SENATE, No. 866

STATE OF NEW JERSEY
216th LEGISLATURE

PRE-FILED FOR INTRODUCTION IN THE 2014 SESSION

Sponsored by:
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SYNOPSIS
Authorizes certain gestational carrier agreements.

CURRENT VERSION OF TEXT
As reported by the Senate Health, Human Services and Senior Citizens Committee with technical review.

(Sponsorship Updated As Of: 5/15/2015)
AN ACT concerning gestational carrier agreements, revising various parts of the statutory law and supplementing Title 9 of the Revised Statutes.

BE IT ENACTED by the Senate and General Assembly of the State of New Jersey:

1. (New section) Title.
   This act shall be known as the “New Jersey Gestational Carrier Agreement Act.”

2. (New section) Purpose.
   a. The Legislature finds and declares that gestational carrier agreements executed pursuant to this act are in accord with the public policy of this State.
   b. It is the intent and purpose of the Legislature to:
      (1) Establish consistent standards and procedural safeguards to promote the best interests of the children who will be born as a result of gestational carrier agreements executed pursuant to P.L. , c. (C. )(pending before the Legislature as this bill); and
      (2) Protect all parties involved in gestational carrier agreements executed pursuant to P.L. , c. (C. )(pending before the Legislature as this bill); and
      (3) Recognize the technological advances in assisted reproductive medicine in ways that allow the use of these advances by intended parents and gestational carriers according to the public policy of New Jersey.

3. (New section) Definitions.
   As used in this act:
   “Advanced practice nurse” means a person certified in accordance with the provisions of section 8 or 9 of P.L.1991, c.377 (C.45:11-47 or 45:11-48).
   “Assisted reproductive technology” means procreative laboratory procedures involving human eggs or pre-embryos, including, but not limited to: in vitro fertilization; embryo transfer; gamete transfer; pronuclear stage transfer; and zygote transfer.
   “Attorney” means a person licensed to practice law in New Jersey or another state or the District of Columbia.
   “Certified nurse midwife” means a midwife licensed by the State Board of Medical Examiners as a certified nurse midwife pursuant to the provisions of P.L.1991, c.97 (C.45:10-17 et seq.).
   “Donor” means a person who contributes gametes for use in assisted reproduction. The term does not include an intended parent

EXPLANATION – Matter enclosed in bold-faced brackets [thus] in the above bill is not enacted and is intended to be omitted in the law.

Matter underlined thus is new matter.
who contributes gametes to be used in assisted reproduction pursuant to a valid gestational carrier agreement.

“Fertilization” means the initial union of the sperm and the egg.
“Gamete” means sperm or egg.
“Gestational carrier” means a woman 21 years of age or older who agrees to become pregnant for an intended parent by assisted reproductive technology without the use of her own egg.
“Gestational carrier agreement” means the written contract between the gestational carrier and the intended parent, pursuant to which the intended parent agrees to become the legal parent of a child created through assisted reproductive technology and carried by the gestational carrier.
“Implantation” means when the fertilized egg adheres to the gestational carrier’s uterine wall.
“Intended parent” means a person who enters into a gestational carrier agreement with a gestational carrier pursuant to section 6 of P.L. , c. (C. )(pending before the Legislature as this bill), pursuant to which the person shall be the legal parent of the resulting child. The term shall include persons who are single, married, partners in a civil union or domestic partnership, and couples who are not married or in a civil union or domestic partnership. Any reference to an intended parent shall include both spouses or partners in a civil union or domestic partnership. This term shall include the intended mother, the intended father, the intended mother and intended father, the intended mother and intended mother, or the intended father and intended father.
“In vitro fertilization” means all medical and laboratory procedures that are required to effectuate the formation of a human embryo outside the human body.
“Medical evaluation” means an evaluation and consultation by a physician, a certified nurse midwife, or an advanced practice nurse.
“Order of parentage” means a judgment determining parentage pursuant to the provisions of a gestational carrier agreement that satisfies P.L. , c. (C. )(pending before the Legislature as this bill).
“Physician” means a person licensed to practice medicine in New Jersey pursuant to R.S.45:9-1 et seq. or licensed to practice in any one of the United States or its territories, or the District of Columbia.
“Pre-embryo” is a fertilized egg prior to 14 days of development.
“Pre-embryo transfer” means all medical and laboratory procedures that are necessary to effectuate the transfer of a pre-embryo into the uterine cavity.
“Psychological evaluation” means an evaluation and consultation by a clinical social worker, psychotherapist, or psychiatrist licensed by the State of New Jersey or licensed to practice in any one of the United States or its territories, or the District of Columbia.
“Reasonable expenses” means medical, hospital, counseling or other similar expenses incurred in connection with the gestational carrier agreement, reasonable attorney fees and costs for legal services in connection with the gestational carrier agreement, and the reasonable living expenses of the gestational carrier during her pregnancy including payments for reasonable food, clothing, medical expenses, shelter, and religious, psychological, vocational, or similar counseling services during the period of the pregnancy and during the period of postpartum recovery. These payments may be made directly to the gestational carrier or on the gestational carrier’s behalf to the supplier of the goods or services pursuant to the gestational carrier agreement.

