

To: UPA 2017 Drafting Committee
From: Courtney Joslin, Reporter
Date: October 5, 2016
Re: Background information for the October 2016 In-Person Drafting Meeting

Dear UPA 2017 Drafting Committee:

This memo is intended to provide background information to assist the Drafting Committee in its consideration of:

- (1) concerns that were raised at the Annual Meeting regarding the prior draft of the Act; and
- (2) two new issues on the table for consideration: (a) whether to add de facto parents to the list of people who can be adjudicated to be legal parents; and (b) whether to permit a court to find that a child has more than two legal parents.

Part I of the memo lays out some of the concerns that were raised at the Annual Meeting regarding the prior draft. Part II of the memo provides additional background information and drafting questions related to de facto parentage and numerosity.

I. CONCERNS RAISED AT THE ANNUAL MEETING

A. Article 2 (means of establishing parentage; presumptions)

- Gender neutrality
 - o CONCERN: Some commissioners expressed concerns about whether the Committee's attempts to make Article 2 gender neutral work and whether the changes are consistent with other provisions and purposes of the Act.
 - o RESPONSE: I believe that the changes the committee made to Article 2 to make it gender neutral do work, and that these changes are consistent with the purpose of the Act. The Committee may, however, want to add commentary that clarifies what legal parentage means, and what the purpose of the marital presumption is. Clarifying that legal parentage does not necessarily mean biological parentage may help explain why it makes sense to make the marital presumption gender neutral.
- Numerosity
 - o CONCERN: Some concerns about numerosity were raised during the reading of Article 2.
 - o RESPONSE: See Part II infra of this memo for more discussion of the numerosity issue.
- Marital presumption and surrogacy.
 - o CONCERN: A question was raised about whether the marital presumption applied in cases involving surrogacy.
 - o RESPONSE: I added clarifying language to Section 204 to address this concern.

B. Article 3 (voluntary acknowledgements of paternity)

- Gender neutrality

- NOTE: Previously, the Drafting Committee considered whether to add another article that would mirror the voluntary acknowledgements of paternity procedure, but would be available without regard to gender. According to the federal Office of Child Support Enforcement (OCSE), revising Article 3 so that it is gender neutral would not jeopardize the state's receipt of the federal child support subsidy as long as the state is able to meet the requirements of 42 U.S.C. § 666(a)(5)(C) and establish paternity in appropriate cases. OCSE has indicated a willingness to work with the Drafting Committee to ensure the revised UPA is consistent with title IV-D requirements. The Drafting Committee may want to reconsider the possibility of making Article 3 gender neutral.

C. Article 7 (assisted reproduction)

- Numerosity
 - CONCERN: Some concerns about numerosity were raised during the reading of Article 7.
 - RESPONSE: See Part II infra of this memo for more discussion of the numerosity issue.

D. Article 8 (surrogacy)

- Requirements
 - CONCERN: A number of Commissioners asked questions about various specific requirements.
 - RESPONSE: The Drafting Committee may want to review all of the requirements, including the age requirements, and the requirements for mental and physical health evaluations.
- Enforceability
 - CONCERN: A number of Commissioners asked questions related to whether small deviations from the extensive list of requirements would render the agreement unenforceable.
 - RESPONSE: I amended the language of Section 810 with regard to gestational surrogacy agreements. We should consider whether the revised language adequately addresses the concerns. Genetic surrogacy agreements must be validated prior to pregnancy, so any non-compliance can be cured at that point.

E. Article 9 (information regarding gamete donors)

- Facilities that go out of business
 - CONCERN: A Commissioner asked what happens when facilities go out of business
 - RESPONSE: I think this is a serious concern. At the moment, however, I don't have a proposed solution to this problem.
- Interstate applicability
 - CONCERN: A Commissioner asked whether this Article covers facilities licensed in another state
 - RESPONSE: It is not obvious to me how this act could regulate facilities licensed in another state that has not adopted the UPA

- Intrastate transfer
 - o CONCERN: A number of Commissioners asked why the Act does not require the information about the donor to be collected and maintained by any subsequent facility that acquires the gametes.
 - o RESPONSE: Currently, the Article is based on the idea that the detailed information about gamete providers is retained by the first collecting facility. If the gametes are transferred elsewhere, the second facility must keep information about where the gametes came from, but the Act does not require that second facility to collect or maintain the information about the gamete provider. The idea under the current draft is that the person seeking the identifying information would then turn to the first facility for the information about the gamete providers. It seems to me that such a system would work.
 - o We could, however, alter the scheme so that the information about the gamete providers would have to be passed along to and then (also) maintained by the second facility. Requiring all of the involved facilities to maintain information about the gamete provider might help address the concern about facilities going out of business.
 - o The downside of requiring all involved entities to collect and maintain information about the gamete provider is that such a system potentially complicates the process under Section 903(c) that allows a donor who has signed an affidavit of nondisclosure to change his or her mind. And more generally, which entity is responsible for keeping the current affidavit of disclosure or nondisclosure?
- Affidavit of Disclosure
 - o CONCERN: A Commissioner asked whether a donor who agreed to identity disclosure can change his or her mind.
 - o RESPONSE: Currently, the draft allows someone who signed an affidavit of nondisclosure can change his or her mind, but it does not allow for the reverse. I think that is the correct approach. Some intended parents want their resulting children to have the choice of whether to learn about and potentially meet their gamete providers. Those intended parents intentionally choose gamete providers who agreed to identity disclosure. I think parties should be able to rely on that agreement.
- Remedy
 - o CONCERN: A number of Commissioners asked questions about how this Article would be enforced.
 - o RESPONSE: I think this is a concern that merits further consideration by the Drafting Committee.

