

MAINE STATE LEGISLATURE

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119th MAINE LEGISLATURE

FIRST REGULAR SESSION-1999

Legislative Document

No. 2173

H.P. 1523

House of Representatives, April 8, 1999

An Act to Create the Maine Surrogacy Law.

Reference to the Committee on Judiciary suggested and ordered printed.

A handwritten signature in black ink that reads "Joseph W. Mayo".

JOSEPH W. MAYO, Clerk

Presented by Representative GERRY of Auburn. (By Request)

Be it enacted by the People of the State of Maine as follows:

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Sec. 1. 19-A MRSA c. 52 is enacted to read:

CHAPTER 52

SURROGACY

§1521. Short title

This chapter is known and may be cited as the "Maine Surrogacy Act."

§1522. Definitions

As used in this chapter, unless the context indicates otherwise, the following terms have the following meanings.

1. Artificial insemination. "Artificial insemination" means the introduction of semen into a woman's vagina, cervical canal or uterus through extracorporeal or noncoital means.

2. Birth mother. "Birth mother" means a woman who gestates an embryo conceived by natural or artificial insemination or in vitro fertilization, zygote transfer or as a result of a surrogacy arrangement.

3. Donor. "Donor" means an individual who contributes a gamete for the purpose of artificial insemination, in vitro fertilization or implantation in a woman or a woman who contributes a zygote.

4. Gamete. "Gamete" means a human ovum or a human spermatozoon.

5. Health care provider. "Health care provider" means a person who is duly licensed, certified or otherwise authorized to administer health care in the ordinary course of business or practice of a profession.

6. Informed consent. "Informed consent" means a voluntary decision made by a competent person who exercises care for that person's own welfare about whether or not to participate in a proposed medical procedure or contractual arrangement that is based on a full awareness of:

A. The medical and psychological risks;

B. The legal, financial and contractual rights and obligations; and

2 C. The available alternatives, including the alternative of
4 not participating in any procedure or arrangement, and each
 alternative's attendant risks and obligations.

6 7. Intended parents; intended father; intended mother.
 "Intended parents" means persons who are married to each other
8 including a woman, known in this chapter as "intended mother,"
 and a man, known in this chapter as "intended father," and who,
10 complying with the requirements of this chapter, enter into a
 surrogacy arrangement.

12 8. In vitro fertilization. "In vitro fertilization" means
14 the employment of all medical and laboratory procedures that are
 necessary to effectuate the extracorporeal combining of gametes
16 to allow fertilization to occur.

18 9. Party. "Party" means an intended parent, the surrogate
 or, if the surrogate is married, her husband.

20 10. Surrogacy or surrogacy arrangement. "Surrogacy" or
22 "surrogacy arrangement" means any arrangement by which a woman
 agrees to be impregnated using either the intended father's
24 sperm, the intended mother's egg or their zygote with the intent
 that the intended parents are to become the parents of the
26 resulting child after the child's birth.

28 11. Surrogacy contract. "Surrogacy contract" means a
 written contract that complies with the requirements of section
30 1525, subsection 5.

32 12. Surrogate. "Surrogate" means a woman who agrees,
 pursuant to a surrogacy arrangement, to bear a child for the
34 intended parents.

36 13. Zygote. "Zygote" means the cell mass that results from
 fertilization of an ovum prior to implantation in the surrogate.

38 14. Zygote transfer. "Zygote transfer" means effectuating
40 the transfer of a zygote into the uterine cavity employing all
 medical and laboratory procedures necessary.

42 §1523. Surrogacy arrangement

44 1. Validity. A surrogacy arrangement is valid and
46 enforceable only if it complies with this section.

48 A. The arrangement must be by written contract that:

- 2 (1) Contains the elements set forth in section 1525,
 subsection 5;
- 4 (2) Is entered into by the parties who meet the
 eligibility requirements of section 1524; and
- 6 (3) Is judicially authorized under section 1525.
- 8
- 10 B. The parties must undergo the medical and nonmedical
 evaluations required under section 1524.

