MICROFILM DIVIDER

OMB/RECORDS MANAGEMENT DIVISION
SFN 2053 (2/85) 5M

ROLL NUMBER

DESCRIPTION

1121

2005 HOUSE JUDICIARY

HB 1121

2005 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1121

House Judiciary Committee

❑ Conference Committee

Hearing Date 1/17/05

Tape Number	Side A	Side B	Meter #
1	xx		1.1-33.3

Committee Clerk Signature A Penrose

Minutes: 14 members present.

Chairman DeKrey: We will open the hearing on HB 1121.

Gail Hagerty, District Court Judge & Uniform Law Commissioner: (see written testimony).

Chairman DeKrey: Thank you.

Representative Koppelman: I appreciate you walking us through this bill. The substantive changes you touched on a few things, it looks like section 14-18, that deals with surrogate agreements being void in ND. Does this change that.

Gail Hagerty: I don't think so. There was a surrogate agreement portion of this bill that we did not incorporate, and I don't know why that is. This does not attempt to deal with the issue of surrogate parents.

Representative Koppelman: But that section that does deal with surrogate agreements is repealed. It is included up in the repealer in the beginning of the bill, and so if you repeal it and don't replace it with something, what happens.

Gail Hagerty: I wish Jay Buringrud was here.

Chairman DeKrey: Thank you. Further testimony in support of HB 1121.

James Fleming, Dep. Director, General Counsel of State Child Support Enforcement Division of the Dept. of Human Services: (see written testimony and proposed amendments).

Chairman DeKrey: I will appoint a subcommittee, Rep. Kretschmar, Klemin and Delmore.

Representative Charging: In regards to the point you brought up regarding the jurisdictional problems with the reservations. How many cases have you experienced.

James Fleming: I don't have a case number for you. So far we've been lucky that there's only been maybe a dozen or so that have been set aside. In the one case where we were ordered to return money, we had not collected any, which is not uncommon. It is was not a problem for us to say, there is no money to return. It has not been a big volume issue at this point. It's possible that you might have three or four federal tax intercepts, which is one of the few remedies available to us without jurisdiction over the member. If we've got 5 or 6 refunds intercepted, you can have a $6,000-7,000 tab that is being asked to be refunded.

Representative Charging: How difficult are the tribal courts to deal with.

James Fleming: I don't know, our program could not tell you that, because we have been working with the regional offices, our program works through 8 regional offices at the county level. We are still trying to get them to get admitted into Tribal Court and practice there more often, because we recognize that certain cases have to be brought in Tribal Court. So far, there's

a disagreement between the region's perspective and the tribe's perspective on how they're working and how they're not. From what we've heard from the Tribal judges, it sounds relatively easy and it's something that our program should be doing; but to date, I can tell you that we're not doing much of it. We are making progress, I believe three of our regional offices that serve reservations, have just now for the first time, gotten their attorneys authorized to do cases in Tribal Court, which we hope will alleviate a lot of these problems.

Representative Charging: So it may not be as big of a problem as you stated, but it has the potential to be.

James Fleming: I think that is a fair statement. We're hoping it never becomes a problem at all; but we do know of one case that we took to the Supreme Court on a paternity issue, where we still feel we had good jurisdiction and in that appeal, the attorney for the tribal dad asked for money back and the Supreme Court didn't say he wasn't entitled to it, they said you are bringing the wrong action to get money back. To my knowledge, that claim has never been submitted, but there was real money collected on that case. If they do so, we are going to have a challenge about trying to avoid handing money back to someone we know is genetically a parent and legally responsible and someone who's children have not been supported and therefore have received a lot of public assistance. The taxpayers have a real issue there. To hand money back and then go to Tribal Court to get the money back from that person, seems like it's not good operations.

Representative Koppelman: We see these Uniform Form law commission acts that come before us from time to time, and sometimes you really need to adopt this as it is, if you start amending it, you defeat the purpose of it being uniform. I understand from your department's

perspective how important it is to have uniformity when it comes to, for example, collecting child support - state to state, etc. I know there isn't uniformity out there and it causes problems. You've got a lot of amendments that you are recommending and they certainly seem reasonable, some because of federal requirements, but what is your thought on adopting Uniform measures, if we amend them substantially. Is that a problem.

James Fleming: It is a potential problem if it were done recklessly, or without sensitivity to the magnitude of the change. Each state is required to give each other full faith and credit to their acknowledgments. So all the changes we are making to the ND acknowledgment, will not disturb the overall uniformity. If we thought the effectiveness of this as a Uniform Act, was eliminated because of our amendments, we wouldn't offer the amendments because we do support the idea of uniformity. We also support the volume of this bill that is the guidance on what you are supposed to do. There is a wonderful provision in this act that says that if you have a presumed father, before that presumed father can seek to overturn his paternity through genetic tests, the court needs to authorize those tests.

Chairman DeKrey: Thank you. Further testimony in support. Testimony in opposition. We will close the hearing. We will have the subcommittee work on this.

2005 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1121

House Judiciary Committee

❑ Conference Committee

Hearing Date 2/2/05

Tape Number	Side A	Side B	Meter #
3	xx		38.9-48

Committee Clerk Signature dlPenrose

Minutes: 13 members present, 1 member absent (Rep. Maragos).

Chairman DeKrey: What are the committee's wishes in regard to HB 1121.

Representative Kretschmar: Explained the Kretschmar amendments. I move the amendments.

Representative Klemin: Seconded.

Chairman DeKrey: Motion carried.

Representative Delmore: I move a Do Pass as amended.

Representative Boehning: Seconded.

12 YES 1 NO 1 ABSENT DO PASS AS AMENDED CARRIER: Rep. Kretschmar

2005 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1121

House Judiciary Committee

❑ Conference Committee

Hearing Date 2/7/05

Tape Number	Side A	Side B	Meter #
1		xx	38-42.8
2	xx		1.8-7.8

Committee Clerk Signature Dawn Penrose

Minutes: 13 members present, 1 member absent (Rep. Maragos).

Chairman DeKrey: We had to bring HB 1121 back from the floor. HB 1121 was with the Uniform Child Act, Representative Kretschmar you wanted a further amendment.

Lori Fossum, Intern: In talking to Mr. Flemmer about this, I was just wondering about a typographical change, and he asked about the amendment to 1121. He said that if the SS#'s and the birth certificate requirements that were in the proposed amendment he gave us first, if they weren't included it would be a deal breaker for federal funding. If you would like him to come down and speak to you, he would do that.

Representative Kretschmar: I thought we had the SS#'s in there.

Representative Delmore: I thought it was on the amendments.

Chairman DeKrey: We'll let Representative Kretschmar mull this over and take it up later this afternoon. The first thing we have to do is bring it back to reconsider it. We'll let Representative Kretschmar take a look and see if we want to reconsider it or not because there

was a disagreement with Mr. Flemmer, on exactly what we wanted to do. If this is just a second bite of the apple for him, we'll just send it back to the floor. We'll let Representative Kretschmar think about that and decide exactly what we want to do. We'll recess it for now. (Reopened in the afternoon session).

Chairman DeKrey: What are the committee's wishes in regard to HB 1121.

Representative Kretschmar: Explained the 1/28/05 amendments.

Representative Kretschmar: I make a motion to reconsider HB 1121.

Representative Meyer: Seconded.

Chairman DeKrey: Motion carried.

Representative Kretschmar: I move the amendments of 1/28/05.

Representative Kingsbury: Seconded.

Chairman DeKrey: Motion carried.

Mr. Flemmer: This bill was brought before an Interim Committee where Sen. Nelson expressed her concerns with the existing provision that you mentioned is still in the law. Legislative committee council has been advised of that twice, and has read the law and believes that is covered. I gave Sen. Nelson the bill number so she could look at it herself and I suspect that if it doesn't do the job, Sen. Nelson will bring that to their attention on the Senate side.

Representative Koppelman: I got an e-mail since we talked before from the ND Catholic Conference, they asked the same question about HB 1418, the repealer on in-vitro fertilization. Was that addressed at all.

Representative Kretschmar: I believe there are provisions in the new law.

Mr. Flemmer: This was an issue that wasn't of primary importance to the department, the child support program. Committee counsel and I had a few long distance phone calls over the holidays, when she was putting the bill together. I believe that she has spot checked the new law to see that even if it doesn't use the same language, it accomplishes the same objective as current law. I do not believe that any substantive change has been intended. I can't speak for counsel on that, as we were not spot checking with that particular question in mind.

Representative Kretschmar: I move a Do Pass as amended.

Representative Delmore: Seconded.

13 YES 0 NO 1 ABSENT DO PASS AS AMENDED CARRIER: Rep. Kretschmar

Prepared by the North Dakota
Department of Human Services
1/17/05

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1121

Page 1, line 1, after "enact" insert "a new section to chapter 14-09 and"

Page 1, line 2, after the first "to" insert "termination of parental rights and"

Page 1, line 3, remove "and" and after "14-15-11" insert ", and subsection 5 of section 23-02.1-13"

Page 1, after line 21, insert:

"**SECTION 2.** A new section to chapter 14-09 of the North Dakota Century Code is created and enacted as follows:

Termination of parental rights – Duty of Support. A termination of parental rights does not terminate the duty of either parent to support the child before the child's adoption unless that duty is specifically terminated by order of the court after notice of a proposed termination or relinquishment is given to the department of human services in the manner appropriate for the service of process in a civil action in this state. A termination of a child support obligation under this section does not relieve a parent of the duty to pay any unpaid child support."

Page 4, line 2, after "district" insert "court"

Page 7, remove lines 29 and 30

Page 8, line 9, replace "or otherwise authenticated, under penalty of perjury" with "before a witness,"

Page 8, line 21, replace "two years" with "one year"

Page 8, line 24, replace "or otherwise authenticated" with "before a witness"

Page 8, line 29, remove "or otherwise authenticate"

Page 9, line 3, replace ", or otherwise authenticated," with "before a witness"

Page 9, line 5, replace ",or otherwise authenticated, under penalty of perjury" with "before a witness"

Page 9, after line 23, insert:

"5. An acknowledgment of paternity or denial of paternity can be completed for a child who was not born in this state."

Page 9, line 28, after "parent" insert ", and must be recognized as a basis for a support order in any proceeding to establish, enforce, or modify a support order"

Page 10, line 6, replace "commencing a proceeding to rescind" with "a notarized writing filed with the state department of health"

Page 10, line 18, replace "two years" with "one year"

Page 10, line 22, remove "**rescission or**"

Page 10, line 24, remove "rescind or"

Page 10, line 26, remove "rescission of, or" and remove the second comma

Page 10, line 30, remove "rescind or"

Page 11, line 3, remove "rescind or to"

Page 11, line 6, remove "rescind or"

Page 11, line 19, after period insert "The forms must be approved by the state department of human services and must include the social security numbers of the signatories and any other information required by the secretary of the United States department of health and human services."

