

## Adoptions (Updated 2015)

### I. General and Practical Issues

#### A. Bear in Mind:

- ★ The file is not necessarily complete when you get it.
- ★ Many of the attorneys, case workers, and pro se litigants you will be dealing with assume that adoption is a ministerial act and will act as if you are your judge are making unreasonable demands of them when you ask for information or documents. At times you will be pressured to finalize by a certain date to meet S&G, so that case worker will get bonus, parents will qualify for tax credit, etc. These are not necessarily bad reasons to expedite a case but if something feels ‘fishy’, it probably is, and should be looked into.
- ★ Adoptions are created by statute and statutory requirements should be strictly followed.
- ★ Adoptions are at the convergence of a lot of different areas of the law (N, B,P,V etc.) and often involve other states’ laws. They involve fundamental questions of constitutional import involving what marriage is and what family is or is not. These definitions and laws are in a state of flux and parents are trying to adapt/adjust (same sex couples; surrogacy; other scientific methods of conceiving children which are outpacing the law).
- ★ The finalization of an adoption should represent a guarantee to the child and the adoptive family that no legitimate claim can be made thereafter to undermine the new family unit and this is not the same as determining best interest
- ★ Forms on UCS website are helpful but not always accurate.
- ★ Usually there is no one opposing the petition (including Attorney for the Child).
- ★ The denial of an adoption does not have to mean the breakup of the family unit.

#### B. Dos and Don’ts:

- ★ Do check dates and inquire into time gaps.
- ★ Do check if there are other court files that you need, or other Judges or Attorneys for Children who need to be consulted.
- ★ Do maintain healthy skepticism.
- ★ Don’t waive documents that are essential to an analysis of whether the child is actually “free” for adoption (i.e. bio-parent’s divorce judgment).
- ★ If the child is in foster care, speak to the referee who is doing the permanency hearings, get the permanency reports and consider appointing the same attorney for the child on the adoption case. Once the adoption is finalized, tell the referee so that the next permanency date can be vacated.

#### C. In the Case of the Private (Non-Foster Care) Adoptions:

- ★ Bear in mind that cases have had little or no prior court-involvement or judicial oversight.
- ★ There are no standards and goals for finalization.

#### D. Terminology

Within the court system, we tend to categorize adoption cases as being either ‘agency cases’ or ‘private cases’. When we use these terms, we use agency to refer to a foster care agency and private to mean everything else. When private attorneys who do adoption cases talk about agency cases, they mean private agencies licensed by New York State to accept the transfer of parental rights directly from a birth parent to the agency. The agency then places the child with an adoptive family and the agency remains the child’s legal guardian until the adoption is finalized by the court. When private attorneys talk about private adoptions, they are referring to a situation where there is no agency involvement at all. The adoption is arranged entirely through the lawyers. This placement is technically supervised by the court until the finalization (see certification section below). You can use whatever terminology you want. Just be aware that you may not always be using the same vocabulary as the person you are speaking with.

## II. Forms

### A. Forms Drafted by Adoption and/or Agency Attorney

1. **Affidavit Identifying Parties** - attorney states that she knows the parties
2. **Petition** - contains information about adoptive parents and child
3. **Agreement of Adoption/Consent** - adoptive parents agree to adopt child; bio parent consents to adoptive parent(s) adopting child and/or agency consents to the adoption
4. **Consent of a Child 14 Years or Older** - a child who is 14 yrs old or older (and competent) must consent or there is no adoption
5. **Adoptive Parent’s Financial Disclosure** - adoptive parents list money received or paid in connection with adoption. In the case of a foster care adoption, this includes the foster care payment and adoption subsidy. In a private agency case, this includes payments made by the adoptive parents to the agency for supervision of the home. In a privately-arranged adoption, this includes reimbursement of the biological parent for pregnancy-related expenses.
6. **Attorney’s Financial Disclosure** - reports legal fees incurred and paid
7. **Affidavit of Receipt of Child’s Medical Information**
8. **Child’s Medical History Form** - usually lists child’s vaccination history and child’s bio parent’s medical history, to the extent known
9. **Affidavit of Denial** - adoptive parent’s denial of drug, drinking, dv, criminal and child abuse/neglect history. If they can not deny any of these, there should be

more information in the file.