II. DE FACTO PARENTAGE AND NUMEROSITY

To assist the Committee's consideration regarding de facto parents and numerosity, I have collected information about the current state and evolution of the law in this area.

A. De Facto Parents

(i) A majority of states recognize and extend rights to functional parents

A majority of states recognize and extend at least some parental rights to people who have functioned as parents to children but who are unconnected to those children through either biology or marriage.¹ These states span the country; ranging from Massachusetts, to West Virginia, to North and South Carolina, to Texas. Some states recognize such people under a variety of equitable doctrines – sometimes called de facto parentage, or in loco parentis, or the psychological parent doctrine.² Other states extend rights to such people through broad third party standing statutes.³ And, more recently, states have begun to treat such people as legal parents under their parentage provisions.⁴

(ii) Trend is in favor of expanded rights and obligations

¹ These jurisdictions include: Arkansas, Delaware, Hawaii, Indiana, Kansas, Kentucky, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Jersey, North Carolina, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Texas, West Virginia, Wisconsin, Washington, and Washington, D.C.

² See, e.g., *Bethany v. Jones*, 378 S.W.3d 731 (Ark. 2011) (in loco parentis); *Mullins v. Picklesimer*, 317 S.W.3d 569 (Ky. 2010) (in equity); *C.E.W. v. D.E.W.*, 845 A.2d 1146 (Me. 2004) (de facto parentage); *E.N.O. v. L.M.M.*, 711 N.E.2d 886 (Mass. 1999) (de facto parentage); *V.C. v. M.J.B.*, 748 A.2d 539 (N.J. 2000) (psychological parent); *Boseman v. Harrell*, 704 S.E.2d 494 (N.C. 2010) (in equity); *McAllister v. McAllister*, 779 N.W.2d 652 (N.D. 2010) (psychological parent); *In re Bonfield*, 780 N.E.2d 241 (Ohio 2002) (in equity); *J.A.L. v. E.P.H.*, 682 A.2d 1314 (Pa. 1996) (in loco parentis); *Marquez v. Caudill*, 656 S.E.2d 737 (S.C. 2008) (psychological parent); *In re Parentage of L.B.*, 122 P.3d 161 (Wash. 2005) (de facto parentage); *In re Clifford K.*, 619 S.E.2d 138 (W. Va. 2005) (psychological parent); *In re Custody of H.S.H.-K.*, 533 N.W.2d 419 (Wis. 1995) (de facto parentage).

³ See, e.g., D.C. Code Ann. § 16-831; HAW. REV. CODE § 571-46; IND. CODE § 31-9-2-35.5; MINN. STAT. § 257C.01-08; MONT. CODE § 40-4-211; TEX. FAM. CODE § 102.003(9). See also, e.g., *Brooke S.B. v. Elizabeth A. C.C.*, 2016 WL 4507780 (N.Y. 2016) (holding that a non-biological, non-adoptive partner who agreed to conceive and raise a child with his or her partner is a “parent” within the meaning of the visitation and custody statute).

⁴ See, e.g., *In re Nicholas H.*, 46 P.3d 932 (Cal. 2002) (holding that the mother’s former nonmarital male partner was a legal parent under the state’s holding out provision, which is premised on the 1973 UPA); *Elisa B. v. Superior Court*, 117 P.3d 660 (Cal. 2005) (concluding that the mother’s former same-sex partner was a legal parent under California’s holding out provision, which is premised on the 1973 UPA); *In re S.N.V.*, 2011 WL 6425562 (Colo. App. 2011) (concluding that a person who is unconnected to a child through either biology or marriage can be a legal parent under the state’s holding out provision, which is premised on the 1973 UPA); DEL. CODE ANN. Tit. 13, § 8-201(c) (statutorily defining legal parents to include de facto parents); *Frazier v. Goudschaal*, 295 P.3d 542 (Kan. 2013) (holding that a functional parent was a legal parent under the parentage provision that creates a presumption based on the conduct of “notoriously or in writing recogniz[ing] paternity of the child”); ME. REV. CODE tit. 19-a, § 1891 (statutorily defining legal parents to include de facto parents); *Guardianship of Madelyn B.*, 98 A.3d 494 (N.H. 2014) (holding that a person who is unconnected to a child through biology or marriage can be a legal parent under the state’s holding out provision, which is premised on the 1973 UPA); *Chatterjee v. King*, 280 P.3d 283 (N.M. 2012) (holding that a parent’s former nonmarital partner was a legal parent under the state’s holding out provision, which (at the time) was premised on the 1973 UPA).

