

Act 156 Taskforce

Assisted Reproduction Permitted Interaction Group

Final Report July 19, 2024

The Assisted Reproduction Permitted Interaction Group has completed a detailed review of the Assisted Reproduction and Surrogacy provisions of the draft bill and considered feedback from the Task Force and the public.

We previously presented a number of policy recommendations in a Concept Document dated May 17, 2024. *See* Exhibit 1. These are incorporated to this report as our final notes, and are not repeated below.

The discussion below presents additional recommendations, which we reached after further investigation and deliberation.

The group has also produced a redline of the draft bill with comments in the margins, which is incorporated to this report and attached as Exhibit 2. Many of the proposed edits are for clarity and are non-substantive. The rest are meant to implement the policy recommendations discussed in the Concept Document and below.

Additional Policy Decisions Recommended by Assisted Reproduction Permitted Interaction Group

- 1. Mental Health Consultation:** As noted in the Concept Document, we brought the issue of whether mental health consultations should be mandated for Intended Parents (IPs) to the Task Force for further discussion. Arguments in favor were that the requirement aligns with ASRM guidelines and that reciprocal requirements for surrogates and IPs creates an appearance of fairness. Arguments against were that it imposes unnecessary burdens on IPs as mental health consultations are not typically needed, others involved in the process - doctors, nurses, agency personnel, and lawyers - already work with IPs to prepare them for the surrogacy process, and IVF doctors already serve in a gatekeeper role, referring IPs to mental health professionals when necessary. There was also a concern that a lack of qualified mental health professionals in Hawaii would likely result in significant delays for IPs and surrogates. Upon further consideration, the group recommends against mandating mental health consultations for IPs as a matter of law; however, as a compromise, we have proposed language in Sec. XX to ensure that the parties' expectations about IP mental health consultations are addressed in the surrogacy agreement.
- 2. Health Insurance.** Section XX(6) of the draft requires surrogacy agreements to disclose how IPs will cover surrogacy-related expenses and medical expenses of the child and to include a summary of certain terms of health insurance policies the parties intend to rely on. The group has concerns that summarizing insurance policies could be problematic

and feels the parties should rely on actual policy terms rather than summaries. We looked for alternative language in other state surrogacy laws and thought Connecticut had a better approach. CT is a 2017 UPA enactment state, but its version eliminates the insurance summary requirement and also provides greater clarity about the types of expenses that should be addressed in the surrogacy agreement and IPs' liability for uncovered medical expenses. We propose replacing Sec. XX(6) of the draft with language adapted from CT Gen Stat § 46b-524(6)-(7).

3. **Confidentiality.** As indicated in the Concept Document, the group further discussed the issue of maintaining the confidentiality of surrogacy arrangements in relation to the public. In its present form, the bill provides authority for the court to seal its records; however, after discussing with a member of the judiciary, the group believes this language should be expanded, providing clearer authority to ensure that identifying information is not included in public court dockets. We have proposed language that we believe would accomplish this in Secs. DDD-4 and HHH-4.
4. **Reciprocal IVF.** The Concept Document indicated that our PIG would consider whether amendments needed to be made to address 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). After further consideration, however, our group determined that no further amendments were necessary to bring reciprocal IVF within the reach of the proposed bill.
5. **Withdrawal of Consent for Assisted Reproduction.** Our PIG recommends an edit to Sec. -SS, to make it so the right to withdraw consent for assisted reproduction should be cut off before a transfer, and not depend on whether that transfer results in a pregnancy. If the transfer does not result in a pregnancy the consent would no longer matter. This edit would match the same concept in the surrogacy agreement section, which says: "If an embryo transfer does not result in a pregnancy, a party may terminate the agreement at any time before a subsequent embryo transfer." This edit would also parallel the responsibilities attaching to heterosexual parents reproducing biologically.

Attach. Concept Document, Dated May 17, 2024
Portion of Bill, Redlined by PIG, dated 7/19/24

EXHIBIT 1

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.

EXHIBIT 2

**ASSISTED REPRODUCTION AND SURROGACY PROVISIONS
AS SUBMITTED TO THE TASKFORCE
JULY 19, 2024**

FROM THIS DRAFT:
HAWAI'I UNIFORM PARENTAGE ACT DRAFT
(INCLUDING ASSISTED REPRODUCTION, SURROGACY, AND DONOR ID
DISCLOSURE)
10.24.22

SECTION 1. This measure enacts appropriate portions of the Uniform Parentage Act of 2017 (UPA) to replace the Uniform Parentage Act of 1973. The UPA seeks to do the following: ensures the equal treatment of children born to same-sex couples, establishes a de facto parent as a legal parent, includes surrogacy provisions to reflect developments in that area, and addresses the rights of children born through assisted reproductive technology.

SECTION 2. The Hawaii Revised Statutes is amended by adding a new chapter to be appropriately designated and to read as follows:

CHAPTER

UNIFORM PARENTAGE ACT

PART I. GENERAL PROVISIONS

§ **-A Short title.** This chapter may be cited as the Uniform Parentage Act.

