UNIFORM LAW CONFERENCE OF CANADA

CIVIL LAW SECTION

A JOINT PROJECT OF THE UNIFORM LAW CONFERENCE OF CANADA AND THE FEDERAL/PROVINCIAL/TERRITORIAL COORDINATING COMMITTEE OF SENIOR OFFICIALS ON FAMILY JUSTICE

UNIFORM CHILD STATUS ACT

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Halifax, Nova Scotia
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INTRODUCTION

[1] Advances in reproduction technology, available both in Canada and abroad to those seeking to have children, have resulted in increasing instances of legal uncertainty for parents and their children. Although some provinces have addressed some of these issues in their legislation (Quebec's *Civil Code* and Alberta's *Family Law Act*), existing provincial and territorial parentage legislation does not uniformly deal with assisted reproduction. This has left couples and individuals wishing to be legal parents of a child to file court challenges, asking judges to make decisions in a policy vacuum. This situation may allow the law to develop in an inconsistent *ad hoc* way. From the child's perspective, inconsistency in child status rights may arguably be inherently unconstitutional, since birth registration is a foundation document from which citizenship and the right to participate in society flows. As well, the legislative gap results in inequities for children born through assisted reproduction and their families.

[2] The purpose of the new Uniform Act is to modernize and replace the *Uniform Child Status Act*, adopted in 1992, to provide basic rules for the determination of parentage for all children, whether conceived with or without the use of assisted reproduction.

Background:

[3] In 2007, Federal/Provincial/Territorial Ministers and Deputy Ministers Responsible for Justice approved the principles and policy approach proposed by the Coordinating Committee of Senior Officials on Family Justice (CCSO) and directed that a joint working group be formed with the Uniform Law Conference of Canada (ULCC). The current members of the working group are: Elizabeth Strange, David Nurse, Holly Nason, Eric Boucher, Lisa Hitch, Jill Dempster, Ruth Fast, Miranda Gass-Donnelly and Rita Simka. Betty Ann Pottruff, Q.C., John Booth, Hoori Hamboyan and Janis Cooper are former members. The working group began its review of the existing uniform legislation in the fall of 2007, and provided the ULCC with an interim report in 2008 and a more detailed report and proposed approach in 2009. The ULCC then directed the working group to prepare a Uniform Act and commentaries for consideration at the ULCC's 2010 meeting.

[4] Representatives of the working group consulted with representatives from the Federal/Provincial/Territorial Vital Statistics Council and from Assisted Human Reproduction Canada in June 2008; with representatives from AHR Canada, from the Fertility and Andrology Society, and from the Society of Obstetricians and Gynaecologists of Canada in February 2009; with representatives from the Canadian Bar Association having expertise in family law, wills and estates, and concerns of gay and lesbian couples in February/March/April 2009; and with legal academics in March 2009.

Guiding Principles:

[5] The potential indicators for parentage are the act of birth, genetics and intention to parent. The current law of parentage in most common law jurisdictions is based on biological presumptions. Parentage begins with the act of birth: the birth mother is the legal parent of the child, and a man who shares a conjugal relationship with the birth mother is presumed to be the

father. This approach to parentage does not always work well in the assisted reproduction context. The result is to exclude some persons who have started families using assisted reproduction from acquiring automatic parental status by operation of law on the birth of a child.

[6] The challenge in developing a scheme for determining parentage that includes assisted reproduction is to balance the potential indicators of parentage in a way that best reflects the guiding principles referred to in paragraph 7 below. The approach reflected in the new *Uniform Child Status Act* is: to recognize the birth mother link, to equalize the natural and assisted reproduction models so that the two processes are treated the same as much as possible, and to consider the intentions of those who wish to parent. A court process remains for persons who are left out of the determination of parentage at birth but who seek to be named as parents after birth.

[7] The Federal/Provincial/Territorial Ministers and Deputy Ministers Responsible for Justice approved the following principles used by the working group to guide the work of the group in preparing the Uniform Act, and to explain and to help assess the options for reform:

1. respect Canada's obligations under the *UN Convention on the Rights of the Child*, including:
    - recognizing the best interests of the child as a primary consideration
    - protecting the child from discrimination
    - ensuring the status of the parent-child relationship is protected from birth;

2. promote equality of treatment of children regardless of the means of their conception;

3. avoid the commodification of children and reproductive abilities;

4. recognize that women and men perform distinct roles in reproduction, which may merit distinct treatment for the woman who gives birth;

5. recognize that, while generally a child has a maximum of two legal parents, there are specific limited situations where it is appropriate to recognize additional legal parents; and

6. promote clarity and certainty of parent-child status at the earliest possible time in the child's life.

[8] It is important in this discussion not to confuse the issues of parental status and parenting roles/responsibilities. Provincial and territorial family laws recognize that persons who are not parents may have responsibilities or roles for children based on their relationship to the child and in the child's best interests. Even where a person is not recognized as a legal parent, that person may still be found to have some parenting role in the life of the child in terms of a person of sufficient interest under custody and access regimes or as a person *in loco parentis*, as is the case, for example, with a step-parent.

