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State's Parentage Act Gets Major Makeover

By Raegen Rasnic

Washington's parentage statute was significantly revised effective January 1 as a result of the 2018 Legislature's passage of SB 6037. This historic legislation made Washington the first state to substantially enact the 2017 Uniform Parentage Act (UPA) developed by the Uniform Laws Commission.

The new statute, codified as RCW ch. 26.26A, repealed most (but not all) sections of the former parentage statute, RCW ch. 26.26. Summarized below are some of the new statute's most significant provisions, including those governing de facto parentage, assisted reproduction and surrogacy.

Parentage

Under RCW § 26.26A.100, a person is considered a parent if he or she:

- Gives birth to the child (except pursuant to a valid surrogacy arrangement);
- Is considered a presumed parent of the child (RCW § 26.26A.115) as a result of marriage or state-registered domestic partnership or as a result of living with the child and holding the child out as his or her own during the first four years of the child's life, and the presumption is not rebutted;
- Acknowledges parentage by signing a Voluntary Acknowledgment of Parentage (VAP) (RCW § 26.26A.205);
- Is adjudicated to be a parent (RCW § 26.26A.400 through RCW § 26.26A.515); or
- Is determined to be a parent pursuant to a valid, assisted reproduction or surrogacy arrangement (RCW § 26.26A.700 through RCW § 26.26A.785).

Notably, the new statute provides that a court may adjudicate a child to have more than two parents if the failure to do so "would be detrimental to the child" (RCW § 26.26A.460(3)).

Gender-Neutral Voluntary Acknowledgment of Parentage

Unlike previous parentage statutes, RCW ch. 26.26A is gender-neutral. To the extent practicable, the statute's provisions applicable to the father-child relationship also apply to the mother-child relationship, and vice versa under RCW § 26.26A.060.

The statute also makes the acknowledgment of parentage gender-neutral, referencing "parentage" rather than "paternity," as was the case under the previous statute. A new, gender-neutral Voluntary Acknowledgment of Parentage (VAP) form has been developed to implement the statute. Under RCW § 26.26A.205, the VAP must be signed by the woman giving birth and the alleged genetic father, intended parent through assisted reproduction, and any presumed parent.

The enactment of a gender-neutral VAP is significant for LGBTQ parents because it offers a simple method for non-biological, intended parents to establish parentage without the need for a second parent or stepparent adoption, which can be cost-prohibitive. RCW § 26.26A.200 allows the woman who gives birth to the child, and the child's intended parent, to use the VAP to establish parentage.

Per RCW § 26.26A.215, the VAP may be signed before or after the child's birth and may be signed in counterparts, and is effective upon the later of the birth of the child or the filing of the VAP with the state registrar of vital records. The VAP is equivalent to an acknowledgment of parentage (RCW § 26.26A.220), is entitled to full faith and credit, and should satisfy the federal law requirement that states give full faith and credit to other states' voluntary acknowledgments of "paternity."

The procedure and requirements for rescinding a VAP are set forth in RCW § 26.26A.235. The time period for challenging parentage after expiration of the period for rescinding the VAP, and the basis for such a challenge, are set forth in RCW § 26.26A.240.

Pre-Birth Parentage Orders

As under the previous statute, the new statute permits the filing of a parentage petition prior to the child's birth. However, a parentage order or judgment may now be entered prior to the birth, although "enforcement of the order or judgment must be stayed until the birth of the child" under RCW § 26.26A.480.

It is the responsibility of the parent to present the parentage order or judgment to the hospital or other party handling the child's birth, so that the birth is recorded properly.

De Facto Parentage

The new UPA includes a section — RCW § 26.26.A.440 — codifying Washington's common law doctrine of de facto parentage. The statute adopts the multi-factor test first established by the Washington Supreme Court in *In re Parentage of L.B.*[1]

De facto parentage requires the court to find by a preponderance of the evidence that the alleged de facto parent:

(1) resided with the child as a regular member of the child's household for a significant period;

(2) engaged in consistent caretaking of the child;

(3) undertook full and permanent responsibilities of a parent of the child without expectation of financial compensation;

(4) held out the child as the person's own;

(5) established a bonded and dependent relationship with the child which is parental in nature;

(6) that another parent of the child fostered or supported the bonded dependent relationship; and

(7) that continuing the relationship between the individual and the child is in the best interest of the child.

Under *Parentage of L.B.*, recognition of de facto parentage is "limited to those adults who have fully and completely undertaken a permanent, unequivocal, committed, and responsible parental role in the child's life."[2]

It is important to note that under RCW § 26.26A.440(1)(b) a de facto parentage petition can only be filed by the person claiming to be a de facto parent. A person cannot be held to be a de facto parent unless they affirmatively seek such recognition. Under RCW § 26.26A.440(2), the petition must be filed before the child is 18 and while the child is alive.

