



**524.1-201 GENERAL DEFINITIONS.**

Subject to additional definitions contained in the subsequent articles which are applicable to specific articles or parts, and unless the context otherwise requires, in chapters 524 and 525:

(2) "Application" means a written request to the registrar for an order of informal probate or appointment under article III, part 3.

(3) "Beneficiary," as it relates to trust beneficiaries, includes a person who has any present or future interest, vested or contingent, and also includes the owner of an interest by assignment or other transfer and as it relates to a charitable trust, includes any person entitled to enforce the trust.

(5) "Child" includes any individual entitled to take as a child under law by intestate succession from the parent whose relationship is involved and excludes any person who is only a stepchild, a foster child, a grandchild or any more remote descendant.

(6) "Claims" includes liabilities of the decedent whether arising in contract or otherwise and liabilities of the estate which arise after the death of the decedent including funeral expenses and expenses of administration. The term does not include taxes, demands or disputes regarding title of a decedent to specific assets alleged to be included in the estate, tort claims, foreclosure of mechanic's liens, or to actions pursuant to section 573.02.

(7) "Court" means the court or branch having jurisdiction in matters relating to the affairs of decedents. This court in this state is known as the district court.

(8) "Conservator" means a person who is appointed by a court to manage the estate of a protected person.

(9) "Descendant" of an individual means all of the individual's descendants of all generations, with the relationship of parent and child at each generation being determined by the definition of child and parent contained in this section.

(10) "Devise," when used as a noun, means a testamentary disposition of real or personal property and when used as a verb, means to dispose of real or personal property by will.

(11) "Devisee" means any person designated in a will to receive a devise. In the case of a devise to an existing trust or trustee, or to a trustee on trust described by will, the trust or trustee is the devisee and the beneficiaries are not devisees.

(12) "Disability" means cause for appointment of a conservator as described in section 524.5-401, or a protective order as described in section 524.5-412.

(13) "Distributee" means any person who has received or who will receive property of a decedent from the decedent's personal representative other than as a creditor or purchaser. A

## Exhibit A

testamentary trustee is a distributee with respect to property which the trustee has received from a personal representative only to the extent of distributed assets or their increment remaining in the trustee's hands. A beneficiary of a testamentary trust to whom the trustee has distributed property received from a personal representative is a distributee of the personal representative. For purposes of this provision, "testamentary trustee" includes a trustee to whom assets are transferred by will, to the extent of the devised assets.

(14) "Estate" includes all of the property of the decedent, trust, or other person whose affairs are subject to this chapter as originally constituted and as it exists from time to time during administration.

(16) "Fiduciary" includes personal representative, guardian, conservator and trustee.

(17) "Foreign personal representative" means a personal representative of another jurisdiction.

(18) "Formal proceedings" means those conducted before a judge with notice to interested persons.

(20) "Guardian" means a person who has qualified as a guardian of a minor or incapacitated person pursuant to testamentary or court appointment, but excludes one who is merely a guardian ad litem.

(21) "Heirs" means those persons, including the surviving spouse, who are entitled under the statutes of intestate succession to the property of a decedent.

(22) "Incapacitated person" is as described in section 524.5-102, subdivision 6, other than a minor.

(23) "Informal proceedings" means those conducted by the judge, the registrar, or the person or persons designated by the judge for probate of a will or appointment of a personal representative in accordance with sections 524.3-301 to 524.3-311.

(24) "Interested person" includes heirs, devisees, children, spouses, creditors, beneficiaries and any others having a property right in or claim against the estate of a decedent, ward or protected person which may be affected by the proceeding. It also includes persons having priority for appointment as personal representative, and other fiduciaries representing interested persons. The meaning as it relates to particular persons may vary from time to time and must be determined according to the particular purposes of, and matter involved in, any proceeding.

(27) "Lease" includes an oil, gas, or other mineral lease.

(28) "Letters" includes letters testamentary, letters of guardianship, letters of administration, and letters of conservatorship.

(30) "Mortgage" means any conveyance, agreement or arrangement in which property is used as security.

(31) "Nonresident decedent" means a decedent who was domiciled in another jurisdiction at the time of death.

(32) "Organization" includes a corporation, government or governmental subdivision or agency, business trust, estate, trust, partnership or association, two or more persons having a joint or common interest, or any other legal entity.

