FISCAL IMPACT REPORT

SPONSOR Nibert **LAST UPDATED** 03/04/2023
ORIGINAL DATE 03/02/2023
SHORT TITLE Surrogacy and Parental Determination **BILL NUMBER** House Bill 305
ANALYST Chilton

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT*
(dollars in thousands)

	FY23	FY24	FY25	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
		Indeterminate, but minimal	Indeterminate, but minimal	Indeterminate, but minimal	Recurring	General Fund

Parentheses ( ) indicate expenditure decreases.
*Amounts reflect most recent analysis of this legislation.

Sources of Information

LFC Files

Responses Received From
Administrative Office of the Courts (AOC)
Office of the Attorney General (NMAG)

No Response Received
Department of Health (DOH)

SUMMARY

Synopsis of House Bill 305

House Bill 305 amends the Uniform Parentage Act (40-11A NMSA 1978), amending, adding, and repealing parts of the act. The act deals with many legal aspects of gestational surrogacy agreements (gestational surrogacy is a process where one person, who did not provide the egg used in conception, carries a fetus through pregnancy and gives birth to a baby) and genetic surrogacy, (the method of family building in which a woman agrees to carry a pregnancy for an intended parent or parents and in which the surrogate is a genetic parent of the baby.) In each of many possible scenarios involving assisted reproduction methods, parentage determination is codified where it may have been uncertain before.

Section 1 of the bill amends Section 40-11A-102 NMSA 1978 on definitions. The definition of "assisted reproduction" is altered to include intracervical as well as intrauterine insemination, and the "donation of eggs" is changed to "donation of gametes." The definition of "donor" can now include the husband who provides sperm or the wife who donates eggs, but excludes women who conceive a child through assisted reproduction. "Intended parent" is newly defined as one

who intends to have a legal relationship as parent to a child born through assisted reproduction. "Parentage" and "parent-child relationship" both refer to the legal relationship between a child and a parent.

Section 2 amends Section 40-11A-701 NMSA 1978, adding to its scope that it does not apply to assisted reproduction under a surrogacy agreement.

Section 3 amends Section 40-11A-702 on the parental status of the donor, stating in different words that a sperm or egg donor is not a parent of a child conceived through assisted reproduction.

Section 4 amends Section 40-11A-703 on parentage of a child conceived through assisted reproduction, stating that a donor who consents to assisted reproduction with the intent to be the product's parent is a to be considered parent of the child.

Section 5 amends Section 40-11A-704, on consent to assisted reproduction, providing for written consent by the woman-recipient and a person intending to be the child's parent, except that a court may decide that a person has become the parent through specified actions after the child's birth.

Section 6 amends Section 40-11A-705 to outline the conditions under which a spouse may deny parentage of a child.

Section 7 amends Section 40-11A-706 to provide conditions under which a child conceived through assisted reproduction can or may not be considered the child of a divorced parent.

Section 8 amends Section 40-11A-707 to indicate parentage when a parent dies before the birth of a child conceived through assisted reproduction.

Section 9 establishes a new Section-40A-708 to allow for a person agreeing to be a parent under conditions of assisted reproduction to withdraw that consent until such time as gametes are transferred to a woman that then results in pregnancy, and in that case is not to be considered a parent.

Section 10 repeals Section 40-11A-801, which allows for agreements between a woman and parents for whom she is or will be carrying a pregnancy, which are called "surrogacy agreements." This section thus became the repository for definitions.

Section 11 creates a new Section 40-11A-802 that lays out requirements for becoming part of a surrogacy agreement, including that each person signing be more than 21 years of age, have had a mental health evaluation, and have legal representation.

Section 12 in a new Section 40-11A-803 establishes requirements for those entering into gestational or genetic surrogacy agreements, including residence in New Mexico or receiving at least some medical care here, and having legal representation.

Section 13, to become Section 40-11A-804, states requirements for the contents of a gestational or genetic surrogacy agreement.

Section 14, to become Section 40-11A-805, provides for what should occur if the marriage dissolves between two parties to the surrogacy agreement.

Section 15, to become Section 40-11A-806, denies access to records of a surrogacy agreement unless under court order.

Section 16, new Section 40-11A-807, gives the original court continuing jurisdiction over a surrogacy agreement until 90 days after the birth of the infant.

Section 17, to be Section 40-11A-808, deals with termination of a surrogacy agreement.

Section 18, to be Section 40-11A-809, assigns parentage to those who signed the surrogacy agreement as intended parents, rather than the gestational surrogate.

Section 19, to become Section 40-11A-810 assigns parentage to both individuals who signed the surrogacy agreement as intended parents, even if one of them dies before the assisted reproduction procedure takes place.

