

MEMORANDUM

To: The Committee on Scope and Program

From: Jamie Pedersen, Chair, Study Committee on Possible Amendments to the Uniform Parentage Act in Light of the Supreme Court Decisions Concerning Same-Sex Marriage (the “**Study Committee**”)

Date: October 5, 2015

Subject: Recommendation Regarding Scope of and Issues to Be Addressed through Amendments to the Uniform Parentage Act

The Study Committee recommended in a report dated June 12, 2015 that a drafting committee be established to consider amendments to the Uniform Parentage Act (the “**UPA**”). Although the Committee on Scope and Program concurred with this recommendation, the Executive Committee at its July 13, 2015 meeting requested that the Study Committee provide a more detailed recommendation regarding the scope of and issues to be addressed through the amendments to the UPA.

The Study Committee met by telephone conference on August 20, 2015 and September 30, 2015 and unanimously approved the submission of this memorandum, which provides those details. Section 1 gives a thematic overview of issues in the UPA that should be reconsidered in light of the reality of married and unmarried same-sex couples throughout the United States. Section 2 provides a section-by-section analysis of amendments that a drafting committee should consider to the UPA.

1. Issues to Reconsider

As a threshold matter, the Study Committee recommends that if a drafting committee is established, its title and mandate should not be explicitly tied to *Obergefell v. Hodges*, 135 S.Ct. 2584 (US 2015), the decision establishing marriage equality for all states. The sense of the Study Committee is that the UPA needs to be modified not only to conform to current constitutional standards regarding marriage equality but also to more fully address determinations of parentage within unmarried same-sex relationships. Significantly, at least three states have produced their own revised versions of the UPA to provide a clearer legal framework for determinations of parentage among same-sex couples. We believe that the UPA is a very important product of the conference, but there will likely be no further adoptions of the act unless its language is updated. We believe a drafting committee should be appointed to consider revisions to the UPA in light of developments in constitutional law, innovations at the state legislative level, and changes in American society over the nearly 20 years since the last major revision process began for the UPA.

The fundamental question for a drafting committee to consider in revising the UPA is whether (and if so, how) to establish legal parentage based on the intent or conduct of the

parents, separate and apart from parentage based on a genetic or biological connection or adoption of the child. Same-sex couples who want to have children together are often advised that they must adopt their own children. This is both expensive and time-consuming and requires intrusive government home-studies. The presumption and/or acknowledgement processes in the UPA could be adapted to provide an alternative pathway to legal parentage for same-sex couples.

Because of the close relationship between various provisions of the UPA and the federal IV-D statute regarding child support enforcement, revisions to the UPA will require careful coordination with federal authorities so that states enacting these revisions do not endanger federal TANF and child support enforcement funding.

In the UPA, as in other ULC acts, there is language scattered throughout that assumes that a married couple consists of a wife and a husband, and that a child cannot have two legal parents of the same sex. A drafting committee should consider how to update this language to conform to contemporary constitutional law and to reflect the reality of current family structures.

In light of the growing importance of information about genetic heritage in modern medicine, a drafting committee might also consider whether to establish the right of a child to information about (and potentially the identity of) his or her genetic parents.

A drafting committee might also explore the reasons that the 2000 version of the UPA was not more widely enacted and consider whether there are amendments that would aid enactability. There is some evidence that the UPA's failure to cover same-sex couples, including same-sex married couples, was a significant barrier to enactment. As noted above, the only recent enactments have been in states that revised the UPA themselves to include same-sex couples. The surrogacy provisions of UPA 2000 were a significant innovation as well and may have been ahead of their time. Surrogacy is more widely practiced today than before, and scientific advancements have improved the technology relating to in vitro fertilization and other methods of assisted reproduction. A drafting committee could revisit those provisions in light of the changes that have occurred since 2002.

Finally, a drafting committee must carefully consider the effect of any changes on the UPA's application to opposite-sex couples, who will continue to constitute the great bulk of parentage cases under the UPA. The UPA has proven useful and expedient for these cases, greatly reducing protracted litigation.

2. Analysis of UPA Sections Potentially Needing Amendments

The Study Committee has reviewed the UPA and has identified the following sections in which amendments should be considered. This list is not meant to be exhaustive, since further review and discussions with a reporter and stakeholders may identify other provisions that need to be revised. Instead, the list indicates the types of amendments that should be considered to adapt the act to include married and unmarried same-sex couples.

Section 102 (Definitions): A drafting committee should consider revising the terms “acknowledged father”, “adjudicated father”, and “presumed father” and either adding a version of each for a “mother” or changing the term to “parent”. See notes on Section 204, Article 3, and Article 6.

Section 103 (Scope of Act; Choice of Law): A drafting committee should consider revising subsection (d) to reflect the possibility that a same-sex couple may enter into a surrogacy agreement.

Section 201 (Establishment of Parent-Child Relationship): A drafting committee should consider creating easier paths to legal parentage for same-sex couples rather than requiring non-biological parents to adopt children born to their spouses during a marriage. Section 201 might also cover the variety of family configurations better if it were restructured to be more gender-neutral.

