

**THE PROPOSED PENNSYLVANIA  
ASSISTED REPRODUCTIVE  
TECHNOLOGIES ACT**

**REPORT OF THE SUBCOMMITTEE ON  
ASSISTED REPRODUCTIVE TECHNOLOGIES**

**MAY 2007**



General Assembly of the Commonwealth of Pennsylvania  
JOINT STATE GOVERNMENT COMMISSION  
108 Finance Building  
Harrisburg, PA 17120

The release of this report should not be interpreted as an endorsement by the members of the Executive Committee of the Joint State Government Commission of all the findings, recommendations or conclusions contained in this report.

**Joint State Government Commission**  
**Room 108 Finance Building**  
**Harrisburg, PA 17120-0018**

**Telephone 717-787-4397**  
**Fax 717-787-7020**

**E-mail: [jntst02@legis.state.pa.us](mailto:jntst02@legis.state.pa.us)**  
**Website: <http://jsg.legis.state.pa.us>**

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Professor Robert Rains

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## **Consultants**

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(Pennsylvania Department of Health)

Stephen D. Tompkins, Esquire  
(Pennsylvania Department of Health, retired)

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Representative Stephen R. Maitland



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# **INTRODUCTION**

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## ***The Subcommittee and Legislative Process***

The Joint State Government Commission Subcommittee on Assisted Reproductive Technologies is comprised of representatives from the Commission's Advisory Committees on Adoption Law, Decedents' Estates Laws and Domestic Relations Law, as well as practitioners with experience in matters relating to assisted reproductive technologies and establishing the legal parentage of children born as a result of such technologies. In addition, consultants from the Pennsylvania Department of Health were invited to participate in the subcommittee discussions to provide guidance on current departmental practices and procedures.<sup>1</sup>

The impetus for establishing the subcommittee was the introduction of Senate Bill 408 (Printer's No. 391) of 2005, which provided a statutory framework for surrogate parenting agreements, and the Senate Judiciary Committee public hearing on the legislation on March 14, 2005. During the March 14 public hearing, Senator Stewart J. Greenleaf, the Chair of the Judiciary Committee, requested that the Subcommittee on Assisted Reproductive Technologies review the subject matter and report back to the Senate Judiciary Committee with its recommendations.<sup>2</sup>

Lawrence A. Kalikow was named the chair of the subcommittee, which held its organizational meeting on April 22, 2005. The subcommittee subsequently met nine times to date: June 2005, August 2005, October 2005, December 2005, January 2006, April 2006, September 2006, December 2006 and January 2007. During the meetings, the subcommittee members thoroughly reviewed the Uniform Parentage Act (UPA),<sup>3</sup> statutory law, case law, current Pennsylvania practice and Department of Health procedures.

The subcommittee members agreed on a statutory framework for assisted reproductive technologies in Title 23 of the Pennsylvania Consolidated Statutes (the Pennsylvania Assisted Reproductive Technologies Act), consisting of general provisions and provisions regarding gestational agreements, set forth in this report as Subchapters A,

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<sup>1</sup> The participation of the consultants from the Pennsylvania Department of Health in the subcommittee process resulting in this report should not be construed as an official endorsement of the proposed statutory language by the department, the Secretary of Health or the Governor or his administration.

<sup>2</sup> Senator Greenleaf is also the Chair of the Joint State Government Commission's legislative Task Forces on Adoption Law, Decedents' Estates Laws and Domestic Relations Laws.

<sup>3</sup> The UPA, promulgated by the National Conference of Commissioners on Uniform State Laws (NCCUSL), was approved and recommended at the NCCUSL annual conference in 2000 and last amended or revised in 2002.

B and C of proposed Chapter 59 of Title 23. The members also recommended that the Pennsylvania Supreme Court amend the Orphans' Court rules to conform to the provisions of this chapter.

Comments follow the sections of this chapter and explain the statutory provisions. Several comments are derived from the UPA comments and concepts raised in the UPA. The official comments may be used in determining the intent of the General Assembly.<sup>4</sup>

In addition, throughout this chapter, notes explain the source of the provisions and outline similarities and differences with the UPA.

The members are continuing their discussions on provisions relating to children of assisted reproduction and records, which will constitute the foundation of a subsequent report and will add Subchapters D and E to proposed Chapter 59 of Title 23.

In light of the complexity of the issues concerning assisted reproduction, the members recommended a review of the report of the President's Council on Bioethics titled *Reproduction and Responsibility: The Regulation of New Biotechnologies* (March 2004).<sup>5</sup>

## ***The Pennsylvania Assisted Reproductive Technologies Act***

### *Subchapter A - General Provisions*

Section 5902 sets forth definitions for the chapter. The term "gestational carrier" replaces "gestational mother" in the UPA<sup>6</sup>. The definition of "gestational carrier" applies under Subchapters B and C regardless of whether the adult woman's eggs are used to conceive the child. Therefore, under both subchapters, the adult woman may be genetically related to the child. Subchapters B and C concern a gestational agreement, which is designed to involve at least an intended parent and a gestational carrier, who is the woman who agrees to bear a child for the intended parent using assisted reproduction.

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<sup>4</sup> 1 Pa.C.S. § 1939.

<sup>5</sup> See <http://www.bioethics.gov/reports/reproductionandresponsibility/index.html> (last visited April 19, 2007).

<sup>6</sup> Before the UPA, the term "surrogate mother" was used. The UPA, however, rejects the term "surrogate mother," explaining in its comment to Article 8 that the term does not comport with the dictionary definition of the term under any construction and is especially misleading when referring to a woman who supplies both egg and womb (where the woman is both the genetic mother and gestational carrier). The comment also notes that the term "surrogate" has acquired a negative connotation in American society. Consequently, the UPA uses the term "gestational mother," which it describes as more accurate and inclusive and which applies to (1) a woman who through assisted reproduction performs the gestational function without being genetically related to the child and (2) a woman who is both the gestational and genetic mother.

