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IN THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAI'I

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| LC,<br><br>Petitioner-Appellant,<br><br>vs.<br><br>MG and Child Support Enforcement Agency,<br><br>Respondents-Appellees. | FC-P NO. 16-1-6009<br><br>APPEAL FROM THE DECISION AND ORDER FILED NOVEMBER 1, 2016<br><br>FAMILY COURT, FIRST CIRCUIT<br><br>HON. MATTHEW J. VIOLA |

ANSWERING BRIEF OF RESPONDENT-APPELLEE MG

STATEMENT OF RELATED CASES

CERTIFICATE OF SERVICE

LAW OFFICE OF CHRISTOPHER D. THOMAS
CHRISTOPHER D. THOMAS #8203
American Savings Bank Tower
1001 Bishop Street, Suite 2925
Honolulu, HI 96813
Telephone: 808-261-7710
Facsimile: 808-356-0276
Email: cthomas@hawaiianfamilylaw.com

LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.
PETER C. RENN (Admitted *Pro Hac Vice*)
4221 Wilshire Blvd. Suite 280
Los Angeles, CA 90010
Telephone: 213-382-7600
Facsimile: 213-351-6050
Email: prenn@lambdalegal.org

Appellate Attorneys for Respondent-Appellee MG

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**INTRODUCTION**

At the heart of this case is a child ("Child") and his right to support from *both* of the parents responsible for bringing him into this world, Petitioner-Appellant LC and Respondent-Appellee MG. Looking back, LC may now regret decisions and commitments that she made, but she cannot simply walk away from the consequences of her actions. The Child has a right to all the legal protections that are afforded to children, and that right cannot be extinguished merely because both of his parents are women, only one of whom has a biological connection to him.

LC is as much the Child's legal parent as MG, his biological mother. The basis for that is straightforward: LC and MG were married when MG became pregnant and gave birth to the Child. The marital presumption of parentage has been described as one of the strongest and most powerful presumptions in law because it is vital to the welfare of the many children who depend upon it. It does not carve out the children of same-sex spouses from its protection.

The Family Court was thus correct to conclude that the marital presumption of parentage in Hawaiʻi's Uniform Parentage Act ("UPA") applies as much to a woman whose wife gives birth as it does to a man whose wife gives birth. That is compelled by the plain meaning of the UPA, which expressly envisions its gender-neutral application. It is also compelled by Hawaiʻi's Marriage Equality Act, which independently mandates the equal treatment of married same-sex couples and different-sex couples. And it is compelled by *Obergefell v. Hodges*, 135 S. Ct. 2584 (2016), which, as the Supreme Court recently reiterated, mandates that the same parental rights and responsibilities apply to same-sex spouses as to different-sex spouses. *Pavan v. Smith*, -- S. Ct. --, 2017 WL 2722472 (Jun. 26, 2017).

Contrary to LC's assertion, the UPA's presumption of parentage is not an evidentiary tool for rooting out biological parentage. Indeed, the UPA's provisions confirm that biology is not king; otherwise, the results of genetic testing would simply dictate the determination of legal parentage, contrary to what the law actually provides. That proposition is confirmed by settled Hawaiʻi precedent, which recognizes child welfare as the central aim of the UPA, and it echoes a nationwide chorus of courts interpreting similar parentage laws.

Although biological and legal parentage may typically coincide for most individuals, this case illustrates that, for many others, they are not necessarily coextensive. Families formed through assisted reproduction are now commonplace, and the resulting children may not share a genetic connection with both of their parents. LC's position seeks to cut the legal ties that bind

these families together simply because of their genetic composition. That would have calamitous consequences for countless children and their parents across Hawai‘i.

LC's interpretation of the UPA would also violate constitutional guarantees of due process and equal protection. As the U.S. Supreme Court has made clear, same-sex couples have a constitutional right to marry and to access the rights and responsibilities of marriage. That includes equally presuming that a child born during the marriage of a same-sex couple is the child of both individuals—just as for a child born during the marriage of a different-sex couple. Indeed, to hold otherwise would also discriminate against the Child, in violation of equal protection, by penalizing him simply because he was born to parents of the same sex.

Furthermore, the Family Court was also correct—and certainly not clearly erroneous—to find that LC had not rebutted the presumption of parentage with clear and convincing evidence that she did not consent to the conception of the Child. The testimony and documentary evidence at trial demonstrated that the decision to have the Child was not some rogue, unilateral action on the part of MG but instead the result of joint deliberation and planning by LC and MG. The Family Court found simply not credible LC's central testimony that, prior to the procedure that resulted in the Child's conception, LC verbally informed MG of an objection to MG becoming pregnant at that time. That credibility determination—which is also supported by written communications between LC and MG before and after the Child's conception—cannot be disregarded on appeal.

It was not until LC and MG's marriage later deteriorated that LC decided she no longer wished to be a parent to the Child. It is an unfortunate reality that some individuals regret their decisions to become parents. But, having walked hand-in-hand with MG down the path to parenthood, LC cannot abandon the family several weeks shy of the Child's birth and disclaim legal responsibility for her earlier actions. MG relied on LC's words and conduct that LC would always be there to support MG and their Child.

Given these stark facts, this Court may also affirm the Family Court's ruling on the alternate grounds of equitable estoppel and hold that LC was precluded from rebutting her presumed parentage. Either avenue—affirming the factual findings below or affirming on equitable estoppel grounds—leads to the same conclusion: LC is a legal parent to the Child, responsible to share in the Child's support.

## STATEMENT OF THE CASE

### I. MG and LC's Relationship and Subsequent Marriage

MG and LC met in June 2010 in Maryland. Dkt 24 at 24:10-16.[1] They began dating that same year and then entered into a committed relationship in January 2011. Dkt 14 at 416:21-22. More than three years after meeting, the couple married on October 13, 2013 in Washington, D.C., which had permitted same-sex couples to marry since 2010. Dkt 24 at 34:5-15; D.C. Code § 46-401. They also held a subsequent wedding ceremony to which friends and family were invited in the Dominican Republic in January 2014. Dkt 24 at 50:4-51:1. The trip additionally served as the couple's honeymoon. *Id.* at 52:10-12.

### II. MG and LC's Joint Steps to Start a Family Together

#### A. Period From Start of Relationship (2010) Until Relocation to Hawai'i (2014)

From early on, since 2010, MG and LC discussed with each other their mutual desire to become parents. *Id.* at 24:21-25:9. After extensive discussions, they began working with a Maryland fertility clinic in 2012, even before they had married. *Id.* at 26:23-27:16. They jointly visited the clinic on August 12, 2012, both to obtain information and to begin family planning. *Id.* at 28:19-25. Their plan was to utilize intrauterine insemination (IUI) rather than in vitro fertilization (IVF).[2] *Id.* at 29:22-30:7; Dkt 14 at 215.

The very next day after their marriage in Washington, D.C., they visited the clinic again, on October 14, 2013. Dkt 24 at 38:6-8. They signed multiple joint consent forms, with MG designated as the patient and LC as the patient's partner, for insemination treatment using anonymous donor sperm. *Id.*; Dkt 14 at 215-23. In LC's own words, "I was very much in love with [MG] and looking into starting a family with her." Dkt 14 at 420:14-15.

Despite this testimony, LC asserted that, shortly thereafter, she sent a letter to the fertility clinic withdrawing her consent for MG's pregnancy. She claims to have written the letter on

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[1] Citations to the record on appeal refer to the Judiciary Electronic Filing and Service System docket (Dkt) number, PDF page number, and, where appropriate, line numbers of the transcript containing the supporting testimony.

[2] Although immaterial for purposes here, LC's brief incorrectly states that MG became pregnant through IVF rather than IUI (perhaps confusing IVF with any form of assisted reproduction). IVF and IUI are different forms of assisted reproduction: as its name implies, intrauterine insemination involves insemination that takes place within the body, whereas in vitro (meaning "in glass") fertilization involves fertilization that occurs outside the body.

January 1, 2014, New Year's Day—which, if true, would have been while the couple was in the Dominican Republic for their wedding ceremony and honeymoon. *Id.* at 431:15-25. Indeed, LC claims to have written this letter around the same time that she was also preparing her wedding vows. *Id.* at 430:3-12. Other evidence at introduced trial, including that detailed below, called into doubt whether LC authored and sent the letter in January 2014 as she claimed—or whether LC fabricated, backdated, and sent the letter much later, around December 2015. *See, e.g.*, *id.* at 386 (clinic's copy of letter showing a December 2015 facsimile timestamp), 432:24-433:13 (LC admitting that she never informed MG regarding this purported withdrawal of consent in January 2014). Against this backdrop, the Family Court found LC's testimony that she had sent a letter to the fertility clinic at any point prior to the birth of the Child not credible. *Id.* at 111 (Finding of Fact, hereafter "FOF," 69).

The fertility clinic required a psychological assessment to determine the couple's fitness to become parents through assisted reproduction. The couple met with a psychologist in March 2014 for that purpose. Dkt 24 at 55:17-56:13. It was LC who wrote a check to pay for the psychologist's services—further discrediting LC's narrative that she withdrew her consent to the pregnancy two months earlier. *Id.* at 61:3-9. The psychologist cleared them to proceed with insemination and sent her assessment to the fertility clinic. Dkt 14 at 208. Despite this evidence, LC testified that she verbally told MG in March 2014 that she did not want to have a child with MG. Dkt 25 at 16:3-18; *but see* Dkt 24 at 67:13-68:1. The Family Court again found LC's testimony to be not credible. Dkt 14 at 112 (FOF 76).

