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SENATE BILL NO. 1544

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the Senate Committee for Courts of Justice
on January 21, 2019)

(Patron Prior to Substitute—Senator Surovell)

*A BILL to amend and reenact §§ 20-156, 20-158 through 20-163, 20-165, 32.1-257, and 32.1-258.1 of the Code of Virginia, relating to assisted conception; parentage presumption.***Be it enacted by the General Assembly of Virginia:****1. That §§ 20-156, 20-158 through 20-163, 20-165, 32.1-257, and 32.1-258.1 of the Code of Virginia are amended and reenacted as follows:****§ 20-156. Definitions.**

As used in this chapter, unless the context requires a different meaning:

"Assisted conception" means a pregnancy resulting from any intervening medical technology, whether in vivo or in vitro, which completely or partially replaces sexual intercourse as the means of conception. Such intervening medical technology includes, but is not limited to, conventional medical and surgical treatment as well as noncoital reproductive technology such as artificial insemination by donor, cryopreservation of gametes and embryos, in vitro fertilization, uterine embryo lavage, embryo transfer, gamete intrafallopian tube transfer, and low tubal ovum transfer.

"Compensation" means payment of any valuable consideration for services in excess of reasonable medical and ancillary costs.

"Cryopreservation" means freezing and storing of gametes and embryos for possible future use in assisted conception.

"Donor" means an individual, other than a surrogate, who contributes the sperm or egg used in assisted conception.

"Gamete" means either a sperm or an ovum.

"Genetic parent" means an individual who contributes a gamete resulting in a conception.

"Gestational mother" means the woman who gives birth to a child, regardless of her genetic relationship to the child.

"Embryo" means the organism resulting from the union of a sperm and an ovum from first cell division until approximately the end of the second month of gestation.

"Embryo transfer" means the placing of a viable embryo into the uterus of a gestational mother.

"Infertile" means the inability to conceive (i) after one year of unprotected sexual intercourse or (ii) as established by a diagnosis of infertility by a licensed physician.

"Intended parents" means a ~~man and a woman~~, married to each other, couple who enter into an agreement with a surrogate under the terms of which they will be the parents of any child born to the surrogate through assisted conception regardless of the genetic relationships between the intended parents, the surrogate, and the child.

"In vitro" means any process that can be observed in an artificial environment such as a test tube or tissue culture plate.

"In vitro fertilization" means the fertilization of ova by sperm in an artificial environment.

"In vivo" means any process occurring within the living body.

"Ovum" means the female gamete or reproductive cell prior to fertilization.

"Reasonable medical and ancillary costs" means the costs of the performance of assisted conception, the costs of prenatal maternal health care, the costs of maternal and child health care for a reasonable ~~post partum~~ *postpartum* period, the reasonable costs for medications and maternity clothes, and any additional and reasonable costs for housing and other living expenses attributable to the pregnancy.

"Sperm" means the male gametes or reproductive cells which impregnate the ova.

"Surrogacy contract" means an agreement between intended parents, a surrogate, and her ~~husband~~ spouse, if any, in which the surrogate agrees to be impregnated through the use of assisted conception, to carry any resulting fetus, and to relinquish to the intended parents the custody of and parental rights to any resulting child.

"Surrogate" means any adult woman who agrees to bear a child carried for intended parents.

§ 20-158. Parentage of child resulting from assisted conception.

A. Determination of parentage, generally. — Except as provided in subsections B, C, D, and E of this section, the parentage of any child resulting from the performance of assisted conception shall be determined as follows:

1. The gestational mother of a child is the child's mother.

2. The ~~husband~~ spouse of the gestational mother of a child is the child's ~~father~~ other parent, notwithstanding any declaration of invalidity or annulment of the marriage obtained after the

60 performance of assisted conception, unless ~~he~~ *such spouse* commences an action in which the mother
61 and child are parties within two years after ~~he~~ *such spouse* discovers or, in the exercise of due diligence,
62 reasonably should have discovered the child's birth and in which it is determined that ~~he~~ *such spouse*
63 did not consent to the performance of assisted conception.

64 3. A donor is not the parent of a child conceived through assisted conception, unless the donor is the
65 ~~husband spouse~~ of the gestational mother.

66 B. Death of spouse. — Any child resulting from the insemination of a ~~wife's mother's~~ ovum using
67 her ~~husband's spouse's~~ sperm, with ~~his~~ *such spouse's* consent, is the child of the ~~husband and wife~~
68 ~~spouses~~ notwithstanding that, during the ~~ten-month~~ 10-month period immediately preceding the birth,
69 either party died.

