

Department of Legislative Services
Maryland General Assembly
2014 Session

FISCAL AND POLICY NOTE
Revised

Senate Bill 208

(Senator Kelley, *et al.*)

Judicial Proceedings

Rules and Executive Nominations

Maryland Collaborative Reproduction Act

This bill establishes rights and obligations of intended parents who use gamete or embryo donors to conceive a child through “collaborative reproduction.” The bill also establishes requirements for a “gestational carrier agreement” to be enforceable in the State.

Fiscal Summary

State Effect: Potential minimal increase in general fund expenditures due to the bill’s penalty provision. Any potential minimal increase in expenditures for the Judiciary to handle additional hearings or the Department of Health and Mental Hygiene (DHMH) to handle the bill’s requirements does not materially impact State finances. Revenues are not materially affected.

Local Effect: Potential minimal increase in local revenues from cases heard in circuit courts. Potential minimal increase in local expenditures due to the bill’s penalty provision. The bill’s requirements can be implemented and enforced with existing resources.

Small Business Effect: None.

Analysis

Bill Summary:

Definitions

“Assisted reproduction” means the laboratory and medical procedures performed by a medical professional in which human gametes are used outside of the body for reproductive purposes.

“Collaborative reproduction” means assisted reproduction that involves a gestational carrier, a gamete donor or an embryo donor, or both.

“Embryo donor” means an individual other than an intended parent who contributes embryos (a fertilized egg until the eighth week of pregnancy) for use in collaborative reproduction.

“Gamete donor” means an individual other than an intended parent who contributes gametes (either a sperm or an egg) for use in collaborative reproduction.

“Gestational carrier” means a woman other than an intended parent or gamete donor who agrees to become pregnant for an intended parent with the intention of gestating and delivering the intended parent’s child.

“Gestational carrier agreement” means a written contract between a gestational carrier, her spouse or partner, if any, and each intended parent under which each intended parent agrees to become the legal parent of the child resulting from collaborative reproduction.

“Intended parent” means an individual, whether married or unmarried, who manifests the intent to be the legal parent of a child resulting from collaborative reproduction.

Applicability

The bill’s provisions do not apply to the birth of a child conceived through sexual intercourse. The provisions also do not apply to a child conceived by means of assisted reproduction if (1) a couple uses their own gametes, gestates any resulting pregnancy, and intends to parent the resulting child or (2) a woman other than an intended parent agrees to use her own egg to become pregnant and to gestate and deliver a child for an intended parent.

Gamete and Embryo Donors

An intended parent who uses a gamete donor or an embryo donor to conceive a child through collaborative reproduction is the parent of the child and has all corollary rights and obligations with respect to the child. The child has all the rights of a parent-child relationship with the intended parent, including rights of inheritance, from the moment of birth. A gamete donor or an embryo donor is not a parent of a child conceived through collaborative reproduction and does not have any rights or obligations with respect to the child. These provisions do not apply to collaborative reproduction in which a gestational carrier is used.

Gestational Carrier Agreements

At the time that a gestational carrier agreement is executed, the bill requires that the gestational carrier (1) be at least 21 years old; (2) has given birth to at least one live child; (3) has undergone a medical evaluation by a reproductive endocrinologist and been approved to serve as a gestational carrier; (4) has undergone a psychological evaluation by a mental health professional and been approved to serve as a gestational carrier; and (5) be represented in the agreement by a licensed attorney who is independent of each intended parent and the intended parents' attorneys. The latter requirement does not prohibit an intended parent from paying a gestational carrier's attorney's fees. Similarly, at the time that a gestational carrier agreement is executed, the bill requires that each intended parent (1) be at least 21 years old; (2) has undergone an appropriate medical evaluation and been approved to proceed with the agreement; (3) has undergone a psychological evaluation and been approved to proceed with the agreement; (4) be represented by a licensed attorney; and (5) has guaranteed payment of all reasonable medical and ancillary expenses that are agreed to in the agreement. A licensed attorney may not represent both the intended parent or parents and the gestational carrier in the preparation, counseling, and negotiation of the agreement.

