

SENATE BILL NO. 162

BY SENATOR GARY SMITH AND REPRESENTATIVES ADAMS, ANDERS, ARNOLD, BERTHELOT, BILLIOT, WESLEY BISHOP, BROWN, TIM BURNS, BURRELL, COX, DIXON, GISCLAIR, HARRISON, HOLLIS, HONORE, HUNTER, KATRINA JACKSON, JAMES, JEFFERSON, KLECKLEY, LEOPOLD, LOPINTO, MILLER, MORENO, JIM MORRIS, PYLANT, REYNOLDS, RITCHIE, SCHEXNAYDER, ST. GERMAIN, STOKES, THIBAUT, THIERRY, ALFRED WILLIAMS AND PATRICK WILLIAMS (On Recommendation of the Louisiana State Law Institute)

Prefiled pursuant to Article III, Section 2(A)(4)(b)(i) of the Constitution of Louisiana.

VETOED
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Veto Message

1 AN ACT
2 To amend and reenact R.S. 40:34(B)(1)(a)(viii), (h)(v), (i), and (j), to enact Chapter 1-C of
3 Code Title IV, of Code Book III, of Title 9 of the Louisiana Revised Statutes of
4 1950, to be comprised of R.S. 9:2718 through 2720.15, and to repeal R.S. 9:2713,
5 relative to surrogacy contracts; to provide for amendments to birth certificates; to
6 provide for definitions relative to surrogacy contracts; to provide for genetic
7 surrogacy contracts; to provide for the enforceability of gestational surrogacy
8 contracts; to provide for the parties to a gestational surrogacy contract; to provide for
9 contractual requirements for a gestational surrogacy contract; to provide for a
10 proceeding to approve a gestational surrogacy contract; to provide for the check of
11 the criminal records of the parties to a gestational surrogacy contract; to provide for
12 a pre-embryo transfer order relative to a gestational surrogacy contract; to provide
13 for matters relative to multiple attempts at in utero embryo transfer; to provide for
14 confidentiality of the proceedings relative to a gestational surrogacy contract; to
15 provide for continuing and exclusive jurisdiction to the proceedings relative to a
16 gestational surrogacy contract; to provide for the termination of a gestational
17 surrogacy contract by notice; to provide for remedies for the failure to perform under
18 a gestational surrogacy contract; to provide for the termination of a gestational
19 surrogacy contract and for the effects of divorce, nullity, and death on a gestational
20 surrogacy contract; to provide for the effect of a subsequent marriage of the

1 gestational carrier on a gestational surrogacy contract; to provide for a post-birth
2 order; to provide for DNA testing when the child is alleged not to be the child of the
3 intended parents; to provide for time limitations and finality; and to provide for
4 related matters.

5 Be it enacted by the Legislature of Louisiana:

6 Section 1. Chapter 1-C of Code Title IV, of Code Book III, of Title 9 of the
7 Louisiana Revised Statutes of 1950, to be comprised of R.S. 9:2718 through 2720.15, is
8 hereby enacted to read as follows:

9 **CHAPTER 1-C SURROGACY CONTRACTS**

10 **PART I. DEFINITIONS**

11 **§2718. Definition of terms**

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

15 **(1) "Gamete" means either a sperm or an egg.**

16 **(2) "Genetic surrogacy" means the process by which a woman attempts**
17 **to carry and give birth to a child using her own gametes and either the gametes**
18 **of a person who intends to parent the child or donor gametes, when there is an**
19 **agreement to relinquish the custody of and all rights and obligations to the**
20 **child.**

21 **(3) "Gestational surrogacy" means the process by which a woman**
22 **attempts to carry and give birth to a child conceived by in vitro fertilization**
23 **using the gametes of the intended parents and to which the gestational carrier**
24 **has made no genetic contribution.**

25 **(4) "Gestational carrier" means a woman who agrees to engage in a**
26 **gestational surrogacy.**

27 **(5) "In utero embryo transfer" means the medical procedure whereby**
28 **the genetic mother's egg is fertilized with the sperm of the genetic father, with**
29 **the resulting embryo transferred into the uterus of the gestational carrier.**

30 **(6) "Intended parents" means married persons who contribute their**

1 gametes to be used in assisted reproduction, and who enter into an enforceable
 2 gestational surrogacy contract, as defined in this Chapter, with a gestational
 3 carrier pursuant to which they will be the legal parents of the child resulting
 4 from that assisted reproduction.

5 PART II. GENETIC SURROGACY

6 ~~§2713.~~ **2719.** Contract for surrogate motherhood **genetic surrogacy**; nullity

7 A. A contract for surrogate motherhood as defined herein **genetic surrogacy**
 8 shall be absolutely null and shall be void and unenforceable as contrary to public
 9 policy.