12 §1524. Eligibility

14 1. Age. The parties to a surrogacy arrangement must be 21
 years of age or older.

16 2. Intended mother unable to bear child. The intended
18 mother must be medically determined to be physiologically unable
20 to bear a child without risk to her health or to the child's
 health.

22 3. Prior pregnancy and delivery. A woman may not be a
 surrogate unless:

24 A. She has a documented history of at least one pregnancy
26 and viable delivery;

28 B. She is in good health without recurrent conditions that
 may affect pregnancy; and

30 C. She meets the requirements under subsection 5,
32 paragraphs B and C.

34 4. Nonmedical evaluations. Each party must be evaluated as
 follows.

36 A. A nonmedical evaluation must be performed on each party
38 by a psychiatrist, psychologist, pastoral counselor or
40 social worker who is licensed, certified or authorized to
42 practice under the laws and rules of this State and who
44 shall maintain a record of the findings and conclusions and
 make a copy available to the person evaluated. Each party
 shall waive any privilege against disclosure of confidential
 communications and disclose a copy of the findings to the
46 other parties prior to entering the surrogacy contract.
 Each party shall file a copy of the findings with the court
 unless good cause is shown.

48 B. The person conducting the nonmedical evaluation shall
50 determine the party's suitability to parent by considering:

2 (1) The ability and disposition of the party being
3 evaluated to give a child love, affection and guidance;
4 and

6 (2) The ability of the party to adjust to and assume
7 the inherent risks of the surrogacy contract.

8
9 C. A home study of each party involved must be conducted by
10 a licensed child placing agency or the Department of Human
11 Services to assess the ability and disposition of the party
12 to provide the child with food, clothing, shelter, medical
13 care and other basic necessities. Each party shall file a
14 copy of the findings with the court.

16 5. Medical evaluations. The parties must undergo the
17 following medical evaluations.

18
19 A. Semen may not be used in an insemination procedure
20 unless the sperm donor has been medically evaluated and the
21 results, documented in accordance with rules adopted by the
22 Department of Human Services, demonstrate the medical
23 acceptability of the person as a sperm donor.

24
25 B. A woman may not be a surrogate unless the woman has been
26 medically evaluated and the results, documented in
27 accordance with rules adopted by the Department of Human
28 Services, demonstrate the medical acceptability of the woman
29 to be a surrogate.

30
31 C. A woman may not undergo an insemination procedure unless
32 the woman has been medically evaluated and the results,
33 documented in accordance with rules adopted by the
34 Department of Human Services, demonstrate the medical
35 acceptability of the woman to undergo insemination.

36
37 6. Medical counseling. The surrogate and the intended
38 parents must receive genetic counseling if the surrogate is 35
39 years of age or older.

40 **§1525. Judicial authorization**

41
42 1. Jurisdiction. A petition for authorization of a
43 surrogacy arrangement must be brought in the Probate Court for
44 the county in which the surrogate or the intended parents reside
45 at the time the petition is filed. The surrogate or the intended
46 parents must have resided in this State for at least 6 months
47 prior to the date the petition for authorization is filed.

2 2. Petition for authorization hearing. Prior to natural or
3 artificial insemination of or in vitro fertilization and zygote
4 transfer into a surrogate, the parties to a surrogacy arrangement
5 shall jointly petition the Probate Court for judicial
6 authorization of the surrogacy arrangement.

7 A. The petition must contain:

8 (1) The full name, including the intended mother's and
9 surrogate's names before marriage, if different; age;
10 and place and duration of residence of each party;

11 (2) The date and place of the intended parents'
12 marriage;

13 (3) The date and place of the marriage of the
14 surrogate, if she is married;

15 (4) A copy of the duly executed surrogacy contract;

16 (5) All required written consents;

17 (6) All evaluations and reports required by this
18 chapter; and

19 (7) The name and address of the health care provider
20 who will perform the procedure.