Initially, states tended to extend only limited rights to such persons. For example, in one of the seminal cases in this area – *In re Custody of H.S.H.-K.*⁵ – the Wisconsin Supreme Court held that de facto parents are entitled to seek *visitation* with the child they parented. As noted above, since that decision in 1995, the majority of states have agreed with the basic concept of *H.S.H.-K.* – that, is that people who form true parent-child bonds with children, particularly when they do so with the consent and encouragement of the child’s (other) legal parent, are entitled to parental rights.

More recently, the trend has been in favor of extending greater rights and greater responsibilities to such persons. So, for example, in many states, it is now clear that de facto/functional parents are entitled to seek not only visitation but also *custody*.⁶ Among the states that have broad third party statutes, many similarly allow such persons to seek both custody and visitation.⁷

Indeed, in the states that recognize such people in equity, the trend is in favor of concluding that such persons *stand in parity* with the child’s legal parent(s).⁸

(iii) Emerging trend towards finding legal parentage

Most recently, a growing number of states have taken the position that people who have functioned as parents to child with the consent and encouragement of the child’s legal parent(s) can be adjudicated to be legal parents under their state’s parentage statutes.

⁵ 533 N.W.2d 419 (Wis. 1995).

⁶ *See, e.g.*, *Kinnard v. Kinnard*, 43 P.3d 150, 151, 153-55 (Alaska 2002) (affirming shared-custody award to father and stepmother, who was child’s psychological parent); *Conover v. Conover*, 141 A.3d 31, 51 (Md. 2016) (adopting the *H.S.H.-K.* de facto parent test and holding that “de facto parents have standing to contest custody or visitation and need not show parental unfitness or exceptional circumstances before a trial court can apply a best interests of the child analysis”); *V.C. v. M.J.B.*, 748 A.2d 539, 553 (N.J. 2000) (“The standards to which we have referred will govern all cases in which a third party asserts psychological parent status as a basis for a custody or visitation action regarding the child of a legal parent, with whom the third party has lived in a familial setting.”); *Latham v. Schwerdfeger*, 802 N.W.2d 66, 76 (Neb. 2011) (concluding that in loco parents have standing to seek custody and visitation); *Ramey v. Sutton*, 362 P.3d 217, 221 (Okla. 2015) (“We have held that when persons assume the status and obligations of a parent without formal adoption they stand *in loco parentis* to the child and, as such, may be awarded custody even against the biological parent.”); *T.B. v. L.R.M.*, 786 A.2d 913 (Pa. 2001) (holding that in loco parent had standing to seek custody and visitation).

⁷ *See, e.g.*, TEX. FAM. CODE § 102.003(9) (permitting a person who had care and control of a child for at least six months to file an action seeking parenting time); MINN. STAT. §§ 257C.01-257C-08 (permitting a de facto custodian to seek child custody).

In addition to these broad statutes, courts in some states have interpreted their parent-only custody and visitation provisions to include functional parents. *See, e.g.*, *Brooke S.B. v. Elizabeth A.* C.C., 2016 WL 4507780 (N.Y. 2016) (holding that a non-biological, non-adoptive partner who agreed to conceive and raise a child with his or her partner is has “standing to seek visitation and custody” as a “parent”).

⁸ *See, e.g.*, *C.E.W. v. D.E.W.*, 845 A.2d 1146, 1151-52 (Me. 2004) (recognizing *de facto* parents and placing them in parity with statutory parents); *V.C. v. M.J.B.*, 748 A.2d 539 (N.J. 2000) (holding that a de facto parent “stands in parity with the legal parent”), *cert. denied*, 531 U.S. 926 (2000); *In re Parentage of L.B.*, 122 P.3d 161, 176 (Wash. 2005) (“Reason and common sense support recognizing the existence of *de facto* parents and according them the rights and responsibilities which attach to parents in this state.”).

Two states – Delaware⁹ and Maine¹⁰ – achieve this result by including “de facto parents” in their definition of parent in their state versions of the Uniform Parentage Act. Other states, including California, Colorado, Kansas, Massachusetts, New Hampshire, and New Mexico, have reached this conclusion by applying their existing parentage provisions to such persons.¹¹

(iv) Extension of rights and obligations

Initially, most cases involving functional parents were brought by the functional parent seeking rights of parentage. Increasing, however, we are seeing cases where the action is brought by the (other) legal parent or by the state against the functional parent for the purpose of obtaining a support order against the functional parent.¹² And, of course, if a functional parent is adjudicated to be a legal parent under the state’s parentage laws, that person would have both the rights and the responsibilities of parentage.

