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Janet Fink, Deputy Counsel
NYS Unified Court System – NYC Office
Office of Court Administration
25 Beaver Street – Room 1170
New York, New York 10004

Email: JFINK@nycourts.gov

Re: Alleged parents entitled to consent to adoptions and to notice of adoption, surrender and termination of parental rights proceedings [DRL §§ 111, 111-a; SSL § 384-c]

Dear Ms. Fink:

We, the undersigned, are a group of adoption attorneys and other adoption and child-welfare professionals from across New York State, who work with adoptive families, children, child welfare agencies and the court system to protect and advocate for the rights of adoptive children and their families. We submit this letter in opposition to the Family Court Advisory & Rules Committee, which proposes to make various amendments to Section 111 of the New York State Domestic Relations Law, relating to notice and consent rights for purported birth parents in adoption proceedings.

Currently, in order for a biological father to be entitled to withhold his consent to the adoption of his child, it is required that he maintain both a requisite level of contact with the child **and** that he provides a reasonable amount of financial support for the child in accordance with his means. This has been a longstanding requirement of New York law, mandating that birth fathers "grasp the opportunity and accept some measure of responsibility" for their child in order to enjoy

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the protections of a parent-child relationship (*Lehr v. Robertson*, 463 U.S. 248 [1983]; *Raquel Marie X.*, 76 NY2d 387, 401 [1990]). This child-centered approach has been the core principle of New York adoption law, creating objective rules which unwed fathers must comply with in order to secure rights in the first place. As has been determined by the United States Supreme Court and the New York Court of Appeals, unwed fathers have a right to secure parental rights, but these rights do not automatically spring into being (*Lehr v. Robertson*, 463 U.S. at 261 ("[T]he mere existence of a biological link does not merit constitutional protection.")). "The protected interest is not established simply by biology. The unwed father's protected interest requires both a biological connection **and** full parental responsibility; *he must both **be** a father and **behave** like one*" (*Raquel Marie X.*, 76 NY2d 387, 401 [1990]).

The proposed legislation would substantially alter the requirements for unwed birth fathers in New York, to the peril of prospective adoptive children, and would dramatically lower the standard required of purported fathers who seek to prevent a child from being adopted into a permanent home.

Child More Than Six Months Old

Domestic Relations Law § 111(1)(d) sets forth the criteria required for an unwed birth father to withhold his consent to the adoption of his child who is **more** than six months old. Under the current DRL § 111(1)(d), the birth father must have paid a fair and reasonable amount of support for the child and either visited with the child monthly or regularly communicated with the child, in order for his consent to the adoption to be required. This is the case regardless of whether a child support or custody order has previously been issued. The proposed amendments would elevate two additional categories of individuals to the status of "consent" father, in that (1) any person who executed an acknowledgment of parentage or was adjudicated to be a parent by a court, or (2) any person who openly lived with and held themselves out as the child's parent for a period of six months, would be required to consent to the child's adoption. This is a radical departure from the current statutory scheme and is extremely problematic for a number of reasons.

Of significant importance, the inclusion of these additional categories of individuals **completely removes the current requirement that a purported father provide some measure of financial support for his child in order to be considered a "consent" parent.** As is outlined above, the current statutory framework makes it clear that providing financial support for a child

is a crucial hallmark of parental interest in a child. The Practice Commentaries to Section 111(1)(d) and a host of appellate-level caselaw from **all four** departments and the New York Court of Appeals have made clear that this is a twofold inquiry: requiring the birth father to demonstrate both contact/communication with the child **and** the payment of financial support (*Matter of Andrew Peter H.T.*, 64 NY2d 1090 [1985]; *In re Blake I.*, 136 AD3d 1190 [3d Dep't 2016]; *Matter of Bella FF.*, 130 AD3d 1187 [3d Dep't 2015]; *Matter of Floyd J.B.*, 2019 NY Slip Op. 03965 [2d Dep't 2019]; *Matter of Makia R.J.*, 128 AD3d 1540 [4th Dep't 2015]; *In re Phajja Jada S.*, 86 AD3d 438 [1st Dep't 2011]). **Requiring the consent of a purported father who simply executed an acknowledgement of paternity or filed a paternity petition, without providing any degree of financial support for the child, is contrary to public policy, contrary to the legislative intent of Section 111, and contradicts decades of well-established appellate caselaw in every department of our State.**[1]

It is also problematic that the proposed amendment elevates an individual to the status of "consent" father simply by signing an acknowledgment of parentage because this is something which is often done informally at the hospital and very frequently done by someone who is not the biological father of the child. Signing an acknowledgment of parentage is done without any type of screening, regulation or oversight whatsoever. A purported father is not required to provide any evidence that he is, in fact, the father of the child, and he is not even required to execute the acknowledgment under oath, or before a Notary Public. The practical impact of this amendment is that scores of individuals who were previously not considered "consent" fathers would now be required to consent to proposed adoptions. The direct consequence of this is that it will make it more difficult, time consuming and costly to free children for adoption, thereby increasing the length of time children are required to remain in foster care, and likely preventing many adoptions from finalizing altogether.

