

To: New Jersey Law Revision Commission
From: John M. Cannel
Re: New Jersey Parentage Act – Comments Received
Date: June 7, 2021

MEMORANDUM

The Draft Final Report regarding the proposed changes to the New Jersey Parentage Act (Act) was not considered by the Commission in April. It was held to allow time for the submission of comments by Legal Services of New Jersey and members of the New Jersey State Bar Association.

Mary M. McManus-Smith, Esq., Chief Counsel for Family Law and Director of Litigation for Legal Services of New Jersey (LSNJ) submitted detailed comments pertaining to a number of sections of the draft Act.

Debra E. Guston, Esq., C.A.E., of Guston & Guston, L.L.P., was asked to review the Act more recently. As a result, she provided initial general comments and indicated her willingness to provide additional information moving forward.¹

This Memorandum contains the comments received, and Staff's preliminary proposed drafting responses for consideration by the Commission.

Staff anticipates updating its drafting on this project in response to comments and any guidance supplied by the Commission and preparing a Revised Draft Tentative Report for Commission consideration at an upcoming meeting.

The language of the Act included below is taken from the Draft Final Report that was prepared for the Commission's April meeting, and the comments received to this time are shown after each section to which they apply.

Draft Act and Comments Received

Comments submitted, and preliminary drafting done by Staff in response to comments received are shown in this document in italics to distinguish them from proposed changes contained in earlier drafts.

1. Short title

This act shall be known and may be cited as the "New Jersey Parentage Act of 2021."

¹ Ms. Guston is a member of the NJ State Bar's Family Law Section's Family Law Executive Committee, served as its Adoption and Reproductive Rights Sub-Committee Chair, and is a Past President of the Academy of Adoption & Assisted Reproduction Attorneys, a leading international, credentialed organization of family formation attorneys. <https://www.gustonlaw.com/our-team/debra-e-guston/> (last visited June 3, 2021).

COMMENT

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

No comments received on 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.

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.

LSNJ comment: *For subsection b., this seems to have typo “regardless of without regard to.” Also, the reference to “without regard to marital status” suggests that marital status does not have legal significance, which is not accurate. See, Section 4a below.*

Deb Guston comment: *Ms. Guston generally noted her concern, applicable throughout, regarding “language that seeks to ‘clarify’ the Gestational Carrier Agreement Act of 2018. In my view, the law does not need clarification, only assurance that any UPA revisions not alter what has proved to be a workable, clear and successful legislative endeavor.”*

She also provided a general comment, broadly applicable, expressing concerns about “[a] continued over-reliance on genetics and less of an expansion to intentionality in parenting. The 2017 UPA was a great expansion of the concept of intentional parentage.”

Staff response: *The typo was corrected. The concern regarding the legal status of marital status was not clear to Staff. The draft was intended to reduce reliance on genetics and the time limit on parentage actions was designed to prevent late genetic claims.*

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).

No comments received on 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 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, and

(3) the spouse executes a Certificate of Denial of Parentage or 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.

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.

LSNJ comment: The proposed language provides an exception to the spousal presumption where the spouse is not the genetic parent. In practice, this would take away the presumption's applicability to same-sex couples. It says in the comments that it applies regardless of gender – but science says a same-sex partner cannot be the genetic parent (A lesbian spouse can be genetically related to the woman giving birth, in the rare situation where the spouse's fertilized egg is implanted into her wife's womb). This affirmatively takes away legal rights currently in place for children born to same-sex couples in a civil union or marriage.

The proposal also seems to eliminate or conflict with the opportunity to use the Certificate of Parentage and Denial of Parentage process that is currently used to disclaim parentage at the

outset, by requiring litigation to overcome the marital presumption. N.J.A.C. 10:110-12.2 and 12.7(b)2. See also, the NJ Child Support Program Manual

(https://njcsi.org/cspm/Chapter_05_Establishment/06_Methods_of_Establishing_Paternity/Administrative_Paternity_Establishment.htm).

Codifying the COP/DOP process would be helpful in bolstering that process for establishing parentage in accordance with the child's genetic connections without requiring the cost and time of litigation.