§ **-B Definitions.** In this chapter:

“Acknowledged parent” means an individual who has established a parent-child relationship under part III and IV.

“Adjudicated genetic parent” means an individual who has been adjudicated to be a parent of a child by a court with jurisdiction after genetic testing.

"Adjudicated parent" means an individual who has been adjudicated to be a parent of a child by a court with jurisdiction.

"Alleged genetic parent" means an individual who is alleged to be, or alleges that the individual is, a genetic parent or possible genetic parent of a child whose parentage has not been adjudicated. The term does not include a presumed parent; an individual whose parental rights have been terminated or declared not to exist; or a donor.

"Assisted reproduction" means a method of causing pregnancy other than sexual intercourse. The term includes intrauterine or intracervical insemination, donation of gametes, donation of embryos, in-vitro fertilization and transfer of embryos, and intracytoplasmic sperm injection.

"Birth" includes stillbirth.

"Birthing center" means any facility outside a hospital that provides maternity services.

"Birthing hospital" means any hospital with licensed obstetric-care units, any hospital licensed to provide obstetric services, or any licensed birthing center associated with a hospital.

"Child" means an individual of any age whose parentage may be determined under this chapter.

"Child support enforcement agency" means a state agency created pursuant to chapter 576D.

"Combined relationship index" means the product of all tested relationship indices.

"De facto parent" means an individual who meets the criteria set out in -Z(d).

"Determination of parentage" means establishment of a parent-child relationship by a judicial or administrative proceeding or signing of a valid acknowledgment of parentage under part IV.

"Donor" means an individual who provides gametes or embryos intended for use in assisted reproduction, whether or not for consideration. The term does not include a parent under part VIII, an intended parent under part IX, or an individual who gives birth to a child conceived by assisted reproduction, except as otherwise provided in part IX, ~~or a parent under part VIII or an intended parent under part IX.~~

Commented [1]: Recommended addition from PIG to make sure all forms of donors excluded from definition of intended parent.

"Embryo" means the fertilized product of a sperm and egg, including the zygote stage of early embryo development after fertilization.

Commented [2]: The non-included terms that are not subject to the exception in Part IX to the beginning of that list, for clarity (non-substantive edit).

"Ethnic or racial group" means for the purpose of genetic testing, a recognized group that an individual identifies as the individual's ancestry or part of the individual's ancestry or that is identified by other information.

Commented [3]: PIG recommends adding this definition, which will further clarify the definition of "assisted reproduction" above.

Commented [4]: Recommended addition for clarity.

~~"Facility" means a birthing hospital or a birthing center.~~

Commented [5]: Delete as unnecessary

"Fertility clinic" means a medical facility that specializes in diagnosing and treating infertility and the use of assisted reproductive technology.

Commented [6]: Suggested addition for clarity

"Gamete" means sperm, egg, or any part of a sperm or egg.

"Genetic parent" means an individual whose relationship to a child has been determined by genetic testing or based on a physician's statement by the physician who oversaw the in vitro process by which the embryo was created and transferred.

Commented [7]: PIG recommends this addition, which would allow for a statement from a doctor to serve the same purpose as genetic testing. This is aligned with current practice in the field.

"Genetic testing" means an analysis of genetic markers to identify or exclude a genetic relationship.

"Hypothesized genetic relationship" means an asserted genetic relationship between an individual and a child.

"Individual" means a natural person of any age.

"Intended parent" means an individual, married or unmarried, who manifests an intent to be legally bound as a parent of a child conceived by assisted reproduction.

"Parent" means an individual who has established a parent-child relationship under section -F.

"Parentage" or "parent-child relationship" means the legal relationship between a child and a parent of the child.

"Presumed parent" means an individual who under section -H is presumed to be a parent of a child, unless the presumption is overcome in a judicial proceeding, a valid denial

of parentage is made under part V, or a court adjudicates the individual to be a parent.

“Probability of parentage” means, for the ethnic or racial group to which an individual alleged to be a parent belongs, the probability that a hypothesized genetic relationship is supported, compared to the probability that a genetic relationship is supported between the child and a random individual of the ethnic or racial group used in the hypothesized genetic relationship, expressed as a percentage incorporating the combined relationship index and a prior probability.

“Record” means information that is written or printed, or that is stored in an electronic or other medium and is retrievable in a perceivable form.

“Relationship index” means a likelihood ratio that compares the probability of a genetic marker given a hypothesized genetic relationship and the probability of the genetic marker given a genetic relationship between the child and a random individual of the ethnic or racial group used in the hypothesized genetic relationship.

“Signatory” means an individual who signs a record.

“Transfer” means a procedure for assisted reproduction by which an embryo or sperm is placed within the reproductive tract of the individual who will give birth to the child.

Commented [8]: PIG suggests that this definition be added, given use of the term in the AR part. This language is pulled from other uniform laws already in the HRS. It also matches the UPA.