A gestational carrier agreement must (1) be in writing and executed by the gestational carrier and her spouse or partner, if any, and each intended parent; (2) be executed before the embryo transfer; (3) contain verified signatures of each of the parties; and (4) be approved by a circuit court judge prior to the embryo transfer. The agreement must also contain specific terms requiring the gestational carrier and her spouse or partner to (1) follow physician's instructions; (2) acknowledge and agree that the carrier and her spouse or partner is not a parent of the child and may not have legal custody of the child at any time; (3) agree to surrender physical custody of the child immediately after the child's birth; (4) cooperate in any necessary proceeding to recognize the intended parents as the legal parents of the child; and (5) agree to all other terms consistent with the requirements of the bill and negotiated and agreed on by the parties. The gestational carrier agreement must also include terms requiring the intended parent or parents to

accept legal and physical custody of the child immediately after birth, regardless of the condition of the child, and to assume responsibility for the support of the child immediately after birth. In addition, the gestational carrier agreement must include a provision that the gestational carrier may not be required to terminate a pregnancy resulting from the collaborative reproduction without the consent of the gestational carrier.

The gestational carrier agreement must require the intended parent or parents to pay all reasonable and ancillary expenses that are agreed to in the agreement, but the bill prohibits the inclusion of payments to the gestational carrier other than reasonable medical and ancillary expenses. The bill also requires that 75% of the total estimated expenses be deposited with an independent, bonded escrow agent or licensed attorney for distribution in accordance with the agreement and that the remaining 25% be deposited in accordance with the agreement.

Court Approval of Gestational Carrier Agreements

Before an embryo transfer, the parties to a gestational carrier agreement must jointly petition the court for approval of the agreement. A petition may be filed in the circuit court for the county in which (1) the intended parent or gestational carrier is domiciled if the intended parent or gestational carrier has been a resident of the State for at least 90 days; (2) the child is expected to be born, as specified; or (3) the embryo transfer is to be performed.

In addition to a copy of the executed gestational carrier agreement, a petition must include an affidavit by each attorney representing a party to the agreement attesting (1) that the requirements of the bill have been met, including a specific attestation regarding specified requirements; (2) to the identity of the parties; (3) to the fact that the attorney did not represent both the intended parent or parents and the gestational carrier and her spouse or partner, if any, during the preparation, counseling, or negotiation of the gestational carrier agreement; and (4) that the terms of the gestational carrier agreement comply with the requirements specified within the bill.

The court must hold a hearing within 60 days after the filing of a petition. If a party to the petition requests separate hearings, the court must hold separate hearings on the petition for approval of the gestational carrier agreement. The intended parent or parents, the gestational carrier, and the gestational carrier's spouse or partner, if any, must be present at the hearing. However, if a party to the petition requests a separate hearing, the parties must be present at the separate hearing appropriate for that party.

The court must issue an order approving a gestational carrier agreement if the court makes the following findings: (1) all parties to the agreement have voluntarily entered

into the agreement and understand its terms; (2) all required evaluations have been conducted and specified qualifications for parties to the agreement have been met; (3) the agreement satisfies specified requirements; (4) adequate provision has been made for all reasonable medical and ancillary expenses that are agreed to in the agreement until the birth of the child, including responsibility for those expenses if the agreement is terminated; and (5) the compensation, if any, paid to the prospective gestational carrier is reasonable.

A hearing must be closed to the public. Records of a hearing are not subject to public inspection unless all parties consent to the inspection or a court order is issued on a showing of good cause by the party petitioning for the inspection.

Dissolution of Relationships, Death, and Revoking Consent

The dissolution of a gestational carrier's marriage, civil union, or other legal domestic partnership does not affect a gestational carrier agreement. If the relationship of the intended parents dissolves after the embryo transfer, the dissolution does not affect the agreement, both intended parents remain parents of the resulting child with all corollary rights and obligations with respect to the child, and both parents remain bound by the terms of the agreement. If the relationship of the intended parents dissolves *before* the embryo transfer, the embryo transfer may not occur unless otherwise agreed to in writing by both intended parents. If an unauthorized embryo transfer occurs, however, the bill establishes that both parents are the parents of the resulting child with all corollary rights and obligations with respect to the child, and that both parents remain bound by the terms of the gestational carrier agreement.

