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4. Adoption Law and Practice

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Please see D.C. Superior Court Rules Governing Adoption Proceedings.

Adoption Law and Practice in the District of Columbia

Children's Law Center
Washington, D.C.

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Introduction

This manual has been developed to assist *pro bono* attorneys representing caregivers seeking to adopt children in the D.C. neglect system. It is not a comprehensive treatise and attorneys should conduct their own independent research specific to their own cases.

Neglect Cases

This manual is written primarily to assist attorneys who are representing individuals seeking to adopt children "in the neglect system" — children for whom there is an open neglect case in D.C. Family Court.

For a number of reasons, it is important for counsel for the adoptive parents to understand the neglect proceeding. Much information that is relevant to the adoption case will have been created as a result of or in the context of the neglect case, so it is important to know what kind of information and evidence to look for and how to obtain access to it. In addition, the neglect case is a court proceeding involving the status and custody of the adoptee that will be going on simultaneously with the adoption case. The fact that there is an on-going neglect case may create strategy options and legal issues that you will want to be aware of as you prepare your adoption case.

Neglect proceedings generally

Neglect proceedings are governed by Title 16, Subchapter 23 of the D.C. Code (D.C. Code §16-2301 *et seq.*)[1] The definition of neglect is set forth in §16-2301(9). "Neglect" is an umbrella term that encompasses both abuse (*e.g.*, physical and sexual abuse) and neglect (*e.g.*, improper care of a child, incapacity to care for a child).

Neglect cases are civil proceedings. In one sense, neglect cases are a kind of custody case: if the court determines that the child is neglected, it has the authority, subject to certain limitations, to determine who shall have custody of the child.[2]

The District of Columbia government is required to investigate most reports of alleged child abuse and neglect that it receives. D.C. Code §4-1301.01 *et seq.* The D.C. Child and Family Services Agency (CFSA) is the government agency responsible for conducting the required

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[1] Also relevant to neglect proceedings are D.C. Code §§ 4-1301.01 *et seq.* Those provisions address, *inter alia*, mandatory reporting of suspected abuse and neglect, investigations of reported child abuse and neglect, the establishment of a child protection registry for reports of abuse and neglect, and the establishment and duties of the D.C. Child and Family Services Agency, the District's child protective services agency. There are also court rules governing neglect proceedings (SCR-Neglect 1- 47).

[2] Note that the Uniform Child Custody Jurisdiction and Enforcement Act specifically includes neglect cases in its definition of "child-custody proceeding." D.C. Code §16-4601.1. The UCCJEA is a uniform law, enacted by 49 states and the District of Columbia, which determines when a state can exercise jurisdiction over a custody case and addresses various procedural requirements in such cases. A related statute is the Parental Kidnapping Prevention Act, 28 U.S.C. §1728A, a federal full faith and credit statute.

investigations.[3] If CFSA recommends the filing of a neglect petition, it will refer the case to the District of Columbia Office of the Attorney General (OAG). OAG makes the decision whether or not to file a neglect petition.

A neglect case is commenced by the filing of a petition in D.C. Family Court by the Office of the Attorney General, alleging that a child is neglected.[4] D.C. Code §16-2305.

A finding by the court that a child is neglected is called a "neglect adjudication." Children can be adjudicated neglected as the result of a fact-finding hearing (trial) or as the result of a stipulation (a written admission by the parent to specified facts coupled with a judicial finding of neglect based on those facts). D.C. Code §16-2317; SCR-Neglect 17.

The court has on-going authority over adjudicated neglected children to make decisions about custody and certain related matters, subject to the applicable legal standards.

After the child is adjudicated neglected, the court next holds a "dispositional hearing." D.C. Code §§16-2319, -2320. At the dispositional hearing, the court makes a custody determination about the child in light of the facts underlying the neglect adjudication together with such other information as it is entitled to consider at this stage of the proceeding. The order that results from this hearing is called a "dispositional order." The terms that are customarily used to describe the most common dispositional statuses are:

> ***protective supervision*:** placement in the custody of a parent
>
> ***private placement*** or ***third-party placement*:** placement in the custody of an individual who is not the parent
>
> ***commitment*:** placement in the custody of a public agency responsible for the care of neglected children (CFSA) or a licensed child-placing agency[5] or institution.[6] Commitment is also referred to as "being a ward" or as "foster care."[7]

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[3] At one time, responsibility for investigations was divided between CFSA and the Metropolitan Police Department, depending on the nature of the alleged neglect.

[4] D.C. Family Court is a part of D.C. Superior Court.

[5] *See* D.C. Code §4-1401 *et seq.* (licensed child-placing agencies). Licensed child-placing agencies are more commonly known as foster care or adoption agencies.

[6] It is currently the universal practice of the court to commit children to CFSA rather than to a private agency or institution, although CFSA contracts with a number of private agencies to provide foster homes together with case management and related social services.

[7] "Foster care" is an umbrella term that encompasses not only foster homes but also other living arrangements (e.g., group homes or residential treatment facilities).

A dispositional order can be entered for a period not to exceed one or two years (depending on the custodial status of the child). Dispositional orders can be extended by the court for additional successive periods of one year, subject to the applicable legal standard, until the child is 21 years of age.[8] D.C. Code §16-2322, 2303. Disposition orders can also be modified or new disposition orders entered by the court. D.C. Code §16-2323.

As long as a neglect case is open -- in other words, as long as the child is subject to a dispositional order in the neglect case and remains under the jurisdiction of the court -- the court continues to have the authority to make certain decisions relating to the child and the family, most significantly the on-going authority to determine the child's placement.

After disposition, the court must hold review hearings in a neglect case a minimum of once or twice a year depending on the age and legal status of the child, although review hearings are typically held more often.[9] D.C. Code §16-2323. This post-dispositional phase of a neglect case is commonly referred to as the "review stage."

In addition, what is typically called a "permanency hearing" must be held within 12 months after a child's entry into foster care and at least every six months thereafter. The purpose of the permanency hearing is to determine the permanency goal for the child and whether CFSA has made reasonable efforts to achieve the permanency goal. D.C. Code §16-2323(a)(4), 16-2323(c); 4-1301.09a. Permanency goals are reunification, adoption, legal custody, guardianship, or alternative planned permanent living arrangement (APPLA) (long-term foster care).

As a general rule, a neglect case will be heard by the same judge, starting with the initial hearing and throughout the duration of the case.[10]

The court's jurisdiction in a neglect case terminates by operation of law when the child turns 21 years of age. The court can also terminate jurisdiction ("close the neglect case") if it determines that termination is in the best interests of the child. D.C. Code §16-2322; *In re A.R.*,

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[8] By comparison, the age of majority in the District is age 18. However, a parent's duty of child support continues until a child is 21. *See* D.C. Code §46-101.

[9] At each review hearing, the next one is scheduled. Hearings can also be convened on motion and it is common practice for judges to convene "emergency hearings" on very short notice on an as-needed basis at the request of counsel.

[10] In January 2002, Congress enacted the "District of Columbia Family Court Act of 2001," P.L. 107-114, which amended Title 11 of the D.C. Code to abolish the Family Division of Superior Court and to create a separate Family Court within Superior Court. After the enactment of the Family Court Act, the court changed the system for how neglect cases are handled. New neglect cases are heard by magistrate judges sitting in Family Court who are assigned to neglect calendars. Magistrate judges assigned to neglect calendars rarely rotate out of those assignments.

950 A.2d 667 (D.C. 2008); *In re T.R.J.*, 661 A.2d 1086 (D.C. 1995). For example, the court will customarily close the neglect case if a child has been returned to the custody of the parent and monitoring is no longer necessary, or when the court is satisfied that a long-term custodial arrangement with a caregiver is in effect (such as through adoption).

Who is involved in the neglect case?

A. Office of the Attorney General

The District of Columbia is a party to all neglect proceedings. D.C. Code §16-2305(f). The District is represented by the District of Columbia Office of the Attorney General. An individual attorney with OAG is known as an Assistant Attorney General (AAG).

The AAG who files the petition will usually continue to be assigned to the case at all stages.

B. Child and Family Services Agency; social worker

The public agency that is responsible for the District's statutory child protective services and social services duties in neglect cases is the D.C. Child and Family Services Agency. CFSA is represented by the Office of the Attorney General and also CFSA's General Counsel's office.

There is always at least one social worker assigned to a neglect case and occasionally more than one.[11] The social worker is responsible for statutory duties such as monitoring the child and the family, providing mandated services, providing and supervising foster care placements for children removed from their parents or custodians, and submitting reports to the court for disposition, review and permanency hearings. The assigned social worker in the neglect case will also, as a general rule, be responsible for any of CFSA's obligations in connection with the adoption case (*e.g.*, preparation of the adoption report, *infra*).

CFSA is responsible for providing all "foster care" – placements and care for children removed from their homes and placed in CFSA custody by the court in neglect cases. CFSA recruits and licenses foster homes and provides related services for children foster care. It also contracts with private licensed child-placing agencies (foster care agencies) and other organizations to provide foster care placements and the related services. Thus, if the child is in a foster home that is provided and supervised through one of the private contract agencies, there will be a social worker from that agency assigned to the case who will be handling most of the case management and social services responsibilities.[12] However, a child in foster care is in

[11] For example, if siblings are placed in foster homes through different private agencies, each sibling will have a social worker from the agency through which s/he is placed.

[12] Although a child may be placed in a foster home through a private contract agency, the

CFSA custody even if the child is placed in a private agency foster home and CFSA thus retains ultimate responsibility.

In cases in which there is more that one social worker, the day-to-day division of responsibilities among them is generally left to CFSA's administrative protocols.

