

2020 South Dakota Legislature

House Bill 1096**AMENDMENT 1096K FOR THE HOUSE BILL**

This bill has been extensively amended (hoghoused) and may no longer be consistent with the original intention of the sponsor.

1 **An Act to ~~prohibit commercial surrogacy contracts, provide a penalty for facilitating~~**
2 **~~a commercial surrogacy, and establish an interim committee to evaluate~~**
3 **~~surrogacy in the state authorize gestational carrier agreements.~~**

4 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

5 **Section 1.** That a NEW SECTION be added:

6 **25-11-1. Definitions.**

7 Terms used in this Act mean:

- 8 (1) "Assisted conception," a pregnancy resulting from the insemination of a woman's
9 egg with the sperm of a man, by means other than sexual intercourse;
10 (2) "Donor," an individual who produces eggs or sperm used for assisted conception,
11 whether or not for consideration, provided the term does not include:
12 (a) A husband who provides sperm or a wife who provides eggs, to be used for
13 assisted conception by the wife;
14 (b) A woman who gives birth to a child by means of assisted conception; or
15 (c) An individual whose body produces sperm or egg used for the purpose of
16 conceiving a child for that individual;
17 (3) "Gestational carrier," an adult woman who enters into an agreement to bear a child
18 conceived through assisted conception, not using her own egg, for intended
19 parents; and
20 (4) "Surrogate," an adult woman who enters into an agreement to bear a child
21 conceived through assisted conception, using her own egg, for intended parents.

22 **Section 2.** That a NEW SECTION be added:

1 **25-11-2. Assisted conception.**

2 This Act does not prohibit assisted conception between a husband and wife who
3 are the intended parents.

4 **Section 3.** That a NEW SECTION be added:

5 **25-11-3. Surrogacy agreement--Enforceability.**

6 Any agreement in which a woman consents to become a surrogate and to relinquish
7 the woman's rights and duties as the parent of a child conceived through assisted
8 conception is unenforceable. The surrogate is the mother of a resulting child and the
9 surrogate's husband, if a party to the agreement, is the father of the child. If the
10 surrogate's husband is not a party to the agreement or if the surrogate is unmarried, the
11 paternity of the child is governed by applicable law.

12 Any placement of a child conceived pursuant to a surrogate agreement must follow
13 the requirements of chapter 25-6.

14 **Section 4.** That a NEW SECTION be added:

15 **25-11-4. Donors.**

16 Donors have no parental rights.

17 **Section 5.** That a NEW SECTION be added:

18 **25-11-5. Child born to gestational carrier.**

19 A child born to a gestational carrier is a child of the intended parents for all
20 purposes and is not a child of the gestational carrier or of the gestational carrier's husband.

21 **Section 6.** That a NEW SECTION be added:

22 **25-11-6. Gestational carrier--Agreements.**

23 All gestational carrier agreements must be filed with and approved by the court,
24 prior to conception.

25 **Section 7.** That a NEW SECTION be added:

26 **25-11-7. Gestational carrier--Requirements.**

27 A gestational carrier is deemed to have satisfied the requirements of this Act if at
28 the time the gestational carrier agreement is executed the carrier:

29 (1) Is at least twenty-one years of age;

- 1 (2) Has given birth to at least one child;
2 (3) Has completed a medical evaluation;
3 (4) Has completed a mental health evaluation;
4 (5) Has undergone consultation with independent counsel regarding the terms of the
5 agreement and the potential legal consequences of a gestational surrogacy; and
6 (6) (a) Has obtained a health insurance policy covering major medical treatments and
7 hospitalization and having a term that covers the expected pregnancy plus eight
8 weeks following the birth; or
9 (b) Has a health insurance policy obtained by the intended parents, in accordance
10 with the gestational carrier agreement.

11 **Section 8.** That a NEW SECTION be added:

12 **25-11-8. Intended parent--Requirements.**

13 An intended parent is deemed to have satisfied the requirements of this Act if at
14 the time the gestational carrier agreement is executed the intended parent:

- 15 (1) Contributes either the sperm or the egg, thereby resulting in a pre-embryo that
16 the gestational carrier will attempt to carry to term;
17 (2) Has a medical need for the gestational carrier, as evidenced by a physician's
18 affidavit attached to the gestational carrier agreement;
19 (3) Has completed a mental health evaluation; and
20 (4) Has undergone consultation with independent counsel regarding the terms of the
21 gestational carrier agreement and the potential legal consequences of the
22 gestational surrogacy.

