

DYFS and Adoption Practice

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This article is designed to provide a brief overview of how children may become freed for adoption when New Jersey's child welfare agency, the Division of Youth and Family Services (DYFS), is involved. Child welfare law continues to be an evolving area of the law. In 2010, the Appellate Division published 17 Decisions involving Title 9 and Title 30 litigation. These cases are all very fact sensitive. This article takes no position on the various arguments presented in Title 9/Title 30 cases and is being presented for informational purposes only.

To understand how adoption occurs when DYFS is involved, one must first understand the two statutes which govern DYFS, namely, Title 9 (found at N.J.S.A. 9:6-8.21 to 185) and Title 30 (found at N.J.S.A. 30:4C-1 to 40). DYFS's statutory mission is to protect the health and welfare of the children of this state.¹ It does so under the rubric of these two statutes.

Title 9 covers the adjudication of child-abuse and neglect cases. If abuse or neglect of a child is alleged, the Court is authorized to place the child in a safe haven for an initial period not to exceed eighteen months.²

Subsequently, if the Court makes a finding that the alleged child abuse or neglect occurred, a provision of Title 9 permits approved agencies to file a Complaint in the Superior Court seeking to terminate parental rights pursuant to Title 30.³ A provision within Title 30 authorizes DYFS not only to receive and investigate complaints of child abuse or neglect but also, if necessary, to apply for temporary custody of such children.⁴ Under Title 30, DYFS may seek to take children from their parents permanently, terminate the parents' parental rights, and arrange for the adoption or permanent placement of the children.

The overlapping of Titles 9 and 30 causes occasional confusion. Termination of parental rights can occur without child abuse and neglect.⁵ The burdens of proof and the remedies available are different under the statutes.⁶ The statutes are to be read together because both statutes involve abused or neglected children.⁷ The confusion has led the Appellate Court to suggest coalescing the two statutes into one.⁸ The Court, however, has recently clarified the different focus of the two statutes. Under Title 9, the trial court should examine whether the parent has failed to perform his parental functions. Conversely, under Title 30, the court should concentrate on whether the

child was harmed by the parent or is likely to continue to be harmed by the parent.⁹

In New Jersey, there can be no adoption of a child without a valid termination of parental rights.¹⁰ Termination of parental rights is most often sought by the Division of Youth and Family Services (DYFS); however, private actions for termination of parental rights are authorized by statute if a parent is convicted of various crimes. Though DYFS is most commonly the plaintiff seeking to terminate parental rights, a petition for guardianship may be filed by any person, association or agency interested in a child¹¹. Involuntary termination of parental rights decisions often occur in an adoption context where a proposed adoptive parent seeks to terminate the parental rights of the natural parent to allow the proposed adoptive parent to adopt the child.¹²

Both of these mechanisms for obtaining the termination of parental rights are involuntary. However, a parent may, in certain circumstances, voluntarily terminate his or her parental rights. This would be accomplished by executing either a General Surrender or an Identified Surrender (i.e., to a chosen individual).¹³ Under Title 30, DYFS "after due investigation and consideration, may, in cases where it would be to the permanent advantage of the child,

take voluntary surrenders and releases of custody and consents to adoption from the parent, parents, guardians or other persons or agencies having the right or authority to give such surrenders, releases or consents.”¹⁴ The natural parents must give consent freely and voluntarily with a present resolution to abandon their parental rights.¹⁵ The consent generally becomes irrevocable and binding, absent fraud or some overriding equitable consideration.¹⁶ Each surrender is valid whether or not the person giving consent is a minor, and must be made before a notary.¹⁷

Under Title 9, an approved agency may take a voluntary surrender of custody of a child from a parent by order of a Court of competent jurisdiction.¹⁸ Each such surrender is valid whether or not the person giving consent is a minor.¹⁹ Consent is irrevocable, except at the discretion of the approved agency taking the surrender, or in the event a Court sets aside the surrender upon proof of fraud, duress or misrepresentation.²⁰

