

**THE PROPOSED PENNSYLVANIA  
ASSISTED REPRODUCTIVE  
TECHNOLOGIES ACT**

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

**MAY 2008**



General Assembly of the Commonwealth of Pennsylvania  
JOINT STATE GOVERNMENT COMMISSION  
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## **INTRODUCTION**

### ***The Subcommittee 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,<sup>2</sup> 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.

Lawrence A. Kalikow was named the Chair of the subcommittee, which held its organizational meeting on April 22, 2005. The subcommittee subsequently met eleven times: in June 2005, August 2005, October 2005, December 2005, January 2006, April 2006, September 2006, December 2006, January 2007, September 2007 and November 2007. During its deliberations, the subcommittee thoroughly reviewed the Uniform Parentage Act,<sup>3</sup> statutory law, case law, current Pennsylvania practice and Department of Health procedures.

By May 2007, the subcommittee had reached consensus on a statutory framework for assisted reproductive technologies in the Domestic Relations Code (Title 23 of the Pennsylvania Consolidated Statutes, or "23 Pa.C.S."). At that time, the subcommittee

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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 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 Uniform Parentage Act, promulgated by the National Conference of Commissioners on Uniform State Laws, was approved and recommended at the National Conference of Commissioners on Uniform State Laws annual conference in 2000 and last amended or revised in 2002.

had completed its consideration of issues concerning gestational agreements (so-called surrogacy arrangements). Accordingly, a report<sup>4</sup> was published in May 2007 containing the recommendations of the subcommittee, which included major provisions of the proposed Assisted Reproductive Technologies Act under 23 Pa.C.S. Chapter 59. As structured, the May 2007 report included proposed Subchapters A (general provisions), B (gestational agreements and pre-pregnancy validation process) and C (gestational agreements and legal parentage through post-pregnancy process) of 23 Pa.C.S. Chapter 59. Comments followed the sections of the proposed act and explained the statutory provisions. Several comments were derived from the Uniform Parentage Act comments and concepts raised in the Uniform Parentage Act. In addition, notes throughout the proposed act explained the source of the provisions and outlined similarities and differences with the Uniform Parentage Act.

In its May 2007 report, the subcommittee also recommended that the Pennsylvania Supreme Court amend the Orphans' Court rules to conform to the provisions of 23 Pa.C.S. Chapter 59. In light of the complexity of the issues concerning assisted reproduction, the subcommittee further 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 May 2007 report noted that the subcommittee was continuing discussions on provisions relating to children of assisted reproduction and to records, which would be added as Subchapters D and E of the proposed act and which would constitute the foundation of a subsequent report.

In September and November 2007, the subcommittee completed its review of proposed Subchapters D and E and resolved the outstanding issues regarding the implementation of the subchapters. The subcommittee agreed that a new report should be published containing the entire proposed Assisted Reproductive Technologies Act (Subchapters A through E).

This report, therefore, reflects the latest recommendations of the subcommittee -- a fully integrated proposed Assisted Reproductive Technologies Act.<sup>6</sup> As was the case in the May 2007 report, notes and comments follow the statutory provisions. Official comments may be used to construe a statute and determine the intent of the General Assembly.<sup>7</sup> This report also contains a summary of the statutory recommendations<sup>8</sup> and a detailed table of contents for the statutory provisions.<sup>9</sup> Following the proposed statutory provisions are conforming amendments to §§ 711 and 713 of the Probate, Estates and

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<sup>4</sup> Joint State Government Commission, *The Proposed Pennsylvania Assisted Reproductive Technologies Act: Report of the Subcommittee on Assisted Reproductive Technologies* (May 2007).

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

<sup>6</sup> *Infra* pp. 23-65.

<sup>7</sup> 1 Pa.C.S. § 1939.

<sup>8</sup> *Infra* pp. 15-17.

<sup>9</sup> *Infra* pp. 19-21.

Fiduciaries Code (Title 20 of the Pennsylvania Consolidated Statutes, or “20 Pa.C.S.”)<sup>10</sup> and transitional language (applicability and effective date provisions).<sup>11</sup>

As a result of the continued discussions and the integration of the additional subchapters into the proposed act, technical amendments are made to several of the provisions published in the May 2007 report.<sup>12</sup> In addition, the notes previously published are rewritten and expanded to include more precise information.

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

### ***Subchapter A: General Provisions***

#### *Definitions*

Section 5902 contains the definitions for the Assisted Reproductive Technologies Act. Several of the terms defined are patterned after the definitions under the Uniform Parentage Act: “assisted reproduction,” “child,” “donor” and “man.”

The term “gestational carrier,” defined in § 5902, replaces “gestational mother” in the Uniform Parentage Act. Before the Uniform Parentage Act, the term “surrogate mother” was used. The Uniform Parentage Act, 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 Uniform Parentage Act 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.

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

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<sup>10</sup> *Infra* pp. 67-68.

<sup>11</sup> *Infra* p. 69.

<sup>12</sup> Most notably, § 102 adds the definition of “child” and amends the definition of “donor,” the order of the paragraphs under § 5903(b) are switched, and § 5906 is moved and renumbered as § 5941.

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.

The definition of "parent" differs from that contained in the Uniform Parentage Act, which references a "parent-child relationship" and § 201 of the Uniform Parentage Act.

The following terms defined in § 5902 are not defined in § 102 of the Uniform Parentage Act: "court," "department," "gestational agreement," "intended parent," "legal parent" and "prospective gestational carrier."

The Uniform Parentage Act provides a comprehensive framework for the determination of parentage, whereas 23 Pa.C.S. Chapter 59 is limited to the subject of assisted reproductive technologies and the determination of parentage with respect to assisted reproduction. Other provisions of the Domestic Relations Code and, in general, Pennsylvania law resolve additional issues regarding parentage. Accordingly, the following definitions provided in § 102 of the Uniform Parentage Act are not replicated in § 5902: "acknowledged father," "adjudicated father," "alleged father," "commence," "determination of parentage," "ethnic or racial group," "genetic testing," "parent-child relationship," "paternity index," "presumed father," "probability of paternity," "state" and "support-enforcement agency." In addition, the terms "record" and "signatory," defined in § 102(18) and (19) of the Uniform Parentage Act, are not replicated in § 5902. Subchapter E of the Assisted Reproductive Technologies Act concerns records.

### *Marital status*

Under 23 Pa.C.S. 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.

### *Donors*

Section 5903 applies to any situation under 23 Pa.C.S. Chapter 59 involving a donor. 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. A donor has no parental rights and duties regarding the child born by means of assisted reproduction; the donor has no standing to seek to establish a parent-child relationship with the child.

An exception to the foregoing general rule is provided: a donor, with the intent to become a parent of the child conceived by means of assisted reproduction, may evidence that intent in writing to the other genetic parent before making a sperm or egg donation. However, a contrary intent may subsequently be provided in a separate writing to the other genetic parent before the placement of the eggs, sperm or embryos. In this instance, the foregoing general rule would again apply.

#### *Determination of legal parentage generally*

The court may resolve a parentage issue arising from an agreement regarding assisted reproduction (involving an adult woman who conceives or gives birth to a child pursuant to the agreement) even 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 proper venue is established, a party proceeds in good faith and cause is shown excusing compliance with a specific requirement regarding gestational agreements under 23 Pa.C.S. Chapter 59.

