

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Judiciary Committee

BILL: SB 2640

INTRODUCER: Senator Constantine

SUBJECT: Assisted Reproductive Technology

DATE: April 20, 2009

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Daniell	Maclure	JU	Favorable
2.			RC	
3.				
4.				
5.				
6.				

I. Summary:

This bill relates to assisted reproductive technology and provides that, except for an attorney, a person may not charge or accept compensation of any kind for making a referral relating to an egg, sperm, or preembryo donor or to a gestational surrogate. Additionally, the bill provides that only an attorney may advertise or offer to the public in any manner or by any medium that an egg, sperm, or preembryo donor or gestational surrogate is available or is sought.

This bill substantially amends section 742.14, Florida Statutes.

II. Present Situation:

Infertility in the United States

An estimated 7.3 million couples in the United States – about 12 percent of the reproductive-age population – experience infertility.¹ The advancement of scientific technology over the years has provided infertile couples with a variety of options. Artificial insemination appears to be the oldest and most widely used method of assisted reproductive technology.² However, in vitro fertilization, embryo transfer, and surrogacy have also gained popularity.

There are two types of surrogacy: traditional surrogacy and gestational surrogacy. Traditional surrogacy has been defined as “an [a]greement wherein a woman agrees to be artificially

¹ American Society for Reproductive Medicine, *Frequently Asked Questions About Infertility*, <http://www.asrm.org/Patients/faqs.html> (last visited April 14, 2009).

² Brent Parker Smith, *Anna J. v. Mark C: Proof of the Imminent Need for Surrogate Motherhood Regulation*, 30 J. FAM. L. 493 (1991/1992).

inseminated with the semen of another woman's husband; she is to conceive a child, carry the child to term and after the birth, assign her parental rights to the birth father and his wife."³ In traditional surrogacy, the surrogate mother is genetically related to the child.⁴ The second type of surrogacy is gestational surrogacy, which uses in vitro fertilization⁵ to create an embryo that is then transferred into the uterus of the surrogate woman. In gestational surrogacy, the child is not genetically related to the surrogate, but rather is genetically related to both parents who adopt the child.⁶ The first case of gestational surrogacy in the United States was reported in 1985, and the technique has become increasingly popular, now accounting for approximately 95 percent of all surrogate pregnancies in the United States.⁷

Surrogacy Regulation

Neither the federal government nor the United States Supreme Court has regulated or addressed the issue of surrogacy. Instead, surrogacy is regulated among the states through either legislative action or court decisions. As of 1999, almost half of the states had enacted legislation addressing surrogacy in varying degrees.⁸

State Regulation

In an attempt to reduce "the 'commercialization' of surrogacy arrangements, the Virginia and New Hampshire statutes prohibit the use of third party brokers and payment of a fee that exceeds the surrogate mother's actual costs in carrying and delivering the child."⁹ The New Hampshire statute provides: "No person or entity shall promote or in any other way solicit or induce for a fee, commission or other valuable consideration, or with the intent or expectation of receiving the same, any party or parties to enter into a surrogacy arrangement."¹⁰ Virginia has a similar, but more expansive, provision. Section 20-165 of the Virginia Code provides:

A. It shall be unlawful for any person, firm, corporation, partnership, or other entity to accept compensation for recruiting or procuring surrogates or to otherwise arrange or induce intended parents 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

³ Lisa L. Behm, *Legal, Moral & International Perspectives on Surrogate Motherhood: The Call for a Uniform Regulatory Scheme in the United States*, 2 DEPAUL J. HEALTH CARE L. 557, 557 (1999) (quoting BLACK'S LAW DICTIONARY 1445 (6th ed. 1990)).

⁴ Usha Rengachary Smerdon, *Crossing Bodies, Crossing Borders: International Surrogacy Between the United States and India*, 39 CUMB. L. REV. 15, 16 (2008-2009).

⁵ In vitro fertilization is a process where doctors remove eggs from a woman, which are then placed in a petri dish where fertilization occurs with the sperm of the male donor. Brent Parker Smith, *supra* note 2.

⁶ *Id.*

⁷ See Usha Rengachary Smerdon, *supra* note 4, at 17; Eric A. Gordon, *The Aftermath of Johnson v. Calvert: Surrogacy Law Reflects a More Liberal View of Reproductive Technology*, 6 ST. THOMAS L. REV. 191, 194 (1993).

⁸ Lisa L. Behm, *supra* note 3, at 582.

⁹ *Id.* at 601.

