TO: Uniform Parentage Act Drafting Committee

FROM: Cathy Sakimura, Family Law Director, National Center for Lesbian Rights (Observer)

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Thank you again for the opportunity to participate in this discussion. As I previously mentioned, the majority of my practice is litigating parentage cases involving LGBT parents in both UPA and non-UPA states. I would like to share a few thoughts on issues that I see as extremely important in these revisions.

Proposed revisions in the current draft

- Clarity that lack of genetic ties do not rebut presumptions of parentage. We strongly support the revisions to make it clear that parentage presumptions are not automatically rebutted where there is a lack of biological connection. If we are going to provide equal recognition for same-sex spouses who have children, this must be clear. I have been involved in numerous cases where the wording of the UPA created confusion about whether a genetic test could rebut a presumption of parentage for a non-biological mother. It is also important to have clarity about what states should do when there are more than two claims to parentage – thus, we agree with the addition in the end of Section 204. This includes the addition in Section 204, clarity about the effect of genetic testing in Article 5, and the deletion of Section 631.

- Genetic testing provisions. We strongly support moving Section 608, and related provisions from Article 6, into Article 5, which addresses genetic testing. Not all states have enacted the UPA in its entirety, and states that just adopt Article 5 end up with provisions that just say that genetic testing shall be ordered. Even in states that adopt the Act in its entirety, the separation of the provision about ordering genetic testing from the provision that provides when genetic testing should not be ordered is confusing and has caused genetic testing to be initially ordered, sometimes leading to inappropriate temporary custody orders.

- Time limits on parentage actions (Section 607). I highly support the clarifying change in Section 607 that the time limit is on *challenging* the parentage of a presumed, parent, not on establishing it. This was clearly the intent of this provision, but at least one court has issued a contrary ruling. In *Dubose v. North*, 2014 OK CIV APP 68, 332 P.3d 311, an Oklahoma Court of Appeals ruled that a woman could not seek to establish her parentage as a presumed parent because the child was over two years of age, and that Oklahoma's statute adopting UPA Section 607 prohibited any parentage action for a child involving a presumed parent after age two, including establishing parentage.

- Ways to establish parentage (Section 201). The proposal to create one list of ways to establish parentage in 201 is important. I was involved in protracted litigation in a state with the UPA of 2002 over the question of whether a woman who consented to her partner's insemination could

be a parent because consent to assisted reproduction in Section 201 was only listed under ways to establish a father-child relationship, even though the actual provision providing that any person can become a parent through consent to assisted reproduction is gender neutral (in part also because Section 704 does not by itself make it clear that the effect of this consent is to establish parentage – as noted in my comment below on this section, I also support clarifying in that section that a person who consents is a parent).

- Changes to VAP provisions. We agree with the clarity provided in the new draft about when VAPs are void, or merely may be challenged. Confusion in this area has led to cases where sperm donors who mistakenly signed VAPs were found to be parents without any ability for the presumed parent to challenge this determination. We agree with clarifying that VAPs are void, and may be challenged as void, where there is an existing presumed parent who did not sign a denial of paternity.

- Voluntary Claims of Parentage. We agree with creating a parallel process for women to voluntarily acknowledge parentage. This is necessary to avoid discriminating against unmarried children with same-sex parents – which is of course in line with the original purpose of the UPA. We strongly support having this process be open to unmarried women, as limiting it to married parents would likely be unconstitutional by denying nonmarital children the same protection. We would advocate for making the title as parallel as possible to VAPs, so that other states with VAP processes would be more likely to recognize them. I would advocate for calling them "Voluntary Acknowledgements of Parentage."

Additional revisions to consider

- Time requirements for holding out (Section 204(a)(5)). The current formulation of the holding out provision has caused some serious unfairness. I suggest changing it to something like, "for at least two years beginning when the child is under one year of age." This would be slightly more flexible and take care of issues caused by the rigidity of the standard. I was involved in litigation that resulted in a Wyoming Supreme Court decision denying recognition to a non-biological father despite parenting the child and holding himself out as a father from birth until the child was nearly ten years old. LP v. LF, 2014 WY 152, 338 P.3d 908 (Wyo. 2014). The Court held that he could not claim parentage because the mother had taken the child out of their home for a few months just short of the child's second birthday. Even though he and the mother lived together again with the child shortly after the child turned two, and then he went on to parent the child many more years afterward, the Court held that he was not a presumed parent because he did not reside with the child and hold himself out as a father from birth until two years of age.

- Clarity for consent to assisted reproduction (Section 704(a)). I would recommend adding clarifying language to Section 704(a) that the effect of this consent is that the person is a parent (right now it just requires consent). The UPA of 1973 had greater clarity on this.

Additional comments

- We strongly support the continuation of the UPA of 2002's decision to eliminate the requirement that assisted reproduction be done under the supervision of a physician. As many as half of all known donor inseminations are done at home without doctor involvement, and these families must be given the same protections. In states that still have the UPA of 1973 and have the requirement that a sperm donor is a father unless a doctor is involved, many cases have resulting in devastating rulings that sperm donors who have no relationship to a child are a parent, and the non-biological mother, who has raised the child, is not.