

SUBJECT: Regulating gestational agreements under the Uniform Parentage Act

COMMITTEE: Juvenile Justice and Family Issues — committee substitute recommended

VOTE: 5 ayes — Dutton, Goodman, Baxter, Castro, Reyna
0 nays
4 absent — Dunnam, Hodge, J. Moreno, Morrison

WITNESSES: For — Linda Blankenship, for Dr. Samuel J. Chantilis; Judge Tom Stansbury, Texas Family Law Foundation; Kathy Stern, SSA, Inc.; Ellen A. Yarrell, State Bar of Texas
Against — None
On — John J. Sampson

BACKGROUND: The Uniform Parentage Act (Family Code, ch. 160) specifies that it does not authorize or prohibit an agreement between a woman and the intended parents of a child in which the woman relinquishes all rights as a parent of a child conceived by means of assisted reproduction and which provides that the intended parents become the parents of the child. If a birth results under a gestational agreement that is unenforceable under Texas law, the parent-child relationship is determined under subch. C, which governs the establishment of the parent-child relationship.

Under Family Code, sec. 160.602, a proceeding to adjudicate parentage may be brought by the child or the child's mother; a man whose paternity of the child is to be adjudicated; the support enforcement agency or another government agency authorized by other law; an authorized adoption agency or licensed child-placing agency; a representative authorized by law to act for a person who otherwise would be entitled to maintain a proceeding but who is deceased, incapacitated, or a minor; or a person related within the second degree by consanguinity to the child's mother, if the mother is deceased.

DIGEST: CSHB 729 would adopt the Uniform Parentage Act with respect to gestational agreements. A prospective gestational mother, her husband if married, each donor, and each intended parent could enter into a written agreement establishing that the prospective gestational mother agreed to pregnancy by means of assisted reproduction; that the prospective gestational mother, her husband if married, and each donor other than the intended parents would relinquish all parental rights; that the intended parents would be the child's parents; and that the gestational mother and each intended parent agreed to exchange information regarding their health.

The bill would define a gestational mother as a woman who gave birth to a child conceived under a gestational agreement. It would require the intended parents to be married to each other and for each intended parent to be a party to the agreement. The gestational mother's eggs could not be used in the assisted reproduction procedure.

The agreement would have to state that the physician who would perform the assisted reproduction procedure had informed the parties of the rate of successful conceptions and births attributable to the procedure; the potential for and risks associated with the implantation of multiple embryos and consequent multiple births resulting from the procedure; the nature of and costs related to the procedure; the health risks associated with any fertility drugs or other procedures to be used; and reasonably foreseeable psychological effects from the procedure.

The gestational agreement would have to be entered into no later than 14 days before the date of the transfer of eggs, sperm, or embryos to the gestational mother. A gestational agreement would not apply to the birth of a child conceived by means of sexual intercourse and could not limit the right of the gestational mother to make decisions to safeguard her health or the health of the embryo.

The parties could commence a court proceeding to validate their written agreement only if the prospective gestational mother or the intended parents had lived in Texas for at least 90 days before the date the proceeding was commenced, and if the prospective gestational mother's husband, if married, was joined as a party to the proceeding.

A court could validate a gestational agreement only if it found that:

- the parties had submitted to the jurisdiction of the court;
- medical evidence showed that the intended mother could not carry a pregnancy to term and give birth to the child without unreasonable risk to her physical or mental health or to the health of the unborn child;
- unless waived by the court, a home study of the intended parents had been conducted and determined that they met the standards of fitness applicable to adoptive parents;
- each party had entered into the agreement voluntarily and understood it;
- the prospective gestational mother had had at least one previous pregnancy and delivery, and carrying another pregnancy to term and giving birth would not pose an unreasonable risk to the child's health or to her physical or mental health; and
- the parties had provided for which party would be responsible for health-care expenses associated with the pregnancy.

If those requirements were met, the court could render an order validating the gestational agreement and declaring that the intended parents would be the parents of a child born under the agreement. The court that conducted a proceeding would have continuing, exclusive jurisdiction over all matters arising out of the gestational agreement until the date a child born to the gestational mother reached 180 days of age.

A prospective gestational mother, her husband, or either intended parent could terminate a gestational agreement before the pregnancy commenced by filing notice with the court. On receipt of such notice, the court would have to vacate the order validating the gestational agreement.

Under a validated gestational agreement, the intended parents would have to file a notice of the child's birth within 300 days of the day the assisted reproduction occurred. After receiving notice, the court would have to render an order confirming that the intended parents were the child's parents; requiring the gestational mother to surrender the child to the intended parents, if necessary; and requiring the Bureau of Vital Statistics to issue a birth certificate naming the intended parents as the child's parents.

A gestational mother's marriage after the court rendered an order validating a gestational agreement would not affect the agreement's validity.

A gestational agreement not validated by the court would be unenforceable. However, an intended parent who was a party to a gestational agreement that was not validated could be held liable for the child's support. The parent-child relationship of a child born under an unvalidated gestational agreement would be determined as otherwise provided under the Family Code.

The Texas Department of Health would have to develop and implement a confidential reporting system that would require each health-care facility at which assisted reproduction procedures were performed under gestational agreements to report statistics related to those procedures.

The bill would repeal a provision stating that Family Code, ch. 160 does not authorize or prohibit gestational agreements. It would amend Family Code, sec. 160.602 to include an intended parent as a person who may maintain a proceeding to adjudicate parentage.