Page 11, line 22, replace "The" with "Upon request, the" and replace "may" with "shall"

Page 11, line 25, after "state" insert ", including the state department of human services and other states' support enforcement agencies"

Page 15, line 6, remove the third "to"

Page 17, line 13, replace "may be maintained at any time if" with "must be commenced not later than two years after the birth of the child unless"

Page 17, after line 18, insert:

"3. If an action to establish support for a child is commenced against the child's presumed father, the presumed father may not raise nonpaternity as a defense unless the action is commenced not later than two years after the birth of the child."

Page 17, line 20, after "father" insert ", to disprove the father-child relationship between a child and the child's presumed father,"

Page 18, line 1, remove "to adjudicate parentage"

Page 18, line 29, remove "to rescind the"

Page 18, line 30, remove "acknowledgment or denial or"

Page 18, line 31, remove "14-20-17 or"

Page 20, line 25, after "court" insert ", the court"

Page 22, after line 23, insert:

"3. The order must include the social security numbers of the child and the individuals determined to be the child's parents.

4. The order may contain any other provision in the best interest of the child, including payment of support, payment of expenses of the mother's pregnancy and confinement, custody of the child, visitation with the child, and furnishing of bond or other security for payment of support. A support order must be for a monthly payment in an amount consistent with the guidelines established under section 14-09-09.7 and must be subject to section 14-09-08.1. All remedies for the enforcement of support, custody, and visitation orders apply. The court has continuing jurisdiction to modify an order for future support and, subject to section 14-09-09.6, custody of and visitation with the child."

Page 22, line 24, replace "3." with "5." and replace "4" with "6"

Page 22, line 30, replace "4." with "6."

Page 23, line 1, replace "5." with "7."

Page 23, line 4, replace "6." with "8."

Page 23, after line 4, insert:

"9. An order adjudicating parentage must be filed with the state department of health."

Page 23, line 26, after "support" insert "custody of the child, or visitation with the child"

Page 24, after line 2, insert:

"**14-20-58.1. Liability for collection of support.**

1. As used in this section, "former parent" means an acknowledged father who successfully rescinded or challenged an acknowledgment of paternity under this chapter, a presumed father whose parentage was successfully rebutted under this chapter, or an adjudicated father whose parentage was disestablished after an order issued under this chapter was vacated.

2. The state is not liable for child support that was collected from or on behalf of a former parent and disbursed to an obligee as defined in section 14-09-09.10.

3. The state is not liable for child support that was collected from or on behalf of a former parent and retained by the state unless ordered by a court after being presented with genetic test results that would otherwise be admissible under this chapter showing that the former parent is not the genetic parent of the child."

Page 25, after line 25, insert:

"**SECTION 7. AMENDMENT.** Subsection 5 of section 23-02.1-13 of the North Dakota Century Code is amended and reenacted as follows:

5. If the child is not born during the marriage of the mother, or within three hundred days after a marriage is terminated by death, annulment, declaration of invalidity, or divorce, or after a decree of separation is entered by a court, the name of the father may not be entered on the birth certificate unless:

   a. After the child's birth, the father and the child's natural mother have married, or attempted to marry, each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and:

      (1) He has acknowledged his paternity of the child in writing filed with the state registrar;

      (2) With his consent, he is named as the child's father on the child's birth certificate; or

      (3) He is obligated to support the child under a written voluntary promise or by court order;

   b. While the child is under the age of majority, he received the child into his home and openly holds out the child as his natural child;

   ~~c.~~ After the child's birth, the child's natural mother and the father voluntarily acknowledge the child's paternity in a writing signed by both and filed with the state registrar; or

~~d.~~ c. A court or other entity of competent jurisdiction has adjudicated paternity."

Renumber accordingly

Prepared by the North Dakota
Department of Human Services
1/17/05
Reviewed and amended by the House Judiciary subcommittee
1/24/05

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1121

Page 1, line 1, after "enact" insert "a new section to chapter 14-09 and"

Page 1, line 2, after the first "to" insert "termination of parental rights and"

Page 1, after line 21, insert:

"**SECTION 2.** A new section to chapter 14-09 of the North Dakota Century Code is created and enacted as follows:

Termination of parental rights – Duty of Support. A termination of parental rights does not terminate the duty of either parent to support the child before the child's adoption unless that duty is specifically terminated by order of the court after notice of a proposed termination or relinquishment is given to the department of human services in the manner appropriate for the service of process in a civil action in this state. A termination of a child support obligation under this section does not relieve a parent of the duty to pay any unpaid child support."

Page 4, line 2, after "district" insert "court"

Page 8, line 21, replace "two years" with "one year"

Page 9, after line 23, insert:

"5. An acknowledgment of paternity or denial of paternity can be completed for a child who was not born in this state."

Page 9, line 28, after "parent" insert ", and must be recognized as a basis for a support order in any proceeding to establish, enforce, or modify a support order"

Page 10, line 18, replace "two years" with "one year"

Page 15, line 6, remove the third "to"

Page 20, line 25, after "court" insert ", the court"

Page 22, after line 23, insert:

"3. The order must include the social security numbers of the child and the individuals determined to be the child's parents.

4. The order may contain any other provision in the best interest of the child, including payment of support, payment of expenses of the mother's pregnancy and confinement, custody of the child, visitation with the child, and furnishing of bond or other security for payment of support. A support order must be for a monthly payment in an amount consistent with the guidelines established under section 14-09-09.7 and must be subject to section 14-09-08.1. All remedies for the enforcement of support, custody, and visitation orders apply. The court has continuing jurisdiction to modify an order for future support and, subject to section 14-09-09.6, custody of and visitation with the child."

Page 22, line 24, replace "3." with "5." and replace "4" with "6"

Page 22, line 30, replace "4." with "6."

Page 23, line 1, replace "5." with "7."

Page 23, line 4, replace "6." with "8."

Page 23, after line 4, insert:

"9. An order adjudicating parentage must be filed with the state department of health."

Page 23, line 26, after "support" insert "custody of the child, or visitation with the child"

Page 24, after line 2, insert:

"14-20-58.1. Liability for collection of support.

1. As used in this section, "former parent" means an acknowledged father who successfully rescinded or challenged an acknowledgment of paternity under this chapter, a presumed father whose parentage was successfully rebutted under this chapter, or an adjudicated father whose parentage was disestablished after an order issued under this chapter was vacated.

2. The state is not liable for child support that was collected from or on behalf of a former parent and disbursed to an obligee as defined in section 14-09-09.10.

3. The state is not liable for child support that was collected from or on behalf of a former parent and retained by the state unless ordered by a court after being presented with genetic test results that would otherwise be admissible under this chapter showing that the former parent is not the genetic parent of the child."

Renumber accordingly

Prepared by the North Dakota
Department of Human Services
1/28/05

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1121

Page 1, line 3, remove "and" and after "14-15-11" insert ", section 14-19-05, and subsection 5 of section 23-02.1-13"

Page 1, line 5, remove "14-19-05,"

Page 3, after line 8 insert:

"**SECTION 5. AMENDMENT.** Section 14-19-05 of the North Dakota Century Code is amended and reenacted as follows:

14-19-05. Filing of acknowledgment. An acknowledgment of paternity ~~made~~ under ~~this~~ chapter 14-20 must be filed with the state department of health on a form approved by the department, which must include the social security number of the parents and any other information required by the secretary of the United States department of health and human services. Upon request of the department, the state department of health shall furnish a certified copy of an acknowledgment of paternity to the department."

Page 17, after line 18, insert:

"3. An action to establish support for a child is a proceeding to adjudicate parentage for purposes of this section and section 14-20-43 if the child's presumed father raises nonpaternity as a defense to the action."

Page 25, after line 22, insert:

"**SECTION 7. AMENDMENT.** Subsection 5 of section 23-02.1-13 of the North Dakota Century Code is amended and reenacted as follows:

5. If the child is not born during the marriage of the mother, or within three hundred days after a marriage is terminated by death, annulment, declaration of invalidity, or divorce, or after a decree of separation is entered by a court, the name of the father may not be entered on the birth certificate unless:

   a. After the child's birth, the father and the child's natural mother have married, or attempted to marry, each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and:

(1) He has acknowledged his paternity of the child in writing filed with the state registrar;

(2) With his consent, he is named as the child's father on the child's birth certificate; or

(3) He is obligated to support the child under a written voluntary promise or by court order;

b. While the child is under the age of majority, he received the child into his home and openly holds out the child as his natural child;

~~e.~~ After the child's birth, the child's natural mother and the father voluntarily acknowledge the child's paternity in a writing signed by both and filed with the state registrar; or

~~d.~~ c. A court or other entity of competent jurisdiction has adjudicated paternity."

Page 25, line 24, remove "14-19-05,"

Renumber accordingly

Date: 2/2/05
Roll Call Vote #: 1

2005 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1121

HOUSE JUDICIARY COMMITTEE

☐ Check here for Conference Committee

Legislative Council Amendment Number

Action Taken Do Pass as Amended

Motion Made By Rep. Delmore Seconded By Rep. Boehning

Representatives	Yes	No	Representatives	Yes	No
Chairman DeKrey	✓		Representative Delmore	✓	
Representative Maragos	A		Representative Meyer	✓	
Representative Bernstein	✓		Representative Onstad	✓	
Representative Boehning	✓		Representative Zaiser	✓	
Representative Charging		✓			
Representative Galvin	✓				
Representative Kingsbury	✓				
Representative Klemin	✓				
Representative Koppelman	✓				
Representative Kretschmar	✓				

Total (Yes) 12 No 1

Absent 1

Floor Assignment Rep. Kretschmar

If the vote is on an amendment, briefly indicate intent:

House Amendments to HB 1121 - Judiciary Committee 02/09/2005

Page 1, line 1, after "enact" insert "a new section to chapter 14-09 and"

Page 1, line 2, after the first "to" insert "the termination of parental rights and"

Page 1, line 3, remove "and" and after "14-15-11" insert ", section 14-19-05, and subsection 5 of section 23-02.1-13"

Page 1, line 5, remove "14-19-05,"

Page 1, after line 21, insert:

"**SECTION 2.** A new section to chapter 14-09 of the North Dakota Century Code is created and enacted as follows:

Termination of parental rights - Duty of support. A termination of parental rights does not terminate the duty of either parent to support the child before the child's adoption unless that duty is specially terminated by order of the court after notice of a proposed termination or relinquishment is given to the department of human services in the manner appropriate for the service of process in a civil action in this state. A termination of a child support obligation under this section does not relieve a parent of the duty to pay any unpaid child support."

House Amendments to HB 1121 - Judiciary Committee 02/09/2005

Page 3, after line 8, insert:

"**SECTION 5. AMENDMENT.** Section 14-19-05 of the North Dakota Century Code is amended and reenacted as follows:

14-19-05. Filing of acknowledgment. An acknowledgment of paternity made under ~~this~~ chapter 14-20 must be filed with the state department of health on a form approved by the department, which must include the social security number of the parents and any other information required by the secretary of the United States department of health and human services. Upon request of the department, the state department of health shall furnish a certified copy of an acknowledgment of paternity to the department."