Staff response: *A reference to a Certificate of Denial of Parentage has been included in this draft. The numbered paragraphs in subsection a. are joined with an “and” to prevent the effect on same sex spouses, but additional drafting could be done to clarify the intention of this provision if necessary.*

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;

(2) 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

b. Notwithstanding, subsection a., by agreement of all parents including the genetic parent, there may be three parents. The genetic parent is a parent of the child.

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.

Both the American Law Institute and the Uniform Law Commission recognize that a child may have more than two parents. Subsection b. allows the possibility of more than two parents but only with the agreement of all parents.

LSNJ comment: *The language in section b. is insufficiently clear that the intent is that there may be more than two parents. Maybe mentioning egg donor, sperm donor, and/or surrogate in section b would help. Section b seems to be lacking sufficient standards or procedures to implement the “agreement of all parents.” Is there a timeframe on the agreement of all parents (can the married couple and donor agree to add the donor when the child is 12?) Does it need to be recorded somewhere (if the state is not aware of the agreement, it will be hard to exercise rights)? Will that document and its filing result in a birth certificate with 3 parents? Is there a right of rescission, as with the COP, within a specified time period? This could be incorporated into the COP program potentially, but would require more consideration of the impact on that program and whether such*

an adjustment would comport with federal requirements for establishing parentage via affidavit or certification before or shortly after the birth of the child.

Staff response: *Language has been added to clarify that there may be more than two parents, but the added language limits it to three, which may not fully address the commenters' concerns.*

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.

No comments received on 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. 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 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.

COMMENT

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

Subsection b. was added to assure that a minor not 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.

LSNJ comment: NJSA 9:17-41(b) currently says, “In accordance with 42 U.S.C. s.666(a)(5), a signed voluntary acknowledgment of paternity shall be considered a legal finding of paternity,” that is, the COP carries the weight of a court judgment of paternity. The new requirement for a GAL is likely to fully undermine the COP for minor parents, because a COP is typically made available at the hospital or birthing center and executed within 24 hours of birth. Adding a requirement for GAL delays the process and makes it very unlikely to occur. This requires court action, who would file? It may also conflict with the federal requirements for a certificate of parentage program.

Eliminating the COP for minor parents has significant consequences: if the parents split up (which is more likely for minor parents), it becomes significantly harder to secure child support for the child and other parent; the child will have only one parent listed on birth certificate; the child will have significant difficulty securing survivor benefits (and possibly inheritance), or other dependent benefits if the unrecognized parent dies or becomes disabled. Unrecognized parent may have difficulty securing group health insurance for the child.

Unless the purpose of the GAL is to litigate paternity for every child born to one or more minor parents (which would be extremely onerous on the courts and the new parent/s), it may be more effective to establish statutory authority for the provision of legal advice to minor parents at the time the COP is offered by the hospital or birthing center. As someone signing a COP has 60 days to rescind the COP, post execution legal advice might also be effective.

I would think that such legal advice would become a somewhat routine repetition of the rights and responsibilities associated with certifying to parentage and the option to seek genetic testing before signing. Federal law already requires that before signing an acknowledgement of paternity, parents must be given notice of “the alternatives to, the legal consequences of, and the rights including, if 1 parent is a minor, any rights afforded due to minority status) and responsibilities that arise from, signing the acknowledgment.” 42 U.S.C. s.666(a)(5)(C)(i) (parenthetical in the original)

Questioning whether the notice presently provided to parents, particularly minor parents, is certainly a reasonable concern. Appointing a GAL may not be an efficient way to address that concern. Allowing additional time for a minor parent to rescind a COP might be helpful. In accordance with other statutes about minors, providing a right to rescind a COP until the minor parent reaches the age of majority, might sufficiently address some of the inherent vulnerability of minor parents.

Additionally, pursuant to LSNJ’s comments below on DCPD use of DNA testing to terminate parental rights without litigation, LSNJ recommends that a subsection (c) be added to state that “The Parentage Act, including Section 7 applies to all litigation, including actions brought by DCPD. Genetic testing is not needed if parentage is established by methods in subsection (a), unless requested by the parents,” or in the alternative, “DCPD is not authorized to challenge parentage that is established under the Parentage Act.” This could also be established under Section 16 below.

