

To: New Jersey Law Revision Commission
From: John Cannel
Re: New Jersey Parentage Act
Date: April 11, 2022

MEMORANDUM

Background

In June 2021, the Commission considered a draft of New Jersey's Parentage Act that had been modified in response to comments received from Mary M. McManus-Smith, Esq., Chief Counsel for Family Law and Director of Litigation for Legal Services of New Jersey (LSNJ), who submitted detailed comments pertaining to a number of sections of the Commission's draft Act; and Debra E. Guston, Esq., C.A.E., of Guston & Guston, L.L.P., who provided initial general comments and indicated a willingness to provide additional information moving forward. The information they provided supplemented comments that had previously been received from Professor Solangel Maldonado, Eleanor Bontecou Professor of Law at Seton Hall University School of Law.

After that earlier draft, we were fortunate to receive input from a number of commenters on this project in addition to those mentioned above, including: Jodi Argentino, Esq., Managing Partner, Argentino Fiore Law & Advocacy, LLC; Patience Crozier, Esq., Senior Staff Attorney, GLBTQ Legal Advocates & Defenders; Courtney G. Joslin, Martin Luther King Jr. Professor of Law, University of California, Davis, School of Law; Douglas NeJaime, Anne Urowsky Professor of Law, Yale Law School; and Catherine Sakimura, Esq., Deputy Director & Family Law Director, National Center for Lesbian Rights.

Some of the commenters appeared at the June Commission meeting, some at a Zoom meeting with Commission staff members in September 2021, and some provided written comments response after that September Zoom meeting.

Staff benefited greatly from the input of the commenters, especially the situations they raised, real and hypothetical, that needed to be addressed in the Report. The changes to the proposed draft statutory language were the result of issues raised by these commenters.

The Appendix to this Memorandum reflects these changes and after each statutory section in the draft there is a brief explanation of the changes.

September 2021 Comments

The paragraphs below incorporate, for Commission consideration, sections of the written submission provided in September 2021 by Courtney G. Joslin, Douglas NeJaime, and Catherine Sakimura, who raised a number of points in response to an earlier staff draft. As they explained in

their September 30, 2021 Memorandum to the Commission, the staff draft on which they were commenting

responds to some of the concerns that we previously raised in our Zoom meeting on September 9, 2021 and in the Proposed Changes to the New Jersey Parentage Act and the Follow-Up Materials Regarding Proposed Changes to the New Jersey Parentage Act, both dated August 13, 2021. Most importantly, this draft now provides some means of protecting nonbiological, nonmarital parent-child relationships, which can be profoundly important for children. This draft also expands the assisted reproduction rules to protect some nonmarital intended parents. Thank you for your efforts to address those concerns.

However, in addressing those concerns, this draft creates a number of new ones. Below we identify a few of our overarching concerns about the September 2021 draft.¹

The September comments and Staff responses are set forth below.

Comment:

(1) “Spousal equivalent”

As a way of capturing a range of nonmarital parents, this draft creates a new term—“spousal equivalent.” § 4(b). This new term, one that does not exist in any other state’s parentage laws, creates a number of potential problems.

- It directs focus on the person’s relationship with the birth parent, and away from where the focus should be – on the person’s relationship with the child. By so doing, it will exclude some deeply rooted parent-child relationships.
- It invites fact finding that is unnecessary and will lead to unnecessary litigation. For example, the requirement that the person “agrees to be identified as a parent of the child on the birth certificate of the child” would be very hard to prove. It also not clear whether the person must agree to be identified on the birth certificate and actually meet relevant requirements to be listed on the birth certificate (e.g., an unmarried non-birth parent who signs an acknowledgment). More fundamentally, it is not clear why the person’s agreement to be on the birth certificate should be key in deciding whether the person should be considered a parent of the child.
- The current text does not require any agreement or participation of the parent who gave birth. As a result, a person could be a parent

¹ Memorandum from Courtney G. Joslin, Douglas NeJaime, and Catherine Sakimura, to the New Jersey Law Revision Commission, at 1 (Sept. 30, 2021), (on file with the NJLRC) (hereafter “September 2021 comments”).

under this provision simply by having a unilateral intent to be named as a parent on the birth certificate along with a unilateral intent to live with the child, regardless of whether the person actually does either of these things, and, regardless of whether the birth parent agrees with those intentions.