However, additional individuals may be involved, such as the gestational carrier's husband, an egg donor and a sperm donor. By definition, a child born pursuant to a gestational agreement will need to have maternity as well as paternity clarified.

Under Chapter 59, the marital status of an intended parent is irrelevant, with respect to the use of assisted reproduction and to entering into a gestational agreement. Subchapters B and C are designed to protect the interests of children to be born under the gestational agreement as well as the interests of gestational carriers and intended parents. The subchapters are neutral on the issue of gestational agreements involving single parents and same-sex couples; they do not prohibit them from entering into a gestational agreement. The rights and duties of parents and children are located elsewhere in Pennsylvania law.

Section 5903 (donors) applies to any situation under this chapter involving a donor. Subsection (a) specifies that if a child is conceived as the result of assisted reproduction, a donor (whether of sperm or egg) is not a parent of the resulting child. The purpose of subsection (a) is to foreclose an individual from establishing a parent-child relationship between the donor and the child based on the provisions of this chapter. A donor has no parental rights and duties regarding the child born by means of assisted reproduction. Neither § 5904(b) nor any other provision of this chapter would be applicable to give the donor standing to proceed to seek to establish a parent-child relationship with the child. However, subsection (b)(2) provides an exception to the general rule and sets forth the criteria necessary for a donor to establish a parent-child relationship. In addition, subsection (b)(3) sets forth the circumstances to reverse the donor's initial intent to establish a parent-child relationship.

Section 5903, like the UPA and explained in the comment to UPA § 702, does not deal with many of the complex and serious legal problems raised by the practice of assisted reproduction, such as the ownership and disposition of embryos, the regulation of the medical procedures and insurance coverage.

Section 5904(b) (determination of legal parentage generally) allows the court to resolve a parentage issue arising from an agreement regarding assisted reproduction if the specific requirements for a gestational agreement are not satisfied. In such instances, the court is not automatically foreclosed from resolving the issue. The case may proceed under the general procedures set forth in Subchapter C if the requirements of subsection (b)(1), (2) and (3) are satisfied. Specifically, proper venue must be established, a party must proceed in good faith and cause is shown excusing compliance with a specific requirement regarding gestational agreements under Chapter 59.

Section 5905 (gestational agreements generally) sets forth general provisions regarding gestational agreements under Subchapters B and C. Subsection (a) requires that if two individuals are the intended parents, each must be a party to the gestational agreement, regardless of whether or not they are married. Subsection (b) specifies that the gestational agreement must be in writing. Subsection (c) sets forth permissible provisions of a gestational agreement. Subsection (c)(1) allows for reasonable

compensation and is intended to shield agreements that include payment to the gestational carrier from challenge under 18 Pa.C.S. § 4305 (dealing in infant children), which prohibits the dealing “in humanity, by trading, bartering, buying, selling, or dealing in infant children.” Subsection (c)(2) allows for the payment or reimbursement of reasonable expenses relating to the pregnancy and the agreement and includes, but is not limited to, medical, legal and other professional services; rent; clothing; insurance; and lost wages. Subsection (d) concerns health decision-making by a gestational carrier.

Section 5905 also provides for the circumstances under which a decree under Subchapter B or C may be challenged. Subsection (f) concerns genetic testing to determine the genetic parentage of the child to whom a gestational carrier has given birth, and subsection (g) concerns fraud and duress. Challenges under subsections (f) and (g) require the filing of a petition and a special hearing.

Because the procedures involved in Chapter 59 are exceptionally personal and protection from invasions of privacy is warranted, § 5906 (records generally) provides for the retention and confidentiality of any petition, agreement, order, decree, record or paper pertaining to a proceeding under Chapter 59. Section 5906 protects, among other things, the identities of the parties to a gestational agreement.

#### *Subchapter B - Gestational Agreements and the Pre-Pregnancy Validation Process*

Proposed Subchapter B provides a statutory framework for gestational agreements that are validated before any attempt to achieve the pregnancy through assisted reproduction. In order to achieve the benefit of receiving a pre-pregnancy decree under Subchapter B, the procedures under Subchapter B must be strictly followed. Sections 5912, 5913 and 5914 contain specific provisions regarding venue, the execution of the agreement and mandatory contents of the agreement. Section 5915 (terminating gestational agreement and vacating decree) permits the termination of the agreement before the prospective gestational carrier becomes pregnant by means of assisted reproduction, specifies how to give proper notice of the termination and addresses liability issues as a result of the termination.

Section 5916 (establishing legal parentage through validation of gestational agreement) sets forth the contents of a petition to commence a proceeding to validate a gestational agreement and contains provisions regarding the hearing to consider the petition, notice requirements and the issuance of both a validation decree and a post-birth decree.

*Subchapter C - Gestational Agreements and Legal Parentage  
Through the Post-Pregnancy Process*

Proposed Subchapter C is not contained in the UPA and is based on current Pennsylvania practice through policies developed by the Department of Health. However, Subchapter C does not represent an absolute codification of current practice. The development of uniform procedures throughout the Commonwealth under the proposed statutory framework has eliminated the need for specific policies to account for local court practices.