"Witnessed" means that at least one individual who is authorized to sign and has signed a record to verify that the individual personally observed a signatory sign the record.

[Part II, Jurisdiction omitted]

[Part III, Parent-Child Relationship omitted]

[Part IV, Voluntary Establishment of Parentage omitted]

[Part V, Proceeding to Adjudicate Parentage omitted]

[Part VI, Special Rules of Proceedings to Adjudicate Parentage omitted]

[Part VII, Genetic Testing omitted]

PART VIII. ASSISTED REPRODUCTION

§ -MM **Scope of part.** This part does not apply to the birth of a child conceived by sexual intercourse or assisted reproduction under a surrogacy agreement under part IX.

§ -NN **Parental status of donor.** A donor is not a parent of a child conceived by assisted reproduction.

§ -OO **Parentage of child of assisted reproduction.** An individual who consents under section -PP to assisted reproduction by another individual with the intent to be a parent of a child conceived by the assisted reproduction is a parent of the child.

§ -PP **Consent to assisted reproduction.** (a) Except as otherwise provided in subsection (b), the consent described in section -OO shall be in a record signed by an individual

Commented [9]: Use of the word "individual" twice to refer to different people is confusing. Suggested addition of "another" to make this clearer.

giving birth to a child conceived by assisted reproduction and ~~an~~ the other individual who intends to be a parent of the child.

Commented [10]: Suggested edit for clarity.

(b) Failure to consent in a record as required by subsection (a), before, on, or after the birth of the child does not preclude the court from finding consent to parentage if:

(1) The individual giving birth to a child or the other individual proves by clear and convincing evidence the existence of an express agreement entered into before conception that ~~the individual and~~ the individual giving birth and the other individual intended they both would be parents of the child; or

Commented [11]: Suggested edits for clarity; "other individual" needs to follow the "individual giving birth"

(2) The individual giving birth to the child and the other individual for the first two years of the child's life, including any period of temporary absence, resided together in the same household with the child and both openly held out the child as the individual's child; provided, however, that if an individual dies or becomes incapacitated before the child attains two years of age or the child dies before the child attains two years of age, in which case the court may find consent under this subsection to parentage if a party proves by clear and convincing evidence that the individual giving birth to the child and the other individual intended to reside

Commented [12]: This structure added for clarity of this paragraph; it is not a substantive change.

Commented [13]: Unnecessary

together in the same household with the child and both intended the individual would openly hold out the child as the individual's child, but the individual was prevented from carrying out that intent by death or incapacity.

§ -00 Limitation on spouse's dispute of parentage. (a)

Except as otherwise provided in subsection (b), an individual who, at the time of the child's birth, is the spouse of an individual who gave birth to the child by assisted reproduction may not challenge the individual's own parentage of the child unless:

Commented [14]: Suggested edit for clarity.

- (1) Not later than two years after the birth of the child or the date of which the individual first learns of the birth of the child, whichever is later, the individual commences a proceeding to adjudicate the individual's parentage of the child; and
- (2) The court finds the individual did not consent to the assisted reproduction, before, on, or after the birth of the child, or withdrew consent under section -SS.

(b) A proceeding to adjudicate a spouse's parentage of a child born by assisted reproduction may be commenced at any time if the court determines:

(1) The spouse neither provided a gamete for, nor consented to, the assisted reproduction;

(2) The spouse and the individual who gave birth to the child have not cohabited since the probable time of assisted reproduction; and

(3) The spouse never openly held out the child as the spouse's child.

(c) This section applies to a spouse's dispute of parentage even if the spouse's marriage is declared invalid after assisted reproduction occurs.

§ -RR Effect of certain legal proceedings regarding marriage. If a marriage of an individual who gives birth to a child conceived by assisted reproduction is terminated through divorce or dissolution, subject to legal separation or separate maintenance, declared invalid, or annulled before transfer of gametes or embryos to said individual, a former spouse of said individual is not a parent of the child unless the former spouse consented in a record that the former spouse would be a parent of the child if assisted reproduction were to occur after a divorce, dissolution, annulment, declaration of invalidity, legal separation, or separate maintenance, and the former spouse did not withdraw consent under section -SS.

§ -SS Withdrawal of consent. (a) An individual who consents under section -PP to assisted reproduction may

withdraw consent any time before a transfer ~~that results in a pregnancy~~, by giving notice in a record of the withdrawal of consent to the individual who agreed to give birth to a child conceived by assisted reproduction and to any clinic or health-care provider facilitating the assisted reproduction. Failure to give notice to the clinic or health-care provider does not affect a determination of parentage under this part.

(b) An individual who withdraws consent under subsection (a) is not a parent of the child under this part.

§ ~~TT~~ **Parental status of deceased individual.** (a) If an individual who intends to be a parent of a child conceived by assisted reproduction dies during the period between the transfer of a gamete or embryo and the birth of the child, the individual's death does not preclude the establishment of the individual's parentage of the child if the individual otherwise would be a parent of the child under this chapter.

