

TERMINATION of PARENTAL RIGHTS

A Handbook for proceedings in the
New York Family Court of the State of New York.

**Supreme Court of the State of New York
Appellate Division, First Department
Presiding Justice
FRANCIS T. MURPHY, Jr.**

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1981

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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, FIRST DEPARTMENT
OFFICE OF PROJECTS DEVELOPMENT - 1981

This publication has been prepared without the assistance of the Justices of the Appellate Division, First Department, and does not necessarily reflect the views of either the Court or any Justice thereof.

ACKNOWLEDGEMENTS

This handbook on the substantive and procedural law of termination of parental rights proceedings in the Family Courts was prepared for use in continuing legal education courses. The publication of this text represents the cooperative efforts of many individuals. Some of these must be singled out for special acknowledgment.

We wish first to express our gratitude to Janet Fink, Esq., who provided her invaluable assistance in reading the text and in offering both suggestions for its improvement and additional information to be included. We wish also to thank Michael Neff, Esq., for his assistance in the area of permanent neglect proceedings, easily the most difficult area of law covered in this handbook. A special thanks should go also to James Neely, of the Office of Projects Development, for the special editorial skills he has contributed toward the writing of this text.

We are also indebted to the other members of the staff of the Office of Projects Development of the Appellate Division, First Department, for their labors: Jul Eliot Graham, Esq.; Elizabeth Matti; and Carolyn Varga.

PREFACE

For the one-quarter of New York City's 25,000 foster care children, who cannot be cared for by their biological parents, the only way to secure a permanent, loving environment is through adoption. Yet in New York City, children slated for adoption spend an average of over seven years in foster care before being adopted; it sometimes takes five years for parental rights to be terminated after adoption has been set as the goal.

Many factors contribute to children languishing in foster care: court delays, bureaucratic red tape and the failure of adoption agencies to assign a child a goal of adoption and secure its finalization in a timely manner.

Although the stumbling blocks discouraging adoptions must be eliminated, the significance of permanently terminating the rights of natural parents should not be taken lightly. If a parent's rights are terminated, not only is custody permanently lost, but all rights to access, authority and influence between natural parent and child is forever precluded. In fact, preference for reunification of the biological family is built into the legislation authorizing termination proceedings.

Nonetheless, termination of parental rights is an important and delicate step. These guidelines can help attorneys proceed with the best interest of the children in mind.

CAROL BELLAMY
PRESIDENT OF THE CITY COUNCIL

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TERMINATION OF PARENTAL RIGHTS PROCEEDINGS

I. Introduction

A. Overview

1. The proceedings discussed herein differ from abuse and neglect proceedings in the family courts in one very significant respect:

an abuse and neglect proceeding is an initial vehicle for the removal of the child from its home, whereas in the termination proceeding, the subject child has already been placed in foster care.

Note: Neglect and abuse cases are sometimes brought after a child is already in foster care--eg, in situations where an agency declines to return a voluntarily placed child upon demand by the parent [Social Services Law §384-a(2)(a)]. Thus, neglect and abuse cases are not always the initial vehicle for removal of a child from home. The key difference between termination and child protection cases is more precisely the irrevocable and permanent nature of the determination in the former.

2. Additionally, some of the proceedings to be discussed have as their purpose the establishment of de jure custody in a person or agency other than the natural parent.
 - a. The distinction between de facto and de jure custody is vital. Only a person having de jure custody can consent to permanent transfer of custody to another person.
 - b. An agency having physical (or de facto) custody of the child, absent the parents' surrender of custodial rights, or the involuntary termination thereof, does not have de jure (or legal) custody of the child, and thus may not consent to the adoption of the child.

B. Definitions

1. Authorized agency. SSL §370(10)
 - a. Any agency, association, corporation, institution, society or other organization which is incorporated or organized under the laws of this state to care for, to place out or to board out children, which actually has its place of business or plant in this state and which is approved, visited, inspected and supervised by the department or which shall submit and consent to the approval, visitation, inspection and supervision of the board as to any and all acts in relation to the welfare of children performed or to be performed under this title;

b. Any court or any public welfare official of this state authorized by law to place out or to board out children.