The court may also resolve a parentage issue arising from an agreement, consent or otherwise under Subchapter D if a party proceeds in good faith under this chapter.

#### *Gestational agreements generally*

Section 5905 sets forth general provisions regarding gestational agreements under Subchapters B and C. If two individuals are the intended parents, each must be a party to the gestational agreement, regardless of whether or not they are married. The gestational agreement must be in writing.

Reasonable compensation is permitted under a gestational agreement, thereby shielding 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.”

Under section 5905, the payment or reimbursement of reasonable expenses relating to the pregnancy and the agreement is also permitted. These expenses encompass medical, legal and other professional services, rent, clothing, insurance and lost wages.

Section 5905 also sets forth other examples of permissible provisions in a gestational agreement, including those concerning medical and health-related decisions

and treatment. However, a provision of a gestational agreement that violates any constitutional right of a gestational carrier to make decisions to control her health or the health of in utero embryos or the fetus is unenforceable.

Section 5905 specifies that a gestational agreement may also provide for mandatory, nonjudicial, alternative dispute resolution procedures for nonemergency situations.

Generally, a party may enforce a gestational agreement under the proposed Assisted Reproductive Technologies Act if a material breach is alleged to have occurred. The court must give due regard to the intent of the parties when the agreement was executed.

Finally, 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.

#### *Scope of the act*

The Assisted Reproductive Technologies Act, like the Uniform Parentage Act and explained in the comment to § 702 of the Uniform Parentage Act, 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.

As noted in the comment to Article 7 of the Uniform Parentage Act, if a married couple uses their own eggs and sperm to conceive a child born to the wife, the parentage of the child is straightforward: the wife is the mother by gestation and genetics, and the husband is the father by genetics and presumption (neither parent is a “donor” under § 5902).

Many couples employ a common assisted reproductive technology procedure that combines sperm and eggs to form a pre-zygote that is then frozen for future use. If the couple later divorces, or one of them dies, absent legislation there are no clear rules for determining the parentage of a child resulting from a pre-zygote implanted after divorce or after the death of the would-be father. Disposition of such pre-zygotes and a determination of their “ownership” create public policy issues.

***Purpose and Effect of  
Subchapters B and C***

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; the subchapters do not prohibit such individuals from entering into a gestational agreement. The rights and duties of parents and children are located elsewhere in Pennsylvania law.

***Subchapter B:  
Gestational Agreements and the  
Pregnancy Validation Process***

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 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 postbirth decree.

***Subchapter C:  
Gestational Agreements and Legal Parentage  
Through the Postpregnancy Process***

Subchapter C is not contained in the Uniform Parentage Act 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 such copies. 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 prebirth decree is sought and the birth occurs after the filing of the petition but prior to the entry of the decree.

***Subchapter D:  
Child of Assisted Reproduction***

*Scope of the subchapter*

Subchapter D applies only to children born as the result of assisted reproduction; it does not apply to children conceived by means of sexual intercourse, irrespective of the alleged intent of the parties.



This subchapter involves (1) an individual or a couple seeking to become parents through assisted reproduction and (2) either one donor (which is the more common situation) or two donors, who most of the time are anonymous. In a typical situation, the woman who uses assisted reproduction and gives birth to the child will become the legal mother of the child, if she is not already the genetic mother of the child. The man involved in the relationship with the woman will become the legal father of the child, if he is not already the genetic father of the child.

The marital status of the following two individuals is irrelevant: the man who either provides sperm for the assisted reproduction or consents to the assisted reproduction pursuant to § 5933 and the woman who gives birth to the child.

Even though a man may “donate” sperm for assisted reproduction, he is not considered a “donor” under the definition of that term (§ 5902) if he intends to become a parent of the child and satisfies the requirements of § 5932(a).

A woman who gives birth to a child by means of assisted reproduction under Subchapter D is a legal parent of the child. The woman may be both the genetic and legal mother of the child.

Subchapter D does not statutorily provide for the following: (1) what happens if a clinic uses or implants the wrong embryo or uses the wrong sperm to fertilize an egg, (2) the four possible dispositions of “donated embryos” if they are not used right away or are no longer needed (donating them to research, donating them to another individual, destroying them or keeping them frozen) and (3) consideration. There are no specific venue requirements; although the likelihood of a dispute arising under this subchapter is small, if a dispute would arise, the court would presumably resolve the issue of venue as it would in a paternity or contract matter.

Subchapter D does not attempt to resolve the issue of whether the birth location or the location of the assisted reproductive planning triggers the provisions of § 5933, concerning consent to assisted reproduction. For example, a woman could plan for assisted reproduction in another state (where no agreements, consents or forms of any kind are signed) but then give birth in Pennsylvania. Two consequences could then result: (1) the mother could claim that the pregnancy was the result of sexual intercourse and seek child support against the donor or (2) the donor could make a similar claim and seek custody or visitation. In either situation, a court would need to determine the intent of the individuals since there would be no document evidencing intent.

In addition, Subchapter D does not attempt to resolve issues as to control of frozen embryos following the filing of a complaint for divorce or annulment or the dissolution of a nonmarital relationship.

Finally, Subchapter D does not address the following: (1) procedures when a married couple has separated; (2) the reinstatement of consent; (3) a central repository for withdrawals of consent, either statewide or in the County Register of Wills Office;

(4) how records, such as consents and withdrawals of consent, are preserved if a clinic closes and (5) a court hearing or decree to confirm the consent and establish that the man described in § 5933 becomes the legal father of the child.

### *Consent to assisted reproduction*

Section 5933 provides that a consent to assisted reproduction must be in writing, dated and signed by (1) a woman who intends to give birth to a child by the assisted reproduction and be a parent of the child and (2) a man who intends to be a parent of the child. It does not apply to a gestational carrier, who is covered by the provisions of Subchapters B and C.

Section 5933 also provides for the contents of the consent, retention of a copy of the consent, the failure to sign the consent and the withdrawal of the consent, which may be filed in the same location that the consent was filed (for example, the laboratory in which the sperm or embryos are stored). In the absence of fraud, misrepresentation or nondisclosure regarding assisted reproduction, even if a man did not sign a consent, he may be found to be the father of the resulting child, if he openly and consistently holds the child out as his own (in such a case, the principle of paternity by estoppel would govern).

A child born through assisted reproduction accomplished after consent has been voided by the filing and service of a divorce complaint (*see* § 5934) or withdrawn under § 5933 will have a legal mother and a genetic father, but not a legal father. In this instance, intention, rather than biology, is the controlling factor. Section 5933, in conjunction with § 5934, is intended to encourage careful drafting of assisted reproduction agreements, so that the intent of the woman and man is clear.

An individual may specify a particular individual as a donor, in which case the specification would be a condition of the consent. Therefore, if this or any other condition set forth in the consent is not fulfilled, the consent is not valid.

Although not statutorily mandated, a clinic or other facility performing the assisted reproduction should make available consent forms and withdrawal of consent forms. If a clinic or other facility has been provided a copy of the consent, prudence dictates that the withdrawal of consent form be sent to the clinic or other facility.

