

Department of Legislative Services
 Maryland General Assembly
 2012 Session

FISCAL AND POLICY NOTE

Senate Bill 508 (Senator Kelley)
 Judicial Proceedings

Assisted Reproduction Agreements - Court Approval, Notice, and Required Records

This bill authorizes individuals to enter into gestational agreements if specified requirements are met. The bill also requires the Department of Health and Mental Hygiene (DHMH) to develop and maintain an Assisted Reproduction Registry and to adopt regulations governing the disclosure of medical and genetic information to a child born as a result of assisted reproduction.

Fiscal Summary

State Effect: General fund expenditures increase by \$27,200 in FY 2013, which accounts for the bill’s October 1, 2012 effective date. This estimate reflects the cost of hiring one part-time (50%) research statistician to develop and maintain the required registry. It includes a salary, fringe benefits, one-time start-up costs, and ongoing operating expenses. Future year expenditures reflect annualization and inflation. Revenues are not affected.

(in dollars)	FY 2013	FY 2014	FY 2015	FY 2016	FY 2017
Revenues	\$0	\$0	\$0	\$0	\$0
GF Expenditure	27,200	33,700	35,800	37,400	39,100
Net Effect	(\$27,200)	(\$33,700)	(\$35,800)	(\$37,400)	(\$39,100)

Note:() = decrease; GF = general funds; FF = federal funds; SF = special funds; - = indeterminate effect

Local Effect: Currently, gestational agreements are rare. Thus, any increase in circuit court caseloads can likely be handled with existing resources. Revenues are not affected.

Small Business Effect: Minimal.

Analysis

Bill Summary:

Definitions

“Intended parent” means an individual who intends to be legally bound as the parent of a child resulting from assisted or collaborative reproduction.

“Gamete” means a cell containing a haploid complement of DNA that has the potential to form an embryo when combined with another gamete.

“Gestational carrier” means an adult woman who (1) is not an intended parent; (2) is not genetically related to the resulting child; and (3) who enters into a gestational agreement to bear a child.

“Assisted reproduction” means a method of causing pregnancy through means other than by sexual intercourse, including intrauterine insemination; donation of eggs or embryos; in-vitro fertilization and transfer of embryos; and intracytoplasmic sperm injection.

“Collaborative reproduction” means any assisted reproduction in which an individual other than the intended parent provides genetic material or agrees to act as a gestational carrier.

Gestational Agreements, Consideration, and Confidentiality

The bill authorizes intended parents, gamete donors, and a prospective gestational carrier to (if specified conditions are met) enter into a gestational agreement intended to result in the birth of a child. Specifically, the intended parent or parents must agree to become the legal parents of the child; the gestational carrier must agree to pregnancy by assisted reproduction; and the gestational carrier, gamete donors, and the gestational carrier’s spouse (if any) must agree to relinquish all rights and duties as parents of any child resulting from the assisted reproduction. The bill prohibits a gestational agreement from limiting the gestational carrier’s right to make decisions to safeguard her health or the health of the embryo or fetus.

The bill also authorizes a gestational agreement to provide for payment of consideration to the gestational carrier or gamete donors. However, any consideration paid by an intended parent must be reasonable and negotiated in good faith. In addition, consideration paid to a gamete donor or gestational carrier may not be conditioned on either (1) the alleged quality or genome-related traits of the gametes or embryos; or (2) actual genotypic or phenotypic characteristics of the gamete donor or the child. A

gamete donor may be reimbursed for economic losses resulting from the retrieval or storage of gametes or embryos, as specified by the bill.

Individually identifiable information obtained or created in the course of assisted reproduction treatment is medical information and is subject to all applicable confidentiality requirements.

Court Approval

The bill authorizes the intended parents, gamete donors, or prospective gestational carrier to petition a circuit court to validate the agreement if (1) one of those individuals has been a resident of the State for at least 90 days; and (2) the prospective gestational carrier's spouse (if any) is joined in the proceeding.

A gestational agreement that is not validated is unenforceable. If a child resulting from assisted reproduction is born under a gestational agreement that is not validated, the bill's provisions related to determining the parents of the child do not apply and the individuals determined to be the parents of the child are responsible for the child's support.

