CAAP-16-0000837

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

LC, Petitioner-Appellant, vs. MG, Defendant-Appellee,	FC-P NO. 16-1-6009 ON APPEAL FROM THE: DECISION AND ORDER, FILED NOVEMBER 1, 2016 FAMILY COURT, FIRST CIRCUIT HONORABLE MATTHEW J. VIOLA, JUDGE

STATE OF HAWAII'S UNOPPOSED MOTION FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF

MEMORANDUM IN SUPPORT OF MOTION

DECLARATION OF CLYDE J. WADSWORTH

EXHIBIT "A"

CERTIFICATE OF SERVICE

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STATE OF HAWAII'S UNOPPOSED MOTION FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF

The State of Hawai'i respectfully requests leave from the Court to file an amicus curiae brief in support of Defendant-Appellee MG in this matter regarding the proper construction and enforcement of Hawaii's marital presumption of parentage, HRS § 584-4(a)(1) (the "marital presumption"), and the Hawai'i Marriage Equality Act of 2013 (the "Marriage Equality Act"). Petitioner-Appellant LC does not oppose the motion. *See* Wadsworth Decl. ¶ 4.

As set forth in the attached memorandum, the State has a strong interest in ensuring that the marital presumption and the Marriage Equality Act are properly construed and enforced. As the State argues in its proposed amicus brief, attached hereto as Exhibit "A," the Marriage Equality Act and controlling Supreme Court precedent require that the marital presumption be applied equally, in a gender-neutral manner, to both same-sex and opposite-sex married couples, contrary to the argument advanced by Petitioner-Appellant LC.

The State files this motion pursuant to Rule 28(g) of the Hawai'i Rules of Appellate Procedure; the motion is supported by the attached memorandum, declaration, and exhibit, and the records and files in this matter.

DATED: Honolulu, Hawai'i, July 14, 2017.

Respectfully submitted,

CLYDE J. WADSWORTH

Counsel for Amicus Curiae
State of Hawai'i

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MEMORANDUM IN SUPPORT OF MOTION

Pursuant to Rule 28(g) of the Hawai'i Rules of Appellate Procedure, the State of Hawai'i respectfully requests leave to file an amicus curiae brief in the above-captioned matter.[1] The State's proposed brief is attached hereto as Exhibit "A."

This appeal asks whether married same-sex couples have the same parental rights and responsibilities as married opposite-sex couples, and relatedly, whether their children must have the same opportunity to receive child support. These questions implicate the State's strong interest in ensuring that the marital presumption of parentage—which many same-sex couples and their children rely upon to secure their legal relationships—is properly construed and applied. This is particularly important following Hawaii's 2013 adoption of the Marriage Equality Act, which demands that there be no legal distinction between same-sex and opposite-sex married couples with respect to marriage under state law, and that gender-specific

[1] Rule 28(g) gives the Attorney General an automatic right to file an amicus brief when the constitutionality of any state statute is drawn into question. Although this case raises important questions of public interest, including constitutional issues, it does not expressly draw the constitutionality of a state statute into question, and the State thus moves for permission to file its amicus brief.

terminology in the law be construed in a gender-neutral manner. The State has a powerful interest in upholding the constitutional principles of due process and equal protection that animate the Marriage Equality Act, and in furthering the public policies that underlie HRS Chapter 584, including preservation of the parent-child relationship, encouragement of parental responsibility, and protection of the public fisc. The proposed amicus brief offers the State's legal perspective on these issues, as they relate to the proper construction of the marital presumption and the Marriage Equality Act.

For these reasons, the State of Hawai'i respectfully requests leave to file the amicus brief attached hereto as Exhibit "A."

DATED: Honolulu, Hawai'i, July 14, 2017.

Respectfully submitted,

CLYDE J. WADSWORTH

Counsel for Amicus Curiae
State of Hawai'i

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DECLARATION OF CLYDE J. WADSWORTH

I, Clyde J. Wadsworth, declare that:

1. I am the Solicitor General of the State of Hawai'i, and counsel for Amicus Curiae State of Hawai'i (the "State").

2. Unless otherwise stated, I make this declaration based on my personal knowledge and am competent to testify as to the matters stated herein.

3. Attached hereto as Exhibit "A" is a true and correct copy of the State's proposed amicus brief in the above-captioned matter.

4. On July 12, 2017, I informed Rebecca A. Copeland, appellate counsel for Petitioner-Appellant LC, that the State intended to file a motion for leave to file an amicus curiae brief in support of Defendant-Appellee MG in this matter regarding the construction and enforcement of Hawaii's marital presumption of parentage, HRS § 584-4(1)(1), and the Hawai'i Marriage Equality Act of 2013. Counsel stated that Petitioner-Appellant LC does not oppose the motion.

I declare under penalty of perjury that the foregoing is true and correct.

DATED: Honolulu, Hawai'i, July 14, 2017.

