

2018 Regular Session

SENATE BILL NO. 396

BY SENATOR GARY SMITH (On Recommendation of the Louisiana State Law Institute)

CHILDREN. Provides relative to gestational carrier contracts. (gov sig)

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), the  
3 introductory paragraph of (B), and (B)(4), and 2720.3(A) and the introductory  
4 paragraph of (B) and R.S. 40:34.1(B), 34.2(2)(d), 34.5(C) and 34.6, and to repeal  
5 R.S. 9:2720.3(B)(4) and (5) and R.S. 40:46.10, relative to gestational carrier  
6 contracts; to provide for gestational carrier contract requirements; to provide for  
7 enforceability of gestational carrier contracts; to provide for a proceeding to approve  
8 a gestational carrier contract; to provide for the required content of birth certificates;  
9 to provide for legislative intent; to provide for definitions; and to provide for related  
10 matters.

11 Be it enacted by the Legislature of Louisiana:

12 Section 1. R.S. 9:2718, 2718.1(1) and (3), 2720(C) and (D), 2720.2(A)(3), the  
13 introductory paragraph of (B), and (B)(4), and 2720.3(A) and the introductory paragraph of  
14 (B) are hereby amended and reenacted to read as follows:

15 §2718. Purpose and intent

16 The purpose and intent of this Part **Chapter** is to regulate gestational  
17 surrogacy ~~agreements~~ **contracts**. The legislature has been guided by, among other

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

12 §2718.1. Definition of terms

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

16 (1) "Compensation" means a payment of money, objects, services, or  
 17 anything else having monetary value. ~~Compensation shall not include reimbursement~~  
 18 ~~of actual expenses, as provided for in R.S. 9:2720.5(B)(3), to the gestational carrier~~  
 19 ~~or payment for goods or services incurred by the intended parents as a result of the~~  
 20 ~~pregnancy and that would not have been incurred but for the pregnancy. The~~  
 21 ~~payments provided for in R.S. 9:2720.5(B)(3) shall not be prohibited~~  
 22 ~~compensation in connection with a gestational carrier contract.~~

23 \* \* \*

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

29 \* \* \*

1 §2720. Enforceability of gestational carrier contract

2 \* \* \*

3 C. No person shall enter into a gestational carrier contract **that is** for  
4 compensation as defined in R.S. 9:2718.1 or that is not in compliance with all of the  
5 requirements of this Part. Any such contract ~~executed in the state of Louisiana or any~~  
6 ~~other state~~ shall be absolutely null and unenforceable in the state of Louisiana as  
7 contrary to public policy.

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

16 \* \* \*

17 §2720.2. Contractual requirements

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

20 \* \* \*

21 (3) Certify that prior to executing the gestational carrier contract she has  
22 undergone at least two counseling sessions, separated by at least thirty days, with a  
23 licensed clinical social worker, licensed psychologist, medical psychologist, licensed  
24 psychiatrist, or licensed **professional** counselor, to discuss the proposed gestational  
25 carrier.

26 \* \* \*

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

29 \* \* \*

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

4 \* \* \*

5 §2720.3. Proceeding to approve gestational carrier contract

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

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

13 \* \* \*

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

16 §34.1. Original birth certificate; required contents

17 \* \* \*

18 B. 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 biological  
20 parents shall be considered the parents of the child.

21 §34.2. Original birth certificate; required contents; name of child

22 \* \* \*

23 (2) Surname.

24 \* \* \*

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

28 \* \* \*

29 §34.5. Original birth certificate; required contents; name of father

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\* \* \*

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

\* \* \*

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

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

Section 3. R.S. 9:2720.3(B)(4) and (5) are hereby repealed in their entirety.

Section 4. R.S. 40:46.10 is hereby repealed in its entirety.

Section 5. This Act shall become effective upon signature by the governor or, if not signed by the governor, upon expiration of the time for bills to become law without signature by the governor, as provided by Article III, Section 18 of the Constitution of Louisiana. If vetoed by the governor and subsequently approved by the legislature, this Act shall become effective on the day following such approval.

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The original instrument and the following digest, which constitutes no part of the legislative instrument, were prepared by Ashley E. Menou.

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DIGEST

SB 396 Original

2018 Regular Session

Gary Smith

Present law provides the purpose and intent of present law is to regulate gestational surrogacy agreements and to assure that the intended parents of every child born through the use of assisted reproductive technology be legal and biological parents of the child.

Proposed law changes "gestational surrogacy agreements" to "gestational surrogacy contracts" and otherwise retains present law.

Present law defines "compensation", as it relates to gestational surrogacy contracts, as payment of money, objects, services, or anything else having value. Further provides that reimbursement of certain expenses to the gestational carrier or payment for goods or services incurred by the intended parents as a result of the pregnancy and that would not have been incurred but for the pregnancy shall not be considered compensation.