House Amendments to HB 1121 - Judiciary Committee 02/09/2005

Page 4, line 2, after "district" insert "court"

House Amendments to HB 1121 - Judiciary Committee 02/09/2005

Page 8, line 21, replace "two years" with "one year"

House Amendments to HB 1121 - Judiciary Committee 02/09/2005

Page 9, after line 23, insert:

"5. An acknowledgment of paternity or denial of paternity may be completed for a child who was not born in this state."

Page 9, line 28, after "parent" insert "and must be recognized as a basis for a support order in any proceeding to establish, enforce, or modify a support order"

House Amendments to HB 1121 - Judiciary Committee 02/09/2005

Page 10, line 18, replace "two years" with "one year"

House Amendments to HB 1121 - Judiciary Committee 02/09/2005

Page 15, line 6, remove the third "to"

House Amendments to HB 1121 - Judiciary Committee 02/09/2005

Page 17, after line 18, insert:

"3. For purposes of this section and section 14-20-43, an action to establish support for a child is a proceeding to adjudicate parentage if the child's presumed father raises nonpaternity as a defense to the action."

House Amendments to HB 1121 - Judiciary Committee 02/09/2005

Page 20, line 25, after "court" insert ", the court"

House Amendments to HB 1121 - Judiciary Committee 02/09/2005

Page 22, after line 23, insert:

"3. The order must include the social security numbers of the child and the individuals determined to be the child's parents.

4. The order may contain any other provision in the best interest of the child, including payment of support, payment of expenses of the mother's pregnancy and confinement, custody of the child, visitation with the child, and furnishing of bond or other security for payment of support. A support order must be for a monthly payment in an amount consistent with the guidelines established under section 14-09-09.7 and must be subject to section 14-09-08.1. All remedies for the enforcement of support, custody, and visitation orders apply. The court has continuing jurisdiction to modify an order for future support and, subject to section 14-09-09.6, custody of and visitation with the child."

Page 22, line 24, replace "3." with "5." and replace "4" with "6"

Page 22, line 30, replace "4." with "6."

House Amendments to HB 1121 - Judiciary Committee 02/09/2005

Page 23, line 1, replace "5." with "7."

Page 23, line 3, replace "6." with "8."

Page 23, after line 4, insert:

"9. An order adjudicating parentage must be filed with the state department of health."

Page 23, line 26, after "child" insert ", custody of the child, or visitation with the child"

Page 24, after line 2, insert:

"14-20-58.1. Liability for collection of support.

1. As used in this section, "former parent" means an acknowledged father who successfully rescinded or challenged an acknowledgment of paternity under this chapter, a presumed father whose parentage was successfully rebutted under this chapter, or an adjudicated father whose parentage was disestablished after an order issued under this chapter was vacated.

2. The state is not liable for child support that was collected from or on behalf of a former parent and disbursed to an obligee as defined in section 14-09-09.10.

3. The state is not liable for child support that was collected from or on behalf of a former parent and retained by the state unless ordered by a court after being presented with genetic test results that would otherwise be admissible under this chapter showing that the former parent is not the genetic parent of the child."

Page 25, after line 22, insert:

"**SECTION 7. AMENDMENT.** Subsection 5 of section 23-02.1-13 of the North Dakota Century Code is amended and reenacted as follows:

5. If the child is not born during the marriage of the mother, or within three hundred days after a marriage is terminated by death, annulment, declaration of invalidity, or divorce, or after a decree of separation is entered by a court, the name of the father may not be entered on the birth certificate unless:

   a. After the child's birth, the father and the child's natural mother have married, or attempted to marry, each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and:

      (1) He has acknowledged his paternity of the child in writing filed with the state registrar;

      (2) With his consent, he is named as the child's father on the child's birth certificate; or

      (3) He is obligated to support the child under a written voluntary promise or by court order;

   b. While the child is under the age of majority, he received the child into his home and openly holds out the child as his natural child;

   ~~c.~~ After the child's birth, the child's natural mother and the father voluntarily acknowledge the child's paternity in a writing signed by both and filed with the state registrar; or

   ~~d.~~ c. A court or other entity of competent jurisdiction has adjudicated paternity."

Page 25, line 24, remove "14-19-05,"

Renumber accordingly

Date: 2/7/05
Roll Call Vote #: 1

2005 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1121

HOUSE JUDICIARY COMMITTEE

☐ Check here for Conference Committee

Legislative Council Amendment Number

Action Taken Do Pass as Amended

Motion Made By Rep. Kretschmar Seconded By Rep. Delmore

Representatives	Yes	No	Representatives	Yes	No
Chairman DeKrey	✓		Representative Delmore	✓	
Representative Maragos	A		Representative Meyer	✓	
Representative Bernstein	✓		Representative Onstad	✓	
Representative Boehning	✓		Representative Zaiser	✓	
Representative Charging	✓				
Representative Galvin	✓				
Representative Kingsbury	✓				
Representative Klemin	✓				
Representative Koppelman	✓				
Representative Kretschmar	✓				

Total (Yes) 13 No Ø

Absent 1

Floor Assignment Rep. Kretschmar

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

HB 1121: Judiciary Committee (Rep. DeKrey, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (13 YEAS, 0 NAYS, 1 ABSENT AND NOT VOTING). HB 1121 was placed on the Sixth order on the calendar.

Page 1, line 1, after "enact" insert "a new section to chapter 14-09 and"

Page 1, line 2, after the first "to" insert "the termination of parental rights and"

Page 1, line 3, remove "and" and after "14-15-11" insert ", section 14-19-05, and subsection 5 of section 23-02.1-13"

Page 1, line 5, remove "14-19-05,"

Page 1, after line 21, insert:

"**SECTION 2.** A new section to chapter 14-09 of the North Dakota Century Code is created and enacted as follows:

Termination of parental rights - Duty of support. A termination of parental rights does not terminate the duty of either parent to support the child before the child's adoption unless that duty is specially terminated by order of the court after notice of a proposed termination or relinquishment is given to the department of human services in the manner appropriate for the service of process in a civil action in this state. A termination of a child support obligation under this section does not relieve a parent of the duty to pay any unpaid child support."

Page 3, after line 8, insert:

"**SECTION 5. AMENDMENT.** Section 14-19-05 of the North Dakota Century Code is amended and reenacted as follows:

14-19-05. Filing of acknowledgment. An acknowledgment of paternity made under ~~this~~ chapter 14-20 must be filed with the state department of health on a form approved by the department, which must include the social security number of the parents and any other information required by the secretary of the United States department of health and human services. Upon request of the department, the state department of health shall furnish a certified copy of an acknowledgment of paternity to the department."

Page 4, line 2, after "district" insert "court"

Page 8, line 21, replace "two years" with "one year"

Page 9, after line 23, insert:

"5. An acknowledgment of paternity or denial of paternity may be completed for a child who was not born in this state."

Page 9, line 28, after "parent" insert "and must be recognized as a basis for a support order in any proceeding to establish, enforce, or modify a support order"

Page 10, line 18, replace "two years" with "one year"

Page 15, line 6, remove the third "to"

Page 17, after line 18, insert:

"3. For purposes of this section and section 14-20-43, an action to establish support for a child is a proceeding to adjudicate parentage if the child's presumed father raises nonpaternity as a defense to the action."

Page 20, line 25, after "court" insert ", the court"

Page 22, after line 23, insert:

"3. The order must include the social security numbers of the child and the individuals determined to be the child's parents.

4. The order may contain any other provision in the best interest of the child, including payment of support, payment of expenses of the mother's pregnancy and confinement, custody of the child, visitation with the child, and furnishing of bond or other security for payment of support. A support order must be for a monthly payment in an amount consistent with the guidelines established under section 14-09-09.7 and must be subject to section 14-09-08.1. All remedies for the enforcement of support, custody, and visitation orders apply. The court has continuing jurisdiction to modify an order for future support and, subject to section 14-09-09.6, custody of and visitation with the child."

Page 22, line 24, replace "3." with "5." and replace "4" with "6"

Page 22, line 30, replace "4." with "6."

Page 23, line 1, replace "5." with "7."

Page 23, line 3, replace "6." with "8."

Page 23, after line 4, insert:

"9. An order adjudicating parentage must be filed with the state department of health."

Page 23, line 26, after "child" insert ", custody of the child, or visitation with the child"

Page 24, after line 2, insert:

"14-20-58.1. Liability for collection of support.

1. As used in this section, "former parent" means an acknowledged father who successfully rescinded or challenged an acknowledgment of paternity under this chapter, a presumed father whose parentage was successfully rebutted under this chapter, or an adjudicated father whose parentage was disestablished after an order issued under this chapter was vacated.

2. The state is not liable for child support that was collected from or on behalf of a former parent and disbursed to an obligee as defined in section 14-09-09.10.

3. The state is not liable for child support that was collected from or on behalf of a former parent and retained by the state unless ordered by a court after being presented with genetic test results that would otherwise be

admissible under this chapter showing that the former parent is not the genetic parent of the child."

Page 25, after line 22, insert:

"**SECTION 7. AMENDMENT.** Subsection 5 of section 23-02.1-13 of the North Dakota Century Code is amended and reenacted as follows:

5. If the child is not born during the marriage of the mother, or within three hundred days after a marriage is terminated by death, annulment, declaration of invalidity, or divorce, or after a decree of separation is entered by a court, the name of the father may not be entered on the birth certificate unless:

   a. After the child's birth, the father and the child's natural mother have married, or attempted to marry, each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and:

      (1) He has acknowledged his paternity of the child in writing filed with the state registrar;

      (2) With his consent, he is named as the child's father on the child's birth certificate; or

      (3) He is obligated to support the child under a written voluntary promise or by court order;

   b. While the child is under the age of majority, he received the child into his home and openly holds out the child as his natural child;

   ~~c.~~ After the child's birth, the child's natural mother and the father voluntarily acknowledge the child's paternity in a writing signed by both and filed with the state registrar; or

   ~~d.~~ c. A court or other entity of competent jurisdiction has adjudicated paternity."

Page 25, line 24, remove "14-19-05,"

Renumber accordingly

2005 SENATE JUDICIARY

HB 1121

2005 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1121

Senate Judiciary Committee

☐ Conference Committee

Hearing Date March 22, 2005

Tape Number	Side A	Side B	Meter #
1		x	532 - 3300

Committee Clerk Signature

Minutes:

Chairman Traynor opened the hearing on HB 1121, a bill relating to the termination of parental rights and the Uniform Parentage Act; parentage determinations; legitimacy of children; the Uniform Status of Children of Assisted Conception Act; paternity acknowledgment. All members were present..

Judge Gail Hagerty testified in favor of the bill. (written testimony) It provides clear guidelines for judges.

Senator Traynor asked if the Uniform Parentage Act was first promulgated in 1973, did North Dakota adopt it. (meter 913)

Judge Hagerty said yes.

Senator Traynor asked when

Judge Hagerty said she was not sure.

