"Concepts" proposed by the Legal Parentage PIG
for discussion at the May 24, 2024 meeting of the Act 156 Task Force

Summary:

- A majority of the Legal Parentage PIG (4 out of 5 members) are in favor of adopting the policy of the 2017 Uniform Parentage Act ("2017 UPA", **attached**) which allows alleged genetic parents, intended parents using assisted reproductive technology ("ART"), or "presumed parents" to utilize the Voluntary Establishment of Parentage ("VEP") process. One member is not in favor of allowing all "presumed parents" to use the VEP process.
    - All members of the PIG are in favor of adopting a requirement that people who claim to be "presumed parents" by holding a child out as their own must reside with the child for at least two years.
    - All members of the Legal Parentage PIG are in favor of removing the provisions of the 2017 UPA which provide that presumed parents may file a "denial of parentage" with the Department of Health ("DOH"). When a child has more than one presumed parent, the Legal Parentage PIG's position is that the judicial process, rather than the VEP process, should be used.
    - All members of the Legal Parentage PIG are in favor of amending the definition of "presumed parent" under the 2017 UPA to include individuals who have been established as the genetic parents of a child via court-ordered genetic testing.

- A majority of the Legal Parentage PIG (4 out of 5 members) are in favor of providing for an uncontested parentage proceeding through the courts and allowing "professed parents" to utilize this process. This would allow unmarried partners of birthing parents to establish parentage without having to marry the birthing parent or waiting two years to become a "presumed parent" as long as the birthing parent agrees and the identity of the other possible genetic parent is unknown. Note however that the definition of "professed parent" is not included in the UPA and thus has not been vetted by the Uniform Laws Commission ("ULC"). A "professed parent" will not be able to use the VEP process.

Concept 1: Expansion of Eligibility to Utilize the VEP Process:

Background

Federal law (42 U.S.C. § 666(a)(5)(C)(i)) requires states receiving subsidies for their child-support enforcement programs to establish procedures for "a simple civil process for voluntarily acknowledging paternity." Currently in Hawai'i, this "simple civil process" is provided for under HRS § 584-3.5. Under this process, the parents sign a voluntary acknowledgment of paternity form under oath. The form is then sent by the birthing center to the DOH, which will issue a birth certificate with the names of both parents.

However, the process under HRS § 584-3.5 is currently only available to the "natural mother and the natural father." The 2017 UPA proposes a revised "Voluntary Acknowledgment of Parentage" that is gender neutral and also allows the "intended parents" of children born through ART to voluntarily acknowledge parentage. Specifically, it allows the individual who gave birth to the child and "an alleged genetic parent of the child, intended parent [as defined in the ART section of the UPA], or presumed parent" to sign the acknowledgment. 2017 UPA, Section 301.

Note that the voluntary acknowledgment process is not available to couples who have a child through surrogacy. Surrogacy is governed by a separate section of the UPA.

Under the UPA, a person is a presumed parent if:

- They were married to the person who gave birth to the child when the child was born.
- They were married to the person who gave birth to the child and the child was born not later than 300 days after the marriage was terminated.
- They get married to the person who gave birth to the child after the child is born, *and* at any time asserted parentage of the child, *and*:
    - The assertion is in a record filed with the state, or
    - The individual agreed to be and is named as a parent on the birth certificate.
- They resided in the same household with the child for the first two years of the life of the child, including any period of temporary absence, and openly held out the child as the individual's child.

2017 UPA, Section 204.

The 2017 UPA is thus gender neutral as applied to married couples and couples who conceive a child via ART. However, there is disparate treatment for unmarried heterosexual, cisgender couples versus unmarried non-heterosexual-cisgender couples. Because an "alleged genetic parent" can only be a biological male, any male who attests that they are an "alleged genetic parent" can establish parentage *at birth*, regardless of whether they are married to the birthing parent. But (unless they are party to an ART agreement) an unmarried same-sex partner of the birthing parent can only voluntarily establish parentage if they later marry the birthing parent or reside with the child and hold them out as their own for two years. Thus, their parentage cannot be established at birth through voluntary acknowledgment, but must occur some time later.

<u>Recommendations</u>

- 4 out of the 5 members of the PIG (members Chun, Pham, Nugent, and Judge Hall) would recommend adopting the 2017 UPA's expansion of VEP eligibility to presumed parents, as well as intended parents and alleged genetic parents, for the reasons below:

- The provisions of the 2017 UPA have already been vetted by the ULC, and adopted by several states.[1]
- Even though some "presumed parents" (i.e., unmarried non-heterosexual-cisgender couples) may not be able to use the VEP process immediately after the birth of the child, there is still utility in allowing them to voluntarily establish parentage once the presumption of parentage attaches (i.e. once they either marry the birthing parent or hold the child out as their own). These parents would have to file their VEP paperwork directly with the DOH once the presumption attaches.
- Even though this results in some disparate treatment between heterosexual cisgender and non-heterosexual-cisgenderunmarried couples, more equity is still better than less.
- Requiring that an individual reside with the child and hold them out as their own for at least two years helps to ensure that the person is truly committed to being legally responsible for the child.

