121st MAINE LEGISLATURE

SECOND SPECIAL SESSION-2004

Legislative Document **No. 1851**

H.P. 1377 House of Representatives, February 11, 2004

An Act To Implement the Recommendations of the Family Law Advisory Commission with Regard to the Uniform Parentage Act

Reported by Representative MILLS of Farmington for the Family Law Advisory Commission pursuant to Resolve 2003, chapter 25, section 2.

Reference to the Committee on Judiciary suggested and ordered printed under Joint Rule 218.

Millicent M. MacFarland

MILLICENT M. MacFARLAND
Clerk

Be it enacted by the People of the State of Maine as follows:

PREFATORY NOTE

The National Conference of Commissioners on Uniform State Laws has addressed the subject of parentage throughout the 20th Century. In 1922, the Conference promulgated the "Uniform Illegitimacy Act," followed by the "Uniform Blood Tests To Determine Paternity Act" in 1952, the "Uniform Paternity Act" in 1960, and certain provisions in the "Uniform Probate Code" in 1969. The "Uniform Illegitimacy Act" was withdrawn by the Conference and none of the other Acts were widely adopted. As of June 1973, the Blood Tests to Determine Paternity Act had been enacted in nine states, the "Uniform Paternity Act" in four, and the "Uniform Probate Code" in five.

The most important uniform act addressing the status of the nonmarital child was the Uniform Parentage Act approved in 1973 [hereinafter referred to as UPA (1973)]. As of December, 2000, UPA (1973) was in effect in 19 states stretching from Delaware to California; in addition, many other states have enacted significant portions of it. Among the many notable features of this landmark Act was the declaration that all children should be treated equally without regard to marital status of the parents. In addition, the Act established a set of rules for presumptions of parentage, shunned the term "illegitimate," and chose instead to employ the term "child with no presumed father."

UPA (1973) had its genesis in a law review article, Harry D. Krause, A Proposed Uniform Act on Legitimacy, 44 Tex. L. Rev. 829 (1966); see also Krause, Equal Protection for the Illegitimate, 65 Mich. L. Rev. 477 (1967). Professor Krause followed with a pathfinding book, Illegitimacy: Law and Social Policy (1971), and then went on to serve as the reporter for UPA (1973). When work on the Act began, the notion of substantive legal equality of children regardless of the marital status of their parents seemed revolutionary. Even though the Conference had put itself on record in favor of equal rights of support and inheritance in the Paternity Act and the Probate Code, the law of many states continued to differentiate very significantly in the legal treatment of marital and nonmarital children. A series of United States Supreme Court decisions invalidating state inheritance, custody, and tort laws that disadvantaged out-of-wedlock children provided both the impetus and a receptive climate for the Conference to promulgate UPA (1973).

Case law has not always reached consistent results in construing UPA (1973). Moreover, widely differing treatment on subjects not dealt with by the Act has been common. For example, California courts have held that a nonmarital father does not

have standing to sue an intact family to assert his rights of fatherhood. Another UPA (1973) state, Colorado, has declared that under its state constitution the father may not be denied such rights. Texas, which has adopted many of the provisions of UPA (1973), reached much the same conclusion. Similarly, a judgment's binding effect on the child or on others seeking to claim a benefit of the judgment or to attack the judgment collaterally is confused in the case law. Adding to the confusion is the fact that UPA (1973) is entirely silent regarding the relationship between a divorce and a determination of parentage. Finally, the incredible scientific advances in parentage testing since 1973 warrant a thoroughgoing revision of the Act.

Beginning in the 1980s, states began to adopt paternity registries in an attempt to deal with the risk of a man's subsequent claim of paternity after the mother relinquishes a child for adoption. Although at that time the Conference rejected a paternity registry as a solution, it promulgated the Uniform Putative and Unknown Fathers Act in 1988 (UPUFA) to deal with the rights of such men. However, UPUFA has not been enacted by any state. In 1988 the Conference also adopted the Uniform Status of Children of Assisted Conception Act (USCACA). Assisted reproduction and gestational agreements became commonplace in the 1990s, long after the promulgation of UPA (1973). The USCACA resembled a model act more than a uniform act because it provided two opposing options regarding "gestational agreements." To date, only two states have enacted USCACA, each choosing a different option.

The promulgation of the Uniform Parentage Act in 2000, as amended in 2002, is now the official recommendation of the Conference on the subject of parentage. This Act relegates to history all of the earlier uniform acts dealing with parentage, to wit, UPA (1973). UPUFA (1988), and USCACA (1988). The amendments of 2002 are the end-result of objections lodged by the American Bar Association Section of Individual Rights and Responsibilities and the ABA Committee on the Unmet Legal Needs of Children, based on the view that in certain respects the 2000 version did not adequately treat a child of unmarried parents equally with a child of married parents. Because equal treatment of nonmarital children was a hallmark of the 1973 Act, the objections caused the drafters of the 2000 version to reconsider certain sections of the Act. Through extended discussion and a meeting of representatives of all the entities involved, a determination was made that the objections had merit. As a result of this process, the amendments shown in this Act were presented by mail ballot to the Commissioners and unanimously approved in November 2002.

In brief outline, UPA (2002) is structured as follows: Article 1, General Provisions, adds many new definitions to clarify the participants in determinations of parentage and adapt the Act to recent scientific developments. Article 2, Parent-Child Relationship, will look familiar to past users of UPA (1973) because it continues a number of the 1973 provisions with little or no change, while eliminating the ambiguous term "natural" to describe a genetic parent. Article 3, Voluntary Acknowledgment of Paternity, is entirely new and is driven by federal mandates that states provide simplified nonjudicial means to establish paternity, especially for newborns and young children. Article 4, Registry of Paternity, is entirely new and incorporates a tightly integrated registry law to deal with the rights of a man who is neither an acknowledged, presumed or adjudicated father. A primary goal of this article is to facilitate adoption proceedings. Article 5, Genetic Testing, comprehensively covers that subject in ten separate sections (the 1973 Act had one section on the subject). Article 6, Proceeding to Adjudicate Parentage, sets forth the parties to, and the procedures for, adjudicating parentage and challenging acknowledgments, presumptions, and judgments. Article 7, Child of Assisted Reproduction, recodifies USCACA (1988), but applies its provisions to nonmarital as well as marital children born as a result of assisted reproductive technologies. The bracketed Article 8, Gestational Agreement, is based upon USCACA (1988), but follows only the option that permits enforcement of a gestational agreement. Moreover, the Act makes a number of important changes in that option.

UPA (1973) contained a number of other substantive provisions, including those applicable to child support and custody. These subjects are omitted from UPA (2002) because other state law adequately provides for them.

Finally, Uniform Parentage Act (2002) is consistent with the provisions of two other uniform acts of great significance, namely the Uniform Interstate Family Support Act [UIFSA (1996) and UIFSA (2001)] and the Uniform Child Custody Jurisdiction and Enforcement Act [UCCJEA (1997)].

Sec. 1. 19-A MRSA c. 61 is enacted to read:

CHAPTER 61

UNIFORM PARENTAGE ACT

SUBCHAPTER 1

GENERAL PROVISIONS

§1831. Short title

This chapter may be known and cited as "the Uniform Parentage Act."

§1832. Definitions

As used in this chapter, unless the context otherwise indicates, the following terms have the following meanings.

1. Acknowledged father. "Acknowledged father" means a man who has established a parent-child relationship under subchapter 3.

2. Adjudicated parent. "Adjudicated parent" means a person who has been adjudicated by a court of competent jurisdiction to be the parent of a child.

3. Alleged father. "Alleged father" means a man who alleges himself to be, or is alleged to be, the genetic father or a possible genetic father of a child, but whose paternity has not been determined. "Alleged father" does not mean:

A. A presumed parent;

B. A man whose parental rights have been terminated or declared not to exist; or

C. A male donor.

4. Assisted reproduction. "Assisted reproduction" means a method of causing pregnancy other than sexual intercourse. "Assisted reproduction" includes:

A. Intrauterine insemination;

B. Donation of eggs;

C. Donation of embryos;

D. In vitro fertilization and transfer of embryos; and

E. Intracytoplasmic sperm injection.

5. Child. "Child" means an individual of any age whose parentage may be determined under this chapter.

6. Commence. "Commence" means to file the initial pleading seeking an adjudication of parentage in the District Court.

7. Determination of parentage. "Determination of parentage" means the establishment of the parent-child relationship by the signing of a valid acknowledgment of paternity under subchapter 3 or adjudication by the court.

8. Donor. "Donor" means an individual who produces eggs or sperm used for assisted reproduction, whether or not for consideration. "Donor" does not mean:

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 subchapter 8; or

C. A parent under subchapter 7 or an intended parent under subchapter 8.

9. Ethnic or racial group. "Ethnic or racial group" means, for purposes of genetic testing, a recognized group that an individual identifies as all or part of the individual's ancestry or that is so identified by other information.

10. Genetic testing. "Genetic testing" means an analysis of genetic markers to exclude or identify a man as the father or a woman as the mother of a child. "Genetic testing" includes an analysis of one or a combination of the following:

A. Deoxyribonucleic acid; and

B. Blood group antigens, red cell antigens, human leukocyte antigens, serum enzymes, serum proteins or red cell enzymes.

11. Gestational mother. "Gestational mother" means an adult woman who gives birth to a child under a gestational agreement.

12. Man. "Man" means a male individual of any age.

13. Parent. "Parent" means an individual who has established a parent-child relationship under section 1841.

14. Parent-child relationship. "Parent-child relationship" means the legal relationship between a child and a parent of the child as established under section 1841.

15. Paternity index. "Paternity index" means the likelihood of paternity calculated by computing the ratio between:

A. The likelihood that the tested man is the father based on the genetic markers of the tested man, mother and child and conditioned on the hypothesis that the tested man is the father of the child; and

B. The likelihood that the tested man is not the father based on the genetic markers of the tested man, mother and child and conditioned on the hypothesis that the tested man is not the father of the child and that the father is of the same ethnic or racial group as the tested man.

16. Presumed parent. "Presumed parent" means a person who, by operation of law under section 1844, is recognized as the parent of a child until that status is rebutted or confirmed in a judicial proceeding.

17. Probability of paternity. "Probability of paternity" means the measure, for the ethnic or racial group to which the alleged father belongs, of the probability that the man in question is the father of the child compared with a random, unrelated man of the same ethnic or racial group and expressed as a percentage incorporating the paternity index and a prior probability.

18. Record. "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. Signatory. "Signatory" means an individual who authenticates a record and is bound by its terms.

20. State. "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 subject to the jurisdiction of the United States.

21. Support enforcement agency. "Support enforcement agency" means a public official or agency authorized to seek:

A. Enforcement of support orders or laws relating to the duty of support;

B. Establishment or modification of child support;

C. Determination of parentage; or

D. Location of child support obligors and their income and assets.

Comment

(This is section 102 of the UPA.)

Four separate definitions of "father" are provided by the Act to account for the permutations of a man who may be so classified. Subsection (1), "acknowledged father," directly responds to a 1996 federal mandate encouraging states to adopt nonjudicial means for a man to identify himself as the father of a child in order to achieve an early determination of paternity. The term "acknowledged father" is given a relatively narrow meaning, rather than the broader definition previously accorded to the term. Only a man who acknowledges paternity of a child in accordance with the formal requirements established in Article 3 qualifies as an "acknowledged father." Because the mother of the child must concur in the formal acknowledgment, the federal mandate declares that the states must treat the action as the equivalent of an adjudication of paternity.

Subsection (2), "adjudicated father," although self-defining, presents a policy choice reached by the Conference that contested parentage matters are reserved for courts to resolve. The definition is limited to judicial adjudication of parentage, rather than providing for an alternative of administrative determination of parentage.

Subsection (3), "alleged father," is derived from the UPUFA § 1(1), although much of the terminology has been changed. A man who is asserted to be, or asserts himself to be or possibly to be, the father of a child is the primary target of the Uniform Parentage Act.

Subsection (16), "presumed father," is more fully defined by the factual circumstances establishing a presumption of paternity in § 204, infra.

Closely related to the definitions of "father," Subsection (12) is derived from the UPUFA § 1(1). Defining "man" to include all male humans eliminates the connotation of adulthood, thereby satisfying the obvious need for the Act to cover under-age progenitors. Although objection to calling a 14-year-old father a "man" was raised when UPUFA was considered by the Conference, for purposes of procreation such a teen-age boy is a man.

Note that a wide variety of other terms historically employed to identify the male parent are not defined in this section. Specifically, the term "putative father" has been replaced by the broader term "alleged father." According to Webster's, "putative" means "commonly accepted or supposed." Clearly, many "alleged fathers" do not fit that definition. Further, UPUFA chose the term "biological father" over more

ambiguous "natural father." Because one woman may be the genetic mother of a child while another woman is the gestational mother, for consistency the term "genetic father" was substituted for "biological." Definitions are not supplied for such terms as "unknown father, legal father, real father, and the like," either because the term is self-defining or because it is ambiguous.

Subsection (8) was amended in 2002 to clarify that an individual who becomes a parent through assisted reproduction as provided in Article 7 is not a "donor." Similarly, if bracketed Article 8, Gestational Agreement, is enacted, an individual who is an intended parent through the procedure implemented in that article is not a "donor." No substantive change is intended by this clarification.

Subsection (9), "ethnic or racial group," relates to an individual only for purposes of genetic testing. The genetic tests themselves do not determine the race or ethnic group of the individual. Rather, if a tested individual is not excluded, his race or ethnic group provided is used in the paternity calculations because those calculations give the most conservative result, that is, those most favoring non-paternity.

Subsection (10), "genetic testing," contemplates that paternity testing must be broadly defined to include all of the traditional genetic tests, such as blood types and HLA (Human Leukocyte Antigen), as well as newer DNA technologies. In the past the term "blood test" was commonly applied to paternity testing. However, this usage actually referred to the sample collected; in fact, the tests were genetic tests performed on blood samples. The Act uses the scientific term "deoxyribonucleic acid." This is to accommodate the changes in technology used to evaluate the DNA. Early DNA testing involved RFLP technology (Restriction Fragment Length Polymorphism), followed by PCR techniques (Polymerase Chain Reaction); these may be replaced by newer technology, such as SNP (Single Nucleotide Polymorphisms). The type of DNA technology to be employed is best left to scientific bodies, such as accreditation agencies, see § 503(a), infra.

Subsection (11), "gestational mother," is derived from USCACA (1988) § 1(4), which employed the now-discarded term "surrogate mother" to define the same factual circumstances dealt with in bracketed Article 8, Gestational Agreement, infra. For purposes of this Act, a woman giving birth to her own genetic child, a.k.a. "birth mother," is distinguished from a "gestational mother." The former is both a gestational and genetic mother, while the latter also gives birth to a child, who may or may not be her genetic child. In the Act the term "gestational mother" is narrowly defined to restrict it to a

situation in which a woman gives birth to a child pursuant to a gestational agreement validated under Article 8. If Article 8 is not enacted, this definition should be omitted from the Act. The 2002 amendment providing that the gestational mother must be an adult corrects a drafting oversight.

A 2002 amendment deleted former subsection (12), "intended parents," as adopted in UPA 2000. That term is now employed exclusively in bracketed Article 8, and thus is no longer appropriate as a definition for the Act.

Subsection (14), "parent-child relationship," is derived from UPA (1973) § 1. A wide variety of the rights and duties flowing to and from parents and children are found in many other laws of this state.

Subsection (15), "paternity index," defines a complex scientific and mathematical concept. Note that the definition includes statistical measures of the mother and tested man. The tested man may be an alleged father, or any other potential biological father. In fact, under appropriate circumstances Article 5 provides for testing without samples from the mother or the alleged father. In these cases the expert statistically reconstructs the missing potential mother or biological father from genetic testing of samples from their relatives. Therefore the definition is correct even in cases involving a missing parent.

Subsection (18) is derived from the Uniform Electronic Transactions Act § 102(13), which establishes a standard for either paper or electronic record keeping.

Maine Comment

Specific gender references have been removed from several definitions consistent with other Maine amendments that make the UPA gender neutral and ensure equal treatment for every child regardless of the circumstances of the parent or parents.

§1833. Scope of chapter; choice of law

1. Scope. This chapter applies to determination of parentage in this State.

2. Application. The court shall apply the law of this State to adjudicate the parent-child relationship. The applicable law does not depend on:

A. The place of birth of the child; or

B. The past or present residence of the child.

3. Effect on parental rights. This chapter does not create, enlarge or diminish parental rights or duties under other law of this State.

Comment

(This is section 103 of the UPA.)

The new UPA conforms to the requirement of 42 U.S.C. § 666(a)(5)(A), that a state must provide that parentage proceedings be available at any time before a child attains 18 years of age or suffer the potential penalty of forfeiture of the federal funds that subsidize child support enforcement by the state, see Appendix: Federal IV-D Statute Relating to Parentage, infra.

Subsection (a) was amended in 2002 in response to objections that the phrase "governs every determination of parentage" was excessively broad and could conflict with other state laws, such as those governing probate issues.

Subsection (b) is derived from the UIFSA (1996) § 303 and UPA (1973) § 8(b). This section simplifies choice of law principles; the local court is directed to apply local law. If in fact this state is an inappropriate forum, dismissal for forum non-conveniens may be appropriate.