Senator Nelson said in 1995 a bill was passed that concerned gestational carriers, when a family could not have their own child. The law at the time stated that the woman who had the child was the mother and so the biological mother then had to adopt her own child. The bill in 1995 stated the parents would be the providers of the egg and sperm. Is that part of the code still there.

Judge Hagerty said yes. Advances in medicine and technology required some changes that are present in the rewrite.

Senator Trenbeath said the act was adopted by North Dakota in 1975.

Jim Fleming, Deputy Director and General Counsel of the State Child Support Enforcement Division of the Department of Human Services, testified in favor of the bill. (written testimony) (meter 1070).

Senator Triplett asked how this bill is different from the Uniform bill. Is it just the voluntary paternity act or were there other changes.

Mr. Fleming said there were other changes. One was the impact of termination of parental rights on existing arrears, did the termination of parental rights also wipe out all the debt. There were modest changes to where to file acknowledgments and what they should contain. They caught a couple of typos in the original bill. They added language to clarify the adjudication of parentage must be recognized as the basis for a child support order. They added a provision on liability for collection of support, If a person successfully goes back to court and establishes they are not the father, there is a question of what to do about child support that has already been paid. If the support has flowed through to the custodial parent that is a matter between the former parent and the custodial parent, the state is not liable when there is not public assistance expended. There is also a provision the state will return assigned dollars but only if it is proven

they are not truly a genetic parent. There was an amendment to the current vital record statute to comply with federal law that if a child is born to unmarried parents, the man's name may not be listed on the birth certificate without a VPA or paternity judgment. The amendments were 3 pages.

Senator Triplett asked if the amendments were modest enough that we are retaining most of the uniformity.

Mr. Fleming said he hopes so, he agrees with the volume of interstate cases they do, it is helpful to have the same set of rules in each state.

Senator Nelson asked if the amendments would generally not have the parenthesis with references back to the model code.

Mr. Fleming said he thinks that is correct, if you see a .1, that is an amendment. The other new section amended is on page 25, line 11, the .1 means it is state specific.

Senator Traynor asked Judge Hagerty if the commissioners are agreeable with what the house did.

Judge Hagerty said yes.

Roland Reimers testified in favor of the bill. (meter 1884) This is a very good piece of legislation and badly needed in North Dakota. On page 7, it would be useful if the legislation included examples of these rights. On page 9, section 2, there is no time limit and it should always be void because the North Dakota government should not endorse inappropriate use of the law to maintain legal advantage. On page 10 section 4, he has a problem with someone who is a child himself signing a statement of parentage and they don't understand the implications. He would suggest but there should be some kind of limitation until he reaches age 18. At the

bottom of page 10 60 days is too short, 1 year is better for recession. On page 11, one year statute of limitations is way too short for fraud or duress, 2 or 6 would be better.

Christopher Dodson, Executive Director of the North Dakota Catholic Conference, testified in opposition to the bill. (written testimony) (meter 2340)

Senator Traynor asked if he has discussed his concerns with Judge Hagerty or Mr. Fleming. (meter 2669)

Mr. Dodson said no, he just recently convinced himself that the bill repeals these provisions. He is unsure of the best way to amend the bill. He would like to discuss it with Mr. Fleming.

Senator Traynor asked if Mr. Fleming would be willing to discuss this with Mr. Dobson.

Mr. Fleming said they are always willing to help the committee with amendments. On the surrogacy agreements, they have no position for or against. He agrees with Mr. Dobson the repeal of 14 18 repeals the section that Mr. Dobson mentioned. Whether or not this is good policy is the committee's call. There are two substantive things about not including article 8. One is the existing provision on surrogacy agreements and one is it uses the existing language from the 1995 amendments, whether they accomplished the goal in the 1995 amendments, it is not a model of language. They could mechanically draft the amendments but they are probably not the best people to describe why section 8 was included or not. They are willing to help.

Senator Triplett asked if section 8 was adopted by the commission.

Judge Hagerty said is was bracketed which means it was optional.

Senator Triplett asked if they could get copies of section 8.

Senator Traynor asked if Mr. Fleming and Mr. Dobson work together on possible amendments.

Judge Hagerty said section 8 would allow gestational agreements and there are probably some problems with that but she can get it for the committee.

Senator Trenbeath asked if we were to accomplish what you hope we would accomplish would we adopt language that is reflected in the present 14-18.05 plus the definition of surrogate.

Mr. Dobson said yes but without a reference to the definition of gestational carrier it might undermine unintentionally what was done in 1995. When you put surrogate and gestational carrier together it limits the definition of surrogate. There must be a way to do it.

Mr. Dobson said states approach surrogacy agreements in different ways, allow them, void them or criminalize them. We could find ourselves in a murky area again, like we were in 1995.

Mr. Fleming provided a copy of article 8.

Mr. Fleming clarified if the intention is to avoid any substantive changes to current law in the area of surrogate agreement and to preserve the outcome of gestational carriers. With the committee's indulgence, there might be a better way to get to the intended outcome than the language used in 1995.

Chairman Traynor closed the hearing on HB 1121.

Senator Trenbeath said he received an email from Judge Hagerty suggesting some language and he would like the committee to have a copy. (meter 4979)

Senator Traynor asked what part of article 8 did Judge Hagerty have concerns about.

Senator Trenbeath said she didn't have concerns, she said it was in brackets and could be adopted or not adopted. Because North Dakota has a law, article 8 was not a part of the bill.

Senator Nelson said she thinks Judge Hagerty has a concern that the uniform act could undo our gestational carrier law so you have to be careful with how you add the rest of that section.

Senator Triplett said we are waiting for Mr. Fleming and Mr. Dobson to work on a possible amendment.

Chairman Traynor said we will defer action at this time.

2005 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB1121

Senate Judiciary Committee

☐ Conference Committee

Hearing Date March 23, 2005

Tape Number	Side A	Side B	Meter #
1	X		2598 - 3255

Committee Clerk Signature Mona L Solberg

Minutes: Relating to Paternity acknowledgment.

Senator John (Jack) T. Traynor, Chairman called the Judiciary committee to order. All Senators were present. The hearing opened with the following committee work:

The committee discussed **Mr. Flemings** Amendment - Att. #1 The only change is the non-uniform language added by LC. I think we have met all of the requirements of the committee **Mr. Dobson** is in agreement to the amendments Discussed new section in Ch. 14 18 that clarifies what was meant in 1995 with the amendments coming out of the Jamestown family that said you have a gestation carrier the intended parents, the ones who donated the egg and the sperm-those will be the legal parents of the child being formed during the gestation period. This amendment better clarifies this. Discussed were it would be located in the bill.

Sen. Trenbeath made the motion to pass the amendment and **Senator Triplett** seconded the motion. All members were in favor and the motion passes.

Senator Triplett made the motion to pass as amendment and **Sen. Trenbeath** seconded the motion. All members were in favor and motion passes

Carrier: **Sen. Nelson**

Senator John (Jack) T. Traynor, Chairman closed the Hearing

3/23 AH #1

Prepared by the North Dakota
Department of Human Services
3/22/05

PROPOSED AMENDMENTS TO ENGROSSED HOUSE BILL NO. 1121

Page 1, line 1, after "14-09" insert ", a new section to chapter 14-18"

Page 1, line 2, after "to" insert "gestational carriers,"

Page 1, line 4, replace the second "section" with "sections" and insert immediately thereafter "14-18-01, 14-18-05,"

Page 1, line 5, after the first "to" insert "gestational carriers and"

Page 1, line 6, replace "chapters" with "chapter", remove "and 14-18", and after "sections" insert "14-18-02.1, 14-18-03, 14-18-04, 14-18-06, 14-18-07,"

Page 1, line 20, remove the overstrike over ", as defined in section 14-18-01,"

Page 3, after line 17, insert:

SECTION 5. AMENDMENT. Section 14-18-01 of the North Dakota Century Code is amended and reenacted as follows:

14-18-01. Definitions. As used in this chapter:

1. "Assisted conception" means a pregnancy resulting from insemination of an egg of a woman with sperm of a man by means other than sexual intercourse or by removal and implantation of an embryo after sexual intercourse but does not include a pregnancy resulting from the insemination of an egg of a wife using her husband's sperm.

2. "Donor" means an individual whose body produces sperm or egg used for the purpose of assisted conception, whether or not a payment is made for the sperm or egg used, but does not include an individual whose body produces sperm or egg used for the purpose of conceiving a child for that individual.

~~3.~~ "Gestational carrier" means an adult woman who enters into an agreement to have an embryo implanted in her and bear the resulting child for intended parents, where the embryo is conceived by using the egg and sperm of the intended parents.

~~4.~~ 3. "Surrogate" means an adult woman who enters into an agreement to bear a child conceived through assisted conception for intended parents.

SECTION 6. AMENDMENT. Section 14-18-05 of the North Dakota Century Code is amended and reenacted as follows:

14-18-05. Surrogate agreements. Any agreement in which a woman agrees to become a surrogate or to relinquish that woman's rights and duties as parent of a child conceived through assisted conception is void. The surrogate, however, is the mother of a resulting child and the surrogate's husband, if a party to the agreement, is the father of the child. If the surrogate's husband is not a party to the agreement or the surrogate is unmarried, paternity of the child is governed by chapter ~~14-17~~ 14-20.

SECTION 7. A new section to chapter 14-18 of the North Dakota Century Code is created and enacted as follows:

Gestational carrier agreements. A child born to a gestational carrier is a child of the intended parents for all purposes and is not a child of the gestational carrier and the gestational carrier's husband, if any.

Page 25, line 29, replace "Paternity" with "Parentage"

Page 25, line 30, remove "this" and after "chapter" insert "14-18"

Page 28, line 2, replace "chapters" with "chapter" and after "14-17" insert a comma

Page 28, line 3, remove "and 14-18," and after "sections" insert "14-18-02.1, 14-18-03, 14-18-04, 14-18-06, 14-18-07,"

Renumber accordingly

Date: 3/23/05
Roll Call Vote #: 1

2005 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. HB 1121

Senate Judiciary Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number

Action Taken Do Pass Amend By Dept of H.S.

Motion Made By Senator Trenbeath Seconded By Senator Triplett

Senators	Yes	No	Senators	Yes	No
Sen. Traynor	✓		Sen. Nelson	✓	
Senator Syverson	✓		Senator Triplett	✓	
Senator Hacker	✓				
Sen. Trenbeath	✓				

Total (Yes) 6 No 0

Absent 0

Floor Assignment

If the vote is on an amendment, briefly indicate intent:

Date: 3/23/05
Roll Call Vote #: 2

2005 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. HB 1121

Senate Judiciary Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number

Action Taken Do Pass As Amended

Motion Made By Senator Triplett Seconded By Senator Trenbeath

Senators	Yes	No	Senators	Yes	No
Sen. Traynor	✓		Sen. Nelson	✓	
Senator Syverson	✓		Senator Triplett	✓	
Senator Hacker	✓				
Sen. Trenbeath	✓				

Total (Yes) 6 No 0

Absent 0

Floor Assignment Sen Nelson

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

HB 1121, as engrossed: Judiciary Committee (Sen. Traynor, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (6 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). Engrossed HB 1121 was placed on the Sixth order on the calendar.

