

SENATE No. 2502

The Commonwealth of Massachusetts

—————
In the One Hundred and Ninetieth General Court
(2017-2018)
—————

SENATE, Monday, April 30, 2018

The committee on the Judiciary, to whom was referred the petition (accompanied by bill, Senate, No. 969) of Bruce E. Tarr for legislation to create an updated Parental Surrogacy Act,- reports the accompanying bill (Senate, No. 2502).

For the committee,
William N. Brownsberger

SENATE No. 2502

The Commonwealth of Massachusetts

In the One Hundred and Ninetieth General Court
(2017-2018)

An Act to promote family stability.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

1 The General Laws, as appearing in the 2016 Official Edition is hereby amended by
2 inserting the following new chapter after chapter 210:-

3 CHAPTER 210A CHILD OF ASSISTED REPRODUCTION

4 Section 1. SCOPE OF CHAPTER.

5 In addition to the presumptions, proceedings, and operations of law provided for in other
6 chapters of this title, this chapter applies to the Parentage of a Child born by means of Assisted
7 Reproduction not otherwise addressed by statute. The statutes herein should be construed as
8 gender neutral, and all child-related protections are intended to apply regardless of marital status
9 of the parent or parents.

10 Section 2. DEFINITIONS

11 As used in this Title, unless the context otherwise indicates, the following terms have the
12 following meanings.

13 "Assisted Reproduction", a method of causing pregnancy other than sexual intercourse
14 that includes but is not limited to:

- 15 (a) Intrauterine or vaginal insemination;
- 16 (b) Donation of Gametes;
- 17 (c) Donation of Embryos;
- 18 (d) In vitro fertilization and transfer of Embryos;
- 19 (e) Intracytoplasmic sperm injection; and
- 20 (f) Gestational carrier.

21 "Child", means an individual born as a result of assisted reproduction whose Parentage
22 may be determined under this chapter.

23 "Donor", a person who contributes a Gamete or Gametes or an Embryo or Embryos to
24 another person for Assisted Reproduction, whether or not for consideration, who is not intended
25 to be a Parent of any resulting Child(ren). A donor is not a parent of a child resulting from
26 assisted reproduction.

27 "Embryo", a cell or group of cells containing a diploid complement of chromosomes or a
28 group of such cells, not including a Gamete, that has the potential to develop into a live born
29 human being if transferred into the body of a woman under conditions in which gestation may
30 reasonably be expected to occur.

31 "Gamete", a cell containing a haploid complement of deoxyribonucleic acid that has the
32 potential to form an Embryo when combined with another Gamete. "Gamete" includes:

- 33 (a) Sperm;
- 34 (b) Eggs; and
- 35 (c) Deoxyribonucleic acid from one human being combined with the cytoplasm,
36 including without limitation cytoplasmic deoxyribonucleic acid, of another human being.

37 "Gestational Carrier", an adult who is neither an Intended Parent nor a donor, who agrees
38 to become pregnant with a Child created from the Gametes of others and not of the adult, by
39 Assisted Reproduction and pursuant to a Gestational Carrier arrangement, and who fulfills the
40 requirements of Section 6 of this Chapter.

41 "Gestational Carrier Agreement", a contract between an Intended Parent(s) and a
42 Gestational Carrier intended to result in a live birth.

43 "Intended Parent", a person, married or unmarried, who manifests an intent to be legally
44 bound as the Parent of a Child resulting from Assisted Reproduction without regard to genetic
45 connection to the Child. In the case of a married couple, any reference to an Intended Parent
46 includes both spouses for purposes of this chapter.

47 "Parent", means an individual who has established a parent-child relationship under this
48 chapter or other applicable law.

49 "Parentage", the legal relationship between a Child and a Parent as established in this
50 chapter.

51 "Record", information that is inscribed on a tangible medium or that is stored in an
52 electronic or other medium and is retrievable in perceivable form.

53 Section 3. PARENTAL STATUS OF DONOR.

54 A Donor as defined in this Chapter is not a Parent of a Child born pursuant to Assisted
55 Reproduction.

56 Section 4. PARENTAGE OF CHILD OF ASSISTED REPRODUCTION.

57 An individual who provides Gametes for Assisted Reproduction with the intent to be a
58 Parent, or who consents to Assisted Reproduction of a person as provided in Section 5 of this
59 Chapter shall be a Parent of the resulting Child. The individual described in this section may be
60 the person who is themselves using Assisted Reproduction.

61 Section 5. CONSENT TO ASSISTED REPRODUCTION.

62 (a) Consent by an individual to be an Intended Parent of a Child conceived through
63 Assisted Reproduction must be in a signed Record. Neither biological relationship to a Child nor
64 marriage to another Intended Parent is necessary for an individual to be an Intended Parent of a
65 Child conceived through Assisted Reproduction.

