GOVERNMENT OF THE DISTRICT OF COLUMBIA OFFICE OF THE ATTORNEY GENERAL

* * *

Tonya A. Sapp Director of Legislative Affairs

October 3, 2008

The Honorable Phil Mendelson, Chairperson Committee on the Judiciary and Public Safety Suite 402 John A. Wilson Building 1350 Pennsylvania Avenue, N.W. Washington, DC 20004

Re: Bill 17-727: "Domestic Partnership Judicial Determination of Parentage Act of 2008"

Dear Chairperson Mendelson:

Please find attached an opinion letter from the federal Office of Child Support Enforcement on the amendments proposed in the above-referenced bill.

I may be contacted at (202) 724-5562 with any questions or concerns.

Very truly yours,

Peter J. Nickles Acting Attorney General for the District of Columbia

Tonya A. Sapp

Director of Legislative Affairs

Attachment

COUNCILMEMBER MENDELSON
2008 OCT -3 AM 11: 55



DEPARTMENT OF HEALTH & HUMAN SERVICES Administration for Children and Families, Region III

Suite 864 150 S. Independence Mall West Philadelphia, PA 19106-3499

September 24, 2008

Peter J. Nickles Interim Attorney General for the District of Columbia Office of the Attorney General One Judiciary Square 441 4th Street, N.W. Washington, D.C. 20001

Dear Mr. Nickles:

This is in response to your May 23, 2008, inquiry to our office requesting an opinion on the impact of proposed legislation titled "The Domestic Partnership Judicial Determination of Parentage Act of 2008" (also known as the Domestic Partnership Act) on the Title IV-D Program.

As your letter indicates, the proposed Domestic Partnership Act seeks to amend Title 16 of the District of Columbia Official Code to include domestic partners as parents of children born in the District of Columbia; to amend the Uniform Interstate Support Family Act of 1995 (presumably the Uniform Interstate Family Support Act of 1996) to include domestic partners within coverage of the Act; and further seeks to amend the Vital Records Act of 1981 to allow domestic partners to be included on birth certificates.

First, the proposed Domestic Partnership Act appears to be flawed on its face with reference to amending Section 101 of the Uniform Interstate Family Support Act (UIFSA) of 1995. Section 466(f) of the Social Security Act (Act) requires that in order to satisfy the State plan requirements of section 454(20) of the Act, a State must enact the August 1996 version of UIFSA. In order to enact a different version of UIFSA or to modify any provisions of UIFSA 1996, a State would need to request and be granted an exemption. In August 2001, the National Conference of Commissioners on Uniform State Laws approved amendments to UIFSA (referred to as UIFSA 2001). On May 24, 2007, the District's request for an exemption to adopt UIFSA 2001 was approved by the Office of Child Support Enforcement (OCSE) based on enactment of DC Law 16-137, the Uniform Family Support Amendment Act of 2006. The waiver was granted because the District demonstrated that there were no procedural or substantive differences

between UIFSA 1996 and UIFSA 2001 that would adversely affect the District's ability to process Title IV-D cases.

Secondly, UIFSA does not cover persons in domestic partnerships or define persons other than spouses. The District's amendment of its version of UIFSA to include domestic partners within the coverage of its UIFSA statute would be a substantive change to its UIFSA statute and would result in the District's Title IV-D State plan being out of compliance with section 454(20) of the Act.

The following comments have been provided on the other specific issues you raised:

Treatment of the Marital Presumption of Domestic Partners

The Domestic Partnership Act extends the martial presumption to people who are in a domestic partnership at the time of conception or birth of a child. In the District of Columbia, same sex couples qualify as domestic partners. What is OCSE's position on acknowledging this presumption where one of the parents in a domestic partnership is not biologically related to the child?

Response:

The proposed legislation would amend the "Vital Records Act of 1981" to provide for the automatic inclusion of the names of domestic partners on birth certificates as a parent. It would amend the District of Columbia Code to define a parent to be the mother or the father or the domestic partner of the mother or the father at the time of the birth. This proposed change could result in a conflict with section 466(a)(5)(D)(i) of the Act which requires States to have procedures which provide that "the name of the father shall be included on the record of birth of the child of unmarried parents only if - (I) the father and mother have signed a voluntary acknowledgment of paternity; or (II) a court or administrative agency of competent jurisdiction has issued an adjudication of paternity." Domestic partners would be "unmarried parents". (See subsequent discussion on the Defense of Marriage Act.) For example, if one member of a male domestic partnership donated semen that was used to impregnate a woman with the intention that the child would be raised by the male couple, under the proposed DC legislation, the biological father's name would automatically appear on the birth certificate as the father. The inclusion of the father's name on the birth certificate would conflict with section 466(a)(5)(D)(i) of the Act unless there were also a signed voluntary paternity acknowledgment or an adjudication of paternity by a court or administrative agency.

