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Supreme Court
SCAP-16-0000837
04-OCT-2018
08:35 AM

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

LC,
Petitioner-Appellant,

vs.

MG and CHILD SUPPORT ENFORCEMENT AGENCY, STATE OF HAWAI'I,
Respondents-Appellees.

SCAP-16-0000837

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT
(CAAP-16-0000837; FC-P NO. 16-1-6009)

OCTOBER 4, 2018

OPINION OF THE COURT BY McKENNA, J., AS TO PART III(B)

When it adopted a modified version of the 1973 Uniform Parentage Act as Chapter 584 of the Hawai'i Revised Statutes ("HRS"), the Legislature specifically deleted Section 5, which contains language requiring a spouse to consent to artificial insemination to establish parentage. Accordingly, we hold that a spouse cannot rebut the HRS § 584-4(a)(1) marital presumption of parentage pursuant to HRS § 584-4(b) by demonstrating by clear and convincing evidence a lack of consent to the other spouse's artificial insemination procedure.

In this case, all parties and the family court assumed that a spouse can rebut the HRS § 584-4(a)(1) (2006) marital presumption of parentage pursuant to HRS § 584-4(b) (2006) by showing lack of consent. However, party agreement as to a question of law is not binding on this court, and does not relieve us from the obligation to review questions of law de novo. See Hawaiian Ass'n of Seventh-Day Adventists v. Wong, 130 Hawai'i 36, 46, 305 P.3d 452, 462 (2013) (citing Chung Mi Ahn v. Liberty Mut. Fire Ins. Co., 126 Hawai'i 1, 10, 265 P.3d 470, 479 (2011)); Chung, 126 Hawai'i at 10, 265 P.3d at 479 ("[P]arty agreements on questions of law are not binding on a court.") (citing Beclar Corp. v. Young, 7 Haw. App. 183, 190, 750 P.2d 934, 938 (1988)); State v. Tangalin, 66 Haw. 100, 101, 657 P.2d 1025, 1026 (1983) ("[I]t is well established that matters affecting the public interest cannot be made the subject of stipulation so as to control the court's action with respect thereto.").[1]

For the reasons explained below, we hold that a spouse cannot rebut the HRS § 584-4(a)(1) marital presumption of parentage pursuant to HRS § 584-4(b) by demonstrating by clear and convincing evidence a lack of consent to the other spouse's

[1] Justice Nakayama opines that this court should not consider this issue of law because it was not specifically argued by the parties. Opinion of Nakayama, Section III(B)(1). We respectfully disagree. The parties' assumption that lack of consent is a permissible method of rebuttal is tantamount to a stipulation on a question of law.

artificial insemination procedure. We therefore respectfully do not agree with Part III(B)(1) of Justice Nakayama's opinion. In addition, the discussion in Part III(B)(2) of her opinion regarding whether consent existed is not necessary, and we do not join that part of her opinion. Therefore, although we otherwise agree with and join in Justice Nakayama's opinion, we respectfully depart from Part III(B).

I. PRINCIPLES OF STATUTORY INTERPRETATION REQUIRE THIS COURT TO GIVE EFFECT TO LEGISLATIVE INTENT.

"When construing a statute, our foremost obligation is to ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself. And we must read statutory language in the context of the entire statute and construe it in a manner consistent with its purpose." In re Doe, 95 Hawai'i 183, 191, 20 P.3d 616, 624 (2001) (citation omitted).

Applying these principles, first, with respect to the language "contained in the statute itself," HRS § 584-4 provides in relevant part as follows:

> **Presumption of paternity.** (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, or within three hundred days after the marriage is terminated by death, annulment, declaration of invalidity, or divorce, or after a decree of separation is entered by a court. . . .
>
> . . . .

> (b) A presumption under this section may be rebutted in an appropriate action only by clear and convincing evidence. If two or more presumptions arise which conflict with each other, the presumption which on the facts is founded on the weightier considerations of policy and logic controls. The presumption is rebutted by a court decree establishing paternity of the child by another man.

