CHAPTER 375

An Act to amend and reenact §§ 20-156, 20-158 through 20-163, and 20-165 of the Code of Virginia, relating to assisted conception.

[H 1979]

Approved March 14, 2019

Be it enacted by the General Assembly of Virginia:

1. That §§ 20-156, 20-158 through 20-163, and 20-165 of the Code of Virginia are amended and reenacted as follows:

§ 20-156. Definitions.

As used in this chapter unless the context requires a different meaning:

"Assisted conception" means a pregnancy resulting from any intervening medical technology, whether in vivo or in vitro, which completely or partially replaces sexual intercourse as the means of conception. Such intervening medical technology includes, but is not limited to, conventional medical and surgical treatment as well as noncoital reproductive technology such as artificial insemination by donor, cryopreservation of gametes and embryos, in vitro fertilization, uterine embryo lavage, embryo transfer, gamete intrafallopian tube transfer, and low tubal ovum transfer.

"Compensation" means payment of any valuable consideration for services in excess of reasonable medical and ancillary costs.

"Cryopreservation" means freezing and storing of gametes and embryos for possible future use in assisted conception.

"Donor" means an individual, other than a surrogate, who contributes the sperm or egg used in assisted conception.

"Gamete" means either a sperm or an ovum.

"Genetic parent" means an individual who contributes a gamete resulting in a conception.

"Gestational mother" means the woman who gives birth to a child, regardless of her genetic relationship to the child.

"Embryo" means the organism resulting from the union of a sperm and an ovum from first cell division until approximately the end of the second month of gestation.

"Embryo transfer" means the placing of a viable embryo into the uterus of a gestational mother.

"Infertile" means the inability to conceive after one year of unprotected sexual intercourse.

"Intended ~~parents~~ *parent*" means a ~~man and a woman,~~ married ~~to each other,~~ *couple or unmarried individual* who ~~enter~~ *enters* into an agreement with a surrogate under the terms of which ~~they~~ *such parent* will be the ~~parents~~ *parent* of any child born to the surrogate through assisted conception regardless of the genetic relationships between the intended ~~parents~~ *parent*, the surrogate, and the child.

"In vitro" means any process that can be observed in an artificial environment such as a test tube or tissue culture plate.

"In vitro fertilization" means the fertilization of ova by sperm in an artificial environment.

"In vivo" means any process occurring within the living body.

"Legal or contractual custody" means having authority granted by law, contract, or court order to make decisions concerning the use of an embryo.

"Ovum" means the female gamete or reproductive cell prior to fertilization.

"Reasonable medical and ancillary costs" means the costs of the performance of assisted conception, the costs of prenatal maternal health care, the costs of maternal and child health care for a reasonable ~~post partum~~ *postpartum* period, the reasonable costs for medications and maternity clothes, and any additional and reasonable costs for housing and other living expenses attributable to the pregnancy.

"Sperm" means the male gametes or reproductive cells which impregnate the ova.

"Surrogacy contract" means an agreement between *the* intended ~~parents~~ *parent*, a surrogate, and her ~~husband~~ *spouse*, if any, in which the surrogate agrees to be impregnated through the use of assisted conception, to carry any resulting fetus, and to relinquish to the intended ~~parents~~ *parent* the custody of and parental rights to any resulting child.

"Surrogate" means any adult woman who agrees to bear a child carried for *the* intended ~~parents~~ *parent*.

§ 20-158. Parentage of child resulting from assisted conception.

A. Determination of parentage, generally. — Except as provided in subsections B, C, D, and E ~~of this section~~, the parentage of any child resulting from the performance of assisted conception shall be determined as follows:

1. The gestational mother of a child is the child's mother.

2. The ~~husband~~ *spouse* of the gestational mother of a child is the child's ~~father~~ *other parent*,

notwithstanding any declaration of invalidity or annulment of the marriage obtained after the performance of assisted conception, unless ~~he~~ *such spouse* commences an action in which the mother and child are parties within two years after ~~he~~ *such spouse* discovers or, in the exercise of due diligence, reasonably should have discovered the child's birth and in which it is determined that ~~he~~ *such spouse* did not consent to the performance of assisted conception.

3. A donor is not the parent of a child conceived through assisted conception, unless the donor is the ~~husband~~ *spouse* of the gestational mother.

B. Death of spouse. — Any child resulting from the insemination of a ~~wife's~~ *gestational mother's* ovum using her ~~husband's~~ *spouse's* sperm, with his consent, is the child of the ~~husband~~ ~~and~~ ~~wife~~ *gestational mother and her spouse* notwithstanding that, during the ~~ten-month~~ *10-month* period immediately preceding the birth, either party died.