Proposed law retains present law definition of "compensation", as it relates to gestational surrogacy contracts, as payment of money, objects, services, or anything else having value.

Further provides the following payments to the gestational carrier shall not be prohibited compensation:

- (1) Actual medical expenses related to prenatal care and expenses incident to the birth.
- (2) Actual expenses incurred for mental health counseling prior to the birth and for up to six months after birth.
- (3) Certain lost wages.
- (4) Travel costs related to the pregnancy, delivery, court costs, and attorney fees.
- (5) Judicially sanctioned settlement or judgement rendered as a result of the gestational carrier's death, loss of reproductive organs or capability, or other health related health complication.

Present law defines "genetic gestational carrier" as the process by which a woman attempts to carry and give birth to a child using her own gametes and either the gametes of a person who intends to parent the child or donor gametes, when there is an agreement to relinquish the custody of and all rights and obligations to the child.

Proposed law changes the definition of "genetic gestational carrier" to a woman who attempts to carry and give birth to a child using her own gametes and either the gametes of a person who intends to parent the child or donor gametes, when there is a contract to relinquish the custody of and all rights and obligations to the child.

Present law provides that no person shall enter into a gestational carrier contract for compensation or that is not in compliance with applicable provisions of present law and any such contract shall be absolutely null and unenforceable as contrary to public policy.

Present law provides that no person shall enter into a gestational carrier contract that requires the carrier to consent to terminate a pregnancy and any such provision shall be absolutely null and unenforceable as contrary to public policy.

Proposed law retains present law.

Present law requires a gestational carrier to certify that prior to executing the gestational carrier contract she has undergone at least two counseling sessions with certain mental health professionals, including a licensed counselor.

Proposed law changes "licensed counselor" to "licensed professional counselor" and otherwise retains present law.

Present law requires that the intended parents in an enforceable gestational carrier contract have a valid will or succession plan establishing custody for the child in the event both intended parents predecease the birth of the child.

Proposed law requires that the intended parents in an enforceable gestational carrier contract have a testament or authentic act naming a tutor for the child should both intended parents die before the birth of the child.

Present law provides that prior to in utero embryo transfer, the intended parents or the gestational carrier and her spouse may initiate a summary proceeding to have a court approve the gestational carrier contract.

Proposed law requires that the summary proceeding to approve the gestational carrier contract be initiated prior to the in utero embryo transfer by either the intended parents or gestational carrier and her spouse and otherwise retains present law.

Present law provides that a proceeding to approve a gestational carrier contract shall be maintained only if all of the following occur:

- (1) The gestational carrier and each of the intended parents have been domiciled in this state for at least 180 days.
- (2) The intended parents, the gestational carrier, and her spouse if she is married, are all parties to the proceeding.
- (3) A copy of the proposed gestational carrier contract is attached to the motion.
- (4) An independent physician who has treated the intended mother submits an affidavit certifying that in utero embryo transfer is medically necessary. Present law further provides that "medically necessary" means that the intended mother is infertile or that pregnancy creates too great a health risk for the intended mother.

Proposed law removes the requirement that the intended mother must be certified infertile in order to enter into a gestational carrier contract. Further provides that a gestational carrier contract shall be approved by the court if all of the following occur:

- (1) The gestational carrier and each of the intended parents have been domiciled in this state for at least 180 days.
- (2) The intended parents, the gestational carrier, and her spouse if she is married, are all parties to the proceeding.
- (3) A copy of the proposed gestational carrier contract is attached to the motion.

Present law provides that the biological parents of a child born of a surrogate birth parent as a result of an enforceable gestational carrier contract shall be considered the parents of the child.

Proposed law retains present law.

Present law provides that a child born of a surrogate birth parent as a result of an enforceable gestational carrier contract shall have the surname of the biological parents.

Proposed law retains present law.

Present law provides that the full name of the biological father shall be listed on the birth certificate of a child born of a surrogate birth parent as a result of an enforceable gestational carrier contract.

Proposed law retains present law.

Present law provides that the maiden name of the biological mother shall be listed as the mother on the birth certificate of a child born of a surrogate birth parent as a result of an enforceable gestational carrier contract.

Present law provides that in the case of a child born of a surrogate birth parent who is related by blood or affinity to a biological parent, the biological parents, proven to be so by DNA testing, shall be considered the parents of the child.

Proposed law deletes present law.

Effective upon signature of the governor or lapse of time for gubernatorial action.

(Amends R.S. 9:2718, 2718.1(1) and (3), 2720(C) and (D), 2720.2(A)(3) and (B)(intro para) and (B)(4), 2720.3(A) and (B)(intro para), R.S. 40:34.1(B), 34.2(2)(d), 34.5(C), and 34.6; repeals R.S. 9:2720.3(B)(4) and (5) and R.S. 40:46.10)