

Gestational Surrogacy

This Act establishes consistent standards and procedural safeguards for the protection of all parties involved in a gestational surrogacy contract in the state and confirms the legal status of children born as a result of such contracts.

Submitted as:

Illinois

Public Act 093-0921

Status: Enacted into law in 2004.

Suggested State Legislation

(Title, enacting clause, etc.)

1 Section 1. [*Short Title.*] This Act may be cited as “The Gestational Surrogacy Act.”

2

3 Section 2. [*Purpose.*] The purpose of this Act is to establish consistent standards and
4 procedural safeguards for the protection of all parties involved in a gestational surrogacy contract
5 in this State and to confirm the legal status of children born as a result of these contracts. These
6 standards and safeguards are meant to facilitate the use of this type of reproductive contract in
7 accord with the public policy of this State.

8

9 Section 3. [*Definitions.*] As used in this Act:

10 “Compensation” means payment of any valuable consideration for services in excess of
11 reasonable medical and ancillary costs.

12 “Donor” means an individual who contributes a gamete or gametes for the purpose of in
13 vitro fertilization or implantation in another.

14 “Gamete” means either a sperm or an egg.

15 “Gestational surrogacy” means the process by which a woman attempts to carry and give
16 birth to a child created through in vitro fertilization using the gamete or gametes of at least one of
17 the intended parents and to which the gestational surrogate has made no genetic contribution.

18 “Gestational surrogate” means a woman who agrees to engage in a gestational surrogacy.

19 “Gestational surrogacy contract” means a written agreement regarding gestational
20 surrogacy.

21 “Health care provider” means a person who is duly licensed to provide health care,
22 including all medical, psychological, or counseling professionals.

23 “Intended parent” means a person or persons who enters into a gestational surrogacy
24 contract with a gestational surrogate pursuant to which he or she will be the legal parent of the
25 resulting child. In the case of a married couple, any reference to an intended parent shall include
26 both husband and wife for all purposes of this Act. This term shall include the intended mother,
27 intended father, or both.

28 “In vitro fertilization” means all medical and laboratory procedures that are necessary to
29 effectuate the extracorporeal fertilization of egg and sperm.

30 “Medical evaluation” means an evaluation and consultation of a physician meeting the
31 requirements of Section 13 of this Act.

32 “Mental health evaluation” means an evaluation and consultation of a mental health
33 professional meeting the requirements of Section 13 of this Act.

34 “Physician” means a person licensed to practice medicine in all its branches in [this
35 state].

36 “Pre-embryo” means a fertilized egg prior to [14 days] of development.

37 “Pre-embryo transfer” means all medical and laboratory procedures that are necessary to
38 effectuate the transfer of a pre-embryo into the uterine cavity.

39

40 Section 4. [*Rights of Parentage.*]

41 (a) Except as provided in this Act, the woman who gives birth to a child is presumed to
42 be the mother of that child for purposes of State law.

43 (b) In the case of a gestational surrogacy satisfying the requirements set forth in
44 subsection (d) of this Section:

45 (1) the intended mother shall be the mother of the child for purposes of State law
46 immediately upon the birth of the child;

47 (2) the intended father shall be the father of the child for purposes of State law
48 immediately upon the birth of the child;

49 (3) the child shall be considered the legitimate child of the intended parent or
50 parents for purposes of State law immediately upon the birth of the child;

51 (4) parental rights shall vest in the intended parent or parents immediately upon
52 the birth of the child;

53 (5) sole custody of the child shall rest with the intended parent or parents
54 immediately upon the birth of the child; and

55 (6) neither the gestational surrogate nor her husband, if any, shall be the parents of
56 the child for purposes of State law immediately upon the birth of the child.

57 (c) In the case of a gestational surrogacy meeting the requirements set forth in subsection
58 (d) of this Section, in the event of a laboratory error in which the resulting child is not genetically
59 related to either of the intended parents, the intended parents will be the parents of the child for
60 purposes of State law unless otherwise determined by a court of competent jurisdiction.

61 (d) The parties to a gestational surrogacy shall assume the rights and obligations of
62 subsections (b) and (c) of this Section if:

63 (1) the gestational surrogate satisfies the eligibility requirements set forth in
64 subsection (a) of Section 5 of this Act;

65 (2) the intended parent or parents satisfy the eligibility requirements set forth in
66 subsection (b) of Section 5 of this Act; and

67 (3) the gestational surrogacy occurs pursuant to a gestational surrogacy contract
68 meeting the requirements set forth in Section 6 of this Act.

