Final Report of the Legal Parentage Permitted Interaction Group

I. Executive Summary

The Legal Parentage Permitted Interaction Group (PIG) presents the following recommendations for approval by the Act 156 Task Force:

A. Adopting the 2017 UPA's policy of allowing "presumed parents," and "intended parents," in addition to "alleged genetic parents" to voluntarily establish parentage through the Department of Health (DOH) without the need for adjudication by the Family Courts.

B. Allowing the Family Courts to adjudicate competing claims of parentage based on "denial of parentage" affidavits filed by "presumed parents" or "alleged genetic parents."

C. Allowing the Family Courts to adjudicate parentage without a hearing via "uncontested parentage proceedings" in certain circumstances.

D. Allowing "professed parents" to establish parentage in court, either through a hearing or through an "uncontested parentage proceeding."

E. Adopting other clarifying amendments to the draft bill under consideration by the Task Force, including amendments requested by the Child Support Enforcement Agency (CSEA).

II. Background

The PIG was created on September 30, 2023 to investigate and recommend revisions to the Hawai‘i Parentage Laws, as well as any comments or concerns, relating to legal parentage. The members of the PIG are:

1. Lauren Chun, Deputy Solicitor General
2. Sianha Gualano, Deputy Solicitor General
3. Judge Jessi Hall, District Family Court Judge
4. Thaddeus Pham, Viral Hepatitis Prevention Coordinator, Department of Health
5. Mark Nugent, Deputy Attorney General, CSEA
6. Geraldine Hasegawa, Deputy Attorney General, CSEA

The starting point for the PIG's review was a draft bill created by Judge Hall which largely incorporates the 2017 version of the Uniform Parentage Act (UPA) created by the Uniform Laws Commission (ULC). Judge Hall's draft bill was also substantially similar to H.B. 384/S.B. 484 introduced in 2023.

In reviewing the draft bill, the PIG had the following goals:

- To fulfill the Task Force's directive to "update existing parentage laws that reflect outdated concepts of families, parenthood, conception and gestation, and parental rights." 2023 Haw. Sess. Laws Act 156 §1.
- To create as much equity as possible between heterosexual-cisgender couples and non-heterosexual-cisgender couples.
- To protect the due process rights of individuals with possible parentage claims.
- To facilitate the establishment of parentage for children born to an unmarried birthing parent. This assists the CSEA in meeting federal requirements for funding.

The draft bill with the PIG's proposed edits is attached as the "Proposed Draft Bill."

III. Recommendations

A. Adopting the 2017 UPA's policy of allowing "presumed parents," and "intended parents," in addition to "alleged genetic parents" to voluntarily establish parentage.

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 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 only available to the "natural mother and the natural father." In contrast, the 2017 UPA proposes a process that is gender neutral and allows the individual who gave birth to the child and "an alleged genetic parent of the child, intended parent [as defined in the assisted reproduction (ART) section of the UPA], or presumed parent" to sign the acknowledgment.[1] 2017 UPA, Section 301.

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.

[1] 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.

- 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, (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 the time of birth, but must occur some time later.

5 out of the 6 members of the PIG would recommend adopting the 2017 UPA's expansion of eligibility to use the voluntary establishment of parentage (VEP) process to both presumed parents and intended parents for the reasons below:

- The provisions of the 2017 UPA have already been vetted by the ULC, and adopted by several states.[2]
- 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 could file their VEP paperwork directly with the DOH once the presumption attaches.
- 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.

Thus, the PIG recommends adopting § -I of the attached Proposed Draft Bill, which provides "Acknowledgment of parentage. An individual who gave birth to a child and an alleged genetic parent of the child, intended parent under part VIII, or presumed parent may sign an acknowledgment of parentage to establish the parentage of the child."

The PIG would also recommend that the DOH adopt forms requiring individuals asserting parentage to attest that they meet each of the legal requirements of an "alleged

[2] 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.

genetic parent," "presumed parent," or "intended parent," as applicable. **Example forms from Connecticut and Maine are attached.**

B. Allowing the Family Courts to adjudicate competing claims of parentage based on "denial of parentage" affidavits filed by "presumed parents" or "alleged genetic parents."

Under the 2017 UPA, a presumed parent or alleged genetic parent can sign a "denial of parentage" form in connection with the VEP process. The denial is valid only if another person files an acknowledgment of parentage. The denial of parentage procedure first appeared in the 2002 UPA, but only allowed a "presumed father" to file a denial.