B. Numerosity

⁹ DEL. CODE ANN. Tit. 13, § 8-201(c) (including “de facto parents” in the list of ways to establish a “parent-child relationship”); ME. REV. STAT. ANN. Tit. 19-A, § 1851 (including “de facto parents” in the list of ways to establish a parent-child relationship); *id.* at § 1891 (defining de facto parentage).

¹⁰ ME. REV. CODE tit. 19-a, § 1891.

¹¹ *See, e.g., In re Nicholas H.*, 46 P.3d 932 (Cal. 2002) (holding that the mother’s former nonmarital male partner was a legal parent under the state’s holding out provision, which is premised on the 1973 UPA); *Elisa B. v. Superior Court*, 117 P.3d 660 (Cal. 2005) (concluding that the mother’s former same-sex partner was a legal parent under California’s holding out provision, which is premised on the 1973 UPA); *In re S.N.V.*, 2011 WL 6425562 (Colo. App. 2011) (concluding that a person who is unconnected to a child through either biology or marriage can be a legal parent under the state’s holding out provision, which is premised on the 1973 UPA); *Frazier v. Goudschaal*, 295 P.3d 542 (Kan. 2013) (holding that a functional parent was a legal parent under the parentage provision that creates a presumption based on the conduct of “notoriously or in writing recogniz[ing] paternity of the child”); *Partanen v. Gallagher*, -- N.E.3d --, 2016 WL 5721061 (Mass. 2016) (holding that a parent’s former nonmarital partner was a legal parent under the state’s holding out provision, which is premised on the 1973 UPA); *Guardianship of Madelyn B.*, 98 A.3d 494 (N.H. 2014) (holding that a person who is unconnected to a child through biology or marriage can be a legal parent under the state’s holding out provision, which is premised on the 1973 UPA); *Chatterjee v. King*, 280 P.3d 283 (N.M. 2012) (holding that a parent’s former nonmarital partner was a legal parent under the state’s holding out provision, which (at the time) was premised on the 1973 UPA).

¹² *See, e.g., Elisa B. v. Superior Court*, 117 P.3d 660 (Cal. 2005) (holding, in a child support action initiated by the state, that a same-sex partner was a legal parent under the state’s holding out provision and, therefore, was required to support the children); *Chambers v. Chambers*, 2005 WL 645220 (Del. Fam. Code 2005) (holding, in a child support action brought by the child’s biological mother, that the woman’s former same-sex partner was responsible for child support); *L.S.K. v. H.A.N.*, 813 A.2d 872 (Pa. Super. Ct. 2002) (holding, in a child support action initiated by the biological mother, that the woman’s former same-sex partner was responsible under equitable principles to support the couple’s five children). *See also cf. State ex rel D.R.M.*, 34 P.3d 887 (Wash. Ct. App. 2001) (child support action filed by biological mother against her former same-sex partner; court declined to impose child support obligations); *T.F. v. B.L.*, 813 N.E.2d 1244 (Mass. 2004) (child support action filed by biological mother against her former same-sex partner; court declined to impose child support obligations based on the facts of the case).

In a variety of ways and contexts, legislatures and courts are increasingly recognizing that children may have more than two people playing important parent-like roles in their lives. (It is also important to note that it is now possible for a child to have more than two genetic parents.¹³)

Many states recognize this reality in more limited ways. For example, in recognition of the fact that many children have stepparents that play important roles in their lives, a number of states have enacted provisions that expressly permit stepparents to seek visitation and/or custody with the child after divorce.¹⁴ And, of course, in other states, the stepparent is entitled to seek custody and/or visitation if he or she is an equitable parent. The Uniform Probate Code permits a child to inherit from a person's whose parental rights have been terminated.¹⁵ Thus, under the UPC, a child can inherit through three "parents," even though the Act only recognizes two of those people as legal parents. About half the states permit open adoptions, which allow the child to maintain a relationship with his or her birth parents, even at the completion of the adoption.¹⁶

Increasingly, states are also recognizing this reality in more robust ways. For example, courts in a number of states have concluded (or are permitted via express statutory provision to conclude) that a particular child had two legal parents plus a parent in equity. These jurisdictions include: D.C.,¹⁷ Minnesota,¹⁸ New Jersey,¹⁹ New York,²⁰ North Dakota,²¹ Pennsylvania,²² and Washington.²³

¹³ See, e.g., Rob Stein, *New York Fertility Doctor Says He Created Baby with 3 Genetic Parents*, NPR (Sept. 27, 2016), available at

<http://www.npr.org/sections/thetwo-way/2016/09/27/495668299/new-york-fertility-doctor-says-he-created-baby-with-3-genetic-parents>.

¹⁴ See, e.g., CAL. FAM. CODE § 3101(a) (permitting "reasonable visitation" based on a best interest of the child standard); TENN. CODE ANN. § 36-6-303(a) (permitting "reasonable visitation rights" based on a best interest of the child standard); UTAH CODE ANN. § 30-5a-102(2)(e) (expressly listing "stepparents" among those people "other than a parent" who are permitted to seek custody or visitation); VA. CODE ANN. § 20-124.1 (expressly listing stepparents among those "persons with a legitimate interest"); Wis. Stat. Ann. § 767.43(1) (permitting "reasonable visitation rights" based on a best interest of the child standard). See also cf. DEL. CODE ANN. tit. 13, § 733 (permitting a stepparent to seek continued placement of the child upon "the death or disability of the custodial or primary placement parent").

