

# Gestational Surrogacy

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

Submitted as:

Illinois

[Public Act 093-0921](#)

Status: Enacted into law in 2004.

## Suggested State Legislation

(Title, enacting clause, etc.)

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

2

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

8

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

39  
40 Section 4. [*Rights of Parentage.*]

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

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

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

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

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

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

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

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

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

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

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

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

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

69  
70 Section 5. [*Eligibility.*]

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

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

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

76 (3) she has completed a medical evaluation;

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

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

(6) she has obtained a health insurance policy that covers major medical treatments and hospitalization and the health insurance policy has a term that extends throughout the duration of the expected pregnancy and for [8 weeks] after the birth of the child; provided, however, that the policy may be procured by the intended parents on behalf of the gestational surrogate pursuant to the gestational surrogacy contract.

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

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

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

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

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

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

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

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

and

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

Section.

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

(1) it shall be in writing;

(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 5 of this Act) in furtherance of the gestational surrogacy:

(i) by a gestational surrogate meeting the eligibility requirements of subsection (a) of Section 5 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 5 of this Act. In the event an intended parent is married, both husband and wife must execute the gestational surrogacy contract;

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

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

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

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

(c) A gestational surrogacy contract shall provide for:

129 (1) the express written agreement of the gestational surrogate to:  
130 (i) undergo pre-embryo transfer and attempt to carry and give birth to the  
131 child; and  
132 (ii) surrender custody of the child to the intended parent or parents  
133 immediately upon the birth of the child;  
134 (2) if the gestational surrogate is married, the express agreement of her husband  
135 to:  
136 (i) undertake the obligations imposed on the gestational surrogate  
137 pursuant to the terms of the gestational surrogacy contract;  
138 (ii) surrender custody of the child to the intended parent or parents  
139 immediately upon the birth of the child;  
140 (3) the right of the gestational surrogate to utilize the services of a physician of  
141 her choosing, after consultation with the intended parents, to provide her care during the  
142 pregnancy; and  
143 (4) the express written agreement of the intended parent or parents to:  
144 (i) accept custody of the child immediately upon his or her birth; and  
145 (ii) assume sole responsibility for the support of the child immediately  
146 upon his or her birth.  
147 (d) A gestational surrogacy contract shall be presumed enforceable for purposes of State  
148 law even though it contains one or more of the following provisions:  
149 (1) the gestational surrogate's agreement to undergo all medical exams,  
150 treatments, and fetal monitoring procedures that the physician recommended for the success of  
151 the pregnancy;  
152 (2) the gestational surrogate's agreement to abstain from any activities that the  
153 intended parent or parents or the physician reasonably believes to be harmful to the pregnancy  
154 and future health of the child, including, without limitation, smoking, drinking alcohol, using  
155 nonprescribed drugs, using prescription drugs not authorized by a physician aware of the  
156 gestational surrogate's pregnancy, exposure to radiation, or any other activities proscribed by a  
157 health care provider;  
158 (3) the agreement of the intended parent or parents to pay the gestational  
159 surrogate reasonable compensation; and  
160 (4) the agreement of the intended parent or parents to pay for or reimburse the  
161 gestational surrogate for reasonable expenses (including, without limitation, medical, legal, or  
162 other professional expenses) related to the gestational surrogacy and the gestational surrogacy  
163 contract.  
164 (e) In the event that any of the requirements of this Section are not met, a court of  
165 competent jurisdiction shall determine parentage based on evidence of the parties' intent.

166  
167 Section 7. *[Duty to Support.]*

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

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

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

176  
177 Section 8. *[Establishment of the Parent-Child Relationship.]*

178 (a) A parent-child relationship shall be established prior to the birth of a child born  
179 through gestational surrogacy if the attorneys representing both the gestational surrogate and the  
180 intended parent or parents certify that the parties entered into a gestational surrogacy contract  
181 intended to satisfy the requirements of Section 6 of this Act with respect to the child.

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

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

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

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

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

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

199  
200 Section 12. [*Damages.*]

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

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

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

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

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

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

225

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

(a) A parent and child relationship may be established voluntarily by the signing and witnessing of a voluntary acknowledgment of parentage in accordance with the provisions of this Act. The voluntary acknowledgment of parentage shall contain the social security numbers of the persons signing the voluntary acknowledgment of parentage; however, failure to include the social security numbers of the persons signing a voluntary acknowledgment of parentage does not invalidate the voluntary acknowledgment of parentage.

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

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

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

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

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

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

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

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

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

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

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

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

(e) Once a parent and child relationship is established in accordance with subsection (a), an order for support may be established pursuant to a petition to establish an order for support by consent filed with the [clerk of the circuit court]. A copy of the properly completed acknowledgment of parentage form shall be attached to the petition. The petition shall ask that the circuit court enter an order for support. The petition may ask that an order for visitation, custody, or guardianship be entered. The filing and appearance fees provided under the [insert citation] shall be waived for all cases in which an acknowledgment of parentage form has been properly completed by the parties and in which a petition to establish an order for support by consent has been filed with the [clerk of the circuit court]. This subsection shall not be construed to prohibit filing any petition for child support, visitation, or custody under this Act or to prevent the establishment of an administrative support order in cases involving persons receiving child support enforcement services under [insert citation].

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

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

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