OVERVIEW:

APPLICABLE STATE LAW, FEDERAL PRE-EMPTION, SURROGATE PARENTING, AND SUBSIDIES

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7/31/06

I. OVERVIEW

A. APPLICABLE LAW

Adoption is generally a matter of state law. So, the law in New York and the law in Pennsylvania, for example, could be very different from each other and, in fact, they are.

Adoption is defined in New York as "the legal proceeding whereby a person takes another person into the relation of child and thereby acquires the rights and incurs the responsibilities of parent in respect of such other person." DRL §110.

The word "child" is used to define the legal relationship which is created. It does not mean that one cannot adopt an adult, and, although the vast majority of adoptions involve minors, an adult can adopt another adult as long as the parties' purpose is neither insincere nor fraudulent, see Matter of Adult Anonymous II, 88 AD 2d 30, 452 N.Y.S. 2d 198; Matter of Elizabeth P.S., 134 Misc. 2d 144, 509 N.Y.S. 2d 746.

Much of adoption law is statutory, which ought to make it easy, but it is not. Chief Judge Kaye has described it as "a complex and not entirely reconcilable patchwork." Amended innumerable times since its passage in 1873, the statute was last consolidated 68 years ago, in 1938 (L. 1938, ch.606). Thus, after decades of piecemeal amendment upon amendment, it contains language from the 1870's alongside language from just a few months ago, and, with its long, tortuous history, it is a far cry from a "methodical and meticulous" expression of legislative judgment. Matter of Jacob, 86 N.Y. 2d 651, 659, 636 N.Y.S. 2d 716, 719.

In fact, New York's "adoption statute" is not a single statute at all, but several. Pieces of it are found in the Domestic Relations Law, the Social Services Law, the Family Court Act, ,and even the Surrogates Court Procedure Act, which has to do, mostly, with dead persons.

It is also the subject of numerous regulations, many outdated but still on the books, of the Office of Children and Family Services, 18 NYCRR Part 421.

Likewise, the Courts are fond of saying that adoption is solely a **creature of statute**, Matter of Eaton, 305 N.Y. 162, 165, that it has no common law roots or evolution, Matter of Seaman, 78 N.Y.2d 451, 455, 576 N.Y.S.2d 838, and that it must be strictly construed, Matter of Robert Paul P., 63 N.Y.2d 233, 481 N.Y.S.2d 652. For the most part this is true. But, when it comes to the rights of biological fathers of out-of-wedlock children placed less than 6 months after birth, it is now, in fact, *entirely* a matter of **common law**. The statutory law pertaining to the rights of biological fathers of children placed less than six months after birth was declared unconstitutional in 1990 by the Court of Appeals in Matter of Racquel Marie X, 76 N.Y. 2d 387, 559 N.Y.S. 2d 855, and despite the Court's express hope that the legislature would re-formulate the statute after the decision, the legislature, in its wisdom, chose not to. So, for the last 25 years or so, we have been operating under the guidelines set down by the Courts, the key decisions by the Court of Appeals being Matter of Racquel Marie X , supra, and Matter of Robert O v. Russell K, 80 N.Y. 2d 254, 590, N.Y.S. 2d 37.

If you are involved with an adoption, you must apply *adoption* law. Despite the fact that there is no volume of McKinney's labeled "Adoption", it is a complete and self-contained area of the law with its own unique rules. The rule of Bennett v. Jeffreys, 40 N.Y. 2d 543, 387 N.Y.S. 2d 821, a favorite of family law practitioners, for example, is largely abrogated by statute, e.g., DRL 111, or case law, Matter of Robert O. v. Russell K., supra.

You should also expect to have to act much more quickly than you would in many other types of case. If you represent the biological father of an out-of-wedlock child, particularly the biological father of an out-of-wedlock child less than 6 months of age, for example, you may be confronted with the ultimate legal emergency. You may not have the luxury of putting him off for even 24 hours after his initial call. More likely than not, you will have to get him in and act immediately.

B. TYPES OF ADOPTION

Legally, there are but two types of adoption: adoption from an authorized agency, and private-placement adoption, DRL Article 7. Even foreign adoptions, for all of the special rules applicable to them, fall into one of these two categories.