Although Subchapter C, like Subchapter B, involves assisted reproduction through a gestational carrier and a gestational agreement, the formalities of a gestational agreement under Subchapter B do not apply to Subchapter C. In cases involving a gestational carrier, legal parentage may be established under the procedures set forth in § 5916 or under Subchapter C. Unlike § 5916, which provides for a decree before the prospective gestational carrier becomes pregnant, Subchapter C provides for a decree after the gestational carrier becomes pregnant and either before or after the birth of the child. Sections 5922 and 5923 contain specific provisions regarding venue and the execution of the agreement.

Section 5924 (petition to ratify agreement) specifies the requirements regarding a petition for a decree ratifying the gestational agreement, declaring that each intended parent is a legal parent of the child and assumes parental rights and duties regarding the child, and directing that any certified copies of the child's birth records issued by the Division of Vital Records of the Department of Health reflect such parentage when parentage appears on the certified copies that the department issues of such birth records. Subsection (b) sets forth the contents of the petition, and subsection (c) lists the exhibits that must be attached to the petition. Subsection (d) permits the specified affidavit, acknowledgment and waiver to be contained in one instrument.

Sections 5925 and 5926 provide for hearing and notice procedures and the issuance of a decree. Section 5927 specifies that an amended petition is not required if a pre-birth decree is sought and the birth occurs after the filing of the petition but prior to the entry of the decree.

*Other Provisions*

This report also contains conforming amendments to 20 Pa.C.S. §§ 711 and 713 and applicability and effective date provisions.



**ASSISTED REPRODUCTIVE TECHNOLOGIES:  
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# ASSISTED REPRODUCTIVE TECHNOLOGIES

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## TITLE 23 DOMESTIC RELATIONS

### PART VI CHILDREN AND MINORS

#### CHAPTER 59 ASSISTED REPRODUCTIVE TECHNOLOGIES

##### Subchapter

- A. General Provisions
- B. Gestational Agreements and Pre-Pregnancy Validation Process
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##### SUBCHAPTER A GENERAL PROVISIONS

##### Sec.

- 5901. Short title.
- 5902. Definitions.
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##### § 5901. Short title.

This chapter shall be known and may be cited as the Pennsylvania Assisted Reproductive Technologies Act.

##### § 5902. Definitions.

The following words and phrases when used in this chapter shall have the meanings given to them in this section unless the context clearly indicates otherwise:

“Assisted reproduction.” A reproductive method, other than sexual intercourse, that results in a child’s conception or causes pregnancy. The term includes:

- (1) Artificial insemination.
- (2) In-vitro fertilization.
- (3) Placement of embryos.
- (4) Intracytoplasmic sperm injection.

“Court.” Either of the following:

- (1) For all judicial districts other than Philadelphia County, the court of common pleas exercising jurisdiction through its orphans’ court division.
- (2) The family court division of the court of common pleas in Philadelphia County.

“Department.” The Department of Health of the Commonwealth.

“Donor.” An individual who produces eggs or sperm used for assisted reproduction, whether or not for consideration. The term does not include:

- (1) A husband who produces sperm, or a wife who provides eggs, to be used for assisted reproduction by the wife.
- (2) An intended parent of the child.

“Gestational agreement.” A written contract that:

- (1) strictly complies with Subchapter B (relating to gestational agreements and pre-pregnancy validation process); or
- (2) serves as the basis to determine legal parentage under Subchapter C (relating to gestational agreements and legal parentage through post-pregnancy process).

“Gestational carrier.” An adult woman who conceives or gives birth to a child pursuant to a gestational agreement under Subchapter B or C.

“Intended parent.” An adult individual who seeks to become a legal parent of a child conceived pursuant to a gestational agreement under Subchapter B or C.

“Legal parent.” An individual whose parentage regarding a child is established pursuant to this chapter.

“Man.” A male individual of any age.

“Parent.” An individual who is the genetic mother or genetic father of a child or whose parentage is otherwise established by law.

“Prospective gestational carrier.” An adult woman who intends to conceive and give birth to a child pursuant to a gestational agreement under Subchapter B or C.

#### **Note**

**This section is based on UPA § 102. However, the following terms are not contained in the UPA: “court,” “department,” “intended parent,” “legal parent” and “prospective gestational carrier.” Under the definition of “assisted reproduction,” the phrase “artificial insemination” in paragraph (1) replaces “intrauterine insemination” contained in UPA § 102(4)(A), and the phrase “placement of embryos” in paragraph (3) replaces “transfer of embryos” contained in UPA § 102(4)(D). The definition of “assisted reproduction” does not contain UPA § 102(4)(B) and (C) (“donation of eggs” and “donation of embryos”). The term “gestational agreement” is expanded to apply to a contract under Subchapter B or C. The term “gestational carrier” in this chapter replaces “gestational mother” in the UPA. The definition of “parent” replaces the one from the UPA.**

#### **Comment**

**The list under the definition of “assisted reproduction” is not intended to be exclusive. Under this chapter, the marital status of an intended parent is irrelevant, with respect to the use of assisted reproduction and to entering into a gestational agreement.**

**The definition of "gestational carrier" applies under Subchapters B and C regardless of whether the adult woman's eggs are used to conceive the child. Therefore, under both subchapters, the adult woman may be genetically related to the child. Subchapters B and C concern a gestational agreement, which is designed to involve at least an intended parent and a gestational carrier, who is the woman who agrees to bear a child for the intended parent using assisted reproduction. However, additional individuals may be involved, such as the gestational carrier's husband, an egg donor and a sperm donor. By definition, a child born pursuant to a gestational agreement will need to have maternity as well as paternity clarified.**

**Subchapters B and C are designed to protect the interests of children to be born under the gestational agreement as well as the interests of gestational carriers and intended parents. The subchapters are neutral on the issue of gestational agreements involving single parents and same-sex couples; they do not prohibit them from entering into a gestational agreement. The rights and duties of parents and children are located elsewhere in Pennsylvania law.**

§ 5903. Donors.

