Hearing: 10/26/16
9AM

STATE OF RHODE ISLAND
NEWPORT, SC.

FAMILY COURT

In re Adoption Petition of

[redacted] H[redacted] &
[redacted] M[redacted]

FC Case No. 2015-0877-1
NSS-15-000002

EX-PARTE MOTION TO WAIVE NOTICE TO AN ANONYMOUS SPERM DONOR

[redacted] H[redacted] and [redacted] M[redacted] ("Petitioners") respectfully request this Court to order that, as a married couple who used reproductive assistance to conceive their daughter, Petitioners are under no obligation pursuant to R.I. Gen. Laws §§ 15-7-8;-9 to provide notice to an unknown sperm donor in order for Ms. M[redacted] to have her parentage of her daughter established through adoption.

FACTS

Petitioners are a married same-sex couple who filed a joint petition for Ms. M[redacted] to adopt their 3-year-old daughter ("Minor")[1] who was born to Ms. H[redacted] on June 12, 2013. Exhibit A – birth certificate (redacted). Like Petitioners' older daughter (who is three years older than Minor), Minor was conceived through in vitro fertilization (IVF) using sperm donated eight years ago by an anonymous donor at a donation center in Fairfax, Virginia. Exhibit B - Aff. of [redacted] M[redacted]; Exhibit C – Aff. J. Nulsen, MD; Exhibit D – Donor 2849 packing slip. At the time of Minor's birth, Petitioners were unable to be married in Rhode Island, but enjoyed a committed partnership for over

[1] Minor is a pseudonym.

10 years. Exhibit B - Aff. of [redacted] M[redacted]. Petitioners did marry in Rhode Island shortly after this state recognized the right to equal marriage.[2] Exhibit E – marriage certificate.

As Minor's birth mother, Ms. H[redacted]'s parental rights are established. Because Petitioners were not married when Minor was born, however, Ms. M[redacted] was not listed on Minor's birth certificate and her parental rights have not yet been confirmed. Nevertheless, as a committed (and now married) couple, Petitioners have provided all care for their children since their births and they are the only parents that Minor and Minor's sister have ever known.

Ms. H[redacted] adopted the Petitioners' older daughter in 2011, and Ms. M[redacted] now wishes to adopt their younger daughter, Minor, to ensure the recognition of her parentage of Minor within this state and beyond its borders. Exhibit B - Aff. of [redacted]. M[redacted]. Given the discrimination against same-sex relationships that still exists in this country and abroad, couples must often adopt their own children to obtain the securities and presumptions that opposite-sex couples have automatically.

Unlike the process that they followed when Ms. H[redacted] adopted Petitioners' older daughter in this Family Court on May 11, 2011, Petitioners have now been told by a clerk of the court that their adoption petition may not be considered unless they obtains consent from the anonymous sperm donor, or give notice of the adoption petition to the anonymous sperm donor. Exhibit B - Aff. of [redacted]. M[redacted]. By the terms of the Virginia donation center, information about the identity or whereabouts of the donor (who donated in 2008) is strictly confidential. Id. As such, Petitioners know nearly nothing about this donor and—especially after an eight (8) year passage of time—they have no idea whether the donor resides in Virginia or ever did. Id.; Exhibit D – Donor 2849 packing slip. Likewise, the Petitioners' identities and whereabouts are kept strictly confidential and are not disclosed to the donor either. Exhibit B - Aff. of [redacted]. M[redacted].

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[2] Rhode Island's law to recognize all marriages went into effect on August 1, 2013.

ARGUMENT

I. The Minor's parents consent to the adoption and therefore no notice is required.

Rhode Island's adoption statute provides that, generally,[3] the "parents" of a child must provide written consent to adoption, or the adoption "petition shall be dismissed." R.I. Gen. Laws § 15-7-5; see In re Nicholas, 457 A.2d 1359, 1360 (R.I. 1983) (concluding that a natural grandfather had no standing to participate in adoption proceedings and therefore his consent was not necessary). "It would appear from this edifice of statutory provisions that the Legislature has expressed a clear intent. The persons who determine whether a child will be adopted or not are his parents." In re Nicholas, 457 A.2d at 1360.