21 3. Time of hearing; notice. The court shall hold a hearing
22 within 90 days after the filing of a petition for authorization.

23 A. Separate hearings for each party may be held if one or
24 more parties request separate hearings.

25 B. Any mental health practitioner, child placing agency,
26 health care provider or any other person who conducted
27 nonmedical or medical evaluation or counseling pursuant to
28 section 1524, subsections 4, 5 and 6 must be given notice of
29 the filing of the petition and the time and place of the
30 hearing by the parties at least 10 days prior to the hearing.

31 4. Hearing. This subsection governs the hearing on a
32 surrogacy arrangement.

33 A. The parties must be present at the hearing.

34 B. The parties may offer additional evidence the court
35 determines relevant, and the court may require the
36 submission of additional information as it determines
37 appropriate.

2 C. All hearings must be closed to the public. Only
4 essential officers of the court, parties, witnesses and
 counsel may be admitted.

6 D. Papers and records pertaining to the hearing are subject
8 to inspection only upon consent of all parties or upon a
 showing of good cause supported by a court order.

10 5. Mandatory terms of surrogacy contract. The surrogacy
12 contract must include the following provisions:

14 A. The consent of the surrogate that she will surrender
16 custody of the child or accept the obligation of parenthood
 if she gives notice of intent to keep the child as provided
 in paragraph D;

18 B. The consent of the husband of the surrogate, if the
20 surrogate is married, that he will surrender custody of the
22 child or accept the obligation of parenthood if the
 surrogate gives notice of intent to keep the child as
 provided in paragraph D;

24 C. The consent of the intended parents that they will
26 accept the obligations of parenthood, unless the surrogate
 gives notice of intent to keep the child as provided in
 paragraph D;

28 D. The right of either party to withdraw from the contract
30 within 72 hours after signing the contract and prior to the
32 surrogates undergoing in vitro fertilization and zygote
 transfer. Any fees paid to the surrogate must be returned
 to the intended parents.

34 E. If the surrogate receives a fee, a provision that fees
36 are limited to:

38 (1) Pregnancy-related medical expenses, including
40 expenses related to any complications occurring within
42 6 weeks after delivery and expenses related to the
 medical evaluation;

44 (2) Actual lost wages related to pregnancy, delivery
46 and postpartum recovery, if absence from employment is
 recommended in writing by the attending physician;

48 (3) Health, disability and life insurance during the
 term of pregnancy and 6 weeks after delivery;

50 (4) Reasonable attorney's fees and court costs;

2 (5) Counseling fees and costs associated with the
3 nonmedical evaluations and home studies for the
4 surrogate and her husband, if the surrogate is married;
5 and

6 (6) A maximum of an additional \$1,000 per month during
7 the course of the pregnancy;

10 F. The signatures of the intended parents, the surrogate,
11 and, if she is married, the surrogate's husband; and

12 G. A provision that clearly states the parental rights of a
13 natural parent under state law and that by signing the
14 contract the birth mother waives these rights permanently.
15 This provision must be typed entirely in capital letters in
16 a font size no smaller than any other font size used in the
17 contract.

20 6. Order. The court may issue an order validating the
21 surrogacy arrangement if, after the hearing, the court makes the
22 following findings:

24 A. All parties to the surrogacy arrangement have given
25 their informed consent;

26 B. The surrogacy contract conforms to all of the
27 requirements of subsection 5 and does not contain prohibited
28 or unconscionable terms;

30 C. Evaluations and counseling, pursuant to section 1524,
31 subsections 4, 5 and 6, have been completed, and the parties
32 have been determined by the persons performing the
33 evaluations or counseling to be qualified to enter into the
34 surrogacy arrangement under this chapter; and

35 D. The surrogacy arrangement is in the best interest of the
36 child.

40 7. Effect of validation. The effect of a judicial order
41 validating the surrogacy arrangement is the automatic termination
42 of the parental rights of the surrogate and her husband, if the
43 surrogate is married, after the birth of a child born as a result
44 of the arrangement and a vesting of those rights solely in the
45 intended parents.