In this case, we are asked to decide whether, pursuant to HRS § 584-4(b), the marital presumption of parentage under HRS § 584-4(a)(1) can be rebutted based on a lack of consent to artificial insemination. Based on "the language contained in [HRS § 584-4(b)] itself," the marital presumption can be rebutted by another HRS § 584-4(a) presumption of parentage if the other presumption "is founded on the weightier considerations of policy and logic."[2] The statute itself does

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[2] The presumptions of parentage adopted by the Legislature other than the marital presumption of HRS § 584-4(a)(1)(2006), which could rebut the marital presumption pursuant to HRS § 584-4(b), are as follows:

> (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, and:
>
> > (A) If the attempted marriage could be declared invalid only by a court, the child is born during the attempted marriage, or within three hundred days after its termination by death, annulment, declaration of invalidity, or divorce; or
> > (B) If the attempted marriage is invalid without a court order, the child is born within three hundred days after the termination of cohabitation;
>
> (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:

(continued. . .)

not contain language indicating that a HRS § 584-4(a)(1) marital presumption of parentage can be rebutted by a lack of consent to artificial insemination. In fact, when the Hawai'i State Legislature enacted HRS § 584-4 in 1975 as part of its adoption of the 1973 Uniform Parentage Act (the "1973 UPA"), see 1975 Haw. Sess. Laws Act 66, at 115-16, it expressly chose not to adopt Section 5 of the 1973 UPA regarding the need for a spouse to consent to artificial insemination.

In 1973, the National Conference of Commissioners on Uniform State Laws approved and recommended for enactment in all

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(continued. . .)

(A) He has acknowledged his paternity of the child in writing filed with the department of health;
(B) With his consent, he is named as the child's mother on the child's birth certificate; or
(C) He is obligated to support the child under written voluntary promise or by court order;

(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) Pursuant to section 584-11, he submits to court ordered genetic testing and the results, as stated in a report prepared by the testing laboratory, do not exclude the possibility of his paternity of the child; provided the testing used has a power of exclusion greater than 99.0 per cent and a minimum combined paternity index of five hundred to one; or

(6) A voluntary, written acknowledgment of paternity of the child signed by him under oath is filed with the department of health. The department of health shall prepare a new certificate of birth for the child in accordance with section 338-21. The voluntary acknowledgment of paternity by the presumed father filed with the department of health pursuant to this paragraph shall be the basis for establishing and enforcing a support obligation through a judicial proceeding.

states the 1973 UPA.[3] The 1973 UPA contained thirty sections, of which subsections 4(a)(1) and 4(b), as well as section 5, are relevant to the issue at hand.[4]

Subsection 4(a)(1) of the 1973 UPA stated:

> § 4. [Presumption of Paternity]
>
> (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, or within 300 days after the marriage is terminated by death, annulment, declaration of invalidity, or divorce, or after a decree of separation is entered by a court. . . .

This language is identical to the current language of HRS § 584-4(a)(1).

Subsection 4(b) of the 1973 UPA stated:

> (b) A presumption under this section may be rebutted in an appropriate action only by clear and convincing evidence. If two or more presumptions arise which conflict with each other, the presumption which on the facts is founded on the weightier considerations of policy and logic controls. The

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[3] Unif. Parentage Act (Nat'l Conf. of Comm'rs on Unif. State Laws 1973), available at http://www.uniformlaws.org/shared/docs/parentage/upa73_With%20pref%20note.pdf .

