

CURRENT LAW ON CONDITIONAL SURRENDERS

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Procedures to do the conditional surrender

- Surrenders of children to agency for adoption can contain conditions; without any doubt this is a “legal” procedure
- Must be in writing and on state mandated forms - OCFS forms consist of both the surrender and a terms addendum for both judicial and extra judicial
- If someone is designated to adopt, must be person who is “certified or approved foster parent” or “agency has fully investigated and approved such person as an adoptive parent”
- Must have everyone agree and sign to the terms – includes anyone designated to adopt, birth parent(s) who is surrendering, someone from agency, law guardian(s), and child over 14 if any terms re sibling visits
- Can be terms of contact with children who are siblings and half siblings – enforced only if children over 14 willing
- What about attorneys for foster/adopt parents?
- Judge must make a ruling that the terms are in child’s best interests – hearing? Judge can refuse to allow the conditions, parent does not have to surrender if Judge will not allow conditions
- Everyone gets a copy

Procedures at the adoption if surrender was conditional

- Adoption papers to the court have a copy of the terms attached
- Court must be made aware of terms – likely to be the same Judge who took the surrender, if not, judge may want to know what is happening with the agreement
- Adoption order and second order that incorporates terms and incorporation order (OCA forms 13-A and 14-A) are issued – incorporation order is sent to birth parent, birth parent lawyers and law guardian so that they know child has been adopted and terms are included in the adoption order

Procedures if there are problems BEFORE the adoption is finalized

- If there is a “substantial failure of a material condition” then the agency must notify the birth parent (unless they waived such notification at the surrender) the law guardian and the court within 20 days
- Within 30 days, agency must file a petition under FCA 1055-a and serve everyone (again except parent if they waived at surrender) to review the failure and hold a hearing “if necessary”- OCA form SURR-7
- If agency fails to file petition, parent or law guardian can file within 60 days
- So far the courts have permitted birth parent to withdraw the surrender in these instances – perhaps not if agreement says otherwise – in some cases, the parties have renegotiated the terms of the surrender and in other cases the agency has responded to the withdrawal of the surrender with a new TPR
- If a party thinks that the conditions are not being honored and the child is not yet adopted, can bring an action to enforce the terms
- The court ‘shall enter an order enforcing communication or contact pursuant to the terms and conditions of the agreement unless the court finds that enforcement would not be in the best interests of the child.’”

Procedures if there are problems AFTER the adoption is finalized

- Any party can file for enforcement after the child has been adopted under DRL 112-b and the court shall enforce the contact or communication if the terms were incorporated in the adoption and were found to have been in the child best interests at the time of the surrender. OCA form 17
- Enforcement is only in Family Court
- The court “shall enforce” unless it finds that enforcement is now not in the child’s best interests – seems like the court can not modify the terms but perhaps the parties can agree to modify them
- The failure of any party to obey the terms and conditions will not be grounds to set aside an adoption or allow the birth parent to withdraw a consent. There have been very rare instances of proof of fraud, duress or coercion which could result in setting aside an adoption