One important reason to understand which social workers are involved in a case is because social workers will be important sources of information and evidence for the adoption case.[13] In addition, knowing which agency, branch or individual social worker is responsible (either by law or in practice) for the various duties or decisions in connection with the neglect and adoption cases will help you direct your advocacy appropriately.

C. <u>Guardian ad litem</u>

All children in neglect cases are assigned court-appointed guardians ad litem. D.C. Code §16-2304(b)(5). The statute provides that the court "shall appoint a guardian ad litem who is an attorney to represent the child in the proceedings. The guardian ad litem shall in general be charged with the representation of the child's best interest." [14] The legislative history of the neglect statute indicates that the GAL is to function as a lawyer (e.g., litigate, file pleadings, call and examine witnesses, etc.).[15] See also Child Abuse and Neglect Attorney Practice Standards, Appendix to Rules Governing Neglect and Abuse Proceedings.

There is nothing in the law to suggest that the GAL is anything other than a lawyer/advocate. In other words, the GAL has no authority to make decisions on behalf of the child or to take legal action on behalf of the child (as a parent or guardian) (*e.g.* authorize release of information, consent to medical treatment).

GALs are generally considered to have party status in neglect cases and participate fully in all aspects of the proceedings. *See* SCR-Neglect 9.

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universal practice is that judges commit children to the custody of CFSA, not to the custody of the private agency. As a result, CFSA is considered and for the most part considers itself as being the agency with ultimate custodial responsibility for a child in foster care, even if the child is placed in foster home through a private agency.

[13] Because of intra-agency transfers of cases between different branches of CFSA, transfers of responsibilities between CFSA and the private agencies, and staff turnover, it is not unusual for cases to have been transferred several times by the time an adoption case is filed.

[14] *See S.S. v. D.M.*, 597 A.2d 870 (D.C. 1991); Rule A-5, Child Abuse and Neglect Attorney Practice Standards. Occasionally, a judge will "bifurcate" the appointment and appoint both an attorney and a GAL for the child.

[15] Report, Prevention of Child Abuse and Neglect Act, Committee on the Judiciary (David A. Clarke, Chairperson), Council of the District of Columbia, March 29, 1977.

D. Parents

Parents are parties to neglect proceedings (as are guardians and custodians as defined in D.C. Code §16-2301). D.C. Code §16-2304. They are entitled to be represented by counsel and if they cannot afford counsel, the court must appoint counsel to represent them. The majority of parents in neglect cases have court-appointed counsel. Each parent is assigned separate counsel.[16]

E. Foster parents/caretakers

Foster parents and individuals in whose custody children have been placed in a neglect case can be made parties to the neglect case. D.C. Code §16-2304; SCR-Neglect 9. If they have been foster parents for less than a year, the court has the discretion to give them party status; after a year, the court shall make them parties upon request. See *In re Phy. W.*, 722 A.2d 1263 (D.C. 1998). In addition, regardless of whether or not they are parties, foster parents shall be provided notice of and have the opportunity to be heard in neglect proceedings. D.C. Code §16-2304.

What is a foster parent?

"Foster parents" are individuals who are licensed to provide care for children who have been removed from their homes and placed in CFSA custody.[17] Some foster parents, often known as "kinship" foster parents, had a family or personal connection to the child prior to the filing of the neglect case (relatives, family friends) and then became licensed foster parents, typically because there are financial and other benefits and services available to children in foster care that are not available if the child is simply placed in that individual's custody in the neglect case (through an order of third-party placement).[18]

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[16] The court office that is responsible for administering the appointment of counsel and GALs in neglect cases is the Office of Counsel for Child Abuse and Neglect. Court-appointed attorneys in neglect cases are known as "CCAN attorneys."

[17] For the most part, there is no meaningful distinction between a "foster parent" and "adoptive parent" in the context of this manual – in the context of neglect cases – and those terms will be used interchangeably,

[18] A "kinship caregiver" is defined in D.C. Code §4-1301.02 as a relative of the child by blood, marriage or adoption, or a godparent recognized by a religious ceremony or recognized by reputation in the community and by other family members. Thus, a "kinship foster parent" is a kinship caregiver who is a licensed foster parent. Although "kinship foster care" may be spoken of as if it were a separate category from "regular foster care," there is no longer any meaningful legal distinction between the two, although there was in the past, and the term is simply used descriptively.

Foster parents receive a monthly foster care payment and foster children receive Medicaid. CFSA may also fund a range of other services for foster children as needed, either voluntarily or as a result of a court order in the neglect case.

Foster homes must be licensed. D.C. Code §3-801 *et seq*. Foster home licensing is regulated by 29 DCMR 6000 *et seq.* Foster homes located in Maryland must be licensed pursuant to Maryland licensing laws and regulations.

The decision to adopt; counseling your client

Your clients will have been referred for representation through Children's Law Center's because they have expressed an interest in adopting. As with any client, however, you should thoroughly review the decision and the alternatives with your clients in order to ensure that they have all the relevant information concerning their options so that they can make informed choices. Remember that until you became involved, your client was not represented by counsel and had no source of thorough, accurate and objective information.

In cases involving children in the neglect system, it is particularly advisable to explore the process by which your client reached the decision to adopt. During the past several years, CFSA has increasingly focused on what is known as "permanency planning" in neglect cases. The federal "Adoption and Safe Families Act," Pub. L. 103-89 (amending the Adoption Assistance and Child Welfare Act of 1980, Pub. L. 96-272),[19] federal AFSA regulations, and parallel (although not identical) amendments to D.C. law enacted in 2000 encourage the child welfare system to achieve legally "permanent" arrangements for children in foster care – reunification with the parent, adoption, legal custody or guardianship – that get the child out of foster care status and permit the neglect case to be closed (court jurisdiction terminated).

Thus, CFSA, the GAL, and even the judge presiding over the neglect case may put pressure on foster parents to adopt their foster children. It is not uncommon for foster parents to be informed by CFSA that if the goal of the child's case plan is adoption and if the foster parents will not adopt (or file for legal custody or guardianship), CFSA must then seek an adoptive home for the child. In other words, there may be a tacit or explicit threat that the child will be taken from your clients and placed elsewhere if they do not adopt.

However, while ASFA may establish a preference for certain permanency goals, the focus of the AACWA and ASFA is on ensuring that there is accountability on the part of the child welfare agency for appropriate planning for the child. This is done primarily by requiring that the court and the agency follow certain procedures to ensure that appropriate planning takes place for children who have been removed from their homes. For example, "permanency hearings" must be held at specified intervals to determine what the permanency goal for the child is; and in order for the agency to receive federal funds for foster care and related programs, there must be a judicial finding that the agency has made reasonable efforts to finalize the permanency plan.

[19] The AACWA is a federal funding statute. States that opt into the funding scheme must satisfy the requirements of the statutes or potentially lose federal funding.

There is no absolute requirement that so-called "permanency" be achieved within a set period of time. In addition, reunification, adoption, legal custody and guardianship are not the only acceptable permanency goals. ASFA specifically provides that a "planned permanent living arrangement" (also know as "alternative planned permanent living arrangement" or APPLA) that is not reunification, guardianship/legal custody, or adoption is also a permissible goal if there are compelling circumstances. D.C. Code §16-2323. Thus, it is permissible for children to remain in foster care status if that is what is in the child's best interest, and there are situations in which that is the outcome that your client wants and is in fact in the child's best interest.

Keep in mind that foster parents and caregivers, while very committed to their foster children and willing to continue to care for the them indefinitely, may nonetheless be hesitant to adopt or to pursue other forms of permanency for a variety of reasons. In particular, foster parents may lose significant financial, medical, mental health and educational services that are available if a child remains in foster care status.[20] So-called "legal permanency" is only one factor to be considered in determining what is in a child's best interest – the child's emotional well-being, relationships and emotional attachments, stability, the effect on the child of a move to a new home, and the need for services are other important issues to be considered.

In addition, guardianship is a "permanency option" that is an alternative to adoption, which your client may not have been made aware of.

Thus, it is important to ensure that your client knows what all of the options are and the possible benefits and disadvantages of each so that your client can make an informed choice.

[20] You may want to consider making a list of all the services that your client and the child are receiving (e.g., stipends, therapy, school, day care/after-school care, transportation, summer programs) and ascertain the funding source for all of them and whether or not that funding would be affected if the child were no longer a ward of CFSA.

Adoption

Overview

Statute

Adoptions are governed by D.C. Code §16-301 *et seq.* Adoptions are creatures of statute; there is no common law adoption. *In re A.W.K.*, 778 A.2d 314, 318 (D.C. 2001).

The Uniform Child Custody Jurisdiction and Enforcement Act also applies to adoptions. D.C. Code §16-4601.01 *et seq*. The UCCJEA is a uniform law adopted by 49 states and the District of Columbia which determines when a state can exercise jurisdiction over a custody proceeding. The UCCJEA also addresses various procedural issues such as pleading and notice requirements.

Court rules

There are Superior Court rules applicable to adoptions. SCR-Adoption 1 – 79-I, 101, 201.

In addition to the adoption rules, the General Family Division rules are also applicable to all proceedings in the Family Division of the court. SCR-General Family A - T.

What are adoptions?

Adoptions are civil cases. Like neglect cases, they are included in the definition of "custody case" set forth in the Uniform Child Custody Jurisdiction and Enforcement Act.

While the statute does not, strictly speaking, provide a definition of adoption, §16-312 describes the "legal effects" of adoption:

> A final decree of adoption establishes the relationship of natural parent and natural child between adopter and adoptee for all purposes . . . as if adoptee were born to adopter . . . . All rights and duties including those of inheritance and succession between the adoptee, his natural parents, their issue, collateral relatives, and so forth, are cut off . . . .

One way of conceptualizing adoption is that it results in both (1) the termination of the parent-child relationship between the birth parents and the child, if not already previously terminated, and (2) the creation of a parent-child relationship between the adoptive parents and the adoptee.