4. (New section) Rights of Parentage.
   a. Provided that the gestational carrier and the intended parent satisfy the eligibility requirements set forth in section 5 of P.L. ,
   c. (C. )(pending before the Legislature as this bill) and the gestational carrier agreement satisfies the requirements set forth in section 6 of P.L. , c. (C. )(pending before the Legislature as this bill), immediately upon the birth of the child:
      (1) The intended parent shall be the legal parent of the child;
      (2) In the case of an intended parent who is a spouse or partner in a civil union or domestic partnership, both spouses or partners shall be the parents of the child; and
      (3) Neither the gestational carrier nor her spouse or partner, if any, shall be the legal parent of the child.
   b. In the event of a medical or laboratory error in which the resulting child is not genetically related to an intended parent whose gamete was intended to be used under the agreement, the intended parent shall be the parent of the child where the gestational carrier agreement satisfies the requirements set forth in section 6 of P.L. , c. (C. )(pending before the Legislature as this bill), unless otherwise determined by a court of competent jurisdiction pursuant to a complaint challenging parentage filed by a genetic parent within 120 days of birth.

5. (New section) Eligibility.
   a. A gestational carrier shall be deemed to have satisfied the requirements of P.L. , c. (C. )(pending before the Legislature as this bill) if, at the time the gestational carrier agreement is executed, she:
      (1) Is at least 21 years of age;
      (2) Has given birth to at least one child;
      (3) Has completed a medical evaluation approving her suitability to serve as a gestational carrier;
      (4) Has completed a psychological evaluation approving her suitability to serve as a gestational carrier;
(5) Has retained an attorney, independent of the intended parent, but for whose services the intended parent may pay, who has consulted with her about the terms of the gestational carrier agreement and the potential legal consequences of being a gestational carrier under the terms of this agreement.

b. The intended parent shall be deemed to have satisfied the requirements of P.L. , c. (C. )(pending before the Legislature as this bill) if, at the time the gestational carrier agreement is executed, the intended parent:

(1) Has completed a psychological evaluation approving the intended parent’s suitability to participate in a gestational carrier agreement; and

(2) Is represented by an attorney who consulted with the intended parent about the terms of the gestational carrier agreement and the potential legal consequences of the agreement.

6. (New section) Requirements for a Gestational Carrier Agreement.

a. A gestational carrier agreement shall satisfy the following requirements:

(1) It is in writing and executed by the gestational carrier, her spouse or partner in a civil union or domestic partnership, if any, and each intended parent. If the intended parent is married or in a domestic partnership or civil union at the time the intended parent enters the agreement, both spouses or partners shall meet the requirements of subsection b. of section 5 of P.L. , c. (C. )(pending before the Legislature as this bill) and shall be required to enter into the agreement as intended parents. If the intended parent is not married or in a civil union or domestic partnership, no other person shall be deemed a legal parent of the child unless that person meets the requirements of subsection b. of section 5 of P.L. , c. (C. )(pending before the Legislature as this bill) and duly executes the agreement;

(2) It is executed after the required medical and psychological screenings of the gestational carrier and the psychological screening of the intended parent, but prior to the commencement of any other necessary medical procedures in furtherance of the implantation of the pre-embryo; and

