

**Legal Rights of Foster and Adoptive Parents**  
**NYSCCC Healing Connections Conference**  
**May 7, 2011**

**SAMPLE SURRENDER TERMS TO PLACE in State Mandated Addendum Form**  
**By Margaret A. Burt, Esq.**

**SAMPLE : This is a sample that was used in a case where the birth father and the adoptive mother had a relatively comfortable relationship due to visitation during the foster care placement**

The undersigned hereby agree to the following conditions as part of and a condition of the surrender for adoption of Julia Mary Miller:

**First:** Julia will be surrendered for adoption by her birth father Carl Miller. Julia will be adopted by her foster mother Linda Perry. If the agency becomes aware that Ms. Perry can not or will not adopt the child Julia, the agency will immediately notify Carl Miller and the agency shall follow all procedures designated under SSL §383-c and FCA §1055-a.

**Second:** Carl Miller, birth father of Julia, will have visitation with Julia 3 times per year - at intervals of approximately every 4 months. These visits will occur on dates and times mutually agreed upon by the two parties, Mr. Miller and Ms. Perry. At each visit the parties will consult their schedules and agree upon the date and time of the next visit. The parties will endeavor to agree to dates that are convenient for both of them and for the child. Mr. Miller may request that his visit coincide with a special or family occasion and Ms. Perry will endeavor to cooperate with such activity. All the visits will occur under the following conditions:

- A. The visits will be minimally one hour in length, but may be longer if the parties so agree.
- B. The visits will be at a location of Linda Perry's choice.
- C. The visits will be supervised by Ms. Perry or someone she has approved of as a supervisor until such time as both parties agree that the child is comfortable with an unsupervised setting.
- D. If Mr. Miller can not or does not make a visit that had already been arranged for, for whatever reason, Ms. Perry is under no obligation to "make up" or offer an alternative visit. If Ms. Perry cannot or does not make a visit that had already been arranged for, the visit will be "made up" within a month's time at a time the parties mutually agree upon. The parties will show as much consideration as possible to advise each other of visits which cannot be made.
- E. If Mr. Miller misses two visits within any 12 month time period, excluding a provable crisis beyond his control, such as serious illness, Ms. Perry is no longer obligated to provide any further visitation whatsoever.
- F. The parties shall exchange phone numbers and addresses but shall only use same to communicate regarding visits.
- G. All visits will be discontinued if that is the recommendation of any therapist treating the child. Visits would only then recommence upon a therapist's recommendation and under terms recommended.
- H. A visit will be discontinued if Mr. Miller engages in any offensive conduct toward Julia, Ms. Perry, or anyone supervising the visit. A visit will terminate immediately if Mr. Miller appears

to be under the influence of drugs or alcohol or uses same during a visit.

I. Visits will be discontinued if at any time after the child turns 12 years of age, the child states that she does not wish to visit Mr. Miller.

J. At the visit, Mr. Miller will be permitted to take 2-3 photos of the child or of Mr. Miller with the child for his own use. Mr. Miller shall not display the photos in any way on any internet site or in any public media.

**Third:** Ms. Perry will provide copies of Julia's report cards to Mr. Miller

**Fourth:** This Agreement shall survive the adoption of Julia and shall be governed by the laws of New York State.

**Fifth:** This constitutes the entire agreement between birth father Carl Miller, foster and adoptive mother Linda Perry and Mohawk County DSS

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**ADVICE FOR NEW YORK FOSTER PARENTS  
IN THE POST-ASFA WORLD**

**By Margaret A. Burt, Esq. Copyright 3/10**

New York States Adoption and Safe Families Act has been in existence for over a decade. The purpose of the legislation is to reduce the amount of time children spend in foster care by returning them home sooner when it is safe to do so or by establishing a permanent home for them if they can not return home within a reasonable period of time. In most cases, foster children will return to live with their birth family after services have been provided to resolve the problems that caused the child to be placed in foster care. Foster parents are expected to be an active partner in the provision of services to help this reunification happen safely and as quickly as possible. In an increasing number of foster care cases return home may not be safe or possible within a reasonable time frame. An alternative plan for a safe permanent environment for the child will have to be made. Regardless of what the ultimate permanent placement of the child is - what can a foster parent do to help advocate for quicker, safer permanency for the child?