The second step – creation of the new parent-child relationship – can only be achieved through an adoption proceeding pursuant to §16-301 *et seq.*

The first step -- the severing of the legal relationship between the birth parent and the child -- can be done through the adoption proceeding. It can also be accomplished separately in one of two ways:

- Birth parents can voluntarily give up their parental rights by executing a "**relinquishment of parental rights**." Relinquishments are governed by D.C. Code §4-1406. Relinquishments can only be made to a licensed child-placing agency or CFSA. Upon relinquishment, the agency taking the relinquishment becomes the guardian of the child. There is no court involvement in the relinquishment process (although the document is to be filed with the court).

- If a child has been adjudicated neglected, the court can terminate parental rights as a result of a **motion to terminate parental rights** (TPR) filed pursuant to D.C. Code §16-2351 *et seq*. The motion may be filed in the neglect case by the District of Columbia government or the GAL.[21] A TPR can be filed and litigated prior to the filing of an adoption or while an adoption case is pending. A TPR and an adoption can also be consolidated and litigated together. SCR-Adoption 42; *In re Baby Girl D.S.*, 600 A.2d 71 (D.C. 1991).

But even if parental rights have <u>not</u> already been terminated or relinquished, the court can grant an adoption under the following circumstances:

- A birth parent can **consent** to the adoption. While the prevailing view is that a consent does not in and of itself terminate parental rights (which would terminate only upon the entry of the adoption decree), the consent obviates any requirement of further notice to the birth parent and will, in the absence of any other disputed issue, result in the adoption being granted.

- If a birth parent does <u>not</u> consent, the court can nonetheless grant the adoption if it finds that consent is being withheld contrary to the best interests of the child or that the parent had abandoned and voluntarily failed to support the child for six months preceding the filing of the petition. This is often referred to as "**waiving the consent of the birth parent.**"

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[21] The TPR statute uses the term "legal representative," which includes the guardian ad litem. *In re L.H.*, 634 A.2d 1230 (D.C. 1993).

Thus, while parental rights can be terminated separate and apart from an adoption proceeding – either voluntarily by the parent through relinquishment or involuntarily by the court through a motion to terminate parental rights filed in a neglect case – the court also has the power in the adoption proceeding to terminate the birth parent's rights. Thus, it is not necessary for parental rights to have already been terminated prior to the filing or granting or an adoption; the legal effect of an adoption decree is the termination of the birth parent-child relationship.

To put it another way, under District of Columbia law, a parent does not have "veto power" over an adoption. The court can grant an adoption over the objection of the birth parent, even when parental rights have not been previously terminated.

However, in contrast to TPRs or relinquishments, the court in an adoption proceeding cannot terminate parental rights without at the same time creating a new parent-child relationship; it is an all-or-nothing proposition. If an adoption petition is withdrawn, dismissed or denied, parental rights remain intact.

If parental rights have not been terminated prior to the adoption and there is no consent by the parents, the adoption is commonly known as a "**direct**," "**show cause**" or "**contested**" adoption. When parental rights have been separately terminated or the birth parents consent, the adoption is often referred to as "**uncontested**."

Post adoption contact

The "Adoption Reform Amendment Act of 2010" allows adoptive parents and birth parents to enter into enforceable post-adoption contact agreements. D.C. Code §4-361.

Where are adoption proceedings heard?

Adoption petitions are filed in D.C. Family Court, which is part of D.C. Superior Court. D.C. Code §11-1101.

There is currently one adoptions calendar to which all adoption cases are initially assigned. However, adoptions cases in which the adoptees have open neglect cases will not be heard by the adoptions judge. The District of Columba Family Court Act of 2001 provides that the Family Court should implement a "one family, one judge" policy whenever possible. D.C. Code §11-1104(a). As a result, the procedure currently followed by the court is that the adoptions calendar judge issues the initial orders in all adoption cases – the order of reference and the order to show cause (see below). But the first hearing in the adoption case (the "initial show cause hearing") will be scheduled before the judge or magistrate judge who presides over

the neglect case, who will hear the adoption case from that point on.[22] That first hearing in the adoption case is usually scheduled for the date and time of the next neglect review or permanency hearing.

Clerk's office

Pleadings in adoption cases are filed through the Family Court Intake Center, located on the east end of the JM level of the courthouse. Adoption files are kept in the Adoptions Clerk's office, located in the Family Court Clerk's office, Room JM-300. The hours of the clerk's offices are 8:30 a.m. to 5:00 p.m.[23]

Jurisdiction

The adoption statute provides that an adoption petition may be filed if:

(1) the petitioner is a legal resident of the District,
(2) the petitioner has actually resided in the District for one year next preceding the filing of the petition,
(3) the adoptee is in the legal care, custody or control of the Mayor or of a child-placing agency[24] licensed under the laws of the District, or
(4) the child to be adopted was born in the District of Columbia after July 18, 2009.

D.C. Code §16-301; see *In re A.W.K.*, 778 A.2d 314 (D.C. 2001).

Children in foster care by virtue of a neglect case are in the custody of CFSA pursuant to D.C. Code §16-2320(a)(3)(A). As a result, foster parents can file to adopt in D.C. pursuant to §16-301(b)(3) even when they reside in another state.

In addition to the jurisdictional requirements of the adoption statute, the jurisdictional requirements of the Uniform Child Custody Jurisdiction and Enforcement Act must be met. D.C. Code §16-4601.01 *et seq*. The UCCJEA is a uniform law that sets forth criteria for

[22] An as yet unresolved is the issue of whether the fact that the judge hearing the adoption case has also been presiding over the underlying neglect case could create grounds for recusal.

[23] Pleadings can be filed after hours through a box located outside of the information window on the first floor of the courthouse. However, if a pleading is filed after hours, it is recommended that you date-stamp a copy (there is a time clock located there) and possibly re-file the pleading during regular business hours.

[24] *See* D.C. Code §4-1401 and 16 DCMR Chapter 29 (D.C. Register, vol. 37, no. 19, page 3033) regarding licensed child-placing agencies.

determining when a state has jurisdiction of a child custody proceeding.[25] The definition of "custody proceeding" in the UCCJEA includes adoptions. Typically, for adoptions that have a companion neglect case, D.C. will have jurisdiction under the UCCJEA.

Who can adopt?

Any person may petition the court for a decree of adoption. D.C. Code §16-302. It is generally accepted that any adult may adopt, including married couples and single individuals.

§16-302 requires that a spouse must join in an adoption petition.[26] This provision is generally interpreted as meaning that both spouses must adopt.[27] On occasion, you may discover that your client is married but separated from the spouse. If your client is willing, a divorce proceeding can be initiated.[28]

Adoption by more than one unmarried individual (gay and lesbian adoptions)

In *In re M.M.D.*, 662 A.2d 837 (D.C. 1995), the D.C. Court of Appeals ruled that two unmarried individuals living together in a committed personal relationship (including same-sex couples) may jointly adopt a child. The decision allows for adoption by one partner of the other partner's birth/adoptive child, or adoption of a child by both partners simultaneously.

Who can be adopted?

A person, whether a minor or an adult, may be adopted. D.C. Code §16-303.

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[25] Jurisdictional defects under the UCCJEA may be waivable under certain circumstances. *Kenda v. Pleskovic*, 39 A.3d 1249 (D.C. 2012); *B.J.P. v. R.W.P.*, 637 A.2d 74 (D.C. 1994).

[26] Step-parent adoptions are explicitly exempted from this requirement. In step-parent adoptions, the spouse (i.e., the child's birth parent) need only consent to the adoption.

[27] Some attorneys have proposed an argument that a spouse can "join in the petition" by agreeing to the adoption but not actually adopting him/herself.

[28] D.C. has jurisdiction over a divorce proceeding if either spouse has been a resident of D.C. for six months next preceding the filing of the action. There are only two grounds for divorce in D.C., both no-fault: voluntary separation for six months or separation for one year. The court can grant a divorce even if the whereabouts of the spouse are unknown. If your client is willing to divorce and there are no collateral issues to be litigated (such as division of marital property), divorce proceedings can be simple and can often be completed in a few months. Form divorce pleadings and a *pro se* divorce handbook are available from the D.C. Bar. In Maryland, there are both fault grounds and no-fault grounds (voluntary separation for more than 12 months or separation for two years) for divorce, and there are a number of handbooks and on-line forms available.

There is no statutory requirement that a child be living with or in the physical or legal custody of the petitioner at the time the petition is filed. However, in order for a final decree of adoption to be entered, the child must have been living with the petitioner for at least six months, unless the adoptee is over 18 years of age.[29] D.C. Code §16-303(c).

Parties

The adoption statute

The adoption statute does not explicitly define or designate parties as such. Instead, D.C. Code §16-304 lists those persons whose consent is required in order for a petition for adoption to be granted. D.C. Code §16-306 then states that notice of adoption proceedings shall be given to each person whose consent is necessary. [30]

D.C. Code §16-309 also provides that the court may grant the adoption after considering such evidence as "the parties and any other properly interested person may present."

Uniform Child Custody Jurisdiction and Enforcement Act

The UCCJEA provides that notice and an opportunity to be heard must be given to all persons entitled to notice under the law of the District as in child custody proceedings between residents of the District, any parent whose parental rights have not been previously terminated, and any person having physical custody of the child. D.C. Code §§16-4602.05. *See also* D.C. Code §16-914(b).

The adoption rules

SCR-Adoption 17, "Parties; Interested Persons," provides that the parties to an adoption proceeding include the petitioner; birth parents who have not consented to the adoption, relinquished parental rights or had their parental rights terminated; the child (or, if appointed, a guardian for the child); the Mayor, if the child has been committed in a neglect proceeding or if parental rights have been relinquished to the Mayor;[31] and a D.C. licensed child-placing agency

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[29] If the child has not lived with the petitioner for the requisite period, the court can enter an interlocutory decree of adoption. D.C. Code §16-309(d).