2. Place out. SSL §371(12)

a. To arrange for the free care of a child in a family other than that of the child's parent, step-parent, grandparent, brother, sister, uncle or aunt or legal guardian, for the purpose of adoption or for the legal purpose of providing care. See People v. Scopas, 11 N.Y.2d 120, 227 N.Y.S.2d 5 (1962); In re Adoption of Anonymous, 46 Misc.2d 928, 261 N.Y.S.2d 439 (Fam. Ct. Dutchess Co. 1965).

b. "Place" or "commit" includes replace and recommit.

3. Board out. SSL §371(14)

To arrange for the care of a child in a family, other than that of the child's parent, step-parent, or legal guardian, to whom payment is made or agreed to be made for care and maintenance.

4. Home. SSL §371(15) - includes a family boarding home or a family free home.

5. Agency boarding home. SSL § 371(16).

A family-type home for children and/or for minors operated by an authorized agency, in quarters or premises owned, leased or otherwise under the control of such agency, for the purposes of providing care and maintenance therein for children or minors under the care of such agency.

6. Group home. SSL §371(17)

A facility for the care and maintenance of not less than seven nor more than twelve children, who are at least five years of age, operated by an authorized agency except that such minimum age shall not be applicable to siblings placed in the same facility nor to children whose mother is placed in the same facility.

7. Foster child. SSL §371(19)

Any person in the care, custody or guardianship of an authorized agency, who is placed for temporary or long-term care.

8. Foster parent. SSL §371(19)

Any person with whom a child in the care, custody or guardianship of an authorized agency, is placed for temporary or long-term care.

9. Abandoned child.

- a. A child under the age of 18 years who is abandoned by both parents, or by the parents having its custody, or by another person or persons lawfully charged with its care and/or custody (SSL §371(2)), and in accordance with the definition or other criteria set forth in SSL §371-b(5)(a).
- b. The criteria provide that a child is abandoned by its parent or parents if such parent evinces an intent to forego his or her parental rights and obligations as manifested by his or her failure to visit the child and communicate with the child or agency, although able to do so and not prevented or discouraged from doing so by the agency. In the absence of evidence to the contrary, such ability to visit and to communicate shall be presumed. SSL §384-b(5)(a).

10. Abused child. SSL §§371(4-b)(i), (ii), (iii)

A child less than 18 years of age whose parents or other persons legally responsible for its care:

- a. inflicts or allows to be inflicted upon such child physical injury by other than accidental means which causes or creates a substantial risk of death or serious or protracted disfigurement, or protracted impairment of physical or emotional health or protracted loss or impairment of the function of any bodily organ;

- b. creates or allows to be created a substantial risk of physical injury to such child by other than accidental means which would be likely to cause death or protracted disfigurement, or protracted impairment of physical or emotional health or protracted loss or impairment of the function of any bodily organ;
- c. commits, or allows to be committed, an act of sexual abuse against such child as defined in the penal law.

11. Destitute child. SSL §§371(3)(a), (b), (c), (d)

A child who, through no neglect on the part of its parent, guardian or custodian, is:

- a. destitute or homeless; or
- b. in a state of want or suffering due to lack of sufficient food, clothing, shelter or medical or surgical care; or
- c. a person under the age of 18 years who is absent from his legal residence without the consent of his parent, legal guardian or custodian; or
- d. a person under the age of 18 who is without a place of shelter where supervision and care are available.

12. Neglected child. SSL §§371(4-a)(i)(A), (B); (ii)

A child less than 18 years of age:

- a. whose physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of his parent or other person legally responsible for his care to exercise a minimum degree of care
 - (1) in supplying the child with adequate food, clothing, shelter, education, medical or surgical care, though financially able to do so or offered financial or other reasonable means to do so; or

(2) in providing the child with proper supervision or guardianship by unreasonably inflicting or allowing to be inflicted harm, or a substantial risk thereof, including the infliction of excessive corporal punishment; or by using a drug or drugs; or by using alcoholic beverages to the extent that he loses self-control of his actions; or by any other acts of a similarly serious nature requiring the aid of the court; or

b. who has been abandoned by his parents or other person legally responsible for his care.