CLYDE J. WADSWORTH

CAAP-16-0000837

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STATE OF HAWAII'S AMICUS BRIEF

CERTIFICATE OF SERVICE

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EXHIBIT "A"

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I. INTRODUCTION

This appeal asks whether married same-sex couples have the same parental rights and responsibilities as married opposite-sex couples, and relatedly, whether their children must have the same opportunity to receive child support. Because the Hawai'i Marriage Equality Act and controlling Supreme Court precedent require just that, the State of Hawai'i urges this Court to construe and apply Hawaii's marital presumption of parentage in a gender neutral manner, as did the court below. Whether male or female, the spouse of a woman who delivers a child must be deemed the presumptive legal parent of the child pursuant to HRS § 584-4(a)(1) (the "marital presumption"), regardless of any genetic link to the child.

The State has a strong interest in ensuring that the marital presumption and the Marriage Equality Act are properly construed and enforced. The State has a related powerful interest in upholding the constitutional principles of due process and equal protection that animate the Marriage Equality Act, as well as the important public policies that underlie HRS Chapter 584, including preserving parent-child relationships, encouraging parental responsibility and protecting the public fisc.

Here, there is no dispute that Petitioner-Appellant LC and Defendant-Appellee MG were legally married when their child (the "Child") was born. The Marriage Equality Act makes clear that "all gender-specific terminology" regarding marriage must be construed in a gender-neutral manner. HRS § 572-1. "All" means all. The family court thus properly applied the marital presumption in a gender-neutral manner and correctly ruled that LC is the presumptive legal parent of the Child.[1]

II. STATEMENT OF THE CASE

LC and MG were a married same-sex couple when the Child, conceived through anonymous sperm donation, was born. (Dkt. 14 at 104, 109, 112.) After filing for divorce, LC filed a petition in the family court seeking to disestablish her parentage and avoid child support obligations, in part because MG, who delivered the Child, is also female. (*Id.* at 103.) But if LC had been a man, parental status would have been

[1] LC also argues on appeal that even if the marital presumption applies to her, she has rebutted the presumption by clear and convincing evidence pursuant to HRS § 584-4(b). The State takes no position on the family court's finding that LC failed to show by clear and convincing evidence that she did not consent to MG's pregnancy.

presumed under the marital presumption – without regard to biology – because LC was married to the Child's mother when the Child was born. *See infra* Section III.A. The family court ruled in favor of MG, finding that the marital presumption applied and that LC had not rebutted the presumption with clear and convincing evidence that she did not consent to the pregnancy. (Dkt. 14 at 116-18.) The court also ordered LC to pay child support. (*Id.* at 119.)

On appeal, LC is arguing in part that the marital presumption does not apply to married same-sex couples because as a woman, LC could never be a "father" under HRS Chapter 584, and there must be a biological connection to the child in order for an individual to be deemed a parent. (*E.g.*, Dkt. 39 at 7, 11-12, 14-26.) If that interpretation were adopted, it could have serious negative consequences for same-sex couples across Hawai'i and their children who rely on the marital presumption to secure their legal relationships to one another. This is particularly true following: (1) Hawaii's 2013 adoption of the Marriage Equality Act, which demands there be no legal distinction between same-sex and opposite-sex married couples with respect to marriage under state law, and that gender-specific terminology in the law be construed in a gender-neutral manner; and (2) the Supreme Court's decisions in *Obergefell v. Hodges,* 135 S. Ct. 2584, 2605 (2015), and *Pavan v. Smith*, 137 S. Ct. 2075, 2076 (2017), which ruled that the Constitution entitles same-sex couples to civil marriage "on the same terms and conditions as opposite-sex couples," including those related to parentage.

Because of its strong interests in this matter, the State respectfully submits this amicus brief regarding the proper construction and enforcement of the marital presumption and the Marriage Equality Act.[2]

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[2] As a nominal appellee under HRAP Rule 2.1, Appellee Child Support Enforcement Agency, State of Hawaii ("CSEA"), filed a Statement of No Position in this appeal on May 1, 2017. CSEA did so because "[it] was a named party for the limited issue of child support in the Family Court . . ., [it] did not actively participate in the case, and therefore has no interest in the outcome of [LC's] appeal . . . ." (Dkt. 41.) Nevertheless, the State as a whole has the strong interest in proper statutory construction and enforcement identified above. And even if CSEA's Statement of No Position were viewed (paradoxically) as a "position," the Attorney General's office may represent separate interests. *See State v. Klatenhoff*, 71 Haw. 598, 603-05, 801 P.2d 548, 551-52 (1990).

III. ARGUMENT

Hawaii's version of the Uniform Parentage Act ("UPA") – as construed in accordance with the later Marriage Equality Act and controlling Supreme Court precedent – governs the determination of parentage in this case. *See* UPA, 1975 Haw. Sess. L. Act. 66, at 115-26 (codified at HRS Chapter 584); Marriage Equality Act, 2013 Haw. Sess. L., 2d Sp. Sess., Act 1, at 1-8 (codified at HRS Chapter 572).

