

MEMORANDUM

TO: Drafting Committee to Amend Intestacy Provisions of the Uniform Probate Code

FROM: Larry Waggoner, Reporter

SUBJECT: Draft UPC Amendments for Discussion at the February 23-24, 2007 Meeting in Portland, OR

Date: February 6, 2007

This memo reviews some of the issues that will arise at our meeting in Portland, but is not intended to cover all such issues.

The Joint Editorial Board for Uniform Trust and Estate Acts (JEB-UTEA) reviewed our earlier draft at its meeting of November 10-11, 2006. The following discussion incorporates the JEB-UTEA's view on selected issues.

Section 2-103 Share of Heirs other than Surviving Spouse: The JEB-UTEA agreed that stepchildren should inherit but in the last tier, as in the draft. Please look carefully at how I defined stepchildren--as children of a deceased spouse, deceased former spouse, and surviving former spouse. We will need to consider whether this is the right approach.

Another issue under 2-103 arises because under 2-102(4), the intestate share of the decedent's surviving spouse is the first \$100,000¹ plus one-half of the excess if "one or more of the decedent's descendants are not descendants of the surviving spouse." Under 2-103(1), the other half of the excess goes to the decedent's descendants. Because some of the committee members may not be as familiar as others with 2-102, here is that section in full:

§ 2-102. Share of Spouse.

The intestate share of a decedent's surviving spouse is:

(1) the entire intestate estate if:

(i) no descendant or parent of the decedent survives the decedent; or

(ii) all of the decedent's surviving descendants are also descendants of the surviving spouse and there is no other descendant of the surviving spouse who survives the decedent;

(2) the first [\$200,000], plus three-fourths of any balance of the intestate estate, if no descendant of the decedent survives the decedent, but a parent of the decedent survives the decedent;

(3) the first [\$150,000], plus one-half of any balance of the intestate estate, if all of the

¹ To adjust for inflation, the JEB-UTEA is in the process of proposing a 50% increase in all of the lump sums in 2-102.

decendent's surviving descendants are also descendants of the surviving spouse and the surviving spouse has one or more surviving descendants who are not descendants of the decedent;

(4) the first [\$100,000], plus one-half of any balance of the intestate estate, if one or more of the decedent's surviving descendants are not descendants of the surviving spouse.

In order for Section 2-102(4) to apply, the decedent must have one or more surviving descendants who are *not* descendants of the surviving spouse. Here is the problem: Section 2-103(1) now provides that any part of the estate not passing to the surviving spouse is divided by representation among *all* of the decedent's descendants, even if some of them *are* descendants of the surviving spouse. The question is, should the descendants who take in such a case be limited to the decedent's descendants who are not descendants of the surviving spouse? The theory would be that the surviving spouse is unlikely to use the decedent's property to benefit those descendants but is likely to use that property to benefit the decedent's descendants who are also descendants of the surviving spouse. Limiting the takers to the decedent's descendants who are not descendants of the surviving spouse would make 2-103(1) consistent with the overall theory of 2-102, and especially 2-102(1)(ii), which gives all of the intestate estate to the decedent's surviving spouse if all of the decedent's descendants are also descendants of the surviving spouse and if there is no other descendant of the surviving spouse who survives the decedent. I'm not sure whether this question is within the jurisdiction of this committee, because the scope of our project is centered on questions of status. Nevertheless, I'd like to hear the committee's reactions to this question, even if it is determined not to be within the scope of our jurisdiction but rather within the jurisdiction of the JEB-UTEA (which, as you know, is also considering amendments to the UPC). A possible fix would be to revise 2-103(1) to read: "to the decedent's descendants by representation, except that if the decedent has a surviving spouse who takes a share of the intestate estate under Section 2-102(4), and if the decedent has one more descendants who are descendants of the surviving spouse, the part of the estate passing to the decedent's descendants, if any, passes only to those descendants who are not descendants of the surviving spouse."

Section 2-107 Kindred of Half Blood: The JEB-UTEA reacted negatively to the Brashier proposal, and confirmed the inclination of the drafting committee not to amend the section on half-blood relatives, understanding that the section could be overinclusive in certain cases. On this basis, I have deleted this section from the list of sections to be amended.

Section 2-114 Parent Barred from Inheriting in Certain Circumstances: The JEB-UTEA discussed whether § 2-114 should be limited to parents whose rights have been terminated (omitting the references to abandonment and failure to support) but reached no consensus.

At the committee's request, I've included in the draft the New York statute and the proposed revised version of this statute. The JEB-UTEA suggested that a requirement should be added that the conduct must have occurred while the decedent was a minor, as in N.Y. EPTL §4-1.4. I have not tried to incorporate any of this in the enclosed draft, as I think the committee needs to discuss how to approach this question. Many questions remain, for example, what happens if a parent is in

arrearage on one or more child support payments, but makes them up later? Or has missed only one or only a few but paid all of the others? Also, should we say “*refused to support*” rather than “*failed to support*,” so that a parent who was financially unable to pay is not disinherited? Some on the JEB-UTEA suggested that approach.

Section 2-116 Parent and Child Relationship; Adopted Individual: The JEB-UTEA discussion centered on:

1. The need for a definition of incapacity in subsection (e).
2. On whether “estranged” in subsection (e)(3) should be replaced by “known to the genetic family”: the JEB-UTEA suggested the latter formulation.
3. On whether subsections (e)(1) and (e)(3) should also apply in abandonment: the JEB-UTEA reached no consensus on this question.
4. On whether adult adoptions should create inheritance rights with respect to other relatives of the adopting parent (e.g., if A adopts an adult B, is there a grandparent relationship between A’s parent and B?): the JEB-UTEA reached no consensus on this question.

Also perhaps relevant to 2-116 is the italicized portions of the Pennsylvania and South Dakota statutes:

20 Pa. Cons. Stat. § 2108. ... An adopted person shall not be considered as continuing to be the child or issue of his natural parents except in distributing the estate of a natural kin, other than the natural parent, who has maintained a *family relationship* with the adopted person....

S.D. Cod. Laws 29A-2-114. Parent and child relationships

(a) For purposes of intestate succession by, from, or through a person, and except as provided in subsection (b), an individual born out of wedlock is the child of that individual's birth parents. However, inheritance from or through the child by a birth parent or that birth parent's kindred is precluded unless that birth parent has openly treated the child as kindred, and has not refused to support the child.

(b) For purposes of intestate succession by, from, or through a person, an adopted individual is the child of that individual's adopting parent or parents and not of that individual's birth parents, except that:

(1) Adoption of a child by the spouse of a birth parent has no effect on (i) the relationship between the child and the birth parent whose spouse has adopted the child or (ii) the right of the child or a descendant of the child to inherit from or through the other birth parent; and

(2) *Adoption of a child by a birth grandparent or a descendant of a birth grandparent of the child has no effect on the right of the child or a descendant of the child to inherit from or through either birth parent;*

(c) The identity of the mother of an individual born out of wedlock is established by the birth of the child. The identity of the father may be established by the subsequent marriage of the parents, by a written acknowledgment by the father during the child's lifetime, by a judicial determination of paternity during the father's lifetime, or by a presentation of clear

and convincing proof in the proceeding to settle the father's estate.