Subsection (d) is bracketed. If a state enacts Article 8, Gestational Agreement, this subsection should be omitted. If a state does not enact Article 8, this subsection should be included to make clear that this Act does not affect other law of the jurisdiction on the subject, if any. The 2002 amendment employs consistent language in order to treat married and unmarried couples alike with regard to parentage issues, and reflects the terminology in Articles 2, 7, and bracketed Article 8.

Maine Comment

Subsection (d) is deleted because Article 8 is included in this chapter.

§1834. Court of this State

The District Court is authorized to adjudicate parentage under this chapter.

Comment

(This is section 104 of the UPA.)

Source: UPA (1973) § 8(a).

The court having jurisdiction over parentage proceedings under this Act should be identified here. Although a proceeding to determine parentage is most often associated with an action to establish a child support order, the Act departs from the choice made by the UIFSA (1996) § 102, which allows for the establishment of a child support order by an administrative agency. Insofar as establishment of parentage is concerned, the new UPA reflects the deliberate decision by NCCUSL that an "adjudication" should require a judicial proceeding. This procedure is consistent with the practice of most states. In fact, very few states provide for the resolution of disputed paternity through administrative processes, which, of course, is a policy judgment for the State legislature to make.

The term "tribunal" found in UIFSA to describe both courts and agencies is not employed in the Act. Rather, the dispute resolution entity in UPA (2002) is limited to a "court." UPA (2002) conforms to the congressional determination that parentage may also be established by an acknowledgment of parentage under Article 3. Article 7 allows parentage to be established in a written record that presumably could then be approved by an administrative officer. These exceptions create potential disputes that only a judicial proceeding can resolve.

Joinder of a parentage proceeding with an action for divorce, annulment, separate maintenance, or child support and custody is left to state law. This should be considered in choosing which court in a state is to be given jurisdiction over proceedings under this Act.

§1835. Protection of participants

Proceedings under this chapter are subject to other law of this State governing the health, safety, privacy and liberty of a child or other individual who could be jeopardized by disclosure of identifying information, including address, telephone number place of employment, social security number and the child's day-care facility and school.

Comment

(This is section 105 of the UPA.)

Source: UCCJEA (1997) § 209(e).

§1836. Determination of maternity

Provisions of this chapter relating to determination of paternity apply to determinations of maternity.

Comment

(This is section 106 of the UPA.)

Source: UPA (1973) § 21.

This section provides for a determination of the mother-child relationship if that issue is in dispute. Except in circumstances involving immigration, cases involving disputed maternity are extraordinarily rare. Therefore, the new UPA is otherwise written in terms applicable to the determination of paternity, while maintaining the possibility that a dispute may arise regarding whether a woman claiming maternity actually is the mother of a particular child.

Although certain provisions found in the balance of the Act logically do not apply in a proceeding to establish maternity, the Act continues the decision made in UPA (1973) not to burden these already complex provisions with unnecessary references to the ascertainment of maternity. Except for issues arising from assisted reproduction technologies or gestational agreements, see Article 7 and bracketed Article 8, § 201(a) is the sole provision in the Act that specifically relates to the mother-child relationship. In an actual case, a judge facing a claim for the determination of the mother-child relationship should have little difficulty deciding which portions of the Act should be applied.

SUBCHAPTER 2

PARENT-CHILD RELATIONSHIP

§1841. Establishment of parent-child relationship

The parent-child relationship is established by:

1. Woman's giving birth. The woman's having given birth to the child, except as otherwise provided in subchapter 8;

2. Unrebutted presumption of parentage. An unrebutted presumption of parentage under section 1844;

3. Effective acknowledgment of paternity. An effective acknowledgment of paternity by the man under subchapter 3, unless the acknowledgment has been rescinded or successfully challenged;

4. Adjudication of parentage. An adjudication of parentage;

5. Adoption of child. Adoption of the child;

6. Consent to assisted reproduction. Consent to assisted reproduction by a woman under subchapter 7 that resulted in the birth of the child; or

7. Adjudication confirming parentage. An adjudication confirming the individual as a parent of a child born to the gestational mother if the agreement was validated under subchapter 8 or is enforceable under other law.

Comment

(This is section 201 of the UPA.)

Source: UPA (1973), § 4; expanded to include all possible bases of the parent-child relationship

Subsection (b)(5) and bracketed subsections (a)(4) and (b)(6) reflect the fact that Article 7 provides that both a married and an unmarried couple are entitled to assisted reproductive technologies in order to become parents and, if bracketed Article 8 is enacted, to enter into a gestational agreement. If a state enacts Article 8, Gestational Agreement, the brackets should be removed. If a state does not enact Article 8, the bracketed subsections should be omitted.

Maine Comment

Section 1841 has been amended to delete reference to gender-specific terms and has been made gender neutral to include all parent-child relationships. Recent advancements in science make possible the birth of children through the use of assisted reproduction and gestational agreements. As a result, new parent-child relationships are being created and new and unanticipated issues relating to the parentage of these children have arisen. Many of Maine's courts are struggling with these issues now. The UPA is made gender neutral to provide guidance in the resolution of these new and unanticipated issues and to ensure equal treatment of every child in Maine regardless of the circumstances of the child's parent or parents.

Accordingly, section 1841 has been reconfigured to reflect that the Act has been made gender neutral to establish the parentage of every child born or living in Maine. The parent-child relationship is created between a person and the resulting child if the person provides sperm or egg or consents to assisted reproduction by a woman with the intent to be the

parent of the child or to a gestational agreement with the intent to be the parent of the child born pursuant to the agreement. The parent-child relationship is also created if for the first two years of the child's life, a person resided in the same household with the child and that person openly held out the child as that person's child. Section 1841 clarifies who the child's parent or parents are and who is responsible for all aspects of that child's welfare, including the child's financial welfare. Section 1841 creates stability and security for every child in Maine.

§1842. No discrimination based on marital status

A child born to parents who are not married to each other has the same rights under the law as a child born to parents who are married to each other.

Comment

(This is section 202 of the UPA.)

Source: UPA (1973) § 2 and Massachusetts Gen. Laws ch. 209C, § 1.

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. As discussed in the Prefatory Note, supra, U.S. Supreme Court decisions and lower federal and state court decisions require equal treatment of marital and nonmarital children without regard to the circumstances of their birth.

Nonetheless, the equal treatment principle does not necessarily eliminate all distinctions in the application of other substantive laws to different kinds of children. For example, as amended in 1991 the Uniform Probate Code § 2-705(b), states:

Y in construing a dispositive provision of a transferor who is not a natural parent, an individual born to the natural parent is not considered a child of that parent unless the individual while a minor lived as a regular member of the household of that parent or of that parent's parent, brother, sister, spouse, or surviving spouse.

8 U.L.A. 188 (1998)

In short, the UPC provides that an individual is presumed not to be included in a class gift from someone other than the child's parent unless that individual lived as a member of the parent's family during childhood. This presumed intent of the

donor is rebuttable. Although this provision probably has a disproportionate effect on nonmarital children, the disparity is not based on the circumstances of birth, but rather on post-birth living conditions.

§1843. Consequences of establishment of parentage

Unless parental rights are terminated, a parent-child relationship established under this chapter applies for all purposes, except as otherwise specifically provided by other law of this State.

Comment

(This is section 203 of the UPA.)

Source: USCACA (1988) § 10.

This section may seem to state the obvious, but both the statement and the qualifier are necessary because without this explanation a literal reading of §§ 201-203 could lead to erroneous statutory constructions. The basic purpose of the section is to make clear that a mother, as defined in § 201(a), is not a parent once her parental rights have been terminated. Similarly, a man whose paternity has been established by acknowledgment or by court adjudication may subsequently have his parental rights terminated.

The qualifier, "as otherwise provided by other law of this State," is necessary because other statutes may restrict rights of a parent. For example, UPC (1993) § 2-114(c) precludes a parent of a child (and the parent's family) from inheriting from the child by intestate succession "unless that natural parent has openly treated the child as his [or hers] and has not refused to support the child." Similarly, as discussed in the preceding Comment, UPC (1993) § 2-705(b) affects the right of a child to take under a class gift from a person who is not a parent of the child.

§1844. Presumption of parentage

1. Presumption established. A person is presumed to be the parent of a child if:

A. The person and the mother of the child are married to each other and the child is born during the marriage;

B. The person and the mother of the child were married to each other and the child is born within 300 days after the

marriage is terminated by death, annulment, divorce or declaration of invalidity or after a decree of separation;

C. Before the birth of the child, the person and the mother of the child married each other in apparent compliance with law, even if the attempted marriage is or could be declared invalid, and the child is born during the invalid marriage or within 300 days after its termination by death, annulment, divorce or declaration of invalidity or after a decree of separation;

D. After the birth of the child, the person and the mother of the child married each other in apparent compliance with law, whether or not the marriage is or could be declared invalid, and the person voluntarily asserted parentage of the child and:

(1) The assertion is in a record filed with the State Registrar of Vital Statistics;

(2) The person agreed to be and is named as the child's parent on the child's birth certificate; or

(3) The person promised in a record to support the child as that person's own; or

E. For the first 2 years of the child's life, the person resided in the same household with the child and openly held out the child as that person's own.

2. Rebuttal of presumption. A presumption of parentage established under this section may be rebutted only by an adjudication under subchapter 6.

Comment

(This is section 204 of the UPA.)

Source: UPA (1973) § 4.

A network of presumptions was established by UPA (1973) for application to cases in which proof of external circumstances indicate a particular man to be the probable father. The simplest of these is also the best known--birth of a child during the marriage between the mother and a man. When promulgated in 1973 the contemporaneous commentary noted that:

While perhaps no one state now includes all these presumptions in its law, the presumptions are based on existing presumptions of 'legitimacy' in state laws and do not represent a serious departure. Novel is that they have been collected under one roof.

All presumptions of paternity are rebuttable in appropriate circumstances. Uniform Parentage Act (1973), Prefatory Note, 9B U.L.A. 379 (2001).

After amendments adopted in 2002, the Uniform Parentage Act retains all but one of the original presumptions of paternity contained in UPA § 4 (1973). Originally the 2000 version of the new Act limited presumptions of paternity to those related to marriage. The objection by the ABA Steering Committee on the Unmet Legal Needs of Children and the Section of Individual Rights and Responsibilities that this could result in differential treatment of children born to unmarried parents resulted in the revision to this section.

Subsection (1) deals with a child born during a marriage; subsection (2) deals with a child conceived during marriage but born after its termination; subsection (3) deals with a child conceived or born during an invalid marriage; and, subsection (4) deals with a child born before a valid or invalid marriage, accompanied by other facts indicating the husband is the father.

Added by amendment in 2002, subsection (5), is a significant revision of UPA § 4(4) (1973), which created a presumption of paternity if a man "receives the child into his home and openly holds out the child as his natural child." Because there was no time frame specified in the 1973 act, the language fostered uncertainty about whether the presumption could arise if the receipt of the child into the man's home occurred for a short time or took place long after the child's birth. To more fully serve the goal of treating nonmarital and marital children equally, the "holding out" presumption is restored, subject to an express durational requirement that the man reside with the child for the first two years of the child's life. This mirrors the presumption applied to a married man established by § 607, infra. Once this presumption arises, it is subject to attack only under the limited circumstances set forth in § 607 for challenging a marital presumption, and is similarly subject to the estoppel principles of § 608.

One presumption found in UPA (1973) is not repeated in the new Act. Former UPA §4(5) created a presumption of paternity if the man "acknowledges his paternity of the child in a writing filed with [named agency] [and] the mother does not dispute the acknowledgment within a reasonable time." This presumption was eliminated because it conflicts with Article 3, Voluntary Acknowledgment of Paternity, under which a valid acknowledgment establishes paternity rather than a presumption of paternity.

Finally, subsection (b) is a complete rewrite of UPA (1973) § 4(b). The requirement that a presumption "may be rebutted only

by clear and convincing evidence" was eliminated from the Act. The same fate was accorded the statement that: "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." Nowadays the existence of modern genetic testing obviates this old approach to the problem of conflicting presumptions when a court is to determine paternity. Nowadays, genetic testing makes it possible in most cases to resolve competing claims to paternity. Moreover, courts may use the estoppel principles in § 608 in appropriate circumstances to deny requests for genetic testing in the interests of preserving a child's ties to the presumed or acknowledged father who openly held himself out as the child's father regardless of whether he is in fact the genetic father.

Maine Comment

Section 1844 is made gender neutral and preserves, for example, a child's ties to the presumed parent who for the first two years of the child's life openly held the child out as that person's own child regardless of whether that person is in fact a genetic parent.

SUBCHAPTER 3

VOLUNTARY ACKNOWLEDGMENT OF PATERNITY

Comment

Voluntary acknowledgment of paternity has long been an alternative to a contested paternity suit. Under UPA (1973) § 4, the inclusion of a man's name on the child's birth certificate created a presumption of paternity, which could be rebutted. In order to improve the collection of child support, especially from unwed fathers, the U.S. Congress mandated a fundamental change in the acknowledgment procedure. The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA, also known as the Welfare Reform Act) conditions receipt of federal child support enforcement funds on state enactment of laws that greatly strengthen the effect of a man's voluntary acknowledgment of paternity, 42 U.S.C. § 666(a)(5)(C). This statute is reproduced in Appendix: Federal IV-D Statute Relating to Parentage, infra. In brief, it provides that a valid, unrescinded, unchallenged acknowledgment of paternity is to be treated as equivalent to a judicial determination of paternity.

Because in many respects the federal act is nonspecific, the new UPA contains clear and comprehensive procedures to comply with the federal mandate. Primary among the factual circumstances that Congress did not take into account was that a married woman

may consent to an acknowledgement of paternity by a man who may indeed be her child's genetic father, but is not her husband. Under the new UPA, the mother's husband is the presumed father of the child, see § 204, supra. By ignoring the real possibility that the child will have both an acknowledged father and a presumed father, Congress left it to the states to sort out which of the men should be recognized as the legal father.

Further, PRWORA does not require that a man acknowledging paternity must assert genetic paternity of the child. Section 301 is designed to prevent circumvention of adoption laws by requiring a sworn assertion of genetic parentage of the child.

Sections 302-305 clarify that, if a child has a presumed father, that man must file a denial of paternity in conjunction with another man's acknowledgment of paternity in order for the acknowledgement to be valid. If the presumed father is unwilling to cooperate, or his whereabouts are unknown, a court proceeding is necessary to resolve the issue of parentage.

Congress also directed that the acknowledgment can be "rescinded" within a particular timeframe, and subsequently can be "challenged" without stating a timeframe. Those procedures are dealt with in §§ 307-309.

Finally, the related issue of issuance or revision of birth certificates is left to other state law.

§1851. Acknowledgment of paternity

The mother of a child and a man claiming to be the genetic father of the child may sign an acknowledgment of paternity with intent to establish the man's paternity.

Comment

(This is section 301 of the UPA.)

Source: 42 U.S.C. § 666(a)(5)(C), see preceding Comment and Appendix: Federal IV-D Statute Relating to Parentage, infra.

PRWORA does not explicitly require that a man acknowledging parentage necessarily is asserting his genetic parentage of the child. In order to prevent circumvention of adoption laws, § 301 corrects this omission by requiring a sworn assertion of genetic parentage of the child. A 2002 amendment provides that a man who signs an acknowledgment of paternity declares that he is the genetic father of the child. Thus both the man and the mother acknowledge his paternity, under penalty of perjury, without requiring the parents to spell out the details of their sexual

relations. Further, the amended language also takes into account a situation in which a man, who is unable to have sexual intercourse with his partner, may still have contributed to the conception of the child through the use of his own sperm. Henceforth, a man in that situation will be able to recognize legally his paternity through the voluntary acknowledgment procedure.

§1852. Execution of acknowledgment of paternity

1. Acknowledgement; requirements. An acknowledgment of paternity must:

A. Be in a record;

B. Be signed, or otherwise authenticated, under penalty of perjury by the mother and by the man seeking to establish his paternity;

C. State that the child whose paternity is being acknowledged:

(1) Does not have a presumed parent or has a presumed parent whose full name is stated; and

(2) Does not have another acknowledged father or adjudicated parent;

D. State whether there has been genetic testing and, if so, that the acknowledging man's claim of paternity is consistent with the results of the testing; and

E. State that the signatories understand that the acknowledgment is the equivalent of a judicial adjudication of paternity of the child and that a challenge to the acknowledgment is permitted only under limited circumstances and is barred after 2 years.

2. Acknowledgement void. An acknowledgment of paternity is void if it:

A. States that another person is a presumed parent, unless a denial of parentage signed or otherwise authenticated by the presumed parent is filed with the State Registrar of Vital Statistics;

B. States that another person is an acknowledged father or adjudicated parent; or

C. Falsely denies the existence of a presumed parent, acknowledged father or adjudicated parent of the child.

3. Presumed parent. A man who is a presumed parent may sign or otherwise authenticate an acknowledgment of paternity.

Comment

(This is section 302 of the UPA.)

Source: 42 U.S.C. § 666(a)(5)(C), see Appendix: Federal IV-D Statute Relating to Parentage, infra.