As shown below in Section A, the male spouse of a woman who delivers a child is the presumptive legal parent of the child pursuant to the UPA, HRS § 584-4(a)(1) (*i.e.*, the marital presumption), regardless of any genetic link to the child. As shown in Sections B and C, respectively, the Marriage Equality Act and the Supreme Court's decisions in *Obergefell* and *Pavan* require that the marital presumption be applied equally, in a gender-neutral manner to both same-sex and opposite-sex married couples.[3] Because LC and MG were legally married when the Child was born, LC is the presumptive legal parent of the Child.

A. Under the Marital Presumption, the Spouse of a Woman Who Delivers a Child Is the Presumptive Legal Parent, Regardless of Any Genetic Link to the Child

Enacted in 1975, well before the Marriage Equality Act, the UPA used gender-specific language at a time when marriage was restricted to opposite-sex couples. Thus, HRS § 584-1 defines the "parent and child relationship" as follows:

> [A] 'parent and child relationship' includes the legal relationship existing between a child and the child's natural mother, **between a child and father whose relationship as parent and child is**

---

[3] LC's Opening Brief construes the UPA in virtual isolation (*see* Dkt. 39 at 19-22), ignoring fundamental principles of statutory construction. In determining a statute's meaning, courts "take into consideration subsequent action of the legislature, or the interpretation which the legislature subsequently places upon the statute. There are no principles of construction which prevent the utilization by the courts of subsequent enactments or amendments as an aid in arriving at the correct meaning of a prior statute, and it is very common for a court, in construing a statute, to refer to subsequent legislation as impliedly confirming the view which the court has decided to adopt." *Territory of Hawaii v. Yamamoto*, 39 Haw. 556, 565 (Haw. Terr. 1952) (quoting *Gomes v. Campbell*, 37 Haw. 252, 257 (Haw. Terr. 1945)). *See Parel v. Dep't of Human Servs.*, No. CAAP-13-0005495, 2017 WL 237668, at *9 (App. Jan. 19, 2017) (mem.) (also quoting *Gomes*). *See also* HRS § 1–16 ("Laws in pari materia, or upon the same subject matter, shall be construed with reference to each other. What is clear in one statute may be called upon in aid to explain what is doubtful in another.")

> **established under this chapter**, or between a child and the child's adoptive parents, incident to which the law confers or imposes rights, privileges, duties, and obligations.

HRS § 584-1 (emphasis added). *See id.* § 584-21 ("[i]nsofar as practicable, the provisions of this chapter applicable to the father and child relationship shall apply" to an action to determine the existence or nonexistence of a mother and child relationship).

HRS § 584-4(a), in turn, establishes several legal presumptions that are employed in determining a child's "legal father." *Doe v. Doe*, 99 Hawai'i 1, 4-5, 52 P.3d 255, 258-59 (2002). That section states in relevant part:

> (a) A man is presumed to be the natural father of a child if:
>
> (1) **He and the child's natural mother are or have been married to each other and the child is born during the marriage**, . . . ;
>
> (2) Before the child's birth, he and the child's natural mother have attempted to marry each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid . . . ;
>
> (3) After the child's birth, he and the child's natural mother have married, or attempted to marry, each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and;
>
> . . .
>
> (B) With his consent, he is named as the child's father on the child's birth certificate; or
>
> . . .
>
> (4) While the child is under the age of majority, he receives the child into his home and openly holds out the child as his natural child;
>
> (5) . . ., he submits to court ordered genetic testing and the results, . . . do not exclude the possibility of his paternity of the child; . . .; **or**
>
> (6) A voluntary, written acknowledgment of paternity of the child signed by him under oath is filed with the department of health. . . .

Id. (emphasis added). Section 584-4(b) makes each of these presumptions rebuttable "in an appropriate action only by clear and convincing evidence."

In *Doe*, the Hawai'i Supreme Court examined the underlying purposes of Chapter 584 and, specifically, Section 584-4(a)'s presumptions. 99 Hawai'i at 7-8, 52 P.3d at 261-62. Rejecting a genetic-centric reading of those presumptions, the court ruled that a birth mother was precluded from bringing a paternity action against her son's alleged biological father, where the child's presumed legal father had been determined in a prior divorce decree. *Id.* at 11, 52 P.3d at 265. The presumed legal father had been married to the birth mother when the child was born. When he and the mother later divorced, a divorce decree determined that he was the child's father and ordered him to pay child support. *Id.* at 11, 52 P.3d at 265. In light of that determination, the court held that the mother was barred by the doctrine of issue preclusion from bringing an action against the alleged biological father to establish his paternity under HRS § 584-6. *Doe*, 99 Hawai'i at 11, 52 P.3d at 265.

