

MEMORANDUM

TO: Drafting Committee, UPA Revisions
FROM: Courtney Joslin, Reporter
DATE: March 4, 2016
RE: Draft for March 2016 In-Person Meeting

INTRODUCTION

This memo provides some background information for our in-person drafting meeting scheduled for March 11-12, 2016 in Seattle, Washington. The memo is intended to highlight some issues related to the draft revised Act, which will be distributed along with this memo. Attendees and other interested parties might also want to review the January 31, 2016 memo on the marital presumption and the February 8, 2016 memo on the surrogacy provisions.

Part I of this memo includes the official charge for our drafting committee. Part II highlights a few overarching drafting issues. Part III identifies three specific issues for discussion and consideration.

I. Drafting Committee Charge

The official charge for our drafting committee is as follows:

RESOLVED, that the Committee on Scope and Program recommends to the Executive Committee that a drafting committee to Amend the Uniform Parentage Act be formed, that the scope of the proposed amendments be limited to issues relating to same sex couples, surrogacy, and the right of a child to genetic information, and that the drafting committee be asked to return to the Scope and Program Committee for approval if it wishes to address additional issues.

II. General Drafting Issues

A. *Gender Neutrality*

A core charge of the drafting committee is to revise the UPA so that it applies equally to same-sex couples. The 2002 UPA is written in gendered terms; the Act assumes that all couples are different-sex couples. So, for example, provisions regarding married couples refer to a husband and a wife. *See, e.g.*, Section 204(a)(1) (“A man is presumed to be the father of a child if: (1) he and the mother of the child are married to each other and the child is born during the marriage.”). Even provisions that apply to unmarried couples refer specifically to a man and a woman. *See, e.g.*, Section 801(b) (“The man and the woman who are the intended parents must both be parties to the gestational agreement.”). One of the core goals of this drafting committee is to amend these gendered provisions to clarify that the Act applies equally to same-sex couples.

Accordingly, in the March 3, 2016 draft, I changed most of the gendered terms to gender-neutral terms. There are, however, a few exceptions to this general rule.

First, there are some places where the provisions are intended to refer specifically to the woman who is pregnant or who gave birth to the child. I did not make such provisions gender neutral. So, for example, in the assisted reproduction provisions in Article 7, I removed the gendered language regarding the person who is consenting to become the second parent, but retained the gendered language with regard to the woman giving birth. Second, the Voluntary Acknowledgement of Paternity provisions are intended to provide a streamlined way for a man who is or who likely is the child's genetic father to establish his parentage. I also did not make VAPs provisions gender neutral. (As discussed in Part III.B. below, however, I did include a gender-neutral VAP-like scheme).

B. Proof and Relevance of Genetic Parentage

When same-sex couples have children, only one member of the couple (if any) is genetically related to the couple's resulting child. For this reason, the inclusion of same-sex couples highlights to a greater degree the question of the relevance of genetic parentage, or lack thereof. To make sure the Act is applied equally to same-sex couples, there are a number of places where we may need to revise existing provisions to be clearer. In addition, currently, a number of provisions related to the relevance of genetic parentage or lack thereof are included in different parts of the UPA (indeed, some are in different Articles). For example, in the 2002 UPA, Section 502 details the circumstances under which a court can order genetic testing; Section 608 details the circumstances under which a court can deny a request for genetic testing; and Section 631 details the "Rules for Adjudication of Paternity" based on evidence of genetic parentage. Moving the provisions to one centralized location will, I think, clarify and streamline the analysis.

III. Specific Issues for Consideration/Discussion

A. Marital Presumption

During the Committee's first drafting call, the Committee discussed the issue of the marital presumption. Currently, the 2002 UPA provides that "[a] man is presumed to be the father of a child if he and the mother of the child are married to each other and the child is born during the marriage." This presumption becomes conclusive after the child's second birthday. Section 607. Within the first two years of the child's life, a court is directed to apply a variety of equitable consideration before allowing the husband to deny parentage based on lack of genetic parentage. Section 608. Thus, the presumption does not depend on a genetic relationship, and it is not necessarily rebutted by evidence of lack of genetic parentage. Accordingly, a court is likely to conclude that refusing to apply the presumption equally to a female spouse is unconstitutional. Accordingly, the draft Act includes a version of the marital presumption that applies equally to male and female spouses of the woman who gives birth. *See* Draft Act at p. 9, Section 204(a)(1) ("An individual is presumed to be the parent of a child if: the individual and the woman giving birth to the child are married to each other and the child is born during the marriage.").

During our call, we also discussed whether the presumption should be further expanded so that it would apply to the spouse of either a legal mother or a legal father. As I explained in my prior memo, of the states that have amended their marital presumptions to account for same-sex marriage, most have chosen to make the marital presumption only partially gender neutral. That is,

most of these states have amended their marital presumption to apply to the spouse – male or female – of the woman who gave birth.¹ So, for example, the newly enacted Maine provision states:

A person is presumed to be the parent of a child if: The person and the woman giving birth to the child are married to each other and the child is born during the marriage.²

The only jurisdiction that has expressly amended its marital presumption to be fully gender neutral is Washington.³ The Washington provision states:

In the context of a marriage or a domestic partnership, a person is presumed to be the parent of a child if: The person and the mother or father of the child are married to each other or in a domestic partnership with each other and the child is born during the marriage or domestic partnership.⁴

A fully gender neutral version of the marital presumption is included as Alternative B on p. 11 of the Draft Act.