[30] §16-306 also provides that "a party who formally gives his consent to the proposed adoption . . . thereby waives the requirement of notice . . ."

[31] Even if the District is a party under this rule, the Office of the Attorney General often does not appear in adoption proceedings unless their participation is actively solicited or unless there is a significant contested issue about which the petitioner and the government (that is, the social worker) take opposing positions.

if parental rights have been relinquished to that agency. See also SCR-Adoption 24 (intervention).

Paternity

There is virtually no legal distinction between children born in and out of wedlock or the rights of parents of children born in and out of wedlock. See, e.g., D.C. Code §§16-907, -908. But see *Lehr v. Robertson*, 483 U.S. 248 (1983) (a biological father who did not take advantage of his "opportunity interest" to develop a relationship with his child that constitutes a constitutionally protected right is not entitled to notice of adoption proceedings).

D.C. Code §§16-909, 16-909.1 and 16-2341 *et seq.* address issues relating to the establishing of paternity generally.

The procedural question that arises most frequently with regard to fathers in adoption cases is: how is it determined who is a father for purposes of notice and party status? In practice, judges in recent years have tended to err on the side of caution in connection with providing notice to putative fathers, possibly due in part to two Court of Appeals decisions which reversed and remanded adoptions because of lack of notice to birth fathers, *In re H.R.*, 518 A.2d 1141 (D.C. 1990) and *In re N.M.N.*, 605 A.2d 921 (D.C. 1992) (the right of a putative father to notice of a pending adoption proceeding does not depend upon proof that the putative father is in fact the biological father). *Cf. In re T.M.*, 665 A.2d 207 (D.C. 1995); *In re: Three Adoption Cases*, 118 Daily Wash. L. Rptr. 645 (March 27, 1990) (Suda, J.). Over the past several years, the trend has been for the court, at least initially, to treat as a party and require that notice be given to anyone who has been named by the birth mother as a possible father, or any person who comes forward and asserts paternity regardless of whether that person would be entitled to notice under a *Lehr v. Robertson* analysis. In general, the court will rely on the information that is provided during the course of the neglect case and in the CFSA adoption report (see *infra*) in determining who those individuals are.

Note that if the identity of a birth father cannot be established, SCR-Adoption 4 permits notice to be given by posting or publication. See also D.C. Code §16-304(d). In practice, many judges do not require notice to unknown fathers, but some may.

Another question that arises in connection with paternity is: does the petitioner have to establish or prove paternity in order for the adoption to be granted, particularly when a putative birth father does not appear during the course of the proceedings and contest paternity? Historically, in practice, the answer has been "no." See *In re T.M.*, 665 A.2d 207 (D.C. 1995) (court has the authority to address the rights of a putative father in a termination of parental rights proceeding brought pursuant to §16-2351 *et seq.*).

If paternity is contested, the court will customarily grant a request for genetic testing. SCR-Adoption 35. The court has a contract with a laboratory to perform the paternity tests in Family Court cases. The test sample is gathered by a non-invasive swab from the mouth. The test can be performed with samples from the mother, putative father and child, or with samples from just the child and father. Although the court contracts with a laboratory, the test is not free. However, the court will usually approve payment for the test from court funds through an "expert services" voucher issued through the neglect case.[32]

Counsel

Birth parents

There is not an absolute constitutional right to counsel for birth parents in an adoption case.[33] In addition, there was originally no statutory right to counsel in an adoption (as opposed to neglect cases) nor was there any provision for court-appointed counsel. D.C. Code §16-316 now provides that the court may appoint an attorney to represent a parent or guardian in an adoption whose parental rights have not been previously terminated or relinquished, if the individual is financially unable to obtain adequate representation.

As a practical matter, when there is a companion neglect case, attorneys in that case will represent their clients in the adoption case. It has long been the prevailing practice of the court that if the neglect and adoption cases are consolidated,[34] the court-appointed neglect attorney will be compensated for work done in connection with the adoption, and it is now the universal practice that the judge handling the adoptions calendar will *sua sponte* consolidate the neglect and adoption cases at the time the initial orders in the adoption case are issued (the order of

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[32] Parties who are eligible for court-appointed counsel in neglect cases, including the guardian ad litem, are also entitled to "investigative, expert, or other services necessary for adequate representation." D.C. Code §16-2326.1(g). Authorization to secure such services is obtained by *ex parte* submission to a judge of a voucher form (obtained from the Defender Services Branch of the court's Budget and Finance Office). Although vouchers can arguably only be issued in the neglect case, paternity is an issue of relevance to both cases and judges will routinely approve vouchers for paternity testing. In addition, judges appear to be willing approve to vouchers for litigation services more directly related to the adoption because the neglect and adoption cases are consolidated. The guardian ad litem or counsel for the parent will have to request the voucher.

[33] In *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981), the Supreme Court held that notwithstanding the fundamental constitutional right that is involved in a proceeding resulting in the termination of parental rights, there is no absolute due process right to counsel in such proceedings. Whether due process requires counsel for the birth parents is to be determined on a case by case basis. *Cf. In re J.A.P.*, 749 A.2d 715 (D.C. 2000).

[34] SCR-Neglect 3 provides that a neglect case may be consolidated with any other family division case relating to the child or family.

reference and order to show cause), not only because of the "one family, one judge" policy set forth in the Family Court Act, but also for the purpose of providing counsel for the birth parents.[35]

Guardian ad litem

Originally, the adoption statute did not expressly provide for the appointment of a guardian ad litem for the child.[36] However, D.C. Code §16-316 now provides that the court may appoint a guardian ad litem who is an attorney to represent the child in an adoption proceeding. See also SCR-Adoption 17.

The prevailing practice at this time is for the adoptions judge to consolidate the neglect and adoption cases and either explicitly or *sub silentio* appoint the attorneys in the neglect case to represent their clients in the adoption case as well. Thus, when the neglect and adoption cases are consolidated, this is treated as an appointment of the guardian ad litem in the adoption case. The current practice is for the court automatically to allow the guardian ad litem in the neglect case to participate fully in the adoption proceeding.

Intervention

SCR-Adoption 17 provides that a person who is not a party under the rule may present evidence in a particular case with permission of the Court pursuant to D.C. Code §16-309(b).

Filing the adoption

Beginning the adoption; filing procedures

Adoptions are commenced by the filing of a petition. The court files ("jackets") in adoption cases are maintained by the Adoptions Clerk's office, which is located in the Family Court Clerk's office, room JM-300. Pleadings are filed through the Family Court Central Intake Center, located in room JM-520, at the east end of the John Marshall level of the courthouse. The clerk's office and CIC are open from 8:30 a.m. to 5:00 p.m.

It is recommended that you bring an original and at least three copies of the petition when you file. It is advisable to get a copy of any pleading date-stamped for your own files. In addition, the clerk customarily requires that you submit an additional copy of the petition

[35] This is sometimes known as a "limited consolidation" because at one time, the two cases were not heard by the same judge and the consolidation was only for the purpose of providing counsel. However, since the enactment of the Family Court Act, adoptions cases are in fact assigned to be heard by the neglect judge.

[36] In *In re Female Infant*, 237 A.2d 468 (D.C. 1968), the Court of Appeals held that it was not error not to appoint a guardian ad litem for the child in an adoption case.

together with the original; this copy will be sent by the court, together with the order of reference, to the agency that is responsible for preparing the adoption report (see below).

Filing fees; waiver: The filing fee for an adoption is $80. The court can waive filing fees in an adoption proceeding if the adoptee is an adjudicated neglected child, D.C. Code §15-917, and the filing fee will be waived automatically at the time of filing without the need for an application for a fee waiver.

In non-neglect-related adoptions, petitioners can also seek a waiver of filing fees through an application to proceed *in forma pauperis*. The Family Court Intake Center will provide an IFP forms packet upon request.[37] The form is also available at http://www.dcbar.org/for_the_public/legal_information/family/family_court_forms/index.cfm.

Separate petitions: SCR-Adoption 7(b) requires separate petitions, and thus separate cases, for each child. However, for good cause shown, the court may grant permission for a petition to include more than one adoptee. The comment to the rule cites step-parent adoptions and siblings with same birth parents as examples of appropriate circumstances for petitions to include more than one child.

Caption of pleadings: Adoption cases are traditionally captioned "Ex Parte in the Matter of the Petition of [*Petitioner's Name*] and [*Petitioner's Name*] for Adoption of a Minor."

What else is filed with the petition?

SCR-Adoption 7(a)(3) requires that at the time of filing the petition, the petitioner must also furnish several proposed orders that the court will be issuing. However, the court now uses its own templates for those orders, and Family Court "General Order Concerning Adoption Cases in Which the Adoptee is the Respondent in a Neglect Case," dated February 26, 2004, requires only that the following be submitted at the time the petition is filed:

(a) ***the original and one copy of the petition***. The copy will be sent together with the order of reference to the agency that is responsible for filing the adoption report (see below).

(b) ***Vital Records form***. This form, which is required by statute, is sent to the appropriate vital records office after the adoption decree is signed so that a new birth certificate will be created. D.C. Code §§6-209, -210. It is an accepted practice

[37] Counsel should submit the IFP application, together with a copy of the petition, to Judge-in-Chambers, Room 4220, where it will typically be ruled on without a hearing, usually the same day. After the motion is granted, the petition then needs to be filed by counsel through the Family Court Central Intake Center.

for counsel to sign this form. Note that this form is supposed to be completed with information as of the date of birth of the adoptee (not as of the date the form is filled out).

