FRIENDS IN ADOPTION

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LEGAL RIGHTS OF UNWED FATHERS AND THEIR IMPACT ON NEW YORK ADOPTIONS

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It is my pleasure to speak with you today on the legal rights of birth fathers and the impact those legal rights can have on adoptions in New York. The law in New York used to be that the consent to adoption only of the mother of a child born out-of-wedlock was required. When I graduated from law school in 1971, the unwed father was simply without any rights or say in his biological child's adoption. For many in the adoption field, those were the 'Good Old Days!" They didn't last long. How the times have changed.

The first sign of a major change in how New York would have to deal with the unwed father came with the United States Supreme Court decision in Stanley v Illinois, 405 U.S. 645 (1972). The Stanley Court held that men who fathered children out-of-wedlock may have constitutionally protected parental rights to their biological offspring. Mr. Stanley was a father to his children in every practical sense of the word except for the fact that he was not married to their mother. When the children's mother died, Illinois statute dictated that Mr. Stanley had no parental rights to his children who became wards of the state without any hearing and without any finding of his unfitness. The Supreme Court found that result repugnant and struck down Illinois statute. This signaled that the lack of marriage alone was no longer an absolute

disqualifier for the unwed father. The Stanley court recognized that some unwed fathers, by their conduct in relation to their children, enjoy parental rights protected by the Federal Constitution.

Six years after the *Stanley* case, the Supreme Court addressed the rights of the unwed father in the context of a step-parent adoption in Quilloin v Walcott, 434 U.S. 246 (1978). At issue was Georgia's adoption statute which permitted the adoption of a child born out-of-wedlock without requiring the consent the unwed father. While Mr. Quillon was no Mr. Stanley, he objected to the adoption despite having done nothing to demonstrate his parental interest. He never sought custody and only visited occasionally although his name was on the birth certificate. The fact that Mr. Quilloin had never established his parentage of his child and had never been involved with his child until the proposed step-parent adoption was filed proved fatal to his claim to be a consent father. The Court allowed the adoption because it found that it was 'not a case in which the unwed father at any time had, or sought, actual or legal custody of his child." The result was to give "full recognition to a family unit already in existence, a result desired by all concerned, except appellant." *Id.* At 249.

New York addressed the rights of the unwed father in Caban v Mohammed, 441 U.S. 380 (1979). Mr. Caban fathered two children out-of-wedlock with Maria Mohammed. They all lived together for two years before he separated from her. Mr. Caban continued to visit with his children following their separation. Ms. Mohammed married and her husband sought to adopt the two children. Under the then New York law, the step-parent adoption was granted without Mr. Caban's consent. The Supreme Court reversed and found a violation of the Equal Protection provisions of the US Constitution since there was no basis for distinguishing between a fit

unmarried father and a fit married father.

The United States Supreme Court had another occasion to weigh in on the rights of the unwed father in Lehr v Robertson, 463 U.S.248 (1983). Once again, the case arose in the context of a step parent adoption. Mr. Lehr, an unwed father, filed for paternity not knowing that the adoption was pending in another county. Mr. Lehr did not register with the NYS Putative Father Registry as the father. Had he done so, he would have been entitled to notice of the adoption and the right to be heard as to its efficacy. The adoption was granted and Mr. Lehr sought to set aside the adoption for violation of his constitutional rights. After losing in the state courts, Mr. Lehr sought review in the United States Supreme Court.

The Supreme Court rejected his arguments holding that unwed father must demonstrate a commitment to parenthood before being awarded the rights of parents and that he had failed to do so. Unwed fathers possess only an 'inchoate interest' (463 U.S. at 265) which they may, if they take meaningful steps to secure them, turn into constitutionally protected rights. Whether this interest becomes a recognizable right depends upon the action or inaction of the unwed father. The Court also upheld efficacy of the NYS Putative Father Registry as a proper means for the unwed fathers to utilize to insure they receive notice of an adoption.