In reaching this conclusion, the court stated:

> The fundamental purposes of [C]hapter 584 are "to provide substantive legal equality for all children regardless of the marital status of their parents" and to protect the rights and ensure the obligations of parents of children born out of wedlock. . . . The substantive legal rights that illegitimate children were denied in many states included such rights as the right to intestate succession, the right to benefit from a statutory cause of action typically accorded to legitimate children, and **the right to be the beneficiary of child support from the father**.

Id. at 7, 52 P.3d at 261 (emphasis added). To protect these rights, Chapter 584 "establish[ed] a means by which to identify **the person** (usually the father) against whom these rights may be asserted." *Doe*, 99 Hawai'i at 8, 52 P.3d at 262 (citing UPA Prefatory Note, 9B U.L.A. at 379). In short, the purpose of Chapter 584 "is to ensure that every child, to the extent possible, has an identifiable **legal** father." *Id.* (emphasis added). *See Inoue v. Inoue*, 118 Hawai'i 86, 100 n.13, 185 P.3d 834, 848 n.13 (App. 2008) (recognizing this same purpose).

The court made clear, however, that a child's legal parent need not be her biological parent: "Although this goal [of ensuring an identifiable legal father] will usually overlap with the desire of a child to know the identity of his or her biological father, **the two are not always the same**." *Doe*, 99 Hawai'i at 8, 52 P.3d at 262 (emphasis added). Indeed, the presumption of parentage under HRS 584-4(a) is not

necessarily biologically based. Of the six circumstances specified in subsection (a) that give rise to the presumption of parentage, only subsection (a)(5) (the genetic testing presumption) is based on establishing a biological connection with the child through scientific testing. In contrast, subsection (a)(1) presumes parentage if the child is born during the marriage; it does not require a biological connection between parent and child through biological testing. Similarly, subsections (a) (2), (3), (4) and (6) do not require a biological link with the child. Rather, parentage under the latter three subsections is based on the presumed parent's declared intent to be the child's parent and thereby assume the responsibility of supporting the child. *See, e.g., Inoue,* 118 Hawai'i at 86 (even clear and convincing evidence that the presumed father was not in fact the biological father was not enough to rebut the presumption of a parent/child relationship under HRS § 584-4(a)(3)(B) and (a)(4)).

Moreover, the court in *Doe* emphasized that HRS § 584-4(a)'s "genetic testing presumption is **not** more important than the other presumptions," which are not based on genetics. 99 Hawai'i at 8, 52 P.3d at 262 (emphasis added). The court observed that if a presumed father whose paternity had been established could initiate an action to disestablish paternity at any time, even in the absence of another identifiable legal father, "the result would be to leave a child with no identifiable legal father—particularly if the genetic testing presumption of HRS § 584-4(a)(5) 'controlled.' The legislature most certainly did not intend such a result in adopting the UPA as codified in chapter 584."[4] *Id.* at 9, 52 P.3d at 263.

Accordingly, under Hawai'i law, legal parenthood signifies more than biologically established parenthood. In particular, the marital presumption is intended in part to assure that two parents will be required to provide support for a child born during marriage. *See Doe*, 99 Hawai'i at 8, 52 P.3d at 262 (Chapter 584 establishes a means to identify "the person" against whom a child's rights, including the right to receive child support, may be asserted).

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[4] In her Opening Brief, LC quotes the **dissent** in *Doe* to argue that a "child's genetic parentage" is the "overarching consideration in analyzing whether or not someone is a child's [legal] parent." (Dkt. 39 at 12.) The majority in *Doe* flatly rejected that proposition. *See* 99 Hawai'i at 8, 52 P.3d at 262.

It is therefore beyond question that the **male** spouse of a woman who delivers a child is the presumptive legal parent of the child pursuant to Section 584-4(a)(1), regardless of any genetic link to the child. Although rebuttable, this presumption applies even where the child is conceived through artificial insemination by donor (AID) during marriage.[5] Otherwise, the presumed father could initiate an action to disestablish paternity at any time based solely on his lack of a genetic link to the child, even in the absence of another identifiable legal father/parent. The legislature "most certainly did not intend such a result." *Doe*, 99 Hawai'i at 9, 52 P.3d at 263.

Accordingly, the only question is whether the **female** spouse of a woman who delivers a child is the presumptive legal parent of the child pursuant to Section 584-4(a)(1), regardless of any genetic link to the child. The Marriage Equality Act and the Supreme Court's decisions in *Obergefell* and *Pavan* answer that question.