The proposed legislation would also amend section 16-907 of the DC Code to alter the definition of "born out of wedlock" to mean a child that "has been born to parents who, at the time of birth, were not married to, or in a domestic partnership with each other." The term "born out of wedlock" is used in the Act in section 452(g) of the Act in defining the paternity establishment percentage (PEP). While the Act does not define either born out of wedlock or paternity, the change would be inconsistent with how marriage is

defined for purposes of federal law under the Defense of Marriage Act (DOMA), Pub. L. 104-199, which amended Title 1 of the U.S. Code to add a definition of "marriage" and "spouse". Under that definition, "marriage" means only a legal union between one man and one woman and "spouse" refers only to a person of the opposite sex who is a husband or a wife. Thus, for determining what is inside or outside of a marriage for federal purposes, including for purposes of federal programs such as Title IV-D, only a lawful relationship between a man and a woman can be considered. Since "out of wedlock" refers to a birth that occurs outside of a marriage, any birth that occurs outside of a lawful marriage between a man and a woman must be considered as out of wedlock for PEP and other IV-D purposes.

The proposed legislation would, as characterized by you, "extend the marital presumption to persons who are in a domestic partnership at the time of the conception or birth of a child." This would be accomplished at least in part by amending section 16-909 of the DC Code to add a new subsection (e) to read as follows: "A parent-child relationship is established between a child and both persons in a domestic partnership on the same basis available to both persons in a marriage." The Defense of Marriage Act also amended 28 USC to add a new section 1738C which provides:

No State ... shall be required to give effect to any public act, record, or judicial proceeding of any other State... respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, ... or a right or claim arising from such relationship.

Because of the stated intent to apply a marital presumption to domestic partnerships (which are generally same sex unions) and the inclusion of domestic partnerships in the definition of out of wedlock births, it is at least possible that one or more States could conclude that, under the Defense of Marriage Act, they were not required to honor the presumption of parenthood created by the proposed legislation because the District of Columbia was treating these unions as a marriage.

Legal Status of Donor to a Child Born as a Result of Artificial Insemination

The Domestic Partnership Act does not allow the parentage acknowledgement of a donor until the donor completes a written consent to be a parent. The Act also requires the signature of the woman and person who intends to be a parent of a child born to the woman by artificial insemination in order to establish the parent-child relationship. What is OCSE's position on the establishment of parentage in this manner?

Response:

Section 466(a)(5)(A)(i) of the Act requires that the State have procedures which permit the establishment of the paternity of a child at any time before the child attains 18 years of age. Section 466(a)(5)(L) of the Act requires that the State have procedures ensuring that the putative father has a reasonable opportunity to initiate a paternity action. There is a question whether the requirement that the biological mother agree in

writing to the status of the donor as the father/parent as a pre-condition of the recognition of the donor's status would constitute ensuring a reasonable opportunity to initiate a paternity action because it appears that the mother could unilaterally deny the father the ability to be recognized as the father. In the absence of any specific details as to what information an agreement must contain, there is also a question whether, assuming the donor father and mother agree to the donor's status as a parent, the written agreement required by the proposed legislation would meet the requirements of a voluntary paternity affidavit under section 466(a)(5)(C) of the Act which would be required in order for the father's name to be included on the birth certificate under the Act.

De Facto Adoption by the Domestic Partner

In analyzing this Act, if a mother gives birth to a child while in a domestic partnership with another woman, the domestic partner will obtain parental rights to that child even though the domestic partner is not the biological parent and someone else is. The creation of parental rights for the domestic partner circumvents the adoption process and terminates the parental rights of the biological parent. What is OCSE's position on this issue given the fact that there are constitutional issues related to denying a biological father of his parental rights?

Response:

See the prior discussion relating to sections 466(a)(5)(A)(i) and 466(a)(5)(L) of the Act with respect to the automatic denying/termination of parental rights to/of a biological father.

Impact on UIFSA cases

Given the creation of a new presumption of parental rights to domestic partners under this Act, how can the District request that another state uphold the new presumption in cases where the other state does not share the same approach to domestic partnership? If the other state does not share the same approach, how can the District request that the other state establish support orders against domestic partners?

Response:

We did not find any provision in UIFSA that definitively addressed this issue or would require another State to recognize or honor the proposed DC Domestic Partnership Act parentage provisions.

In addition, Section 1738B(h) of the Full Faith and Credit for Child Support Orders Act (FFCCSOA) provides that the establishment of an order will be subject to the laws of the forum State. Thus, there does not appear to be anything in FFCCSOA that would require other States to establish support orders based on the proposed DC Domestic Partnership Act parentage provisions.

Consequently, the District would need to use the UIFSA forms to request that another State establish an order (the same way that it does for any other cases needing the establishment of a support order) and, upon receipt of the request, the other State will determine whether it has the jurisdiction or authority to establish an order under the laws of that State.

See also the initial discussion of the problems resulting from DC's proposed amendments to UIFSA.

I hope this information will be useful to you.

Cordially,

uanita De Vine

Regional Program Manager

Office of Child Support Enforcement

cc: Benidia Rice, Director

Child Support Services Division