Surrogacy

Prior to the enactment of RCW ch. 26.26A, the availability of surrogacy in Washington was limited. Compensation could not be paid, and contracts for compensation were void and unenforceable as contrary to public policy. The new statute removes these prohibitions and authorizes the court to issue parentage orders declaring the intended parents in a surrogacy arrangement to be the parents of the child born to the person acting as surrogate.

With the enactment of the new statute, our state now recognizes two types of surrogacy: "Gestational Surrogacy," where the person who intends to give birth under a surrogacy agreement will become pregnant by assisted reproduction using a different person's eggs, and "Genetic Surrogacy," where the person who intends to give birth under a surrogacy agreement will become pregnant by assisted reproduction using her own eggs.

RCW § 26.26A.705 establishes specific requirements for intended parents and surrogates, including minimum age requirements for the person acting as surrogate and the intended parents, as well as requirements for medical evaluations, mental health consultations, and independent legal representation.

Also included are specific requirements for the content of the surrogacy agreement itself (RCW § 26.26A.715) and the procedure for entering into the surrogacy agreement (RCW § 26.26A.710). Important examples of some of the required content include:

(1) information regarding how the intended parents will cover the surrogacy-related expenses of the person acting as surrogate and medical expenses of the child (even if the statement is that such information is unknown);

(2) the agreement must permit the person acting as surrogate to make all health and welfare decisions regarding the pregnancy, including the choice to terminate the pregnancy; and

(3) a statement that each intended parent is jointly and severally liable to provide financial assistance to any and all children born, regardless of number, gender, or mental or physical condition.

If all of these specific requirements are met, the surrogacy agreement must be enforced by the court (RCW § 26.26A.755(1)). If any of the requirements are not met, the agreement may not be enforceable (RCW § 26.26A.755(2)).

A person who does not live in Washington can enter into a surrogacy agreement in Washington. Under RCW § 26.26A.710(1), a surrogacy agreement is valid and enforceable in Washington as long as at least one party resides in this state or if any of the medical procedures or mental health consultations occurs here.

Per RCW § 26.26A.715(2), the new UPA allows intended parents to pay monetary compensation to a gestational or genetic surrogate in exchange for her services. There are specific requirements for the manner in which compensation may be paid and the ways in which surrogacy agencies may operate in Washington.

In gestational surrogacy cases, the new UPA allows Washington courts to issue pre-birth parentage orders declaring the intended parents to be the legal parents of the child born to the woman acting as surrogate, upon birth. Following the birth, the intended parents may apply for a birth certificate identifying them as the child's legal parents

Pre-birth parentage orders are not available in genetic surrogacy cases. Under RCW § 26.26A.760, genetic surrogacy contracts must be submitted to the court for validation before any medical procedures associated with the surrogacy have taken place. Non-validated agreements are enforceable only as set forth in RCW § 26.26A.775.

Per RCW § 26.26A.770, parentage orders declaring the intended parents to be the legal parents of the child born to the woman acting as genetic surrogate may only be entered after the birth, following a waiting period specified in the statute. Once the parentage order is entered, the intended parents may apply for a birth certificate identifying them as the child's legal parents.

Assisted Reproduction

The statute's assisted reproduction provisions — RCW § 26.26A.010(4) — apply when the child's conception does not result from sexual intercourse. "Assisted Reproduction" refers to methods of creating pregnancy without sexual intercourse, including artificial insemination, intrauterine insemination, in vitro fertilization and embryo transfer.

The statute does *not* impose additional restrictions or requirements for egg donor, sperm donor or embryo donor arrangements. The statute continues to clearly state, under RCW §§ 26.26A.605 and 26.26A.610, that a donor is not a parent of a child conceived and born from the donated eggs, sperm or embryos, unless the woman giving birth and the donor consent to the contrary.

If a child conceived through assisted reproduction (not including surrogacy) is born to unmarried parents, a VAP will be used to confirm the non-biological parent's status. Under certain conditions, if an unmarried, non-biological party fails to consent in a record as required, the party's parental status may subsequently be confirmed by a court under RCW § 26.26A.615. If the child is born to a couple who are married or in a state registered domestic partnership, both spouses or partners will continue to be presumed to be the child's legal parents.

Adoption of the 2017 Uniform Parentage Act placed Washington at the vanguard of family formation law and policy. As enacted, the UPA ensures that the processes of family planning and establishing parentage are more efficient and equitable to all families and prospective parents.

Two other states, California and Vermont, have also substantially enacted the 2017 UPA. At least 10 other states are expected to pursue similar legislation in 2019. ■

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[2] 155 Wn.2d 679, 122 P.3d 679 (2005).

[2] *Id.* at 708.