### *Effect of filing a complaint for divorce or annulment*

In general, absent consent evidencing a different intent, the filing and service of a complaint for divorce or annulment before the placement of the eggs, sperm or embryos

would automatically relieve a husband of parental duties, and he would not have parental rights. If, however, the complaint is withdrawn or the parties reconcile before the birth of the child, the husband would retain his parental rights and duties with respect to the child. If a dispute arises as to whether the parties reconciled, a factual argument would need to be made before the court, and the court would need to determine whether reconciliation occurred.

The actual disposition of embryos after a divorce decree is entered should be addressed in the parties' property settlement agreement.

### *Parental status of a deceased individual*

A decedent is not a parent of a child conceived as a result of assisted reproduction after the decedent's death unless consent is given pursuant to § 5935. In addition, for the decedent to be a parent of the child in this case, the placement of eggs, sperm or embryos must occur within 18 months of the decedent's death and the decedent's surviving spouse must file the consent with the clerk of the court and serve notice on the executor or administrator within six months after the decedent's death.

Section 5935 could cause a result that is contrary to the decedent's intent, as in the case of an individual who intends the embryos to be implanted but who then dies unexpectedly before consenting in a dated, signed writing.

Absent written consent, the death of an individual whose genetic material is subsequently used either in conceiving an embryo or in implanting an already existing embryo into a womb ends the potential legal parenthood of the deceased. Section 5935 is designed primarily to avoid the problems of intestate succession which could arise if the posthumous use of a person's genetic material leads to the deceased being determined to be a parent. Of course, an individual who wants to explicitly provide for such children in his or her will may do so.

Section 5935 eliminates the possibility of having a deceased individual's estate open indefinitely. It balances the interest of effectuating the decedent's intent to be a parent (and have an heir) and the practical need to close the decedent's estate after a reasonable amount of time.

The section is to be broadly construed to effectuate the purposes of the Probate, Estates and Fiduciaries Code, including provisions concerning inheritance, succession and notice requirements.

Although Subchapter D contemplates that a woman who may be the genetic mother of the child will give birth to the child, a situation may occur where that is not the case, thereby implicating § 5935. For example, the surviving husband of a deceased

woman may use his deceased wife's eggs to create a child. If the requirements of § 5935 are satisfied and the surviving husband uses his deceased wife's eggs and enters into an agreement regarding assisted reproduction with a carrier, who will carry the child, his deceased wife would be the parent of the resulting child. In this circumstance, parentage would be determined under § 5904(b), since neither § 5932(b) nor Subchapters B or C are instructive in resolving the parentage issues regarding the mother of the child. To wit, § 5932(b) provides that the woman giving birth to a child is a legal parent of the child, and Subchapters B and C concern gestational agreements, a term specifically defined in § 5902. In this case, the agreement executed by the surviving husband and the carrier would not be a "gestational agreement" as defined in § 5902 because the deceased wife would not have executed the agreement. In addition, in this case, the Division of Vital Records of the Department of Health would need some type of order determining that the deceased wife, instead of the carrier, is to be listed as the mother of the child.

There is no statutory check-off form in which a signatory indicates the intent to be considered the parent of a child born through the placement of eggs, sperm or embryos after death.

### ***Subchapter E: Records***

#### *Scope of the subchapter*

Subchapter E concerns records under Chapter 59. However, it does not provide for the establishment of a registry for medical history information regarding donors, where the department retains such filed information as a permanent record. The subcommittee believed that further analysis of the issue, including how to implement such a registry, is warranted.

#### *Retention of records and confidentiality*

Because the procedures involved in Chapter 59 are exceptionally personal and protection from invasions of privacy is warranted, § 5941 provides for the retention and confidentiality of any petition, agreement, order, decree, record or paper pertaining to a proceeding under Chapter 59. Section 5941 protects, among other things, the identities of the parties to a gestational agreement.

*Release of information from court records*

Section 5942 permits an adult child born as a result of assisted reproduction involving a donor or gestational carrier to petition the court for information regarding the donor or gestational carrier that is contained in the court records. The section does not apply to information collected and retained by other entities or facilities, such as a clinic that performs the assisted reproduction.

No distinction is made between nonidentifying information and identifying information regarding the donor or gestational carrier; any information regarding these individuals should be furnished to the petitioning child. In the case of assisted reproduction involving an anonymous donor, information in the court records about a donor would be quite limited (if it exists at all). If a donor is known, information regarding the donor would appear in the petition filed with the court. Similarly, information regarding the gestational carrier would appear in the petition filed with the court. Because the information regarding the known donor and the gestational carrier would have been known and available to the child's parents, and the parents could have disclosed that information to the child at any time, § 5942 follows the principle that no need arises to redact any information contained in the court records if the child petitions for the information. The petitioning child, therefore, should have unrestricted access to the information. In so providing, § 5942 departs from the current law regarding analogous procedures under the Adoption Act (23 Pa.C.S. Part III, Chapters 21-29). Under § 5942, there is no recourse to prevent disclosure, even if the known donor and the parents agreed that the donor's identification would not be disclosed.



## **SUMMARY OF RECOMMENDATIONS**

This report contains the following recommendations: (1) the addition of new Chapter 59 to the Domestic Relations Code (Title 23 of the Pennsylvania Consolidated Statutes), known as the Assisted Reproductive Technologies Act and (2) conforming amendments to §§ 711 and 713 of the Probate, Estates and Fiduciaries Code (Title 20 of the Pennsylvania Consolidated Statutes). The Assisted Reproductive Technologies Act provides for the following:

- Definitions for assisted reproduction, child, court, department, donor, gestational agreement, gestational carrier, intended parent, legal parent, man, parent and prospective gestational carrier. (§ 5902)
- The legal status of a donor as a nonparent of a child conceived by means of assisted reproduction, unless the donor, with the intent to become a parent of the child, evidences the intent in writing to the other genetic parent before making a sperm or egg donation. (§ 5903)
- The court's ability to resolve any parentage issue arising from an agreement regarding assisted reproduction and an adult woman who conceives or gives birth to a child pursuant to the agreement, if venue is established, a party proceeds in good faith and cause is shown excusing compliance with a specific requirement regarding gestational agreements. (§ 5904(b)(1))
- The court's ability to resolve any parentage issue arising from an agreement, consent or otherwise, which does not involve a purported gestational agreement, if a party proceeds in good faith. (§ 5904(b)(2))
- The general requirements for a gestational agreement, including the necessary parties, the need for a writing, permissible provisions and provisions concerning health decision making by a gestational carrier. (§ 5905(a) through (d))
- Enforcement of a gestational agreement. (§ 5905(e))
- Genetic testing, if there is an allegation that the genetic parentage of a child born to the gestational carrier is not the result of the intended assisted reproduction. (§ 5905(f))
- Fraud and duress regarding a gestational agreement. (§ 5905(g))