¹⁰ N.H. Rev. Stat. s. 168-B:16.

amount equal to three times the amount of compensation to have been paid to the broker pursuant to 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.¹¹

One benefit that some argue comes from removing the influence of third parties has been that the intended parents and the surrogates “can mutually evaluate each other on a first hand basis, rather than in an impersonal, mediated transaction.”¹²

The National Conference of Commissioners on Uniform State Laws has offered two model laws for guidance to states considering surrogacy; however, as of 2004, only North Dakota and Virginia have adopted the model laws.¹³

Federal Regulation

Although several states have enacted legislation regulating surrogacy, problems still remain due to the lack of uniformity in state surrogacy legislation. Due to this lack of uniformity, Congress has attempted to regulate surrogacy on the federal level twice. The “Surrogacy Arrangement Act of 1989” would have imposed criminal sanctions upon any person who “on a commercial basis knowingly makes, engages in, or brokers a surrogacy arrangement.”¹⁴ This bill died in the House Committee on Energy and Commerce. The second bill, titled “Anti-Surrogate-Mother Act of 1989,” would have criminalized commercial surrogacy.¹⁵ Specifically, the bill would have imposed criminal penalties upon anyone who:

- Procures or attempts to procure any woman to engage in surrogate motherhood;
- Provides medical assistance in carrying out an agreement to engage in surrogate motherhood;
- Advertises in or affecting interstate or foreign commerce any services in connection with surrogate motherhood;
- Being a U.S. citizen, engages outside the United States in any of the above conduct; or
- Sells for a profit the right to adopt a child or brokers such a sale.

The bill would have subjected surrogates, contracting parents, and third-party intermediaries to possible criminal penalties. The bill also contained an advertising ban, which subjected anyone who advertised the availability of commercial surrogacy services to criminal penalties. This bill died in the House Committee on Judiciary.

¹¹ Va. Code Ann. s. 20-165.

¹² Lisa L. Behm, *supra* note 3, at 601.

¹³ *Many States Still Lacking Surrogacy Laws*, MSNBC.com, www.msnbc.msn.com/id/5113759/ (June 1, 2004).

¹⁴ Surrogacy Arrangements Act of 1989, H.R. 275, 101st Cong., s. 2 (1989).

¹⁵ Anti-Surrogate-Mother Act of 1989, H.R. 576, 101st Cong. (1989).

Foreign Jurisdiction Regulation

Although it has no direct legal effect on surrogacy in the United States, Canada and England have also attempted to regulate surrogacy. In 1982, the Attorney General for Ontario asked the Ontario Law Reform Commission (Ontario Commission) to look into the legal issues relating to surrogacy, among other forms of artificial insemination.¹⁶ The Ontario Commission then put forth a report giving its findings and recommendations. One of its recommendations was that no compensation should be allowed without prior judicial approval. The Commission reasoned that such a provision may reveal any possible exploitation of the surrogate.¹⁷ Additionally, the Ontario Commission recognized that individuals may try to set up agencies that provide surrogacy services on a commercial basis. The Commission proposed that the Ministry of Community and Social Services be required to regulate such agencies that arrange surrogate agreements by examining the credentials of the operators, the staff, the advertisement and recruitment practices, the services offered, and the fees charged.¹⁸

The framework developed by the Ontario Commission never became law in Canada. Instead, in 1989, the Prime Minister created the Royal Commission on New Reproductive Technologies (Royal Commission) to address the medical, legal, economic, and ethical issues arising from new reproductive technologies.¹⁹ Based on the Royal Commission's report, the Canadian legislature enacted the "New Reproductive and Genetic Technologies Act" (the Reproductive Act), which bans certain uses of new reproductive technologies. One of the specific prohibitions recommended by the commission is as follows:

The federal government legislate to prohibit advertising for or acting as an intermediary to bring about a preconception arrangement; and to prohibit receiving payment or any other financial or commercial benefit for acting as an intermediary, under threat of criminal sanction. It should also legislate to prohibit making payment for a preconception agreement, under threat of criminal sanction.²⁰

This proposal appeared to be "another manifestation of the general principle that human reproduction not be commercialized."²¹

In 1982, the Committee of Inquiry into Human Fertilisation and Embryology (the Warnock Committee) was established in England to study emerging reproductive technologies.²² The Warnock Committee prepared a report (the Warnock Report) recommending a statutory licensing scheme to regulate infertility. Although the Warnock Report approved reproductive technologies, it recommended criminalizing both profit and non-profit organizations that recruit

¹⁶ Lisa L. Behm, *supra* note 3, at 587.

¹⁷ *Id.* at 591.

¹⁸ *Id.* at 593.

¹⁹ *Id.* at 594.

²⁰ Patrick Healy, *Statutory Prohibitions and the Regulation of New Reproduction Technologies Under Federal Law in Canada*, 40 MCGILL L.J. 905, 934 (1995).