**1. Communicate frequently with the caseworker about the permanency status of the child.** As the time frames for permanency for foster children have been dramatically reduced, under ASFA, you need to stay on top of the agency's changing plan for the child. Attend all case plan meetings and focus on the agency's goal for the child. Provide direct information about any observations that you have that would impact the child's safety and well being. Be mindful of the time frames that the agency has to make permanency decisions. Every child in care has to have permanency hearings. Children in care for abuse, neglect or on voluntary placements have these hearings when they have been in care for 8 months and every 6 months thereafter. Children who are in care due to JD or PINS behavior have these hearings every year. Also, agencies must make a decision if it is appropriate to file to terminate parental rights petition within 15 months of the child going into care.

**2. Advocate for the child to have contact with the law guardian - now known as the child's attorney.** By law, all children in foster care have an attorney assigned to represent them. Make sure you ask for the name, address and phone number of that attorney. Help the child stay in contact with his or her attorney. Call the attorney yourself if the child is too young to call on their own and ask to make an appointment for the child to meet with the attorney. Offer to provide the child's attorney with any information that the attorney may need about the child's situation - including health, schooling, visitation responses, and any concerns or questions the child has raised. This attorney is also a key person in deciding if the child will

themselves be coming to court and/or speaking with the Judge and so that issue should be discussed with the attorney.

**3. Ask about relatives.** If you are not related to the child, ask the caseworker and the child about possible relative resources for the child. The agency is obligated to look for and assess the child's relatives as possible caretakers for the child. The earlier such an effort is made, the quicker it can be determined if any relatives are in a position to provide a safe home for the child.

**6. Ask about the father.** Sometimes caseworkers focus their attention on the child's custodial mother and make little effort to identify, locate or provide services to the child's father. This uneven response often delays permanency for children if fathers and/or their relatives may appear long after the child has been placed in care.

**7. Ask about siblings.** The law requires that children be placed with their siblings or half siblings when they are placed out of the home unless an expert has determined that it is not in their best interests to be together. Separated siblings are required to have contact and visitation with each other unless it is not in their best interests. Siblings who are freed for adoption are to be adopted together and if they have been separated while in foster care, this mandate can be very problematic. If your foster child is not placed with and/or seeing his or her siblings, ask the caseworker why this is so. If a new child is born to the parents while you have a sibling in your home, that child may or may not be removed from the parent, but if it is removed, ask questions about where that child will be placed and if not placed with you, how sibling visitation will be arranged.

**8. Know and exercise your legal right to involvement in key permanency decisions for the child.** As a foster parent, you are entitled to be officially notified when the child has a permanency hearing at court and to receive all the legal paperwork for the permanency hearing. The law says you have a "right" to be included and to provide information to the court. This would be true if you are the current foster parent. If you did have a foster child in your home for over a year at any given time, then you will also be invited to any hearings for that child as long as that child is ever in foster care in the future. You are entitled to attend these hearings and you are to be given an opportunity to speak to the court about any issues or concerns that you might have about the child's situation. You are also entitled, in most situations, to be notified and attend relevant portions of agency service plan meetings. Both of these situations give you the opportunity to learn what the future plans are for the child and are important forums for you to provide input into key decisions regarding the child's future. You also have legal rights to advance notification of and the ability to contest an agency decision to move a child from your home.

**9. If the agency is considering freeing the child for adoption, make sure the caseworker is aware of your position regarding an adoption.** ASFA mandates

have meant a significant increase in the number of foster children freed for adoption. The decision to file to terminate parental rights is now reached more quickly than it was in the past. In most situations, the agency will have to consider filing a termination of parental rights petition within if a child remains in foster care for 17 months. Although there are significant exceptions to this time mandate, all cases must at least be reviewed for a potential termination when the child has remained in care 17 months. As the 15 month mark approaches, it is appropriate for you to advise the caseworker about your position regarding adoption, should the decision be made to file to terminate parental rights. It is also appropriate to ask questions about the availability of an adoption subsidy. If the 17 month time frame has come and gone and you are not satisfied with the agency's response, you may wish to consult an attorney about the procedures available for foster parents themselves to file to terminate the birth parent's rights.