If an intended parent dies after an embryo transfer, the surviving spouse or partner must assume all obligations with respect to the agreement and the decedent and surviving spouse or partner are considered the parents of the resulting child. If an intended parent dies before the embryo transfer, however, the bill establishes that the decedent is not a parent of the resulting child, unless the decedent donated the sperm or egg and consented in writing to its posthumous use.

Revocation of Agreements

The bill authorizes an intended parent or gestational carrier to revoke consent to a gestational agreement only if the revocation is in writing, within a reasonable time before the embryo transfer, and delivered to all parties to the agreement and to the medical practice that performs the medical procedures related to the collaborative reproduction by certified mail or by hand delivery with receipt acknowledged or with a witness to the delivery. If consent is withdrawn as required, an embryo transfer may not occur.

Dispute Resolution

The bill requires a gestational carrier agreement to include an alternative dispute resolution provision, and a dispute related to the agreement must be resolved by the procedures specified in the agreement. If a resolution is not possible, a circuit court must determine the respective rights and obligations of the parties to the agreement. The bill provides that, except as expressly provided in the agreement, the intended parent or parents and the gestational carrier are entitled to all remedies available at law or equity. However, a gestational carrier may not be liable for civil damages for breach of contract for carrying a pregnancy to term. There is no specific performance remedy available that requires the gestational carrier to be impregnated, terminate a pregnancy, or undergo or fail to undergo any medical procedure. Specific performance is a remedy if the gestational carrier fails to surrender the child to the intended parent or parents, the intended parents fail to take custody of the child, or any party fails to cooperate in a court proceeding to establish the parental rights of the intended parent or parents.

Petitions for Parentage

A petition for parentage may be filed at the time a petition for approval of a gestational carrier agreement is filed or at any other time before or after the birth of the child. The bill establishes the jurisdiction of a circuit court over a petition for parentage and requires a petition to include certain information establishing the facts of the collaborative reproduction and the gestational carrier agreement. If the requirements for the petition are met, the court must issue an order of parentage establishing that (1) each intended parent is a legal parent of the child with all corollary rights and obligations with respect to the child; (2) the child has all the rights of a parent-child relationship with each intended parent; (3) the gestational carrier and her spouse or partner are not the parents of the child and do not have any rights or obligations with respect to the child; and (4) any gamete or embryo donor is not a parent of the child and has no rights or obligations with respect to the child.

If a court issues an order of parentage, the Department of Health and Mental Hygiene (DHMH) must issue a birth certificate naming each intended parent as the legal parent. The birth certificate may not name the gestational carrier or her spouse or partner and may not reference the fact that the child was born by means of a gestational carrier. With the consent of the intended parent, the bill authorizes a gestational carrier to complete an affidavit of paternity naming the genetic father. On receipt of an affidavit of paternity, DHMH must enter the name of the gestational carrier and the genetic father on the birth certificate.

All hospitals, medical facilities, medical personnel, and State agencies are required to recognize each intended parent named in an order of parentage as the child's parent. In

the absence of an order of parentage, the bill establishes that the parentage of a child born as the result of a gestational carrier agreement must be determined as provided by law and equity.

Prohibition on Certain Persons Being Involved in Collaborative Reproduction Business

The bill prohibits a person who has been convicted of a crime involving impunity of character or honesty, including any crime involving fraud, from being involved in or profiting from, directly or indirectly, the business of collaborative reproduction. This includes providing recruiting or matching services, escrow services, and other professional services for individuals involved in collaborative reproduction. The bill establishes a maximum penalty of two years imprisonment and/or a \$100,000 fine. The prohibition does not apply to the participants in collaborative reproduction, including a gestational carrier, her spouse or partner, a gamete or embryo donor, or an intended parent.