[4] The thirty sections were titled: 1. Parent and Child Relationship Defined, 2. Relationship Not Dependent on Marriage, 3. How Parent and Child Relationship Established, 4. Presumption of Paternity, 5. Artificial Insemination, 6. Determination of Father and Child Relationship; Who May Bring Action; When Action May Be Brought, 7. Statute of Limitations, 8. Jurisdiction; Venue, 9. Parties, 10. Pre-Trial Proceedings, 11. Blood Tests, 12. Evidence Relating to Paternity, 13. Pre-Trial Recommendations, 14. Civil Action; Jury, 15. Judgment or Order, 16. Costs, 17. Enforcement of Judgment or Order, 18. Modification of Judgment or Order, 19. Right to Counsel; Free Transcript on Appeal, 20. Hearings and Records; Confidentiality, 21. Action to Declare Mother and Child Relationship, 22. Promise to Render Support, 23. Birth Records, 24. When Notice of Adoption Proceeding Required, 25. Proceeding to Terminate Parental Rights, 26. Uniformity of Application and Construction, 27. Short Title, 28. Severability, 29. Repeal, and 30. Time of Taking Effect.

> presumption is rebutted by a court decree establishing paternity of the child by another man.

This language is identical to the current language of HRS § 584-4(b). Section 5 of the 1973 UPA specifically addressed artificial insemination, however, and stated:

> § 5. [Artificial Insemination]
>
> (a) If, under the supervision of a licensed physician, and with the consent of her husband, a wife is inseminated artificially with semen donated by a man not her husband, the husband is treated in law as if he were the natural father of a child thereby conceived. The husband's consent must be in writing and signed by him and his wife. The physician shall certify their signatures and the date of the insemination, and file the husband's consent with the [State Department of Health], where it shall be kept confidential and in a sealed file. However, the physician's failure to do so does not affect the father and child relationship. All papers and records pertaining to the insemination, whether part of the permanent record of a court or of a file held by the supervising physician or elsewhere, are subject to inspection only upon an order of the court for good cause shown.
>
> (b) The donor of semen provided to a licensed physician for use in artificial insemination of a married woman other than the donor's wife is treated in law as if he were not the natural father of a child thereby conceived.

(Emphasis added.)

The 1973 UPA was presented to the 1975 Legislature for possible adoption as House Bill 115. On H.B. 115, Standing Committee Report No. 190 of the House Judiciary Committee states in relevant part:

> The purpose of this bill is to enact the Uniform Parentage Act, with appropriate amendments, additions, and deletions to meet particular needs in Hawaii, especially in the areas of procedures, adoption proceedings, and vital statistics.
>
> The [1973 UPA] is intended to provide substantive legal equality for all children regardless of the marital status of their parents. . . .

> Your Committee heard testimony on this bill from representatives of, among others, the Family Court, the City and County of Honolulu Corporation Counsel, Child and Family Service, and the Hawaii Commissioners on Uniform State Laws. On the basis of informed advice from these sources, your Committee on Judiciary recommends the following amendments to H.B. No 115:
>
> 1. Delete all of Sec. -5.

H. Stand. Comm. Rep. No. 190, in 1975 House Journal, at 1019 (emphases added).

Thus, the Hawai'i Legislature passed the 1973 UPA, with some modifications, as Act 66 of 1975. 1975 Haw. Sess. Laws Act 66, at 115-26. The Legislature adopted the language of subsections 4(a)(1) and 4(b) of the 1973 UPA verbatim, yet deleted Section 5 concerning artificial insemination and its consent language.[5]

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[5] The legislative history of H.B. 115 does not explain why Section 5 was deleted. Notably, the companion bill to H.B. 115, S.B. 95, prompted the following testimony by the Hawaii Commission on Uniform State Laws, specifically addressing consent to artificial insemination in Section 5, as follows:

> Birth by artificial insemination is also treated in the Parentage Act. State laws conflict as to the parentage of a child conceived through artificial insemination. In [the 1973 UPA], the consent of the parents control. If the parents consent in writing, and the insemination is supervised by a licensed physician, the husband is treated at law as the natural father. The physician is required to obtain the written consent, to certify the signatures, and file the documents with the State Department of Health. Artificial insemination becomes, under these conditions, the same legally as natural insemination by the husband.

