

GESTATIONAL SURROGACY IN ILLINOIS

If you are considering gestational surrogacy as a family building option, Illinois is one of the friendlier states to enter into a gestational surrogacy arrangement. Parties in Illinois can enter into a gestational surrogacy arrangement without court involvement to establish parentage. Most other states that allow for gestational surrogacy arrangements require court intervention, including approval of the gestational surrogacy agreement, pre or post-birth orders, and/or an adoption proceeding, which can be more timely, expensive and uncertain.

The Illinois Gestational Surrogacy Act (“Act”), which became effective January 1, 2005, provides specific requirements and safeguards for parties wishing to pursue gestational surrogacy, but alleviates the need for court involvement as long as each requirement of the Act is met. Because there are no residency requirements imposed by the Act, the Intended Parent(s) and the Gestational Surrogate do not have to live in Illinois, as long as the birth occurs in Illinois. The Act does not require that an Intended Parent be married – so unmarried persons can become an Intended Parent by gestational surrogacy in Illinois. At least one of the gametes (egg or sperm) used in forming the embryo must be contributed by an Intended Parent. Accordingly, “traditional surrogacy”, where the surrogate contributes her own egg(s) to form the embryo, is *not* covered by the Act.

What is Required to be Eligible Under the Act?

The Act has several eligibility requirements that apply to the Gestational Surrogate and the Intended Parent(s) that must be met at the time the gestational surrogacy agreement is executed. In addition to contributing at least one of the gametes the Intended Parent(s) must have a “medical need” for the gestational surrogacy as evidenced by a qualified physician’s affidavit. The physician

must be certified to practice medicine in Illinois. The Intended Parent(s) must also complete a mental health evaluation and consult with an attorney regarding the terms of the gestational surrogacy agreement and the potential legal consequences of participating in a gestational surrogacy arrangement.

The Gestational Surrogate must be at least 21 years old and have given birth to at least one child. Like the Intended Parent(s) she must complete a medical and mental health evaluation and consult with an attorney regarding the terms of the gestational surrogacy agreement and the potential legal consequences of acting as a gestational surrogate. Because the Intended Parent(s) and Gestational Surrogate must each have their own independent attorney, the same attorney may not represent both parties, and neither party can waive representation. The Gestational Surrogate must have, or obtain, a health insurance policy that covers major medical treatments and hospitalization with a term that will extend for not less than eight weeks after the birth of the child. This policy may be procured by the Intended Parents(s) on behalf of the Gestational Surrogate.

The parties to a gestational surrogacy arrangement should make sure the Gestational Surrogate's health insurance policy is carefully reviewed to determine whether any exclusion exists that may limit or exclude her pregnancy coverage for a gestational surrogacy arrangement. Because more and more health insurance companies are denying or attempting to deny pregnancy coverage for gestational surrogates, the parties may wish to purchase additional health insurance coverage on behalf of the gestational surrogate, even if she has a health insurance policy with no specific surrogacy exclusions. Your attorney or the agency you are working with should be able to recommend options through independent providers who offer pregnancy coverage, supplemental insurance, or back-up policies for gestational surrogates. These options should be considered prior to any pre-embryo transfer.

The Gestational Surrogacy Agreement

Just as the parties to a gestational surrogacy arrangement must meet certain eligibility requirements, the gestational surrogacy agreement must also meet the requirements of the Act to be presumed enforceable under Illinois law. The agreement must be in writing and executed prior to the commencement of any medical procedures (other than the medical and mental health evaluations necessary to determine the parties' eligibility) by the Gestational Surrogate and her spouse, if she is married, and the Intended Parent(s). Often, to avoid unnecessary legal fees, the Intended Parents will wait to have the agreement prepared until after the Gestational Surrogate has passed her medical evaluations. The parties' signatures must be witnessed by two competent adults that are not parties to the gestational surrogacy agreement. Each Party must sign a written acknowledgment that he/she received information about the legal, financial, and contractual rights, expectations, penalties, and obligations of the gestational surrogacy agreement. If the Gestational Surrogate will receive compensation, it must be placed in escrow with an independent escrow agent prior to the Gestational Surrogate's commencement of any medical procedures (excluding the medical and mental health evaluations described above).

The Act also requires the gestational surrogacy agreement to contain certain contractual terms. The agreement must provide for the express written agreement of the Gestational Surrogate to undergo pre-embryo transfer, attempt to carry and give birth to the child, and surrender custody of the child to the Intended Parent(s) immediately upon the birth of the child. If the Gestational Surrogate is married, the agreement must contain her husband's express agreement to undertake the obligations imposed on the Gestational Surrogate under the agreement and surrender custody of the child to the Intended Parent(s) immediately upon the birth of the child. The agreement must also allow the Gestational Surrogate

to utilize the services of a physician of her choosing, in consultation with the Intended Parent(s), to provide for her care during the pregnancy. Finally, it must include the express written agreement of the

Intended Parent(s) to accept custody and assume sole responsibility for the support of the child immediately upon birth. In the event any of the Act's requirements are not included in the agreement, a court will determine who should be the legal parent(s) of the child based upon evidence of the parties' intent.

The Act also allows for (but does not require) the Gestational Surrogate to receive reasonable compensation and reimbursement for her expenses. As stated above, all compensation must be placed in escrow prior to the commencement of any medical procedures in furtherance of the gestational surrogacy (except for the preliminary evaluations). The agreement may also contain provisions regarding the Gestational Surrogate's agreement to undergo medical exams, treatments, and fetal monitoring procedures recommended by the physician for the success of the pregnancy. The parties can also agree that the Gestational Surrogate will abstain from activities the Intended Parent(s) or physician reasonably believe to be harmful to the pregnancy and future health of the child, including, but not limited to, smoking, drinking alcohol, using nonprescribed drugs, using prescription drugs not authorized by a physician aware of the Gestational Surrogate's pregnancy, exposure to radiation, or any other activities proscribed by a health care provider.

Establishing Parentage

Parentage is established immediately at the time of birth if the requirements of the Act are met and the attorneys representing both the Gestational Surrogate and the Intended Parent(s) have certified that the gestational surrogacy agreement intended to satisfy the requirements of the Act. Certification forms are prescribed by the

Illinois Department of Public Health (“IDPH”). Typically, the attorney for the Intended Parents will prepare and file the necessary IDPH forms. In addition to the attorney certifications, the IDPH forms include statements from the Intended Parent(s) and Gestational Surrogate and if married, her spouse, and a statement from the treating Illinois physician that the child is genetically related to at least one of the Intended Parents and not the Gestational Surrogate. The IDPH forms and certifications must be placed in the Gestational Surrogate’s medical file at the hospital where she intends to deliver with copies sent to IDPH. If all the requirements have been met, the Intended Parent(s) names are placed on the birth certificate with no court involvement.

Because parentage is determined according to the laws of the state where a child is born, should the birth occur outside the state of Illinois, parentage will be established pursuant to the laws of that state. Accordingly, it is very important for Intended Parent(s) working with a Gestational Surrogate that does not reside in Illinois, but intends to utilize the Act and deliver in Illinois, to consult with an attorney knowledgeable about gestational surrogacy in the state where the Gestational Surrogate resides in that state. When the Gestational Surrogate resides in Illinois, parties often agree that the Gestational Surrogate will not travel outside the state during her last trimester.