

Negotiating a Good Conditional Surrender

NYSCCC • May 11, 2013 • Margaret A. Burt, Esq.

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 there must be a written addendum to the surrender instrument; and must include 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); following must agree and sign:

- birth parent(s) surrendering
- agency with care & custody
- child’s attorney
- this will bind anyone who adopts as any adoption order must reference and incorporate 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 can withdraw surrender if they do not want to surrender without the terms

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What about children not in foster care?

- Can children not in care be adopted with conditions? What about children in Art. 10 custody arrangements for example?
- No statute on “PACAs” but done
- Remember that Art. 10 custody child could be handled with a consent to the adoptive parents, a “surrender” is not needed
- New case – *Andie B.*, 102 AD3d 128 (3rd Dept. 2012)

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 – no way to pay them, foster parents must pay themselves or must be some pro bono possibilities
- 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 sent a copy of the incorporation order, which they can use for any enforcement proceeding.

Enforcement of terms

Post-surrender but pre-finalization:

FCA §1055-a “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

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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

- Surrendered but not yet adopted, any party 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?**

Enforcement after finalization:

- DRL §112- b - 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 – can petition to enforce

After the adoption finalization : DRL §112-b

- Terms are enforceable IF terms 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?**

Caselaw on Enforcement?

Let’s look at what we have to date!

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So WHEN is it a good idea 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

Not such 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 terms should be considered?

- Take your time
- Everyone needs to think of THE CHILD
- Assume it will be honored
- It must be DETAILED and CLEAR to everyone

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
- How will communication re contact be made?
- What exactly are "reports"? Details re photos and use of photos on internet

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 can refuse at a certain age
- Therapist who says no longer in best interests – is this a caselaw issue?
- Resumptions of terminated visits

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What other terms have some people considered?

- Failure of terms before finalization allows for filing of TPR
- Failure of some terms 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

Is the new subsidized guardianship “better” than surrender and adoption?

- There is more money for an adoption - unless child over 16 or handicapped, guardianship subsidy stops at 18 and adoption goes to 21, also adoption means the tax credit of \$13,360(per child) – lots of money if child is younger or multiple children
- Guardian gets “free” lawyer, almost always true for adoption as well

Adoption vs Subsidized Guardianship?

- There is more “coverage” for an adoptive subsidy if an adoptive parent dies- maybe this will be clarified
- Parent may just not be willing to surrender and then sub guard might be better than a long road to a TPR, appeal, etc
- Parent still has rights with a subsidized guardianship – rights to visit, to seek return of child, this can be good or bad....

- Can the Family Court Judge ORDER that the adoptive parents provide contact as part of a surrender or as a dispositional to a TPR?

Court of Appeals

- The four Appellate Divisions varied on this issue but.....
- C/A says “NO” – Family Courts **do not** have authority to order post TPR contact
- Matter of Hailey ZZ., 19 NY2d 422 (2012)

So – make a deal or there is nothing enforceable after a TPR

So should I/we agree to a conditional surrender?

- Vast majority of counties/courts do them
- Very few problems pre finalization – do adoption quickly
- A few cases have come back on enforcement issues – can be painful
- So far courts seem to have enforced on best interests after adoption
- Time/emotion/gamble of TPR vs can you get what is best for child in the terms