

# MAINE STATE LEGISLATURE

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## MAINE FAMILY LAW ADVISORY COMMISSION

Report to the Maine Legislature,  
Joint Standing Committee on the Judiciary

January 1, 2004

### Introduction

The Maine Family Law Advisory Commission (FLAC) hereby reports to the Maine Legislature, Joint Standing Committee on the Judiciary, on L.D. 865, 2003, chapter 25, "Resolve Directing the Family Law Advisory Commission To Study and Report on Legal Issues Surrounding Surrogate Parenting and Gestational Agreements." Resolve 2003, chapter 25 specifically directs FLAC to study issues concerning the Uniform Parentage Act (UPA) and to submit a report with any applicable implementing legislation to the Second Regular Session of the 121<sup>st</sup> Legislature no later than January 1, 2004.

FLAC recommends the passage of the UPA together with amendments to the UPA that FLAC proposes.<sup>1</sup> FLAC files with this report the UPA and has designated the amendments by crossing out the portions of the UPA to be deleted and underlining the additions to the UPA.

The UPA, if adopted, will bring many changes and important guidance to Maine law. The UPA, as amended, will provide equal treatment of all children regardless of their parent or parents' marital status, greater certainty and stability to children, statutory guidance in determining parentage, and more predictable results for these determinations.

Determinations of parentage have become more complicated with the development of improved DNA testing and new reproductive technologies. The development of accurate DNA testing makes possible the highly accurate determination of paternity or non-paternity, even long after parent-child relationships may have been established. Maine courts and families struggle with what to do when a perceived father

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<sup>1</sup> FLAC had the invaluable assistance of two law clerks, Danny Coyne and Lori Londis, in the research and preparation of this report. FLAC also worked with a subcommittee of the Family Law Section of the Maine State Bar Association. The subcommittee was comprised of the following individuals: Tobi Schneider, Chair, Judy Andrucki, Ed David, Steven Hayes, Sharon McHold, John Sheldon, Tamar Mathieu, Judy Berry, and Karen Boston. In preparation for this report, FLAC spoke with family law practitioners to understand the current parentage issues in Maine, reviewed unpublished Maine trial court decisions where many of these issues appear, and studied the experience of other states in addressing the issues raised in the UPA.

has been disestablished by DNA results, but there is an established parent-child relationship. Maine has an insufficient statutory framework to guide these families, and case law reveals inconsistent results.

New reproductive technologies make possible embryo implantation, artificial insemination and surrogacy agreements. Maine does not have, for the most part, the legal guidance necessary for addressing the new and unanticipated issues relating to the parentage of children born through the use of assisted reproduction and gestational agreements. Consequently, Maine courts and families are left to find new theories to maintain or dissolve the parent-child relationship created as a result of these new technologies.

The UPA addresses some of the complicated issues that arise as a result of the new reproductive technologies and the late accurate determination of paternity or non-paternity. Because advances in DNA testing have created results not anticipated by Maine statutes, and because advanced reproductive technologies permit the creation of new parent-child relationships beyond those specifically addressed in Maine's current law, FLAC recommends that the UPA be enacted, with additional Maine amendments that are recommended to ensure predictable results for Maine people and equal treatment of every child in Maine.

In this report, FLAC will summarize the highlights of the more significant provisions of the UPA, compare existing Maine law with the UPA, address the changes that FLAC proposes to the UPA.

## Discussion

### I. The UPA 2002

To address the inadequacies of existing law, the National Conference of Commissioners on Uniform State Laws ("Commissioners") promulgated the Uniform Parentage Act, last amended and revised in 2002. The UPA contains seven articles with an eighth optional article. FLAC recommends the adoption of all eight articles.<sup>2</sup> The articles as adopted by the Commissioners may be summarized as follows:

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<sup>2</sup> FLAC recommends the adoption of all eight articles together with the amendments proposed by FLAC and discussed in section III below.