Through those cases the United States Supreme Court established that the Constitution does not protect all unwed fathers equally and that, more importantly, the mere act of impregnating a woman does not create constitutional rights.

In the wake of Caban, New York legislature enacted legislation to remedy this situation and bring New York law up to constitutional muster. It enacted two sets of criteria to determine if

the unwed father was meaningly involved in his child's life and entitled to veto an adoption of his child.

New York's Domestic Relations Law created two categories with respect to the adoption of children born out-of -wedlock: infants placed for adoption before they are six months of age, and child who are older than six months of age when they are placed for adoption. DRL 111 (1) (d) & (e). The law also divides the kind of rights the unwed fathers have into two categories. Some fathers may acquire the status of 'consent' father,' meaning their consent to the child's adoption is needed for the adoption. Other fathers, may acquire the status of 'notice only,' fathers meaning they have the right to notice and the right to be heard. They do not have a veto right over the adoption. Domestic Relations Law 111-a.

The core principle of adoption law in New York is to protect children born out-of-wedlock and to create a system of proper reliance by prospective adoptive parents and agencies by creating objective rules with which unwed fathers must comply in order to secure rights in the first place. Unwed fathers have a right to secure parental rights but these rights do not automatically spring into being. ("[T]he mere existence of a biological link does not merit constitutional protection. The actions of Judges neither create nor sever genetic bonds." Lehr, 463 U.S. at 261).

Consent Father for Child Over Six Months of Age When children born out-of-wedlock are over six months of age when placed for adoption, their unwed father in order to gain consent father status must "have maintained substantial and continuous or repeated contact with the child" as demonstrated by his paying child support and visiting or regularly communicating with

the child. DRL 111 (1) (d).

Consent Father for Child Under Six Months of Age For an infant under six months of age

when placed for adoption New York required that the unwed father have taken certain steps to gain a veto right over the adoption. The statute required that the unwed father openly lived with the birth mother or child for a continuous six months immediately preceding the placement of the child for adoption, and openly acknowledged his paternity during that time, and paid reasonable pregnancy and birth related expenses in accordance with his means. DRL 111 (1)(e).

The statute DRL 111 (1) (e) came under attack and was ruled unconstitutional by our New York Court of Appeals in Matter of Raquel Marie X, 76 N.Y.2d 387 (1990) because of the provision that required that the unwed father have lived together with the mother. The living together provision was too attenuated since it did not adequately protect the father's interests - the state couldn't require that the father live with the mother as proof of his parental interest in his child. It was found unconstitutional because the unwed father could not comply with New York law without the mother's acquiescence. Although the Court of Appeals struck down the entire statute as unconstitutional it recognized that the other statutory provisions were appropriate and instructed that future courts faced with such litigation should well consider the remaining provisions of the statute in gauging the interests of the unwed father and whether his actions were substantial until the legislature enacted remedial legislation. Guess what? The Legislature has not enacted remedial legislation in the 25 years since the Court of Appeals decision in Raquel. Thus, courts must continue to look to case law and to the remaining

provisions of the statute to decide the legal status of the unwed father based upon the facts of each new case.

The Constitution does not require that prospective adoptive parents take risks when they accept out-of-wedlock children into their home and hearts. New York can, and has, fashioned laws that protect the rights of the unwed father but also advances sound public policy by encouraging unwed mothers to place children for adoption when the children are infants and also encouraging adoptive couples to accept children into their home free from fear that months after they have bonded with their child a stranger will emerge and demand "his" child. The Court of Appeals has recognized the state's important interest in "ensuring swift, permanent placements" of newborns who are more likely to be adopted and more readily bond with adoptive parents." Matter of Raquel Marie X., at 404. "Certainty and finality" are what the law seeks to achieve precisely to protect against the infliction of needless harm to children and to their prospective adoptive parents. See, Matter of Sarah K., 66 NY2d 223, 234 (1986).