69

70 Section 5. [*Eligibility.*]

71 (a) A gestational surrogate shall be deemed to have satisfied the requirements of this Act
72 if she has met the following requirements at the time the gestational surrogacy contract is
73 executed:

74 (1) she is at least [21 years] of age;

75 (2) she has given birth to at least one child;

76 (3) she has completed a medical evaluation;

77 (4) she has completed a mental health evaluation;

78 (5) she has undergone legal consultation with independent legal counsel regarding
79 the terms of the gestational surrogacy contract and the potential legal consequences of the
80 gestational surrogacy; and

81 (6) she has obtained a health insurance policy that covers major medical
82 treatments and hospitalization and the health insurance policy has a term that extends throughout

83 the duration of the expected pregnancy and for [8 weeks] after the birth of the child; provided,
84 however, that the policy may be procured by the intended parents on behalf of the gestational
85 surrogate pursuant to the gestational surrogacy contract.

86 (b) The intended parent or parents shall be deemed to have satisfied the requirements of
87 this Act if he, she, or they have met the following requirements at the time the gestational
88 surrogacy contract is executed:

89 (1) he, she, or they contribute at least one of the gametes resulting in a pre-
90 embryo that the gestational surrogate will attempt to carry to term;

91 (2) he, she, or they have a medical need for the gestational surrogacy as evidenced
92 by a qualified physician's affidavit attached to the gestational surrogacy contract;

93 (3) he, she, or they have completed a mental health evaluation; and

94 (4) he, she, or they have undergone legal consultation with independent legal
95 counsel regarding the terms of the gestational surrogacy contract and the potential legal
96 consequences of the gestational surrogacy.

97
98 Section 6. [*Requirements for a Gestational Surrogacy Contract.*]

99 (a) A gestational surrogacy contract shall be presumed enforceable for purposes of State
100 law only if:

101 (1) it meets the contractual requirements set forth in subsection (b) of this Section;
102 and

103 (2) it contains at a minimum each of the terms set forth in subsection (c) of this
104 Section.

105 (b) A gestational surrogacy contract shall meet the following requirements:

106 (1) it shall be in writing;

107 (2) it shall be executed prior to the commencement of any medical procedures
108 (other than medical or mental health evaluations necessary to determine eligibility of the parties
109 pursuant to Section 5 of this Act) in furtherance of the gestational surrogacy:

110 (i) by a gestational surrogate meeting the eligibility requirements of
111 subsection (a) of Section 5 of this Act and, if married, the gestational surrogate's husband; and

112 (ii) by the intended parent or parents meeting the eligibility
113 requirements of subsection (b) of Section 5 of this Act. In the event an intended parent is
114 married, both husband and wife must execute the gestational surrogacy contract;

115 (3) each of the gestational surrogate and the intended parent or parents shall have
116 been represented by separate counsel in all matters concerning the gestational surrogacy and the
117 gestational surrogacy contract;

118 (3.5) each of the gestational surrogate and the intended parent or parents shall
119 have signed a written acknowledgement that he or she received information about the legal,
120 financial, and contractual rights, expectations, penalties, and obligations of the surrogacy
121 agreement;

122 (4) if the gestational surrogacy contract provides for the payment of
123 compensation to the gestational surrogate, the compensation shall have been placed in escrow
124 with an independent escrow agent prior to the gestational surrogate's commencement of any
125 medical procedure (other than medical or mental health evaluations necessary to determine the
126 gestational surrogate's eligibility pursuant to subsection (a) of Section 5 of this Act); and

127 (5) it shall be witnessed by [2] competent adults.

128 (c) A gestational surrogacy contract shall provide for:

129 (1) the express written agreement of the gestational surrogate to:

130 (i) undergo pre-embryo transfer and attempt to carry and give birth to the
131 child; and

132 (ii) surrender custody of the child to the intended parent or parents
133 immediately upon the birth of the child;

134 (2) if the gestational surrogate is married, the express agreement of her husband
135 to:

136 (i) undertake the obligations imposed on the gestational surrogate
137 pursuant to the terms of the gestational surrogacy contract;

138 (ii) surrender custody of the child to the intended parent or parents
139 immediately upon the birth of the child;

140 (3) the right of the gestational surrogate to utilize the services of a physician of
141 her choosing, after consultation with the intended parents, to provide her care during the
142 pregnancy; and

143 (4) the express written agreement of the intended parent or parents to:

144 (i) accept custody of the child immediately upon his or her birth; and

145 (ii) assume sole responsibility for the support of the child immediately
146 upon his or her birth.