(3) The gestational carrier and her spouse or partner, if any, and the intended parent shall have been represented by separate attorneys in all matters relating to the gestational carrier agreement and each attorney provides an affidavit of such representation.

b. A gestational carrier agreement shall provide:

(1) Express terms that the gestational carrier shall:

(a) Undergo pre-embryo transfer and attempt to carry and give birth to the child;
(b) Surrender custody of the child to the intended parent immediately upon the child’s birth; and

(c) Have the right to medical care for the pregnancy, labor, delivery, and postpartum recovery provided by a physician, advance practice nurse, or certified nurse midwife of her choice, after she notifies, in writing, the intended parent of her choice;

(2) An express term that, if the gestational carrier is married or in a civil union or domestic partnership, the spouse or partner agrees to the obligations imposed on the gestational carrier pursuant to the terms of the gestational carrier agreement and to surrender custody of the child to the intended parent immediately upon the child’s birth; and

(3) Express terms that the intended parent shall:

(a) Accept custody of the child immediately upon the child’s birth; and

(b) Assume sole responsibility for the support of the child immediately upon the child’s birth.

c. A gestational carrier agreement shall be presumed enforceable if:

(1) It satisfies the contractual requirements set forth in subsection a. of this section; and

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

In addition, an enforceable gestational carrier agreement shall include a provision setting forth the financial responsibilities of the parties and shall include a provision that the intended parent shall pay the gestational carrier’s reasonable expenses, as defined herein, unless expressly waived, in whole or in part, in writing by the gestational carrier.

d. In the event that any of the requirements of this section are not met, a court of competent jurisdiction shall determine parentage based on the parties’ intent.

7. (New section) Duty to Support.

a. The establishment of the parent and child relationship pursuant to a valid gestational carrier agreement shall be the basis upon which an action for child support may be brought against the intended parent and acted upon by the court without further evidentiary proceedings.

b. The breach of the gestational carrier agreement by the intended parent shall not relieve the intended parent of the support obligations imposed by the parent and child relationship created by the provisions of P.L. (C. )(pending before the Legislature as this bill).

c. Unless a person who donates gametes for use in assisted reproduction enters into a written contract to the contrary, the gamete donor is treated in law as if the gamete donor were not the

a. After the gestational carrier becomes pregnant in accordance with the gestational carrier agreement provided for in P.L. , c. (C. )(pending before the Legislature as this bill), the intended parent shall file a complaint for an order of parentage with the Superior Court, Chancery Division, Family Part of the county of the child’s anticipated birth or the intended parent’s or gestational carrier’s county of residence.

b. Attached to the complaint shall be:

(1) An affidavit by the gestational carrier and her spouse or partner, if any, and the intended parent that they have entered into a gestational carrier agreement in conformity with New Jersey law and, after consultation with legal counsel, agreed to be bound by the terms of the agreement;

(2) An affidavit of representation by the attorney for the intended parent and the attorney for the gestational carrier and her spouse or partner, if any; and

(3) A statement from the medical facility which performed the assisted reproduction regarding the achievement of pregnancy in accordance with the gestational carrier agreement.

c. The Superior Court shall, to the extent possible, schedule and expedite a hearing on the matter, except that if the matter is uncontested, the court may decide the matter without the need for an appearance by the parties. Notice to all necessary parties shall be made in accordance with the Rules of Court.

d. The attorney representing the intended parent shall appear at the hearing unless the court waives an appearance.

e. Notwithstanding any other law concerning public hearings and records, any action or proceeding held under P.L. , c. (C. )(pending before the Legislature as this bill), shall be held in closed court without admittance of any persons other than those necessary to the action or proceeding.

f. If the court finds that the parties have complied with the provisions of P.L. , c. (C. )(pending before the Legislature as this bill), the court shall enter an order of parentage naming the intended parent as the legal parent of the child.

g. After the birth of the child, the order of parentage and application for the child’s birth certificate shall be filed with the State Registrar of Vital Statistics pursuant to the requirements of R.S:26:8-28. The State Registrar shall issue the child’s birth certificate naming the intended parent as the parent of the child.

h. All records and filings in connection with a gestational carrier agreement shall remain confidential and unavailable to the public, except that such records and filings may be made available
to a child born as a result of a valid gestational carrier agreement
who has attained at least 18 years of age and who has submitted a
written, notarized request for the records or filings.

