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May 4, 2017

Representative Taylor Barras
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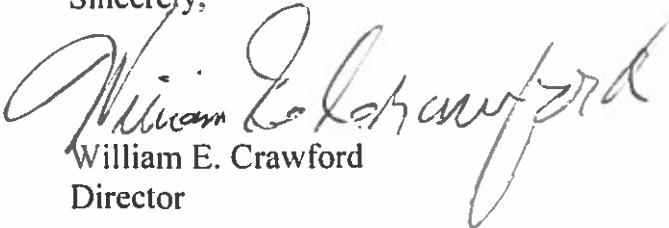
Senator John A. Alario, Jr.
President of the Senate
P.O. Box 94183
Baton Rouge, Louisiana 70804

RE: ACT NO. 494 OF 2016

Dear Mr. Speaker and Mr. President:

The Louisiana State Law Institute respectfully submits herewith its report to the legislature relative to gestational carrier contracts.

Sincerely,


William E. Crawford
Director

WEC/puc

Enclosure

cc: Representative Stuart Bishop

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**LOUISIANA STATE LAW INSTITUTE
SURROGACY COMMITTEE**

**REPORT TO THE LEGISLATURE
IN RESPONSE TO ACT 494 OF THE 2016 REGULAR SESSION**

Relative to gestational carrier contracts

Prepared for the
Louisiana Legislature on

May 4, 2017

Baton Rouge, Louisiana

**LOUISIANA STATE LAW INSTITUTE
SURROGACY COMMITTEE**

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**REPORT TO THE LEGISLATURE
IN RESPONSE TO ACT NO. 494 OF THE 2016 REGULAR SESSION**

Section 8 of Act No. 494 of the 2016 Regular Session directed the Louisiana State Law Institute to prepare comments to the provisions of the Act regarding gestational carrier contracts. In fulfillment of this request, the Law Institute's Surrogacy Committee met several times to craft comments and modest revisions to the recently enacted gestational carrier legislation. In December of 2016, the Council of the Law Institute approved the work of the Committee as it appears in the attached bill draft.

The Law Institute subsequently searched for, but was unable to procure, an author for this proposed legislation during the 2017 fiscal session. The Law Institute plans to submit its proposed changes to the text of the gestational carrier legislation in bill form during the 2018 Regular Session. In the meantime, the Law Institute intends to publish the following comments to the gestational carrier legislation as enacted pursuant to the legislative direction of Act No. 494 of the 2016 Regular Session.

2017 Regular Session

HOUSE/SENATE BILL NO.

BY REPRESENTATIVE/SENATOR

(On Recommendation of the Louisiana State Law Institute)

CHILDREN: Provides relative to gestational carriers

1 AN ACT

2 To amend and reenact R.S. 9:2718, 2718.1(1) and (3), 2720(C) and (D), 2720.2(A)(3),
3 (B) introductory paragraph and (4), 2720.3, and R.S. 40:34.1(B), 34.2(2)(d), 34.5(C), and 34.6,
4 to provide Comments to R.S. 9:2719, 2720.5, 2720.8, 2720.9, 2720.10, 2720.11, 2720.12,
5 2720.14, and 2720.15, and to repeal R.S. 40:46.10, relative to gestational carrier contracts; to
6 provide for definitions; to provide for contractual requirements; to provide for a proceeding to
7 approve a gestational carrier contract; to provide for amendments to birth certificates; and to
8 provide for related matters.

9 Be it enacted by the Legislature of Louisiana:

10 Section 1. R.S. 9:2718, 2718.1(1) and (3), 2720(C) and (D), 2720.2(A)(3), (B)
11 introductory paragraph and (4), and 2720.3 are hereby amended and reenacted and Comments to
12 R.S. 9:2719, 2720.5, 2720.8, 2720.9, 2720.10, 2720.11, 2720.12, 2720.14, and 2720.15 are
13 hereby provided to read as follows:

14 §2718. Purpose and intent

1 The purpose and intent of this ~~Part~~ Chapter is to regulate gestational surrogacy
2 ~~agreements~~ contracts. The legislature has been guided by, among other things, the best
3 interest of the children who are born as a result of gestational surrogacy. The legislature
4 finds that it is desirable to assure that the intended parents of every child born through the
5 use of assisted reproductive technology be legal and biological parents of the child.
6 Accordingly, in regulating gestational surrogacy ~~agreements~~ contracts by means of this
7 ~~Part~~ Chapter, the legislature has restricted the range of enforceable gestational surrogacy
8 ~~agreements~~ contracts to those in which the parties who engage the gestational surrogate
9 not only are married to each other, but also create the child using only their own gametes.
10 These compelling state interests justify provisions for filiation to be recognized by a court
11 upon proof that the child is genetically related to both parents, so that the intended
12 parents can bypass the current need to go through extended proceedings to adopt their
13 own child.

