

To: Law Revision Commission
From: John Cannel
Re: Parentage
Date: May 11, 2020

M E M O R A N D U M

Attached is a rough draft of what would be a Tentative Report on Parentage.

We began with an attempt to update the 2010 Final Report, Title 9 – Parentage.

It appeared, however, that too much had changed in the last 9 years to reflect in a mere update. As a result, this would be a new Report. Much of it is the same or similar to the 2010 Report.

The genetic provisions have been strengthened and made to apply specifically to determinations of genetic parentage. Other provisions provide for instances in which parentage is based on spousal relations or operation of other law.

We seek further guidance before proceeding to a full draft Tentative Report.

Introduction

In 2010, the Law revision Commission published a Report recommending revision the law regarding parentage in Chapter 17 of Title 9. That Report was not acted upon by the Legislature. Changes in scientific knowledge and in societal norms have made a simple update of the 2010 Report insufficient.

As a result, the information on the following pages would replace the 2010 Report and address changes in the law, society, and science occurring in the intervening years.

I. Genetic Parentage

Current statutes on parentage were written before the development of modern genetic tests that can almost always determine whether a particular person is a genetic parent of a particular child. These tests now have a level of accuracy that makes them practically irrefutable. As a result, current law written in terms of factual presumptions, is anachronistic.

The 2010 Report gave a central role to genetic testing in litigated cases of disputed genetic parentage. This Report continues that approach.

The majority of biological parentage cases that arise around the time of birth do not involve a court determination. Most often, a man agrees that he is the father and signs a certificate of paternity. Federal statutes and regulations essentially require that states establish a system of voluntary acknowledgements of paternity that is as binding as a court determination. See, e.g. 42 USC §668 and 45 C.F.R. §303.5. Section 7 establishes such a system in the form of certificates of parentage and voluntary acknowledgments of parentage. Unfortunately, some men who sign acknowledgments later come to question whether they were correct either because of the acquisition of new facts or a change of heart. The Commission considered requiring genetic testing in connection with a certificate of paternity but rejected the requirement because of the cost in money, time and invasion of privacy.

A relatively small number of disputes over paternity do not follow the ordinary pattern of a known question around the time of birth. These disputes may arise when the relationship terminates between the persons who thought themselves to be father and mother, or in the context of divorce, or in the distribution of estates or trusts. There are not many of these cases, but they engender a great deal of heat. The chapter deals with this problem, first, with the requirement of genetic testing. Whenever an issue of genetic parentage arises, the court is required to order testing. The draft also limits challenges to parentage by barring challenges to parentage after five years except when the child is the plaintiff.

II. Parentage Not Related to Biology

Changes in law and societal norms have increasingly raised issues of parentage not related to biology. The 2010 Report contained only one specific provision on non-genetic parentage, on sperm or egg donation, tracking a then current provision on sperm donation. This Report takes into consideration parentage where the child is born pursuant to a gestational carrier agreement. It also deals more comprehensively with the rights and obligations of spouses independent of biological parentage.

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 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 identical to N.J.S. 9:17-39 and 9:17-40

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)

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 donation as provided in Section 16; and
- (3) the spouse is a party to an action to deny parentage within 5 years of the child's birth.

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

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.

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

Genetic parentage may be established by:

a. 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

b. 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.

Comment

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

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. by:

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 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.

c. 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.

8 ½. 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 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 parent, any person who has claimed to be the child's 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.

9. 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.

10. Court Determination of Genetic Parentage

A determination of biological 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.

11. 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).

12. 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.

13. 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).

14. 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.

15. 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).

16. Donation of egg or sperm

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

b. Unless the donor of the egg or semen and the parties to a marriage 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 shall be kept confidential and shall not be disclosed without the permission of the donor.

Source: 9:17-44.

COMMENT

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

Table of Dispositions

Section	Disposition	Comment
9:17-38	section 1	
9:17-39	Section 2	
9:17-40	Section 2	
9:17-41	Sections 3, 6, 7, 9, 11, 13	
9:17-42	Section 12	
9:17-43	deleted	anachronistic
9:17-44	Section 16	
9:17-45	Section 8	
9:17-46	deleted	unnecessary
9:17-47	Section 8, 8½	
9:17-48	deleted	unnecessary
9:17-49	Section 8	
9:17-50	deleted	unnecessary
9:17-52	deleted	anachronistic
9:17-53	deleted	see Sections 10, 14(b)
9:17-54	deleted	unnecessary
9:17-55	Section 14	
9:17-56	Section 14	
9:17-57	Section 8	
9:17-58	deleted	unnecessary
9:17-59	Section 15	