Section 15-7-5 does not define "parents."[4] Nor does the statute address a scenario where a child is born to a woman through IVF using sperm donated by an anonymous individual. The Rhode Island Supreme Court, however, has indirectly addressed this issue. In Rubano v. DiCenzo, the Supreme Court considered whether the Family Court had jurisdiction "to determine the existence of a mother and child relationship between [a] nonbiological parent and [a] child" that was born to a same-sex couple that "agreed to become the parents of [the] child" who was conceived through IVF using sperm donated by an anonymous donor. 759 A.2d 959, 961 (R.I. 2000) (recounting that "[t]wo women agreed to become the parents of a child. They arranged for

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[3] No consent is required from a noncustodial parent "when the petitioners are one of the natural parents of the child and his or her spouse ... and the child is residing, at the time the petition is filed, with the petitioners" if the Court determines that the noncustodial parent's parental rights shall be terminated. R.I. Gen. Laws § 15-7-5(b).

[4] The term "parent" is defined in just one other part of the Domestic Relations title 15: "'Parents' mean persons who together are the legal parents of one or more children, regardless of their marital status or whether they have lived together at any time." R.I. Gen. Laws § 15-15-1 (concerning the domestic abuse). While a different matter, it is appropriate for this Court to look to other parts of the same title for definition. State v. Hazard, 68 A.3d 479, 485 (R.I. 2013) ("consider the entire statute as a whole; individual sections must be considered in the context of the entire statutory scheme, not as if each section were independent of all other sections."). The Petitioners certainly fit the bill of "parents" under R.I. Gen. Law § 15-15-1.

one of them to conceive via artificial insemination by an anonymous donor. Following the child's birth, they raised him . . . while living together as domestic partners in the same household.") (emphasis added). The Court acknowledged the strong parent and child bond that may exist between a child and her non-biological mother who, although "has no biological connection with a child, nonetheless has functioned as a parent in relation to that child and has been held out to the community as the child's parent by the biological parent." Id. at 969. In recognition of that strong bond, the Court held that the Family Court does have the power to declare a non-biological mother to be a de facto mother/parent of the child pursuant to R.I. Gen. Laws § 15-8-26.

Like the parents in Rubano, Petitioners mutually agreed and carefully planned to conceive Minor through assisted reproduction using an unknown and anonymous donor's sperm. Since her birth, Minor has lived only with the Petitioners who have cared for and nurtured her. The Supreme Court in Rubano has implicitly concluded that two people can become "parents" in this manner. Id. Likewise, the uniform acts confirm that the consenting female partner of a woman who is inseminated with donor sperm is the "parent" of the resulting child. See ABA Model Act Governing Assisted Reproductive Technology § 603 ("An individual who . . . consents to, assisted reproduction by a woman . . . with the intent to be a parent of her child is a parent of the resulting child")[5]; Uniform Parentage Act § 703 (same). As the comment to § 703 explains, "[t]his provision reflects the concern for the best interests of nonmarital as well as marital children of assisted reproduction." Case law has long conformed to the consent-to-insemination approach to parentage. See In re T.P.S., 978 N.E.2d 1070, 1079-80 (Ill. Ct. App. 2012) (holding that an unmarried woman who consented to her female partner's insemination was a parent); In re C. K. G., 173 S.W.3d 714

[5] In fact, ABA Model Act Governing Assisted Reproduction was drafted to explicitly create parentage in the female partner of a woman who gives birth. Nancy Polikoff, *A Mother Should Not Have to Adopt her Own Child: Parentage Laws for Children of Lesbian Couples in the Twenty- First Century*, 5 Stan. J.C.R. & C.L. 201, 236 (2009).

(Tenn. 2005). (holding that an unmarried couple who used assisted reproduction to conceive and give birth to triplets were both legal parents); In re Parentage of M.J., 203 Ill. 2d 526, 540 (2003) (conferring parentage on a consenting, unmarried man whose female partner used artificial insemination to conceive); In re Baby Doe, 291 S.C . 389, 392 (1987) ("Almost exclusively, courts which have addressed this issue have assigned paternal responsibility to the husband based on conduct evidencing his consent to the artificial insemination."); see also E.N.O. v. L.M.M., 429 Mass. 824, 829 (1999) (holding that a woman could seek visitation as a "parent" where she raised a child born through assisted reproduction with her female partner.) Here, Ms. M[redacted] clearly consented to the insemination of Ms. H[redacted], Exhibit C – Aff. J. Nulsen, MD, and therefore is the only other "parent" to Minor.

