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SENATE BILL NO. 69

Senate Amendments in [] — January 20, 2010

A *BILL to amend and reenact §§ 20-156, 20-158, 20-159, 20-160, 20-161, 20-162, 20-163, and 20-165 of the Code of Virginia, relating to surrogacy.*

Patron Prior to Engrossment—Senator McEachin

Referred to Committee for Courts of Justice

Be it enacted by the General Assembly of Virginia:

1. That §§ 20-156, 20-158, 20-159, 20-160, 20-161, 20-162, 20-163, and 20-165 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 after one year of unprotected sexual intercourse.

~~"Intended parents"~~ "Intended parent(s)" means *either* a man and a woman, married to each other, *or one unmarried individual*, who enter into an agreement with a surrogate under the terms of which ~~they~~ *the intended parent(s)* will be the ~~parents~~ *parent(s)* of any child born to the surrogate through assisted conception regardless of the genetic relationships between the intended ~~parents~~ *parent(s)*, 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 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~~ *parent(s)*, a surrogate, and her husband, 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~~ *parent(s)* 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~~ *parent(s)*.

§ 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:

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

2. The husband of the gestational mother of a child is the child's father, notwithstanding any declaration of invalidity or annulment of the marriage obtained after the performance of assisted conception, unless he commences an action in which the mother and child are parties within two years after he discovers or, in the exercise of due diligence, reasonably should have discovered the child's birth and in which it is determined that he did not consent to the performance of assisted conception.

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

B. Death of spouse. - Any child resulting from the insemination of a wife's ovum using her husband's sperm, with his consent, is the child of the husband and wife notwithstanding that, during the ten-month period immediately preceding the birth, either party died.

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

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

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

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

1. The gestational mother is the child's mother unless (i) the intended mother is a genetic parent, in which case the intended mother is the mother, or (ii) *the gestational mother is not a genetic parent and the intended father is a genetic father, in which case the intended father is the father.*

2. If either of the intended parents, *if married to each other*, is a genetic parent of the resulting child, the intended father is the child's father *and the intended mother is the child's mother.* However, if (i) the surrogate is married, (ii) her husband is a party to the surrogacy contract, (iii) *the surrogate is genetically related to the child*, and (iii) (iv) the surrogate exercises her right to retain custody and parental rights to the resulting child pursuant to § 20-162, then the surrogate and her husband are the parents.

3. If ~~neither of the~~ *no* intended ~~parents~~ *parent* is a genetic parent of the resulting child, the surrogate is the mother and her husband is the child's father if he is a party to the contract. The intended ~~parents~~ *parent(s)* may only obtain parental rights through adoption as provided in Chapter 12 (§ 63.2-1200 et seq.) of Title 63.2.

4. After the signing and filing of the surrogate consent and report form in conformance with the requirements of subsection A of § 20-162, the intended ~~parents~~ *parent(s)* are the ~~parents~~ *parent(s)* of the child and the surrogate and her husband, if any, shall not be the parents of the child.

§ 20-159. Surrogacy contracts permissible.

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

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

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

A. Prior to the performance of assisted conception, the intended ~~parents~~ *parent(s)*, 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~~ parent(s), the surrogate, and her husband, *if any*, and has filed a report of this home study with the court;

3. The intended ~~parents~~ parent(s), 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~~ parent(s), 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~~ parent(s) 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.

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~~ parent(s).

D. Within seven days of the birth of any resulting child, the intended ~~parents~~ parent(s) 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~~ parent 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~~ parent(s) as the ~~parents~~ parent(s) of the child pursuant to § 32.1-261.

If evidence cannot be produced that at least one of the intended ~~parents~~ parent 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~~ parent(s) as the ~~parents~~ parent(s) of the child, and the surrogate and her husband, *if any*, shall be the parents of the child. *The intended parent(s) may only obtain parental rights 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 husband, *if any*, or the intended ~~parents~~ *parent(s)* may terminate the agreement by giving written notice of termination to all other parties and by filing notice of the termination with the court. Upon receipt of the notice, the court shall vacate the order entered under subsection B of § 20-160.

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

Unless otherwise provided in the contract as approved, the surrogate shall incur no liability to the intended ~~parents~~ *parent(s)* for exercising her rights of termination pursuant to this section.

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

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

1. The surrogate, her husband, if any, and the intended ~~parents~~ *parent(s)* shall be parties to any such surrogacy contract.

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

3. Upon expiration of ~~twenty-five~~ *three* days following birth of any resulting child, the surrogate may relinquish her parental rights to the intended ~~parents~~ *parent(s)*, if at least one of the intended ~~parents~~ *parent* is the genetic parent of the child, by signing a surrogate consent and report form naming the intended ~~parents~~ *parent(s)* as the ~~parents~~ *parent(s)* of the child. The surrogate consent and report form shall be developed, furnished and distributed by the State Registrar of Vital Records. The surrogate consent and report form shall be signed and acknowledged before an officer or other person authorized by law to take acknowledgments. The surrogate consent and report form, a copy of the contract, and a statement from the physician who performed the assisted conception stating the genetic relationships between the child, the surrogate, and the intended ~~parents~~ *parent(s)*, at least one of whom shall be the genetic parent of the child, shall be filed with the State Registrar within ~~sixty~~ [~~60~~ 180] days after the birth. The statement from the physician shall be signed and acknowledged before an officer or other person authorized by law to take acknowledgments. There shall be a rebuttable presumption that the statement from the physician accurately states the genetic relationships among the child, the surrogate and the intended ~~parents~~ *parent(s)*. *Where a physician statement is not available, DNA testing establishing the genetic relationships between the child, the surrogate, and the intended parent(s) may be substituted for the physician statement.*

4. Upon the filing of the surrogate consent and report form and the required attachments, including the physician's statement, within ~~sixty~~ [~~60~~ 180] days of the birth, a new birth certificate shall be established by the State Registrar for the child naming the intended ~~parents~~ *parent(s)* as the ~~parents~~ *parent(s)* of the child as provided in § 32.1-261.

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

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

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

3. A guarantee by the intended ~~parents~~ *parent(s)* for 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, or breach of the contract by any party.

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

1. If the intended ~~parents~~ *parent(s)* and the surrogate and her husband, if any, and if he is a party to

the contract, consent in writing to termination of the contract, the intended ~~parents~~ *parent(s)* are responsible for all reasonable medical and ancillary costs for a period of six weeks following the termination.

2. If the surrogate voluntarily terminates the contract during the pregnancy, without consent of the intended ~~parents~~ *parent(s)*, the intended ~~parents~~ *parent(s)* 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~~ *parent(s)* pursuant to the contract, the intended ~~parents~~ *parent(s)* 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 shall not be deemed a party to the contract in the absence of his 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~~ *parent(s)* 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~~ *parent(s)* as the ~~parents~~ *parent(s)* 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 ~~arrange~~ *arranging* or ~~induce~~ *inducing* intended parents and surrogates to enter into surrogacy contracts in this 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, if any, and if he is a party to the contract, and one-half shall be due the intended ~~parents~~ *parent(s)*.

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.