However, any person who dies before in utero implantation of an embryo resulting from the union of ~~his~~ *the spouse's* sperm or ~~her~~ *gestational mother's* ovum with another gamete, whether or not the other gamete is that of the person's spouse, is not the parent of any resulting child unless (i) implantation occurs before notice of the death can reasonably be communicated to the physician performing the procedure or (ii) the person consents to be a parent in writing executed before the implantation.

C. Divorce. — Any child resulting from insemination of a ~~wife's~~ *gestational mother's* ovum using her ~~husband's~~ *spouse's* sperm, with his consent, is the child of the ~~husband~~ ~~and~~ ~~wife~~ *gestational mother and her spouse* notwithstanding that either party filed for a divorce or annulment during the ~~ten-month~~ *10-month* period immediately preceding the birth. Any person who is a party to an action for divorce or annulment commenced by filing before in utero implantation of an embryo resulting from the union of ~~his~~ *the spouse's* sperm or ~~her~~ *gestational mother's* ovum with another gamete, whether or not the other gamete is that of the person's spouse, is not the parent of any resulting child unless (i) implantation occurs before notice of the filing can reasonably be communicated to the physician performing the procedure or (ii) the person consents in writing to be a parent, whether the writing was executed before or after the implantation.

D. Birth pursuant to court approved surrogacy contract. — After approval of a surrogacy contract by the court and entry of an order as provided in subsection D of § 20-160, the intended ~~parents~~ ~~are~~ *parent is* the ~~parents~~ *parent* of any resulting child. However, if the court vacates the order approving the agreement pursuant to subsection B of § 20-161, the surrogate *who is the genetic parent* is the mother of the resulting child and her ~~husband~~ *spouse, if any,* is the ~~father~~ *other parent*. The intended ~~parents~~ *parent* may only obtain parental rights through adoption as provided in Chapter 12 (§ 63.2-1200 et seq.) of Title 63.2.

E. Birth pursuant to surrogacy contract not approved by court. — In the case of a surrogacy contract that has not been approved by a court as provided in § 20-160, the parentage of any resulting child shall be determined as follows:

1. The gestational mother is the child's mother unless the intended mother is a genetic parent, in which case the intended mother is the mother.

2. If ~~either~~ ~~of~~ ~~the~~ ~~intended~~ ~~parents~~ *an intended parent* is a genetic parent of the resulting child, ~~the~~ ~~intended~~ ~~father~~ ~~is~~ ~~the~~ ~~child's~~ ~~father~~ *such intended parent is the child's parent*. However, if (i) the surrogate is ~~married~~ *a genetic parent,* (ii) *the surrogate is married and* her ~~husband~~ *spouse* is a party to the surrogacy contract, and (iii) the surrogate *who is a genetic parent* exercises her right to retain custody and parental rights to the resulting child pursuant to § 20-162, then the surrogate and her ~~husband~~ *spouse* are the parents. *If the surrogate is unmarried and (a) is a genetic parent, (b) is a party to the surrogacy contract, and (c) exercises her right to retain custody and parental rights to the resulting child pursuant to § 20-162, then the surrogate is the parent.*

3. If ~~neither~~ ~~of~~ ~~the~~ *no* intended ~~parents~~ *parent* is a genetic parent of the resulting child, *but the embryo that was used is subject to the legal or contractual custody of an intended parent, then such intended parent is the parent. However, if no intended parent is a genetic parent, and the embryo that was used is not subject to the legal or contractual custody of such intended parent, then* the surrogate is the mother and her ~~husband~~ *spouse, if any,* is the child's ~~father~~ *other parent* if ~~he~~ *such other parent* is a party to the contract. ~~The~~ *In such an event, the* intended ~~parents~~ *parent* may only obtain parental rights through adoption as provided in Chapter 12 (§ 63.2-1200 et seq.) of Title 63.2.

4. After the signing and filing of the surrogate consent and report form in conformance with the requirements of subsection A of § 20-162, the intended ~~parents~~ ~~are~~ *parent is* the ~~parents~~ *parent* of the child and the surrogate and her ~~husband~~ *spouse,* if any, shall not be the parents of the child.

§ 20-159. Surrogacy contracts permissible.

A. A surrogate, her ~~husband~~ *spouse,* if any, and *the* prospective intended ~~parents~~ *parent* may enter into a written agreement whereby the surrogate may relinquish all her rights and duties as parent of a child conceived through assisted conception, and the *prospective* intended ~~parents~~ *parent* may become the ~~parents~~ *parent* of the child as provided in subsection D or E of § 20-158.

