

THIS WAS NOT THE OUTCOME EXPECTED
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Outcomes in adoption matters are just like life, regardless of the care, preventative measures and good intentions, the outcome may not be what was expected. This article shall address some of the issues which may either cause the adoption to unravel, or disrupt, and how to best address them.

Rights of Biological Parents and Adoptive Parents

Until the biological¹ parents' rights are properly terminated, either voluntarily, or by judicial decree, the prospective adoptors² have no rights to the child, nor the right to make decisions on behalf of the child, mother or father. It is irrelevant that the mother and/or the father may have decided to make an adoption plan, and even chosen prospective adoptors prior to the time when their rights are to be terminated.

Unless and until a father's name appears upon the child's birth certificate, all decisions are deemed to be made by the mother. The law recognizes her as having sole legal and physical custody of the child. M.G.L. Ch. 209C §2. Massachusetts makes no provision for a pre-birth surrender. Moreover, the rights of the parents may not be terminated until four calendar days after birth. M.G.L. Ch. 210 §2.

¹ Another party to the adoptive triad may be the legal father to child. If the mother was married at the time of birth, her lawful husband in the legal father, and his rights, in Massachusetts take precedence over the biological father, and any alleged father.

² For simplicity sake, the term prospective adoptors shall refer to any single, married, or couples in a significant relationship, seeking to adopt.

Prospective adoptors must be cautioned to assume nothing until after the birth of the child, and the mother has entered into an adoption plan with the agency, who will then have the authority to place the child with them. Until such time, the expectant mother³ and if involved, the expectant father must be given the utmost respect and deference to all of their decisions. Examples would include, an agreement that the prospective adoptors agreed that the prospective adoptors may be present during labor, and/or delivery. Expectant mother may change her mind, at any point. The best practice is to allow the expectant mother privacy. The quickest way to alienate an expectant/birth mother is to attempt to ignore that she gave birth to the child, this is her child until she determines otherwise, overrule a decision, or make decisions unilaterally. Likewise, similar behavior may also provoke the father.

Clearly, until or unless the father of the child establishes his paternity, absent mother's assent, the father has no rights which will allow him to play a part in any decision making. However, unless it is clearly inappropriate to involve father because of a history of abuse and/or violent crime, father should be encouraged to participate.

The more involved both parents are in making the plan for adoption for the child, the more secure and better the placement. In such circumstances pertinent information may be exchanged with the prospective adoptors, and perhaps the establishment of some form of post adoption contact. M.G.L. Ch. 210 §6C. The purpose of post adoption contact is for the *benefit of the child*, not as an enticement to the parents to surrender the child for adoption.

³ It is this author's opinion that the terms birth mother and birth father are inappropriate, until after the birth of the child and the plan for adoption is in process. Until the mother gives birth, and her plan for the child is adoption, she is NOT a birth mother. Likewise, for the father, if he is participating in the plan. Until such time, as with all pregnancies, the mother and father are expectant parents.

Proving a Parent is Unfit in Contested Adoptions

Birth Father's Challenge to the Adoption

For a child to be free for adoption, parental rights of both parents must be terminated. M.G.L. Ch. 210 §2; §3. Should a birth mother and/or birth father not consent to the adoption, if, either the Department of Children and Families or the licensed private adoption agency having custody of the child believe it is in the best interest of the child to be adopted, a Petition to Dispense with Parental Consent is filed with either the Juvenile Court or the Probate and Family Court ("Court"). M.G.L. Ch. 210 §2; M.G.L. Ch. 119 §24. The Court must determine whether the best interests of the child will be served by granting the petition for adoption, without parental consent. M.G.L. Ch. 210 §3.

M.G.L. Ch. 210 §3 and M.G.L. Ch. 119 §24, are the controlling statutes. M.G.L. Ch. 119 §24 refers to M.G.L. Ch. 210 §3,⁴ for the standard to determine whether granting the Petition to Dispense with Parental Consent, or an Adoption Petition, without parental consent.

M.G.L. Ch. 210 §3 is set out in the Appendix. The standard of proof is by clear and convincing evidence. The seminal case being *Stantosky v. Kramer*, 455 U.S. 745 (1982).

Although M.G.L. Ch. 210 §3 (c) "...the court shall consider the ability, capacity, fitness and readiness of the child's parents ..." the courts have focused on parental unfitness or unwillingness to assume parental responsibility. *Petition of the Department of Social Services to Dispense with Consent to the Adoption*, 389 Mass. 793, 452 N.E.2d 497 (1983). Logically, if the

⁴ M.G.L. Ch. 210 §3, attached in Appendix.

parent lacked the ability and capacity and readiness to parent the child, hence the parent would be unfit.