The federal statute cited above provides that receipt of the federal subsidy by a state for its child support enforcement program is contingent on state enactment of laws establishing specific procedures for voluntary acknowledgment of paternity. This deceptively simple principle proved difficult to implement.

Problems most notably include fact situations in which the mother of the child is married to someone other than the man who intends to acknowledge his paternity. With an acknowledgment the child would then have both an acknowledged father and a presumed father. To deal with this circumstance, many states have passed laws allowing the presumed father to sign a denial of paternity, which must be filed as part of the acknowledgment. This Act adopts this common sense solution; otherwise the acknowledgment would have no legal consequence because it cannot affect the legal rights of the presumed father.

At least two other provisions of this section warrant special emphasis. Subsection (a)(2) requires that the acknowledgment be "signed, or otherwise authenticated, under penalty of perjury," just as income tax returns and many other government documents require. Clearly, the potential punishment for false swearing is substantial, and the benefits from avoiding the complication of requiring witnesses and a notary are significant in this context. Mandating greater formality would greatly discourage the in-hospital signatures so earnestly desired in 42 U.S.C. § 666(a)(5)(C)(ii), see Appendix: Federal IV-D Statute Relating to Parentage, infra.

Similarly, in an attempt to ensure full disclosure and avoid false swearing, subsection (a)(4) requires that the results of genetic testing, if any, be reported along with confirmation that the acknowledgment is consistent with the results of that testing. This provision is also designed to avoid a possible subversion of the requirements for an adoption. A would-be "father" whose parentage of a child has been excluded by genetic

testing may not validly sign an acknowledgment once that fact has been established.

Maine Comment

Section 1852 is made gender neutral to cover all presumed parents, regardless of gender. Subsequent sections are revised accordingly.

§1853. Denial of parentage

A presumed parent may sign a denial of that person's parentage. The denial is valid only if:

1. Acknowledgement. An acknowledgment of paternity signed, or otherwise authenticated, by another man is filed pursuant to section 1855;

2. Under penalty of perjury. The denial is in a record and is signed, or otherwise authenticated, under penalty of perjury; and

3. Presumed parent. The presumed parent has not previously:

A. Acknowledged paternity, unless the previous acknowledgment has been rescinded pursuant to section 1857 or successfully challenged pursuant to section 1858; or

B. Been adjudicated to be the parent of the child.

§1854. Acknowledgment of paternity and denial of parentage

1. Acknowledgement and denial. An acknowledgment of paternity and a denial of parentage may be contained in a single document or may be signed in counterparts and may be filed separately or simultaneously. If the acknowledgement and denial are both necessary, neither is valid until both are filed.

2. Signed before birth. An acknowledgment of paternity or a denial of parentage may be signed before the birth of the child.

3. Effective date. Subject to subsection 1, an acknowledgment of paternity or denial of parentage takes effect on the birth of the child or the filing of the document with the State Registrar of Vital Statistics, whichever occurs later.

4. Signed by minor. An acknowledgment of paternity or denial of parentage signed by a minor is valid if it is otherwise in compliance with this chapter.

Comment

(This is section 304 of the UPA.)

Source: 42 U.S.C. § 666(a)(5)(C)(i), requiring a "simple civil process" for voluntary acknowledgment of paternity, see Appendix: Federal IV-D Statute Relating to Parentage, infra.

§1855. Effect of acknowledgment of paternity or denial of parentage

1. Acknowledgment. Except as otherwise provided in sections 1857 and 1858, a valid acknowledgment of paternity filed with the State Registrar of Vital Statistics is equivalent to an adjudication of parentage of a child and confers upon the acknowledged father all of the rights and duties of a parent.

2. Denial. Except as otherwise provided in sections 1857 and 1858, a valid denial of parentage by a presumed parent filed with the State Registrar of Vital Statistics in conjunction with a valid acknowledgment of paternity is equivalent to an adjudication of the nonparentage of the presumed parent and discharges the presumed parent from all rights and duties of a parent.

Comment

(This is section 305 of the UPA.)

Source: 42 U.S.C. § 666(a)(5)(D)(ii), requiring that an acknowledgment of paternity be "a legal finding of paternity," and 42 U.S.C. § 666(a)(5)(M), directing that acknowledgments be "filed with the State registry of birth records . . . "; see Appendix: Federal IV-D Statute Relating to Parentage, infra.

§1856. No filing fee

The State Registrar of Vital Statistics may not charge for filing an acknowledgment of paternity or denial of parentage.

§1857. Proceeding for rescission

A signatory may rescind an acknowledgment of paternity or denial of parentage by commencing a proceeding to rescind before the earlier of:

1. Sixty days after effective date. Sixty days after the effective date of the acknowledgment or denial, as provided in section 1854; and

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

Comment

(This is section 307 of the UPA.)

This section reflects a decision by NCCUSL to require a judicial adjudicatory process to rescind a voluntary acknowledgment of paternity. The federal statute, 42 U.S.C. § 666(a)(5)(c)(D)(ii), does not prescribe the method for the rescission, see Appendix: Federal IV-D Statute Relating to Parentage, infra.

§1858. Challenge after expiration of period for rescission

1. Challenge acknowledgment or denial. After the period for rescission under section 1857 has expired, a signatory of an acknowledgment of paternity or denial of parentage may commence a proceeding to challenge the acknowledgment or denial only:

A. On the basis of fraud, duress or material mistake of fact; and

B. Within 2 years after the acknowledgment or denial is filed with the State Registrar of Vital Statistics.

2. Burden of proof. A party challenging an acknowledgment of paternity or denial of parentage has the burden of proof.

Comment

(This is section 308 of the UPA.)

The federal statute also includes a provision for a "challenge" of an acknowledgment of paternity after the period for rescission of a voluntary acknowledgment of paternity has elapsed. Such a collateral attack is to be limited to a challenge based on alleged "fraud, duress, or material mistake of fact," and according to 42 U.S.C. § 666(a)(5)(c)(D)(iii), must be made "in court," see Appendix: Federal IV-D Statute Relating to Parentage, infra.

§1859. Procedure for rescission or challenge

1. Every signatory party. Every signatory to an acknowledgment of paternity and any related denial of parentage

must be made a party to a proceeding to rescind or challenge the acknowledgment or denial.

2. Submission to personal jurisdiction. For the purpose of rescission of, or challenge to, an acknowledgment of paternity or denial of parentage, a signatory submits to personal jurisdiction of this State by signing the acknowledgment or denial, effective upon the filing of the document with the State Registrar of Vital Statistics.

3. Suspension of legal responsibilities. Except for good cause shown, during the pendency of a proceeding to rescind or challenge an acknowledgment of paternity or denial of parentage, the court may not suspend the legal responsibilities of a signatory arising from the acknowledgment, including the duty to pay child support.

4. Proceeding to rescind or challenge. A proceeding to rescind or to challenge an acknowledgment of paternity or denial of parentage must be conducted in the same manner as a proceeding to adjudicate parentage under subchapter 6.

5. Amendment to birth record. At the conclusion of a proceeding to rescind or challenge an acknowledgment of paternity or denial of parentage, the court shall order the State Registrar of Vital Statistics to amend the birth record of the child, if appropriate.

Comment

(This is section 309 of the UPA.)

Although the federal statute does not prescribe the method for "rescission" of an acknowledgment of paternity, it does require a judicial proceeding for a subsequent "challenge." Overturning an acknowledgment of paternity through either of the prescribed methods has significant legal consequences. Thus, both methods should require a formal procedure because either one may result in the setting aside of an otherwise valid legal determination of the child's parentage. A procedure that allows a signatory of an acknowledgment of paternity merely to file a rescission with the state bureau of vital statistics would be an unwise policy choice. Many jurisdictions have come to the same conclusion.

§1860. Ratification barred

A court or administrative agency conducting a judicial or administrative proceeding is not required or permitted to ratify an unchallenged acknowledgment of paternity.

Comment

(This is section 310 of the UPA.)

Source: 42 U.S.C. § 666(a)(5)(E), see Appendix: Federal IV-D Statute Relating to Parentage, infra.

§1861. Full faith and credit

A court of this State shall give full faith and credit to an acknowledgment of paternity or denial of parentage effective in another state if the acknowledgment or denial has been signed and is otherwise in compliance with the law of the other state.

Comment

(This is section 311 of the UPA.)

Source: 42 U.S.C. § 666(a)(5)(C)(iv).

PRWORA requires states "to give full faith and credit to such an affidavit [of acknowledgment of paternity] signed in any other State according to its procedures." Id. And, § 666(a)(5)(D)(ii) provides that a "signed voluntary acknowledgment is considered a legal finding of paternity . . . ." In sum, federal law requires that an acknowledgment of paternity has the same status as a "judgment," 28 U.S.C. § 1738, a "child custody determination," 28 U.S.C. § 1738A, and a "child support order," 28 U.S.C. § 1738B. This section implements these mandates.

§1862. Forms for acknowledgment and denial of paternity

1. Form. To facilitate compliance with this subchapter, the State Registrar of Vital Statistics shall prescribe forms for the acknowledgment of paternity and the denial of parentage.

2. Later modification of form. A valid acknowledgment of paternity or denial of parentage is not affected by a later modification of the prescribed form.

Comment

(This is section 312 of the UPA.)

Source: 42 U.S.C. § 666(a)(5)C)(i),(iv), see Appendix: Federal IV-D Statute Relating to Parentage, infra.

The federal Office of Child Support Enforcement has issued an Action Transmittal to all IV-D agencies specifying how to

ensure that the forms comply with PRWORA, OCSE-AT-98-02, Required Data Elements for Paternity Acknowledgment Affidavits, http://www.acf.dhhs.gov/programs/cse/1998-at.htm

§1863. Release of information

The State Registrar of Vital Statistics may release information relating to the acknowledgment of paternity or denial of parentage to a signatory of the acknowledgment or denial and to courts and appropriate state or federal agencies of this State or another state.

§1864. Adoption of rules

The State Registrar of Vital Statistics may adopt rules to implement this subchapter. Rules adopted pursuant to this section are routine technical rules for the purposes of Title 5, chapter 375, subchapter 2-A.

Comment

(This is section 314 of the UPA.)

This section is bracketed to account for situations in which it may conflict with other rulemaking limitations in a particular state. States will implement voluntary acknowledgment of paternity 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.

SUBCHAPTER 4

REGISTRY OF PATERNITY

Comment

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 child born out-of-wedlock to register 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. As of May, 2000, at least 28 states had enacted legislation creating paternity registries.

Initially, in 1988 the Conference took a much different view, stating:

> [The Uniform Putative and Unknown Fathers Act] does not include a putative fathers registry requirement for, essentially, three reasons: (1) while "ignorance of the law is no excuse," most fathers or potential fathers--even very responsible ones--are not likely to know about the registry as a means of protecting their rights, and the objective is providing some actual protection, not relying on a cliche more relevant to the criminal law; (2) individual state registries do not protect responsible fathers in interstate situations; and (3) since the registries rely on unsupported claims, their accuracy is in doubt and their potential for an invasion of privacy and for interference with matters of adoption, custody, and visitation is substantial. It has also been pointed out that such a registry could provide a means for blackmailing the mother. The registry can, however, provide a simple (albeit "hard-nosed" and potentially unjust) solution when a father fails to register, as in Lehr v. Robertson.

The new UPA reverses that approach by accepting the importance and utility of a parentage registry to facilitate infant adoptions. Under circumstances in which the mother consents to the adoption of her infant child, time is of the essence in placing an infant with the adoptive parents. Therefore, resort to the constitutionally approved paternity registry system is appropriate. But, the Act 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, see § 405, infra. This recognizes the need to expedite infant adoptions, while properly protecting the rights of those nonmarital fathers who may not have registered, but instead have established some relationship with the child following birth. This gives the nonmarital father the opportunity to step forward to accept the responsibilities of parenthood, while not derailing infant adoptions. Requiring notification to the alleged father of a proceeding when the child has reached one year of age or more will not unduly delay the placement of an older child. Further, this Act excepts from the registration requirement a man who timely initiates a proceeding for paternity, notwithstanding his failure to register.

Article 1

General Provisions

§1871. Establishment of registry

The State Registrar of Vital Statistics shall establish a registry of paternity within the Office of Data Research and Vital Statistics.

§1872. Registration for notification

1. Registration required. Except as otherwise provided in subsection 2 or section 1875, a man who desires to be notified of a proceeding for adoption of, or termination of parental rights regarding, a child that he may have fathered must register in the registry of paternity before the birth of the child or within 30 days after the birth.

2. Exception to registration requirement. A man is not required to register if:

A. A parent-child relationship between the man and the child has been established under this chapter or other law; or

B. The man commences a proceeding to adjudicate his parentage before the court has terminated his parental rights.

3. Notification of change in information. A registrant shall promptly notify the registry in a record of any change in the information registered. The State Registrar of Vital Statistics shall incorporate all new information received into its records but need not affirmatively seek to obtain current information for incorporation in the registry.

Comment

(This is section 402 of the UPA.)

A registry of paternity protects a claim of paternity from summary termination, but the primary advantage of such a registry is to facilitate infant adoptions. By registering, a registrant ensures that he will receive notice of the possible adoption of a child that he may have fathered if the birth occurs in the state of registration. In this manner, a man may seek to protect his right to assert parentage.

Limiting the consequence of a failure to register with a registry of paternity only to termination of paternal rights in cases of infant adoption seems appropriate. If an adoption is not commenced in the first year of the child's life, the nonmarital father and the mother remain responsible for support and eligible for custody or visitation throughout the minority of the child in the absence of an adoption or termination after notice to the alleged father. The latter fact situation distinguishes it from an infant adoption in which both parents lose those rights and duties for the benefit of the child.

If a state chooses to enact subsection (b)(2), one of the major criticisms of Lehr v. Robertson, supra, will be eliminated. In Lehr, although the 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 biological father, where he could be located, and that he was seeking to establish his paternity 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 father from the requirement of registration if the man "commences a proceeding to adjudicate his paternity before the court has terminated his parental rights."

The act of registration submits the man to the personal jurisdiction of the tribunals of the state of registration, see UIFSA (1996) § 201(7).

Bracketed subsection (b)(2) may be omitted by those states that do not decide termination and adoption separately, but rather combine the termination of parental rights with the adoption. Under optional subsection (b) [enacted without the bracketed (2)], the alleged father may establish his father-child relationship before an adoption can be completed.

§1873. Notice of proceeding

Notice of a proceeding for the adoption of, or termination of parental rights regarding, a child must be given to a registrant who has timely registered. Notice must be given in a manner prescribed for service of process in a civil action.

Comment

(This is section 403 of the UPA.)

This section is the logical conclusion to the legal rationale for establishing a paternity registry. In an adoption of a child or termination of parental rights proceeding, the registry provides a clear procedure for resolving whether a nonmarital father intends to assert his rights with regard to the child. If he registers, termination of his rights and adoption of his child may not proceed without notice to him; this affords him the opportunity to assert his paternity and his claims for custody or visitation.

§1874. Termination of parental rights: child under one year of age

The parental rights of a man who may be the father of a child may be terminated without notice if:

1. Age of child. The child has not attained one year of age at the time of the termination of parental rights;

2. Timely registration. The man did not register timely with the State Registrar of Vital Statistics; and

3. Not exempt. The man is not exempt from registration under section 1872.

Comment

(This is section 404 of the UPA.)

This section is the obverse logical conclusion to the legal rationale for establishing a paternity registry. In an infant adoption or termination of the genetic father's parental rights, the registry provides a clear procedure for determining that a man does not intend to assert parental rights with regard to the infant. Although the registry protects a man's right to notice in a termination or adoption proceeding, his failure to register waives those rights. Thus, the registry is both a first step towards claiming parental rights and a means for terminating the rights of those men who do not register. If a man fails to register with the paternity registry, a termination and adoption may proceed without fear of a belated claim, most particularly a claim coming after adoptive parents have received custody of the infant. This expedited procedure greatly facilitates infant adoption, which in truth explains the existence--and popularity--of the registries with a majority of state legislatures.

§1875. Termination of parental rights: child at least one year of age

1. Age of child. If a child has attained one year of age, notice of a proceeding for adoption of, or termination of parental rights regarding, the child must be given to every alleged father of the child, whether or not he has registered with the State Registrar of Vital Statistics.

2. Manner of notice. Notice must be given in a manner prescribed for service of process in a civil action.

Comment

(This is section 405 of the UPA.)

Source: UPA (1973) § 25, and UPUFA (1988) § 3.

With the exception of infant adoptions (children under one year of age) as provided in the preceding section, this provision is solidly based on the Supreme Court's decision in Lehr v. Robertson, supra, while affirming the basic principle of Stanley v. Illinois, supra, and its progeny by requiring notice to the nonmarital father of an adoption of his child or a termination of parental rights proceeding against him. This protects those fathers who may have had some informal or de facto relationship with the child or mother for some time and prevents unilateral action to adversely affect that father's rights.

