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# LAW AND THE FAMILY

The 'Child's Best Interests' in Adoption Cases

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THE MOST RECENT New York Court of Appeals decision on adoptions deserves praise for its openness and genuine commitment to children's rights. Having given the green light to adoptions by homosexuals it may be one of the most heralded gay rights cases. Across the country, wide-ranging decisions are coming down involving custody, adoption and gays. In March, California banned adoption by gay couples; in Illinois, in July, a lesbian couple was granted the right to adopt a child conceived by one of them.

In *Matter of Jacob and Matter of Dana*,\*1 the Court of Appeals asserted, 4-3, its expanding role and ability to reflect the times by saying that children come first in adoption, to the exclusion of all else including prejudices or historical conservatism. It held that the unmarried partner of a child's biological mother, whether heterosexual (Jacob) or homosexual (Dana), who is raising the child together with the biological parent, has standing to become the child's second parent by means of adoption. In a deeply moving and socially enhancing decision, the Court stated, To rule otherwise would mean that the thousands of New York children actually being raised in homes headed by two unmarried persons could only have one legal parent, not the two who want them.

The dissenters argued that there was no express legislative authority for such adoptions.

## The Mother's Relationship

In *Matter of Jacob* the Family Court denied the adoption by the biological mother's heterosexual partner on the ground that Domestic Relations Law (DRL) Sec.110 does not authorize adoptions by an unmarried couple. In *Matter of Dana*, the court denied the adoption, by the child's biological mother and her lesbian partner, of a child conceived by artificial insemination, on the ground of lack of standing and on the further ground that the adoption was prohibited by DRL Sec.117, which had been construed as requiring the automatic termination of the biological parent's relationship with his or her child upon the child's adoption by someone not married to the parent.

The Court of Appeals held that appellants had standing to adopt under DRL Sec.110 and were not foreclosed from doing so by DRL Sec.117. It reversed in each case and remitted to Family Court for a determination as to whether the adoptions would be in the best

interest of the children. Its analysis is based upon the proposition that while the "the adoption statute must be strictly construed": What is to be construed strictly and applied rigorously in this sensitive area of the law, however, is legislative purpose as well as legislative language. Thus, the adoption statute must be applied in harmony with the humanitarian principle that adoption is a means of securing the best possible home for the child . . . .

The Court examined the history of New York's adoption laws, noting that since their passage in 1873, the statutes that comprise adoption law have been amended so many times that it is "a complex and not entirely reconcilable patchwork." Nonetheless, first and foremost is the primary legislative purpose of the statute -- "the child's best interest."

The Court concluded that choosing not to construe the words of the statute strictly would advance the legislative policy in situations such as those presented here by allowing the two adults who actually function as the child's parents to become the child's legal parents. It listed both the financial and emotional advantages of permitting such adoptions.

The Court rejected on policy grounds a reading of DRL Sec.117 that would automatically terminate the parental rights of the biological parent in such cases and preclude the adoptions here. "An interpretation of the statute that avoids such discrimination or hardship is all the more appropriate here where a contrary ruling could jeopardize the legal status of the many New York children whose adoptions by second parents have already taken place." It held that the legislative purpose behind the statute "was never intended as a sword to prohibit otherwise beneficial intrafamily adoptions by second parents."

Adoption is a legal proceeding whereby a person takes another person into the relation of child and acquires the rights and incurs the responsibilities of parent.\*2 Once an adoption has properly occurred, the ties between the adoptee and the adoptee's biological parents are severed.

DRL Article 7 defines the persons who may adopt another and sets forth the procedure to be followed. An adoption may be either by means of a private transaction between individuals, which is referred to as a "private-placement" adoption,\*3 or it may be arranged between an agency set up for the placement of children and prospective adoptive parents, which is referred to as an "authorized agency adoption."\*4 In private-placement adoptions, all procedures from inception through the order of adoption are governed by the DRL.\*5 In authorized-agency adoptions, all preliminary procedures up to the petition for adoption are governed by the Social Services Law.\*6

#### Creature of Statute

In New York adoption is solely a creature of statute. No lawful adoption may occur outside the framework of statute.\*7 Adoption can only be accomplished by virtue of a proceeding under the DRL.\*8 DRL Sec.110 specifically declares that no person shall be adopted except in pursuance thereof and under the conditions prescribed therein. There must be strict and exact compliance with all essential parts of the adoption statute.\*9 The Family Court has original concurrent jurisdiction with the Surrogate's Court over adoption proceedings

under DRL Article 7.\*10

DRL Sec.110 provides that the following categories of persons may legally adopt\*11:

an adult unmarried person or husband and his adult wife together;  
an adult married person who is living separate and apart from his or her spouse pursuant to a decree or judgment of separation or pursuant to a written agreement of separation subscribed by the parties and acknowledged or proved in the form required to entitle a deed to be recorded;

+an adult or minor husband and his adult or minor wife together may adopt a child of either of them born in or out of wedlock and an adult or minor husband, or adult and minor wife may adopt such a child of the other spouse.

