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UNIFORM PARENTAGE ACT TASK FORCE

FINAL REPORT

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UNIFORM PARENTAGE ACT TASK FORCE

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EXECUTIVE SUMMARY

INTRODUCTION:

The Uniform Parentage Act (UPA) is model legislation developed by the National Conference of Commissioners on Uniform State Laws (NCCUSL). During the 2001 legislative session two bills (see S.F. 617/H.F. 831 and S.F. 2335/H.F. 2478) were introduced in the Minnesota legislature that contained some provisions of the Uniform Parentage Act. Several provisions of the UPA would constitute a significant change to existing law or introduce controversial new laws in specific policy areas such as assisted reproduction and gestational agreements. The legislature directed the Minnesota Department of Human Services to "appoint a Task Force to review the Uniform Parentage Act and make recommendations to the legislature on whether Minnesota should enact all or part of the Uniform Parentage Act..."

The Department of Human Services recruited the Honorable Robert Carolan, Judge of District Court, First Judicial District and Mark Ponsolle, Director of the Child Support Enforcement Division of the Ramsey County Attorney's Office to co-chair the Task Force. Task Force members were appointed in consultation with the co-chairs, legislators, professionals in the policy areas affected by the UPA, and staff of the Department of Human Services. The Task Force membership included representatives from several government agencies, community advocates, legislators, and professionals in the policy areas affected by the UPA.

The Task Force conducted most of its work in three subcommittees, representing each major policy area addressed in the UPA; specifically adoption, paternity, and assisted reproduction and gestational agreements. Typically, the subcommittees met weekly. In addition, there were six full Task Force meetings throughout fall 2001 and winter 2002. The analytic framework used by the Task Force and the subcommittees was to review and analyze the UPA looking for concepts, policies, or mechanisms that would improve Minnesota law or create better public policy for Minnesota residents.

RECOMMENDATIONS:

The Task Force recommends that the Uniform Parentage Act not be implemented in Minnesota. Generally, the Task Force concluded that there is little in the UPA that would significantly enhance Minnesota law and there is much that reduces or eliminates a number of desirable aspects of law and policy in the state. The specific reasons for not recommending each Article of the UPA are described in the subsequent sections of this report.

Articles 7 and 8 of the UPA address policy areas that would primarily be new to Minnesota law. Article 7 would expand upon Minnesota's single statutory provision (see Minn. Stat. §257.56) that addresses assisted reproduction (specifically, artificial insemination). Article 8 would create an entirely new body of law that addresses the requirements, judicial processes, and qualifications to enter into a gestational

agreement to conceive and bear a child. The Task Force does not recommend implementing either of these Articles as they are proposed in the UPA. However, the Task Force recommends additional analysis with the intent to implement laws that address these important public policy issues, as is presently occurring in several states. Generally, the Task Force believes that legislation governing these topics is necessary although there is no consensus that such agreements should be endorsed or that the provisions of the UPA sufficiently address a variety of concerned discussed by the Task Force. The Task Force concludes that there are a number of sensitive and controversial topics that require substantive deliberation before specific provisions are legislated. Unfortunately the Task Force had only enough time and resources to initiate a discussion on these topics.

GENERAL CONCERNS ABOUT THE UPA:

Repeal provisions must be carefully constructed: Current Minnesota parentage law, which would be repealed if the UPA was implemented, contains a number of provisions that are essential to ensuring that the best interests of children are paramount in a number of family law proceedings. The early versions of the UPA introduced in the Minnesota legislature were not selective in repealing existing laws. The Task Force recommends that any changes in Minnesota parentage or adoption law be carefully constructed to preserve existing provisions that protect the best interests of children, ensure that appropriate parties receive notice of legal proceedings in adoptions and other relevant areas, and ensure that the state complies with a variety of federal requirements to preserve essential funding sources.

The UPA does not adequately address the Indian Child Welfare Act (ICWA): There are a number of instances where paternity and adoption proceedings must incorporate provisions of ICWA in making legal decisions that involve Indian children. The UPA makes no references to ICWA. The Task Force is concerned that this oversight could have serious implications if it were not remedied in any large-scale revision of paternity or adoption statutes in Minnesota.

The UPA does not incorporate federal laws and regulations: There are a number of essential federal/state initiatives that provide assistance to families that may be affected by any large-scale repeal of Chapter 257 and subsequent adoption of UPA provisions. The comments to the UPA note the existence of the various programs, but does not incorporate the necessary provisions into the proposed bill. These omissions could inadvertently result in significant and substantive changes to the law and, if not addressed in any new legislation, potential reduction of federal funding for a variety of public assistance programs.

The best interests of children are not adequately addressed in the UPA: The Task Force notes that the provisions of the UPA tend to advance a general notion that expedient proceedings take precedence over consideration of the best interests of children in judicial proceedings. For example, the UPA places much greater emphasis on presumptions of paternity based on

marriage, genetic testing to adjudicate parentage, and affords less discretion to courts to consider a general notion of the best interests of children in making parentage decisions. Much of Minnesota's law, particularly in paternity, adoption, and child protection proceedings, requires courts to consider the best interests of children above many other legal facts of a particular case. While expedient legal action may sometimes lead to conclusive decisions regarding parentage of children, the Task Force is concerned that the UPA would upset the delicate balance of reconciling competing policies to determine the best result for children. The Task Force recommends that all provisions of the UPA, if they are considered for implementation, be carefully examined to ensure that the best interests of children remain of paramount importance in judicial proceedings.

UNIFORM PARENTAGE ACT TASK FORCE

INTRODUCTION

LEGISLATIVE MANDATE:

The Minnesota legislature directed the Department of Human Services as follows:

> "The Commissioner of Human Services shall appoint a Task Force to review the Uniform Parentage Act adopted by the Uniform Laws Commission in 2000 and to make recommendations to the legislature on whether Minnesota should enact all or part of the Uniform Parentage Act, whether portions of that act should be amended, and when it should be effective if it is enacted. (b) The Task Force appointed under paragraph (a) should include, but is not limited to, persons representing: (1) the Department of Human Services; (2) the Department of Health; (3) adoption agencies; (4) the Family Law and Children and the Law Sections of the Minnesota State Bar Association; (5) the Juvenile Law Section of the Hennepin County Bar Association; (6) genetic testing organizations; (7) public defenders; (8) county attorneys; (9) legal service attorneys; (10) judges; (11) child support magistrates; (12) children's advocates; (13) communities of color; (14) guardians ad litem; (15) parent organizations; (16) families involved in infertility treatment processes; (17) persons who have been adopted; (18) birth parents; (19) adoptive families; and (20) noncustodial parents. (c) The Task Force must submit its report and recommendations to the chairs of the committees in the House of Representatives and Senate with jurisdiction over family and parentage issues by January 15, 2002. The Task Force expires on January 15, 2002."
> (see 2001 Regular Session Laws, Chapter 178, Article 1)

THE UNIFORM PARENTAGE ACT (2000):

There were two Uniform Parentage Act (UPA) bills introduced in the Minnesota legislature in 2001 (see S.F.617/H.F.831 and S.F.2335/H.F. 2478). Each of these contained some provisions of the UPA set forth by the National Conference of Commissioners on Uniform State Laws (NCCUSL). To ensure that the work of the Task Force included analysis and review of all of the UPA provisions, the Task Force reviewed the final draft of the UPA issued by NCCUSL (see Appendix).

TASK FORCE RECRUITMENT AND MEMBERSHIP:

The Department of Human Services directed Children's Services and the Child Support Enforcement Division to convene and provide administrative support to the Uniform Parentage Act Task Force. The UPA addresses policy and law that is generally broader than the expertise of the Department of Human Services. To better address the broad scope of issues affected by provisions of the UPA, the Department recruited two distinguished individuals to lead the Task Force. The Task Force co-chairs were Mark Ponsolle, the Director of the Child Support Enforcement Division of the Ramsey County Attorney's Office, and the Honorable Robert Carolan, Judge of District Court, First Judicial District. Their leadership and the broad

representation among the Task Force members were instrumental in successfully conducting the thorough analysis of the UPA presented in this report.

The members of the Task Force were recruited from various referral sources, including legislators, professional staff in the law and policy arenas affected by the UPA, and staff of the Department of Human Services. Several members were recruited to represent communities not specifically identified in the authorizing legislation for the Task Force. A list of the Task Force members is included in the Appendix to this report.

TASK FORCE ADMINISTRATION AND PROCESS:

The primary review and analysis of the UPA occurred in three Task Force subcommittees. Each subcommittee focused its review, analysis, and recommendations on one subject matter area addressed by the Uniform Parentage Act. The subject matter areas were (1) adoption, (2) paternity establishment, and (3) assisted reproduction and gestational agreements. The subcommittees met regularly to review and analyze the sections of the UPA that contained provisions relevant to the subject matter areas described above. The direction given to the Task Force was to look for legal concepts, policy changes, or administrative mechanisms that would improve existing law and processes. ***All of the analyses, and thus the recommendations of the Task Force, assume that relevant sections of Minnesota Statutes Chapter 257 would be entirely repealed***. This assumption is based on the fact that the versions of the UPA introduced in the legislature in 2001 contained similar repeal provisions.