- A statutory framework regarding gestational agreements and a prepregnancy validation process (Subchapter B), including provisions regarding:
  - Venue. (§ 5912)
  - Execution of a gestational agreement. (§ 5913)
  - Mandatory contents of a gestational agreement. (§ 5914)
  - Terminating a gestational agreement and vacating a decree. (§ 5915)
  - Establishing legal parentage. (§ 5916)
- The establishment of legal parentage through the validation of a gestational agreement, which occurs after the execution of the agreement but before any attempt to achieve the pregnancy through assisted reproduction. (§ 5916)
- The requirements to petition to commence a proceeding to validate a gestational agreement, including the contents of the petition and notice of the hearing. (§ 5916(c) and (d))
- The hearing on the petition to validate a gestational agreement, the validation decree, postbirth notice and the postbirth decree. (§ 5916(d) through (g))
- A statutory framework regarding gestational agreements and legal parentage through a postpregnancy process (Subchapter C), if the gestational agreement has not been validated under § 5916. The statutory framework includes provisions regarding:
  - Venue. (§ 5922)
  - Execution of a gestational agreement. (§ 5923)
  - Petition to ratify a gestational agreement. (§ 5924)
  - Hearing and notice requirements. (§ 5925)
  - A decree resulting from the hearing. (§ 5926)
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- The legal parentage of a man who, with the intent to be a parent of a child born as a result of assisted reproduction, provides sperm for the assisted reproduction or consents to the assisted reproduction pursuant to § 5933. (§ 5932(a))
- The legal parentage of a woman who gives birth to a child by means of assisted reproduction. (§ 5932(b))



- The requirements that a consent to assisted reproduction be in writing, dated and signed by (1) the woman who intends to give birth to a child by the assisted reproduction and be a parent of the child and (2) a man who intends to be a parent of the child. (§ 5933(a) and (b))
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- Retention of a consent to assisted reproduction. (§ 5933(d))
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- The effect of filing and serving a complaint for divorce or annulment before the placement of the eggs, sperm or embryos on the parentage of a husband. (§ 5934(a))
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- Retention of records and confidentiality. (§ 5941)
- Release of information from the court records to an adult child who was born as a result of assisted reproduction. (§ 5942)



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# **ASSISTED REPRODUCTIVE TECHNOLOGIES**

Title 23 of the Pennsylvania Consolidated Statutes (the Domestic Relations Code) is amended to include the following chapter:

## TITLE 23 DOMESTIC RELATIONS

### PART VI CHILDREN AND MINORS

#### CHAPTER 59 ASSISTED REPRODUCTIVE TECHNOLOGIES

##### Subchapter

- A. General Provisions
- B. Gestational Agreements and Prepregnancy Validation Process
- C. Gestational Agreements and Legal Parentage through Postpregnancy Process
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##### SUBCHAPTER A GENERAL PROVISIONS

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- 5901. Short title of chapter.
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§ 5901. Short title of chapter.

This chapter shall be known and may be cited as the 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) Invitro fertilization.
- (3) Placement of embryos.
- (4) Intracytoplasmic sperm injection.

“Child.” An individual of any age whose parentage is determined under this chapter.

“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.



(3) A woman who gives birth to a child by means of assisted reproduction under Subchapter D (relating to child of assisted reproduction).

(4) A parent of the child under Subchapter D.

“Gestational agreement.” A written contract that:

(1) strictly complies with Subchapter B (relating to gestational agreements and prepregnancy validation process); or

(2) serves as the basis to determine legal parentage under Subchapter C (relating to gestational agreements and legal parentage through postpregnancy process).

“Gestational carrier.” An adult woman who conceives or gives birth to a child pursuant to a gestational agreement under Subchapter B (relating to gestational agreements and prepregnancy validation process) or C (relating to gestational agreements and legal parentage through postpregnancy process).

“Intended parent.” An adult individual who seeks to become a legal parent of a child conceived pursuant to a gestational agreement under Subchapter B (relating to gestational agreements and prepregnancy validation process) or C (relating to gestational agreements and legal parentage through postpregnancy process).

“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 (relating to gestational agreements and prepregnancy validation process) or C (relating to gestational agreements and legal parentage through postpregnancy process).

**Note**

Several of the terms defined in this section are patterned after the definitions under the Uniform Parentage Act. Section 102 of the Uniform Parentage Act defines the terms “assisted reproduction,” “child,” “donor” and “man” as follows:

(4) “Assisted reproduction” means a method of causing pregnancy other than sexual intercourse. The term includes:

- (A) intrauterine insemination;
- (B) donation of eggs;
- (C) donation of embryos;
- (D) in-vitro fertilization and transfer of embryos; and
- (E) intracytoplasmic sperm injection.

(5) “Child” means an individual of any age whose parentage may be determined under this [Act].

(8) “Donor” means an individual who produces eggs or sperm used for assisted reproduction, whether or not for consideration. The term does not include:

- (A) a husband who provides sperm, or a wife who provides eggs, to be used for assisted reproduction by the wife;
- (B) a woman who gives birth to a child by means of assisted reproduction [, except as otherwise provided in [Article] 8]; or
- (C) a parent under Article 7 [or an intended parent under Article 8].

(12) “Man” means a male individual of any age.

The term “gestational carrier” in this section is based on the following definition of “gestational mother,” contained in § 102(11) of the Uniform Parentage Act: “an adult woman who gives birth to a child under a gestational agreement.”

The definition of “parent” in this section differs from the following definition of “parent,” contained in § 102(13) of the Uniform Parentage Act: “an individual who has established a parent-child relationship under Section 201.” Section 102(14) of the Uniform Parentage Act defines the term “parent-child relationship” as “the legal relationship between a child and a parent of the child. The term includes the mother-child relationship and the father-child relationship.” Section 201 of the Uniform Parentage Act provides the following:

**SECTION 201. ESTABLISHMENT OF PARENT-CHILD RELATIONSHIP.**

(a) The mother-child relationship is established between a woman and a child by:

- (1) the woman’s having given birth to the child [, except as otherwise provided in [Article] 8];
- (2) an adjudication of the woman’s maternity; [or]
- (3) adoption of the child by the woman [; or]
- (4) an adjudication confirming the woman as a parent of a child born to a gestational mother if the agreement was validated under [Article] 8 or is enforceable under other law].

(b) The father-child relationship is established between a man and a child by:

- (1) an un rebutted presumption of the man’s paternity of the child under Section 204;
- (2) an effective acknowledgment of paternity by the man under [Article] 3, unless the acknowledgment has been rescinded or successfully challenged;
- (3) an adjudication of the man’s paternity;
- (4) adoption of the child by the man; [or]
- (5) the man’s having consented to assisted reproduction by a woman under [Article] 7 which resulted in the birth of the child [; or]
- (6) an adjudication confirming the man as a parent of a child born to a gestational mother if the agreement was validated under [Article] 8 or is enforceable under other law].

The following terms defined in this section are not defined in § 102 of the Uniform Parentage Act: “court,” “department,” “gestational agreement,” “intended parent,” “legal parent” and “prospective gestational carrier.”

The Uniform Parentage Act provides a comprehensive framework for the determination of parentage, whereas this chapter is limited to

the subject of assisted reproductive technologies and the determination of parentage with respect to assisted reproduction. Other provisions of the Domestic Relations Code (Title 23 of the Pennsylvania Consolidated Statutes) and, in general, Pennsylvania law resolve additional issues regarding parentage. Accordingly, the following definitions provided in § 102 of the Uniform Parentage Act are not replicated in this section: “acknowledged father,” “adjudicated father,” “alleged father,” “commence,” “determination of parentage,” “ethnic or racial group,” “genetic testing,” “parent-child relationship,” “paternity index,” “presumed father,” “probability of paternity,” “state” and “support-enforcement agency.” In addition, the terms “record” and “signatory,” defined in § 102(18) and (19) of the Uniform Parentage Act, are not replicated in this section. *See* Subchapter E for information regarding records.