In a traditional **agency adoption**, the agency acquires care, custody, and control of the child as a result of a termination of parental rights (TPR) by Family Court pursuant to Article Six of the Family Court Act or an agreement with the birth parent, called a "Surrender", SSL §§383-c, 384. Historically, in an agency adoption, once they signed a Surrender, the birth parents were completely out of the picture. Even now, the default

rule after the termination of parental rights by Family Court or the signing of the Surrender is that they need not be informed even if the child dies before the adoption can become final, and it is the right and duty of the agency, in such a case, to arrange for the child's burial. Thus, traditionally, in an agency adoption, the proposed adoptive parents deal only with the agency, and it is the agency which places out the child and consents to the adoption. If the adoption is not finalized, the child is returned to the agency, rather than to the birth parent(s).

In a **private-placement** adoption, the proposed adoptive parents deal directly with the birth mother and, where he meets the applicable criteria, the biological father. The birth parent(s) place out the child and execute a "Consent" to the adoption of the child by a specific person or couple. Although their right to revoke their consents is severely limited immediately upon the execution of even an extra judicial (out of court) consent, DRL §115-b [3], Matter of Jarrett 230 AD2d 513, 660 N.Y.S.2d 916, they retain the right to the return of the child if the adoption is not finalized.

In an agency adoption, the suitability of the prospective adoptive parents to receive a child into their home pending finalization is passed upon "in-house" by the agency, c.f. SSL §372-e. In a private adoption, the suitability of the prospective adoptive parents to receive a child into their home pending completion of the adoption is determined by the court upon a petition for certification as qualified adoptive parents pursuant to DRL §115-d.

Not only are the rules pertaining to agency adoptions and private placement adoptions different, the rules pertaining to agency adoptions from the Department of

Social Services and those pertaining to agency adoptions from non-governmental agencies are also different. For example, the extra-judicial (out of court) surrender of a child in foster care to the Department of Social Services must be signed by the birthparent(s) in the presence of two witnesses. One of these witnesses must be an employee of the agency trained to receive surrenders. The other must be a licensed master social worker, licensed clinical social worker, or an attorney who is not an employee of the agency, and the document does not become irrevocable for 45 days. SSL §383-c. The extra-judicial surrender of a child not in foster care to a non-governmental agency requires but one witness for whom the statute describes no special qualifications, and becomes irrevocable after just 30 days, SSL §384.

C. SUBJECT MATTER JURISDICTION

The truth of Chief Judge Kaye's observation in Matter of Jacob, supra, that New York Adoption Law is a "complex and not entirely reconcilable patchwork" becomes obvious when we look at the fact that, by statute, **subject matter jurisdiction** over adoption is vested in *both* Family Court and Surrogate's Court.

Supreme Court could also exercise jurisdiction, but is unlikely to do so, Kaplan v. Meskin, 108 AD2d 787, 485 N.Y.S. 2d 117.

In the case of Family Court, such jurisdiction can be found in Article VI, §13(b)(3) of the New York Constitution as a specifically enumerated grant of power.

Not so, in the case of Surrogate's Court. Its constitutional grant of jurisdiction is in Article VI, § 12. Article VI, § 12(d) provides that

> "The surrogate's court shall have jurisdiction over all actions and proceedings relating to the affairs of decedents, probate of wills, administration of estates and actions and proceedings arising thereunder or pertaining thereto, guardianship of the property of minors, *and such other actions and proceedings, not within the exclusive jurisdiction of the Supreme Court, as may be provided by law.*" (Emphasis added).

There is no mention of adoption.

The only direct grant of subject matter jurisdiction over adoption to Surrogate's Court is found in Section 641 of the *Family* Court Act. There is no mention of it in the Surrogate's Court Procedure Act and, although Article VII of the Domestic Relations Law, which contains the bulk of the rules relative to adoption, mentions both judges and surrogates, it contains no specific grant of authority to either.

In my home county of Erie County, New York, the courts have agreed that, as a matter of convenience, Family Court will handle adoptions which come through the Department of Social Services and its contract agencies, and Catholic Charities, and Surrogate's Court will pretty much handle the rest, and this has resulted in a fairly equal division of labor. In other counties, adoptions are most frequently handled by Family Court regardless of type.

