Adoption Law: Start to Finish

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What To Do If Something Goes Wrong

Submitted by Frederick J. Magovern

Overview:

Types of Adoptions:

1. Agency Adoption (by licensed adoption agency or County Department of Social Services). The operative legal document, signed by the birth parent(s), is the *Surrender*.
2. Independent or Private Adoption (arranged directly or via an unpaid[1] intermediary). The operative legal document signed by the birth parent(s) is the *Consent to Adoption.*

Jurisdiction:

Family Court and Surrogate's Court have concurrent jurisdiction over adoptions.

Venue:

Adoptions are filed in the county where the adoptive parents reside. For non-residents, file in the county where the agency has its offices.

Consent(s) or **Surrender**(s) necessary for the adoption:

Married: Mother & Father

Unmarried: Mother & Birth Father, if father qualifies under DRL 111(1)(d)/(e)
The standard of conduct expected of the unwed father varies depending upon the child's age when placed for adoption[2]:

If infant placed before six months of age: DRL 111 (1)(e)
If infant placed after six months of age: DRL 111 (1)(d)

[1] Lawyers may not place children for adoption nor is dual representation permitted. Intermediaries may not be paid for arranging an adoption.
[2] Matter of Raquel Marie X 76 N.Y. 2d 387 (1990), cert. denied sub nom. Robert C. v. Miguel T., 498 U.S.984 (1990).

"Notice Fathers":

While the biological father's consent or surrender may not be required, there is a category of unwed fathers who are entitled to notice of the adoption and the right to be heard. *See* DRL 111-a; Social Services Law 384-c.

Consents & Surrenders: Judicial and **Extrajudicial**

Judicial: the judicial instrument is irrevocable upon its execution before a judge or surrogate. To be valid there must be a full allocution of the parent regarding the rights and alternatives available. This must be done on the record.

Extrajudicial: Consent to Adoption and Surrender

Consent to Adoption: irrevocable 45 days after its execution provided it is in the required format and properly executed and acknowledged.

Surrender for the adoption of child in foster care: must conform to additional, onerous requirements. SSL 383-c(4)(b).

Surrender for the adoption of a child who is not a public charge child (i.e. not in foster care): irrevocable 30 days after its execution. SSL 384.

Conditional Consent and Surrender:

Surrenders and consents may have conditions (e.g., visitation, photographs) that survive the adoption if they are incorporated into the adoption decree. These conditions may be subject to enforcement in post-adoption litigation, but only if found to be in the child's best interests. *See, e.g.*, DRL 112.

Practice Tip: Do not attempt to draft your own forms. Instead, go to the adoption clerk in Family or Surrogate's Court and you will be given a packet of the appropriate forms to use. Otherwise you will run the risk of lawsuit.

Timely Notice of Revocation by the Birth Parent

Contested adoptions arise where a birth parent timely files a written notice of revocation of the extrajudicial consent with the adoption court (i.e. within 45 days). If the adoptive parents oppose the revocation and have filed their opposition in writing within fifteen days, the court must schedule a hearing to decide if giving force and effect to the revocation is in the child's best interests. These contests are governed by DRL 115-b and the applicable law.

New York's adoption laws recognize that in determining revocation of extrajudicial consent to adoption or surrender, the sole consideration is the best interests of the child. Speaking for a unanimous Court of Appeals in the landmark case Matter of Sarah K., 66 N.Y.2d 223 (1986), *cert. denied sub nom. Kosher v Stamatis*, 475 U.S. 1108 (1986) (hereinafter "Matter of Sarah K."), former Chief Judge Judith Kaye emphasized that a birth parent who consents to the adoption of her child cannot unilaterally nullify her actions.

> A parent's consent to the release of a child for adoption has consequence in the law, and cannot invariably be undone at will. The law recognizes that consent implicates not only the fundamental rights of birth parents whose decision initiates the process but also the child's substantial interests in a stable, continuous home environment, and those of third parties, the adoptive parents, who but for the consent would not have become involved (emphasis added).