Page 1, line 1, after "14-09" insert ", a new section to chapter 14-18,"

Page 1, line 2, after "rights" insert ", gestational carriers,"

Page 1, line 4, replace the second "section" with "sections 14-18-01, 14-18-05, and"

Page 1, line 5, after the first "to" insert "gestational carriers and"

Page 1, line 6, replace "chapters" with "chapter", remove "and 14-18", and after "sections" insert "14-18-02.1, 14-18-03, 14-18-04, 14-18-06, 14-18-07,"

Page 1, line 20, remove the overstrike over ", as defined in section 14-18-01,"

Page 3, after line 17, insert:

"**SECTION 5. AMENDMENT.** Section 14-18-01 of the North Dakota Century Code is amended and reenacted as follows:

14-18-01. Definitions. As used in this chapter:

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2. "Donor" means an individual whose body produces sperm or egg used for the purpose of assisted conception, whether or not a payment is made for the sperm or egg used, but does not include an individual whose body produces sperm or egg used for the purpose of conceiving a child for that ~~individual.~~

~~3.~~ "Gestational carrier" means an adult woman who enters into an agreement to have an embryo implanted in her and bear the resulting child for intended parents, where the embryo is conceived by using the egg and sperm of the intended parents.

~~4.~~ 3. "Surrogate" means an adult woman who enters into an agreement to bear a child conceived through assisted conception for intended parents.

SECTION 6. AMENDMENT. Section 14-18-05 of the North Dakota Century Code is amended and reenacted as follows:

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SECTION 7. A new section to chapter 14-18 of the North Dakota Century Code is created and enacted as follows:

Gestational carrier agreements. A child born to a gestational carrier is a child of the intended parents for all purposes and is not a child of the gestational carrier and the gestational carrier's husband, if any."

Page 25, line 29, replace "Paternity" with "Parentage"

Page 25, line 30, remove "this" and after "chapter" insert "14-18"

Page 28, line 2, replace "chapters" with "chapter"

Page 28, line 3, remove "and 14-18" and after "sections" insert "14-18-02.1, 14-18-03, 14-18-04, 14-18-06, 14-18-07,"

Renumber accordingly

2005 TESTIMONY

HB 1121

Testimony in Support of HB1121

The Uniform Parentage Act

Gail Hagerty
District Judge

Mr. Chairman, Members of the Committee:

I'm Gail Hagerty. I'm a district judge from Bismarck, and I'm a Uniform Law Commissioner. I'm here today in support of House Bill 1121, the Uniform Parentage Act. The Act modernizes the law for determining the parents of children.

As you probably know, the National Conference of Commissioners on Uniform State Laws drafts laws in areas where there should be uniformity or near uniformity in the law among the states. The drafting process is a lengthy one – at least two years. There is input from groups with special interest of expertise in the project. The proposals are read line-by-line at two general sessions.

The Uniform Parentage Act was first promulgated in 1973. It was a revolution in the law of determination of parentage, paternity actions and child support. The new Uniform Parentage Act, which you are considering, incorporates provisions with regard to the status of children of assisted conception and identification of putative and unknown fathers and the termination of parental rights. The new act, also incorporates changes to conform to technological changes in areas of genetic identification.

Article 1 of the Uniform Act, which is included in Section 4 of your bill, includes definitions used in the Act.

Article 2 provides the legal father may be one of the following:

- An unrebutted presumed father (usually a man married to the birth mother at conception or a man who has lived with a child for the first two years of the child's life and treats the child as his child.
- A man who has acknowledged paternity.
- A man who has been adjudicated to be the father as the result of a judgment in a paternity action.
- An adoptive father.
- A man who consents to an assisted reproduction.

Article 3 of the Uniform Act provides a non-judicial consent proceeding for acknowledgment of paternity. Such an acknowledgment is effective so long as there is not another presumed, acknowledged or adjudicated father. There are provisions for recision, if a proceeding is filed within two years. There is a counterpart denial of paternity by a presumed father that is also available.

We are not asking that Article 4 be enacted – it would require establishment of a registry for putative and unknown fathers.

Article 5 establishes a separate procedure for genetic testing, so that a court may order testing without a full-blown paternity action. A reasonable probability of sexual contact between the putative father and mother is enough to initiate the proceeding.

Article 6 governs the basic proceeding to determine parentage.

Article 7 deals with parentage deals with parentage when there is assisted conception and incorporates an early uniform act which deals with assisted conception. If a couple consents to any sort of assisted conception, and the woman gives birth to the resultatant child, they are the legal parents. A donor of either sperm or eggs used in an assisted conception may not be a legal parent under any circumstances.

The Uniform Parentage Act has been endorsed by the ABA Family Law Section, the ABA Section of Individual Rights and Responsibilities, the ABA Steering Committee on Unmet Legal Needs of Children, the National Child Support Enforcement Association, the National Association of Public Health Registrars and the American Association of Matrimonial Attorneys.

I would ask your favorable action on this legislation.

Gail Hagerty
P.O. Box 1013
Bismarck, ND 58502-1013
phone: 701-222-6682, ext. 115
e-mail: ghagerty@ndcourts.com

TESTIMONY
HOUSE Bill 1121 - DEPARTMENT OF HUMAN SERVICES
HOUSE JUDICIARY COMMITTEE
DUANE DEKREY, CHAIRMAN
JANUARY 17, 2005

Chairman DeKrey, members of the House Judiciary Committee, I am James Fleming, Deputy Director and General Counsel of the State Child Support Enforcement Division of the Department of Human Services. I am here to express the Department's support for House Bill 1121 with some amendments.

We respect and share the interest of the Commission on Uniform State Laws that there be a minimal number of state-specific amendments. Therefore, we have attempted to limit our amendments to substantive items or clarifications, even if we prefer the language of current law. This is also an area regulated in part by federal requirements on the child support enforcement program.

A core function of the child support enforcement program under Title IV-D of the Social Security Act is to establish paternity for children who are receiving our services. Our program handles a large number of paternity cases each year. At the close of the 2004 federal fiscal year, there were 18,093 children in our caseload who had been born out of wedlock. As of the end of December 2004, paternity had been established for 16,335 born-out-of-wedlock children in our caseload, or 90.28% of the prior year's total. Paternity establishment is one of five performance measures on which federal incentives are distributed, and is one of three measures that can result in a penalty for poor performance. Throughout the federal fiscal year, children are added or removed from our caseload. At the end of each federal fiscal year, we need to achieve at least a 90% average to avoid a federal penalty to the TANF program.

Overall, UPA 2002 would be a significant improvement over our current paternity law, which was enacted in 1975. UPA 2002 provides more guidance in many areas than current law. One such area is when there are multiple presumed fathers and

it is necessary to determine which man should be legally established as the child's father. Across the country, courts and legislatures are struggling with the important policy issue of whether the rights and responsibilities of being a parent belong to the child's biological parent or to the child's "psychological" parent. The child's needs for stability and finality also must be considered. UPA 2002 does not settle this issue with a single arbitrary rule, but establishes a framework for a court to make the decision that is generally lacking in current law.

Several years ago, the legislature established a policy in North Dakota that a father has a limited number of years to dispute his paternity of a child. However, a hole in the law exists, recently confirmed by the North Dakota Supreme Court in Rydberg v. Rydberg, which allowed a psychological father to successfully walk out of the child's life after more than 10 years and leave the child without a father. This hole in the law defeats the public policy of the state, unreasonably disrupts the life of a child who has bonded with a psychological parent, and needs to be filled. We have proposed an amendment to address this concern.

Historically, a "paternity" case involved a formal court action to determine the father of the child. With the development of genetic tests, the outcome of these cases became much more predictable. However, one cannot discuss paternity today without addressing the use of voluntary paternity acknowledgments or VPAs. A VPA is a simple document that parents can use to establish paternity of a child without going to court in a formal paternity action. Since the enactment of current North Dakota Century Code chapter 14-19 in 1995 and the full implementation of that chapter through a revised acknowledgment form in 1998, a valid VPA has been the equivalent of paternity judgment of a court. With a valid VPA, unmarried parents can immediately establish the paternity of the child without the cost and burden of a formal paternity action. It is a mandatory function of our program to sponsor a hospital-based paternity acknowledgment program.

North Dakota has a very successful VPA program under N.D.C.C. chapter 14-19, which is a separate chapter from the current paternity act. In some respects, the current VPA law is even better than the VPA article in UPA 2002. Our amendments in this area are intended to ensure we don't take a step backward and lose the benefit of what has worked well under current law.

Mr. Chairman, before describing the amendments we propose, I would be happy to answer any questions the committee may have.

EXPLANATION OF PROPOSED SUBSTANTIVE CHANGES

1) **Change:** New section on terminations of parental rights

   Reason: Transfer and revision of existing language in 14-17-24(6)

2) **Change:** Remove holding out presumption – Page 7, lines 29 and 30

   Reason: As a legal presumption of paternity, we recommend against authorizing a provision that is so subjective and fact-dependent.

3) **Change:** Require signature be witnessed instead of under oath – Pages 8, 9

   Reason: Federal requirements

4) **Change:** One year to challenge VPA instead of two years – Pages 8, 10

   Reason: Current law

5) **Change:** VPA authorized for children born outside North Dakota – Page 7

   Reason: Clarification and continuation of current law

6) **Change:** VPA serves as the basis for child support action – Page 9, line 28

   Reason: Current law

7) **Change:** Proceeding to rescind VPA is not required – Page 10, 18

   Reason: Unnecessary formality and continuation of current law

8) **Change:** VPA developed and copies shared with DHS – Page 11, lines 19, 25

   Reason: Current law and is needed to ensure federal compliance

9) **Change:** Limit disestablishment actions or defenses to two years – Page 17, 18

   Reason: Consistent with other timeframes for determining the parentage of a child and promotes finality for the child.

10) **Change:** Content and filing of paternity orders – Pages 22, 23

    Reason: Current law and is needed to ensure federal compliance

11) **Change:** Liability for collection – Page 24

    Reason: Protection of public funds

12) **Change:** Restrict inclusion of man's name on birth certificates – Page 25

    Reason: Federal requirements

Testimony in Support of HB1121

The Uniform Parentage Act

Gail Hagerty
District Judge

Mr. Chairman, Members of the Committee:

I'm Gail Hagerty. I'm a district judge from Bismarck, and I'm a Uniform Law Commissioner. I'm here today in support of House Bill 1121, the Uniform Parentage Act. The Act modernizes the law for determining the parents of children.

As you probably know, the National Conference of Commissioners on Uniform State Laws drafts laws in areas where there should be uniformity or near uniformity in the law among the states. The drafting process is a lengthy one – at least two years. There is input from groups with special interest of expertise in the project. The proposals are read line-by-line at two general sessions.