Once a petition for adoption is filed in one or the other of these courts, the New York Constitution arguably prohibits even a voluntary transfer from one to the other, Matter of Earl, 119 Misc.2d 515, 463 N.Y.S. 2d 724.

D. FEDERAL PREEMPTION

Although adoption is generally a matter of state law, it is preempted by federal law in three very specific areas having to do with race, ethnicity, or national origin.

1. INDIAN CHILD WELFARE ACT

One of the things which must be included in your petition for adoption is a statement as to whether or not the child is a Native American. This is because of the **Indian Child Welfare Act** (ICWA), 25 U.S.C. §§1901-1963. This is obviously federal law and, where it applies, it preempts any contrary provision of the Domestic Relations or Social Services Law, including with respect to jurisdiction.

The statute defines an "Indian Child" as one who is under the age of eighteen and is either (a) a member of an Indian tribe or (b) is *eligible* for membership in a tribe, §1903(4), and clearly applies to adoptions, §1903(1)(iv).

Where the statute applies, it *requires* that the proceedings be transferred to the tribal court, absent good cause shown, upon the application of the Indian parent, §1911(b), thus divesting both Family Court and Surrogate's Court of process and, where

due to good cause shown the transfer is not made by the state court, gives the tribe an absolute right to intervene at any point in the proceeding, §1911(c).

Where it applies, the Indian Child Welfare Act also preempts those provisions of our law relative to who may adopt and as to the taking and revocation of surrenders or consents.

Section 1915(a), for example, requires that preference for adoption be given to:

(1) A member of the child's extended family;

(2) Other members of the tribe; or

(3) Other Indian families.

Section 1913 provides that the surrender of an Indian child to an authorized agency or a consent by a child's birthparents to the child's private adoption shall be invalid if given within ten days after the child's birth. It also requires that it be given before a judge who must attach a certificate that the terms and conditions of the document were fully explained in detail *and understood.*

Section 1913 also gives the Indian parent an absolute right to withdraw his or her consent at any time prior to the entry of a formal decree despite the contrary language of the Domestic Relations Law, and provides that such withdrawal shall result in the automatic return of the child.

If you are confronted with a case involving the Act and are unable to comply, the first thing you should do is check the technicalities:

1. The statute does not apply where the "tribe" is not recognized as such by the Bureau of Indian Affairs, Matter of the Adoption of Christopher, 173 Misc.2d 851, 662 N.Y.S.2d 366.

2. Most tribes in this area are matrilineal. A child is "eligible" for membership in the tribe only if his *mother* is a native American.

3. The statute does not apply in the case of a putative father who, though a native American, has not perfected his rights pursuant to the standards set forth in Matter of Racquel Marie X, supra and Matter of Robert O. vs. Russell K., supra, for biological fathers generally.

If an examination of the technicalities doesn't solve your problem, you must resort to an invention of a number of unhappy state courts called "the existing Indian family doctrine".

The "existing Indian family doctrine" precludes application of the Indian Child Welfare Act when the Indian child's mother has not maintained a significant social, cultural, or political relationship with her tribe or where the child has never lived in an Indian environment. The courts adopting this doctrine have held that the Indian Child Welfare Act is inapplicable even though facts were presented which might otherwise

establish threshold jurisdiction under the statute. Adoption of Baby Girl, 181 Misc.2d 117, 690 N.Y.S.2d 907.

2. MULTI-ETHNIC PLACEMENT ACT

The other example of federal pre-emption is the Multi-Ethnic Placement Act. It is found at 42 U.S.C. §1996b. It prohibits the delay or denial of an adoption on the basis of race, color, or national origin of the prospective adoptive parent or the prospective child. Previously, social workers, to my surprise primarily African American social workers, opposed the placement of African American children with white adoptive parents and agencies often matched prospective adoptive parents and children based on race. If no matching parent could be found, the child was often left without a home. The Multi-ethnic Placement Act was enacted to prevent this. States and agencies can still match parents and children by race *unless* it would result in a delay or denial of the adoption. In that case, the child must go to a willing adoptive parent even if of a different race, color, or national origin, and interracial adoptions are now fairly common.

