

To: New Jersey Law Revision Commission
From: John M. Cannel
Re: Update – Additional Comments on Parentage
Date: September 11, 2020

M E M O R A N D U M

Professor Solangel Maldonado, of Seton Hall University School of Law, has been extremely helpful to us in this project. She met with us and made detailed comments to an earlier draft. Much of the substance of those earlier comments has been incorporated into the current draft.

She was kind enough to offer additional comments in response to the current draft. Her comments deal largely with two broad, substantive issues on which we are seeking guidance from the Commission: (1) how broad is the definition of “spouse”; and (2) may a child have more than two full (not psychological) parents.

This Memorandum briefly discusses Professor Maldonado’s new comments, roughly in order in which the language in issue appears in the most current draft, and seeks Commission guidance.

Section 3: Professor Maldonado notes that declining to address the questions not covered in this section, as noted in the comment to the section (including things like whether or not a child may have two mothers) seems like a missed opportunity.

Section 4 b.: The italicized language (“and also includes a non-marital partner who co-habited with the person who gave birth to the child for at least one year immediately preceding the birth of the child”) was added to the section in response to an issue raised during our meeting with Professor Maldonado. She observed that there are many couples living together in a settled relationship without marriage, and suggested that their relationship should be treated as one between spouses. The language is italicized in the draft because we did not know what the Commission’s reaction would be. In her later written comments, she raises problems posed by the provision, with which I agree. She asked, for example, whether a mother’s lesbian partner who did not intend to be a parent need to file an action to deny parentage or risk child support obligations? She suggested that some additional indication of intent to parent, beyond being a cohabiting non-marital partner, is required.

We considered the possibility of a requirement of “holding out the child as their own,” but I am concerned that such a standard would not be easily susceptible of proof early enough to allow convenient settlement of support obligation. One solution would be to delete the italicized language, and to rely instead on the psychological parentage sections to give some rights to unmarried spouses. That is not, however, a complete solution. It does not recognize frequency of

these relationships, and it does not provide rights and obligations in regard to support and inheritance.

Generally applicable - the issue of more than two parents: Nothing in the draft specifically bars situations in which there would be more than two parents, but its structure is presently designed to limit parents to two. So, if the spouse is a parent, the genetic parent is not. There are some situations in which that result might be contrary to the wishes of the parties, but the complications inherent in three (or more) parents may outweigh those wishes. All of our support law assumes only two parents. The same is true of inheritance law.

Changing those is possible, but there is another solution. Again, an incomplete one, but one based in the psychological parent provisions of the act. If the third party functions as expected, that party would easily meet the requirements of a psychological parent. Professor Maldonado is correct when she suggests that, since some states and the UPA now recognize more than two parents, the reasoning for rejection more than two parents – if that is the Commission’s decision - should be included in the comments.

Sections 7/8 – Genetic parentage: Professor Maldonado asked whether we need a provision to explain when genetic parentage was relevant since, for example, it is not relevant in many assisted reproduction cases. I had initially thought that Section 5 made that clear. The issue may arise most frequently in support actions. Perhaps an addition to the commentary would be advisable. We do not provide for actions to determine parentage other than genetic parentage. They may come up in many situations as they do now. I would recommend adding: “Other actions to determine parentage shall be governed by Court Rules”.

Sections 11 and 15 – Psychological parentage: Professor Maldonado suggests, and I agree, that Sections 11 and 15 should be together. She also asked whether a child can have two parents and a psychological parent or parents. Two genetic parents and a psychological parent (or more than one) have been recognized by the UPA and in ALI materials. That is the intent of this section, but it should be made clear. An addition to one of the sections concerning psychological parentage could achieve that. Professor Maldonado also asked whether a psychological parent should have support obligation. We have not provided for that. It is of concern that doing so might deter psychological parenting when that is useful. And a support obligation is inconsistent with the absence of a right of inheritance. The simpler answer is to limit psychological parentage to matters of custody etc., which could be made clearer in Section 15.

Section 18 – Donation of egg or sperm: Professor Maldonado suggested that the section focuses only on couples, rather than a single woman who obtains a donated egg or sperm or both. I agree that this section needs more work. In the initial draft, I stuck too closely to the current statute. I deleted the physician requirement but substituted a written contract provision. That may be impractical, or it may, as Professor Maldonado suggests, lead to unjust outcomes. There also needs to be a more complete provision on the rights and obligations of a non-anonymous donor.