**10. Keep on top of the legal situation if a termination petition is filed.** Often after a termination petition is filed, other alternatives are contemplated, particularly by the various attorneys at court. There may be a discussion about the parent surrendering the child - perhaps with some conditions such as specification of the adoptive parent or even small amounts of post adoption visitation. Make sure you are included in such discussions. Consult your own attorney to explain your rights in such an arrangement. Sometimes, there is consideration given to a "suspended judgement" which may mean the parent will be given another few months or up to a year to make improvements in their situation. Where the court does terminate the birth parent's rights, it is possible that the parents will consider appealing a decision to terminate their rights which will prevent an adoption for many months, if not years. Ask your caseworker to keep you aware of these possibilities. Attend court and ask questions.

**In the post- ASFA world, foster parents need  
to be informed advocates for their foster children.**

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**CURRENT LAW ON CONDITIONAL SURRENDERS**

**By Margaret A. Burt, Copyright 2008**

**Procedures to do the conditional surrender**

- Surrenders of children to agency for adoption can contain conditions; without any doubt this is a “legal” procedure
- Must be in writing and on state mandated forms - OCFS forms consist of both the surrender and a terms addendum for both judicial and extra judicial
- If someone is designated to adopt, must be person who is “certified or approved foster parent” or “agency has fully investigated and approved such person as an adoptive parent”
- Must have everyone agree and sign to the terms – includes anyone designated to adopt, birth parent(s) who is surrendering, someone from agency, law guardian(s), and child over 14 if any terms re sibling visits
- Can be terms of contact with children who are siblings and half siblings – enforced only if children over 14 willing
- What about attorneys for foster/adopt parents?
- Judge must make a ruling that the terms are in child’s best interests – hearing? Judge can refuse to allow the conditions, parent does not have to surrender if Judge will not allow conditions
- Everyone gets a copy

**Procedures at the adoption if surrender was conditional**

- Adoption papers to the court have a copy of the terms attached
- Court must be made aware of terms – likely to be the same Judge who took the surrender, if not, judge may want to know what is happening with the agreement
- Adoption order and second order that incorporates terms and incorporation order (OCA forms 13-A and 14-A) are issued – incorporation order is sent to birth parent, birth parent lawyers and law guardian so that they know child has been adopted and terms are included in the adoption orders

## **Procedures if there are problems BEFORE the adoption is finalized**

- If there is a “substantial failure of a material condition” then the agency must notify the birth parent (unless they waived such notification at the surrender) the law guardian and the court within 20 days
- Within 30 days, agency must file a petition under FCA 1055-a and serve everyone (again except parent if they waived at surrender) to review the failure and hold a hearing “if necessary”- OCA form SURR-7
- If agency fails to file petition, parent or law guardian can file within 60 days
- So far the courts have permitted birth parent to withdraw the surrender in these instances – perhaps not if agreement says otherwise – in some cases, the parties have renegotiated the terms of the surrender and in other cases the agency has responded to the withdrawal of the surrender with a new TPR
- If a party thinks that the conditions are not being honored and the child is not yet adopted, can bring an action to enforce the terms
- The court ‘shall enter an order enforcing communication or contact pursuant to the terms and conditions of the agreement unless the court finds that enforcement would not be in the best interests of the child.’

## **Procedures if there are problems AFTER the adoption is finalized**

- Any party can file for enforcement after the child has been adopted under DRL 112-b and the court shall enforce the contact or communication if the terms were incorporated in the adoption and were found to have been in the child best interests at the time of the surrender. OCA form 17
- Enforcement is only in Family Court
- The court “shall enforce” unless it finds that enforcement is now not in the child’s best interests – seems like the court can not modify the terms but perhaps the parties can agree to modify them
- The failure of any party to obey the terms and conditions will not be grounds to set aside an adoption or allow the birth parent to withdraw a consent. There have been very rare instances of proof of fraud, duress or coercion which could result in setting aside an adoption

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**CONDITIONAL SURRENDERS - ISSUES TO CONSIDER**

By Margaret A. Burt, Esq.

Agency should have a written pre-defined policy regarding what kinds of cases and in what ways surrenders with conditions would be accepted. The parties should be able to discuss the possible terms in an open way, with attorneys present and with enough time to consider the matter carefully.

Who could be included in the discussion?

Foster parents/adoptive parents and their counsel (must sign if designated), Law Guardian (must sign), child at a particular age (must sign if over 14 and sib visits), DSS on-going worker, adoption worker, DSS counsel (someone from DSS must sign), child's therapist/counselor, parent's therapist/ counselor, birth parents and their counsel(must sign)

When should the process take place and how? - Should the agency still accept conditional surrenders after a certain point in a TPR?