#### Comment

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

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; the subchapters do not prohibit such individuals 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 under 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) 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.

(2) 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.

(3) This subsection does not apply if Subchapter B (relating to gestational agreements and prepregnancy validation process) or C (relating to gestational agreements and legal parentage through postpregnancy process) is applicable.

**Note**

**Subsection (a)(1) through (3) is based on § 702 of the Uniform Parentage Act and its comment. Section 702 and the relevant portion of its Comment are as follows:**

**SECTION 702. PARENTAL STATUS OF DONOR.**

**A donor is not a parent of a child conceived by means of assisted reproduction.**

**[Uniform Parentage Act] Comment**

**If a child is conceived as the result of assisted reproduction, this section clarifies that a donor (whether of sperm or egg) is not a parent of the resulting child. The donor can neither sue to establish parental rights, nor be sued and required to support the resulting child. In sum, donors are eliminated from the parental equation.**

**Paragraphs (4) and (5) of subsection (a) are not contained in the Uniform Parentage Act.**

**Subsection (b) applies only in situations that occur outside the Subchapter B or C context.**

**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)(1) 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)(2) 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.--

(1) The court has jurisdiction to resolve any parentage issue arising from an agreement regarding assisted reproduction and an adult woman who conceives or gives birth to a child pursuant to the agreement by proceeding under the general procedures set forth in Subchapter C (relating to gestational agreements and legal parentage through postpregnancy process) if:

(i) venue is established under section 5922 (relating to venue);

(ii) a party proceeds in good faith under this chapter; and

(iii) subject to subparagraph (i), cause is shown excusing compliance with a specific requirement regarding gestational agreements under this chapter.

(2) The court has jurisdiction to resolve any parentage issue arising from an agreement, consent or otherwise under Subchapter D (relating to child of assisted reproduction) if a party proceeds in good faith under this chapter.

**Note**

**This section is not contained in the Uniform Parentage Act.**

**Comment**

**Subsection (b)(1) 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)(i), (ii) and (iii) 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 (d), 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, nonjudicial, alternative dispute resolution procedures for nonemergency 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 (relating to gestational agreements and pre-pregnancy validation process) or C (relating to gestational agreements and legal parentage through post-pregnancy process), 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 § 801(a) of the Uniform Parentage Act and on § 801(b) of the Uniform Parentage Act, 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 Uniform Parentage Act provisions are as follows:**

**SECTION 801. GESTATIONAL AGREEMENT AUTHORIZED.**

(a) A prospective gestational mother, her husband if she is married, a donor or the donors, and the intended parents may enter into a written agreement providing that: ....

(b) The man and the woman who are the intended parents must both be parties to the gestational agreement.

The requirement under subsection (b) that the agreement be written is based on the introductory language to § 801(a) of the Uniform Parentage Act, replicated previously.

Subsection (c)(1) is based on § 801(e) of the Uniform Parentage Act, with the addition of the modifier “reasonable” and the phrase “and the return of consideration upon the termination of the agreement.” Section 801(e) of the Uniform Parentage Act simply provides that “[a] gestational agreement may provide for payment of consideration.”

Subsection (c)(2) through (5) is not contained in the Uniform Parentage Act.

Subsection (d) is based on § 801(f) of the Uniform Parentage Act, which provides that “[a] gestational agreement may not limit the right of the gestational mother to make decisions to safeguard her health or that of the embryos or fetus.”

Subsection (e) is not contained in the Uniform Parentage Act.

Subsection (f) is based on § 807(b) of the Uniform Parentage Act and expanded. Section 807(b) provides that “[i]f the parentage of a child born to a gestational mother is alleged not to be the result of assisted reproduction, the court shall order genetic testing to determine the parentage of the child.”

Subsection (g) is not contained in the Uniform Parentage Act.

**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.

SUBCHAPTER B  
GESTATIONAL AGREEMENTS AND  
PREPREGNANCY 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 § 801(d) of the Uniform Parentage Act, which simply provides that “[a] gestational agreement does not apply to the birth of a child conceived by means of sexual intercourse.”**

§ 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 Uniform Parentage Act, although §§ 104 and 802 of the Uniform Parentage Act concern the adjudication of parentage and validation of a gestational agreement.**

**Sections 104 and 802 of the Uniform Parentage Act provide the following:**

**SECTION 104. COURT OF THIS STATE.**

**The [designate] court is authorized to adjudicate parentage under this [Act].**

**SECTION 802. REQUIREMENTS OF PETITION.**

**(a) The intended parents and the prospective gestational mother may commence a proceeding in the [appropriate court] to validate a gestational agreement.**

**(b) A proceeding to validate a gestational agreement may not be maintained unless:**

**(1) the mother or the intended parents have been residents of this State for at least 90 days;**

- (2) the prospective gestational mother's husband, if she is married, is joined in the proceeding; and
- (3) a copy of the gestational agreement is attached to the [petition].

Section 805 of the Uniform Parentage Act, replicated as follows, is not contained in this subchapter.

**SECTION 805. EXCLUSIVE, CONTINUING JURISDICTION.**

Subject to the jurisdictional standards of [Section 201 of the Uniform Child Custody Jurisdiction and Enforcement Act], the court conducting a proceeding under this [article] has exclusive, continuing jurisdiction of all matters arising out of the gestational agreement until a child born to the gestational mother during the period governed by the agreement attains the age of 180 days.

*See the Conforming Amendments following Chapter 59 for amendments to the Probate, Estates and Fiduciaries Code (Title 20 of the Pennsylvania Consolidated Statutes).*

§ 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 Uniform Parentage Act and is based on § 25(b)(2) of Illinois statute 750 ILCS 47/25, which provides the following:**

**Sec. 25. Requirements for a gestational surrogacy contract.**

\* \* \*

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

\* \* \*

- (2) it shall be executed prior to the commencement of any medical procedures (other than medical or mental

**health evaluations necessary to determine eligibility of the parties pursuant to Section 20 of this Act) in furtherance of the gestational surrogacy:**

**(i) by a gestational surrogate meeting the eligibility requirements of subsection (a) of Section 20 of this Act and, if married, the gestational surrogate's husband; and**

**(ii) by the intended parent or parents meeting the eligibility requirements of subsection (b) of Section 20 of this Act. In the event an intended parent is married, both husband and wife must execute the gestational surrogacy contract;**

**\* \* \***

**Unlike subsection (b), the Uniform Parentage Act 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) through (3) are based on § 801(a)(1) through (3) of the Uniform Parentage Act, without the references to the husband of the gestational carrier and the donor. Section 801(a)(1) through (3) of the Uniform Parentage Act provides the following:**

**SECTION 801. GESTATIONAL AGREEMENT AUTHORIZED.**

(a) A prospective gestational mother, her husband if she is married, a donor or the donors, and the intended parents may enter into a written agreement providing that:

- (1) the prospective gestational mother agrees to pregnancy by means of assisted reproduction;
- (2) the prospective gestational mother, her husband if she is married, and the donors relinquish all rights and duties as the parents of a child conceived through assisted reproduction; and
- (3) the intended parents become the parents of the child.