10 B. ~~"Contract for surrogate motherhood"~~ means any agreement whereby a
 11 person not married to the contributor of the sperm agrees for valuable consideration
 12 to be inseminated, to carry any resulting fetus to birth, and then to relinquish to the
 13 contributor of the sperm the custody and all rights and obligations to the child.

14 Comments - 2013

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

21
 22 (b) If individuals choose to ignore the provisions of this Chapter and engage
 23 in prohibited forms of surrogacy, this Chapter provides them no legal protection.
 24 Parentage, custody, and other questions will be determined in accordance with the
 25 general provisions of Louisiana law. See, e.g., C.C. Art. 184.

26 PART III. GESTATIONAL SURROGACY

27 **§2720. Enforceability of gestational surrogacy contract**

28 **A. In accordance with the requirements of this Part, a gestational**
 29 **carrier, her spouse if she is married, and the intended parents may enter into**
 30 **a written contract, known as a gestational surrogacy contract.**

31
 32 **B. A gestational surrogacy contract is enforceable only if approved by**
 33 **a court in advance of in utero embryo transfer, as provided in this Part.**

34 Comment - 2013

35 Subsection B makes it clear that entering into a gestational surrogacy contract
 36 is a significant legal act that must be approved by a court, just as an adoption of a
 37 minor must be judicially approved. This Part provides for state involvement, through

1 judicial oversight, of the gestational surrogacy contract before, during, and after the
 2 assisted reproduction process. The purpose of early involvement is to ensure that the
 3 parties are appropriate for a gestational surrogacy contract, that they understand the
 4 consequences of what they are undertaking, and that the best interests of a child born
 5 of the gestational surrogacy contract are considered before the arrangement is
 6 approved. Parties who enter into a gestational surrogacy contract not meeting the
 7 requirements of this Part may not have their contract judicially approved; in such
 8 cases, the law provides no rights or remedies governing their disputes.
 9

10 **§2720.1. Parties to a gestational surrogacy contract**

11 **A gestational carrier shall, at the time the gestational surrogacy contract**
 12 **is executed:**

13 **(1) Be at least twenty-five years of age.**

14 **(2) Have given birth to at least one child.**

15 **§2720.2. Contractual requirements**

16 **A. In an enforceable gestational surrogacy contract, the gestational**
 17 **carrier shall:**

18 **(1) Agree to become pregnant by means of in utero embryo transfer,**
 19 **using the gametes of the intended parents, and to give birth to the resulting**
 20 **child.**

21 **(2) Agree to submit to reasonable medical evaluation and treatment**
 22 **during the term of the pregnancy, to adhere to reasonable medical instructions**
 23 **about prenatal health, and to execute medical records releases under R.S.**
 24 **40:1299.96 in favor of the intended parents.**

25 **(3) Certify that she has undergone at least two counseling sessions,**
 26 **separated by at least thirty days, with a licensed clinical social worker, licensed**
 27 **psychologist, medical psychologist, licensed psychiatrist, or licensed counselor,**
 28 **to discuss the proposed surrogacy.**

29 **(4) Agree, along with her spouse if she is married, to relinquish all rights**
 30 **and duties as the parents of a child born as a result of in utero embryo transfer.**

31 **B. In an enforceable gestational surrogacy contract, the intended**
 32 **parents shall:**

33 **(1) Acknowledge that the gestational carrier has sole authority with**
 34 **respect to medical decision-making during the term of the pregnancy consistent**

1 with the rights of a pregnant woman carrying her own biological child.

2 (2) Agree to accept custody of and to assume full parental rights and
 3 responsibilities for the child immediately upon the child's birth, regardless of
 4 any impairment of the child.

5 (3) Be recognized as the legal parents of the child.

6 C. The parties shall agree upon a preliminary estimate of reasonable
 7 expenses and their allocation in accordance with R.S. 9:2720.5.

8 Comments - 2013

9 (a) The gestational surrogacy contract regulated under this Part is a contract
 10 subject to the provisions governing Conventional Obligations or Contracts in Title
 11 IV, Book III of the Louisiana Civil Code.

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

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

19 (d) In requiring the parties to estimate expenses during the contracting
 20 process and to have this agreed-upon financial arrangement approved by the court,
 21 this Chapter mirrors the financial provisions of Louisiana adoption law. Mothers
 22 who relinquish their children for adoption in this state may not financially profit
 23 from the transaction, and are limited to recovery of actual and reasonable expenses.
 24 This and subsequent provisions of this Chapter subject contracts for gestational
 25 surrogacy to the same limitations on financial remuneration. See, e.g., Ch.C. Art.
 26 1223.