### B. Relocation to Hawai‘i (Late 2014)

In late 2014, MG and LC moved to Hawai‘i pursuant to military orders for LC, who was serving in the Navy. Dkt 24 at 69:2-9. Following their relocation, they continued taking steps to start a family together. For example, they jointly researched potential sperm banks and settled upon which bank they would use. *Id.* at 79:15-80:1. They also jointly researched potential sperm donor candidates, and MG prepared spreadsheets of the candidates based on her and LC's preferences. *Id.* at 80:9-85:19; Dkt 25 at 206:7-23.

Once in Hawai‘i, the couple jointly selected and transitioned to a fertility clinic there, given that their prior clinic was in Maryland. Dkt 24 at 86:2-11. The purpose of engaging a local clinic was not merely to learn about what the clinic had to offer, as LC claims, but to use the clinic's services to start a family. *Id.* at 89:21-23. LC drove the two of them to the clinic in

December 2014, where they met with medical staff who explained to them the IUI procedure and other steps for the couple. *Id.* at 87:6-88:18. LC later unconvincingly testified at trial that she was merely chauffeuring her wife to the fertility clinic because MG wanted to go, Dkt 25 at 70:4-11, and that LC was sparing MG from having to take a bus there, *id.* at 74:23, but that MG's pursuit of pregnancy was "[a]gainst [LC's] will," *id.* at 85:6. Yet, as the Family Court found, both of them jointly met with staff and toured the facility. Dkt 14 at 106 (FOF 30); Dkt 25 at 71:9-25.

Indeed, during this December 2014 clinic visit, LC promised MG: "I'm going to always be here for my family." Dkt 24 at 91:4-6. Those words of assurance confirmed to MG their joint decision to have MG carry their child. *Id.* at 91:1-9. They had decided MG would be the birth parent in light of LC's military career and potential deployment and MG's maternal age. *Id.* at 68:2-23 (MG explaining that LC "didn't want to become pregnant first because it would have interfered with her career"), 91:10-14. LC in fact left Hawai'i on military assignment beginning around late January 2015. *Id.* at 92:18-20. As detailed below, while LC was overseas and MG was pregnant, LC twice repeated similar language—in writing—about always being there to support their family. Plainly, LC made these promises of support knowing that she was not biologically related to the Child.

**C. MG's Pregnancy (2015)**

***Before IUI.*** In February 2015, after researching potential sperm donor candidates, the couple jointly decided upon a donor. Dkt 25 at 209:4-10. That is confirmed by text messages between MG and LC that same month discussing the availability of funds in their joint bank account to pay for the vial of donor sperm. Dkt 14 at 250. On February 23, 2015, MG informed LC that she would be starting a fertility drug that evening, with a follow-up appointment the next week, and expressed, "I'm so happy that I do have 'time' to order our vial!" *Id.* LC responded, "Good morning baby. I'm glad everything went ok." *Id.* This fatally undermines LC's assertion that she supposedly told MG on multiple occasions—including in January 2015—that she did not want to go forward with assisted reproduction at the time. MG's testimony also confirmed that LC did not express any such sentiment prior to the conception of the Child. *See, e.g.*, Dkt 24 at 90:7-10, 103:1-104:22, 176:18-21, 272:6-8.

On February 25, 2015, the couple exchanged a series of text messages discussing their relationship and having children together. MG inquired if LC was having second thoughts. Dkt

14 at 139. LC responded that she wanted their child to have parents who adored each other but added, "[n]ot saying that we don't." *Id.* She denied that she was "backing out." *Id.* at 141 ("What are you talking about backing out? I have always wanted a child."). Indeed, she reassured LC: "You will be a great mother in the very near future." *Id.* at 142. The conversation ended with MG again noting that she had been taking the fertility pills since earlier that week, and LC acknowledging that fact. *Id.* at 252 (LC responding "K @ pills").

After taking fertility pills for a week, MG attended a follow-up appointment on Monday, March 2, 2015. *Id.* at 263. She texted LC that there was a mature follicle and the medical staff would inform her "if we can get IUI tomorrow or Wednesday," with the appointment currently scheduled for the latter date. *Id.* MG also explained she would need to give herself a shot that evening to help with the procedure. *Id.* If, as LC testified at trial, they had already agreed they should *not* start a family at that time, one would expect a person in LC's situation to respond: "Stop! We agreed we should not have a baby now." But that was not LC's response. Instead, at this pivotal moment in time—within two days of when MG would undergo IUI—the conversation proceeded with LC responding as one would expect if everything was proceeding precisely as planned and agreed upon: "Hi honey. OK. Tty after my flight. I love you." *Id.* at 264; Dkt 14 at 109 (FOF 49, 50).

***After IUI.*** As MG informed LC would occur, on Wednesday, March 4, 2015, MG underwent the IUI procedure that resulted in conception of the Child.[3] *Id.* at 298. In the days afterward, the couple texted about when to conduct a pregnancy test as well as what foods MG should not consume given that she might be pregnant. *Id.* at 267-68. LC tried to explain this away, without success, by testifying that when she asked if MG was pregnant during this time, she was just "joking"—as if one of them had eaten a meal and had "a food baby." Dkt 25 at 139:20-140:3. Two weeks after the IUI, MG texted LC that the pregnant test came back positive. Dkt 14 at 272.

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[3] MG signed the clinic's consent forms when she went in for the IUI, but LC was not in a position to do so because she was deployed overseas at the time, as the Family Court noted. Dkt 14 at 109 (FOF 52). LC also relies on a post from MG's social media that purportedly shows that MG proceeded with the IUI in defiance of LC's wishes. LC Br. at 5. But LC selectively quotes from that post, which was written *nine months* before the IUI and reads in relevant part: "We just need IUI and to solidify a donor and we're good. *I'd rather wait a few months to ensure we are on the right page* before doing my own thing..." Dkt 14 at 170 (emphasis added).

LC responded with pure elation—again, not with the reaction that one would expect if a spouse had gotten pregnant against one's expressed wishes: ":-D I'sa pregnant!!! I love you baby!!!" *Id.* at 272; *see also* Dkt 24 at 109:11-12 (MG explaining that "I's a pregnant" is "just a southern way, a twang, [of] just saying, 'I'm pregnant.'"). LC expressed excitement about the start of their family. She texted MG, "I get to rub your tummy and feel *our* baby. :-)." Dkt 14 at 274 (emphasis added). The next day, LC expressed her love and affection for MG in further text messages. *Id.* at 277 ("I['m] going back to bed to dream of you."); *id.* ("I love you").

MG and LC both wanted to participate in the process surrounding the pregnancy together, despite LC's overseas deployment. MG thus scheduled medical appointments during times when LC could participate remotely through videoconference. *Id.* at 145-48 (reproducing text messages from April 2017, with texts from MG in the middle column and texts from LC in the right column). LC expressed her appreciation to MG: "I love you for that." *Id.* at 147.

LC explained to MG, "I really wanted to experience the pregnancy and birth of our first child" because "being there for [the] pregnancy was my vision." *Id.* Despite LC's military duties, she was hopeful that "I will be home for the birth of our child God willing." *Id.* She prayed she would not become "one of those ppl" who never meets their child because then "[she] would have no interaction with my child." *Id.* LC also agreed with MG that starting a family was not as easy for them as it was for "a hetero[sexual] couple" but that "[a] family is a family ready made or not." *Id.* LC promised: "I will be there for our child no matter what. I love you and am thankful for you carrying our child." *Id.*

LC played an active role in events leading up to the Child's birth. For example, it was LC who independently communicated with medical staff to determine the sex of the Child so that this information could be revealed as a surprise to MG during the baby shower in August 2015, which LC attended by videoconference. Dkt 24 at 178:2-15; Dkt 14 at 314. For Mother's Day 2015, LC wrote and sent a note addressed to "The Future Mother" from "The Future Momma/Papa." Dkt 14 at 505. That note discussed "our child[']s eyes" and again promised, "I will always be here for our Family. XOXO." *Id.* at 506. A month later, LC addressed a postcard to MG which states that LC purchased a teddy bear "for my future child" and "I love you both!" *Id.* at 327.

LC's unconvincing rebuttal to much of this evidence was that this *first* child was solely for MG—but the *next* child would be for both of them—and therefore any references to "our baby" or "our child" by LC should be understood as limited to only that *second* child. The Family Court

did not credit this bewildering explanation, which the evidence at trial laid to waste. *See, e.g.*, *id.* at 147 (LC referencing "birth of our first child" and expressing gratitude to MG for "carrying our child").

