

# UNIFORM PARENTAGE ACT (2017)

drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS  
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT  
IN ALL THE STATES

at its

ANNUAL CONFERENCE  
MEETING IN ITS ONE-HUNDRED-AND-TWENTY-SIXTH YEAR  
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By  
NATIONAL CONFERENCE OF COMMISSIONERS  
ON UNIFORM STATE LAWS

September 22, 2017

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## **UNIFORM PARENTAGE ACT (2017)**

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## UNIFORM PARENTAGE ACT (2017)

### PREFATORY NOTE

The Uniform Parentage Act (UPA) was originally promulgated in 1973 (UPA (1973)). UPA (1973) removed the legal status of illegitimacy and provided a series of presumptions used to determine a child's legal parentage. A core principle of UPA (1973) was to ensure that "all children and all parents have equal rights with respect to each other," regardless of the marital status of their parents. UPA (1973) § 2, Comment.

The UPA was revised in 2002 (UPA (2002)). UPA (2002) augmented and streamlined UPA (1973). UPA (2002) added provisions permitting a non-judicial acknowledgment of paternity procedure that is the equivalent of an adjudication of parentage in a court and added a paternity registry. UPA (2002) also included provisions governing genetic testing and rules for determining the parentage of children whose conception was not the result of sexual intercourse. Finally, UPA (2002) included a bracketed Article 8 to authorize surrogacy agreements.

UPA (2017) makes five major changes to the UPA. First, UPA (2017) seeks to ensure the equal treatment of children born to same-sex couples. UPA (2002) was written in gendered terms, and its provisions presumed that couples consist of one man and one woman. For example, Section 703 of UPA (2002) 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."

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. Even more recently, in June 2017, the Supreme Court held that a state may not, consistent with *Obergefell*, deny married same-sex couples recognition on their children's birth certificates that the state grants to married different-sex couples. *Pavan v. Smith*, 137 S. Ct. 2075, 2078-79 (2017). After *Obergefell* and *Pavan*, parentage laws that treat same-sex couples differently than different-sex couples may be unconstitutional. For example, in September 2017 the Arizona Supreme Court held that refusing to apply that state's marital presumption equally to same-sex spouses would violate the Due Process and Equal Protection Clauses of the United States Constitution. *McLaughlin v. Jones*, slip op. at 9 (Ariz. 2017) ("The marital paternity presumption is a benefit of marriage, and following *Pavan* and *Obergefell*, the state cannot deny same-sex spouses the same benefits afforded opposite-sex spouses."). See also *Roe v. Patton*, 2015 WL 4476734, \*3 (D. Utah. 2015) (concluding that the plaintiffs were "highly likely to succeed in their claim" that extending the "benefits of the assisted reproduction statutes [which are based on UPA (2002)] to male spouses in opposite-sex couples but not for female spouses in same-sex couples" was unconstitutional). As the Arizona Supreme Court explained in *McLaughlin*, state legislatures, like state courts, are "obliged to follow the United States Constitution. . . . Through legislative enactments and rulemaking, [the] coordinate branches of government can forestall unnecessary litigation and help ensure that [state] law guarantees same-sex spouses the dignity and equality the Constitution requires—namely the same benefits afforded couples in opposite-sex marriages." *McLaughlin v. Jones*, slip op. at 13 (Ariz. 2017). UPA (2017) helps state legislatures address this potential constitutional infirmity by amending provisions throughout the act so that they address

and apply equally to same-sex couples. These changes include broadening the presumption, acknowledgment, genetic testing, and assisted reproduction articles to make them gender-neutral.

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 changes include broadening the presumption, acknowledgment, genetic testing, and assisted reproduction articles to make them gender-neutral.

Second, UPA (2017) includes a provision for the establishment of a de facto parent as a legal parent of a child. Most 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. 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 standing statutes. And, more recently, states have begun to treat such people as legal parents under their parentage provisions. 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, reached this conclusion by applying their existing parentage provisions to such persons. New Section 609 provides a process for the establishment of parentage by those who claim to be de facto parents.

Third, UPA (2017) includes a provision that precludes establishment of a parent-child relationship by the perpetrator of a sexual assault that resulted in the conception of the child. The United States Congress adopted the Rape Survivor Child Custody Act in 2015, which provides 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 with regard to that child, which the court shall grant upon clear and convincing evidence of rape.” In 2017, at least 17 state legislatures were considering bills to enact such statutes. New Section 614 provides language to implement the federal law.

Fourth, UPA (2017) updates the surrogacy provisions to reflect developments in that area. States have been particularly slow to enact Article 8 of UPA (2002). Eleven states adopted versions of UPA (2002).<sup>1</sup> Of these 11 states, only two – Texas and Utah – enacted the surrogacy provisions based on Article 8 of UPA (2002). At least five of the 11 states that enacted UPA (2002) enacted surrogacy provisions that are *not* premised on the 2002 UPA. These states include: Delaware (permitting) (enacted 2013); Illinois (permitting) (enacted 2004); Maine (permitting) (enacted 2015); North Dakota (banning) (enacted 2005); and Washington (banning compensated) (enacted 1989).

The fact that very few states enacted Article 8 is likely the result of a confluence of factors. One

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<sup>1</sup> The eleven states are: Alabama, Delaware, Illinois, Maine, New Mexico, North Dakota, Oklahoma, Texas, Utah, Washington, and Wyoming. *See* Uniform Law Commission, *Legislative Fact Sheet – Parentage Act*.

likely factor is the controversial nature of surrogacy itself. But the fact that four of the states that enacted UPA (2002) have provisions permitting surrogacy that are not modeled on Article 8 of UPA (2002) suggests that the small number of enactments is also affected by the substance of Article 8. Accordingly, UPA (2017) updates the surrogacy provisions to make them more consistent with current surrogacy practice.

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 2015, the CDC reports that “approximately 1.6% of all infants born in the United States every year are conceived using ART.”<sup>2</sup> Data suggest that this percentage continues to increase. 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%”). 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, but it does require gamete banks and fertility clinics to ask donors if they want to have their identifying information disclosed when the resulting child attains 18 years of age. It does require disclosure of non-identifying medical history of the gamete donor.

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<sup>2</sup> Centers for Disease Control, ART Success Rates, <http://www.cdc.gov/art/reports/> (last updated May 4, 2017).

**UNIFORM PARENTAGE ACT (2017)**

**[ARTICLE] 1**

**GENERAL PROVISIONS**

**SECTION 101. SHORT TITLE.** This [act] may be cited as the Uniform Parentage Act (2017).

**SECTION 102. DEFINITIONS.** In this [act]:

(1) “Acknowledged parent” means an individual who has established a parent-child relationship under [Article] 3.

(2) “Adjudicated parent” means an individual who has been adjudicated to be a parent of a child by a court with jurisdiction.

(3) “Alleged genetic parent” means an individual who is alleged to be, or alleges that the individual is, a genetic parent or possible genetic parent of a child whose parentage has not been adjudicated. The term includes an alleged genetic father and alleged genetic mother. The term does not include:

(A) a presumed parent;

(B) an individual whose parental rights have been terminated or declared not to exist; or

(C) a donor.

(4) “Assisted reproduction” means a method of causing pregnancy other than sexual intercourse. The term includes:

(A) intrauterine or intracervical insemination;

(B) donation of gametes;

(C) donation of embryos;

(D) in-vitro fertilization and transfer of embryos; and

(E) intracytoplasmic sperm injection.

(5) “Birth” includes stillbirth.

(6) “Child” means an individual of any age whose parentage may be determined under this [act].

(7) “Child-support agency” means a government entity, public official, or private agency, authorized to provide parentage-establishment services under Title IV-D of the Social Security Act, 42 U.S.C. Sections 651 through 669.

(8) “Determination of parentage” means establishment of a parent-child relationship by a judicial or administrative proceeding or signing of a valid acknowledgment of parentage under [Article] 3.

(9) “Donor” means an individual who provides gametes intended for use in assisted reproduction, whether or not for consideration. The term does not include:

(A) a woman who gives birth to a child conceived by assisted reproduction[, except as otherwise provided in [Article] 8]; or

(B) a parent under [Article] 7[ or an intended parent under [Article] 8].

(10) “Gamete” means sperm, egg, or any part of a sperm or egg.

(11) “Genetic testing” means an analysis of genetic markers to identify or exclude a genetic relationship.

(12) “Individual” means a natural person of any age.

(13) “Intended parent” means an individual, married or unmarried, who manifests an intent to be legally bound as a parent of a child conceived by assisted reproduction.

(14) “Man” means a male individual of any age.

(15) “Parent” means an individual who has established a parent-child relationship under Section 201.

(16) “Parentage” or “parent-child relationship” means the legal relationship between a child and a parent of the child.

(17) “Presumed parent” means an individual who under Section 204 is presumed to be a parent of a child, unless the presumption is overcome in a judicial proceeding, a valid denial of parentage is made under [Article] 3, or a court adjudicates the individual to be a parent.

(18) “Record” means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(19) “Sign” means, with present intent to authenticate or adopt a record:

(A) to execute or adopt a tangible symbol; or

(B) to attach to or logically associate with the record an electronic symbol, sound, or process.

(20) “Signatory” means an individual who signs a record.

(21) “State” means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession under the jurisdiction of the United States. The term includes a federally recognized Indian tribe.

(22) “Transfer” means a procedure for assisted reproduction by which an embryo or sperm is placed in the body of the woman who will give birth to the child.

(23) “Witnessed” means that at least one individual who is authorized to sign has signed a record to verify that the individual personally observed a signatory sign the record.

(24) “Woman” means a female individual of any age.

## Comment

As was true of UPA (2002), UPA (2017) utilizes separate classifications of parents. Five of the classifications—acknowledged parents, adjudicated parents, alleged genetic parents, intended parents, and presumed parents—are largely carried over from UPA (2002), although the classifications have been made gender neutral.

As was true in UPA (2002), the terms “woman” and “man” are defined to clarify that any human, regardless of age, can be a parent under the act.

UPA (2017) includes new definitions and amendments to existing definitions related to assisted reproduction. For example, the definition of the term “gamete” has been amended to include parts of gametes to reflect new technological developments. Definitions that are used in only one article have been moved into the relevant Article.

### **SECTION 103. SCOPE.**

(a) This [act] applies to an adjudication or determination of parentage.

(b) This [act] does not create, affect, enlarge, or diminish parental rights or duties under law of this state other than this [act].

[(c) This [act] does not authorize or prohibit an agreement between one or more intended parents and a woman who is not an intended parent in which the woman agrees to become pregnant through assisted reproduction and which provides that each intended parent is a parent of a child conceived through assisted reproduction. If a birth results under the agreement and the agreement is unenforceable under [cite to law of this state regarding surrogacy agreements], the parent-child relationship is established as provided in [Articles] 1 through 6.]

*Legislative Note: A state should enact subsection (c) if the state does not enact Article 8 or otherwise does not permit surrogacy agreements.*

## Comment

Source: UPA (2002) § 103.

UPA (2002) contained a single section—Section 103—that addressed both the scope of the act and the issue of choice of law under the act. UPA (2017) follows the substance of UPA (2002), but addresses these concepts in two separate sections. The scope of the act is addressed in Section 103. Choice of law is addressed in Section 105.



**SECTION 104. AUTHORIZED COURT.** The [designate court] may adjudicate parentage under this [act].

**Comment**

Source: UPA (2002) § 104.

The court and, if applicable, child-support agency having jurisdiction over parentage proceedings under the UPA should be identified here. As recognized in the comment to Section 402 of UIFSA, several states have laws that allow a child-support agency to determine parentage administratively in certain cases, such as when parentage is not contested, while other states rely solely on the judicial process for parentage adjudications. Section 466(a)(2) of the Social Security Act authorizes both administrative and judicial procedures for parentage establishment.

**SECTION 105. APPLICABLE LAW.** The court shall apply the law of this state to adjudicate parentage. The applicable law does not depend on:

- (1) the place of birth of the child; or
- (2) the past or present residence of the child.

**Comment**

Source: UPA (2002) § 103; UIFSA (2008) § 303; UIFSA (1996) § 303.

UPA (2017) follows the choice of law approach of UPA (2002) § 103, UIFSA (1996) § 303, and UIFSA (2008) § 303. These acts all direct the local court to apply local law. If this state is an inappropriate forum, dismissal for forum non-conveniens may be appropriate.

**SECTION 106. DATA PRIVACY.** A proceeding under this [act] is subject to law of this state other than this [act] which governs the health, safety, privacy, and liberty of a child or other individual who could be affected by disclosure of information that could identify the child or other individual, including address, telephone number, digital contact information, place of employment, Social Security number, and the child's day-care facility or school.

**Comment**

Source: UPA (2002) § 105; UCCJEA (1997) § 209(e).

**SECTION 107. ESTABLISHMENT OF MATERNITY AND PATERNITY.** To the extent practicable, a provision of this [act] applicable to a father-child relationship applies to a mother-child relationship and a provision of this [act] applicable to a mother-child relationship applies to a father-child relationship.

**Comment**

Source: UPA (2002) § 106; UPA (1973) § 21.

This section carries over a principle followed in UPA (1973) § 21 and UPA (2002) § 106, that, where appropriate, a court may apply a gender-specific provision in a gender-neutral manner. Although UPA (2017) revised many provisions and concepts to make them gender neutral, some provisions of UPA (2017) remain written in terms applicable to one gender or the other. This section makes clear that a court has the authority to apply gendered provisions in a gender-neutral manner if appropriate.

**[ARTICLE] 2**

**PARENT-CHILD RELATIONSHIP**

**SECTION 201. ESTABLISHMENT OF PARENT-CHILD RELATIONSHIP.** A parent-child relationship is established between an individual and a child if:

- (1) the individual gives birth to the child[, except as otherwise provided in [Article] 8];
- (2) there is a presumption under Section 204 of the individual's parentage of the child, unless the presumption is overcome in a judicial proceeding or a valid denial of parentage is made under [Article] 3;
- (3) the individual is adjudicated a parent of the child under [Article] 6;
- (4) the individual adopts the child;
- (5) the individual acknowledges parentage of the child under [Article] 3, unless the acknowledgment is rescinded under Section 308 or successfully challenged under [Article] 3 or 6;[ or]
- (6) the individual's parentage of the child is established under [Article] 7[; or]

(7) the individual’s parentage of the child is established under [Article] 8].

**Legislative Note:** *A state should include paragraph (7) if the state includes Article 8 in this act. If the state does not enact Article 8 but otherwise permits and recognizes surrogacy agreements by statute, the state should include a reference to the statute in paragraph (7).*

### Comment

Source: UPA (2002) § 201.

UPA (2017) updates the UPA so that it applies equally to children born to same-sex couples. Most of the mechanisms for establishing parentage apply equally without regard to gender. Accordingly, UPA (2017) merges into a single list what had been separate subsections for establishing the parentage of women and men. This approach removes unnecessary distinctions based on gender. This approach is also consistent with the approach taken by states that have amended their UPA-based parentage provisions to apply equally to children born to same-sex couples. *See, e.g.,* Me. Rev. Stat. tit. 19-a, § 1851; N.H. Rev. Stat. § 168-B:2.

In Section 201(2) and in other provisions of the act related to presumed parents, the UPA (2017) uses the term “overcome” in place of the term “rebuttal” that was used in prior versions of the act. The term “overcome” better captures the concept that the determination as to whether a presumed parent is a legal parent is a policy choice based on equitable considerations. Although the UPA (2017) uses a new term, the same principle animated earlier versions of the act. *See, e.g.,* UPA (2002), Section 608(a) (providing that a court can deny a presumed parent’s challenge to his parentage “if the court determines that: (1) the conduct of the mother or . . . father estops that party from denying parentage; and (2) it would be inequitable to disprove the father-child relationship between the child and the presumed . . . father”); UPA (1973), Section 4(b) (“If two or more presumptions arise which conflict with each other, the presumption which on the facts is founded on the weightier considerations of policy and logic controls.”). A court may draw upon case law regarding the term “rebuttal” when considering whether a presumption has been overcome.

**SECTION 202. NO DISCRIMINATION BASED ON MARITAL STATUS OF PARENT.** A parent-child relationship extends equally to every child and parent, regardless of the marital status of the parent.

### Comment

Source: UPA (2002) § 202; UPA (1973) § 2.

Historically, children born to unmarried women were extended fewer rights and protections than marital children. In the 1960s and 1970s, the Supreme Court decided cases in which it held unconstitutional rules that treated nonmarital children unequally. The nondiscrimination provision of UPA (1973), UPA 1973, § 2, was one of the “major substantive

sections of the Act.” UPA (1973), § 2, Comment. Section 2 of UPA (1973) was intended to “establish the principle that regardless of the marital status of the parents, all children and all parents have equal rights with respect to each other.” UPA (1973) § 2, Comment. *See also* UPA (2002) § 202, Comment (“From a legal and social policy perspective, this is one of the most significant substantive provisions of the act, reaffirming the principle that regardless of the marital status of the parents, children and parents have equal rights with respect to each other.”).

This provision reaffirms the principle that once a parent-child relationship has been established, that relationship is entitled to substantive equality, regardless of whether the child is a marital or a nonmarital child.

**SECTION 203. CONSEQUENCES OF ESTABLISHING PARENTAGE.** Unless parental rights are terminated, a parent-child relationship established under this [act] applies for all purposes, except as otherwise provided by law of this state other than this [act].

#### **Comment**

Source: UPA (2002) § 203; USCACA (1988) § 10.

The qualifier “as otherwise provided by law of this state other than this [act]” is necessary because other statutes may restrict rights of a parent. For example, UPC (2008) § 2-114(a)(2) precludes a parent of a child (and the parent’s family) from inheriting from the child by intestate succession if the child “died before reaching [18] years of age and there is clear and convincing evidence that immediately before the child’s death the parental rights of the parent could have been terminated under the law of this state . . .”

#### **SECTION 204. PRESUMPTION OF PARENTAGE.**

(a) An individual is presumed to be a parent of a child if:

(1) except as otherwise provided under[ [Article] 8 or] law of this state other than this [act]:

(A) the individual and the woman who gave birth to the child are married to each other and the child is born during the marriage, whether the marriage is or could be declared invalid;

(B) the individual and the woman who gave birth to the child were married to each other and the child is born not later than 300 days after the marriage is

terminated by death, [divorce, dissolution, annulment, or declaration of invalidity, or after a decree of separation or separate maintenance], whether the marriage is or could be declared invalid; or

(C) the individual and the woman who gave birth to the child married each other after the birth of the child, whether the marriage is or could be declared invalid, the individual at any time asserted parentage of the child, and:

(i) the assertion is in a record filed with the [state agency maintaining birth records]; or

(ii) the individual agreed to be and is named as a parent of the child on the birth certificate of the child; or

(2) the individual resided in the same household with the child for the first two years of the life of the child, including any period of temporary absence, and openly held out the child as the individual's child.

(b) A presumption of parentage under this section may be overcome, and competing claims to parentage may be resolved, only by an adjudication under [Article] 6 or a valid denial of parentage under [Article] 3.

**Legislative Note:** *A state should use its own terms for the proceedings identified in the bracketed language in subsection (a)(1)(B).*

### Comment

Source: UPA (2002) § 204; UPA (1973) § 4.

A network of presumptions was established by UPA (1973). Under UPA (1973), presumptions of parentage were established by previous marriage to the woman, subsequent marriage to the woman, and by the conduct of holding the child out as the individual's own child. Because, at the time of its drafting, marriage was permitted only between one man and one woman, and because few same-sex couples were raising children together, the presumptions were written to apply only to men.

These presumptions were largely carried over by UPA (2002), although UPA (2002) added an express durational requirement to the holding out presumption. As was true of UPA (1973), the presumptions remained gendered, referring only to men.