(35) "Person" means an individual, a corporation, an organization, or other legal entity.

(36) "Personal representative" includes executor, administrator, successor personal representative, special administrator, and persons who perform substantially the same function under the law governing their status. "General personal representative" excludes special administrator.

(37) "Petition" means a written request to the court for an order after notice.

(38) "Proceeding" includes action at law and suit in equity.

(39) "Property" includes both real and personal property or any interest therein and means anything that may be the subject of ownership.

(40) "Protected person" is as described in section 524.5-102, subdivision 14.

(42) "Registrar" refers to the judge of the court or the person designated by the court to perform the functions of registrar as provided in section 524.1-307.

(43) "Security" includes any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in an oil, gas or mining title or lease or in payments out of production under such a title or lease, collateral trust certificate, transferable share, voting trust certificate or, in general, any interest or instrument commonly known as a security, or any certificate of interest or participation, any temporary or interim certificate, receipt or certificate of deposit for, or any warrant or right to subscribe to or purchase, any of the foregoing.

(44) "Settlement," in reference to a decedent's estate, includes the full process of administration, distribution and closing.

(45) "Special administrator" means a personal representative as described by sections 524.3-614 to 524.3-618.

(46) "State" includes any state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession subject to the legislative authority of the United States.

(47) "Successor personal representative" means a personal representative, other than a special administrator, who is appointed to succeed a previously appointed personal representative.

(48) "Successors" means those persons, other than creditors, who are entitled to property of a decedent under the decedent's will, this chapter or chapter 525. "Successors" also means a funeral director or county government that provides the funeral and burial of the decedent, or a state or county agency with a claim authorized under section 256B.15.

(49) "Supervised administration" refers to the proceedings described in sections 524.3-501 to 524.3-505.

(51) "Testacy proceeding" means a proceeding to establish a will or determine intestacy.

(53) "Trust" includes any express trust, private or charitable, with additions thereto, wherever and however created. It also includes a trust created or determined by judgment or decree under which the trust is to be administered in the manner of an express trust. "Trust" excludes other constructive trusts, and it excludes resulting trusts, conservatorships, personal representatives, trust accounts as defined in chapter 528, custodial arrangements pursuant to sections 149A.97, 318.01 to 318.06, 527.21 to 527.44, business trusts providing for certificates to be issued to beneficiaries, common trust funds, voting trusts, security arrangements, liquidation trusts, and trusts for the primary purpose of paying debts, dividends, interest, salaries, wages, profits, pensions, or employee benefits of any kind, and any arrangement under which a person is nominee or escrowee for another.

(54) "Trustee" includes an original, additional, or successor trustee, whether or not appointed or confirmed by court.

(55) "Ward" is as described in section 524.5-102, subdivision 17.

(56) "Will" includes codicil and any testamentary instrument which merely appoints an executor or revokes or revises another will.

**History:** 1974 c 442 art 1 s 524.1-201; 1975 c 347 s 15; 1978 c 525 s 1; 1986 c 444; 1987 c 384 art 2 s 1; 1992 c 423 s 2; 1994 c 472 s 1; 1995 c 130 s 11; 1995 c 186 s 119; 1995 c 189 s 8; 1996 c 277 s 1; 1997 c 215 s 45; 1997 c 217 art 2 s 15; 2004 c 146 art 3 s 40

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# **The 36<sup>th</sup> Annual Probate & Trust Law Section Conference**

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**June 2010**  
511-10

**Exhibit B**

**PLENARY DAY 1**

## **MN Legislative Update**

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**Scott M. Nelson**  
Lommen Abdo Law Firm  
Minneapolis

**Peter S. Hatinen**  
Fredrikson & Byron, P.A.  
Minneapolis

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## MSBA PROBATE & TRUST SECTION LEGISLATION

### A. House File No. 2825/Senate File No. 2427

**Sections 1 & 2.** Clarification of Minnesota estate return filing requirements.

**Section 3.** Adoption of a MN QTIP provision. Allows a QTIP election when a federal return is not required, but only allows the election to reduce the taxable estate to \$3.5 million. An estate will still pay Minnesota estate tax on the gap between \$1 million and \$3.5 million.