13. Permanently neglected child. SSL §384-b(7)(a)

A child who is in the care of an authorized agency and whose parent or custodian has failed for a period of more than one year following the date such child came into the care of an authorized agency substantially and continuously or repeatedly to maintain contact with or plan for the future of the child, although physically and financially able to do so, notwithstanding the agency's diligent efforts to encourage and strengthen the parental relationship when such efforts will not be detrimental to the best interests of the child.

C. Entering foster care

1. In New York City, de facto custody generally is obtained initially by the Commissioner of Social Services. The Commissioner, in turn, may transfer de facto custody of the child in his care to another authorized agency. SSL §398(6)(g)

2. A child may be placed in:

- a. a public institution for children. SSL §371(18);
- b. a group home. SSL §371(17);
- c. an agency boarding home. SSL §371(16);
- d. the care of foster parents. SSL §371(19).

3. Children may come into foster care:

- a. by voluntary surrender of guardianship and custody by the parent, guardian or custodian. SSL §384;
- b. through voluntary transfer of care and custody by the parent, guardian or custodian. SSL §384-a;
- c. as a "destitute child," as defined supra. The Commissioner of Public Welfare (in New York City, the Commissioner of Social Services) is responsible for assuming charge of such children. SSL §398(1);
- d. through involuntary court termination of parental rights and commitment of guardianship and custody to an authorized agency or foster parents. SSL §384-b; FCA Article 6, Part 1 (permanent neglect). Such termination and commitment may be based on the grounds of:
 - (1) death of both parents and lack of lawful guardian;
 - (2) abandonment;
 - (3) mental illness or mental retardation of the parent or parents;
 - (4) permanent neglect;
- e. as neglected or abused children. FCA Article 10. Temporary removal of the child from the child's residence with the consent of the parent or person legally responsible for his care, if the child is neglected or abandoned. FCA §1021

D. Rights of natural parents, generally

1. The natural parents have a superior right to custody, guardianship and care of the child, as against other persons and without state intervention, absent the unfitness of the parents, surrender of the child or other extraordinary circumstances. Matter of Sanjivini K., 47 N.Y.2d 374, 417 N.Y.S.2d 339 (1979).
2. The natural parents have the right to assistance of counsel and of the assignment of counsel if they are indigent, in the following proceedings:

- a. contested adoptions;
 - b. foster care review;
 - c. proceedings for transfer of surrender instrument or instrument transferring care and custody;
 - d. termination of parental rights proceedings. FCA §262
3. If the natural parent is found to be incapable of adequately defending parental rights, then that parent has the right to have a guardian ad litem appointed to represent the natural parent. In re Carmen G. F., 63 A.D.2d 651, 404 N.Y.S.2d 381 (2nd Dept. 1978); see also CPLR §§321(a), 1201.

E. Rights of putative fathers, generally

- 1. Right to notice of proceedings. Caban v. Mohammed, 441 U.S. 380, 99 S.Ct. 1760, 60 L.Ed.2d 297 (1979).
- 2. Right to the opportunity to be heard as to the child's best interests. DRL §111-a; SSL §384-c; see Stanley v. Illinois, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972); Caban v. Mohammed, supra.

F. Rights of foster parents, generally

- 1. Foster care is generally intended to be temporary in nature. In most circumstances, where the agency has de facto custody of the child, it is mandated to make diligent efforts to strengthen the parent-child relationship. See FCA §§1055(a), 614(1)(c); SSL §384-b(7)(a).
- 2. In recent years, foster parents have obtained certain rights with respect to the children in their care:
 - a. They are entitled to written notice of an agency's intention to remove the child from their home;
 - b. Where the foster parents object to such removal, they are entitled to an agency conference or an independent review. They may appeal an adverse decision in a state "fair hearing," under SSL §§22, 400, or they may further challenge by an Article 78 proceeding. See, e.g., Alan D.M. v. Nassau County Department of Social Services, 58 A.D.2d 111, 395 N.Y.S.2d 666 (2d Dept. 1977).