(b) If an individual who consented in a record to assisted reproduction by an individual who agreed to give birth to a child dies before a transfer of gametes or embryos, the deceased individual is a parent of a child conceived by the assisted reproduction only if:

(1) Either:

(A) The individual consented in a record that if assisted reproduction were to occur after the

Commented [15]: See note in final report about this edit.

death of the individual, the individual would be a parent of the child; or

- (B) The individual's intent to be a parent of a child conceived by assisted reproduction after the individual's death is established by clear-and-convincing evidence; and

(2) Either:

- (A) The embryo is in utero not later than thirty-six months after the individual's death; or
- (B) The child is born not later than forty-five months after the individual's death.

PART IX. SURROGACY AGREEMENT

§ -UU **Definitions.** In this part:

"Genetic surrogate" means an individual who is capable of carrying a pregnancy to term and giving birth to a child, who is not an intended parent and who agrees to become pregnant through assisted reproduction using their own gamete, under a genetic surrogacy agreement as provided in this part.

"Gestational surrogate" means an individual who is capable of carrying a pregnancy to term and giving birth to a child, who is not an intended parent and who agrees to become pregnant through assisted reproduction using gametes that are not their

own, under a gestational surrogacy agreement as provided in this part.

“Surrogacy agreement” means an agreement between one or two intended parents and an individual who is capable of carrying a pregnancy to term and giving birth to a child and who is not an intended parent in which said individual agrees to become pregnant through assisted reproduction and which provides that any intended parent is a parent of a child conceived under the agreement. Unless otherwise specified, the term refers to both a gestational surrogacy agreement and a genetic surrogacy agreement.

§ -VV Eligibility to enter gestational or genetic surrogacy agreement. (a) To execute an agreement to act as a gestational or genetic surrogate, an individual who is capable of carrying a pregnancy to term and giving birth to a child shall:

- (1) Have attained twenty-one years of age;
- (2) Previously have given birth to at least one child;
- (3) Complete a medical evaluation related to the surrogacy arrangement by a licensed medical doctor;
- (4) Complete a mental health consultation by a licensed mental health professional; and
- (5) Have independent legal representation of their choice throughout the surrogacy arrangement regarding the

terms of the surrogacy agreement and the potential legal consequences of the agreement.

(b) To execute a surrogacy agreement, each intended parent, whether or not genetically related to the child, shall:

- (1) Have attained twenty-one years of age; and
- (2) ~~Complete a mental health consultation by a licensed mental health professional; and~~
- (3) Have independent legal representation of the intended parent's or parents' choice throughout the surrogacy arrangement regarding the terms of the surrogacy agreement and the potential legal consequences of the agreement; provided that the intended parents may be jointly represented if desired.

Commented [16]: After further discussion, our FIG recommends a compromise on this, by requiring that surrogacy agreements address this topic (see below), but not requiring a mental health consultation for every surrogacy agreement in the law itself.

Commented [17]: This addition is made to clarify that the intended parents may be jointly represented.

§ **-WW Requirements of gestational or genetic surrogacy agreement; process.** A surrogacy agreement shall be executed in compliance with the following rules:

- (1) At least one party shall be a resident of this State or, if no party is a resident of this State, at least one medical evaluation or procedure or mental health consultation under the agreement shall occur in this State and in such circumstance each party to the agreement shall consent to the jurisdiction of the courts of this state;

Commented [18]: Our FIG recommends that consent to the jurisdiction of our state courts be made explicit in situations where the connection to the State might be more tenuous.

- (2) A surrogate and each intended parent shall meet the requirements of section -VV;
- (3) Each intended parent, the surrogate, and the surrogate's spouse, if any, shall be parties to the agreement;
- (4) The agreement shall be in a record signed by each party listed in paragraph (3);
- (5) The surrogate and each intended parent shall acknowledge in a record receipt of a copy of the agreement;
- (6) The signature of each party to the agreement shall be attested by a notarial officer or witnessed in accordance with the laws of the jurisdiction in which the agreement is signed;
- (7) The surrogate, surrogate's spouse, if any, and the intended parent or parents shall have independent legal representation throughout the surrogacy arrangement regarding the terms of the surrogacy agreement and the potential legal consequences of the agreement, and each counsel shall be identified in the surrogacy agreement; provided that the surrogate and the surrogate's spouse, if any, may be jointly represented if so desired, and the intended parent or parents may be jointly represented if so desired.

Commented [19]: Same comment about joint representation as above.

- (8) The intended parent or parents shall pay for independent legal representation for the surrogate and surrogate's spouse, if any; and
- (9) The agreement shall be executed before a medical procedure, to include the taking of medication, occurs related to the surrogacy agreement, other than the medical evaluation and mental health consultation required by section -VV.

