TESTIMONY OF GLBTQ LEGAL ADVOCATES & DEFENDERS
H 7541 – The Rhode Island Uniform Parentage Act
Rhode Island House Committee on Judiciary
February 26, 2020

Dear Chair Craven and Members of the House Committee on Judiciary,

Thank you for the opportunity to submit testimony regarding H 7541. It is vitally important for there to be comprehensive parentage reform that furthers the best interests of Rhode Island's children by providing them equal access to the security that comes with legal parentage.

Currently Rhode Island parentage law is over 40 years old, based on a 1960s version of a uniform act, and is among the oldest parentage laws in the country, along with Mississippi and Kentucky. The current statutory scheme needs updating to take account of the families in Rhode Island, as well as ways in which it is unconstitutional and leaves children and families vulnerable.

GLAD appreciates the leadership of Representative McEntee in championing these important reforms. With certain amendments described below, this bill, which is based on the Vermont Parentage Act, will update Rhode Island law to best practices and constitutional norms. By clearly articulating who can be a parent in Rhode Island and how to establish parentage, this Act will ensure that Rhode Island parentage law recognizes, respects and protects all of the diverse families that enrich this state.

Brief Background about GLAD

As you know, GLAD is a New England-based legal organization dedicated to ending discrimination on the basis of sexual orientation, gender identity and expression, and HIV status. GLAD has a particular interest and long history in the protection and recognition of LGBTQ families, particularly ensuring that the lives of children are stable and secure. In Rhode Island, GLAD has been involved in groundbreaking family law cases including *Rubano v. DiCenzo*, 759

A.2d 959 (R.I. 2000) and *In Re Parentage of a Minor Child*, No. 2015-0877-1 (R.I. Fam. Ct. Oct. 26, 2016), https://www.glad.org/wp-content/uploads/2017/01/in-re-parentage-minor-decision-10-26-16.pdf. In other New England states, GLAD has successfully litigated cases to protect children born into same-sex relationships, including in Massachusetts (*Partanen v. Gallagher*, 475 Mass. 632, 59 N.E.3d 1133 (Mass. 2016); *Hunter v. Rose*, 463 Mass. 488, 975 N.E.2d 857 (Mass. 2012)), New Hampshire (*In re Guardianship of Madelyn B.*, 166 N.H. 453, 98 A.3d 494 (N.H. 2014)), and Vermont (*Baker v. State,* 170 Vt. 194, 744 A.2d 864 (Vt. 1999); *Miller-Jenkins v. Miller-Jenkins*, 180 Vt. 441, 912 A.2d 951 (Vt. 2006); *Sinnott v. Peck*, 2017 Vt. 115, 2017 Vt. LEXIS 133 (Vt. 2017)).

Beyond the courtroom, GLAD has successfully worked in coalition on legislation promoting the security of children regardless of the circumstances of their birth, including children born through assisted reproduction, to non-marital parents, and to LGBTQ parents. Another GLAD attorney collaborated in drafting the statute that became the Maine Parentage Act, 19-A M.R.S. §1831 et seq., a comprehensive update to Maine's parentage statutes enacted in 2015. In the 2017-2018 legislative session, I collaborated with stakeholders in Vermont to pass the Vermont Parentage Act ("VPA"). See H. 562, Reg. Sess. (Vt. 2018). Effective July 2018, the VPA modernized decades-old statutes and added to Vermont law critical advances designed to protect children, including access to parentage through assisted reproduction, access to parentage through surrogacy, and access to parentage through a gender-neutral voluntary acknowledgment of parentage (VAP). Currently, I serve on the Uniform Law Commission's national Uniform Parentage Act Enactment Committee, and, through that work, I am in regular communication with the two leading legal scholars on parentage in the United States – Professor Courtney Joslin of the University of California Davis and Professor Doug NeJaime of Yale University. I am also actively involved in legislative efforts on parentage in Massachusetts, Connecticut and New Hampshire. GLAD is deeply engaged in and committed to best practice legislation that protects all children, regardless of the circumstances of their birth.

Brief Background on Parentage and the Need for Reform

Parentage refers to the *legal* parent-child relationship. This legal bond is core to a child's stability and security. Legal parentage comes with a number of rights such as custody, parenting time and decision making, and it also comes with a number of responsibilities such as providing care, financial support, and health insurance. That legal parentage brings emotional security to children.