10. **Marital Affidavit** - adoptive parents list their marital history or lack thereof
11. **Verified Schedule** - see DRL 112 and 113 provisions related to agencies
12. **DRL 111/111a Affidavit** - a statement regarding the biological mother's marital status and relationships at the time that the child was conceived
10. **Supplemental Affidavit** - form where parties state no changes have occurred since filing of petition
11. **Affirmation of Readiness** - Attorney's Statement that file is complete and ready for review
12. **Affirmation Regarding Status of Appeal** - Affirmation (usually from agency attorney) that tpr has not been appealed, or that appeal was denied
13. **Order Accepting Investigation** - form for Judge's signature approving and accepting the home study report at finalization of adoption
14. **Order of Incorporation of Post-Adoption Contact Agreement** - see PACA section below
15. **Order of Adoption** - form for Judge's signature at finalization; may also change child's name

#### B. Clearances/Reports that Must be Dated within One Year

1. **Medicals for Adoptive Parents and Child**
2. **SCR** - Child Abuse Registry Clearance for adoptive parents and anyone over 18 living in household, including siblings; need out of state clearances if they live out of state
3. **Putative Father Registry** - original (EPTL 4-1.2)
4. **Home Study** - check the date of the visit and not just the date of the report
5. **Criminal Clearances**- for adoptive parents and anyone over 18 living in household, including siblings: if they live out of state, need out of state clearances

#### C. Original and/or Certified Copies of other Forms

1. **TPR/Surrender** - if these proceedings occurred out of state, may need transcript
2. **Child's Birth Certificate**
3. **Adoptive Parents and Biological Parent's divorce judgments**, if applicable
4. **Adoptive Parents' Marriage Certificate** (not marriage license)
5. **Death Certificate** (if applicable)
6. **OCA affidavit receipt**
7. **Interstate Compact (ICPC) approval**, if applicable - In a nutshell, this is required when a person who does not have custody of a child or guardianship of a child moves a child across state lines. It does not matter if the child is in foster care or not at the time of the move. The approval should have been sought at the time of the move. If it did not, the adoption is not permitted. This is a

complicated issue and should be researched if it pertains to your case.

#### D. Other Forms

1. **Backup Guardian Affidavit** - required by some Judges. This is an identified friend or relative who agrees to care for the child in the event of the death or incapacity of the adoptive parent. This is not binding. Nevertheless, if your Judge requires a backup guardian, this person should also be cleared.
2. **Notification/Report of Adoption to Board of Health** - sent by clerk after adoption to B/H
3. **Translations of any Foreign Documents** - should have notarized affidavit by certified translator
4. **Approval of Subsidized Adoption** - forms generated when adoption subsidy is approved stating the rate of the subsidy
5. **Safety Assessment** - in a case where a household member has had a substantiated case of abuse or neglect, there will not be an SCR clearance form generated. Instead, you will get a copy of the allegations and the result of any investigation. You should also have information called a Safety Assessment explaining why the child was left in the home despite the allegation and what was done to address it.

### III Legal Issues

#### A. Who May Adopt

##### 1. Standing (DRL § 110)

- a. Married Couples
- b. Single and/or Separated People (must be separated at least 3 years)
- c. Unmarried Couples (heterosexual or homosexual, Matter of Jacob and Dana, 86 NY2d 651 [1995])

##### 2. Age - 18 or older, unless a step-parent (18 NYCRR §421.16)

##### 3. Health - DRL § 110

##### 4. Disqualifying Convictions [DRL 115-d(3a)(b)]

#### B. Who May be Adopted

##### 1. A child who is “free” for adoption because of some mix of these factors:

- a. parent(s) rights have been terminated by a court

- b. parent(s) have surrendered child for adoption to an agency
- c. parent(s) have signed an extra-judicial or judicial surrender
- d. parent(s) consent to the adoption
- e. father is unknown or is a “notice-only” father and has been properly notified

2. An adult may be adopted by another adult assuming that the parties have a parent-child relationship. [DRL § 110, Matter of Robert Paul P., 63 N.Y.2d 233 (1984) ]

- a. no requirement of parental or third party consent
- b. not a best interest standard

1) In Matter of Anonymous, 106 Misc. 2d 792, 794-5 (Fam. Ct. 1981) a judge permitted one partner in a same sex couple to adopt the other in order to create a pseudo-marriage. While this arrangement is disfavored, the case is interesting as a historical artifact and for its rejection of a best interest standard in the case of adult adoption.