§ **-XX Requirements of gestational or genetic surrogacy agreement; content.** (a) A surrogacy agreement shall comply with the following requirements:

- (1) A surrogate agrees to attempt to become pregnant by means of assisted reproduction;
- (2) Except as otherwise provided in sections -DDD, -GGG, and -HHH, the surrogate and the surrogate's spouse or former spouse, if any, have no claim to parentage of a child conceived by assisted reproduction under the agreement;
- (3) The surrogate's spouse, if any, shall acknowledge and agree to comply with the obligations imposed on the surrogate by the agreement;
- (4) Except as otherwise provided in sections -DDD, -GGG, and -HHH, the intended parent, or, if there are two intended ~~or~~ parents, each one jointly

Commented [20]: Terminology not consistent here between (4) and (5). One says "each one" and the next says "each parent."

The UPA language is clearer here and accomplishes the same result. Suggested edits for clarity.

and severally, immediately on birth will be the exclusive parent or parents of the child, regardless of the number of children born, or the gender or mental or physical condition of each child;

- (5) Except as otherwise provided in sections -DDD, -GGG, and -HHH, the intended parent or if there are two intended parents, each parent jointly and severally, immediately on birth will assume physical and legal custody of, and responsibility for the financial support of the child, regardless of the number of children born, or the gender or mental or physical condition of each child;

Commented [21]: Suggested edits for clarity.

- (6) The surrogacy agreement shall provide for payment by the intended parent or parents of reasonable legal, medical and ancillary expenses, including: (A) Premiums for a health insurance policy that covers medical treatment and hospitalization for the person acting as surrogate unless otherwise mutually agreed upon by the parties, pursuant to the terms of the surrogacy agreement; (B) payment of all uncovered medical expenses; (C) payment of legal fees for the legal representation of the person acting as surrogate; (D) payment of life insurance premiums, pursuant to the terms of the surrogacy agreement; and

Commented [22]: See final report as to these edits.

(E) any other reasonable financial arrangements mutually agreed upon by the parties, including any applicable reimbursement and compensation schedule, pursuant to the terms of the surrogacy agreement.

(7) The intended parent or parents are liable for the surrogacy-related expenses of the individual acting as surrogate, including expenses for health care provided for assisted reproduction, prenatal care, labor and delivery and for the medical expenses of the resulting child that are not paid by insurance. This paragraph shall not be construed to supplant any health insurance coverage that is otherwise available to the person acting as surrogate or an intended parent for the coverage of health care costs. This paragraph shall not change the health insurance coverage of the person acting as surrogate or the responsibility of the insurance company to pay benefits under a policy that covers a person acting as surrogate.

~~The agreement shall include information disclosing how each intended parent will cover the surrogacy related compensation and expenses of the surrogate and the medical expenses of the child, including whether a bond or escrow account shall be required of each intended parent.~~

~~If health care coverage is used to cover the medical expenses, the disclosure shall include a summary of the health care policy provisions related to coverage for surrogate pregnancy, including any possible liability of the surrogate, third-party liability liens, other insurance coverage, and any notice requirement that could affect coverage or liability of the surrogate. Unless the agreement expressly provides otherwise, the review and disclosure does not constitute legal advice. If the extent of coverage is uncertain, a statement of that fact is sufficient to comply with this paragraph;~~

(7~~8~~) The agreement shall permit the surrogate to make all health and welfare decisions regarding themselves and their pregnancy, ~~but may include agreed to health related commitments~~. This chapter does not enlarge or diminish the surrogate's ~~constitutional or other legal~~ right to terminate the pregnancy;

(8) The agreement shall include information about each party's right under this part to terminate the surrogacy agreement; and

(9) ~~The agreement shall address contain a confidentiality agreement between the parties to the agreement;~~

Commented [23]: Our PIG recommends that this phrase be omitted. It could be inconsistent with the rest of the provision.

Commented [24]: Our PIG recommends that the phrase "or legal" be added, as under Hawaii law, the right to reproductive freedom has both (state) constitutional and state statutory implications. For clarification.

Commented [25]: Our PIG recommends that surrogacy agreements should address confidentiality but not mandate it (that is, leave confidentiality to be decided by the parties).

Note: confidentiality is not mandatory under the UPA.

(10) The agreement shall address whether the intended parents will complete a mental health consultation by a licensed mental health professional.

(b) A surrogacy agreement may provide for:

(1) Payment of consideration to, and payment or reimbursement of reasonable expenses to, the surrogate; and

(2) Reimbursement of specific expenses if the agreement is terminated under this part.

(c) A right created under a surrogacy agreement is not assignable and there is no third-party beneficiary of the agreement other than the child.

§ -YY Surrogacy agreement; effect of subsequent change of marital status. (a) Unless a surrogacy agreement expressly provides otherwise:

(1) The marriage of a surrogate after the agreement is signed by all parties does not affect the validity of the agreement, their spouse's consent to the agreement is not required, and their spouse is not a presumed parent of a child conceived by assisted reproduction under the agreement; and

(2) The divorce, dissolution, annulment, declaration

of invalidity, or legal separation, of the surrogate after the agreement is signed by all parties does not affect the validity of the agreement.