B. Under the Marital Presumption, in Accord With the Marriage Equality Act, LC Is the Presumptive Legal Parent of the Child

In enacting the Marriage Equality Act, the legislature expressly stated its intent to "[e]nsure that there be no legal distinction between same-sex married couples and opposite-sex married couples with respect to marriage under the laws of this State by applying **all** provisions of law regarding marriage equally to same-sex couples and opposite-sex couples regardless of whether this Act does or does not amend any particular provision of law[.]" 2013 Haw. Sess. L., 2d Sp. Sess., Act 1, at 1 (emphasis added). To effectuate its intent, the legislature adopted HRS 572-1, which specifically provides:

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[5] Consistent with Hawaii's strong presumption of legitimacy and the compelling public policy of protecting children conceived through AID, the modern view of other jurisdictions is that the marital presumption of legal parentage incorporates a rebuttable presumption of consent to the artificial insemination. Only clear and convincing evidence can rebut the presumption of consent and therefore legal parentage. *See, e.g., Laura WW. v. Peter WW.*, 51 A.D. 3d 211 (N.Y. 2008) ("consistent with our State's strong presumption of legitimacy, as well as the compelling public policy of protecting children conceived via AID, we follow the lead of other jurisdictions that impose a rebuttable presumption of consent by the husband of a woman who conceives by AID, shifting the burden to the husband to rebut the presumption by clear and convincing evidence") (citing cases); *K.S. v. G.S.*, 182 N.J. Super. 102, 109, 440 A.2d 64, 68 (1981) ("[p]ublic policy considerations seeking to prevent children born as a result of AID procedures from becoming public charges or being bastardized require that a presumption of consent exist and that a strong burden be placed on one seeking to rebut the resumption").

> **Interpretation of terminology to be gender-neutral.** When necessary to implement the rights, benefits, protections, and responsibilities of spouses under the laws of this State, **all** gender-specific terminology, such as "husband", "wife", "widow", "widower", or similar terms, shall be construed in a gender-neutral manner. This interpretation shall apply to **all** sources of law, including statutes, administrative rules, court decisions, common law or any other source of law.

HRS § 572-1 (some emphasis added).

"All" means all. The marital presumption of parentage embodied in HRS § 584-4(a)(1) is plainly a provision of state law "regarding marriage." 2013 Haw. Sess. L., 2d Sp. Sess., Act 1, at 1. Indeed, variations of the word "marriage" appear three times in the single-sentence provision. *See* HRS § 584-4(a)(1) ("A man is presumed to be the natural father of a child if: (1) He and the child's natural mother are or have been **married** to each other and the child is born during the **marriage**, or within three hundred days after the **marriage** is terminated . . . [.]") (emphasis added). Because the marital presumption is a "provision[] of law regarding marriage," there can be no question that the legislature intended for it to be applied "equally to same-sex couples and opposite-sex couples." Act 1, 2013 Haw. Sess. Laws, 2d Sp. Sess., at 1.

The express language of HRS § 572-1 achieves that purpose here. A gender-neutral interpretation of the marital presumption is "necessary to implement the rights, benefits, protections, and responsibilities of spouses under the laws of this State" – most notably here, the responsibility of spouses to provide for children born during their marriage, regardless of biology. *See Doe*, 99 Hawai'i at 8, 52 P.3d at 262. It does not matter that the words "man" and "father" do not appear in Section 572-1's list of gender-specific terms. That section makes clear that "**all** gender-specific terminology," including terms "similar" to those listed (such as "man" and "father"), must be construed in a gender-neutral matter. "All" means all.

Here, the gender-neutral construction of the marital presumption is plain: "A [woman] is presumed to be the [legal parent] of a child if: (1) [She] and the child's natural mother are or have been married to each other and the child is born during the marriage, or within three hundred days after the marriage is terminated . . . [.]") HRS § 584-4(a)(1). In short, just as the male spouse of a woman who delivers a child is the presumptive legal parent of the child pursuant to Section 584-4(a)(1), regardless of

biology (*see supra*), so, too, is the female spouse. The comprehensive language of the Marriage Equality Act commands this result.

LC wrongly argues that "the marriage equality law is not sufficiently broad to apply to the specifics of UPA's paternity provisions." (Dkt. 39 at 15.) In fact, HRS § 572-1 could hardly be broader: it applies to **all** gender-specific terminology related to spousal rights and responsibilities in **all** sources of law (including HRS Chapter 584). And the legislature's intent in enacting Section 572-1 could not be clearer: to ensure that **all** provisions of law regarding marriage apply equally to same-sex couples and opposite-sex couples, regardless of whether the Marriage Equality Act amends any particular provision (such as HRS § 584-4(a)(1)).

Of course, it is true that HRS § 584-4(a) includes presumptions of parentage that do not depend on marriage. (Dkt. 39 at 25.) But that does not change the fact that HRS § 584-4(a)(1) explicitly creates a presumption based on marriage – which affects corresponding spousal and parental obligations – and that HRS § 572-1 therefore requires that the presumption be applied equally to same-sex and opposite-sex married couples. By GC's logic, any benefit or obligation that "is not limited merely to marriage" (Dkt. 39 at 25) could be withheld from or imposed on married same-sex couples, but not their opposite-sex counterparts. That cannot be what the legislature intended in enacting the Marriage Equality Act.