Article 1	General Provisions
Article 2	Parent-Child Relationship
Article 3	Voluntary Acknowledgment of Paternity
Article 4	Registry of Paternity
Article 5	Genetic Testing
Article 6	Proceeding to Adjudicate Parentage
Article 7	Child of Assisted Reproduction
Article 8	Gestational Agreement

Article 1 contains definitions and choice of law rules.

Article 2 defines all possible bases for establishing the parent-child relationship, including presumptions of paternity, acknowledgement, adjudication, consent to assisted reproduction, adoption, and gestational agreements.

Article 2 clarifies that a legal mother is not only one who carries a child to birth, but may also be one who is adjudicated as the legal mother, who adopts the child, or who is the legal mother under a gestational agreement. Under the last three circumstances, the woman who carries the child to birth is not necessarily the legal mother.

Under Article 2 there are many possible ways to be considered the legal father. Under the UPA, the genetic father or the presumed genetic father is not necessarily the legal father. A legal father is an un rebutted presumed father, that is a man married to the birth mother at the time of the conception, or a man who resided in the same household as the child during the first two years of life and openly held the child out as his own. A legal father is also one who acknowledges his paternity under Article 3. An adjudicated father results from a judgment in a paternity action. A legal father may result from an adoption. Other possible ways to be considered a legal father include a man who consents to assisted reproduction under Article 7 or an adjudicated father in a proceeding to confirm a gestational agreement under Article 8.

Article 3 provides for a non-judicial acknowledgment of paternity that is the equivalent of a judgment of paternity for child support enforcement purposes. Article III seeks to prevent the circumvention of adoption laws by requiring a sworn assertion of actual parentage of the child through sexual intercourse in support of acknowledgment. An acknowledgment is effective provided there is not another presumed, acknowledged

or adjudicated father. There is also a provision for a presumed father, such as man married to the birth mother at the time of conception, to deny paternity as part of the acknowledgment process, that has the effect of a judgment of non-paternity if another man acknowledges paternity or is adjudicated to be the natural father.

Article 4 authorizes a registry for putative and unknown fathers. The registry permits individuals listed in the registry to be notified if there is a proceeding for adoption or termination of parental rights. Before a child is one year old there must be a certificate of search of the registry presented to the court. If the certificate shows that no putative or unknown father has registered within 30 days of the birth of the child, parental rights may be terminated without further notice. Once a child has reached the age of one year, the registry no longer has any effect and actual notice is required before there can be a termination of parental rights. The intent of this provision is to expedite adoption proceedings for infants under one year of age at the time of the hearing. The registry has no impact on a father who has established a father-child relationship. Thus, no presumed, acknowledged or adjudicated father may have his parental rights terminated under this provision.

Article 5 addresses genetic testing. It covers genetic testing pursuant to a court order or support enforcement agency. The article contemplates that testing for paternity may take place without testing the mother and, when the putative father is unavailable, by testing close relatives of the father. A court may order testing without a paternity action: A reasonable probability of sexual contact between the putative father and the mother suffices to initiate a proceeding, and a putative father may initiate the proceeding to show that he is not the genetic father. Article 5 establishes standards for genetic testing, setting a standard for a presumption of paternity of 99% probability of paternity based on appropriate calculations of "the combined paternity index", and limits the rebuttal of the 99% presumption only by competing further genetic evidence that excludes the putative father or identifies another man as the genetic father. Article 5 also covers the mechanics of genetic testing, including the form of the report of genetic testing, the rebuttal of that report, confidentiality of that report, and the payment of costs of genetic testing.