27 (e) This Section speaks only to what must be provided for in the gestational
 28 surrogacy contract. There are additional requirements that must be met before a court
 29 may approve a gestational surrogacy agreement. See, e.g., R.S. 9:2720.1 (detailing
 30 requirements of eligibility for the gestational surrogate) and R.S. 9:2720.3 (setting
 31 out residence and other procedural requirements).

32 §2720.3. Proceeding to approve surrogacy contract

33 A. Prior to in utero embryo transfer, the intended parents or the
 34 gestational carrier and her husband, if she is married, may initiate a summary
 35 proceeding in the court exercising jurisdiction over the adoption of minors
 36 where the intended parents or the gestational carrier reside, seeking to have the
 37 court approve a gestational surrogacy contract.

38 B. A proceeding to approve a gestational surrogacy contract shall be
 39 maintained only if:

1 **(2) Order that the Department of Children and Family Services conduct**
2 **a records check for validated complaints of child abuse or neglect in this or any**
3 **other state in which either of the intended parents and the gestational carrier**
4 **and her spouse, if she is married, has been domiciled since becoming a major.**

5 **(3) Order that the Judicial Administrator's Office of the Louisiana**
6 **Supreme Court conduct a records check for court orders entered into the**
7 **Louisiana Protective Order Registry involving each of the intended parents and**
8 **the gestational carrier and her spouse, if she is married.**

9 **B. Each order shall state the full name, date of birth, social security**
10 **number, and former and current state of domicile since becoming a major of**
11 **each subject of the check.**

12 **C. The sheriff or the office of state police, Louisiana Bureau of Criminal**
13 **Identification and Information, the Department of Children and Family**
14 **Services, and the Judicial Administrator's Office of the Louisiana Supreme**
15 **Court shall accord priority to these orders and shall provide a certificate to the**
16 **court indicating all information discovered, or that no information has been**
17 **found.**

18 **§2720.5. Pre-Embryo Transfer Order**

19 **A. Within sixty days of the initiation of a proceeding to approve a**
20 **gestational surrogacy contract, the court shall set the matter for hearing, and**
21 **after the hearing may issue an order, known as the Pre-Embryo Transfer**
22 **Order, approving the gestational surrogacy contract and declaring that the**
23 **intended parents shall be recognized as the legal parents of a child born**
24 **pursuant to the gestational surrogacy contract.**

25 **B. The court shall issue a Pre-Embryo Transfer Order upon finding**
26 **that:**

27 **(1) The requirements of R.S. 9:2720-2720.3 have been satisfied and the**
28 **reports of criminal records, validated complaints of child abuse or neglect, and**
29 **Louisiana Protective Order Registry checks show that there is no risk of harm**
30 **to the child.**

1 surrogacy contract and the Pre-Embryo Transfer Order shall continue in full
 2 force and effect in accordance with the parties' agreement until terminated
 3 under R.S. 9:2720.9 or 2720.11, or until a live birth occurs pursuant to the
 4 gestational surrogacy contract.

5 §2720.7. Confidentiality

6 All proceedings governed by this Chapter shall be heard by the judge in
 7 chambers or in a closed hearing, and no one shall be admitted to the hearings
 8 except the parties in interest, their attorneys, and officers of the court. The
 9 court, in its discretion, may grant the request of a petitioner to permit others to
 10 be present at the hearing. The court records of these proceedings and the
 11 identities of the parties to a gestational surrogacy contract shall be sealed and
 12 are subject to disclosure, release or inspection only upon application to the
 13 court and in conformity with the applicable requirements of confidentiality
 14 applicable to adoptions in the Children's Code.

15 §2720.8. Continuing and exclusive jurisdiction

16 Subject to the jurisdictional requirements of the Uniform Child Custody
 17 Jurisdiction and Enforcement Act, the court having jurisdiction over the
 18 proceeding to approve a gestational surrogacy contract pursuant to this Part
 19 shall have exclusive, continuing jurisdiction of all matters arising out of the
 20 gestational surrogacy contract.

21 Comment - 2013

22 This Section is designed to minimize the possibility of parallel litigation in
 23 different states and the consequent risk of kidnapping for strategic purposes.

24 §2720.9. Termination of contract by notice

25 A. Before each in utero embryo transfer, the gestational carrier or either
 26 of the intended parents may terminate the gestational surrogacy contract by
 27 filing a motion with the court giving notice of termination and serving all other
 28 parties with the motion. Upon filing of the motion, the court shall issue an order
 29 vacating the Pre-Embryo Transfer Order.

