

As promised, here are some detailed comments to the Parentage Act. I have incorporated your limitation of at most two parents. See my section 204½. I have not taken a position on your strict rules for donation and surrogacy. Those will vary in any state that considers this act. However, there are now situations that will not fall within your limitations, where individuals structure relationships that will not be handled easily within a traditional two parent family. I expressed surprise in Stowe with the extraneous provision in the Non-Parent Custody Act that covered some of these situations. They may have to broaden that provision given your approach. And you may have to make reference to it in comments.

Your basic problem in the parts of the Act that concern me is that you have put patches on an act that needs more. Gender neutralizing the provisions just shows up problems. Some of the problems were pre-existing; others are introduced by gender neutralizing. In addition, the patching and re-patching obscures the basic provisions. It is time for a wholesale re-write. I know; the problem is caused by Scope. It is a ULC tradition to blame anything that cannot be blamed on Style on Scope. But I think that the project would be improved by taking an extra year and starting from scratch in close co-ordination with Non-Parent Custody. Anyway, here are a few reactions. I do not promise that I will not have more in San Diego.

Sec 102. Obviously, the definitions will need some adjustment to reflect substantive changes.

Sec 106. This section is probably unnecessary now, but it certainly will be with the changes implementing rational gender neutrality.

Sec 201 and 203. Too many words. And it duplicates part of the presumption section (or what replaces it) and the acknowledgment section and several others. How about just the substance of 203 with the underlined addition:

Unless parental rights are terminated, or parentage is changed by adoption, a parent-child relationship established under this [Act] applies for all purposes, except as otherwise specifically provided by other law of this State.

Or

Parentage of a child for all purposes shall be determined by:

- (1) the provisions of this act;
- (2) law regarding adoptions [cite]; and
- (3) law on termination of parental rights [cite].

Sec 202. This is not true. The Act gives rights to a spouse that are not given to an unmarried person. And while this provision may have been necessary some years ago to kill old common law, it is no longer useful. If you establish clear provisions about parentage, you will make only the distinctions as to marriage that you intend.

Sec 204. As I explained in my first, short, set of comments, this section presents major problems. First, it is a mixture of things that cannot be lumped together. The section includes a factual presumption and a bunch of legal rules couched in presumption terms. For example, the old factual presumption that the husband was the father had a purpose 50 years ago when we had to rely on blood type. Now, if there is

a question of biological parentage, we have good scientific tools to answer the question. Gender neutralizing the “presumption raises the question remains how much right do you want to give to a spouse who is biologically unconnected to the child.

In my redraft, I have assumed that a spouse who wants to assume parentage should have that right irrespective of the claims of an outsider who is the biological father. This decision protects the family unit and is key to protecting two female marriages. However, that principle has an unfortunate effect of protecting the husband of a surrogate where the surrogacy does not meet the strict limitations of Article 8. If you think that that is a problem, an exception can be drafted. More generally, I have made many judgments as to what legal rules you intend. Your language allows many interpretations, I hope I am right.

The structure of “presumptions” and exceptions to them in sections 607b and 612 is not completely clear as to your intent as to the legal rules they implement. That is a problem generally; the law should be clear as to who is a child’s parent. Remember that when the Act was read to the Commission, it was clear to you, but not to me, that you intended a limit of two parents. If I have misinterpreted any of your intent, my redraft can be adjusted to reflect the difference. Also, though I hate using the word “presumption” for things that are not presumptions, I have used the phrase “presumptive parent” because I could not come up with a better one.

204. Presumptive Parents.

a. A woman, other than a surrogate as provided by Article 8, who gives birth to a child is that child’s parent.

b. The spouse of a woman who is a parent as provided in subsection (a) or as provided in Article 8, is the parent of the child if:

(1) the spouse asserts the right to parentage of the child, or

(2) neither the father nor any other person has commenced a proceeding to determine parentage, or

(3) a proceeding to determine parentage has not been commenced within two years after the birth of the child, or

(4) the spouse is the biological father of the child.

c. The spouse is not the parent of the child if the spouse has filed a denial of parentage under Article 3 and is not the biological father of the child.

204½ Other Parent.

If the spouse of a woman who is a parent as provided in subsection (a) or as provided in Article 8, is not the parent of the child, the biological father of the child who acknowledges parentage of the child under Article 3 or is found to be the biological father under Article 6 is the parent of the child.