**Section 4.** The proposal clarifies that distributions of short-term capital gains (and long-term capital gains) by regulated investment companies and real estate investment trusts will be treated as distributions of principal for purposes of trust accounting. The change will clarify the issue, which some practitioners find ambiguous under the current statute. This can be a trust accounting issue for distributions of income and principal, and is distinct from tax principles.

**Sections 5-13.** The proposed provisions apply when a person dies without a Will, or when another instrument, such as a trust, provides for disposition of property according to the laws of intestacy. The summary of the changes is as follows:

#### **Section 524.1-201 is amended as to the following subsections:**

(1) Adds a definition of “adoptee” because no prior definition existed. Where more extensive adoption provisions are being proposed in the sections discussed later, this definition is necessary. This definition does not limit adoption to minors, but also includes adults who are adopted in accordance with Minnesota law.

(3) Adds a definition of “assisted reproduction” because no prior definition existed. Where extensive provisions are being added in the sections discussed later to define inheritance rights of children conceived through “assisted reproduction,” this definition is necessary. This definition broadly defines assisted reproduction as any method of causing pregnancy other than sexual intercourse.

(5) Adds a definition of “birth mother” because no prior definition existed. Where extensive provisions are being added to define the rights of children conceived through “assisted reproduction,” this definition is necessary. This definition includes any woman who gives birth to a child, except if under a gestational agreement because the Probate Code does not yet address inheritance rights of children born under gestational agreements.

(7) Adds a definition of “child of assisted reproduction” because no prior definition existed. Where extensive provisions are being added in the sections discussed later to define the rights of children conceived through “assisted reproduction,” this definition is necessary. This definition excludes a child born under a gestational

agreement because the Probate Code does not yet address inheritance rights of children born under gestational agreements.

**(16)** Adds a definition of “divorce” because no prior definition existed, and the term is used in the later provisions so it is necessary to define it.

**(21)** Adds a definition of “functioned as a parent of the child” because no prior definition existed. Where extensive provisions are being added in the sections discussed later to define the rights of children conceived through “assisted reproduction,” this definition is necessary. This definition is necessary because the proposed provisions giving inheritance rights to children conceived through assisted reproduction recognize that a person who functions as a parent (but would otherwise not be a parent under prior provisions) can be a parent for inheritance purposes.

**(22) (23) (24)** Add definitions of “genetic parent,” “genetic father” and “genetic mother,” to provide that those terms mean the person who provides the genetic material (sperm or egg) to create the child. The genetic parent must be distinguished from an adoptive parent or a person determined by the later rules governing assisted reproduction to be the parent. A person determined to be a father under Minnesota’s existing Paternity Act is treated as a genetic father for purposes of these proposed provisions.

**(25)** Adds a definition of “gestational agreement.” The proposed assisted reproduction provisions exclude surrogacy arrangements and agreements entered into on behalf of a deceased person. Minnesota law does not have a settled body of law (or a settled practice) that recognizes the validity of and requirements for gestational agreements, so these intestacy provisions do not affect or validate any of those practices and arrangements. Rather, these proposed assisted reproduction and adoption provisions would govern those arrangements. Where these proposed provisions would yield unintended results for parties participating in surrogacy or gestational arrangements, those parties would have to complete adoption proceedings and/or affirmatively plan their estates to avoid those results.

**(29)** Adds a definition of “incapacity” because no prior definition existed. This term is used in the assisted reproduction provisions so it was necessary to define it.

**(31)** Adds a definition of “intended parent” solely for the purpose of excluding gestational and surrogacy arrangements from the proposed provisions.

**(45)** Adds a definition of “relative” because no prior definition existed. The term is used in the proposed provisions for adoption and assisted reproduction.

**(54)** Adds a definition of “third party donor” because no prior definition existed. The term includes a man who donates sperm or a woman who donates eggs. The definition is necessary to exclude such donors from the defined parent-child

relationship in assisted reproduction situations, as discussed later.

**Section 524.2-114** adds a section stating that a parent (whether, genetic, adoptive or defined under these provisions) is barred from inheriting from or through a child if the parent's parental rights were terminated (and not re-established), or if the child died before age 18 and there is clear and convincing evidence that the parent's parental rights could have been terminated under other provisions of applicable law. This provision improves the provisions of current law by incorporating, rather than paraphrasing, the standards for termination of parental rights, and applying those to inheritance rights. Old Section 524.2-114 is replaced by Section 524.2-116 and the later proposed provisions relating to adoption and assisted reproduction.