The Uniform Parentage Act was first promulgated in 1973. It was a revolution in the law of determination of parentage, paternity actions and child support. The new Uniform Parentage Act, which you are considering, incorporates provisions with regard to the status of children of assisted conception and identification of putative and unknown fathers and the termination of parental rights. The new act, also incorporates changes to conform to technological changes in areas of genetic identification.

Article 1 of the Uniform Act, which is included in Section 4 of your bill, includes definitions used in the Act.

Article 2 provides the legal father may be one of the following:

- An unrebutted presumed father (usually a man married to the birth mother at conception or a man who has lived with a child for the first two years of the child's life and treats the child as his child.
- A man who has acknowledged paternity.
- A man who has been adjudicated to be the father as the result of a judgment in a paternity action.
- An adoptive father.
- A man who consents to an assisted reproduction.

Article 3 of the Uniform Act provides a non-judicial consent proceeding for acknowledgment of paternity. Such an acknowledgment is effective so long as there is not another presumed, acknowledged or adjudicated father. There are provisions for recision, if a proceeding is filed within two years. There is a counterpart denial of paternity by a presumed father that is also available.

We are not asking that Article 4 be enacted – it would require establishment of a registry for putative and unknown fathers.

Article 5 establishes a separate procedure for genetic testing, so that a court may order testing without a full-blown paternity action. A reasonable probability of sexual contact between the putative father and mother is enough to initiate the proceeding.

Article 6 governs the basic proceeding to determine parentage.

Article 7 deals with parentage deals with parentage when there is assisted conception and incorporates an early uniform act which deals with assisted conception. If a couple consents to any sort of assisted conception, and the woman gives birth to the resultatant child, they are the legal parents. A donor of either sperm or eggs used in an assisted conception may not be a legal parent under any circumstances.

The Uniform Parentage Act has been endorsed by the ABA Family Law Section, the ABA Section of Individual Rights and Responsibilities, the ABA Steering Committee on Unmet Legal Needs of Children, the National Child Support Enforcement Association, the National Association of Public Health Registrars and the American Association of Matrimonial Attorneys.

I would ask your favorable action on this legislation.

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TESTIMONY
HOUSE Bill 1121 - DEPARTMENT OF HUMAN SERVICES
SENATE JUDICIARY COMMITTEE
JOHN T. TRAYNOR, CHAIRMAN
MARCH 22, 2005

Chairman Traynor, members of the Senate Judiciary Committee, I am James Fleming, Deputy Director and General Counsel of the State Child Support Enforcement Division of the Department of Human Services. I am here to express the Department's support for Engrossed House Bill 1121.

A core function of the child support enforcement program under Title IV-D of the Social Security Act is to establish paternity for children who are receiving our services. Our program handles a large number of paternity cases each year. At the close of the 2004 federal fiscal year, there were 18,093 children in our caseload who had been born out of wedlock. As of the end of December 2004, paternity had been established for 16,335 born-out-of-wedlock children in our caseload, or 90.28% of the prior year's total. Paternity establishment is one of five performance measures on which federal incentives are distributed, and is one of three measures that can result in a penalty for poor performance. Throughout the federal fiscal year, children are added or removed from our caseload. At the end of each federal fiscal year, we need to achieve at least a 90% average to avoid a federal penalty to the TANF program.

Overall, UPA 2002 would be a significant improvement over our current paternity law, which was enacted in 1975. UPA 2002 provides more guidance in many areas than current law. One such area is when there are multiple presumed fathers and it is necessary to determine which man should be legally established as the child's father. Across the country, courts and legislatures are struggling with the important policy issue of whether the rights and responsibilities of being a parent belong to the child's biological parent or to the child's "psychological" parent. The child's needs for stability and finality also must be considered. UPA 2002

does not settle this issue with a single arbitrary rule, but establishes a framework for a court to make the decision that is generally lacking in current law.

Several years ago, the legislature established a policy in North Dakota that a father has a limited number of years to dispute his paternity of a child. However, a hole in the law exists, recently confirmed by the North Dakota Supreme Court in Rydberg v. Rydberg, which allowed a psychological father to successfully walk out of the child's life after more than 10 years and leave the child without a father. This hole in the law defeats the public policy of the state, unreasonably disrupts the life of a child who has bonded with a psychological parent, and needs to be filled. Engrossed House Bill 1121 addresses this issue by applying the same timeframe whether paternity is disputed in a separate action or is raised as a defense to a child support action.

Historically, a "paternity" case involved a formal court action to determine the father of the child. With the development of genetic tests, the outcome of these cases became much more predictable. However, one cannot discuss paternity today without addressing the use of voluntary paternity acknowledgments or VPAs. A VPA is a simple document that parents can use to establish paternity of a child without going to court in a formal paternity action. Since the enactment of current North Dakota Century Code chapter 14-19 in 1995 and the full implementation of that chapter through a revised acknowledgment form in 1998, a valid VPA has been the equivalent of paternity judgment of a court. With a valid VPA, unmarried parents can immediately establish the paternity of the child without the cost and burden of a formal paternity action. It is a mandatory function of our program to sponsor a hospital-based paternity acknowledgment program.

North Dakota has a very successful VPA program under N.D.C.C. chapter 14-19, which is a separate chapter from the current paternity act. In some respects, the current VPA law is even better than the VPA article in UPA 2002. We worked with

the House to amend the original bill to ensure we do not take a step backward and lose the benefit of what has worked well under current law.

Mr. Chairman, that concludes my testimony and I would be happy to answer any questions the committee may have.

NORTH DAKOTA CATHOLIC CONFERENCE

NDCC

presenting the Diocese of Fargo
d the Diocese of Bismarck

hristopher T. Dodson
xecutive Director and
eneral Counsel

To: Senate Judiciary Committee
From: Christopher T. Dodson, Executive Director
Subject: House Bill 1121 (Uniform Parentage Act)
Date: March 21, 2005

The North Dakota Catholic Conference opposes House Bill 1121 because it repeals North Dakota's law against surrogacy agreements.

Since 1989, North Dakota law has held that surrogacy agreements are void. House Bill 1121, perhaps unintentionally, repeals those provisions without replacing them in the new statutory language.

Attached to this testimony is a copy of Chapter 14-18. This chapter, modeled after the Uniform Status of Children of Assisted Conception Act (1988), addresses the parental status of children conceived through assisted reproduction. It also addresses the validity of surrogacy agreements (sections 14-18-02(4) and 14-18-05), declaring them void.

The National Conference of Commissioners on Uniform State Laws (NCCUSL) never revised the Uniform Status of Children of Assisted Conception Act. Instead, the subject matter became part of on-going revisions to the Uniform Parentage Act. Thus, House Bill 1121, which is based on the 2002 version of the Uniform Parentage Act, incorporates definitions and issues regarding parentage which are presently part of Chapter 14-18.

House Bill 1121, however, does not incorporate the provisions of Chapter 14-18 related to surrogacy agreements. Presumably, this is because the NCCUSL did not make a recommendation on the legality or enforceability of surrogacy agreements in the 2002 version of the Uniform Parentage Act. Instead, the NCCUSL created an optional section for states that wish to allow, but regulate, surrogacy agreements. States that opt to prohibit or make no law about such agreements could enact the model law without that section.

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Since House Bill 1121 does not include that optional section of the Uniform Parentage Act, the intent, presumably, is to retain the state law on surrogacy agreements. Nevertheless, the bill repeals all of chapter 14-18 and not just those portions of the chapter dealing with parentage (see page 28, line 3 of HB 1121, First Engrossment.) None of the provisions concerning surrogacy from chapter 14-18 are incorporated into HB 1121.[1] Consequently, HB 1121, though intended to address issues regarding the determination of parentage, will also substantially change North Dakota law on surrogacy agreements.

There exist many reasons why surrogacy agreements should be void, ranging from respect for human dignity to the need to prevent the exploitation of women and the reduction of childbearing to a mere commodity. Perhaps most pertinent to this bill is the fact that the state already has a policy on the matter. A change in that policy should result from a clear and transparent debate on the issue and not as a consequence of a revision to the state's laws on parentage determination.

We urge the committee to give a "Do Not Pass" recommendation to HB 1121 unless the bill is amended to retain current law regarding surrogacy agreements.

[1] Curiously, the bill makes a needed change to Section 12.1-31-05 in the Criminal Code (page 1, line 20 of HB 1121, First Engrossment), but without chapter 14-18 and no new language in HB 1121, the Code has no definition of "surrogate."

CHAPTER 14-18
UNIFORM STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT

14-18-01. Definitions. As used in this chapter:

1. "Assisted conception" means a pregnancy resulting from insemination of an egg of a woman with sperm of a man by means other than sexual intercourse or by removal and implantation of an embryo after sexual intercourse but does not include a pregnancy resulting from the insemination of an egg of a wife using her husband's sperm.

2. "Donor" means an individual whose body produces sperm or egg used for the purpose of assisted conception, whether or not a payment is made for the sperm or egg used, but does not include an individual whose body produces sperm or egg used for the purpose of conceiving a child for that individual.

3. "Gestational carrier" means an adult woman who enters into an agreement to have an embryo implanted in her and bear the resulting child for intended parents, where the embryo is conceived by using the egg and sperm of the intended parents.

4. "Surrogate" means an adult woman who enters into an agreement to bear a child conceived through assisted conception for intended parents.

14-18-02. Maternity. Repealed by S.L. 1995, ch. 158, § 3.

14-18-02.1. Paternity. Paternity of a child born to a gestational carrier is governed by chapter 14-17.

14-18-03. Assisted conception by married woman. The husband of a woman who bears a child through assisted conception is the father of the child, notwithstanding any declaration of invalidity or annulment of the marriage obtained after the assisted conception, unless within two years after learning of the child's birth the husband commences an action in which the mother and child are parties and in which it is determined that the husband did not consent to the assisted conception.

14-18-04. Parental status of donors and deceased persons.

1. A donor is not the parent of a child conceived through assisted conception.

2. A person who dies before a conception using that person's sperm or egg is not a parent of any resulting child born of the conception.

14-18-05. Surrogate agreements. Any agreement in which a woman agrees to become a surrogate or to relinquish that woman's rights and duties as parent of a child conceived through assisted conception is void. The surrogate, however, is the mother of a resulting child and the surrogate's husband, if a party to the agreement, is the father of the child. If the surrogate's husband is not a party to the agreement or the surrogate is unmarried, paternity of the child is governed by chapter 14-17.

14-18-06. Relation of parent and child. A child whose status as a child is declared or negated by sections 14-18-01 through 14-18-07 is the child only of the child's parent or parents as determined under sections 14-18-01 through 14-18-07 for all purposes, including succession and gift rights in section 14-18-07.

14-18-07. Succession and gift rights. Unless superseded by later events forming or terminating a parent and child relationship, the status of parent and child declared or negated by sections 14-18-01 through 14-18-07 as to a given individual and a child born alive controls for purposes of:

1. Intestate succession;

2. Probate law exemptions, allowances, or other protections for children in a parent's estate; and

3. Determining eligibility of the child or the child's descendants to share in a donative transfer from any person as a member of a class determined by reference to the relationship.