A few of the factors, in and of themselves constitute grounds for dispensing with consent; namely, abandonment; conviction of murder or voluntary manslaughter or an assault constituting a felony which resulted in serious bodily injury to the child or another child of the parent. M.G.L. Ch. 210 §3(c).

Although the burden of proof lies with the petitioner, the respondent must be just as astute in proving their fitness. Courts need more than the facts of the case, to ensure the reasoning of the court was based upon the evidence presented in the event the judgment is appealed. The best evidence presented is from a qualified expert. Experts are essential in determining such factors under the statute as:

- Because of the lengthy absence of the parent, or the parent's inability to meet the needs of the child, the child has formed a strong, positive bond with his substitute caretaker, the bond has existed for a substantial portion of the child's life, the forced removal of the child from the caretaker would likely cause serious psychological harm to the child and the parent lacks the capacity to meet the special needs of the child upon removal. M.G.L. Ch. 210 §3(c) (vii).
- Whether there has been a willful failure to visit the child. M.G.L. Ch. 210 §3(c) (x).
- Whether a condition is reasonably likely to continue for a prolonged, indeterminate period and the condition makes the parent or other person whose consent is required,

unlikely to provide minimally acceptable care of the child. M.G.L. Ch. 210 §3(c)
(xii).

There are also instances where a birth mother who has executed an adoption surrender may seek to revoke her surrender. This is an extremely formidable task for several basic reasons, but not insurmountable. Such grounds may be mistake of law, fraud, duress, undue influence, lack of capacity, or impropriety on the face of the surrender, or in the execution of the surrender,

If the court determines parental consent is not needed, because the parent has been found unfit, the court must still determine whether the plan proposed is in the best interests of the child.

Should the birth parent succeed in having the surrender revoked on any of the grounds as set out above that does not preclude the prospective adoptors from filing a Petition for Adoption. M.G.L. Ch. 210 §1. The burden is then on the Petitioners, now the prospective adoptors to prove the parent's unfitness by clear and convincing evidence.

Tackling Third Party Challengers

As stated above, in accordance with M.G.L. Ch. 210 §1, any person of full age, may petition the court for leave to adopt as his child another person younger than himself. However, there are some statutory exceptions. The person to be adopted may not be the husband or wife, or brother, sister, uncle or aunt, of the whole or half blood of the petitioner. M.G.L. Ch. 210 §1. In a third party challenge, the focus is then on whether the petitioners have the ability, capacity, fitness and readiness to assume parental responsibilities. M.G.L. Ch. 210 §3(c). Each factor for determining

fitness would apply, and in making that determination, should there be no issue of fitness of any of the competing petitioners, the court would have to weigh heavily each petitioner's plan for the child to determine which is truly in the child's best interests, and how that comports with the child's health and safety. M.G.L. Ch. 210 §3(c).

Often times, if appropriate, the competing petitioners may enter into a co-guardianship agreement, or an Agreement for Post-Adoption Contact or Communication, ("Agreement") in accordance with M.G.L. Ch. 210 §6C; D & E. One caveat: parties should enter into post adoption contact, *only* if it is truly in the child's best interest; with the implication that there is an established relationship between the child and the parties to the agreement; a meaningful one, that, should contact or communication be halted or disturbed, it would be harmful for the child. M.G.L. Ch. 210 §6C; D & E may have originally been implemented to appease birth parents as an offering in settlement. Nevertheless, the Agreement is NOT for the parents, but for the child. If all parties cannot approach the terms of the Agreement from a child-centered perspective, it will fail.

Procedures for Dissolution of Adoption

Unfortunately, there are times when the placement and finalization of a child for adoption fails because of a variety of reasons. Often times, the child may be extremely disruptive, destructive, and a harm to himself and/or members of the family. In such cases, the best course of action is to contact the agency that assisted in the placement of the child. Additionally social services agencies may have resources as well. The best result is finding a family who has the ability to assist this child, and is willing to take on the responsibility.

Should a suitable family be found, the process is basically the same as in any adoption. The prospective adoptors should have a home study, geared to their parenting a child with specific special needs. The agency conducting the home study must ensure that the family has the capacity to serve the needs of this child well. It is critical that there be full disclosure of all health related risks. It is very beneficial that the child and prospective adoptors spend significant time together, at different time intervals so the prospective adoptors can assess as best as possible their ability to parent the child, and set into place various resources to assist them.