**Section 524.2-116** states that a parent-child relationship established under these provisions is conclusive for purposes of inheritance rights. This eliminates the prior statute's reliance on the Parentage Act provisions, which could conflict with these provisions or have differing policy considerations supporting it.

**Section 524.2-117** states the provision of old 524.2-114(2) that, except as excepted elsewhere in these sections, a parent-child relationship exists between a child and the child's genetic parents irrespective of the parents' marital status.

**Section 524.2-118** Adds new provisions to govern the rights of adoptees and adoptive parents to inherit from each other. This provision significantly expands and clarifies the provisions of prior law contained in old Section 524.2-114(1).

(1) States the general rule that a parent-child relationship is established for purposes of intestate succession between an adoptee and the adoptee's adoptive parent(s).

(2) Provides that if one spouse of a married couple dies or the spouse of a genetic parent dies while "in the process of" adopting a child, the parent-child relationship is deemed to exist between that deceased person and the adoptee, as long as the adoption is completed or the genetic parent survives. This circumstance was not covered by prior law.

(3) Recognizes the parent-child relationship where the spouse/adopting parent dies "in the process of" the adoption, where the child is determined to be a child of the other spouse by assisted reproduction. This puts children born by assisted reproduction on the same footing as genetic and adopted children. This circumstance was not covered by prior law.

(4) Defines the phrase "in the process of being adopted" to require a showing of clear and convincing evidence of both the intention to adopt and the identification of the child to be adopted to warrant recognition of the parent-child relationship.

**Section 524.2-119** Adds a new provision to govern the right of adoptees and their genetic parents to inherit from one another. These provisions expand and change prior law to recognize genetic relationships in certain circumstances and provide for a right to inherit from and through that relationship in those circumstances, despite the adoption.

(1) States the general rule that, except as provided in situations described in Subsections (2) through (5), a parent-child relationship does not exist between any adoptee and the adoptee's genetic parents. This section recognizes that a familial relationship between the adopted child and non-custodial genetic parents is unlikely to exist, except in certain circumstances.

(2) Provides that a person remains a child of a genetic parent where that parent's spouse adopts the person. No parent-child relationship exists with the other (non-custodial) genetic parent except for purposes of the child inheriting from or through that other genetic parent, and only if that other genetic parent is deceased at the time of the child's adoption.

(3) Continues to recognize the child's right to inherit from and through both genetic parents, despite adoption of that child by a relative of a genetic parent or the spouse of a relative of a genetic parent. In this case, there would likely remain a familial relationship with the genetic parents' families. No right to inherit from or through the adoptee exists in the adoptive parents.

(4) Continues to recognize a child's right to inherit from and through both of his or her genetic parents where the child is adopted by someone else after the death of both genetic parents. Again, there would likely remain a familial relationship with the genetic parents' families. No right to inherit from or through the adoptee exists in the adoptive parents.

(4) Maintains these same rules for a child conceived by assisted reproduction.

**Section 524.2-120** addresses assisted reproduction and extends and clarifies current law. Currently, under Minnesota's Parentage Act, a third party donor of sperm is not considered a parent, however it is not clear that a third party donor of an egg is not a parent. In addition, that law has not caught up with technology that currently exists and is commonly used to conceive and bear children. Also, because it is possible that there could develop inconsistencies between the Parentage Act's and the Probate Code's treatment of parent-child relationships, it is preferable for the Probate Code to specifically address these issues, rather than defer to the Parentage Act.

(1) States existing law that a third party donor, whether of sperm or eggs, is not a parent.

(2) States that a parent-child relationship exists between the child of assisted reproduction and the birth mother.

(3) States that a husband of a birth mother is a parent if he provided the sperm during his lifetime.

(4) Contains a presumption that the persons listed on a birth certificate are the parents of a child of assisted reproduction.

(5) Provides that a parent-child relationship is presumed to exist between a child of assisted reproduction and an individual other than the birth mother who consented to be the other parent of the child. That consent is shown by the existence of a signed record that shows consent, or in the absence of a signed record, by that person functioning as a parent or intending to so function (but being precluded from actually functioning as a parent by death, incapacity, etc.). This provision allows a spouse or significant other to be a parent of a child of assisted reproduction even if that person is not genetically related to the child nor adopted the child.