- More broadly, these rules governing nonmarital parents combine two different parentage rules – (a) rules that provide a means for establishing parentage based on having actually functioned as a parent to a child such that the person has formed a parent-child relationship; and (b) rules that provide a means of establishing parentage of children conceived through assisted reproduction by virtue of mutual consent (along with the birth parent) to that process. Because the rules are based on different conduct, combining them creates a host of problems. One rule is backward looking, based on past conduct, the other is forward looking, holding people accountable for their mutual, deliberate procreative conduct. Because they are fundamentally looking at different conduct and behaviors, the rules should be separate and distinct. That is how they have been handled in every other jurisdiction that has undertaken parentage reform of this kind.²

Staff response:

Staff created the new category of “spousal equivalent” to reach people who are not legally married, but will be functioning as a parent to the child. Many people who are in settled relationships, both same sex and different sex, would have no rights as a result of the relationship without this new category.

Since the draft grants parental rights to the spouse of the birth parent, the addition of some language to address unmarried partners seems important. The definition is a first attempt, and its general direction is intended to include individuals who intent to function as a parent. The commenters’ point concerning consent by the birth parent, could be addressed in redrafting the definition if Commission wishes to give parental rights to those in the position of what the draft refers to as a “spouse equivalent”.

Comment:

(2) Failure to address competing claims of parentage

As family law lawyers know, and the Supreme Court decisions teach, it is not uncommon for family law cases to involve competing claims of parentage – that is situations where two people, in addition to the birth parent, claim to be a child’s parents. *Michael H. v. Gerald D.*, 491 U.S. 110 (1989), is but one such example.

² *Id.* at 1-2.

Currently, New Jersey law provides guidance to courts in such cases. *D.W. v. R.W.*, 212 N.J. 232, 255, 52 A.3d 1043, 1055 (2012) (citing N.J.S.A. 9:17–48). This draft contains no such guidance to courts.

We offer here one simple competing claims fact pattern to illustrate the concern: The child is born when the birth parent is married to A. At the time the child is born, however, the birth parent is estranged from A and is living with B. Birth parent and B intend that B will function as a parent to the child. Under the draft, A is a spouse at the time of birth and therefore a parent. B is a spousal equivalent and therefore a parent. While the draft provides that a child can have three parents, that is only where all parties agree. Assuming that is not the case in this fact pattern, the draft Act does not acknowledge this possibility nor provide guidance to courts as to how to resolve this case.³

Staff response:

The concern expressed by commenters was accurate. There was no explicit provision regarding these disputes. As a result of this comment, subsection 11b. was added. Since these cases are fact specific, no statutory standard for decisions is included.

Comment:

(3) Lack of protection for genetic parents, including genetic parents who have developed parent-child relationships with the child.

Under the current draft, if the birth parent is married at the time of birth, the spouse is a parent unless the spouse denies parentage by the child’s 5th birthday. § 4(a). Where that is the case, unless the genetic parent is a “spousal equivalent,” the genetic parent is completely precluded from being established as the child’s parent, even in situations where the genetic parent has developed an actual parent-child relationship with the child.⁴ § 5(a)(2).⁵

In addition to creating results that may be harmful to the child, such a scheme also raises constitutional concerns in cases where the marriage is not intact and the birth parent’s spouse does not have a relationship with the child. *See, e.g., Lehr v. Robertson*, 463 U.S. 248, 261 (1983) (“When an unwed father demonstrates a full commitment to the responsibilities of parenthood by ‘com[ing] forward to

³ *Id.* at 2.

⁴ To be clear, a person with a bonded, parent-child relationship (including a genetic parent) may not qualify as a “spousal equivalent.” This would be true if the person did not “intend to be named on the child’s birth certificate.” Or if the person did not reside with the child. [footnote in original comment]

⁵ There is a limited exception that would allow the genetic parent to be recognized as a parent in this fact pattern—*where all three parties agree*. § 5(2). [footnote in original comment]

participate in the rearing of his child,' his interest in personal contact with his child acquires substantial protection under the due process clause.”).⁶

Staff response:

The draft language does give a spouse rights that prevail over those of a genetic parent. That was intended to be consistent with comments that suggested that, generally, intentional parentage should be protected. The draft, in Section 4 also limits the rights of spouses.

The second point raised in this comment seems to concern mainly unknown genetic parents who would be entitled to be parents under this Act. A genetic parent, in most cases, has the legal right to be a parent. One commenter said that if the genetic parent is unknown or cannot be found, that may interfere with adoption. The draft does not include a provision of cutting off the rights of all unknown genetic parents, or genetic parents who know of the birth and do not intervene. It may be possible to limit the rights of unknown parents, but constitutional considerations make this a challenging issue. It may also be beyond the scope of this project, and Staff awaits Commission guidance on this issue.

