STATE OF NEW YORK

7272

2019-2020 Regular Sessions

IN ASSEMBLY

April 18, 2019

Introduced by M. of A. BICHOTTE -- read once and referred to the Committee on Judiciary

AN ACT to amend the domestic relations law, in relation to legalizing gestational carrier agreements; to amend the family court act, in relation to the status of a child born pursuant to a gestational carrier agreement; to amend the estates, powers and trusts law, in relation to inheritance by a child born pursuant to a gestational carrier agreement; to amend the social services law, in relation to the residency of a child born pursuant to a gestational carrier agreement; to amend the insurance law, in relation to certain liability coverage; to amend the public health law, in relation to the content of birth certificates; and to repeal article 8 of the domestic relations law relating to surrogate parenting contracts

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. This act shall be known as the "New York gestational carrier agreement act".

§ 2. Legislative intent. The legislature finds and declares that gestational carrier agreements executed pursuant to this act are in accord with the public policy of this state. It is the intent and purpose of the legislature to 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, protect all parties involved in gestational carrier agreements and 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 York.

§ 3. Article 8 of the domestic relations law is REPEALED and a new article 8 is added to read as follows:

ARTICLE 8

GESTATIONAL CARRIER AGREEMENTS

EXPLANATION--Matter in *italics* (underscored) is new; matter in brackets [-] is old law to be omitted.

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Section 121. Definitions.
122. Rights of parentage.
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129. Certain provisions of law not applicable to gestational carrier agreements.
130. Effect of an order of parentage.

§ 121. Definitions. As used in this article:

1. "Advanced practice nurse" means a person certified in accordance with the provisions of:

(a) section sixty-nine hundred ten of the education law (nurse practitioner practice);

(b) section sixty-nine hundred eleven of the education law (clinical nurse specialist);

(c) article one hundred forty of the education law (professional midwifery practice act); or

(d) as a nurse anesthetist.

2. "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.

3. "Attorney" means a person licensed to practice law in New York or another state or the District of Columbia.

4. "Certified nurse midwife" means a midwife licensed by the state board of medical examiners as a certified nurse midwife pursuant to the provisions of article one hundred forty of the education law.

5. "Donor" means a person who contributes gametes for use in assisted reproduction. The term does not include an intended parent who contributes gametes to be used in assisted reproduction pursuant to a valid gestational carrier agreement.

6. "Fertilization" means the initial union of the sperm and the egg.

7. "Gamete" means sperm or egg.

8. "Gestational carrier" means a woman twenty-one 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.

9. "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.

10. "Implantation" means when the fertilized egg adheres to the gestational carrier's uterine wall.

11. "Intended parent" means a person who enters into a gestational carrier agreement with a gestational carrier pursuant to section one hundred twenty-four of this article, 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.

12. "In vitro fertilization" means all medical and laboratory procedures that are required to effectuate the formation of a human embryo outside the human body.

13. "Medical evaluation" means an evaluation and consultation by a physician, a certified nurse midwife, or an advanced practice nurse.

14. "Order of parentage" means a judgment determining parentage pursuant to the provisions of a gestational carrier agreement that satisfies the provisions of section one hundred twenty-six of this article.

15. "Physician" means a person licensed to practice medicine in New York pursuant to article one hundred thirty-one of the education law, or licensed to practice in any one of the United States or its territories, or the District of Columbia.

16. "Pre-embryo" is a fertilized egg prior to fourteen days of development.

17. "Pre-embryo transfer" means all medical and laboratory procedures that are necessary to effectuate the transfer of a pre-embryo into the uterine cavity.

18. "Psychological evaluation" means an evaluation and consultation by a clinical social worker, psychotherapist, or psychiatrist licensed by the state of New York or licensed to practice in any one of the United States or its territories, or the District of Columbia.

19. "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.

§ 122. Rights of parentage. 1. Provided that the gestational carrier and the intended parent satisfy the eligibility requirements set forth in section one hundred twenty-three of this article and the gestational carrier agreement satisfies the requirements set forth in section one hundred twenty-four of this article, immediately upon the birth of the child:

(a) The intended parent shall be the legal parent of the child;

(b) 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

(c) Neither the gestational carrier nor her spouse or partner, if any, shall be the legal parent of the child.

2. 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 one hundred twenty-four of this article, unless otherwise determined by a court of competent jurisdiction pursuant to a complaint challenging parentage filed by a genetic parent within one hundred twenty days of birth.