Other legislation that may be affected:

[9] While the mandate of the working group did not include other areas of law that might be affected by these changes to clarify parentage, other areas of law that may require review and adjustment as a consequence include – human tissue acts, to ensure that they are consistent with the *Assisted Human Reproduction Act* (Canada); intestate succession acts and dependants' relief legislation, to ensure the equal entitlement of children born through assisted reproduction, and as appropriate, the inclusion of children born posthumously; and legislation on wills and estates, to address issues of due diligence regarding the testator's intention with respect to children born posthumously. Jurisdictions will need to carefully review all of their statutes that touch on children and family entitlements.

[10] The 1992 *Uniform Child Status Act* contains some provisions dealing with records and registration under vital statistics legislation. Those provisions are not included in the new *Uniform Child Status Act*. Although there is substantial interplay between parentage or child status legislation and vital statistics legislation (that requires and permits the administrative act of registration of parentage), the two are discrete areas of law (child status is a legal status and registration is a reflection of that status). A review of the *Uniform Vital Statistics Act* is recommended.

UNIFORM CHILD STATUS ACT

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Definitions

1 In this Act,

"assisted reproduction" means a method of conceiving other than by sexual intercourse; (*procréation assistée*)

"birth mother" means a person who gives birth to a child; (*mère naturelle*)

["common-law partnership" means the relationship between two persons who are cohabiting in a conjugal relationship of some permanence; (*union de fait*)]

"court" means (*reference to court of enacting jurisdiction*); (*cour*)

"embryo" means an embryo as defined in the *Assisted Human Reproduction Act* (Canada); (*embryon*)

"human reproductive material" means human reproductive material as defined in the *Assisted Human Reproduction Act* (Canada); (*matériel reproductif humain*)

"surrogate" means a person who gives birth to a child as a result of assisted reproduction if, at the time of the child's conception, she intended to relinquish that child to

- **(a) the person whose human reproductive material was used in the assisted reproduction or whose human reproductive material was used to create the embryo used in the assisted reproduction, or**
- **(b) the person referred to in (a) and the person married to or in a common-law partnership with that person. (*mère porteuse*)**

Comment: The purpose of the new Uniform Act is to modernize and replace the 1992 *Uniform Child Status Act* in order to provide basic rules for determining the parentage of all children. These rules provide the same level of legal certainty for parents and children regardless of the method of conception. Where "conception" is referred to in matters of timing, it is intended to refer to *in utero* conception, meaning the implantation in the case of an embryo. Jurisdictions may wish to enact the provisions of this Uniform Act as an amendment to their family law statutes, rather than as a separate Act.

The continued use of presumptions based on the "birth mother" and the person with whom she is in a conjugal relationship at the relevant time, build on the history of parentage determination in the common law.

The term "common-law partnership" is used to extend the presumptions that were historically marriage-based to committed unmarried couples. The term is square bracketed as each jurisdiction would employ the terminology used in that jurisdiction.

The definitions for "embryo" and "human reproductive material" reference the *Assisted Human Reproduction Act* (Canada). The use of these cross-references will ensure that the definitions, and applicable parentage rules in the Uniform Act, continue to encompass all of the possibilities for assisted reproduction permitted in the federal Act.

The definition of "surrogate" includes only a person who intends at the time of conception to relinquish parentage after birth to the person who has provided his or her own genetic material for the purpose of conception, or to the person who has provided his or her own genetic material for the purpose of conception and that person's spouse or common-law partner.

Application and interpretation

2(1) Subject to subsection (2), this Act applies to an enactment made before, on or after the commencement of this Act and to an instrument made on or after the commencement of this Act.

(2) This Act shall not be construed to affect the following:

- **(a) an instrument made before the commencement of this Act; and**
- **(b) a disposition of property made before the commencement of this Act.**

(3) In an enactment or an instrument, a reference to a person or a group or class of persons described in terms of relationship to another person by blood or marriage includes a person who comes within that description by reason of the parent-child relationship as determined under this Act.

(4) In an enactment or an instrument, a reference to a person or a group or class of persons described in terms of relationship to another person by blood or marriage does not include the following persons:

- **(a) a person who has donated human reproductive material or an embryo for use in assisted reproduction if**
  - **(i) that person is not presumed under this Act to be a parent of the child born as a result, or**
  - **(ii) that person has not been declared under this Act to be a parent of the child born as a result; and**
- **(b) a person related by blood or marriage to a person referred to in clause (a).**

(5) For the purposes of this Act,

- **(a) if two persons go through a form of marriage and at least one of them does so in good faith and they cohabit and the marriage is void, they are deemed to be married during the period of cohabitation, and the marriage is deemed to be terminated when the period of cohabitation ends, and**
- **(b) if a voidable marriage is decreed a nullity, the persons who went through the form of marriage are deemed to be married until the date of the decree of nullity.**

(6) For the purposes of this Act, if a child is born as a result of assisted reproduction, the child's conception is deemed to have occurred at the time the procedure that resulted in the conception was performed.