If this is an interstate placement, there must be compliance with the Interstate Compact on the Placement of Children (“ICPC”) and; it is wise to check with the receiving state on what additional documentation, if any, will be required to approve the placement. Furthermore, another critical element will be who will take financial responsibility should the adoption disrupt. Massachusetts will not allow either the parents or the prospective adoptors to do so. Massachusetts prefers either the agency or attorney of the sending state to sign the ICPC 100A. The reasoning is clear: Massachusetts does not want to be responsible for a child from another state; in such high risk circumstances that another disruption may occur.

Withdrawal of Consent

Should a birth parent seek to withdraw consent, according to Massachusetts case law, she/he may only do so, with the permission of a Probate and Family Court Judge. *In re Surrender of Minor Children*, 344 Mass. 230 (Mass. 1962).⁵ In doing so, the birth parent must file a Petition to Revoke Surrender, and establish that there was procedural impropriety on the face of the

⁵ Nevertheless, there have been rare and extreme circumstances when the agency who took the surrender may determine it is in the best interests of the child for mother’s surrender to be revoked, prior to any court intervention.

surrender; in the execution of the surrender; the execution of the surrender was conditional; or fraud, undue influence, mistake of law, or incapacity which prevented her/ him from understanding and voluntarily, and unconditionally, signing the surrender, thereby making it void. M.G.L. Ch. 210 §2.

It is critical at this point, if the child has been placed with a family, for the agency to make an assessment and determine whether the child should be removed from the home, and placed in temporary foster care. The assessment is based upon the likelihood of success on the merits, and whether keeping the child in the current placement is in the best interests of the child.

To Appeal, or Not To Appeal

The first step in handling any appeal is to file the notice of appeal timely. The notice of appeal must be filed within 30 days from the date of the date of the entry of the judgment, with the clerk for the lower court. Mass. R.A.P. 3, 4.

Once the notice of appeal has been filed, in addition to complying with the other applicable rules of appellate procedure, Mass. R.A.P., a determination must be made as to whether there will truly be any likelihood of success on the merits. To prevail on appeal, the appellant must demonstrate the judge abused his/her discretion, made an error, or was wrong as a matter of law.

In adoption matters, as in all child custody cases, the filing of the appeal does not stay the judgment. Absent the allowance of a stay, a court may act on the basis of a decree dispensing with consent to adoption. M.G.L. Ch. 210 §2A; §3. There is no right of an automatic stay of the

order dispensing with the need for consent. *Adoption of Duval*, 46 Mass. App. Ct. 916, 706 N.E.2d.312 (1999). Because Petitions Dispensing with Consent are grounded in custody and there is no automatic stay, Mass. R. Dom. Rel. P. 62(g) (ii), the Appellant must demonstrate to the Appeals Court, irreparable harm, should the stay not be allowed, and a likelihood of success on the merits.

Appendix



PART II REAL AND PERSONAL PROPERTY AND DOMESTIC RELATIONS
(Chapters 183 through 210)

TITLE III DOMESTIC RELATIONS

CHAPTER 210 ADOPTION OF CHILDREN AND CHANGE OF NAMES

Section 3 Dispensing with required consent in certain cases

Section 3. (a) Whenever a petition for adoption is filed by a person having the care or custody of a child, the consent of the persons named in section 2, other than that of the child, shall not be required if:— (i) the person to be adopted is 18 years of age or older; or (ii) the court hearing the petition finds that the allowance of the petition is in the best interests of the child pursuant to paragraph (c).

(b) The department of children and families or a licensed child care agency may commence a proceeding, independent of a petition for adoption, in the probate court in Suffolk county or in any other county in which the department or agency maintains an office, to dispense with the need for consent of any person named in section 2 to adoption of the child in the care or custody of the department or agency. Notice of such proceeding shall be given to such person in a manner prescribed by the court. The court shall appoint counsel to represent the child in the proceeding unless the petition is not contested by any party. The court shall issue a decree dispensing with the need for consent or notice of any petition for adoption, custody, guardianship or other disposition of the child named therein, if it finds that the best interests of the child as provided in paragraph (c) will be served by the decree. Pending a hearing on the merits of a petition filed under this paragraph, temporary custody may be awarded to the petitioner. The entry of such decree shall have the effect of terminating the rights of a person named therein to receive notice of or to consent to any legal proceeding affecting the custody, guardianship, adoption or other disposition of the child named therein. The department shall provide notice of the hearing on the merits to any foster parent, pre-adoptive parent or relative providing care for the child informing the foster parent, pre-adoptive parent or relative of his right to attend the hearing and be heard. The provisions of this paragraph shall not be construed to require that a foster parent, pre-adoptive parent or relative be made a party to the proceeding.