Trenbeath, Thomas L.

From: Hagerty, Gail [GHagerty@ndcourts.com]
Sent: Tuesday, March 22, 2005 1:24 PM
To: 'jfleming@state.nd.us'; Trenbeath, Thomas L.
Subject: amendment

I'm wondering if it would work to not repeal Section 14-28-05, but to amend it so the section reads:

Surrogate agreements. Any agreement in which a woman agrees to relinquish that woman's rights and duties of a child conceived through assisted conception is void. However, notwithstanding the provisions of chapter 14-20, a woman who has agreed that another woman have an embryo implanted in her and bear the resulting child is the mother of the child if the embryo was conceived using the egg and sperm of the intended parents.

Gail

or her will may do so.
(Comment updated December 2002)

ARTICLE 8

GESTATIONAL AGREEMENT

Comment

The longstanding shortage of adoptable children in this country has led many would-be parents to enlist a gestational mother (previously referred to as a "surrogate mother") to bear a child for them. As contrasted with the assisted reproduction regulated by Article 7, which involves the would-be parent or parents and most commonly one and sometimes two anonymous donors, the gestational agreement (previously known as a surrogacy agreement) provided in this article is designed to involve at least three parties; the intended mother and father and the woman who agrees to bear a child for them through the use of assisted reproduction (the gestational mother). Additional people may be involved. For example, if the proposed gestational mother is married, her husband, if any, must be included in the agreement to dispense with his presumptive paternity of a child born to his wife. Further, an egg donor or a sperm donor, or both, may be involved, although neither will be joined as a party to the agreement. Thus, by definition, a child born pursuant to a gestational agreement will need to have maternity as well as paternity clarified.

The subject of gestational agreements was last addressed by the National Conference of Commissioners on Uniform State Laws in 1988 with the adoption of the UNIFORM STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT (USCACA). Because some Commissioners believed that such agreements should be prohibited, while others believed that such agreements should be allowed, but regulated, USCACA offered two alternatives on the subject; either to regulate such activities through a judicial review process or to void such contracts. As might have been predicted, the only two states to enact USCACA selected opposite options; Virginia chose to regulate such agreements, while North Dakota opted to void them.

In the years since the promulgation of USCACA (and virtual de facto rejection of that Act), approximately one-half of the states developed statutory or case law on the issue. Of those, about one-half recognized such agreements, and the other half rejected them. A survey in December, 2000, revealed a wide variety of approaches: eleven states allow gestational agreements by statute or case law; six states void such agreements by statute; eight states do not ban agreements per se, but statutorily ban compensation to the gestational mother, which as a practical matter limits the likelihood of agreement to close relatives; and two states judicially refuse to recognize such agreements. In states rejecting gestational agreements, the legal status of children born pursuant to such an agreement is uncertain. If gestational agreements are voided or criminalized, individuals determined to become parents through this method will seek a friendlier legal forum. This raises a host of legal issues. For example, a couple may return to their home state with a child born as the consequence of a gestational agreement recognized in another state. This presents a full faith and credit question if their home state has a statute declaring gestational agreements to be void or criminal.

Despite the legal uncertainties, thousands of children are born each year pursuant to gestational agreements. One thing is clear; a child born under these circumstances is entitled to have its status clarified. Therefore, NCCUSL once again ventured into this controversial subject, withdrawing USCACA and substituting bracketed Article 8 of the new UPA. The article incorporates many of the USCACA provisions allowing validation and enforcement of gestational agreements, along with some important modifications. The article is bracketed because of a concern that state legislatures may decide that they are still not ready to address gestational agreements, or that they want to treat them differently from what Article 8 provides. States may omit this article without undermining the other provisions of the UPA (2002).

Article 8's replacement of the USCACA terminology, "surrogate mother," by "gestational mother" is important. First, labeling a woman who bears a child a "surrogate" does not comport with the dictionary definition of the term under any construction, to wit: "a person appointed to act in the place of another" or

"something serving as a substitute." The term is especially misleading when "surrogate" refers to a woman who supplies both "egg and womb," that is, a woman who is a genetic as well as gestational mother. That combination is now typically avoided by the majority of ART practitioners in order to decrease the possibility that a genetic\gestational mother will be unwilling to relinquish her child to unrelated intended parents. Further, the term "surrogate" has acquired a negative connotation in American society, which confuses rather than enlightens the discussion.

In contrast, term "gestational mother" is both more accurate and more inclusive. It applies to both a woman who, through assisted reproduction, performs the gestational function without being genetically related to a child, and a woman is both the gestational and genetic mother. The key is that an agreement has been made that the child is to be raised by the intended parents. The latter practice has elicited disfavor in the ART community, which has concluded that the gestational mother's genetic link to the child too often creates additional emotional and psychological problems in enforcing a gestational agreement.

The new UPA treats entering into a gestational agreement as a significant legal act that should be approved by a court, just as an adoption is judicially approved. The procedure established generally follows that of USCACA, but departs from its terms in several important ways. First, nonvalidated gestational agreements are unenforceable (not void), thereby providing a strong incentive for the participants to seek judicial scrutiny. Second, there is no longer a requirement that at least one of the intended parents would be genetically related to the child born of the gestational agreement. Third, individuals who enter into nonvalidated gestational agreements and later refuse to adopt the resulting child may be liable for support of the child.

Although legal recognition of gestational agreements remains controversial, the plain fact is that medical technologies have raced ahead of the law without heed to the views of the general public--or legislators. Courts have recently come to acknowledge this reality when forced to render decisions regarding collaborative reproduction, noting that artificial insemination, gestational carriers, cloning and gene splicing are part of the present, as well as of the future. One court predicted that even if all forms of assisted reproduction were outlawed in a particular state, its courts would still be called upon to decide on the identity of the lawful parents of a child resulting from those procedures undertaken in less restrictive states. This court noted:

> Again we must call on the Legislature to sort out the parental rights and responsibilities of those involved in artificial reproduction. No matter what one thinks of artificial insemination, traditional and gestational surrogacy (in all of its permutations) and--as now appears in the not-too-distant future, cloning and even gene splicing--courts are still going to be faced with the problem of determining lawful parentage. A child cannot be ignored. Even if all the means of artificial reproduction were outlawed with draconian criminal penalties visited on the doctors and parties involved, courts would still be called upon to decide who the lawful parents are and who--other than the taxpayers--is obligated to provide maintenance and support for the child. These cases will not go away. Again we must call on the Legislature to sort out the parental rights and responsibilities of those involved in artificial reproduction. Courts can continue to make decisions on an ad hoc basis without necessarily imposing some grand scheme. Or, the Legislature can act to impose a broader order which, even though it might not be perfect on a case-by-case basis, would bring some predictability to those who seek to make use of artificial reproductive techniques.

Buzzanca v. Buzzanca, 72 Cal. Rptr. 2d 280 (Cal. Ct. App. 1998).

SECTION 801. GESTATIONAL AGREEMENT AUTHORIZED.

(a) A prospective gestational mother, her husband if she is married, a donor or the donors, and the

intended parents may enter into a written agreement providing that:

(1) the prospective gestational mother agrees to pregnancy by means of assisted reproduction;

(2) the prospective gestational mother, her husband if she is married, and the donors relinquish all rights and duties as the parents of a child conceived through assisted reproduction; and

(3) the intended parents become the parents of the child.

(b) The man and the woman who are the intended parents must both be parties to the gestational agreement.

(c) A gestational agreement is enforceable only if validated as provided in Section 803.

(d) A gestational agreement does not apply to the birth of a child conceived by means of sexual intercourse.

(e) A gestational agreement may provide for payment of consideration.

(f) A gestational agreement may not limit the right of the gestational mother to make decisions to safeguard her health or that of the embryos or fetus. **Comment**

Source: USCACA §§ 1(3), 5, 9.

The previous uniform act on this subject, USCACA, proposed two alternatives, one of which was to declare that gestational agreements were void. Subsection (a) rejects that approach. The scientific state of the art and the medical facilities providing the technological capacity to utilize a woman other than the woman who intends to raise the child to be the gestational mother, guarantee that such agreements will continue to be written. Subsection (a) recognizes that certainty and initiates a procedure for its regulation by a judicial officer. This section permits all of the individuals directly involved in the procedure to enter into a written agreement; this includes the intended parents, the gestational mother, and her husband, if she is married. In addition, if known donors are involved, they also must sign the agreement. The agreement must provide that the intended parents will be the parents of any child born pursuant to the agreement while all of the others (gestational mother, her husband, if any, and the donors, as appropriate) relinquish all parental rights and duties.

Under subsection (b), a valid gestational agreement requires that the man and woman who are the intended parents, whether married or unmarried, to be parties to the gestational agreement. This reflects the Act's comprehensive concern for the best interest of nonmarital as well as marital children born as the result of a gestational agreement. Throughout UPA the goal is to treat marital and nonmarital children equally.

Subsection (c) provides that in order to be enforceable, the agreement must be validated by the appropriate court under § 803.

Subsection (e) is intended to shield gestational agreements that include payment of the gestational mother from challenge under "baby-selling" statutes that prohibit payment of money to the birth mother for her consent to an adoption.

Subsection (f) is intended to acknowledge that the gestational mother, as a pregnant woman, has a constitutionally-recognized right to decide issues regarding her prenatal care. In other words, the intended

parents have no right to demand that the gestational mother undergo any particular medical regimen at their behest.

(Comment updated December 2002)

SECTION 802. REQUIREMENTS OF PETITION.

(a) The intended parents and the prospective gestational mother may commence a proceeding in the [appropriate court] to validate a gestational agreement.

(b) A proceeding to validate a gestational agreement may not be maintained unless:

(1) the mother or the intended parents have been residents of this State for at least 90 days;

(2) the prospective gestational mother's husband, if she is married, is joined in the proceeding; and

(3) a copy of the gestational agreement is attached to the [petition].

Comment

Source: USCACA § 6(a).

Sections 802 and 803, the core sections of this article, provide for state involvement, through judicial oversight, of the gestational agreement before, during, and after the assisted reproduction process. The purpose of early involvement is to ensure that the parties are appropriate for a gestational agreement, that they understand the consequences of what they are about to do, and that the best interests of a child born of the gestational agreement are considered before the arrangement is validated. The trigger for state involvement is a petition brought by all the parties to the arrangement requesting a judicial order authorizing the assisted reproduction contemplated by their agreement. The agreement itself must be submitted to the court.

To discourage forum shopping, subsection (b)(1) requires that the petition may be filed only in a state in which the intended parents or the gestational mother have been residents for at least ninety days.

SECTION 803. HEARING TO VALIDATE GESTATIONAL AGREEMENT.

(a) If the requirements of subsection (b) are satisfied, a court may issue an order validating the gestational agreement and declaring that the intended parents will be the parents of a child born during the term of the of the agreement.