Comment: This section contains interpretive statements to be used in applying parentage determinations made under the Uniform Act to other enactments and instruments.

Subsection (4) clarifies that an individual who has donated human reproductive material or an embryo, for the reproductive use of another person or couple, will not be considered a relative by blood of the child if he or she is not otherwise presumed or declared a parent under this Act.

Subsection (6) clarifies that the time of conception is deemed to be the time of the medical procedure that resulted in the conception. This primarily relates to requirements in the Act with regard to who is in a conjugal relationship with the birth mother at the time of the child's conception for the application of certain presumptions of parentage and with regard to the timing of consent to parent.

Rules of parentage

3(1) For all purposes of the law of (*enacting jurisdiction*) a person is the child of his or her parents.

(2) The following persons are the parents of a child:

(a) his or her birth mother;

(b) his or her birth mother and

(i) the person presumed under section 4 to be the father,

(ii) the person presumed under section 5 to be a parent,

(iii) a person declared by a court to be a parent under section 6,

(iv) a person declared by a court to be a parent under subsection 7(3), or

(v) a person referred to in subclause (ii) and a person declared by a court to be a parent under section 9;

(c) a person declared by a court under subsection 7(4), section 8 or 18 to be a parent;

(d) a person recognized as a parent under section 13 or 16; or

(e) a person specified as a parent in an adoption order granted or recognized under the *(reference to adoption legislation in enacting jurisdiction*) Act.

(3) Kindred relationships shall be determined according to the relationships described in this section.

(4) Any distinction between the status of a child born inside marriage and a child born outside marriage is abolished.

Comment: This section is the centerpiece of the Act, setting out the basic rules that apply to determine parentage in all of the situations that are described in the sections that follow. It explains who is a parent and the responsibilities of a parent (i.e. subsection (1) provides that these persons are parents for all purposes of the law within that jurisdiction, including inheritance, support, etc.).

Subsection (2) establishes a list of the persons who are the parents of a child. The birth mother is the child's legal mother at the time of birth. This applies whether or not the child is conceived using the birth mother's egg or a donor's egg. This provides stability for the child and treats natural and assisted reproduction in the same manner. It complies with the requirement in Article 7(1) of the UN Convention on the Rights of the Child that a child has a right to a name, nationality and to know his or her parents from birth. This is also consistent with the treatment of mothers both historically in the common law and in the civil law, and under existing Vital Statistics legislation.

There are two presumptions set out in sections 4 and 5. If someone does not fall within the presumptions, or if there are conflicting presumptions identifying more than one person, then the individual may apply to the court for a declaration of parentage (under one of sections 6 to 9).

The following are the combinations of parents that may exist under the rules in subsection (2):

- The birth mother may be the sole parent of the child;
- Where assisted reproduction was not used, the birth mother and the person presumed to be the father (i.e. the husband or common-law partner of the birth mother at the relevant time set out in section 4);
- Where assisted reproduction was used, the birth mother and the person presumed to be the parent (i.e. under section 5, the spouse or common-law partner of the birth mother at the time of conception, who consented to be a parent of the child);
- The birth mother and a person declared by a court to be a parent under section 6 - generally someone in a situation of conflicting presumptions, or someone potentially rebutting a presumption;
- The birth mother and a deceased person declared by a court to be a parent because that person provided the human reproductive material or embryo used in assisted reproduction, or a person declared by a court to be a parent in the case of posthumous conception involving a surrogate (further requirements are detailed in the comment under section 7);
- The birth mother, a parent under section, 5, and a person declared by a court to be a parent under section 9 (explained further in the comment under section 9);
- A person declared by a court to be a parent in a surrogacy situation (under section 8);
- A person named as a parent in a recognized extra-provincial declaratory order, whether made in Canada (section 13) or outside Canada (section 16);
- A person declared by a court to be a parent who is listed as a parent on a birth certificate issued outside Canada, but who would not meet the presumptions in this Act (under section 18);
- A person specified as a parent in an adoption order.

Subsection (3) extends the determination of kinship relationships on the basis of parentage to relationships arising through assisted reproduction.

Presumption of parentage - no assisted reproduction

4(1) Unless the contrary is proven, a male person is presumed to be the father of a child and is recognized in law to be a parent of a child in any of the following circumstances:

(a) he was married to the birth mother at the time of the child's birth;

(b) he was married to the birth mother by a marriage that, within 300 days before the birth of the child, or a longer period if the court allows, ended by

(i) death,

(ii) judgment of nullity,

(iii) judgment of divorce, or

(iv) ceasing to cohabit, in the case of a void marriage;

(c) he married the birth mother after the child's birth and acknowledges that he is the father;

(d) he was in a common-law partnership with the birth mother at the time of the child's birth;

(e) he was in a common-law partnership with the birth mother that ended for any reason within 300 days, or a longer period if the court allows, before the birth of the child; or

(f) he and the birth mother have acknowledged that he is the father of the child by filing an acknowledgment under (*reference to Vital Statistics Act of enacting jurisdiction*).

(2) If circumstances exist that give rise to conflicting presumptions as to the identity of the father, there is no presumption that a person is the father.

