

5.

G.S. 49A

RIGHTS OF CHILDREN  
CONCEIVED BY ASSISTED  
REPRODUCTION

MEMORANDUM

TO: NCBA Legislative Advisory Committee

FROM: NCBA Estate Planning and Fiduciary Law Section Legislative Committee  
Linda F. Johnson, Rebecca L. Smitherman and Janice L. Davies, Co-Chairs

RE: Proposed Expansion Of Article 1 Of Chapter 49A, "THE RIGHTS OF CHILDREN," To Include A Broader Class Of Children Born As The Result Of Assisted Reproduction, And Expansion Of G.S. 29, "INTESTATE SUCCESSION," To Insure The Inheritance Rights Of Such Children

DATE: October 1, 2016

The purpose of the proposed legislation is to revise Article 1 of North Carolina General Statutes Chapter 49A entitled "Children Conceived By Artificial Insemination" with the substitution of a new Article 1 entitled "Rights of Children Conceived By Assisted Reproduction." The original statute was enacted in 1971 and covered the rights of only a narrow group of children born of assisted reproduction. The revised statute covers a broader class of children and follows the modern trend recognized in the *Restatement (Third) of Property: Wills and Other Donative Transfers* (herein the "Restatement"). The Restatement itself follows positions set forth in Articles 7 and 8 of the "Uniform Parentage Act (2000)" as last amended in 2002 (herein the "UPA"), Sections 2-120 and 2-121 of Article II, Part 1, Subpart 2 of the "Uniform Probate Code (2010)" (herein the "UPC") which were added to the UPC by amendment in 2008, and Articles 6 and 7 of American Bar Association Model Act Governing Assisted Reproductive Technology (February 2008) (herein the "ABA Model Act").

The revised statute is designed to protect the rights of the ever increasing number of children born using a variety of assisted reproduction techniques. According to the Centers for Disease Control and Prevention (the "CDC") based on preliminary 2014 data from 460 reporting fertility clinics (including 13 North Carolina clinics) over 70,000 children were born in the United States in 2014 involving assisted reproduction in which the eggs were handled by fertility clinics. The CDC estimates that 1.6% of all children born in the United States each year are now conceived in this manner. See [www.cdc.gov/art/index.html](http://www.cdc.gov/art/index.html). Over fifteen other states have substantially more comprehensive legislation governing assisted reproduction than the current Article 1 of G.S. 49A, and a number of other states have legislation that is somewhat broader than the current North Carolina statute.

The proposed revised statute most closely resembles the above-cited provisions of the UPC along with procedural provisions patterned in part after Article 8 of the UPA and Article 7 of the ABA Model Act. The gestational agreement provisions were also derived from selected portions of Article 8 of the UPA and Article 7 of the Model Act. The provisions dealing with the legal status of children of assisted reproduction are patterned after the present G.S. 49A-1 and G.S. 48-1-106(e) of the North Carolina Adoption statutes.

Contemporaneously with the revisions to Article 1 of G.S. 49A, a new Article 4A of G.S. Chapter 29, "Intestate Succession," is also proposed to expressly provide for the intestate succession rights of children conceived by assisted reproduction. These proposed provisions parallel the rights of adopted children in Article 4 of G.S. 29.

Comments and collaboration on the proposed legislation were requested and received from the Family Law Section over the last two and one-half years summarized as follows:

1. Early June 2014, R. Smitherman requested assistance and collaboration from D. Holm.
2. Mid July & August 17, 2014 drafts of proposed legislation and comments sent to D. Holm and S. Gibbs.
3. September 17, 2014 comments received from D. Holm and Nadia Margherio, Chair of Family Law Modern Family Committee, all of which were incorporated into a draft and forward to D. Holm and N. Margherio.
4. September 23, 2014 comments received from D. Holm to the September 17 draft, which was revised.
5. November 4, 2014 extensive comments received from N. Margherio's Committee, all of were accepted and incorporated into a November 7, 2014 Draft which together with red-lined copies and a Memo explaining the changes were e-mailed to N. Margherio on November 7, 2014.
6. January 20, 2015 Bill Drew, the Children of Assisted Reproduction Subcommittee Chair, met with N. Margherio in her office and requested that the two sections work together on the existing proposals or even start over with a Family Law proposal. N. Margherio seemed enthusiastic and promised a progress report by our mid-April Legislative Committee meeting.
7. November 12, 2015 after numerous unanswered efforts to contact N. Margherio, L. Johnson e-mailed D. Holms advising that we would like to propose legislation in 2017 and requested comments or suggestions by mid-December.
8. December 10, 2015 D. Holm responded apparently unaware of our responses to Family Law's November 2014 comments, the meeting with N. Margherio and the numerous unanswered attempts to reach N. Margherio in 2015. This e-mail was answered immediately forwarding to D. Holm all of the relevant documents, memo's, etc., reviewing in detail our efforts to work with Family Law since June 2014 and requesting Family Law to either collaborate on proposed legislation or drop out of the initial effort.

9. March 3, 2016 D. Holm advised L. Johnson that Jennifer Tharrington was the new Modern Family Chair.

10. March 4, 2016 B. Drew e-mailed J. Tharrington all of the relevant documents on the proposed legislation and their history including responses to Family Law comments, etc. He offered to meet with her in Raleigh and do whatever necessary to speed the process along.

