Conditional Surrenders of Foster Children

CONDITIONAL SURRENDERS AND ADOPTIONS WITH CONDITIONS

SSL 383-c

SSL 384

FCA 1055-a

DRL 112-b

Conditional surrenders

- A surrender of child in foster care to agency or surrender of any child to agency can include terms and conditions such as adoption by a particular person and/or contact
- If conditioned upon adoption by a particular person, person must be certified or approved foster parent or “fully investigated and approved” adoptive parent

Conditional Surrenders

If particular person(s) is designated to adopt then the addendum will contain <u>written</u> agreement to that effect and also, if agreed - terms re communication or contact between child and surrendering birth parent(s). The following persons must agree and sign the addendum:

- person(s) designated to adopt
- birth parent(s) surrendering
- agency with care & custody
- child's attorney

Conditional surrenders

If no particular person(s) are designated to adopt, then a written addendum about communication or contact between child and surrendering birth parent(s), can also be done and the following must agree and sign:

- birth parent(s) surrendering
- agency with care & custody
- child's attorney
- this will bind anyone who adopts as the adoption must reference this agreement

- Also - the court shall determine if proposed terms of surrender are in child’s best interests before approval of surrender and, if so determined, shall approve agreement and surrender - the court will say so in the addendum
- If court does not think conditional surrender terms are in child’s best interests, can approve surrender without the terms, BUT parent is to be given opportunity to withdraw surrender instrument

Issues

- IF child is in foster care - must only use OCFS surrender forms – these forms tell of option to have terms
- Can you do an extrajudicial conditional surrender for a foster child ?
- Attys for foster parents……..
- Can it be anonymous??

Siblings

Terms and conditions can contain agreement for contact between siblings and half siblings. If any child is over 14 years old, there will be no enforcement of sibling visits unless child over 14 consents in writing to visits - signature line on form. Nothing in the statute re the child having to agree to the birth parent contact but the child's atty must agree at the time of the surrender

Issues:

- Which sibling? The one being surrendered or the other one? Or both?
- What happens if child is under 14 at surrender but does not want to visit when he/she turns 14?
- Does this mean all children can refuse sib visits at 14 or just those who were surrendered after the law?
- Can they refuse parent visits?

At time of adoption:

After a SSL 383-c or SSL 384 surrender, the surrender and addendum with the terms must be included with any subsequent petition of adoption. The court upon finalization issues two orders - the adoption order and an order incorporating the terms of the agreement into the adoption - and all parties to the surrender are to be given a copy of the incorporation order.

Enforcement of terms

Post-surrender but pre-finalization: FCA 1055-a section re enforcement of terms:

- “substantial failure of material condition” pre-finalization, court has ongoing jurisdiction
- agency must notify parent of failure of condition UNLESS parent expressly waived notification in writing in surrender - form allows parent choice of option

Where there has been a material failure pre-finalization:

- Agency must notify parent who did not waive, law guardian, and court within 20 days of failure of condition
- Agency must file petition within 30 days of failure on notice to parent who did not waive, law guardian, and court to review failure and hold hearing if necessary
- If agency does not file petition, parent or law guardian has 60 days to file
- WILL COURT ALLOW REVOCATION?

Enforcement of terms before finalization but not failure of material condition

- Where child surrendered but not yet adopted, any party to agreement may file to enforce terms - petition should have agreement attached
- Court “shall” enforce communication and contact upon terms of agreement unless court finds “enforcement will not be in the best interests of the child”
- WILL COURT ALLOW REVOCATION?
- CAN COURT ORDER MODIFICATION?

DRL 112-b- after the finalization:

- Post-adoption contact agreement enforcement
- If parties entered into written agreements regarding contact/communication between child, birth parent(s), adoptive parent(s), siblings, and half siblings at time of surrender

After the adoption finalization :

DRL 112-b

- Terms are not enforceable unless they were incorporated into a written court order based on a written agreement to which the parties consented
- Court must have found, at time of surrender, that agreement was in child’s best interests
- Copy of terms were given to all parties

DRL 112-b

- Failure to comply with terms post-adoption shall not be grounds to set aside adoption or revoke consent to adoption
- Petition to enforce can be brought by any party, including child's attorney, in Family Court after adoption - even if adoption was in Surrogate Court
- Court shall not enforce terms if it determines that enforcement is not in child's best interests -
- Can court MODIFY?

What kinds of cases does this make sense to consider?