Comment:

(4) Voluntary denial of parentage

The draft allows “any person” to voluntarily deny parentage for any reason under any circumstances. § 7 ½ (“Any person may execute a certificate denying parentage.”).

We identify here just one of the limitless range of people who could voluntarily and unilaterally deny parentage under this provision: a spouse who is a genetic parent. This is deeply troubling. It is inconsistent with the law around the country, which does not allow people to unilaterally walk away from their responsibilities to children. Such a rule could put the state’s child support enforcement funds at risk. See 42 USC § 666(a)(5) (limiting the circumstances under which a party can challenge a voluntary acknowledgement). Perhaps the language suggesting that the denial “shall not be binding on others” is intended to address these concerns about support; but that language is neither clear nor sufficient.⁷

Staff response:

The section providing generally for “Denials of Parentage” has been deleted in response to this concern. The only remaining provision allowing for a denial concerns a spouse.

⁶ September 2021 comments, at 2-3.

⁷ *Id.* at 3.

Comment:

(5) Voluntary Acknowledgments

While we appreciate that this draft expands the acknowledgment process to allow both men and women to utilize the process, we have concerns about the provisions as drafted.

- It is not clear who can establish parentage by this process, and the draft includes no limitations on who can do so. For example, it seems like a person alleging themselves to be a genetic parent of a child born to a married woman, could establish their parentage through this process without regard to whether the woman’s spouse agrees or even knows this has happened, and without regard to how old the child is and whether the spouse has developed a parent-child relationship with the child.
- It is also unclear whether the provision is consistent with the federal requirements for acknowledgments. Most importantly, the draft does not clearly require the birth parent to sign the acknowledgment for it to be valid, something that is required under the federal provisions. 42 USC § 666(a)(5)(D).⁸

Staff response:

A voluntary acknowledgement of parentage is a useful tool to settle matters when there is no dispute. The draft intends to make clear that it does not affect the rights of other parties. Staff does not believe that the draft is inconsistent with federal law, which requires the use of acknowledgements for genetic parents but does not forbid other uses.

Comment:

(6) Assisted reproduction provisions

While we appreciate that this provision has been broadened to cover some nonmarital intended parents, we have a number of concerns about the current text of the provision.

- Some people who are intended parents may be inappropriately considered donors and therefore not parents under the provision. § 17(a). This is the case because the Act declares that anyone who is not a spouse or a spouse equivalent is a donor and not a parent. As a result, a person who provides a gamete with the joint intention (along with the birth parent) of being a parent to the resulting child is by law a nonparent if that person did not “agree to be listed as a parent on the child’s birth certificate.”⁹

⁸ *Id.* at 3.

⁹ *Id.* at 4.

Staff response:

Subsection 17c. was added to address this issue.

Comment:

(7) Information about gamete providers

This draft also attempts to address the anonymity of gamete donors. We have a number of concerns about this provision, one procedural and some substantive.

- The content of § 17(d) relates to the disclosure of information about gamete providers. It is not a parentage rule and, therefore, it should not be addressed in this section which addresses the parentage of children conceived through assisted reproduction. If included in the Act, it should be addressed separately.
- We also have a number of concerns about the substance of rule.
- First, it is unclear who is regulated by this provision and what the consequences of a violation would be. While we can appreciate a desire to ensure that gamete banks keep confidential information that was intended to be confidential, we do not think it would be appropriate for the state to try to regulate, and potentially criminalize, the conduct of the parents or the children themselves.¹⁰
- Second, to the extent the state seeks to regulate information about gamete providers, its approach is inconsistent with the clear national trend. Following developments regarding adoption, the trend today in the context of assisted reproduction is towards permitting and regulating *the disclosure* of information about gamete providers so that children can get access to medical and, if all parties agree, to identifying information about the gamete providers. A number of states, including California, Connecticut, and Washington now have such schemes in place.¹¹

Staff response:

This provision is part of existing law and its deletion might be interpreted as a substantive change.

¹⁰ Some children conceived through assisted reproduction seek to find information about their gamete providers through various sources, including donor sibling registries. If they are successful, they may share that information with others, including other children conceiving using gametes from the same donor.