11. April 19, 2016 J. Tharrington responded noting the need for comprehensive legislation on this subject but suggesting as a "first step" amending G.S. 49A-1 along with the General Statutes Commission's revision of the General Statutes to be inclusive of same sex married couples. She also suggested educational initiatives and later working on comprehensive legislation, commending our existing drafts as a good start. She said she would convene the first meeting of her committee in early summer and invited B. Drew to attend.

12. April 25, 2016 B. Drew answered J. Tharrington noting our enthusiastic reception her e-mail, accepting her invitation to attend her Committee's early summer meeting, and agreeing with her "first step" in joining the General Statutes Commission's project in revising G.S. 49A-1. He made some suggested changes to her proposed wording if she felt they would be consistent with the GSC project.

13. June 15, 2016 L. Johnson and D. Holm exchanged e-mails bringing D. Holm up to date on our correspondence with J. Tharrington.

14. July 22, 2016 Milam Pham, as a representative of Family Law, made a presentation at the 37<sup>th</sup> Annual Estate Planning and Fiduciary Law CLE Program emphasizing the need for more awareness of Assisted Reproduction in estate planning and the need for comprehensive legislation in North Carolina. Her materials included an outline co-authored with Sharon Thompson, another Family Law expert, which concluded: "*I applaud the foresight of the Estate Planning Section in recognizing this issue and its efforts in drafting a proposal to bring NC law in line with the realities of today's families.*" [Emphasis Added].

On September 28, 2016 the NCBA Estate Planning and Fiduciary Law Section's Council voted unanimously to advance the proposed legislation.

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GENERAL ASSEMBLY OF NORTH CAROLINA  
SESSION 2017

SENATE BILL \_\_\_\_\_

Short Title: Protection of Children of Assisted Reproduction (Public)

Sponsors: \_\_\_\_\_

Referred to: \_\_\_\_\_

A BILL TO BE ENTITLED

AN ACT TO EXPAND THE ARTICLE 1 OF CHAPTER 49A, "THE RIGHTS OF CHILDREN," TO INCLUDE A BROADER CLASS OF CHILDREN BORN AS THE RESULT OF ASSISTED REPRODUCTION AND TO EXPAND G.S. 29, "INTESTATE SUCCESSION," TO INSURE THE INHERITANCE RIGHTS OF SUCH CHILDREN.

The General Assembly of North Carolina enacts:

SECTION 1. Article 1 of G.S. 49A reads as rewritten:

ARTICLE 1

RIGHTS OF CHILDREN CONCEIVED BY ARTIFICIAL INSEMINATION ASSISTED REPRODUCTION

~~§ 49A-1. Status of child born as a result of artificial insemination.~~

~~—Any child or children born as the result of heterologous artificial insemination shall be considered at law in all respects the same as a naturally conceived legitimate child of the husband and wife requesting and consenting in writing to the use of such technique.~~

§ 49A-1-100. Definitions.

In this Article:

(1) "Assisted reproduction" means a method of causing pregnancy other than sexual intercourse.

(2) "Birth mother" means a woman, other than a gestational carrier defined in subsection (8) of this section, who gives birth to a child of assisted reproduction. The term is not limited to a woman who is the child's genetic mother.

(3) "Child of assisted reproduction" means a child conceived by means of assisted reproduction by a woman other than a gestational carrier defined in subsection (8) of this section.

(4) "Divorce" includes annulment, dissolution, and declaration of invalidity of a marriage.

(5) "Function as a parent of the child" means behaving toward a child in a manner consistent with being the child's parent and performing functions that are customarily performed by a parent, including fulfilling parental responsibilities toward the child, recognizing or holding

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1 out the child as the individual's child, materially participating in the child's upbringing, and  
2 residing with the child in the same household as a regular member of that household.

3  
4 (6) "Genetic mother" means the woman whose egg was fertilized by sperm used for  
5 assisted reproduction.

6  
7 (7) "Gestational agreement" means an agreement described in and meeting the  
8 requirements of §49A-1-103, providing for assisted reproduction by a gestational carrier who  
9 agrees to carry a child to birth for an intended parent, intended parents, or an individual  
10 described in subsection (5) above.

11  
12 (8) "Gestational carrier" means a woman, at least 21 years of age, who is not an  
13 intended parent, who is a party to a gestational agreement and who conceives a gestational child.  
14 The term is not limited to a woman who is the child's genetic mother.

15  
16 (9) "Gestational child" means a child conceived by a gestational carrier pursuant to a  
17 gestational agreement.

18  
19 (10) "Incapacity" means a chronic and substantial inability, as a result of mental or  
20 organic impairment, to understand the nature and consequences of decisions concerning the care  
21 of one's minor child, and a consequent inability to make these decisions.

22  
23 (11) "Instrument" means a writing.

24  
25 (12) "Intended parent" means an individual who entered into a gestational agreement  
26 providing that the individual will be the parent of a child born to a gestational carrier by means  
27 of assisted reproduction. The term is not limited to an individual who has a genetic relationship  
28 with the child.

29  
30 (13) "Relative" means a grandparent or a descendant of a grandparent.

31  
32 (14) "Separate" means to live separate and apart within the meaning of G.S. Chapter  
33 50.

34  
35 (15) "Third-party donor" means an individual who produces eggs or sperm used for  
36 assisted reproduction, whether or not for consideration. The term does not include:

37  
38 (a) A husband who provides sperm, or a wife who provides eggs, that are  
39 used for assisted reproduction by the wife;

40  
41 (b) The birth mother of a child of assisted reproduction; or

42  
43 (c) An individual who has been determined under G.S. 49A-1-101(d) or (e) to  
44 have a parent-child relationship with a child of assisted reproduction.