Testimony of Patricia K. Putnam, Hawaii Comm'n on Uniform State Laws, Testimony on S.B. 95, "A BILL RELATING TO THE UNIFORM PARENTAGE ACT[,"] before the Senate Judiciary Committee, Feb. 5, 1975 (emphasis added).

S.B. 95 did not advance after its hearing in the Senate Judiciary Committee, while H.B. 115 eventually passed into law. The record of testimony on H.B. 115 and S.B. 95 in the State Archives is scant. The archival record shows the Hawaii Commission on Uniform State Laws did not submit testimony regarding H.B. 115, but the House Standing Committee Report No. 190 on H.B. 115 refers to testimony submitted by the Hawaii Commission on Uniform State Laws, suggesting the members of the House Judiciary Committee

(continued. . .)

As noted, "when construing a statute, our foremost obligation is to ascertain and give effect to the intention of the [L]egislature, which is to be obtained primarily from the language contained in the statute itself." In re Doe, 95 Hawai'i at 191, 20 P.3d at 624. The Legislature rejected Section 5 of the 1973 UPA and has not later enacted a provision allowing for the spousal presumption of parentage to be rebutted through lack of consent to artificial insemination. Thus, judicial recognition of this method of rebutting parentage would constitute adoption of a method expressly rejected by the Legislature and not "contained in the language of the statute itself[.]" Recognition of this method of rebuttal would therefore violate the initial rule of statutory interpretation.

Second, even if this rule of statutory interpretation and legislative intent did not control, another cardinal rule of statutory interpretation is that "we must read statutory language in the context of the entire statute and construe it in a manner consistent with its purpose." As pointed out earlier, Standing Committee Report No. 190 of the House Judiciary

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may have been aware of S.B. 95 testimony. In any event, in passing H.B. 115 into law without Section 5, the Legislature rejected the idea that "consent of the parents [would] control" with respect to artificial insemination. Therefore, because the Legislature specifically rejected a requirement of consent to artificial insemination for a husband to be recognized as the father of his wife's child conceived through artificial insemination, we should not, through the common law, allow lack of consent to rebut the spousal parentage presumption under HRS § 584-4(a)(1).

Committee laid out the legislative purpose in adopting the UPA, which was to provide substantive legal equality for all children regardless of the marital status of their parents. In Doe v. Doe, this court stated:

> 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. For purposes of this discussion, the UPA and, by extension, chapter 584 are largely concerned with establishing a means by which to identify the person (usually the father) against whom these rights may be asserted. In short, it is to ensure that every child, to the extent possible, has an identifiable legal father. Although this goal 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.

99 Hawai'i 1, 8, 52 P.3d 255, 262 (2002) (internal citations omitted).

Thus, as recognized in Doe, although in the context of providing equality to children born outside a marriage, the legislative purpose of Chapter 584, including HRS § 584-4, was "to ensure that every child, to the extent possible," has another parent to provide the child with the rights to intestate succession, to benefit from statutory causes of action afforded to children of married parents, and to financial support.

Along these lines, the only specific methods for rebutting a parentage presumption delineated by HRS § 584-4(b) involve a parent under one presumption being replaced by a parent under another presumption or as determined by a court decree. The structure of HRS § 584-4(b) therefore supports our observation

in Doe that the purpose of HRS Chapter 584 is to provide a child with a second parent obligated to provide the child with financial benefits.

In this case, LC seeks to disestablish parentage and thereby eliminate financial obligations to the child. Allowing a spouse to rebut parentage based on a lack of consent to artificial insemination would eliminate financial benefits to the child from the spouse presumed to be a parent, which is inconsistent with the legislative purpose of Chapter 584 "to ensure that every child, to the extent possible," has another parent to provide the child with these financial benefits. Such a holding would therefore violate another cardinal rule of statutory interpretation.