The entire Task Force met regularly, holding six meetings between September 2001 and January 2002. In addition to regular updates from the subcommittees, the Task Force heard and received public comment from a variety of stakeholders. Additionally, the Task Force invited the Honorable Jack Davies, a member of the NCCUSL committee that drafted the UPA and a former judge and legislator in Minnesota, to share his thoughts about the UPA.

FORMAT OF REPORT:

The subsequent sections of this report are devoted to Articles 1-9 of the Uniform Parentage Act as set forth by NCCUSL. Each section contains a brief summary of the topics addressed by the Article, the recommendation of the Task Force with respect to the Article, and discussion and comments that address the underlying rationale of the Task Force recommendation.

ARTICLE 1

SUMMARY:
Article 1 contains general provisions pertaining to the UPA. These include definitions of terms used throughout the Act, specifications with respect to jurisdiction and scope of the law, and other miscellaneous provisions.

RECOMMENDATION:
The Task Force recommends that Article 1 not be implemented.

COMMENTS AND DISCUSSION:
The recommendation to not implement Article 1 flows largely from recommendations to not implement other Articles of the Act. The primary provision of Article 1 that would produce a significant change to current Minnesota law is Section 102, which contains definitions of terms used throughout the UPA. Generally, the Task Force supports creation of a definitional section in Minnesota Statutes Chapter 257. However, there is no consensus that the definitions included in the UPA would be acceptable. A comprehensive review and analysis of terminology was determined to be beyond the scope of the Task Force's charge.

While reviewing the definitions, however, a number of observations were noted, including:

- "Man." The UPA does not distinguish between minor and adult parents. The consensus of the Task Force is that the law should retain special provisions regarding minor parents (i.e. Voluntary Paternity Acknowledgements). This definition effectively eliminates distinctions in Minnesota laws that currently exist. There is also concern that the UPA definition may imply that a minor may enter into assisted reproduction and/or gestational agreements. The Task Force recommends that minors should not be allowed to enter into assisted reproduction or gestational agreements. There was also a suggestion that there should be a comparable definition of "woman" if a definitional section is added.

- "State." The term as defined by the UPA does not include tribes in the definition of a "state." This may have potential conflicts with other provisions of Minnesota law and the Indian Child Welfare Act (ICWA).

- "Record." There are references throughout the UPA to a "record", which is essentially information stored and retained in perceivable form. There were many discussions during Task Force meetings about the methods of authenticating and filing documents in the UPA. The UPA definition of a "record" would include electronic media (i.e. e-mail). Many Task Force members expressed concern about the reliability of documents that were created or communicated electronically, especially if there are not other provisions (perhaps in other areas of the law) addressing the validity of such transmissions. Some Task Force members expressed concern about the UPA's requirements that documents must be sworn under penalty of perjury rather than preserving Minnesota's requirements for having documents

notarized. There were many discussions about the potential for fraud or forgery—and the implications of such acts for the affected individuals—if the existing requirements throughout much of Minnesota's family law to have documents notarized were altered.

- "Donor." The term as defined by the UPA excludes *all* donors from consideration as a parent. The Task Force recommends that this term be narrowed to require that a method of assisted reproduction must be utilized under the care of a licensed physician or office in order for the man to be considered a donor. There is concern that short-term sexual partners might deny paternity on the basis that the conception occurred as a result of "donation" rather than sexual intercourse.

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ARTICLE 2

SUMMARY:
Article 2 contains provisions that address the establishment of the parent and child relationship, a provision that sets forth the presumption of paternity in the context of marriage, and other miscellaneous provisions.

RECOMMENDATION:
The Task Force recommends that Article 2 not be implemented.

COMMENTS AND DISCUSSION:
If it were implemented without amendment, Section 204, which describes the presumption of paternity in the context of marriage, would eliminate additional presumptions of paternity that exist under Minnesota Statutes §257.55. The subcommittees that discussed paternity presumptions were nearly unanimous in their support for preserving Minnesota's existing array of paternity presumptions. The Task Force generally concludes that this UPA provision has the result of shrinking the pool of parties that can obtain legal standing as a presumed father in a parentage proceeding, thus limiting the ability of the courts to weigh various factors to determine the best interests of the child. The scenarios and legal issues that arise in disputed parentage cases vary greatly, which the relatively inflexible provisions of the UPA do not sufficiently address.

According to practitioners on the Task Force, Minnesota's law that allows a man who "receives the child into his home and openly holds out the child as his biological child" (see Minn. Stat. §257.55) to initiate a parentage action is often a vital mechanism to gain legal standing to ask the court to settle paternity disputes. This provision affords the court the flexibility to consider a man who is not biologically related to a child, but who has established an emotional bond with the child and has acted as the child's father, to be declared the child's legal father. This is particularly important in instances where the child's biological parents are unable to care for the child or when severing a long-standing relationship would be detrimental to the child's well being.

The Task Force noted that the UPA aspires to reduce the incidence of competing paternity presumptions and to ensure that the process of determining parentage is expedient. It is also noted that the UPA tends to rely on genetic testing to resolve paternity questions, which may place the results of genetic testing above the best interests of the child or existing family relationships. The UPA generally requires that a man who is determined to be the biological father of the child must be adjudicated as the legal father, regardless of the surrounding facts. While the Task Force does not discount the importance of genetic testing and the general desirability of conclusively determining who is the biological father, there is a general recognition that relying too heavily on scientific conclusions may discount the subtle nuances and complexity of human relationships.

It is noted that the comments to the UPA refer to Minnesota's current provision that allows courts to resolve competing paternity presumptions by assessing the "weightier considerations of policy and logic controls" (see §257.55 Subd. 2) as the "old approach." The consensus of the Task Force is that application of this provision is often the best approach to ensure that the best interests of the child are primary in the decision.

ARTICLE 3

SUMMARY:

Article 3 contains provisions that address the execution and administration of voluntary paternity acknowledgement[1] forms.

RECOMMENDATION:

The Task Force recommends that Article 3 not be implemented.

COMMENTS AND DISCUSSION:

Generally, the Task Force believes that the major provisions relating to paternity establishment in Minnesota are superior to the UPA provisions. The framework of current Minnesota law is the Uniform Parentage Act of 1973. The proposed UPA (2000) would replace or repeal the existing framework. The Minnesota legislature has modified the initial legislation through the years to address a number of public policy concerns and to incorporate a variety of federal requirements. The Task Force notes the following areas that influenced the recommendation to not implement Article 3.

Voluntary paternity acknowledgement: Minnesota has a Voluntary Paternity Acknowledgement process that allows parents to acknowledge a man as the biological father of a child and establish the parent and child relationship without a formal proceeding. Virtually every state has such an administrative process to establish the parent and child relationship when the parents agree that they are the child's biological relations. The statutory provisions regarding the Voluntary Paternity Acknowledgement are located in Minnesota Statutes §257.75.

Current Minnesota law requires certain notices and safeguards to ensure that parties understand the implications of completing the Voluntary Paternity Acknowledgement form. For example, under Minnesota law, prior to signing the Voluntary Paternity Acknowledgement form, the parties are given both oral and written notice of the rights waived and responsibilities assumed upon signing the form, and the alternatives to signing the forms. This notice is very important, as it provides the parties an opportunity to understand the significant rights they waive (including the right to a jury trial, genetic testing, counsel and others) upon signing the form. The UPA does not require these notices and safeguards.

Current Minnesota law also provides that a Voluntary Paternity Acknowledgment is the basis to bring an action regarding issues such as custody, parenting time, and support. However, under Minnesota law, such an action may not be combined with a domestic abuse proceeding under Minnesota Statutes Chapter 518B. This prohibition is not contained within the UPA. Some members of the Task Force, as well as individuals providing public comment, are concerned that elimination of this prohibition may discourage victims of domestic abuse from participating in parentage proceedings.

[1] In Minnesota, the Voluntary Paternity Acknowledgement is known as the Recognition of Parentage. We use the term Voluntary Acknowledgement throughout the report, which is the term used in the UPA.

Custody to unmarried mother by statute: Current Minnesota law (see Minn. Stat. §257.75) provides that, until a court order grants custody to another person, the custody of a child born to an unmarried woman must remain with the mother. This initial grant of custody is not addressed in UPA, which practitioners on the Task Force indicated would create a number of problems for hospitals and police if both parents claim custody of the child prior to leaving the hospital. The consensus of the Task Force is that the law should address custody of a child born to unmarried parents and that without compelling argument to the contrary, the existing provision should be retained. In addition, most of the Task Force agrees that this grant of custody should occur without a legal proceeding or court order—it should be addressed in statute, as is currently the case. A minority view advocating that physical custody be given to the mother and legal custody to both parents, provided that paternity was acknowledged by the father, was expressed. It was noted that such a provision would convey to unmarried fathers similar rights and responsibilities as are granted to married fathers.

Competing paternity presumptions: The UPA provisions that govern the signing and administration of Voluntary Paternity Acknowledgement forms are structured so that there are no competing paternity presumptions. In the context of the Voluntary Paternity Acknowledgement process in Minnesota, competing presumptions can arise in a number of scenarios, including if two or more individuals file a form for the same child. In theory, there should not be competing Voluntary Paternity Acknowledgement forms for the same child because individuals signing the form are declaring that they are the biological parents. In practice situations regularly arise where the court must sort out the claims of more that one individual asserting that he is the legal father of a child.