Article 2

Operation of Registry

§1881. Required form

The State Registrar of Vital Statistics shall prepare a form for registering with the agency. The form must require the signature of the registrant. The form must state that the form is signed under penalty of perjury. The form must also state that:

1. Notice. A timely registration entitles the registrant to notice of a proceeding for adoption of the child or termination of the registrant's parental rights;

2. Does not commence proceeding. A timely registration does not commence a proceeding to establish paternity;

3. Use of information. The information disclosed on the form may be used against the registrant to establish paternity;

4. Services available. Services to assist in establishing paternity are available to the registrant through the support enforcement agency;

5. Register in another state. The registrant should also register in another state if conception or birth of the child occurred in the other state;

6. Information from other states. Information on registries of other states is available from the State Registrar of Vital Statistics; and

7. Rescind registration. Procedures exist to rescind the registration of a claim of paternity.

§1882. Furnishing of information; confidentiality

1. Location and notification of mother. The State Registrar of Vital Statistics need not seek to locate the mother of a child who is the subject of a registration, but the State Registrar of Vital Statistics shall send a copy of the notice of registration to a mother if she has provided an address.

2. Information confidential; release. Information contained in the registry is confidential and may be released on request only to:

A. A court or a person designated by the court;

B. The mother of the child who is the subject of the registration;

C. An agency authorized by other law to receive the information;

D. A licensed child-placing agency;

E. A support enforcement agency;

F. A party or the party's attorney of record in a proceeding under this chapter or in a proceeding for adoption of, or for termination of parental rights regarding, a child who is the subject of the registration; and

G. The registry of paternity in another state.

§1883. Penalty for releasing information

An individual commits a Class E crime if the individual intentionally releases information from the registry to another individual or agency not authorized to receive the information under section 1882.

§1884. Rescission of registration

A registrant may rescind his registration at any time by sending to the registry a rescission in a record signed or otherwise authenticated by him and witnessed or notarized.

§1885. Untimely registration

If a man registers more than 30 days after the birth of the child, the State Registrar of Vital Statistics shall notify the registrant that on its face his registration was not filed timely.

§1886. Fees for registry

1. Filing registration or rescission. A fee may not be charged for filing a registration or a rescission of registration.

2. Search; certificate. Except as otherwise provided in subsection 3, the State Registrar of Vital Statistics may charge a reasonable fee for making a search of the registry and for furnishing a certificate.

3. No fee. A support enforcement agency is not required to pay a fee authorized by subsection 2.

Article 3

Search of Registries

§1891. Search of appropriate registry

1. Child under one year of age; certificate of search. If a parent-child relationship has not been established under this chapter for a child under one year of age, a petitioner for adoption of, or termination of parental rights regarding, the child must obtain a certificate of search of the registry of paternity.

2. Certificate of search from another state. If a petitioner for adoption of, or termination of parental rights regarding, a child has reason to believe that the conception or birth of the child may have occurred in another state, the petitioner must also obtain a certificate of search from the registry of paternity, if any, in that state.

§1892. Certificate of search of registry

1. Certificate of search. The State Registrar of Vital Statistics shall furnish to the requester a certificate of search of the registry on request of an individual, court or agency identified in section 1882.

2. Contents. A certificate provided by the State Registrar of Vital Statistics must be signed on behalf of the State Registrar of Vital Statistics and state that:

A. A search has been made of the registry; and

B. A registration containing the information required to identify the registrant:

(1) Has been found and is attached to the certificate of search; or

(2) Has not been found.

3. File with court. A petitioner must file the certificate of search with the court before a proceeding for adoption of, or termination of parental rights regarding, a child may be concluded.

§1893. Admissibility of registered information

A certificate of search of the registry of paternity in this State or another state is admissible in a proceeding for adoption of, or termination of parental rights regarding, a child and, if relevant, in other legal proceedings.

SUBCHAPTER 5

GENETIC TESTING

§1901. Scope of subchapter

This subchapter governs genetic testing of an individual to determine parentage, whether the individual:

1. Voluntary. Voluntarily submits to testing; or

2. Pursuant to order. Is tested pursuant to an order of the court or a support enforcement agency.

Comment

(This is section 501 of the UPA.)

This section is intended to avoid problems with regard to the admissibility of the results of voluntary genetic testing. Testing is often agreed upon to avoid the cost and delay engendered by requiring a proceeding to be filed before the results of genetic testing can be admitted as evidence. If the test excludes the man's paternity, an unnecessary step has been avoided.

§1902. Order for testing

1. Order to submit to genetic testing. Except as otherwise provided in this subchapter and subchapter 6, the court shall order the child and other designated individuals to submit to genetic testing if the request for testing is supported by the sworn statement of a party to the proceeding:

A. Alleging paternity and stating facts establishing a reasonable probability of the requisite sexual contact between the individuals; or

B. Denying parentage and stating facts establishing a possibility that sexual contact between the individuals, if any, did not result in the conception of the child.

2. No presumed parent, acknowledged father or adjudicated parent. A support enforcement agency may order genetic testing only if there is no presumed parent, acknowledged father or adjudicated parent.

3. In utero testing. If a request for genetic testing of a child is made before birth, the court or support enforcement agency may not order in utero testing.

4. Concurrent or sequential testing. If 2 or more men are subject to court-ordered genetic testing, the testing may be ordered concurrently or sequentially.

Comment

(This is section 502 of the UPA.)

Source: UPA (1973) § 11; 42 U.S.C. § 666(a)(5)(B)(i) requiring genetic testing in certain cases, see Appendix: Federal IV-D Statute Relating to Parentage, infra.

The progress that science has made in understanding molecular genetics since the promulgation of UPA (1973) is phenomenal. Subsection (a) speaks to testing of a "designated individual" other than of the "mother, and alleged or presumed father" to take into account the fact that testing for paternity may proceed without testing the mother. Further, testing may also proceed without testing the alleged father by testing close relatives of that man. Moreover, the right of the court to order testing is not absolute; §§ 607-609 place limitations on genetic testing if the child has a presumed, acknowledged, or adjudicated father.

Subsection (c) is intended to prevent the court from ordering the mother to undergo prenatal testing, such as through amniocentesis or other in utero collection method. These procedures pose a measurable risk to the life and health of both the fetus and the mother. If the mother volunteers for such testing, she may undergo prenatal sample collection for parentage determination.

Subsection (d) recognizes that multiple men may be participating in the establishment process. The laboratories prefer to evaluate all persons concurrently, as concurrent testing may prevent multiple sample collections from the child and in rare cases (such as evaluating two non-identical siblings) the laboratory can continue testing until one or both of the tested men are excluded. However, sequential testing is also acceptable.

§1903. Requirements for genetic testing

1. Type of genetic testing. Genetic testing must be of a type reasonably relied upon by experts in the field of genetic testing and performed in a testing laboratory accredited by:

A. The American Association of Blood Banks, or a successor to its functions;

B. A national society for histocompatibility and immunogenetics; or

C. An accrediting body designated by the federal Secretary of Health and Human Services.

2. Specimen. A specimen used in genetic testing may consist of one or more samples, 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.

3. Selection of databases; objections. Based on the ethnic or racial group of an individual, the testing laboratory shall determine the databases from which to select frequencies for use in calculation of the probability of paternity. If there is disagreement as to the testing laboratory's choice, the following provisions apply.

A. The individual objecting may require the testing laboratory, within 30 days after receipt of the report of the test, to recalculate the probability of paternity using an ethnic or racial group different from that used by the laboratory.

B. The individual objecting to the testing laboratory's initial choice shall:

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

(2) Engage another testing laboratory to perform the calculations.

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

4. Additional genetic testing. If, after recalculation using a different ethnic or racial group, genetic testing does not rebuttably identify a man as the father of a child under section 1905, an individual who has been tested may be required to submit to additional genetic testing.

Comment

(This is section 503 of the UPA.)

Source: 42 U.S.C. §§ 666(a)(5)(B)(i)(I)(II) and 666(a)(5)(F)(i)(I)(II), see Appendix: Federal IV-D Statute Relating to Parentage, infra.

As of December 2000, the Secretary of Health and Human Services had not officially designated any accreditation bodies as referenced in subsection (b)(3). But, Information Memorandum OCSE-IM-97-03, April 10, 1997, from the Deputy Director of the Office of Child Support Enforcement identifies the American Association of Blood Banks and American Society for Histocompatibility and Immunogenetics as meeting this requirement. The accreditation requirement assures that the testing will "be of a type reasonably relied upon by experts in the field of genetic testing."

Subsection (b) clarifies that a "specimen" suitable for genetic testing may be composed from one of a wide variety of constituent elements of "body tissue and fluids." This conforms the statutory language to biological terminology to assure common understanding between the scientific community and the legal profession. In states with statutes employing only the broad terms, bench and bar have evidenced confusion about the fact that blood, buccal cells, bone, hair, etc. are "body tissues."

Subsections (c) and (d) are designed to clarify the use of "race or ethnic group" in the paternity calculations. Generally, the individual tested provides the information regarding the ethnic or racial group to use in the calculations. These sections are designed to avoid last minute changes in the racial designation, a scientific version of "forum shopping", and to

easily correct any misunderstanding about which race should be used.

§1904. Report of genetic testing

1. Report; self-authenticating. 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 made under the requirements of this subchapter is self-authenticating.

2. Documentation. Documentation from the testing laboratory of the following information is sufficient to establish a reliable chain of custody that allows the results of genetic testing to be admissible without testimony:

A. The names and photographs of the individuals whose specimens have been taken;

B. The names of the individuals who collected the specimens;

C. The places and dates the specimens were collected;

D. The names of the individuals who received the specimens in the testing laboratory; and

E. The dates the specimens were received.

Comment

(This is section 504 of the UPA.)

Source: 42 U.S.C. § 666(a)(5)(F) requiring genetic testing in certain cases, see Appendix: Federal IV-D Statute Relating to Parentage, infra.

Subsection (b) is designed to indicate that in civil trials only a minimal showing of reliability of the chain of custody is needed. This avoids evidentiary problems, such as arguments modeled on criminal cases in which the chain of evidence is crucial. If an element of the chain is missing, such a defect may be corrected by affidavit or other testimony as to the reliability of the sample. For example, samples from a deceased individual may be obtained from a coroner's office and a picture of the individual need not be taken. In this case, proof of the chain of custody of the body maintained by the coroner may be provided.

§1905. Genetic testing results; rebuttal

1. Results identify as father. Under this chapter, a man is rebuttably identified as the father of a child if the genetic testing complies with this subchapter and the results disclose:

A. That the man has at least a 99% probability of paternity, using a prior probability of 0.50, as calculated by using the combined paternity index obtained in the testing; and

B. A combined paternity index of at least 100 to 1.

2. Rebuttal. A man identified under subsection 1 as the father of the child may rebut the genetic testing results only by other genetic testing satisfying the requirements of this subchapter that:

A. Excludes the man as a genetic father of the child; or

B. Identifies another man as the possible father of the child.

3. Further genetic testing. Except as otherwise provided in section 1910, if more than one man is identified by genetic testing as the possible father of the child, the court shall order them to submit to further genetic testing to identify the genetic father.

Comment

(This is section 505 of the UPA.)

Source: 42 U.S.C. § 666(a)(5)(G) requiring genetic testing in certain cases, see Appendix: Federal IV-D Statute Relating to Parentage, infra.

The selection of a probability of paternity of 99.0% and a combined paternity index of 100 to 1 as the rebuttably identified man as father of the child is consistent with the year 2000 standard of practice in the genetic-testing community. Accrediting agencies require the reporting of both of these numbers. As of December, 2000, 27 states have established a presumption at less than this level. However, for several years the standard of practice in the scientific community has been 99.0%. Therefore, raising the genetic presumption to the 99.0% level should have no impact on those states. This number represents a reasonable level of testing, given the breadth of the Act and potential difficulty of working with some specimens in a probate case. It is not intended as a standard of practice for the laboratories, but as a legal presumption to satisfy the legal standard of proof. Given the rapid progress of science, it

is likely that accrediting standards will rise over time. If the standard of practice becomes more strict, the newer standards will be made routine by the requirement that laboratories be accredited in order to perform testing under the Act. But, the legal significance of the genetic presumption stated in this section will be unaffected.

Genetic testing results will usually exceed the statutory minimum. During the drafting of the new UPA several statutory presumptions were considered, i.e., 95%, 99%, 99.9% and 99.99%. Genetic testing laboratory representatives presented quite persuasive arguments for a variety of choices. The Drafting Committee ultimately chose to settle on the 99% standard because:

(1) the 99% standard reflects the current standard of the American Association of Blood Banks (Standards for Parentage Testing Laboratories, 4th ed. 1999), and the proposed standards (5th ed. 2001);

(2) the standards promulgated by the various accrediting bodies (American Association of Blood Banks and the American Society for Histocompatibility and Immunogenetics) will, in reality, set the benchmark for genetic testing;

(3) the 99% standard is consistent with the standards of the plurality of American jurisdictions as of December, 2000;

(4) a standard higher than 99% could cause evidentiary problems in probate proceedings because of degraded specimens. Similarly, that problem may arise in cases involving one or more missing individuals, e.g., the mother is not available, but the child and alleged father are available;

(5) the percentage is an evidentiary presumption that the respondent may always challenge by requesting a second test under §507; and

(6) a proceeding to adjudicate paternity is a civil action based on a preponderance of the evidence, not a criminal action based on evidence beyond reasonable doubt.

§1906. Costs of genetic testing

1. Costs advanced. Subject to assessment of costs under subchapter 6, the cost of initial genetic testing must be advanced:

A. By a support enforcement agency in a proceeding in which the support enforcement agency is providing services;

B. By the individual who made the request;

C. As agreed by the parties; or

D. As ordered by the court.

2. Reimbursement. In cases in which the cost is advanced by the support enforcement agency, the agency may seek reimbursement from a man who is rebuttably identified as the father.

Comment

(This is section 506 of the UPA.)

Source: UPA (1973) § 11; 42 U.S.C. § 666(a)(5)(B)(ii)(I), see Appendix: Federal IV-D Statute Relating to Parentage, infra; Little v. Streater, 452 U.S. 1, (1981).

In general, the party seeking relief from a court must bear the cost of the initial genetic testing. The federal law mandates that the support enforcement agency pay the cost of testing, subject to recoupment. Subsection (a)(3) does present the possibility that a court might order a respondent to pay the initial cost.

§1907. Additional genetic testing

The court or the support enforcement agency shall order additional genetic testing upon the request of a party who contests the result of the original testing. If the previous genetic testing identified a man as the father of the child under section 1905, the court or agency may not order additional testing unless the party provides advance payment for the testing.

Comment

(This is section 507 of the UPA.)

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

Obviously the opportunity for additional testing should be provided if the original testing is contested in good faith, see Appendix: Federal IV-D Statute Relating to Parentage, infra. The requirement that the contestant provide advance payment if prior testing has identified a man as the father is intended to discourage spurious contests. This section provides the most important mechanism for determining the accuracy of a paternity test. While extremely rare, even after initial tests indicate a probability of paternity greater than 99.99% it is theoretically

possible that additional testing can result in exclusion of the tested man. Likewise, if there is an error in the chain of custody or testing procedures, exclusion is the expected outcome. The only way to reliably determine whether an error occurred is to obtain a second test.

§1908. Genetic testing when specimens not available

1. Specimen not available; submission of specimens. Subject to subsection 2, if a genetic-testing specimen is not available from a man who may be the father of a child, for good cause and under circumstances the court considers to be just, the court may order the following individuals to submit specimens for genetic testing:

A. The parents of the man;

B. Brothers and sisters of the man;

C. Other children of the man and their mothers; and

D. Other relatives of the man necessary to complete genetic testing.

2. Finding required. Issuance of an order under this section requires a finding that a need for genetic testing outweighs the legitimate interests of the individual sought to be tested.

Comment

(This is section 508 of the UPA.)

In some cases, the alleged father may be unavailable for testing. Subsection (a) accommodates those cases by providing for testing of the man's relatives to establish his paternity or nonpaternity of a child. Depending on the proceeding, some of the individuals listed for testing in subsection (a) will be parties to the paternity proceeding and others will not. If an individual does not volunteer to participate in the testing and is not a party, in the absence of this provision the court would be required to decide whether it has the authority to order the testing and whether testing the objecting individual is necessary. This provision resolves the issues. Given the fact that genetic testing in the modern age is not invasive--use of the buccal swab method means that the intrusion into the privacy of the individual is relatively slight compared to the right of the child to have parentage established. Moreover, the alleged parent also has a right to have that fact determined.

Note that no provision is explicitly made for court-ordered testing of maternal relatives because the establishment of paternity by genetic testing is in no way dependent on testing the mother of the child. However, if maternity is at issue, §106, Determination of Maternity, directs that this section be construed to test the relatives of the mother.

§1909. Deceased individual

For good cause shown, the court may order genetic testing of a deceased individual.

Comment

(This is section 509 of the UPA.)

In some states, the court with jurisdiction to adjudicate parentage may lack authority to order disinterment of a deceased individual. If so, that authority is provided by this section.

§1910. Identical brothers

1. Genetic testing of brother. The court may order genetic testing of a brother of a man identified as the father of a child if the man is commonly believed to have an identical brother and evidence suggests that the brother may be the genetic father of the child.

2. Nongenetic evidence. If each brother satisfies the requirements as the identified father of the child under section 1905 without consideration of another identical brother being identified as the father of the child, the court may rely on nongenetic evidence to adjudicate which brother is the father of the child.