Paragraphs (4) and (5) are not contained in the Uniform Parentage Act and are based on § 25(c)(1)(ii) and (4) of Illinois statute 750 ILCS 47/25, which provides the following:

**Sec. 25. Requirements for a gestational surrogacy contract.**

(c) A gestational surrogacy contract shall provide for:

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

\* \* \*

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

\* \* \*

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

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

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

\* \* \*

**Comment**

Paragraphs (2) and (4) are not intended to create or expand any rights for the prospective gestational carrier. Her rights are to be determined elsewhere in this act or as otherwise provided by law.

§ 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 § 806(a) of the Uniform Parentage Act, which provides the following:**

**(a) After issuance of an order under this [article], but before the prospective gestational mother becomes pregnant by means of assisted reproduction, the prospective gestational mother, her husband, or either of the intended parents may terminate the gestational agreement by giving written notice of termination to all other parties.**

**Unlike the Uniform Parentage Act, 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 § 806(b) of the Uniform Parentage Act, which provides that “[t]he 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 Uniform Parentage Act).**

**Subsection (b) is not contained in the Uniform Parentage Act.**

**Subsection (c) is based on § 806(c) of the Uniform Parentage Act, with the addition of the requirement that the individual must send notice to the other parties to the agreement. Section 806(c) of the Uniform Parentage Act provides the following:**

**(c) An individual who terminates a gestational agreement shall file notice of the termination with the court. On receipt of the notice, the court shall vacate the order issued under this [article]. An individual who does not notify the court of the termination of the agreement is subject to appropriate sanctions.**

**Subsection (d)(1) is based on § 806(d) of the Uniform Parentage Act but expanded to excuse from liability any party to the gestational**

**agreement. Section 806(d) of the Uniform Parentage Act provides the following:**

**(d) Neither a prospective gestational mother nor her husband, if any, is liable to the intended parents for terminating a gestational agreement pursuant to this section.**

**Subsection (d)(2) is not contained in the Uniform Parentage Act.**

**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 address, 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 of the following:

(1) The requirements of this chapter have been satisfied.

(2) All of 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) Postbirth 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 the 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) Postbirth 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 Uniform Parentage Act.**

**Subsection (b)(1) is based on § 802(a) of the Uniform Parentage Act, but without the need for the prospective gestational carrier to be**

a co-petitioner. Section 802(a) provides that “[t]he intended parents and the prospective gestational mother may commence a proceeding in the [appropriate court] to validate a gestational agreement.”

Subsection (b)(2) is based on § 802(b)(3) of the Uniform Parentage Act, which provides that “[a] proceeding to validate a gestational agreement may not be maintained unless: ... a copy of the gestational agreement is attached to the [petition].”

Subsections (c) and (d) are not contained in the Uniform Parentage Act.

The introductory language of subsection (e) is based on § 803(a) of the Uniform Parentage Act, which provides that “[i]f the requirements of subsection (b) are satisfied, a court may issue an order validating the gestational agreement and declaring that the intended parents will be the parents of a child born during the term of the of the agreement.”

Subsection (e)(1) is implied in the Uniform Parentage Act and derived from § 803(b)(1) of the Uniform Parentage Act, which provides that “[t]he court may issue an order under subsection (a) only on finding that ... the residence requirements of Section 802 have been satisfied and the parties have submitted to the jurisdiction of the court under the jurisdictional standards of this [Act].”

Subsection (e)(2) and (3) is based on § 803(b)(3) and (4) of the Uniform Parentage Act, which provides the following:

(b) The court may issue an order under subsection (a) only on finding that:

\* \* \*

(3) all parties have voluntarily entered into the agreement and understand its terms;

(4) adequate provision has been made for all reasonable health-care expense associated with the gestational agreement until the birth of the child, including responsibility for those expenses if the agreement is terminated;

\* \* \*

Subsection (f)(1) is based on the first sentence of § 807(a) of the Uniform Parentage Act, which provides that “[u]pon birth of a child to a gestational mother, the intended parents shall file notice with the court that a child has been born to the gestational mother within 300 days after assisted reproduction.”

Subsection (f)(2) is based on the first sentence of § 807(c) of the Uniform Parentage Act, which provides that “[i]f the intended parents fail to file notice required under subsection (a), the gestational mother or the appropriate State agency may file notice with the court that a child has been born to the gestational mother within 300 days after assisted reproduction.”

Unlike the Uniform Parentage Act, 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 § 807(a) of the Uniform Parentage Act, which provides the following:

- (a) ... Thereupon, the court shall issue an order:
- (1) confirming that the intended parents are the parents of the child;
  - (2) if necessary, ordering that the child be surrendered to the intended parents; and
  - (3) directing the [agency maintaining birth records] to issue a birth certificate naming the intended parents as parents of the child.

The reference to the intended parents being financially responsible for the child in subsection (g)(1) is based on the second sentence of § 807(c) of the Uniform Parentage Act, which provides that “[u]pon proof of a court order issued pursuant to Section 803 validating the gestational agreement, the court shall order the intended parents are the parents of the child and are financially responsible for the child.”

Section 807(a)(2) of the Uniform Parentage Act, replicated previously and 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 POSTPREGNANCY 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 prebirth decree is sought;
- (3) the child was born, if a postbirth 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 address, 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).**

**AFFIDAVIT, ACKNOWLEDGMENT AND WAIVER  
FOR INTENDED PARENT**

**I, \_\_\_\_\_, am an intended parent of the child referenced in the accompanying petition.**

**I am the petitioner and the information contained in the accompanying petition is true and correct to the best of my knowledge, information and belief.**

_____ <b>Signature of Intended Parent</b>	_____ <b>Date</b>
--	----------------------

**I acknowledge that I agree to become a legal parent of the child.**

_____ <b>Signature of Intended Parent</b>	_____ <b>Date</b>
--	----------------------

**I waive the right to a hearing to ratify the gestational agreement.**

_____ <b>Signature of Intended Parent</b>	_____ <b>Date</b>
--	----------------------



**If a statement in the foregoing instruments would apply to the individual executing it, the individual would sign and date the line underneath the statement; otherwise, that signature and date line would remain blank.**

§ 5925. Hearing and notice.

(a) Scheduling.--

(1) Unless the court determines that a hearing is unnecessary, the court shall schedule a hearing to confirm the facts set forth in the petition under section 5924 (relating to petition to ratify agreement).

(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 prebirth decree is sought and birth occurs after the filing of the petition but prior to the entry of the decree.

#### SUBCHAPTER D CHILD OF ASSISTED REPRODUCTION

Sec.

5931. Applicability.

5932. Legal parentage.

5933. Consent to assisted reproduction.

5934. Effect of filing complaint for divorce or annulment.

5935. Parental status of deceased individual.

§ 5931. Applicability.

This subchapter does not apply if a child is conceived by means of sexual intercourse or as the result of a gestational agreement.

#### Note

**This section is based on § 701 of the Uniform Parentage Act, which provides that “[t]his [article] does not apply to the birth of a child conceived by means of sexual intercourse [, or as the result of a gestational agreement as provided in [Article] 8].”**

#### Comment

**This subchapter applies only to children born as the result of assisted reproduction. A child conceived by sexual intercourse is not covered by this subchapter, irrespective of the alleged intent of the parties. This subchapter involves an individual or a couple seeking to become parents through assisted reproduction. It may involve either one donor (which is the more common situation) or two donors, who**

**most of the time are anonymous. In a typical situation, the woman who uses assisted reproduction and gives birth to the child will become the legal mother of the child, if she is not already the genetic mother of the child. The man involved in the relationship with the woman will become the legal father of the child, if he is not already the genetic father of the child.**

§ 5932. Legal parentage.