New York's Marriage Equality Act – which like Hawaii's requires the gender-neutral interpretation of marriage-related terms – has been construed in the same manner the State urges here. *See Wendy G-M v. Erin G-M*, 45 Misc. 3d 574, 985 N.Y.S.2d 845 (Sup. Ct. N.Y. 2014). Like the present case, *Wendy G-M* arose from a divorce action involving a married same-sex couple and their child conceived through AID. There, the court ruled that the female spouse of the birth mother was a legal parent under New York's common-law marital presumption. The court reasoned that: (1) the marital presumption and the corresponding presumption of consent to AID applied to the male spouse of a woman who conceived by AID (*id.* at 584-85, 593-94 (citing *Laura WW. v. Peter WW.*, 51 A.D. 3d at 211) (*see supra* note 5)); and (2) New York's Marriage Equality Act required the courts to extend the same statutory and common-law rights to

same-sex married couples as for opposite-sex married couples. The court further explained:

> Section 2 of the MEA [Marriage Equality Act] mandates that not only statutes, but the common law as well, are gender-neutral with respect to all the legal benefits, obligations, etc. arising from marriage. . . . In *Laura WW. v. Peter WW.*, the Third Department predicated the husband's parental status on the fact of marriage, without regard to the husband's biological connection to the child or to his fertility in general. To impose the presumption of consent to AID for couples in a heterosexual marriage, but not for those in a same-sex one, when both are similarly situated, but for sexual orientation, would reverse the gender-neutral approach to New York's families canonized in the MEA.

Wendy G-M, 45 Misc. 3d at 595.

The same is true here. The gender-neutral mandate of Hawaii's Marriage Equality Act requires that the female spouse – just like the male spouse – of a woman who delivers a child be deemed the presumptive parent of the child pursuant to Section 584-4(a)(1), without regard to the spouse's biological link to the child. The marital presumption incorporates a rebuttable presumption of consent to the AID, just as it does for an opposite-sex couple. *See supra* note 5. *See also McLaughlin v. Jones*, 382 P.3d 118, 122-23 (Ariz. Ct. App. 2016) (ruling that *Obergefell* requires a gender-neutral application of Arizona's marital presumption statute, such that the female spouse of a woman who delivers a child is the presumptive parent) (discussed *infra*), *rev. granted*, Apr. 18, 2017.

The policy rationales for Hawaii's marital presumption also strongly support its gender-neutral application. As previously shown (*supra* p. 6), Hawaii's presumption, like that of other states, is intended in part to assure that two parents will be required to provide support for a child born during marriage. *See Doe*, 99 Haw. at 8, 52 P.3d at 262; *McLaughlin*, 382 P.3d at 123. *See also Elisa B. v. Superior Court,* 33 Cal. Rptr. 3d 46, 117 P.3d 660, 669 (2005) ("By recognizing the value of determining paternity, the Legislature implicitly recognized the value of having two parents, rather than one, as a source of both emotional and financial support, especially when the obligation to support the child would otherwise fall to the public.") The marital presumption also serves the important purpose of preserving the family unit. *McLaughlin*, 382 P.3d at 123. *See also Gartner v. Iowa Dep't of Pub. Health*, 830 N.W.2d 335, 345–47, 348 (Iowa 2013)

(presumption of parentage protects "the legitimacy of children, which in turn entitle[s] them to the financial support, inheritance rights, and filiation obligations of their parents" and also protects "the integrity of the marital family, even when a biological connection is not present"); *In re Guardianship of Madelyn B.*, 98 A.3d 494, 500–01 (N.H. 2014) (paternity presumptions are driven by "the state's interest in the welfare of the child and the integrity of the family" (quoting *In re Salvador M.*, 4 Cal. Rptr. 3d 705, 708 (Cal. Ct. App. 2003)). These purposes "are equally served whether the child is born during the marriage of a heterosexual couple or to a couple of the same sex." *McLaughlin*, 382 P.3d at 123. *See also* Nancy D. Polikoff, *A Mother Should Not Have to Adopt Her Own Child: Parentage Laws for Children of Lesbian Couples in the Twenty–First Century,* 5 Stan. J. C.R. & C.L., 201, 247 (2009) (based on these policies, "ten states and the District of Columbia have extended (or are set to extend) the 'marital' parentage presumption to same-sex couples in the formalized relationship of marriage, civil union, or domestic partnership").

As applied here, and unless rebutted by clear and convincing evidence, the marital presumption serves at least the purpose of assuring that two parents will be required to provide support for the Child, who was indisputably born during LC's marriage to MG. Contrary to LC's argument (Dkt. 39 at 17), that is plainly in the Child's best interest. LC's complaint that she has never known the Child and does not want a relationship with the Child speaks to LC's interest, not the Child's.