(a) General rule.--Except as provided in subsection (b), the following rules apply to a donor and a child conceived by means of assisted reproduction:

- (1) The donor is not a legal parent of the child.
- (2) The donor may not sue to establish parental rights regarding the child.
- (3) The donor may not be sued and required to support the child.
- (4) The donor is not an heir of the child.
- (5) The child is not an heir of the donor.

(b) Donor with intent to become parent.--

(1) This subsection does not apply if Subchapter B (relating to gestational agreements and pre-pregnancy validation process) or C (relating to gestational agreements and legal parentage through post-pregnancy process) is applicable.

(2) Subsection (a) does not apply if a donor, with the intent to become a parent of a child conceived by means of assisted reproduction, evidences such intent in writing to the other genetic parent before he or she respectively makes a sperm or egg donation.

(3) After a donor has evidenced the intent pursuant to paragraph (1), the donor may evidence a clear, contrary intent in a separate writing to the other genetic parent before the placement of the eggs, sperm or embryos, in which case subsection (a) shall apply.

#### Note

**Subsection (a) is based on UPA § 702 and the comment to UPA § 702, with the addition of paragraphs (4) and (5). Subsection (b) applies only in situations that occur outside of the Subchapter B or C context. It is presented in this report in expectation of additional provisions being proposed for this chapter.**

#### Comment

**This section applies to any situation under this chapter involving a donor. Subsection (a) specifies that if a child is conceived as the result of assisted reproduction, a donor (whether of sperm or egg) is not a parent of the resulting child. The purpose of subsection (a) is to foreclose an individual from establishing a parent-child relationship between the donor and the child based on the provisions of this chapter. A donor has no parental rights and duties regarding the child born by means of assisted reproduction. Neither § 5904(b) nor any other provision of this chapter would be applicable to give the donor standing to proceed to seek to establish a parent-child relationship with the child. However, subsection (b)(2) provides an exception to the general rule and sets forth the criteria necessary for a donor to establish a parent-child relationship. In addition, subsection (b)(3) sets forth the circumstances to reverse the donor's initial intent to establish a parent-child relationship.**

§ 5904. Determination of legal parentage generally.

(a) Exclusivity.--Nothing in this chapter is intended to create an exclusive means of determining the legal parentage of a child.

(b) Court jurisdiction.--The court has jurisdiction to resolve any parentage issue arising from an agreement regarding assisted reproduction by proceeding under the general procedures set forth in Subchapter C (relating to gestational agreements and legal parentage through post-pregnancy process) if:

- (1) venue is established under 5922 (relating to venue);
- (2) a party proceeds in good faith under this chapter; and
- (3) subject to paragraph (1), cause is shown excusing compliance with a specific requirement regarding gestational agreements under this chapter.

**Note**

**This section is not contained in the UPA.**

**Comment**

**Subsection (b) allows the court to resolve a parentage issue arising from an agreement regarding assisted reproduction if the specific requirements for a gestational agreement are not satisfied. In such instances, the court is not automatically foreclosed from resolving the issue. The case may proceed under the general procedures set forth in Subchapter C if the requirements of subsection (b)(1), (2) and (3) are satisfied.**

§ 5905. Gestational agreements generally.

(a) Parties to agreement.--A prospective gestational carrier and each intended parent of the child shall be a party to a gestational agreement.

(b) Writing required.--A gestational agreement under this chapter shall be written.

(c) Permissible provisions in agreement.--A gestational agreement may provide for:

(1) The payment of reasonable consideration and the return of consideration upon the termination of the agreement.

(2) The payment or reimbursement of reasonable expenses relating to the pregnancy and the agreement.

(3) Subject to subsection (c), that the gestational carrier:

(i) Consult with an intended parent regarding the choice of an obstetrical health care provider.

(ii) Undergo medical examinations, treatments and fetal monitoring procedures that the health care provider recommends for the success of the pregnancy.

(iii) Inform an intended parent of the health care services rendered to the gestational carrier during the pregnancy.

(iv) Abstain from an activity that the health care provider reasonably believes would be harmful to the pregnancy and future health of the child.

(4) The effect of the gestational carrier's injury, disability or death.

(5) Mandatory, non-judicial, alternative dispute resolution procedures for non-emergency situations.

(d) Health decision-making by gestational carrier.--A provision of a gestational agreement that violates any Constitutional right of the gestational carrier to make decisions to control her health or the health of in utero embryos or the fetus is unenforceable.

(e) Enforcement of gestational agreement.--

(1) If a material breach regarding a provision of a gestational agreement is alleged to have occurred, an intended parent or the gestational carrier may seek to enforce the agreement, in which case the court shall make its determination on the matter after giving due regard to the intent of the parties when the agreement was executed.

(2) An enforcement action under this subsection shall be commenced in the court of the judicial district where:

(i) the validation decree under section 5916(e) (relating to establishing legal parentage through validation of gestational agreement) was issued;

(ii) a petition under section 5924 (relating to petition to ratify agreement) was filed; or

(iii) the gestational carrier or an intended parent has resided for at least 90 days.

(f) Genetic testing.--

(1) Notwithstanding the provisions of Subchapter B or C, the court shall order genetic testing to determine the genetic parentage of the child to whom a gestational carrier has given birth if an intended parent, the gestational carrier or the gestational carrier's husband alleges that the genetic parentage of a child born to the gestational carrier is not the result of the intended assisted reproduction.

(2) An allegation under paragraph (1) shall be made through a petition filed in court by an intended parent, the gestational carrier or the gestational carrier's husband within 30 days after the birth of the child.