UPA (2017) carries over the substance of these presumptions, but revises them so that they apply equally to men and women. Revising the presumptions so that they apply equally to men and women may be required now that same-sex couples can marry in all states. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). In *Obergefell*, and more recently in *Pavan v. Smith*, 137 S. Ct. 2075, 2078 (2017), the Supreme Court made clear that states not only are precluded from denying same-sex couples from the right to marry, they are also precluded from denying same-sex married spouses the “constellation of benefits” that are extended to married different-sex spouses. *See also McLaughlin v. Jones*, slip op. at 9 (Ariz. 2017) (“[T]he presumption of paternity . . . cannot, consistent with the Fourteenth Amendment’s Equal Protection and Due Process Clauses, be restricted to only opposite-sex couples. The marital paternity presumption is a benefit of marriage, and following *Pavan* and *Obergefell*, the state cannot deny same-sex spouses the same benefits afforded opposite-sex spouses.”). Several states recently have enacted similar revisions to parentage presumptions, making them apply equally to men and women. *See, e.g.*, Cal. Fam. Code § 7611; D.C. Code § 16-909; 750 Ill. Comp. Stat. Ann. § 46/204; Me. Rev. Stat. tit. 19-a, § 1881(1); N.H. Rev. Stat. § 168-B:2(V).

In addition, the holding out provision has been amended to account for situations where the person is absent only temporarily. The newly added language is modeled on the definition of “home state” in the Uniform Child Custody Jurisdiction and Enforcement Act. *See* UCCJEA § 102(7) (“A period of temporary absence of any of the mentioned persons is part of the period.”).

Subsection (b) expressly addresses cases where multiple individuals have claims to parentage of a child under the act. UPA (1973) contained a provision for resolving cases involving multiple presumptions. Section 4(b) of UPA (1973) provided, in relevant part: “If two or more presumptions arise which conflict with each other, the presumption which on the facts is founded on the weightier considerations of policy and logic controls.” UPA (1973) § 4(b). UPA (2002) omitted this provision and contained no provision expressly addressing how courts should resolve cases in which there are multiple presumptions of parentage. UPA (2017) provides express guidance for resolving such cases. Section 204(b) references the possibility that a court might have to resolve competing presumptions of parentage. Factors to be considered in such cases are set forth in Section 613.

### [ARTICLE] 3

## VOLUNTARY ACKNOWLEDGMENT OF PARENTAGE

### Comment

Article 3 implements federal law. 42 U.S.C. § 666(a)(5)(C) provides that receipt of a federal subsidy by a state for its child-support enforcement program is contingent on state enactment of laws establishing specific procedures for “a simple civil process for voluntarily acknowledging paternity.” If a state does not have such provisions or if its provisions are not in

compliance with federal law, the state is at risk of losing its federal child-support subsidy. *See, e.g.*, 42 U.S.C. § 666(a) (providing that “each State must have in effect laws requiring the use of the following procedures, consistent with this section and with regulations of the Secretary”). *See also* 42 U.S.C. § 654(20). Today, all states have adopted procedures for voluntary acknowledgments of paternity. Indeed, “[v]oluntary acknowledgments have become the most common way to establish the legal paternity of children born outside marriage.” Leslie Joan Harris, *Voluntary Acknowledgments of Parentage for Same-Sex Couples*, 20 AM. U. J. GENDER SOC. POL’Y & L. 467, 469-70 (2012) (footnotes omitted).

Article 3 of UPA (2002) referred only to the establishment of paternity through this administrative process. UPA (2017) makes Article 3 gender neutral and refers to the establishment of parentage through the acknowledgment process for an alleged genetic father, an intended parent, and a presumed parent, allowing Article 3 to apply to both men and women. The gender-neutral language and addition of the term “intended parent” is consistent with one of the goals of this revision process, which is to ensure that UPA (2017) applies equally to same-sex couples.

Revised Article 3 of UPA (2017) was drafted in close consultation with the federal Office of Child Support Enforcement (OCSE) to be consistent with Title IV-D requirements. State law determines what support rights exist and are legally enforceable. These changes ensure that all children can have parentage established regardless of a parent’s gender and facilitate the establishment and enforcement of child support under state law.

Following is the text of portions of the Title IV-D statute most relevant to determinations of parentage:

**42 U. S. C. § 666. Requirement of Statutorily Prescribed Procedures To Improve Effectiveness of Child Support Enforcement.**

**(a) Types of procedures required.** In order to satisfy section 654(20)(A) of this title, each State must have in effect laws requiring the use of the following procedures, consistent with this section and with regulations of the Secretary, to increase the effectiveness of the program which the State administers under this part:

\* \* \*

**(5) Procedures concerning paternity establishment.**

**(A) Establishment process available from birth until age 18.**

(i) Procedures which permit the establishment of the paternity of a child at any time before the child attains 18 years of age.

(ii) As of August 16, 1984, clause (i) shall also apply to a child for whom paternity has not been established or for whom a paternity action was brought but dismissed because a statute of limitations of less than 18 years was then in effect in the State.

**(B) Procedures concerning genetic testing.**

(i) Genetic testing required in certain contested cases. Procedures under which the State is required, in a contested paternity case (unless otherwise barred by State law) to require the child and all other parties (other than individuals found under section 654(29) of this title to have good cause and other exceptions for refusing to cooperate) to submit to genetic tests upon the request of any such party, if the request is supported by a sworn statement by the party:

(I) alleging paternity, and setting forth facts establishing a reasonable possibility of the requisite sexual contact between the parties; or

(II) denying paternity, and setting forth facts establishing a reasonable possibility of the nonexistence of sexual contact between the parties.

(ii) Other requirements. Procedures which require the State agency, in any case in which the agency orders genetic testing:

(I) to pay costs of such tests, subject to recoupment (if the State so elects) from the alleged father if paternity is established; and

(II) to obtain additional testing in any case if an original test result is contested, upon request and advance payment by the contestant.

**(C) Voluntary paternity acknowledgment.**

(i) Simple civil process. Procedures for a simple civil process for voluntarily acknowledging paternity under which the State must provide that, before a mother and a putative father can sign an acknowledgment of paternity, the mother and the putative father must be given notice, orally or through the use of audio or video equipment and in writing, of the alternatives to, the legal consequences of, and the rights (including, if 1 parent is a minor, any rights afforded due to minority status) and responsibilities that arise from, signing the acknowledgment.

(ii) Hospital-based program. Such procedures must include a hospital-based program for the voluntary acknowledgment of paternity focusing on the period immediately before or after the birth of a child.

(iii) Paternity establishment services.

(I) State-offered services. Such procedures must require the State agency responsible for maintaining birth records to offer voluntary paternity establishment services.

(II) Regulations.

(aa) Services offered by hospitals and birth record agencies. The Secretary shall prescribe regulations governing voluntary paternity establishment services offered by hospitals and birth record agencies.

(bb) Services offered by other entities. The Secretary shall prescribe regulations specifying the types of other entities that may offer voluntary paternity establishment services, and governing the provision of such services, which shall include a requirement that such an entity must use the same notice provisions used by, use the same materials used by, provide the personnel providing such services with the same training provided by, and evaluate the provision of such services in the same manner as the provision of such services is evaluated by, voluntary paternity establishment programs of hospitals and birth record agencies.

(iv) Use of paternity acknowledgment affidavit. Such procedures must require the State to develop and use an affidavit for the voluntary acknowledgment of paternity which includes the minimum requirements of the affidavit specified by the Secretary under section 652(a)(7) of this title for the voluntary acknowledgment of paternity, and to give full faith and credit to such an affidavit signed in any other State according to its procedures.

**(D) Status of signed paternity acknowledgment.**

(i) Inclusion in birth records. Procedures under which the name of the father shall be included on the record of birth of the child of unmarried parents only if:

(I) the father and mother have signed a voluntary acknowledgment of paternity;

or



(II) a court or an administrative agency of competent jurisdiction has issued an adjudication of paternity.

Nothing in this clause shall preclude a State agency from obtaining an admission of paternity from the father for submission in a judicial or administrative proceeding, or prohibit the issuance of an order in a judicial or administrative proceeding which bases a legal finding of paternity on an admission of paternity by the father and any other additional showing required by State law.

(ii) Legal finding of paternity. Procedures under which a signed voluntary acknowledgment of paternity is considered a legal finding of paternity, subject to the right of any signatory to rescind the acknowledgment within the earlier of:

(I) 60 days; or

(II) the date of an administrative or judicial proceeding relating to the child (including a proceeding to establish a support order) in which the signatory is a party.

(iii) Contest. Procedures under which, after the 60-day period referred to in clause (ii), a signed voluntary acknowledgment of paternity may be challenged in court only on the basis of fraud, duress, or material mistake of fact, with the burden of proof upon the challenger, and under which the legal responsibilities (including child support obligations) of any signatory arising from the acknowledgment may not be suspended during the challenge, except for good cause shown.

**(E) Bar on acknowledgment ratification proceedings.** Procedures under which judicial or administrative proceedings are not required or permitted to ratify an unchallenged acknowledgment of paternity.

**(F) Admissibility of genetic testing results.** Procedures:

(i) requiring the admission into evidence, for purposes of establishing paternity, of the results of any genetic test that is:

(I) of a type generally acknowledged as reliable by accreditation bodies designated by the Secretary; and

(II) performed by a laboratory approved by such an accreditation body;

(ii) requiring an objection to genetic testing results to be made in writing not later than a specified number of days before any hearing at which the results may be introduced into evidence (or, at State option, not later than a specified number of days after receipt of the results); and

(iii) making the test results admissible as evidence of paternity without the need for foundation testimony or other proof of authenticity or accuracy, unless objection is made.

**(G) Presumption of paternity in certain cases.** Procedures which create a rebuttable or, at the option of the State, conclusive presumption of paternity upon genetic testing results indicating a threshold probability that the alleged father is the father of the child.

**(H) Default orders.** Procedures requiring a default order to be entered in a paternity case upon a showing of service of process on the defendant and any additional showing required by State law.

**(I) No right to jury trial.** Procedures providing that the parties to an action to establish paternity are not entitled to a trial by jury.

**(J) Temporary support order based on probable paternity in contested cases.** Procedures which require that a temporary order be issued, upon motion by a party, requiring the

provision of child support pending an administrative or judicial determination of parentage, if there is clear and convincing evidence of paternity (on the basis of genetic tests or other evidence).

**(K) Proof of certain support and paternity establishment costs.** Procedures under which bills for pregnancy, childbirth, and genetic testing are admissible as evidence without requiring third-party foundation testimony, and shall constitute prima facie evidence of amounts incurred for such services or for testing on behalf of the child.

**(L) Standing of putative fathers.** Procedures ensuring that the putative father has a reasonable opportunity to initiate a paternity action.

**(M) Filing of acknowledgments and adjudications in State registry of birth records.** Procedures under which voluntary acknowledgments and adjudications of paternity by judicial or administrative processes are filed with the State registry of birth records for comparison with information in the State case registry.

**SECTION 301. ACKNOWLEDGMENT OF PARENTAGE.** A woman who gave birth to a child and an alleged genetic father of the child, intended parent under [Article] 7, or presumed parent may sign an acknowledgment of parentage to establish the parentage of the child.

#### **Comment**

Source: 42 U.S.C. § 666(a)(5)(C); UPA (2002) § 301.

This section has been revised to permit an intended parent under Article 7 or a presumed parent to sign an acknowledgment of parentage, in addition to an alleged genetic parent. This change not only furthers the goal of ensuring that the act applies equally to children born to same-sex couples, but it also furthers the goal of establishing parentage quickly and with certainty.

#### **SECTION 302. EXECUTION OF ACKNOWLEDGMENT OF PARENTAGE.**

(a) An acknowledgment of parentage under Section 301 must:

(1) be in a record signed by the woman who gave birth to the child and by the individual seeking to establish a parent-child relationship, and the signatures must be attested by a notarial officer or witnessed;

(2) state that the child whose parentage is being acknowledged:

(A) does not have a presumed parent other than the individual seeking to

establish the parent-child relationship or has a presumed parent whose full name is stated; and

(B) does not have another acknowledged parent, adjudicated parent, or individual who is a parent of the child under [Article] 7[ or 8] other than the woman who gave birth to the child; and

(3) state that the signatories understand that the acknowledgment is the equivalent of an adjudication of parentage of the child and that a challenge to the acknowledgment is permitted only under limited circumstances and is barred two years after the effective date of the acknowledgment.

(b) An acknowledgment of parentage is void if, at the time of signing:

(1) an individual other than the individual seeking to establish parentage is a presumed parent, unless a denial of parentage by the presumed parent in a signed record is filed with the [state agency maintaining birth records]; or

(2) an individual, other than the woman who gave birth to the child or the individual seeking to establish parentage, is an acknowledged or adjudicated parent or a parent under [Article] 7[ or 8].

### **Comment**

Source: 42 U.S.C. § 666(a)(5)(C); UPA (2002) § 302.

Section 302 has been amended to apply equally to men and women.

UPA (2017) also effects a substantive change to Subsection (b): the acknowledgment is void if another person other than the woman who gave birth *is* a presumed, acknowledged, or adjudicated parent. Under UPA (2002), the acknowledgment was void only if it *stated* that there was another presumed, acknowledged, or adjudicated parent. Thus, under UPA (2002), the acknowledgment was void only if the person knowingly lied on the form. As a result, under UPA (2002), the acknowledgment could cut off potential claims of other individuals so long as the signatories did not lie. UPA (2017) protects the rights of other individuals who are presumed, acknowledged, or adjudicated parents. What had been subsection (b)(3) of UPA (2002) § 302 has been eliminated because it is no longer necessary in light of this change to subsection (b).

**SECTION 303. DENIAL OF PARENTAGE.** A presumed parent or alleged genetic parent may sign a denial of parentage in a record. The denial of parentage is valid only if:

(1) an acknowledgment of parentage by another individual is filed under Section 305;

(2) the signature of the presumed parent or alleged genetic parent is attested by a notarial officer or witnessed; and

(3) the presumed parent or alleged genetic parent has not previously:

(A) completed a valid acknowledgment of parentage, unless the previous acknowledgment was rescinded under Section 308 or challenged successfully under Section 309; or

(B) been adjudicated to be a parent of the child.

**SECTION 304. RULES FOR ACKNOWLEDGMENT OR DENIAL OF PARENTAGE.**

(a) An acknowledgment of parentage and a denial of parentage may be contained in a single document or may be in counterparts and may be filed with the [state agency maintaining birth records] separately or simultaneously. If filing of the acknowledgment and denial both are required under this [act], neither is effective until both are filed.

(b) An acknowledgment of parentage or denial of parentage may be signed before or after the birth of the child.

(c) Subject to subsection (a), an acknowledgment of parentage or denial of parentage takes effect on the birth of the child or filing of the document with the [state agency maintaining birth records], whichever occurs later.

(d) An acknowledgment of parentage or denial of parentage signed by a minor is valid if the acknowledgment complies with this [act].

### Comment

Source: 42 U.S.C. § 666(a)(5)(C)(i); UPA (2002) § 304.

### **SECTION 305. EFFECT OF ACKNOWLEDGMENT OR DENIAL OF PARENTAGE.**

(a) Except as otherwise provided in Sections 308 and 309, an acknowledgment of parentage that complies with this [article] and is filed with the [state agency maintaining birth records] is equivalent to an adjudication of parentage of the child and confers on the acknowledged parent all rights and duties of a parent.

(b) Except as otherwise provided in Sections 308 and 309, a denial of parentage by a presumed parent or alleged genetic parent which complies with this [article] and is filed with the [state agency maintaining birth records] with an acknowledgment of parentage that complies with this [article] is equivalent to an adjudication of the nonparentage of the presumed parent or alleged genetic parent and discharges the presumed parent or alleged genetic parent from all rights and duties of a parent.

### Comment

Source: 42 U.S.C. § 666(a)(5)(D)(ii), and 42 U.S.C. § 666(a)(5)(M); UPA (2002) § 305.

**SECTION 306. NO FILING FEE.** The [state agency maintaining birth records] may not charge a fee for filing an acknowledgment of parentage or denial of parentage.

**SECTION 307. RATIFICATION BARRED.** A court conducting a judicial proceeding or an administrative agency conducting an administrative proceeding is not required or permitted to ratify an unchallenged acknowledgment of parentage.

### Comment

This provision, which is carried over verbatim from UPA (2002), is required by federal law. *See* 42 U.S.C. § 666(a)(5)(E) (“procedures under which judicial administrative proceedings

are not required or permitted to ratify an unchallenged acknowledgment of paternity.”).

### **SECTION 308. PROCEDURE FOR RESCISSION.**

(a) A signatory may rescind an acknowledgment of parentage or denial of parentage by filing with the [relevant state agency] a rescission in a signed record which is attested by a notarial officer or witnessed, before the earlier of:

(1) 60 days after the effective date under Section 304 of the acknowledgment or denial; or

(2) the date of the first hearing before a court in a proceeding, to which the signatory is a party, to adjudicate an issue relating to the child, including a proceeding that establishes support.

(b) If an acknowledgment of parentage is rescinded under subsection (a), an associated denial of parentage is invalid, and the [state agency maintaining birth records] shall notify the woman who gave birth to the child and the individual who signed a denial of parentage of the child that the acknowledgment has been rescinded. Failure to give the notice required by this subsection does not affect the validity of the rescission.

#### **Comment**

UPA (2002) required a judicial process to rescind a voluntary acknowledgment of parentage. This is not required by the federal statute, 42 U.S.C. § 666(a)(5)(D)(ii), and many states allow the acknowledgment to be rescinded within the applicable timeframe by filing a rescission form with the child-support agency or vital records agency. UPA (2017) removes the judicial proceeding requirement to offer states flexibility in designing their rescission process.

### **SECTION 309. CHALLENGE AFTER EXPIRATION OF PERIOD FOR RESCISSION.**

(a) After the period for rescission under Section 308 expires, but not later than two years after the effective date under Section 304 of an acknowledgment of parentage or denial of

parentage, a signatory of the acknowledgment or denial may commence a proceeding to challenge the acknowledgment or denial, including a challenge brought under Section 614, only on the basis of fraud, duress, or material mistake of fact.

(b) A challenge to an acknowledgment of parentage or denial of parentage by an individual who was not a signatory to the acknowledgment or denial is governed by Section 610.

### **Comment**

Source: 42 U.S.C. § 666(a)(5)(D)(iii); UPA (2002) § 308.

The substance of subsection (a) is largely carried over from UPA (2002), § 308. This provision is consistent with federal law which permits a “challenge” to a voluntary acknowledgment of parentage, but only on the basis of alleged “fraud, duress, or material mistake of fact.” 42 U.S.C. § 666(a)(5)(D)(iii). UPA (2017) does, however, add a cross-reference to the new Section 614 regarding children born as the result of sexual assault. If a woman establishes that the child was born as the result of sexual assault under Section 614, generally this showing will be sufficient to establish that she signed the acknowledgment under duress.

UPA (2017) also adds an express cross-reference to the provision governing challenges to an acknowledgment by a nonsignatory. The substantive rules governing such challenges were included in Article 6 of UPA (2002), but there was no cross-reference in Article 3 to the relevant provision.

### **SECTION 310. PROCEDURE FOR CHALLENGE BY SIGNATORY.**

(a) Every signatory to an acknowledgment of parentage and any related denial of parentage must be made a party to a proceeding to challenge the acknowledgment or denial.

(b) By signing an acknowledgment of parentage or denial of parentage, a signatory submits to personal jurisdiction in this state in a proceeding to challenge the acknowledgment or denial, effective on the filing of the acknowledgment or denial with the [state agency maintaining birth records].

(c) The court may not suspend the legal responsibilities arising from an acknowledgment of parentage, including the duty to pay child support, during the pendency of a proceeding to challenge the acknowledgment or a related denial of parentage, unless the party challenging the

acknowledgment or denial shows good cause.

(d) A party challenging an acknowledgment of parentage or denial of parentage has the burden of proof.

(e) If the court determines that a party has satisfied the burden of proof under subsection (d), the court shall order the [state agency maintaining birth records] to amend the birth record of the child to reflect the legal parentage of the child.