¹⁵ UNIF. PROBATE CODE § 2-119(b) & (c) (providing that a parent-child relationship exists for purposes of intestate succession between a child and his or her genetic parent even after that parent's rights are terminated in a stepparent adoption proceeding or in an adoption proceeding involving a relative of a genetic parent).

¹⁶ Leigh Gaddie, *Open Adoption*, 22 J. AM. ACAD. MATRIM. LAW. 499 (2009) ("Twenty-two states currently have statutes explicitly providing for enforceable post adoption contact agreements.").

¹⁷ D.C. CODE ANN. § 16-831.01 (recognizing de facto parents and providing that they are entitled to seek custody and visitation).

¹⁸ *LaChapelle v. Mitten*, 607 N.W.2d 151, 156 (Minn. Ct. App. 2000) (granting visitation rights to both the nonbiological same-sex partner of child's genetic parent and to the semen donor).

¹⁹ See, e.g., *K.A.F. v. D.L.M.*, 96 A.3d 975, 977 (N.J. Super. Ct. 2014) (concluding, in a custody dispute between biological mother, adoptive parent, and stepparent, that all three parties had standing to seek custody); *D.G. v. K.S.*, 133 A.3d 703 (N.J. Super. Ct. 2015) (concluding that biological father, his same-sex spouse, and biological mother were all entitled to joint legal and joint physical custody).

Although they have not been expressly adopted in any state, the ALI Principles of the Law of Family Dissolution (“ALI Principles”) permit the possibility of a child having two legal parents and a parent by estoppel or a de facto parent.²⁴ Under the ALI Principles, parents by estoppel are treated in parity with legal parents for purposes of custody and visitation; while de facto parents are entitled to seek contact with a child, they do not stand in parity with legal parents for purposes of custody and visitation.

Even more significantly, a growing number of jurisdictions have statutes permitting a court to conclude in a parentage action that a child has *more than 2 legal parents*. These jurisdictions include California,²⁵ Delaware,²⁶ D.C.,²⁷ Louisiana,²⁸ and Maine.²⁹

²⁰ Frank G. v. P.F., 2016 WL 4646017, --- N.Y.S.3d – (2016) (holding that a same-sex domestic partner had standing to seek custody of or visitation with a child born through surrogacy; surrogate and genetic father were considered to be legal parents).

²¹ McAllister v. McAllister, 779 N.W.2d 652 (N.D. 2010) (holding that stepparent, who had assumed role as a psychological parent, was entitled to seek visitation, in case in which child had two legal parents).

²² Jacob v. Shultz-Jacob, 923 A.2d 473 (Pa. Super. Ct. 2007) (awarding a 3-way custody and support split between the legal mother, the in loco parentis mother and the known sperm donor who had parented the child); A.M. v. T.V., 2015 WL 7571451 (Pa. Super. Ct. 2015) (holding that three people – the child’s biological mother, the child’s biological father, and the father’s subsequent wife who was found to stand in loco parentis to the child – all had standing to seek custody).

²³ *In re* Parentage of J.B.R. Child, 336 P.3d 648, 653 (Wash. App. Ct. 2014) (“The fact that [the child] has two living biological parents does not prohibit [the child’s stepparent] from petitioning for de facto parentage.”).

²⁴ ALI Principles of the Law of Family Dissolution § 2.03. For example, § 2.03(1)(b)(iii) provides that an individual is a parent by estoppel if the individual:

(iii) lived with the child since the child’s birth, holding out and accepting full and permanent responsibilities as parent, as part of a prior co-parenting agreement with the child’s legal parent (or, if there are two legal parents, both parents) to raise a child together each with full parental rights and responsibilities, when the court finds that recognition of the individual as a parent is in the child’s best interests.

Section 2.03(1)(b)(iv) provides that an individual is a parent by estoppel if the individual:

(iv) lived with the child for at least two years, holding out and accepting full and permanent responsibilities as a parent, pursuant to an agreement with the child’s parent (or, if there are two legal parents, both parents), when the court finds that recognition of the individual as a parent is in the child’s best interests.

²⁵ CAL. FAM. CODE § 7612(c) (permitting a court to decline to break a tie between two presumed parents where denying recognition of parentage would be detrimental to the child); CAL. FAM. CODE § 8617 (permitting third parent adoptions). *See also, e.g.*, Martinez v. Vaziri, 246 Cal. App. 4th 373 (2016) (reversing trial court decision refusing to recognize child’s uncle as child’s third legal parent under Section 7612(c)).

