LAW AND THE FAMILY

Surrender Agreements in Adoption Proceedings

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New York Law Journal
January 26, 1999

A PARENT'S RIGHT to a child can be voluntarily terminated by executing a surrender agreement to an authorized agency1 or by an adoption proceeding.2 Surrender agreements form an important part of the adoption process, allowing placement of a child with adoptive parents through an agency. In this kind of 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.3

A validly executed and filed surrender agreement4 frees the surrendered child for adoption5 and authorizes the agency to consent to the child's adoption in the place of the parent. After surrendering the child, the parent has no say in who the adoptive parents are.6

A "private-placement" adoption is different from an adoption of a child who has been placed by an authorized agency.7 In such an adoption the birth parents are required to execute a "consent" to the adoption.8 Surrender agreements and consents to private placement adoptions are subject to statutory regulation and court approval.9

Domestic Relations Law º117[1][a] provides that: "After the making of an order of adoption the natural [birth] parents of the adoptive child shall be relieved of all parental duties toward and of all responsibilities for and shall have no rights over such adoptive child or to his property by descent or succession [with certain exceptions not pertinent herein]." The effect of an order of adoption has been to sever all ties between the child and the birth parents. The statute divests the birth parents of all duties and responsibilities and deprives them of any further rights. However, DRL ºº71 and 72 give the siblings and grandparents of a child who was the subject of the surrender agreement "standing" to seek visitation rights with the child despite the child's subsequent adoption.10

'Open' Adoption

In Matter of Gregory B.11 the Court of Appeals referred to "open" adoption as a situation where the adopted child has continuing contacts and visitation with members of his or her biological family. The Court expressed no opinion as to whether such contacts are generally appropriate once the child has been adopted or whether a court should have the discretionary authority to order such contacts. It noted, however, they were not authorized and that "open" adoption appeared to be inconsistent with the public policy enunciated in DRL º117, that adoption relieves the biological parent "of all parental duties toward and of all responsibilities for" the

adoptive child, over whom the parent "shall have no rights."

Effective Jan. 1, 1991, the Legislature enacted Social Services Law (SSL) º383-c, which provides in pertinent part, that with respect to the judicial surrender of the child, "[s]uch guardianship shall be in accordance with the provisions of this article and the instrument shall be upon such terms and subject to such conditions as may be agreed upon by the parties thereto and shall comply with subdivision five of this section."12 SSL º383-c (5)(b)(ii) provides, among other things, that the surrender instrument shall provide "that the parent is giving up all rights to have custody, visit with, speak with, write to or learn about the child, forever, unless the parties have agreed to different terms pursuant to subdivision two of this section, and unless such terms are written in the surrender ...."

This statute specifically authorizes the biological parents to vary the usual terms of adoption and facilitates the freeing of children in foster care for adoption by the expedient method of surrender.13

In Matter of Jacob,14 the Court of Appeals discussed in dicta the effect of the statue, noting that a class of adoptions where complete termination of parental rights appears to be contrary to legislative intent are those adoptions contemplated by SSL º383-c. It pointed out that New York law now allows the parties to an agency adoption to "agree to different terms" as to the nature of the biological parents' post-adoptive relationship with the child. "The statute thus expressly permits parties to agree that the biological parent will retain specified rights -- such as visitation with the child -- after the adoption, thereby authorizing "open adoptions" for the first time in this State (***)." It recognized that by passing SSL º383-c as it did, the Legislature rejected the reading of º117 it articulated in Matter of Gregory B.

'Different Terms'

Although New York law allows the parties to an agency adoption to "agree to different terms," the statute has been strictly construed. In Re Alexandra C.15 the parties executed a judicial surrender of a child in foster care for the purpose of adoption. In the surrender instrument the biological mother attempted to reserve visitation rights. The Court reconciled SSL º383-c with DRL º117 and held that, while a parent consenting to adoption of a child in foster care could reserve the privilege of maintaining visitation with the child as a condition of consent, the reservation does not convey an automatic right to visitation, but rather confers "standing" on the biological parents to seek such visitation.

When such visitation is desired a hearing would be necessary to determine if it is in the child's "best interests." This view, which relegates the biological parent to the same "standing" as a sibling to petition for visitation, has been uniformly followed, although it would appear that if this was the intention of the Legislature it would have simply amended DRL º71 to give the biological parent "standing."

In Matter of Adoption of Gerald T.16 the child was born in 1989 and was placed in foster care in January 1991 after a finding of neglect. His mother

was convicted of manslaughter in 1991 for the death of the child's brother and sentenced to 6 to 18 years' imprisonment. In June 1991 the agency placed the child with petitioner, his maternal great aunt.

The child bonded with petitioner and her two daughters. Petitioner maintained a relationship with the child's mother and took the child to the correctional institution for visitation. The mother surrendered the child for adoption, which was to be specifically by the petitioner, pursuant to SSL º383-c in November 1992 before the Family Court.