§ 123. Eligibility. 1. A gestational carrier shall be deemed to have satisfied the requirements of section one hundred twenty-four of this

article if, at the time the gestational carrier agreement is executed, she:

(a) is at least twenty-one years of age;

(b) has given birth to at least one child;

(c) has completed a medical evaluation approving her suitability to serve as a gestational carrier;

(d) has completed a psychological evaluation approving her suitability to serve as a gestational carrier; and

(e) 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.

2. The intended parent shall be deemed to have satisfied the requirements of section one hundred twenty-four of this article if, at the time the gestational carrier agreement is executed, the intended parent:

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

(b) 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.

§ 124. Requirements for a gestational carrier agreement. 1. A gestational carrier agreement shall satisfy the following requirements:

(a) 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 subdivision two of section one hundred twenty-three of this article 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 subdivision two of section one hundred twenty-three of this article and duly executes the agreement;

(b) 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

(c) 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.

2. A gestational carrier agreement shall provide:

(a) express terms that the gestational carrier shall:

(1) undergo pre-embryo transfer and attempt to carry and give birth to the child;

(2) surrender custody of the child to the intended parent immediately upon the child's birth; and

(3) 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.

(b) 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

(c) express terms that the intended parent shall:

(1) accept custody of the child immediately upon the child's birth; and

(2) assume sole responsibility for the support of the child immediately upon the child's birth.

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

(a) it satisfies the contractual requirements set forth in subdivision one of this section; and

(b) it contains at a minimum each of the terms set forth in subdivision two of this section.

4. 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 in section one hundred twenty-seven of this article, unless expressly waived, in whole or in part, in writing by the gestational carrier.

5. 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.

§ 125. Duty to support. 1. 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.

2. 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 section one hundred twenty-six of this article.

3. 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 legal parent of a child thereby conceived and shall have no rights or duties stemming from the conception of the child.

§ 126. Establishment of parent-child relationship. 1. After the gestational carrier becomes pregnant in accordance with the gestational carrier agreement provided for in section one hundred twenty-four of this article, the intended parent shall file a complaint for an order of parentage with the family court of the county of the child's anticipated birth or the intended parent's or gestational carrier's county of residence.

2. Attached to the complaint shall be:

(a) 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 York law and, after consultation with legal counsel, agreed to be bound by the terms of the agreement;

(b) 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

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

3. The 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.

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

5. Notwithstanding any other law concerning public hearings and records, any action or proceeding held under this section shall be held in closed court without admittance of any persons other than those necessary to the action or proceeding.

6. If the court finds that the parties have complied with the provisions of section one hundred twenty-three of this article, the court shall enter an order of parentage naming the intended parent as the legal parent of the child.

7. After the birth of the child, the order of parentage and application for a birth certificate for the child shall be filed with the registrar of vital statistics of the district in which the birth occurred pursuant to paragraph (b) of subdivision one of section forty-one hundred thirty-eight of the public health law. The registrar shall issue the child's birth certificate naming the intended parent as the parent of the child.

8. 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 eighteen years of age and who has submitted a written, notarized request for the records or filings.

§ 127. Remuneration. Payment of the following expenses shall be allowable by an intended parent to or on behalf of a gestational carrier pursuant to a valid gestational carrier agreement executed in accordance with the provisions of this article:

1. Reasonable and actual medical fees and hospital expenses for assisted reproduction, including artificial insemination or in vitro fertilization services, incurred by the gestational carrier in connection with the conception of the child;

2. Reasonable and actual medical fees or hospital charges for services rendered to the gestational carrier in connection with the birth of the child or of other necessary expenses incurred by the gestational carrier in connection with or as a result of her pregnancy or the birth of the child;

3. Reasonable and actual nursing, medical or hospital fees for the care of such child, including pre-natal care, if such payment is made to the physician, nurse or hospital who or which rendered the services or to the child;

4. Payment of the gestational carrier's reasonable and actual expenses for housing, maternity clothing and clothing for the child;

5. Reasonable and necessary transportation expenses of the gestational carrier in seeking medical treatment as described in subdivisions one, two and three of this subdivision; and

6. Reasonable and actual legal fees charged for consultation and legal advice, preparation of papers and representation and other legal services rendered in connection with the gestational carrier agreement.

§ 128. Prohibitions. 1. Except as provided in section one hundred twenty-seven of this article, no person or other entity shall knowingly request, accept, receive, pay or give any fee, compensation or other remuneration, directly or indirectly, in connection with any gestational carrier agreement, or induce, arrange or otherwise assist in arranging a gestational carrier agreement for a fee, compensation or other remuneration. The provisions of this subdivision shall not be construed to prohibit the payment of legal fees to an attorney for consultation and legal advice, preparation of papers and representation and other legal services rendered in connection with the gestational carrier agreement.