(3) Subsection (1) does not apply if a child was born as a result of assisted reproduction.

Comment: This section states the well-established rebuttable presumptions that apply to determine who is the father of the child, where assisted reproduction is not used, based on his conjugal relationship with the birth mother at the relevant time. The relevant presumption in subsection (1) is applied to determine who is the child's father, unless the contrary is proven on a balance of probabilities. The presumptions are similar for both married and common-law couples, flowing either from the fact that the father was in a conjugal relationship with the birth mother at the time of conception; that he acknowledges that he is the father (alone in the case of a marriage after the birth, or with the birth mother in the case where there is no marriage or common-law relationship); or that he was in a conjugal relationship with the birth mother that ended within 300 days prior to the birth. The 300 day period represents a reasonable maximum gestational period (i.e. 10 months of 30 days), but can be further lengthened by a court.

Subsection (2) provides that, where more than one person could qualify as the father under different presumptions, no presumption will apply.

Presumption of parentage - assisted reproduction

5(1) A person is presumed to be and is recognized in law to be a parent of a child born as a result of assisted reproduction, if the person

(a) was married to or in a common-law partnership with the birth mother at the time of the child's conception, and

(b) consented to be a parent of a child born as a result of assisted reproduction and did not withdraw that consent prior to the child's conception.

(2) Unless the contrary is proven, a person is presumed to have consented to be a parent of a child born as a result of assisted reproduction if the person was married to the birth mother or was in a common-law partnership with the birth mother at the time of the child's conception.

(3) Despite subsections (1) and (2), a person who was married to or in a common-law partnership with a surrogate at the time of a child's conception is not presumed to be nor is recognized in law to be a parent of the child born as a result of assisted reproduction.

Comment: This section creates a parallel set of rebuttable presumptions that apply in situations involving assisted reproduction. Here, however, the basis for the presumption is not the assumption of a genetic connection flowing from the existence of a conjugal relationship, but rather the intention to be a parent of a child born as a result of assisted reproduction. The determination of parentage flows from the person's conjugal relationship with the birth mother at the relevant time. This presumption applies whether or not there is a genetic link between the birth mother or the other parent and the child. This approach provides stability for the child and equal treatment of children regardless of the method of their conception.

However, unlike the presumptions in situations where assisted reproduction is not used, here the other parent must have consented to be a parent of the child at the time of conception (although under subsection (2) that consent is presumed to flow from the relationship, unless the contrary is proven on a balance of probabilities), and so that person must have been in a conjugal relationship with the birth mother at that time. Any person who enters into a conjugal relationship with the birth mother after conception and wishes to be a legal parent would have to apply for a step-parent adoption. Since the child is conceived using assisted reproduction, proof of lack of a genetic link between the presumed parent and the child will not rebut the presumption of parentage. In order to rebut the presumption, the presumed parent will have to prove on the balance of probabilities that he or she did not consent, or prior to conception withdrew consent, to be the child's parent. This approach is similar to the law in Quebec (*Civil Code*, S.Q. 1991, c. 64, arts. 538-42) and in some Australian states.

Unlike the presumption in section 4 [presumption of parentage – no assisted reproduction], the other parent may be either a male spouse or common-law partner or a female spouse or common-law partner of the birth mother.

Subsection (3) adds the limitation that the presumption does not apply to the spouse or common-law partner of a surrogate.

Declaratory order respecting parentage - general

6(1) Any person having an interest may apply to the court for a declaratory order that a person is or is not a parent of a child.

(2) If the court finds that a person is or is not a parent of a child, the court may make a declaratory order to that effect.

(3) If the court finds that a deceased person is or is not a parent of a child conceived before that person's death, the court may make a declaratory order to that effect.

(4) In making a declaratory order under this section, the court shall give effect to any applicable presumption set out in section 4 or 5.

(5) The court may consider the following evidence in making a declaratory order under this section:

(a) evidence respecting the genetic paternity of a child if the child was not born as a result of assisted reproduction; and

(b) evidence respecting the consent required under clause 5(1)(b) if the child was born as a result of assisted reproduction.

(6) A person who donates human reproductive material or an embryo for use in assisted reproduction is not, by reason only of the donation, a parent of a child born as a result and may not, by reason only of the donation, be declared under this section to be a parent of the child.

(7) Subsection (6) does not apply to a person who provides his or her own human reproductive material or an embryo created with his or her own human reproductive material for use in assisted reproduction for his or her own reproductive use.

(8) An application may not be made under this section if

(a) the child has been adopted, or

(b) the declaratory order sought shall result in the child having more than two parents.

Comment: This section is the general declaration section. Subsection (1) provides that anyone having an interest may apply for a declaration that a person is or is not a parent.

Although the section is quite broad, there are two stated exceptions: under subsection (8), an application may not be made if the child has been adopted, or the order sought is that a child has more than two parents. Note that the latter exception does not negate the possibility of a declaration under section 9 that a child has more than two parents. Jurisdictions may choose to further limit the scope of the general declaration section, for example, to situations where there is a genetic link between the child and at least one of the persons declared to be a parent.