(f) A proceeding to challenge an acknowledgment of parentage or denial of parentage must be conducted under [Article] 6.

### **Comment**

Source: UPA (2002) § 309.

The relevant provision of UPA (2002) addressed the procedure for both rescission and challenge. UPA (2017), however, removed the requirement that rescission be done through an adjudicatory process. Accordingly, references to rescission have been removed from this section. This section now addresses only the judicial procedures governing a challenge to an acknowledgment or denial of parentage.

UPA (2017) also places the responsibility to file the order described in subsection (e) with the agency maintaining birth records on the party who wants the record changed. If the party who wants the record changed does not file the order with the agency maintaining records and take any other required steps, the record will not be changed.

**SECTION 311. FULL FAITH AND CREDIT.** The court shall give full faith and credit to an acknowledgment of parentage or denial of parentage effective in another state if the acknowledgment or denial was in a signed record and otherwise complies with law of the other state.

### **Comment**

Source: 42 U.S.C. § 666(a)(5)(C)(iv); UPA (2002) § 311.

The federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996 requires states “to give full faith and credit to such an affidavit signed in any other State according to its procedures,” 42 U.S.C. § 666(a)(5)(C)(iv), and that it have the same status as a



judgment. This section, carried over from UPA (2002), implements these mandates.

**SECTION 312. FORMS FOR ACKNOWLEDGMENT AND DENIAL OF PARENTAGE.**

(a) The [state agency maintaining birth records] shall prescribe forms for an acknowledgment of parentage and denial of parentage.

(b) A valid acknowledgment of parentage or denial of parentage is not affected by a later modification of the form under subsection (a).

**Comment**

Source: 42 U.S.C. § 666(a)(5)(C)(i), (iv); UPA (2002) § 312.

**SECTION 313. RELEASE OF INFORMATION.** The [state agency maintaining birth records] may release information relating to an acknowledgment of parentage or denial of parentage to a signatory of the acknowledgment or denial, a court, federal agency, and child-support agency of this or another state.

**Comment**

Source: UPA (2002) § 313.

**[SECTION 314. ADOPTION OF RULES.** The [state agency maintaining birth records] may adopt rules under [state administrative procedure act] to implement this [article].]

*Legislative Note:* A state should include Section 314 unless the provision is unnecessary or is inconsistent with other law of the state regarding agency rulemaking authority.

**Comment**

Source: UPA (2002) § 314.

Like UPA (2002), UPA (2017) makes this section optional to account for situations in which it may conflict with other rulemaking limitations in a particular state. States will implement acknowledgment procedures in a variety of ways, depending on local practice. This grant of rulemaking authority to carry out the provisions of this article may include electronic

transmission of birth and acknowledgment data to the designated state agency.

## [ARTICLE] 4

### REGISTRY OF PATERNITY

#### Comment

The provisions establishing a paternity registry were added by UPA (2002). Signing a registry entitles the registrant to notice of and a right to oppose the adoption of an infant child; signing a paternity registry is *not* a means of establishing parentage. In *Lehr v. Robertson*, 463 U.S. 248 (1983), the Supreme Court upheld the constitutionality of a New York “putative father registry.” A New York statute required a father of a nonmarital child to sign a paternity registry if he wished to be notified of a termination of parental rights or adoption proceeding. Thereafter, a series of well-publicized adoption cases occurred in which state courts held that nonmarital fathers had not been given proper notice of such proceedings and voided established adoptions. A substantial number of legislatures responded to these decisions by enacting paternity registries similar to the New York statute.

Like UPA (2002), UPA (2017) limits the effect of the registry to cases in which a child is less than one year of age at the time of the court hearing. This recognizes the need to expedite infant adoptions, while properly protecting the rights of those individuals who have not registered, but instead have established some relationship with the child following birth.

UPA (2017) does not make any substantive changes to Article 4. UPA (2017) does, however, replace gendered terms with gender-neutral ones where appropriate.

## [PART] 1

### GENERAL PROVISIONS

**SECTION 401. ESTABLISHMENT OF REGISTRY.** A registry of paternity is established in the [state agency maintaining the registry].

**SECTION 402. REGISTRATION FOR NOTIFICATION.**

(a) Except as otherwise provided in subsection (b) or Section 405, a man who desires to be notified of a proceeding for adoption of, or termination of parental rights regarding, his genetic child must register in the registry of paternity established by Section 401 before the birth of the child or not later than 30 days after the birth.

(b) A man is not required to register under subsection (a) if[:

(1)] a parent-child relationship between the man and the child has been established under this [act] or law of this state other than this [act]]]; or

(2) the man commences a proceeding to adjudicate his parentage before a court has terminated his parental rights].

(c) A man who registers under subsection (a) shall notify the registry promptly in a record of any change in the information registered. The [state agency maintaining the registry] shall incorporate new information received into its records but need not seek to obtain current information for incorporation in the registry.

### **Comment**

Source: UPA (2002) § 402.

Subsection (b)(2) addresses and eliminates a concern raised by *Lehr v. Robertson*, 463 U.S. 248 (1983). In *Lehr*, although the alleged genetic father did not avail himself of the New York putative fathers registry, he had filed a “visitation and paternity” petition in another local court. The trial judge in the adoption proceeding knew the identity of the genetic father, where he could be located, and that he was seeking to establish his parentage in another court. Nonetheless, the court granted the adoption and terminated the genetic father’s parental rights without notice to him. Subsection (b)(2) exempts an alleged parent from the requirement of registration if the man “commences a proceeding to adjudicate his parentage before a court has terminated his parental rights.”

**SECTION 403. NOTICE OF PROCEEDING.** An individual who seeks to adopt a child or terminate parental rights to the child shall give notice of the proceeding to a man who has registered timely under Section 402(a) regarding the child. Notice must be given in a manner prescribed for service of process in a civil proceeding in this state.

**SECTION 404. TERMINATION OF PARENTAL RIGHTS: CHILD UNDER ONE YEAR OF AGE.** An individual who seeks to terminate parental rights to or adopt a child is not required to give notice of the proceeding to a man who may be the genetic father of the child if:

- (1) the child is under one year of age at the time of the termination of parental rights;
- (2) the man did not register timely under Section 402(a); and
- (3) the man is not exempt from registration under Section 402(b).

**SECTION 405. TERMINATION OF PARENTAL RIGHTS: CHILD AT LEAST ONE YEAR OF AGE.** If a child is at least one year of age, an individual seeking to adopt or terminate parental rights to the child shall give notice of the proceeding to each alleged genetic father of the child, whether or not he has registered under Section 402(a) unless his parental rights have already been terminated. Notice must be given in a manner prescribed for service of process in a civil proceeding in this state.

## [PART] 2

### OPERATION OF REGISTRY

#### **SECTION 406. REQUIRED FORM.**

(a) The [state agency maintaining the registry] shall prescribe a form for registering under Section 402(a). The form must state that:

- (1) the man who registers signs the form under penalty of perjury;
- (2) timely registration entitles the man who registers to notice of a proceeding for adoption of the child or termination of the parental rights of the man;
- (3) timely registration does not commence a proceeding to establish parentage;
- (4) the information disclosed on the form may be used against the man who registers to establish parentage;
- (5) services to assist in establishing parentage are available to the man who registers through [the appropriate child-support agency];
- (6) the man who registers also may register in a registry of paternity in another

state if conception or birth of the child occurred in the other state;

(7) information on registries of paternity of other states is available from [the appropriate state agency]; and

(8) procedures exist to rescind the registration.

(b) A man who registers under Section 402(a) shall sign the form described in subsection (a) under penalty of perjury.

**SECTION 407. FURNISHING INFORMATION; CONFIDENTIALITY.**

(a) The [state agency maintaining the registry] is not required to seek to locate the woman who gave birth to the child who is the subject of a registration under Section 402(a), but the [state agency maintaining the registry] shall give notice of the registration to the woman if the [state agency maintaining the registry] has her address.

(b) Information contained in the registry of paternity established by Section 401 is confidential and may be released on request only to:

(1) a court or individual designated by the court;

(2) the woman who gave birth to the child who is the subject of the registration;

(3) an agency authorized by law of this state other than this [act], law of another state, or federal law to receive the information;

(4) a licensed child-placing agency;

(5) a child-support agency;

(6) a party or the party's attorney of record in a proceeding under this [act] or in a proceeding to adopt or terminate parental rights to the child who is the subject of the registration; and

(7) a registry of paternity in another state.

**SECTION 408. PENALTY FOR RELEASING INFORMATION.** An individual who intentionally releases information from the registry of paternity established by Section 401 to an individual or agency not authorized under Section 407(b) to receive the information commits a [appropriate level misdemeanor].

**SECTION 409. RESCISSION OF REGISTRATION.** A man who registers under Section 402(a) may rescind his registration at any time by filing with the registry of paternity established by Section 401 a rescission in a signed record that is attested by a notarial officer or witnessed.

**SECTION 410. UNTIMELY REGISTRATION.** If a man registers under Section 402(a) more than 30 days after the birth of the child, the [state agency maintaining the registry] shall notify the man who registers that, based on a review of the registration, the registration was not filed timely.

**SECTION 411. FEES FOR REGISTRY.**

(a) The [state agency maintaining the registry] may not charge a fee for filing a registration under Section 402(a) or rescission of registration under Section 409.

(b) [Except as otherwise provided in subsection (c), the][The] [state agency maintaining the registry] may charge a reasonable fee to search the registry of paternity established by Section 401 and for furnishing a certificate of search under Section 414.

[(c) A child-support agency [is][and other appropriate agencies, if any, are] not required to pay a fee authorized by subsection (b).]

*Legislative Note: A state should include subsection (c) if the state does not require certain agencies to pay a fee authorized by subsection (b).*

**[PART] 3**

**SEARCH OF REGISTRY**

**SECTION 412. CHILD BORN THROUGH ASSISTED REPRODUCTION:**

**SEARCH OF REGISTRY INAPPLICABLE.** This [part] does not apply to a child born through assisted reproduction.

**Comment**

This section was added to clarify that individuals who have children through assisted reproduction are not required to conduct a search of the paternity registry, which was not designed or intended to address such situations.

**SECTION 413. SEARCH OF APPROPRIATE REGISTRY.** If a parent-child relationship has not been established under this [act] between a child who is under one year of age and an individual other than the woman who gave birth to the child:

(1) an individual seeking to adopt or terminate parental rights to the child shall obtain a certificate of search under Section 414 to determine if a registration has been filed in the registry of paternity established by Section 401 regarding the child; and

(2) if the individual has reason to believe that conception or birth of the child may have occurred in another state, the individual shall obtain a certificate of search from the registry of paternity, if any, in that state.

**SECTION 414. CERTIFICATE OF SEARCH OF REGISTRY.**

(a) The [state agency maintaining the registry] shall furnish a certificate of search of the registry of paternity established by Section 401 on request to an individual, court, or agency identified in Section 407(b) or an individual required under Section 413(1) to obtain a certificate.

(b) A certificate furnished under subsection (a):

(1) must be signed on behalf of the [state agency maintaining the registry] and

state that:

(A) a search has been made of the registry; and

(B) a registration under Section 402(a) containing the information required

to identify the man who registers:

(i) has been found; or

(ii) has not been found; and

(2) if paragraph (1)(B)(i) applies, must have a copy of the registration attached.

(c) An individual seeking to adopt or terminate parental rights to a child must file with the court the certificate of search furnished under subsection (a) and Section 413(2), if applicable, before a proceeding to adopt or terminate parental rights to the child may be concluded.

**SECTION 415. ADMISSIBILITY OF REGISTERED INFORMATION.** A certificate of search of a registry of paternity in this or another state is admissible in a proceeding for adoption of or termination of parental rights to a child and, if relevant, in other legal proceedings.

## [ARTICLE] 5

### GENETIC TESTING

**SECTION 501. DEFINITIONS.** In this [article]:

(1) “Combined relationship index” means the product of all tested relationship indices.

(2) “Ethnic or racial group” means, for the purpose of genetic testing, a recognized group that an individual identifies as the individual’s ancestry or part of the ancestry or that is identified by other information.

(3) “Hypothesized genetic relationship” means an asserted genetic relationship between



an individual and a child.

(4) “Probability of parentage” means, for the ethnic or racial group to which an individual alleged to be a parent belongs, the probability that a hypothesized genetic relationship is supported, compared to the probability that a genetic relationship is supported between the child and a random individual of the ethnic or racial group used in the hypothesized genetic relationship, expressed as a percentage incorporating the combined relationship index and a prior probability.

(5) “Relationship index” means a likelihood ratio that compares the probability of a genetic marker given a hypothesized genetic relationship and the probability of the genetic marker given a genetic relationship between the child and a random individual of the ethnic or racial group used in the hypothesized genetic relationship.

#### **Comment**

UPA (2017) amends terms that were used in UPA (2002) to reflect the fact that a court may need to adjudicate the parentage of an alleged genetic mother. UPA (2017) moves the relevant definitions from Section 102 to Section 501 because they are used only in this article.

The formula for calculating the probability of parentage is  $100 \cdot AB / (AB - (1 - B))$ , where A is the combined relationship index and B is the prior probability (assumed to be 0.50).

#### **SECTION 502. SCOPE OF [ARTICLE]; LIMITATION ON USE OF GENETIC TESTING.**

(a) This [article] governs genetic testing of an individual in a proceeding to adjudicate parentage, whether the individual:

- (1) voluntarily submits to testing; or
- (2) is tested under an order of the court or a child-support agency.

(b) Genetic testing may not be used:

- (1) to challenge the parentage of an individual who is a parent under [Article] 7[

or 8]; or

(2) to establish the parentage of an individual who is a donor.

*Legislative Note:* A state should include the bracketed reference to Article 8 if the state includes Article 8 in this act.

### Comment

Source: UPA (2002) § 501.

The substance of Section 502(a) is carried over from UPA (2002) § 501.

Subsection (b) has been added to clarify that genetic testing cannot be used to challenge or argue against the parentage of an intended parent who is considered a parent under Articles 7 or 8. Because the parentage of an intended parent under Articles 7 and 8 is not premised on a genetic connection, the lack of a genetic connection should not be the basis of a challenge to the individual's parentage.

New subsection (b)(2) clarifies that an individual who is a donor under this act, and therefore is not a parent, is precluded from seeking to establish parentage by evidence of a genetic connection to the child.

### **SECTION 503. AUTHORITY TO ORDER OR DENY GENETIC TESTING.**

(a) Except as otherwise provided in this [article] or [Article] 6, in a proceeding under this [act] to determine parentage, the court shall order the child and any other individual to submit to genetic testing if a request for testing is supported by the sworn statement of a party:

(1) alleging a reasonable possibility that the individual is the child's genetic parent; or

(2) denying genetic parentage of the child and stating facts establishing a reasonable possibility that the individual is not a genetic parent.

(b) A child-support agency may order genetic testing only if there is no presumed, acknowledged, or adjudicated parent of a child other than the woman who gave birth to the child.

(c) The court or child-support agency may not order in utero genetic testing.

(d) If two or more individuals are subject to court-ordered genetic testing, the court may

order that testing be completed concurrently or sequentially.

(e) Genetic testing of a woman who gave birth to a child is not a condition precedent to testing of the child and an individual whose genetic parentage of the child is being determined. If the woman is unavailable or declines to submit to genetic testing, the court may order genetic testing of the child and each individual whose genetic parentage of the child is being adjudicated.

(f) In a proceeding to adjudicate the parentage of a child having a presumed parent or an individual who claims to be a parent under Section 609, or to challenge an acknowledgment of parentage, the court may deny a motion for genetic testing of the child and any other individual after considering the factors in Section 613(a) and (b).

(g) If an individual requesting genetic testing is barred under [Article] 6 from establishing the individual's parentage, the court shall deny the request for genetic testing.

(h) An order under this section for genetic testing is enforceable by contempt.

### **Comment**

Source: 42 U.S.C. § 666(a)(5)(B)(i); UPA (2002) § 502 & § 608; UPA (1973) § 11.

Most of the substance of this section regarding genetic testing is carried over from UPA (2002). This section of UPA (2017) does, however, consolidate several subsections that had been included in different sections and in different articles of UPA (2002). Subsections (a) through (d) are carried over from UPA (2002) § 502, with some minor modifications to make the provisions gender neutral where appropriate. Subsection (e) is carried over from UPA (2002) § 622(c). Subsection (h) is carried over from UPA (2002), § 622(a). Subsection (f) is similar in substance to Section 608 of UPA (2002).

Subsection (g) is new and is intended to clarify that if an individual is barred under Article 6 from establishing parentage, there is no use for the genetic testing under this act, which governs legal parentage. Accordingly, it directs a court to deny the request in such circumstances.

### **SECTION 504. REQUIREMENTS FOR GENETIC TESTING.**

(a) Genetic testing must be of a type reasonably relied on by experts in the field of genetic testing and performed in a testing laboratory accredited by:

(1) the AABB, formerly known as the American Association of Blood Banks, or a successor to its functions; or

(2) an accrediting body designated by the Secretary of the United States Department of Health and Human Services.

(b) A specimen used in genetic testing may consist of a sample or a combination of samples of blood, buccal cells, bone, hair, or other body tissue or fluid. The specimen used in the testing need not be of the same kind for each individual undergoing genetic testing.

(c) Based on the ethnic or racial group of an individual undergoing genetic testing, a testing laboratory shall determine the databases from which to select frequencies for use in calculating a relationship index. If an individual or a child-support agency objects to the laboratory's choice, the following rules apply:

(1) Not later than 30 days after receipt of the report of the test, the objecting individual or child-support agency may request the court to require the laboratory to recalculate the relationship index using an ethnic or racial group different from that used by the laboratory.

(2) The individual or the child-support agency objecting to the laboratory's choice under this subsection shall:

(A) if the requested frequencies are not available to the laboratory for the ethnic or racial group requested, provide the requested frequencies compiled in a manner recognized by accrediting bodies; or

(B) engage another laboratory to perform the calculations.

(3) The laboratory may use its own statistical estimate if there is a question which ethnic or racial group is appropriate. The laboratory shall calculate the frequencies using statistics, if available, for any other ethnic or racial group requested.

(d) If, after recalculation of the relationship index under subsection (c) using a different ethnic or racial group, genetic testing under Section 506 does not identify an individual as a genetic parent of a child, the court may require an individual who has been tested to submit to additional genetic testing to identify a genetic parent.

#### **Comment**

Source: 42 U.S.C. § 666(a)(5)(B)(i) and § 666(a)(5)(F)(i); UPA (2002) § 503.

This substance of this section is largely carried over from UPA (2002). Section 504(a)(1), however, was revised because the listed entity now uses a different name. The reference to the American Society for Histocompatibility and Immunogenetics was deleted because that body is no longer accrediting laboratories for parentage testing.

#### **SECTION 505. REPORT OF GENETIC TESTING.**

(a) A report of genetic testing must be in a record and signed under penalty of perjury by a designee of the testing laboratory. A report complying with the requirements of this [article] is self-authenticating.

(b) Documentation from a testing laboratory of the following information is sufficient to establish a reliable chain of custody and allow the results of genetic testing to be admissible without testimony:

- (1) the name and photograph of each individual whose specimen has been taken;
- (2) the name of the individual who collected each specimen;
- (3) the place and date each specimen was collected;
- (4) the name of the individual who received each specimen in the testing

laboratory; and

- (5) the date each specimen was received.

#### **Comment**

Source: 42 U.S.C. § 666(a)(5)(F).

**SECTION 506. GENETIC TESTING RESULTS; CHALLENGE TO RESULTS.**

(a) Subject to a challenge under subsection (b), an individual is identified under this [act] as a genetic parent of a child if genetic testing complies with this [article] and the results of the testing disclose:

(1) the individual has at least a 99 percent probability of parentage, using a prior probability of 0.50, as calculated by using the combined relationship index obtained in the testing; and

(2) a combined relationship index of at least 100 to 1.