B. Surrogacy contracts ~~shall~~ *may* be approved by the court as provided in § 20-160. However, any surrogacy contract that has not been approved by the court shall be governed by the provisions of §§ 20-156 through 20-159 and §§ 20-162 through 20-165 including the provisions for reformation in

conformance with this chapter as provided in § 20-162.

§ 20-160. Petition and hearing for court approval of surrogacy contract; requirements; orders.

A. Prior to the performance of assisted conception, the intended ~~parents~~ *parent*, the surrogate, and her ~~husband~~ *spouse, if any*, shall join in a petition to the circuit court of the county or city in which at least one of the parties resides. The surrogacy contract shall be signed by all the parties and acknowledged before an officer or other person authorized by law to take acknowledgments.

A copy of the contract shall be attached to the petition. The court shall appoint a guardian ad litem to represent the interests of any resulting child and shall appoint counsel to represent the surrogate. The court shall order a home study by a local department of social services or welfare or a licensed child-placing agency, to be completed prior to the hearing on the petition.

All hearings and proceedings conducted under this section shall be held in camera, and all court records shall be confidential and subject to inspection only under the standards applicable to adoptions as provided in § 63.2-1245. The court conducting the proceedings shall have exclusive and continuing jurisdiction of all matters arising under the surrogacy contract until all provisions of the contract are fulfilled.

B. The court shall hold a hearing on the petition. The court shall enter an order approving the surrogacy contract and authorizing the performance of assisted conception for a period of twelve months after the date of the order, and may discharge the guardian ad litem and attorney for the surrogate upon finding that:

1. The court has jurisdiction in accordance with § 20-157;

2. A local department of social services or welfare or a licensed child-placing agency has conducted a home study of the intended parents, the surrogate, and her ~~husband~~ *spouse*, if any, and has filed a report of this home study with the court;

3. The intended ~~parents~~ *parent*, the surrogate, and her ~~husband~~ *spouse*, if any, meet the standards of fitness applicable to adoptive parents;

4. All the parties have voluntarily entered into the surrogacy contract and understand its terms and the nature, meaning, and effect of the proceeding and understand that any agreement between them for payment of compensation is void and unenforceable;

5. The agreement contains adequate provisions to guarantee the payment of reasonable medical and ancillary costs either in the form of insurance, cash, escrow, bonds, or other arrangements satisfactory to the parties, including allocation of responsibility for such costs in the event of termination of the pregnancy, termination of the contract pursuant to § 20-161, or breach of the contract by any party;

6. The surrogate has had at least one pregnancy, and has experienced at least one live birth, and bearing another child does not pose an unreasonable risk to her physical or mental health or to that of any resulting child. This finding shall be supported by medical evidence;

7. Prior to signing the surrogacy contract, the intended ~~parents~~ *parent*, the surrogate, and her ~~husband~~ *spouse*, if any, have submitted to physical examinations and psychological evaluations by practitioners licensed to perform such services pursuant to Title 54.1, and the court and all parties have been given access to the records of the physical examinations and psychological evaluations;

8. The intended ~~mother~~ *parent* is infertile, is unable to bear a child, or is unable to do so without unreasonable risk to the unborn child or to the physical or mental health of the intended ~~mother~~ *parent* or the child. This finding shall be supported by medical evidence;

9. At least one ~~of the~~ intended ~~parents~~ *parent* is expected to be the genetic parent of any child resulting from the agreement *or such intended parent has the legal or contractual custody of the embryo at issue*;

10. The ~~husband~~ *spouse* of the surrogate, if any, is a party to the surrogacy agreement;

11. All parties have received counseling concerning the effects of the surrogacy by a qualified health care professional or social worker, and a report containing conclusions about the capacity of the parties to enter into and fulfill the agreement has been filed with the court; and

12. The agreement would not be substantially detrimental to the interests of any of the affected persons.

C. Unless otherwise provided in the surrogacy contract, all court costs, counsel fees, and other costs and expenses associated with the hearing, including the costs of the home study, shall be assessed against the intended ~~parents~~ *parent*.

D. Within seven days of the birth of any resulting child, the intended ~~parents~~ *parent* shall file a written notice with the court that the child was born to the surrogate within 300 days after the last performance of assisted conception. Upon the filing of this notice and a finding that ~~at least~~ one ~~of the~~ intended ~~parents~~ *parent* is the genetic parent of the resulting child as substantiated by medical evidence, *or upon proof of the legal or contractual custody of the embryo by such intended parent,* the court shall enter an order directing the State Registrar of Vital Records to issue a new birth certificate naming the intended ~~parents~~ *parent* as the ~~parents~~ *parent* of the child pursuant to § 32.1-261.