(3) A hearing on the petition under paragraph (2) shall be held in an expeditious manner within 60 days of the filing of the petition.

(4) After a hearing on the petition under paragraph (2), the court shall make an appropriate order.

(g) Fraud and duress.--

(1) A decree under section 5916(e) or section 5926 (relating to decree) is not subject to challenge except as provided in this subsection and subsection (f).

(2) An intended parent or the gestational carrier may challenge a decree under section 5916(e) or 5926 by filing a petition alleging fraud or duress within 30 days after the issuance of the decree.

(3) Fraud or duress under this section must be proven by clear and convincing evidence.

(4) A hearing on the petition under paragraph (2) shall be held in an expeditious manner within 60 days of the filing of the petition.

(5) After a hearing on the petition under paragraph (2), the court shall make an appropriate order.

#### Note

**Subsection (a) is based on the introductory language to UPA § 801(a) and on UPA § 801(b), without the reference to donors and with a reference to “each intended parent” (instead of “the intended parents” collectively or “the man and the woman who are the intended parents”). The requirement under subsection (b) that the agreement be written is based on the introductory language to UPA § 801(a). Subsection (c)(1) is based on UPA § 801(e), with the addition of the modifier “reasonable” and the phrase “and the return of consideration upon the termination of the agreement.” Subsections (c)(2) through (5) are not contained in the UPA. Subsection (d) is based on UPA § 801(f). Subsection (e) is not contained in the UPA.**

Subsection (f) is based on UPA § 807(b) and expanded. Subsection (g) is not contained in the UPA.

### Comment

This section applies to situations under either Subchapter B or C. Subsection (a) requires that if two individuals are the intended parents, each must be a party to the gestational agreement, regardless of whether or not they are married. Subsection (c)(1) allows for reasonable compensation and is intended to shield agreements that include payment to the gestational carrier from challenge under 18 Pa.C.S. § 4305 (dealing in infant children), which prohibits the dealing “in humanity, by trading, bartering, buying, selling, or dealing in infant children.” Subsection (c)(2) includes, but is not limited to, medical, legal and other professional services; rent; clothing; insurance; and lost wages. The list of permissible provisions in this section is not intended to be exclusive. Enforcement under subsection (e) is permissible even if, for example, the gestational agreement has not been validated under § 5916(e). In addition, the court that validated the gestational agreement under Subchapter B has the authority to enforce the gestational agreement. The time periods under subsections (f)(2) and (g)(2) may not be waived. A decree under § 5916(e) or 5926 may not be challenged except as provided in subsection (f) and (g).

A specific provision in a gestational agreement that is unenforceable does not mean that the entire agreement is unenforceable. The purpose of judicial review is to effectuate the overall intent of the parties when the agreement was executed.

The orphans’ court division (and the family court division in Philadelphia County) has jurisdiction over all matters under this chapter including custody matters and a parentage determination, if they relate directly to the validity, compliance or enforcement of a gestational agreement under this chapter. *See* 20 Pa.C.S. §§ 711(23) and 713.

Rule 5 of the Orphans’ Court Rules (Notice) provides for the method of providing notice, the time for providing notice and the return of notice. *See* Rules 5.1 through 5.4.

§ 5906. Records generally.

(a) Retention and confidentiality.--All petitions, agreements, orders, decrees and other records or papers pertaining to a proceeding under this chapter shall be:

(1) retained in the files of the court as a permanent record; and

(2) withheld from inspection except on an order of court granted upon cause shown or as otherwise provided in this subchapter.

(b) Penalty for unauthorized disclosure.--An officer, employee or agent of the department or court, other than a judge of the court, who willfully discloses confidential information, other than as expressly authorized by this chapter, commits a misdemeanor of the third degree.

**Note**

**This section is not contained in the UPA.**

**Comment**

**The procedures involved in this chapter are exceptionally personal, thereby warranting protection from invasions of privacy. This section encompasses, among other things, the identities of the parties to a gestational agreement.**

SUBCHAPTER B  
GESTATIONAL AGREEMENTS AND  
PRE-PREGNANCY VALIDATION PROCESS

Sec.

5911. Applicability.

5912. Venue.

5913. Execution of gestational agreement.

5914. Mandatory contents of gestational agreement.

5915. Terminating gestational agreement and vacating decree.

5916. Establishing legal parentage through validation of gestational agreement.

§ 5911. Applicability.

This subchapter relates to gestational agreements in a pre-pregnancy context and applies to assisted reproduction involving a gestational carrier, where requirements under

this subchapter regarding the gestational agreement and procedures resulting in the determination of the parentage of the child are strictly followed.

**Note**

**This section is loosely based on UPA § 801(d).**

§ 5912. Venue.

A proceeding under this subchapter shall be commenced in the court of the judicial district where the prospective gestational carrier or an intended parent has resided for at least 90 days.

**Note**

**This section is not explicitly part of the UPA, although §§ 104 and 802 concern the adjudication of parentage and validation of a gestational agreement. UPA § 802(b)(1) provides that a validation proceeding may not be maintained unless the gestational mother or the intended parents have been residents of this state for at least 90 days. UPA § 805, concerning exclusive and continuing jurisdiction of matters arising from a gestational agreement until the child is 180 days old, is not contained in this subchapter. See the Conforming Amendments following Chapter 59 for amendments to 20 Pa.C.S.**

§ 5913. Execution of gestational agreement.

(a) Timing.--The prospective gestational carrier and each intended parent shall execute a gestational agreement under this subchapter prior to any attempt to achieve the pregnancy using assisted reproduction through the prospective gestational carrier.