Article 6 governs the proceeding to determine parentage. It takes into consideration the need to adjudicate in some circumstances the legal parentage of a woman, as well as that of a man. An action may be brought by the child, the mother of

the child, a man whose paternity is to be adjudicated, a support-enforcement agency, an authorized adoption agency or licensed child-placing agency, a representative of a deceased, incapacitated or minor person, or an intended parent under a gestational agreement. If there is not a presumed, acknowledged or adjudicated father, an action may be brought at any time. If there is a presumed father, the statute of limitations for an action is two years from the birth of the child, but an action to disprove the presumed father's paternity may be brought at any time if the presumed father and mother did not cohabit or have sexual intercourse during the time of conception and the presumed father did not treat the child as his own. A court may deny on the basis of the best interest of the child a request for genetic testing in a proceeding to challenge the parentage of a child with a presumed or acknowledged father. A refusal to submit to genetic testing can ripen into an adjudication of paternity for the putative father who refuses. A child is not bound by an adjudication of fatherhood unless the adjudication was based on a finding consistent with the results of genetic testing. The time bars in Article 6, when combined with the presumptions of parentage defined in Article 2, put families on notice that the determination of parentage is important and become final early in the child's life. They have the effect of telling the mother, the genetic father, and the presumed parent, that the child is to be protected from late arguments about the child's parentage, as the law tries very hard to have parentage become final early in the child's life.

Article 7 addresses assisted reproduction. It includes donor eggs, the implantation of embryos, and artificial insemination. It does not apply to the birth of a child conceived by sexual intercourse or as a result of a gestational agreement, which is addressed in Article 8. If a man and a woman consent to any sort of assisted conception, and the woman gives birth to a child, they are the legal parents. Consent may be withdrawn at any time before the placement of the eggs, sperm or embryos. A donor of either sperm or eggs used in an assisted conception may not be a legal parent.

Article 8 provides for gestational agreements. A gestational agreement occurs between a woman and a married or unmarried couple obligating that a woman carry a child that may or may not be genetically related to the intended parents. The conception must be an assisted conception. The woman who carries the child to birth pursuant to a gestational agreement is not the legal mother of the child. The intended parents become the legal parents.

The Drafting Committee of the UPA considered the passage of the UPA too important an event to have the UPA jeopardized by controversy surrounding gestational agreements; therefore, the UPA makes Article 8 optional. The Drafting Committee also believed that having available to states statutory provisions that address gestational agreements was important because gestational agreements are being used all the time, and the legal parenthood of children born pursuant to such agreements should not be in doubt because such agreements are used. Article 8 acknowledges that a child born pursuant to a gestational agreement is entitled to have his/her status determined before the conception of that child.

Article 8 considers a gestational agreement to be a significant legal act that should be reviewed by a court prior to the assisted reproduction. Judicially approved gestational agreements are enforceable legal agreements. Under the UPA, agreements are permitted if all parties sign the necessary documents, and make provisions granting the intended parents parentage and relinquishing the other parties' parental rights. Compensation is permitted and health decisions during pregnancy are left to the gestational mother.

Gestational agreements are carefully controlled under Article 8. To validate a gestational agreement, the mother or intended parents must meet a ninety-day residency requirement, and the gestational mother's husband (if married) is joined in the proceeding. Prior to the assisted reproduction, a court may issue an order declaring the intended parents as parents if the agreement meets the requisite criteria.

Article 8 provides that there is no requirement of a genetic link between the intended parents and the child. Furthermore, the Article confers exclusive and continuing jurisdiction upon the appropriate court until the child attains the age of 180 days in order to minimize parallel litigation in other states. Before pregnancy, any party on written notice can terminate an agreement. In addition, the court can terminate the agreement for good cause. The gestational mother and husband are not liable to the intended parents if they terminate the agreement prior to pregnancy.

The intended parents must file a notice of birth with the court within 300 days after assisted reproduction. The court will then issue an order confirming the intended parents as parents, ordering surrender if necessary, and directing the Bureau of Vital Records to issue a birth certificate. If assisted reproduction is alleged not to have been used, genetic testing will be used. If the intended parents do not file, the gestational

mother can file for child support after 300 days if a pre-birth order has been issued pursuant to Section 803.