Section 204 (Presumption of Paternity): A drafting committee should consider broadening this section to create a “presumption of parentage”. For example, if a married lesbian couple decide to conceive a child with donor sperm, the non-biological mother could be presumed to be a legal parent of the child from birth without the necessity of an adoption. Washington, Illinois, and Maine have all created a presumption of parentage in one spouse for children born to the other spouse during a marriage. Significantly, that presumption may be overcome only by evidence of a lack of consent or intent to become a parent and not by genetic evidence. Similarly, if a same-sex couple raise a child and both partners reside with the child and hold the child out as their own for the first two years of the child’s life, a drafting committee should consider whether there should be a presumption of parentage that cannot be rebutted except through an adjudication. As a matter of logic, genetic testing should not be relevant to disprove such a presumption.

Article 3 (Voluntary Acknowledgement of Paternity): A drafting committee should consider making the acknowledgement process available to same-sex couples as well as a more-streamlined and less expensive process than a second-parent adoption. This change may require work with the federal government to ensure that a revised process continues to satisfy federal IV-D requirements. If a drafting committee creates an “acknowledgement of parentage”, this would require amendments to nearly all sections in Article 3. Also, a drafting committee should consider revising various other provisions in Article 3 to reflect the possibility that a child may have two parents of the same sex.

Section 502 (Order for Testing): If a drafting committee does create a possibility of parentage by intent, then it should consider specifically excluding intended parents from the provisions of the UPA regarding genetic testing.

Section 602 (Standing to Maintain Proceeding): A drafting committee should consider revising the reference to “the mother of the child” to reflect the possibility of a child’s having more than one legal mother.

Section 603 (Parties to Proceeding): A drafting committee should consider revising the requirement that at least one man and one woman must be a party to each adjudication to reflect the possibility that a child might have no legal mother or more than one legal mother.

Section 606 (No Limitation: Child Having No Presumed, Acknowledged, or Adjudicated Father): A drafting committee should consider revising the statutes of limitations to track the different paths to legal parentage created earlier in the UPA. It should also consider whether it is appropriate not to have a statute of limitations on proceedings to adjudicate the child's parentage if a child has two legal mothers.

Section 607 (Limitation: Child Having Presumed Father): A drafting committee should consider applying the statute of limitations equally when the child has a presumed mother.

Section 608 (Authority to Deny Motion of Genetic Testing): A drafting committee should consider broadening the authority to deny genetic testing to same-sex couples.

Section 609 (Limitation: Child Having Acknowledged or Adjudicated Father): A drafting committee should consider applying this section equally in cases where a child has an acknowledged or adjudicated mother.

Section 624 (Temporary Order): A drafting committee should consider whether temporary orders should also be available for presumed mothers. It should also consider revising the section to avoid use of the term "the" mother, which implies that there may be only one.

Section 631 (Rules for Adjudication of Paternity): If a drafting committee chooses to employ intent or conduct as a basis for parentage, rather than a biological connection to the child, it should consider whether genetic testing is relevant to a proceeding involving same-sex couples. Under Section 631 as currently written, the non-biological father in a gay male couple would otherwise "be adjudicated not to be the father of the child," a result that would directly conflict with the concept of parentage by intent.

Section 634 (Order on Default): A drafting committee should consider whether this section should apply equally to adjudications of parentage in which a presumed or acknowledged mother is in default.

Section 636 (Order Adjudicating Parentage): A drafting committee should consider whether this section should apply equally to adjudications of maternity.

Section 637 (Binding Effect of Determination of Parentage): A drafting committee should consider whether to revise subsection (c) to reflect the possibility of married same-sex couples.

Section 703 (Paternity of Child of Assisted Reproduction): A drafting committee should consider whether this section should apply also in cases where a woman provides an egg to a same-sex partner who will be the gestational carrier of the child. This is a common fact pattern for lesbian couples.

Section 704 (Consent to Assisted Reproduction): A drafting committee should consider whether to revise this section to apply to same-sex couples as well, i.e. requiring both intended parents to sign the consent, unless the “holding out” provision applies.

Section 705 (Limitation on Husband’s Dispute of Paternity): A drafting committee should consider similar limits on the ability of a non-biological parent in a same-sex couple to challenge his or her parentage of a child and whether these limits should apply even if there is not a genetic connection, as long as the requisite intent is proved. In addition, a drafting committee should consider revising provisions in this section relating to married couples to encompass same-sex married couples.

Section 801 (Gestational Agreement Authorized): A drafting committee should consider revisions to this section to reflect the fact that a gestational mother may have a wife and not a husband and that intended parents may be of the same sex.

Section 802 (Requirements of Petition): A drafting committee should consider revising this section to reflect the fact that a gestational mother may have a wife and not a husband.

Section 806 (Termination of Gestational Agreement): A drafting committee should consider revising this section to reflect the fact that a gestational mother may have a wife and not a husband.

Section 808 (Gestational Agreement: Effect of Subsequent Marriage): A drafting committee should consider revising this section to reflect the fact that a gestational mother may have a wife and not a husband.