

## **Parentage Proceedings Under the *Child - Parent Security Act***

In conjunction with the New York State budget for Fiscal Year 2020-2021, the Legislature passed the *Child - Parent Security Act*, which, for the first time, legalizes gestational surrogacy agreements in which the surrogate has not contributed genetic material. It further delineates procedures for establishing parentage for children conceived either as a result of such agreements or through assisted reproduction. See Laws of 2020, chapter 56, Part L (effective Feb. 15, 2021). Suggested forms for use in these proceedings will shortly be posted on the web-site of the New York State Unified Court System, [www.nycourts.gov/forms/familycourt/parentage.shtml](http://www.nycourts.gov/forms/familycourt/parentage.shtml)

The following is a summary of the key provisions of the *Act*:

### 1. Parentage Proceedings [Family Court Act Article 5-C]

The new statute contains a new Article 5-C of the Family Court Act, which sets forth a judicial procedure, governed by the Civil Practice Law and Rules, for establishing parentage in cases involving assisted reproduction except those in which “a person acting as a surrogate contributed the egg used in conception.” [FCA §§581-101, 581-201(a)]. The petition, which must be verified, may be brought by the child, a parent, a person claiming parentage, a social services agency, a person representing a minor or disabled person, or a “participant” (intended parent, surrogate, spouse of intended parent or surrogate or contributor of a gamete). [FCA §581-201(c)]. The petition may be brought in Supreme, Family or Surrogate’s Court, which may then exercise “exclusive, continuing jurisdiction” until the child reaches 180 days old. [FCA §581-206]. While intended parents need not be married, spouses of intended parents may obtain parentage judgments. [FCA §581-204]. A parentage judgment may be made prior to, but does not take effect until, the child’s birth [FCA §201(b)]. Notice of a parentage order must be sent to the NYS Department of Health or, where the child is born in New York City, the NYC Department of Health. [FCA §§581-202(g), 581-203(d)]. While the records of the court proceedings must be kept sealed, the parties and child have a right to inspect and copy the record and copies may be made available the NYS Office of Temporary and Disability Assistance, a Title IV-D child support agency in another state and local Support Collection Units to the extent necessary for the provision of child support services. [FCA §581-205].

(a). Assisted reproduction: The Court must find parentage of an intended parent if the following allegations are determined by the court to be true: (1) the intended parent is a New York resident or, if not, that the child was or will be born in New York within 90 days of filing; (2) if the intended parent is gestating, that the pregnancy resulted from assisted reproduction; (3) if the intended parent is non-gestating, a statement from both the gestating and non-gestating intended parent that the latter consented to assisted reproduction; and (4) proof that a donor does not intend to be a parent [FCA §581-202(c)]. Where the donor is anonymous, the donor’s intent may be demonstrated by a statement from the gamete storage facility or healthcare practitioner or by clear and convincing evidence of intent to be anonymous, or, where the donor is known, the donor’s intent may be demonstrated by a statement signed by the donor and gestating parent confirming that the donor “has no parental or proprietary interest in the gametes or embryos” or by providing the donor with at least 20 days prior notice of the proceeding [FCA §§581-202(d), 581-202(e)].

(b). Surrogacy Agreements: A parentage petition in a surrogacy agreement case may be brought any time after execution of the surrogacy agreement and must include allegations: (i) by the intended parents and surrogate that at least one of them has been a New York resident for at least six months and attesting to their knowing and voluntary consent to the agreement and request for a parentage judgment, and (ii) by the attorneys for all parties that the

requirements for surrogacy agreements set forth in Part 4 of the article have been satisfied. [FCA §581-203( c)]. If the attorneys' statements do not indicate full compliance, the Court may enforce the agreement if it finds "substantial compliance," or may adjudicate parentage in accordance with the child's "best interests." [FCA §581-203( e), 581-407]. The petition, which must be verified, may be brought by the child, a parent, a person claiming parentage, a social services agency, a person representing a minor or disabled person, or a "participant" (intended parent, surrogate, spouse of intended parent or surrogate or contributor of a gamete). [FCA §§581-203( e), 581-407].

A person may be eligible to act as a surrogate if she: (i) is at least 21 years of age, (ii) is a United States citizen or lawful permanent resident, (iii) is a New York resident for at least six months, if one of the intended parents is not a NYS resident, (iv) has not provided the egg for conception, (v) has completed a medical evaluation by a licensed health practitioner, (vi) has given informed consent after being informed of medical risks, (vii) has been represented by independent legal counsel, along with her spouse, if applicable, (viii) has or will obtain comprehensive medical insurance and life insurance policies that take effect prior to taking medication or beginning any embryo transfers, and (ix) any other criteria deemed appropriate by the Commissioner of Health [FCA §581-402(a)]. The surrogate's spouse must also provide informed consent unless they have lived apart for three years or have lived apart pursuant to an order, judgment or separation agreement acknowledged in the manner of a deed. [FCA §581-403(a)(2)].