Thus, based on fundamental principles of statutory interpretation, lack of consent to artificial insemination is not a method of rebutting the marital presumption of parentage under HRS § 584-4(a). Although these principles of statutory interpretation control and further analysis is therefore not required, the factors below also dictate against adoption of this method of rebutting the marital presumption of parentage.

II. SECTION 5 OF THE UPA, WHICH THE LEGISLATURE REJECTED, WAS IN ANY EVENT NOT INTENDED TO PROVIDE A METHOD OF REBUTTING PARENTAGE.

Even if the Legislature had adopted Section 5 of the 1973 UPA, which it did not, the purpose of that rejected artificial

insemination provision was not to provide a method of rebutting or disestablishing the presumption of parentage under Section 4(a)(1). Rather, the purpose of Section 5 of the 1973 UPA was to provide another method of establishing paternity when no presumption under Section 4 existed to provide a father to the child.

As stated in the Prefatory Note to the 1973 UPA, the 1973 UPA first set up "a network of presumptions which cover cases in which proof of external circumstances (in the simplest case, marriage between the mother and a man) indicate a particular man to be the probable father. . . . All presumptions of paternity are rebuttable in appropriate circumstances." 1973 UPA, Prefatory Note ¶ 10. These presumptions based on proof of external circumstances were reflected in the 1973 UPA Section 4(a) presumptions, which were adopted verbatim as HRS § 584-4(a), and remain in effect today. The Prefatory Note goes on to state, however:

> The ascertainment of paternity when no external circumstances presumptively point to a particular man as the father are [sic] the next major function of the Act.

1973 UPA, Prefatory Note ¶ 11. That next "major function of the Act" began with Section 5, governing artificial insemination.

Therefore, the intent of the consent provision of Section 5, which was the section following the "external circumstances presumptions" of Section 4(a) in the 1973 UPA, was not to

provide a mechanism to rebut or disestablish a presumption of parentage under Section 4(a)(1). Rather, the intent of Section 5 was to provide another method to establish paternity when no "external circumstances" provided a presumption of paternity under Section 4(a). Under the facts of this case, this method of establishing parentage is not necessary due to the applicability of the marital presumption of parentage under HRS § 584-4(a)(1).

III. ADOPTION OF A COMMON LAW RULE BASED ON LACK OF CONSENT TO ARTIFICIAL INSEMINATION OPENS THE DOOR TO OTHER METHODS OF REBUTTAL BASED ON LACK OF CONSENT.

Recognition of a common law[6] rule allowing a spouse to rebut parentage based on a lack of consent to artificial insemination would open the door to arguments from spouses who did not consent to other methods or causes of impregnation to seek relief from parental obligations. There are various other methods of impregnation as to which a spouse might not consent. For example, pregnancy could result from a negligent or intentional failure of a contraceptive method, a negligent or intentional misrepresentation regarding infertility status, or even sexual assault by a third person. If we were to allow a spouse to rebut parentage through lack of consent to a manner of

[6] Black's Law Dictionary defines "common law" as "[t]he body of law derived from judicial decisions, rather than from statutes or constitutions. . . ." "Common Law," Black's Law Dictionary 334 (10th ed. 2014).

conception as a matter of common law, the slippery slope would be opened to similar arguments for other methods of impregnation to which a spouse did not consent.[7]

This concern would not arise if a specific method of disestablishing parentage is set out by the Legislature. As explained in Section I, supra, our opinion that lack of consent to artificial insemination cannot be a method of rebutting the marital presumption of parentage is fundamentally based on the Legislature's express rejection of Section 5 of the 1973 UPA. If the Legislature chooses to recognize lack of consent to artificial insemination as a method of rebutting parentage, it could also consider the concerns we express in this opinion.[8]

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[7] For this reason and also because the Legislature did not make a distinction regarding the means by which a parentage presumption can be rebutted based on how a child is brought into being, we respectfully disagree with Justice Nakayama that issues of consent in situations in which sexual intercourse results in the birth of a child require a different analysis under Chapter 584. Opinion of Nakayama, J., at n.21.