Comment

(This is section 510 of the UPA.)

This section refers to "identical brothers" rather than "identical twins" to account for the possibility of identical triplets, etc. In some cases, non-identical brothers (and even other related men) will not be excluded after initial genetic testing. This section should not be used to resolve those cases because more sophisticated genetic testing can differentiate between non-identical siblings. If a case occurs in which, after initial testing, two men are not excluded, both men should be ordered to submit to additional testing as provided in § 505(c) to determine which is the father. In the extremely rare case in which a competent laboratory exhausts all of its in-house testing

and still cannot determine which non-identical sibling is excluded, the common practice is to provide the genetic material to another laboratory for more extensive testing to resolve the case.

Contrasting identical brothers with non-identical brothers, identical brothers can never be differentiated by additional genetic testing. This creates a completely different situation for the court. This section resolves the identical-brother conundrum as much as possible, and is designed to prevent the court from simply dismissing the case.

§1911. Confidentiality of genetic testing

1. Release of report. The report of genetic testing for parentage may not be released except as provided in this subchapter.

2. Intentional release of identifiable specimen. An individual who intentionally releases an identifiable specimen of another individual for any purpose other than that relevant to the proceeding regarding parentage without a court order or the written permission of the individual who furnished the specimen commits a Class E crime.

Comment

(This is section 511 of the UPA.)

This section seeks to protect the privacy rights of persons who are tested for a parentage determination. Although the Drafting Committee was not informed of an instance in which a paternity-testing laboratory had released samples or performed unauthorized testing, several states have proposed or passed laws regulating the "genetic privacy" of paternity tests. This section is intended to provide some guidance in this area. The term "identifiable specimen" is included, as there are beneficial uses of samples for anonymous research purposes. For example, the frequency tables used to make calculations are compiled from anonymous data and provide a more precise calculation for all persons involved in paternity testing. On occasion, a court may order the laboratory to release samples. For instance, a man who had been tested in one paternity proceeding and then dies may have his samples utilized in another paternity proceeding if a court orders testing in the second action. Courts have also ordered the release of samples when the tested man has allegedly engaged in criminal conduct. This has occurred when the alleged father has sent an imposter for sample collection. If the state pursues criminal charges, a court might order the laboratory to

release the samples to a state crime laboratory for further identification and possible criminal prosecution.

The Drafting Committee was informed that in one case, a grand jury brought indictments for multiple counts of a scheme to defraud, tampering with physical evidence and perjury against the alleged father and the imposter. The results of genetic testing for paternity purposes appear to have no medical or predictive value in any other context. Thus, regulation of the paternity-test results is left to the states. In some states, the records of paternity proceedings are open, thus allowing anyone to obtain the results. A more comprehensive treatment on this subject must necessarily be left to other laws.

The control of the records is left to other state law. In some states paternity records are open to the public, and a fundamental change in handling of the records is beyond the scope of this Act. The accreditation agencies provide guidance on this subject. For example, the American Association of Blood Banks requires that accredited laboratories maintain records for at least five years. Because a laboratory performing testing under this Act should be accredited, see § 503(a), supra, protection is thus provided to the tested person's records under the accreditation standards.

SUBCHAPTER 6

PROCEEDING TO ADJUDICATE PARENTAGE

Article 1

Nature of Proceeding

§1921. Proceeding authorized

A civil proceeding may be maintained to adjudicate the parentage of a child. The proceeding is governed by the Maine Rules of Civil Procedure.

Comment

(This is section 601 of the UPA.)

Source: UPA (1973) § 14.

A determination of paternity is governed by the ordinary rules of civil procedure. The party seeking to establish paternity is entitled to full discovery, to compel the testimony of all witnesses, and to have the case tried by a preponderance of the evidence. "The equipoise of the private interests that are

at stake in a paternity proceeding supports the conclusion that the standard of proof normally applied in private litigation is also appropriate for these cases." Rivera v. Minnich, 483 U.S. 574, 581 (1987).

A corresponding amendment to UPC § 2-114 was not made until the major revision of 1990 (as further revised in 1993). By that time, it had been recognized as illogical and unjust to impose discriminatory burdens on children born out-of-wedlock who were seeking paternal inheritance. It also had been ruled unconstitutional by application of the intermediate scrutiny test formulated under the 14th Amendment. Reed v. Campbell, 476 U.S. 852 (1986) Moreover, by 1990 the preponderance of the evidence standard had been widely applied to determinations of paternity and probate proceedings. Against this background, UPC (1993) abandoned the clear and convincing evidence standard for determining paternal relationships.

§1922. Standing to maintain proceeding

Subject to subchapter 3 and sections 1927 and 1929, a proceeding to adjudicate parentage may be maintained by:

1. Child. The child;

2. Mother. The mother of the child;

3. Person whose parentage to be adjudicated. A person whose parentage of the child is to be adjudicated;

4. Support enforcement agency. The support enforcement agency or other governmental agency authorized by other law;

5. Agency. An authorized adoption agency or licensed child-placing agency;

6. Representative of individual. A representative authorized by law to act for an individual who would otherwise be entitled to maintain a proceeding but who is deceased, incapacitated or a minor; or

7. Intended parent. An intended parent under subchapter 7 or 8.

Comment

(This is section 602 of the UPA.)

Source: UPA (1973) § 6.

This section grants standing to a broad range of individuals and agencies to bring a parentage proceeding. But, several limitations on standing to sue are contained within the Act. Article 3 details the procedures involved in a voluntary acknowledgment of parentage. Sections 607 and 609 establish the ground rules for proceedings involving children with, and without, a presumed father. Article 8 regulates parentage determinations arising from a gestational agreement.

Maine Comment

The Maine enactment broadens the range of individuals who have standing by deleting specific gender references and making the language gender neutral to ensure equal treatment for every child regardless of the circumstances of the parent or parents.

§1923. Parties to proceeding

The following individuals must be joined as parties in a proceeding to adjudicate parentage:

1. Mother. The mother of the child; and

2. Person whose parentage to be adjudicated. A person whose parentage of the child is to be adjudicated.

Comment

(This is section 603 of the UPA.)

Source: UPA (1973) § 9.

This section partially follows and partially rejects the UPA (1973) requirements regarding who must be named as parties in a parentage proceeding. First, contra to UPA (1973), the child is not a necessary party. Few states require children as necessary parties. Further, with the widespread use of DNA testing, such a requirement has outlived its usefulness. On the other hand, failure to join a child as a party may later result in a child's successful collateral attack on the original determination of paternity to be filed by the child. This subject is discussed more fully in the comment to § 637, infra.

Second, as far as can be ascertained, no state requires the children born to a woman during marriage to be named as parties in a divorce proceeding. Divorce decrees generally serve as res judicata in the event of a subsequent challenge to the decree's determination of parentage. Id.

Maine Comment

The Maine enactment broadens the range of individuals who must be named in a parentage proceeding by deleing specific gender references and making the language gender neutral consistent with other Maine amendments to the Uniform Act.

§1924. Personal jurisdiction

1. Personal jurisdiction. An individual may not be adjudicated to be a parent unless the court has personal jurisdiction over the individual.

2. Personal jurisdiction over nonresident. A court of this State having 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 section 2961 are fulfilled.

3. Adjudication. Lack of jurisdiction over one individual does not preclude the court from making an adjudication of parentage binding on another individual over whom the court has personal jurisdiction.

Comment

(This is section 604 of the UPA.)

Source: UPA (1973) § 6(b).

Although custody and visitation proceedings are considered to be status adjudications, and therefore do not require personal jurisdiction over both parents, subsection (a) confirms the long-standing view that paternity proceedings require personal jurisdiction.

Subsection (b) incorporates the long-arm provision for establishing personal jurisdiction over an absent respondent set forth in UIFSA (1996), which is in effect in every state.

Subsection (c) makes the best of a situation in which an adjudication will almost inevitably be incomplete because not all the necessary parties are subject to the personal jurisdiction of the court. The most likely scenario for this unfortunate circumstance is one in which the mother and alleged father of the child are subject to the court's jurisdiction, but the mother's absent husband is not. Even if the husband's whereabouts are known, if both the forum court and the court of his residence lack jurisdiction over all three parties, there still is no court with power to bind all of them to a parentage determination.

Subsection (c) takes the common sense approach that a court should not be dissuaded from making a parentage decision, even if it cannot bind all appropriate parties. In the scenario described above, binding the mother and alleged father to a decision of the man's parentage may not technically bind the husband (the presumed father), but more than likely it will end litigation on the subject.

§1925. Venue

Venue for a proceeding to adjudicate parentage is in the judicial division of this State in which:

1. Child. The child resides or is found;

2. Respondent. The respondent resides or is found if the child does not reside in this State; or

3. Estate proceeding. A proceeding for probate or administration of the presumed parent's or alleged father's estate has been commenced.

Comment

(This is section 605 of the UPA.)

Source: UPA (1973) § 8(c).

The venue provision provides choices proven to be reasonable and convenient since its inclusion in the 1973 Act.

§1926. No limitation: child having no presumed parent, acknowledged father or adjudicated parent

A proceeding to adjudicate the parentage of a child having no presumed parent, acknowledged father or adjudicated parent may be commenced at any time, even after:

1. Child. The child becomes an adult, but only if the child initiates the proceeding; or

2. Earlier proceeding dismissed. An earlier proceeding to adjudicate parentage has been dismissed based on the application of a statute of limitation then in effect.

Comment

(This is section 606 of the UPA.)

Source: UPA (1973) §§ 6, 7.

For a state to retain the federal child support enforcement subsidy, 42 U.S.C. § 666(a)(5)(A)(i) mandates that the states must have laws to "permit the establishment of the paternity of a child at any time before the child attains 18 years of age." States have chosen a wide range of age options: age 18 (20 states), age 19 (6 states), age 20 (2 states), age 21 (10 states), age 22 (2 states), age 23 (2 states), and no limitation (9 states). Several states limit the establishment of parental rights to a shorter period.

The new UPA directs that an individual whose parentage has not been determined has a civil right to determine his or her own parentage, which should not be subject to limitation except when an estate has been closed. Accordingly, if the action is initiated by the child this section allows a proceeding to adjudicate parentage after the child has reached the age of majority. Such a proceeding is the exclusive province of the child, however. This limitation prohibits the filing of an intrusive proceeding by an individual claiming to be a parent of an adult child, or by a legal stranger. There appear to be no reported problems encountered in states without a statute of limitations for such actions.

Maine Comment

The Maine enactment broadens the range of individuals against whom a child whose parentage has not been determined may initiate an action by making the language gender neutral to ensure equal treatment for every child regardless of the circumstances of the parent or parents.

§1927. Limitation: child having presumed parent

1. Two years after birth. Except as otherwise provided in subsection 2, a proceeding brought by a presumed parent, the mother or another individual to adjudicate the parentage of a child having a presumed parent must be commenced not later than 2 years after the birth of the child.

2. Anytime. A proceeding seeking to disprove the parent-child relationship between a child and the child's presumed parent may be maintained at any time if the court determines that:

A. The presumed parent and the mother of the child neither cohabited nor engaged in sexual intercourse with each other during the probable time of conception; and

B. The presumed parent never openly held out the child as that person's own.

Comment

(This is section 607 of the UPA.)

Source: UPA (1973) § 6; cf. UPC (1993) § 2-114(c).

This section deals with difficult issues. First, it establishes the right of a mother or a presumed marital or nonmarital father to challenge the presumption of his paternity established by § 204. Second, it clarifies the right of a third-party male to claim paternity of a child who has an existing presumed father.

UPA (1973) § 6(a) places a [five-year] limitation on the time in which a proceeding may be brought "for the purpose of declaring the non-existence of the father and child relationship presumed under [the Act]." At that time, the comment noted that: "Ten states have denied standing to a man claiming to be the father when the mother was married to another at the time of the child's birth. In some of these states, even though a presumed father may seek to rebut his presumed paternity, a third-party male will be denied standing to raise that same issue."

As of the year 2000, the right of an "outsider" to claim paternity of a child born to a married woman varies considerably among the states. Thirty-three states allow a man alleging himself to be the father of a child with a presumed father to rebut the marital presumption. Some states have granted this right through legislation, while in other states case law has recognized the alleged father's right to rebut the presumption and establish his paternity. In some states, there is both statutory and common law support for the standing of a man alleging himself to be the father to assert his paternity of a child born to a married woman. Not that long ago, some states imposed an absolute bar on a man commencing a proceeding to establish his paternity if state law provides a statutory presumption of the paternity of another man. See Michael H. v. Gerald D., 491 U.S. 110, (1989). It is increasingly clear that those days are coming to an end.

The new UPA attempts to establish a middle ground on these exceedingly complex issues. Subsection (a) establishes a two-year limitation for rebutting the presumption of paternity established under § 204 if the mother and presumed father were cohabiting at the time of conception. The presumption of paternity may be attacked by the mother, the presumed father, or a third-party male during this limited period; thereafter the presumption is

immune from attack by any of those individuals except as provided in subsection (b).

The reverse fact situation is also clear; a presumption of paternity may be challenged at any time if the mother and the presumed father were not cohabiting and did not engage in sexual intercourse at the probable time of conception and the presumed father never openly held out the child as his own.

Under the fact circumstances described in subsection (b), nonpaternity of the presumed father is generally assumed by all the parties as a practical matter. It is inappropriate for the law to assume a presumption known by all those concerned to be untrue.

Maine Comment

Consistent with the Maine enactment of section 1844 (§204 of the UPA), this enactment broadens the range of individuals who have the right to challenge the presumption of parentage or to claim parentage of a child who has an existing presumed parent by deleting specific gender references and making the language gender neutral to ensure equal treatment for every child regardless of the circumstances of the parent or parents.

§1928. Authority to deny motion for genetic testing

1. Denial of motion for genetic testing. In a proceeding to adjudicate the parentage of a child having a presumed parent or to challenge the paternity of a child having an acknowledged father, the court may deny a motion seeking an order for genetic testing of the mother, the child and the presumed parent or acknowledged father if the court determines that:

A. The conduct of the mother or the presumed parent or acknowledged father estops that party from denying parentage; and

B. It would be inequitable to disprove the parent-child relationship between the child and the presumed parent or acknowledged father.

2. Best interest of child; factors. In determining whether to deny a motion seeking an order for genetic testing under this section, the court shall consider the best interest of the child, including the following factors:

A. The length of time between the proceeding to adjudicate parentage and the time that the presumed parent or

acknowledged father was placed on notice that the parent might not be the genetic parent;

B. The length of time during which the presumed parent or acknowledged father has assumed the role of parent of the child;

C. The facts surrounding the presumed parent's or acknowledged father's discovery of that person's possible nonparentage;

D. The nature of the relationship between the child and the presumed parent or acknowledged father;

E. The age of the child;

F. The harm that may result to the child if presumed parentage or acknowledged paternity is successfully disproved;

G. The nature of the relationship between the child and any alleged parent;

H. The extent to which the passage of time reduces the chances of establishing the paternity of another man and a child-support obligation in favor of the child; and

I. Other factors that may affect the equities arising from the disruption of the parent-child relationship between the child and the presumed parent or acknowledged father or the chance of other harm to the child.

3. Guardian ad litem. In a proceeding involving the application of this section, the court may appoint a guardian ad litem to represent the best interests of a minor or incapacitated child.

4. Clear and convincing evidence. Denial of a motion seeking an order for genetic testing must be based on clear and convincing evidence.

5. Order adjudicating parent. If the court denies a motion seeking an order for genetic testing, it shall issue an order adjudicating the presumed parent or acknowledged father to be the parent of the child.

Comment

(This is section 608 of the UPA.)

This section incorporates the doctrine of paternity by estoppel, which extends equally to a child with a presumed father or an acknowledged father. In appropriate circumstances, the court may deny genetic testing and find the presumed or acknowledged father to be the father of the child. The most common situation in which estoppel should be applied arises when a man knows that a child is not, or may not be, his genetic child, but the man has affirmatively accepted his role as child's father and both the mother and the child have relied on that acceptance. Similarly, the man may have relied on the mother's acceptance of him as the child's father and the mother is then estopped to deny the man's presumed parentage.

Subsection (b) delineates the standards for denying genetic testing. Subsection (c) requires the child to be independently represented. Subsection (d) requires an elevated standard of proof before the order for genetic testing can be denied.

Because § 607 places a two-year limitation on challenging the presumption of parentage, the application of this section should be applied in those meritorious cases in which the best interest of the child compels the result and the conduct of the mother and presumed or acknowledged father is clear.

Maine Comment

The Maine version deletes the specific gender references to make this section gender neutral consistent with the presumed parentage provisions recognized in Sections 1841 and 1844. Thus, the court may deny genetic testing and find the presumed parent to be the parent of the child when a parent knows that a child is not, or may not be, that parent's genetic child, but the parent has affirmatively accepted the role as child's parent and both the mother and the child have relied on that acceptance.

§1929. Limitation: child having acknowledged father or adjudicated parent

1. Sixty days or 2 years. If a child has an acknowledged father, a signatory to the acknowledgment of paternity or denial of parentage may commence a proceeding seeking to rescind the acknowledgement or denial or challenge the parentage of the child only within the time allowed under section 1857 or 1858.