Ideas

- Child knows the parent and there are positive aspects to the relationship
- Birth parent and adoptive parent have relationship - there are able to manage it
- Agency can get out
- DETAILS of agreement are crystal clear
- KEEP it from coming back
- ANTICIPATE problems

What kinds of cases would this maybe not be a good idea?

DANGER SIGNS

- Child does not know parent
- Child has had problems with contact
- No adoptive parents have been identified and there are lots of terms
- More than one set of adoptive parents who do not agree on issues
- Adoptive parents who have never met/do not know/ actively have problems with birth parents

What are some areas to be careful about – to try to minimize problems?

Terms to consider

- Details on what will happen before the finalization and what will happen after - who is responsible
- Understanding the options if there are problems - clarify if all will follow the law, if there is an agreement for more
- Exchange of info or Contact? DETAILS on photos, “reports”, report cards, e-mail, post mail, - one way or both?

Terms to Consider

- DETAILS on visits - contact, time, location, people, “o/p”, makeups
- A “Dead Man’s Clause” - negotiate time, details that would mean obligation ends
- Child of a Specified Age?
- Therapist who says no longer in best interests – is this a caselaw issue?
- Resumptions?

How far should you go?

- Failure of terms before finalization allows for filing of TPR?
- Failure of someterms before finalization and birth parent can not revoke?
- Relocation?
- Re-surrender and re- adopt?
- Consent to allow court modification?
- Consent to submit disagreements to a body before litigation permitted?

Can the court ORDER contact conditions as part of a surrender or disposition of a TPR?

Not as to surrenders, but as to TPRS - Caselaw is now conflicted

- 1st - Cheyanne N 2002, April S. 2003
- 2nd - Lovell Raeshawn McC 2003 (Corinthian Marie "exceptional" 2002)
- 3rd - William W. 2005, Jessi W. 2003
- 4th - Jamie T. 2005….Kenneth D .September, 2006 - We further conclude that the court properly determined that it lacked authority to provide for visitation between respondent and the children *Matter of Jessi W.*, 20 A.D.3d 620, 621-622, 798 N.Y.S.2d 193; *Matter of Livingston County Dept. of Social Servs. v Tracy T.*, 16 A.D.3d 1133, 792 N.Y.S.2d 273;

- BUT>>>> Matter of Kahill-4th Dept. December 2006….specifically overrules previous statement!!!

MATTER OF KAHLIL S.
35 A.D.3d 1164 (2006 4th Dept)

- We recognize, however, that the termination of the parental rights of a biological parent results in an abrupt and complete cessation of contact between a child and the parent, and that "psychological harm . . . may possibly result from severing the bonds between a child and his or her biological parent, particularly where the child is older and has strong emotional attachments to the birth family" (*Matter of Gregory B., 74 N.Y.2d 77, 90, 542 N.E.2d 1052, 544 N.Y.S.2d 535*).

WOW! This changes the world

- We conclude that, in the event that parental rights are terminated after a finding that the parent is unable by reason of **mental illness** or **mental retardation** to provide proper and adequate care for his or her child or after a finding of **permanent neglect** , Family Court may, in those cases in which the court deems it appropriate, exercise its **discretion in determining whether some form of post termination contact with the biological parent is in the best interests of the child.**

- To the extent that our decisions in (*Matter of Kenneth D., 32 AD3d 1237, 821 N.Y.S.2d 698*) and (*Matter of Livingston County Dept. of Social Servs. v Tracy T. , 16 AD3d 1133, 792 N.Y.S.2d 273*) hold otherwise, they are no longer to be followed.
- Application for stay denied March 16, 2007 and leave to appeal denied.

IN CASE you thought they didn’t mean it

- **Matter of Thomas 35AD3d 1289**
- **Matter of Bert M 50 AD3d 1509**
- **Matter of Diana MT 57 AD3d 1492**
- **Matter of Kahlil S 60 AD3d 1450**
- **Matter of Terrell Z 60 AD3d 1451**
- **Matter of Josh M 61 AD3d 1366**
- **Matter of Christopher J 60 AD3d 1402**
- **Matter of Samantha K 59 Ad3d 1012**
- **Matter of Tryston M 885 NYS2d 824**

Inquiring minds want to know!!

- WHY have the other Departments ignored the decision?
- Will the Court of Appeals hear it and WHAT will they do?
- Will there be some legislation?

Issues

- If parent asks, better have a Kahlil hearing and better make a clear record
- If there is Kahlil ordered visitation, how will it be enforced as DRL 112-b does not seem to fit?
- What if it is overturned, will orders still be valid?
- Why do they call it “post termination” and not “post adoption”?
- Is it modifiable?