<https://www.nytimes.com/2019/06/26/magazine/sperm-donor-questions.html>. We would be concerned about an attempt to criminalize or civilly punish this conduct. [footnote in original]

¹¹ *Id.* at 4.

Other Matters Raised by Commenters

Genetic versus intentional parentage

Commenters previously expressed concern that earlier drafts appeared to overweigh genetic parentage, as compared to intentionally formed relationships. That was not its intent. As a result, the provisions concerning court proceedings to determine parentage have been revised to include issues unrelated to genetic parentage. The ability to decide these other issues was assumed in earlier drafts, but now it is stated. These changes emphasize that genetic parentage is only sometimes the relevant issue.

Other drafting changes were made in the interest of recognizing intentional parentage. The most significant is that individuals in the category currently referred to as spouse equivalents are given the same rights to parentage as spouses. The goal was to recognize and protect intentional parentage whether or not the Commission decides to retain the term “spousal equivalent.”

De facto parentage

The sections concerning de facto, or psychological, parentage have been deleted. A commenter suggested that the development of the law through additional court decisions was appropriate at this time.

Project Scope

When this project began, its scope was limited to three issues: (1) modernizing the genetic determination process; (2) broadening the scope of gamete donations; and (3) modernizing what is now a husband-father presumption to reflect case law and broadening marriage to include same-sex marriage.

Other than the question of whether genetics was overweighed, as discussed above, no objections have been raised to modernizing the statutory provisions concerning genetic determination.

No objection has been raised to this time regarding the broadening of the scope of allowable gamete donations. The substantive changes to this section of the statute were intended to reflect current practice.

Difficult issues have resulted from the effort to update the husband-father presumption. That presumption had two bases. The first was factual. The presumption was developed at a time when there was no definitive way to determine paternity, and the most likely father of a child was the husband of the woman who gave birth to the child. Cases have long rejected the suggestion that the presumption was irrebuttable, but it remained as a reasonable inference before genetic testing existed. It no longer serves that purpose.

The second basis for the husband-father presumption was as a device to avoid illegitimacy. Modern social mores undercut that basis, but no one has suggested that the rights of a spouse should be eliminated. The new basis for spousal rights is the intentions of the parties. With same-sex marriage and new options in gamete donation, a spouse can be of any gender. A spouse must be given rights to parentage. Since the extent of those rights is a matter that requires serious consideration, the section on spousal rights may require adjustment.

In the area of spousal rights, commenters raised issues that related to the rights of persons who are not spouses but fill a similar role. In response, Staff broadened the drafting to include the term “spouse equivalents.” Commenters noted that many stable couples, both same-sex couples and different-sex couples, choose not to marry. The “spouse equivalent” language was an attempt to deal with that issue. The issue is important, and the proposed solution involves some substantive changes, but these changes were intended to reflect modern society and values. Staff seeks guidance regarding whether the Commission supports the direction of the drafting.

Appendix – New Draft Statute

Changes to the language of the statutory sections below are shown with underlining and ~~strikeout~~.

Changes that were made after the Commission considered the draft language in June of 2021 are shown with italicized underlining and ~~strikeout~~.

1. Short title

This act shall be known and may be cited as the "New Jersey Parentage Act of 202~~1~~2."

UPDATE COMMENT

No issue has been raised as to this section.

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 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.

b. The parent and child relationship extends equally to every child and to every parent, without regard to the gender or marital status of the parents.

UPDATE COMMENT

No issue has been raised as to this section.

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.).

UPDATE COMMENT

No issue has been raised as to this section.

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 or spouse equivalent of that person is also a parent of the child unless:

(1) the spouse or spouse equivalent is not the genetic parent of the child;

(2) the spouse or spouse equivalent did not acquiesce to sperm or egg donation that produced the birth of the child; and

(3) the spouse or spouse equivalent:

i. is separated from the birth parent at the time of the birth and there is no expectation that that the separation will end;

ii. executes a Certificate of Denial of Parentage or;

iii. is a party to an action to deny parentage within five years of the child's birth.

b. As used in this section:

(1) spouse means a party to a marriage, or civil union or domestic partnership.

(2) spouse equivalent means an individual who agrees to be identified as a parent of the child on the birth certificate of the child and intends to reside in the household with the child and hold out as the parent of the child.

UPDATE COMMENT

“Spouse equivalent” was added in response to commenter concerns for both same-sex and different-sex couples who are in a settled relationship but do not choose to marry. Some commenters raised a concern that no other state had legislation that includes the concept of spouse equivalent.