LC returned to Hawai‘i in September 2015. Dkt 24 at 208:9-11. She and MG then jointly attended Lamaze classes, *id.* at 212:16-22, jointly attended pregnancy-related medical appointments including an ultrasound, *id.* at 210:4-20, and jointly toured a birthing facility, *id.* at 211:22. LC testified at trial that she was merely giving MG "a ride" to the Lamaze classes and ultrasound appointment (although LC admitted she went into the buildings for both) and that LC "[couldn't] recall" whether she had toured the birthing facility where their Child would shortly be born. Dkt 25 at 170:9-172:18. The couple's relationship subsequently deteriorated after MG became concerned that LC was having an extramarital affair with LC's former girlfriend. Dkt 24 at 213:12-18. LC filed for divorce on October 7, 2016. Dkt 14 at 102.

On November 11, 2015, MG gave birth to the couple's Child. *Id.* at 371. LC was not present for the birth. *Id.* at 115.

## III. Procedural History

LC filed a petition to disestablish parentage on January 11, 2016. Dkt 14 at 103. The hearing on the petition was consolidated with a hearing in the divorce case for pre-decree relief. *Id.* After hearing two days of trial testimony and reviewing hundreds of pages of documentary evidence, the Family Court found that LC was a legal parent to the Child. First, the Family Court concluded that LC was a presumed parent under the UPA's marital presumption of parentage, HRS § 584-4(a)(1), because she was married to MG when MG gave birth to the Child. Dkt 14 at 116. Second, the Family Court found that LC had failed to meet her burden of proving by clear and convincing evidence that she did not consent to the conception of the Child. *Id.* at 118. It specifically found that, prior to March 4, 2015, LC "did not inform [MG] that she objected to and/or did not consent to [MG] undergoing an artificial insemination procedure" at the fertility clinic in Hawai‘i. *Id.* at 112 (FOF 75). The Family Court also made a number of credibility determinations, concluding that key aspects of LC's testimony were not credible. *Id.* at 111 (FOF 69), 112 (FOF 74, 76).

The Family Court denied LC's petition to disestablish parentage, ordered LC to pay child support, awarded MG temporary sole legal and physical custody, and declined to award LC visitation. *Id.* at 118-19.

## ARGUMENT

### I. LC Is a Presumed Parent Under the UPA.

#### A. The Family Court Correctly Applied the UPA's Marital Presumption of Parentage Because MG and LC Were Married When the Child Was Born.

The Family Court correctly concluded that LC is a presumed parent under the UPA, HRS § 584-1 *et seq.*, because the Child was born during LC's marriage to MG. The UPA creates a legal presumption of parentage in various circumstances, including where an individual is married to a woman who gives birth. HRS § 584-4(a) provides in relevant part that "[a] man is presumed to be the natural father of a child if . . . [h]e and the child's natural mother are or have been married to each other and the child is born during the marriage." This presumption—that a child born during a marriage is the child of both spouses—"is one of the strongest and most persuasive known to the law." *Inoue v. Inoue*, 118 Hawaiʻi 86, 100 n.13, 185 P.3d 834, 848 (App. 2008) (internal quotation marks omitted).

Contrary to LC's assertion, the marital presumption of parentage applies to anyone—whether male or female—who is married to a woman who gives birth. First, as explained below, the UPA contains a provision directing that the law must be interpreted to apply to maternity in addition to paternity. Second, Hawaiʻi's Marriage Equality Act, as well as U.S. Supreme Court precedent discussed below, independently requires that there be no legal distinction between same-sex and different-sex married couples.

***UPA's Gender-Neutral Application.*** First, since Hawaiʻi's adoption of the UPA in 1975, the law has always directed that wherever practicable, "the provisions of this chapter applicable to the father and child relationship shall apply" to determining "the existence or nonexistence of a mother and child relationship." HRS § 584-21. The comments to the model Uniform Parentage Act (on which Hawaiʻi's UPA is based) explained: "it is not believed that cases of this nature [disputing the existence of a mother and child relationship] will arise frequently" and therefore the model language was "written principally in terms of the ascertainment of *paternity*" rather than "with references to the ascertainment of *maternity*." Uniform Parentage Act, § 21, cmt. (1973) (emphases in original). But the model legislation specifically includes a provision—which Hawaiʻi adopted in HRS § 584-21—providing for its application to cases disputing the existence of a mother and child relationship.

Applying the plain meaning of this provision of the UPA to this case is straightforward: where HRS § 584-4(a) defines a presumed "father" to include "a man" who is married to the

child's "natural" mother, it must also be understood as defining a presumed "mother" to include "a woman" who is married to the child's "natural" mother.[4] Because LC would be a presumed parent if she were a man and the facts of this case were otherwise unchanged, the Family Court correctly held that, as a woman, she is also a presumed parent.

Consistent with a gender-neutral understanding of the marital presumption of parentage, courts across the country have overwhelmingly held that the presumption applies with full force to married same-sex couples. *See, e.g.*, *Kelly S. v. Farah M.*, 28 N.Y.S.3d 714, 720-21 (N.Y. App. Div. 2016) (applying California's marital presumption of parentage with respect to a child born to a married same-sex couple); *McLaughlin v. Jones*, 382 P.3d 118, 122-23 (Ariz. App. 2016) (holding that a female spouse in a same-sex couple was entitled to marital presumption of parentage—despite the use of male-specific statutory terms such as "man," "paternity," and "father"—because the statute could be construed in a gender-neutral fashion to achieve its purpose that "two parents will be required to provide support for a child born during the marriage" and of "preserving the family unit"), *review granted* (Apr. 17, 2017); *Counihan v. Bishop*, 974 N.Y.S.2d 137, 139 (N.Y. App. Div. 2013) (holding that a woman was a legal parent based on her marriage to the biological mother); *Hunter v. Rose*, 975 N.E.2d 857, 862 (Mass. 2012) (applying the marital presumption of parentage to a same-sex couple whose registered domestic partnership was recognized as a marriage in Massachusetts); *Barse v. Pasternak*, No. HHBFA 123030541S, 2015 WL 600973, at *10 (Conn. Super. Jan. 16, 2015) (holding that "the marital presumption applies equally to same-sex and opposite-sex marriages"); *Wendy G-M v. Erin G-M*, 985 N.Y.S.2d 845, 858 (N.Y. Sup. Ct. 2014) (applying the marital presumption of parentage to the biological mother's same-sex spouse); *Beth R. v. Donna M.*, 853 N.Y.S.2d 501, 509 (Sup. Ct. N.Y. County 2008) (holding that the same-sex spouse of a parent who conceived through artificial insemination was entitled to proceed with action to determine custody, visitation, and child support obligations); *cf. Della Corte v. Ramirez*, 961 N.E.2d 601, 603 (Mass. App. 2012) (holding that the same-sex spouse of child's mother was a legal parent because the term "husband" in an artificial insemination statute did not exclude a woman); *Miller-Jenkins v. Miller-Jenkins*, 912 A.2d 951, 971 (Vt. 2006) (relying on the marital presumption to find that both

[4] As noted below, the phrase "natural father" and "natural mother" are legal terms of art defined by the UPA—and not to be confused with "biological father" and "biological mother."

women in a civil union were legal parents to their child). Indeed, many of these courts reached this conclusion even without the added benefit of a gender-neutral application provision like that in Hawai‘i's UPA.

Even outside the context of marriage, courts have long applied gender-specific parenting provisions in a gender-neutral fashion to same-sex couples. And, contrary to LC's assertion, it has been entirely "practicable" to do so. LC Br. at 15. For example, courts have consistently held that statutory provisions presuming a man's paternity where he holds out a child as his own must be applied equally to presume a woman's maternity where she holds out a child as her own. *See, e.g.*, *In re Guardianship of Madelyn B*, 98 A.3d 494, 498-501 (N.H. 2014) (holding that a statute addressing when "a man is presumed to be the father of a child" applied to a biological mother's same-sex female partner who held out the child as her own); *Chatterjee v. King*, 280 P.3d 283, 287-88 (N.M. 2012) (holding that it was practicable for the presumption of parentage based on holding out a child as one's own to be applied to a woman, because it is "based on a person's conduct, not a biological connection"); *Elisa B. v. Superior Court*, 117 P.3d 660, 667 (Cal. 2005) (construing the California UPA in a gender-neutral manner as required by its terms and holding that "father" included the biological mother's female partner, who could hold out child as her own); *cf. In re S.N.V.*, 284 P.3d 147, 149 (Colo. App. 2011) (holding, in a surrogacy case, that Colorado UPA's presumed "father" provisions applied to a non-biological presumed mother who was married to the biological father and held out the child as her own).

Courts have similarly held that other provisions giving rise to a presumption of parentage must be applied in a gender-neutral manner to same-sex couples. *See, e.g.*, *Frazier v. Goudschaal*, 295 P.3d 542, 558 (Kan. 2013) ("the UPA and, in turn, the [Kansas Parentage Act] are gender-neutral, so as to permit both parents to be of the same sex"); *Rubano v. DiCenzo*, 759 A.2d 959, 970 n.13 (R.I. 2000) (recognizing that "the word 'paternity' implies the 'fathering' of a child" but holding that statutory directive to read gender-specific terms neutrally meant that two women could be involved with "paternity" of child). Here, contrary to LC's assertion, there is nothing impracticable about a woman (like LC) being married to woman (like MG) who gives birth to a child during their marriage.