2. Two years. If a child has an acknowledged father or an adjudicated parent, an individual, other than the child, who is neither a signatory to the acknowledgment of paternity nor a party to the adjudication and who seeks an adjudication of parentage of the child must commence a proceeding not later than

2 years after the effective date of the acknowledgment or adjudication.

3. Estoppel. A proceeding under this section is subject to the application of the principles of estoppel established in section 1928.

Comment

(This is section 609 of the UPA.)

A two-year period is prescribed in § 307 for a challenge in which the acknowledged or adjudicated father mistakenly believed himself to be the genetic father. A similar limitation is prescribed in § 607(a) for an individual who was not a signatory or a party to the earlier determination.

The 2002 amendment adding subsection (c) authorizes the court to deny genetic testing in accordance with the principles enumerated in § 608 in a fact situation in which equity justifies a denial. For example, if there is an untimely challenge by a third party to the paternity of an acknowledged or adjudicated father long after an actual father-child relationship has been formed, the court has discretion to refuse to order genetic testing.

Maine Comment

To be consistent with Sections 1841 and 1844, this section has been amended to delete specific gender references and add gender-neutral language. This amendment makes applicable the time limitations to any adjudicated parent and authorizes a court to exercise its discretion when equity justifies a denial of genetic testing. For example, a court may exercise its discretion when there is an untimely challenge by a third party to the parentage of an adjudicated parent long after an actual parent-child relationship has been formed.

§1930. Joinder of proceedings

1. Joinder permitted. Except as otherwise provided in subsection 2, a proceeding to adjudicate parentage may be joined with a proceeding for adoption, termination of parental rights, child custody or visitation, child support, divorce, annulment, legal separation, probate or administration of an estate or other appropriate proceeding.

2. Joinder not permitted. A respondent may not join a proceeding described in subsection 1 with a proceeding to adjudicate parentage brought under chapter 67.

Comment

(This is section 610 of the UPA.)

Source: UPA (1973) § 8.

Joinder of paternity proceedings with related matters is common, especially when a child support agency seeks to establish paternity and fix child support.

Subsection (b) restricts counterclaims in those instances in which an initiating state sends a paternity suit 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 action for such matters, but there must be independent jurisdiction not arising from the petitioner's appearance in the paternity proceeding.

§1931. Proceeding before birth

A proceeding to determine parentage may be commenced before the birth of the child, but may not be concluded until after the birth of the child. The following actions may be taken before the birth of the child:

1. Service of process. Service of process;

2. Discovery. Discovery; and

3. Collection of specimens. Except as prohibited by section 1902, collection of specimens for genetic testing.

Comment

(This is section 611 of the UPA.)

This section recognizes that establishing a parental relationship as quickly as possible may be in the best interest of a child. To facilitate that process, some initial steps may be completed prior to the birth of the child.

§1932. Child as party; representation

1. Permissible but not necessary party. A minor child is a permissible party, but is not a necessary party to a proceeding under this subchapter.

2. Appointment. The court shall appoint an attorney to represent a minor or incapacitated child if the child is a party or the court finds that the interests of the child are not adequately represented.

Comment

(This is section 612 of the UPA.)

This section rejects UPA (1973) § 9. Consistent with § 603, supra, this Act rejects the view that the child necessarily has independent standing in a parentage proceeding. On the other hand, if the court determines that the child in fact does have a position at variance with all the other litigants, an attorney may be appointed to represent that interest.

Article 2

Special Rules for Proceeding to Adjudicate Parentage

§1941. Admissibility of results of genetic testing; expenses

1. Record admissible; objection. Except as otherwise provided in subsection 3, a record of a genetic-testing expert is admissible as evidence of the truth of the facts asserted in the report unless a party objects to its admission within 14 days after its receipt by the objecting party and cites specific grounds for exclusion. The admissibility of the report is not affected by whether the testing was performed:

A. Voluntarily or pursuant to an order of the court or a support enforcement agency; or

B. Before or after the commencement of the proceeding.

2. Testimony of experts. A party objecting to the results of genetic testing may call one or more genetic-testing experts to testify in person or by telephone, videoconference, deposition or another method approved by the court. Unless otherwise ordered by the court, the party offering the testimony bears the expense for the expert testifying.

3. Results inadmissible; exceptions. If a child has a presumed parent, acknowledged father or adjudicated parent, the results of genetic testing are inadmissible to adjudicate parentage unless performed:

A. With the consent of both the mother and the presumed parent, acknowledged father or adjudicated parent; or

B. Pursuant to an order of the court under section 1902.

4. Copies of bills as evidence. Copies of bills for genetic testing and for prenatal and postnatal health care for the mother and child that are furnished to the adverse party not less than 10 days before the date of a hearing are admissible to establish:

A. The amount of the charges billed; and

B. That the charges were reasonable, necessary and customary.

Comment

(This is section 621 of the UPA.)

Source: 42 U.S.C. § 666(a)(5)(F)(ii), see Appendix: Federal IV-D Statute Relating to Parentage, infra; UPA (1973) §§ 10, 13.

Justification for additional testing is provided by subsection (a). If the objecting party can state with specificity the grounds for rejecting a genetic test, and those grounds cannot be clarified under Article 5, retesting should be ordered. For example, if the chain of custody is seriously flawed, or the testing laboratory is not accredited, errors of this sort may be corrected by collecting new specimens and repeating the testing. Unlike the samples collected in a potential criminal proceeding which cannot be replaced, such as a blood alcohol test, the samples in a paternity proceedings remain the same no matter when, or how often, the samples are collected. Any flaw in the original test can be corrected by collection of new samples and additional testing of the individuals.

Maine Comment

This section has been made gender neutral.

§1942. Consequences of declining genetic testing

1. Contempt. An order for genetic testing is enforceable by contempt.

2. Adjudication contrary to position. If an individual whose paternity is being determined declines to submit to genetic testing ordered by the court, the court for that reason may adjudicate parentage contrary to the position of that individual.

3. Testing of mother; unavailable or declines. Genetic testing of the mother of a child is not a condition precedent to testing the child and a man whose paternity is being determined. If the mother is unavailable or declines to submit to genetic testing, the court may order the testing of the child and every man whose paternity is being adjudicated.

Comment

(This is section 622 of the UPA.)

Source: UPA (1973) § 10.

§1943. Admission of parentage authorized

1. Admission of parentage. A respondent in a proceeding to adjudicate parentage may admit to the parentage of a child by filing a pleading to that effect or by admitting parentage under penalty of perjury when making an appearance or during a hearing.

2. Order adjudicating parentage. If the court finds that the admission of parentage satisfies the requirements of this section and finds that there is no reason to question the admission, the court shall issue an order adjudicating the child to be the child of the person admitting parentage.

Comment

(This is section 623 of the UPA.)

Source: 42 U.S.C. § 666(a)(5)(D)(i)(II), see Appendix: Federal IV-D Statute Relating to Parentage, infra.

Maine Comment

This section is gender neutral consistent with other Maine amendments to the UPA.

§1944. Temporary order

1. Temporary order for support. In a proceeding under this subchapter, the court shall issue a temporary order for support of a child if the order is appropriate and the individual ordered to pay support is:

A. A presumed parent of the child;

B. Petitioning to have parentage adjudicated;

C. Identified as the father through genetic testing under section 1905;

D. An alleged father who has declined to submit to genetic testing;

E. Shown by clear and convincing evidence to be the parent of the child; or

F. The mother of the child.

2. Custody and visitation. A temporary order may include provisions for custody and visitation as provided by other law of this State.

Comment

(This is section 624 of the UPA.)

Source: UIFSA (1996) § 401; 42 U.S.C. § 666(a)(5)(J), see Appendix: Federal IV-D Statute Relating to Parentage, infra.

Maine Comment

The Maine version broadens the range of individuals against whom a child order may be entered by making the language gender neutral consistent with prior Maine amendments to the UPA.

Article 3

Hearings and Adjudication

§1951. Adjudication of parentage

The court shall apply the following provisions to adjudicate the parentage of a child.

1. Parentage disproved. The parentage of a child having a presumed parent, acknowledged father or adjudicated parent may be disproved only by admissible results of genetic testing excluding that man as the father of the child or identifying another man as the father of the child.

2. Identified father adjudicated as father. Unless the results of genetic testing are admitted to rebut other results of genetic testing, a man identified as the father of a child under section 1905 must be adjudicated the father of the child.

3. Genetic testing not conclusive. If the court finds that genetic testing under section 1905 neither identifies nor

excludes a man as the father of a child, the court may not dismiss the proceeding. In that event, the results of genetic testing, and other evidence, are admissible to adjudicate the issue of parentage.

4. Excluded man adjudicated as not father. Unless the results of genetic testing are admitted to rebut other results of genetic testing, a man excluded as the father of a child by genetic testing must be adjudicated not to be the parent of the child.

Comment

(This is section 631 of the UPA.)

Source: UPA (1973) § 14.

This section establishes the controlling supremacy of admissible genetic test results in the adjudication of paternity. Other matters such as statute of limitations, equitable estoppel and res judicata may preclude the matter from reaching trial or the court denying genetic testing. However, if test results are admissible, those results control unless other test results create a conflict rebutting the admitted results.

Paragraph (3) is included to ensure that the fact a genetic test does not reach the 99% level decreed in § 505 will not be perceived as an indicator of an exclusion of paternity. Although test results that do not reach that level do not create a presumption of paternity, the testing should be evaluated as an indicator of paternity along with the other evidence of paternity presented in the proceeding. Presumably expert testimony will be required to provide information about the measure of the weight of a test that does not achieve "at least a 99 percent probability of paternity, using a prior probability of 0.50, as calculated by using the combined paternity index obtained in the testing, and a combined paternity index of at least 100 to 1."

The inclusion of the first clause in paragraph (4) indicates that although a genetic testing exclusion of paternity can be absolute, errors (and sometimes fraud) may occur in testing. Some courts have imposed a rule that a party must first show the test is in error before ordering another test. This imposes an impossible burden because the only accurate method to show that a test is in error is to repeat the testing. Without this clause, some litigants might argue that once an exclusion is obtained it is absolute and no other test can be ordered, even when the first test is shown to be wrong.

Maine Comment

The Maine version is gender neutral consistent with other Maine amendments to the UPA that recognize the adjudication of parentage.

§1952. Jury prohibited

The court, without a jury, shall adjudicate parentage of a child.

Comment

(This is section 632 of the UPA.)

Source: 42 U.S.C. § 666(a)(5)(I), requiring state law to provide that "parties to an action to establish paternity are not entitled to trial by jury . . . ." See Appendix: Federal IV-D Statute Relating to Parentage, infra.

UPA (1973) § 14[(d)] prohibited jury trials in parentage proceedings on the basis that "The use of a jury is not desirable in the emotional atmosphere of cases of this nature." Congress agreed when it enacted an effectively identical prohibition in PRWORA (1996).

Maine Comment

This section is gender neutral consistent with other Maine amendments to the UPA.

§1953. Hearings; inspection of records

1. Close proceeding. On request of a party and for good cause shown, the court may close a proceeding under this subchapter.

2. Public records; consent or order. A final order in a proceeding under this subchapter is available for public inspection. Other papers and records are available only with the consent of the parties or on order of the court for good cause.

Comment

(This is section 633 of the UPA.)

Source: UPA (1973) § 20.

UPA (1973) § 20 was concerned with the privacy of the parties in a paternity proceeding and required closure of the proceedings. The high caseload and the desensitizing of such

proceedings, however, lead to the conclusion that mandating closure of the proceedings is no longer appropriate.

§1954. Order on default

The court shall issue an order adjudicating the parentage of a person who:

1. In default. After service of process, is in default; and

2. Found to be parent. Is found by the court to be the parent of a child.

Comment

(This is section 634 of the UPA.)

Source: 42 U.S.C. § 666(a)(5)(H), see Appendix: Federal IV-D Statute Relating to Parentage, infra.

Maine Comment

This section is gender neutral consistent with other Maine amendments to the UPA.

§1955. Dismissal for want of prosecution

The court may issue an order dismissing a proceeding commenced under this chapter 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

(This is section 635 of the UPA.)

A major principle of the new UPA--and its predecessor--is that the child's right to have a determination of paternity is fundamental. This new section confirms this right by declaring that the delinquency of another person in prosecuting such a proceeding, e.g., the mother or a support enforcement agency, may not permanently preclude the ultimate resolution of a parentage determination.

§1956. Order adjudicating parentage

1. Order. The court shall issue an order adjudicating whether a person alleged or claiming to be the parent is the parent of the child.

2. Identify child. An order adjudicating parentage must identify the child by name and date of birth.

3. Fees, costs and expenses. Except as otherwise provided in subsection 4, 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 subchapter. The court may award attorney's fees, which may be paid directly to the attorney, who may enforce the order in the attorney's own name.

4. No assessment against agency. The court may not assess fees, costs or expenses against the support enforcement agency of this State or another state, except as provided by other law.

5. Change of name. On request of a party and for good cause shown, the court may order that the name of the child be changed.

6. Amended birth registration. If the order of the court is at variance with the child's birth certificate, the court shall order the State Registrar of Vital Statistics to issue an amended birth registration.

Comment

(This is section 636 of the UPA.)

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

This Act differs from UPA (1973), which attempted to do more than merely establish parentage. For example, UPA (1973) § 15 provided for a wide range of court orders to be made relating to the child's support, custody, guardianship, visitation privileges, as well as to the payment by the father of the mother's expenses of pregnancy and confinement. This Act leaves such matters to other state law. Only in instances where other state law is likely to be inadequate does this Act specify special treatment for litigants, For example, subsections (c) and (d) may be required because ordinary civil litigation probably does not provide for the court to apportion the costs of litigation among the parties.

Maine Comment

This section is gender neutral consistent with other Maine amendments to the UPA.

§1957. Binding effect of determination of parentage

1. Determination binding; signatories, parties. Except as otherwise provided in subsection 2, a determination of parentage is binding on:

A. All signatories to an acknowledgement of paternity or denial of parentage as provided in subchapter 3; and

B. All parties to an adjudication by a court acting under circumstances that satisfy the jurisdictional requirements of section 2961.

2. Determination binding; child. A child is not bound by a determination of parentage under this chapter unless:

A. The determination was based on an unrescinded acknowledgment of paternity and the acknowledgement is consistent with the results of genetic testing;

B. The adjudication of parentage was based on a finding consistent with the results of genetic testing and the consistency is declared in the determination or is otherwise shown; or

C. The child was a party or was represented in the proceeding determining parentage by an attorney.

3. Adjudication in proceeding to dissolve marriage. In a proceeding to dissolve a marriage, the court is deemed to have made an adjudication of the parentage of a child if the court acts under circumstances that satisfy the jurisdictional requirements of section 2961 and the final order:

A. Expressly identifies a child as a "child of the marriage" or "issue of the marriage" or by similar words indicates that the husband is the father of the child; or

B. Provides for support of the child by the husband unless paternity is specifically disclaimed in the order.

4. Determination a defense. Except as otherwise provided in subsection 2, 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.

5. Challenge to adjudication. A party to an adjudication of parentage may challenge the adjudication only under law of this State relating to appeal, vacation of judgments or other judicial review.

Comment

(This is section 637 of the UPA.)

A considerable amount of litigation involves exactly who is bound and who is not bound by a final order determining parentage. This section codifies rules regarding the effect of such orders. Subsection (a) provides that, if the order is issued under standards of personal jurisdiction of the UIFSA (1996), the order is binding on all parties to the proceeding. This solves the problem of an order issued without the appropriate jurisdiction, as would be the case of a divorce based on status jurisdiction in which the court lacked the requisite personal jurisdiction over a nonresident party.

Subsection (b) partially resolves the question of whether a child is bound by the terms of the order. UPA (1973) required that the child be made a party to a parentage proceeding, and be bound. However, the 1973 Act did not address whether a divorce decree had a legal impact on paternity. A majority of jurisdictions hold that the child is not bound by the divorce decree because the child was not a party to the proceeding. A minority of states hold that the child is bound by the order and that the child is in privity with the parents. In its present formulation, this subsection adopts the majority rule, which does not bind the child during minority unless the parentage order is based on genetic testing or the child was represented by an attorney ad litem (each state supplies its own terminology).

Subsection (c) resolves whether a divorce decree constitutes a finding of paternity. This subsection provides that a decree is a determination of paternity if the decree states that the child was born of the marriage or grants the husband visitation or custody, or orders support. This is the majority rule in American jurisprudence.

Subsection (d) gives protection to third parties who may claim benefit of an earlier determination of parentage.

Finally, the section is silent on whether state IV-D agencies are bound by prior determinations of parentage. This controversial issue is left to other state law. Similarly, issues of collateral attack on final judgments are to be resolved by recourse to other state law, as in civil proceedings generally.

Maine Comment

This section is gender neutral consistent with other Maine amendments to the UPA.

SUBCHAPTER 7

CHILD OF ASSISTED REPRODUCTION

Comment

During the last thirty years, medical science has developed a wide array of assisted reproductive technology, often referred to as ART, which have enabled childless individuals and couples to become parents. Thousands of children are born in the United States each year as the result of ART. If a married couple uses their own eggs and sperm to conceive a child born to the wife, the parentage of the child is straightforward. The wife is the mother--by gestation and genetics, the husband is the father--by genetics and presumption. And, insofar as the Uniform Parentage Act is concerned, neither parent fits the definition of a "donor."