(a) Legal parentage of man.--Subject to section 5933(f) (relating to consent to assisted reproduction), a man is a legal parent of a child born as a result of assisted reproduction if, with the intent to be a parent of the child and without countermanding that intent before the placement of the eggs, sperm or embryos, he:

(1) provides sperm for the assisted reproduction; or

(2) consents to the assisted reproduction as provided in section 5933.

(b) Legal parentage of woman.--A woman who gives birth to a child by means of assisted reproduction under this subchapter is a legal parent of the child.

#### **Note**

**Subsection (a) is based on §§ 201(b)(5) and 703 of the Uniform Parentage Act. Section 201(b)(5) provides that “[t]he father-child relationship is established between a man and a child by ... the man’s having consented to assisted reproduction by a woman under [Article] 7 which resulted in the birth of the child.” Section 703 provides the following:**

#### **SECTION 703. PATERNITY OF CHILD OF ASSISTED REPRODUCTION.**

**A man who provides sperm for, or consents to, assisted reproduction by a woman as provided in Section 704 with the intent to be the parent of her child, is a parent of the resulting child.**

**Subsection (b) is not contained in the Uniform Parentage Act.**



## Comment

**The marital status of the man described in this section and the woman who gives birth to the child is irrelevant. Even though a man under this section may “donate” sperm for assisted reproduction, he is not considered a “donor” under the definition of that term (§ 5902). If a man is a donor and intends to become a parent, § 5903(b) would apply. Subsection (b) reiterates the concept set forth in paragraph (3) of the definition of “donor” in § 5902. The woman may be both the genetic and legal mother of the child.**

§ 5933. Consent to assisted reproduction.

(a) General rule.--A consent under this section shall be in writing, dated and signed by the required parties under subsection (b).

(b) Who must consent.--The following individuals shall consent to assisted reproduction:

(1) The woman who intends to give birth to a child by the assisted reproduction and be a parent of the child.

(2) A man who intends to be a parent of the child.

(c) Contents of consent.--A consent under this section shall at a minimum specify:

(1) That the woman who intends to give birth to a child by assisted reproduction pursuant to this subchapter shall be a parent of the child.

(2) That the man who intends to be a parent of the child shall be a parent of the child.

(3) The name of any known donor regarding the assisted reproduction.

(d) Copy of consent.--A copy of the consent:

(1) shall be retained by the individuals executing the consent; and

(2) may be provided to the clinic or other facility performing the assisted reproduction.

(e) Failure to sign consent.--In the absence of fraud, misrepresentation or nondisclosure regarding assisted reproduction, the failure of a man under subsection (b)(2) to sign a consent under this section, before or after the birth of the child, does not preclude a judicial finding of paternity if the man and woman openly and consistently hold the child out as their own, in which case paternity may be established by estoppel.

(f) Withdrawal of consent.--

(1) An individual may withdraw his or her consent at any time before the placement of the eggs, sperm or embryos.

(2) A withdrawal of consent shall be in writing, dated and signed by the individual withdrawing consent.

(3) A withdrawal of consent:

(i) shall be served on the other individual who executed the consent; and

(ii) may be provided to the clinic or other facility that is scheduled to perform the assisted reproduction.

(4) A man who formerly had intended to be the father of the child and who later withdraws his consent pursuant to this section is not a legal parent of the resulting child.

#### Note

**Subsections (a) and (b) are based on § 704(a) of the Uniform Parentage Act, which provides the following:**

**(a) Consent by a woman, and a man who intends to be a parent of a child born to the woman by assisted reproduction must be in a record signed by the woman and the man. This requirement does not apply to a donor.**

**Subsections (c) and (d) are not contained in the Uniform Parentage Act. There is no statutory consent form.**

Subsection (e) is based loosely on § 704(b) of the Uniform Parentage Act, which provides the following:

(b) Failure a man to sign a consent required by subsection (a), before or after birth of the child, does not preclude a finding of paternity if the woman and the man, during the first two years of the child's life resided together in the same household with the child and openly held out the child as their own.

Subsection (f)(1) and (4) is based on § 706(b) of the Uniform Parentage Act, which provides the following:

(b) The consent of a woman or a man to assisted reproduction may be withdrawn by that individual in a record at any time before placement of eggs, sperm, or embryos. An individual who withdraws consent under this section is not a parent of the resulting child.

Subsection (f)(2) and (3) is not contained in the Uniform Parentage Act.

Subsection (f) may apply to intact families and impact on the presumption of paternity in Pennsylvania. For example, if a husband wishes to withdraw his consent and the wife does not favor that decision, the wife may threaten to implant the embryos and establish the husband's parentage, thereby making him liable for support. Subsection (f) does not address this scenario, the possible consequence being that the husband withdraws his consent, the wife proceeds with the assisted reproduction, the wife becomes pregnant and has a child, and the child has only one legal parent (the wife), even though the husband and wife remain married. Subsection (f) does not provide statutory language to resolve this potential problem, along the lines of "notwithstanding subsection (f), the court may adjudicate paternity of the husband of the woman who gave birth to a child by assisted reproduction under this subchapter, taking into consideration the best interests of the child."

#### Comment

This section does not apply to a gestational carrier, who is covered by the provisions of Subchapters B and C. The marital status of the consenting man and woman is irrelevant.

Under subsection (c)(3), an individual may specify a particular individual as a donor, in which case the specification would be a

**condition of the consent. Therefore, if this or any other condition set forth in the consent is not fulfilled, the consent is not valid.**

**Under subsection (e), even if the man does not consent to the assisted reproduction, he may nonetheless be found to be the father of the resulting child, if he openly and consistently holds the child out as his own. Subsection (e) essentially reiterates the current law if a party does not execute a consent. A woman who gives birth to a child will be listed as the mother of the child. If she is married, her husband is the presumptive father of the child, unless he can successfully rebut the presumption or defeat the principle of paternity by estoppel. If she is unmarried, she and the child's father may file an acknowledgment of paternity pursuant to § 5103.**

**Under subsection (f), the withdrawal of consent may be filed in the same location that the consent was filed (for example, the laboratory in which the sperm or embryos are stored). A child born through assisted reproduction accomplished after consent has been voided by the filing and service of a complaint for divorce or annulment (*see* § 5934) or withdrawn under this section will have a legal mother and a genetic father, but not a legal father. In this instance, intention, rather than biology, is the controlling factor. This section, in conjunction with § 5934, is intended to encourage careful drafting of assisted reproduction agreements, so that the intent of the woman and man is clear.**

**Service of the withdrawal of consent shall be performed in the manner prescribed by the Pennsylvania Rules of Civil Procedure No. 400 et seq.**

**A clinic or other facility performing the assisted reproduction should make available consent forms and withdrawal of consent forms. If a clinic or other facility has been provided a copy of the consent, prudence dictates that the withdrawal of consent form be sent to the clinic or other facility.**

§ 5934. Effect of filing complaint for divorce or annulment.