302. I have some qualms with details. Subsection (b) makes the acknowledgment void if there is a presumed parent. That seems broad. The presumed parent may be a spouse who does not wish to claim the child, but who has not acted yet. I assume that what you then contemplate is a court decision rather than an acknowledgement, but that is not as clear as it could be.

303. This is a good and important provision. But. Subsection (1) seems to be a mistake. Whether or not there is another parent in the wings, the spouse may want to opt out. There may be no possibility

that the spouse is a genetic parent and no desire to claim the child. Consider a situation where there is assisted reproduction that the spouse did not condone. There might never be another parent available, but everyone may agree that the spouse has no responsibility. A similar situation would occur in the more common case of an undisclosed or unknown genetic father. I assume that you are relying on the exception to the old husband presumption of parentage to solve the problem, but it is not broad enough. Moreover, if anyone disputes the denial of parentage, a court decision would be necessary.

307. Is this necessary given 305? I assume that you are putting out a fire that I have not seen.

308 and 309. Can anyone else challenge an acknowledgement? What if the mother disagrees? Support agencies have been known to be a little overeager to settle the matter quickly.

Article 5. From time to time I have commented that ULA products have more words and more detail than is necessary. And that detail can be a problem. It is not that one cannot see the forest for the trees; it is that one cannot see the forest or even the trees for the leaves. I would make this a single section allowing genetic testing (though even that is unnecessary) and listing those who may be compelled to provide samples.

602. As I said in Stowe, there may be others who would be affected by a parentage decision. The New Jersey case involved beneficiaries of a grandfather trust. I think that parties with a legal interest should be permitted to bring an action, though they should not be necessary parties under 603.

The importance of this point is reduced greatly if you adopt clear, firm rules as to who is a parent such as the ones I drafted for Section 204. The vague and flexible rules in current 204, 607 and 612 raise the issue squarely and may even give it a Constitutional base.

607. I would delete subsection (b). Part of this is a holdover from the old factual presumption. It is meaningless in the broadened concept of a spouse as a presumed parent. Two years is long enough to allow the spouse to opt in or out. Of course, there are strong voices to allow biological parentage to be re-examined at least until the child is out of college. Testimony at a Legislative hearing on this subject centered on instances of late discovery (often in the context of divorce proceedings) that the husband was not the biological father.

609. Delete this section. "in the report" what report? But more generally, under every set of Rules of Evidence that I have worked with, relevant evidence is generally admissible. All that this provision could do is to complicate what is an easy issue. You have already approved pages and pages allowing genetic testing. Of course, it is admissible. Otherwise why is it allowed?

611. This section has to be recast completely. First, stating the prerequisite in terms of the existence of a presumed parent causes problems. Is the situation different if the spouse died? Or the birth mother died? Second, you are covering situations where the issue is whether a particular person is the biological father and that is a relevant issue. Clarity is necessary because there are situations where biology is relevant and those where it is not. The situations where it is not relevant include donation, approved surrogacy and, in my formulation, where there is spouse who is a presumed parent. So here is a redraft. I have left in provisions that seem to me to be surplusage; a new provision is underlined:

611. Adjudicating genetic parentage. If genetic parentage is the basis for determining whether an individual is a parent of the child, the following rules apply.

(1) The court shall issue an order declaring the individual to be the child's parent if:

(A) the individual is identified as the genetic parent of the child under Section 505 3 and that identification is not successfully challenged under Section 505; or

(B) the individual admits parentage by filing a pleading to that effect or by admitting parentage under penalty of perjury when making an appearance or during a hearing and the court finds that there is no reason to question the admission, or

(C) the Court determines from evidence presented that the individual is the genetic father of the child.

(2) If the individual whose genetic parentage is being determined declines to submit to genetic testing ordered by the court, the court may adjudicate parentage contrary to the position of the individual.

(3) If the individual whose genetic parentage is being determined is in default after service of process and is found by the court to be the parent of the child, the court shall issue an order adjudicating the individual to be the child's parent.

(4) If the court finds that the genetic testing neither identifies nor excludes the individual as the genetic parent of the child, the court may not dismiss the proceeding. In that event, the results of genetic testing, and other evidence, are admissible to adjudicate the issue of parentage.

612. I would delete this provision entirely. Competing claims based on the legal position of the parties are decided on the law and facts proved. With clarified rules, the decisions look like any others that a court must make based on the facts proved and the law applicable. What made the section necessary was the vague rules that were merely presumptions. That scheme could lead a judge to substitute his judgment as to who would be a "better" parent for the child. That consideration is inappropriate in deciding matters of basic rights of the parties.