Under the UPA, if two forms are filed for the same child, the second form would automatically be void. The second form could only be recognized if the first form was somehow voided or invalidated, such as forms that inadvertently fail to note a presumed father. During their discussion of this Article the practitioners on the Task Force presented numerous scenarios where the actual biological father submits the second Voluntary Paternity Acknowledgement form. The ability of the second man, in many instances, to obtain standing before the court may be essential to determine who is the biological father of the child, which, in turn, may be critical in determining the best interests of the child. The Task Force prefers the current law, which grants equal legal standing (as presumed fathers) to all men who sign a Voluntary Paternity Acknowledgement form. In addition, the Task Force prefers deferring to the court to determine the best interests of the child in these situations.

Rescission of Voluntary Paternity Acknowledgement: Currently in Minnesota, a Voluntary Paternity Acknowledgement form may be rescinded within 60 days by submitting a written statement to the State Registrar of Vital Statistics (the Minnesota Department of Health). The UPA does not permit a rescission to occur in this manner, but requires an individual to commence a legal proceeding to rescind the voluntary acknowledgement. The Task Force notes that this provision, and others in the UPA, requires individuals to initiate additional court proceedings and navigate the complex legal system. The Task Force recommends that any changes that would direct more activity to the courts or require individuals to initiate more legal proceedings than existing law be carefully reviewed to ensure that they are essential to

constitutional requirements or promoting the best interests of the child. The primary concern regarding requiring court actions is that such requirements are generally thought to discourage individuals with less education or economic resources from engaging the legal system.

Minors signing Voluntary Paternity Acknowledgement: Both the UPA and current Minnesota law allow minors to sign the Voluntary Paternity Acknowledgement form, although Minnesota law provides more protection for minors than the UPA. In particular, Minnesota law allows either party (until the youngest party is 18 years and 6 months old) to petition the court to declare the nonexistence of the father-child relationship, and by necessity vacate the Voluntary Paternity Acknowledgement. The UPA does not contain a similar provision. The consensus of the Task Force is that Minnesota's existing provisions with respect to minors should be retained. Some Task Force members suggested that Minnesota law should be amended to also require that minors receive some sort of counseling prior to signing a Voluntary Paternity Acknowledgement form. Another suggestion is to require that a trusted adult (such as a parent or legal guardian) co-sign the Voluntary Paternity Acknowledgement form with the minor.

In-Hospital paternity program: Current provisions of Minnesota law mandate that an in-hospital paternity program be administered throughout the state. This program, which is rooted in a federal requirement, is the source of the notice requirements for the Voluntary Paternity Acknowledgement form. The federal requirements include details on administration of the Voluntary Paternity Acknowledgement program. Minnesota's provisions also ensure that hospitals and other parties work together to provide effective administration of the program and ensure that individuals who sign a Voluntary Paternity Acknowledgement form understand all of the rights and responsibilities that are assumed and waived by signing the form. If the in-hospital paternity program provisions of Chapter 257 are not retained, certain federal funding elements could be lost. The consensus of the Task Force is that the program should be retained, not only because of funding implications, but because the notice requirements of the program are essential in helping individuals make an informed decision about signing or not signing the form.

Signing Voluntary Paternity Acknowledgement prior to birth of the child: The UPA permits signing of a Voluntary Paternity Acknowledgement form prior to the birth of a child. The form becomes effective when the child is born. Minnesota does not allow signing of the Voluntary Paternity Acknowledgement form prior to the child's birth. To implement the UPA provision would require development of an additional administrative system to match Voluntary Paternity Acknowledgement forms without names or birth dates to whatever notice would be submitted when the child is born. The consensus of the Task Force is that this provision would create an administrative burden that far exceeds any potential benefit from implementing it.

Miscellaneous requirement to execute Voluntary Paternity Acknowledgment: The UPA does not require that the Voluntary Paternity Acknowledgement form be notarized. Most practitioners on the Task Force believe that Minnesota's notary requirement for the Voluntary Paternity Acknowledgement form is essential. The notary requirement protects individuals from being fraudulently bound to a lifetime commitment to support and nurture a child.

Lump Sum Settlements: The UPA does not contain provisions similar to Minnesota law regarding a lump sum support settlement as part of a paternity proceeding (see Minn. Stat.

§257.64, §257.60, §257.66, §257.68). Under this procedure, the Commissioner of Human Services becomes a party to the parentage proceeding together with a Guardian ad Litem. The requirements for the Commissioner's approval of the agreement are set forth in State Rules Parts 9500.1650 through 9500.1663. If the statutory provisions are deleted, it would be unclear whether such agreements may be executed, and if so, under what requirements. The Task Force supports retaining the existing Minnesota provision regarding lump-sum support settlements because such settlements may have fiscal implications for the state and because it is essential to ensure that the best interests of the child (including financial and emotional implications for the child) are addressed in such settlements.

ARTICLE 4

SUMMARY:

Article 4 sets forth provisions for establishment of a paternity registry, operation of the registry, and conducting searches of the registry.

RECOMMENDATION:

The Task Force recommends that Article 4 not be implemented.

COMMENTS AND DISCUSSION:

Minnesota recently implemented the Father's Adoption Registry, which is in many respects similar to the registry proposed in the UPA. However, there are provisions in the UPA that the Task Force finds particularly problematic. Additionally, there are a number of provisions in current Minnesota law that the Task Force is concerned would be repealed by implementing the provisions of the UPA. Finally, the Task Force is concerned that the time and resources needed to implement the changes proposed in the UPA would interrupt operation of the current registry.

Goals of UPA Registry and existing Minnesota Registry are similar: Minnesota implemented the Father's Adoption Registry (see Minn. Stat. 259.52) in 1998. The Minnesota Father's Adoption Registry and the UPA Paternity Registry have many common goals. Registries under both provisions allow men who believe they may be the father of a child to register with a state agency, in Minnesota with the Department of Health, which maintains the Registry. The registry is intended to provide a mechanism for notice to men who might not otherwise be entitled to notice of a pending adoption. If a child is to be adopted, the UPA and existing Minnesota law requires that the registry be searched to ensure that a man has not registered. If a man has registered, he must receive notice of the adoption proceeding. The man must also receive information and materials regarding his rights and obligations in the adoption proceedings. An unstated goal of the UPA registry is to facilitate infant adoptions (this was articulated by the Honorable Jack Davies when he addressed the Task Force). The Task Force is uncertain whether the UPA effectively accomplishes this goal and there were significant questions about the merit of incorporating this goal into public policy.

Implementing UPA provisions would be time consuming with no significant improvement in public policy: Practitioners regard the Registry as a useful resource. Because there are substantive differences between the UPA Registry and Minnesota's Registry, implementing the UPA provisions would require the Department of Health to repeat much of the implementation work that was done to establish the current registry. The Task Force did not see any clear reasons to suggest that the UPA Registry would serve citizens better than the existing registry. The Task Force, including representatives from the Department of Health, indicated that several factors help Minnesota's current Registry provide more certainty in outcomes for children in adoptions and are therefore superior to the Registry contained in the UPA. These factors include:

- Minnesota law prohibits a man from filing any paternity claim for a child if he does not register in a timely fashion; the UPA registry does not contain a similar prohibition. This difference raises the possibility of unexpected challenges in adoption proceedings.
- Minnesota law requires the Department of Health to retain late registries to prove time of filing; UPA requires the responsible Department to notify the man of late filing, but does not require that proof be retained. This could result in needed evidence being discarded or never recorded, which could complicate and extend already time consuming adoption proceedings.
- Minnesota law provides an exception for late filing for a man who can demonstrate that it was "not possible" to register within the 30 day limit imposed by law; UPA has no exception for late filing. This difference could help to facilitate adoptions but it may preclude men with valid reasons for a delayed filing from asserting their parental rights.
- Minnesota law provides that "lack of knowledge of the pregnancy" is not a defense to late filing; the UPA does not reference what defenses are barred or permitted. When combined with Minnesota's exception immediately above, this difference could be significant in preventing unanticipated challenges to adoptions.
- Minnesota law requires that detailed information on what a man who has registered must do to consent to an adoption or to establish paternity (thereby forestalling an adoption) must be provided to the registrant. The UPA requires notice to the registered man, but does not spell out other procedures for him to follow to assert or waive his parental rights.
- Minnesota law has provisions for consolidating adoption and paternity actions and has a 30 day limit for commencing paternity action; no similar provision is found in the UPA.
- Minnesota law provides indigent parties with the right to court-appointed counsel to establish paternity; the UPA has no similar provision.
- Minnesota law requires search of only the Minnesota registry making it clear which state's Registry law applies. The UPA requires search of all states where conception "may have occurred" introducing the possibility of confusion about which state law may apply.

The UPA is silent with respect to special provisions of the Indian Child Welfare Act: Minnesota's registry recognizes the requirements of the Indian Child Welfare Act (ICWA) that exempt Indian fathers from the 30-day limit on registration and gives full faith and credit to tribal paternity proceedings. The UPA is silent on this and other ICWA provisions. If the state fails to comply with the requirements of ICWA it overlooks important rights accorded Indian tribes, Indian parents, and Indian children, which may result in legal actions to force the state's compliance with important provisions of federal law. In turn, such legal actions could result in the removal of children from adoptive homes at any time, even years after an adoption was thought to be final.