14 §2718.1. Definition of terms

15 As used in this Chapter, the following terms shall have the meanings ascribed to
16 them in this Section unless otherwise provided for or unless the context otherwise
17 indicates:

18 (1) "Compensation" means a payment of money, objects, services, or anything
19 else having monetary value. Payments provided for in R.S. 9:2720.5(B)(3) shall not be
20 prohibited compensation in connection with a gestational carrier contract. ~~Compensation~~
21 ~~shall not include reimbursement of actual expenses, as provided for in R.S.~~
22 ~~9:2720.5(B)(3), to the gestational carrier or payment for goods or services incurred by the~~

1 ~~intended parents as a result of the pregnancy and that would not have been incurred but~~
2 ~~for the pregnancy.~~

3 * * *

4 (3) "Genetic gestational carrier" means a woman who ~~the process by which a~~
5 ~~woman~~ attempts to carry and give birth to a child using her own gametes and either the
6 gametes of a person who intends to parent the child or donor gametes, when there is ~~an~~
7 ~~agreement~~ a contract to relinquish the custody of and all rights and obligations to the
8 child.

9 * * *

10 §2719. Contract for a genetic gestational carrier; nullity

11 * * *

12 Comments – 2017

13 (a) This Section continues the longstanding disapproval of contracts for genetic
14 surrogacy, which began in 1987 in the wake of the controversial "Baby M" case. *See In*
15 *re Baby M*, 537 A.2d 1227 (N.J. 1988). A surrogacy arrangement that would allow a
16 mother to agree to relinquish her biological child in advance of the child's birth violates
17 the public policy of this state and is, therefore, unenforceable, whether the contract is
18 gratuitous or onerous.

19
20 (b) If persons choose to ignore the provisions of this Chapter and engage in
21 prohibited forms of surrogacy, this Chapter provides them no legal protection. Parentage,
22 custody, and other questions will be determined in accordance with the general
23 provisions of Louisiana law. *See, e.g.*, C.C. Art. 184; *see also* Title XII, LA. CH. CODE.

24 §2720. Enforceability of gestational carrier contract

25 * * *

26 C. No person shall enter into a gestational carrier contract that is for compensation
27 as defined in R.S. 9:2718.1 or that is not in compliance with all of the requirements of

1 this Part. Any such contract ~~executed in the state of Louisiana or any other state~~ shall be
2 absolutely null and unenforceable in the state of Louisiana as contrary to public policy.

3 D. No person shall enter into a gestational carrier contract that requires the
4 gestational carrier to consent to terminate a pregnancy resulting from in utero embryo
5 transfer for any reason, including a prenatal diagnosis of an actual or potential disability,
6 impairment, genetic variation, or any other health condition or a discrimination based on
7 gender, or for the purposes of the reduction of multiple fetuses. Any such provision in a
8 contract ~~executed in the state of Louisiana or any other state~~ shall be absolutely null and
9 unenforceable in the state of Louisiana as contrary to public policy.

10 Comments – 2017

11 Subsection B clarifies that entering into a gestational carrier contract is a
12 significant legal act that must be approved by a court, just as an adoption of a minor must
13 be judicially approved. This Part provides for state involvement, through judicial
14 oversight, of the gestational carrier contract before, during, and after the assisted
15 reproduction process. The purpose of early involvement is to ensure that the parties are
16 appropriate for a gestational carrier contract, that they understand the consequences of
17 what they are undertaking, and that the best interests of a child born of the gestational
18 carrier contract are considered before the arrangement is approved. Parties who enter
19 into a gestational carrier contract not meeting the requirements of this Part may not have
20 their contract judicially approved; in such cases, this Chapter provides no rights or
21 remedies governing their disputes.