[8] Although we need not decide the issue at this time, it appears the marital presumption of parentage of a child conceived through artificial insemination could be rebutted under HRS § 584-4(b) through clear and convincing evidence of the existence of another common law "parent," such as a "de facto," "psychological," or "intended" "parent[,]" and/or evidence that disestablishment of parentage would be in the best interests of the child. We therefore respectfully disagree with Justice Nakayama's opinion that "the Majority does not provide any meaningful way to rebut the marital presumption where only one presumption arises, and where an artificial insemination procedure leads to the birth of a child." Opinion of Nakayama, J., Section III(B)(1)(b). Parentage can also be terminated through HRS Chapter 587A (Supp. 2010), the Child Protective Act. In addition, the issue here is whether lack of consent to artificial insemination is a method of rebutting the marital presumption of parentage. The Legislature's adoption in HRS § 584-4(b) of a "clear and convincing evidence" burden of proof to rebut a parentage presumption does not affect the preliminary question of whether it rejected lack of consent to artificial insemination as a method of rebuttal. Opinion of Nakayama, J., Section III(B)(1)(b).

IV. ADOPTION OF A COMMON LAW RULE BASED ON LACK OF CONSENT TO ARTIFICIAL INSEMINATION ALSO RAISES ISSUES WITH RESPECT TO THE SPOUSAL PRIVILEGE.

Recognition of lack of consent as a method of rebutting the marital presumption of parentage also raises significant issues regarding the spousal privilege under the Hawai'i Rules of Evidence. Determining whether a spouse consented may well involve inquiries into confidential marital communications between spouses, as happened in this case.

Rule 505 of the Hawai'i Rules of Evidence regarding the "Spousal privilege" provides as follows:

> a) Criminal proceedings. In a criminal proceeding, the spouse of the accused has a privilege not to testify against the accused. This privilege may be claimed only by the spouse who is called to testify.
>
> b) Confidential marital communications; all proceedings.
>
> (1) Definition. A "confidential marital communication" is a private communication between spouses that is not intended for disclosure to any other person.
>
> (2) Either party to a confidential marital communication has a privilege to refuse to disclose and to prevent any other person from disclosing that communication.
>
> (c) Exceptions. There is no privilege under this rule (1) in proceedings in which one spouse is charged with a crime against the person or property of (A) the other, (B) a child of either, (C) a third person residing in the household of either, or (D) a third person committed in the course of committing a crime against any of these, or (2) as to matters occurring prior to the marriage.

(Emphases added.)

We have held that "[m]arital communications are presumed to be confidential," although "the presumption may be overcome by

proof of facts showing they were not intended to be confidential." State v. Levi, 67 Haw. 247, 250, 686 P.2d 9, 11 (1984) (citing Pereira v. United States, 347 U.S. 1, 6 (1954); Blau v. United States, 340 U.S. 332, 333 (1951)). The presence of a third party, for example, "negates any presumption of privacy." Levi, 67 Haw. at 250, 686 P.2d at 11 (citing Picciurro v. United States, 250 F.2d 585, 589 (8th Cir. 1958)).

No facts negating the presumption of confidentiality appear to have been present in this case, but the spousal privilege was in any event not asserted. The family court engaged in an excruciating analysis of multiple conflicting communications in an attempt to discern whether LC consented by clear and convincing evidence to MG's artificial insemination procedure. The family court's findings are therefore replete with discussions of communications between the spouses during their marriage, some of which are referred to in Justice Nakayama's opinion, which appear to have been intended to be confidential. Had the spousal privilege been asserted by either spouse in this case, the family court would have had to determine whether the communications were intended to be confidential and therefore subject to the spousal privilege.