(b) Unless a surrogacy agreement expressly provides otherwise:

(1) The marriage of an intended parent after the agreement is signed by all parties does not affect the validity of a surrogacy agreement, the consent of the spouse of the intended parent is not required, and the spouse of the intended parent is not, based on the agreement alone, a parent of a child conceived by assisted reproduction under the agreement; and

(2) The divorce, dissolution, annulment, declaration of invalidity, or legal separation of an intended parent after the agreement is signed by all parties does not affect the validity of the agreement and, except as otherwise provided in section -GGG, the intended parents are the parents of the child.

§ **-ZZ Exclusive, continuing jurisdiction.** During the period after the execution of a surrogacy agreement until ninety days after the birth of a child conceived by assisted reproduction under the agreement, a court of this State conducting a proceeding under this chapter has exclusive, continuing jurisdiction over all matters arising out of the agreement. This section does not give the court jurisdiction

Commented [26]: This suggested addition for clarity. This person could become a presumed parent for other reasons (i.e., holding the child out as their own).

over a child custody or child support proceeding if jurisdiction is not otherwise authorized by a law of this State other than this chapter.

SPECIAL RULES OF GESTATIONAL SURROGACY AGREEMENT

Commented [27]: UPA has a helpful header here. FIG suggests we add it.

§ -AAA Termination of gestational surrogacy agreement.

(a) A party to a gestational surrogacy agreement may terminate the agreement, at any time before an embryo transfer, by giving notice of termination in a record to all other parties. If an embryo transfer does not result in a pregnancy, a party may terminate the agreement at any time before a subsequent embryo transfer.

(b) Unless a gestational surrogacy agreement provides otherwise, on termination of the agreement under subsection (a), the parties are released from the agreement, except that each intended parent remains responsible for expenses that are reimbursable under the agreement and incurred by the gestational surrogate through the date of termination.

(c) Except in a case involving fraud, neither a gestational surrogate nor the surrogate's spouse or former spouse, if any, is liable to the intended parent or parents for a penalty or liquidated damages, for terminating a gestational surrogacy agreement under this section.

§ -BBB Parentage under gestational surrogacy agreement.

(a) Except as otherwise provided in subsection (c), section -CCC(b), or section -EEE, on birth of a child conceived by assisted reproduction under a gestational surrogacy agreement, each intended parent is, by operation of law, a parent of the child.

(b) Except as otherwise provided in subsection (c) or section -EEE, neither a gestational surrogate nor the surrogate's spouse or former spouse, if any, is a parent of the child.

(c) If a child is alleged to be a genetic child of the individual who agreed to be a gestational surrogate, the court shall order genetic testing of the child. If the child is a genetic child of said individual who agreed to be a gestational surrogate, parentage shall be determined based on parts I through VII.

(d) Except as otherwise provided in subsection (c), section -CCC(b), or section -EEE, if, due to a clinical or laboratory error, a child conceived by assisted reproduction under a gestational surrogacy agreement is not genetically related to either intended parent or to a donor who donated gametes to the intended parent or parents, each intended parent, and not the gestational surrogate and the surrogate's spouse or

Commented [28]: Suggested addition made for clarity, because if a surrogate becomes accidentally pregnant with their genetic child, they are not a gestational surrogate.

This edit also lines up with the UPA and the next sentence.

former spouse, if any, is a parent of the child, subject to any other claim of parentage.

§ -CCC Gestational surrogacy agreement; parentage of deceased intended parent. (a) Section -BBB applies to an intended parent even if the intended parent dies during the period between the transfer of a gamete or embryo and the birth of the child.

(b) Except as otherwise provided in section -EEE, an intended parent is not a parent of a child conceived by assisted reproduction under a gestational surrogacy agreement if the intended parent dies before the transfer of a gamete or embryo unless:

- (1) The agreement provides otherwise; and
- (2) The transfer of a gamete or embryo occurs not later than thirty-six months after the death of the intended parent or the birth of the child occurs not later than forty-five months after the death of the intended parent.

§ -DDD Gestational surrogacy agreement; order of parentage. (a) Except as otherwise provided in section -BBB(c) or -EEE, before, on, or after the birth of a child conceived by assisted reproduction under a gestational surrogacy agreement, a party to the agreement may commence a proceeding in the appropriate court for an order or judgment:

- (1) Declaring that each intended parent is a parent of the child and ordering that parental rights and duties vest immediately on the birth of the child exclusively in each intended parent;
- (2) Declaring that the gestational surrogate and the surrogate's spouse or former spouse, if any, are not the parents of the child;
- (3) Designating the content of the birth record in accordance with chapter 338 and directing the department of health to designate each intended parent as a parent of the child;
- (4) To protect the privacy of the child and the parties, declaring that the court record is not open to public inspection, provided that the court records under this chapter shall be fully sealed, such that the filings, caption, party names, docket, and any information identifying the type of case are not open for public inspection;
- (5) If necessary, that the child be surrendered to the intended parent or parents; and
- (6) For other relief the court determines necessary and proper.