Section 20, to become Section 40-11A-811, establishes rules for a court to follow in the case of disputes between intended parents and surrogate parents as to custody of children born through surrogacy agreements.

Section 21, to become Section 40-11A-812, establishes the enforceability of a gestational surrogacy agreement, stating that specific performance is not a legal remedy for a breach of the contract except in specified instances.

Section 22, to become Section 40-11A-813, states that genetic surrogacy agreements must be validated in a district court before the assisted reproduction maneuver takes place.

Section 23, to become Section 40-11A-814, deals with termination of a genetic surrogacy agreement. This may occur in the case that a pregnancy does not result from the assisted reproduction procedure or if the genetic surrogate changes her mind and files her intention to keep the child within 24 hours of birth. Expenses incurred are apportioned between the parties.

Section 24, to become new Section 40-11A-815, deals with parentage after validated genetic surrogacy agreements. The intended parents, and not the genetic surrogate or her partner, are to be recognized as the true parents, to be indicated as such on the birth certificate. Exceptions to this rule are noted.

Section 25, to become Section 40-11A-816, deals with nonvalidated genetic surrogacy agreements, including parentage issues and standing in court of intended parents and genetic surrogate.

Section 26, to become Section 40-11A-817, deals with legal matters, including parentage3 determination, after the death of an intended parent.

Section 27, to become Section 40-11A-818, deals with legal effects of a breach of a genetic surrogacy agreement, with specific performance not being a remedy except in specified instances.

Section 28 establishes the act as applicable to actions begun on or after January 1, 2024.

The effective date of this bill is January 1, 2024 (Section 29).

FISCAL IMPLICATIONS

There is no appropriation in House Bill 305. AOC indicates, "There will be a minimal administrative cost for statewide update, distribution and documentation of statutory changes. Any additional fiscal impact on the judiciary would be proportional to the increase in cases filed involving surrogacy and necessary training for judges regarding surrogacy-related issues and law."

SIGNIFICANT ISSUES

The American College of Obstetricians and Gynecologists, in a policy statement titled "Toward an Ethically Acceptable Public Policy on Surrogate Parenting Arrangements," comes to the following set of conclusions:

> An ethically acceptable public policy on surrogate parenthood will recognize that commissioning parents and surrogate mothers have divergent interests as well as interests in common. Because of the divergent interests, one professional person or agency should not attempt to represent the interests of both major parties to surrogate parenting arrangements. As in the case of organ donation and transplantation, public policy should require separation of roles to prevent apparent or real conflicts of interest. Further, because surrogate parenthood is in many respects analogous to adoption, the same kinds of safeguards that have been established for the practice of adoption should also be instituted for surrogate parenting arrangements.
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> In light of these general guidelines and the discussion above, the following specific policies are proposed:
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> 1. Surrogate motherhood arrangements should be considered only in the case of infertility or other medical need, but not for reasons of convenience alone.
> 2. The surrogate mother and the commissioning couple should be regarded as distinct parties agreeing to cooperate for a defined purpose. Each party should be separately represented, both medically and legally.
> 3. Surrogate parenting arrangements should be viewed as preconception adoption agreements in which the surrogate mother is regarded as the mother for all medical and other purposes. After the birth of the infant, the surrogate mother can decide whether or not to place the child for adoption, in accordance with applicable local adoption rules and practices. This policy includes a specified period of time after birth during which the surrogate mother is free to depart from the preconception agreement and retain custody of the child. If she decides to place the child for adoption, the members of the commissioning couple will become the parents of the child.
> 4. While the committee is reluctant to propose a specific regulatory framework, it recommends that, for the near future, surrogate parenting arrangements be overseen by private nonprofit agencies with credentials similar to those of adoption agencies. Such agencies should seek to ensure that the interests of all involved parties are adequately protected. The agencies should conduct confidential counseling and screening of candidate surrogates and candidate commissioning parents. Their

primary goal should be to promote the welfare of the future child, as well as the welfare of any existing children of the surrogate.

5. Plans for contingencies like the following should be carefully considered in advance by the commissioning couple, the surrogate mother, and the professionals involved in this reproductive arrangement: the prenatal diagnosis of a genetic or chromosomal abnormality; the inability or unwillingness of the surrogate to carry the pregnancy to term; the death of a member of the commissioning couple or the dissolution of the couple's marriage during the pregnancy; the birth of a handicapped infant; and a decision by the surrogate mother to retain custody of an infant conceived on behalf of, and typically with the aid of gametes from, the commissioning couple.
6. The contingency plans discussed by the parties to surrogate parenting arrangements should be written down to make explicit the intentions of the parties, to facilitate later recollection of these intentions, and to help promote the interests of the future child.
7. The surrogate mother, in consultation with her physician, should be the sole source of consent for medical decisions regarding pregnancy and delivery.
8. Whatever compensation is provided to the surrogate mother should be paid solely on the basis of her service in attempting to assist an infertile or otherwise medically handicapped couple; compensation should not be based on a successful delivery or on the health status of the child.

