Matter of L.
2016 NY Slip Op 31868(U)
October 6, 2016
Family Court, Kings County
Docket Number: A-11966/15
Judge: Richard Ross
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At a term of the Family Court of the State of New York, held in and for the City of New York, County of Kings, 330 Jay Street, Brooklyn, New York on October 6, 2016.

PRESENT:

Hon. Richard Ross
Judicial Hearing Officer

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A-11966/15
A-29746/15
A-29747/15
A-29857/15
A-704/16
A-3706/16

Matter of L., et.al.

DECISION

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Richard Ross, Judicial Hearing Officer: [1]

These six private placement adoption proceedings raise the question of whether a person has standing to adopt a child in New York State who is already a legal parent of the child in New York State but whose legal parentage is not expressly recognized in all jurisdictions within the United States and abroad. In order to harmonize the non-uniform, unsettled state of family law regarding the definition of legal parentage in the United States and elsewhere with New York's emphatic legal mandate to promote the best interests of children, this Court answers in the affirmative.

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[1]Judicial Hearing Officers are former New York State judges who preside over cases with full judicial authority to hear and determine proceedings pursuant to an Order of Reference and the consent of litigants. An Order of Reference for each of these proceedings was made to this Judicial Hearing Officer by the Supervising Judge of Kings County Family Court (Hon. Amanda White, JFC). All of the petitioners consented to the Judicial Hearing Officer hearing and determining the proceedings. *Rules of the Chief Administrative Judge, Part 122; Judiciary Law 853; CPLR 4301, 4311.*

The proceedings involve a total of five petitioners and six subject children. All of the petitioners and subject children were residents of Kings County at the time the proceedings were filed. *Domestic Relations Law (DRL) 115.2.* Each petitioner is the female spouse of the birth mother and was married to the birth mother when the children were born. Two of the marriages took place in New York State. *DRL 10-a (the "Marriage Equality Act," effective July 24, 2011).* The other three marriages took place outside New York prior to 2011; those three marriages are valid in New York State. *Martinez v. County of Monroe, 80 AD3rd 189 (4th Dept. 2008)*. Each petitioner is named as a parent on her subject child's birth certificate. All of the birth mothers conceived by artificial donor insemination (ADI) with the consent of their spouse. In four of these proceedings, the donor sperm was obtained from a cryobank; the donor was anonymous. In the other two proceedings, the sperm donor was an individual known to the petitioner. In all but one proceeding, a person authorized to practice medicine performed the ADI procedures. (Appendix A contains additional factual details.)

The Court finds that each petitioner is a legal parent of her respective child or children. DRL Section 73.1 provides that "Any child born to a married woman by means of artificial insemination performed by persons duly authorized to practice medicine and with the consent of the woman and her husband, shall be deemed the legitimate, birth child of the husband and wife for all purposes." When the requirements of DRL 73.1 are met, the presumption is irrebuttable. *See*, *e.g., Laura WW. v. Peter WW., 51 AD3rd 211, 214 (3rd Dept. 2008).* Moreover, even when couples do not follow the statutorily required steps, such as obtaining written consents and having the ADI procedures performed by a physician, the marital presumption nevertheless applies although in such circumstances it is rebuttable. *Id. at 214-15*; *Wendy G-M v. Erin G-M, 45* Misc. *3d 574 (Sup. Ct., Monroe County 2014)*. The requirements of DRL 73.1 were followed for five of the six subject children. For the sixth subject child, a licensed physician did not perform the ADI procedures and therefore the DRL 73.1 presumption of legitimacy would be rebuttable as to this child. The known sperm donor for that child consented to the child's adoption, however. The four anonymous sperm donors waived their claims to paternity and surrendered any rights they may have had to establish paternity or seek legal custody. The other of the two known sperm donors consented to the child's adoption.