Section 2-117 Parent and Child Relationship; When Unadopted Stepchild Treated as Adopted: Section 2-117 is based on Cal. Prob. Code § 6454, which applies to both stepchildren and foster children. At the last meeting, we decided as a first step to limit the UPC version of this section to stepchildren, a decision with which the JEB-UTEA concurs. In an appropriate case, the doctrine of equitable adoption would still potentially apply to a foster child (on equitable adoption, see below).

An important California decision that is relevant to the interpretation of the language of the California statute, and hence of 2-117, is *Estate of Joseph*, 949 P.2d 472 (Cal. 1998). In *Joseph*, the California Supreme Court interpreted the “but for” requirement. The court held that the refusal of a biological parent to consent to an adoption by a stepparent when the child was a minor is not a sufficient legal barrier under the statute once the child attains the age of majority. The theory was that adoption could have occurred once the child became an adult. You will note that I have attempted to codify this approach in 2-117(b)(2), by adding the phrase “during the child’s minority.” Note also that I’ve added the phrase “but for the refusal of the genetic parent to consent to the adoption.” (The California statute has neither phrase.)

Another relevant California decision is *Estate of Stevenson*, 14 Cal.Rptr.2d 250 (Ct. App. 1992). In that case, the court addressed the question of what constitutes a “continuous relationship.” In this case, the children lived with their stepmother from about 1953 until about 1959, at which time the couple separated. They reconciled seven years later, and the children were then reunited with their stepmother. The court held that the courts should consider the totality of the circumstances to determine whether the statutory requirement was met and held that the circumstances in this case warranted a finding that the relationship was continuous.² I don’t offhand see any way of codifying this approach, as taking into account the totality of the circumstances seems implicit in the “continuous relationship” language.

On equitable adoption. I appreciate Harry Tindall’s desire to codify the doctrine of equitable adoption. I’ve inserted Harry’s draft into the draft below § 2-117. I do have to report, however, that the JEB-UTEA discussed this question and urged the drafting committee not to try to codify this doctrine, mainly because of the perceived danger that any attempt at codification, either in the UPC itself or in a subsequent state enactment, would embrace the narrower parameters of the doctrine (i.e., requiring a contract to adopt), thereby stultifying evolution of the doctrine by the courts. This is my position also.

² For further analysis of the California statute, see Margaret M. Mahoney, *Stepfamilies in the Law of Intestate Succession and Wills*, 22 U.C. Davis L. Rev. 917 (1989) (viewing the statute as too restrictive); Thomas M. Hanson, Note, *Intestate Succession for Stepchildren: California Leads the Way, But Has It Gone Far Enough?*, 47 Hastings L.J. 257 (1995) (recommending a broadening of the eligibility requirements under the statute as well as a liberal interpretation of the existing statute); Robin Meadow & Jeffrey M. Loeb, *Heir Unapparent*, L.A. Lawyer, June 1994, at 34 (recommending repeal of what authors view as a misguided expansion of the rights of stepchildren and foster children).

To give some perspective on the case law, here follows the treatment of equitable adoption in Waggoner et al., *Family Property Law: Wills, Trusts, and Future Interests* (4th ed. 2006). Please note the treatment of the doctrine in *Estate of Ford*, which does not restrict the doctrine to contracts to adopt, but formulates the doctrine to depend on behavior. To be sure, many courts restrict the doctrine to a contract, but the *Ford* case is not alone in holding that it is not so restricted, but the exact requirements (in the absence of a contract) vary from jurisdiction to jurisdiction.

“Equitable Adoption” of Foster Children. Foster children who have not been formally adopted by their foster parents may nevertheless obtain inheritance rights under a doctrine called “equitable adoption.” Courts also refer to this doctrine as “virtual adoption,” “de facto adoption,” or “adoption by estoppel.” Courts in over half the states have recognized such a doctrine, but a number of jurisdictions have rejected it. The strongest factual situation presented for applying the doctrine is where the foster parents expressly contracted to adopt the child but failed to complete the adoption procedures. Even if the child cannot prove an express contract, courts have implied a contract under certain circumstances.

The cases are divided on whether an equitable adoption only qualifies the child to inherit from the child’s foster parents or grants the child full status as a child of the foster parents for other purposes.³

Although California grants a foster child a right of inheritance if the child would have been adopted “but for a legal barrier”, California continues to recognize the need for the doctrine of equitable adoption. See Cal. Prob. Code § 6455 (“Nothing in this chapter affects or limits application of the judicial doctrine of equitable adoption for the benefit of the child or the child’s issue.”). In *Estate of Ford*, 82 P.3d 747 (Cal. 2004), the Supreme Court of California explained that the doctrine of equitable adoption is limited to claimants who can “demonstrate the existence of some direct expression, on the decedent’s part, of an intent to adopt the claimant. This intent may be shown, of course, by proof of an unperformed express

³ For cases granting full status, see *First Nat’l Bank v. Phillips*, 344 S.E.2d 201 (W. Va. 1985) (allowed an equitably adopted child to inherit from a foster parent’s other child); *Foster v. Cheek*, 96 S.E.2d 545 (Ga. 1957) (allowed an equitably adopted child to receive insurance benefits providing for a “child” on a policy insuring a foster parent); *Bower v. Landa*, 371 P.2d 657 (Nev. 1962) (allowed a suit under a wrongful death statute for the death of a foster parent); *Estate of Radovich*, 308 P.2d 14 (Cal. 1957) (an equitably adopted child had a right to favorable state inheritance tax treatment).

Contra, e.g., *Reynolds v. Los Angeles*, 222 Cal. Rptr. 517 (Ct. App. 1986) (denied a foster father the right to pursue a wrongful death action upon the accidental death of his equitably adopted son); *In re Estate of Jenkins*, 904 P.2d 1316 (Colo. 1995) (en banc) (denied an equitably adopted child the right to take under the testamentary trust of his foster grandfather); *First National Bank v. People*, 516 P.2d 639 (Colo. 1973) (denied favorable inheritance tax treatment to an equitably adopted child); *Board of Education v. Browning*, 635 A.2d 373 (Md. 1994) (denied an equitably adopted child the right to inherit from the foster parent’s sister); *McGarvey v. State*, 533 A.2d 690 (Md. 1987) (denied favorable inheritance tax treatment to an equitably adopted child); *Estate of Riggs*, 440 N.Y.S.2d 450 (Sur. Ct. 1981) (denied family members of a foster parent the right to inherit from an equitably adopted child).