45  
46 § 49A-1-101. Children of assisted reproduction.

47

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1           (a) A parent-child relationship does not exist between a child of assisted reproduction  
2 and a third-party donor merely because of his or her status as a third-party donor.

3  
4           (b) A parent-child relationship exists between a child of assisted reproduction and the  
5 child's birth mother.

6  
7           (c) A parent-child relationship exists between a child of assisted reproduction and the  
8 husband of the child's birth mother if the husband provided the sperm that the birth mother used  
9 during the husband's lifetime for assisted reproduction.

10  
11           (d) A birth certificate identifying an individual other than the birth mother as the  
12 other parent of a child of assisted reproduction presumptively establishes a parent-child  
13 relationship between the child and that individual.

14  
15           (e) Unless a parent-child relationship is established under subsection (c) or (d) of this  
16 section, a parent-child relationship exists between a child of assisted reproduction and an  
17 individual other than the birth mother who consented to assisted reproduction by the birth mother  
18 with intent to be treated as the other parent of the child. The following are the methods of  
19 establishing that an individual consented to assisted reproduction by the birth mother with intent  
20 to be treated as the other parent of the child:

21  
22           (1) If the individual, either before or no later than two years after the child's  
23 birth, signs an instrument that, considering all the facts and circumstances, evidences the  
24 individual's consent; or

25  
26           (2) If the individual signs an instrument described in subsection (1) more than  
27 two years after the child's birth and functions as a parent of the child before the child  
28 reaches 18 years of age or is otherwise considered an adult under the laws of this state; or

29  
30           (3) In the absence of a signed instrument described in subsection (1),  
31 if the individual:

32                   (A) functions as a parent of the child no later than two years  
33 after the child's birth; or

34  
35                   (B) before two years after the child's birth, forms an intent to  
36 function as a parent of the child no later than two years after the child's birth, but  
37 is prevented from carrying out that intent due to such individual's death,  
38 incapacity, or other circumstances.

39  
40           (f) For the purpose of subsection (e)(3) of this section, the following rules apply:

41  
42           (1) If the birth mother is married, is not separated and no divorce proceeding  
43 is pending, in the absence of clear and convincing evidence to the contrary, her spouse  
44 satisfies subsection (e)(3)(A) or (B) of this section;

45  
46           (2) If the birth mother is a surviving spouse and at her deceased spouse's  
47 death she was not separated and no divorce proceeding was pending, in the absence of  
48

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1 clear and convincing evidence to the contrary, her deceased spouse satisfies subsection  
2 (e)(3)(B) of this section.

3  
4 (g) Notwithstanding subsections (c) and (e) of this section:

5  
6 (1) If a married couple separates or divorces before the implantation of  
7 eggs, sperm, or embryos, a child resulting from the assisted reproduction is not a child  
8 of the birth mother's separated or former spouse, unless the separated or former spouse  
9 consented in a signed instrument before such implantation that if assisted reproduction  
10 were to occur after the separation or divorce, the child would be treated as the separated  
11 or former spouse's child.

12  
13 (2) If in a signed instrument, an individual withdraws consent to assisted  
14 reproduction before implantation of eggs, sperm, or embryos, a child resulting from  
15 the assisted reproduction is not a child of that individual, unless the individual  
16 subsequently satisfies subsection (e) of this section.

17  
18 **§ 49A-1-102. Gestational Children.**

19  
20 (a) A parent-child relationship may be conclusively established by a court order  
21 designating the parent or parents of a gestational child. All such orders shall be obtained in  
22 accordance with G.S. 49A-1-104 unless otherwise included in a proceeding under G.S. 49A-1-  
23 103(k).

24  
25 (b) A parent-child relationship between a gestational child and the child's gestational  
26 carrier does not exist unless the gestational carrier is:

27  
28 (1) Designated as a parent of the child in a court order described in sub-  
29 section (a); or

30  
31 (2) The child's genetic mother, and a parent-child relationship does not exist  
32 under this Article 1 of G.S. 49A with an individual other than the gestational carrier.

33  
34 (c) In the absence of a court order described in subsection (a), a parent-child  
35 relationship exists between a gestational child and an intended parent who:

36  
37 (1) Is an intended parent pursuant to a gestational agreement; or

38  
39 (2) Functions as a parent of the child no later than two years after the child's  
40 birth; or

41  
42 (3) Dies while the gestational carrier is pregnant if:

43  
44 (A) there are two intended parents and the other intended parent  
45 functions as a parent of the child no later than two years after the child's birth;

46  
47 (B) there are two intended parents, the other intended parent also  
48 dies while the gestational carrier is pregnant, and a relative of either deceased

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1 intended parent or the spouse or surviving spouse of a relative of either deceased  
2 intended parent functions as a parent of the child no later than two years after the  
3 child's birth; or

4  
5 (C) there is no other intended parent and a relative of or the spouse  
6 or surviving spouse of a relative of the deceased intended parent functions as a  
7 parent of the child no later than two years after the child's birth.

8  
9 **§ 49A-1-103. Gestational Agreements.**

10 (a) A gestational agreement meeting the requirements of this section is valid and  
11 enforceable in accordance with its terms and provisions to the extent such terms and provisions  
12 are not inconsistent with the provisions of this Section or any other provisions of this Article 1 of  
13 G.S. 49A. A gestational agreement does not require any proper consideration to be valid and  
14 enforceable.