New York's Marriage Equality Act provides that "No government treatment or legal status, effect, right, benefit, privilege, protection, or responsibility relating to marriage, whether derived from statute, administrative or court rule, public policy, common law or any other source of law, shall differ based on the parties to the marriage being or having been of the same sex rather than a different sex. When necessary to implement the rights and responsibilities of spouses under the law, all gender-specific language or terms shall be construed in a gender-neutral manner in all such sources of law." DRL 10-a.2. In other words, the Marriage Equality Act requires that the word "husband" in DRL 73.1 be interpreted to include the female spouse of a birth mother.

The presumption that a child is the legitimate child of a birth mother's spouse has been described as "one of the strongest and most persuasive known to the law." *Matter of Findlay, 253 NY 1, 7 (1930); see also, David L. v. Cindy Pearl L., 208 AD2d 502, 503 (2nd Dept. 1994),* quoting Findlay. The effect of the presumption, *inter alia*, is to preserve each child's relationship with both spouses in a legally protected family unit even if the child may not be genetically linked to both spouses—an interest that represents a prime example of the type of "protections," "responsibilities," and "benefits" envisioned by the Marriage Equality Act. *Marriage Equality Act legislative history at Marriage Equality Act, ch. 95, AB 8354, S.2 "Legislative Intent" (2011).*

In addition, each petitioner is named on the birth certificate of the applicable child as one of the parents. This constitutes prima facie evidence in New York State of the petitioners' parenthood. *Public Health Law 4103.2* ["Any copy of the record of a birth or of a death or any certificate of registration of birth or any certification of birth, when properly certified by the local registrar, shall be prima facie evidence of the facts stated therein in all courts and places and in all actions, proceedings, or applications, judicial, administrative, or otherwise . . . ."]. The prima facie evidence of parenthood may be rebutted (for example, by a man who asserts a claim of paternity). As noted, however, in these proceedings the four anonymous sperm donors waived their claims to paternity and the two known sperm donors consented to the adoptions.

With respect to the Court's finding that the petitioners herein are the legal parents of their respective subject children, the Court additionally notes the following cases:

- *Debra H. v. Janice R, 14 NY3d 576 (2010)*. This case involved the issue of a person's right to seek visitation with a child on a theory of equitable estoppel in the child's best interests where the person was not biologically related to the child and had not adopted him. The Court of Appeals instructed that "any change in the meaning of 'parent' under our law should come by way of legislative enactment rather than by judicial revamping of precedent." *Debra H. at 596.* In this Court's view, the Marriage Equality Act is precisely a type of legislative enactment which the Court of Appeals had in mind. Enacted the year after Debra H., the Marriage Equality Act's impact on the legitimacy of a child born pursuant to the terms of DRL 73.1 is to require general-neutral construction of the term "husband" to include a female spouse of the birth mother; therefore, the female spouse must be deemed a legal parent of the child.

- *Paczkowski v. Paczkowski, 128 AD3d 968 (2nd Dept. 2015)*, involved a child who was born shortly before the marriage of the birth mother and her female spouse. In denying the non-genetic spouse's petition for joint custody, the Court commented that the marital "presumption of legitimacy" created by DRL 24 and Family Court Act (FCA) 417 "is one of biological relationship, not of legal status." *Id. at 969.* The Marriage Equality Act was not mentioned at all and therefore no instruction can be gleaned regarding its potential impact on DRL 24 and FCA 417. Moreover, DRL 73.1, the applicable presumption of legitimacy statute in the instant proceedings, was not mentioned at all.

- *Matter of Q.M. v. B.C., 46 Misc.3d 595 (Fam. Ct., Monroe County 2014)*, was a paternity proceeding involving a child alleged to have been conceived during sexual intercourse between one of the female spouses and the male petitioner, not by means of ADI. Thus, DRL 73.1 did not apply. The Court stated that the female spouse who was not the birth mother of the subject child "stands in the position of many loving stepparents, male and female, who are not legal parents . . . ," adding that "It is this court's view that the Marriage Equality Act does not require the court to ignore the obvious biological differences between husbands and wives,"

and that "Thus, while the language of Domestic Relations Law 10-a requires same-sex married couples to be treated the same as all other married couples, it does not preclude differentiation based on essential biology." *Id. at 599-600*. As noted, Matter of Q.M. did not involve artificial insemination and therefore DRL 73.1 was not implicated. Moreover, the Court gave no example of where either the plain language of DRL 10.a.2 or its legislative history demonstrated that the Legislature intended DRL 10-a.2 or any other New York statute containing a definition of presumption of legitimacy to be "differentiated based on essential biology."