Staff response: *The additional language proposed in response to the comment is only a half step; it would allow execution of certificates in the hospital, but still encourage counselling of minors.*

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; 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.
- 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.

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.

LSNJ concerns: *DCPP should not have an independent right to prove or challenge parentage. Such authority is inconsistent with the statutory purpose of the agency. It does NOT provide a tool to ensure the safety of a child from harm or imminent risk of harm. Such a right is NOT in the current NJS 9:17-45(a). There is presently a serious problem with the OAG on behalf of DCPP seeking paternity testing in DCPP litigation without acknowledging existing consent orders, COPs, or other legal bases for parentage. This is done to lighten the litigation load for Deputies Attorney General. They hope to eliminate litigation against one or more defendant parents by discovering that they are not the genetic parent. DsAG also have expressed fears that a putative father may seek to raise issues of paternity late in the litigation. This is not a lawful reason for seeking a parentage determination under the current statute and case law. In fact, it wreaks havoc on families, causing unnecessary trauma to children.*

LSNJ was contacted by a man who had split with the mother of his kids. They had a child support order in place (which is only permitted if paternity is established – typically by consent). While he was deployed to Iraq or Afghanistan, the mother developed a drug problem. DCPP became involved. When he returned, he was notified of the case (and named as a defendant). DCPP

secured an order for paternity testing (likely in hopes of avoiding the need to litigate against this parent, and despite the child support order being indicative of paternity already being adjudicated, and with none of the justifications required by statute or case law). The DNA testing showed that 2 of the 3 kids were not genetically related to him. DCPD helped the mother get treatment to resolve her substance use issue, and the children were successfully reunited with their mother. But, the family relationships were in shambles because of the revelation (previously unknown to the parents and children) about genetic paternity. As an added problem, the father's child support order for all three children was not changed when the court extinguished his parental rights based on the DNA.

The Department of Health having authority is also NOT in the current statute. The current statute permits DFD to bring a case for parentage because the right to child support is assigned to DFD when a custodial parent and child obtain child support. The vast majority of judgments of parentage are entered as part of child support orders. Most of those are the result of consent of parties.

1) 5 year limit to determine genetic parentage. So, if there is no one listed as a co-parent early on, there is no chance to add a parent after 5 years (unless the child brings a lawsuit)? This is particularly problematic when this provision is coupled with the requirement for judicial appointment of GAL for minor parents (which will effectively eliminate COP for minor parents – so none/exceptionally few will be listed on birth certificate, or otherwise establish parentage).

*2) This is tightly focused on genetics. It throws out the 11 factors the Supreme Court articulated in *D.W. v. R.W.*, 212 N.J. 232 (2012), for courts to consider in deciding whether to order DNA testing. That is, that court recognized that there are many times when the genetics alone should not dictate who is a child's legal parent, largely focusing on the experience of the child and who the child knows to be family.*

In its capacity as the recipient of child support on behalf of children in foster care, DCPD works with the Division of Family Development and county welfare agencies (CWAs) to litigate child support matters. This is effective in that the CWAs have in place the legal professional who litigate child support where recipients of TANF are required to assign their rights to child support to the CWA.

The current statutory scheme authorizes DHS (including the CWAs) to bring actions to establish parentage. That is wholly consistent with their obligation to establish and collect child support on behalf of child recipients of TANF. LSNJ proposes that if there is a need to specify DCPD's authority regarding child support establishment and collection, where the statute authorizes DHS to bring parentage actions, that it add clarifying language, such as "including in pursuit of child support establishment and collection for children in out-of-home placement through DCPD."

Additionally, as mentioned above, the statutory authority for the Department of Human Services to bring an action to establish parentage may be necessary to permit CWAs to establish child support on behalf of TANF recipients.