Establishing parentage as soon after birth as possible ensures that a child is secured to their parents for all purposes and increases clarity for all involved in a child's life. This is particularly important if a problem arises; for example, legal parents are able to make medical decisions, to provide health insurance and other benefits, and to ensure that their child inherits in the event of death. The rapid clip of changes in society and family creation have outpaced Rhode Island parentage law, which has not been updated in over 40 years. For example, as in all states, nonmarital births are common: 45.1% of all births in 2015 (4,957 out of 10,993 births) were births to unmarried people.[1] Additionally, births from assisted reproductive technology are becoming increasingly common. In 2015, 2.4% of all Rhode Island births involved the use of assisted reproductive technology (268 out of 10,993 births).[2] **Despite the reality of Rhode Island families, current law treats children of some unmarried couples differently, has no statutes protecting children born through assisted reproduction,[3] and has no protections for anyone involved in the surrogacy process.** Rhode Island has become an outlier, and children and families are directly impacted as a result. Comprehensive legislation is needed to

[1]National Vital Statistics Reports, CDC, Vol. 66, No. 1, January 5, 2017, Table I-4. Further, the Office of Child Support Services reports that 50% of RI children are born to non-marital parents.
[2] Assisted Reproductive Technology Surveillance – United States, 2015, CDC, Feb. 16, 2018, Table 3. According to 2016 Centers for Disease Control data, over 2.5% of births here are through assisted reproduction, which is higher than the national average. See https://www.cdc.gov/art/state-specific-surveillance/index.html.
[3] This lack of protection is ironic given that Rhode Island provides comprehensive insurance coverage for assisted reproduction. According to the CDC's report on 2015 ART statistics, only four states (Illinois, Massachusetts, New Jersey, and Rhode Island) have comprehensive mandated health insurance coverage for ART procedures (i.e., coverage for at least four cycles of IVF). *See* Assisted Reproductive Technology Surveillance – United States, 2015, CDC, Feb. 16, 2018.

provide clarity for courts and equal protections for children, regardless of the circumstances of their birth.

Brief Overview of the Legislation

The intent of this bill, around which there is much consensus because of the hard work of many people, is to ensure that all children in Rhode Island have an equal path to the security of legal parentage. GLAD supports the aim of H 7541 and is committed to ensuring that the Act is constitutional, internally consistent, and best practice.

Through this bill, the Legislature will respond to the needs of children and families for clarity, stability and equality in their family relationships. Substantively, this bill, which is based on the structure of the Vermont Parentage Act and incorporates the input of key stakeholders, particularly the Family Court, addresses the following areas:

1. General provisions, which includes definitions, scope, and general procedural issues (Article 1);
2. Establishment of Parentage, which provides an overview of the ways in which a person can establish parentage, which are birth, adoption, acknowledgement, presumption, de facto parentage, consent to assisted reproduction, and consent to a gestational carrier agreement (Article 2);
3. Voluntary Acknowledgement of Parentage, which ensures that parents have a simple, administrative route to parentage in compliance with federal law (Article 3);
4. Parentage by presumption, including a marital presumption and non-marital presumption (Article 4);
5. De facto parentage, which codifies existing Rhode Island case law (Article 5);
6. Genetic parentage (Article 6);
7. Parentage by assisted reproduction (Article 7);
8. Parentage by gestational carrier agreement (Article 8);
9. The bill also includes access to information about gamete donors for donor-conceived children and when medical information is helpful (Article 9); and
10. Miscellaneous provisions, which addresses technical issues such as effective date (Article 10).

In other words, the proposed Rhode Island Uniform Parentage Act provides a clear and comprehensive framework for determining legal parentage that is accessible and consistent. It addresses the realities of Rhode Islanders today, particularly the increased use of assisted reproduction and surrogacy to create families, and ensures equality for all children and families by not discriminating on the basis of marital status or gender. The Rhode Island Uniform Parentage Act would clarify who can be established as a parent in Rhode Island and how to establish that legal parentage. One very important caveat is that the proposed statutory scheme does not disturb established law regarding parental rights and responsibilities; rather, the court would maintain the discretion to assess the best interests of children and parental rights and responsibilities.

Brief Overview of Necessary Amendments

H 7541 has many important provisions that GLAD supports and goes a long way to modernizing Rhode Island parentage law to protect children. We believe certain amendments are needed to ensure that the bill is internally consistent, constitutional and consistent with best practice. The amendments identified below are central to ensuring clarity and equality so that that all children have equal access to establishing their parentage despite the circumstances of their birth, particularly in Article 7 (parentage through assisted reproduction) and Article 8 (parentage through surrogacy). Our hope is to collaborate with the Committee on addressing these changes.