### C. Reasons Why Adoption May be Necessary or Appropriate and Why It is Difficult to Answer the Question - A Developing Area of the Law

1. Cases where there is an Order of Guardianship and Custody - perhaps because Adoption is very much favored as a permanency option in the foster care context, guardians and custodians sometimes will come back to court, many years after the conclusion of a V or a G case and seek to adopt. There are also non-profit groups whose focus is on providing assistance to ‘kinship’ caregivers. In many cases, there is little or no information available about the whereabouts of the parents. The attorney representing these petitioners often do not understand that there is a need to make efforts to locate them. They seem to conflate the order of guardianship or custody with a termination of parental rights.

#### 2. Same Sex Couples

a. A same sex couple is in a difficult situation legally given that marriage was not legally permitted in some states until recently and because even after the Supreme Court’s ruling in Obergefell v. Hodges (2015) there is still a lack of compliance at the time of the preparation of this outline (Kentucky). It is also unclear how this may affect the family law provisions of each State over time. In some families, the adoptive child is the biological or adoptive child of one partner and not the other. Even in a situation where the parties have raised the child together, absent an adoption, the partner who is not legally or biologically related may not have a

right to custody or visitation. Alison D. v. Virginia M., 77 N.Y.2d 651 (1991) (rejects application of estoppel theory); Debra H. v. Janice R., 14 N.Y.3d 576 (2010) [ holding that Alison D. was still good law despite appearances to the contrary under Matter of Shondel, 7 NY3d 320 (2006); and holding that “there is no inconsistency in applying equitable estoppel to determine filiation for purposes of support, but not to create standing when visitation and custody is sought”].

b. Once some states permitted same sex marriage, did New York’s presumption of legitimacy apply to New Yorkers married in another state, i.e., that a child born during the marriage was the child of both irrespective of biology?

c. Does another state’s law that a child who is the product of a marriage in that state is a marital child apply in New York? Yes, according to Alison D., which extended comity to Vermont Law.; Kelly S. v. Farah M. 3/30/15 NYLJ (Suffolk Co. Fam. Ct.?)

d. Matter of Wendy G-M v. Erin G-M., 45 Misc.3d 574, 985 N.Y.S.2d 845 (Monroe Co. 2014) - NY trial level decision where 2 mothers were divorcing in NY after having been married in Connecticut. Child born during the marriage as the result of artificial insemination. Holds that DRL 73 applies to these cases, specifically that a child born to a married woman by means of AI with the written consent of her spouse is the legitimate child of the couple for all purposes. Upon strict compliance with the requirements, there is an irrebuttable presumption of legitimacy. There was not strict compliance in this case, and therefore no irrebuttable presumption, however, in this case the presumption was found to apply to the couple and the non-biological spouse was found to be an equal parent to the birth parent.

e. What about cases where there has already been an order of support entered against the non-biological spouse? Arriaga v. Dukoff, 123 A.D.3d 1023, 999 N.Y.S.2d 504 (2d Dept. 2014) held that in a case where a biological parent had sought child support and support had been directed to be paid by the non-biological parent that judicial estoppel prevented the bio-parent from claiming in a custody/visitation case that the obligor was not a parent.

f. There is no “bright line rule.” Therefore, we may continue to see cases where non-biological parents will continue to file adoption petitions even in cases where it may seem to us that there should be no need to do so. What is the appropriate response?

