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HOUSE OF REPRESENTATIVES

147th GENERAL ASSEMBLY

HOUSE BILL NO. 131
AS AMENDED BY
HOUSE AMENDMENT NO. 2

AN ACT TO AMEND TITLE 13 OF THE DELAWARE CODE RELATING TO GESTATIONAL CARRIER AGREEMENTS.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE:

Section 1. Amend § 8-102 of Title 13 of the Delaware Code by making insertions as shown by underlining and deletions as shown by strike through as follows:

§ 8-102. Definitions.

In this chapter:

(1) "Acknowledged father" means a man who has established a father-child relationship under subchapter III of this chapter.

(2) "Adjudicated father" means a man who has been adjudicated by a court of competent jurisdiction to be the father of a child.

(3) "Alleged father" means a man who alleges himself to be, or is alleged to be, the genetic father or a possible genetic father of a child, but whose paternity has not been determined. The term does not include:

- (i) A presumed father;
- (ii) A man whose parental rights have been terminated or declared not to exist; or
- (iii) A male donor.

(4) "Assisted reproduction" means a method of causing pregnancy other than sexual intercourse. The term includes, but is not limited to:

- (i) ~~Intrauterine~~ Insemination;

- (ii) Donation of eggs;
- (iii) Donation of embryos;
- (iv) In-vitro fertilization and transfer of embryos; and
- (v) Intracytoplasmic sperm injection.

(5) “Child” means an individual of any age whose parentage may be determined under this chapter.

(6) “Commence” means to file the initial pleading seeking an adjudication of parentage in the Family Court of the State of Delaware.

(7) “Compensation” means payment of any valuable consideration for services in addition to payment for reasonable medical and ancillary costs.

(78) “Determination of parentage” means the establishment of the parent-child relationship by the signing of a valid acknowledgment of paternity under subchapter III of this chapter or adjudication by the court.

(89) “Donor” means an individual who produces eggs or sperm, or who provides embryos used for assisted reproduction, whether or not for consideration. The term does not include:

- (i) A husband who provides sperm, or a wife who provides eggs, to be used for assisted reproduction by the wife;
- (ii) A woman who gives birth to a child by means of assisted reproduction, or
- (iii) A parent under subchapter VII of this chapter.

(10) “Embryo transfer” means all medical and laboratory procedures that are necessary to effectuate the transfer of an embryo in the uterine cavity.

(911) “Ethnic or racial group” means, for purposes of genetic testing, a recognized group that an individual identifies as all or part of the individual's ancestry or that is so identified by other information.

(12) “Gamete” means either a human egg or sperm.

~~(4013)~~ “Genetic testing,” means an analysis of genetic markers to exclude or identify a man as the father or a woman as the mother of a child. The term includes an analysis of 1 or a combination of the following:

- (i) Deoxyribonucleic acid; and
- (ii) Blood-group antigens, red-cell antigens, human-leukocyte antigens, serum enzymes, serum proteins or red-cell enzymes.

(14) “Gestational carrier” means a woman who is neither an intended parent nor a donor, who agrees to become pregnant for an intended parent by assisted reproduction with the intention of gestating and delivering the intended parent’s child.

(15) “Gestational carrier agreement” means a written agreement between the gestational carrier, her spouse or partner, if any, and the intended parent, pursuant to which the intended parent agrees to become the parent of the child resulting from the assisted reproduction.

(16) “Gestational carrier arrangement” means the process by which a woman attempts to carry and give birth to a child created through assisted reproduction using the gamete(s) provided by the intended parents which may or may not be genetically related to either of the intended parents, and to which the gestational carrier has made no genetic contribution.

(17) “Health care provider” means a person who is duly licensed to provide health care, including all medical, psychological, or counseling professionals.

(18) “Intended parent” means a person or persons who enters into a gestational carrier agreement with a gestational carrier to become a parent of any resulting child. In the case of a married couple, any reference to an intended parent shall include both spouses for all purposes of this chapter. This term shall include the intended mother(s), intended father(s), or both.

(19) “In vitro fertilization” means all medical and laboratory procedures that are necessary to effectuate the extracorporeal fertilization of egg and sperm.

~~(11)~~20) “Man” means a male individual of any age.

(21) “Married couple” includes two people who are parties to a civil union.

~~(12)~~22) “Parent” means an individual who has established a parent-child relationship under § 8-201 of this title.

