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THE SURROGATE RESPONDS: THE NEED FOR REFORM IN ADOPTION PROCEEDINGS

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In the spring of 1987, Touro Law Review published a Comment, The Lawyer's Role in the Independent Adoption Process: Parental Consent and Best Interests of the Child.[1] *In it, Diana La Femina criticized the independent adoption process in New York state because, although the interests of prospective adoptive parents are generally represented by attorneys, the interests of the child to be adopted have no comparable representation. The Comment proposed that the attorneys of prospective adoptive parents protect not only the interests of their clients, but, as a social and moral obligation, the best interests of the child to be adopted as well. Pointing to the relative ease with which New York law permits natural parents to revoke their consent to an adoption, the Comment focused on the deleterious effects such instability may have on an adopted child who is just beginning to adjust to a new home. Citing several instances of such disruptions under the applicable New York State Domestic Relations Law, the Comment places the burden of insuring the best interests of the child squarely on the shoulders of the adoptive parents' attorney, thus placing him in the anomalous position of representing what may turn out to be two antithetical interests.*

After reading La Femina's Comment, C. Raymond Radigan, Judge of the Surrogate's Court of Nassau County, responded with the following article.

In New York, the Domestic Relations Law authorizes both agency and private placement adoptions. The Nassau County Surrogate's Court processes between 450 and 700 adoptions each year. Approximately one-third of these adoptions are agency placements; the other two-thirds are private placement adoptions. Of the private placement adoptions, nearly one-third are the result of second marriages where one spouse adopts the other spouse's child from a previous marriage.

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1. 3 Touro L. Rev. 283 (1987).

Surprisingly, though, in about one-half of all the private placement adoptions, the child is placed with a non-relative.

Most often, the decision to place a child for adoption is made by the natural mother. Some would prefer that all children to be released for adoption be placed first with an agency so that the agency may conduct reasonable studies in order to find satisfactory adoptive parents for the child. Some agencies provide the birth parents with background information concerning the prospective adoptive parents. By and large, however, the natural parents who choose this placement option rely fully on the agency to investigate the candidates and make the actual determination of the persons with whom the child should be placed. Other natural parents, however, prefer to take an active role in the placement of their child and would prefer not to deal with agencies. These parents want to know something about the prospective adoptive parents and to feel personally satisfied that their child will be properly placed.

Prospective adoptive parents also confront a dilemma in deciding how to attempt an adoption: whether to seek a child through an agency or privately. Many prefer to work through agencies in order to avoid the anxiety that can arise in private placement adoptions if the natural mother should change her mind about giving the child up for adoption. Other prospective parents find agencies too bureaucratic and prefer the private placement route. They perceive that frustrations often arise in agency placements, both because of the limited number of children available for adoption and the inevitable delays that result from agency procedures.

During the last five years, a relatively new method of initiating private placement adoptions has become increasingly popular. The adoption procedure begins when either the natural parents or the prospective adoptive parents place a classified advertisement in a newspaper indicating that they wish to place a child for adoption, or, conversely, that they want to adopt a child. Ultimately, through direct communication, arrangements are made to start formal adoption proceedings. As this new method of making contact gained popularity, however, courts began to recognize that in some instances, attorneys for the adoptive parents, as opposed to the principals themselves, were placing the newspaper ads. The natural mothers would then contact the adoptive parents' attorneys who would negotiate the details of the prospective adoption with them. Discussions between the attorneys and the natural mothers would usually include such matters as the payments to be made by the adoptive parents for the mother's expenses of delivery, medical treatment, and hospitaliza-

tion, as well as various other needs the natural mothers might have, such as rent and support during pregnancy and after delivery. At this juncture, the natural mothers were not represented by their own attorneys. The courts noted, however, that they were often lulled into a false sense of security in dealing with counsel, not fully appreciating the fact that the attorneys were representing the interests of the adoptive parents and not their own.

The Surrogates Association, concerned with possible abuses, has adopted a resolution seeking statewide guidelines for dealing with this new method of arranging private placement adoptions. In the interim, while waiting for statewide statutory changes and/or rules, several of the Surrogates have promulgated local rules to deal with the situation. In Nassau County, the Surrogate's Court adoption practice is that only the natural mother or the adoptive parents are allowed to place ads seeking to arrange an adoption. The attorneys for the adoptive parents are not to place the ad nor are they to deal with any outside unlicensed agency which may undertake to place such ads. This court has found that, in many instances, these 'listing' agencies have charged substantial fees and, in fact, maintain an accomplished list of birth parents who wish to place their child for adoption.

Under the temporary rules enacted by the Nassau County Surrogate's Court, the court is to be notified immediately following the principals' first contact. If the natural parents do not have their own attorney, the court assigns them one from a panel assembled by the Nassau County Bar Association, which has been advised by the court of its concern for full representation in adoption proceedings. The cost of assigned counsel is met by the adoptive parents unless they are financially unable, in which event the county will provide for this expense.

Assigned counsel must then confer with the natural parents and offer them guidance as to the options available to them. They must be made aware that, if they so desire, the court will provide them with professional counseling services through private or public agencies such as the Department of Social Services. The assigned counsel and the attorney for the adoptive parents discuss the natural mother's necessary expenditures, and communicate her needs to the court. The court also insists that the natural parents' consent to an adoption be made in court before the surrogate, or another judge authorized to take the necessary consents. Such in-court consent proceedings will not be scheduled before five days after the delivery of the child. When the natural parent or parents appear with counsel,

the court specifically inquires as to the execution of the various documents that have been prepared in the adoption proceeding. The consenting party or parties are asked to reswear to the truth of the facts and allegations set forth in the papers. They are told that by giving their consents before the surrogate, they must realize that they will no longer have anything further to say regarding the child surrendered for adoption. Inquiry is made as to whether the adoption has been fully discussed with counsel, and whether the determination has been made that it is in the best interests of the parents and the child that the adoption go forward. The consenting parent or parents are asked if their consent is voluntary, free from restraint and an act of their own free will and volition. They are given an opportunity to ask the court any questions they might have. They are made aware of their entitlement to information about the adopting parents, such as their identity, religion, ages, wealth, or other desired information, in order to make a considered judgment as to whether the adoption should go forward. In private placement adoptions, the judges, in part, rely on the sworn statements of the natural mother and the adoptive parents, in addition to the representations made by the attorneys and the court's own investigators.