70 However, any person who dies before in utero implantation of an embryo resulting from the union of
71 ~~his the spouse's~~ sperm or ~~her the mother's~~ ovum with another gamete, whether or not the other gamete
72 is that of the person's spouse, is not the parent of any resulting child unless (i) implantation occurs
73 before notice of the death can reasonably be communicated to the physician performing the procedure or
74 (ii) the person consents to be a parent in writing executed before the implantation.

75 C. Divorce. — Any child resulting from insemination of a ~~wife's mother's~~ ovum using her ~~husband's~~
76 ~~spouse's~~ sperm, with ~~his~~ *such spouse's* consent, is the child of the ~~husband and wife spouses~~
77 notwithstanding that either party filed for a divorce or annulment during the ~~ten-month~~ 10-month period
78 immediately preceding the birth. Any person who is a party to an action for divorce or annulment
79 commenced by filing before in utero implantation of an embryo resulting from the union of ~~his the~~
80 ~~spouse's~~ sperm or ~~her the mother's~~ ovum with another gamete, whether or not the other gamete is that
81 of the person's spouse, is not the parent of any resulting child unless (i) implantation occurs before
82 notice of the filing can reasonably be communicated to the physician performing the procedure or (ii)
83 the person consents in writing to be a parent, whether the writing was executed before or after the
84 implantation.

85 D. Birth pursuant to court approved surrogacy contract. — After approval of a surrogacy contract by
86 the court and entry of an order as provided in subsection D of § 20-160, the intended parents are the
87 parents of any resulting child. However, if the court vacates the order approving the agreement pursuant
88 to subsection B of § 20-161, the surrogate is the mother of the resulting child and her ~~husband spouse, if~~
89 ~~any, is the father other parent~~. The intended parents may only obtain parental rights through adoption as
90 provided in Chapter 12 (§ 63.2-1200 et seq.) of Title 63.2.

91 E. Birth pursuant to surrogacy contract not approved by court. — In the case of a surrogacy contract
92 that has not been approved by a court as provided in § 20-160, the parentage of any resulting child shall
93 be determined as follows:

94 1. The gestational mother is the child's mother unless ~~the intended mother is a genetic parent, in~~
95 ~~which case the intended mother is the mother~~.

96 2. If either of the intended parents is a genetic parent of the resulting child, *in which case* the
97 intended ~~father is~~ *parents are* the child's ~~father~~ *parents*. However, if (i) the surrogate is married, (ii) her
98 ~~husband spouse~~ is a party to the surrogacy contract, and (iii) the surrogate exercises her right to retain
99 custody and parental rights to the resulting child pursuant to § 20-162, then the surrogate and her
100 ~~husband spouse~~ are the parents.

101 3. 2. If neither of the intended parents is a genetic parent of the resulting child, the surrogate is the
102 mother and her ~~husband spouse, if any, is the child's father other parent~~ if ~~he~~ *such spouse* is a party to
103 the contract. The intended parents may only obtain parental rights through adoption as provided in
104 Chapter 12 (§ 63.2-1200 et seq.) of Title 63.2.

105 4. 3. After the signing and filing of the surrogate consent and report form in conformance with the
106 requirements of subsection A of § 20-162, the intended parents are the parents of the child and the
107 surrogate and her ~~husband spouse~~, if any, shall not be the parents of the child.

108 § 20-159. Surrogacy contracts permissible.

109 A. A surrogate, her ~~husband spouse~~, if any, and prospective intended parents may enter into a written
110 agreement whereby the surrogate may relinquish all her rights and duties as parent of a child conceived
111 through assisted conception, and the intended parents may become the parents of the child as provided
112 in subsection D or E of § 20-158.

113 B. Surrogacy contracts shall be approved by the court as provided in § 20-160. However, any
114 surrogacy contract that has not been approved by the court shall be governed by the provisions of
115 §§ 20-156 through 20-159 and §§ 20-162 through 20-165, including the provisions for reformation in
116 conformance with this chapter as provided in § 20-162.

117 § 20-160. Petition and hearing for court approval of surrogacy contract; requirements; orders.

118 A. Prior to the performance of assisted conception, the intended parents, the surrogate, and her
119 ~~husband spouse, if any~~, shall join in a petition to the circuit court of the county or city in which at least
120 one of the parties resides. The surrogacy contract shall be signed by all the parties and acknowledged
121 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~~ 12 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~~ spouse, if any, and has filed a report of this home study with the court;

3. The intended parents, the surrogate, and her ~~husband~~ spouse, 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 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~~ spouse, 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, *or neither intended parent is female*. 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~~ spouse 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.