The statutory framework governing judicial consents, embodied in Domestic Relations Law 115-b, was designed to add "certainty and finality" to the adoption process by limiting a parent's right to revoke consent. Its stated intention is to balance the rights of surrendering parents, adoptive parents, and children. *See* Matter of Sarah K., at 234. The statute seeks to achieve the desired "certainty and finality" by providing that a birth parent's timely filing of a notice of revocation does not necessarily result in the return of the child to the birth parent if the adoptive parents oppose the revocation. Rather, the revocation will be given effect *only* where the court determines that the best interests of

the child will be served by doing so. *See* Matter of Sarah K., at 235; DRL 115-b (3)(b); In the Matter of Summer A., 49 A.D.3d 722 (2nd Dept. 2008).

Thus, there is no presumption favoring a birth parent's custody. In the best interest hearing, the birth parent has "no right of custody superior to that of the adoptive parents," even if the birth parent can establish that she/he is "fit, competent and able to maintain, support and educate the child." Matter of Sarah K., at 235. Custody is to be awarded solely on the basis of the child's best interests, without any presumption that such interests would be promoted by any particular disposition." *Id.,* at 235; DRL 115-b(6)(d)(v).

Practice Tip: When representing a birth parent you must make clear that by their act on signing the extrajudicial surrender/consent means giving up their paramount right to custody of their child. Read the document aloud and have the parent read it completely. Provide a copy to the birth parent(s) in advance of your meeting.

Proceedings to Vacate Consent/Surrender After Revocation Period Passes

An adoption may become contested *after* the operative time to revoke an extrajudicial consent has passed if the surrendering parent brings a proceeding alleging that the surrender or consent was the product of fraud, duress or coercion. DRL 115-b(7). Typically the birth parent may file a petition for custody (FCA 651-b) or seek a Writ of Habeas Corpus challenging the legitimacy of the adoption consent or surrender. The party asserting fraud, duress or coercion has a heavy burden of proof. *See* In Re Ricardo N., 195 A.D.2d 559 (2d Dept. 1993). For example, the failure to disclose the identity of the birth father has been held not to be fraud. *See, e.g.,* Robert O. vs. Russell K., 173A.D.2d 30 (2d Dept. 1983). Duress must have involved a wrongful act or wrongful threat that precluded the exercise of free will. *See* Kazaras v Manufacturers Trust Co., 4 A.D.2d 227 (1st Dept. 1957), aff'd 4 N.Y2d 930 (1958). Neither emotional distress nor parental pressure to place a child for adoption is considered duress. *See* In re Baby Boy L., 144 A.D.2d 674 (2d Dept. 1989).

Unwed Birth Father Litigation

The adoption of a child born out of wedlock may also become contested where the birth father comes forward and claims that his consent to the adoption is required. An adoption contested by the unwed father is governed by DRL 111 (1) (d) or (e) and case law. *See, e.g.,* Matter of Robert O. vs. Russell K., 80 N.Y.2d 264 (1992); Matter of Rachel Marie X., 76 N.Y. 2d 387 (1990); Matter of Seasia D., 10 N.Y.3d 879 (2008), cert. denied 555 U.S. 1046 (2008).

The "inchoate interest" of unwed birth fathers is not the primary focus of New York adoption law. Lehr v. Robertson, 463 U.S. 248, 265 (1983). It is the protection of children born out-of-wedlock, and creating a system of proper reliance by putative adoptive parents by creating objective rules which must be abided in order to secure rights in the first place. Faithful attention both to legislative intent and to the Court of Appeals pronouncement in Matter of Raquel Marie X., 76 N.Y.2d 387 (1990), *cert. denied sub nom.* Robert C. v. Miguel T., 498 U.S. 984 (1990) is required of an unwed father who seeks to earn the mantle of a "consent father."