66 (b) Failure of an Intended Parent to sign a consent required by paragraph (a), before or
67 after birth of the Child, does not preclude a finding of Parentage of that Intended Parent if
68 consent can be proven by other means.

69 Section 6. GESTATIONAL CARRIER AGREEMENT AUTHORIZED

70 (a) A prospective Gestational Carrier, the Gestational Carrier's legal spouse if applicable,
71 and the Intended Parent(s) may enter into an agreement in a Record that provides:

72 (1) The prospective Gestational Carrier agrees to pregnancy by means of Assisted
73 Reproduction;

74 (2) The prospective Gestational Carrier and the Gestational Carrier's legal spouse if
75 applicable, relinquish all parental rights and duties as to a Child conceived through Assisted
76 Reproduction; and

77 (3) The named Intended Parent(s) become the Parents of the Child.

78 (b) A gestational carrier agreement is presumptively enforceable if it meets the following
79 requirements:

80 (1) The Intended Parent(s) must be parties to the gestational agreement.

81 (2) If an Intended Parent is married at the time of the execution of the agreement, that
82 party's legal spouse must be a party to the gestational agreement unless excused by reason of
83 prolonged unexplained absence, legal separation, incapacity, or circumstances constituting an
84 unreasonable withholding of consent.

85 (3) All parties must be at least 21 years of age.

86 (4) The Gestational Carrier must have previously given birth to at least one (1) child.

87 (5) If the parties are represented by counsel, then the parties to the agreement must have
88 independent legal representation regarding the terms and legal consequences of the agreement, or
89 must expressly waive such representation. Specifically, the Gestational Carrier must have had
90 the opportunity to hire independent legal representation, with the fees for this attorney to be paid
91 for by the Intended Parent(s). Nothing in this paragraph precludes the Intended Parents from

92 having joint representation, or the Gestational Carrier and the Gestational Carrier's spouse from
93 having joint representation.

94 (6) The gestational carrier agreement must be in writing and signed by all parties before
95 the commencement of the Assisted Reproduction treatment; specifically, before the transfer of
96 any Embryo that is to be governed by the agreement.

97 (7) At least one of the parties must be domiciled in the Commonwealth, or the Assisted
98 Reproduction facility where the Embryo transfer occurs must be located in the Commonwealth,
99 or the Child must be expected to be born in the Commonwealth.

100 (8) Each party must receive a fully executed copy of the agreement.

101 (c) A gestational carrier agreement does not apply to the birth of a child conceived by
102 means of sexual intercourse.

103 (d) A gestational carrier agreement may provide for payment of reasonable compensation
104 and expenses, which, if paid to a Gestational Carrier, must be negotiated in good faith between
105 the parties.

106 (e) A gestational agreement may not limit the right of the Gestational Carrier to make
107 decisions to safeguard the Gestational Carrier's health.

108 (f) Before any Embryo transfer to the Gestational Carrier, the prospective Gestational
109 Carrier, the prospective Gestational Carrier's legal spouse, or either or both Intended Parents
110 may terminate the gestational agreement by withdrawing consent and giving notice of
111 termination in a Record to all other parties. This subsection does not preclude any action to

112 enforce any reasonable obligations between the parties that may be included in the gestational
113 agreement.

114 Section 7. GESTATIONAL CARRIER AGREEMENT: EFFECT OF SUBSEQUENT
115 MARRIAGE

116 Subsequent marriage of the Gestational Carrier does not affect the validity of a
117 gestational carrier agreement, the consent to the agreement of the Gestational Carrier's
118 subsequent legal spouse is not required, and the Gestational Carrier's subsequent legal spouse is
119 not presumed to be a Parent of the resulting Child.

120 Section 8. EFFECT OF NONCOMPLIANCE ON PARENTAGE DETERMINATION;
121 REMEDIES

122 (a) Except as otherwise provided, a Gestational Carrier Agreement is presumably
123 enforceable if it is in substantial compliance with the requirements of this Chapter.

124 (b) If a birth results under a gestational carrier agreement that is not in compliance with
125 this chapter, the parent-child relationship may be determined upon a finding that it is in the best
126 interest of the Child to establish Parentage as if the gestational carrier compliance were in
127 substantial compliance with this Chapter.

128 (c) In the event of noncompliance with the requirements of this chapter or in the event of
129 a breach of a Gestational Carrier Agreement, the Probate and Family court in the county where
130 the Child resides, or where the Parent(s) reside or where the Child was born, shall determine the
131 respective rights and obligations of the parties to the Gestational Carrier Agreement, including
132 evidence of the intent of the parties at the time of the execution of the agreement.

133 (d) Except as expressly provided in a Gestational Carrier Agreement and in subsection e,
134 in the event of a breach of the Gestational Carrier Agreement by any party to the agreement, the
135 other parties to the agreement are entitled to all remedies available at law or in equity.