New York law cares about actions, not intentions, of the unwed fathers because actions put agencies and prospective adoptive parents on notice that there is a putative father who is interested. That is why the Legislature enacted laws that requires the unwed father to register his interest with NYS Putative Father Registry and that allows the filing of a paternity petition and custody petition before the child's birth. Such actions enable adoption agencies and prospective adoptive parents to know whether the child has a father whose consent to adoption may be required.

In any contested adoption proceedings, the Court is required to make this threshold

determination of the status of the unwed father. In re Dominique, 14 A.D.3 319 (1st Dept.2005); see also Matter of Raymond v. Doe, 217 A.D.2d 757 (3rd Depot. 1995)(Court properly addressed putative father status pursuant to DRL 111(1) even though the putative father had filed custody and paternity petitions after the adoption petition was filed); see also Matter of John Paul B.v.Dominica B., 900 N.Y.S.2d 753 (2nd Dept. 2010) ("Accordingly, the Family Court correctly determined that the [putative father's] consent to the child's adoption was not required and, thus, properly denied the petitions in the paternity and custody proceedings.").

HOW DOES THE UNWED FATHER BECOME A CONSENT FATHER? For the purpose of the adoption of a new born, that is, an infant under six months of age when placed for adoption, the unwed father must, in the six months preceding the birth or placement of the under six month old infant for adoption, publicly acknowledge his paternity, pay pregnancy and birth related expenses, take steps to establish legal responsibility for the child, and take other steps evincing his commitment to the child. Matter of Raquel Marie X., 76 NY2d 387, 408 (1990).

In status determination proceedings the burden of proof is on the putative father to convincingly demonstrate that he has accomplished these necessary steps to entitle him to impose his consent under DRL 111 (1). See, e.g., Matter of Taylor R., 290 AD 2d 830 (3rd Dept. 2002); Matter of Charle Chiedu E., 87 A.D3d 1140 (2nd Dept. 2011); Matter of Carrie GG., 273 AD2d 561 (3rd Dept. 2000).

If the unwed father fails to assert the requisite parental interest in the child during the six months prior to placement of the child for adoption, he is not entitled to give or withhold his

consent to the adoption and rather, he is deemed either a notice birth father who is entitled to receive notice of the adoption and to participate in a best interests hearing or a non-notice father who has no further rights with respect to the child. Domestic Relations Law Sections 111 (1) (e) & 111-a (2) (3); See, also Matter of Baby Girl, 206 A.D.2d 992 (4th Dept.1994).

New York will only give recognition to the rights of the unwed father who promptly acts in the six months immediately preceding the child's placement for adoption. Matter of Baby Girl, 206 A.D.2d 932 (4th Dept. 1994) (timeliness is not measured from when the putative father became aware of the existence of the child). The failure to act acts as an absolute bar to any claim of a constitutionally protected right to a parent child relationship.

The unwed father's subjective intent is of no legal significance. The unwed father must manifest his interest, his care, and his concern at the earliest possible time and take every available avenue to "establish legal responsibility for the child." Raquel Marie X., at 408.

In Raymond AA vs Doe, 217 A.D.2d 757 (3rd Dept. 1995), on facts quite favorable to the unwed father than in most cases, the Appellate Division held that the consent to the adoption of the unwed father who came forward a mere seven days after the adoption placement was not required. He was only a notice father. In Raymond AA, that unwed father had attended two Lamaze classes with the mother and purchased a stroller. Yet, despite such actions prior to the placement the court held

> "While [the birth father] acted promptly to assert his interest in obtaining custody of the child after learning of the planned adoption, the testimony supports the Family Court's determination that, in the six months preceding the child's placement, [he] did little to establish his interests in assuming the responsibilities

of parenthood." (Emphasis added) 629 N.Y.S.2d at 324.

(See also Matter of Taylor, (custody petition postdating the adoption is "at best, merely a belated interest in the child which is inherent to carry his burden . . . as required by DRL Section111.").