147 (d) A gestational surrogacy contract shall be presumed enforceable for purposes of State
148 law even though it contains one or more of the following provisions:

149 (1) the gestational surrogate's agreement to undergo all medical exams,
150 treatments, and fetal monitoring procedures that the physician recommended for the success of
151 the pregnancy;

152 (2) the gestational surrogate's agreement to abstain from any activities that the
153 intended parent or parents or the physician reasonably believes to be harmful to the pregnancy
154 and future health of the child, including, without limitation, smoking, drinking alcohol, using
155 nonprescribed drugs, using prescription drugs not authorized by a physician aware of the
156 gestational surrogate's pregnancy, exposure to radiation, or any other activities proscribed by a
157 health care provider;

158 (3) the agreement of the intended parent or parents to pay the gestational
159 surrogate reasonable compensation; and

160 (4) the agreement of the intended parent or parents to pay for or reimburse the
161 gestational surrogate for reasonable expenses (including, without limitation, medical, legal, or
162 other professional expenses) related to the gestational surrogacy and the gestational surrogacy
163 contract.

164 (e) In the event that any of the requirements of this Section are not met, a court of
165 competent jurisdiction shall determine parentage based on evidence of the parties' intent.

166

167 Section 7. [*Duty to Support.*]

168 (a) Any person who is considered to be the parent of a child pursuant to Section 4 of this
169 Act shall be obligated to support the child.

170 (b) The breach of the gestational surrogacy contract by the intended parent or parents
171 shall not relieve such intended parent or parents of the support obligations imposed by this Act.

172 (c) A gamete donor may be liable for child support only if he or she fails to enter into a
173 legal agreement with the intended parent or parents in which the intended parent or parents agree
174 to assume all rights and responsibilities for any resulting child, and the gamete donor
175 relinquishes his or her rights to any gametes, resulting embryos, or children.

176

177 Section 8. [*Establishment of the Parent-Child Relationship.*]

178 (a) A parent-child relationship shall be established prior to the birth of a child born
179 through gestational surrogacy if the attorneys representing both the gestational surrogate and the

180 intended parent or parents certify that the parties entered into a gestational surrogacy contract
181 intended to satisfy the requirements of Section 6 of this Act with respect to the child.

182 (b) The attorneys' certifications required by subsection (a) of this Section shall be filed
183 on forms prescribed by the [Department of Public Health] and in a manner consistent with the
184 requirement of [insert citation].

185
186 Section 9. [*Immunities.*] Except as provided in this Act, no person shall be civilly or
187 criminally liable for non-negligent actions taken pursuant to the requirements of this Act.

188
189 Section 10. [*Noncompliance.*] Noncompliance by the gestational surrogate or the
190 intended parent or parents occurs when that party breaches a provision of the gestational
191 surrogacy contract.

192
193 Section 11. [*Effect of Noncompliance.*]

194 (a) Except as otherwise provided in this Act, in the event of noncompliance with the
195 requirements of subsection (d) of Section 4 of this Act, a court of competent jurisdiction shall
196 determine the respective rights and obligations of the parties.

197 (b) There shall be no specific performance remedy available for a breach by the
198 gestational surrogate of a gestational surrogacy contract term that requires her to be impregnated.

199
200 Section 12. [*Damages.*]

201 (a) Except as expressly provided in the gestational surrogacy contract, the intended parent
202 or parents shall be entitled to all remedies available at law or equity.

203 (b) Except as expressly provided in the gestational surrogacy contract, the gestational
204 surrogate shall be entitled to all remedies available at law or equity.

205
206 Section 13. [*Rulemaking.*] The [Department of Public Health] may adopt rules pertaining
207 to the required medical and mental health evaluations for a gestational surrogacy contract. Until
208 the [Department of Public Health] adopts such rules, medical and mental health evaluations and
209 procedures shall be conducted in accordance with the recommended guidelines published by the
210 American Society for Reproductive Medicine and the American College of Obstetricians and
211 Gynecologists. The rules may adopt these guidelines or others by reference.

212
213 Section 14. [*Severability.*] If any provision of this Act or its application to any person or
214 circumstance is held invalid, the invalidity of that provision or application does not affect other
215 provisions or applications of this Act that can be given effect without the invalid provision or
216 application.

217
218 Section 15. [*Irrevocability.*] No action to invalidate a gestational surrogacy meeting the
219 requirements of subsection (d) of Section 4 of this Act or to challenge the rights of parentage
220 established pursuant to Section 4 of this Act shall be commenced after [12 months] from the date
221 of birth of the child.