(c) an ***Adoption Information Form***

(d) a "***copies to***" list with the names and addresses of petitioner's counsel, the social worker, and all attorneys of record in the neglect case; and

Notwithstanding the General Order, the court has announced that mailing labels or addressed envelopes need not be filed with the adoption petition.

Criminal records check

D.C. Code §4-1305.03 requires that a criminal records check be applied for by the petitioner for adoption and every adult residing in the petitioner's home "before the filing of the petition for adoption." "Criminal records check" is defined as a search conducted by the FBI, the police if the individual resides in the District, and a state law enforcement agency if the individual resides outside the District. Records checks have to be conducted for the petitioner's state of residence and certain other states where the petitioner has previously resided. Note that the records check need only be applied for, not obtained, prior to filing; there can be some delay between the application and receipt of the information.

The requirement that the records check be applied for prior to the filing of the petition is not rigorously enforced; however, the records check will be required to be completed or updated prior to the entry of a decree of adoption. If a new or updated records check needs to be obtained, the social worker will routinely inform the petitioners as part of the process of preparing the adoption report.

If the petitioner is a foster parent, a criminal records check should have been conducted as a part of the original foster home licensing process, although CFSA may require an updated check when it prepares the required adoption report.

The petition

D.C. Code §16-305 sets forth information that must be contained in the petition. In addition, the Uniform Child Custody Jurisdiction and Enforcement Act requires that certain information be included regarding whether (to the petitioner's knowledge) there have been or are other custody proceedings involving the child and identifying individuals who may be entitled to notice and party status. D.C. Code §16-4602.09.

SCR-Adoption 7 provides more detailed requirements regarding what information is to be included in the petition. The petitioner is only required to provide information s/he has.

Information in the petition can be "to the best of petitioner's knowledge" or, If the information is not known to the petitioner, that can be stated in the petition.

Petitions must be signed under oath (signed before a notary or before the adoptions clerk, who can administer oaths in adoption cases). If there are two petitioners, they do not need to sign at the same time, as long as each signature is notarized.

SCR-Adoption 7(b) requires separate petitions (and thus separate cases) for each child. However, for good cause shown, the court may grant permission for a petition to include more than one adoptee. The comment to the rule cites step-parent adoptions and siblings with same birth parents as examples of appropriate circumstances for joint petitions.

Name change

If the petitioners are requesting that the child's name be changed, that request should be included in the factual statements and in the prayer for relief, although the adoption statute provides that the family name of the adoptee will be changed to that of the adopter unless the decree otherwise provides. Both the given and family names of the adoptee may be changed. D.C. Code §16-312(c). If between the time of filing and the time the decree is entered the petitioner would like to change or add a name-change request, this can usually be done by filing a praecipe rather than through a formal motion to amend the petition.

Confidentiality

D.C. Code §16-311 provides that from the filing of the petition on, the record in adoption proceedings is sealed and can only be inspected, even by the parties, upon order of the Court. *See also* SCR-Adoption 79-I (upon request, clerk shall provide a case summary to specified individuals, including counsel of record). As a result, parties and counsel cannot inspect the court file, including the adoption report, without leave of court. Authorization can be sought through a motion.

The adoption rules require that parties be referred to in pleadings by initials and not name when necessary to maintain confidentiality or in pleadings to be served on other parties. *See*, *e.g.*, SCR-Adoption 5, 10, 26, 39(c). SCR-Adoption 10 provides that in the petition and the adoption decree, the full name of the petitioner should be used. Those documents will not be served on the birth parents.

The court has announced that pleadings which reference an adoption case number or any information about an adoption case will not be accepted for filing in neglect cases. Pleadings referencing an adoption will only be filed in the adoption file. If you need to file a pleading which applies to both an adoption and a neglect case, you will need to file two

separate pleadings, one in the neglect case with the neglect case number and one in the adoption case with the adoption number.

Service of pleadings generally

SCR-Adoption 5 requires that, except as otherwise provided, service of pleadings shall be made by the Clerk. See also SCR-Adoption 8 (motions). However, the comment to Rule 5 states:

> Under paragraph (a) of this rule, pleadings and other papers relating to an adoption case will be served upon the parties by the Clerk . . . . In contested cases [as defined in SCR-Adoption 2], service by the parties is permitted under SCR-Adoption 8(a)(4). Provisions for service of notices of adoption, orders to show cause and subpoenas are set forth in SCR Adoption 4, 39 and 45.

Pleadings filed after the petition are, in fact, served by the parties/counsel, not by the clerk. Pleadings filed after the petition can be served by mail, as they would be in any civil case. The petition itself is not served on the birth parent; the notice of adoption and order to show cause are the required notice documents that are served instead. It is the universal practice, when there is a companion neglect case, that CFSA is responsible for effecting service of the required notice documents on the birth parents (see below).

The adoption report and the "order of reference"

Upon the filing of an adoption petition, D.C. Code §16-307 requires the court to refer the adoption petition to the licensed child-placing agency by which the case is supervised, or to the Mayor if the case is not supervised by a licensed child-placing agency, for an "investigation, report and recommendation."[38]

This process is initiated by the court issuing what is known as an "order of reference" to the appropriate agency. The order of reference directs the agency to submit the required report within the required time frame. The order is issued automatically in response to the filing of the petition without the need for a motion or other action by counsel.[39] SCR-Adoption 4(a)(3), 7(c).

Who prepares the report?

[38] The court may dispense with the report if the adoptee is an adult or if the petitioner is a spouse or domestic partner of the natural parent. D.C. Code §16-308.

[39] Pursuant to D.C. Superior Court Administrative Order 97-10, the order of reference is to be sent out within 48 hours after the filing of the petition. In practice, it is generally issued within a month of filing.

In general, in adoption cases in which there is a related open neglect case, the agency responsible for the report is CFSA. The assigned social worker in the neglect case is usually the individual responsible for actual preparation of the report. If the child is in a foster home through a private foster care agency, the assigned social worker from that agency will probably prepare the report, although it will be reviewed and submitted by CFSA.

When is the report submitted?

The report is to be filed within 90 days after service upon the agency of the order of reference and copy of the petition. D.C. Code §16-309(a); SCR-Adoption 4(a)(3). However, the agency is routinely granted extensions of time and it is unusual for a final report to be filed within the 90-day period.[40] The status of the report and what information is still needed in order to complete a final report can be discussed at adoption status hearings or neglect review hearings. If you have reason to believe that the agency is not taking appropriate steps to complete the report, counsel can bring that to the attention of the judge or possibly move for an order to show cause why the agency should not be held in contempt for failing to file the report as ordered. SCR-Adoption 39(b)[41].

The agency often submits "interim reports" until it can submit a final report and recommendation.

What is in the report?

The statute is very general as to the contents of the report, requiring the report to address the truth of the allegations of the petition, whether the adoptee is a proper subject for adoption, the home of the petitioner to determine whether it is suitable, and any other circumstances and conditions which have a bearing on the adoption. D.C. Code §16-307.

SCR-Adoption 7 sets out more explicit requirements regarding the information to be included in the report. The information required by the rule incorporates, inter alia, various statutory and regulatory requirements relating to the licensing of foster and adoptive homes, as well as information that the court decided it wants to have.[42]

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[40] Parties are commonly not served with the agency's request for an extension of time. In fact, the agency may not even file a formal request for an extension of time.

[41] Although the parties are not permitted to see the report(s) without leave of court, the social worker can be asked about the status of the reports and what information is outstanding, and these issues can be raised at and are typically discussed at court hearings.

[42] For example, D.C. Code §4-1305.01 requires that petitioners apply for a criminal records check. 16 DCMR 29 (D.C. Register, vol. 37, no. 19, page 3033) (May 11, 1990)) sets forth regulations regarding licensed child-placing agencies which include regulations relating to licensing of adoptive homes and the

The report usually consists of a narrative about the background and current status of the birth parents, adoptive parents and the child,[43] together with confirmation that any information specifically required by statute or rule has been obtained by the agency.[44]

The petitioners will be asked by the social worker to furnish information or updated information that is required for the report. The information and documents are for the most part the same as what the petitioners, if they are foster parents, had to supply as part of the foster home licensing process.

Access to the report

Because the adoption file is sealed upon the filing of the petition, the parties can obtain access to the adoption report only upon order of the court. D.C. Code §16-311; SCR-Adoption 79-I.[45]

The expedited report

SCR-Adoption 4(a)(2) and 7(c) require the submission of an "expedited report" concerning the identity and whereabouts of the birth parents if the identity and address of a person whose consent to the adoption is being withheld are not disclosed in the petition.

This "expedited report" procedure was devised to help ensure that birth parents receive timely notice. Historically, the court has relied on information in the adoption report in order to ascertain to whom and what kind of notice should issue. However, the frequent and lengthy delays in the submission of these reports led to the development of the requirement of this "expedited report" so that the notice process could proceed more expeditiously (see notice requirements section below).

The order requires that within 21 days after its receipt, the agency submit a report on the name and address of each person whose consent to the adoption is being withheld or the status of efforts to identify and locate such persons. The information provided in the expedited report

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placement of children for adoption. The court is also looking, for example, for confirmation that an adoption subsidy agreement has been signed (federal law requires the signing of the agreement prior to the entry of the decree) or that subsidy is not being requested.

[43] When there is an open neglect case, much of the information for the narrative is culled from CFSA's existing agency records and the disposition and review reports that CFSA submits to the court and parties in the neglect case.

[44] CFSA has a standardized format for adoption reports that is used fairly consistently.

[45] Consideration by the court of a report that has not been seen by all parties would seem to raise a due process issue.

enables the court to determine to whom notice should issue (i.e., to whom the notice of adoption and order to show cause should be directed, and whom CFSA should be directly to locate and serve).