The appropriate vehicle to vacate a judgment terminating parental rights is R. 4:50-1.²¹ With R. 4:50-1 motions, the need to achieve equity and justice is balanced against the state’s legitimate interest in the finality of judgments.²² However, in termination cases, there are additional concerns for the permanency and stability of the

child. Thus, the Court has established a two-prong test to succeed at setting aside a judgment terminating parental rights. First, the motion must be supported by evidence of changed circumstances, and the moving party bears the burden of proving that events have occurred subsequent to the entry of a judgment to justify vacating the judgment.²³ Second, the movant must demonstrate that setting aside the judgment is in the best interests of the child.²⁴

Only where the child is to be adopted may a parent voluntarily terminate her parental rights.²⁵ For instance, parties to a divorce Agreement may not trade off the termination of parental rights for the non-payment of child support.²⁶ A surrender enables an approved agency to terminate parental rights for the purposes of adoption.²⁷ Surrenders are not valid if executed before the birth of the child or within 72 hours of the birth.²⁸

When DYFS is involved, statutory authority for guardianship differs from those less frequent occasions when a private citizen seeks guardianship of a child.²⁹ However, no matter who files the action, the standard for terminating parental rights are relatively the same. DYFS is required to file a petition to terminate parental rights on the grounds of the "best interests of the child" when the following standards are met:

(1) The child's safety, health or development has been or will continue to be endangered by the parental relationship;

(2) The parent is unwilling or unable to eliminate the harm facing the child or is unable or unwilling to provide a safe and stable home for the child and the delay of permanent placement will add to the harm. Such harm may include evidence that separating the child from his resource family parents would cause serious and enduring emotional or psychological harm to the child;

(3) The division has made reasonable efforts to provide services to help the parent correct the circumstances which led to the child's placement outside the home and the court has considered alternatives to termination of parental rights; and

(4) Termination of parental rights will not do more harm than good³⁰.

This four-prong test must be met by clear and convincing evidence.³¹ Typically, DYFS litigates against the parent allegations of abuse and/or neglect of a child before filing an action for guardianship; however, limited case law involving unique facts exists holding that DYFS is not required to proceed with an abuse or neglect action before it files for guardianship.³²

In this practitioner's experience, when DYFS is involved, the best way to become the adoptive parent is to obtain placement of the child through the agency. DYFS placements are governed by the Child Placement Review Act.³³ The purpose of this statute is "to afford every child placed outside his home by the Division of Youth and Family

Services with the opportunity for eventual return to his home or placement in an alternative permanent home".³⁴ The Act creates Child Placement Review Boards, panels of citizens who make recommendations to the Court for placement of children involved in DYFS litigation.³⁵ The Act vests wide discretion in both the Division and the Board to devise and recommend a placement plan for each child in DYFS custody; however, the trial Court is not bound by that plan.³⁶ The trial Court must enter an Order of placement for the child which it deems will best serve the interests of the child.³⁷ Both the trial Court and the Child Placement Review Board have jurisdiction to resolve placement disputes.³⁸ Guardianship of children in DYFS custody is not tantamount to "permanent placement" for purposes of the Child Placement Review Act, which would end jurisdiction of the court.³⁹

The Division has a statutory obligation to contact relatives of a child in its custody.⁴⁰ DYFS must initiate a search for relatives who may be willing and able to provide the care and support required by the child.⁴¹ If the agency determines that the relative is unwilling or unable to care for the child, it is not required to re-evaluate the relative.⁴² However, the Division must notify the relative in writing to advise if there is a change in

circumstances upon which the determination was made.⁴³

Upon removing a child, Division has a responsibility to reunify the biological family, which is clear from many references in both Title 9 and Title 30.⁴⁴

DYFS is authorized to place a child in a foster home (now referred to as a Resource Family Home) whenever the circumstances of the child are such that his or her needs cannot be adequately met at home.⁴⁵ Placement, without more, does not give the foster parents the right to seek to adopt the children entrusted to them.⁴⁶ Case law has acknowledged that foster care is designed as a "temporary palliative to care for children whose parents are unable to do so for one or more reasons."⁴⁷ Nevertheless, foster parents are not forever precluded from adopting a child placed in their care.⁴⁸ The Act provides:

Any husband and wife, who, as foster parents, have cared for a child continuously for a period of 2 years or more, may apply to the Bureau of Children's Services (DYFS) for the placement of said child with them for the purpose of adoption and if said child is eligible for adoption, the bureau shall give preference and first consideration to their application over all other applications for adoption placements.⁴⁹