46 **§1526. Birth registration**

48 The certificate of birth must be completed in accordance
49 with Title 22, chapter 703. The birth certificate must name the
50

intended parents as the parents.

§1527. In vitro fertilization and zygote transfer

1. Eligibility. In vitro fertilization and zygote transfer must be performed in accordance with rules adopted by the Department of Human Services and may be available only to a woman:

A. Who is 21 years of age or older;

B. Who has been medically evaluated, and the results, documented in accordance with rules adopted by the Department of Human Services, demonstrate the medical acceptability of the woman to undergo the in vitro fertilization and zygote transfer procedure;

C. Who receives counseling pursuant to section 1524, subsections 4, 5 and 6 and provides written certification of the counseling and evaluation to the health care provider performing the in vitro fertilization and zygote transfer procedure; and

D. Whose husband, if the surrogate is married, receives appropriate counseling pursuant to section 1524, subsections 4, 5 and 6 and:

(1) Successfully completes the medical evaluation if he is a gamete donor in the in vitro fertilization procedure;

(2) Provides written certification of the nonmedical counseling and any evaluation to the health care provider performing the in vitro fertilization procedure; and

(3) Indicates, in writing, acceptance of the legal rights and responsibilities of parenthood for any resulting child, unless the husband contributes his sperm for the in vitro fertilization procedure.

2. Provision of gamete by intended mother or intended father. The intended mother or the intended father shall provide a gamete to be used to impregnate the surrogate.

3. Provision of gamete by surrogate. If the intended mother does not provide a gamete, the surrogate shall provide a gamete.

2 4. Gamete donors. A gamete may not be used for an in vitro
3 fertilization procedure unless the gamete donor has been
4 medically evaluated and the results, documented in accordance
5 with rules adopted by the Department of Human Services,
6 demonstrate the medical acceptability of the person as a gamete
7 donor.

8 5. Requirements before procedure. Before performing the
9 procedure to impregnate the surrogate:

10 A. The health care provider performing the procedure must
11 receive written certification that the parties successfully
12 completed the medical and nonmedical evaluations and
13 counseling pursuant to section 1524, subsections 4, 5 and 6;

14 B. The surrogate contract has been authorized pursuant to
15 section 1525; and

16 C. All parties to the surrogacy arrangement provide the
17 health care provider performing the procedure with written
18 indication of their informed consent to the surrogacy
19 arrangement.

20 6. In accordance with rules. The procedure to impregnate a
21 surrogate may be performed only in accordance with rules adopted
22 by the Department of Human Services.

23 **§1528. Health care decisions**

24 1. Health of birth mother and fetus. The birth mother
25 shall make all decisions regarding the health of the birth mother
26 and the fetus.

27 2. Health of child after birth. In the case of surrogacy,
28 unless the surrogacy arrangement otherwise provides, the birth
29 mother or, in the event of her disability, the intended parents
30 shall make health care decisions concerning the resulting child.

31 **§1529. Rules of parentage**

32 1. Mother-child relationship. A woman is the mother of a
33 child to whom she has given birth, except as otherwise provided
34 in this chapter.

35 2. Father-child relationship; presumptions. A man is
36 presumed to be the father of a child if:

37 A. He and the child's mother are or have been married to
38 each other and the child is born during the marriage or

2 within 300 days after the marriage is terminated for any
reason or after a decree of separation is entered by a court;

4 B. Before the child's birth, he and the child's mother have
attempted to marry each other by a marriage solemnized in
6 apparent compliance with law, although the attempted
marriage is or could be declared void, voidable or otherwise
8 invalid and;

10 (1) If the attempted marriage could be declared
invalid only by a court, the child is born during the
12 attempted marriage or within 300 days after its
termination for any reason; or