***Hawai‘i Marriage Equality Act of 2013.*** Second, a gender-neutral interpretation of the marital presumption of parentage is also independently required by the Hawai‘i Marriage Equality Act of 2013, which removed the State's exclusion of same-sex couples from marriage. That Act

confirmed that there can be "no legal distinction" between same-sex and different-sex married couples and that "all provisions of law regarding marriage" must be equally applied to such couples. S.B. 1, H.D. 1, 27th Leg., 2d Spec. Sess. § 1 (2013). Critically, the Act changed all sources of law in omnibus fashion—including where the Legislature "does not amend any particular provision"—thereby obviating any need for statute-by-statute amendments. *Id.* The Act requires a gender-neutral interpretation when necessary to implement not merely the "rights, benefits, [and] protections" of spouses but also the "responsibilities of spouses." HRS § 572-1.8.

Here, there can be no question that the UPA's *marital* presumption of parentage is a "provision[] of law regarding marriage." S.B. 1, § 1. The Legislature could not have been clearer—or more sweeping—in directing how "all" gender-specific marital language must be construed. HRS § 572-1.8 (applying not only to statutes but also "court decisions, common law, or any other source of law"). Yet LC seeks to revive precisely the type of "legal distinction" between married same-sex couples, on the one hand, and married different-sex couples, on the other, that the Legislature took pains to foreclose in the Marriage Equality Act. S.B. 1, § 1.

She cannot do so. In *Wendy G-M*, the court analyzed New York's Marriage Equality Act, which contains a similar provision directing that gender-specific language relating to marriage must construed be in a gender-neutral manner. 985 N.Y.S.2d at 860. Based in part on that statute, the court held that "the child of either partner in a married same-sex couple will be presumed to be the child of both, even though the child is not genetically linked to both parents." *Id.* at 861.

LC admits that the Hawai'i Marriage Equality Act of 2013 eliminated any legal distinction between same-sex and different-sex couples "with respect to marriage." LC Br. at 25. But she argues that because the UPA is also concerned with the welfare of children born *outside* the context of marriage, that somehow justifies penalizing the children of same-sex couples *inside* the context of marriage. *Id.*

That makes no sense. The Hawai'i Supreme Court has explained that a "fundamental" purpose of the UPA is "'to provide substantive legal equality for all children regardless of the marital status of their parents.'" *Doe v. Doe*, 99 Hawai'i, 7, 52 P.3d 255, 261 (2002) (quoting legislative history). Penalizing children because they are born to married same-sex couples would undermine the purpose of protecting children "regardless of the marital status of the parents," HRS § 584-2, just as penalizing children because they are born outside the context of marriage

undermines that purpose. Under LC's position, children of married same-sex couples would face *precisely* the harms that children born outside the context of marriage often faced in many places. That includes denial of rights to intestate succession, statutory causes of action, and child support. *Id.* at 8, 52 P.3d at 262.

***LC's Authorities.*** LC's authorities do not support carving out same-sex couples from the UPA's marital presumption of parentage. First, LC relies on *Shineovich v. Shineovich*, 214 P.3d 29 (Or. App. 2009), which concerned an *unmarried* lesbian couple who used artificial insemination to have children but subsequently separated, leading to a dispute regarding the parental rights of the non-biological mother. Significantly, the Oregon court held that depriving the non-biological mother of parental rights unconstitutionally discriminated against same-sex couples, who were barred from marriage at the time. Because a husband whose wife became pregnant through artificial insemination was deemed a legal father despite the absence of a biological connection to the child, it was unconstitutional to deny legal parentage to a woman whose same-sex partner also used artificial insemination to become pregnant. *Id.* at 40. *Shineovich* thus supports MG, rather than LC, because it illustrates the serious constitutional questions that LC's interpretation of the UPA would inject into Hawai‘i law, as discussed below.

To the extent that the court interpreted Oregon's presumption of parentage statute as requiring the possibility of a biological connection, that interpretation does not govern Hawai‘i's presumption of parentage statute, which Hawai‘i courts have interpreted as *not* requiring any such possibility, as discussed below. *Compare id.* at 36 (relying on Oregon-specific statutory provisions addressing impotence and sterility), *with Doe*, 99 Hawai‘i at 8, 52 P.3d at 262 (holding that presumed father's parentage could not be disestablished even if there was genetic evidence proving that he was not the biological father); *Inoue*, 118 Hawai‘i at 88, 185 P.3d at 836 (holding that presumed father's parentage could not be rebutted, even though it was undisputed that he was not the biological father); *Pratt v. Pratt*, 104 Hawai‘i 37, 42, 84 P.3d 545, 550 (App. 2004) (holding that presumed father could not be relieved of responsibilities of legal parentage, despite evidence that he was not the biological father).

Second, MG relies on *Q.M. v. B.C.*, 995 N.Y.S.2d 470, 474 (N.Y. Fam. Ct. 2014), but the facts of that case could not be further from those here. *Q.M.* involved a woman who became pregnant as a result of sexual intercourse with a man when she was separated from her wife. The court held that the marital presumption of parentage did not automatically preclude the biological

father from attempting to establish his parentage. Notably, this was not a case involving a married same-sex couple who consented to have a child together using anonymous donor sperm—the facts found here—and the court agreed that both women in that situation *would* be legal parents. *Id.* at 473 (describing as "well-crafted" a decision involving such facts). In *Q.M.*, however, the woman at issue and her wife had not jointly consented to the child's conception; it occurred as a result of the woman's relationship with a man, who asserted his parental rights.[5] Furthermore, to the extent LC relies on *Q.M.* for the proposition that legal parentage should be limited to biology and adoption, New York's high court has now expressly rejected that view. *See Brooke S.B. v. Elizabeth A.C.C.*, 61 N.E.3d 488, 498-500 (N.Y. 2016) (overruling prior precedent).

**B. Presumed Legal Parentage Under the UPA Does Not Turn On Biology.**

Notwithstanding the marital presumption of parentage, LC maintains that she cannot be a legal parent because she is not the Child's biological parent. This reads a limitation into the UPA that does not exist. She asserts that this limitation can be found in HRS § 584-1, which provides that a legal parent-child relationship includes that between a child and (1) the child's "natural mother," (2) the child's "natural father," and (3) the child's adoptive parent. But LC's argument fails from the outset: the Hawaiʻi Supreme Court has held that the UPA "provides a vehicle by which [parentage] *may* be established" but its provisions "do *not* state that chapter 584 is the exclusive means by which [parentage] must be established." *Doe*, 99 Hawaiʻi at 5, 52 P.3d at 259 (emphases in original). Thus, even if LC's relationship with the Child did not fall into one of the categories enumerated above, that fact would not negate the establishment of legal parentage.

***"Natural" Parentage.*** In any event, LC's interpretation of the UPA is wrong for multiple reasons. First, the UPA uses the word "natural" as a legal term of art: a "natural mother" may be established by "proof of her having given birth, *or under this chapter*" and, similarly, a "natural

[5] The fact that the marriage was between a same-sex couple appears irrelevant: even if the biological mother had been married to a man, and then had a child by another man under identical facts, the court could have reached the same conclusion. Had the facts of *Q.M.* occurred in Hawaiʻi, and the biological father sought to establish parentage, the UPA would likely require deciding which presumption of parentage—one based on marriage or, presumably, one based on genetic testing—is founded on the weightier considerations of policy and logic given the facts of the case. HRS § 584-4(b).

father *may be established under this chapter*." HRS § 584-3 (emphases added). In other words, a "natural" parent is an individual who meets the relevant conditions set forth in the UPA.

A "natural" parent under the UPA cannot be conflated with a "biological" parent, although the two terms may overlap for many individuals. For example, if legal maternity simply reduced to a matter of biology, the UPA could have required proof of having given birth and stopped there; but it goes on to state that a woman may *also* establish legal parentage under chapter 584. HRS § 584-3. LC's argument would render that additional language superfluous. *Cf. Chatterjee*, 280 P.3d at 288 (holding that the phrase "natural mother" under New Mexico's UPA was not limited to biology because such an interpretation "renders meaningless" the instruction that, in addition to giving birth, a natural mother may also be established as provided by the state UPA). Other courts have construed analogous "natural" parentage provisions as not containing a biological requirement. *See, e.g.*, *Elisa B.*, 117 P.3d at 668 (explaining that "a natural parent within the meaning of the UPA [can] be a person with no biological connection to the child"); *Bowers v. Bowers*, -- S.W.3d --, 2017 WL 2332740, at *13 (Mo. App. 2017) (holding that "natural father" under the Missouri UPA does not mean biological father, when read in *pari materia*, and noting that if the legislature intended a biological limitation, it would have said so).

***UPA's Parentage Presumptions.*** Second, the circumstances that give rise to a presumption of parentage under the UPA also establish that parentage flows from more than just biology. Multiple avenues lead to a presumption—but only one rises or falls exclusively on a biological connection to the child. HRS § 584-4(a) (listing six circumstances, one of which relates to genetic testing). For example, one presumption applies where there has been a marriage or attempted marriage after the child's birth and the presumed parent has filed a written acknowledgement of parentage, has consented to being named as a parent on the child's birth certificate, or is obligated to support the child based on a promise or court order. HRS § 584-4(a)(3).