136 (e) Specific performance is not an available remedy for a breach by the Gestational
137 Carrier of any term in a Gestational Carrier Agreement that requires the Gestational Carrier to be
138 impregnated or to terminate a pregnancy. Specific performance is an available remedy for a
139 breach by the Gestational Carrier of any term that prevents the Intended Parent(s) from
140 establishing or exercising the full rights of Parentage immediately upon birth of the Child.

141 Section 9. LIMITATION ON LEGAL SPOUSE'S DISPUTE OF PARENTAGE

142 (a) Except as otherwise provided in subsection b, the legal spouse of an Intended Parent
143 may challenge the Parentage of the Child only if an action to challenge Parentage is brought
144 within 60 days after learning of the birth of the Child; and:

145 (i) The legal spouse did not consent to Assisted Reproduction, before or after birth of the
146 Child; and

147 (ii) The legal spouse did not consent for the use of the spouse's own Gametes, or
148 Gametes under the spouse's control, for Assisted Reproduction; and

149 (iii) The legal spouse never openly held out the Child as the spouse's own.

150 (b) The limitation provided in this Section applies to a marriage declared void after
151 Assisted Reproduction.

152 Section 10. BIRTH ORDERS FOR GESTATIONAL CARRIER AGREEMENTS

153 If a Gestational Carrier Agreement satisfies the requirements of this chapter, the Intended
154 Parent(s) shall be the Parent or Parents of the Child immediately upon the birth of the Child, and
155 the resulting Child is considered the Child of the Intended Parent(s) immediately upon the birth
156 of the Child.

157 (a) Any of the parties to a Gestational Carrier Agreement pursuant to Section 6 of this
158 Chapter may petition the Probate and Family Court for a parentage order declaring that the
159 Intended Parent(s) is/are the sole Parents of a Child resulting from Assisted Reproduction and a
160 Gestational Carrier and the Gestational Carrier's spouse or partner, if any, are not the Parent or
161 Parents of such Child.

162 (b) Such a petition may be brought pre- or post-birth in the Probate and Family Court in
163 the county where the Gestational Carrier resides, where the Intended Parent(s) reside, or where
164 the resulting Child is born or is expected to be born.

165 (c) Sworn affidavits of the parties and assisted reproductive physician demonstrating
166 the intent of the parties for the Intended Parent(s) to be the sole legal Parent(s) of the Child and
167 that the Child was born pursuant to Assisted Reproduction shall be sufficient to permit such a
168 finding and a hearing shall not be required unless the court requires additional information which
169 cannot reasonably be ascertained without a hearing.

170 (d) The court shall, within thirty (30) days of the filing of the petition, grant the petition
171 upon a finding that the intent of the parties was for the Intended Parent(s) to be the sole legal
172 Parents of the Child and that the Child was conceived through Assisted Reproduction. Such
173 parentage orders issued under this section shall conclusively establish or affirm, where
174 applicable, the parent-child relationship and shall:

- 175 a. If necessary, order that the Child be surrendered to the Intended Parents;
- 176 b. Order that the certificate of birth name the Intended Parent(s) as the sole Parent(s)
- 177 of the resulting Child and that such certificate of birth shall not name the Gestational Carrier or
- 178 the Gestational Carrier’s spouse or partner, if any, as the Parent or Parents of the resulting Child.
- 179 c. Order any additional relief that the court determines necessary and proper.
- 180 (e) Neither the Commonwealth nor the State Registrar of Vital Records and Statistics
- 181 nor any town clerk nor the hospital where the Child is to be born is a necessary party to a
- 182 proceeding under subsection (a).
- 183 (f) The Court which issues any parentage order pursuant to paragraph (a) may, at the
- 184 request of the Intended Parents or the Child, issue a subsequent parentage order that does not
- 185 declare that the Child was born through surrogacy specifically or Assisted Reproduction
- 186 generally.
- 187 (g) If there is sufficient evidence before the court that the subject Child of the parentage
- 188 petition was not conceived through Assisted Reproduction and this question is relevant to the
- 189 determination of Parentage, the court may order, with good cause and at the expense of the
- 190 parties, genetic testing or take any action the court deems necessary and proper to determine
- 191 Parentage.

192 Section 11. INSPECTION OF RECORDS

193 All proceedings pursuant to this Chapter shall be closed to the public, and papers and

194 records pertaining to such proceedings, including but not limited to all pleadings filed in support

195 of a parentage order, shall be impounded and subject to inspection only upon consent of all the

196 parties or upon a showing of good cause supported by a court order. However, when a Child
197 who is a subject of a parentage order, upon reaching the age of eighteen, the Child may have
198 access to the court documents and pleadings in the Child's case.

199 Section 12. LABORATORY ERROR

200 If due to a laboratory error the resulting Child is found to have been conceived with
201 Gametes other than those consented to by the Intended Parent(s), the Intended Parent(s) are the
202 Parent(s) of the Child unless otherwise determined by a court of competent jurisdiction.