New York's Domestic Relations Law defines an adoption as follows: "Adoption is the legal proceeding whereby a person takes another person into the relation of child and thereby acquires the rights and incurs the responsibilities of parent in respect to such other person." *DRL 110.* Adoption did not exist at common law; there must be strict compliance with statutory requirements for an adoption to be recognized as valid. *Matter of Robert Paul P., 63 N.Y.2d 233 (1984)*. As legal parents, then, the petitioners herein do not appear to need to "acquire the rights and incur the responsibilities" of parent by adoption. New York law already grants them those rights and responsibilities.

Moreover, DRL 110 provides that the following may adopt a child—categories that do not match the petitioners' status:

- an adult unmarried person;
- an adult married couple together;
- any two unmarried intimate partners together;
- an adult married person who is living separate and apart from his or her spouse pursuant to a decree or judgment of separation [with certain documentary formalities], and an adult married person who has been living separate and apart

from his or her spouse for at least three years prior to commencing an adoption proceeding.[2]

- an adult or married minor couple together of a child of either of them born in or out of wedlock and an adult or minor spouse may adopt such a child of the other spouse.[3]

New York State law requires approval of an adoption if the judge presiding over the proceeding believes the adoption will promote the best interests of the subject child. *DRL 114.1* ["If satisfied that the best interests of the adoptive child will be promoted thereby the judge or surrogate *shall* [emphasis added] make an order approving the adoption . . . ."]. The petitioners argue that, absent approval of these adoptions, their New York legal parenthood will not be given recognition uniformly throughout the United States and in foreign countries—that denying their standing to adopt will leave the legality of their parenthood in limbo. Envisioning situations in which they will be unable to ensure that their children receive appropriate care related to unforseen health, housing, legal, travel, or other circumstances (theirs or the children's) that require such recognition when they are with the children outside New York State and the birth mother is not available, they argue that denial of the adoptions will fail to promote the best interests of the subject children.

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[2]These two categories refer to an adult married (separated) person petitioning to adopt a child who is not the biological child of the petitioner's spouse. The legislative intent in this regard is made clear by the provision in DRL 110 that a child so adopted shall not be deemed the child or step-child of the non-adopting (separated) spouse.

[3] These two categories comprise the so-called "step-parent" adoption. The word "together" in the provision refers to the requirement of consent of the legal parent to the spouse's adoption.

The petitioners further assert that denying standing to adopt would violate or vitiate constitutionally-protected due process and equal protection rights.[4]

In the United States, same-sex couples may exercise the fundamental right to marry in all states, and each state must recognize a same-sex marriage that was validly performed in any other state. *Obergefell, supra; U.S. Const. Art. IV, Section 1* ["Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State"]. Outside the United States, however, most countries do not recognize the legality of their marriage. As of June 2016, just twenty-one foreign countries grant marriage licenses to same-sex couples.[5] Twenty-one foreign countries offer some lesser degree of status, such as civil union, registered partnership, or similar status;[6] eighteen of those twenty-one do not grant marriage licenses to same-sex couples. In the remaining 153 United Nations member countries outside the United