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

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

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

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

A. Subsequent to an order entered pursuant to subsection B of § 20-160, but before the surrogate becomes pregnant through the use of assisted conception, the court for cause, or the surrogate, her

183 husband spouse, if any, or the intended parents may terminate the agreement by giving written notice of
184 termination to all other parties and by filing notice of the termination with the court. Upon receipt of the
185 notice, the court shall vacate the order entered under subsection B of § 20-160.

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

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

193 **§ 20-162. Contracts not approved by the court; requirements.**

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

201 1. The surrogate, her husband spouse, if any, and the intended parents shall be parties to any such
202 surrogacy contract.

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

205 3. Upon expiration of three days following birth of any resulting child, the surrogate may relinquish
206 her parental rights to the intended parents, if at least one of the intended parents is the genetic parent of
207 the child, by signing a surrogate consent and report form naming the intended parents as the parents of
208 the child. The surrogate consent and report form shall be developed, furnished, and distributed by the
209 State Registrar of Vital Records. The surrogate consent and report form shall be signed and
210 acknowledged before an officer or other person authorized by law to take acknowledgments. The
211 surrogate consent and report form, a copy of the contract, and a statement from the physician who
212 performed the assisted conception stating the genetic relationships between the child, the surrogate, and
213 the intended parents, at least one of whom shall be the genetic parent of the child, shall be filed with
214 the State Registrar within 180 days after the birth. The statement from the physician shall be signed and
215 acknowledged before an officer or other person authorized by law to take acknowledgments. There shall
216 be a rebuttable presumption that the statement from the physician accurately states the genetic
217 relationships among the child, the surrogate, and the intended parents. Where a physician's statement is
218 not available, DNA testing establishing the genetic relationships between the child, the surrogate, and the
219 intended parents may be substituted for the physician's statement.

220 4. Upon the filing of the surrogate consent and report form and the required attachments, including
221 the physician's statement, within 180 days of the birth, a new birth certificate shall be established by the
222 State Registrar for the child naming the intended parents as the parents of the child as provided in
223 § 32.1-261.

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

227 1. The intended parents shall be the parents of any resulting child only when the surrogate
228 relinquishes her parental rights as provided in subdivision A 3 of this section and a new birth certificate
229 is established as provided in subdivision A 4 of this section and § 32.1-261;

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

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

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

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

244 2. If the surrogate voluntarily terminates the contract during the pregnancy, without consent of the

intended parents, the intended parents shall be responsible for one-half of the reasonable medical and ancillary costs incurred prior to the termination.

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

§ 20-163. Miscellaneous provisions related to all surrogacy contracts.

A. The surrogate shall be solely responsible for the clinical management of the pregnancy.

B. After the entry of an order under subsection B of § 20-160 or upon the execution of a contract pursuant to § 20-162, the marriage of the surrogate shall not affect the validity of the order or contract, and her ~~husband~~ spouse shall not be deemed a party to the contract in the absence of ~~his~~ such spouse's explicit written consent.

C. Following the entry of an order pursuant to subsection D of § 20-160 or upon the relinquishing of the custody of and parental rights to any resulting child and the filing of the surrogate consent and report form as provided in § 20-162, the intended parents shall have the custody of, parental rights to, and full responsibilities for any child resulting from the performance of assisted conception from a surrogacy agreement regardless of the child's health, physical appearance, any mental or physical handicap, and regardless of whether the child is born alive.

D. A child born to a surrogate within 300 days after assisted conception pursuant to an order under subsection B of § 20-160 or a contract under § 20-162 is presumed to result from the assisted conception. This presumption is conclusive as to all persons who fail to file an action to test its validity within two years after the birth of the child. The child and the parties to the contract shall be named as parties in any such action. The action shall be filed in the court that issued or could have issued an order under § 20-160.

E. Health care providers shall not be liable for recognizing the surrogate as the mother of the resulting child before receipt of a copy of an order entered under § 20-160 or a copy of the contract, or for recognizing the intended parents as the parents of the resulting child after receipt of such order or copy of the contract.

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

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

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

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

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

§ 32.1-257. Filing birth certificates; from whom required; signatures of parents.

A. A certificate of birth for each live birth which occurs in this Commonwealth shall be filed with the State Registrar within seven days after such birth. The certificate of birth shall be registered by the State Registrar if it has been completed and filed in accordance with this section.