15  
16 (b) A gestational agreement must be in writing and acknowledged by all of the parties  
17 before a certifying officer as defined in G.S. 52-10(b).

18  
19 (c) The parties to a gestational agreement must include the prospective gestational  
20 carrier, her spouse if she is married, the intended parent or parents and, except as provided in  
21 subsection (d) of this section, the third-party donor or the third-party donors.

22 (d) A third-party donor is not a necessary party to a gestational agreement if such  
23 third-party donor is anonymous or otherwise not known by any of the other parties to the  
24 gestational agreement.

25 (e) A gestational agreement must provide that:

26  
27 (1) The prospective gestational carrier agrees to pregnancy by means of  
28 assisted reproduction;

29 (2) The prospective gestational carrier, her spouse if she is married, and the  
30 third-party donors who are parties to the agreement (i) relinquish all rights and duties as  
31 parents of the child or children conceived through the assisted reproduction and (ii) agree  
32 to surrender custody of such gestational child or children to the intended parent or  
33 parents immediately upon its or their birth; and

34 (3) The intended parent or intended parents (i) become the parent or parents of  
35 all such resulting children conceived through the assisted reproduction and (ii) agree to  
36 accept custody of all such resulting gestational children regardless of number, gender or  
37 mental or physical condition.

38 (f) A gestational agreement does not apply to a child conceived by means of sexual  
39 intercourse.

40 (g) A gestational agreement may not limit the right of the gestational carrier to make  
41 decisions to safeguard her health or that of the embryo(s) or fetus(es).

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1           (h) Before the prospective gestational carrier becomes pregnant by means of assisted  
2 reproduction, any intended parent may terminate the gestational agreement by giving written  
3 notice of termination to all other parties.

4  
5           (i) A gestational agreement shall terminate upon the deaths of the intended parent or  
6 parents prior to the prospective gestational carrier's becoming pregnant with the child of the  
7 intended parent or parents.

8  
9           (j) A gestational agreement may provide for:

10           (1) The payment consideration or compensation to the gestational carrier  
11 and the timing and manner of any such payment;

12  
13           (2) The payment or reimbursement of the gestational carrier's reasonable  
14 expenses related to the gestational carrier arrangement and the gestational agreement,  
15 including without limitation medical, legal or other professional expenses;

16           (3) The right of the gestational carrier to utilize the services of a physician of  
17 her choosing, after consultation with the intended parent or parents, to provide her care  
18 during the pregnancy;

19           (4) A requirement that the gestational carrier undergo all medical exams,  
20 treatments and fetal monitoring procedures that the chosen physician recommends for the  
21 success of the pregnancy;

22           (5) A requirement that the gestational carrier abstain from any activities that  
23 the intended parent or parents or the chosen physician reasonably believes may be  
24 harmful to the pregnancy or the future health of the child or children, including without  
25 limitation smoking, drinking alcohol, using non-prescribed drugs, using prescription  
26 drugs not authorize by a physician aware of the gestational carrier's pregnancy, exposure  
27 to radiation, or any other activities proscribed by a health care provider; and

28           (6) Other matters or requirements not contrary to or inconsistent with the  
29 provisions of this Article 1 of G.S. 49A.

30           (k) In the event of a breach or anticipated breach of a provision of a gestational  
31 agreement, the superior court division of the General Court of Justice of this State shall have  
32 original jurisdiction to determine the respective rights and obligations of the parties to the  
33 gestational agreement and the appropriate remedies for the breach or anticipated breach; and  
34 except as otherwise provided in this Section or in the gestational agreement, each party to the  
35 gestational agreement shall be entitled to all remedies available at law or in equity; provided,  
36 however, there shall be no specific performance remedy available for a prospective gestational  
37 carrier's breach of a gestational agreement provision requiring her to be impregnated.

38 **§ 49A-1-104. Jurisdiction and Court Orders.**

39  
40           (a) Except as otherwise provided in G.S. 49A-1-103(k), the clerks of superior court  
41 of this State shall have original jurisdiction over proceedings to establish parent-child  
42 relationships for gestational children and children of assisted reproduction. These proceedings

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1 shall be by a special proceeding before the clerks of superior court and may be instituted before  
2 or after a child who is the subject of the proceeding is born. All interested persons shall be served  
3 with the petition instituting such a special proceeding. In uncontested proceedings it shall not be  
4 necessary for a child who is the subject of the proceeding to be a party; however, in all other  
5 proceedings the clerk shall determine whether it shall be necessary for each child who is the  
6 subject of the proceeding to be a party and, if so, if such child is a minor or unborn, whether a  
7 guardian ad litem should be appointed to represent such child. A court order establishing a  
8 parent-child relationship, including without limitation court orders referred to in G.S. 49A-1-102  
9 (a), shall contain the following:

10 \_\_\_\_\_  
11 (1) A finding setting forth and establishing the parent or parents of each child  
12 who is the subject of the proceeding;

13 \_\_\_\_\_  
14 (2) If necessary, an order that each such child be surrendered to such child's  
15 parent or parents established by the court;

16 \_\_\_\_\_  
17 (3) An order directing that a birth certificate be issued for each such child  
18 naming the parent or parents of such child as established by the court; and

19 \_\_\_\_\_  
20 \_\_\_\_\_  
21 (4) Such other findings and orders relating to the parent-child relationship as  
22 the court may deem appropriate, including without limitation the terms of gestational  
23 agreements in cases involving gestational carriers.

24 \_\_\_\_\_  
25 (b) The venue for a proceeding referred to in subsection (a) is the county of this State  
26 where a child who is the subject of the proceeding resides.