Courts have held that the doctrine has no effect on the child’s right to inherit from the child’s biological parents. See, e.g., *Kupec v. Cooper*, 593 So. 2d 1176 (Fla. Dist. Ct. App. 1992); *Gardner v. Hancock*, 924 S.W.2d 857 (Mo. Ct. App. 1996). Courts have also held that the doctrine is not available to a person who claims to have been equitably adopted as an adult. See, e.g., *Miller v. Paczier*, 591 So. 2d 321 (Fla. Dist. Ct. App. 1991).

See generally Annot., *Modern Status of Law as to Equitable Adoption or Adoption by Estoppel*, 122 ALR5th 205 (2004).

agreement or promise to adopt. But it may also be demonstrated by proof of other acts or statements directly showing that the decedent intended the child to be, or to be treated as, a legally adopted child, such as an invalid or unconsummated attempt to adopt, the decedent's statement of his or her intent to adopt the child, or the decedent's representations to the claimant or to the community at large that the claimant was the decedent's natural or legally adopted child." The court also held that the claimant must establish the claim by clear and convincing evidence. [Waggoner et al., Family Property Law: Wills, Trusts, and Future Interests (4th ed. 2006).]

Sections 2-118 Parent and Child Relationship; Child of Assisted Reproduction Other than a Child Born to a Gestational Mother: The treatment of children of assisted reproduction, especially those conceived posthumously, is our most challenging question. The Uniform Parentage Act § 707 (see Appendix C, *infra*), titled Parental Status of Deceased Individual, provides "If an individual who consented in a record to be a parent by assisted reproduction dies before placement of eggs, sperm, or embryos, the deceased individual is not a parent of the resulting child unless the deceased individual consented in a record that if assisted reproduction were to occur after death, the deceased individual would be a parent of the child."

The facts of *Gillett-Netting v. Barnhart*, 371 F.3d 593 (9th Cir. 2004), reversing 231 F.Supp.2d 961 (D. Ariz. 2002), provide a compelling example of why the Uniform Parentage Act's requirement of consent in a record to posthumous conception can lead to what I believe to be an inappropriate result.

On March 13, 1993, Rhonda Gillett, 32, a student, and Robert Netting, 59, a professor of anthropology, were married in California. They resided in Tucson, Arizona. Several months after they were married, they began trying to conceive a child. After Rhonda suffered two miscarriages, she was diagnosed with medical conditions that interfered with her ability to conceive a child and to carry the child to full term without medical intervention. Thereafter, she began fertility treatments.

In mid-December 1994, Robert was diagnosed with multiple myeloma, a form of cancer. Rhonda and Robert jointly decided to continue with their efforts to have a child. On December 16, 1994, Robert was taken to the emergency room in severe pain. His treating physician recommended that he immediately undergo chemotherapy treatment for the cancer. Because the chemotherapy could have rendered him sterile, Robert delayed treatment so he could deposit and preserve his sperm for Rhonda's fertility treatments. According to Dr. David Karabinus, the Director of the Andrology Laboratory at the University of Arizona Health Sciences Center, Robert was aware that his stored sperm could be used to impregnate his wife even after his death. He states that Robert agreed to this and paid \$400 for the initial and first year of storage. He deposited his sperm from December 18-20, 1994.

Throughout Robert's illness, Rhonda continued with her fertility treatments. Rhonda contends that Robert told her that he wanted her to continue trying to conceive a child even if he died. Robert

died on February 4, 1995. After Robert's death, Rhonda was artificially inseminated with Robert's sperm several times. After the artificial insemination procedure proved unsuccessful, Rhonda's doctor advised her to try in vitro fertilization. The in vitro fertilization procedure was performed on December 19, 1995. The embryo transfer occurred on December 21, 1995, and a positive pregnancy test was noted on January 4, 1996. On August 6, 1996, Rhonda gave birth to twins, a female named Juliet and a male named Piers.

The facts of *Estate of Kolacy*, 753 A.2d 1257 (N.J. Super. Ct. Ch. Div. 2000), also provide a compelling example of why the Uniform Parentage Act's requirement of consent in a record to posthumous conception can lead to what I believe to be an inappropriate result, and why other evidence of intention should be controlling. On February 7, 1994, William J. Kolacy and Mariantonia Kolacy were a young married couple living in Rockaway, New Jersey. On that date, William Kolacy was diagnosed as having leukemia, and he was advised to start chemotherapy as quickly as possible. He feared that he would be rendered infertile by the disease or by the treatment for the disease, so he decided to place his sperm in the Sperm and Embryo Bank of NJ. On the morning of February 8, 1994, William Kolacy and Mariantonia Kolacy harvested his sperm, and Mariantonia Kolacy delivered it to the sperm bank. Later that day, the chemotherapy began. After the chemotherapy had been in progress for one month, a second harvesting of sperm occurred and was placed in the sperm bank.

Unfortunately, William Kolacy's leukemia led to his death at the age of 26 on April 15, 1995. He died domiciled in New Jersey. On April 3, 1996, almost a year after the death of William Kolacy, Mariantonia Kolacy authorized the release of his sperm from the Sperm and Embryo Bank of NJ to the Center for Reproductive Medicine and Infertility at Cornell University Medical College in New York City. An IVF fertilization procedure uniting the sperm of William Kolacy and eggs taken from Mariantonia Kolacy was performed at the Center. The procedure was successful, and the embryos that resulted were transferred into the womb of Mariantonia Kolacy. Twin girls, Amanda and Elyse, were born to Mariantonia Kolacy on November 3, 1996. The births occurred slightly more than 18 months after the death of William Kolacy.

Mariantonia Kolacy sought a declaratory judgment in state court declaring that the twin girls were intestate heirs of her deceased husband. The declaratory judgment was sought in order to allow her to pursue claims for child's insurance benefits under the federal Social Security Act. The court found that the certifications submitted by Mariantonio Kolacy and Dr. Isaac Kligman of the Center for Reproductive Medicine and Infertility were fully credible and that they firmly established the facts set forth above. Accordingly, the court found that it was clear that Amanda and Elyse Kolacy were genetically and biologically the children of William Kolacy, and issued the requested declaratory judgment. Apparently the decedent gave no consent in writing or other record to posthumous conception because the court "accept[ed] as true Mariantonia Kolacy's statement that her husband unequivocally expressed his desire that she use his stored sperm after his death to bear his children." *Id.* at 1263.