Subsections (6) and (7) clarify that, in all cases, third party donors of human reproductive material or embryos may not be declared parents unless their donation was for their own reproductive use. This is based on the fact that, generally, a third party donor does not intend to be the child's parent. The clarification of the role of donor is important to remove any barrier to altruistic donation and also to give certainty to the donor, the child and the "parents" as to the status and responsibilities of the donor at law. A donor can, of course, always voluntarily provide benefits to the child. This is consistent with the legal effect of surrogacy, as discussed in more detail in the comments for section 8.

Declaratory order respecting parentage - posthumous conception

7(1) The following persons may apply to the court for a declaratory order that a deceased person is a parent of a posthumously conceived child:

- **(a) the person who was married to or in a common-law partnership with the deceased person at the time of his or her death; or**
- **(b) the person who is claiming to be the posthumously conceived child of the deceased person.**

(2) A person referred to in clause (1)(a) may apply for a declaratory order that he or she and a deceased person are the parents of a posthumously conceived child born to a surrogate.

(3) The court may grant the order sought under subsection (1) if it is satisfied that

- **(a) the human reproductive material of the deceased person or an embryo created with the human reproductive material of the deceased person was used in the assisted reproduction, and**
- **(b) prior to his or her death, the deceased person consented in writing to be recognized as a parent of a child conceived posthumously and did not withdraw that consent in writing.**

(4) The court may grant the order sought under subsection (2) if it is satisfied that

- **(a) the human reproductive material of the deceased person or an embryo created with the human reproductive material of the deceased person was used in the assisted reproduction,**
- **(b) prior to his or her death, the deceased person consented in writing to be recognized as a parent of a child conceived posthumously and did not withdraw that consent in writing,**
- **(c) the applicant consented to be a parent of a child born as a result of the assisted reproduction and did not withdraw that consent prior to the child's conception, and**
- **(d) after the birth of the child, the surrogate consented in the prescribed form**
  - **(i) to relinquish her entitlement to be a parent of the child, and**
  - **(ii) to the application.**

(5) Subsections 8(6) to (8) and (11) and (12) apply with the necessary modifications to an application made under subsection (2).

(6) Subsections 8(9) and (10) apply with the necessary modifications to an order granted under subsection (4).

Comment: Unlike subsection 6(3), which deals with posthumous declarations of parentage for children conceived prior to that death of that parent, this section provides for situations in which a child is posthumously conceived. The *Assisted Human Reproduction Act* (Canada) provides for specific situations in which a surviving spouse or common-law partner may use stored human reproductive material of their deceased spouse or partner for their own reproductive use, and it

appears that frozen embryos created from the human reproductive material of spouses or common-law partners may also be used after the death of one spouse or common-law partner. Subsections (3) and (4) are consistent with that Act, with the requirement for consent to parent in the provisions dealing with assisted reproduction in section 5 [presumption of parentage - assisted reproduction] and with subsection 6(5) [declaratory order respecting parentage – general].

A key component in subsections (3) and (4) is that the deceased individual must have consented in writing to be recognized as a parent of a child conceived posthumously, and must not have withdrawn the consent. Under subsection (1), an application for a declaration can be made only by the spouse or common-law partner of the deceased, or, except where the child is born as a result of surrogacy (see section 8 below), by the posthumously conceived child.

Declaratory order respecting parentage - surrogacy

8(1) In this section, a reference to the provision of human reproductive material or of an embryo by a person is a reference to the provision of

(a) the person's own human reproductive material, or

(b) an embryo created with the person's own human reproductive material.

(2) The following applications for a declaratory order respecting the parentage of a child born to a surrogate may be made under this section:

(a) two persons may apply jointly for an order that they are the parents of the child;

(b) one person may apply for an order that he or she and another person are the parents of the child; or

(c) one person may apply for an order that he or she is the parent of the child.

(3) The court shall grant the order sought under clause (2)(a) if it is satisfied that

(a) the child was born as a result of assisted reproduction,

(b) at least one of the applicants provided the human reproductive material or the embryo used in the assisted reproduction,

(c) an applicant who did not provide the human reproductive material or the embryo used in the assisted reproduction was married to or in a common-law partnership with the applicant referred to in clause (b) at the time of the child's conception,

(d) the applicants consented to be the parents of a child born as a result of the assisted reproduction and did not withdraw that consent prior to the child's conception, and

(e) after the birth of the child, the surrogate consented in the prescribed form

(i) to relinquish her entitlement to be a parent of the child, and

(ii) to the application.

(4) The court shall grant the order sought under clause (2)(b) if it is satisfied that

(a) the child was born as a result of assisted reproduction,

(b) the applicant, the other person for which the order is sought or both of them provided the human reproductive material or the embryo used in the assisted reproduction,

(c) the person who did not provide the human reproductive material or the embryo used in the assisted reproduction was married to or in a common-law partnership with the person who provided the human reproductive material or embryo at the time of the child's conception,

(d) the applicant and the other person both consented to be the parents of a child born as a result of the assisted reproduction and did not withdraw that consent prior to the child's conception, and

(e) after the birth of the child, the surrogate consented in the prescribed form

(i) to relinquish her entitlement to be a parent of the child, and

(ii) to the application.