The surrender order provided that the mother shall have such visits with the child after adoption as agreed to between the mother and the petitioner. The child's father also executed a surrender on the same terms and conditions. Petitioner also requested that the child retain his biological mother's surname as that was the name by which he was known and identified himself.

The Family Court dismissed the adoption petition without a hearing, finding that there was no legislative intention to eliminate or modify the principle that the adoptive parent replaces the biological parent, that here the child would be encouraged to continue to identify the biological mother as his parent and, thus, petitioner's proposal did not represent an adoption but merely a custody or guardianship arrangement.

The Appellate Division held that the dismissal of the petition was in disregard of the legislative action and an abrogation of the statute. It reversed and remanded for a hearing. Under agency approval the child had regularly visited with his birth mother. The adoption was not a mere custody arrangement since the petitioner would be empowered to make all decisions regarding the child's life and the child would presumably become a permanent part of a stable family.

However, the Family Court was not incorrect in expressing its reservations as to whether the proposed adoption was illusory and a sham because of the circumstances. It reiterated that the controlling mandate on the court is always the best interests of the child.

Judicial Surrender

In Matter of Ronald D. Sr.,17 the petitioner executed a judicial surrender of his three children to resolve then-pending termination of parental rights proceedings. The surrenders provided "that Ronald D. would be entitled to receive annual photographs of the children, as well as yearly progress reports, including report cards; that he would be allowed to write to the children through the Department of Social Services; and that if the children desired, they could contact Petitioner, who was to keep the agency apprised of his address and telephone number for this purpose."

The mother also executed judicial surrenders and the children were placed into the custody of the Department of Social Services (DSS) and freed for adoption.

Ronald D. Sr., filed a violation petition against DSS and requested enforcement of the surrender. After it was discovered that one of the children, Crystal, had been adopted during the interim, and that the adoptive parent had not been advised about the conditions in the surrender,

Ronald D. Sr. filed an amended violation petition to include "Jane Doe," the adoptive parent of Crystal.
It appeared that there was no exchange of photographs or reports as to Crystal between the time of Crystal's placement with "Jane Doe" and the filing of these petitions. When "Jane Doe" adopted Crystal, she was not told by the DSS about the terms and conditions in the surrender of the father. Those terms were not listed in the adoption proceedings.
The Family Court denied Jane Doe's motion for dismissal of the petition. It held that the DSS cannot grant greater rights than it acquired. Pursuant to SSL º383-c, the child was placed into the care and custody of the agency under certain restrictions. The parent reserved the rights to receive yearly photographs and reports concerning the children. Those rights were part of the contract between the parties, which is permitted by statute. "Jane Doe" was not a party to that agreement. She entered into a separate contract with the agency concerning one of the children. The agency purported to release one of these children to "Jane Doe" without restriction, but the agency had not receive the child without restriction.
The court found that the terms and conditions of the surrender by the father were valid and that the agency was bound by them.
Recently it was held that New York law does not authorize "open" private-placement adoptions. In Matter of the Adoption of Baby Boy D.,18 the birth mother executed an extra-judicial consent dated March 16, 1998, and signed an unconditional judicial consent nine days later.
The language that was proposed to be in the final order of adoption, in accordance with the understanding of the parties, would have provided, among other things, that the adoptive parents would provide to the birth mother photographs of the adoptive child at least annually; that the adoptive parents shall make the adoptive child available for supervised visitation with the birth mother, once annually, in the presence of the adoptive parents for about two hours' duration following the child's second birthday and would continue annually until the child's 17th birthday; and that the best interests of the child shall be the primary consideration in providing the birth mother with annual access to the child.
The Surrogate's Court rejected the proposed modification to the final order of adoption, denying the right to post-adoption visitation. It noted that SSL º383-c conveys standing to the birth parent to petition the court for visitation in the specific circumstances of an agency adoption and that the Legislature amended SSL to give the biological parent such standing. However, a private-placement adoption is governed by DRL º117(1)(a), and the Legislature did not amend DRL º117(1)(a). The court held that the statute permits an open adoption only as specifically provided in SSL º383-c.

Notes

(1) DRL ºº109 et seq.

(2) SSL º384.

(3) Schenectady County Dept. of Social Services v. S. (1972) 73 Misc2d 104.

(4) SSL º383-c.
(5) DRL º111(2)(b); SSL º384(2).
(6) Spence-Chapin Adoption Service v. Polk (1971) 29 NY2d 196.
(7) DRL º109(5).
(8) DRL º115-b.
(9) DRL º115-b (consent agreements); SSL º384 (surrender agreements).
(10) See DRLºº71 and 72, º240, FCA º651 and º683.
(11) 74 NY2d 77 (1989).
(12) SSL º383-c[2].
(13) In Re Alexandra C. (Fam. Ct., 1993) 157 Misc 2d 262.
(14) 86 NY2d 651 (1995).
(15) 157 Misc2d 262 (Fam. Ct., 1993).
(16) 211 AD2d 17 (1st Dept., 1995).
(17) 176 Misc2d 567 (Fam. Ct., 1998).
(18) 676 NYS2d 862 (Surrogate's Court, Erie County, 1998).
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