Consents

D.C. Code §16-304 lists those individuals whose consent is required for adoption of a person under the age of 18. They are:

- an adoptee who is 14 years of age or older
- birth parents
- any court-appointed guardian of the child
- the licensed child-placing agency or the Mayor if parental rights have been terminated by a court of competent jurisdiction or by a release of parental rights based on the consents of the parents[46]

However, as discussed more fully below, the court can waive any of the required consents pursuant to D.C. Code §16-304(d) and (e).

Consents must be in writing and either notarized or signed and acknowledged before a representative of a licensed child-placing agency or the Mayor.[47] No particular form of words is required by either the statute or the rules. Some attorneys prefer to include language regarding the effect of an adoption and language indicating that the parent is knowingly and voluntarily consenting, in order to protect against any subsequent attempt to challenge the validity of the consent.

Minority of a natural parent is not a bar to that parent's consent to adoption. D.C. Code §16-304(c).

The prevailing view is that the signing and filing of a consent does not constitute a termination of parental rights; it is simply a consent to the adoption. If an adoption decree is not entered, parental rights remain intact. *See In re J.A.*, 119 Daily Washington Law Reporter 941 (1991).

Consents can be revoked if it is shown that the consent was not given voluntarily. SCR-Adoption 70 (and cases cited in the annotation to the rule). Incompetence, fraud or duress may be bases for a revocation. See *In re Adoption of S.E.D.*, 324 A.2d 200 (D.C. 1974).

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[46] "Release" has generally been read to mean a voluntary relinquishment of parental rights pursuant to D.C. Code §4-1406.

[47] This is generally interpreted to mean the social worker.

Waiver of consent

The court can grant an adoption even in the absence of any of the "required" consents.

The adoption statute provides that when "after such notice as the court directs, [a parent] cannot be located, or has abandoned the prospective adoptee and voluntarily failed to contribute to his support for a period of at least six months next preceding the date of the filing of the petition, the consent of that parent is not required." D.C. Code §16-304(d).

In addition, "the court may grant a petition for adoption without any of the consents specified in this section [16-304], when the court finds, after a hearing, that the consent or consents are withheld contrary to the best interest of the child." D.C. Code §16-304(e).

Initial notice and service

The adoption statute provides that due notice of pending adoption proceedings shall be given immediately upon the filing of a petition to each person whose consent is necessary. SCR-Adoption 4(d) requires service of notice on each party and on any other person whose consent to the adoption is necessary who has not in fact consented and whose rights have not otherwise been relinquished or terminated.

Notice is one of the more confusing aspects of how adoptions are handled. In most civil cases, including custody cases, the responsibility for giving notice and securing personal jurisdiction over the other parties falls to the plaintiff. In adoptions, however, the task of giving notice of the adoption proceeding has traditionally been handled by the court, not the petitioner. The adoption rules have now, in essence, formally adopted that practice.[48] SCR-Adoption 4(a)(1), (b)(1). The procedure that has ultimately evolved is that, when there is a companion neglect case, the court places on CFSA the responsibility for effecting service.

In short, the court will automatically issue the process that is to be served (notice of adoption and order to show cause), stating on whom it must be served, and directing CFSA to serve it.

Who is to be served?

D.C. Code §16-306 requires that "due notice of pending adoption proceedings" be given to each person whose consent is necessary (pursuant to §16-304).[49]

[48] SCR-Adoption 7(e)(5) also permits parties to effect service themselves.

[49] If parental rights have been terminated or relinquished or a consent to adoption has been filed, notice does not have to be given to that individual. D.C. Code §§16-304, -306.

SCR-Adoption 4(d) requires service on each party (SCR-Adoption 17) and each individual whose consent to the adoption is necessary pursuant to §16-304.

The Uniform Child Custody Jurisdiction and Enforcement Act provides that notice and an opportunity to be heard must be given to all persons entitled to notice under the law of the District as in child custody proceedings between residents of the District, any parent whose parental rights have not been terminated, and any person having physical custody of the child. D.C. Code §§16-4602.05.

Regarding service on birth parents whose identities or whereabouts are unknown, see "Method of service," below.

How does the court determine whom to serve and how?

The petition, the expedited adoption report required by SCR-Adoption 4(a)(2) and 7, and information from the neglect case, are the primary means by which the court determines in the first instance who is entitled to notice. *See also* SCR-Adoption 4(b)(1) (the Clerk shall serve a notice and an order to show cause to the required individuals whose names and addresses are provided in the expedited report); SCR-Adoption 4(d)(2) and (4). While the petitioner may also provide such information to the court, and while Rules 4(a)(1) and 7(a)(1) mandate that the court serve notice based on such information, petitioners often do not have much or any information, although when there is a companion neglect case, the petitioners and their counsel may know the identity of the mother and the father/putative father.

Regarding service on putative birth fathers, see "Paternity," *supra*.

In practice, formal service of process pursuant to SCR-Adoption 4 is currently only effected on the birth parents and not on other individuals whose consent to adoption is required and are thus entitled to notice, in particular children over age 14. With regard to children over 14, the usual practice is for the court to raise the issue of the child's consent with the parties at an early stage of the proceedings and prior to trial, to ascertain whether the child consenting or not and, if so, what is the best way to obtain the written consent and, if not, how to proceed.

What is to be served?

The adoption rules require that birth parents be served with a "notice of adoption proceedings" and an "order to show cause." SCR-Adoption 4.

SCR-Adoption 4(c) sets forth the information that must be contained in the notice and the order to show cause.

The order to show cause directs the named parent to appear before the court at a date and time certain to show cause whether his/her consent to the adoption is being withheld contrary to the best interests of the child. (See below, on "show cause hearings.") The current practice is for the show cause order also to require CFSA to conduct a "diligent search" to locate the parents and to effect service of the notice and order on them.

The court will issue the notice of adoption and order to show cause *sua sponte*.

The petition for adoption is not served on other parties.

Who is responsible for effecting service?

SCR-Adoption 4(a)(1) and (b)(1) provide that the Clerk shall serve notice of the adoption proceeding and order to show cause on each person whose consent is being withheld.

The current practice of the court is, through the order to show cause, to direct CFSA to effect service when there is a companion neglect case. *See, e.g.*, SCR-Adoption 4(d)(2). CFSA has created the "Diligent Search Unit" (commonly referred to as DSU) for this purpose. The DSU, which is part of the Legal Services Unit at CFSA, investigates the identity and whereabouts of birth parents and serves the notice of adoption and order to show cause. The diligent search investigator who serves the process will file an affidavit of service with the court or an "affidavit of efforts" if s/he has been unable to effect service.

SCR-Adoption 4(e)(5) also permits parties to effect service.

When is service to take place?

Neither the statute nor the rules specify a time frame for service. D.C. Code §16-306(a) states that "due notice of pending adoption proceedings shall be given . . . immediately upon the filing of a petition."

SCR-Adoption 4(a) provides that immediately upon the filing of an adoption petition, the Clerk shall serve notice of the adoption proceeding and order to show cause on each person whose consent is being withheld and whose identity and address are disclosed in the petition. SCR-Adoption 4(b) provides that "upon receipt of the expedited response [to the order of reference], the Clerk shall immediately . . . serve a notice of adoption proceedings and an order to show cause . . . ." In *In re H.R.*, 518 A.2d 1141 (D.C. 1990), the Court of Appeals called attention to the need for prompt notice.

Method of service; constructive service

D.C. Code §16-306(a) provides that notice shall be given by summons, by registered letter sent to the addressee only, or otherwise as ordered by the court.

SCR-Adoption Rule 4(e) permits service by delivery to the individual personally or, with leave of the court, by leaving a copy of the notice/show cause order at the individual's dwelling house or usual place of abode with some person of suitable age or discretion then residing therein. Service is also permitted by registered mail, restricted delivery, return receipt requested.

Upon a determination that personal service cannot be effected, the court may order service by means of posting or publication of notice. Specifically, SCR-Adoption 4(d)(2) permits these forms of constructive service upon parents whose identities are known but whose whereabouts are unknown despite "diligent efforts" by the child-placing agency responsible for filing the adoption report to locate the person. SCR-Adoption 4(d)(4) also permits constructive service upon a parent whose identify is unknown. In such cases, the agency "shall, whenever possible, submit to the Court an affidavit of the known birth parent which sets out the reasons the other birth parent is unknown, or the known birth parent's reason for not revealing the other parent's identity."[50]

CFSA's Diligent Search Unit will file an "affidavit of efforts" if it is unable to locate or serve the birth parent. The petitioner may then file a motion requesting constructive service.

How will you know whether the birth parent has been served?

The show cause order usually directs that CFSA notify the parties when service has been effected. The Diligent Search Unit may mail you a copy of their affidavit of service. If you have not received either an affidavit of service or an "affidavit of efforts" setting forth DSU's efforts to locate and serve a birth parent, you may want to contact DSU or inquire of the judge's chambers as to whether an affidavit has been filed. In addition, the status of service is typically addressed at the initial court hearings in the adoption case.

Consolidation of neglect and adoption cases

It is currently the universal practice of the adoptions judge to order consolidation of the neglect and adoption cases, usually as part of the notice of adoption proceedings/show cause order or the order of reference. In the past, this was called "limited consolidation" and some

[50] *See also* 29 DCMR 1631 *et seq.* (efforts by agency to identify and locate birth parents).

judges still use that language. The consolidation was "limited" because it was solely for the purpose of providing counsel for the birth parents (see *supra*) and the cases were not heard by the same judge. However, the current procedure is that the adoption calendar judge issues the initial orders (the order of reference, the notice of adoption and the order to show cause) but the case is then assigned to the neglect judge and the initial show cause hearing and all subsequent proceedings in the adoption are heard by the neglect judge.

