

**To: New Jersey Law Revision Commission**  
**From: Laura C. Tharney, Executive Director**  
**Re: Parentage project**  
**Date: September 10, 2022**

## MEMORANDUM

### Background

At its meeting in April of 2022, the Commission recognized that its work in the parentage area had evolved to the point that it required policy determinations more appropriately made by the Legislature, rather than the Commission.<sup>1</sup> As a result, the Commission directed that the project return to its original objective, generally expressed as ensuring that the same rights be afforded to different-sex and same-sex spouses.<sup>2</sup>

When this project began, its scope was limited to modernizing the statutory language pertaining to the genetic determination of parentage<sup>3</sup>, expanding the scope of the language concerning gamete donations<sup>4</sup>, and broadening what is now a "husband-father" presumption in New Jersey law to provide the equivalent protection to same-sex spouses as to different-sex spouses.<sup>5</sup>

The Commission noted in April 2022 that any report ultimately issued by the Commission should also identify for the Legislature issues that arose during the Commission's work in this area that are beyond its statutory mandate, with a recommendation that the statutes pertaining to parentage be modernized to reflect current times.<sup>6</sup>

### Comments Received

Comments were received in July 2022 in response to updated drafting distributed to commenters earlier in the summer. The comments explained that commenters continued to have concerns with the latest draft prepared on behalf of the Commission.

A July 1, 2022, letter emailed to the Commission on behalf of a group of commenters highlighted two concerns. The first concern was that the draft "privileges genetic parentage over all other paths to parentage."<sup>7</sup> The commenters described this as "a step backward from existing,

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<sup>1</sup> N.J. Law Revision Comm'n, Minutes, p. 6, (April 21, 2022), <https://static1.squarespace.com/static/596f60f4ebbd1a322db09e45/t/62eb060099fefe2ecff062a1/1659569664106/MI-N042122r.pdf> (last visited August 4, 2022).

<sup>2</sup> *Id.*

<sup>3</sup> N.J. Law Revision Commission, Memorandum, p. 2, (May 11, 2020) <https://static1.squarespace.com/static/596f60f4ebbd1a322db09e45/t/5eb963f2ea86c135075d7a7e/1589208051188/p-arentageM051120r.pdf> (last visited October 10, 2022).

<sup>4</sup> *Id.*, at pp. 9-10.

<sup>5</sup> *Id.* At pp. 4-5.

<sup>6</sup> *Id.*

<sup>7</sup> Letter to the New Jersey Law Revision Comm'n on behalf of Debra Guston, Esq., Courtney Joslin, Martin Luther King Jr. Professor of Law, UC Davis School of Law, Douglas NeJaime, Anne Urowsky Professor of Law, Yale Law

more child-centered New Jersey law, which allows courts in certain circumstances to recognize people as parents even without a genetic connection to the child.”<sup>8</sup> The commenters who raised this concern said that “[w]hile a genetic connection should continue to be one means of establishing parentage, courts should – as they can now – be able to look to other factors as well including the central issue of the best interests of the child.”<sup>9</sup>

The second issue raised by these commenters was that the “draft disregards the needs and interests of children of unmarried parents.”<sup>10</sup> The commenters noted that children born to unmarried parents “make up a substantial portion of children born in New Jersey, and across the nation” and expressed concern that the draft “limits the rules governing children born through assisted reproduction to marital children,” which they described as “out-of-step with developments around the country” and failing to “represent a child-centered approach to parentage.”<sup>11</sup> Commenters suggested that this limitation is also inconsistent with “recent changes to the law in New Jersey regarding children born through surrogacy, which apply equally to all intended parents, regardless of marital status or genetic relationship to the child.”<sup>12</sup>

These commenters respectfully suggested that the Commission pause its work in the area of parentage, noting that they were working in collaboration with the New Jersey State Bar Association to “update New Jersey parentage law to ensure that it protects all children.”<sup>13</sup>

Another July 1, 2022, comment letter, emailed by Mary McManus-Smith on behalf of Legal Services of New Jersey (LSNJ), explained that LSNJ had ongoing concerns focusing on the rights of low-income parents, including challenges to the rights of LGBTQ+ parents.<sup>14</sup> She indicated that LSNJ agreed with the July 1, 2022, concerns expressed by other commenters, and added that parentage issues that might be outside the scope of those raised by other commenters include the practice of New Jersey’s Department of Child Protection and Permanency requiring “birth hospitals to produce genetic evidence of paternity before releasing a child to the putative father, despite there being a marriage, a signed Certificate of Parentage, or both parents acknowledging his paternity.”<sup>15</sup> She explained that LSNJ had seen this “informal practice most frequently with families of color.”<sup>16</sup>