22 * * *

23 §2720.2. Contractual requirements

24 A. In an enforceable gestational carrier contract, the gestational carrier shall do all
25 of the following:

26 * * *

27 (3) Certify that prior to executing the gestational carrier contract she has

CODING: Words in ~~struck through~~ type are deletions from existing law; words underscored
are additions.

1 undergone at least two counseling sessions, separated by at least thirty days, with a
2 licensed clinical social worker, licensed psychologist, medical psychologist, licensed
3 psychiatrist, or licensed professional counselor, to discuss the proposed gestational
4 carrier.

5 * * *

6 B. In an enforceable gestational carrier contract, the intended parents shall ~~certify~~
7 ~~in writing that they~~ do all of the following:

8 * * *

9 (4) Have a ~~valid will~~ testament or succession plan authentic act naming a tutor
10 for establishing custody of the child should both intended parents die before predecease
11 the birth of the child.

12 * * *

13 Comments – 2017

14 (a) The gestational carrier contract regulated under this Part is a contract subject
15 to the provisions governing Conventional Obligations or Contracts in Title IV, Book III
16 of the Louisiana Civil Code.

17
18 (b) The contract must provide that the intended parents will be the parents of any
19 child born pursuant to the contract while all others involved relinquish all parental rights
20 and duties. In accordance with Paragraph (A)(4), the gestational surrogate is relieved of
21 any legal responsibility for the child.

22
23 (c) Paragraph (B)(1) is not intended to modify current law regarding a pregnant
24 woman's prenatal care. A pregnant gestational surrogate's medical rights are consistent
25 with the rights of a pregnant woman carrying her own biological child.

26
27 (d) In requiring the parties to estimate expenses during the contracting process
28 and to have this agreed-upon financial arrangement approved by the court, this Chapter
29 mirrors the financial provisions of Louisiana adoption law. Mothers who relinquish their
30 children for adoption in this state may not financially profit from the transaction, and are
31 limited to recovery of actual and reasonable expenses. This and other provisions of this

1 Chapter subject contracts for gestational surrogacy to limitations on financial
2 remuneration. *See also* Ch.C. Art. 1223.
3

4 (e) This Section speaks only to what must be provided for in the gestational
5 carrier contract. There are additional requirements that must be met before a court may
6 approve a gestational carrier contract. *See, e.g.*, R.S. 9:2720.1 (detailing requirements of
7 eligibility for the gestational surrogate) and R.S. 9:2720.3 (setting out residence and other
8 procedural requirements).

9 §2720.3. Proceeding to approve gestational carrier contract

10 A. Prior to in utero embryo transfer, the intended parents or the gestational carrier
11 and her spouse, if she is married, shall ~~may~~ initiate a summary proceeding in the court
12 exercising jurisdiction over the adoption of minors where the intended parents or the
13 gestational carrier reside, seeking to have the court approve a gestational carrier contract.

14 B. A ~~proceeding to approve a~~ gestational carrier contract shall be approved by the
15 court ~~maintained~~ only if all of the following occur:

16 (1) The gestational carrier and each of the intended parents have been domiciled
17 in this state for at least one hundred eighty days.

18 (2) The intended parents, the gestational carrier, and her spouse, if she is married,
19 are all parties to the proceeding.

20 (3) A copy of the proposed gestational carrier contract is attached to the motion.

21 ~~(4) An independent board-certified physician in obstetrics and gynecology or in~~
22 ~~reproductive endocrinology, who has medically treated the intended mother over a period~~
23 ~~of time such that the physician is competent to reach medical conclusions about the~~
24 ~~intended mother's medical condition and submits a signed affidavit certifying that in~~
25 ~~utero embryo transfer with a gestational carrier is medically necessary to assist in~~
26 ~~reproduction.~~

1 the child. Once a proceeding has been initiated, Subsection A requires the court to
2 approve a gestational carrier contract only if the requirements of this Part are met. If it
3 approves, the court must declare that the intended parents will be the parents of any child
4 born pursuant to, and during the term of, the contract.
5

6 (c) The expense provisions of this Section are similar to those applicable to
7 allowable expenses in connection with the adoption of minors, with some modifications.
8 See Ch.C. Art. 1223.

9 * * *

10 §2720.8. Continuing and exclusive jurisdiction

11 * * *

12 Comments – 2017

13 (a) This Section is designed to minimize the possibility of parallel litigation in
14 different states and the consequent risk of kidnapping for strategic purposes.
15

16 (b) This Section is intended to confer continuing and exclusive jurisdiction over
17 gestational carrier contracts, but not other unrelated matters such as ongoing custody
18 contests.