(5) The court shall grant the order sought under clause (2)(c) if it is satisfied that

(a) the child was born as a result of assisted reproduction,

(b) the applicant

(i) provided the human reproductive material or embryo used in the assisted reproduction, or

(ii) was married to or in a common-law partnership with the person referred to in subclause (i) at the time of the child's conception,

(c) the applicant consented to be a parent of a child born as a result of the assisted reproduction and did not withdraw that consent prior to the child's conception, and

(d) after the birth of the child, the surrogate consented in the prescribed form

(i) to relinquish her entitlement to be a parent of the child, and

(ii) to the application.

(6) An application under this section may not be commenced later than 30 days after the date of the birth of the child, unless the court finds that it is reasonable in the circumstances to extend the period.

(7) Notice of an application shall be served on the following persons in accordance with the (*reference to civil procedure rules of jurisdiction*):

(a) the surrogate;

(b) with respect to an application under clause (2)(b), the other person named in the application; and

(c) with respect to an application under clause (2)(c), if applicable, the person not making the application who

(i) provided the human reproductive material or embryo used in the assisted reproduction, or

(ii) was married to or in a common-law partnership with the person referred to in subclause (i) at the time of the conception of the child.

(8) From the time a surrogate gives the required consent until an order is made under this section, the surrogate and an applicant jointly have the rights and responsibilities of a parent in respect of the child.

(9) When an order is made under this section,
- **(a) the child is the child of the parents specified in the order and the parents specified in the order are the parents of the child, and**
- **(b) the child ceases to be the child of the surrogate and the surrogate ceases to be a parent of the child.**

(10) An order made under this section is deemed to be effective from the time of the birth of the child.

(11) An agreement in which a surrogate arranges to relinquish a child conceived for that purpose
- **(a) is unenforceable,**
- **(b) may not be used as evidence of consent for the purposes of clauses (3)(e), (4)(e) or (5)(d), and**
- **(c) may be used as evidence of consent for the purposes of clause (3)(d), (4)(d) or (5)(c).**

(12) The court may waive the consent required in clause (3)(e), (4)(e) or (5)(d) in the following circumstances:
- **(a) the surrogate is deceased;**
- **(b) the surrogate is incapable of giving consent; or**
- **(c) the surrogate cannot be located after reasonable efforts have been made to locate her.**

Comment: This section establishes specific requirements for declaratory orders in surrogacy situations. One of the "intended parents" must have provided the human reproductive material or embryo used, including where mixed sperm was used. Where there is no possible genetic link between at least one of the intended parents and the child, adoption is the appropriate path to parenthood. Jurisdictions may want to review their adoption legislation to ensure that it covers the situation where a child is born through the use of a donated embryo or a donated egg and sperm, and through the use of a surrogate. Alternatively, a court may make a declaration of parentage.

Again, intention to be a parent forms the cornerstone of the section, as it does in section 5 [presumption of parentage - assisted reproduction] and in section 7 – [declaratory order respecting parentage - posthumous conception]. Here, consent is required by all parties to the surrogacy arrangement (i.e. the person who provided the human reproductive material or embryo, the spouse or partner of that person, and the surrogate). The intended parents' consent is required before conception. The surrogate's consent to relinquish her parentage is required after the child's birth. This is consistent with the principle that the birth mother is always the legal mother of the child at the time of the birth. It allows for legal certainty immediately following the birth, so that there is a legal parent who can provide consent to medical treatment for the child

before court declarations can issue with regard to the intended parents, and for the possibility that the surrogate may change her mind following the establishment of a gestational link to the child that has resulted in an emotional attachment between the birth mother and the child.

Subsections (3), (4) and (5) limit applications to the person who provided the human reproductive material or embryo, and his or her spouse or common-law partner at the time of conception. Applications can be brought jointly when a couple want to be declared parents (clause (2)(a)), by an individual when he or she wants to be declared a parent (clause(2)(c)), or when he or she wants to be declared a parent along with his or her former spouse or common-law partner (clause(2)(b)). Clause(2)(b) is intended to cover situations in which the couple's relationship breaks down after conception, but before the birth of the child, and one or both members of the former couple no longer wish to file a joint application. In a similar manner to situations not involving assisted reproduction, both individuals could be declared parents, gaining legal responsibilities for the child (e.g. for supporting the child).

Subsection (6) provides that the application must be commenced within 30 days of the birth. This time limit was chosen to give the intended parents sufficient time to make arrangements, and the birth mother adequate time to make a decision regarding consent to relinquish her parentage, while encouraging certainty of the parent-child status as close as possible to the child's birth. The court can extend the time frame, if necessary.

In order to balance the rights of all of the parties, under subsection (8) the surrogate and the intended parents jointly have the rights and responsibilities of a parent from the time the surrogate consents to relinquish her parentage after the child's birth until the declaratory order is made. Subsection (10) clarifies that once the order is made, it is deemed effective from the time of the birth, and subsection (9) clarifies that the surrogate ceases to be the parent at that time.

