



NEW JERSEY LAW REVISION COMMISSION

Draft Tentative Report Regarding Proposed Changes to the New Jersey Parentage Act, N.J.S. 9:17-38 *et seq.*

September 16, 2020

The New Jersey Law Revision Commission is required to “[c]onduct a continuous examination of the general and permanent statutory law of this State and the judicial decisions construing it” and to propose to the Legislature revisions to the statutes to “remedy defects, reconcile conflicting provisions, clarify confusing language and eliminate redundant provisions.” *N.J.S. 1:12A-8*.

This Report is distributed to advise interested persons of the Commission's tentative recommendations and to notify them of the opportunity to submit comments. Comments should be received by the Commission no later than **November 16, 2020**.

The Commission will consider these comments before making its final recommendations to the Legislature. The Commission often substantially revises tentative recommendations as a result of the comments it receives. If you approve of the Report, please inform the Commission so that your approval can be considered along with other comments. Please send comments concerning this Report or direct any related inquiries, to:

John M. Cannel, Retired
Jennifer Weitz, Counsel
New Jersey Law Revision Commission
153 Halsey Street, 7th Fl., Box 47016
Newark, New Jersey 07102
973-648-4575
(Fax) 973-648-3123
Email: jdw@njlrc.org
Web site: <http://www.njlrc.org>

Executive Summary

The New Jersey Parentage Act (“the Act”), N.J.S. 9:17-38 *et seq.*, was adopted in 1983 to address issues regarding children born to nonmarital parents.¹ It is based upon the Uniform Parentage Act of 1973.² The Act was intended to establish that regardless of the marital status of the parents, all children and parents have equal rights with respect to each other, and to provide a procedure for establishing parentage in disputed cases.³

At the time of its passage, the Act was designed to reflect United States Supreme Court decisions requiring equality of treatment in various areas of substantive law.⁴ The Act was most recently amended in 2018 to allow for issues related to gestational carrier agreements,⁵ and again in 2019 to address parentage of the partner in a civil union or the spouse of a natural or legal parent of a child.⁶

Background

In May 2020, a Memorandum was submitted to the New Jersey Law Revision Commission (“NJLRC”) that discussed substantial revisions to N.J.S. 9:17-38 *et seq.*⁷ To encompass the many scientific and social changes that had occurred in the interim, particularly concerning determinations of genetic parentage and parentage based on spousal relations or operation of other law, the scope of work expanded to become an intended replacement for the Commission’s 2010 Report.⁸

The current work seeks to clarify situations involving gestational carrier agreements, and to deal more comprehensively with the rights and obligations of spouses independent of biological parentage. At the May 21, 2020 meeting, the Commission recommended that Staff discuss this Report with Solangel Maldonado, a Professor at Seton Hall University School of Law, who has worked with the American Law Institute in this area of law.⁹

Staff forwarded the Report to Professor Maldonado, who graciously met with Staff and provided preliminary comments and insight about the content of the proposed modifications to the Act.

Professor Maldonado recommended that the proposed modifications avoid use of the word “natural” or “biological” when referring to parents or parentage, in favor of the term “genetic.” In addition, she recommended that the Act recognize nonmarital parents. Professor Maldonado noted

¹ *P.L.* 1983, c. 17 (codified at N.J.S. 9:17-38). Available at www.njstatelib.org (last visited 9/01/20).

² *Id.*, Assembly Judiciary, Law, Public Safety and Defense Committee, Statement to Senate, No. 888 (Oct. 7, 1982).

³ *Id.*

⁴ *Id.*

⁵ *P.L.* 2018, c. 18 (codified at N.J.S. 9:17-60 *et al.*).

⁶ *P.L.* 2019, c. 323 (codified at N.J.S. 9:17-69 *et al.*).

⁷ Memorandum to NJLRC (May 11, 2020). Available at www.njlrc.org.

⁸ *Id.*

⁹ NJLRC May 2020 Meeting Minutes. Available at www.njlrc.org.

that New Jersey's approach to issues of parentage more closely mirrors the recommendations of the American Law Institute, than the Uniform Law Commission.

Conclusion

The proposed modifications to the Parentage Act, intended to reflect the most current advances in genetic testing as it relates to parentage and the many varieties of parentage, are set forth in the Appendix that follows.