At least one intended parent in a surrogacy agreement must be a United States citizen or lawful permanent resident and a New York resident for at least six months. Intended parents must be represented by independent legal counsel. An intended parent may be a single adult or, if a couple, may be married or in an intimate relationship. An intended parent may execute a surrogacy agreement without his or her spouse if they have lived apart for three years or if they have been separated pursuant to an order, judgment or separation agreement acknowledged in the manner of a deed. [FCA §581-402(b)]. If the intended parents are providing compensation, the funds must be placed in escrow and the agreement must also delineate how medical expenses will be covered [FCA §§581-403(f), 581-403(g)].

The surrogacy agreement must include, *inter alia*, an acknowledgment that the surrogate has received a copy of the "Surrogate's Bill of Rights," as set forth in Part 6 of FCA Article 5-c, and must provide that the surrogate has the right to make all health and welfare decisions regarding the pregnancy, to utilize medical personnel of her choosing, to be represented by independent legal counsel paid for by the intended parents and to provide or be provided with comprehensive health and life insurance policies. [FCA §§581-403(h), 581-602, 581-603, 581-604], ]. It must also provide that the intended parent or parents must assume custody and responsibility for support of all children resulting from the pregnancy, responsibilities that are not assignable, and it must obligate them to execute a will prior to the embryo transfer delineating a guardian for all such children . *Id.* The agreement may be terminated on notice by the surrogate or the intended parent or parents prior to any pregnancy resulting from the embryo transfer [FCA §§581-405, 581-607].

While disputes regarding parentage may be adjudicated in Family, Surrogate's or Supreme Court, other disputes regarding surrogacy agreements may be adjudicated only in Supreme Court. The Court has discretion to utilize conferencing or mediation "at any point in the proceedings." While no specific performance remedy is available for a breach of a surrogacy agreement, all other "remedies available at law or equity." [FCA §581-409].

(c). Agreements regarding assisted reproduction: Written embryo disposition agreements between intended parents with joint dispositional control require that the parties were advised by independent legal counsel and, where the intended parents had been married, are binding upon divorce. An intended parent transferring rights to an embryo is deemed not to be a parent for any purpose, unless consenting to be a parent; such consent may be withdrawn [FCA §581-306]. If an intended parent transferring rights dies before transfer of eggs, embryos or sperm, the deceased person is not deemed a parent unless indicated in a written consent. [FCA §581-307]

(d). Compensation of donors and surrogates: As set forth in Part 5 of FCA Article 5-C, any compensation must be reasonable, must be negotiated in good faith, must not be contingent upon any characteristics of the child or children born as a result of the pregnancy and must not be paid for the “purchase of any gametes or embryos or for the release of any parental interest in a child.” Compensation may cover the period of pregnancy and a recuperative period of up to eight weeks. Compensation to donors in assisted reproduction may include economic losses resulting from the retrieval or storage of the gametes and may cover only storage fees, transportation costs and attorneys’ fees. [FCA §§581-501, 581-502].

## 2. Additional Family Court Act amendments:

a. Support Magistrates in Family Court: Family Court Act §439(a) is amended to make clear that, just as Support Magistrates have authority to adjudicate paternity matters, other than those involving custody, visitation or equitable estoppel, so, too, they have authority to adjudicate parentage under the new Article 5-c of the Family Court Act, with the exception of cases involving surrogacy agreements that do not conform to the statutory requirements and thus must be adjudicated in accordance with the child’s best interests pursuant to FCA §581-407.

b. Acknowledgment of Parentage and parentage references: Family Court Act §516-a is expanded to provide for “acknowledgments of parentage,” instead of “acknowledgments of paternity,” and to permit them to be signed by “intended parents.” Such acknowledgments will be deemed “void” as of the time of signing if an individual other than the signatory is a presumed or adjudicated parent or has signed a valid acknowledgment of parentage, or where the signatory was a gamete donor under FCA §581-302 or represented falsely that the child was a result of assisted reproduction. [FCA §516-a( c)]. All references to “acknowledgments of paternity” in any law are deemed to refer to “acknowledgments of parentage.” [FCA §516-a(f)]. Conforming amendments are made to refer to substitute “parentage” for “paternity” in FCA §§440 and 1017.

3. Domestic Relations Law amendments: DRL §73 is repealed, Part 8 is renamed “Genetic Surrogate Parenting Contracts” and DRL §121 is amended to make clear that genetic surrogacy agreements – those involving a surrogate who is genetically related to the child or children resulting from the pregnancy – remain contrary to public policy in New York.

