

MEMORANDUM

To: Uniform Law Commissioners
From: Jamie Pedersen, Chair, and Courtney Joslin, Reporter,
Uniform Parentage Act Drafting Committee
Re: First Reading of the Uniform Parentage Act [2017]
Date: June 13, 2016

This memorandum provides background information about the changes to the Uniform Parentage Act (UPA) [2017] (2017 UPA) and highlights sections that have been the focus of conversation and consideration during the drafting process. We look forward to receiving your feedback on this important project.

I. Committee Charge

In November 2015, the Committee on Scope and Program recommended to the Executive Committee that a drafting committee to amend the Uniform Parentage Act formed. The scope of the proposed amendments to the UPA were to address “issues relating to same sex couples, surrogacy, and the right of a child to genetic information.” This recommendation was approved by the Executive Committee and a Drafting Committee was formed.

In May 2016, after the Committee first in-person drafting meeting, the Chair of the Drafting Committee, Jamie Pedersen, requested that two changes be made to the Committee’s charge. First, Chair Pedersen requested that the Drafting Committee be given authority to make additional, nonsubstantive revisions to the Act to improve the clarity and flow of the Act. The primary focus of these nonsubstantive, organizational changes relate to Article 6 of the UPA. (*See* Section III.E *infra* for more information about these changes to Article 6.)

Second, Chair Pedersen requested that the Drafting Committee have the authority to present the draft changes to the UPA in a “hybrid” form, with some articles showing changes in “strike and score” or amendment form, and the remaining articles presented in clean or revision form. Although there are many Articles where the Drafting Committee’s proposed changes are relatively minor, the Committee concluded that Article 8 regarding surrogacy needed to be rewritten completely. (*See* Section III.B *infra* for more information about Article 8.) As noted above, the Drafting Committee also proposed a fair amount of reorganization of Article 6. As a result, presenting the proposed changes to Articles 6 and 8 in amendment form makes it difficult to follow. The Drafting Committee believes that the hybrid form is the most transparent and efficient presentation of these changes for the brief period of floor time available for a first reading.

Both requests were approved by the Scope and Program Committee on June 2, 2016, and by the Executive Committee on June 10, 2016. At its next meeting, the Scope and Program Committee will be considering whether to change the Drafting Committee’s

charge for the future so that the project would be a revision, rather than merely amendments, to the UPA.

Accordingly, the draft of the 2017 UPA is presented in a hybrid form. Articles 1-5 are presented in amendment format, with changes reflected through strike and underscore. For greater clarity and readability, the changes to Articles 6-10 are presented in revision form, without strike and underscore. However, the Drafting Committee has also produced an additional, separate document that shows the changes to Articles 6-10 in a side-by-side comparison with strike and underscore.

II. Background Regarding the UPA

A. 1973 UPA

The Uniform Parentage Act (UPA) was originally promulgated in 1973 (1973 UPA). The 1973 UPA removed the legal status of illegitimacy and provided a series of presumptions used to determine a child's legal parentage. A core principle of the 1973 UPA was to ensure that "all children and all parents have equal rights with respect to each other," regardless of the marital status of their parents. 1973 UPA, Section 2, Comment.

B. 2002 UPA

The UPA was amended in 2002 (UPA 2002). The 2002 UPA augmented and streamlined the original 1973 UPA. The 2002 UPA added provisions permitting a non-judicial acknowledgment of paternity procedure that is the equivalent of an adjudication of parentage in a court and added a paternity registry. The 2002 UPA also included provisions governing genetic testing and rules for determining the parentage of children whose conception was not the result of sexual intercourse. Finally, the 2002 UPA included a bracketed Article 8 that authorized genetic and gestational surrogacy agreements.

C. 2017 UPA

Consistent with the Committee's charge, the 2017 UPA updates the Act to address three primary issues. First, the 2017 UPA seeks to ensure the equal treatment of children born to same-sex couples. The 2002 UPA is written in gendered terms, and its provisions presume that couples consist of one man and one woman. For example, Section 703 of the 2002 UPA provides that "[a] man who provides sperm for, or consents to, assisted reproduction by a woman as provided in Section 704 with the intent to be the parent of her child, is a parent of the resulting child."