Appendix

The proposed modifications to the New Jersey Parentage Act, N.J.S. 9:17-38 *et seq.*, are as follows (changes shown with ~~striketrough~~, and underlining):

1. Short title

This act shall be known and may be cited as the "New Jersey Parentage Act of 2020."

COMMENT

This section replaces N.J.S. 9:17-38.

2. Parent and child relationship defined

a. As used in this act, "parent and child relationship" means the legal relationship existing between a child and the child's ~~natural or adoptive parents or parents, whether those parents are genetic parents or parents by law including this act. It includes the relationship between a child and adoptive parents and~~ between the child and the child's intended parents pursuant to a gestational carrier agreement executed in accordance with the provisions of P.L.2018, c.18 (C.9:17-60 et al.), incident to which the law confers or imposes rights, privileges, duties, and obligations. It includes the mother and child relationship and the father and child relationship.

b. The parent and child relationship extends equally to every child and to every parent, regardless of the marital status of the parents.

COMMENT

This section is based on N.J.S. 9:17-39 and 9:17-40, but specifically includes parentage whether the relationship is based on genetics or action of law.

3. Person who gives birth to child

A person who gives birth to child is a parent of that child unless the child is born in connection with a gestational carrier agreement executed in accordance with the provisions of P.L.2018, c.18 (C.9:17-60 et al.).

COMMENT

This section is substantially identical to N.J.S. 9:17-41(a).

Staff notes that this section does not yet address certain questions, including whether a child can have two mothers – for example, an unmarried couple, one of whom provides the egg, the other gestates the child, in situations in which there may very well be no surrogacy agreement because the women intended to raise the child together.

4. Spouse of Person who gives birth to child

a. If the person who gives birth to child is a parent of that child the spouse of that person is also a parent of the child unless:

- (1) the spouse is not the genetic parent of the child;
- (2) the spouse did not acquiesce to sperm or egg donation as provided in Section 16; and
- (3) the spouse is a party to an action to deny parentage within five years of the child's birth.

b. As used in this section, spouse means a party to a marriage, civil union or domestic partnership. *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.*

COMMENT

This section is new. It replaces the presumption that the husband of a person who gives birth to a child is the father of the child. It is somewhat narrower than the historic presumption because it allows the spouse to disclaim parentage. The right to disclaim is time-limited because after a period of time the interests of the child in consistency of parentage are more important than determination of genetic parentage. The time limit for actions to determine genetic parentage below is five years. In another sense, the section is broader than the historic presumption. It is not based on the likelihood that the spouse is the genetic father; it covers spouses without regard to gender. The section's approach is based on societal expectations and provision of a stable family for the child.

The italicized language in subsection b. has been added to include members of couples who are not married, to address an issue raised by Professor Solangel Maldonado, of Seton Hall University School of Law. It may be appropriate to substitute another term for "non-marital partner" in that subsection, but it is hoped that comments received will be of assistance in determining the most appropriate term.

Staff notes that this draft does not yet address the circumstance of a child conceived using genetic material from more than two individuals.

5. Other genetic parent

A genetic parent is a parent of the child unless:

- a. the genetic parent is a sperm or egg donor as provided in section 16;
- b. the person who gave birth to the child is a parent of the child and the spouse of that person is a parent of the child as provided in section 4; or
- c. another person has been adjudicated a parent under applicable law.

COMMENT

This section is new in form but, for the most part, not in substance. The basic rule is that the genetic parent is a legal parent. Subsection a. exempts sperm or egg donors. That is derived from N.J.S. 9:17-44. Subsection b. eliminates the possibility of more than two parents.

6. Parentage in Gestational Carrier Agreement

Where parties have entered into a gestational carrier agreement executed in accordance with the provisions of P.L.2018, c.18 (C.9:17-60 et al.) parentage shall be as specified in that agreement.

COMMENT

This section is derived from N.J.S. 9:17-41(c)(2). It implements the policy of N.J.S. 9:17-60ff.