Additional information about this issue is included in the Reporter’s Comment to Section 204, and in the January 31, 2016 Memo regarding the marital presumption. I will add one additional comment that is not discussed in those two sources, which is that if we included a fully gender-neutral marital presumption we would need to think through how it might interact with the surrogacy provisions in Article 8 in cases in which the child is born through the use of surrogacy.

B. Voluntary Acknowledgement of Parentage

In the memo about the marital presumption and during the Committee’s first drafting call, the Committee talked about ways other than the marital presumption to protect same-sex co-parents. A suggestion was made to create a procedure that is similar to the existing Acknowledgement of Paternity procedures (VAPs), which are addressed in Article 3 of the 2002 UPA. More information about what VAPs are and how they work is included in the January 31, 2016 memo.

During the Committee’s first drafting call, some participants expressed interest in pursuing such an option. I included two alternatives in the draft. The first alternative would be available to all couples, regardless of sex, sexual orientation, or marital status. So long as all of the parties are in agreement and so long as the woman who gave birth is not trying to disclaim her parentage, the system allows

¹ CAL. FAM. CODE § 7611(a); D.C. CODE ANN. § 16-909(a)(1); 750 ILL. COMP. STAT. ANN. § 46/204; ME. STAT., T. 19-A, § 1881(1). The New Hampshire provision is less clear, but it may also be limited to the spouse of the woman who gave birth. N.H. REV. STAT. § 168-B:2(V) (“Notwithstanding any other provision of law, a person is presumed to be the parent of a child if: (a) The child is born to a person’s spouse during the marriage, or within 300 days after the marriage is terminated for any reason, or after a decree of separation is entered by the court.”).

² ME. STAT., T. 19-A, § 1881(1).

³ In my January 31, 2016 memo, I included New Hampshire in the category of states that have fully gender-neutral marital presumptions. But upon re-reading the provision, it is now my position that the more likely interpretation of the New Hampshire provision is that it is limited to the spouse – male or female – of the woman who gave birth. N.H. REV. STAT. § 168-B:2(V) (“Notwithstanding any other provision of law, a person is presumed to be the parent of a child if: (a) The child is born to a person’s spouse during the marriage, or within 300 days after the marriage is terminated for any reason, or after a decree of separation is entered by the court.”).

⁴ WASH. REV. CODE ANN. § 26.26.116.

the parties to establish the parentage of the second parent through this streamlined administrative process.

Harry Tindall⁵ drafted the second alternative. Harry's version would apply only to married couples.

Option A may be viewed by many states as too controversial. Option B – the version that applies only to married couples -- may be viewed as being inconsistent with the basic purpose of the UPA, which is to ensure the equal treatment of marital and nonmarital children. Based on more recent conversations with Harry, it is my understanding that Harry is no longer advocating for the inclusion of such a provision.

C. Surrogacy

In our second committee call, we discussed what changes, if any, to make to the surrogacy provisions of the UPA. The surrogacy provisions are included in Article 8. We have been given broader authorization to reconsider the substantive provisions of Article 8. I believe that this authorization has been given in part because the surrogacy provisions of the 2002 UPA have not been particularly well received; only two states – Texas and Utah – have adopted Article 8 of the 2000/2002 UPA. The February 8, 2016 memo contains more information about the current status of surrogacy statutes.

Based on the Committee's second drafting call, I understood there to be a desire to continue to include both traditional and gestational surrogacy in Article 8, but to treat the two types of surrogacy differently. I understood the committee to be interested, on the one hand, in imposing more requirements and safeguards to traditional surrogacy agreements, and, on the other hand, in updating and liberalizing the gestational surrogacy provisions.

I took a first stab at trying to implement those goals. As I state in the Reporter's note, the current draft begins with a series of common requirements that apply to both traditional and gestational surrogacy agreements. These common requirements are followed by specific requirements that apply to traditional surrogacy agreements and gestational surrogacy agreements, respectively. I'm not sure whether this type of format is the best approach.

D. The Right of a Child to Genetic Information

As indicated in the charge, we are also authorized to amend the act to address the right of a child to genetic information. I did not address this issue in the March 2, 2016 draft of the Act. To assist us with any discussion we may have about this issue at our drafting meeting, I am enclosing here the text of the Washington provision on this issue.

Wash. Rev. Code § 26.26.750

Identifying information—Requirement to provide—Disclosure.

(1) A person who donates gametes to a fertility clinic in Washington to be used in assisted reproduction shall provide, at a minimum, his or her identifying information and medical

⁵ Harry was the Chair of the Drafting Committee of the 2000/2002 UPA. He is a Commissioner on this Drafting Committee.

history to the fertility clinic. The fertility clinic shall keep the identifying information and medical history of its donors and shall disclose the information as provided under subsection (2) of this section.

(2)(a) A child conceived through assisted reproduction who is at least eighteen years old shall be provided, upon his or her request, access to identifying information of the donor who provided gametes for the assisted reproduction that resulted in the birth of the child, unless the donor has signed an affidavit of nondisclosure with the fertility clinic that provided the gamete for assisted reproduction.

(b) Regardless of whether the donor signed an affidavit of nondisclosure, a child conceived through assisted reproduction who is at least eighteen years old shall be provided, upon his or her request, access to the nonidentifying medical history of the donor who provided gametes for the assisted reproduction that resulted in the birth of the child.

[2011 c 283 § 53.]