23 **Section 9.** That a NEW SECTION be added:

24 **25-11-9. Gestational carrier agreement--Enforceability.**

25 A gestational carrier agreement is presumed to be enforceable if:

- 26 (1) It is in written form;
27 (2) It is executed prior to the commencement of any medical procedure other than the
28 medical and mental health evaluations necessary to determine eligibility of the
29 parties pursuant to §§ 25-11-7 and 25-11-8;
30 (3) It provides for representation of the gestational carrier and each intended parent
31 by independent counsel in all matters concerning the gestational surrogacy and the
32 gestational carrier agreement;

- 1 (4) It requires the gestational carrier and the intended parent to sign a document
2 acknowledging the receipt of information regarding the legal, financial, and
3 contractual rights, expectations, penalties, and obligations of the gestational
4 carrier agreement;
5 (5) It requires that any compensation to be provided to the gestational carrier must
6 be placed in escrow prior to the commencement of any medical procedure; and
7 (6) It is witnessed by two competent adults.

8 **Section 10.** That a NEW SECTION be added:

9 **25-11-10. Gestational carrier agreement--Content.**

10 A gestational carrier agreement must provide:

- 11 (1) That the gestational carrier expressly agrees in writing to undergo pre-embryo
12 transfer, to attempt to carry and give birth to the child, and to surrender custody
13 of the child to the intended parent or parents immediately upon the birth of the
14 child;
15 (2) That if the gestational carrier is married, the husband of the carrier expressly
16 agrees in writing to undertake the obligations imposed on the gestational carrier
17 pursuant to the gestational carrier agreement, and to surrender custody of the
18 child to the intended parent or parents immediately upon the birth of the child;
19 (3) That the gestational carrier agrees to utilize the services of a physician, of her
20 choosing, after consultation with the intended parents, to provide care to her
21 during the pregnancy; and
22 (4) That the intended parent or parents expressly agree in writing to accept custody
23 of the child immediately upon the child's birth and to assume sole responsibility for
24 the support of the child immediately upon birth.

25 **Section 11.** That a NEW SECTION be added:

26 **25-11-11. Gestational carrier agreement--Additional provisions.**

27 A gestational carrier agreement is enforceable for purposes of state law even if it
28 contains any of the following:

- 29 (1) The gestational carrier's agreement to undergo all medical exams, treatments, and
30 fetal monitoring procedures that the physician recommends for the success of the
31 pregnancy;
32 (2) The gestational carrier's agreement to abstain from any activities that any intended
33 parent or the physician reasonably believes to be harmful to the pregnancy and

1 future health of the child, including smoking, drinking alcohol, using nonprescribed
2 drugs, using prescription drugs not authorized by a physician aware of the
3 gestational carrier's pregnancy, exposure to radiation, or any other activities
4 prohibited by a health care provider;

5 (3) The agreement of the intended parents to pay the gestational carrier reasonable
6 compensation; or

7 (4) The agreement of the intended parents to pay for or reimburse the gestational
8 carrier for reasonable expenses including medical, legal, or other professional
9 expenses, related to the gestational surrogacy and the gestational carrier
10 agreement.

11 **Section 12.** That a NEW SECTION be added:

12 **25-11-12. Determination of parentage.**

13 If any requirements of this Act are not met, a court of competent jurisdiction shall
14 determine parentage based on the evidence of the parties' intent.

15 **Section 13.** That a NEW SECTION be added:

16 **25-11-13. Parental obligation.**

17 Any person who is considered to be the parent of a child under this Act is obligated
18 to support the child. A breach of the gestational carrier agreement by any intended parent
19 does not relieve that intended parent of any support obligation imposed by this Act.

20 A sperm or egg donor, other than an anonymous sperm or egg donor, may be
21 liable for child support only if the donor fails to enter into a contract with the intended
22 parents under which the intended parents agree to assume all rights and responsibilities
23 for any resulting child, and the sperm or egg donor relinquishes any rights to the resulting
24 embryos or children.

25 **Section 14.** That a NEW SECTION be added:

26 **25-11-14. Liability.**

27 Except as otherwise provided in this Act, no person may be held civilly liable for
28 any nonnegligent action taken pursuant to this Act.

29 **Section 15.** That a NEW SECTION be added:

1 **25-11-15. Gestational carrier agreement--Breach.**

2 Noncompliance by the gestational carrier or by any intended parent occurs if that
3 party breaches a material provision of the gestational carrier agreement. If there is
4 material noncompliance with this Act, a court of competent jurisdiction shall determine
5 the rights and obligations of the parties.

6 **Section 16.** That a NEW SECTION be added:

7 **25-11-16. Gestational carrier agreement--Breach--Remedy.**

8 There is no specific performance remedy available for the breach, by the
9 gestational carrier, of a gestational carrier agreement that requires the carrier to be
10 impregnated.

11 **Section 17.** That a NEW SECTION be added:

12 **25-11-17. Entitlement to remedies.**

13 Except as otherwise provided in the gestational carrier agreement:
14 (1) Each intended parent is entitled to all remedies available at law or equity; and
15 (2) Each gestational carrier is entitled to all remedies available at law or equity.

16 **Section 18.** That a NEW SECTION be added:

17 **25-11-18. Action to invalidate agreement--Limitation.**

18 No action to invalidate a gestational carrier agreement that meets the requirements
19 of this Act or to challenge the rights of parentage established pursuant to this Act may be
20 commenced more than twelve months after the birth of the child.