~~(13)~~23) “Parent-child relationship” means the legal relationship between a child and a parent of the child. The term includes the mother-child relationship and the father-child relationship.

~~(14)~~24) “Paternity index” means the likelihood of paternity calculated by computing the ratio between:

(i) The likelihood that the tested man is the father, based on the genetic markers of the tested man, mother, and child, conditioned on the hypothesis that the tested man is the father of the child; and

(ii) The likelihood that the tested man is not the father, based on the genetic markers of the tested man, mother, and child, conditioned on the hypothesis that the tested man is not the father of the child and that the father is of the same ethnic or racial group as the tested man.

(25) “Physician” means a person licensed to practice medicine in any or all of its branches in Delaware.

(1526) “Presumed father” means a man who, by operation of law under § 8-204 of this title, is recognized as the father of a child until that status is rebutted or confirmed in a judicial proceeding.

(1627) “Probability of paternity” means the measure, for the ethnic or racial group to which the alleged father belongs, of the probability that the man in question is the father of the child, compared with a random, unrelated man of the same ethnic or racial group, expressed as a percentage incorporating the paternity index and a prior probability.

(1728) “Record” means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(1829) “Signatory” means an individual who authenticates a record and is bound by its terms.

(1930) “State” means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands or any territory or insular possession subject to the jurisdiction of the United States.

(2031) “Support-enforcement agency” means a public official or agency authorized to seek:

- (i) Enforcement of support orders or laws relating to the duty of support;
- (ii) Establishment or modification of child support;
- (iii) Determination of parentage; or
- (iv) Location of child-support obligors and their income and assets.

Section 2. Amend § 8-103 of Title 13 of the Delaware Code by making insertions as shown by underlining and deletions as shown by strike through as follows:

§ 8-103. Scope of chapter; choice of law.

(a) This chapter applies to determinations of parentage in this State.

(b) The court shall apply the law of this State to adjudicate the parent-child relationship. The applicable law does not depend on:

- (1) The place of birth of the child; or
- (2) The past or present residence of the child.

(c) This chapter does not create, enlarge, or diminish parental rights or duties under other law of this State.

(d) This chapter ~~does not authorize or prohibit~~ an agreement between a woman and ~~a man and another woman~~ person, an unmarried couple, or a married couple in which the woman relinquishes all rights as a parent of a child conceived by means of assisted reproduction, and which provides that the ~~man and other woman person or married or~~ unmarried couple become the parents of the child. If a birth results under such an agreement and the agreement is

unenforceable under the law of this State, the parent-child relationship is determined as provided in subchapter II of this title.

Section 3. Amend § 8-201 of Title 13 of the Delaware Code by making insertions as shown by underlining and deletions as shown by strike through as follows:

§ 8-201. Establishment of parent-child relationship.

(a) The mother-child relationship is established between a woman and a child by:

(1) The woman's having given birth to the child, unless she is not the intended parent pursuant to a gestational carrier arrangement;

(2) An adjudication of the woman's maternity;

(3) Adoption of the child by the woman; ~~or~~

(4) A determination by the court that the woman is a de facto parent of the child; or

(5) The woman's intending to be the mother of a child born pursuant to a gestational carrier arrangement;

or

(6) The woman's having consented to assisted reproduction by another woman under subchapter VII of this chapter which resulted in the birth of the child.

(b) The father-child relationship is established between a man and a child by:

(1) An un rebutted presumption of the man's paternity of the child under § 8-204 of this title;

(2) An effective acknowledgment of paternity by the man under subchapter III of this chapter, unless the acknowledgment has been rescinded or successfully challenged;

(3) An adjudication of the man's paternity;

(4) Adoption of the child by the man;

(5) The man's having consented to assisted reproduction by a woman under subchapter VII of this chapter which resulted in the birth of the child; or

(6) A determination by the court that the man is a de facto parent of the child

(c) De facto parent status is established if the Family Court determines that the de facto parent:

(1) Has had the support and consent of the child's parent or parents who fostered the formation and establishment of a parent-like relationship between the child and the de facto parent;

(2) Has exercised parental responsibility for the child as that term is defined in § 1101 of this title; and

(3) Has acted in a parental role for a length of time sufficient to have established a bonded and dependent relationship with the child that is parental in nature.

Section 4. Amend § 8-611 of Title 13 of the Delaware Code by making insertions as shown by underlining and deletions as shown by strike through as follows:

§ 8-611. Proceeding before birth.