It appears that most if not all of these points are covered in the current bill.

Significant issues identified by AOC include the following:

1. The NMUPA [New Mexico Uniform Parentage Act] is significantly modified to rewrite the parentage determination based on consent to assisted reproduction including cohabitation for the first two years of a child's life (or intent to be together for the first two years, if a parent dies or becomes incapacitated or the child dies before two years). Currently a person can demonstrate consent to parentage via living together for the first two years of a child's life and openly holding the child out as their own. This broadens the ways a court can find someone consented to parentage but allows for intent and actions of the parties to be the focus of the court.
2. HB 305, Article 8, enacts all new material to significantly formalize what surrogacy agreements may entail and puts formal restrictions on who may be a surrogate (must have given birth before, etc.) This is a significant change. Currently, New Mexico does not authorize or prohibit surrogacy, but this would authorize it and create remedies (no specific performance, obviously) but terms and protections for everyone involved.
3. Currently, there are many surrogacy cases in New Mexico, but they are not really governed by anything other than contract and some portions of the Uniform Parentage Act about sperm/egg donation.
4. There may be an added area of litigation, entailing the use of more court resources, as the enactment of HB 305 will likely increase the use of surrogacy in New Mexico. In fact, people may come from other countries and states for surrogacy. (They do already but not in large numbers for surrogacy here.)

TECHNICAL ISSUES

As noted by AOC:

- The HB305 amendment to Section 40-11A-102 NMSA 1978, providing a definition for "sign" has language that is unclear and therefore perhaps unenforceable: "Sign" is defined to mean, with present intent to authenticate or adopt a record: (1) to execute or adopt a tangible symbol; or (2) to attach to or logically associate with the record an electronic symbol, sound, or process;" There is no guidance or definition of what the qualifying sound might be.
- Section 1 Page 6, lines 24-25 are inconsistent with the rest of the bill. Instead of "transfer" means a procedure for assisted reproduction by which an embryo or sperm is placed in the body..." it would be appropriate to use "embryo or gamete" as that matches with the definition in HB305 of either sperm or egg.

NMAG makes the following suggestions for changes needed:

It is unclear whether there is a typographical error in a reference in proposed Section 25 to factors to be considered in Subsection A of §40-11-813 NMSA 1978. Proposed Section 25, Section 40-11A-816 states:

> D. If a child conceived by assisted reproduction pursuant to a genetic surrogacy agreement that is not validated pursuant to Section 40-11A-813 NMSA 1978 is born and a genetic surrogate does not withdraw her consent to the agreement, consistent with Paragraph (2) of Subsection A of Section 40-11A-814 NMSA 1978, before forty-eight hours after the birth of the child, the genetic surrogate is not automatically a parent and ***the court shall adjudicate parentage of the child based on the best interest of the child, taking into account the factors in Subsection A of Section 40-11A-813 NMSA 1978*** and the intent of the parties at the time of the execution of the agreement.

Subsection A of Section 40-11A-813 states:

> A. Except as otherwise provided in Section 40-11A-816 NMSA 1978, to be enforceable, a genetic surrogacy agreement shall be validated by the district court. A proceeding to validate the agreement shall be commenced before assisted reproduction related to the surrogacy agreement.

The above paragraph does not appear to contain the factors Subsection D refers to; Subsection B, however, contains potential factors; or, perhaps, another section was intended.

Under Section 16, p. 22 of the proposed bill, a spelling error should be corrected. Surrogacy has been incorrectly spelled as “Surrogracy" in the heading. 40-11A-807. [NEW MATERIAL] GESTATIONAL OR GENETIC **SURROGRACY** AGREEMENT--EXCLUSIVE, CONTINUING JURISDICTION.

In Section 15, neither the terms “relevant agency” nor “exigent circumstances” are defined. Both are subject to varying definitions. Suggest defining those terms, removing them altogether and setting a more definite standard, or changing them to more narrowly defined terms.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

Courts in New Mexico will not have a fully fleshed-out legal basis for decisions regarding

surrogacy. Prospective intended parents and potential surrogates may choose other states with better developed legal underpinnings for surrogacy, potentially depriving New Mexico providers of clients.

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