

## MEMORANDUM

**To: Uniform Law Commissioners**  
**From: Jamie Pedersen (Chair) and Courtney Joslin (Reporter),**  
**Uniform Parentage Act Drafting Committee**  
**Re: Second Reading of the Uniform Parentage Act (2017)**  
**Date: June 9, 2017**

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This memorandum provides an overview of the work of the drafting committee to revise the Uniform Parentage Act (UPA) and highlights sections that have been the focus of conversation and consideration during the drafting process.

The UPA was originally promulgated in 1973 in response to a series of Supreme Court decisions holding unconstitutional the differential treatment of nonmarital children. The UPA was substantially revised in 2000 and 2002.

### **I. Committee Charge**

In November 2015, the Committee on Scope and Program recommended to the Executive Committee formation of a drafting committee to amend the Uniform Parentage Act. 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 the drafting committee was formed.

The Scope and Program Committee and the Executive Committee subsequently gave the drafting committee authority to make additional, nonsubstantive revisions to the UPA to improve its clarity and flow (June 2016); to revise, rather than merely amend, the UPA (August 2016); to address the issue of de facto parentage (January 2017); and to address the parentage of children conceived through sexual assault (April 2017).

### **II. Committee Process**

The drafting committee was structured to include current or former legislators from Washington, Idaho, Nevada, Minnesota, and Colorado and significant political diversity. The committee has also benefitted from a large and engaged group of observers, including representatives from the American Academy of Assisted Reproductive Technology Attorneys, the American Academy of Matrimonial Lawyers, the American Bar Association Family Law Section, the American College of Trust and Estate Counsel, LabCorp, the National Association for Public Health Statistics and Information Systems, the National Center for Lesbian Rights, the National Center for State Courts, the National Child Support Enforcement Association, the federal Office of Child Support Enforcement, and the Society for Assisted Reproductive Technology.

The drafting committee agreed at its first in-person meeting in March 2016 that the committee’s objective should be to create an act that can be widely adopted. The committee held two more in-person meetings, in October 2016 (Minneapolis) and March 2017 (Seattle),

to read and review proposed changes to the entire act. In addition, the committee held eight telephone meetings to discuss thorny issues in the UPA such as whether and under what circumstances to treat de facto parents as legal parents; whether to limit the number of legal parents a child may have; the effect of noncompliant surrogacy agreements; and parentage of children born through sexual assault.

### III. Major Issues

The 2017 revisions to the UPA primarily address five issues.

#### A. Equal Treatment of Children Born to Same-Sex Couples

First, UPA (2017) seeks to ensure the equal treatment of children born to same-sex couples. UPA (2002) is written in gendered terms and its provisions presume that couples consist of one man and one woman. For example, the marital presumptions in UPA (2002) Section 204 provided that a “man is presumed to be the father of a child if . . . he and the mother are married to each other and the child is born during the marriage.” UPA (2002) § 204(a)(1).<sup>1</sup> Provisions applicable to unmarried couples likewise presumed that couples consist of one man and one woman. Section 703 of the UPA (2002), for example, provided 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.” UPA (2002) § 703.<sup>2</sup>

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 same-sex couples differently than 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 same-sex couples likely was unconstitutional. Under the Utah Uniform Parentage Act, which is modeled on the UPA (2002), 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 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). See also *McLaughlin v. Jones*, 382 P.3d 118, 122 (Ariz. Ct. App. 2016), review granted (holding that “*Obergefell* requires us to apply [Arizona’s marital presumption]” in a “gender-neutral” manner).

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<sup>1</sup> Other provisions of UPA (2002) clarified that a husband could be and often was a child’s legal parent under the marital presumption even if he was not the child’s genetic parent. For example, under UPA (2002), § 607(a), the marital presumption could not be challenged after the child’s second birthday. And even within the first two years of the child’s life, the court could deny the man’s request for genetic testing based on consideration of a list of enumerated factors, including the man’s relationship with the child. UPA (2002) § 608.

<sup>2</sup> Thus, under Article 7 of the UPA (2002), a man who consented to a woman’s insemination with the intent to be a parent was a legal parent regardless of his genetic connection to the child.

UPA (2017) updates the Act to address this potential constitutional infirmity by amending provisions throughout the Act so that they address and apply equally to same-sex couples. These revisions include broadening the presumptions (Section 204), and the acknowledgment (Article 3), genetic testing (Article 5), and assisted reproduction articles (Articles 7 and 8) to make them gender-neutral where appropriate. Thus, revised Section 204(a)(1)—the marital presumption—now states that “*an individual* is presumed to be a parent of the child if . . . the individual and the woman who gave birth to the child are married . . . and the child is born during the marriage.” (emphasis added). Revised Section 301 creates a process for some non-biological parents to establish parentage without court involvement through an acknowledgement filed with an administrative agency. This new process may be particularly useful for lesbian couples. And revised Section 703—the assisted reproduction provision—provides: “*An individual* who consents under Section 704 to assisted reproduction by a woman with the intent to be a parent of a child conceived by assisted reproduction is a parent of the child.” (emphasis added). Article 8, governing surrogacy, was likewise updated to apply equally to same-sex intended parents. Several states, including California, Illinois, Maine, Nevada, New Hampshire, and Washington, have already made similar changes to ensure that their parentage provisions apply equally to same-sex couples.