9. (New section) Certain Provisions of Law not Applicable to
Gestational Carrier Agreements.
   a. A gestational carrier agreement shall not be considered:
      (1) An adoption pursuant to Title 9 of the Revised Statutes; or
      (2) A surrender of custody or termination of parental rights to
          the child by the gestational carrier in violation of the requirements
          of Title 9 of the Revised Statutes.
   b. The payment of reasonable expenses in connection with a
      valid gestational carrier agreement shall not constitute a violation of

10. Section 2 of P.L.1983, c.17 (C.9:17-39) is amended to read
    as follows:
      2. As used in this act, "parent and child relationship" means the
         legal relationship existing between a child and the child's natural or
         adoptive parents or between the child and the child's intended
         parents pursuant to a gestational carrier agreement executed in
         accordance with the provisions of P.L. , c. (C. )(pending
         before the Legislature as this bill), incident to which the law confers
         or imposes rights, privileges, duties, and obligations. It includes the
         mother and child relationship and the father and child relationship.
         (cf: P.L.1983, c.17, s.2)

11. Section 4 of P.L.1983, c.17 (C.9:17-41) is amended to read
    as follows:
      4. The parent and child relationship between a child and:
         a. The natural mother, may be established by:
            (1) proof of her having given birth to the child unless the child
                is born in connection with a gestational carrier agreement executed
                in accordance with the provisions of P.L. , c. (C. )(pending
                before the Legislature as this bill), or
            (2) under P.L.1983, c.17 (C.9:17-38 et seq.);
         b. The natural father, may be established by proof that his
            paternity has been adjudicated under prior law; under the laws
            governing probate; by giving full faith and credit to a determination
            of paternity made by any other state or jurisdiction, whether
            established through voluntary acknowledgment or through judicial
            or administrative processes; by a Certificate of Parentage as
            provided in section 7 of P.L.1994, c.164 (C.26:8-28.1) that is
            executed by the father, including an unemancipated minor, prior to
            or after the birth of a child, and filed with the appropriate State
            agency; by a default judgment or order of the court; or by an order
            of the court based on a blood test or genetic test that satisfies or
exceeds the specific threshold probability as set by subsection i. of section 11 of P.L.1983, c.17 (C.9:17-48) creating a rebuttable presumption of paternity.

In accordance with [section 331 of Pub.L.104-193] 42 U.S.C. s.666(a)(5), a signed voluntary acknowledgment of paternity shall be considered a legal finding of paternity subject to the right of the signatory to rescind the acknowledgment within 60 days of the date of signing, or by the date of establishment of a support order to which the signatory is a party, whichever is earlier.

The adjudication of paternity shall only be voided upon a finding that there exists clear and convincing evidence of: fraud, duress or a material mistake of fact, with the burden of proof upon the challenger;

c. (1) An adoptive parent, may be established by proof of adoption;

(2) An intended parent, may be established by proof of an order of parentage related to a gestational carrier agreement executed in accordance with the provisions of P.L. , c. (C. ) (pending before the Legislature as this bill);

d. The natural mother or the natural father, may be terminated by an order of a court of competent jurisdiction in granting a judgment of adoption or as the result of an action to terminate parental rights;

e. The establishment of the parent and child relationship pursuant to subsections a., b., and c. of this section shall be the basis upon which an action for child support may be brought by a party and acted upon by the court without further evidentiary proceedings;

f. In any case in which the parties execute a Certificate of Parentage or a rebuttable presumption of paternity is created through genetic testing, the presumption of paternity under section 6 of P.L.1983, c.17 (C.9:17-43) shall not apply;

g. Pursuant to the provisions of [section 331 of Pub.L.104-193] 42 U.S.C. s.666(a)(5), the child and other parties in a contested paternity case shall submit to a genetic test upon the request of one of the parties, unless that person has good cause for refusal, if the request is supported by a sworn statement by the requesting party:

(1) alleging paternity and setting forth the facts establishing a reasonable possibility of the requisite sexual contact between the parties; or

(2) denying paternity and setting forth the facts establishing a reasonable possibility of the nonexistence of sexual contact between the parties;

h. In a contested paternity case in which the State IV-D agency requires or the court orders genetic testing, the State IV-D agency shall:
(1) pay the costs of the genetic test and may recoup payment from the alleged father whose paternity is established; and

(2) obtain additional testing if the initial test results are contested, and upon the request and advance payment for the additional test by the contestant.