Hawai'i precedent has confirmed that legal parentage under the UPA does not reduce to mere biology. LC repeatedly cites one of the key authorities, *Doe*, 99 Hawai'i at 1, 52 P.3d at 255, that establishes this proposition—but she misleadingly cites to its *dissent*, without disclosing that material fact to this Court. LC Br. at 12 (citing *Doe* as purportedly "reiterating" prior case law that the UPA is intended to create legal relationships between a child and his or her "biological parents"), 14, 17, 19. *Doe* involved an attempt by a child's mother to establish the

legal parentage of the child's alleged biological father. The majority of the Hawaiʻi Supreme Court held that she was estopped from doing so, however, because a divorce decree had already established that a different man—her husband at the time of the child's birth—was the child's legal father. 99 Hawaiʻi at 11, 52 P.3d at 265. The dissent disagreed and argued, as LC does, that a biological connection should be dispositive of legal parentage. Plainly, the dissent's view did not carry the day.

Instead, *Doe* held that the presence or absence of a genetic connection did *not* dictate the determination of legal parentage. The Court took pains to distinguish between a "legal father" and a "biological father" because "the two are not always the same." 99 Hawaiʻi at 8, 52 P.3d at 262. "If the genetic testing presumption 'controlled' as a matter of law, then HRS § 584-4 would plainly say so, and there would be no point in directing the court to consider which competing presumption "on the facts is founded on the weightier considerations of policy and logic[.]" *Id.* Indeed, the Court expressly held that a presumption of parentage based on genetic testing "is *not* more important than the other presumptions" of parentage. *Id.* (emphasis added).

Based on reasoning similar to *Doe*, other courts interpreting their own parentage laws have held that the existence of multiple presumptions relying on both genetic and non-genetic considerations confirms that legal parentage does not turn on biology. *See, e.g.*, *In re Jesusa V.*, 85 P.3d 2, 14 (Cal. 2004) (expressly agreeing with the Hawaiʻi Supreme Court's holding in *Doe* and observing that "other states that have adopted the UPA have consistently declined to make biology determinative"); *McLaughlin*, 382 P.3d at 122 (noting that, out of four statutory provisions giving rise to a presumption of parentage, only one is based on a biological connection and concluding that "[t]he word 'paternity' therefore signifies more than biologically established paternity")[6]; *Frazier*, 295 P.3d at 552-53 (holding that, with the exception of a presumption based on genetic testing, the remaining presumptions confirm that a parental relationship need not rely on biology or adoption); *In re Guardianship of Madelyn B*, 98 A.3d at 501 (observing that various

[6] Another Arizona appeals court came to a different conclusion in *Turner v. Steiner*, -- P.3d --, 2017 WL 2687680 (Ariz. App. 2017). That opinion was issued before the U.S. Supreme Court's recent *Pavan* decision, discussed below, confirming that same-sex spouses must be treated equally to different-sex spouses—including with respect to parenting rights. And, regardless of how Arizona ultimately interprets its own parentage laws, the Hawaiʻi precedent discussed here makes clear that biology does not conclusively determine parentage under Hawaiʻi's UPA.

statutory provisions created "many alternative routes to establish parental status that do not require proof of biological ties").

The Hawai'i Supreme Court in *Doe* also expressly rejected the notion that prior case law somehow established that "a presumptively legitimate child of questionable parentage should know the truth of his or her parentage—both, if there is a difference, her or his natural and her or his legal parentage" under the UPA. *Doe*, 99 Hawai'i at 5, 52 P.3d at 259 (quoting and rejecting lower court's reliance on *Doe v. Roe*, 9 Haw. App. 623, 626-27, 859 P.2d 922, 924 (1993)).

Furthermore, the majority in *Doe* was unpersuaded by the dissent's argument—which LC dusts off here, LC Br. at 22—that the list of evidence relating to paternity in HRS § 584-12 shows that a biological connection is required for legal paternity. 99 Hawai'i at 20, 52 P.3d at 275 (dissent). That list contains items that do not require a biological connection, including a voluntary acknowledgement of paternity, and in any event, the UPA cautions that the list is non-exhaustive. HRS § 584-12(7) (providing that courts may consider "[a]ll other evidence relevant to the issue of paternity" beyond those enumerated); *cf. In re S.N.V.*, 284 P.3d at 150 (noting that a parental relationship "also may be established by 'by any other proof' specified in the UPA"). For example, the list does not include a written promise to support a child, HRS § 584-4(a)(3)(C), even though that too can support a determination of legal parentage.

Other Hawai'i cases have followed *Doe*'s holding that biological parentage does not dictate legal parentage. For example, in *Inoue v. Inoue*, the court held that a mother could not rebut a presumed "natural" father's parentage even though it was undisputed that he was not the biological father because the mother was already pregnant when the couple met. 118 Hawai'i at 88, 185 P.3d at 836. The man was a presumed "natural father" under the UPA both because he had consented to be named on the child's birth certificate after the couple's subsequent marriage, HRS § 584-4(a)(3)(B), and because he had held out the child as his own, HRS § 584-4(a)(4). The court held that she was equitably estopped from rebutting his presumed parentage because she had represented to him that he had adopted the child by consenting to be on the child's birth certificate, which dissuaded him from further investigating or establishing his legal parentage. *Inoue*, 118 Hawai'i at 97-98, 185 P.3d at 845-46. It reached this conclusion "even where clear

and convincing evidence indicated that the presumed father was not, in fact, the biological father."[7] *Id.* at 95, 185 P.3d at 843 (canvassing cases reaching the same conclusion).

Similarly, in *Pratt v. Pratt*, the court affirmed the denial of a presumed father's attempt to disestablish parentage based on genetic testing—"notwithstanding the current ability of science to determine paternity and non-paternity." 104 Hawai'i at 42, 84 P.3d at 550. It held that the Family Court did not abuse its discretion in refusing to relieve the presumed father from "those parts of the Divorce Decree pertaining to his *legal (not necessarily biological) paternity* of, and legal rights and obligations regarding, [the child]." *Id.* (emphasis added).

Taken together, *Doe*, *Inoue*, and *Pratt* make crystal clear that the interpretation LC invites this Court to adopt—privileging biology above all other considerations in determinations of legal parentage—is squarely foreclosed by existing Hawai'i precedent. LC's reliance on out-of-state cases involving same-sex couples where one woman was the genetic mother and the other woman was the gestational mother, LC Br. at 15-17, is therefore irrelevant.[8] The premise of her argument—that a parental relationship can only be formed from a biological relationship (whether defined as a genetic connection or a gestational connection)—has no footing in Hawai'i law.

***UPA's Purposes.*** Third, LC's biology-trumps-all interpretation would also undermine the very reason for the UPA's existence: protecting the welfare of children. *See Doe*, 99 Hawai'i at 7, 52 P.3d at 261. "This is one of the primary reasons that the original UPA was created, and it makes little sense to read the statute without keeping this overarching legislative goal in mind." *Chatterjee*, 280 P.3d at 292. Hewing to that goal, many courts "have read comparable [statutory]

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[7] LC's attempt to distinguish *Inoue* misapprehends its legal relevance here. She argues that *Inoue* is factually distinguishable because, unlike the presumed father in that case, she did not consent to be named on a birth certificate nor hold out the Child as her own. LC Br. at 28. But those are straw-man arguments, because neither served as the basis for the Family Court's ruling here. Instead, the Family Court held that LC was a presumed parent based on a different provision: HRS § 584-4(a)(1)'s marital presumption of parentage. *Inoue*'s import is that LC cannot use the absence of a biological connection to the Child *to rebut* her legal parentage on the facts here.

[8] They also do not support the proposition that LC suggests. That the *presence* of biological connections can form a basis for legal parent-child relationships does not mean the *absence* of biological connections automatically defeats the establishment of such relationships. Moreover, the interests at stake in those cases—such as ensuring that a child has two parents, preventing a child from becoming a ward of the state, and promoting child welfare—all weigh decisively against the interpretation of the UPA urged by LC. *See, e.g.*, *St. Mary v. Damon*, 309 P.3d 1027, 1034 (Nev. 2013); *In re Adoption of Sebastian*, 879 N.Y.S.2d 677, 690 (N.Y. Sur. 2009).

provisions to establish presumed parentage in the absence of biological relationships . . . out of concern for the welfare of children born out of wedlock." *Partanen v. Gallagher*, 59 N.E.3d 1133, 1141 (Mass. 2016). As is true for Hawai'i's UPA, the parentage presumption is "driven, not by biological paternity, but by the state's interest in the welfare of the child and the integrity of the family." *In re Guardianship of Madelyn B*, 98 A.3d at 500 (internal quotation marks omitted).

There are thousands of same-sex couples in Hawai'i, many of whom are raising children together under the protective shelter of the UPA's presumptions of parentage.[9] LC's position would strip them of that protection.

Yet the havoc LC's position would wreak is by no means limited to the children of same-sex couples. As one court observed, "the logical extension" of requiring a biological connection for parentage, as LC urges, "is that the husband of a wife who bears an artificially inseminated child cannot be the father of that child." *Miller-Jenkins*, 912 A.2d at 967. "Such a holding would cause tremendous disruption and uncertainty to some existing families who have conceived via artificial insemination or other means of reproductive technology." *Id.* Even if there was no dispute that the man in this situation consented to the wife's insemination, he could evade his child support obligations, for example, by simply pointing to his genes.