27 \_\_\_\_\_  
28 (c) After the birth of a child to an alleged gestational carrier, regardless of whether  
29 there is a gestational agreement, any person claiming to be a parent of the child, the alleged  
30 gestational carrier or appropriate state agency may institute a proceeding referred to in  
31 subsection (a) to establish the parentage of the child.

32 \_\_\_\_\_  
33 (d) After the birth of a child of assisted reproduction, the birth mother or any other  
34 person claiming to be a parent of the child or any appropriate state agency may institute a  
35 proceeding referred to in subsection (a) to establish the parentage of the child, if any, other than  
36 the child's birth mother.

37 \_\_\_\_\_  
38 (e) If it appears to the clerk of superior court that a proceeding referred to in  
39 subsection (a) is not contested, the clerk of superior court has the power to hear and decide the  
40 petition summarily and issue a court order establishing the parent-child relationship requested in  
41 the petition.

42 \_\_\_\_\_  
43 (f) If in any proceeding referred to in subsection (a), the parentage of the child is  
44 alleged not to be the result of assisted reproduction, the clerk of superior court shall order genetic  
45 testing to determine the parentage of the child.

46 \_\_\_\_\_  
47 (g) If an issue of fact, an equitable defense, or a request for equitable relief or  
48 damages is raised in any proceeding referred to in subsection (a), the clerk of superior court shall

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1 transfer the proceeding to the superior court division of the General Court of Justice of this State  
2 under G.S. §1-301.2.

3  
4 § 49A-1-105. Status of Posthumously Conceived Children.

5  
6 Notwithstanding anything to the contrary under the foregoing provisions of this Article 1 of G.S.  
7 49A, in no event may a parent-child relationship be created or established under this Article 1 of  
8 G.S. 49A between a child and a person who died prior to such child's birth mother or gestational  
9 carrier, as the case may be, becoming pregnant with such child.

10  
11 § 49A-1-106. Status of Children for Whom a Parent-Child Relationship is Established  
12 under this Article.

13  
14 (a) Any child for whom a parent-child relationship has been established under this  
15 Article 1 of G.S. 49A shall be considered for all purposes at law, including without limitation  
16 G.S. 130A-101, in all respects the same as a naturally conceived legitimate child of the person or  
17 persons with whom such parent-child relationship has been established, and any such person for  
18 whom such a parent-child relationship is established with a child under this Article 1 of G.S. 49A  
19 shall likewise be considered for all such purposes at law, including without limitation G.S.  
20 130A-101, in all respects the natural and legitimate parent of such child.

21  
22 (b) In any deed, grant, will, trust agreement or other written instrument executed  
23 [after effective date of statute]:

24  
25 (1) The words "child", "grandchild", "heir", "issue", "descendant", or an  
26 equivalent, or any other word of like import, shall be held to include any person for  
27 whom a parent-child relationship has been established under this Article 1 of G.S. 49A,  
28 unless a contrary intention plainly appears from the terms of the instrument, whether the  
29 instrument was executed before or after the establishment of the parent-child relationship.

30  
31 (2) The use of the phrase "hereafter born" or similar language in any such  
32 instrument to establish a class of persons shall not by itself be sufficient to exclude such  
33 persons from inclusion in the class.

34  
35 (3) Any reference to a natural person shall include any person for whom a  
36 parent-child relationship has been established under this Article 1 of G.S. 49A unless the  
37 instrument explicitly states that such persons are excluded, whether the instrument was  
38 executed before or after such parent-child relationship has been so established.

39  
40 (4) Notwithstanding the provisions of G.S. 49A-1-105, a posthumously  
41 conceived person shall be included in the definitions of the words "child", "grandchild",  
42 "heir", "issue", "descendant" or an equivalent, or any other word of like import in any  
43 written instrument if the instrument explicitly states that such child is included.

44  
45 **SECTION 2.** Chapter 29 of the General Statutes is amended by adding between Article  
46 4 and Article 5 thereof a new Article 4A which reads:  
47  
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ARTICLE 4A.

CHILDREN CONCEIVED BY ASSISTED REPRODUCTION

§ 29-17A. Succession by, through, and from children conceived by assisted reproduction.

(a) A child conceived by assisted reproduction is a child for whom a parent-child relationship has been established in accordance with Article 1 of G.S. 49-A. Each parent for whom a parent-child relationship has been established with a child under Article 1 of G.S. 49A is a parent of such child for all purposes.

(b) A child conceived by assisted reproduction is entitled to take by succession any property by, through and from such child's parent or parents established under Article 1 of G.S. 49A and its or their heirs the same as if such child were the natural legitimate child of such child's said parent or parents.

(c) An individual for whom a parent-child relationship has been established under Article 1 of G.S. 49A with a child conceived by assisted reproduction and the heirs of such individual is entitled to take by succession any property, by, through and from such child the same as if such child were the natural legitimate child of such individual having such a parent-child relationship.

**SECTION 3.** The Revisor of Statutes shall cause to be printed, as annotations to the published General Statutes, the explanatory comments of the drafters of this act as the Revisor may deem appropriate.