2. No attorney or law firm shall serve as the attorney for, or provide any legal services to both the gestational carrier and the intended parent in regard to a gestational carrier agreement.

3. (a) A gestational carrier or her spouse or partner, or an intended parent and his or her spouse or partner who violates this section shall be subject to a civil penalty not to exceed five hundred dollars.

(b) Any other person or entity who or which induces, arranges or otherwise assists in the formation of a gestational carrier agreement for a fee, compensation or other remuneration or otherwise violates this section shall be subject to a civil penalty not to exceed ten thousand dollars and forfeiture to the state of any such fee, compensation or remuneration in accordance with the provisions of subdivision (a) of section seventy-two hundred one of the civil practice law and rules, for the first such offense. Any person or entity who or which induces, arranges or otherwise assists in the formation of a gestational carrier agreement for a fee, compensation or other remuneration or otherwise violates this section, after having been once subject to a civil penalty for violating this section, shall be guilty of a felony. The provisions of this section shall not be construed to prohibit an attorney from charging legal fees for consultation and legal advice, preparation of papers and representation and other legal services rendered in connection with the gestational carrier agreement.

§ 129. Certain provisions of law not applicable to gestational carrier agreements. 1. A gestational carrier agreement shall not be considered an adoption pursuant to article seven of this chapter nor a surrender of custody or termination of parental rights to the child by the gestational carrier in violation of the laws of this state.

2. A child born pursuant to the terms of a gestational carrier agreement shall not be considered to be a child born out of wedlock for the purposes of article five of the family court act or section forty-one hundred thirty-five of the public health law.

3. A child born pursuant to the terms of a gestational carrier agreement shall not be considered to be a non-marital child for the purposes of the estates, powers and trusts law.

§ 130. Effect of an order of parentage. 1. (a) After the birth of the child and the issuance of an order of parentage pursuant to section one hundred twenty-six of this article, the gestational carrier and her spouse or partner shall be relieved of all parental duties toward and of all responsibilities for and shall have no rights over such child or to his or her property by descent or succession.

(b) The rights of the child to inheritance and succession from and through the gestational carrier and her spouse or partner shall terminate upon the birth of the child and the issuance of an order of parentage pursuant to section one hundred twenty-six of this article and the child shall have no right to the property of the gestational carrier or her spouse or partner by descent or succession.

(c) The intended parent and the child shall sustain toward each other the legal relation of parent and child and shall have all the rights and be subject to all the duties of that relation including the rights of inheritance from and through each other and the birth and adopted kindred or other children born pursuant to a gestational carrier agreement of the intended parents or parent.

(d) The right of inheritance of the child extends to the distributees of such child and such distributees shall be the same as if the child were the birth child of the intended parent.

(e) The child and all adoptive children, birth children and other children born pursuant to a gestational carrier agreement of the intended parent shall have all the rights of fraternal relationship including the right of inheritance from each other. Such right of inheritance extends to the distributees of such children and such distributees shall be the same as if each such child were the birth child of the intended parents.

(f) This subdivision shall apply only to the intestate descent and distribution of real and personal property.

2. Except as hereinafter stated, after the birth of the child and the issuance of an order of parentage pursuant to section one hundred twenty-six of this article, the child and his or her issue thereafter are strangers to any relatives of the gestational carrier and her spouse or partner for the purpose of the interpretation or construction of a disposition in any instrument, whether executed before or after the order of parentage or the birth of the child, which does not express a contrary intention or does not expressly include the child by name or by some classification not based on a parent-child or family relationship.

§ 4. Section 417 of the family court act is amended to read as follows:

§ 417. Child of ceremonial marriage. A child born of parents who at any time prior or subsequent to the birth of said child shall have entered into a ceremonial marriage shall be deemed the legitimate child of both parents for all purposes of this article regardless of the validity of such marriage. For purposes of this article, "a child born of parents" shall include a child born pursuant to the provisions of a gestational carrier agreement as provided in article eight of the domestic relations law.