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[4]In the petitioners' view, among these rights are their fundamental right to marry, *See, Obergefell v. Hodges, 135 S.Ct. 2584 (2015),* in that New York couples would feel coerced into having their children without marrying in order to preserve standing to adopt; the right to travel, *See, Shapiro v. Thompson, 394 U.S. 618 (1969), Saenz v. Roe, 506 U.S. 489 (1999);* the guarantee of equal protection of the laws related to their family life, *See, Stanley v. Illinois, 405 U.S. 645 (1972)*; and their right to equal, prompt treatment under the Social Security Act regarding benefits based on a child's relationship with a non-adoptive, non-genetic parent, *See, 42 U.S.C. 416(e)(1), 416(h)(2)(A); Social Security Administration Program Operations Manual System ("POMS"), "Determining Status as Child."* The record of these proceedings, however, contains no evidence that either the petitioners or the subject children have yet experienced what they are afraid of: no such discrimination or harm has been shown as having happened to them or the children outside New York State. Whether or not their constitutional claims seem colorable, in the current posture of these proceedings the petitioners therefore lack standing to seek relief on potential equal protection or due process grounds because they are unable at this point in time to offer proof of having suffered an "injury in fact," i.e., an actual or imminent injury as opposed to a conjectural or hypothetical one. *Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992). See also, Society of Plastics Indus.v. County of Suffolk, 77 N.Y.2d 761 (1991)* ["That an issue may be one of vital public concern does not entitle a party to standing"]. Thus, this Court has not addressed potential constitutional issues in this decision.

[5]Argentina, Belgium, Brazil, Canada, Colombia, Denmark (includes Greenland and the Faroe Islands), Finland, France, Iceland, Ireland, Luxembourg, Mexico (parts), Netherlands, New Zealand, Norway, Portugal, Spain, South Africa, Sweden, United Kingdom (except Northern Ireland), and Uruguay.

[6]Andorra, Australia, Austria, Brazil, Chile, Costa Rica, Croatia, Cyprus, Czechoslovakia, Ecuador, Estonia, Germany, Greece, Hungary, Italy, Liechtenstein, Malta, Mexico (parts), Netherlands, Switzerland, United Kingdom (including Northern Ireland).

States, the female spouse of a birth mother has no legal status with respect to the relationship—she is the birth mother's girlfriend. In other words, in 153 of the 192 United Nations member countries outside the United States, (80%), a female spouse's recognition as a child's legal parent based on a presumption of legitimacy by virtue of her United States marriage to the birth mother (even with her name on the child's birth certificate) is unlikely. Where a foreign country has given a same-sex relationship legal status but not one of marriage, the likelihood is at best highly uncertain. With respect to a couple married in the United States, while a greater likelihood of recognition of the legal parentage of a female spouse of the birth mother may exist abroad where countries have enacted laws permitting same-sex marriage, explicit legal guarantees are for the most part undeveloped.

The petitioners argue that only an adoption decree can provide the requisite legal status for their parentage abroad and protection for their children in the event of a travel situation requiring the assertion of parental rights. While recognition of a New York adoption is more likely (though not certain) to occur in the twenty-five foreign countries which permit either or both "joint same-sex couple" or "second-parent" adoptions,[7] elsewhere abroad the likelihood of the New York adoption decree being recognized is less certain or not to be expected. The petitioners point out, however, that in *any* foreign jurisdiction only the most convincing bona fides of their parentage—an adoption decree—can provide the means to prove parentage promptly and reliably in the type of emergency situations that may occur.

Even within the United States, not all states statutorily recognize legal parentage based on the presumption of legitimacy that in New York is derived from New York's DRL 73.1 and DRL 10-a.2. For example, of the thirty-eight states that have explicit statutes addressing the parental status of spouses participating in ADI, twenty-eight states expressly employ gendered terms such as "husband," "man," and "father" in specifying who may be recognized as a non-genetic parent

[7]Both joint and second-parent: Andorra, Argentina, Belgium, Canada, Denmark, Finland, France, Luxembourg, Netherlands, Norway, South Africa, United Kingdom; Joint only: Australia (most parts), Brazil, Colombia, Ireland, Israel, Malta, Mexico (parts), New Zealand, Portugal; Second-parent only: Austria, Estonia, Germany, Italy (parts).

of child conceived by means of ADI; only ten states and the District of Columbia use non-gendered terminology. Twelve other states have no explicit statute at all in this regard.[8]

The above is intended to illustrate the patchwork nature of the applicable laws. Other illustrations provide additional understanding: As with New York, for example, approximately half of all states require medical participation in ADI procedures; left unresolved is the question of how a claim of legal parentage of a non-adopted child would be evaluated in those states in instances where a parent did not use a physician. The same kind of question would arise in the approximately half of all states that require a variety of consents for ADI as well as have differing filing requirements with either courts or agencies for those consents, in order for ADI to be given legal effect.