14 (2) If the attempted marriage is invalid without a
16 court order, the child is born within 300 days after
the termination of cohabitation;

18 C. After the child's birth, he and the child's mother have
20 married or attempted to marry each other by a marriage
solemnized in apparent compliance with law, although the
22 attempted marriage is or could be declared void, voidable or
otherwise invalid and;

24 (1) He has acknowledged his paternity of the child in
26 a writing filed with the appropriate court or state
agency;

28 (2) With his consent, he is named as the child's
30 father on the birth certificate; or

32 (3) He is obligated to support the child under a
34 written voluntary promise or by court order;

36 D. While the child is under the age of majority, he
receives the child into his home and openly holds out the
38 child as his child; or

40 E. As an unmarried donor of sperm for use in artificial
insemination or in vitro fertilization, he and an unmarried
42 woman, who under subsection 1 would be the mother of the
child, follow the procedures in section 1523 and agree in
44 writing in advance of the procedure that the donor will be
the father.

46 3. Rebuttal of presumption. A presumption under subsection
48 2 may be rebutted in an appropriate action only by clear and
convincing evidence.

2 A. The existence of the father-child relationship presumed
3 under subsection 1, paragraph A, B or C may not, however, be
4 rebutted by evidence that the child was conceived by means
5 of artificial insemination or in vitro fertilization, if the
6 presumptive father complies with the requirements of section
7 1527 or 1531.

8 B. In the absence of compliance under paragraph A, the
9 presumptive father's consent must be conclusively presumed
10 by his failure to object to paternity by filing an action to
11 dispute paternity within 30 days after he knew or should
12 have known of the child's birth.

13 C. If 2 or more presumptions of paternity arise that
14 conflict with each other, the presumption that on the facts
15 is founded on the weightier considerations of policy and
16 logic controls. The presumption is rebutted by a court
17 decree establishing paternity of the child by another man.

18
19 4. Termination and transfer of parental rights to intended
20 parents. Parental rights established under this chapter must be
21 terminated and transferred to the intended parents or to the
22 surrogate and her husband, if the surrogate is married, pursuant
23 to section 1525, subsection 7. This chapter may not be construed
24 to apply to cases other than surrogacy.

25 5. Effect of noncompliance. Noncompliance with the
26 requirements of this chapter does not affect the determination of
27 parentage under this section. Breach of a judicially authorized
28 surrogacy arrangement does not affect transfer of parentage under
29 section 1525, subsection 7.

30
31 §1530. Legitimacy

32
33 If, under this chapter, a parent-child relationship is
34 created between an adult and a child, the child is deemed, for
35 all purposes of law, the legitimate child of the adult.

36
37 §1531. Duty of support

38
39 1. Support. Any person who is determined to be the parent
40 of a child under the provisions of section 1529 shall support the
41 child.

42 2. Liability for support. A sperm donor may be liable for
43 support only if he signs an agreement with the other parties to
44 that effect.

45 3. Court-imposed obligation. If the parties who are
46 involved in a natural or artificial insemination or an in vitro
47 insemination, the court may, in its discretion, impose an obligation
48 on the sperm donor to support the child.

2 fertilization, zygote transfer procedure or surrogacy arrangement
3 do not substantially comply with the applicable provisions of
4 this chapter, the court may impose a support obligation on the
5 parties. In imposing this support obligation, the court may
6 consider the seriousness of and the reasons for noncompliance in
7 order to determine which of the parties, if any, should be liable
8 for support.

9
10 4. Support liability even when noncompliance. If any
11 person intentionally or knowingly fails to comply with this
12 chapter and the effect of noncompliance is the authorization of a
13 procedure in violation of this chapter, that person may be liable
14 for support of the resulting child.

15
16 5. Support obligation even when contract breached. A
17 breach of a surrogacy contract by the intended parents does not
18 affect their support obligation.

