



UNIFORM LAW CONFERENCE OF CANADA

**AMENDMENT TO THE
UNIFORM CHILD STATUS ACT (2010)
REGARDING THE COMMENTARY TO SECTION 8
(2016 Amendment)**

**As adopted - August, 2016
Amends *Uniform Child Status Act (2010)***

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For more information, please contact
info@ulcc-chlc.ca

Amendment to the *Uniform Child Status Act* (2010)
Regarding the commentary to section 8 (2016 Amendment)

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**

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- (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).

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(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. While the Uniform Act requires that ~~One~~ of the “intended parents” must have provided the human reproductive material or embryo used, including where mixed sperm was used – i.e. that there must be an actual or potential genetic link between at least one of the “intended parents” and the child – jurisdictions may wish to consider excluding this requirement. It was initially contemplated that, ~~Where~~ there is no possible genetic link between at least one of the intended parents and the child, adoption is the more appropriate path to parenthood to retain a consistent approach to protecting the best interests of the child. However, given that the intent to parent of the “intended parents” must exist prior to conception, this situation is arguably closer to that of “natural parents” than that of adoption. Jurisdictions may want Jurisdictions that choose the Uniform Act approach will need ~~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, jurisdictions may choose to legislatively align the situation of “intended parents” with no actual or potential genetic link to the child to that included in this section by leaving out paragraphs (3)(b) and (c), (4)(b) and (c), and (5)(b) here. ~~a court may make a declaration of parentage.~~

Again, intention to 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 or alternatively, the intended parent(s) 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. As above, jurisdictions may choose to exclude this limitation.

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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 individual 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. (4th) 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.~~