In *Woodward v. Commissioner of Social Security*, 760 N.E.2d 257 (Mass. 2002), a widow who was artificially impregnated by sperm of her dead husband and gave birth to twin daughters applied

for mother's and children's social security survivor benefits. The Social Security Administration denied such benefits, and the wife appealed. The United States District Court for the District of Massachusetts certified to the Supreme Judicial Court of Massachusetts the question of whether posthumously conceived children enjoyed the inheritance rights of natural children under Massachusetts law of intestate succession. The Supreme Judicial Court held that children could inherit if the wife established their genetic relationship with the decedent, and that the decedent consented both to reproduce posthumously and support any resulting child. The court stated:

[W]e conclude that limited circumstances may exist, consistent with the mandates of our Legislature, in which posthumously conceived children may enjoy the inheritance rights of "issue" under our intestacy law. These limited circumstances exist where, as a threshold matter, the surviving parent or the child's other legal representative demonstrates a genetic relationship between the child and the decedent. The survivor or representative must then establish both that the decedent affirmatively consented to posthumous conception and to the support of any resulting child. Even where such circumstances exist, time limitations may preclude commencing a claim for succession rights on behalf of a posthumously conceived child. In any action brought to establish such inheritance rights, notice must be given to all interested parties.

Id. at 272. The court added, however, that the above formulation is not necessarily the final answer, but that these questions "cry out for lengthy, careful examination outside the adversary process, which can only address the specific circumstances of each controversy that presents itself." Id.

The JEB-UTEA discussion of this section focused on whether consent to posthumous conception can be inferred from a record or from behavior contemplating conception in general, or whether the behavior must specifically contemplate *posthumous* conception. The JEB-UTEA suggested that it should be the former, not the latter. At the last meeting, however, the committee seemed inclined to require that a consent in a record must express consent to posthumous conception in order for the child to inherit, but also seemed inclined to recognize behavior and other evidence indicating that the decedent contemplated posthumous conception, thus softening the UPA's requirement of consent to posthumous conception in a record. Recognizing behavior and other evidence indicating that the decedent contemplated posthumous conception would probably mean that the children in the above cases would be recognized as children of the deceased father. Cases that might not be covered, however, would include one in which the husband had deposited sperm with intent that it be used to get his wife pregnant and then died unexpectedly – accident, crime victim, heart attack, etc. Or, one in which a couple had taken steps to have a child by any method of assisted reproduction, but before pregnancy occurred, one of the intended parents died (perhaps unexpectedly), but the survivor went ahead with the plan and functioned as a parent to the child. I hope the committee will consider whether the child in cases such as these should be treated as a child of the deceased intended parent.

Section 2-119 Parent and Child Relationship; Child Born to a Gestational Mother: We want to be sure that this section gives inheritance rights even if the gestational agreement, though honored, was invalid and hence unenforceable. If the agreement is in fact honored, and the intended parent(s) gain custody of the child, the resulting child should not be disinherited merely because of the

invalidity of the agreement. Also, we want to make sure that this section gives inheritance rights under a gestational agreement that was valid in the state in which the child was born, but the parents later relocate to a state in which such agreements are invalid. I think that 2-119 achieves these objectives, but we should double check this when we discuss this section.

Another question we should consider is what happens if the gestational mother, not the intended parent, gains custody of the child. I would assume that we would not want the child to be treated as a child of the intended parents in such a case. Should we add a requirement in either subsection (b)(3) or in (c) that the intended parent actually gains custody (or that the agreement was honored)?

Also, what if one of two intended parents dies after entering into a gestational agreement but before the gestational mother gives birth or even before she becomes pregnant, and the surviving intended parent takes custody of the child? Is the child a child of the deceased intended parent?

Section 2-705 Rules of Construction for Class Gifts: The JEB-UTEA discussion centered on:

1. On the wording of subsection (a): the JEB-UTEA suggested that the subsection should read “Except as provided in subsections (b) and (c), class gifts are construed in accordance with the rules for intestate succession.”.

2. The requirement in subsection (b) of living while a minor as a regular member of the household: the JEB-UTEA encouraged the committee to adopt a broader formulation akin to the “functioned as a parent” test in Restatement 3d §14.7.

3. On whether subsection (b) should refer explicitly to nonmarital children: the JEB-UTEA reached no consensus on this question.

4. On whether subsection (c) should be replaced with the language from Restatement 3d §14.5(2): the JEB-UTEA reached no consensus on this question.

5. On whether there should be a time-limit in subsection (e) on adoptions in progress: the JEB-UTEA’s suggestion was in the negative.

6. One member of the JEB-UTEA argued against inclusion of adopted stepchildren and foster children. That member seemed to think that such an adoption is a manipulative adoption. My own view is that if a stepparent thinks enough of his/her spouse’s children to adopt them, even though they are adults, they should be included in a class gift. A stepparent who adopts his/her spouse’s children surely does so for nonmanipulative reasons, and may be partly motivated to do so in order to make the stepchildren’s children his/her grandchildren.

7. The same JEB-UTEA member argued against automatic inclusion of children adopted under the age of majority. The argument was that a childless person could adopt his sister’s minor children in order to make them his “issue,” even though they never lived in the adopting parent’s household. In response to this concern, I have added an alternative version for the committee’s consideration that provides that a child must have lived while a minor as a regular member of the household of the adopting parent, but adds that a child who is adopted under the age of majority is rebuttably presumed to have satisfied that requirement.

Section 3-916. Distribution in Case of Possible Posthumous Conception: The JEB-UTEA agreed that this is a most desirable provision.

Appendices

Appendix A (p. 11) contains the current sections of the UPC that are to be amended or replaced.

Appendix B (p. 13) contains the provision from the Restatement Third of Property (Wills and other Donative Transfers) pertaining to children of assisted reproduction.

Appendix C (p. 18) contains relevant provisions from the Uniform Parentage Act.

APPENDIX A

CURRENT UPC SECTIONS TO BE AMENDED OR REPLACED

§ 2-103. Share of Heirs other than Surviving Spouse. Any part of the intestate estate not passing to the decedent's surviving spouse under Section 2-102, or the entire intestate estate if there is no surviving spouse, passes in the following order to the individuals designated below who survive the decedent:

- (1) to the decedent's descendants by representation;
- (2) if there is no surviving descendant, to the decedent's parents equally if both survive, or to the surviving parent;
- (3) if there is no surviving descendant or parent, to the descendants of the decedent's parents or either of them by representation;
- (4) if there is no surviving descendant, parent, or descendant of a parent, but the decedent is survived by one or more grandparents or descendants of grandparents, half of the estate passes to the decedent's paternal grandparents equally if both survive, or to the surviving paternal grandparent, or to the descendants of the decedent's paternal grandparents or either of them if both are deceased, the descendants taking by representation; and the other half passes to the decedent's maternal relatives in the same manner; but if there is no surviving grandparent or descendant of a grandparent on either the paternal or the maternal side, the entire estate passes to the decedent's relatives on the other side in the same manner as the half.

§ 2-104. Requirement that Heir Survive Decedent for 120 Hours. An individual who fails to survive the decedent by 120 hours is deemed to have predeceased the decedent for purposes of homestead allowance, exempt property, and intestate succession, and the decedent's heirs are determined accordingly. If it is not established by clear and convincing evidence that an individual who would otherwise be an heir survived the decedent by 120 hours, it is deemed that the individual failed to survive for the required period. This section is not to be applied if its application would result in a taking of intestate estate by the state under Section 2-105.