Courts have consistently rejected any legal interpretation that would lead to this absurd result. Indeed, "the establishment of fatherhood and the consequent duty to support when a husband consents to the artificial insemination of his wife is one of the well-established rules in family law." *In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d 280, 286 (Cal. App. 1998) (analyzing cases); *see, e.g.*, *Levin v. Levin*, 645 N.E.2d 601, 605 (Ind. 1994) (holding that a husband was the legal father to a child conceived through artificial insemination of donor sperm and recognizing that the child was a child of his marriage with his wife); *In re Baby Doe*, 353 S.E.2d 877, 878 (S.C. 1987) ("Almost exclusively, courts which have addressed this issue have assigned paternal responsibility to the husband based on conduct evidencing his consent to the artificial insemination."); *L.M.S. v. S.L.S.*, 312 N.W.2d 853, 855-56 (Wisc. Ct. App. 1981) ("A husband

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[9] Gary Gates, Same-Sex Couples in Hawaii: A Demographic Summary (2013), *available at* https://williamsinstitute.law.ucla.edu/wp-content/uploads/HI-same-sex-couples-demo-oct-2013.pdf.

who participates in the arrangement for the creation of a child cannot consider this a temporary relation to be assumed and disclaimed at will").

As with much of family law, biological relationships yield to the paramount concern for child welfare in this context. Although no Hawai'i appellate authority has had occasion to confirm what virtually every other court to consider the issue has held, the UPA's marital presumption of parentage would similarly apply to make the husband of a birth mother who conceived using donor sperm the presumed father. There is no basis for treating the female spouse of a birth mother differently in this context and, indeed, it would be unconstitutional to do so, as discussed below.

The position that LC urges would also have the practical consequence of increasing the State's financial responsibility for supporting children born through assisted reproduction. *See People v. Sorensen*, 437 P.2d 495, 501 (Cal. 1968) ("To permit [one's] parental responsibilities to rest on a voluntary basis would place the entire burden of support on the child's [birth] mother, and if she is incapacitated the burden is then on society."). To the extent that the UPA's marital presumption of parentage serves the purpose of protecting the public purse by ensuring a child's support from both parents, excluding children born through assisted reproduction from the scope of the presumption would undermine that purpose.

### C. The Exclusion of Same-Sex Spouses From the UPA's Presumption of Parentage Would Violate Due Process and Equal Protection Guarantees.

The Family Court's application of the UPA to the facts of this case was correct as a matter of statutory construction; and it was also required under the due process and equal protection guarantees of the U.S. and Hawai'i Constitutions. As noted above, the UPA's marital presumption of parentage would make the husband of a birth mother who conceived using donor sperm a presumed parent; thus, it would be unconstitutional to treat the wife of a birth mother who conceived using donor sperm as anything other than a presumed parent.[10] As explained

[10] Under LC's biology-trumps-all interpretation of the UPA, the husband's presumption of parentage in this scenario would presumably be rebutted if there was clear and convincing evidence showing he was not genetically related to the child. But the same-sex spouse of a birth mother would not even be afforded that initial presumption nor required to rebut it. Thus, LC's interpretation of the UPA puts same-sex spouses on unequal footing relative to different-sex spouses. That *itself* is an equal protection violation—regardless of whether LC believes that neither should be recognized as parents at the end of the day. *See Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, Fla.*, 508 US 656, 666 (1993) (holding that a

below, refusing to recognize LC's presumed parentage under the UPA would (1) violate the Supreme Court's decisions in *Obergefell*, 135 S. Ct. at 2584, and *Pavan*, 2017 WL 2722472, (2) discriminate against same-sex spouses on the basis of sex and sexual orientation, and (3) infringe upon the Child's right to equal protection. At a minimum, LC's interpretation of the UPA would indisputably raise serious constitutional questions that this Court must avoid where it can do so. The doctrine of "constitutional doubt" dictates that "where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." *State v. Jess*, 117 Haw. 381, 399-400, 184 P.3d 133, 151-52 (2008) (internal quotation marks omitted).

First, excluding same-sex spouses from the UPA's presumption of parentage would violate controlling U.S. Supreme Court precedent. In *Obergefell*, 135 S. Ct. at 2602-03, the Supreme Court held that the exclusion of same-sex couples from marriage deprived those couples of their fundamental right to marry and thus violated due process as well as equal protection guarantees. Denying government recognition to the marriages of same-sex couples "humiliates tens of thousands of children now being raised by same-sex couples" and "makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families." *U.S. v. Windsor*, 133 S. Ct. 2675, 2694 (2013). "Without the recognition, stability, and predictability marriage offers," same-sex couples' "children suffer the stigma of knowing their families are somehow lesser." *Obergefell*, 135 S. Ct. at 2600. These children also suffer the "significant material costs of being raised by unmarried parents, relegated through no fault of their own to a more difficult and uncertain family life." *Id*. Notably, the Supreme Court regarded *both* members of same-sex couples as parents to their children, without reference to whether the parents and children shared genetic or adoptive ties.

In other words, *Obergefell* was not simply about the right of same-sex couples to obtain marriage licenses. Rather, the Supreme Court recognized that marriage sits "at the center of so many facets of the legal and social order" including through a "constellation" of marital rights and responsibilities. *Id.* at 2601. Denying same-sex couples of that constellation of rights and responsibilities—not just the status of being married—consigns them "to an instability many

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"denial of equal treatment results from the imposition of the barrier, not the ultimate inability to obtain the benefit" and that a deprivation of "equal footing" is itself an equal protection injury).

opposite-sex couples would deem intolerable in their own lives." *Id.* Prominent among that constellation are the rights and responsibilities of legal parentage. The Supreme Court canvassed some of them—including the right to "child custody, support, and visitation rules" and birth certificates—and it held that the government must provide those rights and responsibilities to same-sex spouses "on the same terms and conditions as opposite-sex couples." *Id*. at 2601, 2604-05.

Two years later, in *Pavan*, the Supreme Court confirmed that it indeed meant what it said in *Obergefell* and held that it was unconstitutional for Arkansas to refuse to list the female spouse of a birth mother on a child's birth certificate. Just as LC argues here, Arkansas argued that its refusal was justified by a desire to recognize only "biological parentage." *Pavan*, 2017 WL 2722472, at *2. The Supreme Court flatly rejected that justification in a summary reversal, given that, among other things, Arkansas listed the husband of a birth mother who conceived using donor sperm on the child's birth certificate, as well as non-biological adoptive parents. Here, as well, Hawai‘i precedent (including *Doe*, *Inoue*, and *Pratt*) similarly confirms that the UPA's presumption of parentage is "more than a mere marker of biological relationships." *Id. Pavan* dooms LC's argument.

Other courts have also recognized the importance of legal parentage among the rights and responsibilities of marriage. The Ninth Circuit held that the exclusion of same-sex couples from marriage was unconstitutional because, among other things, it unjustifiably deprived them of the ability to have children within, rather than outside, the confines of marriage. *See Latta v. Otter*, 771 F.3d 456, 472 (9th Cir. 2014) (discussing the interest in the "legitimation" of children who may not be biologically related to both parents and observing that, if the government actually wanted "to increase the percentage of children being raised by their two *biological* parents, they might do better to ban assisted reproduction using donor sperm"). Indeed, when the Hawai‘i Supreme Court started a national conversation regarding marriage equality nearly a quarter century ago, it emphasized that one of the "most salient marital rights and benefits" that same-sex couples were deprived was the right to an "award of child custody and support payments in divorce proceedings." *Baehr v. Lewin*, 74 Haw. 530, 560-61, 852 P.2d 44, 59 (1993) (plurality). LC's interpretation of the UPA would deprive the Child and MG of their right to LC's support as a legal parent and, in the process, restore one of the main legal inequalities that *Obergefell* finally dismantled after decades of legal developments. There is no justification for doing so.

Second and relatedly, failing to apply the marital presumption equally to female spouses of mothers who give birth impermissibly discriminates on the basis of sexual orientation and sex. Among other things, LC argues that the presumption of parentage does not apply to her because, simply put, she is "a woman in a same-sex marriage." LC Br. at 19 (capitalization omitted). That is quintessential discrimination on the basis of both sexual orientation and sex. *See Latta*, 771 F.3d at 467 (rejecting the argument that the exclusion of same-sex couples from marriage discriminates on the basis of procreative biology rather than sexual orientation and applying heightened scrutiny to sexual orientation discrimination); *Baehr*, 74 Haw. at 563-64, 852 P.2d at 60 (holding that denial of marriage and its rights and responsibilities to same-sex couples requires heightened scrutiny under the state constitution as a form of sex discrimination). Consider the situation in which a birth mother dies during childbirth: children of different-sex spouses have a legal parent to take them home, while children of same-sex spouses become wards of the State. The difference between the two classes is the sexual orientation of the spouses as well as the sex of the birth mother's spouse.