²¹ *Id.* at 935.

²² Arthur Serratelli, *Surrogate Motherhood Contracts: Should the British or Canadian Model Fill the U.S. Legislative Vacuum?*, 26 GEO. WASH. J. INT'L L. & ECON. 633, 639 (1993).

women to be surrogates. The Warnock Report resulted in “The Surrogacy Arrangements Act of 1985” (the Act) in England. Section 2 of the Act states: “[n]o person shall on a commercial basis’ make, negotiate, or ‘compile any information with a view to its use in making, or negotiating the making of, surrogacy arrangements.’”²³ The Act allows surrogates and the potential parents to negotiate directly or through an intermediary as long as the intermediary does not get paid. The Act only criminalizes the act of third parties making, negotiating, or facilitating surrogacy agreements **for a fee**.²⁴

Section 3 of the Act makes it a criminal offense to advertise the availability of a person to enter into a surrogacy agreement. It covers all forms of advertising, including advertising that does not originate in England, as long as the advertisements are intended to be received in England. This section applies to the surrogate, contracting parents, and intermediary agencies.²⁵

The legislative intent of the Act provides seven rationales for the prohibition against third-party intermediaries:

- Exploitation of and risk to the surrogate.
- Exploitation of and risk to the infertile couple.
- Risk to the child.
- Selling children should be discouraged.
- The institution of the family is at risk.
- The moral fabric of society is at risk.
- Public opinion is against surrogacy.²⁶

The primary criticism of England’s Act is that it left too many questions unanswered. For example, section 2 of the Act appears to be written broadly enough that it may discourage legal, medical, and psychological professionals from rendering help when surrogates and infertile couples request it. It has also been argued that section 3 of the Act, regarding the advertising ban, leaves only word-of-mouth communication as legal, which limits the amount of information available to those interested in surrogacy. In England, the Act has also caused the disappearance of organized surrogacy professionals to assist infertile couples.²⁷

Assisted Reproductive Technology Regulation in Florida

In Florida, egg, sperm, and preembryo donors and gestational surrogacy are regulated by ch. 742, F.S., relating to determination of parentage. Section 742.14, F.S., provides that the donor of any egg, sperm, or preembryo, with certain exceptions, shall relinquish all maternal or paternal rights and obligations relating to the donation or any resulting children. The statute provides that only reasonable compensation directly related to the donation of eggs, sperm, and preembryos is permitted.

²³ *Id.* at 643.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at 644.

²⁷ *Id.* at 646-649.

Section 742.15, F.S., governs gestational surrogacy contracts and provides that the gestational surrogate must be 18 years of age or older, and the commissioning couple must be legally married and both be at least 18 years old. A couple may only enter into a gestational surrogacy contract if the commissioning mother cannot physically gestate a pregnancy to term, the gestation will cause a risk to the physical health of the commissioning mother, or the gestation will cause a risk of health to the fetus. A gestational surrogacy contract must include the following provisions:

- The commissioning couple agrees that the gestational surrogate shall be the sole source of consent with respect to clinical intervention and management of the pregnancy;
- The gestational surrogate agrees to submit to reasonable medical evaluation and treatment and to adhere to reasonable medical instructions about her prenatal health;
- The gestational surrogate agrees to relinquish any parental rights upon the child's birth and to proceed with statutory judicial proceedings;
- The commissioning couple agrees to accept custody of and to assume full parental rights and responsibilities for the child immediately upon the child's birth, regardless of any impairment of the child; and
- The gestational surrogate agrees to assume parental rights and responsibilities for the child born to her if it is determined that neither member of the commissioning couple is the genetic parent of the child.

The commissioning couple may only pay reasonable living, legal, medical, psychological, and psychiatric expenses of the gestational surrogate that are directly related to prenatal, intrapartal, and postpartal periods.

III. Effect of Proposed Changes:

This bill amends s. 742.14, F.S., relating to assisted reproductive technology. The bill provides that, except for an attorney, a person may not charge or accept compensation of any kind for making a referral relating to an egg donor, sperm donor, preembryo donor, or gestational surrogate. It is not clear what activities are captured in the bill's use of the word "referral." Additionally, the bill provides that only an attorney may advertise or offer to the public in any manner or by any medium that an egg donor, sperm donor, preembryo donor, or gestational surrogate is available or is sought. An attorney making such an advertisement must also publish or broadcast his or her Florida Bar number in the advertisement.

The bill amends the catch-line for s. 742.14, F.S., from "donation of eggs, sperm, or preembryos" to "relinquishment of rights; compensation; advertising."