(a) A proceeding to determine parentage may be commenced before the birth of the child, but may not be concluded until after the birth of the child.

(b) But if a child was conceived through assisted reproduction, an order or judgment may be entered before the birth of the resulting child to establish a parent child relationship, as long as enforcement of the order or judgment shall be stayed until the birth of the child. Such an order shall be sought by filing a petition setting forth the name(s) and address(es) of the intended parent(s), the gestational carrier, if there is one, and her spouse, if there is one, and appending affidavits which

(1) attest that the pregnancy resulted through means other than sexual intercourse verified by the participating health care provider;

(2) acknowledge parentage verified by the parent or parents; and

(3) in cases involving a gestational carrier only,

(i) acknowledge non-parentage verified by the gestational carrier and her spouse, if there is one,
and

(ii) attest to the gestational carrier agreement signed by all the parties in accordance with §8-807.

(c) Except in circumstances outlined in subsection (b), the following actions may be taken before the birth of the
any child:

(1) Service of process

(2) Discovery; and

(3) Except as prohibited by § 8-502 of this title, collection of specimens for genetic testing.

Section 5. Amend § 8-636 of Title 13 of the Delaware Code by making insertions as shown by underlining as follows:

§ 8-636. Order adjudicating parentage

(a) The court shall issue an order adjudicating whether a man alleged or claiming to be the father is the parent of the child.

(b) An order adjudicating parentage must identify the child by name and date of birth except an order pursuant to § 8-611(a) of this title and health care providers shall report the person(s) determined by Family Court to be the parent(s) to the Office of Vital Statistics as required by 16 Del. C. § 3121, Registration of Births.

(c) Except as otherwise provided in subsection (d) of this section, the court may assess filing fees, reasonable attorney's fees, fees for genetic testing, other costs and necessary travel and other reasonable expenses incurred in a proceeding under this subchapter. The court may award attorney's fees, which may be paid directly to the attorney, who may enforce the order in the attorney's own name.

(d) The court may not assess fees, costs or expenses against the support-enforcement agency of this State or another state, except as provided by other law.

(e) On request of a party and for good cause shown, the court may order that the name of the child be changed.

(f) If the order of the court is at variance with the child's birth certificate, the court shall order the Office of Vital Statistics to issue an amended birth registration.

Section 6. Amend § 8-703 of Title 13 of the Delaware Code by making insertions as shown by underlining and deletions as shown by strike through as follows:

§ 8-703. Paternity of a child of assisted reproduction.

(a) A man who provides sperm for, or consents to, assisted reproduction by a woman as provided in § 8-704 of this title with intent to be the parent of her child, is a parent of the resulting child: ;

(b) The child shall be considered the child of the intended parent or parents immediately upon the birth of the child;

(c) Parental rights shall vest in the intended parent or parents immediately upon the birth of the child;

(d) Custody of the child shall vest with the intended parent or parents immediately upon the birth of the child; and

(e) Neither the gestational carrier, if any, nor her spouse, shall be the parent of the child.

Section 7. Amend § 8-704 of Title 13 of the Delaware Code by making insertions as shown by underlining and deletions as shown by strike through as follows:

§ 8-704. Consent to assisted reproduction.

(a) Consent by a woman and an intended ~~man who intends to be a parent of a child born to the woman by~~ conceived via assisted reproduction must be in a record signed by the woman and the ~~man~~ intended parent. This requirement does not apply to a donor.

(b) Failure to sign a consent required by subsection (a) of this section, before or after birth of the child, does not preclude a finding of paternity pursuant to § 8-201 if the woman and man, during the first 2 years of the child's life, resided together in the same household with the child and openly held out the child as their own.

Section 8. Amend Chapter 8 of Title 13 of the Delaware Code by inserting a new subchapter VIII as shown by underlining as follows:

Subchapter VIII. Gestational Carrier Agreement Act

§ 8-801. Short title.

This Act may be cited as the Gestational Carrier Agreement Act.

§ 8-802. Scope and purpose.

(a) The purpose of this Act is to establish consistent standards and procedural safeguards for the protection of all parties to a gestational carrier agreement in this State and to confirm the legal status of children born as a result of these agreements. These standards and safeguards are meant to facilitate the use of this type of reproductive agreement in accordance with the public policy of this State.

(b) This subchapter does not apply to the birth of a child conceived by means of sexual intercourse.