- One member of the PIG (member Hasegawa) is opposed to expanding VEP eligibility to all presumed parents. This is due to concerns that it would be burdensome for the DOH to assess whether people have truly met the requirements of: (a) marrying the birthing parent and asserting parentage, (b) residing with the child and holding the child out as their own for two years, or (c) that they were established as a genetic parent through testing. Her position is that these determinations should be made by a court.

    - Note however, that to address this concern, VEP forms could be drafted to require individuals to attest to the facts that would establish their status as presumed parents. **Sample forms from Connecticut and Vermont are attached.**
    - It is true, however, that there will be no independent verification of the facts attested to.

- Note that the PIG does ***not*** recommend adopting the provisions of the 2017 UPA which allow use of the VEP process when a child has more than one presumed parent. The 2017 UPA says that an acknowledgment of parentage is void if the child has more than one presumed parent, *unless* one of the presumed parents files a "denial of parentage." 2017 UPA Sections 302(b)(1) and 303. The PIG is not in favor of requiring DOH to keep record of such denials. The PIG would require that, when a child has more than one presumed parent, the parties go to court to establish parentage, rather than use VEP.

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[1] Connecticut, Maine, Rhode Island, Vermont, and Washington allow for alleged genetic parents, intended parents, *and* presumed parents to voluntarily acknowledge parentage. California has adopted the UPA but only allows the genetic parent of the child or the intended parent of a child conceived through ART to voluntarily acknowledge parentage. Colorado similarly has adopted the definition of presumed parents, but only allows people who believe themselves to be genetic parents or intended parents of a child conceived via ART to voluntarily acknowledge parentage.

- The PIG recommends adding to the definition of "presumed parent" to include individuals who have been shown to be the genetic parent of the child via court-ordered genetic testing. Thus, if someone has been established to be the genetic parent of a child through such testing, no other presumed parent can establish parentage without going through a court proceeding. But note that a sperm or egg donor is not a parent of a child conceived by assisted reproduction.

Concept 2: Creation of an Uncontested Parentage Proceeding in the Family Courts:

Background

As discussed, even if we adopt the 2017 UPA's provisions which expand VEP eligibility to intended parents and presumed parents, there is still some disparate treatment between unmarried heterosexual-cisgender couples and unmarried non-heterosexual-cisgender couples in that, to establish parentage, the unmarried same-sex partner of a birthing parent must either marry the parent after birth or reside with the child and hold them out as their own for two years.

A potential way to create more equity is to create an expedited process by which unmarried partners of birthing parents, regardless of sex or gender, can establish parentage through the courts as soon as the child is born. In previous discussions, the Task Force seemed generally in favor of creating such a process.

The difficulty in creating such a process would be balancing the interest of creating more equity between unmarried heterosexual cisgender couples and unmarried non-heterosexual-cisgender couples against making it too easy for individuals who are not genetically related to a child to gain legal rights and access to that child. Another concern is ensuring that the rights of possible genetic parents are sufficiently protected.

Recommendations

- 4 of the 5 members of the PIG (members Chun, Pham, Nugent, and Judge Hall) are in favor of adopting a definition of "professed parent" and allowing such individuals to utilize a new "uncontested parentage proceeding" that will be overseen by the Family Courts.
    - The court will not hold a hearing, but will review all the paperwork to ensure that both the petitioning parent and the responding parent agree to be named as legal parents, and that the non-birthing parent meets the legal requirements to be established as a parent. If not, the court can direct the parties to go through a traditional proceeding instead.
    - The parties can also agree to child support and custody if applicable.
    - **Draft forms are attached.**

- The same members propose that a "professed parent" be defined as: "an individual who is not the genetic parent of a child but who, along with agreement from the birthing parent, professes an intent to be legally bound as a parent of a

child where the identity of the possible genetic parent is unknown. A professed parent may not be related by consanguinity or marriage to the birthing parent. The professed parent must reside with the birthing parent and the child, including any period of temporary absence, and the parties must hold themselves out as a family unit. A professed parent does not include any individual who has provided monetary compensation in exchange for the birthing parent's agreement."

  - The intent is to allow partners of birthing parents who are truly intent on supporting the child and holding them out as their own to establish their legal parentage upon birth, regardless of their marital status, gender identity, or genetic relation to the child. This recognizes that there are many couples who choose not to marry, but who parent children together and live as a family unit.
  - If the possible genetic parent is known, this process cannot be used. This is intended to protect the rights of the genetic parent.
  - The intent is to allow only the partners of the birthing parent to establish parentage, but not their friends, family members, or strangers.
  - However, it must be emphasized that the "professed parents" definition is not found in the 2017 UPA and therefore has not been vetted.