²⁶ DEL. CODE ANN. tit. 13, § 8-201(a)(4), (b)(6), (c). *See also, e.g.*, Jw. S. Jr. v. Em. S., 2013 WL 6174814 (Del. Fam. Code 2013) (recognizing child’s biological father as a legal father on the basis of genetics and recognizing the mother’s former husband as a statutory “de facto” (that is, legal) parent).

²⁷ D.C. CODE ANN. § 16-909(e).

²⁸ Warren v. Richard, 296 So.3d 813, 815 (La. 1974) (recognizing dual paternity).

²⁹ ME. REV. STAT. tit. 19-A § 1853(2) (“Consistent with the establishment of parentage under this chapter, a court may determine that a child has more than 2 parents.”). *See also* ME. REV. STAT., tit. 19-A, § 1891(5)

In addition, it has been reported that courts in the following jurisdictions have permitted third parent adoptions: Alaska, California, Massachusetts, Oregon, and Washington.³⁰ California law expressly allows for the possibility of a third parent adoption.³¹

C. Drafting Issues

(i) *De Facto Parent*

If the Drafting Committee decides to add de facto parents to the Uniform Parentage Act, there are a number of drafting issues that need to be resolved, including issues related to: (1) the placement of the provision(s) in the UPA; (2) whether fulfillment of the criteria creates a rebuttal or a conclusive status of parentage; and (3) the criteria necessary to establish that one is a de facto parent.

(a) Placement

As noted above, currently two states – Delaware and Maine – include de facto parents in their UPAs. The two states have taken different approaches on the placement issue.

Delaware added de facto parents to Section 201, which outlines the means by which one can establish a parent-child relationship. Not only are de facto parents included in the list, but the same section also includes the definition of de facto parent.

By contrast, **Maine** chose to create a new, separate article that addresses only de facto parentage. This article follows the parenting presumptions.

In the draft of the **2017 UPA** that was circulated to the Committee, I took a different approach. This draft adds de facto parents to the list of parenting presumptions. Thus, like marital presumption and the holding presumption, de facto parentage would create a rebuttable presumption of parentage.

(b) Effect

The placement issue is related to the next drafting question, which relates to the effect of fulfillment of the criteria.

In both Delaware³² and Maine,³³ if a court finds that an individual demonstrates that the de facto parentage criteria have been fulfilled, the statute requires the court to adjudicate that individual to be

(“The adjudication of a person under this subchapter as a de facto parent does not disestablish the parentage of any other parent.”).

³⁰ Nancy D. Polikoff, *Where Can a Child Have Three Parents*, <http://beyondstraightandgaymarriage.blogspot.com/2012/07/where-can-child-have-three-parents.html>.

³¹ CAL. FAM. CODE § 8617(b).

³² DEL. CODE ANN. Tit. 13 § 8-201 (providing that a parent-child relationship is established by, among other things, a determination by the court that the individual “is a de facto parent of the child” and providing that “(c) De facto parent status is established if the Family Court determines that the de facto parent: (1) Has had the support and consent of the child’s parent or parents who fostered the formation and establishment of a

a parent. Note, however, that the Maine provisions direct a court to consider the best interests of the child when deciding whether the de facto parent criteria have been fulfilled.³⁴

Currently, this draft of the 2017 UPA takes a different approach. Under this draft, if the individual demonstrates that the de facto parent criteria have been fulfilled, that demonstration results in a presumption of parentage. That presumption can then be rebutted under Section 612, in the same manner that any other presumption may be rebutted.

Commissioners Harry Tindall and Barbara Atwood expressed concern about this approach. Both Commissioners favor the ME/DE approach of requiring an adjudication of parentage if the individual fulfills the de facto criteria.

(c) Criteria

The criteria necessary to establish de facto parentage in the Maine and Delaware provisions are similar, but not identical. The full provisions are included in the appendices. If the drafting committee decides to include de facto parents in the act, the committee will have to decide exactly what the criteria should be.

ii. *Numerosity*

If the Drafting Committee decides that it does not want to rigidly limit the total number of parents to two, there are different ways this end could be accomplished.

One approach is to do what Maine did and simply state that the total number of legal parents is not limited to 2 and then allow the court to decide when it is appropriate and necessary to find that a child has more than 2 legal parents.³⁵

parent-like relationship between the child and the de facto parent; (2) Has exercised parental responsibility for the child as that term is defined [in the statute]; and (3) Has acted in a parental role for a length of time sufficient to have established a bonded and dependent relationship with the child that is parental in nature.”).

³³ ME. STAT. REV. tit. 19-a § 1891(3) (“The court *shall adjudicate a person to be a de facto parent* if the court finds by clear and convincing evidence that the person has fully and completely undertaken a permanent, unequivocal, committed and responsible parental role in the child’s life. Such a finding requires a determination by the court that: A. The person has resided with the child for a significant period of time; B. The person has engaged in consistent caretaking of the child; C. A bonded and dependent relationships has been established between the child and the person, the relationships was fostered or supported by another parent of the child and the person and the other parent have understood, acknowledged or accepted that or behaved as though the person is a parent of the child; D. The person has accepted full and permanent responsibilities as a parent of the child without expectation of financial compensation; and E. The continuing relationship between the person and the child is in the best interest of the child.”) (emphasis added).