The clear language of our Court of Appeals in Robert O. v. Russell K., 80 N.Y.2d 254 (1992) and Raquel Marie X., infra, hold that the post placement actions of the unwed father, no matter how prompt cannot confer "consent father" status. See, Raymond AA v. Doe, 629 N.Y.S. 2d 321 (3rd Dept. 1995) (coming forward seven days after placement is insufficient to confer consent status); see, also Matter of John E. v. Doe, 164 A.D.2d 375 (2nd Dept. 1990) (birth father who came forward one month after placement deemed only a notice father). This must be so since "promptness" is measured in the terms of the baby's life, not by the onset of the unwed father's awareness that he must act responsibly. Robert O., at 254. Our Court of Appeals in Matter of Raquel Marie X., noted too, that the "protected interest is not established simply by biology. The biological father must be a father and behave like one."

The Court of Appeals last pronouncement on the rights of the unwed father came in Matter of Seasia D., 10 N.Y.3d 879 (2008), cert. denied 555 U.S. ___ (2008) where the Court reaffirmed that in unwed birth father litigation the core principle of adoption law in New York remains not to protect the "inchoate interest" (Lehr v. Robertson, 463 U.S. 248, 265 (1983) of well-intentioned unwed fathers. It is to protect children born out-of-wedlock and to create a system of proper reliance by adoptive parents by creating objective rules which must be abided in order to secure rights in the first place. Faithful attention both to legislative intent and to the

Court of Appeals pronouncement in Matter of Raquel Marie X., 76 N.Y.2d 387 (1990), *cert. denied sub nom.* Robert C. v. Miguel T., 498 U.S. 984 (1990) is required of the unwed father who seeks to earn the mantle of a "consent father."

The critical time frame for the unwed father to act is the six month period preceding the birth and placement of the infant for adoption. It matters not that the child is in utero during most, if not all, of the critical time period since New York permits pre-birth filing of both paternity and custody petitions. Moreover, the unwed father is supposed to demonstrate his parental commitment by shouldering financial responsibility during the pregnancy and birth. The courts have taken a dim view of superficial displays of financial support. For instance, in the John E. vs Doe case, the unwed father's payment of a couple of hundred dollars was insufficient demonstration of financial responsibility. Similarly, in Raymond AA v Doe, the purchasing of a baby stroller and a few items of baby clothing was not enough. Nor does it appear that the unwed father can successfully rely upon his relatives donations and gifts during the pregnancy as indicia of his interests. Parenthood is a non-delegable responsibility. The Court of Appeals in Seasia D., supra, while not determining if relatives gifts could be attributable to the unwed father, nonetheless held the extended family's contributions were insubstantial regardless of origin.

Any unwed father who seeks to be considered a consent father must promptly file for paternity. Paternity is the legal status of being a father. Paternity can be established in three ways. First, if you are married to the mother at the time the child is born, you are automatically considered to be the legal father of the child. You do not have to establish paternity in court. Second, if you sign an acknowledgment of paternity after the child is born, you have established

paternity. The form is usually signed at the hospital stating that you are the father. Third, if you file a paternity petition in Family Court and get an order of filiation from the court, you are the legal father. However, for the purpose of adoption proceedings, paternity does not presuppose that the unwed father's consent to the adoption will be required. It does entitle him to notice.

HOW DOES A UNWED FATHER BECOME A 'NOTICE FATHER? The provisions of DRL 111-a enumerate who is a notice father. The unwed father is considered a notice father if (a) his name is on the birth certificate; or (b) he is openly living with the child and the mother when the adoption is filed and publicizing his paternity of the child; or © the unwed father was married to the mother within six months of the child's birth; (d) he is registered with the NYS Putative Father Registry; or (e) he has filed an unrevoked notice of intent to claim paternity of the child; or (f) he has been adjudicated the father of the child by the court of New York or of another state; (g) he was married to the mother at the time of the birth; or (h) identified by the mother as the father in a sworn written statement. Any of the foregoing will entitle the unwed father to notice of the adoption proceedings and the right to be heard whether the adoption is in the child's best interests.