19 §2720.9. Termination of contract by notice

20 * * *

21 Comments – 2017

22 (a) Subsection A permits a party to terminate a gestational carrier contract after
23 the Order Preceding Embryo Transfer by canceling the arrangement before in utero
24 implantation has occurred. This permits cancellation at a time when the interests of the
25 parties would not be unduly prejudiced by termination. The intended parents certainly
26 have an expectation interest during this time, but the nature of this interest is little
27 different from that which they would have while attempting to create a pregnancy
28 through traditional means.
29

30 (b) It is certainly possible that, if the gestational surrogate terminates the
31 gestational carrier contract after issuance of an Order Preceding Embryo Transfer, the
32 intended parents may have already expended substantial sums to undergo the fertilization
33 process. Fertilization costs may not be recovered from the gestational surrogate,
34 however, because any resulting embryos are genetically related to the intended parents
35 and could be used by the intended parents in future attempts at assisted reproduction.

1 (c) Once a human embryo exists, it is subject to the rules regulating human
2 embryos in R.S. 9:121-133.
3

4 (d) The use of the word “each” in Subsection A indicates that the possibility of
5 termination by notice remains before each implantation attempt, even if there are multiple
6 attempts.
7

8 (e) Good cause may include a finding of some change in circumstances that
9 would have prevented the court from issuing the Order Preceding Embryo Transfer. For
10 instance, a change in the results of criminal history, child abuse, or domestic violence
11 registry checks after issuance of the Order Preceding Embryo Transfer may provide good
12 cause for termination.

13 §2720.10. Remedies

14 * * *

15 Comments – 2017

16 Before each in utero implantation, the gestational surrogate or either intended
17 parent may terminate the gestational carrier contract by giving the timely notice provided
18 for in R.S. 9:2720.9. After implantation, the remedy of contractual dissolution would be
19 inequitable. If the intended parents failed to pay the agreed-upon expenses, for instance,
20 allowing the gestational surrogate to take advantage of extra-judicial dissolution
21 procedures would not be an appropriate remedy, given the nature of the multiple and
22 conflicting interests involved. The damages, specific performance, and other provisions
23 of the Title on Conventional Obligations or Contracts, however, do apply to gestational
24 carrier contracts.

25 §2720.11. Termination of contract and effects of divorce, nullity, and death

26 * * *

27 Comments – 2017

28 (a) This Section provides an effect for divorce or declaration of nullity only
29 before in utero implantation. A judgment of divorce or judicial declaration of nullity of a
30 marriage between the intended parents, entered after in utero implantation, does not
31 terminate the gestational carrier contract. Custody of the child would be determined by
32 reference to the child custody provisions of Louisiana Civil Code Book I, Title V,
33 Chapter 2, Section 3. Likewise, if an intended parent dies after in utero implantation, the
34 tutorship provisions of the Louisiana Civil Code, found in Book I, Title VIII, would
35 apply to provide for rules governing the person and property of the child.
36

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1 (b) This Section follows the policy and language of R.S. 9:391.1, which regulates
2 children conceived after the death of a parent using the decedent's gametes.

3 §2720.12. Effect of subsequent marriage

4 * * *

5 Comments – 2017

6 If, after the original court order approving the gestational carrier contract, the
7 gestational surrogate marries, the contract continues to be valid and the consent of her
8 new spouse is not required. The new spouse is not a party to the original action and is not
9 the presumed legal father of the child. Under this Part, the intended parents are the
10 child's legal parents. The spouse of the gestational surrogate will not hold the status of a
11 legal parent unless he is the genetic father or adopts the child.

12 * * *

13
14 §2720.14. DNA testing

15 * * *

16 Comments – 2017

17 (a) An allegation that the child is not the child of the intended parents may be
18 raised in a number of different proceedings, including a filiation, disavowal, or
19 contestation action. *See, e.g.,* C.C. Arts. 187, 191, 197, 198. The prescriptive or
20 peremptive period applicable to such an action will be determined by the applicable Civil
21 Code article for the particular form of action instituted.

22
23 (b) DNA testing for paternity determinations is authorized and regulated by R.S.
24 9:396.