§ 5. Section 2-1.3 of the estates, powers and trusts law, paragraph (a) as amended by chapter 248 of the laws of 1990 and subparagraph 1 of paragraph (a) as amended by chapter 305 of the laws of 2008, is amended to read as follows:

§ 2-1.3 Adopted children and posthumous children as members of a class

(a) Unless the creator expresses a contrary intention, a disposition of property to persons described in any instrument as the issue, children, descendants, heirs, heirs at law, next of kin, distributees (or by any term of like import) of the creator or of another, includes:

(1) Adopted children and their issue in their adoptive relationship. The rights of adopted children and their issue to receive a disposition under wills and lifetime instruments as a member of such class of persons based upon their birth relationship shall be governed by the provisions of subdivision two of section one hundred seventeen of the domestic relations law.

(2) Children conceived before, but born alive after such disposition becomes effective.

(3) Nonmarital children. For the purposes of this paragraph, a nonmarital child is the child of a mother and is the child of a father if the

child is entitled to inherit from such father under section 4-1.2 of this chapter. The provisions of this paragraph shall apply to the wills of persons dying on and after September first, nineteen hundred ninety-one, to lifetime instruments theretofore executed which on said date are subject to the grantor's power to revoke or amend, and to all lifetime instruments executed on or after such date.

(4) Children born pursuant to a gestational carrier agreement.

§ 6. Subdivision 2 of section 117 of the social services law, as amended by chapter 305 of the laws of 2008, is amended to read as follows:

2. An infant shall, at the time of birth, whether within or without the state, be deemed to have state residence if he **or she** is in the custody of both birth parents and either of them has state residence or if the birth parent having his **or her** custody has state residence. State residence so acquired by a child born within the state shall continue until the child shall have removed from the state and remained therefrom for one year. State residence so acquired by a child born without the state shall terminate when he **or she** becomes one year of age if he **or she** remains without the state during such year. For the purpose of this subdivision and section, **(i)** a child born out of wedlock whose birth parents were living together on the date of his **or her** birth shall be deemed to have been in the custody of both his **or her** parents on such date if his **or her** birth father has acknowledged or been adjudicated to be such**, and (ii) a child born to one or more intended parents pursuant to a gestational carrier agreement executed pursuant to article eight of the domestic relations law shall be deemed to have state residence if he or she is in the custody of both intended parents, an order of paternity has been issued pursuant to section one hundred twenty-six of the domestic relations law and either of the intended parents has state residence**.

§ 7. Subparagraph (D) of paragraph 17 of subsection (a) of section 1113 of the insurance law, as amended by chapter 551 of the laws of 1997, is amended and a new subparagraph (D-1) is added to read as follows:

(D) Indemnifying an adoptive parent for verifiable expenses not prohibited under the law paid to or on behalf of the birth mother when either one or both of the birth parents of the child withdraw or withhold their consent to adoption. Such expenses may include maternity-connected medical or hospital expenses of the birth mother, necessary living expenses of the birth mother preceding and during confinement, travel expenses of the birth mother to arrange for the adoption of the child, legal fees of the birth mother, and any other expenses which an adoptive parent may lawfully pay to or on behalf of the birth mother. For the purposes of this section "adoptive parent" means the parent or his or her spouse seeking to adopt a child, "birth mother" means the biological mother of the child, "birth parent" means the biological mother or biological father of the child; [~~or~~]

(D-1) Indemnifying an intended parent who is party to a gestational carrier agreement pursuant to article eight of the domestic relations law for verifiable expenses not prohibited under the law paid to or on behalf of the gestational carrier when the gestational carrier fails to comply with the gestational carrier agreement. Such expenses may include maternity-connected medical or hospital expenses of the gestational carrier, necessary living expenses of the gestational carrier preceding and during confinement, travel expenses of the gestational carrier to obtain medical care, legal fees of the gestational carrier, and any

other expenses which the intended parent may lawfully pay to or on behalf of the gestational carrier; or

§ 8. Subdivision 4 of section 4132 of the public health law is amended to read as follows:

4. **In the case of a child born in connection with a gestational carrier agreement executed in accordance with the provisions of article eight of the domestic relations law, the name of the intended parent shall be included on the record of birth as the child's parent.**

5. The registrar shall enter the exact date of filing of the certificate of birth in his office attested by his official signature and registered number of birth.

§ 9. Severability. If any clause, sentence, paragraph, section or part of this act shall be adjudged by any court of competent jurisdiction to be invalid and after exhaustion of all further judicial review, the judgment shall not affect, impair or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, section or part of this act directly involved in the controversy in which the judgment shall have been rendered.

§ 10. This act shall take effect on the ninetieth day after it shall have become a law and shall apply only to gestational carrier agreements entered into on or after such effective date. Effective immediately the addition, amendment and/or repeal of any rule or regulation necessary for the implementation of this act on its effective date are authorized to be made and completed on or before such date.