New York law clearly establishes the conditions under which unwed fathers may secure constitutional parental An unwed father must take visible, public steps which would place adoption agencies and prospective adoptive parents on notice that the recently born child has a father who possesses substantive rights to the child.

Raquel Marie X. stressed that the Legislature intentionally created a statute under which a father must "objectively and unambiguously manifest that, through his efforts, there was a substantial, continuous, meaningful family relationship" to the child. *Id.* at 399. In the case of newborns placed for adoption at or nearly immediately after their birth, it was held that only when an unwed father "promptly avails himself of all the possible mechanisms for forming a legal and emotional bond with his child" can he acquire substantive parental rights. *Id.* at 402. The Court of Appeals explained that to secure "consent father" status concerning an infant placed before six months old, an unwed father "not only must assert his interest promptly . . . but also must manifest his ability and willingness to assume custody of the child." *Id.* at 402.

Raquel Marie X. also made it clear that until the Legislature adopts a successor statute on the subject, courts should conclude that the consent of an unwed father of a child placed for adoption before s/he is six months old is required only when he evidences a prompt manifestation of "a willingness himself to assume full custody of the child," *id.* at 408.

When fathers fail to take those necessary steps, they set adoption agencies and prospective adoptive parents on a course that allows them to move forward without fear that a child's placement, and the consequent bonding that will follow, will be disrupted after a late-acting unwed father emerges from the dark. Justice Titone explained why in his concurring opinion in Matter of Robert O., 80 N.Y.2d 264 (1992) at 269:

> The importance of finality in the lives of the children involved in the adoption process is so obvious as to require little elaboration. One of the most crucial elements of a healthy childhood is the availability of a stable home in which each family member has a secure and definite place. In addition to the stake of the adopted child, the adoptive family is unquestionably adversely affected by any lingering uncertainty about the permanence of the adoption.

What must the unwed father do in order to have the right to impose his consent? He should see a lawyer to learn what his rights (and responsibilities) are. He must file a petition for paternity; he must file a petition for custody for himself; he must register with the NYS Putative Father Registry; he should regularly contribute (at the very least offer) money to the birth mother to assist her with the pregnancy and birth related expenses; he must put money aside to be made available for the child. And he must do so promptly.

Both the Legislature and the Court of Appeals in Matter of Raquel Marie X., *supra*, require that putative fathers actually file with the putative father's registry, file a petition for paternity, or otherwise take public steps so that adoption agencies and prospective adoptive parents could know whether there exists a birth father with rights to the child.

The Court of Appeals instructed future courts to judge an unwed father by his "public acknowledgement of paternity, payment of pregnancy and birth expenses, steps

taken to establish legal responsibility for the child, and other factors evincing a commitment to the child." *Id.* at 408. So long as "a father [ ] has promptly taken every available avenue to demonstrate that he is willing and able to enter into the fullest possible relationship with his" child, he is entitled to the full protection of the status of a parent with constitutional rights to veto his child's adoption." *Id.* at 403.

In the case of newborns, all of the above must be done *before* the infant under six months of age is placed with the adoptive parents. For an older child (placed for adoption after six months of age) there is greater emphasis placed upon financial contribution as the *sine qua non* for demonstrating paternal responsibility. The duty to contribute financial support is non-delegable, so the actions of others are not attributable to the birth parent. *See, e.g.,* Seasia D., supra.

The law seeks "certainty and finality" to protect the infliction of needless harm. *See* Matter of Sarah K., 66 N.Y.2d 223, 234 (1985), *cert. denied sub nom.* Kosher v. Stamatis, 475 U.S. 1108 (1986); *see also* Matter of Raymond AA v. Doe, 217 A.D. 2d 757, 759 (3d Dept. 1995), *lv. app. denied*, 87 N.Y.2d 805 (1995) ("It is axiomatic that the State has a legitimate interest in establishing procedures which assure both a prompt adoption and the stability of the adopted child.").