The bill would take effect September 1, 2003.

**SUPPORTERS
SAY:**

CSHB 729 would establish clear guidelines for court oversight of gestational agreements. The bill is necessary to ensure the well-being of children who are born with the use of assisted reproduction and who deserve to know who their parents are. Without regulation of these agreements, the legal parent-child relationship of a child of a gestational agreement may be unclear.

Under current law, if intended parents want to become the legal parents of a child born through the use of assisted reproduction technology, they must undergo a suit terminating the parental rights of the gestational mother and then a lengthy adoption process. Also, intended parents do not have standing to file suit for adoption until the child actually is born. CSHB 729 would give finality at the time of birth about who the legal parents are.

Without clear legislation in place, courts' ad hoc decisions about the validity of gestational agreements could lead to confusion and inconsistencies among jurisdictions. A case could be left pending for years, and children deserve finality with regard to who their parents are.

Gestational agreements are not tantamount to baby selling. These agreements are entered into before conception, so no child exists at the time of the agreement. Also, under a gestational agreement, the genetic makeup of the child generally is derived from one of the intended parents.

Concerns that gestational agreements undermine traditional family values are misplaced. Only a married man and woman could obtain court validation of a gestational agreement. It is unfair to assume that they would not provide a nurturing, loving home simply because they are incapable of having children of their own. Assisted reproduction gives parents who cannot bear children of their own an appropriate alternative. Adoption is a time-consuming process, and parents may want children who are biologically related to them. Also, there is a shortage of adoptable children in this country.

Assisted reproduction is a widely used practice that is here to stay. Even if Texas outlawed these agreements, intended parents could go to other states or abroad, and then return to Texas with the offspring, whom the state would be forced to recognize. This bill is necessary to establish a clear framework for validating gestational agreements so that all parties know exactly what are their obligations and rights.

CSHB 729 would make the gestational agreement binding on all parties. It would prevent a situation in which the intended parents backed out of an agreement and left the child without a parent who wanted him or her, or in which the gestational mother decided to keep the child for herself rather than relinquish her parental rights. For example, under current law, the intended parents might refuse to take responsibility for a child born with a serious medical problem, and the gestational mother might not have the resources or the desire to raise the child, leaving the child to become a ward of the state. CSHB 729 would prevent such undesirable situations from occurring.

Under the bill, any party could terminate a gestational agreement at any time before the pregnancy began. Otherwise, the court could render an order requiring the gestational mother to surrender the child to the intended parents. CSHB 729 could not be more clear about who would be the legal parents of a child born under a gestational agreement, and the assertion that assisted reproduction inherently causes confusion is misguided.

Under CSHB 729, only a married couple could obtain a court-validated gestational agreement. However, unmarried couples or single people could enter into private contracts of their own regarding the use of assisted reproduction, as they can under current law.

The home study requirement would not be an unreasonable burden on the intended parents. Before an adoption takes place, a similar study is conducted to ensure that the child will be placed in a suitable environment. Also, if the court found a home study unnecessary, it could waive that requirement.

**OPPONENTS
SAY:**

CSHB 729 would be a step in the wrong direction. Gestational agreements should be outlawed because they treat babies like commodities. The bill would do nothing to prevent intended parents from paying the gestational mother for her services, which would undermine the value of human life. Gestational mothers and baby buyers could enter into lucrative financial deals.

The bill is unnecessary. Parents who cannot have children of their own can adopt children without the need for gestational agreements.

CSHB 729 would encourage the use of assisted reproduction, which undermines traditional family values. Conception, gestation, and birth are an important part of the continuum of the family relationship. Assisted reproduction fractures that continuum, because the intended parents do not take part in those important early stages of the child's life.

The use of assisted reproduction inherently leads to confusion about who the real parents are, and no legislation could eliminate such conflict. If a separate woman's donor eggs were used, there could be three potential "mothers" and more than one set of parents. The situation would become even more complex if the intended parents sought a divorce before the child was born.

Also, parties often change their minds after entering into an initial agreement, to the detriment of the child. For example, a gestational mother might not take good care of herself while pregnant because the baby was not her own, leading the intended parents to back out of the agreement. The child, created under a contract, would be left without a loving parent to raise him or her.

OTHER
OPPONENTS
SAY:

The bill should not limit court-validated gestational agreements to a married couple. Single people also should have the right to enter into such agreements, as should gay and lesbian couples and men and women who are in serious relationships but not married. Such people could be just as good at parenting, and could have as strong a right to be parents, as a married couple. CSHB 729 improperly would exclude them.

The bill should not require a home study for the intended parents. Biological parents are not subjected to home studies to be sure they are fit to raise children before engendering them. It would be humiliating for responsible people who were unable to have children of their own to be required to undergo a home study. This requirement would discriminate against women who cannot bear children.

NOTES:

As filed, HB 729 would have prohibited a gestational agreement from providing for payment of consideration, except for payment of all reasonable medical, counseling, and life insurance expenses for the gestational mother. The bill also would have made it a Class A misdemeanor (punishable by up to one year in jail and/or a maximum fine of \$4,000) to advertise that a person would act as a gestational mother, to help another person locate a person to act as a gestational mother, or knowingly or intentionally to pay or promise to pay consideration to a prospective gestational mother with the intent to influence her decision to enter into a gestational agreement.

A similar bill during the 77th Legislature, HB 1246 by Goodman, died in the House Juvenile Justice and Family Issues Committee.