Notwithstanding that other statutory or common law presumptions may apply from state to state, however inconsistently, to fill the legal gaps related to parental rights as regards ADI, *see, e.g., Haw. Rev. Stat. Ann. 584-4; Ind. Code Ann. 31-14-7-1; Gartner v. Iowa Dept. Of Public Health, 830 N.W.2d 335 (Iowa 2013),* the legal situation nationwide falls far short of providing the petitioners with the certainty and security of an adoption decree, which must be given full faith and credit in every state. The full faith and credit requirement can be relied upon for enforcing the judgment of another state. *V.L. v. E.L., 136 S. Ct. 1017 (2016)* [Alabama obligated to grant full faith and credit to Georgia second-parent adoption decree affirming parental rights of female same-sex to child born using assisted reproductive technology]; *Baker v. General Motors, 522 U.S. 222 (1998).* By contrast, full faith and credit may not require one state to substitute its own statutory standards for those arising under another state's statutes. *Baker, supra at 232; Pacific Employers Ins. Co v. Industrial Accident Commission, 306 U.S. 493, 501.* Therefore, while a judgment of adoption obtained in one state must be given full faith and credit nationwide regardless of whether it could have been obtained in another state, the same is not necessarily true

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[8]No explicit statute regarding status of spouses: Arizona, Hawaii, Indiana, Iowa, Kentucky, Nebraska, Pennsylvania, Rhode Island, South Carolina, South Dakota, Vermont, West Virginia; Gendered terminology: Alabama, Arkansas, Colorado, Connecticut, Florida, Idaho, Illinois, Kansas, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, New Hampshire, New Jersey, New York (*but see, DRL 10-a),* North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Tennessee, Texas, Utah, Virginia, Wisconsin, Wyoming; Non-gendered terminology: Alaska, California, Delaware, District of Columbia, Georgia, Illinois, Maine, Nevada, New Hampshire, New Mexico, Washington.

of the parental status obtained in New York by operation of a New York statutory standard. For the issues raised herein, more than the DRL 73.1/DRL 10a.2 presumption of legitimacy is implicated. For example, a New York-issued birth certificate identifying parentage based on the marital presumption provides prima facie evidence, but not conclusive proof, of parentage. *Public Health Law 4301.2, supra*; questions about a child's parentage, therefore, could conceivably arise in other states notwithstanding a New York birth certificate identifying both same-sex spouses as parents. *28 U.S.C. § 1738* [another state's records "shall have the same full faith and credit in every court within the United States . . . *as they have by law or usage in the courts of such State, Territory, or Possession from which they are taken*" (emphasis added].

Recent and pending cases in a number of states demonstrate the lingering resistance in some parts of the country to treating same-sex families with legal equality. For example, many state governments have resisted applying the marital presumption of legitimacy to children conceived by means of ADI for same-sex spouses for purposes of issuing birth certificates naming both parents. *See, e.g., Brenner v. Scott,* No. 4:14CV107-RH/CAS, 2016 WL *3561754, at *3 (N.D. Fla. Mar. 30, 2016*) ["The (Florida) Surgeon General apparently is still not issuing birth certificates as required by *Obergefell."*]; Roe v. Patton**,** *2:15-CV-00253-DB, 2015 WL 4476734 (D. Utah July 22, 2015)* [enjoining Utah Dept. Of Health and Utah Office of Vital Records and Statistics from enforcing Utah laws that differentiate between male spouses of women who give birth through ADI and similarly situated females spouses who give birth by means of ADI]; *Gartner v. Iowa Dept. Of Public Health***,** 830 N.W.2d 335 (2013) [Iowa Dept. Of Health must list non-genetic spouse of birth mother as a parent on birth certificate]. Well over a year after Obergefell, cases on this issue are still being actively litigated. *See, e.g., Marie v. Mosier***,** *No. 14-cv-02518-DDC-TJJ, 2016 WL 3951744 (D. Kan. July 22, 2016)* [ordering Kansas officials to comply with Obergefell]; *Carson v. Heigel***,** *No. 3:2016-cv-00045*-MGL (D. S.C. July 18, 2016) [challenging South Carolina's denial of birth certificates naming both married mothers of children born using ADI]; *Torres v. Seemeyer***,** No. 15-cv-288-bbc *(W.D. Wis. Sept. 14, 2016)* [challenging Wisconsin's denial of birth certificates]