§ 2-108. Afterborn Heirs. An individual in gestation at a particular time is treated as living at that time if the individual lives 120 hours or more after birth.

§ 2-113. Individuals Related to Decedent Through Two Lines. An individual who is related to the decedent through two lines of relationship is entitled to only a single share based on the relationship that would entitle the individual to the larger share.

§ 2-114. Parent and Child Relationship.

(a) Except as provided in subsections (b) and (c), for purposes of intestate succession by, through, or from a person, an individual is the child of his [or her] natural parents, regardless of their marital status. The parent and child relationship may be established under [the Uniform Parentage Act] [applicable state law] [insert appropriate statutory reference].

(b) An adopted individual is the child of his [or her] adopting parent or parents and not of his [or her] natural parents, but adoption of a child by the spouse of either natural parent has no effect on

(i) the relationship between the child and that natural parent or (ii) the right of the child or a descendant of the child to inherit from or through the other natural parent.

(c) Inheritance from or through a child by either natural parent or his [or her] kindred is precluded unless that natural parent has openly treated the child as his [or hers], and has not refused to support the child.

§ 2-705. Class Gifts Construed to Accord With Intestate Succession.

(a) Adopted individuals and individuals born out of wedlock, and their respective descendants if appropriate to the class, are included in class gifts and other terms of relationship in accordance with the rules for intestate succession. Terms of relationship that do not differentiate relationships by blood from those by affinity, such as “uncles,” “aunts,” “nieces,” or “nephews,” are construed to exclude relatives by affinity. Terms of relationship that do not differentiate relationships by the half blood from those by the whole blood, such as “brothers,” “sisters,” “nieces,” or “nephews,” are construed to include both types of relationships.

(b) In addition to the requirements of subsection (a), in construing a dispositive provision of a transferor who is not the natural parent, an individual born to the natural parent is not considered the child of that parent unless the individual lived while a minor as a regular member of the household of that natural parent or of that parent’s parent, brother, sister, spouse, or surviving spouse.

(c) In addition to the requirements of subsection (a), in construing a dispositive provision of a transferor who is not the adopting parent, an adopted individual is not considered the child of the adopting parent unless the adopted individual lived while a minor, either before or after the adoption, as a regular member of the household of the adopting parent.

APPENDIX B RESTATEMENT (THIRD) OF PROPERTY

§ 14.8 Child of Assisted Reproduction

Unless the language or circumstances establish that the transferor had a different intention, a child of assisted reproduction is treated for class-gift purposes as a child of a person who consented to function as a parent to the child and who functioned in that capacity or intended to function in that capacity but was prevented from doing so by an event such as death or incapacity.

Comment:

a. Scope and rationale. Assisted reproduction technologies (sometimes referred to as ART) encompass methods of causing pregnancy other than by sexual intercourse.

When a child is produced by assisted reproduction, the child's genetic lineage is not necessarily controlling for class-gift purposes. Instead, unless the language or circumstances establish that the transferor had a different intention, a child of assisted reproduction is treated for class-gift purposes as a child of a person who consented to function as a parent to the child and who functioned in that capacity or was prevented from doing so by an event such as death or incapacity. That person might or might not be a genetic parent of the child. A reference in the donative document to "lawful children" or children "born in wedlock" does not manifest a different intention.

b. Consent; functioning as a parent. Consent to function as a parent to the child can be in a writing or other record, and is controlling unless that consent is withdrawn before the placement of eggs, sperm, or embryos. Consent to the procedure with intent to function as the parent of the child is equivalent to consent to function as the child's parent. Consent can also be shown by the circumstances of the assisted reproduction. Consent can also be shown by behavior before the child's birth exhibiting consent to the procedure or by behavior after the child's birth exhibiting ratification of the procedure.

A child of assisted reproduction is usually produced for a couple, but sometimes is produced for one person. If the child is produced for a married person (see Comments *d* and *e*), and the couple are not separated and no divorce or annulment proceedings are pending, it is presumed that both spouses consented to function as a parent to the child. The same presumption is extended to partners in a domestic partnership (see Comment *f*), where the partners are not separated and the partnership has not been terminated and is not in the process of being terminated.

For a child to be presumptively treated for class-gift purposes as a particular person's child under this section, consent alone is not sufficient. The person in question must also have actually functioned as a parent to the child or must have been prevented from doing so by an event such as death or incapacity (see Comment *h*). For the criteria used in determining whether a person functioned as a parent to a child, see § 14.5, Comment *f*.

c. Internal and external fertilization. There are currently two main types of assisted reproductive technologies, although variations of these two procedures are practiced and being continually refined. The two types are internal and external fertilization. Internal fertilization occurs inside the uterus of the woman who is to become pregnant (the gestational mother). External fertilization occurs in a laboratory procedure outside the uterus and is followed by implantation of the fertilized egg (embryo) into the uterus of the woman who is to become pregnant.

Internal fertilization includes artificial insemination (AI) and gamete intrafallopian transfer (GIFT). AI is a procedure whereby a man's sperm is injected directly into the uterus of the woman who is to become pregnant. GIFT is a procedure whereby a woman's eggs (oocytes) are retrieved from her ovaries and mixed with sperm, but not actively fertilized. The mixed sperm and eggs are subsequently injected into the woman who is to become pregnant and placed where they would be in natural fertilization.

External fertilization is commonly referred to as invitro fertilization (IVF) or sometimes invitro fertilization-embryo transfer (IVF-ET). IVF is a procedure whereby a woman's eggs are retrieved from her ovaries and fertilized with a man's sperm in a laboratory procedure outside the uterus to produce embryos; the embryos are subsequently placed in the uterus of a woman to produce a pregnancy. In this Restatement, the term "IVF" is not limited to the case in which the woman who donates the eggs is to become pregnant. In some lexicons, the term is so limited and the term "egg donation" is used to refer to cases in which the egg donor and the gestational mother are different women. In this Restatement, the term "IVF" is used to refer to both types of cases.

Although it is hard to imagine that methods of assisted reproduction other than variants of internal or external fertilization will be developed in the future, they might be. For class-gift purposes, a child produced by any such new method should be treated in a manner that is consistent with the principles of this section.

d. Married couple—Wife is gestational mother. If a married couple uses artificial insemination to produce a pregnancy in the wife, the sperm that is injected sometimes comes from the husband and sometimes from a third party. If the husband's sperm is used, the procedure is known as *homologous artificial insemination* or *artificial insemination husband (AIH)*. A child produced by AIH is the genetic child of the husband and the wife and is so treated for class-gift purposes, assuming that the spouse in question functioned as a parent of the child. If the sperm of a third party is used, the procedure is known as *heterologous artificial insemination* or *artificial insemination donor (AID)*. A child produced by AID is the genetic child of the sperm donor and the wife. For class-gift purposes, however, such a child is treated as the child of the husband and the wife, assuming that the spouse in question functioned as a parent to the child. The child is not treated as the child of the sperm donor.