Notice requirements to terminate parental rights are problematic: The UPA contains different processes and notice requirements, based on the age of the child, regarding termination of parental rights. These provisions troubled the Task Force (see UPA Sections 404 & 405). With few exceptions, a man's parental rights can be terminated without notice if the child is under one year of age. Conversely, if the child is over one year of age *every* alleged father, whether or not he has registered, must receive notice of a proceeding to terminate parental rights. This is a

significant barrier to facilitating adoption of older children and may, in some instances, be a barrier even to facilitating adoption of infants. It was noted that many infant adoptions are not finalized before the child is one year of age. The UPA does not clearly address when in the adoption and/or termination of parental rights process that notice must be given. The Task Force members note that if the UPA supports facilitating adoptions, simplifying the rules for adoption of all children—including older children—would seem make more sense.

Additional notice requirements in UPA are problematic: The UPA expands and mandates Registry notice and search requirements to all termination of parental rights proceedings, including cases of child abuse and neglect. Currently, the Minnesota Registry applies only to adoption proceedings. This is significantly different from current Minnesota law and the Task Force believes that such a change requires additional legal and policy analysis. The UPA would expand required searches to include child protection agencies and county attorneys working on termination of parental rights matters. The Task Force recommends additional analysis prior to implementing a change of this magnitude.

Technical change may improve administration of existing Minnesota law: An opportunity to enhance existing Minnesota law was noted by the Task Force while reviewing laws that would be affected by Article 4. It was noted that current notice requirements for non-adjudicated fathers in adoption proceedings (under Chapter 259) differ in several respects from who must receive notice in a paternity proceeding (under Chapter 257). This situation, which may be an oversight in Minnesota laws, would continue under UPA. The Task Force recommends additional analysis of the differences and that either adoption or paternity laws be changed to align the notice requirements so as to make them consistent.

ARTICLE 5

SUMMARY:
Article 5 sets forth provisions governing genetic testing in disputed paternity proceedings. Specific requirements with respect to testing standards are included and specific procedures are outlined. In addition, there are provisions that direct the court to either order or prohibit genetic testing, depending on particular circumstances of a case.

RECOMMENDATION:
The Task Force recommends that Article 5 not be implemented. However, minor changes in existing Minnesota law are recommended (see discussion below).

COMMENTS AND DISCUSSION:
Article 5 primarily contains provisions that already exist in Minnesota law and are not sufficiently different from the current statutes to warrant change.

The Task Force recommends amending current Minnesota law to incorporate the UPA provision in Sections 503 (with the exception of 503 (a) (2)), which defers to accreditation agencies for standards for genetic testing, when appropriate. This type of provision has the benefit of maintaining current technological standards without having to continuously revisit the law and might avoid unforeseen complications in the future. It would not be necessary to adopt other Sections of Article 5 if this recommendation was implemented. Current law does not contain provisions similar to those addressed by this recommendation.

The Task Force indicated some concern about the validity of genetic testing results, given the emergence of non-accredited testing labs. In addition, there is concern that these non-accredited agencies do not adhere to industry standards regarding consent of parents for testing of children. Minnesota Statutes §257.62 provides for procedures regarding genetic testing, and the weight given to results obtained from testing performed by a laboratory accredited by the American Association of Blood Banks (AABB). While the statute affords more weight to results from AABB labs, results from labs not accredited by the AABB may be introduced into evidence. The UPA contains similar provisions in Section 621 of Article 6.

Many Task Force members supported establishing a prohibition on the admissibility of non-accredited testing so as to discourage questionable practices. However, there were concerns about whether imposing such a limitation presents a constitutional question. At a minimum, the Task Force thought that legislators should be alert to emerging issues in the genetic testing profession.

The Task Force recommends that genetic testing standards require that 99 percent of all falsely accused males be excluded, in addition to concluding that there is a 99 percent probability that the man being tested is the biological father of the child. Neither the UPA nor current Minnesota laws specifically address the standard for excluding falsely accused males in genetic testing for

paternity. This standard is recommended by the AABB but it is not currently among the organization's accreditation requirements.

The Task Force recommends incorporating the UPA provision in Section 502 (c), which specifically prohibits the court or the public authority for child support enforcement from ordering in-utero genetic testing. Currently, Minnesota Statutes §257.57, Subd. 5 permits a parentage action prior to the child's birth—but only allows service of process and taking of depositions. By implication, such testing cannot be ordered under existing law. However, the UPA provision would clarify existing law. The consensus of the Task Force is that this clarification of current law would be helpful in an adversarial paternity proceeding that occurred before the child's birth.

Technical clarification needed in current law: The Task Force recommends that references to "blood and genetic tests" in current law be amended to refer to "genetic tests." Such a reference would eliminate some confusion when genetic material other than blood is used to conduct a paternity test. The term "genetic tests" is commonly understood among testing professionals and the legal profession to include blood tests, buccal swabs, and DNA tests.

ARTICLE 6

SUMMARY:
Article 6 sets forth the requirements, processes, special rules, and legal effects/implications of the proceeding to adjudicate parentage.

RECOMMENDATION:
The Task Force recommends that Article 6 not be implemented.

COMMENTS AND DISCUSSION:
Much of Article 6 builds upon the provisions of section 204, which provide that the only presumptions of paternity are generally based upon the marriage or attempted marriage of the parties. The Task Force prefers that Minnesota's broader range of paternity presumptions be retained, which makes many provisions of Article 6 irrelevant or unworkable without substantial revision. The Task Force believes that Minnesota law represents better public policy by placing the best interests of the child above other matters when making critical legal decisions about parentage. In addition, the Task Force notes the following factors that support the decision to recommend against implementation of this Article.

Joinder of proceedings: One of the primary concerns regarding paternity proceedings is that Sections 610 and 636 of the UPA significantly alter the method of addressing issues such as custody, parenting time and child support. Under current Minnesota law (see Minn. Stat. §257.66), all orders to adjudicate parentage must address custody, parenting time, support, the child's name, and other issues the court deems necessary to address the best interests of the child. The UPA does not include a similar requirement, although there is a provision (Section 610) that *allows* joining of related matters, although each issue must be initially raised in a *separate* proceeding. The UPA allows the court to change the child's name for good cause as part of the paternity proceeding.

Essentially, the UPA requires more proceedings to achieve the same result than is currently attained with one proceeding. The Task Force is concerned that the UPA provisions could limit accessibility to the court system, unnecessarily complicate court proceedings, and put additional strain on an overburdened judicial system. Perhaps more importantly, such provisions could lengthen the time it takes to achieve stability for children with final determinations about custody, parenting time, support, and related matters.

Right to jury trial: Section 632 of the UPA specifically prohibits jury trials in a paternity action. However, in Minnesota a jury trial is a constitutionally protected right. See Smith v. Bailen, 258 N.W.2d 118 (1977). To implement this UPA provision would probably require a constitutional amendment rather than a statutory change. The Task Force recommends that the right to a jury trial should be retained and that Section 632 be removed if the legislature decides to implement portions of the UPA.

Notice of proceedings and parties to an action: Current Minnesota law requires that more parties must be included (or receive notice of the proceeding) in a paternity action than is required in the UPA (see Section 603). Much of the difference between current Minnesota provisions and the UPA is related to the different paternity presumptions in Minnesota law. The UPA names the mother of the child and "the man whose paternity is to be adjudicated" as necessary parties. Current Minnesota law (see §257.60) is more specific and requires the mother, and each man either presumed or alleged to be the father of the child to be named as parties. The Task Force prefers the existing requirements, which are tied to the expanded paternity presumptions discussed throughout this report.

Child as a party to proceedings: The UPA significantly alters the status of children as a party to a paternity proceeding. Section 612 of the UPA permits, but does not require, a child to be a party unless the court finds that the interests of the child "are not adequately represented". Under Minnesota Statutes §257.60, children are also generally allowed to be a party to the proceeding, but the circumstances under which a child *must* be made a party are more specific. Minnesota law requires that the child must be made a party and a guardian ad litem must be appointed if there is a lump sum settlement, if the action is to declare the non-existence of the parent-child relationship, or if a man brings an action to declare the parent-child relationship and the mother denies the existence of the relationship. The UPA provisions may be problematic if the interests of either parent conflict with the child's best interests.

Section 612 of the UPA only requires appointment of a guardian ad litem if the court finds that the child's interests are not adequately represented. Under Minnesota law (see §257.60), a guardian must be appointed whenever the child is made a party, whether as a permissive or necessary party. The Task Force believes that the Minnesota provisions better protect the best interests of the children than the UPA.

Right to Counsel: Current Minnesota law guarantees individuals a right to counsel in all facets of a disputed paternity proceeding, including court-appointed counsel if a person is indigent. The UPA is silent regarding the right to counsel. The consensus of the Task Force is that, given the potential financial and emotional impact of an erroneous determination of paternity, it is essential that all individuals, regardless of socioeconomic circumstance, receive the opportunity to have adequate legal representation. The Task Force strongly recommends that that right to counsel provisions in Minnesota law be retained.