If evidence cannot be produced that at least one ~~of the~~ intended ~~parents~~ *parent* is the genetic parent of the resulting child, *or proof of the legal or contractual custody of the embryo by such intended parent cannot be produced,* the court shall not enter an order directing the issuance of a new birth

certificate naming the intended ~~parents~~ *parent* as the ~~parents~~ *parent* of the child, and the surrogate and her ~~husband~~ *spouse*, if any, shall be the parents of the child. The intended ~~parents~~ *parent* may obtain parental rights only through adoption as provided in Chapter 12 (§ 63.2-1200 et seq.) of Title 63.2.

§ 20-161. Termination of court-approved surrogacy contract.

A. Subsequent to an order entered pursuant to subsection B of § 20-160, but before the surrogate becomes pregnant through the use of assisted conception, the court for cause, or the surrogate, her ~~husband~~ *spouse*, if any, or the intended ~~parents~~ *parent, for cause,* may terminate the agreement by giving written notice of termination to all other parties and by filing notice of the termination with the court. Upon receipt of the notice, the court shall vacate the order entered under subsection B of § 20-160.

B. Within 180 days after the last performance of any assisted conception, a surrogate who is also a genetic parent may terminate the agreement by filing written notice with the court. The court shall vacate the order entered pursuant to subsection B of § 20-160 upon finding, after notice to the parties to the agreement and a hearing, that the surrogate has voluntarily terminated the agreement and that she understands the effects of the termination.

Unless otherwise provided in the contract as approved, the surrogate shall incur no liability to the intended ~~parents~~ *parent* for exercising her rights of termination pursuant to this section.

§ 20-162. Contracts not approved by the court; requirements.

A. In the case of any surrogacy agreement for which prior court approval has not been obtained pursuant to § 20-160, the provisions of this section and §§ 20-156 through 20-159 and §§ 20-163 through 20-165 shall apply. Any provision in a surrogacy contract that attempts to reduce the rights or responsibilities of the intended ~~parents~~ *parent, the* surrogate, or her ~~husband~~ *spouse*, if any, or the rights of any resulting child shall be reformed to include the requirements set forth in this chapter. A provision in the contract providing for compensation to be paid to the surrogate is void and unenforceable. Such surrogacy contracts shall be enforceable and shall be construed only as follows:

1. The surrogate, her ~~husband~~ *spouse*, if any, and the intended ~~parents~~ *parent* shall be parties to any such surrogacy contract.

2. The contract shall be in writing, signed by all the parties, and acknowledged before an officer or other person authorized by law to take acknowledgments.

3. Upon expiration of three days following birth of any resulting child, the surrogate may relinquish her parental rights to the intended ~~parents~~ *parent*, if at least one ~~of~~ ~~the~~ intended ~~parents~~ *parent* is the genetic parent of the child, *or the embryo was subject to the legal or contractual custody of such intended parent*, by signing a surrogate consent and report form naming the intended ~~parents~~ *parent* as the ~~parents~~ *parent* of the child. The surrogate consent and report form shall be developed, furnished, and distributed by the State Registrar of Vital Records. The surrogate consent and report form shall be signed and acknowledged before an officer or other person authorized by law to take acknowledgments. The surrogate consent and report form, a copy of the contract, and a statement from the physician who performed the assisted conception stating *either* the genetic relationships between the child, the surrogate, and ~~the~~ *at least one* intended ~~parents,~~ ~~at least one of whom shall be the genetic parent of the child~~ *parent, or proof of the legal or contractual custody of the embryo,* shall be filed with the State Registrar within 180 days after the birth. The statement from the physician shall be signed and acknowledged before an officer or other person authorized by law to take acknowledgments. There shall be a rebuttable presumption that the statement from the physician accurately states the genetic relationships among the child, the surrogate, and the intended ~~parents~~ *parent*. Where a physician's statement is not available *and at least one intended parent is a genetic parent,* DNA testing establishing the genetic relationships between the child, the surrogate, and the intended ~~parents~~ *parent* may be substituted for the physician's statement.

4. Upon the filing of the surrogate consent and report form and the required attachments, including the physician's statement, *DNA testing establishing the genetic relationships between the child, the surrogate, and the intended parent, or proof of the legal or contractual custody of the embryo,* within 180 days of the birth, a new birth certificate shall be established by the State Registrar for the child naming the intended ~~parents~~ *parent* as the ~~parents~~ *parent* of the child as provided in § 32.1-261.