[1] The proposed amendment also provides that, where a birth father has not executed an acknowledgment of paternity or openly lived with the child for a period of six months or more, he is only required to provide financial support for the child if he has been ordered to do so by a court. This is a complete departure from the current status of the law in this State (*see Matter of R. Children*, 119 AD3d 947, 947 [2d Dep't 2014]) and is contrary to the legislative intent of DRL § 111. With the inclusion of this amendment to the statute, a purported birth father could have no contact with his child and pay no child support for the child whatsoever (for a period of up to 18 years) and still be required to consent to the child's adoption, simply because the child's caretaker never instituted a child support proceeding against him. This also shifts the burden from the birth father to provide support for his child, to the birth mother (or other caretaker) to track the birth father down to try and force him to provide financial support involuntarily.

Additionally, there is an inconsistency in the language of DRL § 111(1)(d), in that it requires a purported birth father to have legal parentage established within six months of the child's first entry into foster care, or as the result of a court action filed within six months of the child's birth, as long as the court action is actively prosecuted. However, as discussed above, DRL § 111(1)(d)(i) also provides that a birth father is a "consent" father if he simply executes an acknowledgement of parentage. In that circumstance, the birth father would likely never file a paternity petition, if he had already executed an acknowledgement of parentage, yet the requirement of 111(1)(d)(i)(B) that a petition be filed and "actively prosecuted" within six months of the child's birth, seems to apply in that circumstance as well. This apparent inconsistency (and potential drafting error) is guaranteed to lead to litigation and potential future legislative efforts to remedy this unanticipated and illogical outcome. In that same section of the proposed amendment, requiring that a parentage petition be "actively prosecuted," the term "actively prosecuted" is not defined, thus leaving uncertainty and ambiguity as to what degree of effort is required by the purported father.

Child Under Six Months Old

Domestic Relations Law § 111(1)(e) sets forth the criteria required for an unwed birth father to withhold his consent to the adoption of a child who is **under** six months old. Under the current 111(1)(e), the birth father must have openly lived with the child's mother, held himself out to be the child's father, and paid a fair and reasonable sum for pregnancy expenses and/or birth-related expenses for the child in the six months preceding the child's placement for adoption.

Notably, the Court of Appeals found this section of the DRL to be unconstitutional in 1990 in the case of *Raquel Marie X.* (76 NY2d 387 [1990]). In that case, the Court of Appeals found that the requirement that the birth father live with the birth mother for the six months preceding the child's placement for adoption to be unconstitutional, striking down the statute based on those grounds. However, **the Court did not take issue with the portion of the statute calling for the birth father to provide financial support for the child** – finding that requirement to be consistent with "the State interest" (*id.* at 406). In the years since *Raquel Marie X.* was decided, courts have been tasked with resolving questions arising under Section 111(1)(e) by applying the factors articulated by the Court of Appeals for assessing a birth father's level of parental interest in his child, including: "public acknowledgment of paternity, payment of pregnancy and birth expenses,

steps taken to establish legal responsibility for the child, and other factors evincing a commitment to the child" (*id.* at 408).

Accordingly, it is clear that the legislative intent behind DRL § 111(1)(e) was also to require purported fathers to provide some measure of financial support for or on behalf of the child as an indicator of parental interest and responsibility (*see Raquel Marie X*, 76 NY2d 387, 399 [1990]). Notably, and consistent with *Raquel Marie X.*, the proposed amendments do not remove this financial requirement from Section 111(1)(e) – *only* from 111(1)(d). In fact, the proposed amendment *adds* to this financial requirement in 111(1)(e), by including the payment of "child support" as an element of the "consent" determination. Thus, the proposed amendments create a direct contradiction within themselves depending solely on the age of the child at the time the petition for adoption is filed. This is a completely inconsistent and arbitrary statutory scheme, which mandates drastically different requirements for purported fathers (and drastically different results for adoptive children) based solely on the age of the child.