Timelines to establish or disprove paternity—Actions where there is no presumed father: Both the UPA and Minnesota law contain provisions regarding the time limitations to commence actions to establish the father-child relationship or to disprove the father-child relationship. However, the standing of parties and the timelines for each type of action differ. If a child has no presumed father (a much larger group under the UPA than under current Minnesota law), the UPA (see Section 606) permits the action to be brought at any time, even after the child is an adult. Under Minnesota law (see §257.58), if there is no presumed father, the action to declare the parent-child relationship must be brought by the child's 19th birthday. Implementing the UPA could lead to an increased number of paternity proceedings for adults.

Timelines to establish or disprove paternity—Actions where there is a presumed, adjudicated or acknowledged father: The UPA (see Sections 607 and 609) requires that proceedings to establish paternity must generally be brought within two years of: (1) the child's birth, (2) filing of a valid Voluntary Paternity Acknowledgement, or (3) adjudication of parentage. This potentially excludes a man, who learns that he may be a father, from pursuing his claim at a point when the child could still benefit from knowing who the biological father is. Under current Minnesota law, there are no similar provisions that limit the time frame within which a paternity proceeding may be initiated. The Minnesota Supreme Court has also held that Minnesota statutes permit an action to declare the father-child relationship, under certain circumstances, by an alleged father who believes that he may be a presumed father, even if another presumed father already exists through marriage. *See* Witso v. Overby, 627 N.W.2d 63 (Minn. 2001).

Timelines to establish or disprove paternity—Actions to challenge or disprove paternity: An action to disprove the father-child relationship may be maintained under section 607 of the UPA if the child has a presumed father and the court finds that the presumed father and the mother did not live together nor engage in sexual intercourse and the presumed father never held the child out as his own. This is an exception to the general provisions of Section 607 of the UPA as described above. Minnesota Statutes §257.57 has a more complex and more permissive statutory scheme for bringing an action to declare the non-existence of the parent-child relationship, wherein time limits are dependent upon the basis of the presumption of paternity. Minnesota law (see §257.57) also contains special provisions extending the time period to bring an action to declare the non-existence of the parent-child relationship by a minor signatory to a Voluntary Paternity Acknowledgement form. The UPA contains no specific provisions for minor parents.

Openness of proceedings: UPA section 633 provides that parentage proceedings should be open proceedings. Under Minnesota Statutes §257.70, all parentage proceedings are closed to the public. There is no consensus or preference for either provision among the Task Force members.

ARTICLE 7

SUMMARY:
Article 7 contains provisions governing the rights and responsibilities of individuals who use assisted reproduction technologies to conceive children.

RECOMMENDATION:
The Task Force recommends that Article 7 not be implemented in Minnesota. However, the consensus of the Task Force is that additional analysis and legislation are needed to address public policy concerns in the area of assisted reproduction technology. Minnesota currently has only minor provisions covering this increasingly common method for bearing children. Thus there is a significant need for comprehensive, specific legislation concerning the various aspects of parentage (or disputed parentage) and related matters when individuals use assisted reproduction.

COMMENTS AND DISCUSSION:
Currently, Minnesota law has only one statutory provision regarding assisted reproduction; it specifically addresses artificial insemination. Minnesota Statutes §257.56 contains provisions stating that if a husband consents to assisted reproduction, he is treated as the biological father, rather than the donor. All consent certifications in Minnesota must be in writing and must be retained for at least four years by the physician that provides assisted reproduction services. All records relating to this process are sealed and available for inspection only upon obtaining a court order based on good cause.

In the sections below, the Task Force offers its concerns and suggestions for additional public policy analysis that resulted from many hours of discussion. The Task Force recommends that the issues discussed below, and perhaps others, should be thoughtfully addressed before any legislation concerning assisted reproduction is implemented in Minnesota.

Recommendation to amend specific UPA provisions into Minnesota law: The Task Force recommends that the provisions in Sections 703 and 704, which address the resulting parentage based on a husband's consent to assisted reproduction, as well as the determination of parentage if there is no consent, be considered as changes to Minnesota law. The Task Force determined that these provisions provide substantially clearer direction to the court to determine which man will be recognized as the child's father in assisted reproduction cases where there is no clear consent by husband.

Concerns about specific content of UPA

Limitation of dispute of paternity: Section 705 of the UPA provides limitations on a husband's dispute of paternity when assisted reproduction has been used. If this provision were to be implemented, the Task Force recommends that Section 705 (a) be amended to limit the ability of *both* parties (intended parents) to contest the child's paternity. This recommendation seems to be

consistent with other provisions of the UPA that set forth the specific rights, responsibilities, and obligations of both parties.

Withdrawal of consent: Section 706 of the UPA provides that a former husband cannot be adjudicated the father of a child of assisted reproduction unless he consented, in a record, to be the father if assisted reproduction occurred after a divorce. This section also allows a former spouse to withdraw consent to assisted reproduction any time prior to implantation of biological material. If this provision were implemented, the Task Force recommends that the withdrawal of consent prior to implantation of embryos or biological materials should be uncontestable by the other party in connection with a divorce proceeding.

Assisted reproduction after death of one party: Section 707 of the UPA states that a deceased spouse is not the parent of a child conceived after her or his death unless she or he specifically stated the desire to be the parent in a record. The Task Force understands that this provision may protect living heirs, but questions whether such a provision adequately protects the best interest of children born as the result of an individual acting without full knowledge of such a provision. If such a provision were addressed in any assisted reproduction statute, the Task force recommends that, minimally, there should be a requirement that assisted reproduction clinics provide notice regarding these implications to a party seeking to initiate an assisted reproduction process with the biological material of a deceased spouse.

Notations on technical changes that would be needed if UPA were implemented

Section 704 (b) of the UPA says that a husband can be found to be the father of a child born as a result of assisted reproduction, whether or not he signed a consent to assisted reproduction before or after the birth of the child, if he and the wife "openly treated the child as their own." If the UPA were implemented, the language in this Section should conform to the existing Minnesota provision (Minn. Stat. §257.55) that creates a paternity presumption for an individual who "receives the child into his home and openly holds out the child as his biological child."

Section 705 (b), which provides for exceptions for paternity claims within a specific time frame, needs additional analysis given that the Task Force recommends retaining the existing paternity presumptions set forth in Minnesota Statutes §257.55. The Task Force is concerned that the expanded paternity presumptions in current law may conflict with the relatively narrow exception provisions set forth in this section of the UPA.

PUBLIC POLICY CONCERNS THAT REQUIRE ADDITIONAL ANALYSIS

- ***Ensuring that children have access to genetic and disease history and/or risk factors.*** There is significant concern that children of assisted reproduction should, whenever possible, know the essential facts about their biological heritage. While matters involving the assisted reproduction industry are beyond the scope of the Task Force's authority, this issue is believed to be important enough to recommend additional analysis before legislation in the area of assisted reproduction is implemented.

- ***Questions about sanctioning practices that may promote formation of single-parent families.*** There is concern that the UPA provisions regarding assisted reproduction would inadvertently promote the formation of single-parent families. While the Task Force understands that there may be constitutional questions about limiting access to assisted reproduction services, there is sufficient concern to recommend that the question be subjected to additional analysis before legislation is implemented.

- ***Requirement that parties involved in assisted reproduction be married.*** Under current Minnesota law, a number of scenarios involving unmarried individuals (including same-sex couples) would require at least one party to adopt the child born through assisted reproduction. While the UPA does not specifically prohibit unmarried individuals from pursuing assisted reproduction, the UPA language seems to imply that such a restriction exists. The Task Force recommends that additional analysis addressing this critical parameter of any assisted reproduction legislation be pursued before it is implemented.

- ***Custody and disposition of embryos or other genetic materials in dissolution proceedings.*** Some of the UPA provisions in Article 7 attempt to ensure that a party to a divorce proceeding cannot unknowingly become a parent. However, the Task Force is concerned that without changes in the dissolution law, the provisions may be inadequate. The Task Force recommends that serious consideration be given to requiring that dissolution proceedings address custody of the biological materials and potential parentage issues if biological materials belonging to either party exist in storage. Minimally, the topic should be the subject of additional analysis.

ARTICLE 8

SUMMARY:
Article 8 contains provisions relating to gestational agreements, including requirements for intended parents, judicial processes, and limitations on the use of such agreements.

RECOMMENDATION:
The Task Force recommends that Article 8 not be implemented in Minnesota. However, the consensus of the Task Force is that additional analysis and legislation are needed to address public policy concerns involving gestational agreements, including whether such agreements should be permitted by law. The Task Force is aware that such agreements are currently being negotiated and children are being born in connection with these agreements. There are several complex public policy considerations that the Task Force believes require serious deliberation and discussion before any legislation is implemented in Minnesota.

COMMENTS AND DISCUSSION:
The provisions of Article 8 address complex and controversial public policy areas. Unlike much of the UPA, the drafters anticipated that there would be disagreement about this Article and structured the UPA so that Article 8 is optional. Thus, Article 8 could be omitted without affecting the integrity of the remainder of the legislation. The Task Force was not able to achieve consensus on all of the provisions of Article 8. In addition, there are a number of important public policy concerns that the Task Force could not satisfactorily resolve. These concerns are multifaceted and have significant social, moral, and ethical dimensions that the Task Force believes require additional analysis, discussion, and debate.

Areas of consensus:

Court validation of agreements: The Task Force believes that any legislation permitting gestational agreements should require review and validation of the agreement by the courts. However, there is no consensus on the role of the court and the amount of discretion that the court should have in approving the agreements (see discussion below).