(b) Notarization.--The signatures of the parties to the gestational agreement shall be notarized.

**Note**

**Subsection (a) is not contained in the UPA and is based on § 25(b)(2) of Illinois statute 750 ILCS 47/25. Unlike subsection (b), the UPA does not contain a notarization requirement.**

§ 5914. Mandatory contents of gestational agreement.

A gestational agreement under this subchapter shall contain the following provisions:

(1) The prospective gestational carrier agrees to pregnancy by means of assisted reproduction.

(2) The prospective gestational carrier agrees to relinquish all parental rights and duties regarding the child conceived through assisted reproduction.

(3) Each intended parent agrees to become a legal parent of the child.

(4) The prospective gestational carrier agrees to surrender custody of the child to the intended parents immediately upon the birth of the child.

(5) Each intended parent agrees to accept custody of the child and assume sole responsibility for the support of the child immediately upon the birth of the child.

**Note**

**Paragraphs (1), (2) and (3) are based on UPA § 801(a)(1), (2) and (3), without the references to the husband of the gestational carrier and the donor. Paragraphs (4) and (5) are not contained in the UPA and are based on § 25(c)(1)(ii) and (4) of Illinois statute 750 ILCS 47/25.**

§ 5915. Terminating gestational agreement and vacating decree.

(a) Circumstances under which termination of agreement permitted.--Before the prospective gestational carrier becomes pregnant by means of assisted reproduction, either the gestational carrier or an intended parent may terminate the gestational agreement.

(b) Notice if decree not issued.--If the court has not issued a decree under section 5916(e) (relating to establishing legal parentage through validation of gestational

agreement), an individual who terminates a gestational agreement pursuant to subsection (a) shall give written notice of the termination to all other parties to the agreement.

(c) Notice if decree issued.--

(1) If the court has issued a decree under section 5916(e), an individual who terminates a gestational agreement pursuant to subsection (a) shall:

(i) file notice of the termination with the court; and

(ii) give written notice of the termination to all other parties to the agreement.

(2) The court shall vacate the decree issued under section 5916(e) upon:

(i) receipt of the notice under paragraph (1)(i); and

(ii) proof of notice to all other parties to the agreement.

(3) Termination of a gestational agreement under this subsection is effective only if an individual notifies the court of the termination pursuant to this subsection.

(d) Liability.--

(1) Except as may be provided in the gestational agreement, a party to a gestational agreement is not liable to another party for the termination of the agreement pursuant to this section.

(2) A liability provision that is contained in the gestational agreement and concerns the termination of the gestational agreement survives after the termination of the agreement and is enforceable to the extent that it is reasonable under the circumstances.

#### **Note**

**Subsection (a) is based on UPA § 806(a). Unlike the UPA, however, subsection (a) does not allow the husband of the gestational carrier to terminate the gestational agreement. Subsection (a) does not contain a provision analogous to UPA § 806(b), which provides**

that the court for good cause shown may terminate the gestational agreement (presumably before the prospective gestational carrier becomes pregnant). Exclusion of such a provision presumably has little effect on the operation of the section and avoids the difficult task of defining “good cause” (or worse yet, leaving the phrase undefined as does the UPA). Subsection (b) is not contained in the UPA. Subsection (c) is based on UPA § 806(c), with the addition of the requirement that the individual must send notice to the other parties to the agreement. Subsection (d)(1) is based on UPA § 806(d) but expanded to excuse from liability any party to the gestational agreement. UPA § 806(d) only provides that a prospective gestational carrier and her husband are not liable to the intended parents for such termination. Subsection (d)(2) is not contained in the UPA.

### Comment

Subsection (a) permits the termination of a gestational agreement before the pregnancy has been established, at a time when the interests of the parties would not be unduly prejudiced by termination. By definition, the procreation process has not begun. The intended parents certainly have an expectation interest during this time, but the nature of this interest is little different from that which they would have while they were attempting to create a pregnancy through traditional means.

§ 5916. Establishing legal parentage through validation of gestational agreement.

(a) Applicability.--This section shall apply to a situation that occurs after the execution of a gestational agreement but before any attempt to achieve the pregnancy through assisted reproduction.

(b) General rules.--

(1) The intended parent or parents may petition to commence a proceeding to validate a gestational agreement.

(2) A copy of the gestational agreement shall be attached to the petition.

(c) Contents of petition.--The petition under subsection (b) shall set forth the following:

(1) The basis for venue for filing the petition.

- (2) The full name, residence address and marital status of each intended parent.
  - (3) The full name, residence, marital status and age of the gestational carrier.
  - (4) The full name and residence address of the gestational carrier's husband, if she is married.
  - (5) The identity of the genetic parents of the child, if known.
  - (6) A statement that each intended parent desires that a decree be issued:
    - (i) validating the gestational agreement; and
    - (ii) declaring that each intended parent will be a legal parent of a child born pursuant to the agreement.
- (d) Hearing to consider petition; notice.--
- (1) The court shall schedule a hearing to consider the petition under this section.
  - (2) The hearing shall be held in an expeditious manner within 30 days of the filing of the petition.
  - (3) The parties to the gestational agreement shall appear at the hearing, unless the court determines that their presence is unnecessary.
  - (4) The court shall hear testimony regarding the petition as the court deems necessary.
- (e) Validation decree.--After a hearing on a petition pursuant to this section, the court shall issue a decree validating a gestational agreement and declaring that each intended parent will be a legal parent of a child born pursuant to the agreement if the court finds all the following:
- (1) The requirements of this chapter have been satisfied.



(2) All the parties to the gestational agreement have voluntarily entered into the agreement and understand the terms of the agreement.

