

October 17, 2016

MEMORANDUM

TO: Courtney G. Joslin, Reporter

FROM: Mary Louise Fellows, ABA-RPTE Advisor

I just completed review of your new draft. I thought you might appreciate my thoughts before the meeting. I am not repeating the issues and questions I raised in my earlier memorandum of May 14. I limited this memorandum to the changes made from the last draft I reviewed.

I'm happy to talk with you at any time before the meeting if you think that might be helpful.

§ 102(3)(A): "alleged father": The definition does not include a presumed father under § 204. This would include a de facto father, which seems odd. It would seem that de facto fathers and mothers should be treated similarly throughout the act, suggesting that to put de facto parental status under § 204 may not be ideal.

§ 102(6): "de facto parent": This term may lead to confusion, because § 204(a)(6) creates a presumption of a legal parent. I would eliminate this term from the definitional section and treat the circumstances the draft outlines in § 204(a)(6) as establishing legal parental status. [See below under § 204(a)(6) for further discussion of the criteria set forth in this section.]

§ 102(8): "donor": The definition includes "unless the individual and woman giving birth enter into a writing providing to the contrary." Are you referring to the record required in § 704? Why are you using the term *writing* and not *record*? Why isn't § 102(8)(B) sufficient? [comments did not assist me to understand this added language]. If the draft is going to retain the "unless . . . contrary" phrase, the better format, I suggest, would be to make it a subsection. It is confusing statutorily to have an "unless" phrase and then another list of what the term does not include.

§ 106: I can't find an instance where maternity would be at stake when the draft discusses paternity. Not only do I think it is not necessary, but I question whether it is misleading. If you make Article 3 gender neutral as you suggest in your memorandum, the need for § 106 would seem to be eliminated. In any case, the draft is careful to use gender neutral terms whenever it is possible. To substitute a male term like paternity and ask us to read it as referring to paternity and maternity seems to undermine one of the goals of the new revised version of the UPA.

§ 201(a)(4): Special reference to a de facto parent is unnecessary. § 201(a)(2) sufficiently includes the circumstances, which you refer to as de facto parent, by referencing the un rebutted presumptions established by § 204.

§ 202: In further response to Cannel (NJ), I would urge you to look at UPC § 2-117, which specifies those provisions where marital status does make a difference.

§ 204(a): Just as a matter of style, I think it would be preferable for the introductory language read as follows: “Except as provided by a valid gestational surrogacy agreement under [[Article 8 or] other law of this state, an individual is presumed to be the parent of a child if: . . . .”

§ 204(a)(6): I won’t address the issue of whether an adjudication should be necessary. My concern goes to the criteria set forth. The discussion of the criteria is related to the consequences of finding a parent-child relationship under the concept of de facto parent. Contact or visitation rights may be justified on less stringent criteria than would be required to award custody or to impose support responsibility. For inheritance purposes, which would also allow the child to qualify as a child under the Social Security Act (§ 411), the criteria should be even more stringent. Whether draft should calibrate the recognition of a parent-child relationship based on consequences is one issue to be addressed. If the draft wants to employ the concept of de facto parent to establish a legal parent for all purposes, including inheritance, then the criteria need to be more stringent than is set out in § 204(a)(6).

For example, the draft does not impose a requirement that the parent-child relationship occur before the child attains adulthood (See §§ 102(5), 204(a)(6)(i)). To qualify as a parent, I would argue that the child has to have been a part of the individual’s household during that child’s minority, to assure that the individual materially participated in the child’s upbringing. UPC § 2-115(4) embraces this approach when it defines the term “functioned as a parent of the child.” It refers to “materially participating in the child’s upbringing, and residing with the child in the same household as a regular member of that household.” Moreover, UPC § 2-120(g) does not allow an individual to inherit from the child unless the “individual functioned as a parent of the child before the child reached [18] years of age.” The one exception to the rule of requiring the child to be part of the individual’s household during the child’s minority could be if the child has a disability requiring significant caretaking even after the child attains adulthood and that the individual provides that caretaking during the time the child is an adult.

To the extent the concept has been used in the case law for unmarried same-sex couples at the time of their separation, parental status seems to be substantially resolved in Article 7 as to who is a parent. To the extent that the concept has been used for step-parents, the concept should be applied, in my mind, only if adoption was not otherwise available. I have in mind something like what we see in Cal. Prob. Code § 6454 quoted below:

For the purpose of determining intestate succession by a person or the person's issue from or through a foster parent or stepparent, the relationship of parent and child exists between that person and the person's foster parent or stepparent if both of the following requirements are satisfied:

- (a) The relationship began during the person's minority and continued throughout the joint lifetimes of the person and the person's foster parent or stepparent.
- (b) It is established by clear and convincing evidence that the foster parent or stepparent would have adopted the person but for a legal barrier.

Should the criteria also include that the individual have held out the child as his or her own? Also note that the draft's criteria would seem to preclude a foster parent since frequently foster parents so expect and receive "financial compensation."

One familial situation that that causes me concern is the following: A grandfather takes over the responsibility of rearing a grandchild during that grandchild's minority, because his child is unable for any number of reasons to function as a parent. At the grandfather's death intestate, he would be a presumed legal parent under § 204(6). Under § 612(4), the fact that the grandchild had two other parents would not override the presumption, especially if detriment to the child is interpreted to mean financial detriment. The grandfather's grandchild and child (parent of the grandchild) would each inherit as children to the detriment of the grandfather's other children. I can see how this grandfather should have visitation and/or custody claims, but the consequence of inheritance seems of a different order. Perhaps, a requirement that the individual has held out the child openly as his or her own child would make the consequences on inheritance rights more appropriate, especially if combined with the requirement that a legal barrier to adoption existed.

Even if the individual is unrelated to the child, the requirements of a legal barrier to adoption and openly holding out the child seems necessary to meet the dual goals of an intestacy statute of likely reflecting a decedent's intent and avoiding potential familial dissension.

§ 204(a)(6)(iv): It should refer to "other parent or parents" and not just to "other parent."

§ 612(4): This is the provision that has to do with numerosity. I am troubled by California's approach. A finding of a third legal parent does not mean that the child's custody or support rights would necessarily change. I have in mind the facts of *Michael H v. Gerald D*, 491 U.S. 110 (1989). In that case, recognition of the genetic father as the father, rather than the genetic mother's husband, would not have removed necessarily the child from the marital household. How best to resolve the respective rights of the parents should be left to a separate hearing based on the state's statutory criteria and legal precedent for resolving issues of custody, visitation rights, support payments, etc. In this regard, I believe a statutory provision modeled on Me. Rev. Stat., tit 19-A, § 1853(2).