In its 2015 decision in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), the United States Supreme Court held that laws barring marriage between two people of the same sex are unconstitutional. After *Obergefell*, some parentage laws that treat children of same-sex couples differently than children of different-sex couples may be

unconstitutional. For example, in July 2015, a federal district court in Utah held that refusing to apply Utah’s assisted reproduction parentage provisions equally to children born to same-sex couples likely was unconstitutional. Under the Utah Parentage Act, which is modeled on the 2002 UPA, a husband who consents to his wife’s insemination is the legal father of the resulting child. UTAH CODE ANN. §§ 78B-15-703, 78B-15-704; 78B-15-201(2)(e). The Utah district court concluded that the plaintiffs were “highly likely to succeed in their claim” that extending the “benefits of the assisted reproduction statutes to male spouses in opposite-sex couples but not for female spouses in same-sex couples” was unconstitutional. *Roe v. Patton*, 2015 WL 4476734, *3 (D. Utah. 2015). The 2017 UPA updates the Act to address this potential constitutional infirmity by amending the provisions so that they address and apply equally to same-sex couples.

Second, the 2017 UPA updates the surrogacy provisions to reflect developments in the area. States have been particularly slow to enact Article 8 of the 2002 UPA. Eleven (11) states adopted versions of the 2002 UPA.¹ Of these eleven (11) states, only two (2) – Texas and Utah – enacted the surrogacy provisions based on Article 8 of the 2002 UPA. At least four (4) of the other eleven (11) states that enacted the 2002 UPA chose to permit surrogacy, but did so through provisions that are *not* premised on the 2002 UPA. These states include: Delaware (enacted 2013); Illinois (enacted 2004); Maine (enacted 2015); and Washington (enacted 1989).

The fact that very few states enacted Article 8 is likely the result of a confluence of factors. One likely factor is the controversial nature of surrogacy itself. But the fact that four of the states that enacted the 2002 UPA have provisions permitting surrogacy that are not modeled on Article 8 of the 2002 UPA suggests that the substance of the provisions are also part of the explanation. Accordingly, the 2017 UPA updates the surrogacy provisions to make them more consistent with current surrogacy practice.

Finally, the 2017 UPA includes a new article – Article 9 – that addresses the right of children born through assisted reproductive technology to access medical and identifying information regarding any gamete providers. Based on data from 2014, the CDC reports that “approximately 1.6% of all infants born in the United States every year are conceived using ART.”² Data suggest that this percentage continues to increase. Gaia Bernstein, *Unintended Consequences: Prohibitions on Gamete Donor Anonymity and the Fragile Practice of Surrogacy*, 10 IND. HEALTH L. REV. 291, 298 (2013) (noting that “from 2004 to 2008 the number of IVF cycles used for gestational surrogacy grew by 60%, the number of births by gestational surrogates grew by 53% and the number of babies born to gestational surrogates grew by 89%”). Accordingly, it is increasingly important for states to address the right of children to access information about their gamete donor. Article 9 does not require disclosure of the identity of gamete providers,

¹ The eleven states are: Alabama, Delaware, Illinois, Maine, New Mexico, North Dakota, Oklahoma, Texas, Utah, Washington, Wyoming. See Uniform Law Commission, *Legislative Fact Sheet – Parentage Act*.

² Centers for Disease Control, ART Success Rates, <http://www.cdc.gov/art/reports/> (last updated February 24, 2016).

but it does require gamete banks and fertility clinics to ask donors if they want to have their identifying information disclosed when the resulting child turns 18.

III. Brief explanation of selected sections

A. Marital presumption – Section 204

Today, all fifty states have and have had some version of a “marital presumption,” under which a husband is presumed to be the legal parent of a child born to his wife. Historically, the marital presumption was almost impossible to rebut.³ For example, under “Lord Mansfield’s rule,” spouses were precluded from testifying as to non-access.⁴ As Justice Scalia explained in his 1989 opinion for the Court in *Michael H. v. Gerald D.*:

The primary policy rationale underlying the common law’s severe restrictions on rebuttal of the [marital] presumption appears to have been an aversion to declaring children illegitimate A secondary policy concern was the interest in promoting the “peace and tranquility of States and families[.]”⁵

The 2002 UPA (as did the 1973 UPA) contains a number of marital presumptions. Under the 2002 UPA, the marital presumption could be rebutted in limited circumstances with evidence of lack of genetic connection within the first two years of the child’s life.⁶ After the child’s second birthday, however, the presumption became conclusive and could not be rebutted.⁷ This was true even if the evidence clearly demonstrated that the

³ Theresa Glennon, *Somebody’s Child: Evaluating the Erosion of the Marital Presumption of Paternity*, 102 W. VA. L. REV. 547, 550 (2000) (“In earlier times, the marital presumption of paternity--the presumption that a child is fathered by his or her mother’s husband--was largely irrebuttable.”).