If he does not do these things, a father will not be heard. *Cf.* Matter of Jessica XX v. Lorraine WW, 54 N.Y.2d 417, 430 & n. 7 (1981), *aff'd* Lehr v. Robertson, 463 U.S. 248 (1983) (cataloguing various things the birth father could have done, but did not, as factors properly considered in finding that he failed to take the minimal steps to acquire constitutional rights to notice of the adoption, including filing a notice of intention to claim paternity or a prompt application to intervene in the adoption proceeding). *See, e.g.,* Matter of J.P.B. vs. Friends in Adoption, Inc., 28 Misc.3d 1212 (Fam. Ct. Orange Co. 2010), aff'd, A.D.3d (2d Dept.2010).

Where the unwed father's actions are insubstantial, courts will not hesitate to find his consent is not required. For example, an unwed father doing almost nothing more than offering some maternity clothes is insufficient to secure parental rights. *See* Matter of John E. v. Doe, 164 A.D.2d 375 (2d Dept.1990), *lv. app. denied*, 78 N.Y.2d 853 (1991)

(birth father failed to secure consent father status where he lived with the birth mother six months before the placement, paid $100.00 to an obstetrician, and telephoned and checked on her progress in the last trimester). *See also* Matter of Raymond AA v. Doe, 217 A.D. 2d 757 (3d Dept. 1995), *lv. app. denied*, 87 N.Y.2d 805 (1995); Matter of Russell W. vs. Friends in Adoption, Inc., 64 A.D.3d 912 (3d Dept. 2009).

It is no defense for the birth father to blame the birth mother's failure to cooperate with or assist him, or even keep him informed about the course of the pregnancy. While courts have regarded it as somewhat unfair that the birth mother kept the birth father at a distance, "it is well settled that a natural mother ha[s] no obligation . . . to volunteer any information with respect to the [the father]." Matter of Robert O. v. Russell K., 173 A.D.2d 30, 35-36 (2d Dept.), *aff'd* 80 N.Y.2d 254 (1992) (quoting Matter of Jessica XX, 54 N.Y.2d 417, 427 (1981). Furthermore the law is clear that a birth mother and her family may stay away from unwed fathers without violating their rights, especially if the birth mother views him as her rapist.[3] *See*, *e.g.*, Seasia D., supra; Matter of Baby Girl U., 224 A.D. 2d 869 (3d Dept. 1996).

Notice-Only Unwed Father Litigation

Finally, an unwed father entitled to notice of the adoption pursuant to DRL 111-a or SSL 384-c may also be heard in opposition to the adoption. DRL 111-a requires notice to certain unwed fathers; if they take some action they may be afforded the right to be heard as to whether the adoption is in the child's best interests. These fathers do not have 'veto' right over the adoption.

Section 111-a [3] of the Domestic Relations Law defines the purpose of its notice provisions as follows: "The sole purpose of notice under this section shall be to enable the person served . . . to present evidence to the court relevant to the best interests of the child." Even if the trial court finds that an unwed father is not a consent father, he may be afforded the right to present evidence relevant to the best interests of the child if he comes within the categories of DRL 111-a notice fathers. However, as a notice-only

[3] The statute only dispenses with the consent of a rapist who has been convicted of rape in the 1st degree.

father, his rights are significantly circumscribed by statute, and his wishes are not determinative. He has no interest superior to that of the adoptive parents, and there is no presumption that the child will be better off in his care.

Therefore, much like the rights of the birth parent who timely revokes an extrajudicial consent/surrender, adult parties stand on equal footing at the DRL 111-a best interests hearing. Although it is important to establish unfitness if that case can be made, adoptive parents need not establish that the birth parents are unfit.