(b) The court may issue an order under subsection (a) only on finding that:

(1) the residence requirements of Section 802 have been satisfied and the parties have submitted to the jurisdiction of the court under the jurisdictional standards of this [Act];

(2) unless waived by the court, the [relevant child-welfare agency] has made a home study of the intended parents and the intended parents meet the standards of suitability applicable to adoptive parents;

(3) all parties have voluntarily entered into the agreement and understand its terms;

(4) adequate provision has been made for all reasonable health-care expense associated with the gestational agreement until the birth of the child, including responsibility for those expenses if the agreement is terminated; and

(5) the consideration, if any, paid to the prospective gestational mother is reasonable.

Comment

Source: USCACA § 6(b).

This pre-conception authorization process for a gestational agreement is roughly analogous to prevailing adoption procedures in place in most states. Just as adoption contemplates the transfer of parentage of a child from the birth parents to the adoptive parents, a gestational agreement involves the transfer from the gestational mother to the intended parents. The Act is designed to protect the interests of the child to be born under the gestational agreement as well as the interests of the gestational mother and the intended parents.

In contrast to USCACA (1988) § 1(3), there is no requirement that at least one of the intended parents be genetically related to the child born of a gestational agreement. Similarly, the likelihood that the gestational mother will also be the genetic mother is not directly addressed in the new Act, while USCACA (1988) apparently assumed that such a fact pattern would be typical. Experience with the intractable problems caused by such a combination has dissuaded the majority of fertility laboratories from following that practice. *See In re* Matter of Baby M., 537 A.2d 1227 (N.J. 1988).

This section seeks to protect the interests of the child in several ways. The major protection of the child is the authorization procedure itself. The Act requires closely supervised gestational arrangements to ensure the security and well being of the child. Once a petition has been filed, subsection (a) permits--but does not require--the court to validate a gestational agreement. If it validates, the court must declare that the intended parents will be the parents of any child born pursuant to, and during the term of, the agreement.

Subsection (b) requires the court to make five separate findings before validating the agreement. Subsection (b)(1) requires the court to ensure that the 90-day residency requirement of § 802 has been satisfied and that it has jurisdiction over the parties;

Under subsection(b)(2), the court will be informed of the results of a home study of the intended parents who must satisfy the suitability standards required of prospective adoptive parents.

The interests of all the parties are protected by subsection (b)(3), which is designed to protect the individuals involved from the possibility of overreaching or fraud. The court must find that all parties consented to the gestational agreement with full knowledge of what they agreed to do, which necessarily includes relinquishing the resulting child to the intended parents who are obligated to accept the child.

The requirement of assurance of health-care expenses until birth of the resulting child imposed by subsection (b)(4) further protects the gestational mother.

Finally, subsection (b)(5) mandates that the court find that compensation of the gestational mother, if any, is reasonable in amount.

Section 803, spells out detailed requirements for the petition and the findings that must be made before an authorizing order can be issued, but nowhere states the consequences of violations of the rules. Because of the variety of types of violations that could possibly occur, a bright-line rule concerning the effect of such violations is inappropriate. The consequences of a failure to abide by the rules of this section are left to a case-by-case determination. A court should be guided by the Act's intention to permit gestational agreements and the equities of a particular situation. Note that § 806 provides a period for termination of the agreement and vacating of the order. The discovery of a failure to abide by the rules of § 803 would certainly provide an occasion for terminating the agreement. On the other hand, if a failure to abide by the rules of § 803 is discovered by a party during a time when § 806 termination is permissible, failure to seek termination might be an appropriate reason to estop the party from later seeking to overturn or ignore the § 803 order.
(Comment updated December 2002)

SECTION 804. INSPECTION OF RECORDS. The proceedings, records, and identities of the individual parties to a gestational agreement under this [article] are subject to inspection under the standards of confidentiality applicable to adoptions as provided under other law of this State.

Comment

The procedures involved in this article are exceptionally personal, thereby warranting protection from invasions of privacy. Adoption records provide a suitable model for these records.

SECTION 805. EXCLUSIVE, CONTINUING JURISDICTION. Subject to the jurisdictional standards of [Section 201 of the Uniform Child Custody Jurisdiction and Enforcement Act], the court conducting a proceeding under this [article] has exclusive, continuing jurisdiction of all matters arising out of the gestational agreement until a child born to the gestational mother during the period governed by the agreement attains the age of 180 days.

Comment

Source: USCACA § 6(e).

This section is designed to minimize the possibility of parallel litigation in different states and the consequent risk of childnapping for strategic purposes. The court that validated the gestational agreement will have authority to enforce the gestational agreement until the child is 180 days old. Note that only the parentage issues and enforcement issues are covered; collateral matters, such as custody, visitation, and child support are not covered by this Act.

SECTION 806. TERMINATION OF GESTATIONAL AGREEMENT.

(a) After issuance of an order under this [article], but before the prospective gestational mother becomes pregnant by means of assisted reproduction, the prospective gestational mother, her husband, or either of the intended parents may terminate the gestational agreement by giving written notice of termination to all other parties.

(b) The court for good cause shown may terminate the gestational agreement.

(c) An individual who terminates a gestational agreement shall file notice of the termination with the court. On receipt of the notice, the court shall vacate the order issued under this [article]. An individual who does not notify the court of the termination of the agreement is subject to appropriate sanctions.

(d) Neither a prospective gestational mother nor her husband, if any, is liable to the intended parents for terminating a gestational agreement pursuant to this section.

Comment

Source: USCACA § 7.

Subsection (a) permits a party to terminate a gestational agreement after the authorization order by canceling the arrangement before the pregnancy has been established. This provides for cancellation during a time when the interests of the parties would not be unduly prejudiced by termination. By definition, the procreation process has not begun. The intended parents certainly have an expectation interest during this time, but the nature of this interest is little different from that which they would have while they were attempting to create a pregnancy through traditional means. In contrast to the next subsection, termination of the agreement does not require "good cause."

Subsection (b) gives the court the right to cancel the agreement for cause, which is left undefined.

Under subsection (c) a party who wishes to terminate the agreement must inform the other parties in writing, and must also file notice with the court. The court must then vacate the order validating the agreement. An individual who does not notify the court of his/her termination of the agreement is subject to sanction.

USCACA § 7(b) specifically dealt with termination of a "surrogacy agreement" by a gestational mother who provided the egg for the assisted conception. This possibility is not repeated in the new UPA because there is only a remote likelihood that an agreement for the gestational mother to furnish the egg will be countenanced. Assisted reproduction, as generally conducted by medical facilities today, disapproves of that practice.

Subsection (d) provides that before pregnancy a gestational mother is not liable to the intended parents for terminating the agreement. Although the new Act does not explicitly provide for termination of the agreement after pregnancy. Several sections deal with this issue under certain described circumstances. Section 801(f) recognizes that the gestational mother has plenary power to decide issues of her health and the health of the fetus. Sections 803(a) and 807(a) direct that the intended parents are in fact the parents of the child with an enforceable right to the possession of the child.

SECTION 807. PARENTAGE UNDER VALIDATED GESTATIONAL AGREEMENT.

(a) Upon birth of a child to a gestational mother, the intended parents shall file notice with the court that a child has been born to the gestational mother within 300 days after assisted reproduction. Thereupon, the court shall issue an order:

(1) confirming that the intended parents are the parents of the child ;

(2) if necessary, ordering that the child be surrendered to the intended parents; and

(3) directing the [agency maintaining birth records] to issue a birth certificate naming the intended parents as parents of the child.

(b) If the parentage of a child born to a gestational mother is alleged not to be the result of assisted reproduction, the court shall order genetic testing to determine the parentage of the child.

(c) If the intended parents fail to file notice required under subsection (a), the gestational mother or the appropriate State agency may file notice with the court that a child has been born to the gestational mother within 300 days after assisted reproduction. Upon proof of a court order issued pursuant to Section 803 validating the gestational agreement, the court shall order the intended parents are the parents of the child and are financially responsible for the child.

Comment

Source: USCACA § 8.

Under subsection (a), the intended parents of a child born pursuant to an approved gestational agreement within 300 days of the use of assisted reproduction are deemed to be the legal parents if the order under § 803 is still in effect. Notice of the birth of the child must be filed by the intended parents. On receipt of the notice, the court shall issue an order confirming that the intended parents are the legal parents of the child and direct the issuance of a birth certificate to confirm the court's determination. If necessary, the court may also order the gestational mother to surrender the child to the intended parents.

Subsection (c) clarifies the remedies available if the intended parents refuse to accept a child who is born as the result of a gestational agreement.
(Comment updated December 2002)

SECTION 808. GESTATIONAL AGREEMENT: EFFECT OF SUBSEQUENT MARRIAGE.

After the issuance of an order under this [article], subsequent marriage of the gestational mother does not affect the validity of a gestational agreement, her husband's consent to the agreement is not required, and her husband is not a presumed father of the resulting child.

Comment

Source: USCACA § 9.

If, after the original court order validates the gestational agreement, the gestational mother marries, the gestational agreement continues to be valid and the consent of her new husband is not required. The new husband is neither a party to the original action nor the presumed father of a resulting child, and therefore ought not be burdened with the status of parent unless he is the genetic father or chooses to adopt the child.

SECTION 809. EFFECT OF NONVALIDATED GESTATIONAL AGREEMENT.

(a) A gestational agreement, whether in a record or not, that is not judicially validated is not enforceable.

(b) If a birth results under a gestational agreement that is not judicially validated as provided in this [article], the parent-child relationship is determined as provided in [Article] 2.

(c) Individuals who are parties to a nonvalidated gestational agreement as intended parents may be held liable for support of the resulting child, even if the agreement is otherwise unenforceable. The liability under this subsection includes assessing all expenses and fees as provided in Section 636.]**Comment**

Source: USCACA §§ 5(b),10.

This section distinguishes between an unenforceable agreement and a prohibited one. Given the widespread use of assisted reproductive technologies in modern society, the Act attempts only to regularize the parentage aspects of the science, not to regulate the practice of assisted reproduction. If individuals choose to ignore the protections afforded gestational agreements by the Act, parentage questions will remain when a child is born as a result of an nonvalidated gestational agreement. The Act provides no legal assistance to the intended parents. The gestational mother is denominated the mother irrespective of the source of the eggs, and donors of either eggs or sperm are not parents of the child. Notwithstanding the fact that the intended parents in a nonvalidated agreement may not enforce that agreement, subsection (c) provides that a court may hold the intended parents to an obligation to support the resulting child of the unenforceable agreement.

Under USCACA (1988), agreements that were not approved were declared "void." Under the new UPA, a nonapproved agreement is "unenforceable." The result may be virtually the same in some instances. As under the prior Act, the gestational mother is the mother of a child conceived through assisted reproduction if the gestational agreement has not been judicially approved as provided in this article. Her husband, if he is a party to such agreement, is presumed to be the father. If the gestational mother's husband is not a party to the agreement, or if she is unmarried, paternity of the child will be left to existing law, if any. If the mother decides to keep the child, the intended parents have no recourse. If the parties agree that the intended parents will raise the child, adoption is the only means through which they may become the legal parents of the child will be through adoption.

ARTICLE 9