⁴ Theresa Glennon, *Somebody’s Child: Evaluating the Erosion of the Marital Presumption of Paternity*, 102 W. VA. L. REV. 547, 563 (2000); *Michael H. v. Gerald D.*, 491 U.S. 110, 124-25 (1989) (“And, under the common law both in England and here, ‘neither husband nor wife [could] be a witness to prove access or nonaccess.’ J. Schouler, *Law of the Domestic Relations* § 225, p. 306 (3d ed. 1882); R. Graveson & F. Crane, *A Century of Family Law: 1857–1957*, p. 158 (1957).”).

⁵ *Michael H. v. Gerald D.*, 491 U.S. 110, 125 (1989).

⁶ 2002 UPA, § 608 (requiring the court to take into account a number of equitable factors in deciding whether to allow the marital presumption to be rebutted within the first two years of the child’s life).

⁷ 2002 UPA, § 607 (“Except as otherwise provided in subsection (b), a proceeding brought by a presumed father, the mother, or another individual to adjudicate the parentage of a child having a presumed father must be commenced not later than two years after the birth of the child.”).

husband was not the child’s genetic parent, and indeed even if all parties always knew he was not the child’s genetic parent.⁸

All of these marital presumptions in the 2002 UPA are based on the premise that married couples consist of one man and one woman. For example, Section 204(a)(1) of the 2002 UPA states: “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.” 2002 UPA, § 204(a)(1).

Today, of course, not all married couples consist of one man and one woman. To comply with this reality and with the Supreme Court’s decision in *Obergefell v. Hodges*, the marital presumptions in Section 204 of the 2017 UPA have been updated. As currently drafted, the marital presumptions in the 2017 UPA expressly apply to any spouse—male or female—of the woman who gave birth. For example, Section 204(a)(1) of the 2017 UPA provides: “An individual is presumed to be the parent of a child if: ... the individual and the woman who gave birth to the child are married to each other and the child is born during the marriage.” A number of states have made similar changes to their marital presumptions. *See, e.g.*, CAL. FAM. CODE § 7611;⁹ D.C. CODE ANN. § 16-909; 750 ILL. COMP. STAT. ANN. § 46/204;¹⁰ ME. STAT., tit. § 1881(1); N.H. REV. STAT. § 168-B:2(V).

One state—Washington State—has gone further. The revised Washington marital presumptions are *fully gender neutral*; that is, they establish a presumption of parentage in any spouse—male or female—of any parent—male or female. Specifically, WASH. REV. CODE ANN. § 26-26-116 provides that “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 ... and the child is born during the marriage.” Thus, under the Washington statute, a *wife* is presumed to be the legal parent of the biological child of her husband conceived in an extramarital relationship and born to a woman not his wife.

⁸ There is a limited exception to this two-year statute of limitations that applies in cases where the husband: (1) never cohabitated with the wife during the probable time of conception; (2) never engaged in sexual intercourse during the probable time of conception; *and* (3) never openly held the child out as his own. 2002 UPA, § 607(b).

⁹ CAL. FAM. CODE § 7611(a) (“A person is presumed to be the natural parent of a child if ... (a) The presumed parent and the child’s natural mother are or have been married to each other and the child is born during the marriage, or within 300 days after the marriage is terminated by death, annulment, declaration of invalidity, or divorce, or after a judgment of separation is entered by a court.”).

¹⁰ 750 ILL. COMP. STAT. ANN. § 46/204 (“(a) A person is presumed to be the parent of a child if: (1) the person and the mother of the child have entered into a marriage, civil union, or substantially similar legal relationship, and the child is born to the mother during the marriage, civil union, or substantially similar legal relationship, except as provided by a valid gestational surrogacy contract, or other law.”).

The Drafting Committee decided not to adopt a fully gender-neutral marital presumption for a number of reasons. First, of the seven states that have amended their marital presumptions to account for same-sex marriage, only one state—Washington State—has adopted a fully gender-neutral version of the marital presumption. The other six states have adopted marital presumptions that are similar to the provisions included in the draft.

Second, in practice, a fully-gender neutral marital presumption would rarely establish the parentage of the spouse of a male parent. This is the case because the act provides that the woman who gives birth is a legal parent. 2017 UPA, § 201(a)(1). Thus, in the hypothetical described above, where a male spouse conceives a child with a woman not his wife, despite the fully gender-neutral marital presumption, a court nonetheless would be likely to conclude that the legal parents of the resulting child are the male spouse and the woman who gave birth to the child; the court would be unlikely to conclude that the man’s wife was a legal parent.