What kinds of terms have been used?

- clarifying that the adoption will take time
- specifying the adoptive parent or clarifying that there is no adoptive parent yet identified
- specifying procedure if the identified adoptive parent can not adopt
- exchanging ongoing information about the child - school, photos, reports
- exchanging ongoing health information - one way or both ways
- visitation - frequency, structure, supervision, changes, failure to exercise
- name changes
- supportive statements
- phone calls, letters, gifts
- sibling information or contact
- grandparent contact

Policy and procedure if there are disagreements - what should agency role be, if any?

Does everyone understand legal requirements if failure of terms before and after the adoption?

Should there be a "dead man's clause" for failure of birth parent to appear for visits?

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**“Expedited” or “Accelerated” Adoption Proceedings**  
By Margaret A. Burt

Since 1992, adoptive parents have been permitted to file an adoption petition for a child who is the subject of a termination action even though the termination action has not yet been concluded. DRL 112(8) The adoptive parents can file all the court paperwork necessary for the adoption and the agency is free to begin home studies and procedures for subsidies, even though the child is not yet freed. While the termination matter is pending, the Judge is not to be informed that an adoption petition has been filed - apparently so that this fact would not affect his or her judicial decision on the termination. If and when the child is freed by the Judge, the adoption filing is then “revealed” to the Judge and the adoption can proceed in a more expeditious or accelerated fashion. The local agency is not actually allowed to “consent” to the adoption until the child has been freed and the time period has passed for any notice of appeal. If the termination is appealed, the agency is not supposed to consent to the adoption until the appeal is resolved NYCRR 421.19 (5)( i)

If a child is surrendered, the adoptive parents can also proceed immediately to file an adoption petition. If they had filed the adoption petition during the termination proceeding and the termination is resolved with a surrender, the adoption could immediately proceed. After a Judge accepts the surrender of a foster child, he or she is then supposed to inquire if anyone is seeking to adopt the child. The Judge could then be informed that in fact there has been an adoption petition filed and the court can set a schedule to complete whatever maybe necessary to finalize the adoption. SSL 383-c

Filing the adoption petition while the termination is still pending is sometimes referred to as an “expedited” or an “accelerated” adoption. It might make sense to do a “semi-accelerated” adoption in some instances where the adoption petition is prepared in advance and filed immediately upon the freeing of the child by the surrender or upon the passing of 30 days after the termination order if no notice of appeal has been filed.

The advantage to considering an accelerated adoption is that it creates faster permanency for the child and allows the adoptive family to end the governmental involvement of the agency in their family lives. There is a savings of foster care money and a savings in caseworker time. Less court time is spent on “freed child” reviews. The adoption would stay with the Judge who had handled the termination or surrender allowing for continuity of the case - including as to such issues as the court’s rulings regarding the legal status of the father.

In some cases, there may be disadvantages to doing accelerated adoptions. A birth parent may be more likely to file an appeal of a termination, if they become aware of the quick processing of the adoption. If the agency feels the adoptive family could benefit from some supervision and services before the actual finalization, there is less time for that. If the child would not be eligible for an adoption subsidy but for 12 months in care with the same family and that deadline has not yet been reached, it may be to the advantage of the adoptive family to wait.

There are very few expedited adoptions being done in New York State despite the fact that this law has existed for over a dozen years. In many cases, it may be simply be that people are not aware of this possibility. A significant concern has been the issue of the appeal. If the agency is not supposed to “consent” to the adoption until the time for all appeals is finished and if the court can not finalize an adoption in which the agency has not “consented” - what benefit would there be to filing an accelerated adoption if there was any chance of an appeal? However, many cases are resolved with surrenders in this state and default orders on terminations are not appealable - so matters of this sort may well benefit from consideration of a “semi-accelerated” adoption. Some adoption attorneys are unwilling to do “accelerated adoptions” of foster children until the child has clearly been freed and there is no possibility of appeal since the state will not reimburse an attorney for the filing an adoption that does not result in a finalization! Some counties have benefitted from a discussion among the relevant parties - including the local adoption bar - about the possibility of handling some cases in this accelerated fashion.