- c. See also Smith v. O.F.F.E.R., 431 U.S. 816, 97 S.Ct. 2094, 53 L.Ed.2d 14 (1977); Ramos v. Little Flower Children's Services, N.Y. Law Journal, April 1, 1980 (Sup.Ct. Suffolk Co. (1980)).
- d. They are entitled to preference for adoption where they have cared for the child continuously for two or more years. SSL §383(3).
- e. They are entitled to intervene as of right in certain proceedings under given circumstances. SSL §§392, 383(3), 384(3); see also In re J., 74 Misc.2d 254, 343 N.Y.S.2d 679 (Fam. Ct. Queens Co. 1973).
- f. They are entitled to intervene, at the court's discretion, in appropriate cases. See, e.g., C.F. Curtis v. Ballou, 33 A.D.2d 1034, 308 N.Y.S.2d 770 (2d Dept. 1970); Teeter v. Pruiksma, 47 A.D.2d 101, 364 N.Y.S.2d 656 (4th Dept. 1975), appeal dismissed, 375 N.Y.S.2d 1031; In re Laura Ann, 82 Misc.2d 776, 371 N.Y.S.2d 591 (Fam. Ct. Rockland Co. 1975).
- g. They are entitled to testify as to other conditions of the children in foster care review proceedings. In re Padilla v. Flaherty, 74 A.D.2d 528, 425 N.Y.S.2d 21 (1st Dept. 1980).

II. Proceedings for judicial approval surrender instruments. SSL §358-a

A. Introduction

1. S.S.L. §358-a hearings are held regarding temporary transfer instruments as well as permanent surrender instruments to that §358-a proceedings are most often not a type of permanent termination proceeding.
2. The aid to dependent children provisions of the Social Security Act do not provide for reimbursement to the states for the costs of providing foster care for children who have been temporarily placed or permanently surrendered by voluntarily-executed out-of-court instruments. SSL §358-a was thus passed to require that within 30 days after the receipt by the Commissioner of Social Services of such voluntarily-placed children, the Commissioner must petition the family court to make a determination that continued placement of the child is in the child's best interests, and that it would be

contrary to the welfare of the child to return him to his biologic home. By the entry of such an order, the child becomes a court-placed child and thus the state qualifies for federal reimbursement.

3. The court is asked to approve an instrument executed by the parent pursuant to SSL §§384 or 384-a.
 - a. A SSL §384 instrument is a surrender of all rights of guardianship and custody of the children to an "authorized agency." The instrument vests in the agency the sole right to consent to adoption of the child, and forever terminates the previously-existing parent-child relationship. The surrender provides legal custody to the Commissioner of Social Services, who then signs a transfer of custody to the authorized agency, which can then consent to the adoption.
 - b. A SSL §384-a agency instrument is a temporary "transfer of care and custody" of children to an authorized agency.
 - c. No court proceeding under either SSL §384 or 384-b is required for the surrender to be valid.
 - d. Where federal funding is not sought, a proceeding in family court or surrogate's court is available to approve surrender under SSL §384(4).
4. SSL §358-a(1) mandates that the Commissioner shall originate such a proceeding. The statute does not provide for any other persons being permitted to initiate the proceeding upon failure of the Commissioner to do so.
5. SSL §358-a(4) provides that notice of the petition be given, in such manner as the family court may direct, to the parents or guardian of the child who executed the placement instrument.
 - a. Prevailing practice has been to have a parent execute a waiver of the SSL §358-a hearing and notice at the same time that an authorization for the child's placement is accepted.
 - b. SSL §358-a(5) provides, however, that the waiver of the hearing and notice is not to be given effect unless it is contained in an instrument separate from the placement instrument.

- c. Under SSL §§358-a(4) and (5), the family court judge retains the discretion to disregard an executed waiver and to direct that notice be given to the parent who has executed the placement instrument.