Non-judicially reviewed gestational agreements are not enforceable. If a birth occurs under such an unenforceable agreement, parentage is determined under Article 2 (i.e., the gestational mother is the mother and her husband is presumed to be the father; the intended parents have no recourse; and if all parties still want to transfer the baby then adoption is the proper process). However, the intended parents can still be held liable for child support. This provision provides an incentive for all parties to seek prior judicial review of any agreement.

## II. The UPA 2002 Compared to Existing Maine Family Law

The UPA codifies clear standards for determining parentage. Although there may be Maine law concerning one of the concepts contained in the first six articles of the UPA, the UPA rounds out and codifies the concept. For example, Maine statute does not define “presumed father”, that is a father by operation of law; however, the presumption arises under Rule 302 of the Maine Rules of Evidence to establish that a husband of a woman who gives birth to a child is the presumed father. The presumption does not apply to paternity actions or unmarried fathers. The UPA defines presumed father more specifically to include when a child is born during the marriage, but to also include, for example, when for the first two years of the child’s life, the man resided in the same household with the child and openly held the child out as his own.

Maine law fails to define parent-child relationship. It does define parent to mean the legal parent or the legal guardian when no legal parent exists. See 19-A M.R.S.A. §101. Maine law also defines parent to mean a natural or adoptive parent, unless parental rights have been terminated. The UPA clarifies with very specific examples of when the legal relationship between a child and the parent of a child arises. Section 201 of the UPA provides, for example, that a father-child relationship is established by an un rebutted presumption of paternity; effective acknowledgment of paternity; adoption of the child by the man; an adjudication of paternity; consenting to assisted reproduction under Article 7; or an adjudication confirming the man as a parent of a child born pursuant to a gestational agreement under Article 8.



The UPA tightens the requirements for voluntary acknowledgment of paternity by requiring the mother of the child and the man claiming to be the genetic father sign an acknowledgment of genetic paternity with the intent to establish the man's paternity. That acknowledgement must state that there is no presumed, acknowledged or adjudicated father. If there is a presumed father, he must file simultaneously a denial of paternity. Existing Maine law provides for the acknowledgement of paternity but does not require that the acknowledgement be of genetic paternity. By requiring that the acknowledgement be of genetic paternity, the UPA attempts to foreclose those who would circumvent the adoption law with an acknowledgment not based on a genetic tie to the child. Further, the UPA brings certainty and stability to a child promptly by providing that an acknowledgement can only be challenged by a person not a signatory to the acknowledgement within two years of filing of the acknowledgement. A signatory to the acknowledgement may challenge it only on the basis of fraud, duress or material mistake of fact and only within two years after filing of the acknowledgement.

Bringing prompt stability to a child's life is also a goal of the UPA's provisions for genetic testing. A court may order genetic testing with a sworn affidavit alleging or denying the requisite sexual contact. The UPA requires that the test results establish paternity by a probability of 99% or greater. The UPA grants a court far more discretion than current Maine law allows when considering a request for paternity testing. The UPA allows for fault-based determinations by denying testing on an equitable estoppel basis to parties who come to the court with unclean hands. In making this determination, the court must consider the best interest of the child, including the timeliness of the request, the amount of time a party has served as a parent, the nature of the relationship between the child and the acknowledged or presumed father, the age of the child, the harm that may result to the child, and any other factors relating to the disruption of the father-child relationship.

Current Maine law does not authorize a paternity registry. The permanency of a child's life is often delayed because of the inability to identify the genetic father of the child. The UPA addresses this gap and creates a paternity registry to facilitate adoption of infants less than one year old. A father must register before the birth of a child or within 30 days of the child's birth in order to be given notice of adoption proceedings. Parental rights of a man may be terminated without notice if the child hasn't attained one

year of age at the time of the termination, the man did not register timely, and he is not exempt from the registration requirements. A man is not required to register if a father-child relationship has been established or the man starts a paternity action. Once a child has attained one year of age notice must be given to every alleged father of the child, whether or not he has registered. The UPA facilitates infant adoptions but also protects the rights of unmarried fathers who may not have registered but who have established a relationship with the child.

