

REVISED UNIFORM PARENTAGE ACT 2017

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UPA § 201(7): This subsection refers only to consent under Article 7. UPA § 704(b) allows for parentage to be established by residing with the child during the first two years of the child’s life and holding out the child as the individual’s own. UPA § 705, having to do with the spouse of the woman who gave birth, has another set of rules that determines the spouse as a parent of the child. Article 7 does not define consent to include these two provisions.

UPA § 201(7) could be redrafted to address this issue as follows: *individual other than the woman who gave birth to the child [determined] [established] as a parent under Article 7.* [Italics indicate new language; I follow this convention throughout this memorandum.]

UPA § 202: The comments should indicate that the Act does establish parentage of a child based on marital status in some instances. E.g., UPA §§ 204(a)(1); 705. It would be even more preferable for these provisions to be in the statutory provision itself [“*Except for Sections . . . , the parent-child relationship . . .*”].

UPA § 204(a): The exception clause relating to Article 8 should be expanded to include Article 7 and should be placed in (a) and not in (a)(1). UPA §§ 704(b) and 705 provide specific rules (albeit § 704 is substantively the same as § 204(a)(2)) establishing parentage, making UPA § 204(a) inapplicable. That should be made clear in the text of UPA § 204(a).

UPA § 205(3): The subsection should refer to *financial benefit* rather than “financial compensation.” A concern of the Uniform Probate Code [UPC] is that an individual will claim parental status for financial advantage, such as becoming eligible to share in tort damages or an inheritance. The term benefit, as opposed to the term compensation, would allow a court to investigate more broadly the question of whether an alleged de facto parent was trying to gain a financial advantage by becoming a parent of the child.

UPA § 205(6): What if another parent disagrees and does not support the bonded and dependent relationship? With the possibility of more than two parents under UPA § 611, this provision should indicate whether all the parents must support the alleged de facto parent’s claim.

Harry L. Tindall’s proposed UPA § 205(c): I disagree with Harry’s solution because it fails to give a child or a representative of a child a right to adjudicate an individual as a de facto parent. I share his concern about stepparent situations. That concern is exacerbated by UPA § 609(2), which mandates that a court adjudicate an individual alleged to be a de facto parent to be a parent if “there is no other [individual] [party] other than the woman who gave birth with a claim to parentage under this [act].” Consider the following example: A single person adopts a child, resulting in the termination of all parental rights of the child’s biological parents. That person marries an individual with

children from a prior relationship while the adopted child is still a minor. Only the “holding out” requirement may prevent the stepparent from becoming a de facto parent. This is troubling in the inheritance arena because it creates the potential for conflict between the half-siblings. The stepparent’s children from a prior relationship may already resent their parent’s largesse toward the adopted child and to have that child inherit without the stepparent taking the extra step of actually adopting the child. This problem is ameliorated to some extent by the fact that the adjudication occurs before the stepparent’s death under UPA § 609. Nevertheless, it requires the stepparent to take affirmative steps to execute a will, trust, etc. to assure that the child does not inherit. I too share Harry’s concern about the chilling effect on stepparents who in good faith want to participate in a child’s life. I suggest we add a further requirement under UPA § 205 that provides the following:

(8) If the individual at the time of the adjudication of de facto parentage is a stepparent to the child, it is established that the stepparent would have adopted the person but for legal barrier.

Proof of a legal barrier would be subject to the clear and convincing requirement otherwise provided in UPA § 205. This provision is based on Cal. Prob. Code § 6454, having to do with inheritance by foster parents and stepparents.

Article 5: Reference to paternity needs to be reconsidered given the possibility that there may be a need to have genetic testing of a woman who gave birth. I’m thinking particularly of the genetic testing issue raised in UPA § 808(c), having to do with a gestational surrogate alleged to be the genetic mother of the resulting child. A similar issue of genetic testing arises in UPA § 808(d) if a laboratory error was made with regard to gamete from a female donor.

UPA § 621(d): This section provides that “a determination of parentage may be a defense in a subsequent proceeding seeking to adjudicate parentage of an individual who was not a party to the earlier proceeding.” Why should this be true now that the UPA allows for numerosity?

UPA § 704(a): Should there be a time limit on signing this record? This is another area where we might be concerned if the signing coincides with acquiring a financial advantage, such as eligibility for a tort claim. *Cf* UPC § 2-120(g).

UPA § 704(b): As indicated in Courtney’s commentary, the issue regarding children born or conceived posthumously has been addressed by the UPC. I propose the following language that would make the two acts consistent:

(b) Failure to consent in a record as required by subsection (a), before or after birth of the child, does not preclude a finding of parentage if

- (1) the woman giving birth and the individual, during the first two years of the child’s life, including periods of temporary absence, resided together in the same household with the child and openly held out the child as the individual’s own child,

(2) *the woman giving birth and the individual intended to reside together in the same household with the child and have the individual openly hold out the child as the individual's own child, but was prevented from carrying out that intent by death, incapacity, or other circumstances; or*

(3) *the individual intended to be treated as a parent of a posthumously conceived child and that intent is established by clear and convincing evidence.*

(c) If the woman who gave birth to the child is a surviving spouse and at her deceased spouse's death no divorce proceeding was pending, in the absence of clear and convincing evidence to the contrary, her deceased spouse satisfies subsection (b)(2) and (b)(3).

UPA §§ 704(a) & 708: This provision is not necessary if you adopt the language proposed above. If the individual consents in a record, that would constitute clear and convincing evidence. For purposes of clarity on this issue, UPA § 704(a) could be redrafted as follows:

(a) Under Section 703, consent to assisted reproduction by the woman giving birth to the child and the individual who intends to be the parent of a child born through assisted reproduction must be in a record. *This consent does not extend to the transfer of gametes or embryos after the individual dies unless expressly stated in the record.*

UPA § 808(d): What if resulting child is not genetically related to donor or to an intended parent who provided gamete, but to an individual that had sexual intercourse with the gestational surrogate? This is the parallel issue that arises in gestational surrogacy under UPA § 813(d). Perhaps this issue should be addressed in a separate subsection and not in (d) itself.

UPA § 814(c): Why don't we allow a court to determine the respective rights and obligations of the parties to a nonvalidated gestational agreement in the same way we do for gestational surrogacy agreements under UPA § 810(b), under which a court is authorized to "determine the respective rights and obligations of the parties to the agreement consistent, to the maximum extent possible, with the intent of the parties at the time of the execution of the agreement"?

Article 8: This article does not address the problems of death or incapacity nor the possibility of a posthumously conceived child.

UPA § 803 should contain a subsection as follows:

The agreement must address the circumstances of conception after the death or incapacity of an individual parent.

I would recommend the following statutory provisions for placement within Article 8 as you determine best.

- (a) *Failure to include a provision in the agreement related to conception of a child after the death or incapacity of an intended parent as required under Section 803 (X) does not preclude a finding of parentage of a child if the individual intended to be treated as a parent of a posthumously conceived child and that intent is established by clear and convincing evidence.*
- (b) *For purposes of subsection (a), unless there is clear and convincing evidence of a contrary intent, an individual is deemed to have intended to be treated as the parent of a posthumously conceived child if the individual's spouse or surviving spouse resided together in the same household with the child and openly held out the child as the spouse's own child no later than two years after the child's birth.*