B. Preliminary procedures

1. The petition is filed by a local social services official. SSL §358-a(1)
 - a. In New York City, petitions to be filed in the family court are heard at the New York County family court.
 - b. The petition must be filed within 30 days after the removal of the child from its home.
 - c. Laches is not grounds for dismissal of the petition.
2. Contents of the petition. SSL §358-a(2)
 - a. There must be allegations which support the fact that the parent who executed the instrument is unable to make adequate provision for the care, maintenance and supervision of the child in the home.
 - b. The names and addresses of all persons to whom notice of the proceedings must be given shall be provided.
 - c. The petition must have the request for a temporary order transferring the care and custody of the child to the social service official, pending the hearing.
 - d. For requirements as to form, content and execution of the instrument, see SSL §358-a(4), or §§384-a(2b), (2c), (3), (4).
3. Service of notice of the proceedings and a copy of the petition is to be made on such persons and in such manner as the court directs. SSL §358-a.
 - a. The court in its discretion may dispense with notice to the executing parent if the instrument under SSL §384 contains a waiver. But see supra, re waivers of notice.

- b. The court may not honor a waiver contained in a SSL §384-a instrument, including waiver of notice.
- c. A non-executing parent or guardian must receive notice.

Note: But see SSL §384(1)(b) concerning a parent who has abandoned the child.

d. Notice to putative fathers. SSL §384-c

- (1) SSL §384-c contains no requirement that the putative father sign the instrument of surrender if such father's consent would be required for the child's adoption.
- (2) Under SSL §384(1)(b) there is no requirement of notice to a parent who has abandoned the child for a period of 6 months next preceding the execution of the instrument.
- (3) The statutory rights of unwed fathers have been altered by the Supreme Court of the United States in Caban v. Mohammed, supra, where the Court declared Domestic Relations Law §111(c) unconstitutional, insofar as it held the consent of the natural father was not required for adoption of the child. The original §111(c) had provided that the unwed biological mother could veto an adoption, but that an unwed father could not. The Court held that this section was unconstitutional, since it discriminated against the unwed biological father.

- e. In a proceeding to approve a SSL §384 surrender, the foster parents in whose home the child has been placed for adoption are entitled to notice, and foster parents who have had the child for 24 months are entitled to intervene if a parent seeks to set aside the surrender. SSL §384(3)

4. Assignment of counsel

- a. The parent, foster parent or other person having physical or legal custody of the child, is entitled to assigned counsel if financially unable to retain private counsel. FCA §262(a)(iv)

- b. The non-custodial parent is probably entitled to assigned counsel if financially unable to retain private counsel.
 - c. The child is entitled, at the discretion of the court, to assignment of a law guardian if a hearing is to be held. SSL §358-a(6); FCA §249(a). See also Matter of Orlando F., 40 N.Y.2d 103, 386 N.Y.S.2d 64 (1976) (mandatory right to counsel at the ultimate termination of parental rights proceeding).
5. Preparation by counsel for the hearing. Counsel should:
- a. obtain a copy of the petition and the surrender or "transfer of care and custody" instrument for review.
 - b. interview the clients.

Note: The client in a SSL §384-a transfer is entitled to a copy of the instrument upon execution. SSL §384-a(5)

- c. determine if the client had the mental capacity to understand the effect of signing the surrender instrument. In In re Adoption of E.A.V., 86 Misc.2d 1079, 383 N.Y.S.2d 507 (Sur. Ct. Bronx Co. 1976), the surrender instrument was held to be valid even though the mother's condition was diagnosed as paranoid schizophrenic. The court reviewed an affidavit submitted by the attorney for the mother and the complete hospital record. The court noted:

"In the instant case, it appears that the natural mother had substantial periods of lucidity in which she completely understood her circumstances. The record reflects a clear understanding of the difficulties of raising her child in view of her condition and marital status and a desire to relieve herself of this responsibility while she coped with her other problems.

The court is satisfied that, at the time of execution of the petition, the natural mother, represented by counsel, voluntarily surrendered any right to the infant and accordingly is not a party necessary to the instant proceedings."

- d. consider requesting independent psychiatric and/or psychological examinations of all parties, pursuant to County Law §722-c.