## 4. Public Health Law amendments

a. Acknowledgments of Parentage: Sections 4135 and 4135-b of the Public Health Law are amended to substitute “alleged” for “putative” father and “acknowledgment of parentage” for “acknowledgment of paternity.” All references to “acknowledgments of paternity” are deemed to refer to “acknowledgments of parentage.” [Public Health Law §4135-b(6)]. Significantly, as in Family Court Act §516-a, *supra*, intended parents and “alleged genetic parents,” including those involved in assisted reproduction pursuant to Family Court Act §581-303, will be able to sign voluntary acknowledgments of parentage, thus immediately assuming the status of legal parents, assuming that they are “readily identifiable and available.” All existing provisions regarding acknowledgments of paternity are made applicable to these new acknowledgments of parentage.

However, such acknowledgments will be deemed “void” if an individual other than the signatory is a presumed or adjudicated parent or has signed a valid acknowledgment of parentage, or where the signatory was a gamete donor under FCA §581-302 or represented falsely that the child was a result of assisted reproduction. [Public Health Law §4135-b(1)(d)].

Acknowledgments must be filed, as applicable, with the NYS Department of Health or NYC Health Department, and full faith and credit must be accorded to acknowledgments of parentage executed in another state if they are signed records and comply with the laws of the other state. [Public Health Law §§4135-b(3), 4135-b(4)]. A new form Acknowledgment of Parentage (LDSS-5171) has been promulgated by the NYS Office of Temporary and Disability Assistance.

b. Gestational Surrogacy [Article 25-B]: A new section 2599-cc is added to the Public Health Law delineating regulations that the Department of Health is required to promulgate regarding gestational surrogacy. The regulations must include, but are not limited to, provisions requiring notice to surrogates of possible health risks as part of the process of obtaining informed consent, dissemination and posting of informational material, establishment of a voluntary registry of surrogates and tracking of information regarding surrogacy, protocols regarding medical screening of surrogates in consultation with the American College of Obstetricians and Gynecologists, and protocols aimed at reducing conflicts of interest. Confidentiality of information regarding surrogates must be assured. Additionally, a new subdivision four is added to Public Health Law §4365 requiring promulgation of regulations, in consultation with the Transplant Council and professional medical organizations, regarding egg donations.

5. Social Services Law amendments: Sections 111-c, 111-k and 372-c of the Social Services Law are amended to substitute “parentage” for references to “paternity.” SSL §111-k(2)(a) is amended to provide that parties in contested parentage proceedings may not be required to submit to genetic testing if a court has found that, *inter alia*, the child was conceived through assisted reproduction.

6. Regulation of Surrogacy Programs and Assisted Reproduction Service Providers [General Business Law Article 44]: A new Article 44 is added to the General Business Law to regulate surrogacy programs and assisted reproduction gamete banks, fertility clinics or other entities doing business in New York State, as well as surrogates residing in New York State and medical procedures performed in the State. It sets forth escrow requirements regarding funds, as well as conflicts of interests prohibitions regarding health care providers and attorneys representing intended and surrogate parents. [General Business Law §§1401, 1402, 1403]. In addition to submitting an annual report to the Legislature, the NYS Department of Health, in conjunction with the NYS Department of Financial Services, must promulgate regulations that provide, *inter alia*, for the surrogacy programs to monitor compliance with the surrogacy agreement requirements and for surrogacy programs and assisted reproduction providers to administer Department of Health informed consent procedures. [General Business Law §1404].

7. Insurance Law: Provisions have been added to sections 1113, 2105 of the Insurance Law with respect to indemnification of an intended parent for expenses arising out of certain acts by or death of a surrogate or for medical or hospital expenses as a result of complications experienced by a donor as a result of the gamete donation. Donor medical expense insurance is added to the list of “non-basic kinds of insurance.” [Insurance Law §§4101 and 4103].

8. Estates, Powers and Trusts Law: Section 4-1.2 of the EPTL is amended to provide that non-marital child is a legitimate child of, and may inherit from, a non-gestating intended parent, where the intended parent signed an acknowledgment of parentage, where parentage was adjudicated during the intended parent’s lifetime or where it is adjudicated by clear and

convincing evidence based upon a genetic marker test or by the parent “openly and notoriously” acknowledging the child during his or her lifetime. Additionally, section 4-1.3 of the EPTL is amended to expand the reach of the existing provisions regarding inheritance by children conceived after the death of a genetic parent to also cover inheritance after the death of an “intended parent,” as defined in FCA §581-101. Express consent must be in a written instrument executed not more than seven years prior to the intended person’s death and that if the assisted reproduction occurred after the intended parent’s death, the child was *in utero* no later than 24 months after the death or was born no later than 33 months after the death. If the intended person would be a genetic parent, the instrument must designate a person to make decisions regarding the genetic material . A template for the written instrument is set forth in subdivision (d) of the statute.

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