If a married couple uses invitro fertilization to produce a pregnancy in the wife, the man's sperm sometimes comes from the husband and sometimes from a third party, and the woman's eggs sometime come from the wife and sometime from a third party. A child produced from the husband's sperm and the wife's eggs is the genetic child of the husband and the wife and is so treated for class-gift purposes, assuming that the spouse in question functioned as a parent to the child. A child produced from a third party's sperm or a third party's eggs, with the embryo being placed in the uterus of the wife to produce a pregnancy, is the genetic child of the sperm and egg donors. For class-gift purposes, however, the child is treated as the child of the husband and the wife, assuming that the spouse in question functioned as a parent to the child. The child is not treated as the child of a third-party sperm or egg donor.

Illustrations:

1. G's will devised property in trust, directing the trustee to pay the income to G's daughter LT for life and, on LT's death, to distribute the trust property "to LT's issue per stirpes." When G executed his will and at G's death, LT was married to H1. LT had two children that were

conceived by her by sexual intercourse with H1. After G's death, LT and H1 were divorced and LT married H2. LT and H2 were unable to have a child by sexual intercourse and decided to have a child by assisted reproduction. LT and H2 were not separated and no divorce or annulment proceedings were pending. When a child is produced for a married person who is not separated from his or her spouse and no divorce or annulment proceedings are pending, it is presumed that both spouses consented to function as a parent to the child. The circumstances of the assisted reproduction corroborate LT's consent. The procedure was successful, LT became pregnant, and she gave birth to her third child. LT (and H2) functioned as parents to the child by bringing the child up in their home and raising the child. LT's third child is presumptively treated as LT's child for purposes of the class gift to "LT's issue." The fact that G knew that LT had two children without using assisted reproduction and therefore might not have contemplated that she would have a child by this means is not a basis for concluding that G would have intended to exclude the child produced by artificial insemination.

2. G's will devised property in trust, directing the trustee "to pay the income to G's son LT for life and, on LT's death, to distribute the trust property to LT's issue per stirpes." When G executed his will and when G died, LT was married to W. LT and W had two children conceived by sexual intercourse. After G's death, LT became infertile. W and LT wanted another child, and arrangements were made to have her artificially inseminated with the semen of another man whose identity was not revealed to either W or LT. W and LT were not separated and no divorce or annulment proceedings were pending. When a child is produced for a married person who is not separated from his or her spouse and no divorce or annulment proceedings are pending, it is presumed that both spouses consented to function as a parent to the child. The circumstances of the assisted reproduction corroborate LT's consent. The procedure was successful, W became pregnant, and she gave birth to her third child. LT (and W) functioned as parents to the child by bringing the child up in their home and raising the child. The person whose semen was used was not aware of where or when it was used. The child thus produced by W is presumptively treated as LT's child for purposes of the class gift "to LT's issue." The fact that the child produced by artificial insemination is not LT's genetic child is not a factor indicating that G had a contrary intent, since LT consented to and did function as a parent to the child.

3. Same facts as Illustration 2, except that the third person whose semen is used to artificially inseminate W is known to both LT and W, and the third person knows his semen is to be used to impregnate W. This change in facts does not change the result.

4. Same facts as Illustration 2, except that W made the arrangement to be artificially inseminated without LT's knowledge and consent, but after the child was born LT consented to and did function as a parent to the child. This recognition of the child by LT causes the child to be presumptively treated as LT's child for purposes of the class gift "to LT's issue." LT's behavior within a reasonable time after the child's birth exhibited ratification of the assisted-reproduction procedure and qualifies as consent to function as a parent to the child.

5. Same facts as Illustration 4, except that after the child is born, W turns the child over to the man whose semen was used to produce the child. When a child is produced for a married person, it is presumed that both spouses consented to function as a parent to the child when the couple are not separated and no divorce or annulment proceedings are pending, but that presumption is rebutted in this case. Such child is not presumptively treated as LT's child for purposes of the class gift "to LT's issue," but would be presumptively treated as the child of the

sperm donor for purposes of a class gift to the sperm donor's children or issue.

e. Married couple—Surrogacy agreement. Unless the language or circumstances establish that the transferor had a different intention, a child produced by assisted reproduction for a married couple as a result of a surrogacy agreement (called a gestational agreement in the Uniform Parentage Act) is, for class-gift purposes, treated as the child of the husband and the wife, assuming that the spouse in question functioned as a parent to the child. For purposes of this rule of construction, it makes no difference who is the gestational mother and who are the genetic parents of the child.

f. Domestic partners. Unless the language or circumstances establish that the transferor had a different intention, a child produced by assisted reproduction for domestic partners is, for class-gift purposes, treated as the child of each domestic partner, assuming that the domestic partner in question functioned as a parent to the child. For purposes of this rule of construction, it makes no difference whether one of the domestic partners or a surrogate is the gestational mother. The term “domestic partner” includes a person who qualifies as a domestic partner under § 6.03 of the Principles of the Law of Family Dissolution: Analysis and Recommendations. The term also includes an unmarried partner under any other relationship entitling the partners to intestacy rights from each other under applicable law, such as a civil union relationship under the law of Vermont or Connecticut (or under a similar law of another jurisdiction), a relationship based on the partners’ signed reciprocal beneficiary designation under the law of Hawaii (or under a similar law of another jurisdiction), or registration as domestic partners under the law of California or Maine (or under a similar law of another jurisdiction).

If one or both domestic partners adopt the child, then the child is classified as an adopted child with respect to the adopting parent or parents, and the child’s status is determined under § 14.5.

g. Unmarried person. Unless the language or circumstances establish that the transferor had a different intention, a child produced by assisted reproduction for an unmarried person who is not in a domestic partnership with another is, for class-gift purposes, treated as the child of the person for whom the child is produced, assuming that that person functioned as a parent to the child. For purposes of this rule of construction, it makes no difference whether the unmarried parent or a surrogate is the gestational mother. If the unmarried parent adopts the child, then the child is classified as an adopted child with respect to the adopting parent and is treated as provided in § 14.5.

If the unmarried parent subsequently marries or enters into a domestic partnership, the child is not treated under this Section as the child of the new spouse or domestic partner. A new spouse or domestic partner functions more as a stepparent to the child, not as a parent to the child. Under § 14.5, however, the child would be treated as the adopted child of the new spouse or domestic partner if that spouse or partner adopts the child.

h. Posthumous conception. If a prospective parent dies before the placement of eggs, sperm, or embryos, the decedent is prevented by circumstances from functioning as a parent to the child.