If the communications were found subject to the spousal privilege, the family court would have had to determine whether consent existed without such evidence, making it more difficult

to ascertain the true intent of LC with respect to the consent issue. The same spousal privilege issue could well arise in cases concerning other methods of impregnation, discussed earlier, as to which a spouse might not consent.

We do not find persuasive the New Jersey and South Carolina cases cited in Justice Nakayama's opinion, K.S. v. G.S., 440 A.2d 64 (N.J. Super. Ct. Ch. Div. 1981), and In re Baby Doe, 353 S.E.2d 877 (S.C. 1987), which are cited as jurisdictions that recognize lack of consent to artificial insemination in absence of a statute. New Jersey recognizes a clear exception to the spousal privilege in lawsuits between the spouses, N.J. Code § 2A:84A-22 (1992), and South Carolina recognizes an exception to the spousal privilege for a proceeding concerning child neglect. S.C. Code of Laws § 19-11-30 (2012). Therefore, in addition to it being unclear whether those states' legislatures expressly rejected Section 5 of the 1973 UPA and, if so, why, those states do not share the spousal privilege concern implicated here. Thus, recognition of lack of consent as a method of rebutting the marital presumption of parentage raises serious policy and practical concerns arising out of the spousal privilege.

V. ADOPTION OF A COMMON LAW RULE ALLOWING THE MARITAL PRESUMPTON OF PARENTAGE TO BE REBUTTED BASED ON LACK OF CONSENT TO ARTIFICIAL INSEMINATION DOES NOT FACTOR IN THE BEST INTERESTS OF THE CHILD.

Finally, recognition of a common law rule allowing a spouse to rebut the marital presumption of parentage based on a lack of consent to artificial insemination does not consider the best interests of the child conceived through artificial insemination. HRS § 584-15(c) provides as follows in regard to a judgment or order in a parentage case under HRS Chapter 584:

> The judgment or order may contain any other provision directed against the appropriate party to the proceeding, concerning the duty of support, the custody and guardianship of the child, visitation privileges with the child, the furnishing of bond or other security for the payment of the judgment, <u>or any other matter in the best interest of the child</u>.

(Emphasis added.)

The best interests of the child conceived through artificial insemination are implicated in the legislative purpose of HRS Chapter 584 discussed in Section I above, that a child have two parents to provide financial benefits. It is also important to point out, however, that allowing rebuttal of the marital presumption of parentage based on a lack of consent to artificial insemination would not prohibit a spouse from rebutting parentage during a marriage in which the child

conceived by artificial insemination continues to live in the marital home.[9]

In addition to the financial benefit implications, allowing a spouse to rebut parentage of a child conceived through artificial insemination during an intact marriage could have consequences well beyond the financial aspects of a child's best interests, such as the child's sense of belonging and acceptance.

Therefore, allowing a spouse to rebut parentage based on lack of consent to artificial insemination does not give due consideration to the best interests of the child.

V. CONCLUSION

For all of these reasons, we hold that a spouse cannot rebut the marital presumption of parentage under HRS § 584-4(a)(1) pursuant to HRS § 584-4(b) by demonstrating by clear and

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[9] With respect to financial benefits, allowing a spouse to rebut parentage under such circumstances would also circumvent the intent of HRS § 572-24 (2006), which otherwise requires a spouse to provide financial support to the family:

> **Spousal liabilities.** Both spouses of a marriage, whether married in this State or in some other jurisdiction, and residing in this, shall be bound to maintain, provide for, and support one another during marriage, and shall be liable for all debts contracted by one another for necessaries for themselves, one another, or their family during marriage; provided that when a support or maintenance obligation, however designated, is imposed upon a spouse under chapter 580 or any other law, the amount of such obligation shall be determined by the appropriate court on the basis of factors enumerated in section 580-47(a).

(Emphases added.)

convincing evidence a lack of consent to the artificial insemination procedure that resulted in the conception and birth of the child.

/s/ Sabrina S. McKenna

/s/ Richard W. Pollack

/s/ Michael D. Wilson