Not surprisingly, the Multi-ethnic Placement Act does not apply in the case of Native American children to whom the Indian Child Welfare Act applies, 42 U.S.C. §1996b(3).

3. INTERNATIONAL ADOPTION

Previously, the federal law was involved in international adoption only indirectly, as a matter of practicality. You could use the assistance of anyone you pleased, here or abroad, to find a child and arrange his or her overseas adoption. But there was no point in

adopting a foreign born child unless you could get the child admitted into the United States for permanent residence under the United States Immigration and Nationality Act, which required that the child be "an eligible orphan" or an "adopted child" who had resided with you abroad for more than two years. You would then obtain full faith and credit for your adoption under the U.S. Constitution by re-adopting the child in New York, under New York law.

However, the United States has now fully implemented a treaty called the Hague Convention on Intercountry adoption. The implementing legislation makes the Department of State the "central authority" for the administration of the treaty and it has, among other things, established a protocol for licensing agencies to do or assist with international adoptions, and set standards to be followed if these adoptions are to be recognized or accorded full faith and credit.

E. WHO MAY ADOPT

Section 110 of the Domestic Relations Law provides that **the following persons may adopt**:

1. An adult husband and his adult wife together;

2. An adult married person who is living separate and apart from his or her spouse pursuant to a decree or judgment of separation or pursuant to a written agreement of separation;

3. An adult married person who has been living separate and apart from his or her spouse for at least three (3) years prior to the commencement of the adoption proceeding (irrespective of the lack of any decree or agreement);

4. An adult or minor husband and his adult or minor wife together as to child of either of them; and

5. An unmarried adult person.

Section 117 of the Domestic Relations Law provides that:

> "After the making of an order of adoption the 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, except as hereinafter stated.

Nor can one be denied the right to adopt because they are single, DRL §110(5) or because they are gay or lesbian, Matter of Dana, 86 N.Y.S. 651, 636 N.Y.S.2d 716; 18 NYCRR §421.16. This leads, though, to some interesting questions. For example, can single people adopt together?

Previously, we lawyers thought we knew what Section 110 meant when it said "an adult unmarried person ... may adopt another person," particularly when read in conjunction with the phrase "an adult husband and his adult wife *together* may adopt another person." (Emphasis added). It was that a husband wife could adopt together, but

that single persons could not. There was also the issue of Section 117, which provided, we thought, that once an adoption became final, the consenting birth parent lost all of his or her rights.

From the point of view of those of the gay and lesbian population who were interested, though, this posed a problem. They could adopt, but they couldn't adopt together. The first victory for their cause came in the form of an opinion by Surrogate Preminger of New York County in Matter of the Adoption of Evan, 153 Misc.2d 844, 583 N.Y.S.2d 997. The clincher came in the decision by Chief Judge Judith Kaye in Matter of Dana, 86 N.Y.2d 651, 636 N.Y.S.2d 716 (1995), which the Court decided simultaneously with the Matter of Jacob..

In Jacob, the birth mother had been married to the child's father but they divorced shortly prior to the child's birth. The birth mother, who had custody, moved in with her boyfriend. The child was then just a year old. The boyfriend wanted to adopt the child without the necessity of having to marry the birth mother and she was agreeable as long as she would not lose her rights.

Dana involved two lesbians. The child was conceived by artificial insemination. The life partner wanted to adopt the child and, again, the birth mother was agreeable as long as she did not lose her own rights.

This last part is critical in both cases.

Section 110 of the Domestic Relations Law said that "[a]n adult unmarried person" may adopt, and, with respect to Dana, there was already case law to the affect that the adoption could not be denied merely because the proposed adoptive parent was gay. Therefore, both the boyfriend in Jacob and the partner in Dana had standing to adopt. The real issue was the affect of the adoption by the boyfriend or the partner on the rights of the birth mother.

In the opinion, Judge Kaye held that Section 110 posed no impediment to **single persons adopting *together*** despite the fact that the statute used the word only with respect to married couples, and that Section 117 was, really, only intended to apply to property rights and, hence, could be disregarded. So, the law now is that unmarried persons have a right, irrespective of the lack of any formalization of their commitment to each other, to adopt a child together.