(b) An individual identified under subsection (a) as a genetic parent of the child may challenge the genetic testing results only by other genetic testing satisfying the requirements of this [article] which:

(1) excludes the individual as a genetic parent of the child; or

(2) identifies another individual as a possible genetic parent of the child other than:

(A) the woman who gave birth to the child; or

(B) the individual identified under subsection (a).

(c) Except as otherwise provided in Section 511, if more than one individual other than the woman who gave birth is identified by genetic testing as a possible genetic parent of the child, the court shall order each individual to submit to further genetic testing to identify a genetic parent.

**Comment**

Source: 42 U.S.C. § 666(a)(5)(G); UPA (2002) § 505.

The use of a probability of parentage of 99.0% and a combined relationship index of 100 to 1 is consistent with accreditation standards in the year 2017 within the parentage-testing

community.

The prior probability is expressed as a number, rather than a percentage, within the parentage-testing community and by applicable cases. *See, e.g., Butcher v. Commonwealth*, 96 S.W.3d 3 (Ky. 2002); *Brown v. Smith*, 526 S.E.2d 686 (N.C. App. 2000); *Griffith v. State*, 976 S.W.2d 241 (Tex. Ct. App. 1998); *Plemel v. Walter*, 735 P.2d 1209 (Or. 1987).

Identification as a child's genetic parent does not, in and of itself, establish the child's legal parentage. The standards for adjudicating the parentage of a child are addressed in Article 6.

#### **SECTION 507. COST OF GENETIC TESTING.**

(a) Subject to assessment of fees under [Article] 6, payment of the cost of initial genetic testing must be made in advance:

(1) by a child-support agency in a proceeding in which the child-support agency is providing services;

(2) by the individual who made the request for genetic testing;

(3) as agreed by the parties; or

(4) as ordered by the court.

(b) If the cost of genetic testing is paid by a child-support agency, the agency may seek reimbursement from the genetic parent whose parent-child relationship is established.

#### **Comment**

Source: 42 U.S.C. § 666(a)(5)(B)(ii)(I); UPA (2002) § 506; UPA (1973) § 11.

**SECTION 508. ADDITIONAL GENETIC TESTING.** The court or child-support agency shall order additional genetic testing on request of an individual who contests the result of the initial testing under Section 506. If initial genetic testing under Section 506 identified an individual as a genetic parent of the child, the court or agency may not order additional testing unless the contesting individual pays for the testing in advance.

### **Comment**

Source: 42 U.S.C. § 666(a)(5)(B)(ii)(II); UPA (2002) § 507; UPA (1973) § 11.

#### **SECTION 509. GENETIC TESTING WHEN SPECIMEN NOT AVAILABLE.**

(a) Subject to subsection (b), if a genetic-testing specimen is not available from an alleged genetic parent of a child, an individual seeking genetic testing demonstrates good cause, and the court finds that the circumstances are just, the court may order any of the following individuals to submit specimens for genetic testing:

(1) a parent of the alleged genetic parent;

(2) a sibling of the alleged genetic parent;

(3) another child of the alleged genetic parent and the woman who gave birth to the other child; and

(4) another relative of the alleged genetic parent necessary to complete genetic testing.

(b) To issue an order under this section, the court must find that a need for genetic testing outweighs the legitimate interests of the individual sought to be tested.

### **Comment**

Source: UPA (2002) § 508.

In the vast majority of cases, a genetic-testing specimen will be available from an alleged genetic parent of a child. In those circumstances when a specimen is not available, Section 509 gives the court authority to order genetic testing from other relatives of the alleged genetic parent in a limited set of circumstances. To order genetic testing of other relatives, the court must find that the circumstances are just, and the court must also find that the need for genetic testing outweighs the legitimate interests, including the privacy and bodily integrity interests, of the individual sought to be tested.



**SECTION 510. DECEASED INDIVIDUAL.** If an individual seeking genetic testing demonstrates good cause, the court may order genetic testing of a deceased individual.

**Comment**

Source: UPA (2002) § 509.

**SECTION 511. IDENTICAL SIBLINGS.**

(a) If the court finds there is reason to believe that an alleged genetic parent has an identical sibling and evidence that the sibling may be a genetic parent of the child, the court may order genetic testing of the sibling.

(b) If more than one sibling is identified under Section 506 as a genetic parent of the child, the court may rely on nongenetic evidence to adjudicate which sibling is a genetic parent of the child.

**Comment**

Source: UPA (2002) § 510.

**SECTION 512. CONFIDENTIALITY OF GENETIC TESTING.**

(a) Release of a report of genetic testing for parentage is controlled by law of this state other than this [act].

(b) An individual who intentionally releases an identifiable specimen of another individual collected for genetic testing under this [article] for a purpose not relevant to a proceeding regarding parentage, without a court order or written permission of the individual who furnished the specimen, commits a [appropriate level misdemeanor].

**Comment**

Source: UPA (2002) § 511.

This provision is carried over from UPA (2002).

Subsection (a) refers to provisions other than this act that may regulate the disclosure of a genetic testing report that is part of the case record. In some states, the records of parentage proceedings are sealed. In these states, rules regarding disclosure of materials from a sealed proceeding would apply. In addition, there are also privacy rules in the federal regulations governing child support programs that may be applicable.

Subsection (b) expressly prohibits the intentional release of an identifiable specimen of another individual for a purpose not relevant to the parentage proceeding without proper authorization.

## **[ARTICLE] 6**

### **PROCEEDING TO ADJUDICATE PARENTAGE**

#### **Comment**

While largely retaining the substance of Article 6 of UPA (2002), UPA (2017) substantially reorganizes the content of former Article 6 to improve its clarity and flow.

#### **[PART] 1**

### **NATURE OF PROCEEDING**

#### **SECTION 601. PROCEEDING AUTHORIZED.**

[(a)] A proceeding may be commenced to adjudicate the parentage of a child. Except as otherwise provided in this [act], the proceeding is governed by [cite to this state's rules of civil procedure].

[(b)] A proceeding to adjudicate the parentage of a child born under a surrogacy agreement is governed by [Article] 8.]

*Legislative Note:* A state should include subsection (b) if the state includes Article 8 in the act.

#### **Comment**

Source: UPA (2002) § 601.

Subsection (b), which is new, clarifies that Article 8 governs proceedings to determine the parentage of a child born through surrogacy.

**SECTION 602. STANDING TO MAINTAIN PROCEEDING.** Except as otherwise provided in [Article] 3 and Sections 608 through 611, a proceeding to adjudicate parentage may be maintained by:

- (1) the child;
- (2) the woman who gave birth to the child, unless a court has adjudicated that she is not a parent;
- (3) an individual who is a parent under this [act];
- (4) an individual whose parentage of the child is to be adjudicated;
- (5) a child-support agency[ or other governmental agency authorized by law of this state other than this [act]];
- (6) an adoption agency authorized by law of this state other than this [act] or licensed child-placement agency; or
- (7) a representative authorized by law of this state other than this [act] to act for an individual who otherwise would be entitled to maintain a proceeding but is deceased, incapacitated, or a minor.

**Comment**

Source: UPA (2002) § 602; UPA (1973) § 6.

**SECTION 603. NOTICE OF PROCEEDING.**

(a) The [petitioner] shall give notice of a proceeding to adjudicate parentage to the following individuals:

- (1) the woman who gave birth to the child, unless a court has adjudicated that she is not a parent;
- (2) an individual who is a parent of the child under this [act];

- (3) a presumed, acknowledged, or adjudicated parent of the child; and
- (4) an individual whose parentage of the child is to be adjudicated.

(b) An individual entitled to notice under subsection (a) has a right to intervene in the proceeding.

(c) Lack of notice required by subsection (a) does not render a judgment void. Lack of notice does not preclude an individual entitled to notice under subsection (a) from bringing a proceeding under Section 611(b).

### **Comment**

This new section is intended to ensure that steps are taken to give notice to all persons with a claim to parentage of a child. Giving such individuals notice of and a right to intervene in the proceeding is important because the rights of any absent individual with a claim to parentage of a child could be indirectly affected by the proceeding. Indeed, Section 623(d) provides that, “[e]xcept as otherwise provided in subsection (b), a determination of parentage may be a defense in a subsequent proceeding seeking to adjudicate parentage by an individual who was not a party to the earlier proceeding.”

While a goal of the Section 603 is to ensure that steps are taken to permit all individuals with a claim to parentage of a child the opportunity to participate in the proceeding, another goal of the section is to permit parentage to be adjudicated even if such an individual declines to participate in the proceeding. Hence, the section does not require joinder of such individuals. Subsection (c) also clarifies that failure to comply with the notice requirement of this section does not render the judgment void.

The notice should include a copy of Section 603.

Section 603 does not require that notice be given to the child. This is consistent with the policy decision of UPA (2002) not to require that the child be joined as a necessary party to the proceeding. As the Comment to Section 602 of UPA (2002) explained, few states require children to be joined as necessary parties in parentage actions, and no states then required children born during a marriage to be named as parties to a divorce proceeding. Because the child need not be a party to the action, there is no obligation to notice the child of the proceeding. In addition, as provided in Section 623, the child is not bound during minority by the adjudication unless the order is consistent with the results of genetic testing or the child was represented by an attorney.

### **SECTION 604. PERSONAL JURISDICTION.**

(a) The court may adjudicate an individual’s parentage of a child only if the court has

personal jurisdiction over the individual.

(b) A court of this state with jurisdiction to adjudicate parentage may exercise personal jurisdiction over a nonresident individual, or the [guardian or conservator] of the individual, if the conditions prescribed in [cite to this state's Section 201 of the Uniform Interstate Family Support Act] are satisfied.

(c) Lack of jurisdiction over one individual does not preclude the court from making an adjudication of parentage binding on another individual.

### **Comment**

Source: UPA (2002) § 604; UPA (1973) § 6(b).

This section is carried over from UPA (2002). UPA (2017) continues to take the position that, unlike child custody and visitation proceedings which are considered status adjudications that do not require personal jurisdiction over both parents, parentage proceedings require personal jurisdiction.

While the ideal scenario involves bringing all potential claimants together in a single proceeding, subsection (c) takes the approach that if the court lacks jurisdiction over an individual with a claim to parentage of a child, the court can still proceed.

**SECTION 605. VENUE.** Venue for a proceeding to adjudicate parentage is in the [county] of this state in which:

- (1) the child resides or is located;
- (2) if the child does not reside in this state, the [respondent] resides or is located; or
- (3) a proceeding has been commenced for administration of the estate of an individual who is or may be a parent under this [act].

### **Comment**

Source: UPA (2002) § 605; UPA (1973) § 8(c).

The venue provision follows the approach taken by UPA (1973) and UPA (2002).

**[PART] 2**

**SPECIAL RULES FOR PROCEEDING TO ADJUDICATE PARENTAGE**

**SECTION 606. ADMISSIBILITY OF RESULTS OF GENETIC TESTING.**

(a) Except as otherwise provided in Section 502(b), the court shall admit a report of genetic testing ordered by the court under Section 503 as evidence of the truth of the facts asserted in the report.

(b) A party may object to the admission of a report described in subsection (a), not later than [14] days after the party receives the report. The party shall cite specific grounds for exclusion.

(c) A party that objects to the results of genetic testing may call a genetic-testing expert to testify in person or by another method approved by the court. Unless the court orders otherwise, the party offering the testimony bears the expense for the expert testifying.

(d) Admissibility of a report of genetic testing is not affected by whether the testing was performed:

- (1) voluntarily or under an order of the court or a child-support agency; or
- (2) before, on, or after commencement of the proceeding.

**Comment**

Source: 42 U.S.C. § 666(a)(5)(F)(ii); UPA (2002) § 621(a), (b); UPA (1973) §§ 10, 13.

**SECTION 607. ADJUDICATING PARENTAGE OF CHILD WITH ALLEGED GENETIC PARENT.**

(a) A proceeding to determine whether an alleged genetic parent who is not a presumed parent is a parent of a child may be commenced:

- (1) before the child becomes an adult; or

(2) after the child becomes an adult, but only if the child initiates the proceeding.

(b) Except as otherwise provided in Section 614, this subsection applies in a proceeding described in subsection (a) if the woman who gave birth to the child is the only other individual with a claim to parentage of the child. The court shall adjudicate an alleged genetic parent to be a parent of the child if the alleged genetic parent:

(1) is identified under Section 506 as a genetic parent of the child and the identification is not successfully challenged under Section 506;

(2) admits parentage in a pleading, when making an appearance, or during a hearing, the court accepts the admission, and the court determines the alleged genetic parent to be a parent of the child;

(3) declines to submit to genetic testing ordered by the court or a child-support agency, in which case the court may adjudicate the alleged genetic parent to be a parent of the child even if the alleged genetic parent denies a genetic relationship with the child;

(4) is in default after service of process and the court determines the alleged genetic parent to be a parent of the child; or

(5) is neither identified nor excluded as a genetic parent by genetic testing and, based on other evidence, the court determines the alleged genetic parent to be a parent of the child.

(c) Except as otherwise provided in Section 614 and subject to other limitations in this [part], if in a proceeding involving an alleged genetic parent, at least one other individual in addition to the woman who gave birth to the child has a claim to parentage of the child, the court shall adjudicate parentage under Section 613.

## Comment

This substance of this section is largely carried over from UPA (2002). This section, however, consolidates into a single provision concepts that were previously scattered throughout Article 6 of UPA (2002).

Subsection (a) is based on UPA (2002) § 606; UPA (2017), however, eliminates UPA (2002) § 606(2), which permitted a parentage action to be commenced at any time if an earlier proceeding had been dismissed based on the application of a statute of limitation then in effect. Because federal law requires states to permit parentage establishment any time before the child attains 18 years of age, that provision is no longer necessary. 42 U.S.C. § 666(a)(5)(A)(ii).

Subsection (b)(1) is based on UPA (2002) § 631(2). Subsection (b)(2) is based on UPA (2002) § 623. Subsection (b)(3) is based on UPA (2002) § 622(b). Subsection (b)(4) is based on UPA (2002) § 634. Subsection (b)(5) is based on UPA (2002) § 631(3).

Subsection (c) is arguably new, although its underlying principle – that a court may adjudicate an individual who is not a genetic parent to be a child’s legal parent based on consideration of the child’s best interest – is based on and consistent with UPA (2002) § 608.

### **SECTION 608. ADJUDICATING PARENTAGE OF CHILD WITH PRESUMED PARENT.**

(a) A proceeding to determine whether a presumed parent is a parent of a child may be commenced:

- (1) before the child becomes an adult; or
- (2) after the child becomes an adult, but only if the child initiates the proceeding.

(b) A presumption of parentage under Section 204 cannot be overcome after the child attains two years of age unless the court determines:

- (1) the presumed parent is not a genetic parent, never resided with the child, and never held out the child as the presumed parent’s child; or
- (2) the child has more than one presumed parent.

(c) Except as otherwise provided in Section 614, the following rules apply in a proceeding to adjudicate a presumed parent’s parentage of a child if the woman who gave birth



to the child is the only other individual with a claim to parentage of the child:

(1) If no party to the proceeding challenges the presumed parent's parentage of the child, the court shall adjudicate the presumed parent to be a parent of the child.

(2) If the presumed parent is identified under Section 506 as a genetic parent of the child and that identification is not successfully challenged under Section 506, the court shall adjudicate the presumed parent to be a parent of the child.

(3) If the presumed parent is not identified under Section 506 as a genetic parent of the child and the presumed parent or the woman who gave birth to the child challenges the presumed parent's parentage of the child, the court shall adjudicate the parentage of the child in the best interest of the child based on the factors under Section 613(a) and (b).

(d) Except as otherwise provided in Section 614 and subject to other limitations in this [part], if in a proceeding to adjudicate a presumed parent's parentage of a child, another individual in addition to the woman who gave birth to the child asserts a claim to parentage of the child, the court shall adjudicate parentage under Section 613.

#### **Comment**

This substance of this section is largely carried over from UPA (2002). This section, however, consolidates into a single provision concepts that were previously included in several provisions of Article 6 of UPA (2002).

Subsection (a) is based on UPA (2002) § 607(a). Subsection (b) is based on UPA (2002) § 607(b)(1) and (2). Subsections (c) and (d) are based on UPA (2002) § 608.

#### **SECTION 609. ADJUDICATING CLAIM OF DE FACTO PARENTAGE OF CHILD.**

(a) A proceeding to establish parentage of a child under this section may be commenced only by an individual who:

(1) is alive when the proceeding is commenced; and

(2) claims to be a de facto parent of the child.

(b) An individual who claims to be a de facto parent of a child must commence a proceeding to establish parentage of a child under this section:

(1) before the child attains 18 years of age; and

(2) while the child is alive.

(c) The following rules govern standing of an individual who claims to be a de facto parent of a child to maintain a proceeding under this section:

(1) The individual must file an initial verified pleading alleging specific facts that support the claim to parentage of the child asserted under this section. The verified pleading must be served on all parents and legal guardians of the child and any other party to the proceeding.

(2) An adverse party, parent, or legal guardian may file a pleading in response to the pleading filed under paragraph (1). A responsive pleading must be verified and must be served on parties to the proceeding.

(3) Unless the court finds a hearing is necessary to determine disputed facts material to the issue of standing, the court shall determine, based on the pleadings under paragraphs (1) and (2), whether the individual has alleged facts sufficient to satisfy by a preponderance of the evidence the requirements of paragraphs (1) through (7) of subsection (d). If the court holds a hearing under this subsection, the hearing must be held on an expedited basis.

(d) In a proceeding to adjudicate parentage of an individual who claims to be a de facto parent of the child, if there is only one other individual who is a parent or has a claim to parentage of the child, the court shall adjudicate the individual who claims to be a de facto parent to be a parent of the child if the individual demonstrates by clear-and-convincing evidence that:

(1) the individual resided with the child as a regular member of the child's

household for a significant period;

(2) the individual engaged in consistent caretaking of the child;

(3) the individual undertook full and permanent responsibilities of a parent of the child without expectation of financial compensation;

(4) the individual held out the child as the individual's child;

(5) the individual established a bonded and dependent relationship with the child which is parental in nature;

(6) another parent of the child fostered or supported the bonded and dependent relationship required under paragraph (5); and

(7) continuing the relationship between the individual and the child is in the best interest of the child.

(e) Subject to other limitations in this [part], if in a proceeding to adjudicate parentage of an individual who claims to be a de facto parent of the child, there is more than one other individual who is a parent or has a claim to parentage of the child and the court determines that the requirements of subsection (d) are satisfied, the court shall adjudicate parentage under Section 613.

### **Comment**

This section adds a new means by which an individual can establish a parent-child relationship. This section is modeled on provisions that were recently enacted in Delaware and Maine, two states that adopted UPA (2002), and it reflects trends in state family law.

In most states, if an individual can establish that he or she has developed a strong parent-child relationship with the consent and encouragement of a legal parent, the individual is entitled to some parental rights and possibly some parental responsibilities. Some states extend rights to such persons under equitable principles. *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); *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); *Marquez v. Caudill*, 656 S.E.2d 737 (S.C. 2008) (psychological parent); In re *Clifford K.*, 619 S.E.2d 138 (W. Va. 2005) (psychological parent).

Other states extend rights to such individuals through broad third party custody and visitation statutes. *See, e.g.*, Minn. Stat. § 257C.01-08; Tex. Fam. Code § 102.003(9).

In addition, by statute and through case law, several states recognize such persons as legal parents. *See, e.g.*, *Elisa B. v. Superior Court*, 117 P.3d 660 (Cal. 2005) (under the holding out provision of UPA (1973)); *In re Parentage of L.B.*, 122 P.3d 161 (Wash. 2005) (under Washington state constitution); *In re S.N.V.*, 2011 WL 6425562 (Colo. App. 2011) (under the holding out provision of UPA (1973)); Del. Code Ann., tit. 13, § 8-201(c) (by express statutory provision); *Frazier v. Goudschaal*, 295 P.3d 542 (Kan. 2013) (under a provision based on UPA (1973)); *Partanen v. Gallagher*, 59 N.E.3d 1133 (Mass. 2016) (under a provision based on the holding out provision of UPA (1973)); Me. Rev. Stat. tit. 19-a, § 1891 (by express statutory provision); *Guardianship of Madelyn B.*, 98 A.3d 494 (N.H. 2014) (under the holding out provision of UPA (1973)); *Chatterjee v. King*, 280 P.3d 283 (N.M. 2012) (under the holding out provision of UPA (1973)).

