

SENATE HEALTH, HUMAN SERVICES AND SENIOR
CITIZENS COMMITTEE

STATEMENT TO

SENATE, No. 866

STATE OF NEW JERSEY

DATED: JANUARY 26, 2015

The Senate Health, Human Services and Senior Citizens Committee reports favorably Senate Bill No. 866.

This bill, which would be known as the “New Jersey Gestational Carrier Agreement Act,” would authorize gestational carrier agreements. A gestational carrier agreement is a written contract pursuant to which a woman agrees to carry and give birth to a child with whom she has no genetic relationship and who is created using assisted reproduction on behalf of an intended parent. Upon the birth of the child, the intended parent becomes the legal parent of the child and the woman, who is called a “gestational carrier,” has no parental rights or obligations.

Unlike what is now regarded as traditional surrogacy, where a woman is artificially inseminated with the semen of the intended father and gives birth to a child through the use of her own egg, gestational surrogacy is the result of developments in reproductive technology and involves a woman who does not make use of her own egg. She, therefore, is not genetically related to the child. This bill would take into account this advance in reproductive technology and would permit gestational carrier agreements that satisfy certain requirements.

Pursuant to the bill, a gestational carrier is required to be at least 21 years of age, have given birth to at least one child, have completed medical and psychological evaluations conducted by licensed professionals, and have retained an attorney independent of the intended parent but for whose services the intended parent would be permitted to pay. The bill requires that an intended parent have completed a psychological evaluation conducted by a licensed professional approving the intended parent’s suitability to participate in a gestational carrier agreement, and to have retained an attorney to advise the intended parent about the terms and potential legal consequences of entering into the agreement. Under the bill, single people, as well as those who are married or in a civil union or domestic partnership, are permitted to enter into gestational carrier agreements as either intended parents or as gestational carriers.

This bill requires that the agreement be in writing and executed by the gestational carrier, her spouse or partner in a civil union or

domestic partnership, if any, and the 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 are required to enter into the agreement as intended parents. If the intended parent is not married or in a civil union or domestic partnership, any other person who wishes to be an intended parent must duly execute the agreement as an intended parent.

The agreement may only be executed after the parties have undergone the required medical and psychological screenings and the attorneys who consulted with the parties have submitted the required affidavits of representation in any actions filed with the court.

The agreement is required to include express terms providing that the gestational carrier agrees to undergo pre-embryo transfer, attempt to carry and give birth to the child, and surrender custody of the child to the intended parent immediately upon the birth of the child. Additionally, the agreement is to expressly state that the gestational carrier has the right to have medical care for the pregnancy, labor, delivery, and postpartum care provided by a physician, advanced practice nurse, or certified nurse midwife of her choice after notifying the intended parents of her choice. The agreement is required to include a provision that the gestational carrier's spouse or partner in a civil union or domestic partnership, if any, agrees to the obligations imposed on the gestational carrier and to surrender custody of the child immediately upon the birth of the child. With regard to the intended parent, the agreement is required to include express terms that the intended parent agrees to accept custody of the child immediately upon the birth of the child and assume sole responsibility for the support of the child. An agreement including these terms would be presumed enforceable.

Additionally, an enforceable gestational carrier agreement must include a provision setting forth the financial responsibilities of the parties and include a provision that the intended parent must pay the gestational carrier's reasonable expenses. "Reasonable expenses" means payment, provision of, or reimbursement for, 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 post-partum 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.

A parent and child relationship established by a valid gestational carrier agreement is the basis for a child support order and an intended parent would be legally obligated to support the child even in the event

that the intended parent breaches the agreement. A person who only donates gametes for use in assisted reproduction would have no rights or duties with respect to a child born of a gestational carrier agreement unless the donor enters into a written contract to the contrary.

In the event of a medical or laboratory error resulting in the child not being genetically related to an intended parent whose gametes were intended to be used in the assisted reproduction procedure, the intended parent would be the legal parent of the resulting child provided the parties had executed a valid gestational carrier agreement, 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.

In the event the parties fail to enter into a valid agreement, custody of the resulting child would be determined by a court of competent jurisdiction based on the intent of the parties.

After a gestational carrier becomes pregnant in connection with a valid gestational carrier agreement, the intended parent must file a complaint for an order of parentage with the Superior Court, Chancery Division, Family Part of the county in which the intended parent or the gestational carrier resides, or in the county of the child's anticipated birth. The complaint is to include an affidavit by the gestational carrier and her spouse or partner in a civil union or domestic partnership, if any, that they have entered into and agree to be bound by a gestational carrier agreement, affidavits of representation by the attorneys for both the gestational carrier and the intended parent, and a statement by the medical facility that performed the assisted reproduction regarding the achievement of pregnancy.

The bill provides that the court, to the extent possible, is to schedule and expedite the hearing. All records and filings in connection with a gestational carrier agreement are to remain confidential and unavailable to the public, except that such records and filings may be made available to a child born of a valid gestational carrier agreement who has attained at least 18 years of age and who submits a written, notarized request for the records or filings. The attorney representing the intended parent is to be present at the hearing unless the court waives an appearance. The court is to enter an order of parentage upon finding the parties complied with the statutory requirements to enter into a gestational carrier agreement.

The order of parentage and application for the child's birth certificate are to be filed with the State Registrar of Vital Statistics, who then is to issue a birth certificate naming the intended parent as the sole legal parent of the child.

Under the bill, a valid gestational carrier agreement is not to be considered an adoption pursuant to Title 9 of the Revised Statutes, or a surrender of custody or a termination of parental rights in violation of Title 9 of the Revised Statutes. Additionally, the payment of reasonable expenses in connection with a valid gestational carrier

agreement would not constitute a violation of section 18 of P.L.1993, c.345 (C.9:3-39.1).

This bill would amend sections 2 and 4 of P.L.1983, c.17 (C.9:17-39 and 9:17-41), which concern the definition and establishment of the parent and child relationship, to include intended parents pursuant to a valid gestational carrier agreement. It would also amend section 15 of P.L.1983, c.17 (C.9:17-52) to provide that a valid gestational carrier agreement may serve as evidence of paternity. This bill would provide that the ordinary presumptions of paternity set forth in section 6 of P.L.1983, c.17 (C.9:17-43) and the provisions of section 7 of P.L.1983, c.17 (C.9:17-44), which pertains to artificial insemination, do not apply to a child born pursuant to a valid gestational carrier agreement. This bill would also amend R.S.26:8-28 to provide that the intended parent's name appear on the birth certificate as the parent of a child born pursuant to a valid gestational carrier agreement.

This bill would take effect immediately and apply to any gestational carrier agreements entered into on or after the effective date.

This bill was pre-filed for introduction in the 2014-2015 session pending technical review. As reported, the bill includes the changes required by technical review, which has been performed.