(cf: P.L.1998, c.1, s.38)

12. Section 6 of P.L.1983, c.17 (C.9:17-43) is amended to read as follows:

6. a. A man is presumed to be the biological father of a child if:

(1) He and the child's biological mother are or have been married to each other and the child is born during the marriage, or within 300 days after the marriage is terminated by death, annulment or divorce;

(2) Before the child's birth, he and the child's biological mother have attempted to marry each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and:

(a) if the attempted marriage could be declared invalid only by a court, the child is born during the attempted marriage, or within 300 days after its termination by death, annulment or divorce; or

(b) if the attempted marriage is invalid without a court order, the child is born within 300 days after the termination of cohabitation;

(3) After the child's birth, he and the child's biological mother have married, or attempted to marry, each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and:

(a) he has acknowledged his paternity of the child in writing filed with the local registrar of vital statistics;

(b) he has sought to have his name placed on the child's birth certificate as the child's father, pursuant to R.S.26:8-40; or

(c) he openly holds out the child as his natural child; or

(d) he is obligated to support the child under a written voluntary agreement or court order;

(4) While the child is under the age of majority, he receives the child into his home and openly holds out the child as his natural child;

(5) While the child is under the age of majority, he provides support for the child and openly holds out the child as his natural child; or

(6) He acknowledges his paternity of the child in a writing filed with the local registrar of vital statistics, which shall promptly inform the mother of the filing of the acknowledgment, and she does not dispute the acknowledgment within a reasonable time after being informed thereof, in a writing filed with the local registrar. If another man is presumed under this section to be the child's father,
acknowledgment may be effected only with the written consent of
the presumed father. Each attempted acknowledgment, whether or
not effective, shall be kept on file by the local registrar of vital
statistics and shall entitle the person who filed it to notice of all
proceedings concerning parentage and adoption of the child, as
provided in section 10 of P.L.1983, c.17 (C.9:17-47) and pursuant

b. A presumption under this section may be rebutted in an
appropriate action only by clear and convincing evidence. If two or
more presumptions arise which conflict with each other, the
presumption which on the facts is founded on the weightier
considerations of policy and logic controls. The presumption is
rebutted by a court order terminating the presumed father's paternal
rights or by establishing that another man is the child's biological or
adoptive father.

c. Notwithstanding the provisions of this section to the
contrary, in an action brought under this act against the legal
representative or the estate of a deceased alleged father, the criteria
in paragraphs (4) and (5) of subsection a. of this section shall not
constitute presumptions but shall be considered by the court
together with all of the evidence submitted. The decision of the
court shall be based on a preponderance of the evidence.

d. In the absence of a presumption, the court shall decide
whether the parent and child relationship exists, based upon a
preponderance of the evidence.

e. There is a rebuttable presumption that a man has knowledge
of his paternity and the birth of a child if he had sexual intercourse
with the biological mother within 300 days of the child's birth. This
presumption may be rebutted only by clear and convincing evidence
in an appropriate action based on fraud, duress, or
misrepresentation by the biological mother concerning the paternity
or birth of the child. This claim of fraud, duress, or
misrepresentation must be asserted prior to the finalization of the
adoption.

f. This section shall not apply to a child born in connection
with a gestational carrier agreement executed in accordance with
the provisions of P.L. , c. (C. )(pending before the
Legislature as this bill).
(cf: P.L.1998, c.20, s.4)

