

## Surrender Agreements

The guardianship of the person and the custody of a child in foster care under the age of 18 years may be committed to an authorized agency by a written instrument known as a surrender.<sup>1</sup>

Surrender agreements form a part of the adoption process allowing placement of a child with adoptive parents through an agency to facilitate protecting the child's best interests. In the agreement the agency agrees to provide care and guardianship for the child in the place of the parent and to try to have the child adopted, while the parent abandons the right to interfere in the care of the child and the right to prevent adoption by withholding his or her consent.<sup>2</sup>

The same holds true for a child not in foster care.<sup>3</sup> The care and custody of a child may be transferred by a parent or guardian, and the care of a child may be transferred by any person to whom a parent has entrusted the care of the child, to an authorized agency by a written instrument in accordance with the provisions of Social Services Law §384-a.<sup>4</sup> The transfer by a person who is not the child's parent or guardian shall not affect the rights or obligations of the parents or guardian, and the transfer shall be deemed a transfer of the care and custody of the child for the purposes of Social Services Law §358-a. The transfer by a person who is not the child's parent or guardian shall not affect the rights or obligations of the parents or guardian.<sup>5</sup>

A parent of a destitute or dependent child may commit the child to an authorized agency, to a foster parent, or to a qualified relative.<sup>6</sup>

A "destitute child" is a child who, through no neglect on the part of his or her parent, guardian, or custodian, is:

- Destitute or homeless
- In a state of want or suffering due to lack of sufficient food, clothing, shelter, or medical or surgical care, or
- Under the age of 18 and absent from his or her legal residence without the consent of his or her parent, legal guardian, or custodian, or
- Under the age of 18 and without a place of shelter where supervision and care are available.<sup>7</sup>

A "dependent child" is a child who is in the custody of, or wholly or partly maintained by, an authorized agency or an institution, society, or other organization of charitable, eleemosynary, correctional, or reformatory character.<sup>8</sup>

Whenever the term surrender, surrender paper or surrender instrument is used in any law relating to the adoption of children in foster care, it means and refers exclusively to the instrument described in Social Services Law §383-c for the commitment of the guardianship of the person and the custody of a child to an authorized agency by the child's parent, parents or guardian. In no case may the term be deemed to apply to any instrument purporting to commit the guardianship of the person and the custody of a child to any person other than an authorized agency, nor may the term or the provisions of Social Services Law §383-c be deemed to apply to any instrument transferring the care and custody of a child to an authorized agency pursuant to Social Services Law §384-a.<sup>9</sup>

A validly executed and filed surrender agreement:

- Frees the surrendered child for adoption<sup>46</sup>
- Changes the statutory presumption in a custody dispute that a natural parent is entitled to custody of a child absent clear and convincing evidence that the parent is unfit to determining custody by the best interests of the child<sup>47</sup>
- Terminates judicial proceedings to terminate parental rights<sup>48</sup>

The agency's guardianship of the child after the surrender must be in accordance with the provisions of Article 6 of the Social Services Law,<sup>49</sup> but the agency cannot collect public funds for the support of the child without permission of the local social service official.<sup>50</sup>

Execution of the surrender agreement gives a court only two choices in deciding on the child's future: it may direct either that foster care be continued or that the child be placed for adoption either in the foster home in which the child resides or resided or with any other person.<sup>51</sup> Voluntary surrender of a child does not end the child's right to support from his or her natural parent until the child is formally adopted.<sup>52</sup>

The extended family members of a child who has been surrendered to an authorized agency have no special right to custody and are in no better position than strangers as to placement of the child for adoption by the agency.<sup>53</sup> However, the grandparents of a child who was the subject of the surrender agreement may seek visitation rights with the child despite the child's subsequent adoption.<sup>54</sup>

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<sup>1</sup> SSL §383-c.

Section 383-c of the Social Services Law provides a procedure for the surrender of a child.

In *re Markies V.*, 93 A.D.3d 802, 941 N.Y.S.2d 175 (2d Dep't 2012), the Appellate Division observed that Social Services Law 383-c sets out the procedures for "surrender" of the guardianship of the person and the custody of a child in foster care to an "authorized agency" for the purpose of freeing the child for adoption (SSL §383-c(1)). It provides that the surrender "instrument" may, but is not required to, designate the name of the person or persons who will adopt the child (SSL §383-c (5)). This provision, as well as others in the statutory framework, contemplate that surrender of guardianship and custody will take place in some instances even before a preadoptive home has been identified. The statute further provides that the surrender will be "upon such terms and subject to such conditions as may be agreed upon by the parties" (SSL §383-c (2)). Generally, those terms and conditions concern continued communication or contact between the child and the child's parents or siblings (SSL §383-c (2), (3)). To ensure that these terms and conditions are appropriate, the legislature has mandated that, before approving the surrender, the Family Court determine whether the terms and conditions are in the child's best interests (SSL 383-c(3)(b)). Thus, the statute requires judicial review of the terms and conditions of the surrender, but it does not contemplate that a court may reject the petition simply because no pre-adoptive home has been identified. Here, the Family Court denied the petition solely on the ground that no preadoptive home was designated. The Appellate Division held that this was error. It reversed the order, reinstated the petition, and remitted the matter to the Family Court for further proceedings on the petition.