§ 8-803. Bases for jurisdiction over nonresident

In a proceeding to enforce a gestational carrier agreement, a tribunal of this State may exercise personal jurisdiction over a nonresident individual or the individual's guardian or conservator if:

(a) The individual is personally served with notice within this State;

(b) The individual submits to the jurisdiction of this State by consent, by entering a general appearance, or by filing a responsive document having the effect of waiving any contest to personal jurisdiction;

(c) The individual resided in this State at the time the individual executed the gestational carrier agreement or consented to the embryo transfer;

(d) The individual executed a gestational carrier agreement with a person or persons who resided in this State at the time the gestational carrier agreement was executed and voluntarily submitted to the jurisdiction of this State in the gestational carrier agreement;

(e) The non-resident gestational carrier had, or is expected to have an embryo transfer performed in this State pursuant to a gestational carrier agreement;

(f) The non-resident intended parent(s) consented to a gestational carrier having an embryo transfer in this State pursuant to a gestational carrier agreement;

(g) The child was, or is expected to be born in this State as demonstrated by a provision in the gestational carrier agreement;

(h) The child resides in this State as a result of the acts or directives of the individual; or

(i) There is any other basis consistent with the Constitutions of this State and the United States for the exercise of personal jurisdiction.

§ 8-804. Parental status of gestational carrier.

A gestational carrier is not a parent of a child born as a result of a gestational carrier arrangement.

§ 8-805. Rights and responsibilities of parents.

(a) Any person who is considered to be the parent of a child pursuant to this chapter shall have all the rights, responsibilities and obligations set forth in Chapter 7 of this title.

(b) The breach of the gestational carrier agreement by the intended parent(s) shall not relieve such intended parent(s) of the support obligations imposed by this chapter.

(c) In the event of a laboratory error in which the child conceived through means other than sexual intercourse is not genetically related to either of the intended parents, when the intent was for the child to be genetically related to one or both intended parents, the intended parents will be the parents of the child unless otherwise determined by a court of competent jurisdiction in an action which can only be brought by one or more of the genetic parents within sixty (60) days of the date of the child's birth.

§ 8-806. Eligibility.

(a) Prior to executing an agreement to act as a gestational carrier, a woman must meet the following requirements:

(1) She is at least 21 years of age;

(2) She has given birth to at least one child;

(3) She has completed a medical evaluation;

(4) She has completed a mental health evaluation;

(5) She has been represented by independent legal counsel regarding the terms of the gestational carrier agreement and been advised of the potential legal consequences of the gestational carrier arrangement which legal expense shall be paid for by the intended parent(s) if requested; and

(6) She has or obtains prior to the embryo transfer a health insurance policy that covers major medical treatments and hospitalization and the health insurance policy has a term that extends throughout the duration of the

expected pregnancy and for 8 weeks after the birth of the child; provided, however, that the policy may be procured by the intended parent(s) on behalf of the gestational carrier pursuant to the gestational carrier agreement.

(b) A person or persons intending to become a parent or parents, whether genetically related to the child or not, must meet the following requirements at the time the gestational carrier agreement is executed:

(1) He, she or they have completed a mental health evaluation; and

(2) He, she or they have independent legal representation regarding the terms of the gestational carrier agreement and have been advised of the potential legal consequences of the gestational carrier arrangement.

§ 8-807. Requirements for a gestational carrier agreement.

(a) A gestational carrier agreement shall be enforceable if:

(1) it meets the requirements set forth in subsection (b) of this section, and

(2) it contains at a minimum each of the terms set forth in subsection (c) of this section.

(b) A gestational carrier agreement shall meet the following requirements:

(1) it shall be in writing;

(2) it shall be executed prior to the initiation of an embryo transfer in furtherance of the gestational carrier arrangement;

(i) by a gestational carrier meeting the eligibility requirements of subsection (a) of § 8-806 of this chapter and, if married, the gestational carrier's spouse; and

(ii) by the intended parent(s) meeting the eligibility requirements of subsection (b) of § 8-806 of this chapter. In the event an intended parent is married or a party to a civil union, both spouses must execute the gestational carrier agreement;

(3) the gestational carrier shall be represented by independent legal counsel and the intended parent or parents shall have been represented by independent counsel in all matters concerning the gestational carrier arrangement and the gestational carrier agreement;

(4) each of the gestational carrier and the intended parent or parents shall have signed a written acknowledgement that he or she received information about the legal, financial, and contractual rights, expectations, penalties, and obligations of the gestational carrier agreement;

(5) if a gestational carrier agreement provides for the payment of compensation to the gestational carrier, the compensation shall have been placed in escrow with an independent escrow agent pursuant to an escrow agreement

prior to the gestational carrier's commencement of any medical procedure (other than medical or mental health evaluations necessary to determine the gestational carrier's eligibility pursuant to subsection (a) of § 8-806 of this chapter); and

(6) It shall be witnessed by two (2) disinterested, competent adults.