WHICH UNWED FATHERS SUCCEED IN BECOMING CONSENT FATHERS? Let's examine what unwed father have done to be elevated to parity with the birth mother and entitled to withhold their consent on the adoption.

New York County Surrogate's Court in the Baby Girl S., 141 Misc.2d 905, affd. 150 AD2d 993, affd. 76 NY2d 387 (1990) held that the unwed father was able to block the proposed adoption due to fraud upon the court. Interestingly, this case was decided by the Court of Appeals

along with the *Raquel Marie X.*, decision. In my opinion this was not a case that could be won on appeal given its factual posture. The Court of Appeals found that the consent of the unwed father was required since he had publicly acknowledged his paternity by reason of his having commenced a paternity proceeding before the birth of the child and, in addition, had sought "full custodial responsibility virtually from the time he learned of [the birth mother's] pregnancy.'

What I believe was fatal to the Baby Girl S. contested adoption proceedings was that while the adoption petition was properly filed with the NY County Surrogate's Court since that was where the adoptive parents resided, the birth father had already filed his proceeding in Suffolk County Family Court and had an order that prohibited the mother from removing the child from that county. The adoptive parents apparently failed to reveal to the Surrogate's Court the prior pending proceeding which gave rise to the Surrogate's belief that the adoptive parents were attempting to perpetrate a fraud upon the Court. This fraud claim tainted the proceedings throughout the trial and on appeal.

In a more recent case, the Appellate Division, Fourth Department, in Matter of Matthew, 31 A.D.3d 1103 (4th Dept. 2006), in a split decision upheld the Surrogate's Court determination that the consent to adopt of the unwed father was required. Matthew was born out-of-wedlock on December 25, 2003 and surrendered by his mother to the STAR agency for adoption the next day. Matthew was placed with the adoptive parents on December 27, 2003. Surrogate's Court conducted a status hearing before a Referee (on consent of all parties). The Referee's report that was confirmed by the Surrogate found that the unwed father was both a notice and consent father and dismissed the adoption.

The Appellate Division deferred to the lower court's findings of credibility. The unwed father was found to have acknowledged his paternity of Matthew from the outset, commenced a paternity proceeding prior to Matthew's birth, and brought a custody proceeding although it was after the six months period preceding the adoption placement. The Appellate Division majority excused the unwed father from paying any expenses in connection with the pregnancy because the mother testified that those expenses were covered by Medicaid and that she did not ask him for any financial assistance and didn't need his assistance. The majority decision noted too that the birth mother did not tell him of her adoption plan because "she knew he would attempt to prevent her from doing so, and she decided to deliver the child at a hospital where the biological father would be unlikely to find her and assert his parental rights (citing to the *Baby Girl S.*, decision).

The dissent in *Matthew* provides greater insight into the actions of the unwed father not mentioned in the majority holding. The dissenting Justice noted that but for the $156.04 that the unwed father paid and filing for paternity, he did nothing else during the six months preceding the placement of the child for adoption that signaled his custodial intent. His custody petition was filed one month after the adoption placement. He did not file with the NYS Putative Father Registry, did not arrange for his name to be placed on the birth certificate, did not put the child on his medical insurance, and did not accompany the mother to any prenatal visits nor seek to be present at the birth. The dissent also took a very dim view of the unwed father's claim of preparedness to assume custody. Up until the time of the hearing, he continued to live in six floor walk up that he admitted was too small, too dangerously located, contained no baby furnishings,

and unfit for an infant. While he planned to move back with his mother, the dissent noted he took no steps to do so. For all these reasons, the dissent concluded that "it simply cannot be said that the biological father did 'everything possible to manifest and establish his parental responsibility' (citing *Raquel Marie X.)."*