LC's reliance on *Shineovich & Kemp*, 214 P.3d 29 (Or. Ct. App. 2009), and *Q.M. v. B.C.,* 46 Misc. 3d 594, 995 N.Y.S.2d 470 (N.Y. Fam. Ct. 2014) (Dkt. 39 at 22-24), is misplaced. In *Shineovich*, the court refused to apply Oregon's marital presumption of parentage to the former same-sex partner of a woman who, during the couple's relationship, gave birth to a child conceived through AID. But at the time, Oregon's marital presumption statute, unlike Hawaii's, explicitly tied "paternity" to biology. 214 P.3d at 36 (quoting former ORS 109.070(1)(a)(2003): "The child of a wife cohabiting with her husband *who was not impotent or sterile at the time of the conception of the child* shall be conclusively presumed to be the child of her husband.") (emphasis in original)). As a result, Oregon's "presumption of paternity [did] not apply [even] to a married **man** who [was] not biologically capable" of having conceived a child.

Shineovich, 214 P.3d at 36 (emphasis added). That is simply not the law in Hawai'i. *See supra.* More importantly, in 2009, Oregon did not permit same-sex couples to marry, much less require, as Hawai'i now does, that there be no legal distinction between same-sex and opposite-sex married couples with respect to marriage. *Shineovich*, like many of LC's cited cases, was decided under an obsolete legal regime in which the state legislature had not expressed an intent – as did Hawaii's legislature in 2013 – to ensure that all provisions of law regarding marriage apply equally to same-sex and opposite-sex couples. *Shineovich* is therefore inapposite.

So, too, is *Q.M. v. B.C.*, 46 Misc. 3d at 594 (Dkt. 39 at 23-24), which "produced troubling doctrinal pronouncements, though in factually complex and distinguishable circumstances." Douglas NeJaime, *Marriage Equality and the New Parenthood*, 129 Harv. L. Rev. 1185, 1242 n.341 (2016). There, a woman, married to another woman, conceived a child with a man while she was separated from her spouse. The two spouses later reconciled and raised the child together. The biological father, who wanted recognition as the child's legal father, brought a paternity petition against the biological mother and her spouse. The New York court, addressing the issue of whether the marital presumption applied in that unique situation, decided that it did not, in large part because the effect would be to deprive the child of a father. 46 Misc. 3d at 599, 995 N.Y.S.2d at 474. But the court made clear that "the well-crafted decision of *Wendy G-M v. Erin G-M*" (discussed above) applied where, as here, same-sex female spouses have a child conceived through AID. *Q.M. v. B.C.*, 46 Misc. 3d at 599, 995 N.Y.S.2d at 473-74.

Here, there is no dispute that LC and MG were legally married when the Child, conceived through anonymous sperm donation, was born. Under HRS § 584-4(a)(1), as construed in accordance with the Marriage Equality Act, LC is the presumptive legal parent of the Child, as the family court properly ruled.[6]

[6] Pursuant to HRS § 584-4(b), that presumption is rebuttable by clear and convincing evidence that LC did not consent to the AID procedure that resulted in MG's pregnancy and the Child's birth. Again, the State takes no position on the district court's finding that LC did not meet that burden.

C. Under the United States Supreme Court's Decisions in *Obergefell* and *Pavan*, LC Is the Presumptive Legal Parent of the Child

The United States Supreme Court held in *Obergefell* that same-sex couples "may not be deprived" of the fundamental right to marry, and state laws that "exclude same-sex couples from civil marriage **on the same terms and conditions** as opposite-sex couples" violate the Constitution's due process and equal protection guarantees. 135 S. Ct. at 2604-05 (emphasis added). In reaching this conclusion, the Court identified several liberty-based, constitutionally protected rights that are related to the right to marry, including the right to procreate, raise children and make decisions relating to family relationships. *Id.* at 2598-600.

The Court recently reiterated in *Pavan* that "the Constitution entitles same-sex couples to civil marriage 'on the same terms and conditions as opposite-sex couples,'" including those related to parentage. 137 S. Ct. at 2076 (quoting *Obergefell*, 135 S. Ct. at 2605). In *Pavan*, the court summarily reversed a decision by the Arkansas Supreme Court on the rights of same-sex spouses to be listed as parents on their children's birth certificates. The case arose when two married same-sex couples had daughters in the state in 2015 using anonymous sperm donors. The couples asked to have both women's names on the birth certificates when the children were born, but only the birth mothers were listed. By contrast, state law required a married woman's husband to be listed as the second parent on the child's birth certificate, even if he was not the child's biological parent.

The Court held that the different treatment of same-sex and opposite-sex married couples violates the Constitution by denying same-sex couples "the constellation of benefits that the State has linked to marriage." 137 S. Ct. at 2078. The Court rejected the state's argument, similar to LC's argument here, that being named on a child's birth certificate is not a benefit of marriage, but is instead just a way to record biological parentage, regardless of whether the child's parents are married. *Id.* at 2077-78 "Arkansas law," the Court explained, "makes birth certificates about more than just genetics" – particularly when married men must be listed on their child's birth certificate even if they are not their child's biological father. *Id.* at 2078. *See also id.* at 2078-79 ("The State uses those certificates to give married parents a form of legal recognition that is not available to unmarried parents").