A petition brought pursuant to this paragraph may be filed and a decree entered notwithstanding the pendency of a petition brought under chapter 119 or chapter 201 regarding the same child. The chief justice for administration and management of the trial court may, pursuant to the provisions of section 9 of chapter 211B, assign a justice from any department of the trial court to sit as a justice in any other department or departments of the trial court and hear simultaneously a petition filed under this paragraph and any other pending case or cases involving custody or adoption of the same child. A temporary or permanent custody decree shall not be a requirement to the filing of such petition.

A juvenile court or a district court shall enter a decree dispensing with the need for consent of any person named in section 2 to the adoption of a child named in a petition filed pursuant to section 24 of chapter 119 in such court upon a finding that such child is in need of care and protection pursuant to section 26 of said chapter 119 and that the best interests of the child as defined in paragraph (c) will be served by such decree. The entry of such decree shall have the effect of terminating the rights of a person named therein to receive notice of or to consent to any legal proceeding affecting the custody, guardianship, adoption or other disposition of the child named therein. Facts may be set forth either in the care and protection petition filed pursuant to said section 24 of said chapter 119 or upon a motion made in the course of a care and protection proceeding, alleging that the allowance of the petition or motion is in the best interests of the child.

The department of children and families shall file a petition or, in the alternative, a motion to amend a petition pending pursuant to section 26 of chapter 119 to dispense with parental consent to adoption, custody, guardianship or other disposition of the child under the following circumstances: (i) the child has been abandoned; (ii) the parent has been convicted by a court of competent jurisdiction of the murder or voluntary manslaughter of another child of such parent, of aiding, abetting, attempting, conspiring or soliciting to commit such murder or voluntary manslaughter or of any assault constituting a felony which results in serious bodily injury to the child or to another child of the parent; or (iii) the child has been in foster care in the custody of the commonwealth for 15 of the immediately preceding 22 months. For the purposes of this paragraph, a child shall be considered to have entered foster care on the earlier of: (a) the date of the first judicial finding, pursuant to section 24 or section 26 of chapter 119, that the child has been subjected to abuse or neglect; or (b) the date that is 60 days after the date on which the child is removed from the home. For the purposes of this paragraph, "serious bodily injury" shall mean bodily

injury which involves a substantial risk of death, extreme physical pain, protracted and obvious disfigurement or protracted loss or impairment of the function of a bodily member, organ or mental faculty.

The department shall concurrently identify, recruit, process and approve a qualified family for adoption.

The department need not file a motion or petition to dispense with parental consent to the adoption, custody, guardianship or other disposition of the child, or, where the child is the subject of a pending petition pursuant to section 26 of chapter 119, a motion to amend the petition to dispense with parental consent to the adoption, custody, guardianship or other disposition of the child, if the child is being cared for by a relative or the department has documented in the case plan a compelling reason for determining that such a petition would not be in the best interests of the child or that the family of the child has not been provided, consistent with the time period in the case plan, such services as the department deems necessary for the safe return of the child to the child's home if reasonable efforts as set forth in section 29C of said chapter 119 are required to be made with respect to the child.

(c) In determining whether the best interests of the child will be served by granting a petition for adoption without requiring certain consent as permitted under paragraph (a), the court shall consider the ability, capacity, fitness and readiness of the child's parents or other person named in section 2 to assume parental responsibility and shall also consider the ability, capacity, fitness and readiness of the petitioners under said paragraph (a) to assume such responsibilities. In making the determination, the health and safety of the child shall be of paramount, but not exclusive, concern.

In determining whether the best interests of the child will be served by issuing a decree dispensing with the need for consent as permitted under paragraph (b), the court shall consider the ability, capacity, fitness and readiness of the child's parents or other person named in section 2 to assume parental responsibility, and shall also consider the plan proposed by the department or other agency initiating the petition. In making the determination, the health and safety of the child shall be of paramount, but not exclusive, concern.