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**HOW CAN A NEW YORK STATE FOSTER PARENT EFFECTIVELY ADVOCATE  
FOR A CHILD IN A PERMANENCY HEARING?**

By Margaret A. Burt, Esq. Copyright 4/10

Make sure the caseworker is aware that you expect to be get the papers and that you intend to attend the hearing. You should get the papers in the mail about a week or so before the hearing. The first hearing must be no later than 8 months after placement and there must be a hearing every 6 months after that. Some Judges have them more frequently. At each hearing, the Judge will set the date for the next hearing. Bring your calendar with you to court and speak up right away if the Judge sets a date that is bad for you.

If the caseworker thinks that it would not be a good idea for you to attend or tells you not to attend, ask why. Talk about what the worker says the reasons for this are - talk to the supervisor if you disagree with the worker's opinion. You do have a right to be present and the court is to be informed that you have been advised that you can come. There can sometimes be reasons why you choose not to go. If you choose not to go, tell the caseworker that you would like the worker to tell the court that you are an interested and concerned foster parent.

A foster parent has a legal right to have an attorney at a permanency hearing. Although it is quite unusual for a foster parent to do so, you can hire an attorney if you wish and if you think that it may help you. It would be helpful to discuss with any attorney what you are concerned about and if the attorney thinks they can be of any help to you. You are entitled to have an attorney appointed to assist free of charge to you BUT only if you can demonstrate that you are "indigent" .

Make sure you read what is in the papers ahead of time. Read it with a pen and paper next to you and make notes of anything that you disagree with or anything that seems incorrect to you. If there are things in the papers that are a surprise to you or do not seem to be what you expected, call the worker in advance and speak to the worker about your concerns

The child's law guardian, now called the child's attorney, will be listed in the paperwork if you do not already know who it is. You should talk to the caseworker about the child having contact with his or her attorney before the hearing. How will this contact occur? What is the expectation regarding the child attending court? The child's lawyer is not obligated to speak with you as you are not the client, however, find out if the child's lawyer would like to speak with you.

If you have decided to come to court, consider in advance if there are things you want to say. Write things out if you want to be sure to remember what you wanted to say at court. Things that you might think about: Do you agree with what the agency says is the right plan for the child? Are all the appropriate services being provided to the child? Are there any problems with the visitation? It is really helpful to discuss any of these things in advance with the worker

and the supervisor if necessary. Although you have a right to talk for yourself in the courtroom, the worker may make some suggestions about how to be effective. If you find that you disagree with the worker about what you could or should say in court, speak to the supervisor. Remember that generally a Judge is not allowed to read mail from you or to talk to you in private or by phone so coming to court and speaking there is usually the only way for the Judge to hear your position or answer your questions or concerns. The Judge has a lot of power to change what is happening in a case, to order the agency to provide a child with services or to change visitation.

Sit where you can hear. Ask the worker if you can sit upfront with them or ask to sit in the first row. If you can not hear, raise your hand and say loudly “Judge, I am the child’s foster parent and I can not hear what is being said.”

Make your presence known in court. Some Judges will speak directly to you and ask how things are going and how you feel about the plans being discussed. Others may not ask you or acknowledge you. It is always important to stand up when you speak to the Judge. If it seems like the hearing is about to end or is ending and the Judge has not spoken to you and you want to say something, stand right up and raise your hand and say loudly, “Judge, I am this child’s foster parent, can I add some things here?” Even if you really did not have much that you wanted to say, it can be a good idea for you to make sure that the Judge saw that you were there. In that case you could stand up and raise your hand and say loudly, “Judge, I am this child’s foster parent and I just wanted to make sure everyone knew I was here, is there anything anyone would like to ask me?”

Sometimes, you may be able to ask someone to help you let the Judge know that you would like to talk. You could ask the agency attorney or the child’s attorney if they would tell the Judge that you had something that you would like to say.

Take paper with you to court and take notes. Ask the caseworker afterwards about what happened - make sure you understand what happened - particularly if things did not go the way it was expected.

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**A Foster Parent Asks:  
Do Foster Children Come to Court for Permanency Hearings?  
By Margaret A. Burt, Esq. Copyright 4/08**

**Q I heard that my foster child is going to come to court when the permanency hearings happen, is that true?**

A. There is a new federal requirement that says that a Judge must “consult” with the child in an age appropriate way regarding their permanency plan and goal on every permanency hearing. The federal government has **NOT** said that this means all children must come to court – they have said it means the Judge must know the child’s position from some source. The child could come to court or the child’s position could be simply told to the Judge by someone like the child’s attorney (law guardian) or the caseworker. Because of this new federal law, lots of Judges in NYS are talking and thinking about their position regarding children actually coming to court. Some judges have always done this, some have not. More Judges are considering doing it, especially for older children.

