

Act 156 Taskforce

Assisted Reproduction Permitted Interaction Group

Concept Document
May 17, 2024

The Assisted Reproduction Permitted Interaction Group considered the Assisted Reproduction (Part VIII) and Surrogacy Agreement (Part IX) portions of the proposed bill draft, and the relevant definitions. The items below describe the issues under review and discussion - the group's final recommendations may include items not discussed below.

General Approaches

1. After discussion, the group concluded that we should generally follow the Uniform Parentage Act (2017) language, to gain the benefit of that well-considered language and, if enacted, to bring Hawaii's law closer to other States who have adopted all or part of the UPA. The general feeling was that staying close to the UPA would benefit the bill.
2. Some non-substantive edits will be suggested when the group felt it was necessary for clarity's sake. These edits are in keeping with the draft bill's apparent intent.
3. The group recommends that the terms "record" and "embryo" be formally defined in the definitions section (Section -B). We will have proposed language to consider for both.
4. One distinction which helped the group's review of the proposed draft is that Part VIII (Assisted Reproduction) governs IVF, artificial insemination, etc., but does not govern surrogacy, which is addressed elsewhere (Part IX). See Section -MM. The proposed bill governs assisted reproduction and surrogacy under separate provisions, even though surrogacy itself is a form of assisted reproduction.

Policy Decisions Recommended by Assisted Reproduction Permitted Interaction Group

1. **Genetic vs. gestational surrogacy:** Both genetic surrogacy and gestational surrogacy are included in the current working draft of the bill. There was extensive discussion about the desirability of genetic surrogacy (as opposed to gestational surrogacy) as a matter of policy. The group ultimately concluded that, although it is not the preferred surrogacy route for many medical and legal professionals in the field, genetic surrogacy should be included in the law, and subjected to additional regulation on top of the requirements imposed on gestational surrogacy agreements. No one in the group felt it was appropriate to ban genetic surrogacy.
2. **Reciprocal IVF:** The group decided that reciprocal IVF (that is, where one partner provides the ovum, which is fertilized with donor sperm, and the other partner gestates and delivers the baby) needs to be specifically addressed throughout the law. The group agreed that it is important that these parents not be considered "donors" or "surrogates" under the law, as they are neither; they are both intended parents. This may require some adjustment to the assisted reproduction provisions, which the group is determining how best to address.
3. **Jurisdiction:** The group discussed the jurisdiction of the Hawai'i courts if a surrogacy agreement is formed under Hawai'i law but no party to the agreement is a resident of this State. In its present form the bill would permit non-residents to use this law if "at least

one medical evaluation or procedure or mental health consultation under the agreement shall occur in this State.” (Section -WW(1)). There was some concern that this connection to the State might be too tenuous for jurisdictional purposes, especially if a consultation occurred via telehealth. These concerns may be minimized by explicitly requiring non-residents to consent to our courts’ jurisdiction in the agreement itself. The group was in general agreement on this suggested approach and will suggest language to address it.

4. **Confidentiality:** (a) The draft bill currently requires a confidentiality agreement for every surrogacy agreement. (Section -XX(9): “The agreement shall contain a confidentiality agreement.”) The group felt that confidentiality should be addressed in each surrogacy agreement, but not necessarily that confidentiality must be mandated in each agreement, which should be left to the parties. The group felt that explicitly addressing the parties’ expectations as to confidentiality up front was beneficial, but that the law should not require confidentiality agreed between the parties if they do not desire it. The group was in general agreement on this suggested approach and will suggest language to address it. (b) The group also discussed concerns about maintaining the confidentiality of surrogacy and other assisted reproductive technology arrangements with respect to the general public. Among other things, the group noted that publication of mere case captions on publicly available court dockets can, in some cases, disclose the underlying arrangements, thereby potentially revealing personal information regarding intended parents’ fertility status, services provided by surrogates, and the nature of a child’s origins. The group agreed to discuss this issue further and make policy recommendations or proposed further revisions to the bill.

Policy Issues to Raise for Full Taskforce Discussion

1. **Mental Health Consultation:** There are differing opinions within the group as to whether the bill should require the intended parents using a surrogacy agreement to undergo a mental health consultation and the scope of any such examination. The bill currently imposes this requirement on intended parents in Section -VV(b)(2). Some group members were concerned that the mental health consultation requirement is unduly onerous and inequitable because it imposes a burden on intended parents using assisted reproductive technology that is not imposed on heterosexual couples conceiving without the use of assisted reproductive technology. Other group members, however, consider a mental health consultation requirement for intended parents reasonable for the limited purpose of ensuring intended parents are prepared for the mental and emotional rigors of a surrogacy arrangement. The group believes this topic merits further discussion with the full Task Force.