Opposition to the adoption

There is no requirement that a responsive pleading be filed in an adoption. An adoption can be opposed either by filing a written opposition within 20 days after service of the notice of adoption proceedings or by appearing through counsel at the hearing on the order to show cause. SCR-Adoption 12. *See also* SCR-Adoption 2 (defining "contested case"); SCR-Adoption 26(a).

First court hearing: the "initial show cause" hearing

The current practice of the court, which for the most part follows the procedure set forth in SCR-Adoption 4, is that upon receipt of sufficient information through the petition and the expedited adoption report about the birth parents' identity, the adoption judge *sua sponte* issues a "notice of adoption proceedings" and an "order to show cause." The judge may also issue the notice and order prior to receiving the adoption report.

The show cause order directs a birth parent who has not consented to the adoption to appear in court on a date and time certain and show cause whether his/her consent is being withheld contrary to the best interests of the child. SCR-Adoption 4(c). This hearing is called a "show cause hearing" or "initial show cause hearing."

What happens at the initial show cause hearing? This is one of the questions most frequently asked by attorneys and the applicable court rule is not entirely clear. The language of the order may suggest that the hearing will be a full merits hearing. But is it? Will service have taken place by the date of the hearing? What about discovery?

The short answer is that the initial show cause hearing will be a status hearing.

The adoption statute does not make reference to a "show cause" procedure. It states that the court can grant an adoption without the consent of the birth parent when the court finds "after a hearing" that consent is being withheld contrary to the best interests of the child. D.C. Code §16-304. §16-309 provides that upon receipt of the report and recommendation required by §16-307, "the court shall proceed to act upon the petition" and "[a]fter considering the petition, the consents, and such evidence as the parties and any other properly interested

person may present, the court may enter a final or interlocutory decree" upon finding that the adoptee is suitable for adoption, that the petitioner is a fit person to adopt, and that the adoption will be in the best interests of the child.

The "show cause" procedure is a judicial creation that evolved over time and is now incorporated into the court rules.[51] SCR-Adoption 39 provides that "[w]henever, after issuance of a show cause order pursuant to SCR-Adoption 4, the Court is made aware that there are persons . . . who have not appeared but whose consent to the adoption is necessary, it may set a show cause hearing on its own initiative or at the request of any party." SCR-Adoption 4 provides that a notice of adoption and order to show cause shall be served on each party and on any other person whose consent to the adoption is required under §16-304 and who has not consented or whose rights have not been terminated or relinquished.

SCR-Adoption 39(3) states that at the show cause hearing, the court "shall determine":

(1) whether the birth parent/putative birth parent will consent to the adoption;

(2) whether the putative father fails to admit or deny paternity; if he neither admits nor denies and fails/refuses to take a paternity test, the court may find his consent unnecessary;

(3) whether the birth parent has abandoned the adoptee and voluntarily failed to contribute to the adoptee's support for at least six months next preceding the date of filing of the petition [pursuant to D.C. Code §16-304(d)];

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[51] To understand the show cause concept, it may be helpful to understand its genesis. The show cause order and hearing are essentially judicial inventions that pre-date the promulgation of the current adoption rules. The procedure was developed over time as a means of giving adequate notice to the birth parents. (*Cf.* SCR-Domestic Relations 4(a)(2), requiring service of a notice of hearing and order directing appearance in actions initiated by petition.) In addition to giving clear notice to the birth parent, the procedure serves to create, in the absence of a requirement of a responsive pleading or other required appearance, an event after which the court can proceed to act on the petition even if the parent fails to respond or participate -- in essence, a default procedure.

Prior to the evolution of the show cause process, the customary practice of the court was to issue a notice (ordinarily served by mail) that stated that the parent was to enter his/her appearance on or before a specified date and that failure to do so could result in the case proceeding. No hearing was held if the parent did not respond.

Over time, judges became concerned about the adequacy of this process and developed the show cause procedure. At one time, the show cause hearing was used almost exclusively as a default-triggering mechanism. If the parent appeared at the show cause hearing and objected to the adoption, the general practice of the court was to then schedule a trial date. If the parent did not appear, the court would note the default, waive the birth parent's consent and grant the adoption (often without an evidentiary hearing).

The rule then goes on to state:

> (4) if the (putative) birth parent does not appear at the show cause hearing, the court may determine that her/his consent is being withheld contrary to the best interests of the child [pursuant to D.C Code §16-304(e)].

Thus, the rule essentially creates a hearing at which the parent must come forward and either consent or object to the adoption (subsections (1) and (2)). If the parent does not appear, the case could go forward in default for a determination on the merits (subsections (3) and (4)).

The show cause order itself, consistent with the language of Rule 4, may state that the birth parent is required to appear and show cause why her/his consent is not being withheld contrary to the best interests of the child -- the language of D.C. Code §16-304(e). Such wording suggests that whether the birth parent appears or not, the show cause hearing will be an evidentiary hearing on either of the grounds for adoption: abandonment (304(d)) or that the parent's consent is being withheld contrary to the best interests of the child (304(e)).

Notwithstanding the wording of the order, however, when there is a companion neglect case, the initial show cause hearing will <u>always</u> be a status hearing. Even if the birth parent <u>does</u> appear at the show cause hearing, one of the problems with having an evidentiary merits hearing at this juncture is that the parties may not have had sufficient notice and opportunity to prepare, and it therefore might be an abuse of discretion for the court to deny a continuance request. For example, if there is no personal jurisdiction over the birth parent until s/he has been served, the birth parent may have a legitimate claim that s/he had insufficient time between service and the hearing within which to prepare. Although the amount of time varies, there may be only a relatively short period between the issuance of the notice and show cause order and the date of the show cause hearing -- or, even more significantly, between the date of service and the hearing date.

In addition, until personal jurisdiction over the birth parent has been obtained, it is unlikely that discovery will have been conducted, and there is frequently insufficient time to conduct discovery between the date of service (or even the date the notice/order was issued) and the date of the hearing. Indeed, SCR-Adoption 26(a) states that discovery is only available if and when the adoption becomes contested, and adoption may not become contested until the birth parent appears at the show cause hearing.[52]

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[52] "Contested case" is defined as a case in which a written challenge to the adoption is filed by a party or in which a party whose consent is necessary and being withheld appears. SCR-Adoption 2. Various other provisions of the rules suggest that the initial show cause hearing in a contested case cannot be the merits hearing. *See, e.g.*, SCR-Adoption 16 (scheduling and status conference) ("... upon an adoption becoming contested, the Court shall schedule an initial scheduling and status conference . . .").

Furthermore, even if the parent has been served and does not appear in person at the hearing, the parent has counsel and will, in essence, be deemed to be appearing through counsel, and thus the case will be in a contested posture.

Regardless of the reasoning, at this time, **the court invariably treats the initial show cause hearing as a status hearing.** The judge will then proceed to schedule further hearings as appropriate at that time, e.g. additional status hearings, sometimes called "continued initial show cause hearings," a pre-trial hearing, and trial (sometimes called a "contested show cause hearing").

If service has not been effected as of the initial show cause hearing: If the birth parents have not been served by the time of the show cause hearing, the court will usually continue the hearing, although not in advance. The hearing will remain on the calendar and be treated as a status hearing, a new "initial show cause hearing" date will be scheduled, and a new show cause order will be issued with the new hearing date. This process will continue until the parents are served. Although there is customarily a directive in the show cause order that CFSA is to notify all counsel when the birth parent is served, this does not always happen. To find out prior to the hearing whether service has been effected, you can call the Diligent Search Unit at CFSA (whose staff conduct the searches for birth parents and serve the notice documents) or the judge's chambers.

If service has been effected prior to the initial show cause hearing: when there is a companion neglect case, the initial show cause hearing is still treated as a status hearing even when one or both parents have been served. Once both parents have been served, the court will, at the initial/continued initial show cause hearing, set further dates; for example, further status hearings, a discovery schedule, a pre-trial hearing, and trial ("contested show cause hearing").

Birth parents who are incarcerated

If the parent is at the D.C. Jail, the court can issue what is called a "come-up" for the parent, which will result in the parent's being brought in from the jail for the hearing. Counsel can contact chambers (the judge's law clerk) to ensure that a come-up is issued.

If the parent is incarcerated outside of the District, it is much more difficult to arrange for the parent to be present at the hearing.[53] However, judges are becoming reluctant to proceed without any participation from the parent. In theory, the court can issue a writ of *habeas corpus ad prosequendum* or *ad testificandum* for the parent to be brought into the District for the hearing but that is a somewhat complicated and unreliable process.

[53] This is because D.C. inmates who are sentenced to jail terms longer than a certain number of months are housed in the federal prison system in any number of facilities throughout the country. Parents incarcerated in the federal system can be located through the Bureau of Prisons at www.BOP.gov.

Increasingly, judges and attorneys are making arrangements for an incarcerated parent to participate in adoption hearings by speakerphone. See, e.g., *In re R.E.S.*, 978 A.2d 182 (D.C. 2009). In addition, the court has the capacity to use Skype (online video-conferencing) as do many facilities, although it would be prudent to make those arrangements well in advance.

Pre-trial procedure

As described above, the basic sequence of events in an adoption case is usually:

(1) filing the petition
(2) issuance of the order of reference, notice of adoption proceedings and order to show cause
(3) initial show cause hearing(s) and status hearings
(4) trial (contested show cause hearing)

Several aspects of current adoption practice are worth noting or reiterating because they deviate from conventional civil practice.

You will not always receive copies of filings

Remember that counsel will not receive a copy of any of the adoption reports (and leave of court is required in order to see the report). In addition, counsel may not always be served with affidavits relating to the diligent search for or service on the birth parents.

Consolidation of neglect and adoption cases

The adoption calendar judge usually issues the order of reference, notice of adoption and order to show cause, and also issues an order consolidating the neglect and adoption cases. The initial show cause hearing will be scheduled before the neglect judge and all subsequent proceedings in the adoption will be heard by the neglect judge.