**Q. So, how will I know if my foster child is supposed to come to court?**

A. It will be different in different counties and even with the same Judge; it may depend on the child’s age or the case. You should talk to the caseworker and the child’s attorney about what the expectations are for your child.

**Q. What if my foster child wants to go to court but no one is saying that he/she will or can go?**

A. Bring this up to the caseworker and the child’s attorney. If the child is old enough, help them call their attorney to ask. Although it is the Judge’s decision, it is likely that if the child wants to be there, the child will be allowed to come.

**Q. What if I am told that the child has to come but he/she does not want to or does not want to on a particular date?**

A. Contact the caseworker and the child's attorney about the child's concerns and reasons. Even if the Judge is one who usually wants children in court, it is unlikely that a Judge would require a child to come if he/she did not want to appear. It will be helpful for you to be able to say why the child does not want to come and of course it will be important for the child's attorney to know the child's position to be able to tell it to the Judge.

**Q. Am I allowed to contact the child's attorney? He/She does not seem to want to talk to me and/or does not keep in contact with the child.**

A. There is no rule that says you cannot contact your foster child's attorney and let them know of issues. Most law guardians will want and welcome this. However, the child's lawyer is not your lawyer and they are under no obligation to speak with you, It is best if you can let the attorney know of your willingness to communicate and of the information you have that may be relevant. If you feel that the attorney is not keeping in contact with the child, you should let the caseworker know that. But only a Judge can decide if a child's attorney is doing their job effectively.

**Q. If I think my child's attorney is not meeting with and/or listening to the child, can I do something about it?**

A. There are no absolute rules that attorneys who represent children must follow as to when and how frequently they meet with and talk the child. This is something that each attorney has discretion about based on their perception of what legal help the child needs at any particular time. Of course, any attorney should meet with their client and if the child is old enough help the child to tell them what they want so that the child's wishes are made known to the Judge as is required. You can tell the Judge in a permanency hearing if you think there is a serious problem.

**Q. But isn't the law guardian supposed to be doing what is in the child's "best interests"?**

A. No, that is not true. The primary responsibility of a child's attorney is to tell the judge what the child wants and to try to advance the child's position – lawyers say "zealously advocate the child's position". If the child is so young or limited that they are incapable of a "knowing, voluntary and considered judgment" then the child's attorney can promote what they believe to be in the child's best interests – as they would if a child were say 2 years old. This means that where a child is older and can tell the attorney what they want, then the attorney's job is to tell the Judge that and to try to obtain that result even if what the child wants may not be the best thing. In an unusual case where the attorney is convinced that the child wants something that would "likely result in a

substantial risk of imminent, serious harm to the child” then the attorney can advocate a position different from the child’s, but must tell the Judge that they are doing that and must still tell the judge what the child wants.

**Q. I have been told that my foster child will be expected to come to court for their permanency hearing? How can I prepare the child?**

A. Talk to the child about what court is like and tell the child that the Judge will want to know how he/she is doing and if they have any questions about what is happening to them. Talk to the child’s attorney about any concerns the child might raise about the process.

**Q. What if my foster child wants to talk to the Judge alone or wants to write a private letter to the Judge?**

A. In most cases, a judge is not allowed to talk alone to anyone involved in a case before them or read any private letters because all parties have a right to hear all the evidence that a Judge is considering. Do not tell the child that the Judge will talk to them in private unless you have been specifically told that this is going to happen. If the child is concerned about wanting to say something and not wanting other people – like parents or a caseworker – to hear, tell the child’s attorney about this so that the attorney can consider what options might be available.

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**THE RIGHTS OF FOSTER PARENTS IN NEW YORK STATE**  
**By Margaret A. Burt, Esq. Copyright 4/09**

Foster parents have the right to hire an attorney and have them assist the foster parent at court in abuse and neglect, permanency and termination cases. The court is required to provide a free attorney IF the foster parent is indigent and cannot afford an attorney

Foster parents have a right to a written 10-day notice, an internal formal conference, a fair hearing and ultimately even a court proceeding to contest an agency decision to remove a child from their home regardless of how long the child has been in the home

Foster parents have a right to be formally noticed and appear and offer information at all permanency hearing regardless of how long the child has been in the home

Foster parents have right at a perm hearing to object to court giving child to a relative on a custody petition that the relative has brought and can request that the court hold a “best interest hearing” to see if the custody to a relative would be in the child’s best interests.