(6) States that a record of consent that is signed more than 2 years after the birth of a child of assisted reproduction is not effective to create inheritance rights in the parent or his relatives unless that person also functioned as a parent during such child's minority. This prevents someone from signing a consent just to inherit from the child.

(7) States the presumption that the husband of the birth mother is presumed to be a parent of a child of assisted reproduction, even if he is deceased before such child is born, in the absence of clear and convincing evidence otherwise.

(8) States that if a married couple is divorced, the former husband is not a parent unless he consented to the placement after divorce of eggs, sperm or embryos in a record or there is clear and convincing evidence of his consent.

(9) Provides that if consent is withdrawn prior to placement of eggs, sperm or embryos, no parent-child relationship exists.

(10) In accordance with existing law, no parent-child relationship exists for a child of assisted reproduction if such child was not in gestation prior to the death of a deceased purported parent. Too many issues would arise if inheritance rights were granted to and through children of assisted reproduction where posthumous placement of eggs, sperm or embryos occurred, including determinations of heirs and beneficiaries in probate proceedings and estate and GST tax implications of dispositions of property. There would also be issues raised about assets of other family members that could possibly pass to children produced by posthumous placement of eggs, sperm or embryos under irrevocable provisions that rely on these intestacy provisions.

**Section 524.2-12 1** provides that this chapter does not affect gestational agreements. The status and enforceability of those types of arrangements is not currently clear under Minnesota law and this chapter should not seek to affect or validate those arrangements.

**Section 524.2-122** provides that this chapter also does not affect equitable adoption.

**Section 14.** The legislation provides certainty in most cases where a Decedent dies in 2010 and has documents referencing repealed sections of the Internal Revenue Code, and also allows the estate administrator to petition the Court for a differing interpretation if it is believed that the Decedent intended for the document to be interpreted consistent with federal estate tax repeal. This option for the estate administrator should extinguish any serious procedural due process argument.

**Section 15.** The proposal adds a new Minn. Stat. §524.5-409A to provide a procedure for appointment of a conservator on an emergency or temporary basis. The provision is a companion to the existing Minn. Stat. §524.5-311, which allows appointment of an emergency guardian. This will fill a gap where the Court may find it necessary to appoint a conservator on a temporary or emergency basis.

**B. Explanation of Section 14.**

**Background**

- The Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA) repealed the federal estate and generation-skipping transfer (GST) taxes for 2010. EGTRRA reinstates the federal estate and GST taxes in 2011.
- Many Wills and Trusts executed in Minnesota allocate assets among beneficiaries by reference to terms or concepts that are defined in the now-repealed federal estate and GST tax provisions of the Internal Revenue Code (*e.g.*, “marital deduction,” “estate tax exemption”).
- References to such repealed terms or concepts will introduce ambiguity into the Wills and Trusts of decedents who die in 2010 and may even unintentionally disinherit beneficiaries.
- Proposed Minn. Stat. § 524.2-712 attempts to eliminate any such ambiguity from the Wills and Trusts of decedents who die in 2010. We anticipate that proposed Minn. Stat. § 524.2-712 would resolve controversies and prevent much litigation over the interpretation of otherwise ambiguous Will and Trust provisions related to the federal estate and GST taxes.
- This Will and Trust interpretation problem affects approximately half of the states in the Union. Of those states, at least 12 are reviewing or have passed legislation similar to this proposal.

Operation

- Paragraph (a) of proposed Minn. Stat. § 524.2-712 sets forth a default rule of interpretation for the Wills and Trusts of decedents who die in 2010. Unless a contrary intent is manifest in the Will or Trust, any reference to a term that is defined in repealed estate or GST tax provisions will be deemed to refer to the estate or GST tax provisions in effect on December 31, 2009.
- If a personal representative, trustee, or other interested party believes that the decedent had a contrary intent, such person may petition the probate court to determine what the decedent's intention was.
- This is a temporary Will and Trust construction proposal; it has no effect on state or federal tax law. For budgeting purposes, the Department of Revenue has indicated that the proposal is revenue-neutral.

Applicability

- This proposal would be effective retroactive to January 1, 2010 and would apply to the Wills and Trusts of decedents who die in 2010. If federal estate and GST taxes were enacted and became effective prior to 2011, this proposal would automatically expire.

