

UNIFORM PARENTAGE ACT TASK FORCE

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
<ul style="list-style-type: none"> • 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 	<ul style="list-style-type: none"> • 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.