7. Voluntary Acknowledgement of Genetic Parentage

a. Genetic parentage may be established by:

(1) a Certificate of Parentage as provided in section 7 of P.L.1994, c.164 (C.26:8-28.1) executed by a signatory, including an unemancipated minor, prior to or after the birth of a child, and filed with the appropriate State agency, or

(2) a signed voluntary acknowledgment of paternity in accordance with 42 U.S.C. s.666(a)(5), subject to the right of the signatory to rescind the acknowledgment within 60 days of the date of signing, or by the date of establishment of a support order to which the signatory is a party, whichever is earlier.

b. If the individual signing the certificate or acknowledgment is a minor, a guardian ad litem shall be appointed by the court to advise the child in advance of the signing of the certificate or acknowledgment. The child's parents may not represent the child as guardian or otherwise.

COMMENT

This section is substantially identical to the first parts of N.J.S. 9:17-41(b).

Subsection b. was added in response to a question raised as to whether a minor should be allowed to acknowledge genetic parentage without a test or legal advice. Federal law, 42 U.S.C. s.666(a)(5), provides that a person signing a voluntary acknowledgement be advised of its consequences. While the federal law does not provide for a guardian, there is nothing in that law that makes this provision inappropriate.

8. Action to determine genetic parentage

a. An action to determine the genetic parentage of a child may be brought if genetic parentage is relevant to determination of parentage of the child.

b. An action to determine the genetic parentage may be brought by:

- (1) a known or possible parent of the child
- (2) the child
- (3) the Division of Child Protection and Permanency
- (4) the Department of Health.

c. The action shall join as defendants all known possible genetic parents of the child.

- d. The action shall not be brought later than:
- (1) five years after the child is born; or
 - (2) If the plaintiff is the child, five years after the plaintiff becomes 18 years old.

e. An action under this act is a civil action governed by the Rules Governing the Courts of the State of New Jersey. The trial shall be by the court without a jury.

COMMENT

Subsection b. of this section is substantially similar to N.J.S. 9:17-45(a), -47 and -57. Subsection c. is identical to 9:17-49.

9. Parties; guardian ad litem

a. The child may be made a party to the action. If the child is a minor and is made a party, a guardian ad litem shall be appointed by the court to represent the child. The child's ~~mother~~ or ~~father~~ parents may not represent the child as guardian or otherwise.

b. Any person known to be the child's parent, any person alleged to be the child's genetic parent, any person who has claimed to be the child's genetic parent, and any person who would be affected by the determination of parentage shall be made parties.

c. If a party is not subject to the jurisdiction of the court, the party shall be given notice of the action in a manner prescribed by the court and an opportunity to be heard.

Source: 9:17-47.

COMMENT

Section 9:17-47 bases the requirement that a person be a party on presumptions of paternity. Since those presumptions are being abandoned in favor of a modern DNA approach, the section has been recast in more general terms.

10. DNA Testing

a. When an action to determine the genetic parentage of a child is brought, the court shall order DNA testing of the child and all possible parents of the child.

b. A report of the DNA testing shall be given to each party, and the report shall be received in evidence.

c. The DNA samples shall be treated as confidential and not made available to anyone other than the experts retained for this action. At the conclusion of the action, the experts shall be ordered to destroy the samples.

d. Reports of analysis of DNA samples shall be treated as confidential and not made available to anyone other than the court, parties and counsel.

COMMENT

This section is new, but subsections b. and c. are consistent with N.J.S. 9:17-41.

11. Court Determination of Genetic Parentage

A determination of ~~biological~~ genetic parentage shall be made by the court based on the report and any evidence, including expert testimony, presented by any party.

COMMENT

This section is new.

12. Court Determination of Psychological Parentage

A court shall determine that a person is a psychological parent upon a showing that:

- (1) the legal parent has consented to and fostered the relationship between the person and the child;
- (2) the person has lived with the child for a significant period of time;
- (3) the person has performed parental functions for the child to a significant degree without expectation of financial compensation; and
- (4) a parent-child bond has been established between the person and the child.

COMMENT

This section is new, included for consideration after a review of the treatment of the issue of de facto or psychological parentage by case law and by the Uniform Law Commission.