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<sup>2</sup> In re Schenectady County Dept. of Social Services, 73 Misc. 2d 104, 341 N.Y.S.2d 169 (Fam. Ct. 1972).

<sup>3</sup> Social Services Law §384 (1) provides, in part, the guardianship of the person and the custody of a child who is not in foster care under the age of 18 years may be committed to an authorized agency by a written instrument which shall be known as a surrender.

<sup>4</sup> SSL §384-a.

<sup>5</sup> SSL §384-a.

<sup>6</sup> Social Services Law §384-b (3)(a) provides, in part, that guardianship of the person and the custody of a destitute or dependent child may be committed to an authorized agency, or to a foster parent authorized pursuant to section one thousand eighty-nine of the family court act to institute a proceeding under this section, or to a relative with care and custody of the child, by order of a surrogate or judge of the family court, as hereinafter provided.

<sup>7</sup> SSL §371(3).

In *In re Nurayah J.*, 41 A.D.3d 477, 839 N.Y.S.2d 97 (2d Dep't 2007), leave to appeal denied, 9 N.Y.3d 907, 843 N.Y.S.2d 534, 875 N.E.2d 26 (2007), the child was temporarily removed from the respondent mother by the petitioner Department of Social Services, upon consent. The respondent's consent and the subsequent removal occurred while respondent and the child were in the hospital, a few days after the birth of the child. The respondent was 16 years old at the time of the removal and was a foster child. Within three days of the removal, the petitioner filed a petition pursuant to Family Court Act article 10 alleging, inter alia, that the respondent's history of behavioral problems and prior misconduct placed the child at risk of neglect. After dismissing the child protective proceeding on the ground that the respondent's due process rights were violated by the petitioner for noncompliance with Family Court Act 1021, Family Court placed the child with the petitioner, finding that she was "destitute" as defined by Social Services Law 371(3). The Appellate Division found that Family Court properly dismissed the proceeding, albeit on a different ground than the ground relied upon by the Family Court. Contrary to the Family Court's determination, the petitioner complied with FCA 1021 by annexing to the petition the respondent's written consent to temporary removal. The petitioner also provided the respondent with written notice informing her when the petition would be filed, whom to contact for visitation, of her right to a hearing to request the return of the subject child, of her right to counsel, and whom to contact to obtain assigned counsel. Contrary to the respondent's contention, nothing in the Family Court Act or the Social Services Law lessens, increases, or otherwise changes the responsibilities of the petitioner when it is faced with caring for the offspring of a foster child. However, as the petitioner failed to establish, prima facie, that the child was neglected by the respondent, the child protective proceeding was properly dismissed. The petitioner failed to offer any evidence to establish the allegations in the petition.

Under the unique circumstances of this case, the Family Court did not err in finding that the child was destitute as defined under Social Services Law s 371(3). Social Services Law s 398(1) grants the petitioner "powers" and "duties" to "[a]ssume charge of and provide support for any destitute child who cannot be properly cared for in his home." A child is destitute when, through no neglect on the part of the parent, guardian, or custodian, he or she is: (1) destitute or homeless; (2) in a state of want or suffering due to lack of sufficient food, clothing, or shelter, or medical or surgical care; (3) a person under the age of 18 years who is absent from his legal residence without the consent of his parent, legal guardian, or custodian; or (4) a person under the age of 18 who is without a place of shelter where supervision and care are available (see

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Social Services Law 371[3]). As the respondent was unable to provide the child with food, clothing, or shelter so that the child is in a state of want, the child was destitute.

<sup>8</sup> SSL §371(7).

<sup>9</sup> SSL §383-c 5(g).

<sup>46</sup> New York Domestic Relations Law §111(2)(b); New York Social Services Law §384(2).

Matter of Adoption of E. A. V., 86 Misc. 2d 1079, 383 N.Y.S.2d 507 (Sur. Ct. 1976).

A court may direct return of the surrendered child to the parent until the child is adopted. McGaffin v. Family & Children's Service of Albany, Inc., 6 Misc. 2d 776, 164 N.Y.S.2d 444 (Sup. Ct. 1957), order aff'd, 7 A.D.2d 769, 179 N.Y.S.2d 948 (3d Dep't 1958); Application of Handler, 6 A.D.2d 977, 176 N.Y.S.2d 689 (3d Dep't 1958).

<sup>47</sup> New York Social Services Law §383(6).

State ex rel. Dunn on Behalf of Baby Girl Dunn v. Catholic Home Bureau for Dependent Children, 125 A.D.2d 106, 512 N.Y.S.2d 82 (1st Dep't 1987) holding that until the procedural requirements for executing and filing the surrender agreement are met, the persons to whom the agency delivers the child are not "adoptive parents" for purposes of that statute and the presumption in favor of the natural parent applies.