D. Surrogacy and Other Assisted Reproductive Technologies - see New York Times Article in Materials, “Surrogates and Couples Face a Maze of Laws, State by State” Tamar

Lewin, September 17, 2014

E. Immigration as a basis to adopt a child already living in this country with family but without legal status. Should it be granted based upon a best interest standard or not. Matter of Jason K., 41 Misc.3d 885, 972 N.Y.S.2d 481 (Queens Co. Fam. Ct. 2013)

F. Courts that Preside over Adoptions

1. Family Court and Surrogate's Court have concurrent jurisdiction
2. Practitioner's choice of where to proceed

G. Jurisdictional Requirements

1. In the county where the adoptive parents reside, or if they do not reside in the State, in the county where the child resides, or in the county where the principal office of the agency is
2. Reasons why out of state petitioners may want to file in New York
  - a. same sex couples and single parents may adopt in NY
  - b. Be wary of an adoption filed in New York where the child is in foster care in another State
3. Fact that adoptive parents may move to another jurisdiction after filing the adoption does not divest the Court of jurisdiction, but this does not mean that Court should necessarily continue to exercise its jurisdiction [Matter of Baby Girl, 215 A.D.2d 754, 627 N.Y.S.2d 431 (2 Dept. 1995)].
4. Not subject to UCCJEA jurisdictional requirements; however, if another State has heard a prior custody proceeding, it may have retained jurisdiction over the child and may need to decline jurisdiction before the adoption can proceed in NY.

H. Private Adoptions

1. Law - DRL §115 - specific requirements and rules for private adoptions
2. Types of Private Adoptions
  - a. Step-parent adoption
  - b. Re-Adoption or Registration of Adoption of a child already adopted in another country (DRL § 111-c)
  - c. Adoption of a child who has been surrendered to a licensed agency.

Agency works with and supervises the adoptive family and has to consent to the adoption because they have legal custody of the child.

d. Adoption of a child with no agency involvement. This type of adoption is technically supervised by the court. Parents must be certified by the court.

e. Pre-Adoption [DRL §115-a; Matter of Louis C., 5/5/2008 N.Y.L.J. 19, (col. 1)]

F. Certification - requirements that must be met by adoptive parents where there is no agency involvement at all. Placement is arranged by attorneys and/or the parties themselves through advertising, word of mouth etc. Parents must be certified before taking physical custody of the child.

1. DRL § 115-d

2. Forms - petition, home study, criminal check, SCR clearances, home study by disinterested person

3. May last up to eighteen months (or shorter and then be extended)

4. May be extended (see DRL §115-d(9) for technical requirements)

5. Does not apply to petitions brought by step-parents where the step-parent has resided with the legal parent and the child for a continuous period of at least one year

6. May be waived for good cause (failure to plan does not equal good cause)

7. The court may grant a conditional certification if some of the information is not available. (DRL §115-c)

8. Within 10 days of an adoptive parent taking custody of a child, must file an adoption petition. If it is a conditional certification, it must be filed within five days of taking custody.

G. Home Studies by Disinterested Person in Non-Agency Cases

1. Can be done by probation (pros and cons)

2. May be done by private social worker

3. May have already been done without seeking court approval (to accept or not to accept?)

4. Ethical Issues - Is a home study conducted by a Legal Services Plan's social worker disinterested? How about by petitioner's attorney's wife?

#### H. Reimbursement of Pregnancy and Birth Expenses

1. No "baby-selling"

2. Applicable Law - SSL § 374 (6) -

a. may be reimbursed for "reasonable and actual expenses for housing, maternity clothing, clothing for the child and transportation."

b. time frames - not to exceed sixty days prior to birth and the later of 30 days after the birth or thirty days after consent to the adoption unless the court determines in writing that there are extraordinary circumstances

c. may include payment of legal fees, counseling fees, lost wages and living expenses

3. Forms

a. Adoptive parent(s) and biological parent(s) should fill out affidavits concerning the payment of these expenses. Make sure that they match!

b. Should also be affidavits concerning legal and any other adoption-related expenses.

4. Issues

a. There is no provision or mechanism in the law for a pre-filing review of these expenses and therefore a risk that the expenses will not be approved.