Genetic same-sex parents, estranged from their same-sex spouses, have claimed in custody and visitation disputes that the marital presumption does not confer parental rights on their spouse. *See, e.g., Jamie Satterfield, Parenting Rights in Same-Sex Divorces Headed to a Tennessee Appellate Court, Knoxville New Sentinel (June 24, 2016), http://www.knoxnews.com/news/crime-courts/parenting-rights-in-same-sex-divorces-headed-to-a-tennessee-appellate-court-36046f02-b742-54df-e053--384279061.html* [reporting holding of Tennessee 4th Circuit Judge in divorce action that same-sex spouse of woman who conceived using artificial insemination does not qualify as a parent, given gendered terminology of Tenn. Code Ann § 68-3-306 ["A child born to a married woman as a result of artificial insemination, with consent of the married woman's husband, is deemed to be the legitimate child of the husband and wife"].

Where a couple uses a known sperm donor, cases in a number of states have held that non-paternity provisions in ADI statutes will not necessarily preclude parentage of the known donor if the parties neglected to comply with medical professional participation provisions. *See, e.g., Bruce v. Boardwine, 770 S.E.2d 774 (Va. Ct. App. 2015)* [donor non-paternity statute held inapplicable because home procedure did not comply with statutory requirement of insemination through "medical technology"; donor awarded joint custody and visitation]; In a Kansas case, the state government sought child support from the known donor of a child conceived by a same-sex couple although the donor and parents never claimed that the man was intended to have parental responsibilities or rights. *See, Brooke Bennington, Kansas Sperm Donor Fights Back After State Forces Him To Pay Child Support, WTHITV10.com (Sept. 5, 2015).*

In other cases, lack of strict compliance with statutory requirements, or lack of any statutory guidance at all, has not prevented the disqualification of known donors from parentage. The fact that the issue has been litigated in multiple cases, no matter the outcome, demonstrates the potential conflicts and lawsuits same-sex parents may face without the clarity of an adoption decree. *See generally, e.g., A.A.B. v. B.O.C.,* 112 So. 3d 761 (Fla. Dist. Ct. App. 2d Dist. 2013); *In re Paternity of M.F.,* 938 N.E.2d 1256 (Ind. Ct. App. 2010); *In re K.M.H.,* 285 Kan. 53 (2007);

Ferguson v. McKiernan, 940 A.2d 1236 (Pa. 2007); *See also, Adoption of a Minor,* 29 N.E.3d 830 (Mass. 2015) [known donor is not entitled to notice of second-parent adoption by same-sex spouse of birth mother].

In Obergefell, the United States Supreme Court emphasized the "instability and uncertainty" same-sex couples have faced because their marriages and spousal statuses did not receive uniform recognition. *Obergefell, supra at 2607.* The Court noted that "even an ordinary drive into a neighboring [s]tate to visit family or friends risks causing severe hardship in the event of a spouse's hospitalization while across state lines." *Id.* The petitioners herein fear that the "severe hardship" to which the Supreme Court referred could similarly befall them or their children as they cross state lines if they are unable readily and conclusively to establish that they are the legal mothers of their children.