A court may issue an order that validates a gestational agreement (and declares that an intended parent listed in the agreement will be the legal parent of the child resulting from the assisted reproduction) if, among other requirements, the court finds that (1) all parties have voluntarily entered into, and understand the terms of, the agreement; (2) any consideration paid to the prospective gestational carrier and gamete donors is reasonable; (3) the parties have provided for reasonable health care expenses associated with the assisted reproduction until the birth of the child; and (4) unless waived by the court, the intended parents meet the standards of suitability applied to adoptive parents, as determined by the local department of social services or, in Montgomery County, the county department of health and human services.

After a gestational agreement is validated (but before the prospective gestational carrier becomes pregnant by assisted reproduction), the intended parents, gamete donors, prospective gestational carrier, or the prospective gestational carrier's spouse may terminate the agreement without liability by (1) filing notice of the termination with the court; and (2) providing notice of the termination to all other parties to the agreement. The court may impose sanctions on an individual who does not file notice of the termination with the court. In addition, the court may, on its own motion, terminate a gestational agreement for good cause.

The intended parents are required to file – within 30 days of the birth of a child resulting from the assisted reproduction that is the subject of the gestational agreement – notice of the child's birth. If they fail to do so, the gestational carrier or DHMH may file the

notice. Upon receipt of the notice, the court is required issue an order (1) affirming that the intended parents are the legal parents of the child; (2) directing the Division of Vital Records in DHMH to issue a birth certificate naming the intended parents as the parents of the child; and (3) if necessary, ordering the child to be surrendered to the intended parents.

If a party alleges that a child born to the gestational carrier is not the result of the assisted reproduction that is the subject of the gestational agreement, the court must order genetic testing to determine the parentage of the child.

Required Notice and Mental Health Consultation

Before assisted reproduction may begin, the provider must give to each participant written and oral notice that includes specified statements regarding legal confidentiality protections; potential legal consequences and the advisability of seeking legal counsel; the rights of the patient and donor to withhold or withdraw consent; access to, and release of, the patient's medical information; rights of possession and control of the embryos or gametes; the advisability of deciding whether the embryos or gametes may be used for other purposes; and specified national guidelines. The notice must also include a description of alternative therapies and treatments; a description of known and potential risks, consequences, and benefits of the assisted reproduction; and any policy of the provider that limits the number of embryos that may be transferred. The written notice has to be signed and dated by both the provider and the participant.

Before a gestational agreement may be executed and before assisted reproduction may begin, a mental health professional employed or retained by the provider must perform an initial mental health consultation – as specified by the bill and in accordance with specified standards – on each known participant. In addition, the mental health professional has to provide the provider with a statement that (1) the mental health professional has performed an initial mental health consultation on each participant and has offered each participant the opportunity to receive additional counseling; and (2) if applicable, the intended parents and gestational carrier have undergone a mental health evaluation to determine the participants' suitability to participate in collaborative reproduction.

Consent and Withdrawal of Consent

The bill specifies that, before assisted reproduction may begin, the provider must require a participant who is an intended parent (unless the participant is a gamete donor) to sign a written consent to be an intended parent. This written consent must be included in the record of the assisted reproduction. The failure of a participant to sign the required written consent does not, however, preclude a finding of parentage if the participant and

the intended parent resided together during the first two years of the child's life and openly acknowledged the child as their own.

A participant may withdraw consent to participate in assisted reproduction at any time before the transfer of gametes or embryos. A participant who withdraws consent is not a parent of a child resulting from the assisted reproduction.

If the marriage of two intended parents dissolves before the transfer of gametes or embryos, an intended parent who is not a gamete donor (and who is the former spouse of an intended parent who is a gamete donor) is not a parent of the child resulting from assisted reproduction unless the intended parent consented that, if assisted reproduction were to occur after the entry of a judgment of absolute divorce, the intended parent would be a parent of the child. Similarly, if a participant who consented to be an intended parent dies before the transfer of gametes or embryos, the parent is not a parent of a child resulting from the assisted reproduction unless the deceased participant signed a written consent that, if the assisted reproduction were to occur after the participant's death, the participant would be a parent of the child.