The possibility of broadening the definition of “spouse” to cover the individuals included in “spouse equivalent,” was briefly considered but rejected because the term, “spouse” is defined in other statutes, and a differing definition here would be confusing.

Some commenters expressed a concern with the content of the definition, suggesting that since the term is spouse equivalent, its requirements should relate to the other spouse, not to the child. Staff’s goal is a basis to determine that the person is in a parental role. If an alternative term is recommended as more effective for this purpose, it should certainly be considered.

A commenter pointed out that a domestic partnership was sufficiently different from a spousal relationship that it should not be included in the definition of “spouse” and the drafting was changed accordingly.

5. Genetic parent

a. A genetic parent is a parent of the child unless:

(1) the genetic parent is a sperm or egg donor as provided in Section 17; or

(2) the person who gave birth to the child is a parent of the child and the spouse or spouse equivalent of that person is a parent of the child as provided in Section 4.

b. Notwithstanding the provisions of subsection a., by agreement of all parents there ~~may~~ will be three parents including the genetic parent. In such a case, the genetic parent is a parent of the child.

UPDATE COMMENT

No issue has been raised as to this section. However, the issue regarding spouse equivalents remains.

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.

UPDATE COMMENT

No issue has been raised as to this section.

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. A signed voluntary acknowledgment of parentage may be filed by any person claiming parentage, whether the basis of parentage is genetic or as the result of law including this Act. A voluntary acknowledgment of parentage is binding to establish parentage unless it is disputed by another inconsistent acknowledgment of parentage, or a legal claim filed in court.

c. If the individual signing the certificate or acknowledgment is a minor, a guardian ad litem shall be appointed ~~by the court~~ to advise the minor ~~in advance of~~ concerning the signing of the certificate or acknowledgement. The certificate or acknowledgement shall not be binding until the child has had an opportunity to consult with the guardian ad litem. The child's parents may not represent the child as guardian or otherwise.

UPDATE COMMENT

Subsection b. is new. At present, voluntary acknowledgments are used to determine genetic parentage. A commenter suggested that they would be an expeditious way to establish parentage for a spouse or spouse equivalent.

Subsection c. has been adjusted to take into account conflicting issues raised by two commenters. One expressed concern that a minor might sign a voluntary acknowledgment without understanding its effect. Staff included the guardian ad litem requirement in response to this concern. A second commenter explained that acknowledgments are normally signed in the hospital, long before a court could appoint a guardian. The attempt to incorporate compromise language was to allow signing immediately, but delay binding effect until the minor has an opportunity to consult with a guardian.

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, including any person who has executed a certificate of parentage, a voluntary acknowledgement of parentage, or a certificate denying parentage;

(2) the child; or

(3) ~~the Division of Child Protection and Permanency~~ the Office of Child Support Services (Title IV-D agency).

~~(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; or

(3) if no parent other than the birth parent was determined or known, the child's 18th birthday.

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.

f. A public agency may not order testing to determine genetic parentage except in the context of a court action to determine genetic parentage.

UPDATE COMMENT

There are three changes in this section. Most important, the section has been broadened to apply to any decision about parentage, not just decisions about genetic parentage. A number of commenters expressed concern with a focus on genetic parentage exclusively, rather than including intentional parentage.

Previous drafts assumed that all disputes about parentage were to be decided by courts, there was no specific provision to that effect. The updated language has the advantage of applying to all parentage actions.

Subsection d.(3) allows determination of a second parent later than the default 5-year limitation. The commenter who made this suggestion explained that there were situations in which genetic parentage was not known at or around the time of birth, but a second parent is known later. This change is a partial solution to cases in which a

genetic parent is not aware of pregnancy and birth and to deny that person the right to claim parentage raises Constitutional issues.

Subsection f. was added to address situations described by a commenter in which an agency orders testing and excludes the person that everyone had assumed was the father from custody.

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~~ may be appointed by the court to represent the child. The child's 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, ~~any other person who claims to be a parent~~, and any person who would be affected by the determination of parentage ~~shall~~ may 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.

UPDATE COMMENT

The changes from "shall" to "may" in subsections a. and b were made in response to commenter suggestions to give the court more discretion.

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.

UPDATE COMMENT

No issue has been raised as to this section.

11. Court Determination of *Genetic* Parentage

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

b. A determination of parentage shall be made by the court based on law including this Act. If this Act would result in a determination that more than one person is a parent in addition to the birth parent, the court shall:

(1) decide who is the parent based on which person is more likely to provide for care and custody of the child; or

(2) with the consent of all parents including the birth parent, order that all shall be parents.