Current state laws and practices are not so straightforward, however. If a woman gives birth to a child conceived using sperm from a man other than her husband, she is the mother and her husband, if any, is the presumed father. However, the man who provided the sperm might assert his biological paternity, or the husband might seek to rebut the martial presumption of paternity by proving through genetic testing that he is not the genetic father. As was the case in UPA (1973), it is necessary for the new Act to clarify definitively the parentage of a child born under these circumstances.

Similarly, assisted reproduction may involve the eggs from a woman other than the mother--perhaps using the intended father's sperm, perhaps not. In either event, the new Act makes a policy decision to clearly exclude the egg donor from claiming maternity. Theoretically, it is even possible that absent appropriate legislation the mother could attempt to deny maternity based on her lack of genetic relationship.

Finally, many couples employ a common ART procedure that combines sperm and eggs to form a pre-zygote that is then frozen for future use. If the couple later divorces, or one of them dies, absent legislation there are no clear rules for determining the parentage of a child resulting from a pre-zygote implanted after divorce or after the death of the would-be father. Disposition of such pre-zygotes, or even issues of their "ownership," create not only broad publicity, but also are problems on which courts need guidance.

§1961. Scope of subchapter

This subchapter 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 subchapter 8.

Comment

(This is section 701 of the UPA.)

Article 7 applies only to children born as the result of assisted reproduction technologies; a child conceived by sexual intercourse is not covered by this article, irrespective of the alleged intent of the parties. The bracketed clause relates to gestational agreements under Article 8. If a state enacts Article 8, the brackets should be removed. If a state does not enact Article 8, the bracketed subsection should be omitted.

Maine Comment

The brackets have been deleted because Maine adopts a revised version of Article 8.

§1962. Parental status of donor

A donor is not a parent of a child conceived by means of assisted reproduction.

Comment

(This is section 702 of the UPA.)

Source: UPA (1973) § 5(b); USCACA (1988) § 4(a).

If a child is conceived as the result of assisted reproduction, this section clarifies that a donor (whether of sperm or egg) is not a parent of the resulting child. The donor can neither sue to establish parental rights, nor be sued and required to support the resulting child. In sum, donors are eliminated from the parental equation.

The new UPA does not deal with many of the complex and serious legal problems raised by the practice of assisted reproduction. Issues such as ownership and disposition of embryos, regulation of the medical procedures, insurance coverage, etc., are left to other statutes or to the common law. Only the issue of parentage falls within the purview of this Act. This was also the case in UPA (1973), which wholly deferred speaking on the subject except to ensure the husband's paternal responsibility when he gave his consent to what was then called "artificial insemination" of his wife (now known in the scientific community as "intrauterine insemination"). The

commentary to UPA (1973) stated: "It was thought useful, however, to single out and cover . . . at least one fact situation that occurs frequently."

The new UPA goes well beyond that narrow view; it governs the parentage issues in all cases in which the birth mother is also the woman who intends to parent the child. It also ensures that if the mother is a married woman, her husband will be the father of the child if he gives his consent to assisted reproduction by his wife, regardless of which aspect of ART is utilized. UPA (1973) § 5(b) specified that a male donor would not be considered the father of a child born of artificial insemination if the sperm was provided to a licensed physician for use in artificial insemination of a married woman other than the donor's wife. The new Act does not continue the requirement that the donor provide the sperm to a licensed physician. Further, this section of the new UPA does not limit a donor's statutory exemption from becoming a legal parent of a child resulting from ART to a situation in which the donor provides sperm for assisted reproduction by a married woman. This requirement is not realistic in light of present ART practices and the constitutional protections of the procreative rights of unmarried as well as married women. Consequently, this section shields all donors, whether of sperm or eggs, (§ 102 (8), supra), from parenthood in all situations in which either a married woman or a single woman conceives a child through ART with the intent to be the child's parent, either by herself or with a man, as provided in sections 703 and 704.

If a married woman bears a child of assisted reproduction using a donor's sperm, the donor will not be the father in any event. Her husband will be the father unless and until the husband's lack of consent to the assisted reproduction is proven within two years of his learning of the birth, see § 705, infra. This provides certainty of nonparentage for prospective donors.

The comment to now-withdrawn USCACA § 4(a) states that "nonparenthood is also provided for those donors who provide sperm for assisted reproduction by unmarried women." Under those circumstances--called a "relatively rare situation" in the 1988 comment--"the child would have no legally recognized father." This result is retained in the new UPA, although the frequency of unmarried women using assisted reproduction appears to have grown significantly since 1988.

Maine Comment

This section shields all donors, whether of sperm or eggs, from parenthood in all situations in which either a married woman or a single woman conceives a child through ART with the intent

to be the child's parent, either by herself or with another person, as provided in sections 1983 and 1984.

Maine has no statutes and only one appellate case regarding donors, whether of sperm or eggs; yet, cases are being litigated in Maine's trial courts with little or no guidance. In Guardianship of I.H., 2003 ME 130, the court held that the probate court may waive notice to an anonymous sperm donor. In so ruling, the court cited Section 702 of the UPA 2000 in its analysis of the issue.

§1963. Parentage of child of assisted reproduction

A person who provides an egg or sperm for, or consents to, assisted reproduction by a woman as provided in section 1964 with the intent to be the parent of her child is a parent of the resulting child.

Comment

(This is section 703 of the UPA.)

Source: UPA (1973) § 5; USCACA (1988) §§ 1, 3.

The father-child relationship is created between a man and the resulting child if the man provides sperm for, or consents to, assisted reproduction by a woman with the intent to be the parent of her child, see § 704, infra. This provision reflects the concern for the best interests of nonmarital as well as marital children of assisted reproduction demonstrated throughout the Act. Given the dramatic increase in the use of ART in the United States during the past decade, it is crucial to clarify the parentage of all of the children born as a result of modern science.

Maine Comment

The intent of the UPA is to clarify the parentage of all of the children born of modern science and without regard to the marital status of the parents. Therefore, the Maine version establishes that the parent-child relationship is created between a person and the resulting child if the person provides sperm or egg or consents to assisted reproduction by a woman with the intent to be the parent of her child. This provision reflects the concern for the best interest of all children of assisted reproduction. Given the dramatic increase in the use of ART in Maine during the past decade, it is crucial to clarify the parentage of every child born as a result of modern science and to provide every child in Maine with the opportunity to have as parents, without regard to gender, both the birth parent and the

parent who either contributed sperm or an egg or consented to assisted reproduction with the intent to be the parent of the child.

Further, the UPA must operate in a gender-neutral manner, that is, it must apply equally to women and men. The statutory means available to establish paternity must also be available, where appropriate, to establish the existence of a mother and child relationship. The UPA mandates in section 106 that the provisions of the UPA relating to determination of paternity apply equally to determinations of maternity. Thus a woman is a legal parent of a child gestated by another woman where she has provided an egg or consented to assisted reproduction with the intention of parenting the resulting child. Section 1983 serves to protect the welfare and best interest of every child born of assisted reproductive technology by ensuring that a child will have the opportunity to have as parents both the person who gives birth to the child and the person who either donated the egg or sperm or the person who consented to the assisted reproduction with the intent to be the parent of the child.

§1964. Consent to assisted reproduction

1. Consent. Consent by a woman and a person 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 person who intends to be a parent. This requirement does not apply to a donor.

2. Lack of consent; paternity. Failure of a person to sign a consent required by subsection 1, before or after birth of the child, does not preclude a finding of parentage if the woman and the person, 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.

Comment

(This is section 704 of the UPA.)

Source: UPA (1973) § 5; UPC (1993) § 2-114(c).

Subsection (a) requires that a man, whether married or unmarried, who intends to be a parent of a child must consent in a record to all forms of assisted reproduction covered by this article. The amendment clarifies that the requirement of consent does not apply to a male or a female donor.

Subsection (b) provides that even if a husband, or an unmarried man who intends to be a parent of the child, did not

consent to assisted reproduction, he may nonetheless be found to be the father of a child born through that means if he and the mother openly hold out the child as their own. This principle is taken from the Uniform Probate Code § 2C114(c) (1993), which provides that neither "natural parent" nor kindred may inherit from or through a child "unless that natural parent has openly treated the child as his [or hers], and has not refused to support the child." The "holding out" requirement substitutes evidence of the parties' conduct after the child is born for the requirement of formal consent in a record to prospective assisted reproduction. The "non-support" phrase in § 2C114(c) was not carried forward in subsection (b) (and the term "natural parent" has been replaced by more accurate terminology).

Maine Comment

Subsection 1 is gender neutral and requires that a person, whether married or unmarried and regardless of gender, who intends to be a parent of a child must consent in a record to all forms of assisted reproduction covered by this subchapter. Subsection 2 provides for a finding not limited to paternity, but expanded to afford to a woman the same rights afforded to a man.

§1965. Limitation on husband's dispute of paternity

1. Challenge by husband. Except as otherwise provided in subsection 2, 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:

A. Within 2 years after learning of the birth of the child he commences a proceeding to adjudicate his paternity; and

B. The court finds that he did not consent to the assisted reproduction before or after birth of the child.

2. Proceeding to adjudicate parentage. A proceeding to adjudicate parentage may be maintained at any time if the court determines that:

A. The husband did not provide sperm for, or before or after the birth of the child consent to, assisted reproduction by his wife;

B. The husband and the mother of the child have not cohabited since the probable time of assisted reproduction; and

C. The husband never openly held out the child as his own.

3. Limitation period. The limitation provided in this section applies to a marriage declared invalid after assisted reproduction.

Comment

(This is section 705 of the UPA.)

Source: USCACA (1988) § 3; UPC (1993) § 2-114(c).

Subsection (a) provides for a challenge to a husband's presumed paternity if the conception of the child was through assisted reproduction not consented to by the husband before or after the birth of the child. If a proceeding to establish nonpaternity is timely filed and the husband's lack of consent is demonstrated, the child will be without a legally-recognized father because the sperm donor is not the father under § 702, supra. Because the filing of such a nonpaternity proceeding is permitted within two years of the husband's learning of the child's birth, the period of uncertainty concerning the identity of the child's father will be longer than two years in a situation in which an absent husband is not immediately made aware of the child's birth.

Subsection (b) provides an exception to the two-year time limit if the husband's sperm was not used, the couple has not cohabited since the probable time of the use of assisted reproduction, and the husband has never openly held out the child as his own.

§1966. Effect of dissolution of marriage or withdrawal of consent

1. Prior to placement. 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.

2. Withdrawal of consent. The consent of a woman or a man to assisted reproduction may be withdrawn by that individual in a record and by delivery of a written notice of withdrawal of consent to the woman who intends to give birth to the child born of assisted reproduction 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.

Comment

(This is section 706 of the UPA.)

This section is entirely new to the Parentage Act, but its logic is derived from the policy stated in § 707, infra. Subsection (a) applies only to married couples and posits that if there is to be no liability for a child conceived by assisted reproduction after death, then there should be no liability for a child conceived or implanted after divorce. If a former wife proceeds with assisted reproduction after a divorce, the former husband is not the legal parent of the resulting child unless he had previously consented in a record to post-divorce assisted reproduction. If such were the case, subsection (b) provides a mechanism for him to withdraw that consent, i.e., by so stating in a record (presumably to be filed with the laboratory in which the sperm or embryos are stored).

An amendment in 2002 extends a similar right to an unmarried man. Although there is no automatic cancellation of consent via divorce in the unmarried context, the man may withdraw his consent to ART before the woman conceives or is implanted, and thereby avoid being determined to be the legal parent of the resulting child.

In either fact scenario, a child born through assisted reproduction accomplished after consent has been voided by divorce or withdrawn in a record will have a legal mother under § 201(a)(1). However, the child will have a genetic father, but not a legal father. In this instance, intention, rather than biology, is the controlling factor. The section is intended to encourage careful drafting of assisted reproduction agreements. The attorney and the parties themselves should discuss the issue and clarify their intent before a problem arises.

This Act does not attempt to resolve issues as to control of frozen embryos following dissolution of marital or nonmarital relationships. As indicated in the prefatory note, those matters are left to other state laws.

Maine Comment

Maine's revision provides a mechanism to ensure that the woman bearing a child of assisted reproduction has actual written notice of withdrawal of consent to assisted reproduction before placement of the sperm or embryo.

§1967. 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.

Comment

(This is section 707 of the UPA.)

Source: USCACA (1988) § 4

Absent consent in a record, the death of an individual whose genetic material is subsequently used either in conceiving an embryo or in implanting an already existing embryo into a womb ends the potential legal parenthood of the deceased. This section is designed primarily to avoid the problems of intestate succession which could arise if the posthumous use of a person's genetic material leads to the deceased being determined to be a parent. Of course, an individual who wants to explicitly provide for such children in his or her will may do so.

Maine Comment

This section has replaced "individual" for "spouse" to correct a clerical drafting mistake. The intent of the UPA is to treat a child of unmarried parents equally with a child of married parents.

SUBCHAPTER 8

GESTATIONAL AGREEMENT

Comment

The longstanding shortage of adoptable children in this country has led many would-be parents to enlist a gestational mother (previously referred to as a "surrogate mother") to bear a child for them. As contrasted with the assisted reproduction regulated by Article 7, which involves the would-be parent or parents and most commonly one and sometimes two anonymous donors, the gestational agreement (previously known as a surrogacy agreement) provided in this article is designed to involve at least three parties; the intended mother and father and the woman who agrees to bear a child for them through the use of assisted reproduction (the gestational mother). Additional people may be involved. For example, if the proposed gestational mother is married, her husband, if any, must be included in the agreement to dispense with his presumptive paternity of a child born to his wife. Further, an egg donor or a sperm donor, or both, may be involved, although neither will be joined as a party to the agreement. Thus, by definition, a child born pursuant to a

gestational agreement will need to have maternity as well as paternity clarified.

The subject of gestational agreements was last addressed by the National Conference of Commissioners on Uniform State Laws in 1988 with the adoption of the Uniform Status of Children of Assisted Conception Act (USCACA). Because some Commissioners believed that such agreements should be prohibited, while others believed that such agreements should be allowed, but regulated, USCACA offered two alternatives on the subject; either to regulate such activities through a judicial review process or to void such contracts. As might have been predicted, the only two states to enact USCACA selected opposite options; Virginia chose to regulate such agreements, while North Dakota opted to void them.

In the years since the promulgation of USCACA (and virtual de facto rejection of that Act), approximately one-half of the states developed statutory or case law on the issue. Of those, about one-half recognized such agreements, and the other half rejected them. A survey in December, 2000, revealed a wide variety of approaches: eleven states allow gestational agreements by statute or case law; six states void such agreements by statute; eight states do not ban agreements per se, but statutorily ban compensation to the gestational mother, which as a practical matter limits the likelihood of agreement to close relatives; and two states judicially refuse to recognize such agreements. In states rejecting gestational agreements, the legal status of children born pursuant to such an agreement is uncertain. If gestational agreements are voided or criminalized, individuals determined to become parents through this method will seek a friendlier legal forum. This raises a host of legal issues. For example, a couple may return to their home state with a child born as the consequence of a gestational agreement recognized in another state. This presents a full faith and credit question if their home state has a statute declaring gestational agreements to be void or criminal.

Despite the legal uncertainties, thousands of children are born each year pursuant to gestational agreements. One thing is clear; a child born under these circumstances is entitled to have its status clarified. Therefore, NCCUSL once again ventured into this controversial subject, withdrawing USCACA and substituting bracketed Article 8 of the new UPA. The article incorporates many of the USCACA provisions allowing validation and enforcement of gestational agreements, along with some important modifications. The article is bracketed because of a concern that state legislatures may decide that they are still not ready to address gestational agreements, or that they want to treat them differently from what Article 8 provides. States may omit this

article without undermining the other provisions of the UPA (2002).

Article 8's replacement of the USCACA terminology, "surrogate mother," by "gestational mother" is important. First, labeling a woman who bears a child a "surrogate" does not comport with the dictionary definition of the term under any construction, to wit: "a person appointed to act in the place of another" or "something serving as a substitute." The term is especially misleading when "surrogate" refers to a woman who supplies both "egg and womb," that is, a woman who is a genetic as well as gestational mother. That combination is now typically avoided by the majority of ART practitioners in order to decrease the possibility that a genetic\gestational mother will be unwilling to relinquish her child to unrelated intended parents. Further, the term "surrogate" has acquired a negative connotation in American society, which confuses rather than enlightens the discussion.

In contrast, term "gestational mother" is both more accurate and more inclusive. It applies to both a woman who, through assisted reproduction, performs the gestational function without being genetically related to a child, and a woman is both the gestational and genetic mother. The key is that an agreement has been made that the child is to be raised by the intended parents. The latter practice has elicited disfavor in the ART community, which has concluded that the gestational mother's genetic link to the child too often creates additional emotional and psychological problems in enforcing a gestational agreement.