The concept of the term "parent" as outlined in Rubano–requiring a developed relationship not simply a genetic connection to establish "parentage"—is consistent with Black's law dictionary's definition of the term: "[i]n ordinary usage, the term [parent] denotes more than responsibility for conception and birth." Black's Law Dictionary (10th ed. 2014) (emphasis added). Giving the term "parent" its ordinary meaning, as this Court must, the Petitioners have done far more than conceive and give birth. Cavanaugh v. Cavanaugh, 92 A.3d 200, 203 (R.I. 2014) (requiring that the "words of the statute [be given] their plain and ordinary meanings" (quoting State v. Diamante, 83 A.3d 546, 548 (R.I.2014)). Together, they are Minor's parents.

Because Petitioners are Minor's only parents and consent to the adoption, no other consent is necessary, and no notice to any other person is required. R.I. Gen. Laws § 15-7-8; -9 (requiring notice of the petition for adoption only if the parent(s) do/does not consent to the adoption or are unknown).

II. A sperm donor is not a "parent" and therefore no consent or notice is required.

Notwithstanding that Petitioners are Minor's only "parents," they have been prevented from having their adoption petition considered until they give notice to the anonymous sperm donor. That requirement is neither supported by plain terms of adoption statute nor practical commonsense.

Simply put, a sperm donor is not a "parent." Nowhere in the Rhode Island adoption statute are sperm donors mentioned as a class of individuals who are intended to receive notice or give consent. Rather a sperm donor is a male (in this case, and unknown male) who contributes genetic material, often under strict anonymity and confidentiality, with no intention of being a parent to any resulting child and with procedural steps[6] in place to ensure there is no developed or developable relationship between the resulting child and the donor.

Indeed, the donor of the genetic material—without more—is presumed to not be the "parent" of the child. See Uniform Parentage Act § 702 (2002) ("A donor is not a parent of a child conceived by means of assisted reproduction"); ABA Model Act Governing Assisted Reproductive Technology § 602 (2008) (same). By analogy, not even a putative father is entitled to parentage status by genetics alone. See Rubano, 759 A.2d at 973 (recounting "that a biological father who had not cultivated a relationship with his child or contributed significantly to the child's support had no standing to object to an adoption proceeding that the child's mother and her new husband had initiated" (citing Lehr v. Robertson, 463 U.S. 248, 261 (1983) (genetics, without more, provides no constitutional claim to paternity)); see also C.C. v. A.B., 550 N.E.2d 365, 369 (Mass.1990) ("In the constitutional sense, the father's interest is not one of a biological nature alone. Rather, the protected interest arises when there is a substantial relationship between a putative father and an illegitimate child."). Like the putative father, the sperm donor's genetic material alone is not

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[6] Procedures in place to signify intent and ensure there is no developed or developable relationship includes: express agreements, confidentiality, and donation through a licensed physician, for example.

sufficient to create parentage. And furthermore, equating sperm donation to parentage status would create significant uncertainty. The possibility that donors could bring parenting claims based on this genetic connection alone would "place a great strain on a unitary family" of the couple and their children. See C.C., 406 Mass. at 691 (involving a putative father). Likewise, such treatment of donors would create unwelcome insecurity for donors who donated on the assurance that they were not parents and would not be responsible for the child's welfare or support.

Other states that have addressed this narrow issue concur that a sperm donor is not a "parent" and need not be notified before adoption decree may issue. See In re Adoption of a Minor, 471 Mass. 373 (Mass. 2015) (holding that a known sperm donor is not among those from whom consent is required as a prerequisite to adoption); cf. In re: Guardianship of I.H., 834 A.2d 922, 926 (Me. 2003) (holding, in a petition for guardianship, where the "evidence demonstrates that the biological father of the minor is an anonymous sperm donor, the court may waive service on the donor").

Furthermore, by donating in Virginia, this particular sperm donor, by law, is deemed to have no rights to parentage of any child. Va. Code § 20-158 ("A donor is not the parent of a child conceived through assisted conception, unless the donor is the husband of the gestational mother."). Requiring consent and notice in this case effectively would elevate the unknown donor to "parent" status creating brand new rights that never before existed and which are in conflict with the law of the state from which the genetic material was procured. That is both inappropriate and unsupported in the law. See In re: Guardianship of I.H., 834 A.2d 922, 926 (Me. 2003) (concluding that notice need not be given where the anonymous sperm donor donated sperm under a California law stating that the donor is "treated in law as if he were not the natural father of a child thereby conceived") (emphasis added).