Foster parents can bring on a TPR matter if the court orders the agency to do so and the agency does not do it within 90 days of being ordered to do so or if the child has been in care 19 months and the agency has not brought a petition

Foster parents who have had a child in their home for more than 12 months have a right to notice and to be heard in the dispositional aspects of TPRs, freed child reviews or any hearing that affects custody of the child

Foster parents have a preference under law to be considered first as adoptive parents for any child is in their home as a foster child and who has been in their care for over 12 months when the child is freed

So far the courts have said that foster parents do not have rights to seek visitation or custody orders of former foster children but foster parents have continued to challenge this

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**WHAT SHOULD A FOSTER PARENT DO IF THE BIRTH PARENTS SAY  
THEY ARE WILLING TO CONSIDER A CONDITIONAL SURRENDER?**

**By Margaret A. Burt, Esq. Copyright - 3/08**

1. Consider hiring a lawyer right away if you can - ask the lawyer to be come involved in the negotiations. Insist that you and/or your attorney need to be present at any negotiations. You will be living with this agreement long after the agency is no longer involved.
2. Don't let discussions occur without you. If the surrender is going to be conditional on you adopting the child, then it has to be signed by you. That means you should be discussing the conditions as well – the caseworker should not just “present” you with the conditions that are going to be offered to the parent nor should the caseworker tell you that they have already reached the agreement and you “have” to agree to the terms.
3. Take your time - this is a very important consideration - think carefully about what is being asked of you and your family - can you do this? Do not let yourself be “talked into” a deal in the hallway at court without having had time to think it over and discuss it calmly with your spouse and your lawyer.
4. Consider the alternatives. Would it be better for the child and your family to have a termination occur with no terms? Ask what the agency's timetable would be for that alternative as well as the likelihood of a successful outcome.
5. Ask questions until you understand exactly what is being proposed.
6. Ask to see the full agreement in writing in advance before you sign anything. If you have trouble understanding what some terms means - will the birth parent understand it? Make sure everything is spelled out in the agreement as specifically as you think it needs to be so no one will have to wonder or question later what everyone agreed. Make sure they give you a copy of the agreement at the time it is signed.
7. The devil is in the details. If there is going to be exchanges of photos or information, who is actually obligated to provide them? How will people be kept aware of changing addresses? If there are going to be visits, how long will they be, where will they be, will anyone have to supervise them, will anyone else be allowed to be at them? What about make-ups? What if your family wants to move? Can presents or cards be exchanged? How will you reach each other? Will there be controls on certain behaviors? Will the child be able to refuse visits? Under what circumstances can visits be ended - opinion of a therapist or a certain number of missed visits?
8. When will you expect to be able to finalize the adoption? Will the birth parent be notified if there is a problem before the adoption or has this right been waived? Will the parent be able to revoke the surrender if there are problems before the adoption or has this right been waived?

**LOOK BEFORE YOU LEAP**



**Legal Rights of Foster and Adoptive Parents**  
**NYSCCC Healing Connections Conference**  
**May 7, 2011**

**Basic Info on the Legal Rights of Foster Parents for Attorneys**  
**By Margaret A. Burt copyright - 4/09**

For the attorney representing a foster parent or for counsel with a foster parent as an adversary, the legal rights of foster parents in child welfare situations are not easy to discover. Statutorily speaking, the relevant sections are spread out and hidden without reference to each other. The legislature seems to be saying foster parents have some rights - but they will have to find 'em first! In child welfare situations where the foster parent has a similar goal as the agency, the foster parent can generally rely on the agency counsel to advocate the position. In these situations, the foster parent is generally allowed to be present in the courtroom and, most often, the court will inquire if there is anything the foster parent may wish to add to the proceedings. The agency attorney and/or the law guardian are usually open to answering basic questions the foster parent may have about the proceedings. However, for the foster parent who disagrees with the agency's agenda in a child welfare matter, there are some limited rights that may be useful. Counsel must familiarize themselves with these rights, as it is likely that no one else, including the court, will be familiar with them!