The Supreme Court has confirmed (again) in *Pavan* that this form of disparate treatment against same-sex couples is constitutionally proscribed. 2017 WL 2722472, at *2. It is not alone. Before *Pavan*, a number of courts held that it was unconstitutional to refuse to issue birth certificates listing the same-sex spouses of mothers who gave birth. *See, e.g.*, *Carson v. Heigel*, No. CV 3:16-0045-MGL, 2017 WL 624803, at *2 (D.S.C. Feb. 15, 2017); *Roe v. Patton*, No. 2:15-CV-00253-DB, 2015 WL 4476734, at *3 (D. Utah July 22, 2015); *Gartner v. Iowa Dep't of Pub. Health*, 830 N.W.2d 335, 353-54 (Iowa 2013). Courts have also reached a similar conclusion outside the context of birth certificates. *See, e.g.*, *In re Parental Responsibilities of A.R.L.*, 318 P.3d 581, 587 (Colo. App. 2013) (construing parentage provisions to apply equally to men and women who hold out a child as their own because any contrary interpretation would raise equal protection concerns); *Chatterjee*, 280 P.3d at 288; *Shineovich*, 214 P.3d at 40.

Third and finally, refusing to recognize LC as a presumed parent would also violate the Child's right to equal protection by discriminating against him because he has a non-biological parent. The U.S. Supreme Court has held that laws that discriminate against children based on the circumstances of their birth are unconstitutional unless they are substantially related to an important governmental objective. *Clark v. Jeter*, 486 U.S. 456, 461 (1988). It has repeatedly struck down state laws that burdened or disadvantaged children born to unmarried parents as well

as other children based on the circumstances of their birth. *See, e.g.*, *Trimble v. Gordon*, 430 U.S. 762 (1977) (striking down statute that prohibited non-marital children from inheriting from their father unless their parents had married); *Weber v. Aetna Cas. & Surety Co.*, 406 U.S. 164 (1972) (striking down worker's compensation statute that denied benefits to unacknowledged non-marital children); *Levy v. Louisiana*, 391 U.S. 68 (1968) (striking down statute that prevented non-marital children from bringing a wrongful death action); *Plyler v. Doe*, 457 U.S. 202, 220 (1982) (excluding undocumented immigrant children from public education violated the children's right to equal protection). "Denying the children [of same-sex parents] an opportunity to have two parents, the same as children of a [different-sex] marriage, impinges upon the children's constitutional rights." *Frazier*, 295 P.3d at 557.

There is no legitimate reason, let alone a substantial or a compelling reason, to carve out individuals like LC from their parental rights and responsibilities. The Child's right to financial support from both LC and MG, for example, is no less significant than for children who are genetically related to both of their parents. There is "no reason for children to be penalized because of the decisions that their parents make, legal or otherwise." *Chatterjee*, 280 P.3d at 292. And a child's "need for love and support is no less critical because her second parent also happens to be a woman." *Id.* Recognizing LC as a presumed parent is necessary to avoid these grave constitutional concerns.

## II. It Was Not Clearly Erroneous for the Family Court to Find That LC Failed to Rebut the Presumption of Parentage.

### A. LC Failed To Produce Clear and Convincing Evidence That She Did Not Consent to the Conception of the Child.

The Family Court correctly concluded that LC failed to meet her burden of proving, by clear and convincing evidence, that she did not consent to the Child's conception. To disturb that factual finding on appeal, LC must show either that (1) the record lacks substantial supporting evidence, which is evidence of sufficient quality and probative value to enable a person of reasonable caution to support the finding, or (2) despite such evidence, one is left with a "definite and firm conviction" that a mistake has been made. *Balogh v. Balogh*, 134 Hawai‘i 29, 38, 332 P.3d 631, 640 (2014). She has shown neither.

As a threshold matter, the Family Court did not err in holding that, where a birth mother becomes pregnant as a result of anonymous donor sperm, the birth mother's spouse can rebut the presumption of parentage only with clear and convincing evidence that the spouse did not consent

to the child's conception. Other courts have similarly focused on the issue of consent under analogous circumstances involving assisted reproduction. *See, e.g.*, *Gardenour v. Bondelie*, 60 N.E.3d 1109, 1118-20 (Ind. App. 2016) (holding that a same-sex couple were in a spousal relationship based on their registered domestic partnership and that both were legal parents where evidence showed that they had jointly planned for artificial insemination); *Laura WW. v. Peter WW.*, 856 N.Y.S.2d 258, 263 (N.Y. App. Div. 2008) (holding that there was a rebuttable presumption of consent to wife's assisted reproduction); *In re Baby Doe*, 353 S.E.2d at 878-79 (finding that a husband who consents to wife's use of assisted reproduction—whether consent is express or implied from "conduct which evidences knowledge of the procedure and failure to object"—bears all the legal responsibility of parentage, including child support); *K.S. v. G.S.*, 440 A.2d 64, 68-69 (N.J. Ch. 1981) (finding that husband had not shown clear and convincing evidence that he rescinded his initial consent to wife's use of assisted reproduction).

On appeal, LC fails to show that the Family Court was clearly erroneous in its key finding: she "did not meet her burden of proving by clear and convincing evidence that she did not consent to [MG] undergoing the artificial insemination procedure that resulted in her pregnancy and the birth of the Child." Dkt 14 at 118 (FOF 108). Indeed, LC again relies primarily on her purported *legal* argument that "because [] she is not a man married to a woman when the Child was born," the marital presumption has not been triggered. LC Br. at 27. That argument fails for the reasons noted above.

The evidence to support the Family Court's factual finding regarding consent (i.e., that LC had failed to show clear and convincing proof that she did not consent) was not merely "substantial"; it was devastating. The conception of the Child was not spontaneous: there was a lengthy, documented history of joint action by LC and MG that both predated and postdated his conception, all evidencing LC's consistent consent. As discussed above, this includes: joint discussion about the couple's mutual desire to become parents; joint selection and engagement of fertility clinics; joint participation in psychological counseling to assess parental fitness financed by LC; joint selection of anonymous donor sperm; multiple written and verbal promises by LC to support MG and their Child; MG informing LC about the upcoming IUI procedure and LC's positive written response; the discussion between MG and LC regarding the timing of a pregnancy test; LC's repeated written references to the Child as "our" child and "my" child; LC's independent communication with medical staff regarding the pregnancy; LC's participation in the

baby shower; LC's notes, postcards, and gifts to MG and the Child; and joint participation in Lamaze classes, pregnancy-related medical appointments, and touring of the Child's birthing facility.

For example, the text message exchange from April 2017, Dkt 14 at 145-48, in which LC expressed gratitude to MG for carrying "our child" provides significant support the Family Court's factual findings standing alone. Taken together, the evidence in the record well exceeds what appellate courts have found constitutes substantial evidence as a general matter, and that is particularly true here, where LC needed to show clear and convincing evidence to satisfy her burden below. *See, e.g.*, *Balogh*, 134 Hawai'i at 38, 332 P.3d at 640 (finding substantial evidence based merely on party's own testimony, despite competing testimony by the other side); *Matter of Adoption of H.A.*, -- P.3d --, 2017 WL 1535376, at *15 (Haw. App. 2017) (finding that "[a]lthough conflicting testimony and evidence was presented . . . there is substantial evidence in the record to support the Family Court's findings, and there is no clear error").

Once the Family Court's credibility determinations are factored into the analysis, there is no way for LC to succeed in disturbing the factual findings at issue here. In short, the Family Court found that LC was not credible in material aspects of her testimony, calling into question her veracity and reliability as a witness in general. For example, the Family Court found that the centerpiece of LC's entire case—her testimony that prior to the IUI, she "clearly verbally informed [MG] that she objected to [MG's] attempt to get pregnant at that time"—was simply "not credible." Dkt 14 at 112 (FOF 76). Additionally, the Family Court found "no credible evidence" that LC sent a letter to the couple's first fertility clinic withdrawing her consent when she claimed she had done so, despite LC's testimony to the contrary. *Id.* at 111 (FOF 69).

LC is not the first parent to try to evade her parental obligations by arguing that she did not consent to her spouse's assisted reproduction; but other courts have similarly seen through and rejected such baseless attempts on even less robust factual records than that here. For example, in *Laura WW.*, the husband testified that he repeatedly told his wife that he did not think utilizing assisted reproduction to get pregnant was a good idea, that he did not want another child, and that he thought they needed counseling. 856 N.Y.S.2d at 263. Nevertheless, he did not testify that should a child be conceived as a result of assisted reproduction, he would not accept the child as his own. *Id.* Under those circumstances, the court found that he had not rebutted the

presumption with clear and convincing evidence. *Id.* The facts here are even stronger: LC affirmatively promised that she was "going to always be here for [her] family." Dkt 24 at 91:4-6.

Similarly, in *Engelking v. Engelking*, 982 N.E.2d 326, 328 (Ind. App. 2013), a husband argued that there was insufficient evidence to support the lower court's factual finding that he consented to his wife's artificial insemination. His wife testified that he knew of the artificial insemination, helped her conduct research to plan for it, and was involved with the choice of sperm donor. The husband disputed her testimony. The appellate court refused to disregard the wife's testimony in favor of his own because, as is true here, assessment of credibility was squarely within the province of the lower court.