Subsection (11) clarifies that surrogacy agreements are unenforceable. It is not consistent with public policy or with the court's overarching *parens patriae* responsibilities to allow surrogacy contracts to be enforceable. Note *Jane Doe v. Alberta*, (2007), 278 D.L.R. (4^{th}) 1, which references the inability of an agreement between the parties to bind the hands of the court. However, an agreement may be used as evidence to prove that the intended parents consented to be parents and did not withdraw consent prior to the conception. Agreements cannot be used as evidence of consent of the surrogate to relinquish her parentage.

Finally, subsection (12) provides the court with the ability to waive consent in specific circumstances where the surrogate is unable to give consent.

While it was initially contemplated that jurisdictions could decide whether court oversight or an administrative process was needed for parentage of intended parents, the Uniform Act requires a court declaration to ensure certainty of process. However, jurisdictions may wish to choose to allow the transfer of parentage to occur administratively through a registration process rather than require a court application.

An option considered and rejected would have expanded this section to cover surrogacy without a genetic link between either of the intended parents and the child. The concern is that this

approach could circumvent the public policy around adoption and create an inconsistent approach to protecting the best interests of the child. While it could be argued that this approach can be distinguished from adoption based on the presence of the intent to parent prior to conception, this seems a narrow distinction.

Declaratory order respecting parentage - additional parent

9(1) In this section, a reference to the provision of human reproductive material or of an embryo by a person is a reference to the provision of

- **(a) the person's own human reproductive material, or**
- **(b) an embryo created with the person's own human reproductive material.**

(2) The following persons may apply to the court for a declaratory order that a person is an additional parent of a child born as a result of assisted reproduction:

- **(a) the child's birth mother;**
- **(b) if applicable, the person presumed under subsection 5(1) to be a parent of the child; or**
- **(c) any person for whom an order is sought.**

(3) An application may only be made under this section if the persons referred to in subsection (2) consented to have the person for whom an order is sought declared an additional parent of a child born as a result of the assisted reproduction and did not withdraw that consent prior to the child's conception.

(4) Notice of an application under this section shall be served on the persons referred to in subsection (2).

(5) The court may grant the order sought in subsection (2) if it is satisfied that the person for whom the order is sought consented to be the parent of a child born as a result of the assisted reproduction and did not withdraw that consent prior to the child's conception, and

- **(a) provided the human reproductive material or the embryo used in the assisted reproduction, or**
- **(b) was married to or in a common-law partnership with the person referred to in clause (a) at the time of the child's conception.**

(6) An application under this section may not be commenced later than 30 days after the date of the birth of the child, unless the court finds that it is reasonable in the circumstances to extend the period.

(7) When an order is made under this section, the child is the child of the parent specified in the order in addition to the persons referred to in clauses (2)(a) and (b).

(8) An order made under this section is deemed to be effective from the time of the birth of the child.

Comment: Generally a child will have a maximum of two parents. However, section 9 sets out specific circumstances in which a child born through assisted reproduction may have more than two parents. There must be an agreement prior to conception among the prospective birth mother, her spouse or common-law partner and another person(s) who intend(s) to provide their human reproductive material or an embryo, with or without that person's spouse or common-law partner. The agreement must set out their intention that the donor(s), and their spouses or common-law partners, if applicable, will be a parent along with the birth mother and her spouse or common-law partner. Then, if, within 30 days after the child's birth, the parties apply for a declaratory order that the donor (and the donor's spouse or common-law partner, if applicable) is also a parent of the child, a court may make a declaration of parentage based on the agreement.

Again, the cornerstone here is the intention to be a parent. The principle concern in these cases is to provide certainty and clarity (1) in the best interests of the child, (2) for the potential parents, (3) for the donor in terms of parentage, and (4) regarding legal responsibilities and status in dealing with estates, benefits, support, etc.

The proposed approach is similar to recommendations by both the New Zealand Law Commission and the Victorian Law Reform Commission, and to the decision in the Ontario case of *A.(A.)* v. *B.(B.)*, 2007 ONCA 2.

In theory, under this provision, a child could have a maximum of six parents - the birth mother, her spouse or common-law partner, the two donors who agreed prior to conception to be parents of the child (where the resulting embryo is carried by the birth mother), and the spouses or common-law partners of the donors. However, in most instances, it will result in a maximum of three parents – the birth mother, her spouse or common-law partner, and the donor who all agreed prior to conception to be the child's parents.

Blood, DNA and other tests

10(1) On the application of a party to a proceeding under this Act, the court may give the party leave

- **(a) to obtain a blood test, a DNA test or any other test the court considers appropriate of a person named by the court, and**
- **(b) to submit the results in evidence.**

(2) No order under subsection (1) authorizes taking a blood sample or other biological sample or conducting a test on the sample without the consent of the person in respect of whom the test is to be obtained.

(3) If a person named by the court in an order under subsection (1) is not capable of giving the consent referred to in subsection (2) because of age or incapacity, the person having charge of the person may give consent.