The Uniform Parentage Act addresses the problem of posthumous conception by providing that the decedent is not the parent of the child unless the decedent “consented in a record that if assisted reproduction were to occur after death, the deceased individual would be a parent of the child.” Unif. Parentage Act § 707 (2000, as amended 2002). Under this Restatement, such consent presumptively establishes the child as the child of the decedent for class-gift purposes.

Suppose, however, that the consent merely provides that the decedent consents to the procedure or consents to the procedure with intent to “be a parent” of the child, but does not specifically

provide that if assisted reproduction were to occur after death, the decedent would “be a parent” of the child. Or, suppose that the decedent gave no consent in writing or other record. In such cases, the child is nevertheless treated for class-gift purposes as the child of the decedent if the evidence establishes that the decedent gave consent, though not in a record, or the circumstances of the assisted reproduction otherwise indicate that the decedent would likely have functioned as a parent to the child were it not for the fact that death intervened to prevent the decedent from functioning in that capacity. For example, in the case of a child produced by artificial insemination of the decedent’s widow with the husband’s frozen sperm after the husband’s death, the child is presumptively treated as the child of the deceased husband for class-gift purposes.

If there is no consent in a writing or other record, the problem addressed in this Comment can also arise in other cases, such as if the decedent dies or becomes incapacitated while the child is in gestation or even after the birth of the child if the parent is physically located elsewhere (such as a member of the armed forces dying in combat before he gets a chance to see his baby). The decedent or incapacitated person in such cases may be deprived of the opportunity to function as a parent to the child. In such a case, the child is presumptively treated for class-gift purposes as the child of the deceased or incapacitated person if the circumstances of the assisted reproduction indicate that the deceased or incapacitated person would have functioned as a parent to the child, but the person’s death or incapacity prevented the person from functioning in that capacity.

i. Dissolution of marriage or domestic partnership or withdrawal of consent. The Uniform Parentage Act addresses the problem of dissolution of marriage by providing that “if a marriage is dissolved before placement of eggs, sperm, or embryos, the former spouse is not a parent of the resulting child unless the former spouse consented in a record that if assisted reproduction were to occur after a divorce, the former spouse would be a parent of the child,” subject to the qualification that consent may be withdrawn in a record at any time before placement of eggs, sperm, or embryos. Unif. Parentage Act § 706 (2000, as amended 2002). This Restatement adopts that rule for class-gift purposes, and extends the rule to dissolution of a domestic partnership.

If, after dissolution, the intended parent remarries or enters into a new domestic partnership, the child is not treated under this Section as the child of the new spouse or domestic partner. A new spouse or domestic partner functions more as a stepparent to the child, not as a parent to the child. Under § 14.5, however, the child would be treated as the adopted child of the new spouse or domestic partner if that spouse or partner adopts the child.

APPENDIX C UNIFORM PARENTAGE ACT

§ 701. Scope of Article. This [article] does not apply to the birth of a child conceived by means of sexual intercourse [, or as the result of a gestational agreement as provided in [Article] 8].

§ 702. Parental Status of Donor. A donor is not a parent of a child conceived by means of assisted reproduction.

§ 102. Definitions. In this [Act]:

....
(8) “Donor” means an individual who produces eggs or sperm used for assisted reproduction, whether or not for consideration. The term does not include:

(A) a husband who provides sperm, or a wife who provides eggs, to be used for assisted reproduction by the wife;

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

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

§ 703. Paternity of Child of Assisted Reproduction. 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.

§ 704. Consent to Assisted Reproduction.

(a) Consent by a woman, and a man who intends to be a parent of a child born to the woman by assisted reproduction must be in a record signed by the woman and the man. This requirement does not apply to a donor.

(b) Failure to sign a consent required by subsection (a), before or after birth of the child, does not preclude a finding of paternity if the woman and the man, during the first two years of the child’s life, resided together in the same household with the child and held out the child as their own.

Enactments (with variations)

Delaware

Del. Code Ann. tit. 13 § 8-704 Consent to assisted reproduction.

(a) Consent by a woman and a man who intends to be a parent of a child born to the woman by assisted reproduction must be in a record signed by the woman and the man. This requirement does not apply to a donor.

(b) Failure to sign a consent required by subsection (a) of this section, before or after birth of the child, does not preclude a finding of paternity if the woman and man, during the first 2 years of the child's life, resided together in the same household with the child and openly held out the child as their own.

Texas

Tex. Fam. Code Ann. § 160.704. Consent to Assisted Reproduction

(a) Consent by a married woman to assisted reproduction must be in a record signed by the woman and her husband. This requirement does not apply to the donation of eggs by a married woman for assisted reproduction by another woman.

(b) Failure by the husband to sign a consent required by Subsection (a) before or after the birth of the child does not preclude a finding that the husband is the father of a child born to his wife if the wife and husband openly treated the child as their own.

Washington

Wash. Rev. Code § 26.26.715. Consent to assisted reproduction

(1) A consent to assisted reproduction by a married woman must be in a record signed by the woman and her husband. This requirement does not apply to the donation of eggs for assisted reproduction by another woman.

(2) Failure of the husband to sign a consent required by subsection (1) of this section, before or after birth of the child, does not preclude a finding that the husband is the father of a child born to his wife if the wife and husband openly treated the child as their own.

Wyoming

Wyo. Stat. Ann. § 14-2-904 Consent to assisted reproduction.

(a) Consent by a woman and a man who intends to be the parent of a child born to the woman by assisted reproduction shall be in a record signed by the woman and the man. This requirement shall not apply to a donor.

(b) Failure to sign a consent required by subsection (a) of this section, before or after birth of the child, does not preclude a finding of paternity if the woman and the man, during the first two (2) years of the child's life resided together in the same household with the child and openly held out the child as their own.

§ 705. Limitation on Husband's Dispute of Paternity.

(a) Except as otherwise provided in subsection (b), the husband of a wife who gives birth to a child by means of assisted reproduction may not challenge his paternity of the child unless:

(1) within two years after learning of the birth of the child he commences a proceeding to adjudicate his paternity; and

(2) the court finds that he did not consent to the assisted reproduction, before or after birth of the child.

(b) A proceeding to adjudicate paternity may be maintained at any time if the court determines that:

(1) the husband did not provide sperm for, or before or after the birth of the child consent to, assisted reproduction by his wife;

(2) the husband and the mother of the child have not cohabited since the probable time of assisted reproduction; and

(3) the husband never openly treated the child as his own.

(c) The limitation provided in this section applies to a marriage declared invalid after assisted

reproduction.

§ 706. Effect of Dissolution of Marriage or Withdrawal of Consent.

(a) If a marriage is dissolved before placement of eggs, sperm, or embryos, the former spouse is not a parent of the resulting child unless the former spouse consented in a record that if assisted reproduction were to occur after a divorce, the former spouse would be a parent of the child.

(b) The consent of a woman or a man to assisted reproduction may be withdrawn by that individual in a record at any time before placement of eggs, sperm, or embryos. An individual who withdraws consent under this section is not a parent of the resulting child.

