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May 23, 2021

TO: New York State Senate
Attn: Jabari Brisport, Sponsor

Re: Senate Bill 6389: Relates to non-marital parents in adoption, surrender, and termination of parental rights proceedings in family and surrogate courts in order to ensure that unmarried fathers whose children have been removed by the state and placed into foster care do not lost their parental rights to those children without a full and fair opportunity to a hearing regarding their fitness to care for them

Dear Senator Brisport:

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 passage of Senate Bill 6389 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 and termination of parental rights proceedings.

As an initial matter, while the sponsor's memorandum in support of the bill states that it only applies in cases where the subject child has been placed in foster care, the actual text of the bill is less clear on that issue. Specifically, pursuant to subsection (e), the proposed amendments would apply to any adoptions through an "authorized agency," which could arguably include a voluntary adoption agency licensed by OCFS. This is clearly not the intent of the bill but is a possible adverse side effect.

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Regardless of whether the amendment applies only in foster care cases or also encompasses voluntary agency adoptions, the amendment is a drastic departure from the current state of the law as it relates to consent rights for unwed biological fathers. 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 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.

Current Law

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 or the child's custodian/guardian, in order for his consent to the adoption to be required.

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.[1]

Both tests impose a dual requirement on the birth father to not only maintain a requisite amount of contact with the child, but also to provide some degree of financial support. Senate Bill 6389 would maintain the foregoing tests for determining whether a birth father's consent is required in "any other adoption proceeding" (presumably meaning in a private or voluntary agency adoption) but creates a whole new test only applicable to adoptions from a foster care placement agency.

Proposed Amendments

The proposed amendments would require the consent of any birth father who: (1) has been adjudicated by a court to be the father of the child, (2) has filed a paternity petition (even if the petition still remains pending), (3) has executed an Acknowledgment of Parentage, and/or (4) has filed an unrevoked notice of intent to claim parentage of the child. In other words, just by simply filing a paternity petition or signing an Acknowledgment of Parentage, a birth father is elevated to the status of a "consent" father, regardless of the amount of contact and/or support he has provided the child. This is a radical departure from the current statutory scheme and is extremely problematic for a number of reasons. The proposed bill goes beyond simply elevating current "notice" fathers (DRL § 111-a) to "consent" fathers (DRL § 111); it actually creates new categories of "consent" fathers altogether, based on criteria entirely inconsistent with current statutory and decisional law.

[1] 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]).

Of significant importance, the proposed bill **completely removes the 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 Parentage or filed a paternity petition, without providing any degree of financial support for the child or maintained any significant contact with the child or the child's custodian, 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.**

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 (whether or not they are actually the child's father) in order to "free" the child for adoption out of foster care. 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.

The proposed bill also has the perplexing effect of treating unwed birth fathers whose children are placed in foster care entirely differently than birth fathers whose children are placed

for adoption privately (or through a voluntary adoption agency), thereby creating unequal and conflicting standards for whose consent is required to an adoption, depending on the circumstances of the child's placement. It is not reasonable to have such differing standards for unwed birth fathers within the same statutory scheme.

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 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 and foster care community that the 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.

It is submitted that, if the ultimate goal of the bill sponsors is to ensure that unwary birth fathers do not have their parental rights unwittingly terminated because they were "not aware" of their legal obligation to maintain contact and provide financial support to their children, the better solution would be address this issue through the regulations. Local Departments of Social Services are already required to notify and provide services to purported birth fathers when children are taken into custody of the agency; the regulations could easily impose an additional requirement to notify birth fathers of their legal obligations under DRL § 111 upon the child(ren) coming into the

custody of the agency. That would be a much less onerous requirement that would satisfy the stated objectives of the bill's proponents, without decimating the current statutory scheme regarding parental consent rights.

Please contact the President of our organization, Kathleen ("Casey") Copps DiPaola, at **518-436-4170,** or by email at kdipaola@theCDSLawFirm.com to discuss how NYAAFF can be involved in making Senate Bill 6389 a piece of legislation that would benefit children and families, rather than one which has the potential to harm children in the foster care system.

We appreciate your consideration.

Kathleen ("Casey") Copps DiPaola

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