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 the 12th day of December 2019

P R E S E N T:

Hon. Richard Ross
Judicial Hearing Officer

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Matters of A and LU

A-19686/17
A-24481/18

Decision and Order

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Richard Ross, Judicial Hearing Officer:[1]

In each of these two private placement adoption proceedings, the father seeks to adopt a child who is already legally his by virtue of the child's birth during the father's marriage to the child's mother. *See*, *Matter of Findlay, 253 NY 1,7 (1930); David L. v. Cindy Pearl L., 208 AD2d*

[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.*

502, 503(2nd Dept.1994), quoting Matter of Findlay. The petitioners argue that because they have transitioned from female to male gender, their status as legal father remains uncertain depending on where they may be living or traveling with their child and that adoption is thereby necessary as to ensure their parental status and promote their child's best interests. The birth mothers (each petitioner's spouse) consent to their respective husband's proposed adoption.

In *Matter of L, 2016 NY Slip Op 31868 (October 6, 2016),* involving six petitioners in same-sex marriages, this Court raised the question of whether a New York petitioner may adopt a child when that petitioner is already the child's legal parent in New York State but whose legal parentage is not expressly recognized in all jurisdictions within the United States and abroad because of the same-sex marriage. 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 legal mandate to promote the best interests of children, the Court answered in the affirmative, approving the adoption of six subject children. The petitioners herein maintain that *Matter of L* supports approval of their proposed adoptions as well.

A hearing on each of these petitions was held on November 20, 2019. The testimonial and supporting documentary evidence at hearing showed that the petitioners' parenting of the subject children has promoted and is likely to continue to promote the children's best interests. The expressed fear of each petitioner was that documentation and other evidence of their female gender identity prior to transition might surface at critical moments of needed protection and care for his child, to the detriment of the child's best interests. Additionally, the petitioners expressed concern that, if the birth mother were no longer alive, a legal challenge to their parentage might be brought by a relative or other person seeking custody or guardianship of the child based on the laws of a state other than New York if the legal challenge to their parentage found proper jurisdiction outside

New York at that point in time. The petitioners also expressed concern that their claim to Social Security benefits on behalf of their child, in the event of the birth mother's death or disability, might not be honored based on the Social Security Administration's review of laws involving their status as legal parent that are not uniform from state to state. [2]

The parents of subject child A were married in April 2016; the child was born in July 2017. The parents of subject child LU were married in December 2017; the child was born in March 2018. Each subject child was conceived using sperm from an anonymous sperm donor with the consent of each petitioner and his wife. As to subject child A, a letter from the fertility center states that the birth mother received fertility treatment at the center, conceived, and had a successful pregnancy. With respect to subject child LU, the child was conceived by means of *in vitro* fertilization (IVF), according to a letter submitted by a doctor who is an assistant professor at the reproductive medicine center where the IVF procedure took place. The letter states that LU's birth mother was his patient. *See, Domestic Relations Law (DRL) 73.1.* ["Any child born to a married woman by means of artificial insemination performed by persons duly authorized to practice medicine and with the consent in writing of the woman and her husband, shall be deemed the legitimate birth child of the husband and his wife for all purposes."] When the requirements of

[2] As with ***Matter of L.,*** the Court is not analyzing potential constitutionally-protected due process and equal protection rights that may be raised by the facts underlying these proceedings. The record contains no evidence that either the petitioners or the subject children have yet experienced what they are afraid of: no discrimination or harm has been shown as having yet happened to them outside New York State. Whether or not any such 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"].

DRL 73.1 are met, this presumption of legitimacy is irrebuttable. *See, e.g., Laura WW v. Peter WW, 51 AD3d 211, 214 (3rd Dept. 2008). See also, New York Marriage Equality Act legislative history at Marriage Equality Act, ch. 95, AB 8354, S.2 "Legislative Intent" (2011).*

Moreover, the fathers of subject child A and subject child LU are named on their respective child's birth certificate. 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. No such rebuttal has been raised with respect to either of the subject children, however. In addition, no man has registered with the New York State Putative Father Registry as the father of either child, no man has filed a court proceeding seeking to be named as the legal father of either child, and each birth mother has filed an affidavit pursuant to DRL 111-a demonstrating that no man is entitled to notice of the proposed adoption of her child by her husband.