(4) If a person named by the court refuses to submit to a blood test, a DNA test or another test ordered by the court, the court may draw any inference it considers appropriate.

Comment: This section is drafted broadly to allow for any test that may be relevant in establishing parentage of a child. Subsection (2) clarifies that consent of the individual is still required, even with the court order, although subsection (4) allows a court to draw an adverse inference where an individual refuses a test ordered by the court.

Effect of new evidence on declaratory order

11(1) If a declaratory order has been made or an application has been dismissed under section 6, 7, 8, 9 or 18 of the Act and evidence that was not available at the previous hearing becomes available, on application, the court may confirm or set aside the order or make a new declaratory order.

(2) An application shall not be made under this section unless

(a) the court grants leave, and

(b) the person making the application would have been eligible to make the previous application.

(3) If an order is set aside under subsection (1), the following are not affected:

(a) rights and duties which have been exercised and observed; and

(b) interests in property which have been distributed as a result of the order before its discharge.

Comment: This section allows the court to consider new evidence when a court has previously made a declaratory order or dismissed an application for a declaration.

Definition of "extra-provincial declaratory order"

12 In sections 13 to 17, "extra-provincial declaratory order" means an order similar to a declaratory order provided for in section 6, 7, 8 and 9 made by a court outside (*enacting jurisdiction*).

Comment: This section clarifies that the term "extra-provincial declaratory order", applies to both orders from another jurisdiction in Canada and to foreign orders, where they are similar to what a court would have the jurisdiction to order under the rules in this Act. Note that the broad wording of section 6 would mean that virtually no foreign order would be excluded.

Recognition of orders made in Canada

13 An extra-provincial declaratory order that was made in Canada shall be recognized and have the same effect as if made in (*enacting jurisdiction*).

Comment: This section mandates the recognition of extra-provincial declaratory orders made in Canada.

Exceptions - orders made in Canada

14 A court may decline to recognize an extra-provincial declaratory order that was made in Canada and may make a declaratory order under this Act if

- **(a) new evidence becomes available that was not available at the proceeding at which the extra-provincial declaratory order was made, or**
- **(b) the court is satisfied that the extra-provincial declaratory order was obtained by fraud or duress.**

Application to children born outside Canada

15 Sections 16 to 18 apply with respect only to children who were born outside Canada.

Comment: This section clarifies that the sections on recognition of foreign birth certificates and parentage orders apply only where children were born outside of Canada, to avoid forum shopping.

Recognition of orders made outside Canada

16 An extra-provincial declaratory order that was made outside Canada shall be recognized and have the same effect as if made in (*enacting jurisdiction*) if

- **(a) the child or at least one parent was habitually resident in the jurisdiction of the court making the order at the time the proceeding was commenced or the order was made, or**
- **(b) the child or at least one parent had a real and substantial connection with the jurisdiction of the court making the order at the time the proceeding was commenced or the order was made.**

Comment: This section mandates the recognition of extra-provincial declaratory orders made outside Canada if the court making the order has jurisdiction over the child or at least one of the parents. This provision is intentionally broad to allow for the recognition of foreign declaratory orders except in the circumstances set out in section 17 below.

Exceptions - orders made outside Canada

17 A court may decline to recognize an extra-provincial declaratory order that was made outside Canada and may make a declaratory order under this Act if

- **(a) new evidence becomes available that was not available at the proceeding at which the extra-provincial declaratory order was made,**
- **(b) the court is satisfied that the extra-provincial declaratory order was obtained by fraud or duress, or**
- **(c) the extra-provincial declaratory order is contrary to public policy.**

Comment: This section provides the same limited exceptions to the mandatory recognition of extra-provincial declaratory orders made outside Canada in section 16 as are made in section 14 with regard to section 13. The section adds one new exception – that the order is contrary to public policy – which is intended as a safeguard to allow a court to refuse to recognize a foreign order that might go so far beyond the rules proposed in this Act as to be contrary to public policy in the enacting jurisdiction. One example might be where an order is granted that makes a person a parent who has no genetic or gestational relationship to the child, and there was no evidence of intent to parent prior to the child's conception or birth.

Declaratory order respecting parentage - birth certificates issued outside Canada

18(1) The persons listed as the parents of a child on a birth certificate issued by a jurisdiction outside Canada who would not be presumed to be the parents of that child under this Act may apply to the court for a declaratory order that they are the parents of that child.

(2) The court may make an order sought under subsection (1) if the child would otherwise have no parents.

(3) The court may consider a birth certificate issued by a jurisdiction outside Canada as evidence for the purpose of making an order under this section.

Comment: This section allows a court to regularize the parentage of a child born to Canadian citizens or residents in a country where parentage has been recognized under the applicable law in circumstances where it would not be under this Act. For example, where a child is born through surrogacy in some jurisdictions, the child will be considered the child of the intended parents from the time of the birth, even where there is no genetic link.

Repeal of *Uniform Child Status Act*

19 The *Uniform Child Status Act* of 1992 is repealed.

Comment: This section repeals the existing *Uniform Child Status Act* being replaced by the new Uniform Act.