³⁴ ME STAT. REV. tit. 19-a, § 1891(3) (requiring a court to adjudicate a person to be a de facto parent if a variety of criteria are fulfilled, including that “[t]he continuing relationship between the person and the child is in the best interest of the child”).

³⁵ ME. STAT. REV. tit. 19-a, § 1853(2) (“Consistent with the establishment of parentage under this chapter, a court may determine that a child has more than 2 parents.”).

Another approach is to follow what California has done. In California, although a court is permitted to find that a child has three legal parents, it can do so only if it finds that refusing to recognize all three candidates as legal parents would be detrimental to the child.³⁶

³⁶ CAL. FAM. CODE § 7612(c) (“(c) In an appropriate action, a court may find that more than two persons with a claim to parentage under this division are parents if the court finds that recognizing only two parents would be detrimental to the child. In determining detriment to the child, the court shall consider all relevant factors, including, but not limited to, the harm of removing the child from a stable placement with a parent who has fulfilled the child’s physical needs and the child’s psychological needs for care and affection, and who has assumed that role for a substantial period of time. A finding of detriment to the child does not require a finding of unfitness of any of the parents or persons with a claim to parentage.”).

APPENDIX 1

Statutory De Facto Parent Provisions

(a) Delaware

DEL. CODE ANN. tit. 13, § 8-201(a)(4), (b)(6), (c)

(a) The mother-child relationship is established between a woman and a child by:

...

(4) A determination by the court that the woman is a de facto parent of the child; or

(b) The father-child relationship is established between a man and a child by:

...

(6) A determination by the court that the man is a de facto parent of the child

(c) De facto parent status is established if the Family Court determines that the de facto parent:

(1) Has had the support and consent of the child's parent or parents who fostered the formation and establishment of a parent-like relationship between the child and the de facto parent;

(2) Has exercised parental responsibility for the child as that term is defined in § 1101 of this title; and

(3) Has acted in a parental role for a length of time sufficient to have established a bonded and dependent relationship with the child that is parental in nature.

(b) Maine

ME. REV. CODE, Tit. 19-a

§ 1851. Establishment of parentage

Parentage may be established by:

1. Birth. Giving birth to the child, except as otherwise provided in subchapter 8;

2. Adoption. Adoption of the child pursuant to Title 18-A, Article 9;

3. Acknowledgment. An effective voluntary acknowledgment of paternity under subchapter 3;

4. Presumption. An un rebutted presumption of parentage under subchapter 4;

5. De facto parentage. An adjudication of de facto parentage, under subchapter 5;

6. Genetic parentage. An adjudication of genetic parentage under subchapter 6;

7. Assisted reproduction. Consent to assisted reproduction under subchapter 7; and

8. Gestational carrier agreement. Consent to a gestational carrier agreement under subchapter 8 by the intended parent or parents.

§ 1891. De facto parentage

1. De facto parentage. The court may adjudicate a person to be a de facto parent.

2. Standing to seek de facto parentage. A person seeking to be adjudicated a de facto parent of a child under this subchapter must establish standing to maintain the action in

accordance with the following.

A. A person seeking to be adjudicated a de facto parent of a child shall file with the initial pleadings an affidavit alleging under oath specific facts to support the existence of a de facto parent relationship with the child as set forth in subsection 3. The pleadings and affidavit must be served upon all parents and legal guardians of the child and any other party to the proceeding.

B. An adverse party, parent or legal guardian who files a pleading in response to the pleadings in paragraph A shall also file an affidavit in response, serving all parties to the proceeding with a copy.

C. The court shall determine on the basis of the pleadings and affidavits under paragraphs A and B whether the person seeking to be adjudicated a de facto parent has presented prima facie evidence of the requirements set forth in subsection 3. The court may in its sole discretion, if necessary and on an expedited basis, hold a hearing to determine disputed facts that are necessary and material to the issue of standing.

D. If the court's determination under paragraph C is in the affirmative, the party claiming de facto parentage has standing to proceed to adjudication under subsection 3.

3. Adjudication of de facto parent status. The court shall adjudicate a person to be a de facto parent if the court finds by clear and convincing evidence that the person has fully and completely undertaken a permanent, unequivocal, committed and responsible parental role in the child's life. Such a finding requires a determination by the court that:

A. The person has resided with the child for a significant period of time;

B. The person has engaged in consistent caretaking of the child;

C. A bonded and dependent relationship has been established between the child and the person, the relationship was fostered or supported by another parent of the child and the person and the other parent have understood, acknowledged or accepted that or behaved as though the person is a parent of the child;

D. The person has accepted full and permanent responsibilities as a parent of the child without expectation of financial compensation; and

E. The continuing relationship between the person and the child is in the best interest of the child.

4. Orders. The court may enter the following orders as appropriate.

A. The court may enter an interim order concerning contact between a person with standing seeking adjudication under this subchapter as a de facto parent and the child.