(c) A gestational carrier agreement shall expressly provide the following:

(1) The written agreement of the gestational carrier to:

(i) undergo embryo transfer and attempt to carry and give birth to the child; and

(ii) surrender custody of all resulting children to the intended parent or parents immediately upon the birth of the child(ren);

(2) If the gestational carrier is married, her spouse:

(i) acknowledges and agrees to abide by the obligations imposed on the gestational carrier pursuant to the terms of the gestational carrier agreement; and

(ii) surrender custody of all resulting children to the intended parent or parents immediately upon the birth of the child(ren);

(3) The right of the gestational carrier to utilize the services of a health care provider of her choosing, after consultation with the intended parents, to provide her care during the pregnancy; and

(4) The written agreement of the intended parent or parents to:

(i) accept legal custody of all resulting children immediately upon birth; and

(ii) assume sole responsibility for all resulting children immediately upon birth.

(d) A gestational carrier agreement shall be enforceable even though it contains one or more of the following provisions:

(1) the gestational carrier's agreement to undergo all medical exams, treatments, and fetal monitoring procedures that the physician recommends for the success of the pregnancy;

(2) the gestational carrier's agreement to abstain from any activities that the intended parent or parents or the physician reasonably believes to be harmful to the pregnancy and future health of the child, including, without limitation, smoking, drinking alcohol, using nonprescribed drugs, using prescription drugs not authorized by a physician aware of the gestational carrier's pregnancy, exposure to radiation, or any other activities proscribed by a health care provider;

(3) the agreement of the intended parent or parents to pay the gestational carrier reasonable compensation; and

(4) the agreement of the intended parent or parents to pay for or reimburse the gestational carrier for reasonable expenses (including, without limitation, medical, legal, or other professional expenses) related to the gestational carrier arrangement and the gestational carrier agreement.

(e) In the event that any of the requirements of this section are not met, a court of competent jurisdiction shall determine parentage based on evidence of the parties' intent.

(f) An escrow agent which enters into an escrow agreement with a party to a gestational carrier agreement which is governed by Delaware law, or with a Delaware resident who is a party to a gestational carrier agreement, consents to the jurisdiction of the Delaware courts for all proceedings related to the enforcement of the escrow agreement.

§ 8-808. Immunities.

Except as provided in this chapter, no person shall be liable for non-negligent actions taken pursuant to the requirements of this chapter.

§ 8-809. Effect of noncompliance.

Except as otherwise provided in this chapter, in the event of noncompliance with the requirements of this subchapter, a court of competent jurisdiction shall determine the respective rights and obligations of the parties.

§ 8-810. Remedies.

(a) Except as expressly provided in the gestational carrier agreement and subsection (c) of this section, the intended parent(s) shall be entitled to all remedies available at law or equity.

(b) Except as expressly provided in the gestational carrier agreement and subsection (c) of this section, the gestational carrier shall be entitled to all remedies available at law or equity.

(c) Specific performance is not an available remedy for a breach by the gestational carrier of a gestational carrier agreement term that requires her to be impregnated.

§ 8-811. Severability.

If any provision of this chapter or its application to any person or circumstance is held to be invalid, the invalidity of that provision or application does not affect other provisions or applications of this Act that can be given effect without the invalid provision or application.

§ 8-812. Irrevocability.

No action to invalidate a gestational carrier agreement meeting the requirements of subsection (b) of §8-807 of this chapter or to challenge the rights of parentage established pursuant to this chapter shall commence after 12 months from the date of birth of the child subject to §8-606(e) of this chapter.

§ 8-813. Application.

(a) The rule of construction that statutes in derogation of the common law are to be strictly construed shall have no application to this chapter. This chapter shall be broadly construed to accomplish its intended purposes.

(b) The provisions of this Act shall apply only to agreements executed after the effective date of this Act except proceedings for pre-birth determination of parentage pursuant to §8-611(a) which may be commenced on or after the effective date.