Many observers consider determining the proper nexus of the concepts of standing and a child's best interests to be one of the most important evolving issues of New York family law. Not only do DRL 114.1, a multiplicity of other New York statutes, and hundreds of New York Appellate Division decisions demonstrate that the underlying principle of New York law regarding children is promotion of their best interests, but telling guidance on the standing issue is to be found in two New York Court of Appeals cases. In *Matter of Jacob, 86 NY2d 651 (1995),* the Court of Appeals reversed Appellate Division rulings in two cases and found standing to adopt. One of the cases involved an unmarried couple in which the male partner sought to adopt the birth's mother's child; the birth mother and biological father consented to the adoption. The other case involved an unmarried female couple in which the non-genetic partner sought to adopt, with her partner's consent, her partner's child who was born by means of ADI. At that time, the provisions of DRL 110 as to standing, as well as the provisions of DRL 117 regarding termination of the parental rights of natural parents of a child upon adoption, had not previously been interpreted to permit adoption of the subject children in these two proceedings. In reversing the Appellate Division—while granting DRL 110 standing, interpreting DRL 117 so as not to bar the adoptions, and reinstating the adoption petitions for hearing by Family Court—the Court

explained that while the adoption statute must be strictly construed [referencing DRL 110 and DRL 117] that "What is to be construed strictly and applied rigorously in this sensitive area of the law, however, is legislative purpose as well as legislative language. Thus, the adoption statute must be applied in harmony with the humanitarian principle that adoption is a means of securing the best possible home for a child." *Id. At 657-58.* The Court added that denying the adoptions "would not only be unjust under the circumstances, but also might raise constitutional concerns in light of the adoption statute's historically consistent purpose—the best interests of the child." *Id. at 667.*

In *Matter of Brooke S.B., No. 91, 2016 WL4507780, (August 30, 2016)*, the Court of Appeals extended standing to seek visitation and custody of a child pursuant to DRL 70 to a non-genetic, non-adoptive partner of the birth mother where that partner "shows by clear and convincing evidence that the parties agreed to conceive a child and to raise the child together." *Id. at 2* [overruling *Matter of Alison D., 77 NY2d 61 (1991)]*. Granting standing, of course, permits the issues of custody and visitation to be determined on the basis of the best interests of the child. *See, e.g., Friederwitzer v. Freiderwitzer, 52 NY2d 89 (1982).*

Between *Matter of Jacob and Matter of Brooke S.B.,* New York's Appellate Division and trial courts extended adoption standing to petitioners in family constellations not necessarily contemplated when the Legislature first enacted DRL 110 and therefore who were not yet expressly permitted to adopt. *See, e.g., Matter of Carolyn B., 6 AD3d 67 (4th Dept. 2004)* [unmarried same-sex couple can jointly adopt a child placed with them by an authorized agency, noting that while DRL did not expressly permit the couple to adopt jointly, the statute also did not expressly prohibit it]; *Matter of Emilio R., 293 AD2d 27, 29 (1st Dept. 2002)* [unmarried couple may adopt, noting that "application of the statute must be harmonized with the overarching principle of securing the best possible home for the child"]; *Matter of Sebastian, 25 Misc.3d 567 (Surr. Ct., New York County 2009)* [the Court pointed out that as to adoption, "its purpose and effect is to create a new legal relationship where one did not previously exist. Adoption is not utilized for, nor . . . is it available to reaffirm, an already existing relationship," and also discussed

additional impermissible bases for approving the adoption. The Court nevertheless approved the adoption while starkly stating: "This court, however, lacks jurisdiction to confer legal parentage in any other way other than by granting the adoption requested by the parties."];[9] *Matter of Chan, 37 Misc. 3d 358, 368 (Surr. Ct. New York County 2012)* [permitting adoption by the former intimate partner of the subject child's mother, noting that the "plain language" of DRL 110 "does not mandate the existence of a spousal-type relationship between the adoptive parents"]; *Matter of Carl, 184 Misc.2d 646, 652 (Fam. Ct. Queens County 2000)* [granting joint adoption of foster child by an unmarried couple because "[t]he adoption statute does not expressly prohibit the proposed adoption" which would provide the child "with a stable and permanent home in his best interests"]; *Matter of G., 42 Misc 3d 812, 819 (Surr. Ct. New York County 2013)* [granting adoption by a man who had never been the intimate partner of, nor lived with, the subject child's mother but who was committed to co-parenting the child in a separate home in a different borough than the mother, the Court noting that "[a]cknowledging their obligation to interpret the statute with the child's best interests in mind, courts have consistently read DRL 110 in an expansive manner with respect to the class of persons who may adopt"]; *Matter of A., 27 Misc.3d 304 (Family Court Queens County 2010)* [joint adoption of three children by their grandmother and their aunt, all of whom lived together at the time of filing of the petitions; joint adoption of all three children granted although the petitioners reported to the Court an intent to live separately after adoption, with two children in one petitioner's new home and the other child in the second petitioner's new home].