(3) Adequate provision has been made for all reasonable health care expenses associated with the gestational agreement until the birth of the child, including responsibility for those expenses if the agreement is terminated.

(f) Post-birth notice.--

(1) If a gestational carrier gives birth to a child within 300 days after assisted reproduction, upon the birth of the child, the intended parent or parents of the child shall file notice of the birth with the court and serve notice on the gestational carrier's husband.

(2) If the intended parent or parents fail to file notice required under paragraph (1), the gestational carrier or the department may file with the court notice of the birth.

(3) A copy of the decree under subsection (e) shall accompany the notice under this subsection.

(g) Post-birth decree.--Upon receiving the notice under subsection (f), the court shall issue a decree:

(1) confirming that each intended parent is a legal parent of the child and assumes parental rights and duties regarding the child; and

(2) directing that any certified copies of the child's birth records issued by the department's Division of Vital Records reflect such parentage when parentage appears on the certified copies that the department issues of such birth records.

### Note

Subsection (a) is not contained in the UPA. Subsection (b)(1) is based on UPA § 802(a), but without the need for the prospective gestational carrier to be a co-petitioner. Subsection (b)(2) is based on UPA § 802(b)(3). Subsections (c) and (d) are not contained in the UPA. The introductory language of subsection (e) is based on UPA § 803(a). Subsection (e)(1) is implied in the UPA and derived from UPA § 803(b)(1), which provides that the residence requirements have been satisfied and the parties have submitted to the jurisdiction of the court. Subsection (e)(2) is based on § 803(b)(3). Subsection (e)(3) is based on § 803(b)(4). Subsection (f)(1) is based on the first sentence of UPA § 807(a). Subsection (f)(2) is based on the first sentence of UPA § 807(c). Unlike the UPA, subsection (f)(3) specifically requires that the decree under subsection (e) be attached to the notice. Subsection (g) is based on the second sentence of UPA § 807(a). The reference to the intended parents being financially responsible for the child in subsection (g)(1) is based on the second sentence of UPA § 807(c). UPA § 807(a)(2), providing that the decree if necessary shall order that the child be surrendered to the intended parents, is not incorporated into subsection (g) in light of § 5914(4).

### Comment

Rule 5 of the Orphans' Court Rules (Notice) provides for the method of providing notice, the time for providing notice and the return of notice. *See* Rules 5.1 through 5.4.

## SUBCHAPTER C GESTATIONAL AGREEMENTS AND LEGAL PARENTAGE THROUGH POST-PREGNANCY PROCESS

- Sec.
- 5921. Applicability.
  - 5922. Venue.
  - 5923. Execution of gestational agreement.
  - 5924. Petition to ratify agreement.
  - 5925. Hearing and notice.
  - 5926. Decree.
  - 5927. Amended petition unnecessary.

§ 5921. Applicability.

This subchapter applies to assisted reproduction involving a gestational carrier, if the gestational agreement has not been validated under section 5916 (relating to establishing legal parentage through validation of gestational agreement).

**Comment**

**Although this subchapter, like Subchapter B, involves assisted reproduction through a gestational carrier and a gestational agreement, the formalities of a gestational agreement under Subchapter B do not apply to this subchapter. In cases involving a gestational carrier, legal parentage may be established under the procedures set forth in § 5916 or under this subchapter. Unlike § 5916, which provides for a decree before the prospective gestational carrier becomes pregnant, this subchapter provides for a decree after the gestational carrier becomes pregnant and either before or after the birth of the child.**

§ 5922. Venue.

A proceeding under this subchapter shall be commenced in the court of the judicial district where:

- (1) the gestational carrier or an intended parent has resided for at least 90 days;
- (2) the child is expected to be born, if a pre-birth decree is sought;
- (3) the child was born, if a post-birth decree is sought; or
- (4) the gestational carrier or an intended parent previously resided within the preceding nine months.

§ 5923. Execution of gestational agreement.

(a) Timing.--The prospective gestational carrier and each intended parent shall execute a gestational agreement under this subchapter prior to any attempt to achieve the pregnancy using assisted reproduction through the prospective gestational carrier.

(b) Intent.--The gestational agreement shall express the parties' mutual intent that

each intended parent shall become a legal parent of the child born as a result of the assisted reproduction.

§ 5924. Petition to ratify agreement.

(a) General rule.--Either before or after the birth of the child, but no later than 90 days after the birth of the child, an intended parent or the gestational carrier may petition the court for a decree:

(1) ratifying the gestational agreement;

(2) declaring that each intended parent is a legal parent of the child and assumes parental rights and duties regarding the child; and

(3) directing that any certified copies of the child's birth records issued by the department's Division of Vital Records reflect such parentage when parentage appears on the certified copies that the department issues of such birth records.

(b) Contents of petition.--The petition shall set forth the following:

(1) The basis for venue for filing the petition.

(2) The full name, residence address and marital status of each intended parent.

(3) The full name, residence, marital status and age of the gestational carrier.

(4) The full name and residence address of the gestational carrier's husband, if she is married.

(5) The identity of the genetic parents of the child, if known.

(6) If the child has been born, the child's full name, date of birth, place of birth and history of custody.

(7) If the child has not yet been born, the child's full-term due date and the anticipated place of birth.

(8) The assisted reproduction that resulted in the child's conception and the pregnancy, including the type of procedure and when and where it was performed.

(9) A statement that prior to the assisted reproduction resulting in pregnancy, the gestational carrier and each intended parent entered into a written gestational agreement in which their mutual intent was that each intended parent become a legal parent of the child.

(10) A statement that each intended parent desires that a decree be issued ratifying the gestational agreement and determining that he or she is a legal parent of the child.