The bill provides an effective date of July 1, 2009.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

The constitutionality of surrogacy arrangements has been at the forefront of the surrogacy debate. The Fourteenth Amendment provides, in part, that no state shall “deprive any person of life, liberty, or property, without due process of law.”²⁸ The United States Supreme Court has recognized that this clause guarantees “more than fair process” and, instead, also “provides heightened protection against government interference with certain fundamental rights and liberty interests.”²⁹ Specifically, the Court has said that the Due Process Clause of the Fourteenth Amendment protects “‘a right of personal privacy,’” which includes the right to independently make certain important decisions without governmental interference.³⁰ Moreover, the Court has found it “clear that among the decisions that an individual may make without unjustified government interference are personal decisions ‘relating to marriage, procreation, contraception, family relationships, and child rearing and education.’”³¹ In *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972), the Court held that at the heart of an individual’s right to privacy is his or her right, whether married or single, “to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”

While an implicit right of privacy is recognized under the United States Constitution, Floridians enjoy an explicit right of privacy under article I, section 23 of the Florida Constitution. Specifically, Florida’s right to privacy provision states: “Every natural person has the right to be let alone and free from governmental intrusion into the person’s private life except as otherwise provided herein.”³²

It has been argued that if the United States Supreme Court has established the right to procreate, giving people the right to have children coitally, then the right should also extend to noncoital conception.³³ Another argument that has been made is that banning surrogacy³⁴ is unconstitutional because it treats infertile couples differently. For example:

²⁸ U.S. CONST. amend. XIV, s. 1.

²⁹ *Washington v. Glucksberg*, 521 U.S. 702, 719-20 (1997).

³⁰ *Carey v. Population Servs., Int’l*, 431 U.S. 678, 684 (1977) (quoting *Roe v. Wade*, 410 U.S. 113, 152 (1973)).

³¹ *Id.* at 684-85 (quoting *Roe*, 410 U.S. at 152-53) (internal citations omitted).

³² FLA. CONST. art. I, s. 23.

³³ See Brent Parker Smith, *supra* note 2; Eric A. Gordon, *supra* note 7, at 200.

³⁴ This bill does not attempt to ban surrogacy; rather, it would ban persons, other than attorneys, from receiving compensation for making a referral relating to an egg, sperm, or preembryo donor or gestational surrogate, or from advertising that an egg, sperm, or preembryo donor or gestational surrogate is available or sought.

Since the state allows couples in which the man is sterile to have the biological child of the woman through artificial insemination, it is a violation of equal protection . . . for the state to prohibit an arrangement whereby a couple could have the husband's biological child when it is the wife who is infertile.³⁵

The few states that have dealt with the question of whether surrogacy should be included within the right of privacy have seen inconsistent results.³⁶ The constitutionality of this bill will likely turn on whether Florida courts think that surrogacy is encompassed within the fundamental right of privacy and, if it is, whether the bill unconstitutionally infringes on that right.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

This bill provides that a person may not charge or accept compensation for making a referral relating to an egg, sperm, or preembryo donor or gestational surrogate unless the person is an attorney. This bill appears eliminate the "commercialization" of certain assisted reproductive technologies. To that effect, people or businesses that broker these types of arrangements will no longer be able to do so for money. However, the bill has the potential to save couples dealing with infertility money by making it illegal for a person or business to require payment for making a referral relating to certain assisted reproductive technologies.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

This bill raises several questions that Senate professional staff is currently unable to answer. For example:

- The bill states that certain conduct is "unlawful," but it does not provide penalties for violating the provisions.

³⁵ Eric A. Gordon, *supra* note 7, at 201.

³⁶ See *In re Baby M*, 537 A.2d 1227, 1253-54 (N.J. 1988) (recognizing the right to procreate through sexual intercourse or artificial insemination, but not including surrogacy); *Surrogate Parenting Assocs. v. Armstrong*, 704 S.W.2d 209, 212 (1986) (recognizing surrogacy as within the zone of privacy and its inherent reproductive freedoms).

- The bill only references gestational surrogates; however, there is another form of surrogacy called traditional surrogacy. The bill does not specify whether its provisions would apply to traditionally surrogacy.
- With the use of the Internet, surrogacy efforts often cross state borders. The bill provides that only an attorney may advertise that an egg, sperm, or preembyro donor or gestational surrogate is available or is sought, and that the attorney must include his or her Florida Bar number in the advertisement. It is unclear what would happen if an organization in another state advertised nationally and its advertisement was aired in Florida. Would that advertisement be unlawful? What if an out-of-state attorney advertised in Florida? Under the specific language of the bill, the advertisement must include a **Florida** Bar number.

VIII. Additional Information:

- A. **Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

- B. **Amendments:**

None.