To provide greater clarity to the parties and affected child, UPA (2017) addresses this issue through an express statutory provision. Under this new section, an individual who has functioned as a child's parent for a significant period such that the individual formed a bonded and dependent parent-child relationship may be recognized as a legal parent. This provision ensures that individuals who form strong parent-child bonds with children with the consent and encouragement of the child's legal parent are not excluded from a determination of parentage simply because they entered the child's life sometime after the child's birth. Consistent with the case law and the existing statutory provisions in other states, this section does not include a specific time length requirement. Instead, whether the period is significant is left to the determination of the court, based on the circumstances of the case. The length of time required will vary depending on the age of the child.

At the same time, however, the scope of this section is limited in several ways. First, this section includes a heightened standing requirement that must be satisfied by the individual claiming to be a de facto parent. This requirement is included to ensure that permitting proceedings by de facto parents does not subject parents to unwarranted and unjustified litigation. At the standing stage, under Section 609(c)(3), the requirements may be proved by only a preponderance of the evidence.

Second, the section sets forth a series of substantive requirements that must be satisfied before a court can adjudicate such an individual to be a parent. Some of these substantive requirements—the individual reside with the child for a significant period of time and the individual formed a bonded and dependent relationship with the child which is parental in nature—are based on factors developed under common law doctrine that is utilized in many states. *See, e.g.*, *In re Parentage of L.B.*, 122 P.3d 161, 176 (Wash. 2005), cert. denied, 547 U.S. 1143 (2006); *V.C. v. J.M.B.*, 748 A.2d 539, 551 (N.J.), cert. denied, 531 U.S. 926 (2000); *Custody of H.S.H.-K.*, 533 N.W.2d 419, 421 (Wis. 1995). Accordingly, a court may look to those common law decisions for guidance.

Third, this section permits only the individual alleging himself or herself to be a de facto parent to initiate a proceeding under this section. This limitation was added to address concerns

that stepparents might be held responsible for child support under this theory of parentage. Finally, this section requires the proceeding to establish de facto parentage be commenced before the death of the child and the death of the individual alleged to be a de facto parent, and before the child attains 18 years of age. These safeguards protect against unwarranted and unjustified litigation.

This section is not intended to preclude legal actions based on other legal theories. *See, e.g., DeHart v. DeHart*, 986 N.E.2d 85 (Ill. 2013) (recognizing a cause of action for equitable adoption and contract for adoption in an action contesting the validity of a will).

**SECTION 610. ADJUDICATING PARENTAGE OF CHILD WITH  
ACKNOWLEDGED PARENT.**

(a) If a child has an acknowledged parent, a proceeding to challenge the acknowledgment of parentage or a denial of parentage, brought by a signatory to the acknowledgment or denial, is governed by Sections 309 and 310.

(b) If a child has an acknowledged parent, the following rules apply in a proceeding to challenge the acknowledgment of parentage or a denial of parentage brought by an individual, other than the child, who has standing under Section 602 and was not a signatory to the acknowledgment or denial:

(1) The individual must commence the proceeding not later than two years after the effective date of the acknowledgment.

(2) The court may permit the proceeding only if the court finds permitting the proceeding is in the best interest of the child.

(3) If the court permits the proceeding, the court shall adjudicate parentage under Section 613.

**Comment**

Source: UPA (2002) § 609.

This section is based on UPA (2002) § 609. Section 609 of UPA (2002) addressed challenges both to adjudicated parents and to acknowledged parents. UPA (2017) separates these

concepts into separate sections – Section 610, addressing challenges to acknowledged parents, and Section 611, addressing challenges to adjudicated parents.

As was true under UPA (2002), subsection (b) imposes a two-year limitations period to challenges to an acknowledgment. This is consistent with the limitations periods in other sections of the UPA, including the time for challenging an acknowledgment of parentage by a signatory under Section 307. As was true under UPA (2002), a challenge brought within this limitations period is subject to considerations related to the best interest of the child.

**SECTION 611. ADJUDICATING PARENTAGE OF CHILD WITH  
ADJUDICATED PARENT.**

(a) If a child has an adjudicated parent, a proceeding to challenge the adjudication, brought by an individual who was a party to the adjudication or received notice under Section 603, is governed by the rules governing a collateral attack on a judgment.

(b) If a child has an adjudicated parent, the following rules apply to a proceeding to challenge the adjudication of parentage brought by an individual, other than the child, who has standing under Section 602 and was not a party to the adjudication and did not receive notice under Section 603:

(1) The individual must commence the proceeding not later than two years after the effective date of the adjudication.

(2) The court may permit the proceeding only if the court finds permitting the proceeding is in the best interest of the child.

(3) If the court permits the proceeding, the court shall adjudicate parentage under Section 613.

**Comment**

Source: UPA (2002) § 609.

This section is based on UPA (2002) § 609. Section 609 of UPA (2002) addressed challenges both to adjudicated parents and to acknowledged parents. UPA (2017) separates these concepts into separate sections: Section 610, addressing challenges to acknowledged parents, and

Section 611, addressing challenges to adjudicated parents.

Subsection (a) clarifies that if the individual received notice of the action under Section 603, a proceeding to challenge the adjudication by the individual is governed by the rules governing collateral attacks on judgments.

As was true under UPA (2002), subsection (b) imposes a two-year limitations period on challenges to an adjudication of parentage of a child by an individual who was not a party to and did not receive notice of the prior proceeding. Other sections of the act likewise utilize a two-year limitations period. *See, e.g.*, Section 307; Section 608. As was true under UPA (2002), a challenge brought within this limitations period is subject to considerations related to the best interest of the child.

**SECTION 612. ADJUDICATING PARENTAGE OF CHILD OF ASSISTED REPRODUCTION.**

(a) An individual who is a parent under [Article] 7 or the woman who gave birth to the child may bring a proceeding to adjudicate parentage. If the court determines the individual is a parent under [Article] 7, the court shall adjudicate the individual to be a parent of the child.

(b) In a proceeding to adjudicate an individual's parentage of a child, if another individual other than the woman who gave birth to the child is a parent under [Article] 7, the court shall adjudicate the individual's parentage of the child under Section 613.

**Comment**

This new section specifically authorizes the filing of a proceeding to adjudicate the parentage of individuals who are intended parents under Article 7. The rules regarding adjudications of parentage for individuals who are parents under Article 8 are set forth in Article 8.

**SECTION 613. ADJUDICATING COMPETING CLAIMS OF PARENTAGE.**

(a) Except as otherwise provided in Section 614, in a proceeding to adjudicate competing claims of, or challenges under Section 608(c), 610, or 611 to, parentage of a child by two or more individuals, the court shall adjudicate parentage in the best interest of the child, based on:

(1) the age of the child;

(2) the length of time during which each individual assumed the role of parent of the child;

(3) the nature of the relationship between the child and each individual;

(4) the harm to the child if the relationship between the child and each individual is not recognized;

(5) the basis for each individual's claim to parentage of the child; and

(6) other equitable factors arising from the disruption of the relationship between the child and each individual or the likelihood of other harm to the child.

(b) If an individual challenges parentage based on the results of genetic testing, in addition to the factors listed in subsection (a), the court shall consider:

(1) the facts surrounding the discovery the individual might not be a genetic parent of the child; and

(2) the length of time between the time that the individual was placed on notice that the individual might not be a genetic parent and the commencement of the proceeding.

#### **Alternative A**

(c) The court may not adjudicate a child to have more than two parents under this [act].

#### **Alternative B**

(c) The court may adjudicate a child to have more than two parents under this [act] if the court finds that failure to recognize more than two parents would be detrimental to the child. A finding of detriment to the child does not require a finding of unfitness of any parent or individual seeking an adjudication of parentage. In determining detriment to the child, the court shall consider all relevant factors, including the harm if the child is removed from a stable placement with an individual who has fulfilled the child's physical needs and psychological



needs for care and affection and has assumed the role for a substantial period.

### **End of Alternatives**

***Legislative Note:** A state should enact Alternative A if the state does not wish a child to have more than two parents. A state should enact Alternative B if the state wishes to authorize a court in certain circumstances to establish more than two parents for a child.*

### **Comment**

UPA (1973) contained a provision addressing situations in which multiple individuals have a claim to parentage of a child. Section 4(b) of UPA (1973) provided guidance in such situations, although the guidance was vague. UPA (1973) § 4(b) (“If two or more presumptions arise which conflict with each other, the presumption which on the facts is founded on the weightier considerations of policy and logic controls.”).

UPA (2002) eliminated that provision and did not expressly address how a court should resolve cases involving competing presumptions or claims of parentage. UPA (2002) did, however, include a provision that implicitly acknowledged the possibility of multiple claimants. UPA (2002), § 608 authorized a court to deny a request for genetic testing in cases in which a party sought to challenge a presumption of parentage. The section provided a list of factors that a court was directed to consider in such cases. The reality is, however, that whether or not the court orders genetic testing, the parties often know what the results of that genetic tests would reveal. In that way, the section concealed the purpose of the provision, which was to provide guidance to a court faced with competing claims of parentage between an alleged genetic parent and a presumed parent.

UPA (2017) addresses how to resolve cases between competing claimants directly. While UPA (2017) frames the issue differently, this section is consistent with the basic approach of UPA (2002) § 608. Thus, the factors included in this section are largely carried over from UPA (2002) § 608.

This section also expressly addresses another issue that UPA (2002) did not: whether a court may conclude that a child has more than two parents under the act. This is a question with which courts have increasingly been confronted.

The act provides two alternatives. Alternative A provides that a child cannot have more than two legal parents. Alternative B permits a court, in rare circumstances, to find that a child has more than two legal parents.

Alternative B is consistent with an emerging trend permitting courts to recognize more than two people as a child’s parents. Four states expressly permit a court to find that a child has more than two legal parents by statute. *See* Cal. Fam. Code 7612(c); Del. Code Ann. tit. 13, § 8-201(a)(4), (b)(6), (c); D.C. Code § 16-909(e); Me. Rev. Stat. tit. 19-a, § 1853(2). In addition, courts in several other states have reached that conclusion as a matter of common law. *See, e.g., Warren v. Richard*, 296 So.3d 813, 815 (La. 1974). In addition, courts in some states have

concluded that a child had two legal parents and one equitable parent who was entitled to at least some rights and duties of a parent. *See, e.g., In Interest of P.S.*, 505 S.W.3d 106 (Tex. Ct. App. 2016) (3-way custody and visitation arrangement); *A.B. v. T.V.*, 2015 WL 7571451 (Pa. Super. Ct. 2015); *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.”); *McAllister v. McAllister*, 779 N.W.2d 652 (N.D. 2010).

Again, Alternative B recognizes and reflects this trend in favor of recognizing the possibility that a child may have more than two legal parents. Alternative B, however, stakes out a narrow, limited approach to the issue by erecting a high substantive hurdle before the court can reach this conclusion: a court can determine that a child has more than two legal parents only when failure to do so would cause detriment to the child.

**SECTION 614. PRECLUDING ESTABLISHMENT OF PARENTAGE BY PERPETRATOR OF SEXUAL ASSAULT.**

(a) In this section, “sexual assault” means [cite to this state’s criminal rape statutes].

(b) In a proceeding in which a woman alleges that a man committed a sexual assault that resulted in the woman giving birth to a child, the woman may seek to preclude the man from establishing that he is a parent of the child.

(c) This section does not apply if:

(1) the man described in subsection (b) has previously been adjudicated to be a parent of the child; or

(2) after the birth of the child, the man established a bonded and dependent relationship with the child which is parental in nature.

(d) Unless Section 309 or 607 applies, a woman must file a pleading making an allegation under subsection (b) not later than two years after the birth of the child. The woman may file the pleading only in a proceeding to establish parentage under this [act].

(e) An allegation under subsection (b) may be proved by:

(1) evidence that the man was convicted of a sexual assault, or a comparable crime in another jurisdiction, against the woman and the child was born not later than 300 days

after the sexual assault; or

(2) clear-and-convincing evidence that the man committed sexual assault against the woman and the child was born not later than 300 days after the sexual assault.

(f) Subject to subsections (a) through (d), if the court determines that an allegation has been proved under subsection (e), the court shall:

(1) adjudicate that the man described in subsection (b) is not a parent of the child;

(2) require the [state agency maintaining birth records] to amend the birth certificate if requested by the woman and the court determines that the amendment is in the best interest of the child; and

(3) require the man pay to child support, birth-related costs, or both, unless the woman requests otherwise and the court determines that granting the request is in the best interest of the child.

### **Comment**

According to the National Conference of State Legislatures (NCSL), it is estimated that there are between “17,000 and 32,000 rape-related pregnancies in the United States each year.” In 2015, Congress enacted the Rape Survivor Child Custody Act. Title IV of that act provides for increased funding for states that have statutes permitting women who conceived children through rape to seek termination of the perpetrator’s parental rights. According to NCSL, today “[a]pproximately 45 states and the District of Columbia have enacted legislation regarding the parental rights of perpetrators of sexual assault.” Most states that have enacted legislation address the issue in one of two ways: (1) approximately 30 states have statutes that permit a court to terminate the parental rights of the perpetrator; (2) approximately 20 states permit courts to restrict the custodial or visitation rights of the perpetrator.

This section permits a court to declare that the perpetrator is not a parent if the person has been convicted of sexual assault or if the sexual assault is proved by clear and convincing evidence in the proceeding and the child was conceived as a result the sexual assault. The latter method of proof must be included to meet the requirements of the federal statute. 42 U.S.C. § 14043h-2.

In subsection (a), states must decide which criminal rape statutes should be included in this section. A state may, for example, want to exclude from coverage some forms of statutory rape where the individuals are close in age, or incest between consenting adults who do not have

a parent-child relationship.

In most cases, an allegation that this section applies must be made within two years of the child's birth. This is consistent with several other provisions of UPA 2017 that also impose a two-year statute of limitations. *See, e.g.*, Sections 307, 608, 705. There is one exception to this two-year limitations period. In an action to adjudicate parentage when the child has no presumed, adjudicated, or acknowledged parent, the two-year statute of limitations does not apply.

Even if the action is timely filed, a court must deny the request to preclude the man's parentage of the child if the man has developed a bonded and dependent parent-child relationship with the child. This exception is consistent with the act's focus on the best interest of the child, and with the act's goal of protecting established parent-child bonds.

A woman may seek to preclude establishment of parentage of a child by an alleged perpetrator of sexual assault only in a proceeding to adjudicate parentage.

Subsection (c) provides that a woman may seek to preclude an establishment of parentage under this section. While most proceedings under this section will be brought by the woman, subsection (c) does not expressly limit such proceedings to ones initiated by the woman because there may be limited circumstances when someone acting on behalf of the woman may be permitted to bring a proceeding under this section. This may be the case, for example, if the woman is very young or if she is incapacitated.

### **[PART] 3**

#### **HEARING AND ADJUDICATION**

##### **SECTION 615. TEMPORARY ORDER.**

(a) In a proceeding under this [article], the court may issue a temporary order for child support if the order is consistent with law of this state other than this [act] and the individual ordered to pay support is:

- (1) a presumed parent of the child;
- (2) petitioning to be adjudicated a parent;
- (3) identified as a genetic parent through genetic testing under Section 506;
- (4) an alleged genetic parent who has declined to submit to genetic testing;
- (5) shown by clear-and-convincing evidence to be a parent of the child; or
- (6) a parent under this [act].

(b) A temporary order may include a provision for custody and visitation under law of this state other than this [act].

### **Comment**

Source: 42 U.S.C. § 666(a)(5)(J); UPA (2002) § 624; UIFSA (1996) § 401.

This provision is carried over from UPA (2002) § 624. The provision requires that parentage be established by clear and convincing evidence to comply with federal law. *See* 42 U.S.C. § 666(a)(5)(J) (requiring states to adopt “[p]rocedures which require that a temporary order be issued, upon motion by a party, requiring the provision of child support pending an administrative or judicial determination of parentage, if there is clear and convincing evidence of paternity (on the basis of genetic tests or other evidence).”).

The temporary orders referenced in both subsections (a) and (b) include interim orders.

### **SECTION 616. COMBINING PROCEEDINGS.**

(a) Except as otherwise provided in subsection (b), the court may combine a proceeding to adjudicate parentage under this [act] with a proceeding for adoption, termination of parental rights, child custody or visitation, child support, [divorce, dissolution, annulment, declaration of invalidity, or legal separation or separate maintenance,] administration of an estate, or other appropriate proceeding.

(b) A [respondent] may not combine a proceeding described in subsection (a) with a proceeding to adjudicate parentage brought under [the Uniform Interstate Family Support Act].

**Legislative Note:** *A state should use its own terms for the proceedings identified in the bracketed language in subsection (a).*

### **Comment**

Source: UPA (2002) § 610; UPA (1973) § 8.

This provision is carried over from UPA (2002), although the prior concept of “joining” proceeding has been replaced with the concept of “combining” various proceedings. As the comment to the UPA (2002) provision explained, it is common to have multiple proceedings regarding a single child pending at the same time, especially when a child-support agency seeks to establish paternity and fix child support.

This provision is intended to permit a court to combine such proceedings unless the court

would not otherwise have jurisdiction over the proceeding. Accordingly, subsection (b) restricts counterclaims in those instances in which an initiating state sends proceeding to adjudicate parentage to the responding state. Because petitioner is “appearing” in the other forum, to permit counterclaims would serve as a major deterrent to bringing such proceedings. This bar does not prevent a separate proceeding for such matters, but there must be independent jurisdiction not arising from the petitioner’s appearance in the parentage proceeding.

**SECTION 617. PROCEEDING BEFORE BIRTH.** [Except as otherwise provided in [Article] 8, a][A] proceeding to adjudicate parentage may be commenced before the birth of the child and an order or judgment may be entered before birth, but enforcement of the order or judgment must be stayed until the birth of the child.

*Legislative Note:* A state should include the bracketed phrase on Article 8 if the state wishes to recognize in statute surrogacy agreements and includes Article 8 in this act.

#### **Comment**

UPA (2002) provided that an action to determine parentage could be initiated prior to birth, but that it could not be concluded until after the birth of the child. UPA (2002) § 611.

UPA (2017) takes a slightly different position. This section permits a court to issue an order prior to birth, although the judgment is stayed until the birth of the child. This provision is based on a California provision. Cal. Fam. Code § 7633. In some instances, it may be very helpful for the parties to have a determination of parentage prior to birth, even if the order or judgment is not effective until after birth.

#### **SECTION 618. CHILD AS PARTY; REPRESENTATION.**

(a) A minor child is a permissive party but not a necessary party to a proceeding under this [article].

(b) The court shall appoint [an attorney, guardian ad litem, or similar person] to represent a child in a proceeding under this [article], if the court finds that the interests of the child are not adequately represented.

*Legislative Note:* A state should replace the bracketed language in subsection (b) for terms of persons authorized to represent a child in a proceeding under this article with terms for persons performing similar representation under law of the state other than this act.

### Comment

Source: UPA (2002) § 612.

Section 618 follows UPA (2002). Unlike UPA (1973), UPA (2002) and UPA (2017) take the view that the child is not a necessary party. The court, however, is permitted to appoint an attorney or similar person to represent the child if the court finds that the child's interests are not adequately represented.

**SECTION 619. COURT TO ADJUDICATE PARENTAGE.** The court shall adjudicate parentage of a child without a jury.

### Comment

Source: 42 U.S.C. § 666(a)(5)(I); UPA (2002) § 632.