Likewise, in *K.S. v. G.S.*, 440 A.2d at 68-69, the court found that a husband had not shown clear and convincing evidence that he rescinded his initial consent to his wife's use of assisted reproduction. It reached this conclusion despite the husband's testimony (1) disputing his wife's contention that he had encouraged her use of assisted reproduction following a miscarriage, and (2) claiming that he had told his wife to discontinue assisted reproduction because of the associated financial cost, as evidenced by overdrafts on their checking account. *Id.* at 66. The court found his testimony was not credible and inconsistent with the fact that he had accompanied her to the medical office where the insemination would be performed. *Id.* It also noted that he had never informed the medical office of his reservations regarding the insemination. *Id.* Here, as well, the Family Court deemed LC's central testimony to be not credible. Dkt 14 at 112 (FOF 76). It also found that she had previously accompanied MG to the fertility clinic where MG underwent IUI and that LC never informed the clinic of her purported non-consent at any point prior to the IUI or the birth of the Child. *Id.* at 106 (FOF 30), 112 (FOF 74).

Additionally, LC's attempts to factually distinguish cases dealing with legal provisions other than the marital presumption of parentage also miss the mark. For example, she argues that this case is unlike *A.A. v. B.B.*, 139 Hawai‘i 102, 384 P.3d 878 (2016). LC Br. at 28-29. But that case involved an *unmarried* same-sex couple and the application of a de facto custody statute, HRS § 571-46(a)(2), which entails an analysis into "the best interests of the child based on the entirety of the evidence presented." *A.A.*, 139 Hawai‘i at 107, 384 P.3d at 883. Here, the only relevant factual predicate for application of the marital presumption of parentage is undisputed: LC and MG were married when MG gave birth to the Child. Furthermore, evenhanded application of that presumption unquestionably serves the best interests of all children. As this

case illustrates, the Child would be far better served by having two parents who bear legal responsibility for financially supporting him. LC's status as a legal parent also provided a basis for the Family Court to make an individualized determination as to whether custody and visitation by LC would serve the best interests of the Child.

Throughout her brief, LC argues that she should not be recognized as a legal parent because she has never even met the Child. In that sense, she is no different than any number of legal parents who have also never met or formed meaningful relationships with their children for whatever reason. But legal parents do not have the ability to cast off their child support responsibilities by, for example, simply pointing to the quality of their relationship with their children. Indeed, aside from being unsupported by the UPA, such a rule would discourage those wishing to avoid parental responsibilities from establishing meaningful relationships with their children. That would undermine the welfare of the very children whom the UPA seeks to protect.

### B. This Family Court's Conclusion That LC Failed to Rebut the Presumption of Parentage Is Independently Supported by Equitable Estoppel.

The Family Court's determination that LC failed to rebut the presumption of parentage may also be affirmed, in the alternative, on the basis of equitable estoppel, because LC caused MG to erroneously believe—to MG's detriment—that they would raise the Child together and that LC would provide support for the Child. Although the Family Court relied on the UPA as a "starting point" for its analysis, it noted that the UPA "is not the exclusive means for determining how a parent-child relationship may be established." Dkt 14 at 113. As support for that proposition, the Family Court relied on *Doe*, 99 Hawai'i at 5, 52 P.3d at 259, and *Inoue*, 118 Hawai'i at 86—both of which held that a party could be estopped from rebutting the parentage of a presumed parent. Dkt 14 at 113. That is consistent with the language of the UPA itself, which permits a presumption of parentage to be rebutted only in an "appropriate action." HRS § 584-4(b).

While the Family Court did not expressly invoke the doctrine of equitable estoppel, "[i]t is well settled . . . that the appellate court may affirm a lower court's decision on any ground in the record supporting affirmance, even if not cited by the lower court." *Kiehm v. Adams*, 109 Hawai'i 296, 301, 126 P.3d 339, 344 (2005). Indeed, courts have recognized that equitable estoppel is "an alternative avenue" for reaching the same result of precluding a spouse from rebutting parentage where the circumstances merit that outcome. *Laura WW.*, 856 N.Y.S.2d at 264.

Equitable estoppel is warranted where one person willfully causes another person to erroneously believe a certain state of affairs to his or her detriment. *Inoue*, 118 Hawai'i at 97, 185 P.3d at 845. Estoppel expresses "the law's distaste for inconsistent actions and positions—like consenting to an act which brings a child into existence and then turning around and disclaiming any responsibility." *In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d at 287 (analyzing efforts by parents to evade child support obligations for children conceived through artificial insemination based on the absence of biological ties). That is precisely what happened here.

Based on LC's words and conduct, equitable estoppel may be appropriately applied to prevent her from rebutting her presumed parentage. It was precisely because of LC's assurances of "always" being there to support MG and the Child that MG felt comfortable about their joint decision to have MG to proceed with assisted reproduction and carry the Child. During the couple's visit to the fertility clinic in Hawai'i, LC promised MG that LC was "going to always be here for [her] family." Dkt 24 at 91:4-6. LC repeated that same promise to MG in writing two more times.[11] Dkt 14 at 506 ("I will always be here for our Family."); *id.* at 147 ("I will be there for our child no matter what."). MG proceeded with the IUI based on her reasonable belief that she and LC would jointly raise the child together.

The detrimental reliance that MG experienced here is of a similar quality as that present in other equitable estoppel cases. *See Inoue*, 118 Hawai'i at 98 (finding that the presumed father detrimentally relied on statements by the mother that he would be treated as the legal father by virtue of having consented to be listed on the child's birth certificate and thereby failed to take further steps to secure his parental relationship); *Laura WW.*, 856 N.Y.S.2d at 263-64 (finding that a husband failed to ever inform his wife that he would not accept the child as his own if she proceeded with artificial insemination); *McLaughlin*, 382 P.3d at 566 (noting that the couple

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[11] The Family Court's award of child support is independently supported by these written statements, regardless of whether LC is deemed a legal parent. HRS § 584-22 provides that "[a]ny promise in writing to furnish support for a child, growing out of a supposed or alleged father and child relationship, shall not require consideration and shall be enforceable according to its terms." As with other UPA provisions, this section must be construed in a gender-neutral manner. HRS § 584-21. Furthermore, even absent a legal parent-child relationship, courts have also held that obligations of financial support can be imposed based on conduct evincing consent to bring a child into existence through assisted reproduction. *See In re Parentage of M.J.*, 787 N.E.2d 144, 152 (Ill. 2003) (collecting cases).

entered into a parenting agreement contemplating that each would have equal parenting rights and the non-biological mother thus stayed home to care for the child).

Under the factual circumstances here, it would similarly be inequitable and unjust to permit LC to rebut her status as a presumed parent. Having taken steps with MG to bring the Child into this world, LC must also bear the accompanying responsibilities of her actions.

## CONCLUSION

In affirming the ruling below, this Court would simply give legal effect to what LC presciently acknowledged was true before the birth of the Child: "a family is a family ready made or not." Dkt 14 at 147. For the foregoing reasons, MG respectfully requests that this Court affirm the Family Court's conclusion that LC is a presumed parent under the UPA because she was married to MG when the Child was born and further affirm that LC either failed to rebut the presumption of parentage with clear and convincing evidence that she did not consent to the conception of the Child or is equitably estopped from rebutting the presumption. There is accordingly no basis to reverse or vacate the Family Court's award of child support. Finally, MG reserves the right to seek reasonable attorneys' fees and costs stemming from this appeal pursuant to HRS § 584-16.

DATED: Honolulu, Hawai'i, July 7, 2017.

/s/ Christopher D. Thomas
Christopher D. Thomas
Law Office of Christopher D. Thomas

Peter C. Renn
Lambda Legal Defense and Education Fund, Inc.

Appellate Attorneys for Respondent-Appellee MG

CAAP-16-0000837

IN THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAI'I

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| LC,<br><br>Petitioner-Appellant,<br><br>vs.<br><br>MG and Child Support Enforcement Agency,<br><br>Respondents-Appellees. | FC-P NO. 16-1-6009<br><br>APPEAL FROM THE DECISION AND ORDER FILED NOVEMBER 1, 2016<br><br>FAMILY COURT, FIRST CIRCUIT<br><br>HON. MATTHEW J. VIOLA |

**STATEMENT OF RELATED CASES**

Respondent-Appellee MG is unaware of any further related cases beyond those identified in the Statement of Related Cases submitted by Petitioner-Appellant LC.

DATED: Honolulu, Hawai'i, July 7, 2017.

/s/ Christopher D. Thomas
Christopher D. Thomas
Law Office of Christopher D. Thomas

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the above *Answering Brief of Respondent-Appellee MG* was served upon the following, in the manner and on the date indicated below:

| | |
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| LAW OFFICE OF<br>REBECCA A. COPELAND, LLC<br>REBECCA A. COPELAND<br>1170 Nuuanu Ave., #372041<br>745 Fort Street, Suite 1201<br>Honolulu, HI 96837<br>rebecca@copelandlawllc.com<br><br>Attorney for Petitioner-Appellant LC | Via JEFS |

TRACIE M. KOBAYASHI Via JEFS
Deputy Attorney General
Department of the Attorney General
Family Support Branch
680 Iwilei Road, Suite 400
Honolulu, HI 96817

Attorney for Appellee Child Support Enforcement
Agency, State of Hawai'i

DATED: Honolulu, Hawai'i, July 7, 2017.

/s/ Christopher D. Thomas
Christopher D. Thomas
Law Office of Christopher D. Thomas

Peter C. Renn
Lambda Legal Defense and Education Fund, Inc.

Appellate Attorneys for Respondent-Appellee MG