#### I. Biological Parents who must Consent and Parents who must only be notified

1. Mothers

a. Must have consented, surrendered, or had their rights terminated under another theory (permanent neglect, abandonment, mental illness, retardation).

b. Mothers do not have to identify the father or possible fathers of the child but may have done so or may have been married at the time the child was conceived. Presumption that the child is the child of the marriage. (DRL § 111).

## 2. Fathers

a. Much more complicated

b. Often cases will be filed without adequate information to determine if there is someone who must be notified or whose consent is necessary

1) Bio-mother claims to have been married and divorced before the child was conceived (if in fact this is not the case, father may even be a consent father - often allege that he is not because he has had no contact with child - this is not compelling he may not know child exists. Be sure to get divorce judgment and check dates carefully.

c. Get child's birth certificate to see if there is a father listed

d. Must have PFR check that is less than one year old

e. Read DRL § 111 affidavit and inquire

f. Consider Notification even if not technically required to prevent future claims

g. Check if there are, or have ever been, custody, visitation or support orders

## 3. Statutes and Case Law

a. Consent

1) DRL §111 specifies whose consent is required for a child to be adopted

a) the adoptive child if over age 14 unless judge dispenses with such consent

b) both parents (adults or minors) of a child conceived or born during a marriage

c) mother of a child

d) a person or authorized agency that has custody of the child

e) a parent must consent to adoption by the step-parent

b. *Caban v. Mohammed*, 441 U.S. 380 (1979) - declared a prior version of DRL § 111 unconstitutional because it authorized the adoption of children over the objections of a bio father who maintained a substantial relationship with the children.

c. Unwed Fathers- DRL 111 [1][d] and [e]

1) If child is less than six months old when placed, then the analysis should be whether father manifested an ability and willingness to assume custody during the six months preceding placement. Matter of Raquel Marie X., 76 N.Y.2d 387, 402, 559 N.Y.S.2d 855, 559 N.E.2d 418 [1990]; *see also* Domestic Relations Law § 111[1][e] ). “The ... judicial evaluation of the unwed father's conduct in this key period may include such considerations as his public acknowledgment 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”

2) If child is over six months old when placed, analysis of provision of support and visitation and other contact with the child

a) exception for cases in which fathers efforts are thwarted by mother or others (In re Adoption of Madeline S., 3 A.D.3d. 13, 769 N.Y.S.2d 22 (1 Dept., 2003)

3) What if father did not know about the pregnancy?

a) Matter of Robert O., 80 N.Y.2d 254 (1992)

b) Matter of Baby Girl U., 224 AD.2d 869, 638 N.Y.S.2d 253 ( 3 Dept., 1996)

c) Matter of Jarrett, 224 A.D.2d 1029, 637 N.Y.S.2d 912 (4 Dept., 1996)

4) The Atlantic, “Father’s Struggle to Stop His Daughter’s Adoption”, Kevin Noble Maillard, September 10, 2015 (in materials)

d. When Consent is not required (of someone whose consent would normally be required)

1) Abandonment (heavy burden of proof) - Recent 2<sup>nd</sup> Department case - Matter of Heaven A.A., 130 A.D.3d 10, 8 N.Y.S.3d 10 (2d Dept. 2015) - This case holds that a putative father (“a father not established in fact or in law”) is entitled to DNA testing before a court considers whether his consent has been forfeited on abandonment grounds so as not to subject man to stigma if the child is not in fact biologically his. Furthermore, where paternity is at issue, a court may not conclusorily find that a putative father is not a consent father for adoption.

2) Surrender

3) Involuntary Guardianship

4) Mental Illness or Retardation

5) Denial of Paternity

6) Permanent Neglect

7) Severe and Repeated Abuse

e. Where consent is required, parent must be willing and ready to assume full custody, not merely to block adoption by others. Matter of Gianna L., 33 A.D.3d 1168, 824 N.Y.2d 182 (3d Dept. 2006)

2. Notice (everybody else who does not fit into consent)

a. to be effected in such manner as the judge may direct

b. to be given to those whose consent is not required as the judge may direct

c. those who are entitled to notice (DRL § 111 -a)

