James Wesley, Plaintiff v. Brian Smith-Lasofsky, Defendant, 105819/10 Decided: July 18, 2011

Cite as: Wesley v. Smith-Lasofsky, 105819/10, NYLJ 1202508854947, at *1 (Sup., NY, Decided July 18, 2011)

James Wesley, Plaintiff

v.

Brian Smith-Lasofsky, Defendant

Justice Laura E. Drager

Decided: July 18, 2011

Justice Drager

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DECISION and JUDGMENT OF DISSOLUTION

*1

Plaintiff moves for summary judgment granting a declaratory judgment dissolving the civil union entered into between the parties in Vermont. Defendant consents to and joins in the application.

Factual Background

On July 5, 2002, the parties entered into a civil union in Vermont. At that time, both of them were residents of New York. In January 2003 they relocated together to Texas. In the summer of 2004, the parties separated. On December 30, 2005, Plaintiff adopted his biological niece in Texas. [1] The Defendant is not an adoptive parent of the child. In June 2006, Defendant moved to California where he presently resides. Plaintiff has resided in New York County, with the child, since September 1, 2006. Plaintiff does not seek child support from Defendant and Defendant does not seek access or any custodial rights with regard to the child.

*2 Discussion

This court has subject matter jurisdiction to entertain an action seeking dissolution of a civil union validly entered into outside of this state. See, Dickerson v. Thompson, 73 A.D.3d 52 (3rd Dep't 2010); Parker v. Waronker, 30 Misc. 3d 917 (Sup. Ct. Onandaga Co. 2010).

Both parties seek dissolution of their Vermont civil union. However, because the Plaintiff adopted his daughter (who is his biological niece [2]) during the term of the civil union, the court must consider whether the Defendant has any rights or obligations with regard to the child before granting a judgment of dissolution. The Plaintiff contends, without opposition, that under the specific circumstances of this proceeding his adoption of the child after the parties physically separated did not give rise to any parental rights or obligations on the part of the Defendant.

In his Affidavit consenting to the dissolution, Defendant states that the Plaintiff's adoption of the child "was undertaken by [the Plaintiff] alone, and I am not claiming any parental rights, custodial rights, visitation orders or the like, in connection with the child." (Def.'s Aff. ¶5). The Adoptive Report issued in connection with the Texas adoption proceeding notes that the Plaintiff "has since ended his relationship with his previous boyfriend, although these two men remain friends and continue to have a casual relationship." (Exh. A to Supp. Memorandum in Support, at page 4). The child regularly visited the home shared by Plaintiff and Defendant on weekends after Plaintiff and *3 Defendant moved to Houston, Texas, in January 2003. (Pl. Aff. in Support, ¶¶6-9). According to Plaintiff, the child has seen Defendant several times since 2006 and "is fond of [him] and always enjoys seeing him, but defendant is not understood by [the child] to be a "parent." (Id.).

Pursuant to Vermont Statute Title 15, §1204(f):

The rights of parties to a civil union, with respect to a child of whom either becomes the natural parent during the term of the civil union, shall be the same as those of a married couple.

Vermont statute further provides that parties to a civil union are entitled to "the benefits and protections" and are "subject to the rights and responsibilities" of "spouses." Vermont Statute Title 15, §1201(2). Parties to a Vermont civil union have "all the same benefits, protections and responsibilities under law, whether they derive from statute, administrative or court rule, policy, common law or any other source of civil law, as are granted to spouses in a marriage." Vermont Statute, Title 15, §1204(a).

Adoption is a process that is regulated in each of the states by statute. The Adoption Order issued by the State of Texas to the Plaintiff is entitled to full faith and credit. United States Constitution, Art IV, §1; 28 U.S.C §1738. Under the Texas Adoption Order, the only adoptive parent of the child in question here is the Plaintiff.

The court has reviewed relevant New York cases, including the Court of Appeals decisions in Debra H. v. Janice R., 14 N.Y.3d 576 (2010), and Shondel J. v. Mark D., 7 N.Y.3d 320 (2006. While Debra H. and Shondel J. Provide some guidance, those cases are factually distinguishable from this matter. In Debra H., the Court of Appeals *4 held that where a woman who gave birth to a child, after artificial insemination, had entered into a civil union in Vermont prior to the child's birth, the mother's partner was a parent of the child pursuant to Vermont law, for purposes of custody and visitation. 14 N.Y. 3rd at 599. The present matter is distinguishable from Debra H. in several significant respects. First, the issue before the courts in Debra H. was whether the mother's partner was entitled to an award of visitation with and custody

of the child. Here, the Defendant does not seek any parental rights with regard to the Plaintiff's daughter. Secondly, in Debra H. the child was born to the respondent in that action during the term of the civil union, while in the present proceeding the child in question was adopted solely by her biological uncle. The Vermont statue relied upon by the Court of Appeals in Debra H. specifically refers to a "child of whom either [party] becomes the *natural* parent during the term of the civil union…" Vermont Statute Title 15, §1204(f) [emphasis added]. Review of Vermont statutory and decisional authority sheds no light on whether the Vermont legislature intended for Vermont Statute Title 15, §1204(f) to apply under the circumstances presently before this court where a child was adopted by one of the parties to a civil union. That issue was not present in Debra H. and, therefore, not addressed by the Court of Appeals. Furthermore, pursuant to Debra H., as the Defendant is neither a biological nor an adoptive parent of the child, he is not a parent as that term is defined by the Court of Appeals. 14 N.Y.3rd at 596-597.

In Shondel J., the Court of Appeals held that the respondent was equitably estopped from denying paternity of the subject child for purposes of imposing an *5 obligation for child support. 7 N.Y.3d at 331-332. Although DNA evidence indicated that respondent in Shondel J. was not the child's biological father, the court found that it was in the child's best interests to impose paternity by estoppel, pursuant to FCA §418(a) because the respondent had held himself out as the child's father. Id. The present proceeding is distinguished from Shondel J. because the Defendant here never held himself out as the child's parent and the Plaintiff and child never relied upon the Defendant as a parent.

Under the unique facts of this proceeding, where the Defendant did not form a parental relationship with the Plaintiff's adopted daughter, and the parties to this civil union separated prior to the Plaintiff's adoption of the child, the court finds that Defendant has no parental rights or obligations with regard to the Plaintiff's daughter, notwithstanding the fact that the adoption occurred during the existence of the civil union. This holding is confined to the specific facts of this proceeding. [3]

Accordingly, it is hereby

ORDERED that, Plaintiff's application for a declaratory judgment dissolving the civil union entered into by the parties in the State of Vermont is granted on consent without costs and disbursements; and it is further

ORDERED and DECLARED that, the civil union of James Wesley and Brian Smith-Lasofsky, entered into in the State of Vermont on July 5, 2002, is hereby dissolved; and it is further

*6 ORDERED, ADJUDGED and DECLARED that a copy of this Judgment and Decree shall by served on Brian Smith-Lasofsky with notice of entry within 10 days of the date of filing in the County Clerk's office.

1. The child was born in September 2000. The final order of adoption terminated the biological mother's rights but gave the biological mother limited post-termination rights to visitation and notification rights concerning the child. The biological father's parental rights were terminated in July 2005.

2. The child's mother, who is Plaintiff's sister, had health problems that prevented her from caring for the child.

3. Contrary to Plaintiff's assertions in his Supplemental Memorandum of Law, no question of Defendant's possible parental rights or obligations remain unresolved to be considered at some future date. (See, Supplemental Memorandum of Law, p.2).