Ms. McManus-Smith noted that

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School, and Polly Crozier, Senior Staff Attorney, GLBTQ Legal Advocates & Defenders, emailed July 1, 2022, 8:56 AM EST (on file with the NJLRC).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> Email to the New Jersey Law Revision Commission from Mary M. McManus-Smith, Chief Counsel for Family Law and Director of Litigation, Legal Services of New Jersey, emailed July 1, 2022, 9:58 AM EST (on file with the NJLRC).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

whenever legal parentage is denied, a child’s legal rights to financial resources related to that parent are extinguishes, including inheritance, child support, Social Security dependent or survivor benefits, VA dependent benefits, TANF, and Emergency Assistance. For low-income families, the loss of such resources can make it substantially more difficult for that child to escape the burdens of poverty.<sup>17</sup>

Supplemental comments received in September 2022 in response to updated drafting that was distributed to commenters that month. Comments received from a group of commenters on September 13, 2022, indicated that the group “appreciated the opportunity to engage with the Commission’s work on this project over the past two years” and noted the commenters’ “serious concerns regarding each draft of proposed revisions to the parentage statutes.”<sup>18</sup> The commenters again expressed concern that the most recent “draft privileges genetic parentage over all other paths to parentage” and that it “disregards the needs and interests of children of unmarried parents” who “make up a substantial portion of children born in New Jersey, and across the nation.”<sup>19</sup>

The commenters said that “[a]ny revisions to the existing New Jersey parentage statutes should seek to protect all children in New Jersey, regardless of the marital status, gender, gender identity, or sexual orientation of their parents.”<sup>20</sup> The commenters concluded by

respectfully suggest[ing] that the Commission pause work on this project rather than finalizing its recommendations. We are working, in collaboration with several Sections of the New Jersey State Bar Association, on proposed legislation to update New Jersey parentage law to ensure that it protects all children. We look forward to sharing that work with you when it is complete and hope that the Commission will consider adopting or supporting that work.<sup>21</sup>

In response to a question from Staff about whether it is possible for the Commission to do additional drafting that meaningfully responds to the concerns raised during the course of the Commission's work in this area, while staying within the limited parameters that the Commission recently outlined for this project, Deb Guston explained that she did not see a “means of squaring the Commission’s present course with what I believe to be a full, robust and modern Parentage law.”<sup>22</sup> She added:

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<sup>17</sup> *Id.*

<sup>18</sup> Letter to the New Jersey Law Revision Comm’n on behalf of Debra Guston, Esq.; Mary McManus-Smith, chief Counsel for Family Law, Legal Services of New Jersey; Polly Crozier, Senior Staff Attorney, GLBTQ Legal Advocates & Defenders; Courtney Joslin, Martin Luther King Jr. Professor of Law, UC Davis School of Law; and Douglas NeJaime, Anne Urowsky Professor of Law, Yale Law School, emailed September 13, 2022, 2:32 PM EST (on file with the NJLRC).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> Email to the New Jersey Law Revision Commission from Deb Guston, emailed September 14, 2022, 7:16 PM EST (on file with the NJLRC).

To move alone on genetic parentage without bringing in non-genetic parents, unmarried people and those who form intentional parental relationships risks a substantial chance that a) the Legislature never addresses the unaddressed issues; b) if it does, that the public will need to be referring to two different statutes or at minimum, two different pathways to the establishment of parentage, which will, in my view, create huge disparities. I think two tracks would violate current NJ law that children born out of wedlock have the same rights as children born in wedlock. If parents of children outside of marriage have a different, perhaps more fraught pathway to establishing parentage, that is a problem.<sup>23</sup>

In an email received from Solangel Maldonado, Associate Dean for Faculty Research & Development and Eleanor Bontecou Professor of Law, Seton Hall University School of Law, Professor Maldonado said “I completely agree with the concerns raised in the September 13, 2022 letter submitted by Debra Guston and others and in Debra's September 14<sup>th</sup> email so I will not repeat them here.”<sup>24</sup> “[A]s one of the Reporters for the American Law Institute's Restatement of Children & the Law and the drafter of the section on psychological parentage,” she added that the most recent Commission draft

is not in line with the Restatement's focus on the best interest of the child. When drafting the Restatement section on psychological parentage I relied on NJ law because it was child-centered and focused on the child's needs and well-being. The Commission's draft is a departure from that approach.<sup>25</sup>

### **Conclusion**

Earlier this year, the Commission recognized that its work in this area had evolved to the point that it required policy determinations best made by the Legislature in the first instance, and directed that work in this area return to its earlier, limited, mission.

The ability of the New Jersey State Bar Association (NJSBA) to make recommendations incorporating policy is not subject to the statutory constraints applicable to the Commission. In view of the concerns expressed by commenters, and the work now being done by commenters and the NJSBA, Staff recommends that the Commission pause its work on parentage law to allow the efforts of the commenters and the NJSBA to develop, in the hope that a comprehensive recommendation can be made to the Legislature to update New Jersey's law in this important and impactful area.

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<sup>23</sup> *Id.*

<sup>24</sup> Email to the New Jersey Law Revision Commission from Solangel Maldonado, Associate Dean for Faculty Research & Development and Eleanor Bontecou Professor of Law, Seton Hall University School of Law, emailed September 15, 2022, 8:40 PM EST (on file with the NJLRC).

<sup>25</sup> *Id.*