30 B. Neither a gestational carrier nor her spouse, if she is married, is liable
 31

1 to the intended parents for terminating a gestational surrogacy contract
 2 pursuant to this Section.

3 C. Absent timely notice of termination by an intended parent or the
 4 gestational carrier, no court shall terminate a gestational surrogacy contract
 5 after issuance of a valid Pre-Embryo Transfer Order except for good cause
 6 shown after a hearing. No court shall terminate a gestational surrogacy contract
 7 after a successful in utero embryo transfer.

8 Comments - 2013

9 (a) Subsection A permits a party to terminate a gestational surrogacy contract
 10 after the Pre-Implantation Order by canceling the arrangement before in utero
 11 implantation has occurred. This provides for cancellation during a time when the
 12 interests of the parties would not be unduly prejudiced by termination. The intended
 13 parents certainly have an expectation interest during this time, but the nature of this
 14 interest is little different from that which they would have while they were
 15 attempting to create a pregnancy through traditional means.

16 (b) It is certainly possible that if the gestational surrogate terminates the
 17 gestational surrogacy contract after issuance of a Pre-Implantation Order, the
 18 intended parents may have already expended substantial sums to undergo the
 19 fertilization process. Fertilization costs may not be recovered from the gestational
 20 surrogate, however, as any resulting embryos are genetically related to the intended
 21 parents, and could be used by the intended parents in future attempts at assisted
 22 reproduction.

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

25
 26 (d) The use of the word "each" in Subsection A indicates that the possibility
 27 of termination by notice remains before each implantation attempt, even if there are
 28 multiple attempts.

29
 30 (e) Good cause may include a finding of some change in circumstances that
 31 would have prevented the court from issuing the Pre-Implantation Order. A change
 32 in the results of criminal history, child abuse, or domestic violence registry checks
 33 after issuance of the Pre-Implantation Order, for instance, may provide good cause
 34 for termination.

35
 36 **§2720.10. Remedies**

37 **After in utero embryo transfer, a failure to perform under the**
 38 **gestational surrogacy contract does not give rise to the right to dissolution. The**
 39 **parties' rights and responsibilities are otherwise governed by the rules of the**
 40 **Titles on Obligations in General and Conventional Obligations or Contracts.**

41 Comment - 2013

42 Before each in utero implantation, the gestational surrogate or either intended
 43 parent may terminate the gestational surrogacy contract by giving the timely notice

1 provided for in R.S. 9:2720.9. After implantation, the remedy of contractual
 2 dissolution would be inequitable. If the intended parents failed to pay the
 3 agreed-upon expenses, for instance, allowing the gestational surrogate to take
 4 advantage of extra-judicial dissolution procedures would not be an appropriate
 5 remedy given the nature of the multiple and conflicting interests involved. The
 6 damages, specific performance, and other provisions of the Title on Conventional
 7 Obligations or Contracts, however, do apply to gestational surrogacy contracts.
 8

9 **§2720.11. Termination of contract and effects of divorce, nullity, death**

10 **A judgment of divorce or judicial declaration of nullity of a marriage**
 11 **between the intended parents, entered before in utero embryo transfer,**
 12 **terminates the gestational surrogacy contract. Upon the filing of a motion**
 13 **notifying the court of the judgment of divorce or declaration of nullity, the court**
 14 **shall issue an order vacating the Pre-Embryo Transfer Order. If an intended**
 15 **parent dies before in utero embryo transfer, the deceased individual is not a**
 16 **parent of the resulting child unless the child was born within three years of the**
 17 **death of the decedent and the deceased agreed in writing that if the in utero**
 18 **embryo transfer were to occur after death, the deceased individual would be a**
 19 **parent of the child and that the child would have all rights, including the**
 20 **capacity to inherit from the decedent.**

21 Comments - 2013

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

32 (b) This Section tracks the policy and language of R.S. 9:391.1, which
 33 regulates children conceived after the death of a parent using the decedent's gametes.
 34

35 **§2720.12. Effect of subsequent marriage**

36 **After the issuance of a Pre-Embryo Transfer Order, subsequent**
 37 **marriage of the gestational carrier does not affect the validity of a gestational**
 38 **surrogacy contract. The consent of the spouse is not required, and he is not a**
 39 **presumed father of the resulting child, notwithstanding any legal presumption**
 40 **to the contrary.**

Comment - 2013

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

§2720.13. Post-Birth Order

A. Upon birth of a child to a gestational carrier within three hundred days after in utero embryo transfer, the intended parents or their successors, the gestational carrier, or her spouse shall file a motion requesting issuance of a Post-Birth Order. The motion shall be accompanied by a certified copy of the child's original birth certificate and an affidavit executed by the intended parents containing an accounting of fees and charges paid or agreed to be paid by or on behalf of the intended parents in connection with the gestational surrogacy contract.