**SECTION 4.** This act is effective when it becomes law.

[Type text]

PROPOSED DRAFTER'S COMMENTS

DRAFTERS' GENERAL COMMENTS TO AMMENDMENTS TO N.C.G.S 49A AND  
N.C.G.S. 29

Effective \_\_\_\_\_ Article 1 of North Carolina General Statutes Chapter 49A entitled "Children Conceived By Artificial Insemination" was revised with the substitution of a new Article 1 entitled "Rights of Children Conceived By Assisted Reproduction." The original statute was enacted in 1971 and covered the rights of only a narrow group of children born of assisted reproduction. The revised statute covers a broader class of children and follows the modern trend recognized in the *Restatement (Third) of Property: Wills and Other Donative Transfers* (herein the "Restatement"). The Restatement itself follows positions set forth in Articles 7 and 8 of the "Uniform Parentage Act (2000)" as last amended in 2002 (herein the "UPA"), Sections 2-120 and 2-121 of Article II, Part 1, Subpart 2 of the "Uniform Probate Code (2010)" (herein the "UPC") which were added to the UPC by amendment in 2008, and Articles 6 and 7 of American Bar Association Model Act Governing Assisted Reproductive Technology (February 2008) (herein the "ABA Model Act").

The revised statute is designed to protect the rights of the ever increasing number of children born using a variety of assisted reproduction techniques. According to the Centers for Disease Control and Prevention (the "CDC") based on preliminary 2014 data from 460 reporting fertility clinics (including 13 North Carolina clinics) over 70,000 children were born in the United States in 2014 involving assisted reproduction in which the eggs were handled by fertility clinics. The CDC estimates that 1.6% of all children born in the United States each year are now conceived in this manner. See [www.cdc.gov/art/index.html](http://www.cdc.gov/art/index.html).

The revised statute most closely resembles the above-cited provisions of the UPC along with procedural provisions patterned in part after Article 8 of the UPA and Article 7 of the ABA Model Act. The gestational agreement provisions were also derived from selected portions of Article 8 of the UPA and Article 7 of the Model Act. The provisions dealing with the legal status of children of assisted reproduction are patterned after the present G.S. 49A-1 and G.S. 48-1-106(e) of the North Carolina Adoption statutes.

Contemporaneously with the revisions to Article 1 of G.S. 49A, a new Article 4A was added to G.S. Chapter 29 providing for the intestate succession rights of children conceived by assisted reproduction. These provisions parallel the rights of adopted children in Article 4 of G.S. 29.

DRAFTERS' COMMENTS TO G.S. 49A-1-100

G.S. 49A-1-100 provides the definitions for the special terms used in the revised Article 1 of Chapter 49A.

*Assisted reproduction* is taken from Section 2-115 of the UPC and is defined as a method of causing pregnancy other than by sexual intercourse.

[Type text]

1            *Birth mother* is taken from Section 2-120 of the UPC and is defined as the woman [other  
2 than a *gestational carrier* defined in subsection (8)] who gives birth to a child of assisted  
3 reproduction and includes the child's *genetic mother* defined in subsection (6).

4            *Child of assisted reproduction* is taken from Section 2-120 of the UPC and is defined as a  
5 child conceived by means of assisted reproduction by a woman [other than a *gestational carrier*  
6 defined in subsection (8)].

7            *Divorce* is taken from Section 2-215 of the UPC and is defined to include annulment,  
8 dissolution, and declaration of invalidity of a marriage.

9            *Function as a parent of the child* is taken from Section 2-215 of the UPC and is defined  
10 as behaving toward a child in a manner consistent with being the child's parent and performing  
11 functions that are customarily performed by a parent, etc. The term is derived from the  
12 Restatement, and the Reporter's Note No.4 to Section 14.5 of the Restatement makes a detailed  
13 list of "parental functions" and gives guidance to a trier of fact determining if a person indeed  
14 *functioned as a parent of the child*. According to comments on the definition in the UPA, ideally  
15 a parent would perform all of the normal parent-child functions throughout the child's minority.  
16 In cases falling short of the ideal, the trier of fact must balance both time and conduct. The  
17 question is, did the individual perform sufficient parenting functions over a sufficient period of  
18 time to justify concluding that the individual *functioned as a parent of the child*.

19            *Genetic mother* is derived from Section 2-115 of the UPC and is defined as the woman  
20 whose egg was fertilized by the sperm used for assisted reproduction. The UPC uses the term  
21 "genetic father" in defining *genetic mother*; however, this term appears to be unnecessary and  
22 confusing.

23            *Gestational agreement* is taken from Section 2-121 of the UPC and is defined as an  
24 agreement for *assisted reproduction* (i) in which a woman agrees to carry a child to birth for an  
25 intended parent, intended parents or an individual who *functioned as a parent of the child* as  
26 described in subsection (5) and (ii) which otherwise meets the requirements for gestational  
27 agreements under G.S. 49A-1-103. Such agreements do not require consideration to be valid.  
28 The term is derived in part from Article 8 of the UPA and Article 7 of the ABA Model Act. The  
29 concept is that an agreement has been made that the intended parent or parents will be the legal  
30 parents of the resulting child.

31            *Gestational carrier* is derived in part from Section 2-121 of the UPC and means a woman  
32 who is not an intended parent who conceives a child under a *gestational agreement*. The woman  
33 may or may not be the child's *genetic mother*. The experts on assisted reproduction technology  
34 generally look with disfavor upon the *genetic mother* of the child serving as the *gestational*  
35 *carrier* because such situations often create additional emotional and psychological problems in  
36 enforcing a *gestational agreement*. The requirement that a *gestational carrier* be at least 21 was  
37 added based on similar requirements in Article 7 of the ABA Model ACT and legislation in other  
38 states.