The new UPA treats entering into a gestational agreement as a significant legal act that should be approved by a court, just as an adoption is judicially approved. The procedure established generally follows that of USCACA, but departs from its terms in several important ways. First, nonvalidated gestational agreements are unenforceable (not void), thereby providing a strong incentive for the participants to seek judicial scrutiny. Second, there is no longer a requirement that at least one of the intended parents would be genetically related to the child born of the gestational agreement. Third, individuals who enter into nonvalidated gestational agreements and later refuse to adopt the resulting child may be liable for support of the child.

Although legal recognition of gestational agreements remains controversial, the plain fact is that medical technologies have raced ahead of the law without heed to the views of the general public--or legislators. Courts have recently come to acknowledge this reality when forced to render decisions regarding collaborative reproduction, noting that artificial insemination, gestational carriers, cloning and gene splicing are part of the

present, as well as of the future. One court predicted that even if all forms of assisted reproduction were outlawed in a particular state, its courts would still be called upon to decide on the identity of the lawful parents of a child resulting from those procedures undertaken in less restrictive states. This court noted:

Again we must call on the Legislature to sort out the parental rights and responsibilities of those involved in artificial reproduction. No matter what one thinks of artificial insemination, traditional and gestational surrogacy (in all of its permutations) and--as now appears in the not-too-distant future, cloning and even gene splicing--courts are still going to be faced with the problem of determining lawful parentage. A child cannot be ignored. Even if all the means of artificial reproduction were outlawed with draconian criminal penalties visited on the doctors and parties involved, courts would still be called upon to decide who the lawful parents are and who--other than the taxpayers--is obligated to provide maintenance and support for the child. These cases will not go away. Again we must call on the Legislature to sort out the parental rights and responsibilities of those involved in artificial reproduction. Courts can continue to make decisions on an ad hoc basis without necessarily imposing some grand scheme. Or, the Legislature can act to impose a broader order which, even though it might not be perfect on a case-by-case basis, would bring some predictability to those who seek to make use of artificial reproductive techniques.

Buzzanca v. Buzzanca, 72 Cal. Rptr. 2d 280 (Cal. Ct. App. 1998).

§1971. Gestational agreement authorized

1. Written agreement. The intended parents and prospective gestational mother, her husband if she is married, a donor or the donors may enter into a written agreement that provides:

A. The prospective gestational mother is at least 21 years of age and agrees to pregnancy by means of assisted reproduction;

B. 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

C. The intended parent or parents become the parents of the child.

2. Intended parents. The intended parent or parents must be parties to the gestational agreement.

3. Enforceable if validated. A gestational agreement is enforceable only if validated as provided in section 1973.

4. Child conceived by sexual intercourse. A gestational agreement does not apply to the birth of a child conceived by means of sexual intercourse.

5. Consideration. A gestational agreement may provide for payment of consideration.

6. Decision of gestational mother. 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.

Comment

(This is section 801 of the UPA.)

Source: USCACA §§ 1(3), 5, 9.

The previous uniform act on this subject, USCACA, proposed two alternatives, one of which was to declare that gestational agreements were void. Subsection (a) rejects that approach. The scientific state of the art and the medical facilities providing the technological capacity to utilize a woman other than the woman who intends to raise the child to be the gestational mother, guarantee that such agreements will continue to be written. Subsection (a) recognizes that certainty and initiates a procedure for its regulation by a judicial officer. This section permits all of the individuals directly involved in the procedure to enter into a written agreement; this includes the intended parents, the gestational mother, and her husband, if she is married. In addition, if known donors are involved, they also must sign the agreement. The agreement must provide that the intended parents will be the parents of any child born pursuant to the agreement while all of the others (gestational mother, her husband, if any, and the donors, as appropriate) relinquish all parental rights and duties.

Under subsection (b), a valid gestational agreement requires that the man and woman who are the intended parents, whether married or unmarried, to be parties to the gestational agreement. This reflects the Act's comprehensive concern for the best interest of nonmarital as well as marital children born as the result of a gestational agreement. Throughout UPA the goal is to treat marital and nonmarital children equally.

Subsection (c) provides that in order to be enforceable, the agreement must be validated by the appropriate court under § 803.

Subsection (e) is intended to shield gestational agreements that include payment of the gestational mother from challenge under "baby-selling" statutes that prohibit payment of money to the birth mother for her consent to an adoption.

Subsection (f) is intended to acknowledge that the gestational mother, as a pregnant woman, has a constitutionally-recognized right to decide issues regarding her prenatal care. In other words, the intended parents have no right to demand that the gestational mother undergo any particular medical regimen at their behest.

Maine Comment

Subsection 1, paragraph A requires that a gestational mother be at least twenty-one years of age to ensure that she has sufficient maturity to fully comprehend the consequences of what she is about to undertake.

Subsections 1 and 2 are made gender neutral and establish that the intended parent or parents, regardless of their gender, must be parties to the gestational agreement.

§1972. Requirements of petition

1. Proceeding to validate agreement. The intended parent or parents and the prospective gestational mother may commence a proceeding in the District Court to validate a gestational agreement.

2. Requirements. A proceeding to validate a gestational agreement may not be maintained unless:

A. The mother or the intended parent or parents have been residents of this State for at least 90 days;

B. The prospective gestational mother's husband, if she is married, is joined in the proceeding; and

C. A copy of the gestational agreement is attached to the petition.

Comment

(This is section 802 of the UPA.)

Source: USCACA § 6(a).

Sections 802 and 803, the core sections of this article, provide for state involvement, through judicial oversight, of the

gestational agreement before, during, and after the assisted reproduction process. The purpose of early involvement is to ensure that the parties are appropriate for a gestational agreement, that they understand the consequences of what they are about to do, and that the best interests of a child born of the gestational agreement are considered before the arrangement is validated. The trigger for state involvement is a petition brought by all the parties to the arrangement requesting a judicial order authorizing the assisted reproduction contemplated by their agreement. The agreement itself must be submitted to the court.

To discourage forum shopping, subsection (b)(1) requires that the petition may be filed only in a state in which the intended parents or the gestational mother have been residents for at least ninety days.

Maine Comment

Exclusive jurisdiction over gestational agreements is given to the District Courts.

§1973. Hearing to validate gestational agreement

1. Order. If the requirements of subsection 2 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 agreement.

2. Requirements. The court may issue an order under subsection 1 only on finding that:

A. The residence requirements of section 1972 have been satisfied and the parties have submitted to the jurisdiction of the court under the jurisdictional standards of this chapter;

B. All parties have voluntarily entered into the agreement and understand its terms;

C. 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

D. The consideration, if any, paid to the prospective gestational mother is stated.

Comment

(This is section 803 of the UPA.)

Source: USCACA § 6(b).

This pre-conception authorization process for a gestational agreement is roughly analogous to prevailing adoption procedures in place in most states. Just as adoption contemplates the transfer of parentage of a child from the birth parents to the adoptive parents, a gestational agreement involves the transfer from the gestational mother to the intended parents. The Act is designed to protect the interests of the child to be born under the gestational agreement as well as the interests of the gestational mother and the intended parents.

In contrast to USCACA (1988) § 1(3), there is no requirement that at least one of the intended parents be genetically related to the child born of a gestational agreement. Similarly, the likelihood that the gestational mother will also be the genetic mother is not directly addressed in the new Act, while USCACA (1988) apparently assumed that such a fact pattern would be typical. Experience with the intractable problems caused by such a combination has dissuaded the majority of fertility laboratories from following that practice. See In re Matter of Baby M., 537 A.2d 1227 (N.J. 1988).

This section seeks to protect the interests of the child in several ways. The major protection of the child is the authorization procedure itself. The Act requires closely supervised gestational arrangements to ensure the security and well being of the child. Once a petition has been filed, subsection (a) permits--but does not require--the court to validate a gestational agreement. If it validates, the court must declare that the intended parents will be the parents of any child born pursuant to, and during the term of, the agreement.

Subsection (b) requires the court to make five separate findings before validating the agreement. Subsection (b)(1) requires the court to ensure that the 90-day residency requirement of § 802 has been satisfied and that it has jurisdiction over the parties;

Under subsection(b)(2), the court will be informed of the results of a home study of the intended parents who must satisfy the suitability standards required of prospective adoptive parents.

The interests of all the parties are protected by subsection (b)(3), which is designed to protect the individuals involved from the possibility of overreaching or fraud. The court must

find that all parties consented to the gestational agreement with full knowledge of what they agreed to do, which necessarily includes relinquishing the resulting child to the intended parents who are obligated to accept the child.

The requirement of assurance of health-care expenses until birth of the resulting child imposed by subsection (b)(4) further protects the gestational mother.

Finally, subsection (b)(5) mandates that the court find that compensation of the gestational mother, if any, is reasonable in amount.

Section 803, spells out detailed requirements for the petition and the findings that must be made before an authorizing order can be issued, but nowhere states the consequences of violations of the rules. Because of the variety of types of violations that could possibly occur, a bright-line rule concerning the effect of such violations is inappropriate. The consequences of a failure to abide by the rules of this section are left to a case-by-case determination. A court should be guided by the Act's intention to permit gestational agreements and the equities of a particular situation. Note that § 806 provides a period for termination of the agreement and vacating of the order. The discovery of a failure to abide by the rules of § 803 would certainly provide an occasion for terminating the agreement. On the other hand, if a failure to abide by the rules of § 803 is discovered by a party during a time when § 806 termination is permissible, failure to seek termination might be an appropriate reason to estop the party from later seeking to overturn or ignore the § 803 order.

Maine Comment

Maine's revision has eliminated the requirement of a home study to minimize complexity, expense and delay. Surrogacy is different from adoption. In adoption, a genetic mother places her child into the adoptive process after the child is born. In surrogacy, the intended parent or parents may be the genetic parent or parents, but whether they are or not, a child is procreated because a medical procedure was initiated and consented to by the intended parent or parents. The parent or parents who planned to create and raise a child, taking extensive and complex steps to do so, are the legal parents of the child whether or not there is a genetic tie. The child would not have been born but for the efforts of the intended parent or parents. Since the issues involved in surrogacy are so different from those involved in adoption, it does not make sense to superimpose the home study required by adoptions onto the surrogacy situation.

The word "stated" has replaced "reasonable" to eliminate the discretion that would be invoked if courts were charged with reviewing the reasonableness of the consideration. It is in the best interest of the child that all consideration be stated, or set forth, in the agreement, so that the parties are not involved in lengthy litigation over the amount of the consideration.

§1974. Inspection of records

The proceedings, records and identities of the individual parties to a gestational agreement under this subchapter are subject to inspection under the standards of confidentiality applicable to adoptions as provided under other law of this State.

Comment

(This is section 804 of the UPA.)

The procedures involved in this article are exceptionally personal, thereby warranting protection from invasions of privacy. Adoption records provide a suitable model for these records.

§1975. Exclusive, continuing jurisdiction

Subject to the jurisdictional standards of chapter 58, subchapter 2, the court conducting a proceeding under this subchapter 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.

Comment

(This is section 805 of the UPA.)

Source: USCACA § 6(e).

This section is designed to minimize the possibility of parallel litigation in different states and the consequent risk of childnapping for strategic purposes. The court that validated the gestational agreement will have authority to enforce the gestational agreement until the child is 180 days old. Note that only the parentage issues and enforcement issues are covered; collateral matters, such as custody, visitation, and child support are not covered by this Act.

Maine Comment

The brackets were removed and the Maine citation of the Uniform Child Custody Jurisdiction and Enforcement Act was added.

§1976. Termination of gestational agreement

1. Termination of agreement; parties. After issuance of an order under this subchapter, but before the prospective gestational mother becomes pregnant by means of assisted reproduction, the prospective gestational mother or her husband or either of the intended parents may terminate the gestational agreement by giving written notice of termination to all other parties.

2. Termination of agreement. The court for good cause shown may terminate the gestational agreement.

3. Notice of termination. 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 subchapter. An individual who does not notify the court of the termination of the agreement is subject to appropriate sanctions.

4. No liability. Neither a prospective gestational mother nor her husband, if any, is liable to the intended parent or parents for terminating a gestational agreement pursuant to this section.

Comment

(This is section 806 of the UPA.)

Source: USCACA § 7.

Subsection (a) permits a party to terminate a gestational agreement after the authorization order by canceling the arrangement before the pregnancy has been established. This provides for cancellation during a time when the interests of the parties would not be unduly prejudiced by termination. By definition, the procreation process has not begun. The intended parents certainly have an expectation interest during this time, but the nature of this interest is little different from that which they would have while they were attempting to create a pregnancy through traditional means. In contrast to the next subsection, termination of the agreement does not require "good cause."

Subsection (b) gives the court the right to cancel the agreement for cause, which is left undefined.

Under subsection (c) a party who wishes to terminate the agreement must inform the other parties in writing, and must also file notice with the court. The court must then vacate the order validating the agreement. An individual who does not notify the court of his/her termination of the agreement is subject to sanction.

USCACA § 7(b) specifically dealt with termination of a "surrogacy agreement" by a gestational mother who provided the egg for the assisted conception. This possibility is not repeated in the new UPA because there is only a remote likelihood that an agreement for the gestational mother to furnish the egg will be countenanced. Assisted reproduction, as generally conducted by medical facilities today, disapproves of that practice.

Subsection (d) provides that before pregnancy a gestational mother is not liable to the intended parents for terminating the agreement. Although the new Act does not explicitly provide for termination of the agreement after pregnancy. Several sections deal with this issue under certain described circumstances. Section 801(f) recognizes that the gestational mother has plenary power to decide issues of her health and the health of the fetus. Sections 803(a) and 807(a) direct that the intended parents are in fact the parents of the child with an enforceable right to the possession of the child.

§1977. Parentage under validated gestational agreement

1. Notice of birth; order. Upon birth of a child to a gestational mother, the intended parent or 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:

A. Confirming that the intended parent or parents are the parents of the child;

B. If necessary, ordering that the child be surrendered to the intended parent or parents; and

C. Directing the State Registrar of Vital Statistics to issue a birth certificate naming the intended parent or parents as parent or parents of the child.

2. Genetic testing. 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.

3. Failure to file notice; order. If the intended parent or parents fail to file notice required under subsection 1, 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 1973 validating the gestational agreement, the court shall order that the intended parent or parents are the parent or parents of the child and are financially responsible for the child.

Comment

(This is section 807 of the UPA.)

Source: USCACA § 8.

Under subsection (a), the intended parents of a child born pursuant to an approved gestational agreement within 300 days of the use of assisted reproduction are deemed to be the legal parents if the order under § 803 is still in effect. Notice of the birth of the child must be filed by the intended parents. On receipt of the notice, the court shall issue an order confirming that the intended parents are the legal parents of the child and direct the issuance of a birth certificate to confirm the court's determination. If necessary, the court may also order the gestational mother to surrender the child to the intended parents.

Subsection (c) clarifies the remedies available if the intended parents refuse to accept a child who is born as the result of a gestational agreement.

§1978. Gestational agreement: effect of subsequent marriage

After the issuance of an order under this subchapter, 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 parent of the resulting child.

Comment

(This is section 808 of the UPA.)

Source: USCACA § 9.

If, after the original court order validates the gestational agreement, the gestational mother marries, the gestational agreement continues to be valid and the consent of her new husband is not required. The new husband is neither a party to the original action nor the presumed father of a resulting child,

and therefore ought not be burdened with the status of parent unless he is the genetic father or chooses to adopt the child.

§1979. Effect of nonvalidated gestational agreement

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

2. Parent-child relationship. If a birth results under a gestational agreement that is not judicially validated as provided in this subchapter, the parent-child relationship is determined as provided in subchapter 2.

3. Liability for support. 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 1956.

Comment

(This is section 809 of the UPA.)

Source: USCACA §§ 5(b),10.

This section distinguishes between an unenforceable agreement and a prohibited one. Given the widespread use of assisted reproductive technologies in modern society, the Act attempts only to regularize the parentage aspects of the science, not to regulate the practice of assisted reproduction. If individuals choose to ignore the protections afforded gestational agreements by the Act, parentage questions will remain when a child is born as a result of an nonvalidated gestational agreement. The Act provides no legal assistance to the intended parents. The gestational mother is denominated the mother irrespective of the source of the eggs, and donors of either eggs or sperm are not parents of the child. Notwithstanding the fact that the intended parents in a nonvalidated agreement may not enforce that agreement, subsection (c) provides that a court may hold the intended parents to an obligation to support the resulting child of the unenforceable agreement.

Under USCACA (1988), agreements that were not approved were declared "void." Under the new UPA, a nonapproved agreement is "unenforceable." The result may be virtually the same in some instances. As under the prior Act, the gestational mother is the mother of a child conceived through assisted reproduction if the gestational agreement has not been judicially approved as

provided in this article. Her husband, if he is a party to such agreement, is presumed to be the father. If the gestational mother's husband is not a party to the agreement, or if she is unmarried, paternity of the child will be left to existing law, if any. If the mother decides to keep the child, the intended parents have no recourse. If the parties agree that the intended parents will raise the child, adoption is the only means through which they may become the legal parents of the child will be through adoption.

SUBCHAPTER 9

MISCELLANEOUS PROVISIONS

§1981. Uniformity of application and construction

In applying and construing this chapter, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

§1982. Effective date

This chapter takes effect September 1, 2004.

SUMMARY

This bill enacts the Uniform Parentage Act with changes recommended by the Family Law Advisory Commission. Uniform comments and Maine comments are included.