The amendments to DRL § 111(1)(e) also contain various undefined new terms that create practical questions for interpretation and implementation of the statute. For instance, the proposal adds the requirement that, in order for a purported father to be considered a "consent" father of a child under the age of six months, he must both hold himself out to be the child's parent and pay a fair and reasonable amount of financial support "unless prevented from doing so." It defies logic how a purported father could possibly be "prevented" from holding himself out as a child's parent, an action that is within the exclusive control of the purported father. Likewise, given the ability of even a non-custodial parent to file a petition to establish his child support obligation, it is unrealistic that a purported father could ever be "prevented" from paying child support for his child.[2] These provisions are certain to be used as "loopholes" for purported fathers who have otherwise failed to meet their burden under 111(1)(e), thereby creating additional litigation and making it increasingly difficult to free children for adoption.

Additionally, the amendments to both §§ 111(1)(d) and 111(1)(e) change the timeframe of when the statute becomes applicable. Under the current statutory scheme, the consent provisions of 111(1)(d) spring into effect if the child in question is more than six months old at the time he is

[2] This language also appears in the proposed amendments to DRL § 111, creating the same issues with that portion of the statute.

placed for adoption, and 111(1)(e) applies if the child is under six months old when placed for adoption. The proposed amendments would change that timeframe to be conditioned on the child's age at the time a petition is filed to terminate parental rights, execute a judicial surrender, approve an extra-judicial consent/surrender or to adopt the child. While this proposed change was introduced in an effort to provide clarity given apparent inconsistency by courts in determining what is meant by a child being "placed for adoption," it is rife with practical problems. For example, it is certainly conceivable that in a private agency infant adoption, where the child is placed with adoptive parents from birth, that the agency could take more than six months to file a petition for approval of an extra-judicial surrender. If the consent determination runs from the filing date (something the adoptive parents generally have no control over), rather than the date of placement, the purported father in that scenario would be subject to a different consent standard (111(1)(d)), rather than the more exacting 111(1)(e).

The proposal also inexplicably leaves out the signing of an extra-judicial consent, judicial consent, extra-judicial surrender or judicial surrender as possible triggering events for purposes of the DRL § 111 analysis. It is submitted that the more effective and rational way to address the drafters' concerns would be to define what is meant by "placement for adoption," rather than attempt to implement a bulky, unworkable standard that is likely to result in unforeseen and unintended consequences.

Burden of Proof

Last, the addition of subsection 111(8), which articulates the proposed standard of proof for a birth parent consent hearing, is seemingly only applicable to contests regarding whether a party is a "consent" father in the first place, pursuant to section 111(1), and is not explicitly applicable to abandonment hearings under section 111(2)(a). It would logically seem that this same standard of proof should apply to both types of hearings, but the failure to make that clear in the statute will cause confusion as to what standard of proof should apply when considering the issue of abandonment only.

Issues with Gender-Neutral Language

While we applaud the efforts to make the statute gender-neutral, by only amending Sections 111(1)(d) and 111(1)(e), this creates an internal inconsistency. Replacing the term "father" in subsections (d) and (e) recognizes that not every family will have a father and a mother,

especially in light of the recent legislative changes regarding parentage through assisted reproduction. However, 111(1)(c) still uses the term "mother," leaving this gendered language in that portion of the statute. What would happen in a situation where there are two mothers? Is the consent of both required simply because they are both female, as is suggested by 111(1)(c)? Or would the non-gestating mother be treated as the "other parent," subject to requirements of subsection (d) or (e)? Leaving this question unanswered will surely lead to conflict and litigation regarding legislative intent.

Conclusion

In closing, it is important to remember that the overarching principle of New York's adoption statutes, as interpreted by the New York Court of Appeals, is to further the best interests of adoptive children (*see Matter of Jacob*, 86 NY2d 651, 657-58 [1995]). Our State is concerned with providing stability and permanency to children in foster care and pre-adoptive homes, recognizing that the adoption of children into safe, stable, loving and **permanent** adoptive homes satisfies the overriding policy of providing for the best interests of children. The proposed amendments to Section 111(1)(d) are clearly biased in favor of unwed birth fathers, without a focus on what is in the best interests of pre-adoptive children, namely: the permanency and stability of a long-term adoptive home.

The unwarranted elevation of certain classes of birth fathers to "consent" status, as well as the inherent inconsistencies amongst the statutory subsections, is almost certain to result in the undesirable outcome of delaying permanency for children and preventing many children from being freed for adoption at all. This will undoubtedly put an emotional and psychological strain on children and families but will also result in an increased cost to the public, as less children freed for adoption means more children remaining in foster care for longer periods of time. While this bill may be well-intentioned, it is clear to those of us who are intimately involved with the adoption community, that the impacts and consequences of the proposed amendments will undoubtedly be drastic, far-reaching and severe, benefitting only absentee fathers who seek to prevent the ultimate permanency option of adoption, to the detriment of adoptive families, foster families, and most importantly, children.

We appreciate your consideration.

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