13. Closed court; confidentiality of records

Notwithstanding any other law concerning public hearings and records, any action or proceeding to determine genetic parentage shall be held in closed court without admittance of persons other than those necessary to the action or proceeding. All papers, records and information which may reveal the identity of any party, other than the final judgment or the birth certificate, whether part of the permanent record of the court or of a file with the State registrar of vital statistics or elsewhere, are confidential and are subject to inspection only upon consent of the court and all parties to the action who are still living, or in exceptional cases only upon an order of the court for compelling reason clearly and convincingly shown.

COMMENT

This section is substantially identical to the first parts of N.J.S. 9:17-41(b).

14. Voiding finding of genetic parentage

The adjudication of genetic parentage, whether made on a voluntary acknowledgment or on an action to determine genetic parentage paternity shall be voided only upon a finding that there exists clear and convincing evidence of fraud, duress or a material mistake of fact, with the burden of proof upon the challenger.

COMMENT

This section is substantially identical to N.J.S. 9:17-42.

15. Terminating or Changing Parentage

After parentage is established, it may be changed by adoption or by actions to terminate parentage.

COMMENT

This section is derived from N.J.S. 9:17-41(c).

16. Rights of Psychological Parent

A psychological parent stands in parity with the legal parent in regard to custody and parenting-time issues. A court shall determine custody and parenting-time issues between a parent and the psychological parent using a best-interests-of-the-child standard.

COMMENT

This section is new, see Comment to Section 11.

17. Enforcement

a. If a parent-child relationship is established under this chapter or under prior law, the obligation of the parent may be enforced in the same or other proceedings by the other parent, the child, the public agency that has furnished or may furnish the reasonable expenses of pregnancy, postpartum disability, education, support, medical expenses, or burial, or by any other person, including a private agency, to the extent that the person, has furnished or is furnishing these expenses.

b. The court shall order support payments to be made to the New Jersey Family Support Payment Center unless the court finds good cause for another system of payment.

c. Willful failure to obey the judgment or order of the court is a civil contempt of the court.

d. The court has continuing jurisdiction to modify or revoke a judgment or order.

Source: 9:17-55; 9:17-56.

COMMENT

This section is substantively identical to its sources. Subsections a. through c. are derived from 9:17-55, but subsection b. has been changed to reflect current practice. Subsection d. is derived from 9:17-56.

18. Amended birth record

a. Upon order of a court of this State or upon request of a court of another state, the local registrar of vital statistics shall prepare an amended birth record consistent with the findings of the court.

b. The fact that the parent-child relationship was declared after the child's birth shall not be ascertainable from the amended birth record, but the actual place and date of birth shall be shown.

c. The evidence upon which the amended birth record was made and the original birth certificate shall be kept in a sealed and confidential file and be subject to inspection only upon consent of the court and all interested persons, or in exceptional cases only upon an order of the court for compelling reasons clearly and convincingly shown.

Source: 9:17-59.

COMMENT

This section is substantively identical to 9:17-59. Subsection a. also reflects 9:17-53(b).

19. Donation of egg or sperm

a. If, ~~under the supervision of a licensed physician and~~ with the consent of both ~~spouses parties to a marriage, civil union or domestic partnership,~~ pregnancy is achieved with ~~semen sperm~~, an egg or both, donated by persons not parties to the ~~marriage, spousal relationship~~ the parties to the marriage both spouses shall be the parents of the resulting child irrespective of genetic parentage.

b. Unless the donor of the egg or ~~semen sperm~~ and ~~the parties to a marriage~~ both spouses have entered into a written contract to the contrary, the donor shall not be treated in law as a parent of the resulting child and shall have no rights or duties stemming from the conception of a child.

c. The identity of an anonymous donor of the egg or ~~semen sperm~~ shall be kept confidential and shall not be disclosed without the permission of the donor.

COMMENT

Section 9:17-44 refers only to artificial insemination. This section has been broadened to include donations of both eggs and sperm.

Staff notes that the consent of a non-marital partner would not make that person a parent pursuant to this section. In addition, a woman who provides eggs so that her partner may gestate a child that they will raise together, or a man with a low sperm count who, with his girlfriend uses in vitro fertilization (IVF) to achieve pregnancy, would not be parents absent a written agreement according to the language of this section. Additional research, including a review of the UPA's provisions, is ongoing.