Non-validated agreements go to the courts: The UPA has a provision that requires non-validated agreements to be brought before the court, which reinforces the essential nature of the courts in pre-approval of gestational agreements. The Task Force recommends that any legislation on gestational agreements specifically state that the courts, according to common law and adoption law, will interpret non-validated agreements. A similar provision is contained in the UPA, but it does not direct the courts to apply specific areas of law when making decisions.

Prohibit contingent agreements: The Task Force strongly recommends that contingent provisions, such as requiring the birth of a live or healthy child, be absolutely prohibited. The Task Force believes that the intended parents should not be allowed to refuse the child, or multiple children that are born pursuant to the agreement they willingly enter.

Notice requirements upon termination: The Task Force recommends that all parties to the agreement must receive notice if any party chooses to terminate the agreement prior to implantation of biological materials. No termination of the agreement should be permitted once gestation has begun. While the assisted reproduction clinic (or clinics) should not be a party to the agreement, there should be a requirement that the clinic receive notice of termination of the agreement. This will ensure that no party fraudulently proceeds with the implantation of genetic material against the wishes of the other parties.

Record keeping and birth records: The Task Force recommends that any legislation to permit gestational agreements address the related issue of birth records. Existing law should be reviewed and amended as appropriate to ensure that the unique scenarios involving birth records of children born pursuant to a gestational agreement are accommodated.

Requirements prior to submission of agreement: The Task Force recommends that any legislation include the requirements that must be fulfilled to submit a gestational agreement to the court to have it validated. The consensus of the Task Force is that Section 802 of the UPA is inadequate and that additional requirements are needed. Additionally, the Task Force recommends that some elements of Section 802 of the UPA be specifically excluded. While the Task Force recommends additional analysis, the following provisions are recommended by the Task Force as the minimum requirements needed.

Requirements to Submit Agreement	Requirements that Should be Excluded
• Age requirement (all parties at least 18 years old) • Residency requirement • Consent of spouse (if applicable) • Psychological evaluations of all parties • Medical evaluation for gestational carrier • Reports from psychological and medical evaluations must be submitted to court • Certification that there are no collateral oral or written agreements between the parties	• Evidence or certification that mother (intended parent) is unable to bear children Section 803 (b) (2); scientifically improbable to prove. • Previous pregnancy requirement for gestational carrier Section 803 (b) (5); this provision unnecessarily limits the potential for altruistic intention on behalf of the gestational carrier.

Required elements of agreement: The Task Force believes that the UPA does not adequately address a number of critical issues that all parties to a gestational agreement should address prior to entering the agreement. By specifically enumerating required elements of the agreement, any laws governing gestational agreements can help to ensure that subsequent conflict areas are minimized by providing clear legislative direction to the courts. At a minimum, parties should be required to certify that they discussed these topics. Ideally, the following (and perhaps additional) issues should be addressed in the gestational agreement.

- ***All expenses and payments, including health-care and related expenses must be addressed and the time frame for expense allocation must also be addressed:*** The parties should consider a number of scenarios that could result in unanticipated expenses. For example, it is possible that complications of the pregnancy would require the gestational carrier to stop

working earlier than any of the parties anticipated initially. The agreement should address whether or not the intended parents are expected to compensate the gestational carrier for lost earnings.

- ***Liability of all parties if agreement is cancelled:*** The parties should explicitly address the extent of liability of all parties in the event that any party cancels the agreement. The UPA allows court discretion whether to approve a gestational agreement. This initial decision may be reviewed only for an abuse of discretion. After the entry of court approval, the UPA further allows the court to invalidate the agreement for good cause shown. The parties should be required to certify that they agree on whether and under what circumstances there would be no monetary exchange if any party, including the court, cancels the agreement.
- ***Access to counseling for gestational carrier:*** The Task Force recommends that counseling must be made available to the gestational carrier prior to the pregnancy, throughout the pregnancy, and for a specified period after the child is born. All counseling for the gestational carrier should be provided at the expense of the intended parents or there should be an explicit agreement that addresses counseling expenses. The gestational carrier should have the right to forego counseling. If the gestational carrier chooses to forego counseling, that waiver should be specifically noted in the agreement.
- ***Legal representation for gestational carrier:*** The Task Force recommends that independent legal representation be available to the gestational carrier at expense of the intended parents. If the gestational carrier specifically chooses to forego the offer of legal representation, the agreement should be required to indicate that the parties discussed the issue and that the gestational carrier affirmatively refused legal representation.
- ***Inheritance concerns:*** The Task Force recommends that the intended parents should be required to address inheritance rights for the child in the event of the death of the intended parents prior to the child's birth. This will help to ensure that the best interests of the child in gestation are protected. It will also help to ensure that existing heirs know the specific intention of the intended parents regarding distribution of their estate in the event of their death prior to the birth of the child pursuant to the gestational agreement.
- ***Adoption preference:*** The Task Force recommends that the intended parents be required to address whether or not they desire to allow relatives, friends, or acquaintances a priority in adoption proceedings if the intended parents should die prior to the birth of the child. This requirement is intended to expedite an adoption if it is necessary due to the death of the intended parents. A quick and final resolution of adoption issues will help to ensure that the child has a permanent home when it is born.

Areas where there is no consensus

The Task Force attempted to achieve consensus whenever possible. Many of the issues raised in the discussions about gestational agreements, however, are accompanied by moral and ethical dimensions that could not be reconciled during the brief time available to the Task Force. The discussions of the Task Force can be portrayed along a spectrum with opposition to a particular issue on one end and support for that issue on the other. Along this spectrum there typically were a number of positions that individual Task Force members could accept as a satisfactory public policy solution to the following issues.

Require intended parents to be married: Requiring the intended parents to be married may help to alleviate concerns that individuals could enter a gestational agreement to circumvent the requirements of adoption proceedings. Most scenarios involving assisted reproduction where the parties are not married would require one or both parties who intend to be parents to adopt the child. Most of these scenarios would also require any gestational carrier to terminate her parental rights as part of the process. However, a marriage requirement might also exclude an entire class of people who are eligible to adopt children from availing themselves of advanced mechanisms to conceive and bear children.

Require a biological connection between intended parents and child: This issue relates to a number of areas where the Task Force did not agree. Many Task force members did not perceive any meaningful difference between a scenario where the intended parents are not biologically related to the child and a situation where individuals seek to adopt a child that is not biologically related to them. This group of members would have non-biologically related individuals engage the adoption process rather than permit them to use a gestational agreement. The subcommittee that reviewed the gestational agreement sections of the UPA initially rejected the requirement that there be a biological connection between the intended parents and the child. However, the consensus of this group changed to a recommendation in favor of the requirement. Some on the Task Force were concerned that all of the possible scenarios involving unmarried individuals had not been thoroughly explored and recommending a requirement for a biological relationship could produce unintended consequences.

Permit consideration or compensation: The Task Force could not achieve consensus on the issue of allowing an exchange of monetary resources that exceeds the actual and documented expenses incurred by the gestational carrier. There is some support for incorporating payment for a gestational carrier's "service." However, there is no consensus on what should constitute a "reasonable" standard for consideration that is paid to the gestational carrier. It was suggested that the standard include payment for the carrier's time, effort, risk, pain and suffering, and inconvenience. There was concern that in the long-term the current economic barrier (the monetary expense) to assisted reproduction could be reduced or eliminated (i.e.: such technology could be routinely available). If this were to occur, there is concern that an affluent socioeconomic group could exploit a less affluent socioeconomic group, essentially recruiting that less affluent socioeconomic group to bear the burden of pregnancy and childbirth in exchange for monetary consideration.

Role of court/discretion of court: The Task Force could not reach consensus on the extent of judicial discretion that is appropriate for deciding whether to validate gestational agreements that meet the requirements that may be articulated in the law. There is some concern that the hearing process and unmitigated judicial review could become an effective barrier to obtaining a validated agreement. One proposed consideration was that any provisions setting forth any requirements for the parties be carefully structured to ensure that if the parties meet all requirements the agreement will be validated. Another suggestion is that there be a "checklist" included in the law and that as long as the parties have performed each item on the checklist, the agreement should be approved. Alternatively, many Task Force members believe that the court should have broad discretion in assessing the parties and applying some standard to ensure that the best interests of the child are protected. It was suggested that any legislation specifically

direct the court, when considering a gestational agreement, to apply best interests of the child standard that is routinely used in child protection and adoption proceedings.

Requirement for a home study: The barriers to consensus on this issue are related to the question of whether gestational carrier arrangements are most similar to biological reproduction or adoption. Generally, the Task Force agreed that a home study should be an option available at the discretion of the court. However, the Task Force did not reach consensus regarding whether the option of a home study should always be discretionary or whether it should be required only in certain situations. Some members of the Task Force believed that the home study should be mandatory if the intended parents are not biologically related to the child, as is the case in an adoption proceeding.

Adoption preference for gestational carrier: There is no clear consensus about whether the gestational carrier should have a preference equal to a relative in an adoption proceeding in the event that the intended parents should die prior to the birth of the child, especially if they had failed to address adoption preferences in the agreement. Minnesota law has existing preferences for relatives in most adoption proceedings. This issue achieves a much greater degree of concern if the gestational carrier is biologically related to the child because her ovum was used to achieve conception (technically the woman carrying the child in this situation would be called a "surrogate.").