The trial court must determine without predisposition to either side, which of the adult parties is better able to provide for the child's emotional and intellectual development, not just for today or tomorrow, but also for the rest of his life. The Appellate Division, Second Department, in Matter of Baby Boy L., 206 A.D.2d 470 (2d Dept.1994), appeal denied 84 N.Y.2d 804 (1995), in affirming Suffolk County Family Court (Freundlich, J.), articulated the essential factors of the court's best interest determination:

> Primary among the considerations to be considered in determining the best interests of the child are the ability to provide for the child's emotional and intellectual development, the quality of the home environment, and the parental guidance provided. Other factors to be considered by the court include the original placement of the child, the length of the placement, the relative fitness of the parents, and the parents' financial status (internal citations omitted).

Failings of the adoptive parents will not necessarily be determinative in a best interests hearing. The Appellate Division decision in Matter of Summer A., 49 A.D.3d 722 (2nd Dept. 2008) is instructive. There, the Suffolk County Family Court allowed birth parents to revoke their adoption consents mainly because the adoptive father had used cocaine about a year before he was certified[4] and did not disclose his drug use on the application they submitted to become certified as adoptive parents. Nevertheless, the Appellate Division unanimously reversed.

[4] Adoptive Parents must be pre-certified as suitable adoptive parents by the Family or Surrogate's Court *before* they can take custody of a child. This involves a home study and background check including fingerprinting and child abuse clearance.

> Although we share the Family Court's concern over [the adoptive father's] recent history of cocaine use, and the poor judgment that the prospective adoptive parents exercised in concealing his drug use on their certification application, *we are not convinced that these circumstances render them less fit to care for [the child] than the birth parents*. There is no evidence that the adoptive father's drug problem was long term or continuing, and he voluntarily sought out and obtained treatment to address it (emphasis added).

The Appellate Division found that the Family Court erroneously "failed to give appropriate weight to the past actions of the birth parents, which cast doubt on their ability to maintain stable long term relationships, and to protect [the child] and provide her with proper parental guidance." Matter of Summer A., 49 A.D.3d at 726. In this case, the birth mother had been married twice before, had seven older children with three different men, and had only been with her current husband for one year. By contrast, the adoptive parents had been married for eight years by the hearing date. *Id.*

In Matter of Seasia D, The Queens County Family court held a hearing pursuant to DRL 111-a. There, the Family Court held that the adoption was in the best interests of the child after giving notice and the opportunity to be heard to the birth father pursuant to DRL 111-a.[5] In finding it was in the best interests of Seasia to grant the adoption, the Court noted that the birth father never discussed the impact on the child if she were to be removed from the only home she had ever known, and two years without contacting the child. He also did not address his ability to meet the child's emotional, physical, and psychological needs, instead focusing on his own needs and feelings, and his sense of injustice, failing to separate the child's needs from his own. *Id.* In this situation, the father's consent was not required.

[5] Matter of Seasia D., 10 N.Y.3d 879 (2008), cert. denied 555 US 1046 (2008) (No. 08-296, 2008 Term).

Evolving Areas of Adoption Litigation

Agency adoption surrenders can now be conditioned on future parental contact between the child and the birth parent(s). Cases involving post-adoption enforcement of visitation/contact provisions examine whether enforcement of the conditions is in the best interests of the child.

The Domestic Relations Law also has provision for post adoption visitation by grandparents and by siblings of the adoptee. There have been a number of reported cases involving maternal or paternal grandparents seeking post adoption visitation. *See, e.g.,* Matter of Jordan, 60 A.D.3d 764 (2d Dept. 2009). Siblings also have a statutory right to post adoption contact. Again, the standard that the court will apply is whether such contact is in the best interests of the adoptee child. If contact will disrupt the adoption it will be denied.

CONCLUSION

The trial of a contested adoption proceeding is quite challenging and requires thorough familiarity with the applicable statutes and case law. Thorough preparation is the key for successful representation of your client in such difficult litigation.

Dated: June 12, 2012

Respectfully submitted,

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