Similarly, here, Hawaii's marital presumption gives married parents a form of legal recognition that is not available to unmarried parents. Under HRS 584-4(a)(1), the male spouse of a woman who delivers a child is the presumptive parent, regardless of a biological link with the child. *See supra.* If the similarly situated female spouse of the birth mother is not afforded the same presumption of parenthood as a husband in an opposite-sex marriage, then the same-sex couple is deprived of "civil marriage 'on the same terms and conditions as opposite-sex couples.'" *Pavan*, 137 S. Ct. at 2076 (quoting *Obergefell*, 135 S. Ct. at 2605). *See also Obergefell*, 135 S. Ct. at 2600 (safeguarding children and families, which is among the bases for protecting the right to marry, applies equally to same-sex and opposite-sex couples).

This Court should therefore reject LC's interpretation of HRS 584-4(a)(1); indeed, it must apply the statute in a gender-neutral manner to avoid rendering it unconstitutional. *See Pavan*, 137 S. Ct. at 2076-77. *See also McLaughlin*, 382 P.3d at 122 ("We disagree . . . that it would be impossible and absurd to apply [Arizona's marital presumption statute] in a gender-neutral manner to give rise to presumptive parenthood in Susan. Indeed, *Obergefell* mandates that we do so and the plain language of the statute, as well as the purpose and policy behind it, are not in conflict with that application.")

In her Opening Brief, LC simply ignores *Obergefell*, which post-dates *Q.M. v. B.C.* (*see supra* pp. 11-12), as well as every other out-of-state case LC cites as permitting the unequal treatment of same-sex spouses in parentage determinations. In contrast, the court in *McLaughlin*, which was decided in 2016, ruled that *Obergefell* requires a gender-neutral application of Arizona's marital presumption statute, such that the female spouse of a woman who delivers a child is the presumptive parent. *McLaughlin*, 382 P.3d at 122.

More recently, another Arizona court disagreed with the court's ruling in *McLaughlin*, wrongly stating that "*Obergefell* does not extend so far as to require the courts to modify statutory schemes relating to same-sex parenting," and citing the Arkansas Supreme Court's decision in *Pavan* to support that view. *Turner v. The Honorable Ronee Korbin Steiner*, No. 1 CA-SA 17-0028, 2017 WL 2687680, at *4 (Ariz. 2017) (citing *Smith v. Pavan*, 505 S.W.3d 169 (Ark. 2016)). But just four days after *Turner* was decided, the U.S. Supreme Court reversed the Arkansas court's decision in

Pavan, and expressly held that under *Obergefell*, Arkansas' statutory birth certificate scheme cannot deny married same-sex couples the same parental recognition that the law affords married opposite sex couples. *Pavan*, 137 S. Ct. at 2076-77. In so doing, the Court rejected virtually the same biology-based argument made by the *Turner* majority, which the *Turner* dissent also persuasively criticized.[7] *Turner*, 2017 WL 2687680, at *7 (Winthrop, J., dissenting).

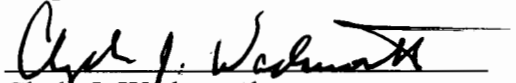
The bottom line is that the U.S. Supreme Court's decisions in *Obergefell* and *Pavan* control this case, and require that Hawaii's marital presumption be applied equally, in a gender-neutral manner to both same-sex and opposite-sex married couples. Under that standard, LC is the presumptive legal parent of the Child.

IV. CONCLUSION

For all of these reasons, the family court properly ruled that LC is the presumptive legal parent of the Child.

DATED: Honolulu, Hawai'i, July 14, 2017.

Respectfully Submitted,



Clyde J. Wadsworth

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[7] In addition, there is no Hawai'i analogue to the Arizona statute that expressly defines "legal parent" as "a **biological** or adoptive parent whose parental rights have not been terminated." *See Turner*, 2017 WL 2687680, at *4 (quoting A.R.S. § 25-401(4)) (emphasis added).

CAAP-16-0000837

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

LC, Petitioner-Appellant, vs. MG, Defendant-Appellee,	FC-P NO. 16-1-6009 ON APPEAL FROM THE: DECISION AND ORDER, FILED NOVEMBER 1, 2016 FAMILY COURT, FIRST CIRCUIT HONORABLE MATTHEW J. VIOLA, JUDGE

CERTIFICATE OF SERVICE

I certify that on July 14, 2017, a copy of the State of Hawaii's Motion for Leave to File an Amicus Curiae Brief was served electronically (through the Court's JEFS system), or conventionally (by mailing copies via USPS, first class, postage prepaid), upon the following:

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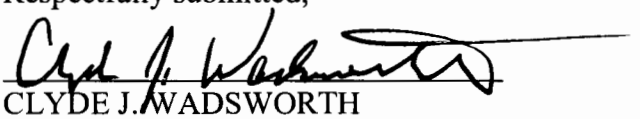

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