Continuing exclusive jurisdiction of specified court: Generally, the Task Force agrees that the concept of retaining legal jurisdiction over an agreement approved in Minnesota for some specified time after the child is born would be helpful to prevent complex litigation should a party leave Minnesota. However, any legislation should be carefully addressed to ensure consistency with other jurisdictional state and federal laws. The best interests of the child standard should be among the discussion issues on this topic.

PUBLIC POLICY CONCERNS THAT REQUIRE ADDITIONAL ANALYSIS:

There are clear public policy implications that surround each area where the Task Force could not achieve consensus. Thus all of the areas above are essential topics for additional analysis and discussion. In addition, the Task Force recommends that the following topics be thoroughly explored prior to implementation of legislation to either permit or prohibit gestational agreements.

Official sanction of gestational agreements: While most of the Task Force members agree that there should be legislation permitting and governing gestational agreements, there is a minority viewpoint that the opposite should occur. Specifically, the minority asserts that there ought to be legislation that makes such agreements unenforceable as a matter of law. Advocates for affirmative legislation assert that it would promote certainty of outcomes for intended parents and help to avoid litigation that may delay custody decisions, which could be detrimental to children. Also, legislation permitting such agreements would help to minimize what is currently a time consuming and expensive process for individuals and public institutions. Advocates against affirmative legislation note that such agreements challenge and undermine society's traditional notions of motherhood. Also, there is concern that the official sanction of gestational

agreements could create perverse economic incentives for women to enter an agreement to bear children. These advocates assert that restricting such agreements to purely altruistic arrangements would dramatically minimize (and probably eliminate) these incentives. In addition, there is concern that the gestational agreement provisions of the UPA—even those where there is a general consensus—merely allow the intended parents to circumvent adoption proceedings. Finally, there is a minority view that the official sanction of gestational agreements would introduce ambiguity that does not currently exist into the limits and expectations of parental rights.

Considering the best interests of the child: The Task Force could not resolve questions regarding whether and when the court should include, or be required to consider, the best interests of the child in making decisions about gestational agreements. Some of the Task Force members would recommend that the courts be directed by statute to incorporate the best interest standard used in child protection and adoption proceedings when reviewing and approving gestational agreements. Another group of Task Force members propose that the specific purpose of the gestational agreement is to determine parentage, which is in the best interest of the child. According to this latter position, if the intended parents or gestational carrier fail to fulfill their obligation under the agreement, the UPA would require that courts use existing parentage law, adoption law, and common law to sort out the implications of the failure of any party to honor the agreement. It is not certain that the best interest standard would be included in the court's consideration in these instances.

ARTICLE 9

SUMMARY:

Article 9 contains miscellaneous provisions, including a repeal provision that would need to be adapted to reflect specific Minnesota provisions that the legislature determines should be replaced with the UPA language. Article 9 also contains a severability clause and a uniformity of application clause that encourages preservation of the intention to promote uniform provisions among the states. Finally, there is a provision for an implementation date.

RECOMMENDATION:

The Task Force recommends that Article 9 not be implemented. If the legislature determines that specific provisions of the UPA should be implemented during the 2002 legislative session, the Task Force recommends that such provisions become effective no sooner than August 1, 2003. If the legislature implements any UPA provisions in the future, the Task Force recommends a sufficient delay in implementation to allow state agencies and other affected organizations sufficient time to implement the changes.

Summary

UNIFORM PARENTAGE ACT
(Last Revised or Amended in 2000)

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The full text of the Model Uniform Parentage Act is available online at the following Internet address: http://www.law.upenn.edu/bll/ulc/upa/final00.pdf

In 1973 the Uniform Law Commissioners promulgated the Uniform Parentage Act. In its time it led a revolution in the law of determination of parentage, paternity actions and child support. A child whose mother was not married was an illegitimate child under the common law. The father of an illegitimate child was burdened neither with rights nor obligations. He could be subject to an action for limited damages (the costs of delivering the baby for the most part) in an action that was quasi-criminal, not a civil action. The child had no right of support, but then the unmarried father also had no rights to custody.

The U.S. Supreme Court eliminated illegitimacy as a legal barrier in a number of cases in the 1960's and 70's. The old-fashioned paternity actions simply did not respond to these changes in fundamental law. The 1973 Uniform Parentage Act was law for a new generation. Section 2 of the Uniform Parentage Act confirmed and completed the revolution with very simple language: "The parent and child relationship extends equally to every child and every parent, regardless of the marital status of the parent." The rest of the 1973 Uniform Parentage Act was devoted to a modern civil paternity action in which the sole issue was identifying the natural father of any child. Section 15 of the 1973 Uniform Parentage Act also authorized a support action within the paternity action.

In 1988, the Uniform Law Commissioners promulgated two other acts that deal with issues of parentage. The Uniform Status of Children of Assisted Conception Act provided rules establishing legal parentage for children conceived other than by sexual intercourse and possibly carried by a woman other than the legal mother. It was a response to the technologies of assisted conception, like in vitro fertilization and artificial insemination. The second was the Uniform Putative and Unknown Fathers Act. It is a procedural act that allows the identification of putative and unknown fathers and termination of their parental rights.

The 2000 Uniform Parentage Act continues to serve the purposes of the 1973 Uniform Parentage Act, particularly the purpose of identifying natural fathers so that child support obligations may be ordered. The two 1988 acts are, also, incorporated into it and lose their separate existence.

There are technological changes that make it necessary to revise the 1973 Uniform Act. New technology in the form of the exact genetic identification was not available in 1973. A statute providing for paternity actions in 2000 must take this technology into account.

There are seven substantive articles: Article 2, Parent-Child Relationship; Article 3, Voluntary Acknowledgment of Paternity; Article 4, Registry of Paternity; Article 5, Genetic Testing; Article 6, Proceeding to Adjudicate Parentage; Article 7, Child of Assisted Conception; and, Article 8, Gestational Agreement. It is not possible in a short summary to cover every provision in the 2000 Uniform Parentage Act. This summary provides some highlights of important provisions.

The original policy of the 1973 Uniform act that provides a relationship between natural parents and their children notwithstanding the marriage of the parents continues. Legal parenthood, however, is more complicated in 2000 than it was in 1973. In Article 2 of the 2000 Uniform Act, a legal mother is one who carries a child to birth (rather than the one whose egg has been fertilized), but may also be one who is adjudicated as the legal mother, who adopts the child (thus expressly recognizing adoption), or who is the legal mother under a gestational agreement. In the last three instances, the woman who carries the child to birth is not the legal mother.

In Article 2, the legal father may be one of the following: an unrebutted presumed father (usually a man married to the birth mother at conception), a man who has acknowledged paternity under Article 3, an adjudicated father as the result of a judgment in a paternity action, an adoptive father, a man who consents to an assisted reproduction under Article 7, or an adjudicated father in a proceeding confirming a gestational agreement under Article 8. The genetic father or the presumed genetic father is the legal father in the first three of these categories, but is not necessarily the legal father in the latter three categories.

The 1973 Uniform Act was simpler, identifying the birth mother and the natural (read genetic) father as the legal parents, except for the case of adoption. It did cut-off the legal fatherhood of the genetic sperm donor in an artificial insemination (the first kind of assisted conception), in favor of the consenting husband of the woman artificially inseminated. But the contrast between the 1973 Uniform Act and the 2000 Uniform Act couldn't be more definitive than just on this issue of legal parenthood. Technology has changed the combinations and permutations of the parent-child relationship, and the 2000 Uniform Act simply reflects that fact.

Article 3 of the 2000 Uniform Act provides a non-judicial, consent proceeding for acknowledgment of paternity. The 1973 Uniform Act permits a court to recommend settlement of a paternity action in a pre-trial proceeding (Section 13), upon acknowledgment of paternity and assumption of a child support obligation by the defendant in the action. An agreed settlement becomes a judgment of paternity. The non-judicial acknowledgment of paternity proceeding under Article 3 of the 2000 Uniform Act allows a knowing and voluntary acknowledgment of paternity that is the equivalent of a judgment of paternity for enforcement purposes. An acknowledgment from another state is given the privilege of full faith and credit in a state adopting the 2000 Uniform Act.

Such an acknowledgment is effective so long as there is not another presumed, acknowledged or adjudicated father. There are provisions for rescission, if a proceeding is filed within two years of registration pursuant to Article 4. There is a counterpart denial of paternity by a presumed father that is, also, available and has the effect of a judgment of non-paternity, if another man acknowledged paternity or is adjudicated to be the natural father.

Article 4 provides a specific registry for putative and unknown fathers. The registry permits them to be notified if there is a proceeding for adoption or termination of parental rights. Before a child is one-year-old, there must be a certificate of search presented to the court hearing the adoption or termination of parental rights action. If the certificate shows that no putative or unknown father has registered within 30 days of the birth of the child, parental rights may be terminated without further notice. Once a child has reached the age of one year, however, the registry no longer has any effect. Actual notice is then required before any termination of parental rights may occur.

There are important exclusions from the effect of the registry. No rights of a father who has established a parent-child relationship may be terminated because there was no registration. Therefore, no presumed father, adjudicated father or father by acknowledgment may have his parental rights terminated under Article 4.