D. Guston comments: *There needs to be a discussion of the 2017 UPA section on a Putative Father Registry. At present, the means of establishing paternity is burdensome and, basically, prejudicial to fathers who want to parent children who may be placed for adoption by their mothers. I say this as an adoption attorney who finds it almost impossible in NJ to assure adoptive parents that an undisclosed father will never surface and express a desire to parent before an adoption can be finalized.*

Staff Response: *Subsections b.(3) and (4) were modified in response to the comments received, and subsection f. was added.*

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.

Source: 9:17-47.

COMMENT

This section is derived from Section 9:17-47, but that section 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.

LSNJ comments: *a. GAL – the current statute permits the court to appoint a GAL. This proposal requires the court to appoint a GAL. There is no indication that the current GAL practice has been a problem. There may be legitimate reasons for the court to decline to appoint a GAL. The current statute indicates that a non-attorney (state agency) may be named as the GAL. If it is the intent of the drafters to limit the GAL to attorneys-at-law, as this seems to be referencing legal representation, the GAL is probably not the best language. In DCPD cases, the appointed attorney for the child is a law guardian. See, R. 5:8A Appointment of Counsel for Child. Whereas, R. 5:8B and its official comment indicates that a GAL need not be an attorney.*

b. The list of potential parents seems both overbroad and under inclusive. The list includes “any person who would be affected by the determination of parentage.” That is likely in many cases to include all potential heirs of the putative or alleged parent, including most commonly children of the putative or alleged parent. That is not currently required. While potential legal siblings of the

child at issue are permitted at the court's discretion to intervene in such cases, including them as a matter of course seems overly burdensome. If putative or alleged parent or child is currently involved in litigation (such as a tort matter), would the adverse parties in such a matter qualify as a person who would be affected (a newly recognized parent-child relationship could result in additional claims if the child is a plaintiff. If the putative parent is a defendant, a newly recognized parent-child relationship could result in support paid for the child reducing the assets from which a judgment by the parent could be paid). If the putative or alleged parent has no other issue, would this require naming parties of that person's parents, or siblings, or nieces and nephews (depending upon who is the next of kin at the time of litigation)?

The list of potential parties should include not only people who have a claim to parentage based on genetic connection, but people who have a claim to parentage-based facts that give rise to parentage under law, such as the spouse/civil union partner of a known parent at or near the time of birth, or a parent under the NJ Gestational Parent Act.

Staff Response: *The change from "shall" to "may" in subsections a. and b., and the addition of language to subsection b. were in response to comments received.*

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.

No comments received on this section.

11. Court Determination of Genetic Parentage

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.

COMMENT

This section is new.

LSNJ comments: Section 10 appears to remove the need for presentation of evidence prior to DNA testing being mandated by parties. That is, the language indicates that merely filing a complaint, regardless of the level of proffered substantiation or frivolous nature of a complaint, triggers mandatory genetic testing. That leaves all families vulnerable to extremely speculative claims of genetic parentage and demands for DNA testing of parents and children, often minor children. One can imagine harassment via litigation - If a couple with child divorces due to domestic violence, the offending ex-husband could file maybe ten sequential claims that a different man is the genetic father of the child. NJ courts, in the context of grandparent visitation cases, have repeatedly held that a threshold proffer of evidence that if proven would meet the standard to permit the court to order the requested relief is needed to move beyond the initial filing stage of the litigation. *Daniels v. Daniels*, 381 N.J. Super. 286 (App. Div. 2005) (dismissed case where complaint did not allege facts that meet the standard for grandparent visitation) *Wilde v. Wilde*, 341 N.J. Super. 381 (App. Div. 2001) (reversed trial court order mandating a parent to undergo a psychological evaluation to potentially provide evidence in support of grandparents' application for visitation, because the grandparents' pleadings did not allege facts that would justify the remedy)

That is because there are constitutional rights of families to be free of governmental intrusion, including the intrusion of courts permitting third-parties to subject a family to litigation.

It must be recognized, of course, that a domestic relations proceeding in and of itself can constitute state intervention that is so disruptive of the parent-child relationship that the constitutional right of a custodial parent to make certain basic determinations for the child's welfare becomes implicated.

[Troxel v. Granville, supra, 530 U.S. at 101, 120 S.Ct. 2054 (Kennedy, J., dissenting); approved by the plurality, 530 U.S. at 73, 120 S.Ct. 2054.]