(b) The court may issue an order or judgment under subsection (a) before the birth of the child. The court shall

Commented [29]: Please see the final report regarding this edit.

stay enforcement of the order or judgment until the birth of the child.

(c) Neither this State nor the department of health is a necessary party to a proceeding under subsection (a).

§ **-EEE Effect of gestational surrogacy agreement.** (a) A gestational surrogacy agreement that complies with sections -VV, -WW, and -XX is enforceable.

(b) If a child was conceived by assisted reproduction under a gestational surrogacy agreement that does not comply with sections -VV, -WW, and -XX, the court shall determine the rights and duties of the parties to the agreement consistent with the intent of the parties at the time of execution of the agreement. Each party to the agreement and any individual who at the time of the execution of the agreement was a spouse of a party to the agreement has standing to maintain a proceeding to adjudicate an issue related to the enforcement of the agreement.

(c) Except as expressly provided in a gestational surrogacy agreement or subsection (d) or (e), if the agreement is breached by the gestational surrogate or one or more intended parents, the non-breaching party is entitled to the remedies available at law or in equity.

(d) Specific performance is not a remedy available for breach by a gestational surrogate of a provision in the agreement that the gestational surrogate undergo an embryo transfer, terminate or not terminate a pregnancy, or submit to medical procedures.

(e) Except as otherwise provided in subsection (d), if an intended parent~~is~~ is determined to be a parent of the child, specific performance is a remedy available for:

- (1) Breach of the agreement by a gestational surrogate or gestational surrogate's spouse which prevents the intended parent from exercising immediately on the birth of the child the full rights of parentage; or
- (2) Breach by the intended parent which prevents the intended parent's acceptance, immediately on the birth of the child conceived by assisted reproduction under the agreement, of the duties of parentage.

SPECIAL RULES FOR GENETIC SURROGACY AGREEMENT

§ **-FFF Requirements to validate genetic surrogacy agreement.** (a) Except as otherwise provided in section **-HHH**, to be enforceable, a genetic surrogacy agreement shall be validated by the family court. A proceeding to validate the agreement shall be commenced before assisted reproduction related to the surrogacy agreement.

Commented [30]: UPA has a helpful sub-header just before this section, which we suggest we add.

(b) The court shall issue an order validating a genetic surrogacy agreement if the court finds that:

- (1) Sections -VV, -WW, and -XX are satisfied; and
- (2) All parties entered into the agreement voluntarily and understand its terms.

(c) An individual who terminates under section -GGG a genetic surrogacy agreement shall file notice of the termination with the court. On receipt of the notice, the court shall vacate any order issued under subsection (b). An individual who terminates a genetic surrogacy agreement under this section but does not notify the court of the termination of the agreement is subject to sanctions.

Commented [31]: Suggested addition for clarity.

§ -GGG Termination of genetic surrogacy agreement. (a)

A party to a genetic surrogacy agreement may terminate the agreement as follows:

- (1) An intended parent who is a party to the agreement may terminate the agreement at any time before a gamete or embryo transfer by giving notice of termination in a record to all other parties. If a gamete or embryo transfer does not result in a pregnancy, a party may terminate the agreement at any time before a subsequent gamete or embryo transfer. The notice of

termination shall be attested by a notarial officer or witnessed; and

(2) A genetic surrogate who is a party to the agreement may withdraw consent to the agreement any time before seventy-two hours after the birth of a child conceived by assisted reproduction under the agreement. To withdraw consent, the genetic surrogate shall execute a notice of termination in a record stating the surrogate's intent to terminate the agreement. The notice of termination shall be attested by a notarial officer or witnessed and be delivered to each intended parent any time before seventy-two hours after the birth of the child.

(b) On termination of the genetic surrogacy agreement under subsection (a), the parties are released from all obligations under the agreement except that each intended parent remains responsible for all expenses incurred by the surrogate through the date of termination which are reimbursable under the agreement. Unless the agreement provides otherwise, the surrogate is not entitled to and shall refund to intended parents within ten days after withdrawal of consent any non-expense related compensation paid for serving as a surrogate.

(c) Except in a case involving fraud, neither a genetic surrogate nor the surrogate's spouse or former spouse, if any, is liable to the intended parent or parents for a penalty or

liquidated damages, for terminating a genetic surrogacy agreement under this section.

§ **-HHH Parentage under validated genetic surrogacy agreement.** (a) Unless a genetic surrogate exercises the right under section -GGG to terminate a genetic surrogacy agreement, each intended parent is a parent of a child conceived by assisted reproduction under an agreement validated under section -FFF.