## **B. De Facto Parents**

Second, UPA (2017) includes a provision for the establishment of a de facto parent as a legal parent of a child. Most states extend at least some parental rights to people who, while not biological parents, functioned as parents with the consent of the child’s legal parent. 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. Other states extend rights to such people through broad third party custody and visitation statutes. And, several states treat such people as legal parents under their parentage statutes. Two states—Delaware and Maine—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, New Hampshire, and New Mexico, have reached this conclusion by applying other parentage provisions to such persons. New Section 609 follows the Delaware and Maine approach of expressly recognizing de facto parentage by statute. This is consistent with the current trend and is consistent with a core purpose of the UPA, which is to protect established parent-child relationships.

At the same time, however, the de facto parent provision (Section 609) erects safeguards to ensure that it does not result in unwarranted or unjustified litigation. Section 609 includes a heightened standing requirement. Section 609 also sets forth a series of robust substantive standards that must be established before a court can adjudicate an individual to be a de facto parent. Because of these requirements, an individual who is functioning as a parent only temporarily would not qualify. Among other requirements, to be adjudicated a parent under Section 609, the individual must have lived with the child as a regular member of the child’s household for a significant period, the individual must have held the child out as the individual’s child, and the individual must have established a bonded and dependent

relationship with the child that is parental in nature. Moreover, this relationship must have been formed with the support of the child's parent. Thus, an individual cannot unilaterally become a de facto parent. In addition, only the alleged de facto parent can file an action under Section 609. This limitation was added to address concerns that unsuspecting stepparents or partners might be pursued for child support after the break down of the adults' relationship. Finally, Section 609 requires that the action to establish de facto parentage be commenced before the death of the child and the alleged de facto parent, and before the child reaches 18 years of age. This limitation was added to address probate-related concerns.

### **C. Parentage of Children Born as the Result of Sexual Assault**

Third, UPA (2017) adds a new a provision that precludes the establishment of a parent-child relationship by the perpetrator of a sexual assault that resulted in the conception of the child. The U.S. Congress adopted the Rape Survivor Child Custody Act in 2015. The federal statute provides financial incentives for states to enact "a law that allows the mother of any child that was conceived by rape to seek court-ordered termination of the parental rights of her rapist regarding that child, which the court shall grant upon clear and convincing evidence of rape." 42 U.S.C. § 14043h-2. In 2017, at least 17 state legislatures were considering bills to enact such statutes.<sup>3</sup> New Section 614 of the UPA (2017) provides language to enable states to comply with the new federal statute.

### **D. Surrogacy Provisions**

Fourth, UPA (2017) updates the surrogacy provisions of the UPA to reflect developments in that area. States have been particularly slow to enact the surrogacy provisions of UPA (2002). Eleven (11) states adopted UPA (2002).<sup>4</sup> Of these eleven (11) states, *only two* (2)—Texas and Utah—enacted the surrogacy provisions based on Article 8 of UPA (2002). At least five (5) of the eleven (11) states that enacted the UPA (2002) choose to address surrogacy, but to do so with provisions that are *not* premised on the UPA (2002). 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 UPA (2002) enacted provisions permitting surrogacy that are not modeled on Article 8 of UPA (2002) suggests that the small number of enactments is also due to lack of enthusiasm for the substance of Article 8 of UPA (2002). Moreover, much has changed in surrogacy practice since those provisions were first drafted, over 15 years ago. Accordingly, UPA (2017) updates the surrogacy provisions to make them more consistent with current surrogacy practice.

UPA (2017) continues to permit and regulate both gestational and genetic (also referred to as "traditional") surrogacy agreements. But unlike UPA (2002), UPA (2017)

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<sup>3</sup> National Conference of State Legislatures, *Parental Rights and Sexual Assault*, <http://www.ncsl.org/research/human-services/parental-rights-and-sexual-assault.aspx>.

<sup>4</sup> 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*.

distinguishes between the two types of agreements, both because there are factual differences between the two types of agreements, and because policymakers have treated the two types of agreements differently. The surrogacy provisions of UPA (2002), which, again, applied to both gestational and genetic surrogacy, were premised on an adoption-based model. This approach has not taken hold and does not reflect contemporary practice. Accordingly, UPA (2017) jettisons the adoption-based model regarding gestational surrogacy agreements in favor of procedures that better accord with contemporary practice. For example, UPA (2017) does not require pre-pregnancy validation for gestational surrogacy agreements.

At the same time, UPA (2017) adds additional requirements for genetic surrogacy agreements. Pre-pregnancy validation is required for genetic surrogacy agreements. UPA (2017) also permits genetic surrogates to withdraw consent up until 72 hours after the birth of the child. This withdrawal-of-consent rule is similar to the approach taken in the limited number of states that permit genetic surrogacy arrangements.

UPA (2017) also adds some new provisions to address issues that had been unaddressed previously, including the remedies that are available in the event of a breach, and the rules for determining parentage in the event of the death of an intended parent.

#### **E. Children’s Right to Access to Information about Gamete Providers**

Finally, UPA (2017) 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.”<sup>5</sup> Data suggest that this percentage continues to increase.<sup>6</sup> 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 a gamete donor. It does, however, require covered facilities to collect identifying information and medical history information from gamete donors, and to obtain a declaration from gamete donors addressing whether they would like their identity disclosed upon request once the child turns 18. In addition, regardless of whether the donor’s identity is disclosed, Article 9 requires covered facilities to make a good faith effort to disclose *nonidentifying medical history* information regarding the gamete donor upon request.

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<sup>5</sup> Centers for Disease Control, ART Success Rates, <http://www.cdc.gov/art/reports/> (last updated February 24, 2016).

<sup>6</sup> 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%”).