States Proposing Similar Legislation:

Florida (requires court order)  
Idaho  
Maryland  
Michigan  
Missouri  
Nebraska  
New York  
Ohio  
South Dakota  
Tennessee  
Virginia  
Washington  
Wisconsin

**C. Intestacy Provisions****APPLICATION**

- Provisions apply only when a person dies without a will or when a trust references intestacy provisions.
- Scenarios not covered by SF2427 can always be covered in a will.

**INTERPLAY WITH PARENTAGE ACT**

- Current probate law allows parentage to be proven pursuant to the Parentage Act.
- Parentage Act applies during lifetime (e.g. custody arrangement and support obligations).
- SF2427 defines parental relationships for inheritance rights.

**GENERAL RULES OTHER THAN ASSISTED REPRODUCTIVE TECHNOLOGY SCENARIOS**

- **Genetic Parents:** Parent-child relationship exists except as otherwise provided in circumstances involving adoption, parental rights termination, or assisted reproductive technology.
- **Adoptive Parents:** Parent-child relationship exists even if adoption was “in process” at death of one parent but completed later.
- **Genetic Parents of Adoptee:** Parent-child relationship does not exist except if: (i) adoptive parent is spouse of genetic parent; (ii) one genetic parent is deceased at adoption, and then only through that parent; (iii) adoptive parents are relatives of genetic parents; or (iv) both genetic parents are deceased.
- **Parental Rights Termination:** Parent-child relationship is severed for purposes of parent inheriting through child.

**ASSISTED REPRODUCTION SITUATIONS**

- **Third Party Egg Donor:** Does not have relationship with child.
- **Mothers:** If a woman is the birth mother (excluding surrogacy) or a wife who donates eggs used by her for assisted reproduction with her husband, she is the mother.
- **Third Party Sperm Donor:** No relationship with child.
- **Fathers:** A man is presumed to be the father if he: (i) is listed on the birth certificate; (ii) consents to be the father; or (iii) is married to the birth mother.

**SURROGACY**

- Surrogacy arrangements are generally excluded from SF2427 because laws governing surrogacy arrangements need to be more well-defined.
- In those circumstances, wills or adoption can be used to effectively distribute estate assets.

**D. Factual Illustrations**

**1. Assumptions**

**a. Application of Statute.** The statute's intestacy provisions only apply in certain situations as follows:

- Where a person dies without a Will or other governing instrument that effectively disposes of his or her estate. Thus, for many situations, the person should or will have a Will or other instrument that provides for children as they desire, rather than die intestate, so as to opt out of the intestacy provisions in the statute.
- Where a trust or other instrument incorporates the intestacy provisions by reference (such as providing for heirs, descendants, etc.) providing for disposition of property according to the laws of intestacy.

**b. Interplay with Parentage Statute.** The Parentage Act sets forth rules and presumptions for parentage for purposes of determining rights of children and parents in many contexts. Current probate law allows parentage to be proven pursuant to the Parentage Act's provisions. That Act applies to men, but also to women who are alleging and who allege to be mothers. For example, genetic parentage can be established by scientific testing, or by consent or a recognition of parentage. The Parentage Act applies in contexts of custody arrangements, support obligations and the like, which are obligations and rights defined both for the parents and the children during lifetime.

With our legislation, we take the position that we should determine parentage mostly independently of the Parentage Act because we think the probate code can define what parental relationships should be recognized for inheritance rights. We validate relationship of a birth mother and child, and define a genetic father to include those situations in which a man is determined to be the genetic parent under the Parentage Act because we believe that that Act's presumptions for paternity are reliable and are aligned with the purposes of the provisions of the inheritance laws. Whereas the Parentage Act applies to maternity, such that surrogacy arrangements might be covered by that Act, we generally exclude surrogacy arrangements because we have taken a conservative approach until the laws governing surrogacy arrangements are more well defined. Rather in those circumstances, people should create wills and/or adopt the children in order to distribute their estates as they desire.

**2. General Rules Other than Assisted Reproduction.** The general rules

applicable to the parent-child relationship will govern determinations for the most common situations.

**a. Genetic Parents.** Except where otherwise provided in the adoption context, the termination of parental rights context, and the assisted reproduction context, a parent-child relationship exists between a child and his or her genetic parents (the persons who provided the egg and sperm). However, third party donors providing egg or sperm for assisted reproduction do not have that relationship unless: (i) the donor was the wife providing eggs or her husband providing sperm and the wife gives birth to the child, (ii) that donor is the birth mother, or (iii) a man who is determined to be a father under the assisted reproduction provisions of the statute. Examples are discussed under the assisted reproduction section below.