This provision is carried over from UPA (2002). This provision is consistent with federal law, which provides that “parties to an action to establish paternity are not entitled to a trial by jury.” 42 U.S.C. § 666(a)(5)(I).

### **SECTION 620. HEARING[; INSPECTION OF RECORDS].**

[(a) ]On request of a party and for good cause, the court may close a proceeding under this [article] to the public.

[(b) A final order in a proceeding under this [article] is available for public inspection. Other papers and records are available for public inspection only with the consent of the parties or by court order.]

*Legislative Note: A state should review the state's open records laws to determine if subsection (b) needs to be included or amended.*

### Comment

Source: UPA (2002) § 633; UPA (1973) § 20.

**SECTION 621. DISMISSAL FOR WANT OF PROSECUTION.** The court may dismiss a proceeding under this [act] for want of prosecution only without prejudice. An order of dismissal for want of prosecution purportedly with prejudice is void and has only the effect of a dismissal without prejudice.

## Comment

Source: UPA (2002) § 635.

A major principle of UPA (2017) —and its predecessors—is that the child’s right to have a determination of parentage is fundamental. This section, which is carried over from UPA (2002), confirms this right by declaring that the delinquency of another person, such as the mother or a support enforcement agency, in prosecuting such a proceeding may not permanently preclude the ultimate resolution of a parentage determination.

### **SECTION 622. ORDER ADJUDICATING PARENTAGE.**

(a) An order adjudicating parentage must identify the child in a manner provided by law of this state other than this [act].

(b) Except as otherwise provided in subsection (c), the court may assess filing fees, reasonable attorney’s fees, fees for genetic testing, other costs, and necessary travel and other reasonable expenses incurred in a proceeding under this [article]. Attorney’s fees awarded under this subsection may be paid directly to the attorney, and the attorney may enforce the order in the attorney’s own name.

(c) The court may not assess fees, costs, or expenses in a proceeding under this [article] against a child-support agency of this state or another state, except as provided by law of this state other than this [act].

(d) In a proceeding under this [article], a copy of a bill for genetic testing or prenatal or postnatal health care for the woman who gave birth to the child and the child, provided to the adverse party not later than 10 days before a hearing, is admissible to establish:

- (1) the amount of the charge billed; and
- (2) that the charge is reasonable and necessary.

(e) On request of a party and for good cause, the court in a proceeding under this [article] may order the name of the child changed. If the court order changing the name varies from the



name on the birth certificate of the child, the court shall order the [state agency maintaining birth records] to issue an amended birth certificate.

### **Comment**

Source: UPA (2002) § 636; UPA (1973) §§ 15, 16, 23; UIFSA (1996) § 313.

### **SECTION 623. BINDING EFFECT OF DETERMINATION OF PARENTAGE.**

(a) Except as otherwise provided in subsection (b):

(1) a signatory to an acknowledgment of parentage or denial of parentage is bound by the acknowledgment and denial as provided in [Article] 3; and

(2) a party to an adjudication of parentage by a court acting under circumstances that satisfy the jurisdiction requirements of [cite to this state's Section 201 of the Uniform Interstate Family Support Act] and any individual who received notice of the proceeding are bound by the adjudication.

(b) A child is not bound by a determination of parentage under this [act] unless:

(1) the determination was based on an unrescinded acknowledgment of parentage and the acknowledgment is consistent with the results of genetic testing;

(2) the determination was based on a finding consistent with the results of genetic testing, and the consistency is declared in the determination or otherwise shown;

(3) the determination of parentage was made under [Article] 7[ or 8]; or

(4) the child was a party or was represented by [an attorney, guardian ad litem, or similar person] in the proceeding.

(c) In a proceeding for [divorce, dissolution, annulment, declaration of invalidity, legal separation, or separate maintenance], the court is deemed to have made an adjudication of parentage of a child if the court acts under circumstances that satisfy the jurisdiction

requirements of [cite to this state’s Section 201 of the Uniform Interstate Family Support Act] and the final order:

(1) expressly identifies the child as a “child of the marriage” or “issue of the marriage” or includes similar words indicating that both spouses are parents of the child; or

(2) provides for support of the child by a spouse unless that spouse’s parentage is disclaimed specifically in the order.

(d) Except as otherwise provided in subsection (b) or Section 611, a determination of parentage may be asserted as a defense in a subsequent proceeding seeking to adjudicate parentage of an individual who was not a party to the earlier proceeding.

(e) A party to an adjudication of parentage may challenge the adjudication only under law of this state other than this [act] relating to appeal, vacation of judgment, or other judicial review.

***Legislative Note:*** *A state should include the bracketed reference to Article 8 if the state wishes to recognize in statute surrogacy agreements and includes Article 8 in this act.*

*A state should replace the bracketed language in subsection (b)(4) for terms of persons authorized to represent a child in a proceeding under this article with terms for persons performing similar representation under law of the state other than this act.*

*A state should use its own terms for the proceedings identified in the bracketed language in subsection (c).*

### **Comment**

Source: UPA (2002) § 637.

As explained in the comment to UPA (2002) § 637, a considerable amount of litigation involves who is bound by a final order determining parentage. This section codifies rules regarding the effect of such orders. Consistent with UPA (2002), subsection (a) provides that, if the order is issued under standards of personal jurisdiction of UIFSA (2008), the order is binding on all parties to the proceeding.

Subsection (b) follows UPA (2002) with regard to whether a child is bound by the terms of the order determining parentage. UPA (2017), as did UPA (2002), adopts the rule that a child is not bound during minority unless the order is consistent with the results of genetic testing or the child was represented by an attorney.

Subsection (c) follows UPA (2002) on whether a divorce decree constitutes a finding of parentage. Subsection (d) follows UPA (2002) by giving protection to third parties who may claim benefit of an earlier determination of parentage.

As was true of UPA (2002), this section is silent on whether state IV-D agencies are bound by prior determinations of parentage. This issue is left to other law of the state. Similarly, issues of collateral attack on final judgments are to be resolved by recourse to other state law.

## [ARTICLE] 7

### ASSISTED REPRODUCTION

#### Comment

The content of Article 7 is substantively similar to the content of Article 7 of UPA (2002). The primary changes to Article 7 are intended to update the article so that it applies equally to same-sex couples.

**SECTION 701. SCOPE OF [ARTICLE].** This [article] does not apply to the birth of a child conceived by sexual intercourse[ or assisted reproduction under a surrogacy agreement under [Article] 8].

*Legislative Note:* A state should include the bracketed phrase concerning a surrogacy agreement if the state wishes to recognize in statute surrogacy agreements and includes Article 8 in this act.

**SECTION 702. PARENTAL STATUS OF DONOR.** A donor is not a parent of a child conceived by assisted reproduction.

#### Comment

Source: UPA (2002) § 702.

**SECTION 703. PARENTAGE OF CHILD OF ASSISTED REPRODUCTION.** 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 the assisted reproduction is a parent of the child.

#### **SECTION 704. CONSENT TO ASSISTED REPRODUCTION.**

(a) Except as otherwise provided in subsection (b), the consent described in Section 703 must be in a record signed by a woman giving birth to a child conceived by assisted reproduction

and an individual who intends to be a parent of the child.

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

(1) the woman or the individual proves by clear-and-convincing evidence the existence of an express agreement entered into before conception that the individual and the woman intended they both would be parents of the child; or

(2) the woman and the individual for the first two years of the child's life, including any period of temporary absence, resided together in the same household with the child and both openly held out the child as the individual's child, unless the individual dies or becomes incapacitated before the child attains two years of age or the child dies before the child attains two years of age, in which case the court may find consent under this subsection to parentage if a party proves by clear-and-convincing evidence that the woman and the individual intended to reside together in the same household with the child and both intended the individual would openly hold out the child as the individual's child, but the individual was prevented from carrying out that intent by death or incapacity.

### **Comment**

Source: UPA (2002) § 704; UPC (2010) § 2-120(f).

This section largely follows UPA (2002), in that it provides that an individual is a parent of a child born through assisted reproduction if the individual consents in writing to the assisted reproduction, or, in the absence of consent, if for the first two years of the child's life, the individual resided together in the same household with the child and both openly held out the child as the individual's child.

This section adds two new means by which an individual can establish parentage of a child born through assisted reproduction. In the absence of written consent to the assisted reproduction, parentage can be established under subsection (b)(1) if the woman or the individual proves that the parties entered into an express agreement prior to conception that they intended that they would both be parents of the child. UPA (2017) continues to provide the most protection to those who have written consent. This protection encourages parties to obtain

written consent, which helps avoid disputes and litigation.

Case law and experience make clear, however, that many parties do not consent in writing, even when the statute requires written consent and even when the evidence indicates that the parties intended that they would both be parents to the child. Some courts have relied on equitable or common law doctrines to do justice in such cases. *See, e.g., In re Parentage of M.J.*, 203 Ill. 3d 526, 541, 787 N.E.2d 144, 152 (2003) (holding that even though the assisted reproduction statute did not apply in the absence of written consent, a man who consented in fact to the woman's insemination was a parent under common law principles and that "to hold otherwise would deprive the children of financial support merely because of deception and a technical oversight."). Some other courts, however, have rigidly applied written consent requirements, often producing results that seem inequitable and harmful to the child.

In light of this experience, UPA (2017) recognizes some non-written forms of consent. New subsection (b)(1) adds a new method of establishing parentage in the absence of written consent, but this new method imposes a high substantive bar: the express agreement must be proven by clear and convincing evidence.

In addition, subsection (b)(2) has been expanded to bring UPA (2017) more in line with the Uniform Probate Code. UPA (2002) provided that the failure to sign a written consent did not preclude a determination of parentage if the individual, during the first two years of the child's life, resided together in the same household with the child and openly held out the child as the individual's own. UPA (2017) also permits a determination of parentage when this two-year period is not fulfilled because of the death or incapacity of the individual or the death of the child.

#### **SECTION 705. LIMITATION ON SPOUSE'S DISPUTE OF PARENTAGE.**

(a) Except as otherwise provided in subsection (b), an individual who, at the time of a child's birth, is the spouse of the woman who gave birth to the child by assisted reproduction may not challenge the individual's parentage of the child unless:

(1) not later than two years after the birth of the child, the individual commences a proceeding to adjudicate the individual's parentage of the child; and

(2) the court finds the individual did not consent to the assisted reproduction, before, on, or after birth of the child, or withdrew consent under Section 707.

(b) A proceeding to adjudicate a spouse's parentage of a child born by assisted reproduction may be commenced at any time if the court determines:

(1) the spouse neither provided a gamete for, nor consented to, the assisted reproduction;

(2) the spouse and the woman who gave birth to the child have not cohabited since the probable time of assisted reproduction; and

(3) the spouse never openly held out the child as the spouse's child.

(c) This section applies to a spouse's dispute of parentage even if the spouse's marriage is declared invalid after assisted reproduction occurs.

### **Comment**

Source: UPA (2002) § 705.

The substance of this section is carried over from UPA (2002). Like UPA (2002) § 705, this section applies even if the parties' marriage is annulled or declared invalid after assisted reproduction occurs, and the term "spouse" includes parties who were in a marriage that was declared invalid after the assisted reproduction occurred.

**SECTION 706. EFFECT OF CERTAIN LEGAL PROCEEDINGS REGARDING MARRIAGE.** If a marriage of a woman who gives birth to a child conceived by assisted reproduction is [terminated through divorce or dissolution, subject to legal separation or separate maintenance, declared invalid, or annulled] before transfer of gametes or embryos to the woman, a former spouse of the woman is not a parent of the child unless the former spouse consented in a record that the former spouse would be a parent of the child if assisted reproduction were to occur after a [divorce, dissolution, annulment, declaration of invalidity, legal separation, or separate maintenance], and the former spouse did not withdraw consent under Section 707.

*Legislative Note:* A state should use its own terms for the proceedings identified in the bracketed language.

### **Comment**

Source: UPA (2002) § 706(a).

This section is largely carried over from UPA (2002) § 706(a). This section applies only to married couples and provides that the spouse is not a parent if the gamete or embryo transfer resulting in pregnancy occurs after annulment or dissolution unless the individual consented in a record that the individual would be a parent if assisted reproduction were to occur after divorce or annulment. The only substantive change made by UPA (2017) is to clarify that the principle established in UPA (2002) § 706(a) applies equally to divorces and annulments.

Like UPA (2002), § 706 of UPA (2017) provides rules for determining of parentage. Accordingly, in the event of a dissolution of marriage or the withdrawal of consent, this act does not address under what circumstances a transfer or gametes or embryos may or may not occur, or which party has the right to control any gametes or embryos.

#### **SECTION 707. WITHDRAWAL OF CONSENT.**

(a) An individual who consents under Section 704 to assisted reproduction may withdraw consent any time before a transfer that results in a pregnancy, by giving notice in a record of the withdrawal of consent to the woman who agreed to give birth to a child conceived by assisted reproduction and to any clinic or health-care provider facilitating the assisted reproduction. Failure to give notice to the clinic or health-care provider does not affect a determination of parentage under this [act].

(b) An individual who withdraws consent under subsection (a) is not a parent of the child under this [article].

#### **Comment**

Source: UPA (2002) § 706(b).

The substance of this provision is carried over from UPA (2002) § 706. UPA (2017), however, divides two concepts that had previously been included in a single section into two separate sections.

The substance of UPA (2002) § 706(b), regarding the rules for the withdrawal of consent by any individual, married or unmarried, is addressed in this section. The content of UPA (2002) § 706(a), regarding the effect of a dissolution or annulment of a marriage, is addressed in UPA (2017) § 706.

#### **SECTION 708. PARENTAL STATUS OF DECEASED INDIVIDUAL.**

(a) If an individual who intends to be a parent of a child conceived by assisted

reproduction dies during the period between the transfer of a gamete or embryo and the birth of the child, the individual's death does not preclude the establishment of the individual's parentage of the child if the individual otherwise would be a parent of the child under this [act].

(b) If an individual who consented in a record to assisted reproduction by a woman who agreed to give birth to a child dies before a transfer of gametes or embryos, the deceased individual is a parent of a child conceived by the assisted reproduction only if:

(1) either:

(A) the individual consented in a record that if assisted reproduction were to occur after the death of the individual, the individual would be a parent of the child; or

(B) the individual's intent to be a parent of a child conceived by assisted reproduction after the individual's death is established by clear-and-convincing evidence; and

(2) either:

(A) the embryo is in utero not later than [36] months after the individual's death; or

(B) the child is born not later than [45] months after the individual's death.

### **Comment**

Source: UPA (2002) § 707; UPC (2008) § 2-120(f).

The rule stated in subsection (a) was implicit in UPA (2002), but UPA (2017) makes the rule explicit. The substance of subsection (b)(1)(A) is carried over from UPA (2002).

Subsection (b)(1)(B) was not included in UPA (2002), but is based on and consistent with the Uniform Probate Code. UPC § 2-120(f) provides that an individual is "treated as the other parent" if it can be shown, "considering all the facts and circumstances," that the individual consented to the assisted reproduction. Subsection (b)(2) was not included in UPA (2002), but, again, is based on and consistent with the approach of UPC § 2-120(k). *See also* 750 ILCS 46/705.



## [[ARTICLE] 8

### SURROGACY AGREEMENT

*Legislative Note: A state should include Article 8 if the state wishes to recognize in statute surrogacy agreements.*

#### Comment

UPA (2017) updates the surrogacy provisions of UPA (2002) to reflect developments that have occurred over the last 15 years. UPA (2002) included a bracketed Article 8 that authorized surrogacy agreements. States have been particularly reluctant to enact that article. Eleven states adopted versions of UPA (2000) or UPA (2002). However, of these 11 states, only two – Texas and Utah – enacted the surrogacy provisions based on Article 8 of UPA (2002).

The fact that very few states enacted Article 8 of UPA (2002) is likely the result of a confluence of factors. One likely factor is the controversial nature of surrogacy itself. To be clear, however, it is not simply resistance to surrogacy that explains states' reluctance to enact Article 8 of UPA (2002). Indeed, at least five of the 11 states that enacted UPA (2002) enacted statutory provisions permitting surrogacy that are *not* premised on UPA (2002). These states include: Delaware (permitting) (enacted 2013); Illinois (permitting) (enacted 2004); Maine (permitting) (enacted 2015). Thus, there appeared to be a lack of enthusiasm for the substance of the provisions themselves. Moreover, much has changed in this rapidly developing area of law and practice during the last 15 years. More states address surrogacy by statute, and more people are having children through surrogacy. Accordingly, UPA (2017) updates the surrogacy provisions to make them more consistent with current surrogacy practice.

As was true of UPA (2002), Article 8 of UPA (2017) regulates and permits both genetic (often referred to as “traditional”) and gestational surrogacy agreements. But UPA (2017) differs in the way that it regulates these two types of surrogacy agreements. UPA (2002) set forth a single set of requirements that applied equally to genetic and gestational surrogacy agreements. While UPA (2017) continues to permit both types of surrogacy, UPA (2017) imposes additional safeguards or requirements on genetic surrogacy agreements. For example, while gestational surrogacy agreements are binding once the successful transfer has occurred, UPA (2017) allows genetic surrogates to withdraw their consent any time up until 72 hours after birth. This differentiation between genetic and gestational surrogacy is intended to reflect both the factual differences between the two types of surrogacy as well as the reality that policy makers view these two forms of surrogacy as being quite different. Of the states that permit surrogacy, most permit *only* gestational surrogacy agreements.

While UPA (2017) adds additional requirements that apply only to genetic surrogacy agreements, it simultaneously liberalizes the rules governing gestational surrogacy agreements. For example, UPA (2017) eliminates the requirement imposed under UPA (2002) that parties to a gestational agreement obtain court approval of the agreement before any medical procedures related to the agreement. The changes to the rules governing gestational surrogacy agreements are intended to bring UPA (2017) more in line with current practice and law.

Sections 801 through 807 establish the rules that apply to both types of surrogacy agreements. Sections 808 through 812 include rules that apply only to gestational surrogacy agreements. Sections 813 through 818 include rules that apply only to genetic surrogacy agreements.

## [PART] 1

### GENERAL REQUIREMENTS

#### **SECTION 801. DEFINITIONS.** In this [article]:

(1) “Genetic surrogate” means a woman who is not an intended parent and who agrees to become pregnant through assisted reproduction using her own gamete, under a genetic surrogacy agreement as provided in this [article].

(2) “Gestational surrogate” means a woman who is not an intended parent and who agrees to become pregnant through assisted reproduction using gametes that are not her own, under a gestational surrogacy agreement as provided in this [article].

(3) “Surrogacy agreement” means an agreement between one or more intended parents and a woman who is not an intended parent in which the woman agrees to become pregnant through assisted reproduction and which provides that each intended parent is a parent of a child conceived under the agreement. Unless otherwise specified, the term refers to both a gestational surrogacy agreement and a genetic surrogacy agreement.

#### **SECTION 802. ELIGIBILITY TO ENTER GESTATIONAL OR GENETIC SURROGACY AGREEMENT.**

(a) To execute an agreement to act as a gestational or genetic surrogate, a woman must:

- (1) have attained 21 years of age;
- (2) previously have given birth to at least one child;
- (3) complete a medical evaluation related to the surrogacy arrangement by a licensed medical doctor;

(4) complete a mental-health consultation by a licensed mental-health professional; and

(5) have independent legal representation of her choice throughout the surrogacy arrangement regarding the terms of the surrogacy agreement and the potential legal consequences of the agreement.

(b) To execute a surrogacy agreement, each intended parent, whether or not genetically related to the child, must:

(1) have attained 21 years of age;

(2) complete a medical evaluation related to the surrogacy arrangement by a licensed medical doctor;

(3) complete a mental-health consultation by a licensed mental health professional; and

(4) have independent legal representation of the intended parent's choice throughout the surrogacy arrangement regarding the terms of the surrogacy agreement and the potential legal consequences of the agreement.