Equally compelling, requiring notice under a cramped reading of this statute is nonsensical from a practical standpoint. First, publishing in a newspaper that these Petitioners are adopting a child conceived using the donor's genetic material has no chance of serving the alleged purpose of giving notice:

> Notice by publication, however, would seem to have virtually no chance of giving actual notice to an anonymous sperm donor. When the sperm donor is anonymous, it is not known where he is most likely to be located, and assuming that the sperm bank has honored its pledge of confidentiality of the names of the recipients of the sperm, neither the mother's name nor the child's name would mean anything to the donor. Even if the court were to order publication of the names of the mother and the child in California on the theory that the donor probably lived in California at the time of the donation, the possibility that the donor would actually be notified is so remote as to be non-existent. Because serving notice by publication is not reasonably likely to provide actual notice to the sperm donor, requiring such notice would subject petitioners to procedures and expense for no realistic purpose.

In re: Guardianship of I.H., 834 A.2d 922, 926 (Me. 2003) (emphasis added).

The futility of publishing notice of this adoption is manifest in this case because the sperm donor made his donation in 2008, more than eight years ago. In a community like Fairfax County, Virginia, just steps from Washington D.C., where people move into and out of that area on a regular basis, it is purely speculative to assume that the donor still resides in any area where notice might be published.

Moreover, the contents of any published notification would serve no meaningful purpose. This donor has no idea who Petitioners are. He has never heard their name nor is he aware that they have used his genetic material to start their family. To the extent these Petitioners put their names in a newspaper publication, they will never be recognized by the sperm donor.

And by donating sperm in a state that specifies that a "donor is not the parent of a child conceived through assisted conception," Va. Code § 20-158, this sperm donor already evidenced his

sincere and serious desire to remain wholly anonymous to the Petitioners and any child born to them.

> Dispensing with the requirement of service when the father of the child is an anonymous sperm donor is further supported by the rationale that donors, who donate sperm to a sperm bank that promises confidentiality, do so with the intention of remaining anonymous and unconnected to the child conceived. By anonymously donating sperm, the donor has signified his wish to remain unknown and to forego any claim to parenthood of a child conceived by his sperm.

In re: Guardianship of I.H., 834 A.2d at 926 (emphasis added). It is nonsensical to ignore this donor's clearly stated position all in the name of "notice."

III. The Prevalence of Assisted Reproduction Demands a Bright Line Rule for Donors.

Assisted reproductive technologies, like IVF, allow infertile and same-sex couples as well as single individuals to form families in ways that were previously not possible. As of 2013, more than five million babies have been born in the United States through reproductive assistance.[7] None of these babies are conceived by accident; rather each baby is wanted sincerely and is born after a deliberate, concerted, and often highly emotional process that his or her parent (or parents) elects because of a fervent desire to become a parent. Given the number of families formed through reproductive assistance and that this number is growing, and because the relevant parentage and family law statutes were not enacted with assisted reproduction and/or same-sex couples in mind, these relevant statutes must be interpreted to keep pace with the evolution of family formation and be interpreted in accordance the statute's underlying fundamental principles and purposes. Given the prevalence of using reproductive assistance to create families, interpreting the R.I. adoption

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[7] Castillo, Report: 5 Million Babies Born Thanks to Assisted Reproductive Technologies, CBS News~ Oct. 15, 2013, http://www.cbsnews.com/news/report-5-million-babies-born-thanks-to-assisted-reproductive-technologies/ (excluding artificial insemination, which refers to conception whereby "semen is inserted into a woman's vagina by some means other than intercourse").

statute to treat all sperm donors predictably and uniformly—regardless of whether the donor is known or unknown—promotes the statutory purpose and beneficial public policies of this Family Court. For one, universal treatment of all donors ensures that all parties involved in reproduction are protected and held to the same standard. The child's parentage is known and secured at birth, and the sperm donor is protected from the many obligations of parentage, including child support. Certainty serves every child's best interests; debate and flux about the identity and legal recognition of one's parents does not. The Rhode Island adoption statute should be applied in a bright line upon which parents and donors alike can, and have, relied.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court grant their motion to waive notice to the donor.

Respectfully Submitted,
Petitioners [redacted] H[redacted] & [redacted] M[redacted]
By their attorneys,

Jennifer L. Levi w/permission KEK

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