New York legislation, in designating who may adopt, provides that such designated persons "may adopt another person" and, thus, permits the adoption of an adult as well as the adoption of a minor.\*12 An adult adoption is permissible so long as there is no insincere or fraudulent purpose.\*13 In fact, adult adoptions are sometimes treated more liberally by the New York courts than minor child adoptions.\*14

A person may desire to adopt an adult for any one of a variety of reasons. For example, an adult might seek to contract for an adoption with the intention of achieving the same result as a valid will.\*15

#### Adoption of Adult

New York courts have noted that adoption sometimes is sought by an adult for purposes which are purely economic, such as the beneficial impact of an adoption upon insurance, inheritance or tax or upon the right under local rent-control ordinances or laws to the continued occupancy of an apartment by a particular tenant or "member of the tenant's family." In considering the propriety of an adult adoption, the courts are guided by whether the adoption will promote the temporal and moral interests of the prospective adult adoptee.\*16

Illustrative is *Re Adoption of Elizabeth P.S.*,\*17 an "adult adoption," between two females who were 49 and 48 years old. The adopter was a nun on life leave who met the adoptee while assigned to work at a facility for troubled females where the adoptee had been placed as a child. She fulfilled the role of parent, providing leadership, guidance, nurturing care and affection for the adoptee who in turn looked to the adopter for the guidance and maturity that a parent normally gives.

It has been held by appellate courts that since consensual adult homosexuality is not a crime in New York, and since judicial interference with the right of adult adoption because of the sexual preference of the parties is not warranted on grounds of public policy, neither the best-interests-of-the-child standard nor public policy nor public morality considerations would operate as a bar to the adoption of a 26-year-old male by a 22-year-old male, despite their homosexual relationship, where the adoption was sought for credible legal and economic reasons.\*18

In addressing itself to the propriety of one adult adopting another adult for the purpose of permitting continued apartment tenant occupancy under local rent control legislation, the court

explained that the "nuclear family" arrangement is no longer the only model of family life in America but rather that the realities of present-day urban life allow many different types of nontraditional families. It held that the statutes involved did not permit a court to deny an adoption petition simply on the basis of any one court's view of what is the nature of the family.\*19

In *Matter of Robert Paul P.*,\*20 the Court of Appeals refused to allow the adoption of a 50-year-old man by his 57-year-old homosexual partner "solely because the adoption would have been wholly inconsistent with the underlying public policy of providing a parent-child relationship for the welfare of the child."

While the DRL provides that a husband and wife generally must adopt together, thus making an adoption by one without the other illegal,\*21 provision is made in DRL Sec.110 for the adoption by a husband, or a wife, of the child of the other spouse whether born in or out of wedlock.

In one case, the biological father of an illegitimate child, with the consent of the biological mother of that child, was allowed to adopt the child. The biological mother at the same time was allowed to preserve her parental rights and obligations in regard to the child, although the parents refused to wed, the court holding that such procedure served the best interests of the child and that the refusal of the biological parents to wed should not contravene the policy of the state to foster the child's best interests above all else.\*22

On another front, an unmarried adult mother was permitted to adopt her illegitimate child.\*23 The court acknowledged that in most instances, such an adoption was unnecessary since she alone already had the right of custody to her child, and the rights of inheritance existed between them; however, the mother had caused the records of the child's birth to be made in a surname different from her own and desired to give the child her own name, adoption being the most practical means of accomplishing this objective. Notably, adoption by a single person generally has been sought and approved only in exceptional circumstances, and in particular for the hard-to-place child for whom no "desirable" parental couple is available.\*24

#### notes

(1) ---- NY2d ---- , New York Law Journal, Nov. 3, 1995, p.25, col.1.

(2) See DRL Sec.110.

(3) DRL Sec.109(5).

(4) See DRL Sec.109(4) and Social Service Law Sec.371(10)(b), which define "authorized agency."

(5) DRL, Art 7; *Re Nicky* (1975) 81 Misc2d 132.

(6) SSL Sec.371-392; *Re Nicky*, supra.

(7) DRL Sec.110; *Matter of Eaton*, 305 NY 162.

(8) *Re Buss* (1932) 234 App Div 299, 254 NYS 852; *Carroll v. Collins* (1896) 6 App Div 106, 40 NYS 54; *Re Anonymous* (1948, Sur.) 85 NYS2d 358; *Re Pierro* (1940) 173 Misc 123.

(9) *Re Estate of Mazzeo* (1983, 3d Dept) 95 AD2d 91; *Re Adoption of XX* (1980, 3d Dept.) 77 AD2d 381, affd 54 NY2d 417, 430 NE2d 896, affd 463 US 248, 77 LEd2d 614, 103 S Ct 2985.

(10) Const. Art. IV Sec.13(b). FCA Sec.641.

(11) DRL Sec.110.

- (12) DRL Sec.110; Re Buckingham's Estate (1949) 194 Misc 297.
- (13) Re Adult Anonymous II (1982, 1st Dept) 88 AD2d 30.
- (14) Re Estate of Mazzeo, supra.
- (15) Stevens v. Halstead (1917) 181 App Div 198, 168 NYS 142.
- (16) Re Adult Anonymous II, supra.
- (17) (1986) 134 Misc2d 144.
- (18) Re Anonymous (1981) 106 Misc2d 792.
- (19) Re Adult Anonymous II, supra.
- (20) 63 NY2d 233 (1985)
- (21) Re O'Keefe (1937) 164 Misc 473, 300 NYS 27; Re R. (1975) 81 Misc2d 436.
- (22) Re J. (1981) 108 Misc2d 657.
- (23) Re Anonymous Adoption (1941) 177 Misc 683.
- (24) Adoption of H. (1972) 69 Misc2d 304.

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