Key Amendments in Detail

Key Amendments regarding parentage through Assisted Reproduction

1. **Remove Section 401(a)(5) (Page 24, line 33 – Page 25, line 2)**

The Act sets forth a number of different ways a person can establish their parentage. One method is by proof of an unrebutted presumption of parentage. H 7541 adds a new presumption of parentage – Section 401(a)(5) – that establishes a parentage rule for intended parents of children conceived through assisted reproduction that is ***inconsistent with*** the parentage rules set forth in Article 7. This does not appear in the Vermont Parentage Act, the UPA 2017, or the law of any other state.

As the name suggests, presumptions can be challenged within the parameters set forth in the Act, and if not challenged, they are solidified. Thus, in some circumstances, a person who is entitled claim a parentage presumption may be held by a court to be a nonparent.

Newly proposed subsection 401(a)(5) establishes a ***presumption of parentage*** for intended parents of children born through assisted reproduction and not, as we suggest, *legal parentage*. Subsection 401(a)(5) provides that a person is ***presumed to be a parent*** if: "The individual resided with the birth parent and entered into an agreement with the birth parent to have a child through assisted reproduction and to assume all the duties and responsibilities of parentage, to raise the child together as co-parents, and consented to be named as a parent on the child's birth certificate."

But in so doing, it erects a parentage rule which is ***different from and inconsistent with*** the rules set forth in Article 7. Under Article 7, an intended parent who properly consents to assisted reproduction ***is a legal parent***. Legal parentage is a conclusive parentage status with immediate security for the children and their parents. The Article 7 approach – treating parents who consent to assisted reproduction with the intent to be parents as parents -- has been part of the UPA since 1973 and is the rule that is followed throughout the country. In addition, a parent who is named on a child's birth certificate is also a legal parent under other provisions of the bill. See Article 3. What this means is that Section 401(a)(5) creates internal inconsistencies within the Act. Leaving it in the legislation will cause confusion and uncertainty for children, families, and judges about who is a legal parent for a wide swath of children. **Section 401(a)(5) should be removed from H 7541.**

2. Remove Section 702(b) (Page 33, lines 13-18)

Rhode Island is the only New England state without any statutory protections for children born through assisted reproduction. Many children born through assisted reproduction are born as a result of gamete donation. An important benefit of the Act is to provide clarity with regard to the status of gamete donors.

H 7541 sets forth ***two different, inconsistent rules*** for determining the parentage of a person who provides gametes for assisted reproduction with the intent to parent the resulting child. One rule is set forth in the newly added subsection 702(b). This rule contradicts the parentage rules

set forth in Sections 703 and 704. To provide clarity for the child, the parties, and the court, subsection 702(b) of H 7541 should be removed to ensure that there is a single legal standard that applies.

Under Section 703, any person, including a person who provides a gamete, who consents to assisted reproduction in compliance with Section 704 is a parent. Section 704 provides that a person can establish the necessary consent through a written agreement, an oral agreement, or by residing with the child after birth and developing a parental relationship with the child. By contrast, newly added Section 702(b)(2) seems to require a gamete provider who intends to be a parent to have a written agreement prior to birth. It is unclear how these two provisions would be reconciled in the event they are not both complied with. And if Section 702(b)(2) controls in cases involving intended parents who are gamete providers, it would erect a more difficult parentage standard for people who are both intended and genetic parents. **Section 702(b) should be removed from H 7541.**

3. Amend or Remove 704(b)(2) (Page 33, lines 32-34)

Section 704 provides how intended parents must demonstrate consent to parent a child born as a result of assisted reproduction. The section prefers a written agreement but, importantly, provides that people can demonstrate consent in other ways, including an oral agreement or by conduct. These are very important protections to ensure that parentage establishment is accessible to all Rhode Islanders.

H 7541 contains language about demonstrating consent to parentage through conduct in Section 704(b)(2). The language provides that the parties can establish the necessary consent if: "The parties resided together and decided to have a child together through assisted reproduction and to assume all the duties and responsibilities of parentage, to raise the child together as co-parents and each consents to being listed as a parent on the birth certificate."

The House bill language does not track language of any other state or model act. It is inconsistent with other parts of the Act, including Article 3. For example, if an unmarried person consents to being listed as a parent on the birth certificate, that means they have signed a VAP form. Properly completing a VAP form establishes the person's parentage.

Our suggestion is that Section 704(b)(2) be amended to track Vermont law. The Vermont subsection 704(b)(2) reads as follows: "the person resided with the child after birth and undertook to develop a parental relationship with the child."