The PIG found that 26 states (including Hawai'i) and the District of Columbia do not have a denial of parentage/paternity process, but 24 states have some form of such a process. The states that do have such a process however, do not necessarily follow the UPA. Many are limited to situations where the mother was married at or between the time of birth and conception and she attests that the person who voluntarily seeks to be named as the father is the biological father, not her husband or ex-husband. Of the 15 states which adopted either the 2002 or 2017 UPA, all but Alabama, California, and Connecticut have chosen to adopt the denial of parentage process. Maine, Rhode Island, Vermont, and Washington have adopted the gender-neutral provision in the 2017 UPA.

The PIG also inquired with the DOH to determine whether allowing denials of parentage to be filed as part of the VEP process would be feasible. The supervisor of registration for DOH relayed that his concerns with adopting such a process are substantial enough that he would recommend that denials of parentage be addressed judicially instead. He estimated that the DOH, which is already short-staffed, would require two new "higher level" clerks with suitable analytical skills to review denials and VEP acknowledgments and determine whether parentage has been established. He also noted that there is no physical space to house these clerks.

In addition, CSEA notes that a simple denial of parentage process would be very helpful because they receive many cases where one person wants to deny parentage and another wants to establish parentage, but nonetheless, the parties have to go to court.

The PIG recognizes the utility in adopting the 2017 UPA's denial of parentage provisions, and that this process appears to be workable in other states which have adopted it. However, given the DOH's concerns, the PIG recommends that the Task Force allow denials of parentage, **but with the caveat** that such denials be filed with the Family Courts, not with the DOH.

Under this proposal, a birthing parent, the person who seeks to establish parentage, and the person seeking to deny parentage would all submit affidavits to the court, which will adjudicate the respective rights of all the parties. A denial would **not be effective** unless another person, other than the birthing parent, agrees to have their parentage established. This ensures that the child is not just left with one parent.

The PIG does not anticipate that having the judiciary receive and resolve denials of parentage would impose burdensome costs on the judiciary in the same way that the DOH would be burdened if it was tasked with processing denials of parentage. The judiciary is already having to process cases where one parent denies parentage and another wants to establish parentage. By allowing denials to be done via affidavit, the goal would be to lessen the burden on the judiciary. In addition, costs will be somewhat offset because the parties petitioning to establish parentage will have to pay fees.

Thus, the PIG recommends adopting the new proposed language in Part VI of the attached Proposed Draft Bill, which would (a) create a new section called "Denial of Parentage," and (b) allow courts to adjudicate parentage based on the filing of a valid denial.

C. <u>Allowing the Family Courts to adjudicate parentage without a hearing via "uncontested parentage proceedings" in certain cases.</u>

Currently, if they cannot use the VEP process, unmarried couples must go to court to have their parentage rights adjudicated. As also discussed above, if there are potentially competing claims of parentage, then the potential parents must also go to court to have their claims adjudicated, even if the parties agree that one party should be established as a parent instead of another.

To facilitate the establishment of parentage rights when VEP is not available, the PIG proposes allowing the Family Courts to adjudicate parentage rights of alleged genetic parents, presumed parents, or professed parents[3] without a hearing when all parties are in agreement and the Family Court is satisfied that a hearing is not necessary. This process would be similar to the uncontested divorce proceedings currently available in Family Court. There would be numerous benefits to allowing the courts to adjudicate certain uncontested parentage cases without a hearing:

- If alleged genetic parents and presumed parents are also allowed to file denials of parentage (as proposed above), it would help expedite decisions in cases where there are multiple claims of parentage, but no disagreement about who should be established as a child's legal parents.
- The Family Courts could adopt forms which would allow parties to agree on issues regarding child support and custody at the same time.
- Since some unmarried, non-heterosexual-cisgender couples will not be able to use VEP, but would have to go to court to establish their parentage, making it easier to adjudicate parentage rights when all parties are in agreement helps to

[3] Allowing "professed parents" to establish parentage is a separate recommendation.

reduce, although not eliminate[4], inequity for these couples as compared to unmarried, heterosexual couples.

- Courts would still have oversight. If they are assured that the petitioning parent, the responding parent, and the parent(s) denying parentage (if applicable) have fulfilled all legal requirements and are aware of their rights, they can adjudicate parentage without a hearing. However, if they are concerned that information is missing, any requirements have not been met, or that other potential parents need to be notified and joined, they can direct the parties to go through a traditional proceeding instead.