In order to use them, or block them effectively, it is important to know what the rights of the foster parent are in New York State. Some rights require the foster parent to have had the child in their home for more than 12 months, others do not. There appears to be no rational reason why this requirement is there in some situations and not in others.

- Foster parents have a right to counsel and the right to have counsel appointed if they are indigent (you could argue that the foster care subsidy should not "count" toward a decision on indigency) FCA§ 262. The right to counsel is afforded in abuse and neglect proceedings, permanency proceedings, terminations, surrenders.
- Foster parents have a first priority to adopt (even over relatives) if the child has lived in their home for more than 12 continuous months when the child is freed for adoption. SSL§ 383 (3). This right is a key one. The agency will sometimes attempt to move a child from a foster home prior to the 12 months to prevent this right from attaching. If a relative appears late on the scene and seeks custody of a child who has been in the foster home for more than a year, this right may protect them from losing the child to the relative.
- Foster parents have a right to intervene as a party in ANY proceeding involving the custody of the child if the child has lived in their home for more than 12 continuous months. SSL § 383 (3). This allows foster parents to participate as a party in custody proceedings brought by relatives and in the dispositional hearings

of terminations. In perm hearings, if a relative has brought a custody petition, a foster parent with more than 12 months of continuous care can object to custody being awarded to the relative and force a “best interests hearing” FCA §1055-b, 1089-a

- Foster parents have a right to be formally noticed, appear, and offer information at all permanency hearings regardless of how long the child has been in their care. This includes having party status!!! 1089 (3)(b)(i) This section on party status appears to be in direct contravention of FCA § 1040. The only way to read both sections in harmony is to determine that the foster parent has party status as per FCA §1089 as FCA§1040 says that they do not receive party status by merely being entitled to notice. This can be a significant argument as it provides the foster parent the ability to call witnesses and seek discovery in permanency actions.
- Foster parents can bring a termination of parental rights proceeding if the court orders the agency to bring one and the agency does not do so for 90 days after the order. FCA §1055 (d), SSL §392 (6) c. It is critical to note that the agency is required to join the petition that has been filed by the foster parent! SSL §384-b (3)(l)(iv)
- Foster parents can also bring a termination of parental rights proceeding if the child has been in foster care for 19 months and the agency has not brought such a petition. Again the agency is then required to join the petition SSL § 384-b (3)(l)(iv)
- Foster parents have a right to a written 10 day notice, an internal conference and a fair hearing with the state as well as, ultimately, can bring court action to contest an agency decision to remove a child from their home regardless of how long the child has been in the home. 18 NYCRR §443.5, SSL§ 400, SSL § 22

The most common situations in which the foster parent and the agency disagree about the process of a case occur when the foster parent feels that procedures should be started to free the child for adoption and the agency disagrees. Also sometimes in situations where the foster parents and the agency disagree, the agency may try to move the child out of the foster home and back to the birth home or to another foster home that is more cooperative. Never underestimate the power of a simple phone call. Many times, the attorney for the foster parent can work magic for the client simply by talking with the agency attorney and the law guardian and ascertaining their long-term plans. The foster parent may believe that the agency has a different outcome in mind due to the cautious statements of a caseworker but the attorney may be able to reassure the client that the intentions of the agency are in fact the same as their own, albeit on a slower track.

If the agency disagrees with the foster parent or there is a fear of them moving the child, there are several pre-emptive strikes that can be considered. The foster parent’s attorney can participate in or bring on a permanency hearing and seek a court order for agency to

file a termination. Since the foster parent loses virtually all of their rights if the agency removes the child from their home, the attorney should seek an order from the court that the child not be removed from the foster parent's home. Convincing the law guardian to agree with the foster parent's position can be very helpful.

A more extreme tactic is for the foster parents to file a termination petition themselves. This will force the issue to be decided by the court but can be expensive for the client. It should not be undertaken without a very careful review of the factual situation and the reasons for the agency's reluctance. Sometimes merely reminding the agency of this right can encourage a slow-moving agency to finally file a termination petition. It remains unclear exactly what is meant by the agency having to join the petition. Also unclear is if the foster parent is entitled to legal expenses from an agency who should have filed a termination petition. On the other hand, when the law remains unclear, the attorney is free to try to make some law!