(a) General rule.--If a complaint for divorce or annulment is filed and served, and not withdrawn before the placement of the eggs, sperm or embryos, the husband is not a parent of the resulting child unless he consented in a dated, signed writing to be a parent

of the child if assisted reproduction were to occur after the filing of the complaint for divorce or annulment.

(b) Effect of withdrawal of complaint or reconciliation.--If a complaint for divorce or annulment is withdrawn or the parties reconcile before the birth of the child born as a result of assisted reproduction, subsection (a) does not apply.

#### Note

**This section differs from § 706(a) of the Uniform Parentage Act, which provided that “[i]f a marriage is dissolved before placement of eggs, sperm, or embryos, the former spouse is not a parent of the resulting child unless the former spouse consented in a record that if assisted reproduction were to occur after a divorce, the former spouse would be a parent of the child.”**

#### Comment

**In general, absent consent evidencing a different intent, the filing and service of a complaint for divorce or annulment before the placement of the eggs, sperm or embryos would automatically relieve a husband of parental duties, and he would not have parental rights. If, however, the complaint is withdrawn or the parties reconcile before the birth the child, the husband would retain his parental rights and duties with respect to the child. If a dispute arises as to whether the parties reconciled, a factual argument would need to be made before the court, and the court would need to determine whether reconciliation occurred.**

**The actual disposition of embryos after a divorce decree is entered should be addressed in the parties’ property settlement agreement. This subchapter does not attempt to resolve issues as to control of frozen embryos following the filing of a complaint for divorce or annulment or the dissolution of a nonmarital relationship.**

§ 5935. Parental status of deceased individual.

(a) Consent necessary.--If an individual who consented to be a parent by assisted reproduction dies before the placement of eggs, sperm or embryos, the deceased individual is not a parent of the resulting child unless the deceased individual consented

in a dated, signed writing to be a parent of the child if assisted reproduction were to occur after death.

(b) Notice and placement requirements.--If an individual has consented pursuant to subsection (a), the deceased individual shall be a parent of the resulting child only if:

(1) the placement of eggs, sperm or embryos occurred within 18 months of the individual's death; and

(2) within six months following the death of the individual, the individual's surviving spouse:

(i) files the consent under subsection (a) with the clerk of the court; and

(ii) serves notice of the consent under subsection (a) with the individual's personal representative, as defined in 20 Pa.C.S. § 102 (relating to definitions).

#### **Note**

**Subsection (a) is based on § 707 of the Uniform Parentage Act, which provides the following:**

#### **SECTION 707. PARENTAL STATUS OF DECEASED INDIVIDUAL.**

**If an individual who consented in a record to be a parent by assisted reproduction dies before placement of eggs, sperm, or embryos, the deceased individual is not a parent of the resulting child unless the deceased spouse consented in a record that if assisted reproduction were to occur after death, the deceased individual would be a parent of the child.**

**Subsection (b) is not contained in the Uniform Parentage Act. The term "personal representative," referenced in subsection (b)(2)(ii), is defined in § 102 of the Probate, Estates and Fiduciaries Code (Title 20 of the Pennsylvania Consolidated Statutes) as "an executor or administrator of any description."**

**There is no statutory check-off form in which a signatory indicates the intent to be considered the parent of a child born through the placement of eggs, sperm or embryos after death.**

## Comment

**This section could cause a result that is contrary to the decedent's intent, as in the case of an individual who intends the embryos to be implanted but who then dies unexpectedly before consenting in a dated, signed writing. A decedent is not a parent of a child conceived as a result of assisted reproduction after the decedent's death unless consent is given pursuant to this section.**

**Absent written consent, the death of an individual whose genetic material is subsequently used either in conceiving an embryo or in implanting an already existing embryo into a womb ends the potential legal parenthood of the deceased. This section is designed primarily to avoid the problems of intestate succession which could arise if the posthumous use of a person's genetic material leads to the deceased being determined to be a parent. Of course, an individual who wants to explicitly provide for such children in his or her will may do so.**

**Subsection (b) eliminates the possibility of having a deceased individual's estate open indefinitely. It balances the interest of effectuating the decedent's intent to be a parent (and have an heir) and the practical need to close the decedent's estate after a reasonable amount of time.**

**This section is to be broadly construed to effectuate the purposes of the Probate, Estates and Fiduciaries Code (Title 20 of the Pennsylvania Consolidated Statutes), including provisions concerning inheritance, succession and notice requirements.**

**Although this subchapter contemplates that a woman may be the genetic mother of the child will give birth to the child, a situation may occur where that is not the case, thereby implicating this section. For example, the surviving husband of a deceased woman may use his deceased wife's eggs to create a child. If the requirements of this section are satisfied and the surviving husband uses his deceased wife's eggs and enters into an agreement regarding assisted reproduction with a carrier, who will carry the child, his deceased wife would be the parent of the resulting child. In this circumstance, parentage would be determined under § 5904(b), since neither § 5932(b) nor Subchapters B or C are instructive in resolving the parentage issues regarding the mother of the child. To wit, § 5932(b) provides that the woman giving birth to a child is a legal parent of the child, and Subchapters B and C concern gestational agreements, a term specifically defined in § 5902. In this case, the agreement executed by the surviving husband and the carrier would not be a "gestational agreement" as defined in § 5902 because the deceased**

**wife would not have executed the agreement. In addition, in this case, the Division of Vital Records of the Department of Health would need some type of order determining that the deceased wife, instead of the carrier, is to be listed as the mother of the child.**

## SUBCHAPTER E RECORDS

Sec.

5941. Records generally.

5942. Release of information from court records.

§ 5941. 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 under 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 Uniform Parentage Act.**

### 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.**



§ 5942. Release of information from court records.

A child born as a result of assisted reproduction involving a donor or gestational carrier may petition the court in the judicial district where the applicable records are retained for information regarding the donor or gestational carrier, if the child is at least 18 years of age. Upon petition, the court shall then furnish the information to the child.

**Note**

**This section is not contained in the Uniform Parentage Act.**

**Comment**

**This section only applies to information contained in the court records. It does not apply to information collected and retained by other entities or facilities, such as a clinic that performs the assisted reproduction.**

**No distinction is made between nonidentifying information and identifying information regarding the donor or gestational carrier; any information regarding these individuals should be furnished to the petitioning child. In the case of assisted reproduction involving an anonymous donor, information in the court records about a donor would be quite limited (if it exists at all). If a donor is known, information regarding the donor would appear in the petition filed with the court. Similarly, information regarding the gestational carrier would appear in the petition filed with the court. Because the information regarding the known donor and the gestational carrier would have been known and available to the child's parents, and the parents could have disclosed that information to the child at any time, this section follows the principle that no need arises to redact any information contained in the court records if the child petitions for the information. The petitioning child, therefore, should have unrestricted access to the information. In so providing, this section departs from the current law regarding analogous procedures under the Adoption Act (23 Pa.C.S. Part III, Chapters 21-29). Under this section, there is no recourse to prevent disclosure, even if the known donor and the parents agreed that the donor's identification would not be disclosed.**



## CONFORMING AMENDMENTS

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. Ch. 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. Ch. 59; or

(ii) as provided in 23 Pa.C.S. § 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**

The addition of 23 Pa.C.S. Ch. 59 shall not limit any rights created or agreements made before the effective date of the addition 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. §§ 711 and 713.