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 the mother is enough to initiate the proceeding. A putative father may also initiate the proceeding to obtain the tests to prove that he is not the genetic father. Standards for genetic testing are part of Article 5. The standard for a presumption of paternity as a result of testing is also established by statute. The measure is 99% probability of paternity based on appropriate calculations of "the combined paternity index." The presumption is rebuttable by further genetic evidence that excludes the putative father or that identifies another man as the genetic father. The standards for admissibility in a paternity proceeding are not contained in Article 5, but are provided in Article 6.

A court may compel genetic testing of a man's blood relatives if he is not available for testing. A child support agency may petition for genetic testing, but only if there is no presumed, acknowledged or adjudicated father. Article 5 also deals with allocation of costs for genetic testing and for confidentiality of results.

The 1973 Uniform Act provided for blood testing in a paternity action. The results were evidence in that action. The "blood" testing of the time could help identify a natural father, but was nowhere as certain and determinative as genetic testing subject to rigorous standards as the 2000 Uniform Act contemplates. Precise genetic testing has changed determination of parentage dramatically.

Article 6 governs the basic proceeding to determine parentage. This was primarily a paternity action under the 1973 Uniform Act, but the 2000 Uniform Act must take into account the need to adjudicate the legal parentage of a woman, also. Who may bring an action is expanded from the 1973 Uniform Act, which favored the mother and the child, but did not generally allow putative

fathers to bring actions if a presumed father already existed. Under the 2000 Uniform Act the child, the mother of the child, a man whose paternity is to be adjudicated, a support-enforcement agency, an authorized adoption agency or licensed child-placing agency, a representative of a deceased, incapacitated or minor person, or an intended parent under a gestational contract have standing.

The objective of this proceeding is to adjudicate parenthood for the alleged father or mother. In a paternity proceeding, rebuttal of a presumption of fatherhood, acknowledged fatherhood or prior adjudicated fatherhood requires genetic information that, within the accepted probabilities, excludes the presumed father from paternity or establishes another man as the father of the child. An unrebutted presumption will ripen into an adjudication of fatherhood in the proceeding. Jurisdiction to bring an action, generally, is governed by Section 201 of the Uniform Interstate Family Support Act. If there is no presumed, acknowledged or adjudicated father, an action to determine parentage may be brought at any time - no limitation. If there is a presumed father, the statute of limitations for an action is two years from the birth of the child. However, an action to disprove the presumed father's paternity may be brought at any time if the presumed father and mother did not cohabit or have sexual intercourse during the time of conception and the presumed father did not treat the child as his own.

Admission of the results of genetic testing are very important in Article 6. A refusal to submit to genetic testing may, in fact, ripen into an adjudication of paternity for the putative father who refuses. Only genetic evidence overcomes a presumption of fatherhood, as noted above. No child (as a party) is bound by an adjudication of fatherhood unless the "adjudication of parentage was based on a finding consistent with the results of genetic testing and the consistency is declared in the determination or is otherwise shown..." The 1973 Uniform Act did not and could not rely upon genetic information in the way the 2000 Uniform Act does.

The section providing for a support action in the 1973 Act is no longer in the 2000 Uniform Parentage Act. Child support actions are covered in other statutes in every state as they were not in 1973.

Article 7 deals with parentage when there is assisted conception and incorporates the earlier Uniform Status of Children of Assisted Conception Act into the 2000 Uniform Parentage Act almost without change. If a married couple consents to any sort of assisted conception, and the wife gives birth to the resultant 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.

Article 8 deals with gestational agreements, incorporating parts of the Uniform Status of Children of Assisted Conception Act on this issue. This article is optional to enacting states. Gestational agreements are valid in some states and not in others. They are made an optional part of the 2000 Uniform Act for that reason. Having such provisions available to the states even in optional form is important simply because gestational agreements are being used all the time, and the legal parenthood of children should not be in doubt because such agreements are used.

A gestational agreement occurs between a woman and a married couple obligating that woman to carry a child genetically related to either or both of the marital partners. The conception must be

an assisted conception. The woman who carries the child to birth pursuant to a gestational agreement is not the legal mother of that child, an exception to the general rule. If she is a married woman, her husband must consent to the agreement. He then has no parental rights or obligations with respect to the child. The married couple become the legal parents of the child.

Gestational agreements are carefully controlled under the 2000 Uniform Act. A court must validate such agreements before they are enforceable. The hearing that the court conducts to validate a gestational agreement is analogous to a proceeding for an adoption of a child. The court verifies the birth mother's qualifications to carry the child and the intended parents qualifications to be parents. The birth mother may be compensated, and has the power to terminate the agreement.

The 2000 Uniform Parentage Act is important to parents and children. We must recognize the obligations of parents in any possible combination and permutation of marriage of the parents, method for conception of the child, and arrangements that intended parents make to have children. Otherwise we have children for whom nobody has responsibility. The 2000 Uniform Parentage Act confronts the complicated issue of establishing legal parentage against the complications that technology provides. It brings genetic testing into modern parentage actions in a manner that is efficient, but that preserves due process rights for all concerned. It is necessary law for the new century.

UNIFORM PARENTAGE ACT TASK FORCE

APPENDIX 2-TASK FORCE MEMBERSHIP

Category	Contact	Affiliation
Adoption Agency	Mary Crozier-Sauer, Advocate	Children's Home Society
Adoption Agency – Abused Children	Marquita Stephens	African American Adoption and Permanency Planning Agency
Adoptive Families	Kelly Gryting	N/A
Birth Parents	Elizabeth Burhans	Goodhue County Court Services
Child Support Magistrates	Brad Johnson	N/A
Child Support Magistrates	Jodie Metcalf	Minnesota Supreme Court
Children and the Law Section, MSBA	Mark Fiddler, Esq.	N/A
Children's Advocates	Marian Saksena	Children's Law Center of Minnesota
Communities of Color	Walter Perkins	Hennepin County Children, Family, and Adult Services
Communities of Color	Lunhia Vang	Southern Minnesota Regional Legal Services
County Attorneys	Thomas Kelly	Olmsted County Attorney's Office
County Attorneys	Janice Allen	Anoka County Attorney's Office
Department of Health	Barbara Bednarczyk	MN Department of Health
Department of Health	Janice Jones	MNDepartment of Health
Department of Human Services	Ann Ahlstrom	MN Department of Human Services Children's Services
Department of Human Services	Dana McKenzie	MN Department of Human Services Child Support Enforcement Division
Families involved in infertility treatment processes	Amy Hill, Alternate: Daonna Depoister	Resolve of Minnesota Resolve of Twin Cities
Family Law Section, MSBA	Mary Catherine Lauhead	N/A

Category	Contact	Affiliation
Fertility Medicine	Dr. Bruce Campbell, Medical Director	Invitro fertilization Programs Abbott Clinic
Fertility Medicine (Ethics)	Pamela Herder, OBGYN N.P., Associate General Counsel	Allina
Fertility Medicine	Dr. David Ball	Reproductive Medicine & Infertility Associates
Fertility Medicine (Ethics)	Carol Tauer	MN Center for Health Care Ethics
Gay and Lesbian Families	Deborah Talen, Director	Rainbow Families
Gay and Lesbian Families	Tom Glaser	N/A
Genetic Testing Organization	Jennifer Bloom	Memorial Blood Center
Gestational Carrier	Tracey Sajady	N/A
Guardians ad litem	Dave Jaehne	N/A
Judges	Hon. Denise Reilly	Hennepin County
Juvenile Law Section, Hennepin County Bar Assoc	Gary Debele	Walling and Berg PA
Juvenile Law Section, Hennepin County Bar Assoc	Jody DeSmidt	Walling and Berg PA
Legal Services	Katie Trotzky Alternate: Robert Roby	Legal Assistance of Dakota County East Central Legal Services
Legislators	Representative Len Biernat	Minnesota House of Representatives
Legislators	Representative Kathy Tingelstad	Minnesota House of Representatives
Noncustodial Parents	Knute Gladen	R-Kids
Parent Organization	Joe Kroll	North American Council on Adoptable Children
Parent Organization	Tom Prichard,	Minnesota Family Council
Persons who have been adopted	Robert O'Connor	N/A
Public Defenders	Don Enockson	El-Ghazzawy Law Office
Sperm Donation	John Olson	Cryogenic Labs
Tribal	Ben Bement, ICW Manager	White Earth Reservation

Category	Contact	Affiliation
Tribal	Julia (Bunny) Jaakola	Fond Du Lac Reservation Min No Aya Win Clinic
Other Experts	Joel Peskay, Ph.D.	N/A
Other Experts	Steven Snyder	Snyder Law
Other Experts	Scott A. Terhune, Ph.D.	N/A
Other Experts	Amy Silberberg,	N/A

UNIFORM PARENTAGE ACT TASK FORCE

Co-Chairs and Staff

Name	Role	Contact Information
Mark Ponsolle	Co-Chair	Office of the Ramsey County Attorney
Hon. Robert F. Carolan	Co-Chair	Judge of District Court
Dennis Albrecht	Staff (Lead)	Department of Human Services Child Support Enforcement Division
Jill Paulsen	Staff	Department of Human Services Child Support Enforcement Division
Melinda Hugdahl	Staff (Legal)	Department of Human Services Child Support Enforcement Division
Cathleen Cotter	Staff	Department of Human Services Child Support Enforcement Division
Connie Caron	Staff	Department of Human Services Children's Services