(b) Unless a genetic surrogate exercises the right under section -GGG to terminate the genetic surrogacy agreement, on proof of a court order issued under section -FFF validating the agreement, the court shall make an order:

- (1) Declaring that each intended parent is a parent of a child conceived by assisted reproduction under the agreement and ordering that parental rights and duties vest exclusively in each intended parent;
- (2) Declaring that the gestational surrogate and the surrogate's spouse or former spouse, if any, are not parents of the child;
- (3) Designating the contents of the birth certificate in accordance with chapter 338 and directing the department of health to designate each intended parent as a parent of the child;

(4) To protect the privacy of the child and the parties, declaring that the court record is not open to public inspection, provided that the court records under this chapter shall be fully sealed, such that the filings, caption, party names, docket, and any information identifying the type of case are not open for public inspection; ~~including captions of filings;~~

Commented [32]: Same comment as above.

(5) If necessary, that the child be surrendered to the intended parent or parents; and

(6) For other relief the court determines necessary and proper.

(c) If a genetic surrogate terminates under section -GGG(a) (2) a genetic surrogacy agreement, parentage of the child conceived by assisted reproduction under the agreement shall be determined under parts I through VII.

(d) If a child born to a genetic surrogate is alleged not to have been conceived by assisted reproduction, the court shall order genetic testing to determine the genetic parentage of the child. If the child was not conceived by assisted reproduction, parentage shall be determined under parts I through VII. Unless the genetic surrogacy agreement provides otherwise, if the child was not conceived by assisted reproduction, the surrogate is not entitled to any non-expense related compensation paid for serving as a surrogate.

(e) Unless a genetic surrogate exercises the right under section § -GGG to terminate the genetic surrogacy agreement, if an intended parent fails to file notice required under section -GGG(a), the genetic surrogate or the department of health may file with the court, not later than sixty days after the birth of a child conceived by assisted reproduction under the agreement, notice that the child has been born to the genetic surrogate. Unless the genetic surrogate has properly exercised the right under section -GGG to withdraw consent to the agreement, on proof of a court order issued under section -FFF validating the agreement, the court shall order that each intended parent is a parent of the child.

§ -III Effect of nonvalidated genetic surrogacy agreement. (a) A genetic surrogacy agreement, whether or not in a record, that is not validated under section -FFF is enforceable only to the extent provided in this section and section -KKK.

(b) If all parties agree, a court may validate a genetic surrogacy agreement after assisted reproduction has occurred but before the birth of a child conceived by assisted reproduction under the agreement.

(c) If a child conceived by assisted reproduction under a genetic surrogacy agreement that is not validated under section -FFF is born and the genetic surrogate, consistent with section -GGG(a)(2), withdraws their consent to the agreement before seventy-two hours after the birth of the child, the court shall adjudicate the parentage of the child under part I or VII.

(d) If a child conceived by assisted reproduction under a genetic surrogacy agreement that is not validated under section -EEE is born and a genetic surrogate does not withdraw their consent to the agreement, consistent with section -GGG(a)(2), before seventy-two hours after the birth of the child, the genetic surrogate is not automatically a parent and the court shall adjudicate parentage of the child based on the best interest of the child, taking into account the factors in section -DD(a) and the intent of the parties at the time of the execution of the agreement.

(e) The parties to a genetic surrogacy agreement have standing to maintain a proceeding to adjudicate parentage under this section.

§ -JJJ Genetic surrogacy agreement; parentage of deceased intended parent. (a) Except as otherwise provided in section -HHH or -III, on birth of a child conceived by assisted reproduction under a genetic surrogacy agreement, each

intended parent is, by operation of law, a parent of the child, notwithstanding the death of an intended parent during the period between the transfer of a gamete or embryo and the birth of the child.

(b) Except as otherwise provided in section -HHH or -III, an intended parent is not a parent of a child conceived by assisted reproduction under a genetic surrogacy agreement if the intended parent dies before the transfer of a gamete or embryo unless:

- (1) The agreement provides otherwise; and
- (2) The transfer of the gamete or embryo occurs not later than thirty-six months after the death of the intended parent, or the birth of the child occurs not later than forty-five months after the death of the intended parent.

§ -KKK Breach of genetic surrogacy agreement. (a)

Subject to section -GGG(b), if a genetic surrogacy agreement is breached by a genetic surrogate or one or more intended parents, the non-breaching party is entitled to the remedies available at law or in equity.

(b) Specific performance is not a remedy available for breach by a genetic surrogate of a requirement of a validated or non-validated genetic surrogacy agreement that the surrogate

undergo insemination or embryo transfer, terminate or not terminate a pregnancy, or submit to medical procedures.

(c) Except as otherwise provided in subsection (b), specific performance is a remedy available for:

- (1) Breach of a validated genetic surrogacy agreement by a genetic surrogate of a requirement which prevents an intended parent from exercising the full rights of parentage seventy-two hours after the birth of the child; or
- (2) Breach by an intended parent which prevents the intended parent's acceptance of duties of parentage seventy-two hours after the birth of the child.

[End]