The State's (and derivatively, the courts') parens patriae authority to regulate and otherwise intrude on family autonomy cannot be reached by a bald claim unsupported by alleged facts that if proven would support the relief requested. That is, before parents and children can be ordered to participate in genetic testing, a threshold standard should be required. The current NJSA 9:17-41 sets that threshold standard at "a sworn statement by the requesting party: (1) alleging paternity and setting forth the facts establishing a reasonable possibility of the requisite sexual contact between the parties; or (2) denying paternity and setting forth the facts establishing a reasonable possibility of the nonexistence of sexual contact between the parties."

Staff response: *The approach of the draft is to mandate scientific determination of genetic parentage when there is an issue of genetic parentage; the requirement does not apply when non-genetic issues need to be determined.*

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.

COMMENT

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

No comments received on 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.

COMMENT

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

No comments received on this section.

14. 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).

No comments received on 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.

COMMENT

This section is substantively identical to its sources, 9:17-55 and 9:17-56.

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.

LSNJ concern: *Section b. eliminates a few key aspects of the current NJSA 9:17-55. The proposal changes a grant of authority to the court (“the court may order”), to a mandate (“the court shall order). While the current child support practice, from the child support guidelines, is to require that when support is ordered it must be paid through Probation (the Family Support Payment Center), the change is problematic because, as indicated in the paragraph above, the court, in its discretion may, in accordance with other current law (statutory and child support guidelines) decline to order child support, either because the newly established parent is not a non-custodial parent, but has the child living with him or her, or because the guidelines calculation results in no child support (such as where the non-custodial parent is a recipient of Supplemental Security Income (SSI). Also, the proposal removes the language indicating that the ordered payments will be made “for the benefit of the child.” There should be some indication that the court is not granting a judgment in favor of the Family Support Payment Center because of a debt or support*

owed to that Center, but rather the funds should be sent to the Center, but is to be paid to satisfy an obligation to the child.

Staff Response: *“Shall” was changed to “may” in subsection b. in response to comments.*

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.

COMMENT

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

No comments received on 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 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, 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, then the donee, donor, and the donee's spouse, may agree that they all shall be the parents of the resulting child.

d. 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. The requirement of physician involvement has been deleted.

Subsection c. is new; it allows more than two parents with the agreement of all parties.

LSNJ comments: Does sperm donation – stated so broadly open the door to fathers who under current law deny paternity, simply claim to be a sperm donor, and thereby have no obligation to support the child? NJ has long eschewed a parent voluntarily giving up their parental rights unless there is a person stepping up to take their place (typically in adoption situations). This is not true in many states, but NJ public policy has been to hold both parents financially responsible for a child – does this potentially turn that on its head? Isn't that likely to lead to significantly more children living in poverty? This needs more parameters and procedures to detail how parentage is formally recognized by the State[.]

It does not specify that sperm donation is only permitted to married couples. By removing that and the medical involvement, self-help means of sperm donation will be permitted. Procedures are needed to establish that donation of sperm was the intent. Will consent to the donation be needed? Does a person have a right to self-determination about whether their genetic material is used to create life, even if that new life is not legally their child?

Staff response: The LSNJ comment with regard to claims that a person was a sperm donor is correct. That result is an effect of removing the medical requirements contained in the current law. If such a claim is made, it would be a non-genetic issue to be decided.

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.

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. The section was drafted to be consistent with the approach taken by the New Jersey Supreme Court in *V.C. v. M.J.B.*, 163 N.J. 200 (2000).

D. Guston comments: In general, I have serious concerns about the codification of psychological parentage into a very short, narrow definition. The *V.C.* case is now 21 years old with significant judicial exploration of what constitutes a psych parent; the consent needed to form such a relationship (the court has found that only one parent need consent to the formation if a de facto parent relationship), etc. The way the statute has been drafted would eliminate such status for

many, many children and psych parents and strip judicial consideration of the best interest of children when evaluating these relationships.

Staff response: *D. Guston's comment will require further study.*

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.

COMMENT

This section is new, see Comment to Section 18.

No comments received on this section.