Two separate investigations of prospective adoptive parents are required by the Nassau County Surrogate's Court before an adoption can become final. Before a child is actually placed in an adoptive home, there must be a preplacement investigation. The court has assembled trained social workers whose services are paid for by the adoptive parents to investigate and report on the suitability of the prospective parents and their home. A second investigation is made after the placement, but before the expiration of the six-month waiting period that is required before the court will finalize the adoption.

There has not been a full review of New York adoption laws in more than twenty-five years. There are many gray areas, and a lack of uniformity in practice persists throughout the state. Abuses exist in both private placement and agency adoptions. Ad hoc attempts to rectify the problems which arise have only resulted in patchwork reform. I recommend that the Legislature form a commission to review both private placement and agency adoption proceedings. This commission should be charged both with the establishment of statewide guidelines and the cure of any existing abuses.

As to agency adoptions, in some instances costs have become exorbitant. There should be some review mechanism instituted to insure that all payments are reasonable and necessary. Moreover, by and large the courts have relied on the adoption agencies themselves to

conduct the investigations required prior to finalizing an adoption. Some courts, in certain instances, have found that a few agency investigation reports were untruthful. In one instance, documents containing misleading information were submitted to this surrogate by a licensed New York adoption agency.[2] Procedures to verify agency reports independently are necessary and long overdue.

In the area of private placement adoptions, there is a need for guidelines that clearly delineate the role an attorney should play: guidelines that distinguish between bona fide legal services and those that are really agency in nature. In addition, there should be specific guidelines as to what expenditures should be allowed on behalf of the natural mother: what are appropriate prenatal and post partum expenses for rent, maintenance and support, and reimbursement for possible lost wages. The interim rules that have been established by various courts should be reviewed to determine whether they should be continued or modified until such time as the practices and procedures before the courts are made uniform.

The surrogates and family court judges agree that there is, in many instances, a lack of uniformity in the adoption proceedings, themselves. For example, there is inconsistency regarding whether a transcript should be taken when the consent of the natural parent is given. It is also unclear exactly what should take place at the finalization proceedings: for example, what questions should be asked. If the court permits out-of-court consents in agency adoptions, there are no guidelines as to what statements must be made in these consents. A lack of uniformity also exists in the matter of revocation of consent: a natural parent may revoke consent to a private adoption for forty-five days under Domestic Relations Law 115-b, while under Social Services Law 384(5), the natural parent has only thirty days in which to revoke consent to an agency adoption. Shouldn't these time periods be the same?

The media have riveted our attention on the serious problem of child abuse. There should be statutory changes establishing rules and guidelines which will afford agencies and the courts an expeditious means of obtaining information concerning the criminal records and history of child abusers. Some procedures have already been extended to the courts, but the agencies have not yet been given the statutory authority to obtain this crucial information.

By and large, New York has strict licensing standards for its adoption agencies. Unfortunately, however, some people seeking to

2. *In re* Baby Boy M.G., 135 Misc. 2d 252, 515 N.Y.S.2d 198 (N.Y.Sur.Ct. 1987).

adopt a child, go to out-of-state agencies that are not as closely regulated. New York courts have no control over these agencies and it is extremely difficult to determine whether the fees and expenses they charge are proper. Unlike the cases involving New York agencies, it is also difficult to direct the return of any excessive payments made to these agencies.

Interstate compact rules, such as Social Service Law 374-a[3] in New York, do insure that children leaving one state and being placed for adoption in another state will be properly treated. Unfortunately, in some instances, the compact rules can be avoided by either the parties or the attorneys. Often, a natural mother will bring her child to New York; then she will leave never to be heard from again. The court is then confronted with the dilemma of what to do with the child. Should we permit an adoption to go forward, especially when the adoptive parents have played no role in the attempt to circumvent the compact rules?

There is an even more severe problem when dealing with foreign children brought into this country for adoption. When they are brought here without even the proper proof of surrender by their parents or guardians in their country of origin, should the court permit the adoption to go forward? In an effort to protect these children as well as their natural and adoptive parents, perhaps there should be international treaties or an international compact to avoid these abuses.

Since there is confusion and uncertainty in the area of private placement adoption proceedings, many courts refuse to accept these petitions. Thus, some prospective adoptive parents are forced to endure the agony of not knowing whether a child placed with them will ultimately become theirs through adoption. A legislative commission consisting of judges, practitioners, social workers, agency representatives, and others who are able to contribute their expertise should be created to formulate clear statutory provisions and rules of procedure. We must endeavor to encourage adoption proceedings, both agency and private placement, and seek to insure that they are properly and legally pursued so that the courts' decrees of adoption are not subject to legal attack. We must eliminate the mercenary aspects evidenced by excessive fees. We must be sure that the unwed mother is not exploited. We must be certain that a child offered for adoption

3. N.Y. SOC. SERV. LAW § 374-a (McKinney 1983 & Supp. 1989). New York and 45 other states have enacted the Interstate Compact on the Placement of Children. These laws aim to insure that "states cooperate with each other in the interstate placement of children." *Id.*

is appropriately placed, and not subjected to abuse. It is unfortunate that these matters have not been attended to sooner. We should not delay any further.