**b. Adoptive Parents.** A parent-child relationship exists between adoptive parents and the adopted child, even if the adoption was “in process” at the death of one of those adoptive parents but completed later. Thus, adoption is one option to create a parent-child relationship where a person is not otherwise defined as a parent under these statutory provisions.

**c. Genetic Parents for Adoptee.** If a child is adopted, no parent-child relationship exists between that child and his or her genetic parents except: (i) if the adoptive parent is the spouse of a genetic parent, (ii) the other genetic parent is deceased at the adoption, and then only for the child inheriting from or through that other genetic parent; (iii) if the adoptive parents are relatives of the genetic parents and then only for the child inheriting from or through that other genetic parent; or (iv) if both genetic parents are deceased, and then only for the child inheriting from or through those genetic parents.

**d. Termination of Parental Rights.** In cases where termination of parental rights has been effected or would be appropriate, the parent-child relationship is severed for purposes of the parent inheriting from or through the child.

**e. Status of Assisted Reproduction Children.** For purposes of these provisions, children of assisted reproduction and their parent-child relationships established under those provisions mean that those parents are considered the genetic parents for purposes of the above provisions.

**f. Examples.**

(i) Child’s parents are deceased and Child is in the process of being adopted by Husband and Wife and Husband dies during the process. Wife completes the adoption.

- The parent-child relationship exists between Child and Husband and Wife for all purposes.
- The parent-child relationship still exists between genetic parents and Child for purposes of Child inheriting from or through Husband and Wife, but that relationship does not exist for purposes of Child's genetic parents inheriting from and through Child.

(ii) Child's genetic parents are both alive and unmarried. Child's mother, Wife, is married to Husband who is not the genetic parent. Husband adopts Child (or dies during the process, and Wife completes the adoption).

- For purposes of Husband and Wife inheriting from or through Child, and for purposes of Child inheriting from or through Husband and Wife, the parent-child relationship exists between Child and Husband and Wife.
- For purposes of Child inheriting from and through Child's genetic father, the parent-child relationship no longer exists between Child's genetic father and Child, and also does not exist for purposes of Child's genetic father inheriting from and through Child. If Child's genetic father was deceased before the adoption, Child could inherit from and through Child's genetic father, but Child's genetic father could not inherit from and through Child.

(iii) Child's genetic parents are both alive and unmarried. Child's grandmother adopts Child.

- For purposes of Child's grandmother inheriting from or through Child, and for purposes of Child inheriting from or through Husband and Wife, the parent-child relationship exists between Child and grandmother.
- For purposes of Child inheriting from and through Child's genetic parents, the parent-child relationship exists, but it does not exist for purposes of Child's genetic parents inheriting from and through Child.

### 3. Illustrations of the Statute's Provisions in Assisted Reproduction Situations.

**a. Only Applies to Assisted Reproduction.** Assisted reproduction only includes situations in which pregnancy is caused other than by sexual intercourse.

**b. No Relationship with Third Party Donor.** No relationship exists with a third party donor of egg or sperm. A third party donor is someone who provides sperm or eggs other than:

- a husband who provides sperm or a wife who provides eggs that are used for assisted reproduction by the wife;
- the birth mother; and
- a man determined under the latter provisions to have a parent-child relationship.

**c. Relationship with Birth Mother.** A birth mother (which excludes surrogacy arrangements) has a parent-child relationship with the child.

**d. Relationship with Husband of Birth Mother.** The husband of the birth mother who provides the sperm has a parent-child relationship with the child.

**e. Father on Birth Certificate.** The man listed on the birth certificate is presumed to have a parent-child relationship with the child. Usually, the woman who is the birth mother is the listed mother.

**f. Father by Consent.** A man can consent to have a parent-child relationship in various ways, including by signing a consent record, functioning as a parent of the child within certain timeframes.

**g. Father by Marriage.** A man is presumed to consent if he is married to the birth mother and functions as a parent of the child.

**h. Examples.**

(i) Wife provides the eggs and Husband provides the sperm for in vitro fertilization and embryo is implanted into Wife who is the birth mother.