The natural parent retains the right to benefit from this presumption if he or she informs the agency of the desire to revoke the agreement before it is acknowledged or recorded as required by New York Social Services Law §384, the agency has not obtained an agreement from the other natural parent to surrender the child where that agreement is necessary, and the surrendered child has not been placed with the adoptive parents. Matter of John J., 135 Misc. 2d 728, 516 N.Y.S.2d 842 (Fam. Ct. 1987).

<sup>48</sup> Matter of Adoption of E. A. V., 86 Misc. 2d 1079, 383 N.Y.S.2d 507 (Sur. Ct. 1976).

<sup>49</sup> New York Social Services Law §§371 et seq.

As to guardianship, generally, see Volume 5 Guardianship Ch 7.

<sup>50</sup> New York Social Services Law §384(2).

<sup>51</sup> New York Social Services Law §392(6).

Matter of Peter L., 59 N.Y.2d 513, 466 N.Y.S.2d 251, 453 N.E.2d 480 (1983).

<sup>52</sup> Harvey-Cook v. Neill, 118 A.D.2d 109, 504 N.Y.S.2d 434 (2d Dep't 1986).

In *Solly M. v. Audrey S.*, 32 Misc. 3d 541, 926 N.Y.S.2d 877 (Sup 2011), the issue before this court was whether the provision in a Judicial Consent by a birth parent for the private placement adoption of a child, which provided that "the consent becomes irrevocable when executed" is equivalent to an adoption for the purpose of extinguishing the birth parent's obligation to pay child support. Plaintiff Solly M, the birth father and defendant Audrey S. conceived a daughter out of wedlock on August 11, 1995. The parties subsequently separated and Audrey S. requested that the Birth Father execute a Judicial Consent in support of a step parent adoption petition allowing defendant Deland W. to become the adoptive step father. The adoption petition was filed by Audrey S. and Deland W; the birth father thereafter appeared before the Surrogate's Court on March 15, 2000, and executed the Judicial Consent to the adoption of his daughter in compliance with DRL §115-b. The Judicial Consent stated in pertinent part that "this consent becomes irrevocable when executed or acknowledged before a judge or surrogate, and thereafter no action or proceeding may be maintained by [Solly M] for the custody of the child." Thereafter the Bronx Surrogate executed the Judicial Consent. The adoption petition was subsequently withdrawn on October 3, 2001.

Supreme Court observed that a parent may not contract away his or her obligation to support a minor child in the interest of protecting the welfare of minor children. (*Streng v.*

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Bearman, 228 A.D.2d 664, 645 N.Y.S.2d 315 (2d Dep't 1996) citing *Pecora v. Cerillo*, 207 A.D.2d 215, 621 N.Y.S.2d 363 (2d Dep't 1995).) A parent's duty to support his or her minor child is "primary in nature" and that a parent remains legally obligated for the support of such minor child until such time as the adoption is finalized. (*Harvey-Cook v. Neill*, 118 A.D.2d 109, 504 N.Y.S.2d 434 (2d Dep't 1986)) Although the father in *Harvey-Cook* executed a "Surrender of Guardianship and Custody" whereby he authorized the agency to "place the child in an adoptive home or to otherwise assume all parental responsibilities for such child," the adoption did not become final and the court held that the father was responsible for continuing child support.

Defendant Deland W, the proposed adoptive step-father, never formalized the adoption. Solly M. contended that the mother actively pursued the adoption and that her failure to follow through on the adoption, and her subsequent failure to actively locate him for eight years, should prevent her from seeking child support is clearly against public policy because it would not take into account the best interests of the child. Plaintiff relied on a Family Court case wherein the court found that the parental rights of the biological father, who was incarcerated for the attempted murder of his wife, were terminated based upon his execution of extrajudicial consents to the adoption of his children despite the failure to complete the adoption proceeding. (*Matter of Adoption of Michael S. by Michael B.*, 159 Misc. 2d 894, 607 N.Y.S.2d 214 (Fam. Ct. 1993).) In *Michael S.*, the wife, and mother of the children, sustained severe head trauma from attempted murder that caused her to be in a coma and vegetative state. The Family Court in *Michael S.* was clear to note that the decision was based on the "unique circumstances" of the case, including father's incarceration and mother's vegetative state. Furthermore, it is apparent that the best interests of the children were served by accepting "extrajudicial consent," of the father who was incarcerated, to help facilitate the adoption of the children who were left virtually parentless.

Supreme Court held that the Judicial Consent without the finalization of an adoption does not extinguish the parent's obligation to pay child support. It held that the best interests of the child would not be served if the court allowed the Judicial Consent of the father to terminate his duty to pay child support.

<sup>53</sup> *Matter of Peter L.*, 59 N.Y.2d 513, 466 N.Y.S.2d 251, 453 N.E.2d 480 (1983).

<sup>54</sup> See New York Domestic Relations Law §72, New York Domestic Relations Law §240, New York Family Court Act §651, and New York Family Court Act §683.

*Carl B. v. Broome County Social Services*, 142 Misc. 2d 406, 537 N.Y.S.2d 456 (Fam. Ct. 1989).