§ 707. Parental Status of Deceased Individual. If an individual who consented in a record to be a parent by assisted reproduction dies before placement of eggs, sperm, or embryos, the deceased individual is not a parent of the resulting child unless the deceased individual consented in a record that if assisted reproduction were to occur after death, the deceased individual would be a parent of the child.

**Enactments
(showing variations)**

Delaware

Del. Code Ann. tit. 13 § 8-707 Parental status of deceased individual. If an individual who consented in a record to be a parent by assisted reproduction dies before placement of eggs, sperm, or embryos, the deceased individual is not a parent of the resulting child unless the deceased individual consented in a record that if assisted reproduction were to occur after death, the deceased individual would be a parent of the child.

Texas

Tex. Fam. Code Ann. § 160.707. Parental Status of Deceased Spouse. If a spouse dies before the placement of eggs, sperm, or embryos, the deceased spouse is not a parent of the resulting child unless the deceased spouse consented in a record that if assisted reproduction were to occur after death the deceased spouse would be a parent of the child.

Washington

Wash. Rev. Code § 26.26.730. Child of assisted reproduction—Parental status of deceased spouse. If a spouse dies before placement of eggs, sperm, or an embryo, the deceased spouse is not a parent of the resulting child unless the deceased spouse consented in a record that if assisted reproduction were to occur after death, the deceased spouse would be a parent of the child.

Wyoming

Wyo. Stat. Ann. § 14-2-907 Parental status of deceased individual. If an individual who consented in a record to be a parent by assisted reproduction dies before placement of eggs, sperm or embryos, the deceased individual is not a parent of the resulting child unless the deceased individual consented in a record that if assisted reproduction were to occur after death, the deceased individual would be

a parent of the child.

§ 801. Gestational Agreement Authorized.

(a) A prospective gestational mother, her husband if she is married, a donor or the donors, and the intended parents may enter into a written agreement providing that:

- (1) the prospective gestational mother agrees to pregnancy by means of assisted reproduction;
- (2) the prospective gestational mother, her husband if she is married, and the donors relinquish all rights and duties as the parents of a child conceived through assisted reproduction; and
- (3) the intended parents become the parents of the child.

(b) The man and the woman who are the intended parents must both be parties to the gestational agreement.

(c) A gestational agreement is enforceable only if validated as provided in Section 803.

(d) A gestational agreement does not apply to the birth of a child conceived by means of sexual intercourse.

(e) A gestational agreement may provide for payment of consideration.

(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.

§ 802. Requirements of Petition.

(a) The intended parents and the prospective gestational mother may commence a proceeding in the [appropriate court] to validate a gestational agreement.

(b) A proceeding to validate a gestational agreement may not be maintained unless:

- (1) the mother or the intended parents have been residents of this State for at least 90 days;
- (2) the prospective gestational mother's husband, if she is married, is joined in the proceeding; and
- (3) a copy of the gestational agreement is attached to the [petition].

§ 803. Hearing to Validate Gestational Agreement.

(a) If the requirements of subsection (b) are satisfied, a court may issue an order validating the gestational agreement and declaring that the intended parents will be the parents of a child born during the term of the of the agreement.

(b) The court may issue an order under subsection (a) only on finding that:

- (1) the residence requirements of Section 802 have been satisfied and the parties have submitted to the jurisdiction of the court under the jurisdictional standards of this [Act];
- (2) unless waived by the court, the [relevant child-welfare agency] has made a home study of the intended parents and the intended parents meet the standards of suitability applicable to adoptive parents;
- (3) all parties have voluntarily entered into the agreement and understand its terms;
- (4) adequate provision has been made for all reasonable health-care expense associated with the gestational agreement until the birth of the child, including responsibility for those expenses if the agreement is terminated; and
- (5) the consideration, if any, paid to the prospective gestational mother is reasonable.

§ 804. Inspection of Records. The proceedings, records, and identities of the individual parties to a gestational agreement under this [article] are subject to inspection under the standards of confidentiality applicable to adoptions as provided under other law of this State.

§ 805. Exclusive, Continuing Jurisdiction. Subject to the jurisdictional standards of [Section 201 of the Uniform Child Custody Jurisdiction and Enforcement Act], the court conducting a proceeding under this [article] has exclusive, continuing jurisdiction of all matters arising out of the gestational agreement until a child born to the gestational mother during the period governed by the agreement attains the age of 180 days.

§ 806. Termination of Gestational Agreement.

(a) After issuance of an order under this [article], but before the prospective gestational mother becomes pregnant by means of assisted reproduction, the prospective gestational mother, her husband, or either of the intended parents may terminate the gestational agreement by giving written notice of termination to all other parties.

(b) The court for good cause shown may terminate the gestational agreement.

(c) An individual who terminates a gestational agreement shall file notice of the termination with the court. On receipt of the notice, the court shall vacate the order issued under this [article]. An individual who does not notify the court of the termination of the agreement is subject to appropriate sanctions.

(d) Neither a prospective gestational mother nor her husband, if any, is liable to the intended parents for terminating a gestational agreement pursuant to this section.

§ 807. Parentage under Validated Gestational Agreement.

(a) Upon birth of a child to a gestational mother, the intended parents shall file notice with the court that a child has been born to the gestational mother within 300 days after assisted reproduction. Thereupon, the court shall issue an order:

(1) confirming that the intended parents are the parents of the child;

(2) if necessary, ordering that the child be surrendered to the intended parents; and

(3) directing the [agency maintaining birth records] to issue a birth certificate naming the intended parents as parents of the child.

(b) If the parentage of a child born to a gestational mother is alleged not to be the result of assisted reproduction, the court shall order genetic testing to determine the parentage of the child.

(c) If the intended parents fail to file notice required under subsection (a), the gestational mother or the appropriate State agency may file notice with the court that a child has been born to the gestational mother within 300 days after assisted reproduction. Upon proof of a court order issued pursuant to Section 803 validating the gestational agreement, the court shall order the intended parents are the parents of the child and are financially responsible for the child.

§ 808. Gestational Agreement: Effect of Subsequent Marriage. After the issuance of an order under this [article], subsequent marriage of the gestational mother does not affect the validity of a gestational agreement, her husband's consent to the agreement is not required, and her husband is not a presumed father of the resulting child.

§ 809. Effect of Nonvalidated Gestational Agreement.

(a) A gestational agreement, whether in a record or not, that is not judicially validated is not enforceable.

(b) If a birth results under a gestational agreement that is not judicially validated as provided in this [article], the parent-child relationship is determined as provided in [Article] 2.

(c) Individuals who are parties to a nonvalidated gestational agreement as intended parents may be held liable for support of the resulting child, even if the agreement is otherwise unenforceable. The liability under this subsection includes assessing all expenses and fees as provided in Section 636.]