B. Any contract governed by the provisions of this section shall include or, in the event such provisions are not explicitly covered in the contract or are included but are inconsistent with this section, shall be deemed to include the following provisions:

1. The intended ~~parents~~ *parent* shall be the ~~parents~~ *parent* of any resulting child ~~only~~ when the surrogate relinquishes her parental rights as provided in subdivision A 3 ~~of this section~~ and a new birth certificate is established as provided in subdivision A 4 of this section and § 32.1-261, *unless parentage is instead established through Chapter 3.1 (§ 20-49.1 et seq.)*;

2. Incorporation of this chapter and a statement by each of the parties that they have read and understood the contract, they know and understand their rights and responsibilities under Virginia law, and the contract was entered into knowingly and voluntarily; and

3. A guarantee by the intended ~~parents~~ *parent* for payment of reasonable medical and ancillary costs either in the form of insurance, cash, escrow, bonds, or other arrangements satisfactory to the parties,

including allocation of responsibility for such costs in the event of termination of the pregnancy, termination of the contract, or breach of the contract by any party.

C. Under any contract that does not include an allocation of responsibility for reasonable medical and ancillary costs in the event of termination of the pregnancy, termination of the contract, or breach of the contract by any party, the following provisions shall control:

1. If the intended ~~parents~~ *parent* and the surrogate and her ~~husband~~ *spouse*, if any, and if ~~he~~ *such spouse* is a party to the contract, consent in writing to termination of the contract, the intended ~~parents are~~ *parent is* responsible for all reasonable medical and ancillary costs for a period of six weeks following the termination.

2. If the surrogate *is a genetic parent and* voluntarily terminates the contract during the pregnancy, without consent of the intended ~~parents~~ *parent*, the intended ~~parents~~ *parent* shall be responsible for one-half of the reasonable medical and ancillary costs incurred prior to the termination.

3. If, after the birth of any resulting child, the surrogate *is also a genetic parent and* fails to relinquish parental rights to the intended ~~parents~~ *parent* pursuant to the contract, the intended ~~parents~~ *parent* shall be responsible for one-half of the reasonable medical and ancillary costs incurred prior to the birth.

§ 20-163. Miscellaneous provisions related to all surrogacy contracts.

A. The surrogate shall be solely responsible for the clinical management of the pregnancy.

B. After the entry of an order under subsection B of § 20-160 or upon the execution of a contract pursuant to § 20-162, the marriage of the surrogate shall not affect the validity of the order or contract, and her ~~husband~~ *spouse* shall not be deemed a party to the contract in the absence of his explicit written consent.

C. Following the entry of an order pursuant to subsection D of § 20-160 or upon the relinquishing of the custody of and parental rights to any resulting child and the filing of the surrogate consent and report form as provided in § 20-162, the intended ~~parents~~ *parent* shall have the custody of, parental rights to, and full responsibilities for any child resulting from the performance of assisted conception from a surrogacy agreement regardless of the child's health, physical appearance, any mental or physical handicap, and regardless of whether the child is born alive.

D. A child born to a surrogate within 300 days after assisted conception pursuant to an order under subsection B of § 20-160 or a contract under § 20-162 is presumed to result from the assisted conception. This presumption is conclusive as to all persons who fail to file an action to test its validity within two years after the birth of the child. The child and the parties to the contract shall be named as parties in any such action. The action shall be filed in the court that issued or could have issued an order under § 20-160.

E. Health care providers shall not be liable for recognizing the surrogate as the mother of the resulting child before receipt of a copy of an order entered under § 20-160 or a copy of the contract, or for recognizing the intended ~~parents~~ *parent* as the ~~parents~~ *parent* of the resulting child after receipt of such order or copy of the contract.

§ 20-165. Surrogate brokers prohibited; penalty; liability of surrogate brokers.

A. It shall be unlawful for any person, firm, corporation, partnership, or other entity to accept compensation for recruiting or procuring surrogates or to accept compensation for otherwise arranging or inducing *an* intended ~~parents~~ *parent* and surrogates to enter into surrogacy contracts in this Commonwealth. A violation of this section shall be punishable as a Class 1 misdemeanor.

B. Any person who acts as a surrogate broker in violation of this section shall, in addition, be liable to all the parties to the purported surrogacy contract in a total amount equal to three times the amount of compensation to have been paid to the broker pursuant to the contract. One-half of the damages under this subsection shall be due the surrogate and her ~~husband~~ *spouse*, if any, and if he is a party to the contract, and one-half shall be due the intended ~~parents~~ *parent*.

An action under this section shall be brought within five years of the date of the contract.

C. The provisions of this section shall not apply to the services of an attorney in giving legal advice or in preparing a surrogacy contract.