Assisted Reproduction Registry and Disclosure

The bill requires DHMH to develop and maintain an Assisted Reproduction Registry consisting of information submitted by providers. Specifically, a provider must register the record of each assisted reproduction, as specified by the bill, as well as maintain a record of the disposition of all gametes and embryos associated with an assisted reproduction. Before assisted reproduction may begin, a provider must give each participant written and oral notice including a statement that medical and genetic information regarding the donor and gestational carrier will be provided to the registry.

The bill authorizes DHMH to disclose medical and genetic information of a gamete donor or gestational carrier (1) on request and for good cause to a child born as a result of assisted reproduction in which the gamete donor or gestational carrier was a participant; and (2) if the gamete donor or gestational carrier consents to the disclosure. The bill further authorizes DHMH to disclose aggregate, nonidentifiable data for the purpose of sharing information with government agencies and researchers to study the practices of assisted reproduction.

DHMH must adopt regulations governing the disclosure of medical and genetic information to a child born as a result of assisted reproduction.

Current Law/Background: According to the Judiciary, there were only 16 known cases of the use of a gestational carrier in Maryland in 2007.

Although a number of bills relating to surrogacy have been introduced (mostly between the mid-1980s and mid-1990s), no current statutory provision specifically permits or prohibits gestational agreements. The present bill is based on the American Bar Association Model Act Governing Assisted Reproductive Technology.

In a 2007 decision, *In re Roberto d.B.*, 399 Md. 267, 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 children are born as a result. The court also noted in that case that “surrogacy contracts, that is payment of money for a child, are illegal in Maryland” under § 3–603 of the Criminal Law Article (Sale of minor) and § 5-3B-32 of the Family Law Article (Prohibited payments relating to adoption).

The Vital Statistics Administration (VSA) in DHMH is charged with registering all births, deaths, and fetal deaths that occur in the State of Maryland; issuing certified copies of birth, death, and marriage certificates and providing divorce verifications; compiling and analyzing vital statistics data; preparing annual estimates of the population of Maryland by political subdivision, age, race, and sex; preparing mandated vital statistics and population reports; and supplying vital statistics and population data to users in the public and private sectors. VSA handles hundreds of thousands of records each year.

State Fiscal Effect: VSA advises that one full-time research statistician is needed under the bill to develop forms for the collection of data; distribute forms and instructions to facilities; review completed forms and follow up with facilities as necessary; and compile, analyze, and share data. However, given that VSA estimates that fewer than 4,000 births resulting from assisted reproduction occur in the State each year, Legislative Services advises that the bill’s requirements associated with developing and maintaining an Assisted Reproduction Registry can be handled by one part-time employee.

Accordingly, general fund expenditures increase by \$27,160 in fiscal 2013, which accounts for the bill’s October 1, 2012 effective date. This estimate reflects the cost of hiring one part-time (50%) research statistician to develop and maintain the required registry. It includes a salary, fringe benefits, one-time start-up costs, and ongoing operating expenses.

Position	0.5
Salary and Fringe Benefits	\$22,985
One-time Start-up Costs	2,243
Ongoing Operating Expenses	<u>1,932</u>
Total FY 2013 State Expenditures	\$27,160

Future year expenditures reflect a salary with annual increases and employee turnover as well as annual increases in ongoing operating expenses.

Legislative Services notes that the use of assisted reproduction is likely to continue to become more widespread. To the extent that this method of reproduction becomes significantly more common in future years, it may be necessary to convert this part-time position into a full-time position in order to meet the bill's requirements.

DHMH can use existing resources to adopt the required regulations.

Additional Information

Prior Introductions: None.

Cross File: HB 873 (Delegate Pena-Melnyk, *et al.*) - Judiciary.

Information Source(s): Department of Health and Mental Hygiene, Judiciary (Administrative Office of the Courts), Department of Legislative Services

Fiscal Note History: First Reader - February 23, 2012
mc/mwc

Analysis by: Jennifer A. Ellick

Direct Inquiries to:
(410) 946-5510
(301) 970-5510