B. If neither the intended parents, their successors, the gestational carrier, or her spouse file the motion described in Subsection A of this Section, the Department of Children and Family Services may file a motion notifying the court that a child has been born to the gestational carrier within three hundred days after in utero embryo transfer and the court shall set the motion for hearing.

C. The court may order a hearing and, after finding that the parties have complied with this Part, shall issue a Post-Birth Order:

(1) Confirming that the intended parents are the legal parents of the child and are financially responsible for the child.

(2) If necessary, ordering that the child be surrendered to the intended parents.

(3) Directing that a new birth certificate be created and that the intended parents be listed on the birth certificate as the parents of the child pursuant to R.S. 40:32 et seq., and that the original birth certificate be sealed and subject to release or inspection only upon application to the court for good

1 cause shown.

2 §2720.14. DNA testing

3 If the child is alleged not to be the child of the intended parents,
 4 supported by a sworn affidavit alleging specific facts which either tend to prove
 5 or deny filiation, the court shall order genetic testing to determine the parentage
 6 of the child. If the court finds after a contradictory hearing that the child is the
 7 genetic child of the carrier, the court shall issue an order recognizing her as a
 8 legal parent of the child. If any party refuses to submit to such tests, the court
 9 may resolve the question of filiation against such party or enforce its order if the
 10 rights of others and the interests of justice so require.

11 Comments - 2013

12 (a) Such an allegation may be raised in a number of different proceedings,
 13 including a filiation, disavowal, or contestation action. See, e.g., C.C. Arts. 187,
 14 191, 197, 198. The prescriptive or preemptive period applicable to such an action
 15 will be determined by the applicable Civil Code Article for the particular form of
 16 action instituted.

17
 18 (b) DNA testing for paternity determinations is authorized and regulated by
 19 R.S. 9:396.

20
 21 §2720.15. Finality; time limitations

22 A. A party to the gestational surrogacy contract may bring an action to
 23 annul a Post-Birth Order. However, except as otherwise provided in this Part,
 24 no action to annul a Post-Birth Order may be brought except on the grounds of
 25 fraud or duress.

26 B. An action to annul a Post-Birth Order based upon a claim of fraud
 27 or duress perpetrated by:

28 (1) Anyone other than an intended parent shall be brought within one
 29 year from the date of the signing of the final decree or mailing of the notice of
 30 the judgment when required.

31 (2) An intended parent shall be brought within two years from the date
 32 of the signing of the final decree or mailing of the notice of the judgment when
 33 required.

34 Comment - 2013

1 is not required.

2 (j) In the case of a child born of a surrogate birth parent ~~who is related by~~
3 ~~blood or affinity to a biological parent,~~ **as a result of an enforceable gestational**
4 **surrogacy contract, as defined in R.S. 9:2720,** the biological parents ~~proven to be~~
5 ~~the mother and father by DNA testing~~ shall be considered the parents of the child.

6 Section 3. R.S. 9:2713 is hereby repealed.

7 Section 4. If and when this Act is finally passed by the legislature and enacted into
8 law, the Louisiana State Law Institute is hereby authorized and directed to review the
9 comments included with the enacted legislation and to correct such comments as it may
10 deem necessary to accurately reflect the sections as enacted or amended by this Act.

PRESIDENT OF THE SENATE

SPEAKER OF THE HOUSE OF REPRESENTATIVES

GOVERNOR OF THE STATE OF LOUISIANA

APPROVED: _____

VETO MESSAGE

"Senate Bill No. 162 by Senator Gary Smith has evoked serious concern from various groups across the state such as Louisiana Family Forum, Louisiana Conference of Catholic Bishops, the Hippocratic Resource, The Bioethics Defense Fund, and the Center for Bioethics and Culture Network. Specifically, these groups reference the potential that Gestational Surrogacy Contracts have to commercialize the use of surrogacy as the bill in its current form permits "reasonable compensation."

Creating a state sanctioned regulatory structure for contracts pertaining to the birth of children has a profound impact on the traditional beginnings of the family and is an important topic worthy of heightened scrutiny and consensus. Given the range of opposition, I am not satisfied that the questions and concerns regarding the implications of Gestational Surrogacy Contracts have been sufficiently studied and thoroughly debated by the legislature at this time.

For these reasons, I have vetoed Senate Bill No. 162 and hereby return it to the Senate."