Once DYFS obtains guardianship of a child, the Division becomes the legal guardian of the children for all purposes, including placement for adoption.⁵⁰ While it is

common that DYFS will consent to adoption of a child by the foster parents who have physical custody of the child at the natural parents' rights are terminated, this is not universal. In recent decisions, the Appellate Division has been very critical of DYFS when foster parent placement was selected in lieu of relative placement.⁵¹ Foster parents and others with whom the child has lived for a significant period of time have a right to be heard at an adoption hearing, but they are granted no other special consideration in the adoption process.⁵² Objections by such persons will not defeat the adoption.⁵³

For this reason, it is imperative that any person interested in adopting a child likely to be freed for adoption seek to obtain placement of the child through DYFS or by court Order as soon as possible to allow for proper bonding of the proposed adoptive parent and the child. As noted above, the trial Court is not bound by DYFS's proposed placement plan for the child.⁵⁴ If DYFS seeks to remove a child from its foster placement, the foster parents may seek to intervene in the DYFS matter for the limited purpose of opposing the Division's decision to remove the child.⁵⁵

Even though DYFS will often seek to prevent foster parent intervention premised upon the applicant's duty to

pursue the issue administratively by seeking an administrative review within the agency, the Appellate Division has made clear that "the administrative review process offered by DYFS is not the type of plenary review desirable for resolution of the fundamental issue of whether a permanency placement plan effectuates the best interest of children".⁵⁶ DYFS often cites to the D.T. case for the premise that intervention should be denied to ensure that termination proceedings do not transmute into custody disputes.⁵⁷ However, allowing intervention for the limited purpose of addressing placement is a far cry from a custody hearing.

In this practitioner's experience, there is little to no predictability from county to county, or judge to judge, as to whether or not foster parents will be permitted to intervene to address placement. In the past year, virtually the same application has been filed on behalf of foster parents in four different counties and has resulted in four different outcomes in terms of the ability to intervene; the extent of discovery allowed; accessibility of counsel for the foster parents to DYFS records relevant to the placement issue, which records are confidential per statute⁵⁸; whether these time sensitive applications will be heard on an Order to Show Cause or must await decision on

Motion; and the scheduling of hearings on placement. To be certain, there is little consensus on the role of relatives, grandparents and foster parents in these matters. Thus, this area of the law presents ample opportunity to make reasoned arguments to advance the cause of the many players in the system.

¹ N.J.S.A. 30:4C-4.

² N.J.S.A. 9:6-8.54.

³ N.J.S.A. 9:2-18.

⁴ N.J.S.A. 30:4C-12

⁵ New Jersey Div. of Youth and Family Services v. K.M., 136 N.J. 546, 557 (1994).

⁶ N.J.S.A. 9: (standard for Title 9 cases); N.J.S.A. 30: (standard for termination of parental rights cases)

⁷ Matter of Guardianship of DMH, 309 N.J.Super. 179, 203 (App.Div.1998).

⁸ New Jersey Div. of Youth and Family Services v. K.M., 136 N.J. 546, 561 (1994).

⁹ In re Adoption of Children by G.P.B., Jr., 161 N.J. 396 (1999).

¹⁰ Matter of Baby M, 109 N.J. 396, 428 (1988), *citing* In re Adoption of Children by D., 61 N.J. 89, 95 (1972). See also In re Adoption of Two Children by A.M. and L.M., 170 N.J.Super. 320, 328 (App.Div.1979).

¹¹ N.J.S.A. 30:4C-15(a).

¹² Matter of Adoption of L.A.S., 134 N.J. 127, 133, 631 A.2d 928, 931 (1993) (stating that state-approved agencies under N.J.S.A. 9:2-18 or private parties in the context of adoption under N.J.S.A. 9:3-46(a) and N.J.S.A. 9:3-48(c)(1) may petition for termination of parental rights). See, also, In re Adoption of Children by G.P.B., Jr., 311 N.J.Super. 38 (App.Div.1998) (finding that evidence did not support terminating natural father's parental rights to allow stepparent adoption).

¹³ See, N.J.S.A. 9:3-41(d)(a parent may make an "identified surrender" to a party designated by that parent through an approved agency); and N.J.S.A. 9:2-16 (an approved agency may take a voluntary surrender of custody of a child from the parent.).