B. Surrogacy – Article 8

As noted above, states have been particularly reluctant to adopt the 2002 UPA’s surrogacy provisions—bracketed Article 8. Only two states adopted Article 8 of the 2002 UPA. No state has enacted Article 8 of the 2002 UPA since 2005.¹¹ This is true even though a number of states have enacted the 2002 UPA since that time.¹² When the 2002 UPA was drafted, surrogacy practice was still in its infancy. Based on the practice at the time, Article 8 of the 2002 UPA is premised on an adoption-like model. Intended parents must undergo a home study, unless waived by the court. The process requires two court hearings—one to validate the agreement prior to pregnancy, and one after the birth of the child.

In the intervening years, surrogacy practice has evolved. The 2017 UPA updates the surrogacy provisions to reflect developments in that area.

As was true of the 2002 UPA, Article 8 of the 2017 UPA regulates and permits both genetic (often referred to as “traditional”) and gestational surrogacy agreements. But the 2017 UPA differs in the way that it regulates these two types of surrogacy agreements. The 2002 UPA set forth a single set of requirements that applied equally to genetic and gestational surrogacy agreements. While the 2017 UPA continues to permit both types of surrogacy, the 2017 UPA imposes additional safeguards or requirements on genetic surrogacy agreements. Among other things, in arrangements involving genetic surrogacy, the surrogate can change her mind up to 72 hours after the birth of the child.

¹¹ 2005 Utah Laws Ch. 150 (S.B. 14).

¹² Indeed, Maine enacted the 2002 UPA just last year. 2015 Me. Legis. Serv. Ch. 296 (S.P. 358) (L.D. 1017) (WEST). Maine did not, however, adopt Article 8 of the 2002 UPA.

The differentiation between genetic and gestational surrogacy is intended to reflect both the factual differences between the two types of surrogacy as well as the reality that policymakers have been particularly reluctant to permit genetic surrogacy.

At the same time that the 2017 UPA adds additional requirements that apply only to genetic surrogacy agreements, it simultaneously liberalizes the rules governing gestational surrogacy agreements. The changes to the rules governing gestational surrogacy agreements is intended to make these rules more consistent with current practice and law. Of note, the provisions of the 2017 UPA regarding gestational surrogacy: do not require a home study; do not require two court proceedings; and permit a pre-birth order declaring the parentage of the intended parents. The gestational surrogacy provisions are modeled in large part on the provisions recently adopted in Maine, Nevada, and New Hampshire.

C. Accessing Information about Gamete Donors – Article 9

As noted above, the 2017 UPA includes a new article—Article 9. Article 9 addresses the right of children born through assisted reproductive technology to access medical and identifying information regarding any gamete providers. Increasing numbers of children are being born through the use of assisted reproductive technologies. In the area of adoption, there is a growing trend in favor of allowing children to access information about their genetic parentage. The 2017 UPA follows this trend with regard to children born through ART.

Article 9 does not require disclosure of the identity of gamete providers, but it does require gamete banks and fertility clinics to ask donors if they want to have their identifying information disclosed when the resulting child turns 18. Article 9 is premised on a Washington state statute.

D. Competing Presumptions – Section 612

The 1973 UPA contained a provision acknowledged the possibility that more than one person might be a presumed parent to a particular child. The 1973 UPA, accordingly, included a provision directing how courts to decide parentage in such cases. Section (4)(b) of the 1973 UPA provided, in relevant part: “If two or more presumptions arise which conflict with each other, the presumption which on the facts is founded on the weightier considerations of policy and logic controls.”

The 2002 UPA contained no provision addressing how courts should resolve cases in which there were competing claims of parentage. Given that there is a range of circumstances that could result in more than one person with a claim to parentage under the act, it is important for the act to address how such cases should be resolved. Section 612 lists the factors that a court must consider in resolving such cases. The factors included in new Section 612 are largely modeled off of the factors included in former Section 608, which addressed when a court could deny a request for genetic testing.

E. Article 6

Article 6 of the UPA contains a range of provisions relating to proceedings to adjudicate parentage. Although the 2017 UPA retains the basic substance of Article 6 of the 2002 UPA, it substantially reorganizes Article 6 to improve its flow and clarity. Article 6 of the 2002 UPA moved back and forth between substantive and procedural rules. For example, in the 2002 UPA, substantive rules governing the establishment of parentage of men who are or who are alleged to be the child's genetic parent were contained in the following Sections: Section 622; Section 623; Section 631; and Section 634. The 2017 UPA brings these scattered provisions into a single section – new Section 611. Likewise, rules governing the assessment of expenses related to genetic testing were included in multiple sections in different parts of Article 6 (specifically Section 621 and Section 636). The 2017 UPA combines these provisions into a single section – new Section 620.