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[9] *But see, Matter of Seb C-M, Redacted by Court, NYLJ 1202640527093d (Surr. Ct, Kings County 2014)*. The Court cited PHL 4103, DRL 10-a.2, and Obergefell v. Hodges, supra, in denying a proposed adoption by the female spouse of the birth mother as "wholly unnecessary," but did not specify or discuss legal issues related to the marital status of the petitioner outside the United States or the variation in presumption of legitimacy and other laws that would affect her parental status in states other than New York.]

In the Court's opinion, the foregoing recital of authority strongly supports promoting the best interests of the subject children by finding that the petitioners have standing to adopt, and the Court so holds.[10] The petitioners, who are legal parents of their children in New York State, are recognized only as step-parents in other states. In most countries outside the United States, they are recognized neither as spouses nor as parents but, at most, as intimate partners of their birth mother spouses. Either of those statuses—step-parent or intimate partner—would give the petitioners standing to maintain adoption proceedings in New York. The language of DRL 110 does not expressly restrict the description of an adoption petitioner's status with respect to a subject child, for the purpose of standing to adopt, to be limited to what that description may be in New York State only.

The factual record of these proceedings makes clear that the quality of the petitioners' parenting has been laudable. Given the non-uniform, unsettled state of family law regarding the definition of legal parenthood in the United States and elsewhere, approving the adoptions is required to promote the children's best interests everywhere they may find themselves.

The petitions to adopt are granted.

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Richard Ross, Judicial Hearing Officer

[10]In an different context, DRL 115-a provides for New York adoption of a child by a person who is already the child's legal parent by means of the so-called "re-adoption" in New York of a child previously adopted by that person in a foreign country. "A re-adoption, is, in effect, a declaratory judgment that a legal parent-child relationship exists. The order or certificate that results from the proceeding can be used to satisfy third persons, such as governmental agencies, that the child is the legal child of the adoptive parents. *DRL 115-a reviewed by Alan D. Scheinkman, Practice Commentaries (McKinney's Cons. Laws of N.Y. 2011].*

Appendix A

Proceeding #1: The parents were married in New York in 2011. The child was born in 2014. The sperm donor was known. The petitioner's spouse consented to the ADI procedures, which were not carried out with the assistance of a licensed physician

Proceeding #2: The parents were married in Canada in 2008. The child was born in 2014. The sperm donor was anonymous. The petitioner's spouse consented to the ADI procedures, which were carried out with the assistance of a licensed physician..

Proceeding #3: The parents were married in Canada in 2008. The child was born in 2010. The sperm donor was anonymous. The petitioner's spouse consented to the ADI procedures, which were carried out with the assistance of a licensed physician.

Proceeding #4: The parents married in Connecticut on June 17, 2013. The child was born on July 8, 2013. The sperm donor was anonymous. The petitioner's spouse consented to the ADI procedures, which were carried out with the assistance of a licensed physician.

Proceeding #5: The parents were married in New York on September 19, 2015. The child was born on December 19, 2015. The petitioner supplied the egg used to conceive the child with sperm from a known donor. The ADI procedures were carried out with the assistance of a licensed physician. The resulting embryo was implanted in her partner, who became the petitioner's spouse while carrying the child to term.

Proceeding #6: The parents were married in Connecticut in 2010. The child was born by means of ADI in New York in 2016. The sperm donor was anonymous. The petitioner's spouse consented to the ADI procedures, which were carried out with the assistance of a licensed physician.