

## Memorandum Urging Veto

### TRUSTS AND ESTATES LAW SECTION

T&E #5-GOV

August 6, 2019

S. 3419  
A. 5494

By: Senator Montgomery

By: M. or A. Weprin

Senate Committee: Health

Assembly Committee: Codes

Effective Date: January 15, 2020

**AN ACT** to amend the public health law and the domestic relations law, in relation to authorizing adoptees to obtain a certified copy of their birth certificate.

**LAW & SECTION REFERRED TO:** Section 4138-e of the public health law and section 114 of the domestic relations law.

### TRUSTS AND ESTATES LAW SECTION OPPOSES THIS LEGISLATION AND URGES ITS VETO

#### The Proposed Bill

The stated purpose of the Bill is to restore what its supporters fashion as the civil right of an adult adoptee to receive a certified copy of his or her original long-form birth certificate and to ensure that an adult adoptee adopted in New York has the same unimpeded right as a non-adopted person born in New York to access his or her original long-form birth certificate. If enacted into law, the Bill would permit an adopted adult to access certain records when he or she reaches the age of 18, including an original birth certificate with the identifying information for the adopted person's birth parents. The Bill also would entitle an adopted person to access background information about his or her birth parents. This information currently is not available (absent a court order) in order to protect the identities and privacy of the birth parents, as well as the adopted parents, both of whom entered into an adoption agreement with the understanding that their privacy would be respected.

If signed into law, the Bill would result in the disclosure of the identities of an adopted person's birth parents to the adopted person, thereby removing the right that birth parents presently have to keep their identities confidential. The Bill would do so without regard to the public policy that New York presently has in maintaining the confidentiality of adoption records (to protect adoptive parents from anger that birth parents may harbor against them, among other reasons). Troublingly, the Bill would apply both prospectively and retroactively, including to adoptions that are many years, if not decades, old.

Current New York law recognizes that birth parents may wish to preserve their anonymity when placing a child for adoption. As discussed by the Court of Appeals in *Matter of Linda F.M.*, 52 NY2d 236 (1981), the sealing of adoption records in New York State has been mandated for more than sixty years. *See also Matter of Victor M.I.*, 23 Misc3d 1103(A) (Sur. Ct., Nassau County 2009). Domestic Relations Law § 114 seals adoption records to ensure confidentiality. *Id.* The rationale for the statute is that sealing records:

1. Provides anonymity for the birth parents;
2. Enables the adoptive parents to form a close bond with their adoptive child;
3. Protects the adoptive child from possibly disturbing information that might be found in the records; and,
4. Allows New York State to foster an orderly and supervised adoption system.

While challenges have been made to New York State's power to seal adoption records (including allegations that it violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution), none of them has been successful. As stated by the United States Court of Appeals for the Second Circuit in *ALMA Society v. Mellon*, 601 F2d 1225 (2d Cir. 1979) (emphasis added):

...[W]e must look to the nature of the relationships and that choices made by those other than the adopted child are involved. Under all the applicable precedents, the State may take these choices into consideration and protect the birth mother's choice of privacy which not all have forsaken even if appellants are correct, as we are told, that many mothers would be willing in this day and age to have their adult adopted children contact them. So, too, a state may take into account the relationship of the adopting parents, even if, as appellants assert, many of them would not object to or would even encourage the adopted child's seeking out the identity of or relationship with a natural parent. ***The New York statutes in providing for release of the information on a "showing of good cause" do no more than to take these other relationships into account. As such they do not unconstitutionally infringe upon or arbitrarily remove appellants' rights of identity, privacy, or personhood.*** Upon an appropriate showing of psychological trauma, medical need, or of a religious identity crisis though it might be doubted upon a showing of "fear of unconscious incest" the New York courts would

appear required under their own statute to grant permission to release all or part of the sealed adoption records. (Emphasis added.)

Notwithstanding New York's longstanding public policy in favor of sealing adoption records, Public Health Law § 4138-c does provide for the creation of an adoption information registry, which authorizes the exchange of known non-identifying information about the adopted child, birth parents, and birth siblings. The non-identifying information includes:

1. The age of the birth parents (in years) at the time of the adopted child's birth;
2. The heritage of the birth parents, including nationality, ethnic background, race, and religion;
3. Education completed by the birth parents at the time of the adopted child's birth;
4. General physical appearance of the birth parents at the time of the adopted child's birth, including height, weight, color of hair, eyes, skin, and other information of similar nature;
5. The occupations of the birth parents;
6. The health history of the birth parents;
7. The talents, hobbies, and special interests of the birth parents;
8. The facts and circumstances relating to the adoption; and,
9. The existence of any known siblings.

Public Health Law § 4138-d also authorizes the creation of a mutual consent voluntary adoption registry, which may be maintained by each agency involved in an adoption. Persons eligible to receive identifying information contained in such a registry may work through the agency involved in the adoption; and the agency shall accept and maintain the registrations of an adoptee, the birth parents, or a birth sibling. If the agency determines that the agency was involved in the adoption, it shall transmit the registration to the adoption information registry operated by the Department of Health and release non-identifying information. An adoption medical information sub-registry is also a part of that registry.

In addition to the non-identifying information to which previously adopted children may have access, an adopted person may seek to have the original birth records, including birth certificates, unsealed upon a showing of "good cause." This good cause can include

the need for parental medical information, and proof of birth parental citizenship for purposes of the adopted child seeking dual citizenship in his or her birth parent's country. See *Matter of Victor M.I.*, 23 Misc3d 1103(A) (Sur. Ct., Nassau County 2009); *Matter of George*, 2019 N.Y.L.J. LEXIS 2450 (Sur Ct, New York County 2019).

Requiring a showing of good cause allows the Surrogate's Court to take into account the specifics of each request, each adoption and the circumstances surrounding that adoption before unsealing the records. It also requires that due consideration be given to the privacy rights of an adopted person's birth parents as well as the adopted parents, who both consented to an adoption when there were statutory prohibitions against the unsealing of adoption records and original birth certificates. See *ALMA Society, et al. v. Mellon, et al.*, 601 F2d 1225 (2d Cir. 1979).

### **Conclusion**

New York has a long history of sealing adoption records and a stated public policy of "closed" adoptions. This Bill would effectively make New York an "open" adoption state – both prospectively and retroactively. The Bill does not consider the implications of this complete turnaround on public policy. There are no protections for the individuals who thought they could maintain their confidentiality, which is particularly troublesome because: (a) birth parents whose children are adopted have the ability to waive the confidentiality that New York law presently affords at the time of the adoptions; (b) birth parents typically do not waive their confidentiality rights at the time that the adoptions occur; and, (c) if enacted, the Bill would unilaterally revoke the right of birth parents whose children were adopted to maintain that confidentiality.

In short, considering the balancing of interests that New York State law currently calls for in determining whether to unseal adoption records, and the well-reasoned, longstanding public policy of this State in favor of confidentiality of adoption records, it is readily apparent that the rights of all parties effected – the adopted children, the birth parents and the adopted parents – are best reviewed on a case-by-case basis. New York State law presently provides for applications to unseal adoption records to be reviewed on a case-by-case basis, and we respectfully submit that our State's law on this issue should remain unchanged.

Accordingly, for the foregoing reasons, we respectfully **URGE VETO OF THIS LEGISLATION by the Governor.**