The UPA corrects an omission in Maine law by providing that a donor is not a parent of a child conceived of assisted reproduction, except as authorized under Articles 7 or 8. Nothing in current Maine statutory law allows a sperm or egg donor to relinquish parental rights by contract. Only recently has Maine case law begun to address the rights of donors. In Guardianship of I.H., 2003 ME 130, the court held that the probate court may waive notice to an anonymous sperm donor. The court cited section 702 of the UPA in its analysis of the rights of donors.

The UPA does not address child support issues that arise as the result of the late discovery of paternity or nonpaternity. Child support is a complicated, separate topic that is governed to large extent by federal law. Although the UPA does not directly address the issue of relief from a child support order, by limiting the time-frame in which challenges to paternity may be made, the UPA indirectly forecloses much of the litigation that currently clogs family courts by eliminating cases in which more than two years of back support payments have accumulated.

Finally, the UPA addresses in Articles 7 and 8 entirely new areas of law that are not yet addressed in Maine law. Although Maine law is silent on assisted reproduction and surrogacy agreements, children are born in Maine with the assistance of these new reproductive technologies giving rise to new and unanticipated issues. The new reproductive technologies make it possible to have as many as six potential “parents”, including the donor of eggs or sperm, the birth mother and her husband, and the intended parent or parents. In Maine today, lawyers are drafting agreements that clarify who the intended parent or parents are in order to provide stability in the child’s life. But when these agreements fall apart, the intent of the “parents” when the child was conceived is soon forgotten and not protected by the law. Children’s lives are then thrown in limbo. The UPA recognizes that a child can be procreated because of a medical procedure that

was initiated and consented to by the intended parents, whether or not there is a genetic tie. Clear legal standards governing these arrangements are critical to providing predictability and stability into the lives of children born of these new reproductive technologies.

### III. FLAC'S Amendments to the UPA

The UPA provides a uniform act that updates and modernizes parentage law for the 21st century. It recognizes the importance to children of having their parentage legally established early in their lives. It acknowledges that the parent and child relationship extends equally to every child and every parent, regardless of the marital status of the parent. See Uniform Parentage Act, Prefatory Note. It recognizes that a child born of assisted reproduction or gestational agreements is entitled to have that child's parentage clarified. However, the UPA uses limiting gender-specific language to establish a parent-child relationship with one mother and one father. The National Conference of Commissioners of Uniform State Laws, in recommending the adoption of the UPA, apparently left for another day the determination of parentage of children born to relationships that do not fit the UPA model. Across the United States and in Maine, children are born into a wide variety of circumstances from married parents, unmarried heterosexual parents, single moms, single dads, to same-sex parents. Each of these children is entitled to equal treatment under the law. Every child has the right to know who his or her parent or parents are and to be able to rely on that determination for the child's life. When a relationship is disrupted, a child's life should not be disrupted because the law ignored and did not give legal recognition to that child's established parent-child relationship.

Eliminating specific gender references from the act and making the UPA gender neutral so that the provisions of the UPA will protect every child may easily remedy this significant omission of the UPA. Maine trial courts are already hearing these cases without any comprehensive, uniform, predictable statutory guidance. These courts try to look at the best interest of the child and how the child will be affected by a disruption of what the child believed was a parent-child relationship, and struggle to find a legal concept that would support preserving that parent-child relationship. By amending the UPA to be gender neutral, the Legislature will not only provide clear and consistent legal

standards to be applied by the courts, but also will ensure the stability and welfare of every child.

Conclusion

For the foregoing reasons, FLAC urges the adoption of the UPA, as amended by the recommendations of FLAC.

Dated: January 1, 2004

Respectfully submitted:

**Maine Family Law Advisory Commission**

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