¹⁴ N.J.S.A. 30:4C-23.

¹⁵ Matter of Guardianship of C. M., 158 N.J.Super. 585 (Juv. & Dom. Rel. 1978).

¹⁶ Id.

¹⁷ N.J.S.A. 30:4C-23.

¹⁸ N.J.S.A. 9:2-16.

¹⁹ Id.

²⁰ N.J.S.A. 9:2-16.

²¹ New Jersey Division of Youth and Family Services v. T.G., 414 N.J.Super. 423, 434-35 (App.Div.2010), *citing* In re Guardianship of J.N.H., 172 N.J. 440, 474 (2002).

²² Id.

²³ In re Guardianship of J.N.H., 172 N.J. 440, 474 (2002).

²⁴ Id.

²⁵ Monmouth County Div. of Social Services v. G.D.M., 308 N.J.Super. 83 (Ch.Div.1997).

²⁶ R.H. v. M.K., 254 N.J.Super. 480 (Ch.Div.1991).

²⁷ In re Baby M, 109 N.J. 396, 432 (1988).

²⁸ N.J.S.A. 9:3-41 (e).

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- ²⁹ See, generally, N.J.S.A. 30:4C-15(c), (d), (e) and (f) governing DYFS-initiated guardianship actions verses N.J.S.A. 30:4C-15(a) governing private party-initiated guardianship actions. See, also, Matter of A., 277 N.J.Super. 454, 464 (App.Div.1994).
- ³⁰ N.J.S.A. 30:4C-15.1(c)(a).
- ³¹ New Jersey Div. of Youth and Family Services v. A.W., 103 N.J. 591, 612 (1986).
- ³² CITE
- ³³ N.J.S.A. 30:4C-50, et. seq.
- ³⁴ Id.
- ³⁵ CITE
- ³⁶ N.J.S.A. 30:4C-61. See, also, State in the Interest of LL, 265 N.J.Super. 68 (App.Div.1993).
- ³⁷ Id. at 77-78.
- ³⁸ In re E.M.B., 348 N.J.Super. 31 (A.D.2002).
- ³⁹ Id.
- ⁴⁰ N.J.S.A. 30:4C-12.1. See, also, Matter of Guardianship of K.H.O., 308 N.J.Super. 432, 455 (App.Div.1998).
- ⁴¹ N.J.S.A. 30:4C-12.1(a).
- ⁴² N.J.S.A. 30:4C-12.1(b).
- ⁴³ N.J.S.A. 30:4C-12.1(b)(2).
- ⁴⁴ See, N.J.S.A. 9:6-8.8(b)(2); N.J.S.A. 30:4C-11.1(b).
- ⁴⁵ N.J.S.A. 30:4C-26, et seq.
- ⁴⁶ Matter of Adoption of Two Children by A. M., 170 N.J.Super. 320 (App.Div.1979).
- ⁴⁷ Id., citing W. C. v. P. M., 155 N.J.Super. 555, 564 (App.Div.1978), cert. den. 75 N.J. 606 (1978).
- ⁴⁸ N.J.S.A. 30:4C-26.5.
- ⁴⁹ N.J.S.A. 30:4C-26.7.
- ⁵⁰ N.J.S.A. 30:4C-20.
- ⁵¹ New Jersey Division of Youth and Family Servs. v. K.L.W. and P.L.J. (Approved for publication on May 5, 2011).
- ⁵² N.J.S.A. 9:3-46(b).
- ⁵³ Id.
- ⁵⁴ State in the Interest of LL, 265 N.J.Super. 68 (App.Div.1993).
- ⁵⁵ Doe v. State, 165 N.J.Super. 392 (App.Dvi.1979). See, also, Matter of A., 277 N.J.Super. 454 (App.Div.1994)(Foster parents can insist on a hearing, call witnesses and cross-examine witnesses as well as have discovery).
- ⁵⁶ In re E.M.B., 348 N.J.Super. 31 (App.Div.2002).
- ⁵⁷ DYFS v. D. T., 171 N.J.Super. 520 (Juv. & Dom.Rel.1979).
- ⁵⁸ N.J.S.A. 9:6-8.10a.

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