For the adoption case planner working with a pregnant birth mother planning an adoption matters are further complicated by the fact that the unwed mother need not identify nor involve the unwed father in her adoption plan. She cannot be compelled to name the father of her unborn child. The Court of Appeals has noted that it is "[i]t is well settled that a natural mother ha[s] no obligation . . . to volunteer any information with respect to the [the father]" (*Matter of Robert O. V. Russell K.,* 173 A.D.2d 30, 35-36, 578 N.Yl.S.2d 594, 597 (2d Dept.), aff'd 80 N.Y.2d 254 [citations omitted]))quoting *Matter of Jessica XX,* 54 N.Y.2d 417, 427 (1981). And, the birth mother may stay away from an unwed father without violating his rights, especially someone the birth mother views as her abuser. See, e.g. *Matter of Baby Girl U.*, 224 A.D.2d 869 (3rd Dept. 1996).

The unwed father must act promptly and decisively if he is to establish his parental right to consent to the adoption of his child. And while there are many steps he can take independent of the birth mother that do not require her cooperation that will constitute visible, public steps that will place adoption agencies and adoptive parents on actual notice that the recently born out-of-wedlock child has a father who possesses substantive rights to the child.

<u>THE ASSESSMENT</u> How then are adoption social workers to work with a birth mother in fashioning an adoption plan that won't be contested while still respecting the birth mother's

right to privacy? This is a very challenging task. The social worker must make every reasonable effort to secure accurate facts about the pregnancy and the role of the unwed father in the pregnancy. Their relationship must be thoroughly explored. Has she lied or deliberately mislead the unwed father about her pregnancy? Has she actively concealed her pregnancy from the unwed father? The social worker's efforts must be carefully and accurately chronicled in the agency records and where ever possible reflected in correspondence. The birth mother should have legal counsel independent of the agency at the earliest possible time. She should be allowed to chose from several experienced lawyers whom she wishes to represent her.

The social worker counseling the birth mother must inquire what has the unwed father done? Has he promptly taken every available avenue to demonstrate that he is willing and able to enter into the fullest possible relationship with his child? Has he manifested his ability and willingness to assume custody of his child? Has he registered with the NYS Putative Father Registry? Has he filed paternity and custody petitions and moved
to intervene in the adoption proceeding? Has he consulted with legal counsel and learned what other steps he could take to gain parental rights in New York and what his responsibilities are? Has he opened a bank account for the child, offered to, and actually provided financial support to the birth mother, provided transportation to the birth mother, and participated in, prenatal visits, made arranging to be at the hospital for the birth, procured the necessary items for infant care (bassinet, crib, changing table, diapers, car carrier, clothing and other necessities)? Has he added the child to his health coverage plan and notified his employer of his impending fatherhood? Who has he told about his impending fatherhood? Does he have any criminal history or history

of domestic violence? Has he other children whom he is supporting?

What matters in New York is not the subjective intent of the birth father, but whether he has demonstrated his interest in the child. Matter of Raquel Marie X., 76 N.Y.2d at 403. The truth is that there is nothing that can be done that will guarantee that the unwed father will not come forward at some point and challenge the adoption plan. Even a judicial surrender can be challenged. Therefore, when the birth father is identified, he should be contacted and his interest explored. If he intends to seek custody, then a decision needs to be made whether the adoption plan is viable. Adoptive parents do not want to begin their long sought parenthood in a emotionally and financially draining lawsuit.

Regrettably, the information provided by the birth mother is not always accurate. Sometimes the facts are intentionally distorted and deliberately shaded to induce the agency or adoptive parents to become involved. It is not uncommon for birth mothers who revoke their surrenders to then seek out and enlist the unwed father in an effort to bolster their chances in gaining custody of the surrendered child. Once they collaborate the truth has a way of disappearing once revocation is sought. On other occasions, the actions of the birth father are unintentionally mis-characterized or colored by the emotions that are in play. More often than not, some adoption contests are motivated by the extended family members and relatives who object to the adoption plan and seeking to disrupt it once they learn of it. Whatever the case, the rights of the unwed father should be determined in accordance with the established legal holdings until remedial legislation is enacted.

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