professional or social worker, and a report containing conclusions about the capacity of the parties to enter into and fulfill the agreement has been filed with the court; and

12. The agreement would not be substantially detrimental to the interests of any of the affected persons.

60 C. Unless otherwise provided in the surrogacy contract, all court costs, counsel fees, and other costs
61 and expenses associated with the hearing, including the costs of the home study, shall be assessed
62 against the intended parents.

63 D. Within seven days of the birth of any resulting child, the intended parents shall file a written
64 notice with the court that the child was born to the surrogate within 300 days after the last performance
65 of assisted conception. Upon the filing of this notice and a finding that at least one of the intended
66 parents is the genetic parent of the resulting child as substantiated by medical evidence, the court shall
67 enter an order directing the State Registrar of Vital Records to issue a new birth certificate naming the
68 intended parents as the parents of the child pursuant to § 32.1-261.

69 If evidence cannot be produced that at least one of the intended parents is the genetic parent of the
70 resulting child, the court shall not enter an order directing the issuance of a new birth certificate naming
71 the intended parents as the parents of the child, and the surrogate and her husband, *if any*, shall be the
72 parents of the child. *The intended parents may obtain parental rights only through adoption as provided*
73 *in Chapter 12 (§ 63.2-1200 et seq.) of Title 63.2.*

74 § 20-161. Termination of court-approved surrogacy contract.

75 A. Subsequent to an order entered pursuant to subsection B of § 20-160, but before the surrogate
76 becomes pregnant through the use of assisted conception, the court for cause, or the surrogate, her
77 husband, *if any*, or the intended parents may terminate the agreement by giving written notice of
78 termination to all other parties and by filing notice of the termination with the court. Upon receipt of the
79 notice, the court shall vacate the order entered under subsection B of § 20-160.

80 B. Within 180 days after the last performance of any assisted conception, a surrogate who is also a
81 genetic parent may terminate the agreement by filing written notice with the court. The court shall
82 vacate the order entered pursuant to subsection B of § 20-160 upon finding, after notice to the parties to
83 the agreement and a hearing, that the surrogate has voluntarily terminated the agreement and that she
84 understands the effects of the termination.

85 Unless otherwise provided in the contract as approved, the surrogate shall incur no liability to the
86 intended parents for exercising her rights of termination pursuant to this section.

87 § 20-162. Contracts not approved by the court; requirements.

88 A. In the case of any surrogacy agreement for which prior court approval has not been obtained
89 pursuant to § 20-160, the provisions of this section and §§ 20-156 through 20-159 and §§ 20-163
90 through 20-165 shall apply. Any provision in a surrogacy contract that attempts to reduce the rights or
91 responsibilities of the intended parents, surrogate, or her husband, *if any*, or the rights of any resulting
92 child shall be reformed to include the requirements set forth in this chapter. A provision in the contract
93 providing for compensation to be paid to the surrogate is void and unenforceable. Such surrogacy
94 contracts shall be enforceable and shall be construed only as follows:

95 1. The surrogate, her husband, *if any*, and the intended parents shall be parties to any such surrogacy
96 contract.

97 2. The contract shall be in writing, signed by all the parties, and acknowledged before an officer or
98 other person authorized by law to take acknowledgments.

99 3. Upon expiration of ~~twenty-five~~ *three* days following birth of any resulting child, the surrogate may
100 relinquish her parental rights to the intended parents, *if* at least one of the intended parents is the genetic
101 parent of the child, by signing a surrogate consent and report form naming the intended parents as the
102 parents of the child. The surrogate consent and report form shall be developed, furnished and distributed
103 by the State Registrar of Vital Records. The surrogate consent and report form shall be signed and
104 acknowledged before an officer or other person authorized by law to take acknowledgments. The
105 surrogate consent and report form, a copy of the contract, and a statement from the physician who
106 performed the assisted conception stating the genetic relationships between the child, the surrogate, and
107 the intended parents, at least one of whom shall be the genetic parent of the child, shall be filed with
108 the State Registrar within ~~sixty~~ *180* days after the birth. The statement from the physician shall be
109 signed and acknowledged before an officer or other person authorized by law to take acknowledgments.
110 There shall be a rebuttable presumption that the statement from the physician accurately states the
111 genetic relationships among the child, the surrogate and the intended parents. *Where a physician's*
112 *statement is not available, DNA testing establishing the genetic relationships between the child, the*
113 *surrogate, and the intended parents may be substituted for the physician's statement.*

114 4. Upon the filing of the surrogate consent and report form and the required attachments, including
115 the physician's statement, within ~~sixty~~ *180* days of the birth, a new birth certificate shall be established
116 by the State Registrar for the child naming the intended parents as the parents of the child as provided
117 in § 32.1-261.

118 B. Any contract governed by the provisions of this section shall include or, in the event such
119 provisions are not explicitly covered in the contract or are included but are inconsistent with this section,
120 shall be deemed to include the following provisions:

121 1. The intended parents shall be the parents of any resulting child only when the surrogate

122 relinquishes her parental rights as provided in subdivision A 3 of this section and a new birth certificate
 123 is established as provided in subdivision A 4 of this section and § 32.1-261;

124 2. Incorporation of this chapter and a statement by each of the parties that they have read and
 125 understood the contract, they know and understand their rights and responsibilities under Virginia law,
 126 and the contract was entered into knowingly and voluntarily; and

127 3. A guarantee by the intended parents for payment of reasonable medical and ancillary costs either
 128 in the form of insurance, cash, escrow, bonds, or other arrangements satisfactory to the parties, including
 129 allocation of responsibility for such costs in the event of termination of the pregnancy, termination of
 130 the contract, or breach of the contract by any party.

131 C. Under any contract that does not include an allocation of responsibility for reasonable medical and
 132 ancillary costs in the event of termination of the pregnancy, termination of the contract, or breach of the
 133 contract by any party, the following provisions shall control:

134 1. If the intended parents and the surrogate and her husband, if any, and if he is a party to the
 135 contract, consent in writing to termination of the contract, the intended parents are responsible for all
 136 reasonable medical and ancillary costs for a period of six weeks following the termination.

137 2. If the surrogate voluntarily terminates the contract during the pregnancy, without consent of the
 138 intended parents, the intended parents shall be responsible for one-half of the reasonable medical and
 139 ancillary costs incurred prior to the termination.

140 3. If, after the birth of any resulting child, the surrogate fails to relinquish parental rights to the
 141 intended parents pursuant to the contract, the intended parents shall be responsible for one-half of the
 142 reasonable medical and ancillary costs incurred prior to the birth.

143 § 20-165. Surrogate brokers prohibited; penalty; liability of surrogate brokers.

144 A. It shall be unlawful for any person, firm, corporation, partnership, or other entity to accept
 145 compensation for recruiting or procuring surrogates or to *accept compensation for* otherwise ~~arrange~~
 146 ~~arranging~~ or ~~induce~~ *inducing* intended parents and surrogates to enter into surrogacy contracts in this
 147 Commonwealth. A violation of this section shall be punishable as a Class 1 misdemeanor.

148 B. Any person who acts as a surrogate broker in violation of this section shall, in addition, be liable
 149 to all the parties to the purported surrogacy contract in a total amount equal to three times the amount
 150 of compensation to have been paid to the broker pursuant to the contract. One-half of the damages
 151 under this subsection shall be due the surrogate and her husband, if any, and if he is a party to the
 152 contract, and one-half shall be due the intended parents.

153 An action under this section shall be brought within five years of the date of the contract.

154 C. The provisions of this section shall not apply to the services of an attorney in giving legal advice
 155 or in preparing a surrogacy contract.