Only a small edit to the Proposed Draft Bill would be needed to allow for uncontested parentage proceedings. The PIG recommends adding language to § -E(b) to state that: "The court, in its discretion, may waive a hearing on an uncontested parentage complaint submitted by an individual who gave birth to a child, an alleged genetic parent of the child, a presumed parent of the child, or a professed parent of the child with proof provided by affidavit." The Family Courts of each respective Circuit will be responsible for adopting forms to effectuate an uncontested parentage proceeding. **Proposed forms are also attached.**

D. Allowing "professed parents" to establish parentage in court, either through a hearing or through an "uncontested parentage proceeding."

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. Meanwhile, an unmarried heterosexual couple can use the VEP process as long as the male parent attests he is the genetic father (even though there is no way to verify the truth of that statement).

A potential way to create more equity is to make it easier for unmarried partners of birthing parents to establish parentage as soon as possible following birth, regardless of their biological sex. However, the difficulty is balancing the interest of creating more equity against the risk of making it too easy for individuals who have no relation to the child to gain legal rights and access to the child. Another concern is protecting the rights of possible genetic parents.

To balance these concerns, the PIG proposes adopting a definition of "professed parent" and allowing such parents establish parentage through the Family Courts (including through the proposed uncontested parentage process). A "professed parent" would be defined as:

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[4] For example, while this proceeding increases access to the establishment of parentage rights for unmarried, non-heterosexual-cisgender couples, they would have to pay court fees to avail themselves of this option.

> 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. The intent is also to allow only the partners of the birthing parent to establish parentage, but not their friends, family members, or strangers.

If the possible genetic parent is known to the birthing parent, this process cannot be used. This is intended to protect the rights of the genetic parent. To further protect the rights of possible genetic parents, uncontested parentage forms should require the birthing parent to state why the identity of the possible genetic parent is unknown.

In prior meetings of the Task Force, members asked whether allowing "professed parents" to establish parentage was necessary and whether it would apply to many cases. The PIG does not anticipate that there will be many cases where couples would not be able to establish parentage but for the "professed parent" definition. However, there are certainly cases where a birthing parent does not know the identity of the genetic parent of their child (e.g. one-off sexual encounters, sexual assaults, or anonymous sperm donation). If, after the child's conception, the birthing parent finds a partner who is willing to be a legal parent, even if the two do not marry, it is in the interest of equity to allow that partner a way to establish parentage regardless of their biological sex. It is also in the child's interest to have two legal parents. The PIG believes that adopting the "professed parent" definition furthers the mandate of the legislature to "update existing parentage laws that reflect outdated concepts of families, parenthood, conception and gestation, and parental rights."

The Task Force also queried whether allowing professed parents to utilize the uncontested parentage proceeding would discourage the use of ART agreements. The PIG does not think that this would be the result. Under § -PP of the draft bill, consenting to parentage using an ART agreement appears to be *less* stringent than the proposed "professed parent" definition and process. Individuals who are "intended parents" of children conceived through ART can also use the VEP process at the time of birth, which is less onerous than going through the uncontested judicial process after birth.

The PIG thus recommends the adoption of the above definition of "professed parents," and the adoption of a new section allowing courts to adjudicate the parentage of

professed parents. Proposed language for that section can be found in Part VI of the Proposed Draft Bill.

Additional notes:

It must be emphasized that the "professed parents" definition is not found in the 2017 UPA and therefore has not been vetted by other states.

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.

E. Other recommended amendments.

The PIG made other clarifying amendments and amendments requested by the CSEA (including adding individuals who are proven to be genetic parents of a child through court-ordered genetic testing to the definition of a "presumed parent," and clarifying that birthing center staff, midwives, and others will not be subject to liability for assisting parents with VEP forms). The PIG also updated language to be gender neutral (e.g., "birthing parent" instead of "mother"). These edits are shown in redline in the Proposed Draft Bill.

IV. Minority Viewpoints

One member of the PIG 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.

The other members of the PIG are satisfied that the DOH will not have to make any determinations regarding whether an individual truly qualifies as a presumed parent, as long as the VEP forms require the individual to attest to the facts that qualify them as a presumed parent.

Attachments

1) Proposed Draft Bill
2) Example VEP forms from Maine and Connecticut
3) Proposed Uncontested Parentage Forms