Key Amendments regarding parentage through Surrogacy

4. Amend 802(b)(3) (Page 36, Line 32).

H 7541 adds a citizenship requirement to establishing parentage through surrogacy as follows: "At least one of the intended parties (sic - parents) shall be a citizen of the United States."

No other state statute requires one party, let alone one intended parent, be a United States citizen in order to create a family though surrogacy. A citizenship requirement unconstitutionally discriminates against people who reside in Rhode Island in violation equal protection principles.[4] For example, the law cannot bar a professor at a R.I. university who is not a U.S. citizen but who is a resident of Rhode Island from being a parent through surrogacy consistently with equal protection. All Rhode Island residents should be able to have equal access to the various routes to parentage under the Act and should have equal access to R.I. courts to secure their parental rights.

In a case wherein a resident of a state was denied access to take the state bar exam because she was not a U.S. citizen, the U.S. Supreme Court has held that such a rule violated the Equal Protection Clause of the U.S. Constitution and unconstitutionally discriminated against "resident aliens." See *In re Griffiths*, 413 U.S. 717, 721 (1973) quoting *Graham v. Richardson*, 403 U.S. 365, 372 (1971)("'Classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny. Aliens as a class are a prime example of a 'discrete and insular' minority for whom such heightened judicial solicitude is appropriate.'")(internal citations omitted). See also *Cherenzia v. Lynch*, 847 A.2d 818, 823 (R.I. 2004)("A legislative classification also is suspect, and therefore subject to strict scrutiny, if the

[4] The Fourteenth Amendment to the United States Constitution requires that a state provide equal protection to all who reside within its jurisdiction: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

act in question discriminates based on 'race, alienage, or national origin.'") (internal citations omitted). In short, All Rhode Island residents should be able to have equal access to the various routes to parentage under the Act and should have equal access to R.I. courts to secure their parental rights.

Vermont and Maine require that one party resides in the state. The UPA 2017 provision states that either one party resides in the state or that one medical evaluation or procedure occur in the state for there to be jurisdiction. **Our suggestion is that Section 802(b)(3) should read: "At least one of the parties shall be a resident of this state."**

5. Amend Section 804 (Page 39, starting at line 2).

Section 804 contains provisions that create inequalities and inconsistencies that will lead to vulnerabilities in for those who bring children into their families through surrogacy.
For example:

- H 7541 differentiates between intended parents who have contributed genetic material to their children and those who have not, which cuts at the whole concept of protecting those who deliberately plan to bring a child into their family. The current proposal requires parents who are not genetically related to their children born through surrogacy to establish parentage through the Family Court alone, rather than have the option to proceed in either the Superior Court or the Family Court, as other parents have. This differentiation based on genetic tie undermines a basic premise of the Act, which is to treat children equally based on the circumstances of their birth. Whether an intended parent is genetically related to their child has no legal relevance in the surrogacy context, and there should be no distinction between these similarly situated parents.
- The House language also differentiates between parentage orders based on whether they are sought before or after birth, and allows concurrent jurisdiction between the Family Court and Superior Court only for pre-birth parentage orders. This change could create confusion and inefficiency. For example, what if an action is commenced 3 months before a child's due date but, due to a premature delivery, the baby is born before the final judgment is issued? The House bill would create confusion and uncertainty for this family about which court has jurisdiction. It might be appropriate for disputes about

parentage orders to be heard in the Family Court, but for parentage orders where all parties are in agreement, it should make no difference whether the parentage order is sought pre-birth or post-birth.

It is recommended to amend Section 804, and that suggested language is attached.

Other Suggested Amendments

Amendment to Section 301 (Page 20, lines 14-23)

Section 301 has additional language added that is already in Section 310. The language is duplicative, but not problematic. If this additional language remains in Section 301, it should be amended to be consistent with Section 310. **It is suggested to delete or amend this language to be consistent with Section 310.**

Amendment to Section 102 (Page 11, lines 21-22)

The definition of "Birth Order" should be deleted. It is unnecessary, and it is confusing because it uses the words "birth order" when the words "parentage order" are used in Article 7. This definition is not in the Vermont Parentage Act. **It is suggested to delete this definition.**

Conclusion

GLAD appreciates the leadership of Representative Carol McEntee, the hard work of all involved, and the shared commitment to reforming parentage law this session to protect all children. With these amendments, GLAD can enthusiastically support the proposed Rhode Island Uniform Parentage Act. GLAD welcomes the opportunity to work in collaboration with the House to ensure that Rhode Island passes a best-practice, internally consistent, and constitutional Act. Please do not hesitate to contact me with questions or for additional information.

Respectfully submitted,

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