39            *Gestational child* is derived from Section 2-121 of the UPC and means a child conceived  
40 by a *gestational carrier* pursuant to a *gestational agreement*.



[Type text]

1 implantation of the sperm used for the *assisted reproduction* unless the former spouse consented  
2 in a signed *instrument* before the implantation that the child born after the *divorce* or *separation*  
3 will be treated as the former spouse's child. An exception to this consent rule is found in G.S.  
4 49A-1-101(g)(2) if the former spouse's consent is withdrawn prior to the implantation of the  
5 sperm used for the *assisted reproduction*. These provisions are also consistent with Section 201  
6 of the UPC.

7  
8 G.S. 49A-1-101(d) provides that a birth certificate identifying an individual other than the  
9 *birth mother* as the other parent of a *child of assisted reproduction* presumptively establishes a  
10 parent-child relationship between that individual and the child. A birth certificate will name the  
11 child's *birth mother* (which term does not include a *gestational carrier*) as the child's mother. In  
12 the case of partners of the opposite sex, this provision is consistent with G.S. 49, and the result  
13 should be no different when the parental relationship is established with another female being the  
14 second parent. G.S. 49A-1-104 and G.S. 49A-1-106(a) are intended to insure that same sex  
15 parents qualify as both parents on birth certificates.

16  
17 G.S. 49A-1-101(e) provides for the establishment of a parent-child relationship between  
18 an individual other than the *birth mother* and a *child of assisted reproduction* when neither G.S.  
19 40A-1-101(c) [the husband rule] nor G.S. 49A-1-101(d) [the birth certificate rule] apply. In  
20 these situations there needs to be proof that the individual consented to the *assisted reproduction*  
21 with the intent to be treated as the other parent. This other individual's genetic material might or  
22 might not have been used to create the pregnancy, and unless the husband rule or the birth  
23 certificate rule apply, depositing genetic material is not, by itself, sufficient to establish a parent-  
24 child relationship with the child. The first method for an individual other than the *birth mother*  
25 to evidence his or her consent to establish a parent-child relationship is to sign an *instrument*,  
26 whether before or no later than two years after the child's birth, that considering all the facts and  
27 circumstances, evidences the individual's consent. The second method of evidencing such  
28 consent is to sign an *instrument* described in the preceding sentence more than two years after  
29 the child's birth and *function as a parent of the child* before the child reaches 18 or becomes  
30 emancipated. The third method of evidencing such consent is to *function as a parent of the child*  
31 no later than two years after the child's birth. However, if the individual is prevented from  
32 *functioning as a parent of the child* no later than two years after the child's birth because of such  
33 individual's death, *incapacity*, or other circumstances, such consent can be established if such  
34 individual intended to *function as a parent of the child* during such period and would have but  
35 for such circumstances or condition.

36  
37 G.S. 49A-1-101(f) creates certain presumptions regarding the proof of the consent to  
38 *assisted reproduction* by the *birth mother* in G.S. 49-1-101(e)(3) (the *functioning as a parent*  
39 method) when the *birth mother's* spouse is the individual proving the requisite consent and either  
40 (i) such spouse lives for the requisite two year period after the child's birth and they are neither  
41 *separated* nor is there any *divorce* proceeding pending during the two year period or (ii) such  
42 spouse dies and at the spouse's death they were neither *separated* nor was there any *divorce*  
43 proceeding pending.

44  
45 G.S. 49A-1-101(g) provides rules that apply (i) in connection with the *separation* or  
46 *divorce* of the *birth mother* and her husband prior to the implantation of the genetic material used  
47 in connection with *assisted reproduction*, and (ii) in connection with the withdrawals of consents



[Type text]

1 to *assisted reproduction* prior to the implantation of the genetic material used in connection with  
2 *assisted reproduction*. These sections were derived from Sections 706(a) and (b) of the UPA.  
3

#### 4 DRAFTERS' COMMENTS TO G.S. 49A-1-102

5  
6 G.S. 49A-1-102 provides the rules for determining parent-child relationships with  
7 children who are conceived by *assisted reproduction* using a *gestational carrier*. It is based in  
8 part on Section 2-121 of the UPC.  
9

10 Pursuant to G.S. 49A-1-102(a) a court order issued under G.S. 49A-1-104 will  
11 conclusively establish parentage. Also, in some circumstances a court order under G.S. 49A-1-  
12 103(k) may also establish parentage.  
13

14 G.S. 49A-1-102(b) provides that the only way that a parent-child relationship exists  
15 between a *gestational child* and the child's *gestational carrier* is if (i) she is designated as a  
16 parent of the child in a court order described in subsection (a) or (ii) she is the child's *genetic*  
17 *mother* and a parent-child relationship does not exist under this Article with an individual other  
18 than the *gestational carrier*.  
19

20 G.S. 49A-1-102(c) applies only in the absence of a court order under subsection (a). If  
21 there is no such court order, subsection (c) provides that a parent-child relationship exists  
22 between a *gestational child* and an intended parent who (i) was designated as an intended parent  
23 pursuant to a *gestational agreement* or (ii) *functioned as a parent of the child* no later than two  
24 years after the child's birth. It also provides that a parent-child relationship is established if the  
25 intended parent died while the *gestational carrier* was pregnant, but only in three circumstances:  
26 (A) there were two intended parents and the other intended parent *functioned as a parent of the*  
27 *child* no later than two years after the child's birth; (B) there were two intended parents, the other  
28 intended parent died also while the *gestational carrier* was pregnant, and a *relative* of either  
29 deceased intended parent or the spouse or surviving spouse of a *relative* of either deceased  
30 intended parent *functioned as a parent of the child* no later than two years after the child's birth;  
31 or (C) there was no other intended parent and a *relative* or spouse of a *relative* of the deceased  
32 parent *functioned as a parent of the child* no later than two years after the child's birth.  
33