B. When a birth occurs in an institution or en route thereto, the person in charge of such institution or an authorized designee shall obtain the personal data, and prepare the certificate either on forms furnished by the State Registrar or by an electronic process as approved by the Board. Such person or designee shall, if submitting a form, secure the signatures required by the certificate. The physician or other person in attendance shall provide the medical information required by the certificate within five days after the birth. The person in charge of the institution or an authorized designee shall certify to the authenticity of the birth registration either by affixing his signature to the certificate or by an electronic process approved by the Board, and shall file the certificate of birth with the State Registrar within seven days after such birth.

C. When a birth occurs outside an institution, the certificate shall be prepared on forms furnished by the State Registrar and filed by one of the following in the indicated order of priority, in accordance with the regulations of the Board:

1. The physician in attendance at or immediately after the birth, or in the absence of such physician,
2. Any other person in attendance at or immediately after the birth, or in the absence of such a person,

3. The ~~father~~, the mother, *the other parent*, or, in the absence of the ~~father~~ *other parent* and the inability of the mother, the person in charge of the premises where the birth occurred.

306 C1. When a birth occurs on a moving conveyance within the United States of America and the child
307 is first removed from the conveyance in this Commonwealth, the birth shall be registered in this
308 Commonwealth and the place where the child is first removed from the conveyance shall be considered
309 the place of birth. When a birth occurs on a moving conveyance while in international waters or air
310 space or in a foreign country or its air space and the child is first removed from the conveyance in this
311 Commonwealth, the birth shall be registered in this Commonwealth although the certificate shall indicate
312 the actual place of birth insofar as can be determined.

313 D. If the mother of a child is not married to the natural father of the child at the time of birth or was
314 not married to the natural father at any time during the ~~ten~~ 10 months next preceding such birth, the
315 name of the father shall not be entered on the certificate of birth without a sworn acknowledgment of
316 paternity, executed subsequent to the birth of the child, of both the mother and of the person to be
317 named as the father. In any case in which a final determination of the paternity of a child has been
318 made by a court of competent jurisdiction pursuant to § 20-49.8, from which no appeal has been taken
319 and for which the time allowed to perfect an appeal has expired, the name of the father and the surname
320 of the child shall be entered on the certificate of birth in accordance with the finding and order of the
321 court.

322 Children born of marriages prohibited by law, deemed null or void or dissolved by a court shall
323 nevertheless be legitimate and the birth certificate for such children shall contain full information
324 concerning the ~~father~~ *other parent*.

325 For the purpose of birth registration in the case of a child resulting from assisted conception,
326 pursuant to Chapter 9 (§ 20-156 et seq.) of Title 20, the birth certificate of such child shall contain full
327 information concerning the mother's ~~husband~~ *spouse* as the ~~father~~ *other parent* of the child and the
328 gestational mother as the mother of the child. Donors of sperm or ova shall not have any parental rights
329 or duties for any such child.

330 In the event any person desires to have the name of the father entered on the certificate of birth
331 based upon the judgment of paternity of a court of another state, such person shall apply to an
332 appropriate court of the Commonwealth for an order reflecting that such court has reviewed such
333 judgment of paternity and has determined that such judgment of paternity was amply supported in
334 evidence and legitimate for the purposes of Article IV, Section 1 of the United States Constitution.

335 If the order of paternity should be appealed, the registrar shall not enter the name of the alleged
336 father on the certificate of birth during the pendency of such appeal. If the father is not named on the
337 certificate of birth, no other information concerning the father shall be entered on the certificate.

338 E. Either of the parents of the child shall verify the accuracy of the personal data to be entered on
339 the certificate of birth in time to permit the filing within the seven days prescribed above.

340 **§ 32.1-258.1. Certificate of Birth Resulting in Stillbirth; requirements.**

341 Upon the request of either individual listed as the ~~mother or father~~ *parent* on a report of fetal death
342 in the Commonwealth as defined in § 32.1-264, the State Registrar shall issue a Certificate of Birth
343 Resulting in Stillbirth for unintended, intrauterine fetal deaths occurring after a gestational period of 20
344 weeks or more. The requesting ~~mother or father~~ *parent* may, but shall not be required to, provide a
345 name for the stillborn child on the Certificate of Birth Resulting in Stillbirth. The Board of Health shall
346 prescribe a reasonable fee to cover the administrative cost and preparation of such certificate. This
347 section shall apply retroactively to any circumstances that would have resulted in the issuance of a
348 Certificate of Birth Resulting in Stillbirth, as prescribed by the Board.