- The Legal Parentage PIG would also recommend that the legislature consider revising the adoption laws to allow unmarried couples to adopt. Currently, only single individuals or married couples can adopt. Allowing unmarried couples to adopt would achieve greater equity between unmarried heterosexual cisgender and non-heterosexual-cisgender couples and also advance the goal of ensuring that children have at least two parents who are legally obligated to support them.

- One member of the PIG (member Hasegawa) opposes allowing professed parents to utilize the uncontested parentage proceeding. Her concerns are the fact that the definition departs from the 2017 UPA, has not been vetted, and still carries the potential for misuse.

- Note that the members of the PIG ***do not*** recommend that "professed parents" be allowed to use the VEP process. If a person claiming to be a "professed parent" cannot use the uncontested parentage proceeding because there is another known, possible genetic parent, then that person should adjudicate their parentage in court, or wait until they can establish parentage as a "presumed parent."

Illustrations:

The following are illustrations of how the PIG's recommendations would work in practice.

1. Couple is married, one parent gives birth to the child during marriage.

- Non-birthing parent can sign the birth certificate regardless of their gender or whether he/she/they are genetically related to the child, or whether the child was conceived via ART.

2. Couple is married OR unmarried, a surrogate gives birth to the child.
    - VEP is not applicable, parentage must be established by a surrogacy agreement which is validated by the court (see Part IX of draft bill, **attached**).

3. Couple was once married, and child is born not later than 300 days after marriage was terminated.
    - Couple can use VEP regardless of non-birthing parent's gender, genetic relation to the child, or whether child was conceived via ART.

4. Couple is not married, child was naturally conceived, non-birthing parent ***is*** the alleged genetic parent.
    - E.g. a woman and her boyfriend conceive a child.
    - Couple can use VEP process at birth.

5. Couple is not married, child was conceived via ART.
    - E.g. a woman and her boyfriend or girlfriend or non-binary partner agree that the woman will conceive via ART and both will co-parent.
    - Couple can use VEP as long as the non-birthing parent, regardless of gender or genetic relation to the child, is the intended parent and has consented to ART (see Part VIII of draft bill, **attached**).

6. Couple is not married at the time of the child's birth, but marry each other after birth. Non-birthing parent ***is*** the alleged genetic parent.
    - E.g. a woman and her boyfriend conceive a child, and get married after birth.
    - Couple can use VEP process ***at*** birth because non-birthing parent is an alleged genetic parent. Couple can also use VEP ***after*** birth once married.

7. Couple is not married at the time of the child's birth, but marry each other after birth. Non-birthing parent ***is not*** the alleged genetic parent:
    - E.g. a woman and her ex-boyfriend conceive a child. Woman subsequently gets married to another partner (of any gender) after the birth of the child.
    - Couple can use VEP process ***after*** birth once married.

8. Couple is not married, non-birthing parent is ***not*** the genetic parent, the identity of the genetic parent ***is*** known.
    - E.g. a woman and her ex-boyfriend conceive a child. Woman subsequently finds a new partner (of any gender) who wishes to co-parent the child with her, but the couple does not get married.

- Couple can use VEP process but must wait ***at least two years after*** birth so that non-birthing parent can reside with the child and hold them out as their own for that period of time.

9. Couple is not married, non-birthing parent is ***not*** the genetic parent, the identity of the possible genetic parent ***is not*** known.
    - E.g. a woman does not know the name of the genetic father of her child. She subsequently finds a partner (of any gender) who wishes to co-parent the child with her, but the couple does not get married.
    - Couple can use the uncontested parentage proceeding ***any time after*** birth if non-birthing parent meets the requirements of a "professed parent."
    - Otherwise, couple can use the VEP process but must wait ***at least two years after*** birth so that non-birthing parent can reside with the child and hold them out as their own for that period of time.

***NOTE THAT: the VEP process will not be available if the child has another presumed parent (e.g. the birthing parent was married to someone else at the time of the birth, or within 300 days before birth, or another person has been established as the genetic parent through court-ordered testing) or if the child has another acknowledged parent, adjudicated parent, or parent under the ART or surrogacy sections of the law, other than the person who gave birth to the child. Competing claims of parentage will have to be adjudicated in court.**

ATTACHMENTS:

1. 2017 UPA
2. Legal Parentage PIG's working draft bill (as of May 15, 2024)
3. Sample VEP forms from Connecticut and Vermont
4. Legal Parentage PIG's working drafts of instructions and affidavits for uncontested parentage proceeding