### **Comment**

This section is modeled on the more recently adopted surrogacy provisions, including those enacted in Delaware (enacted 2013); Maine (enacted 2015); Nevada (enacted 2013); New Hampshire (enacted 2014); Illinois (enacted 2004); and the District of Columbia (enacted 2017), among other states. *See, e.g.*, Del. Stat., tit. 13 §§ 8-801 to 8-809; Me. Rev. Stat. tit. 19-a, §§ 1931 to 1938; Nev. Rev. Stat. §§ 126.500 to 126.810; N.H. Rev. Stat. §§ 168-B:1 to 168-B:22; 750 ILCS 47/1 to 47/75; D.C. Code §§ 16-401 to 16-412.

Most of these recently adopted surrogacy provisions include similar requirements regarding age, medical and mental health evaluations, and independent counsel. *See, e.g.*, D.C. Code § 16-405 (age, medical and mental health evaluations); 16-406(3) (requiring affirmation that all parties had independent legal counsel); Me. Rev. Stat. tit. 19-a, § 1931; Nev. Rev. Code § 126.740; N.H. Rev. Code § 128-B:9. Another requirement included in some recently adopted statutes is that the surrogate have “given birth to at least one live child.” *See, e.g.*, D.C. Code § 16-405(a)(2). *See also* Me. Rev. Stat. tit. 19-a, § 1931(1)(B). This requirement was not included

in UPA (2002), but has been included here.

### **SECTION 803. REQUIREMENTS OF GESTATIONAL OR GENETIC**

**SURROGACY AGREEMENT: PROCESS.** A surrogacy agreement must be executed in compliance with the following rules:

(1) At least one party must be a resident of this state or, if no party is a resident of this state, at least one medical evaluation or procedure or mental-health consultation under the agreement must occur in this state.

(2) A surrogate and each intended parent must meet the requirements of Section 802.

(3) Each intended parent, the surrogate, and the surrogate's spouse, if any, must be parties to the agreement.

(4) The agreement must be in a record signed by each party listed in paragraph (3).

(5) The surrogate and each intended parent must acknowledge in a record receipt of a copy of the agreement.

(6) The signature of each party to the agreement must be attested by a notarial officer or witnessed.

(7) The surrogate and the intended parent or parents must have independent legal representation throughout the surrogacy arrangement regarding the terms of the surrogacy agreement and the potential legal consequences of the agreement, and each counsel must be identified in the surrogacy agreement.

(8) The intended parent or parents must pay for independent legal representation for the surrogate.

(9) The agreement must be executed before a medical procedure occurs related to the surrogacy agreement, other than the medical evaluation and mental health consultation required

by Section 802.

### Comment

This section is modeled on several recently adopted surrogacy schemes, including those enacted in Delaware (enacted 2013); Maine (enacted 2015); Nevada (enacted 2013); New Hampshire (enacted 2014); Illinois (enacted 2004); and the District of Columbia (enacted 2017), among other states. *See, e.g.*, Del. Stat., tit. 13 §§ 8-801 to 8-809; Me. Rev. Stat. tit. 19-a, §§ 1931 to 1938; Nev. Rev. Stat. §§ 126.500 to 126.810; N.H. Rev. Stat. §§ 168-B:1 to 168-B:22; 750 ILCS 47/1 to 47/75; D.C. Code §§ 16-401 to 16-412.

One issue on which these recently adopted statutory schemes diverge is with regard to payment for the surrogate's counsel. As noted above, most recently adopted statutory schemes require the surrogate and the intended parent or parents to be represented by separate, independent counsel. That said, only a minority of states statutorily require the intended parents to pay for the surrogate's counsel. *See* Me. Rev. Stat. tit. 19-a, § 1931(1)(D). *Contra cf.* Nev. Rev. Stat. § 126.750(2) (requiring separate and independent counsel, but not addressing payment); N.H. Rev. Stat. § 168-B:11(III) (same); D.C. Code § 16-406(b) (same). UPA (2017) requires the intended parents to pay for the surrogate's counsel.

## **SECTION 804. REQUIREMENTS OF GESTATIONAL OR GENETIC SURROGACY AGREEMENT: CONTENT.**

(a) A surrogacy agreement must comply with the following requirements:

(1) A surrogate agrees to attempt to become pregnant by means of assisted reproduction.

(2) Except as otherwise provided in Sections 811, 814, and 815, the surrogate and the surrogate's spouse or former spouse, if any, have no claim to parentage of a child conceived by assisted reproduction under the agreement.

(3) The surrogate's spouse, if any, must acknowledge and agree to comply with the obligations imposed on the surrogate by the agreement.

(4) Except as otherwise provided in Sections 811, 814, and 815, the intended parent or, if there are two intended parents, each one jointly and severally, immediately on birth will be the exclusive parent or parents of the child, regardless of number of children born or

gender or mental or physical condition of each child.

(5) Except as otherwise provided in Sections 811, 814, and 815, the intended parent or, if there are two intended parents, each parent jointly and severally, immediately on birth will assume responsibility for the financial support of the child, regardless of number of children born or gender or mental or physical condition of each child.

(6) The agreement must include information disclosing how each intended parent will cover the surrogacy-related expenses of the surrogate and the medical expenses of the child. If health-care coverage is used to cover the medical expenses, the disclosure must include a summary of the health-care policy provisions related to coverage for surrogate pregnancy, including any possible liability of the surrogate, third-party-liability liens, other insurance coverage, and any notice requirement that could affect coverage or liability of the surrogate. Unless the agreement expressly provides otherwise, the review and disclosure do not constitute legal advice. If the extent of coverage is uncertain, a statement of that fact is sufficient to comply with this paragraph.

(7) The agreement must permit the surrogate to make all health and welfare decisions regarding herself and her pregnancy. This [act] does not enlarge or diminish the surrogate's right to terminate her pregnancy.

(8) The agreement must include information about each party's right under this [article] to terminate the surrogacy agreement.

(b) A surrogacy agreement may provide for:

(1) payment of consideration and reasonable expenses; and

(2) reimbursement of specific expenses if the agreement is terminated under this [article].

(c) A right created under a surrogacy agreement is not assignable and there is no third-party beneficiary of the agreement other than the child.

### **Comment**

This section is modeled on several recently adopted surrogacy provisions. *See, e.g.*, D.C. Code § 16-406; Me. Rev. Stat. tit. 19-a, § 1932(J); N.H. Rev. Stat. § 168-B:11.

Subsection (a)(6) is based on Cal. Fam. Code § 7692(a)(4).

The first sentence of subsection (a)(7) is modeled on UPA (2002) and the recently adopted provisions in Maine and D.C. *See, e.g.*, UPA (2002) § 801(f) (“A gestational agreement may not limit the right of the gestational mother to make decisions to safeguard her health or that of the embryos or fetus.”); Me. Rev. Stat. tit. 19-a, § 1932(5) (“A gestational carrier agreement may not limit the right of the gestational carrier to make decisions to safeguard her health.”); D.C. Code § 16-406(c) (“A surrogacy agreement may not limit the right of the surrogate to make decisions to safeguard the surrogate’s health or that of the embryo or fetus.”). The second sentence of subsection (a)(7) reaffirms that the surrogate has a constitutionally protected right to decide whether to terminate the pregnancy within the limits of the law. *Cf.* D.C. Code § 16-406(4)(C) (“Agree that at all times during the pregnancy and until delivery, regardless of whether the court has issued an order of parentage, the surrogate shall maintain control and decision-making authority over the surrogate’s body.”).

Subsection (b) carries over the position of UPA (2002) by permitting compensated surrogacy agreements. Most states that permit surrogacy agreements by statute likewise permit compensated as well as uncompensated agreements.

Unless terminated as provided in this article, a gestational or genetic surrogacy agreement that complies with the requirements of Sections 802, 803, and 804 is enforceable; the agreement may contain additional requirements so long as they are not inconsistent with Sections 802, 803, and 804.

## **SECTION 805. SURROGACY AGREEMENT: EFFECT OF SUBSEQUENT CHANGE OF MARITAL STATUS.**

(a) Unless a surrogacy agreement expressly provides otherwise:

(1) the marriage of a surrogate after the agreement is signed by all parties does not affect the validity of the agreement, her spouse’s consent to the agreement is not required, and her spouse is not a presumed parent of a child conceived by assisted reproduction under the agreement; and

(2) the [divorce, dissolution, annulment, declaration of invalidity, legal separation, or separate maintenance] of the surrogate after the agreement is signed by all parties does not affect the validity of the agreement.

(b) Unless a surrogacy agreement expressly provides otherwise:

(1) the marriage of an intended parent after the agreement is signed by all parties does not affect the validity of a surrogacy agreement, the consent of the spouse of the intended parent is not required, and the spouse of the intended parent is not, based on the agreement, a parent of a child conceived by assisted reproduction under the agreement; and

(2) the [divorce, dissolution, annulment, declaration of invalidity, legal separation, or separate maintenance] of an intended parent after the agreement is signed by all parties does not affect the validity of the agreement and, except as otherwise provided in Section 814, the intended parents are the parents of the child.

*Legislative Note:* A state should use its own terms for the proceedings identified in the bracketed language in subsections (a)(2) and (b)(2).

### Comment

Source: UPA (2002) § 808; D.C. Code § 16-410.

In some states, the statutes address the effect of a subsequent marriage of the surrogate only. *See, e.g.*, Me. Rev. Stat. tit. 19-a, § 1937; Nev. Rev. Stat. § 126.770; N.H. Rev. Stat. § 168-B:14. *See also* UPA (2002) § 808. To avoid ambiguity and unnecessary litigation, UPA (2017) expressly addresses the effect of any subsequent marriage or divorce by any party to the surrogacy agreement.

**[SECTION 806. INSPECTION OF DOCUMENTS.** Unless the court orders otherwise, a petition and any other document related to a surrogacy agreement filed with the court under this [part] are not open to inspection by any individual other than the parties to the proceeding, a child conceived by assisted reproduction under the agreement, their attorneys, and [the relevant state agency]. A court may not authorize an individual to inspect a document related



to the agreement, unless required by exigent circumstances. The individual seeking to inspect the document may be required to pay the expense of preparing a copy of the document to be inspected.]

*Legislative Note: A state should review the state's open records law to determine if this section needs to be included or amended.*

#### **Comment**

Source: UPA (2002) § 804; Cal. Fam. Code § 7962(h); Nev. Rev. Stat. § 126.730.

In some states, family law matters are not open for inspection. In such a state, this provision may be unnecessary. If, however, family law matters generally are open for inspection, a state may consider enacting Section 806.

**SECTION 807. EXCLUSIVE, CONTINUING JURISDICTION.** During the period after the execution of a surrogacy agreement until 90 days after the birth of a child conceived by assisted reproduction under the agreement, a court of this state conducting a proceeding under this [act] has exclusive, continuing jurisdiction over all matters arising out of the agreement. This section does not give the court jurisdiction over a child-custody or child-support proceeding if jurisdiction is not otherwise authorized by law of this state other than this [act].

#### **Comment**

Source: UPA (2002) § 805; Me. Rev. Stat. tit. 19-a, § 1935.

### **[PART] 2**

## **SPECIAL RULES FOR GESTATIONAL SURROGACY AGREEMENT**

#### **Comment**

As noted above, UPA (2002) applied the same substantive rules to gestational and genetic surrogacy agreements. Among other things, UPA (2002) required all agreements to be validated by a court prior to any medical treatments. UPA (2002) also required a home study of the intended parents unless waived by the court. These rules were not widely adopted by states, and they are not consistent with contemporary practice. Part 2, providing special rules for gestational surrogacy agreements, modernizes the rules regarding gestational surrogacy to make them more consistent with contemporary surrogacy practice and the laws in the states that permit surrogacy agreements.

## **SECTION 808. TERMINATION OF GESTATIONAL SURROGACY**

### **AGREEMENT.**

(a) A party to a gestational surrogacy agreement may terminate the agreement, at any time before an embryo transfer, by giving notice of termination in a record to all other parties. If an embryo transfer does not result in a pregnancy, a party may terminate the agreement at any time before a subsequent embryo transfer.

(b) Unless a gestational surrogacy agreement provides otherwise, on termination of the agreement under subsection (a), the parties are released from the agreement, except that each intended parent remains responsible for expenses that are reimbursable under the agreement and incurred by the gestational surrogate through the date of termination.

(c) Except in a case involving fraud, neither a gestational surrogate nor the surrogate's spouse or former spouse, if any, is liable to the intended parent or parents for a penalty or liquidated damages, for terminating a gestational surrogacy agreement under this section.

### **Comment**

Source: UPA (2002) § 808; Me. Rev. Stat. tit. 19-a, § 1936.

Subsection (a) is largely carried over from UPA (2002). Subsection (a) permits a party to terminate the agreement before a successful transfer. This allows the parties some time to change their minds, but within a limited window that does not unduly prejudice the interests of other parties to the agreement.

Subsection (b) is new. The substance of subsection (b) is consistent with the implicit but unstated rule of UPA (2002). UPA (2017) states expressly that if a party properly terminates the agreement under this provision, that termination releases the parties from the obligations recited under the agreement—most importantly rights and duties with regard to the child—except with regard to expenses that are reimbursable under the agreement.

Subsection (c) clarifies that, except in cases involving fraud, the gestational carrier and her spouse, if any, are not liable for any penalties other than any expenses that are reimbursement under the agreement.

## **SECTION 809. PARENTAGE UNDER GESTATIONAL SURROGACY**

### **AGREEMENT.**

(a) Except as otherwise provided in subsection (c) or Section 810(b) or 812, on birth of a child conceived by assisted reproduction under a gestational surrogacy agreement, each intended parent is, by operation of law, a parent of the child.

(b) Except as otherwise provided in subsection (c) or Section 812, neither a gestational surrogate nor the surrogate's spouse or former spouse, if any, is a parent of the child.

(c) If a child is alleged to be a genetic child of the woman who agreed to be a gestational surrogate, the court shall order genetic testing of the child. If the child is a genetic child of the woman who agreed to be a gestational surrogate, parentage must be determined based on [Articles] 1 through 6.

(d) Except as otherwise provided in subsection (c) or Section 810(b) or 812, if, due to a clinical or laboratory error, a child conceived by assisted reproduction under a gestational surrogacy agreement is not genetically related to an intended parent or a donor who donated to the intended parent or parents, each intended parent, and not the gestational surrogate and the surrogate's spouse or former spouse, if any, is a parent of the child, subject to any other claim of parentage.

### **Comment**

Source: Me. Rev. Stat. tit. 19-a, § 1933; Me. Rev. Stat. tit. 19-a, § 1938(4).

Subsections (a) and (b) expressly clarify the legal parentage of a child born through an enforceable gestational surrogacy agreement.

Subsection (c) clarifies how parentage should be determined if the child was not conceived through assisted reproduction. UPA (2002) § 807 acknowledged that possibility and provided for the ordering of genetic testing, but did not expressly state how parentage should be determined in such cases. UPA (2017) includes a clear rule for determining parentage.

UPA (2002) did not expressly address cases involving clinic error. While such cases are rare, they have occurred. *See, e.g., Perry-Rogers v. Fasano*, 715 N.Y.S.2d 19 (N.Y. App. Div. 2000). UPA (2017) addresses such cases expressly in subsection (d). The substance of subsection (d) is based on the newly adopted provision in Maine.

**SECTION 810. GESTATIONAL SURROGACY AGREEMENT: PARENTAGE OF DECEASED INTENDED PARENT.**

(a) Section 809 applies to an intended parent even if the intended parent died during the period between the transfer of a gamete or embryo and the birth of the child.

(b) Except as otherwise provided in Section 812, an intended parent is not a parent of a child conceived by assisted reproduction under a gestational surrogacy agreement if the intended parent dies before the transfer of a gamete or embryo unless:

(1) the agreement provides otherwise; and

(2) the transfer of a gamete or embryo occurs not later than [36] months after the death of the intended parent or birth of the child occurs not later than [45] months after the death of the intended parent.

**Comment**

Source: UPC (2010) § 2-121; D.C. Code § 16-409.

UPA (2002) did not specifically address the issue of parentage if an intended parent died during the arrangement. To avoid uncertainty and unnecessary litigation, UPA (2017) addresses this issue specifically. The principle stated in subsection (a) is implicit with other provisions in Article 8. Subsection (b) is based on the relevant UPC provision, and is consistent with the analogous provision in Article 7 of the act.

**SECTION 811. GESTATIONAL SURROGACY AGREEMENT: ORDER OF PARENTAGE.**

(a) Except as otherwise provided in Sections 809(c) or 812, before, on, or after the birth of a child conceived by assisted reproduction under a gestational surrogacy agreement, a party to the agreement may commence a proceeding in the [appropriate court] for an order or judgment:

(1) declaring that each intended parent is a parent of the child and ordering that parental rights and duties vest immediately on the birth of the child exclusively in each intended parent;

(2) declaring that the gestational surrogate and the surrogate's spouse or former spouse, if any, are not the parents of the child;

(3) designating the content of the birth record in accordance with [cite applicable law of this state other than this [act]] and directing the [state agency maintaining birth records] to designate each intended parent as a parent of the child;

(4) to protect the privacy of the child and the parties, declaring that the court record is not open to inspection[ except as authorized under Section 806];

(5) if necessary, that the child be surrendered to the intended parent or parents;  
and

(6) for other relief the court determines necessary and proper.

(b) The court may issue an order or judgment under subsection (a) before the birth of the child. The court shall stay enforcement of the order or judgment until the birth of the child.

(c) Neither this state nor the [state agency maintaining birth records] is a necessary party to a proceeding under subsection (a).

*Legislative Note:* A state should include the bracketed language in subsection (a)(4) if the state enacts Section 806.

#### **Comment**

Source: D.C. Code § 16-408(d); Me. Rev. Stat. tit. 19-a, § 1934; N.H. Rev. Stat. § 168-B:12.

#### **SECTION 812. EFFECT OF GESTATIONAL SURROGACY AGREEMENT.**

(a) A gestational surrogacy agreement that complies with Sections 802, 803, and 804 is

enforceable.

(b) If a child was conceived by assisted reproduction under a gestational surrogacy agreement that does not comply with Sections 802, 803, and 804, the court shall determine the rights and duties of the parties to the agreement consistent with the intent of the parties at the time of execution of the agreement. Each party to the agreement and any individual who at the time of the execution of the agreement was a spouse of a party to the agreement has standing to maintain a proceeding to adjudicate an issue related to the enforcement of the agreement.

(c) Except as expressly provided in a gestational surrogacy agreement or subsection (d) or (e), if the agreement is breached by the gestational surrogate or one or more intended parents, the non-breaching party is entitled to the remedies available at law or in equity.

(d) Specific performance is not a remedy available for breach by a gestational surrogate of a provision in the agreement that the gestational surrogate be impregnated, terminate or not terminate a pregnancy, or submit to medical procedures.

(e) Except as otherwise provided in subsection (d), if an intended parent is determined to be a parent of the child, specific performance is a remedy available for:

(1) breach of the agreement by a gestational surrogate which prevents the intended parent from exercising immediately on birth of the child the full rights of parentage; or

(2) breach by the intended parent which prevents the intended parent's acceptance, immediately on birth of the child conceived by assisted reproduction under the agreement, of the duties of parentage.

### **Comment**

Source: Me. Rev. Stat. tit. 19-a, § 1938(3), (5); Nev. Rev. Stat. § 126.790(1), (2); N.H. Rev. Stat. § 168-B:18(I), (II).

Subsection (a) expressly declares that a gestational surrogacy agreement that complies

with the requirements of this Article is enforceable.

Subsection (b), setting forth the rules for determining parentage in the event of a noncompliant agreement, is based on Me. Rev. Stat. tit. 19-a, § 1938(2); Nev. Rev. Stat. § 126.780(2). In such cases, a court must determine parentage by looking to the intent of the parties at the time of execution.