The Court agrees with the petitioners' arguments. In a substantial majority of the 192 United Nations member countries, as well as many states within the United States of America, New York State's legal protections of the instant petitioners' parentage of the subject children might not be available to them if they are physically within those jurisdictions and their male gender identity is not recognized— unless they have an adoption decree for their child. *See, Matter of L , supra at 7, 8, 9 and fn 5, fn 6, fn7, fn 8.* New York orders of adoption must be given full faith and credit by every state provided, as herein, that the issuing court has jurisdiction to issue the order. *U.S. Const. Art. IV, Section 1.* ["Full faith and Credit shall be given to each State of the

public Acts, Records, and judicial Proceedings of every other state."] This requirement can be relied upon for enforcing the judgment of another state. *See, V.L. v. E.L., 136 Supt. Ct. 1017 (2016)*. 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. *See, Baker v. General Motors, 522 U.S. 222 (1998).*

In this Court's judgment, New York caselaw makes clear that the best interests of a subject child shall prevail in court decision-making even where a petitioner's standing to seek relief on behalf of the child may be regarded as ambiguous, or even non-existent, when considered in the context of statutory provisions granting such standing—in these proceedings, the provisions of DRL 110 describing who has standing in New York to adopt a child. *See, Matter of Jacob, 86 NY2d 651 (1995); Matter of Brooke S.B., 27 NY3d 1026 (2016); Matter of Carolyn B., 6 AD3d 67(4th Dept. 2004); Matter of Emilio R., 293 AD2d 27 (1st Dept. 2002); Matter of L., supra; Matter of Carl, 184 Misc.2d 646 (Fam. Ct., Queens County, 2000); Matter of G., 42 Misc.3d 812 (Surr. Ct., New York County, 2013); Matter of A., 27 Misc.3d 304 (Fam. Ct., Queens County, 2010). See also, Matter of John, 174 AD3d 89 (2nd Dept. 2019).*

Recent New York legislation, *see, S.3999/A.460, signed 9/16/19, amending DRL Section 110,* prohibits denial of an adoption solely on the basis that a petitioner's parentage, as herein, is already legally-recognized. One of the instant petitioners argued that the new statute by itself requires this Court to approve his petition to adopt his child. The Court, however, understands the legislation as intending to provide protection only to parents who, despite their legal parentage of a child, conceivably could find themselves in a situation where that legal parentage, to the detriment of the best interests of the child, runs the risk of not being recognized. *See, Press Release of New York State Governor's Office, 9/16/19.* ["The bill protects parents whose names were not on the birth certificate, same-sex couples, and parents who had a child through surrogacy from

being denied an adoption when the parent petitioning is already recognized as the child's parent . . . ," and adding, quoting Governor Andrew M. Cuomo: "All parents deserve the same rights and the same recognition under the law – period – and it's unconscionable that this isn't the case in every corner of the nation. These new protections will help ensure that all families are treated with fairness and equality and that no parent encounters unreasonable barriers in a court of law."]

Although the instant petitioners do not match the types of parents specifically described in the press release of the New York State Governor's Office (i.e., parents whose name is not on a child's birth certificate, same-sex couples, and parents of children born through surrogacy), the facts underlying these proceedings raise the potential that the families will not be treated with the fairness and equality envisioned in Governor Cuomo's statement contained in the release. The fact that S.3999/A.460 placed its provision within DRL 110 gives additional strong support for this viewpoint, even though the provision was added to DRL 110 as the eighth (closing) paragraph of the section rather than in the section's first paragraph, which describes who has standing to adopt a child.

The adoptions are approved. *See, DRL 116.4, DRL 114.*

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Richard Ross, Judicial Hearing Officer