- Wife is the genetic mother and the birth mother and

has a parent-child relationship.

- Father is the genetic father and the husband of the birth mother and has a parent-child relationship.

(ii) Husband provides sperm for artificial insemination of Wife who is the birth mother.

- Wife is the genetic mother and the birth mother and has a parent-child relationship.
- Father is the genetic father and the husband of the birth mother and has a parent-child relationship.

(iii) Egg Donor provides egg and Husband of Wife provides sperm and embryo is implanted into Wife who is the birth mother.

- Wife is the birth mother and has a parent-child relationship.
- Father is the genetic father and the husband of the birth mother and has a parent-child relationship.
- Egg Donor is a third party donor and has no parent-child relationship.

(iv) Sperm Donor provides sperm and Wife provides egg whether in in-vitro or in artificial insemination and Wife is the birth mother.

- Wife is the birth mother and has a parent-child relationship.
- Father is the husband of the birth mother and has a parent-child relationship in the absence of clear and convincing contrary evidence and/or if his consent is signified in writing or through functioning as a parent.
- Sperm Donor is a third party donor and has no parent-child relationship.

(v) Sperm Donor provides sperm and Egg Donor provides egg whether in in-vitro or in artificial insemination and Wife is the birth mother.

- Wife is the birth mother and has a parent-child relationship.
- Father is the husband of the birth mother and has a parent-child relationship in the absence of clear and convincing contrary evidence and/or if his consent is signified in writing or through functioning as a parent
- Sperm Donor is a third party donor and has no parent-child relationship.

(vi) In all cases where there is a Surrogate or Gestational Carrier (hereinafter Surrogate), because this Act does not address those types of arrangements, the following would apply:

- Surrogate is birth mother and has a parent-child relationship.
- Any woman seeking establishment of a parent-child relationship would have to adopt or provide for child in her Will.
- Any man seeking establishment of a parent-child relationship would have to adopt, provide for child in his Will, be named in the birth certificate, consent or function as a parent of the child.
- Husband of Surrogate would be presumed to be father, absent contrary proof that he did not consent or function as a parent.

## **E. Assisted Reproduction**

### Women

For assisted reproduction (production of a child other than through sexual intercourse) using egg donors (necessarily women):

(1) If the woman is a third party donor, she does not have a relationship with the child produced from the egg. A third party donor (woman) is a woman who produces eggs used for assisted reproduction who does not fall into one of the following groups:

- (a) wife who provides the eggs that are used by her for assisted reproduction

## (b) birth mother

In other words, if the woman is the birth mother or a wife who donates the eggs that are used by her for assisted reproduction with her husband, she is the mother.

(2) Under the assisted reproduction provisions, the relationship is with the birth mother, not the third party donor of eggs or anyone else (absent adoption by someone else). The birth mother is obviously the woman who gives birth. But we exclude surrogacy from that definition.

Conclusion

So, if you have a woman who gives birth to a child using her own egg, she is a birth mother (as well as the genetic mother) and has a relationship. If a woman uses donated eggs and gives birth to the child, she is a birth mother and has a relationship but the donor of the eggs does not.

Men

For men, there is not as clear a bright line as giving birth. Under our act, we are crafting a brighter line where assisted reproduction occurs:

(1) Under the assisted reproduction provisions, there is no relationship with the third party donor of sperm. A third party donor (man) produces sperm used for assisted reproduction who does not fall into one of the following groups:

(a) husband who provides sperm that are used by wife for assisted reproduction

(b) a man who proves under our assisted reproduction act that he should be the father

(2) Otherwise our assisted reproduction provisions say:

(a) a man listed on the birth certificate is presumed a father (it is almost invariably the case that the woman giving birth is listed as the mother)

(b) a man who consents to be the father is presumed a father

(c) a man who is married to a birth mother is presumed a father

Conclusion

So, while different, the concepts are the same. Women are treated a little differently because we incorporate the Paternity Act's rules for determining the genetic father in our definition of genetic father, but we do not do that for the determination of the genetic mother,

because we think the Parentage Act can be construed by women in a way that surrogacy situations could be included; because we are specifically excluding those arrangements in favor of a conservative approach (and because people can adopt and adjust their wills accordingly) we did not incorporate those presumption provisions as they apply to women (which they already do to some degree under 257.71 if someone raises the issue).