This begs the question, raised by Judge Bellacosa, who wrote the dissenting opinion, in which he was joined by Judges Simons, and Titone, as to *how many* unmarried persons could adopt together. The majority pooh-poohed this concern, but notwithstanding a 1943 opinion of the attorney general to the contrary, 1943, Op. Atty. Gen. 263, there is absolutely nothing in the statute limiting the number to two (2) and any argument that two ought to be a magic number based upon traditional values seems hypocritical at best.

Except for the statutory requirement that the proposed adoptive parent be an adult, DRL §110, one cannot be denied the right to adopt solely because of age, DRL §110, Ward v. Brookwood Child Care Orphan Asylum Soc., 78 A.D.2d 902, 433 N.Y.S.2d 209;

Matter of Infants, 48 A.D.2d 425, 370 N.Y.S.2d 93; Matter of Adoption of Michael D, 37 A.D.2d 78, 322 N.Y.S.2d 532, cancer, or any other disease, DRL §110.

Section 115-d of the Domestic Relations Law and Section 378-a of the Social Services Law effectively prohibit the adoption of a child by persons who have been convicted of certain **crimes**, namely:

A felony conviction at any time involving:

- child abuse or neglect;
- spousal abuse;
- a crime against a child, including child pornography; or
- a crime involving violence, including rape, sexual assault, or homicide, other than a crime involving physical assault or battery.

A felony conviction within the past five years for physical assault, battery, or a drug-related offense.

That part of each of these statutes which refers to "a crime including violence" specifically mentions but three such crimes: "rape, sexual assault, or homicide, other than a crime involving physical assault or battery". These would seem to be words of limitation, so a person who entered a plea to "attempted robbery", for example, would seemingly be okay. But, unfortunately, for such a person, the Office of Children and Family Services" has taken the position that a disqualifying offense is *every* offense

defined as a violent felony offense in the pages-long list contained in Section 70.02 of the Penal Law, including attempts, see OO OCFS ADM-04, Attachment 4. So, the prohibition is very broad.

II. SURROGATE PARENTING

Some adoptions result from cases when a birthmother carries a child for someone else. In other words, where she has *acted* as a surrogate parent.

New York's position on surrogate parenting *contracts* is spelled out in Article 8 of the Domestic Relations Law. Basically, it is that surrogate parenting *contracts* are contrary to the public policy of this state, void, and unenforceable, DRL §122. But this does not mean that a woman cannot carry a child for another, and they sometimes do.

But no person or other entity may knowingly request or receive any *fee*, compensation, or other remuneration, directly or indirectly, in connection with any such contract, or induce, arrange or otherwise assist in arranging such a contract for a fee except for

(1) payments which would be permitted in connection with the adoption of the child, or

(2) payments for reasonable and actual medical fees and hospital expenses for artificial insemination or invitro fertilization services, DRL §123.

If any of the parties violate the statute, they subject themselves to a civil penalty not to exceed $500, DRL §123[2](a), but, if any other person, *including an attorney*, induces, arranges, or otherwise assists in the formation of a surrogate parenting contract for a fee, that person becomes subject to a civil penalty not to exceed $10,000 and forfeiture of the fee. If that person repeats the offense he or she becomes guilty of a felony, DRL §123[2](b).

In the event of a dispute between or among the parties, the court shall not consider the birth mother's participation in the surrogate parenting contract as adverse to her parental rights and may award either party custody and reasonable and actual counsel fees and legal expenses, DRL §124. The only exception is that if the birth mother has executed a valid surrender to an authorized agency or a consent to adoption, the court would be obligated to follow the rules relative to those instruments, DRL §124[2].

IV. SUBSIDIES

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Parents who adopt a “handicapped child” or a “hard-to-place child” through an agency can also benefit from the receipt of subsidies from the Office of Family and Childrens Services.

These subsidies may take the form of monthly payments, Medicaid benefits, or the payment of non-recurring expenses, such as reasonable and necessary adoption fees, court

costs, attorneys' fees, and the cost of a home study and post-placement investigation, depending on the circumstances.

The application is made by the agency. This includes both the Department of Social Services and non-governmental agencies.

There is no provision for the payment of a subsidy in a private adoption.

The rules concerning subsidies are spelled out in 18 NYCRR § 421.24.