1) person adjudicated to be the father in this state or another state when there is a certified PFR

2) person recorded on birth certificate as the father

3) someone who has filed an intent to claim paternity

4) person who has held himself out as father

5) person identified by mother as father in a sworn statement

d. purpose of notice is to allow person to present evidence re: best interest

## J. Consents and Surrenders

### 1. Judicial Consents

- a. If already done in another State, get certified transcript
- b. If already done in another Court in this State, check if they wish to retain jurisdiction or not and case is stayed in the meantime (One Family One Judge)
- c. If done already, Post-Adoption Contact Agreement may already have been approved
- d. Look at forms carefully
- E. Irrevocable at time of execution in court (unless it is an ICWA case)

### 2. Extra-Judicial Consents

#### a. The Form

1) Is it still valid with errors? (Matter of DeFilippis v. Kirchner, 217 A.D.2d 145; Matter of Chaya S. v. Frederick Herbert L. 90 NY2d 389; Matter of Spooner v. Spooner, 244 AD2d 667

2) Suggestion to have clerk send these cases immediately

b. Revocation - court must receive written notice of revocation within 45 days

- 1) revocation is given effect if adoptive parents do not oppose
- 2) if adoptive parents oppose, everyone stands in the same place and it is a best interest standard
- 3) can not reject extra-judicial consent merely because it is extra-judicial unless it is an ICWA case

### 3. Applications for Judicial Approval of Extra-Judicial Consent

a. governed by Social Services Law §384 which provides for guardianship and custody of children not in foster care.

b. SSL § 384(4) provides that an authorized agency may bring a petition seeking to have a family court judge or surrogate approve the surrender on notice to such persons as the surrogate or judge may prescribe. However, this subdivision shall not be deemed to require approval of a surrender for

the surrender to be valid.

c. If the court approves the surrender, the court must schedule a permanency hearing to be completed no later than sixty days after approval of the surrender.

d. SSL § 384(b) governs approval of the post-adoption contact agreement. If the court before which the surrender instrument is presented decides that the contact agreement is in the child's best interest, the court shall approve the agreement. If not, the court may nonetheless approve the surrender provided that the birth parents shall be given the opportunity to withdraw their surrender at that time.

e. Practice Note - these applications are not brought very often. When they are, it is usually because a father has been identified and the agency wants to notify him at the outset and before the adoption is ready to be filed. Alternatively, it may be done where the biological mother wants to be sure that there is an enforceable post-adoption contact agreement and is not opposed to appearing in court.

K. Post Adoption Contact Agreement (DRL §112-b)

1. Child must have attorney

2. Agreement must be in writing and signed

3. Court enters an order approving the agreement and determining that contact is in the best interest in the child.

4. The court incorporates the order into the order of adoption. The order of incorporation should not disclose the last names of birth parents or adoptive parents.

5. Failure to comply with court approved post adoption contact agreement is not grounds for setting aside adoption.

6. Differences between different judges

7. One reported case only - In re Adoption of Jack ex rel. David B., 18 Misc.3d 397, 844 N.Y.S.2d 855 (N.Y.Fam.Ct.,2007.)

L. Indian Child Welfare Act

1. Source of Law - 25 USCA § 1901 - 1963, NY Soc. Serv. Law §§2, 39, 18 NYCRR § 431.18; Mississippi Band of Choctaw v. Holyfield, 490 US 30 (1989); Matter of Baby Boy C., 27 A.D.3d 34, 805 N.Y.S 313 (1<sup>st</sup> Dept. 2005).
2. An ICWA case that remains in state court has different laws and burdens than those that apply to other cases even if the tribe chooses not to get involved.
3. ICWA applies to all adoption cases involving those with no child welfare component including step-parent adoption.
3. It is up to the tribe to determine if a child qualifies for membership in that tribe.
4. A judicial surrender of an ICWA child is revocable before the adoption with the result being return to parent.
5. The adoption of an ICWA child can be vacated on fraud/duress grounds for up to two years with the result being return to parent.
6. Placement preferences for ICWA children are listed in 25 USC §1915(a) and 18 NYCRR 431.18(g)(1)