19 **§1532. Intestate and testate succession**

20
21 1. Child of parents only. Subject to subsection 2, a child
22 is considered a child only of the child's parent or parents, and
23 the parent or parents are considered the parent or parents of the
24 child, as determined under section 1529, for purposes of:

25 A. Intestate succession;

26 B. Taking against the will of any person;

27 C. Taking under the will of any person, unless the will
28 otherwise provides; and

29 D. Being entitled to any support or similar allowance
30 during the administration of a parent's estate.

31
32 2. Child born of surrogate. For purposes of subsection 1,
33 a child born of a surrogate is the child of the intended parents
34 from the moment of the child's birth.

35 **§1533. Actions on contract**

36
37 1. No specific performance. The court may not order
38 specific performance for a breach by the surrogate of a surrogacy
39 contract term that:

40 A. Requires her to become impregnated;

41 B. Requires her to have an abortion; or

42 C. Forbids her to have an abortion.

2 2. Contract voidable. If the surrogate fails to become
pregnant after the surrogacy arrangement has been judicially
4 approved pursuant to section 1525, the contract is voidable at
the option of either party.

6
8 3. Breach of material term by intended parents. If the
intended parents breach a material term of the contract, the
surrogate may:

10 A. Recover health care expenses that the intended parents
12 were required to pay;

14 B. Collect the fees provided for in the contract; and

16 C. If the breach is refusal to accept the child, the
18 surrogate may file notice to keep the child and the intended
19 parents are liable for support. If the birth certificate
20 has been issued, the surrogate may petition to reissue the
21 birth certificate with the surrogate's name listed as the
22 parent of the resulting child.

24 4. Action by surrogate. Any action by the surrogate for
damages must be brought in the Probate Court in which the
petition for authorization was filed under section 1525.

26 **§1534. Liabilities and immunities for participants of**
28 **natural or artificial insemination, in vitro**
30 **fertilization, zygote transfer and surrogacy**

32 1. Immunities. A person may not be subject to civil or
criminal liability for nonnegligent actions taken pursuant to the
requirements of this chapter.

34 A physician or other health care provider whose actions under
36 this chapter are in accord with reasonable medical standards may
37 not be subject to criminal or civil liability or discipline for
38 unprofessional conduct with respect to those actions.

40 2. Liabilities. A person who acts in negligent
noncompliance with this chapter:

42 A. Is liable for resulting damages; and

44 B. May be jointly and severally liable for child support to
46 the resulting child under the laws of this State.

48 3. Not exclusive. The sanctions provided in this section
are in addition to any other sanctions provided under applicable
50 law.

2 **§1535. Prohibited actions and penalties**

4 **1. No fee or commission.** A person or entity may not
6 promote or in any other way solicit for or induce a fee,
8 commission or other valuable consideration, or with the intent or
expectation of receiving a fee, induce any party or parties to
enter into a surrogacy arrangement.

10 **2. Restrictions on use of zygotes.** A zygote:

12 **A. May not be maintained ex utero in the noncryo-preserved**
14 **state beyond 14 days post-fertilization development; and**

16 **B. That has been donated for use in research may not be**
transferred to a uterine cavity.

18 **§1536. Rules**

20 **The Department of Human Services shall adopt rules to carry**
22 **out its duties under this chapter. Rules adopted pursuant to**
24 **this section are major substantive rules under Title 5, chapter**
375, subchapter II-A.

26 **§1537. Application**

28 **This chapter does not apply to cases other than surrogacy.**

30 **Sec. 2. Guidelines pending adoption of rules.** Until the
32 Department of Human Services adopts rules to carry out its duties
34 under the Maine Revised Statutes, Title 19-A, chapter 52, medical
evaluations and procedures must be conducted in accordance with
the relevant sections of guidelines published by the American
Fertility Society.

36

SUMMARY

38

40 This bill establishes procedures for surrogacy
42 arrangements. It requires medical and nonmedical evaluations of
the parties, specifies contract provisions and requires approval
of the contract by the Probate Court.