222
223 Section 16. [*Application.*] The provisions of this Act shall apply only to gestational
224 surrogacy contracts entered into after the effective date of this Act.

225
226 Section 17. [*Establishment of Parent and Child Relationship by Consent of the Parties.*]

227 (a) A parent and child relationship may be established voluntarily by the signing and
228 witnessing of a voluntary acknowledgment of parentage in accordance with the provisions of

229 this Act. The voluntary acknowledgment of parentage shall contain the social security numbers
230 of the persons signing the voluntary acknowledgment of parentage; however, failure to include
231 the social security numbers of the persons signing a voluntary acknowledgment of parentage
232 does not invalidate the voluntary acknowledgment of parentage.

233 (1) A parent-child relationship may be established in the event of gestational
234 surrogacy if all of the following conditions are met prior to the birth of the child:

235 (A) The gestational surrogate certifies that she is not the biological mother
236 of the child, and that she is carrying the child for the intended parents.

237 (B) The husband, if any, of the gestational surrogate certifies that he is not
238 the biological father of the child.

239 (C) The intended mother certifies that she provided or an egg donor
240 donated the egg from which the child being carried by the gestational surrogate mother was
241 conceived.

242 (D) The intended father certifies that he provided or a sperm donor
243 donated the sperm from which the child being carried by the gestational surrogate mother was
244 conceived.

245 (E) A physician licensed to practice medicine in all its branches in [this
246 State] certifies that the child being carried by the gestational surrogate is the biological child of
247 the intended mother and intended father, and that neither the gestational surrogate nor the
248 gestational surrogate's husband, if any, is a biological parent of the child being carried by the
249 gestational surrogate.

250 (F) The attorneys for the intended parents and the gestational surrogate
251 each certifies that the parties entered into a gestational surrogacy contract intended to satisfy the
252 requirements of Section 6 of this Act with respect to the child.

253 (G) All certifications shall be in writing and witnessed by 2 competent
254 adults who are not the gestational surrogate, gestational surrogate's husband, if any, intended
255 mother, or intended father. Certifications shall be on forms prescribed by the [Department of
256 Public Health], shall be executed prior to the birth of the child, and shall be placed in the medical
257 records of the gestational surrogate prior to the birth of the child. Copies of all certifications shall
258 be delivered to the [Department of Public Health] prior to the birth of the child.

259 (2) Unless otherwise determined by order of the [Circuit Court], the child shall be
260 presumed to be the child of the gestational surrogate and of the gestational surrogate's husband,
261 if any, if all requirements of subdivision (a)(1) are not met prior to the birth of the child. This
262 presumption may be rebutted by clear and convincing evidence. The [circuit court] may order the
263 gestational surrogate, gestational surrogate's husband, intended mother, intended father, and
264 child to submit to such medical examinations and testing as the court deems appropriate.

265 (b) Notwithstanding any other provisions of this Act, paternity established in accordance
266 with subsection (a) has the full force and effect of a judgment entered under this Act and serves
267 as a basis for seeking a child support order without any further proceedings to establish paternity.

268 (c) A judicial or administrative proceeding to ratify paternity established in accordance
269 with subsection (a) is neither required nor permitted.

270 (d) A signed acknowledgment of paternity entered under this Act may be challenged in
271 court only on the basis of fraud, duress, or material mistake of fact, with the burden of proof
272 upon the challenging party. Pending outcome of the challenge to the acknowledgment of
273 paternity, the legal responsibilities of the signatories shall remain in full force and effect, except
274 upon order of the court upon a showing of good cause.

275 (e) Once a parent and child relationship is established in accordance with subsection (a),
276 an order for support may be established pursuant to a petition to establish an order for support by
277 consent filed with the [clerk of the circuit court]. A copy of the properly completed

278 acknowledgment of parentage form shall be attached to the petition. The petition shall ask that
279 the circuit court enter an order for support. The petition may ask that an order for visitation,
280 custody, or guardianship be entered. The filing and appearance fees provided under the [insert
281 citation] shall be waived for all cases in which an acknowledgment of parentage form has been
282 properly completed by the parties and in which a petition to establish an order for support by
283 consent has been filed with the [clerk of the circuit court]. This subsection shall not be construed
284 to prohibit filing any petition for child support, visitation, or custody under this Act or to prevent
285 the establishment of an administrative support order in cases involving persons receiving child
286 support enforcement services under [insert citation].

287

288 Section 18. [*Severability.*] [Insert severability clause.]

289

290 Section 19. [*Repealer.*] [Insert repealer clause.]

291

292 Section 20. [*Effective Date.*] [Insert effective date.]