#### 34 DRAFTERS' COMMENTS TO G.S. 49A-1-103

35  
36 G.S. 49A-1-103 sets forth the basic requirements of a *gestational agreement*. It is  
37 derived from selected provisions Article 8 of the UPA and Article 7 of the ABA Model Act. The  
38 agreement must be in writing and acknowledged before a certifying officer. Necessary parties  
39 are the prospective *gestational carrier*, her spouse if she is married, the *intended parent or*  
40 *parents*, and in certain circumstances the *third-party donor* or the *third-party donors*. G.S. 49A-  
41 1-103(d) provides that a *third-party donor* is not a necessary party to a *gestational agreement* if  
42 such person is anonymous or otherwise not known by any of the other parties to the *gestational*  
43 *agreement*. All parties to a *gestational agreement* must agree to the provisions of the  
44 arrangement described in the *gestational agreement* including those provisions required by G.S.  
45 49A-1-103(e). Disputes arising out of *gestational agreements* fall within the jurisdiction of the  
46 superior court.  
47  
48

[Type text]

#### DRAFTERS' COMMENTS TO G.S 49A-1-104

1  
2  
3 G.S. 49A-1-104 sets forth the normal procedure for obtaining a court order establishing  
4 the parent-child relationship of *gestational children* and *children of assisted reproduction*. This  
5 section is based in part on the procedural provisions of the adoption statute found in Article 2 of  
6 G.S. 48 and in part on Section 807 of the UPA. The procedure is basically a special proceeding  
7 before the clerk of superior court. Uncontested proceedings can be handled summarily.

8  
9 Although a court order is not necessary to establish the parentage of a *gestational child*  
10 where there is a valid and uncontested *gestational agreement*, it would seem that in most  
11 instances the parent or parents designated under a *gestational agreement* will want to take  
12 advantage of this procedure to insure that the *gestational child's* birth certificate accurately  
13 reflects them as the legal parents. This procedure will also be helpful in establishing parent-child  
14 relationships in situations in which fact finding is necessary under G.S. 49A-1-101 and G.S.  
15 49A-1-102.

16  
17 Subsection (c) provides that if an issue of fact, an equitable defense or a request for  
18 equitable relief or damages is raised in any proceeding before the clerk of superior court, the  
19 clerk shall transfer the proceeding to the superior court under G.S. 1-301.2.

#### DRAFTERS' COMMENTS TO G.S. 49A-1-105

20  
21  
22 The UPC, the UPA, the ABA Model Act as well as the assisted reproduction statutes of a  
23 number of states include provisions creating parent-child relationships between certain "intended  
24 parents" and children conceived after their deaths. These types of provisions necessarily involve  
25 arbitrary time periods and can have unintended effects on the administration of estates and trusts.  
26 Because of the controversial nature of such provisions relating to posthumously conceived  
27 children, the drafters decided to omit all such provisions in Article 1 of G.S. 49A.

28  
29 G.S. 49A-1-105 makes it clear that in Article 1 of G.S. 49A no parent-child relationship  
30 can be created between a child and a person who has died before the child's *birth mother* or  
31 *gestational carrier*, as the case may be, becomes pregnant with such child.

32  
33 However, as stated in G.S. 49A-1-106 nothing in Article 1 of G.S. 49A prevents a person  
34 from including any such posthumously conceived children as their children or descendants in  
35 any written instrument.  
36

#### DRAFTERS' COMMENTS TO G.S. 49A-1-106

37  
38  
39 G.S. 49A-1-106(a) is based in part on the repealed G.S. 49A-1 and takes the approach of  
40 the old statute to insure both the legal rights of children conceived by *assisted reproduction* and  
41 those of their parents established under the new Article 1 of G.S. 49A.  
42

43  
44 G.S. 49A-1-106(b) is based on G.S. 48-106(b) and grants to any person for whom a  
45 parent-child relationship is established under Article 1 of G.S. 49A the same inclusive status in  
46 deeds, grants, wills, and other written instruments as an adopted child.  
47  
48

[Type text]

1 G.S. 49A-1-106(b)(4) makes it clear that if a written instrument explicitly so states, a  
2 posthumously conceived person may be included in the definitions of a person's children, issue,  
3 descendants and words of like import.

4  
5 In other words under G.S. 49A-1-106, Article 1 of G.S. 49A does not prohibit a person  
6 from being more inclusive or exclusive in defining parent-child relationships than provided in  
7 the statute.

8  
9 **DRAFTERS' COMMENTS TO ARTICLE 4A OF CHAPTER 29**

10  
11 Article 4A of Chapter 29 providing for succession by, through, and from children  
12 conceived by assisted reproduction is patterned after Article 4 of G.S. 29, §29-17(a), (b) and (c)  
13 providing for succession, by through and from adopted children. While the two sections are not  
14 parallel in their language, G.S. 29-17A generally provides children conceived by assisted  
15 reproduction as provided for in Article 1 of G.S. 49A and the persons with whom parent-child  
16 relationships are established under Article 1 of G.S. 49A the same succession rights as adopted  
17 children and their adoptive parents under G.S. 29-17.  
18

6.

G.S. 31E

COMMUNITY PROPERTY