In considering the fitness of the child's parent or other person named in section 2, the court shall consider, without limitation, the following factors:

(i) the child has been abandoned;

(ii) the child or another member of the immediate family of the child has been abused or neglected as a result of the acts or omissions of one or both parents, the parents were offered or received services intended to correct the circumstances which led to the abuse or neglect and refused, or were unable to utilize such services on a regular and consistent basis so that a substantial danger of abuse or neglect continues to exist, or have utilized such services on a regular and consistent basis without effectuating a substantial and material or permanent change in the circumstances which led to the abuse or neglect;

(iii) a court of competent jurisdiction has transferred custody of the child from the child's parents to the department, the placement has lasted for at least six months and the parents have not maintained significant and meaningful contact with the child during the previous six months nor have they, on a regular and consistent basis, accepted or productively utilized services intended to correct the circumstances;

(iv) the child is four years of age or older, a court of competent jurisdiction has transferred custody of the child from the child's parents to the department and custody has remained with the department for at least 12 of the immediately preceding 15 months and the child cannot be returned to the custody of the parents at the end of such 15-month period; provided, however, that the parents were offered or received services intended to correct the circumstances and refused or were unable to utilize such services on a regular and consistent basis;

(v) the child is younger than four years of age, a court of competent jurisdiction has transferred custody of the child from the child's parents to the department and custody has remained with the department for at least 6 of the immediately preceding 12 months and the child cannot be returned to the custody of the parents at the end of such 12-month period; provided, however, that the parents were offered or received services intended to correct the circumstances and refused or were unable to utilize such services on a regular and consistent basis;

(vi) the parent, without excuse, fails to provide proper care or custody for the child and there is a reasonable expectation that the parent will not be able to provide proper care or custody within a reasonable time considering the age of the child provided that the parents were offered or received services intended to correct the circumstances and refused or were unable to utilize such services on a regular and consistent basis;

- (vii) because of the lengthy absence of the parent or the parent's inability to meet the needs of the child, the child has formed a strong, positive bond with his substitute caretaker, the bond has existed for a substantial portion of the child's life, the forced removal of the child from the caretaker would likely cause serious psychological harm to the child and the parent lacks the capacity to meet the special needs of the child upon removal;
- (viii) a lack of effort by a parent or other person named in section 2 to remedy conditions which create a risk of harm due to abuse or neglect of the child;
- (ix) severe or repetitive conduct of a physically, emotionally or sexually abusive or neglectful nature toward the child or toward another child in the home;
- (x) the willful failure to visit the child where the child is not in the custody of the parent or other person named in section 2;
- (xi) the willful failure to support the child where the child is not in the custody of the parent or other person named in section 2. Failure to support shall mean that the parent or other person has failed to make a material contribution to the child's care when the contribution has been requested by the department or ordered by the court;
- (xii) a condition which is reasonably likely to continue for a prolonged, indeterminate period, such as alcohol or drug addiction, mental deficiency or mental illness, and the condition makes the parent or other person named in section 2 unlikely to provide minimally acceptable care of the child;
- (xiii) the conviction of a parent or other person named in section 2 of a felony that the court finds is of such a nature that the child will be deprived of a stable home for a period of years. Incarceration in and of itself shall not be grounds for termination of parental rights; or
- (xiv) whether or not there has been a prior pattern of parental neglect or misconduct or an assault constituting a felony which resulted in serious bodily injury to the child and a likelihood of future harm to the child based on such prior pattern or assault.

For the purposes of this section "abandoned" shall mean being left without any provision for support and without any person responsible to maintain care, custody and control because the whereabouts of the person responsible therefor is unknown and reasonable efforts to locate the person have been unsuccessful. A brief and temporary absence from the home without intent to abandon the child shall not constitute abandonment.

Hearings on petitions to dispense with consent to adoption that allege that a child has been abandoned shall be scheduled and heard on an expedited basis. Notwithstanding the foregoing, the following circumstances shall constitute grounds for dispensing with the need for consent to adoption, custody, guardianship or other disposition of the child: (i) the child has been abandoned; (ii) the parent has been convicted by a court of competent jurisdiction of the murder or voluntary manslaughter of another child of such parent, of aiding, abetting, attempting, conspiring or soliciting to commit such murder or voluntary manslaughter or of an assault constituting a felony which resulted in serious bodily injury to the child or to another child of the parent. For the purposes of this section, "serious bodily injury" shall mean bodily injury which involves a substantial risk of death, extreme physical pain, protracted and obvious disfigurement or protracted loss or impairment of the function of a bodily member, organ or mental faculty.

(d) Nothing in this section shall be construed to prohibit the petitioner and a birth parent from entering into an agreement for post-termination contact or communication. The court issuing the termination decree under this section shall have jurisdiction to resolve matters concerning the agreement. Such agreement shall become null and void upon the entry of an adoption or guardianship decree.

Notwithstanding the existence of any agreement for post-termination or post-adoption contact or communication, the decree entered under this section shall be final.

Nothing in this section shall be construed to prohibit a birth parent who has entered into a post-termination agreement from entering into an agreement for post-adoption contact or communication pursuant to section 6C once an adoptive family has been identified.