25 §2720.15. Finality; time limitations

26 * * *

27 Comments – 2017

28 The narrow grounds and relatively short period of time for nullifying a Post-Birth
29 Order here are drawn, with some modifications, from Louisiana's grounds for annulling a
30 final decree of adoption. There, as here, the parties' arrangement has been subject to
31 substantial judicial scrutiny, and all parties involved have a special need for finality.

1 Section 2. R.S. 40:34.1(B), 34.2(2)(d), 34.5(C), and 34.6 are hereby amended and
2 reenacted to read as follows:

3 §34.1 Original birth certificate; required contents

4 * * *

5 B. In the case of a child born ~~of a surrogate birth parent~~ as a result of an
6 enforceable gestational carrier contract, as provided in R.S. 9:2720, the biological parents
7 shall be considered the parents of the child.

8 §34.2 Original birth certificate; required contents; name of child

9 * * *

10 (2) Surname.

11 * * *

12 (d) In the case of a child born ~~of a surrogate birth parent~~ as a result of an
13 enforceable gestational carrier contract, as provided in R.S. 9:2720, the surname of the
14 child's biological parents shall be the surname of the child.

15 * * *

16 §34.5 Original birth certificate; required contents; name of father

17 * * *

18 C. In the case of a child born ~~of a surrogate birth parent~~ as a result of an
19 enforceable gestational carrier contract, as provided in R.S. 9:2720, the full name of the
20 biological father shall be listed as the father.

21 * * *

22 §34.6 Original birth certificate; required contents; name of mother

1 The full name of the mother of the child, including her maiden name and current
2 surname, shall be entered on the original birth certificate; however, if the child was born
3 of a surrogate birth parent as a result of an enforceable gestational carrier contract, as
4 provided in R.S. 9:2720, the maiden name of the biological mother shall be listed as the
5 mother.

6 Section 3. R.S. 40:46.10 is hereby repealed in its entirety.

DIGEST

The digest printed below was prepared by the Louisiana State Law Institute. It constitutes no part of the legislative instrument. The keyword, one-liner, abstract, and digest do not constitute part of the law or proof or indicia of legislative intent. [R.S. 1:13(B) and 24:177(E)]

AUTHOR

HB/SB NO.

Abstract: Provides Comments and technical changes to the gestational carrier contract law.

Present law (R.S. 9:2718) provides for legislative purpose and intent.

Proposed law provides a technical correction to change the term “agreement” to “contract.”

Present law (R.S. 9:2718.1) defines “compensation” and “genetic gestational carrier”.

Proposed law provides a technical change and a cross reference to existing law for expenses which are prohibited compensation.

Proposed law provides a Comment to R.S. 9:2719 regarding prohibited forms of surrogacy.

Present law (R.S. 9:2720) provides for the nullity of certain types of gestational contracts.

Proposed law provides that Louisiana law cannot invalidate a contract entered into in another state and provides a Comment.

Present law (R.S. 9:2720.2) provides for contractual requirements.

Proposed law retains present law but adds civilian terminology and Comments.

Present law (R.S. 9:2720.3) provides for the proceeding to approve gestational carrier contracts.

Proposed law requires court approval of gestational carrier contracts to be enforceable, eliminates the requirement that a physician sign an affidavit that surrogacy is medically necessary, and adds Comments.

Proposed law provides Comments to R.S. 9:2720.5, 2720.8, 2720.9, 2720.10, 2720.11, 2720.12, 2720.14, and 2720.15 as required by Act No. 494 of the 2016 Regular Session.

Present law (R.S. 40:34.1, 34.2, 34.5, and 34.6) provides the requirements for an original birth certificate.

Proposed law deletes as unnecessary the phrase “of a surrogate birth parent”.

Present law (R.S. 40:46.10) provides for the relationship between a child born as a result of surrogacy and his parents and provides for the name of the child.

Proposed law deletes present law because other existing law provides for the same result.

(Amends R.S. 9:2718, 2718.1(1) and (3), 2720(C) and (D), 2720.2(A)(3), (B)(Intro. Par.) and (4), and 2720.3 and R.S. 40:34.1(B), 34.2(2)(d), 34.5(C), and 34.6; Provides Comments to R.S. 9:2719, 2720.5, 2720.8, 2720.9, 2720.10, 2720.11, 2720.12, 2720.14, and 2720.15; Repeals R.S. 40:46.10)