B. Adjudication of a person under this subchapter as a de facto parent establishes parentage, and the court shall determine parental rights and responsibilities in accordance with section 1653. The court shall make appropriate orders for the financial support for the child in accordance with the child support guidelines under chapter 63. An order requiring the payment of support to or from a de facto parent does not relieve any other parent of the obligation to pay child support unless otherwise ordered by a court.

5. Other parents. The adjudication of a person under this subchapter as a de facto parent does not disestablish the parentage of any other parent.

APPENDIX 2

States that permit a court to find that a child has more than 2 legal parents

(a) California

California permits courts to find that two competing presumed parents, not including the woman who gave birth, are both legal parents. In such an event, the child would have three legal parents.

CAL. FAM. CODE § 7612(c)

(c) In an appropriate action, a court may find that more than two persons with a claim to parentage under this division are parents if the court finds that recognizing only two parents would be detrimental to the child. In determining detriment to the child, the court shall consider all relevant factors, including, but not limited to, the harm of removing the child from a stable placement with a parent who has fulfilled the child's physical needs and the child's psychological needs for care and affection, and who has assumed that role for a substantial period of time. A finding of detriment to the child does not require a finding of unfitness of any of the parents or persons with a claim to parentage.

California law also allows courts to recognize more than two legal parents through adoption.

CAL. FAM. CODE § 8617(b)

(b) The termination of the parental duties and responsibilities of the existing parent or parents under subdivision (a) may be waived if both the existing parent or parents and the prospective adoptive parent or parents sign a waiver at any time prior to the finalization of the adoption. The waiver shall be filed with the court.

(b) Delaware

Delaware law permits a court to conclude that a child has three legal parents – two people who are legal parents through some mechanism *other than* de facto parentage, and one person who is a legal parent under the de facto parent provision. *See, e.g.,* *Jw. S. Jr. v. Em. S.*, 2013 WL 6174814 (Del. Fam. Code 2013) (recognizing child's biological father as a legal father on the basis of genetics and recognizing the mother's former husband as a statutory "de facto" parent).

DEL. CODE ANN. tit. 13, § 8-201(a)(4), (b)(6), (c)

(a) The mother-child relationship is established between a woman and a child by:

...

(4) A determination by the court that the woman is a de facto parent of the child; or

(b) The father-child relationship is established between a man and a child by:

...

(6) A determination by the court that the man is a de facto parent of the child

(c) De facto parent status is established if the Family Court determines that the de facto parent:

- (1) Has had the support and consent of the child's parent or parents who fostered the formation and establishment of a parent-like relationship between the child and the de facto parent;
- (2) Has exercised parental responsibility for the child as that term is defined in § 1101 of this title; and
- (3) Has acted in a parental role for a length of time sufficient to have established a bonded and dependent relationship with the child that is parental in nature.

(c) District of Columbia

For children born through assisted reproduction, the DC statutes permit courts to conclude that a child has three legal parents -- the woman who gave birth, the person who consented to the woman's insemination, and the donor if the donor and the woman agree that the donor will be a parent.

D.C. CODE ANN. § 16-909(e)

(e)(1) A person who consents to the artificial insemination of a woman as provided in subparagraph (A) or (B) of this paragraph with the intent to be the parent of her child, is conclusively established as a parent of the resulting child.

...

(2) A donor of semen to a person for artificial insemination, other than the donor's spouse or domestic partner, is not a parent of a child thereby conceived unless the donor and the person agree in writing that said donor shall be a parent.

(d) Louisiana

Louisiana courts have held that a child can have a legal mother and two legal fathers. *Warren v. Richard*, 296 So.3d 813, 815 (La. 1974).³⁷

(e) Maine

Maine statutes expressly permit a court to conclude that a child has more than two legal parents.

ME. REV. STAT., tit. 19-A, § 1853(2)

Consistent with the establishment of parentage under this chapter, a court may determine that a child has more than 2 parents.³⁸

³⁷ Note, however, that Louisiana has amended its statutory provisions so that it is now more difficult for a biological father to establish his relationship with the child where the child already has a legal father. *See, e.g.*, June Carbone & Naomi Cahn, *Parents, Babies, and More Parents*, -- MD. L. REV. --, 8 (forthcoming). Now, "the biological father has only one year in which to establish paternity in cases in which the child already has a legal father." *Id.*

³⁸ *See also* ME. REV. STAT., tit. 19-A, § 1891(5) ("The adjudication of a person under this subchapter as a de facto parent does not disestablish the parentage of any other parent.").

(f) Third parent adoptions

In addition, third parent adoptions have been reported in the following states:

- Alaska,
- California,
- Massachusetts,
- Oregon, and
- Washington³⁹

³⁹ Nancy D. Polikoff, *Where Can a Child Have Three Parents*, <http://beyondstraightandgaymarriage.blogspot.com/2012/07/where-can-child-have-three-parents.html>.