Registration with DHMH

A person receiving compensation for recruiting or procuring a gestational carrier or otherwise arranging or inducing an intended parent and a gestational carrier to enter into a gestational agreement in the State must register with DHMH. A person who is required to register must provide to DHMH (1) the person's name; (2) the name of the person's company or firm, if any; (3) the person's address; and (4) any other information required by DHMH. DHMH must publish the registration information on its website and may adopt regulations to implement the requirements. The registration requirements do not apply to an attorney providing legal advice to an intended parent or gestational carrier or preparing a gestational carrier agreement.

Current Law/Background: Assisted reproduction is a method of achieving pregnancy other than by sexual intercourse. Forms of assisted reproduction include artificial insemination, in vitro fertilization, and surrogacy. The science of assisted reproduction has vastly outpaced the legal aspects stemming from its use. While the legal implications of a couple using assisted reproduction to aid in the conception of a child using only the couple's own genetic material are few, complicated legal issues concerning parentage arise, for example, where third parties contribute genetic material or where a surrogate agrees to gestate a child for the couple.

Maryland does not have a comprehensive statute on assisted reproduction. Artificial insemination is addressed in the Estates and Trusts Article, which provides that a child conceived by artificial insemination of a married woman with the consent of her husband is the legitimate child of both of them for all purposes. Additionally, Chapter 649 of

2012 prohibits a person from using the sperm or eggs of a known donor after the donor's death for purposes of assisted reproduction without the prior written consent of the donor.

Under Maryland law, the status of surrogacy contracts is unclear as there is little statutory regulation of them. In *In re Roberto d.B.*, 399 Md. 267 (2007), the Court of Appeals held that the name of a genetically unrelated gestational host of a fetus, with whom the genetic father contracted to carry in-vitro fertilized embryos to term, was not required to be listed on the birth certificate when a child is born as a result. The court also noted that "surrogacy contracts, that is, payment of money for a child, are illegal in Maryland" under § 3-603 of the Criminal Law Article, which prohibits the sale of a minor and § 5-3B-32 of the Family Law Article, which prohibits the payment of compensation in connection with an adoption.

Other States

State laws vary tremendously from one state to the next, resulting in a significant lack of uniformity. Among those states that have enacted statutes, many have adopted some form of the Uniform Parentage Act promulgated by the National Conference of Commissioners on Uniform State Laws. The original Uniform Parentage Act, approved in 1973, established that, if a donor provides semen to a licensed physician for use in the artificial insemination of a married woman (other than the donor's wife), the donor is not the father. The 2002 Uniform Parentage Act updated and expanded the original Act to include egg and sperm donors and in vitro fertilization. Under the Act, a donor (of sperm or egg) is not a parent of a child conceived by means of assisted reproduction. A father-child relationship is created between a man and the resulting child if the man provides sperm for, or consents to, assisted reproduction by a woman with the intent to be the parent of her child. The 2002 Act also contained an optional provision legalizing and regulating surrogacy agreements; however, this option has not been widely adopted.

Other states have taken various individualized approaches, with states at one end of the spectrum providing a detailed regulatory framework favorable to the regulation and enforceability of assisted reproduction agreements, and states at the other end of the spectrum banning and even criminalizing surrogacy agreements. Michigan law, for example, provides that surrogacy is a felony punishable by five years imprisonment and/or a \$50,000 fine. Finally, some states' statutes are silent with regard to the legal implications of assisted reproduction.

Additional Information

Prior Introductions: SB 792 of 2013, a similar bill, passed the Senate and received a hearing in the House Judiciary Committee, but no further action was taken. Its cross file, HB 1099, received a hearing in the House Judiciary Committee, but no further action was taken. HB 873 of 2012, a similar bill, received an unfavorable report from the House Judiciary Committee. Its cross file, SB 508, received an unfavorable report from the Senate Judicial Proceedings Committee.

Cross File: HB 236 (Delegate Dumais) - Judiciary.

Information Source(s): State Board of Contract Appeals, Department of Health and Mental Hygiene, Judiciary (Administrative Office of the Courts), Department of State Police, Office of the Public Defender, Department of Public Safety and Correctional Services, State's Attorneys' Association, Department of Legislative Services

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