UPA (2002) did not address the rules that apply in the event of a breach of a surrogacy agreement. New subsection (c) follows the approach taken by several of the recently enacted comprehensive surrogacy statutes, providing that the parties are entitled to remedies available at law or in equity. *See, e.g.*, Me. Rev. Stat. tit. 19-a, § 1938(3); Nev. Rev. Stat. § 126.790(1), (2) (providing that, in the event of a breach, the intended parents or the gestational surrogate, as appropriate, are entitled to “any remedy available at law or equity.”); N.H. Rev. Stat. § 168-B:18(I), (II) (providing that, in the event of a breach, the intended parents or the gestational surrogate, as appropriate, are entitled to “all remedies available at law or equity”).

Subsection (d) clarifies that certain forms of specific performance are precluded, including a court order requiring a surrogate be impregnated, terminate or not terminate a pregnancy, or submit to medical procedures. Such an order may violate the constitutional rights of the surrogate. *See also* Me. Rev. Stat. tit 19-a, § 1938(5) (addressing impregnation and termination, but not submission to medical procedures); Nev. Rev. Stat. § 126.780 (“There must be no specific performance remedy available for breach of the gestational agreement by the gestational carrier that would require the gestational carrier to be impregnated.”).

Subsection (e) provides some forms of specific performance that can be ordered.

### **[PART] 3**

## **SPECIAL RULES FOR GENETIC SURROGACY AGREEMENT**

### **Comment**

UPA (2002) imposed the same rules on gestational and genetic surrogacy agreements. UPA (2017) departs from this approach. While there are some common requirements, UPA (2017) imposes additional requirements or safeguards on genetic surrogacy agreements. Among other things, UPA (2017) allows a genetic surrogate to withdraw her consent up until 72 hours after birth.

Currently, only a very small minority of states expressly permit genetic surrogacy through a comprehensive statutory scheme. These states include Florida, Maine (for close relatives only), Virginia, and the District of Columbia. The statutes in these states distinguish between genetic and gestational arrangements and several of these states permit genetic surrogates to withdraw consent after pregnancy has occurred. *See, e.g.*, Fla. Stat. Ann. § 63.213 (48 hours after birth); D.C. Code § 16-411(4) (48 hours after birth). *Cf.* Vir. Code Ann. § 20-161(B) (providing that in cases where the “surrogate ... is also a genetic parent” the surrogate may “terminate the agreement ... [w]ithin 180 days after the last performance of any assisted

conception”).

**SECTION 813. REQUIREMENTS TO VALIDATE GENETIC SURROGACY AGREEMENT.**

(a) Except as otherwise provided in Section 816, to be enforceable, a genetic surrogacy agreement must be validated by the [designate court]. A proceeding to validate the agreement must be commenced before assisted reproduction related to the surrogacy agreement.

(b) The court shall issue an order validating a genetic surrogacy agreement if the court finds that:

(1) Sections 802, 803, and 804 are satisfied; and

(2) all parties entered into the agreement voluntarily and understand its terms.

(c) An individual who terminates under Section 814 a genetic surrogacy agreement shall file notice of the termination with the court. On receipt of the notice, the court shall vacate any order issued under subsection (b). An individual who does not notify the court of the termination of the agreement is subject to sanctions.

**Comment**

Source: UPA (2002) § 803, § 806(c).

UPA (2002) required pre-pregnancy validation for all agreements. This requirement is now imposed only on genetic surrogacy agreements. Section 813 makes changes to the requirements of UPA (2002). First, Section 813 eliminates the prior requirement of a home study of the intended parents unless waived by a court. Given that it was waivable by the court, in practice it often was not required of the parties. The inclusion in the provision, however, created uncertainty for the parties. Second, UPA (2002) provided that a court “may” issue an order validating the agreement upon a finding that the requirements were fulfilled. Thus, even if the parties complied with all of the statutory requirements, their right to obtain an order validating their agreement was within the discretion of the court. Again, this added uncertainty to the process. Accordingly, UPA (2017) requires the court to issue the order validating the agreement if the court finds that the requirements have been fulfilled.



**SECTION 814. TERMINATION OF GENETIC SURROGACY AGREEMENT.**

(a) A party to a genetic surrogacy agreement may terminate the agreement as follows:

(1) An intended parent who is a party to the agreement may terminate the agreement at any time before a gamete or embryo transfer by giving notice of termination in a record to all other parties. If a gamete or embryo transfer does not result in a pregnancy, a party may terminate the agreement at any time before a subsequent gamete or embryo transfer. The notice of termination must be attested by a notarial officer or witnessed.

(2) A genetic surrogate who is a party to the agreement may withdraw consent to the agreement any time before 72 hours after the birth of a child conceived by assisted reproduction under the agreement. To withdraw consent, the genetic surrogate must execute a notice of termination in a record stating the surrogate's intent to terminate the agreement. The notice of termination must be attested by a notarial officer or witnessed and be delivered to each intended parent any time before 72 hours after the birth of the child.

(b) On termination of the genetic surrogacy agreement under subsection (a), the parties are released from all obligations under the agreement except that each intended parent remains responsible for all expenses incurred by the surrogate through the date of termination which are reimbursable under the agreement. Unless the agreement provides otherwise, the surrogate is not entitled to any non-expense related compensation paid for serving as a surrogate.

(c) Except in a case involving fraud, neither a genetic surrogate nor the surrogate's spouse or former spouse, if any, is liable to the intended parent or parents for a penalty or liquidated damages, for terminating a genetic surrogacy agreement under this section.

**Comment**

Source: Fla. Stat. Ann. § 63.213 (providing that a genetic surrogacy agreement must permit "a right of rescission by the volunteer mother any time within 48 hours after the birth of

the child, if the volunteer mother is genetically related to the child”); D.C. Code § 16-411(4) (providing that a genetic surrogate may withdraw consent “within 48 hours after the birth of the child”).

UPA (2002) did not permit a genetic surrogate to withdraw her consent after validation of the agreement. No state, however, enacted a version of UPA (2002) that authorized genetic surrogacy agreements. Currently, only a very small minority of states expressly permit genetic surrogacy through a comprehensive statutory scheme. These states include Florida, Maine (for close relatives only), Virginia, and the District of Columbia. The statutes in several of these states similarly provide that the genetic surrogate can withdraw her consent up until some period shortly after the birth of the child. *See, e.g.*, Fla. Stat. Ann. § 63.213 (48 hours after birth); D.C. Code § 16-411(4) (48 hours after birth). *Cf.* Vir. Code Ann. § 20-161(B) (providing that in cases where the “surrogate . . . is also a genetic parent” the surrogate may “terminate the agreement . . . [w]ithin 180 days after the last performance of any assisted conception”).

## **SECTION 815. PARENTAGE UNDER VALIDATED GENETIC SURROGACY AGREEMENT.**

(a) Unless a genetic surrogate exercises the right under Section 814 to terminate a genetic surrogacy agreement, each intended parent is a parent of a child conceived by assisted reproduction under an agreement validated under Section 813.

(b) Unless a genetic surrogate exercises the right under Section 814 to terminate the genetic surrogacy agreement, on proof of a court order issued under Section 813 validating the agreement, the court shall make an order:

(1) declaring that each intended parent is a parent of a child conceived by assisted reproduction under the agreement and ordering that parental rights and duties vest exclusively in each intended parent;

(2) declaring that the gestational surrogate and the surrogate’s spouse or former spouse, if any, are not parents of the child;

(3) designating the contents of the birth certificate in accordance with [cite to applicable law of the state other than this [act]] and directing the [state\_agency maintaining birth records] to designate each intended parent as a parent of the child;

(4) to protect the privacy of the child and the parties, declaring that the court record is not open to inspection[ except as authorized under Section 806];

(5) if necessary, that the child be surrendered to the intended parent or parents;  
and

(6) for other relief the court determines necessary and proper.

(c) If a genetic surrogate terminates under Section 814(a)(2) a genetic surrogacy agreement, parentage of the child conceived by assisted reproduction under the agreement must be determined under [Articles] 1 through 6.

(d) If a child born to a genetic surrogate is alleged not to have been conceived by assisted reproduction, the court shall order genetic testing to determine the genetic parentage of the child. If the child was not conceived by assisted reproduction, parentage must be determined under [Articles] 1 through 6. Unless the genetic surrogacy agreement provides otherwise, if the child was not conceived by assisted reproduction the surrogate is not entitled to any non-expense related compensation paid for serving as a surrogate.

(e) Unless a genetic surrogate exercises the right under Section 814 to terminate the genetic surrogacy agreement, if an intended parent fails to file notice required under Section 814(a), the genetic surrogate or [the appropriate state agency] may file with the court, not later than 60 days after the birth of a child conceived by assisted reproduction under the agreement, notice that the child has been born to the genetic surrogate. Unless the genetic surrogate has properly exercised the right under Section 814 to withdraw consent to the agreement, on proof of a court order issued under Section 813 validating the agreement, the court shall order that each intended parent is a parent of the child.

**Legislative Note:** A state should include the bracketed language in subsection (b)(4) if the state enacts Section 806.

## Comment

Source: UPA (2002) § 807.

The substance of this section is largely carried over from UPA (2002). The content of this section does reflect, however, that UPA (2017) permits a genetic surrogate to withdraw consent any time up until 72 hours after the child's birth. Accordingly, new subsection (c) sets forth how parentage should be determined in the event the genetic surrogate withdraws consent within that time period.

### **SECTION 816. EFFECT OF NONVALIDATED GENETIC SURROGACY**

#### **AGREEMENT.**

(a) A genetic surrogacy agreement, whether or not in a record, that is not validated under Section 813 is enforceable only to the extent provided in this section and Section 818.

(b) If all parties agree, a court may validate a genetic surrogacy agreement after assisted reproduction has occurred but before the birth of a child conceived by assisted reproduction under the agreement.

(c) If a child conceived by assisted reproduction under a genetic surrogacy agreement that is not validated under Section 813 is born and the genetic surrogate, consistent with Section 814(a)(2), withdraws her consent to the agreement before 72 hours after the birth of the child, the court shall adjudicate the parentage of the child under [Articles] 1 through 6.

(d) If a child conceived by assisted reproduction under a genetic surrogacy agreement that is not validated under Section 813 is born and a genetic surrogate does not withdraw her consent to the agreement, consistent with Section 814(a)(2), before 72 hours after the birth of the child, the genetic surrogate is not automatically a parent and the court shall adjudicate parentage of the child based on the best interest of the child, taking into account the factors in Section 613(a) and the intent of the parties at the time of the execution of the agreement.

(e) The parties to a genetic surrogacy agreement have standing to maintain a proceeding

to adjudicate parentage under this section.

### **Comment**

This section sets forth the rules for determining parentage of children born through genetic surrogacy where the genetic surrogacy agreement was not properly validated.

Under subsection (b), even if the parties did not validate the agreement prior to pregnancy as required by Section 813, a court is authorized to validate the agreement thereafter if all parties are still in agreement.

Subsections (c) and (d) set forth the rules for determining parentage if the agreement is never validated. Subsection (c) confirms that a genetic surrogate retains the right to withdraw her consent up until 72 hours after the birth of the child, even if the agreement is not validated. If the genetic surrogate withdraws her consent within this time period, parentage is determined based on Articles 1 through 6 of the act. In cases involving an unvalidated genetic surrogacy agreement where the genetic surrogate does not withdraw her consent within that period, subsection (d) provides that the court must determine parentage based on the best interest of the child. In such cases, the genetic surrogate may or may not be determined to be the child's parent.

### **SECTION 817. GENETIC SURROGACY AGREEMENT: PARENTAGE OF DECEASED INTENDED PARENT.**

(a) Except as otherwise provided in Section 815 or 816, on birth of a child conceived by assisted reproduction under a genetic surrogacy agreement, each intended parent is, by operation of law, a parent of the child, notwithstanding the death of an intended parent during the period between the transfer of a gamete or embryo and the birth of the child.

(b) Except as otherwise provided in Section 815 or 816, an intended parent is not a parent of a child conceived by assisted reproduction under a genetic surrogacy agreement if the intended parent dies before the transfer of a gamete or embryo unless:

(1) the agreement provides otherwise; and

(2) the transfer of the gamete or embryo occurs not later than [36] months after the death of the intended parent, or birth of the child occurs not later than [45] months after the death of the intended parent.

## Comment

Source: UPC (2010) § 2-121; D.C. Code § 16-409.

UPA (2002) did not specifically address parentage in the event of the death of an intended parent. To avoid uncertainty and unnecessary litigation, UPA (2017) expressly addresses this scenario. The principle stated in subsection (a) is implicit in other provisions in Article 8, but UPA (2017) states the rule expressly.

Subsection (b) is based on the relevant UPC provision, and is consistent with the analogous provision in Article 7.

### **SECTION 818. BREACH OF GENETIC SURROGACY AGREEMENT.**

(a) Subject to Section 814(b), if a genetic surrogacy agreement is breached by a genetic surrogate or one or more intended parents, the non-breaching party is entitled to the remedies available at law or in equity.

(b) Specific performance is not a remedy available for breach by a genetic surrogate of a requirement of a validated or non-validated genetic surrogacy agreement that the surrogate be impregnated, terminate or not terminate a pregnancy, or submit to medical procedures.

(c) Except as otherwise provided in subsection (b), specific performance is a remedy available for:

(1) breach of a validated genetic surrogacy agreement by a genetic surrogate of a requirement which prevents an intended parent from exercising the full rights of parentage 72 hours after the birth of the child; or

(2) breach by an intended parent which prevents the intended parent's acceptance of duties of parentage 72 hours after the birth of the child.]

## Comment

Source: Me. Rev. Stat. tit. 19-a, § 1938(3), (5); Nev. Rev. Stat. § 126.790(1), (2); N.H. Rev. Stat. § 168-B:18(I), (II).

UPA (2002) did not address the applicable rules in the event of a breach of the agreement. New subsection (a) follows the approach taken by several of the recently enacted comprehensive surrogacy statutes, and provides that the parties are entitled to remedies available at law or in equity. *See, e.g.*, Me. Rev. Stat. tit. 19-a, § 1938(3); Nev. Rev. Stat. § 126.790(1), (2) (providing that, in the event of a breach, the intended parents or the gestational surrogate, as appropriate, are entitled to “any remedy available at law or equity.”); N.H. Rev. Stat. § 168-B:18(I), (II) (providing that, in the event of a breach, the intended parents or the gestational surrogate, as appropriate, are entitled to “all remedies available at law or equity”).

New subsection (b) expressly states that a court cannot order that a surrogate be impregnated, terminate or not terminate a pregnancy, or submit to medical procedures. Such an order may violate the constitutional rights of the surrogate. *See also* Me. Rev. Stat. tit 19-a, § 1938(5) (addressing impregnation and termination, but not submission to medical procedures); Nev. Rev. Stat. § 126.780 (“There must be no specific performance remedy available for breach of the gestational agreement by the gestational carrier that would require the gestational carrier to be impregnated.”).

## [ARTICLE] 9

### INFORMATION ABOUT DONOR

#### Comment

Article 9 is a new addition to the UPA. The content of this article was not included in UPA (2002). The content of new Article 9 is premised on a Washington State provision. Wash. Rev. Code § 26.26.750.

#### **SECTION 901. DEFINITIONS.** In this [article]:

(1) “Identifying information” means:

(A) the full name of a donor;

(B) the date of birth of the donor; and

(C) the permanent and, if different, current address of the donor at the time of the

donation.

(2) “Medical history” means information regarding any:

(A) present illness of a donor;

(B) past illness of the donor; and

(C) social, genetic, and family history pertaining to the health of the donor.

**SECTION 902. APPLICABILITY.** This [article] applies only to gametes collected on or after [the effective date of this [act]].

**SECTION 903. COLLECTION OF INFORMATION.** A gamete bank or fertility clinic licensed in this state shall collect from a donor the donor's identifying information and medical history at the time of the donation. If the gamete bank or fertility clinic sends the gametes of a donor to another gamete bank or fertility clinic, the sending gamete bank or fertility clinic shall forward any identifying information and medical history of the donor, including the donor's signed declaration under Section 904 regarding identity disclosure, to the receiving gamete bank or fertility clinic. A receiving gamete bank or fertility clinic licensed in this state shall collect and retain the information about the donor and each sending gamete bank or fertility clinic.

**SECTION 904. DECLARATION REGARDING IDENTITY DISCLOSURE.**

(a) A gamete bank or fertility clinic licensed in this state which collects gametes from a donor shall:

(1) provide the donor with information in a record about the donor's choice regarding identity disclosure; and

(2) obtain a declaration from the donor regarding identity disclosure.

(b) A gamete bank or fertility clinic licensed in this state shall give a donor the choice to sign a declaration, attested by a notarial officer or witnessed, that either:

(1) states that the donor agrees to disclose the donor's identity to a child conceived by assisted reproduction with the donor's gametes on request once the child attains 18 years of age; or

(2) states that the donor does not agree presently to disclose the donor's identity to



the child.

(c) A gamete bank or fertility clinic licensed in this state shall permit a donor who has signed a declaration under subsection (b)(2) to withdraw the declaration at any time by signing a declaration under subsection (b)(1).

### **Comment**

Article 9 permits a donor to withdraw a declaration of non-disclosure and replace it with a declaration of identity disclosure. The Article does not permit, however, a donor to withdraw a declaration of identity disclosure. UPA (2017) makes this distinction because the recipients of identity disclosure gametes often chose those gametes at least in part because the donor had agreed to identity disclosure. While some donors may change their minds, the equities weigh in favor of holding the donor to his or her original position permitting identity disclosure.

### **SECTION 905. DISCLOSURE OF IDENTIFYING INFORMATION AND MEDICAL HISTORY.**

(a) On request of a child conceived by assisted reproduction who attains 18 years of age, a gamete bank or fertility clinic licensed in this state which collected, stored, or released for use the gametes used in the assisted reproduction shall make a good-faith effort to provide the child with identifying information of the donor who provided the gametes, unless the donor signed and did not withdraw a declaration under Section 904(b)(2). If the donor signed and did not withdraw the declaration, the gamete bank or fertility clinic shall make a good-faith effort to notify the donor, who may elect under Section 904(c) to withdraw the donor's declaration.

(b) Regardless whether a donor signed a declaration under Section 904(b)(2), on request by a child conceived by assisted reproduction who attains 18 years of age, or, if the child is a minor, by a parent or guardian of the child, a gamete bank or fertility clinic licensed in this state shall make a good-faith effort to provide the child or, if the child is a minor, the parent or guardian of the child, access to nonidentifying medical history of the donor.

**SECTION 906. RECORDKEEPING.** A gamete bank or fertility clinic licensed in this state which collects, stores, or releases gametes for use in assisted reproduction shall collect and maintain identifying information and medical history about each gamete donor. The gamete bank or fertility clinic shall collect and maintain records of gamete screening and testing and comply with reporting requirements, in accordance with federal law and applicable law of this state other than this [act].

## [ARTICLE] 10

### MISCELLANEOUS PROVISIONS

**SECTION 1001. UNIFORMITY OF APPLICATION AND CONSTRUCTION.** In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

**SECTION 1002. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT.** This [act] modifies, limits, or supersedes the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but does not modify limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. Section 7003(b).

**SECTION 1003. TRANSITIONAL PROVISION.** This [act] applies to a pending proceeding to adjudicate parentage commenced before [the effective date of this [act]] for an issue on which a judgment has not been entered.

**[SECTION 1004. SEVERABILITY.** If any provision of this [act] or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this [act] which can be given effect without the invalid provision or application, and to this end the provisions of this [act] are severable.]

*Legislative Note: Include this section only if this state lacks a general severability statute or a decision by the highest court of this state stating a general rule of severability.*

**SECTION 1005. REPEALS; CONFORMING AMENDMENTS.** The following are repealed:

- (1) [Uniform Act on Paternity (1960)];
- (2) [Uniform Parentage Act (1973)];
- (3) [Uniform Putative and Unknown Fathers Act (1988)];
- (4) [Uniform Status of Children of Assisted Conception Act (1988)];
- (5) [Uniform Parentage Act (2002)]; and
- (6) [other inconsistent statutes].

**SECTION 1006. EFFECTIVE DATE.** This [act] takes effect ....