13. Section 7 of P.L.1983, c.17 (C.9:17-44) is amended to read
as follows:

7. a. If, under the supervision of a licensed physician and with
the consent of her husband or partner in a civil union, a [wife]
woman is inseminated artificially with semen donated by a man not
her husband or partner, the husband or partner is treated in law as if
[he were the natural father] the husband or partner were the natural
parent of a child thereby conceived. The [husband's] consent of
the husband or partner shall be in writing and signed by [him and
his wife] both parties to the marriage or civil union. The physician
shall certify their signatures and the date of the insemination, upon
forms provided by the Department of Health and Senior Services,
and file the [husband's] consent with the State Department of
Health and Senior Services, where it shall be kept confidential and
in a sealed file. However, the physician's failure to do so shall not
affect the [father] parent and child relationship of the husband or
partner. All papers and records pertaining to the insemination,
whether part of the permanent record of a court or of a file held by
the supervising physician or elsewhere, are subject to inspection
only upon an order of the court for compelling reasons clearly and
convincingly shown.

b. Unless the donor of semen and the woman have entered into
a written contract to the contrary, the donor of semen provided to a
licensed physician for use in artificial insemination of a woman
other than the donor's wife or partner in a civil union is treated in
law as if he were not the father of a child thereby conceived and
shall have no rights or duties stemming from the conception of a
child.

c. This section shall not apply in a proceeding to determine
parentage of a child born in connection with a gestational carrier
agreement executed in accordance with the provisions of P.L.
(cf: P.L.1983, c.17, s.7)

14. Section 15 of P.L.1983, c.17 (C.9:17-52) is amended to read
as follows:

15. Evidence relating to paternity may include:

a. Evidence of sexual intercourse between the mother and
alleged father at any possible time of conception;

b. An expert's opinion concerning the statistical probability of
the alleged father's paternity, based upon the duration of the
mother's pregnancy;

c. Genetic or blood tests, weighted in accordance with
evidence, if available, of the statistical probability of the alleged
father's paternity;

d. Medical or anthropological evidence relating to the alleged
father's paternity of the child, based on tests performed by experts.
If a man has been identified as a possible father of the child, the
court may, and upon request of a party shall, require the child, the
mother, and the man to submit to appropriate tests; [and]
e. All other evidence on behalf of any party, relevant to the
issue of paternity of the child; and
f. A gestational carrier agreement executed in accordance with
the provisions of P.L. , c. (C. )(pending before the
Legislature as this bill).
(cf: P.L.1983, c.17, s.15)

15. R.S.26:8-28 is amended to read as follows:
26:8-28. a. (1) Within five days after each birth, there shall be
filed with the local registrar of the district in which the birth
occurred a certificate of the birth filled out with durable black or
blue ink in a legible manner.
(2) The name of the father shall be included on the record of
birth of the child of unmarried parents only if the father and mother
have signed a voluntary acknowledgment of paternity; or a court or
an administrative agency of competent jurisdiction has issued an
adjudication of paternity.
(3) In the case of a child born in connection with a gestational
carrier agreement executed in accordance with the provisions of
P.L., c. (C. )(pending before the Legislature as this bill),
the name of the intended parent shall be included on the record of
birth as the child’s parent.
(4) Nothing in this section shall preclude the State IV-D agency
from obtaining an admission of paternity from the father for
submission in a judicial or administrative proceeding, or prohibit
the issuance of an order in a judicial or administrative proceeding
which bases a legal finding of paternity on an admission of
paternity by the father and any other additional showing required by
State law.

b. As part of the birth record, all information required by the
State IV-D agency pursuant to section 7 of P.L.1994, c.164 (C.26:8-
28.1) shall be recorded on a separate form provided or approved by
the State registrar pursuant to subsection c. of R.S.26:8-24, and
filed with the State IV-D agency pursuant to R.S.26:8-30 and
R.S.26:8-31 for the establishment and enforcement of child support
matters in the State. For the purposes of this subsection, "State IV-
D agency" means the agency in the Department of Human Services
designated to administer the Title IV-D Child Support Program.
c. The State registrar shall require each parent to provide his
Social Security number in accordance with procedures established
by the State registrar. The Social Security numbers furnished
pursuant to this section shall be used exclusively for child support
enforcement purposes.
d. The certificate of birth shall include the blood type of the
child.
(cf: P.L.1998, c.1, s.42)
16. This act shall take effect immediately and shall apply only to gestational carrier agreements entered into on or after the effective date.