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WELL INTENTIONED SAME-SEX ADOPTION CASE CAUSES UNINTENDED PROBLEMS FOR SAME-SEX COUPLES

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Before same-sex marriages entered into elsewhere were recognized in New York, adoption practitioners routinely advised even their legally married same-sex clients to go through the process of a second-parent (non-biological) adoption to ensure complete protection of the relationship between the child and second parent. After New York began recognizing same-sex marriages entered into elsewhere and even after same-sex marriages were legalized in New York, this advice has remained the same. Although the adoption is not necessary if the couple and their child remain in New York, it is necessary to protect their rights when outside of New York in jurisdictions that do not recognize same-sex marriages. Even if the family plans to reside permanently in New York, a situation could arise while traveling outside of New York. For example, a second parent could be denied the right to make medical decisions for the child if the child is injured or ill. Also, the lack of legal protection of the second parent and child's relationship can be exploited by the biological/legal parent if the relationship ends, by moving with the child to a state that does not recognize same-sex marriages and therefore does not recognize the second-parent as having

any parental rights. The only true way to protect the second parent's rights is to have an adoption order which is entitled to full faith and credit. *In re Sebastian*, 25 Misc.3d 567 (N.Y. Co. Sur. Ct. 2009) (finding that being listed on a child's birth certificate and executing an acknowledgement of paternity does not sufficiently protect a parent's rights in other jurisdictions).

While well-intentioned as a case supporting marriage equality, the recent King's County Surrogate's Court decision *Adoption of Seb C-M*, File No. X 2013-21 (January 6, 2014), issued by Surrogate Margarita Lopez Torres, may cause unintended problems for same-sex couples. The case involved a second-parent adoption petition by the same-sex wife of the biological mother of the child. The two women were legally married at the time of the child's birth and both are listed on the child's birth certificate. The Surrogate dismissed the adoption petition finding that the relief sought was "neither necessary nor available."

In support of her decision, the Surrogate cited the following language from *Sebastian*: "The 'purpose and effect' of adoption 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 parent/child relationship.'" This

language was taken out of context because Sebastian, a case with almost identical facts, reached the opposite conclusion.

Sebastian involved a second-parent adoption petition by Mona, who was both the same-sex wife of the woman who gave birth to the child and the donor of the ova that created the child. Mona and her wife were legally married when the child was born but she was not on the child's birth certificate. In Sebastian, the Court began by stating the general rule about adoptions cited in Seb C-M, but concluded that "although petitioner already has a legally protected parental relationship with Sebastian and, even in the absence of that legal relationship, could utilize several less intrusive, expensive and time-consuming methods of establishing one, the only remedy available here that will accord the parties full and unassailable protection is a second parent adoption."

While Surrogate Lopez Torres notes that the petitioner is listed on the child's birth certificate, which is prima facie evidence of parentage, the Sebastian case points out that a birth certificate does not "confer parental rights that must be recognized elsewhere" and therefore "provide[s] insufficient protection of . . . parental rights."

Surrogate Lopez Torres also notes that there is a strong presumption of legitimacy for children born to a married couple and that entertaining an adoption petition in such circumstances indicates that "a same-sex marriage remains somehow insufficient to establish a parent-child relationship between one particular parent and any child born within that marriage." She goes on to suggest that if the family is concerned about recognition of their legal relationship upon "relocation to a jurisdiction hostile to marriage equality, the more appropriate, and indeed necessary, course of action would be to seek redress of the denial of their civil rights in such jurisdiction."

For many families, this is incredibly impractical. A same-sex second parent adoption generally only costs a few thousand dollars in legal fees and can be completed in a few months. In contrast, a civil rights lawsuit could easily cost tens of thousands of dollars and stretch over many years. Additionally, a second-parent adoption can be completed to protect the family before any problems arise whereas as a civil rights lawsuit requires the family to remain unprotected and then attempt to redress an injury after it has already occurred.

While I share the Surrogate's sentiment about marriage equality, until marriage equality is recognized throughout the United States and abroad, taking away from same-sex couples the protection of a second parent adoption does far more harm than good. Despite this recent case, our office will continue to advise our same-sex couple clients to complete second-parent adoptions. Until the time when there is universal marriage equality, hopefully future cases will follow the reasoning of Sebastian and not Seb C-M.

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