(11) A statement that:

(i) a hearing is requested to ratify the gestational agreement; or

(ii) a hearing is not requested to ratify the gestational agreement because it would be unnecessary or burdensome, along with an explanation why it would be unnecessary or burdensome.

(c) Exhibits.--The following exhibits shall be attached to the petition:

(1) A notarized affidavit executed by the petitioner attesting to the facts set forth in the petition.

(2) If the gestational carrier is the petitioner, a notarized acknowledgment executed by each intended parent, in which each acknowledges that he or she will become a legal parent of the child.

(3) If an intended parent waives the right to a hearing to ratify the gestational agreement, a notarized waiver executed by the intended parent.

(4) If an intended parent waives the required notice under section 5925(b)

(relating to notice and hearing), a notarized waiver executed by the intended parent.

(5) A notarized acknowledgment executed by the gestational carrier, in which she acknowledges that she agrees to permanently relinquish any and all parental rights to the child and to allow each intended parent to become a legal parent of the child.

(6) If the gestational carrier waives the right to a hearing to ratify the gestational agreement, a notarized waiver executed by the gestational carrier.

(7) If the gestational carrier waives the required notice under section 5925(b), a notarized waiver executed by the gestational carrier.

(8) Unless determined by the court to be unnecessary, a notarized acknowledgment executed by the gestational carrier's husband, in which he acknowledges that he is not the genetic father of the child and agrees to permanently relinquish any and all parental rights to the child and to allow each intended parent to become a legal parent of the child.

(d) Instruments.--The following may be executed and notarized in one instrument:

(1) An intended parent's affidavit, acknowledgment and waiver under subsection (c).

(2) The gestational carrier's affidavit, acknowledgment and waiver under subsection (c).

### **Comment**

**In most instances, the intended parent or parent will petition the court for a decree under this section. However, subsection (a) permits the gestational carrier to do so. The following is an example of a form containing a combined affidavit, acknowledgment and waiver of an intended parent under subsection (c).**







(2) The hearing shall be held in an expeditious manner within 30 days of the filing of the petition.

(b) Notice.--At least ten days' notice of the hearing shall be given to a party to the gestational agreement, unless the party waives the notice.

(c) Procedures.--

(1) A party to the gestational agreement shall appear at the hearing, unless the court determines that the party's presence is unnecessary.

(2) The court shall hear testimony regarding the petition as it deems necessary.

§ 5926. Decree.

Following the filing of a petition satisfying the requirements of section 5924 (relating to petition to ratify agreement) and after the hearing under section 5925 (relating to hearing and notice), if required by the court and during which the court is satisfied that the facts set forth in the petition are confirmed at that hearing, the court shall issue a decree:

(1) ratifying the gestational agreement;

(2) declaring that each intended parent is a legal parent of the child and assumes parental rights and duties regarding the child; and

(3) directing that any certified copies of the child's birth records issued by the department's Division of Vital Records reflect such parentage when parentage appears on the certified copies that the department issues of such birth records.

§ 5927. Amended petition unnecessary.

An amended petition is not required if a pre-birth decree is sought and birth occurs after the filing of the petition but prior to the entry of the decree.



## CONFORMING AMENDMENTS

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Title 20 of the Pennsylvania Consolidated Statutes (Probate, Estates and Fiduciaries Code) is amended as follows:

§ 711. Mandatory exercise of jurisdiction through orphans' court division in general.

Except as provided in section 712 (relating to nonmandatory exercise of jurisdiction through the orphans' court division) and section 713 (relating to special provisions for Philadelphia County), the jurisdiction of the court of common pleas over the following shall be exercised through its orphans' court division:

\* \* \*

(23) Assisted Reproductive Technologies.--All matters pertaining to assisted reproduction as provided in 23 Pa.C.S. Chapter 59 (relating to assisted reproductive technologies), including custody matters and a parentage determination:

(i) if they relate directly to the validity, compliance or enforcement of a gestational agreement under 23 Pa.C.S. Chapter 59; or

(ii) as provided in 23 Pa.C.S. section 5904 (relating to determination of legal parentage generally).

\* \* \* \* \*

§ 713. Special provisions for Philadelphia County.

The provisions of section 711 (relating to mandatory exercise of jurisdiction through orphans' court division in general), insofar as they relate to adoptions and birth records, shall not apply to Philadelphia County. In Philadelphia County the jurisdiction over

adoptions and all proceedings which may be necessary to be presented to a court for determination with regard to issues concerning recordation of birth and birth records or the alteration, amendment or modification of such birth records or the right to obtain a certified copy of the same, shall be exercised through the family court division of the court of common pleas. Whenever a resident of Philadelphia is entitled to take an appeal from the action of the Department of Health in connection with any matters concerning birth records, the appeal shall be taken to the family court division of the court of common pleas of Philadelphia. In all other matters in which a petition is addressed to a court by a resident of Philadelphia in connection with matters of birth records, the filing of which petition is not in the nature of an appeal but is an original proceeding, the petition shall be determined by the family court division of the court of common pleas of Philadelphia. The provisions of section 711(23) shall not apply to Philadelphia County. In Philadelphia County, the jurisdiction over matters under section 711(23) shall be exercised through the family court division of the court of common pleas.

## **TRANSITIONAL LANGUAGE**

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### **APPLICABILITY**

Nothing in 23 Pa.C.S. Chapter 59 shall limit any rights created before the effective date of the chapter.

### **EFFECTIVE DATE**

The following shall take effect in 60 days:

- (1) The addition of 23 Pa.C.S. Chapter 59.
- (2) The amendment of 20 Pa.C.S. sections 711 and 713.