UPDATE COMMENT

This section, like Section 8, has been broadened to include all actions to determine parentage in response to commenters' concerns that earlier drafts were too focused on genetic parentage.

Subsection b. is an attempt to deal with situations raised by a commenter in which both a spouse and a spouse equivalent claim to be parents. This subsection addresses the decision between them and allows both to be parents if all parties agree.

Depending on any determinations made by the Commission with regard to this section, any necessary changes can be made to harmonize the language above with that found in Section 5, which states that three people may be parents – the language above does not include the three-person limit.

12. 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.

UPDATE COMMENT

No issue has been raised as to this section.

13. 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.

UPDATE COMMENT

This section has been broadened to remove references to “genetic” and apply to all parentage decisions. No issue has been raised as to the substance of this section.

14. Terminating or Changing Parentage

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

UPDATE COMMENT

No issue has been raised as to this section.

15. 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~~ may 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.

UPDATE COMMENT

The only change is from “shall” to “may” in subsection b. to expand a court’s discretion.

16. 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.

UPDATE COMMENT

No issue has been raised regarding this section.

17. Donation of egg or sperm

a. Except as provided by subsection c., if pregnancy is achieved with sperm, an egg, or both, donated by persons who are not a spouse *or spouse equivalent* of the donee, the donor shall not be treated in law as a parent of the resulting child and shall have no rights or duties of parentage.

b. If, with the consent of both spouses *or spouse equivalents*, if pregnancy of a spouse is achieved with sperm, an egg or both, donated by persons not parties to the spousal relationship, both spouses shall be the parents of the resulting child irrespective of genetic parentage.

c. If, pregnancy of a spouse is achieved with donated sperm, egg or both, by agreement of the donee, donor, and the donee's spouse *or spouse equivalent*, if any, shall all be the parents of the resulting child.

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

UPDATE COMMENT

The addition of spouse equivalent is new to this draft. The original drafting was intended to address the fact that the existing law refers only to artificial insemination, and broadened to include donations of both eggs and sperm as well as to eliminate the requirement of a physician.

Some commenters thought that subsection d. should be deleted because it was not properly part of parentage law. However, that provision is part of existing law, and its deletion would cause confusion. The existing statutory provision concerning this area, N.J.S. 9:17-44, is titled "Artificial Insemination" and reads as follows:

a. If, under the supervision of a licensed physician, a physician assistant, or an advanced practice nurse, and with the consent of her spouse or partner in a civil union, a woman is inseminated artificially with semen donated by a man not her spouse or partner, the spouse or partner is treated in law as if the spouse or partner were the legal parent of a child thereby conceived. The consent of the spouse or partner shall be in writing and signed by both parties to the marriage or civil union. The physician, physician assistant, or advance practice nurse shall certify their signatures and the date of the insemination, upon forms provided by the Department of Health, and file the consent with the Department of Health, where it shall be kept confidential and in a sealed file. However, the physician's, physician assistant's, or advance practice nurse's failure to do so shall not affect the parent and child relationship of the spouse or partner. All papers and records pertaining to the insemination, whether part of the permanent record of a court or of a file held by the supervising

physician, physician's assistant, or advance practice nurse or elsewhere, are subject to inspection only upon an order of the court for compelling reasons clearly and convincingly shown.

b. Unless the donor of semen and the woman have entered into a written contract to the contrary, the donor of semen provided to a licensed physician, physician assistant, or advance practice nurse for use in artificial insemination of a woman other than the spouse or partner in a civil union is treated in law as if the donor of semen were not the legal parent of a child thereby conceived and shall have no rights or duties stemming from the conception of a child.

c. This section shall not apply in a proceeding to determine parentage of a child 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.).

18. Court Determination of Psychological Parentage

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

~~a. the legal parent has consented to and fostered the relationship between the person and the child;~~

~~b. the person has lived with the child for a significant period of time;~~

~~c. the person has performed parental functions for the child to a significant degree without expectation of financial compensation; and~~

~~d. a parent-child bond has been established between the person and the child.~~

UPDATE COMMENT

A commenter suggested that this provision was more restrictive than existing decisional law on this subject and that the decisional law was sufficient and had the advantage of developing over time.

19. Rights of Psychological Parent

~~A psychological parent stands in parity with the legal parent or parents 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.~~

UPDATE COMMENT

See Comment to Section 18.