Consolidation with a competing adoption petition

If a competing adoption petition has been filed, the court will customarily issue an order consolidating the two adoption cases. SCR-Adoption 42.

Rule 16 scheduling and status conference

SCR-Adoption 16 provides that in every contested adoption case, an initial scheduling and status conference shall be held no later than 45 days after the case becomes contested.

The court rarely specifically schedules such a hearing. Instead, the initial show cause hearing is a *de facto* status hearing and the court will then proceed to schedule further status hearings, a pre-trial hearing, and trial (sometimes called a "contested show cause hearing").

Discovery

Discovery is governed by SCR-Adoption 26 through 37. For the most part, the adoption rules parallel the civil discovery rules. The principle distinction is that the court must approve discovery in adoption cases. Typically, this can be addressed at a status hearing; otherwise, counsel can request leave as the need arises. In addition, Rule 26 provides that the discovery rules are applicable "only in the event that an adoption becomes contested." A "contested case" is defined in SCR-Adoption 2.

Regarding access to the required adoption reports filed by CFSA, see above.

Burden of proof

The burden of proof in an adoption is clear and convincing evidence. *Santosky v. Kramer*, 455 U.S. 745 (1982) (due process requires clear and convincing evidence in a parental rights termination-type proceeding); *In re J.S.R.*, 374 A.2d 860 (D.C. 1977).

Notwithstanding the wording of the show cause order (SCR-Adoption 4) which appears to place the burden of proof on the birth parent, the burden of proof and the burden of going forward are on the petitioner.

The legal standard

D.C. Code §16-309(b) states that:

> After considering the petition, the consents, and such other evidence as the parties and any other properly interested person may present, the court may enter a final or interlocutory decree of adoption when it is satisfied that:
>
> (1) the prospective adoptee is physically, mentally and otherwise suitable for adoption by the petitioner;
>
> (2) the petitioner is fit and able to give the prospective adoptee a proper home and education;
>
> (3) the adoption will be for the best interests of the prospective adoptee . . . .

The adoption statute also sets forth two grounds for adoption without the consents of the birth parents.[54]

- D.C. Code §16-304(d) states that:

> When a parent whose consent is hereinbefore required, after such notice as the court directs, cannot be located, or has abandoned the prospective adoptee and voluntarily failed to contribute to his support for a period of at least six months next preceding the date of the filing of the petition, the consent of that parent is not required.

- D.C. Code §16-304(e) states that:

> The court may grant a petition for adoption without any of the consents specified in this section, when the court finds, after a hearing, that the consent or consents are withheld contrary to the best interest of the child.

§16-304(d) cases

Regarding the interpretation of "abandonment and failure to support," see *In re J.T.B.*, 968 A.2d 106 (D.C. 2009); *In re C.E.H.*, 391 A.2d 1370 (D.C. 1978).

As a matter of strategy, many attorneys choose not to proceed on this ground exclusively because the definition is so vague.

§16-304(e) cases; the "best interests" standard

D.C. Code §16-304(e) provides that the requirement of a birth parent's consent to adoption may be waived if consent is being withheld contrary to the best interests of the child.

How does the court determine whether adoption is in the best interests of the child?

The statute itself gives little indication as to how the court is to make such a determination and what factors the court may, must, or must not take into consideration. There are, of course, appellate decisions that shed some light on how this abstract standard is translated into concrete terms. Some additional guiding principles have emerged that can assist lawyers in analyzing what the best interests standard means.

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[54] Note that §16-304(e) applies to any of the required consents, not merely those of the birth parents.

1. *The termination of parental rights (TPR) factors*

Under certain circumstances,[55] if a child has been adjudicated neglected, the child's guardian ad litem or the government may file a motion to terminate the parent-child relationship (TPR) in the neglect case. D.C. Code §16-2351 *et seq*. If the court grants the motion, the rights of the birth parent are completely severed. D.C. Code §16-2352. Thus, for adjudicated neglected children, it is possible only to terminate the legal (birth) parent-child relationship without creating a new (adoptive) parent relationship at the same time.

The standard for granting a TPR is "the best interests of the child." D.C. Code §16-2353. However, unlike the adoption statute, the TPR statute lists a number of more specific factors that the court is to consider in making its determination. D.C. Code §16-2353. Those factors include, *inter alia*:

- the child's need for continuity of care and stability, taking into account the child's age and developmental needs and the child's concept of time;
- the physical, mental and emotional health of all individuals involved;
- the quality of the relationship of the child with parent, siblings, caretakers, foster parents.

In *In re D.R.M.*, 570 A.2d 796 (D.C. 1990), the Court of Appeals held that it was not error for the trial court, in an adoption case, to utilize the TPR factors in reaching its decision. Subsequently, the Court of Appeals held that, in an adoption, the court must consider these factors. *In re K.D.*, 26 A.3d 772 (D.C. 2011); *In re A.T.A.*, 910 A.2d 293 (D.C. 2006); *See also, e.g.*, *In re S.M.*, 985 A.2d 413 (D.C. 2009); *In re H.B.*, 855 A.2d 1091 (D.C. 2004); *In re A.W.K.*, 778 A.2d 314 (D.C. 2001).

As a result, attorneys can look not only to the adoption statute and adoptions cases but also to the TPR factors, and presumably to TPR appellate cases, for guidance in interpreting the "best interests" standard.

2. *Constitutional issues; In re H.R.*

There is a constitutional dimension to adoption cases (as well as neglect cases). The Supreme Court has stated in a series of cases that the care, custody, management and control of a child is a fundamental right under the Constitution. Because this right is constitutionally protected, individuals are entitled to certain heightened due process protections if the state

[55] *See* D.C. Code §16-2354. In general, a TPR can be filed if the child has been adjudicated neglected at least six months prior to the filing of the motion and is in the court-ordered custody of a department, agency, institution or person other than the parent.

wishes to interfere with or terminate it. See, e.g., *Quilloin v. Walcott*, 434 U.S. 246 (1978); *Caban v. Mohammed*, 441 U.S. 380 (1979); *Lassiter v. Department of Social Services*, 452 U.S. 248 (1981); *Santosky v. Kramer*, 455 U.S. 745 (1982); *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996).

However, not all biological parents are entitled to these constitutional protections. In *Lehr v. Robertson*, 483 U.S. 248 (1983), a birth father claimed that, as a matter of constitutional due process, he was entitled to notice of the adoption proceeding concerning his child. The Court ruled that the parent's biological relationship alone does not give him/her a constitutionally protected "fundamental right" and attendant due process protections. Rather, the biological relationship gives the parent the opportunity to develop, by his/her actions, an interest that is constitutionally protected. A birth parent who has not exercised or taken advantage of this "opportunity interest" to develop a constitutionally protected relationship is not entitled to the heightened level of due process protection that a fundamental right affords.[56]

The due process protections are primarily procedural rights relating to, for example, the right to notice and a hearing, or the burden of proof. The level of due process protection accorded to a parent may, however, also have a bearing on the substantive standard applicable in an adoption proceeding. The case of *In re H.R.*, 581 A.2d 1141 (D.C. 1990) (also known as "Baby Boy C.") is primarily a case about a birth parent's due process right to notice in an adoption case. However, the lead opinion by Judge Ferren[57] also addresses in some detail an analysis of the substantive standard to be applied in an adoption proceeding. While his opinion may not be binding precedent, subsequent decisions have applied his analysis, or at least cited his language.

Judge Ferren concludes that because a fundamental constitutional right is implicated in an adoption proceeding, the "best interests" standard must incorporate a presumption that a fit birth parent is entitled to a presumption that it would be in the child's best interests for the parent to have custody.[58] The presumption is rebuttable if it is shown by clear and convincing evidence that failure to terminate parent's rights would be detrimental to the best interests of the child.

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[56] The term "opportunity interest" is sometimes misunderstood to mean that a birth parent who has exercised his opportunity interest is entitled not only to procedural due process rights and the application of a substantive standard that reflects the fact that a fundamental constitutional right is at stake, but is also entitled to some kind of right to an opportunity to regain custody of the child. This appears to be an incorrect reading of *Lehr*.

[57] Each of the three judges on the panel authored a separate opinion.

[58] As discussed further, above, this presumption would be available only if the parent has seized his/her "opportunity interest" to develop a constitutionally protected relationship with the child and thus be entitled to the greater degree of due process protection that is afforded a fundamental constitutional right.

While all adoption appeals after *H.R.* at least implicitly address the issue of the parental presumption (also known as the "parental preference") and the rebutting of the parental presumption, several cases address those issues more directly. See, e.g., *In re C.L.O.*, 41 A.3d 502 (D.C. 2012); *In re S.M.*, 985 A.2d 413 (D.C. 2009); *In re T.W.M.*, 18 A.3d 815 (D.C. 2011); *In re T.W.M.*, 964 A.2d 595 (D.C. 2009); see also *In re D.S.*, 52 A.3d 887 (D.C. 2012).

The constitutional parental preference may also apply in connection with a birth parent's consent to one of two competing adoption or custody petitioners. *In re T.W.M.*, 18 A.3d 815 (D.C. 2011); *In re T.W.M.*, 964 A.2d 595 (D.C. 2009); *In re T.J.*, 666 A.2d 1 (1995). (See "Consents," above.)

Subpoenas

SCR-Adoption 45 governs subpoenas. It requires that every subpoena in an adoption proceeding must be approved by the court prior to issuance. You should call the judge's law clerk after the subpoenas are completed by you to arrange for subpoenas to be submitted and signed by the judge.

Other than the approval requirement, the rule generally parallels other court rules regarding subpoenas in civil cases. Subpoenas must be personally served on the witness. Case law suggests that attorneys can serve their own subpoenas. *See In re Kirk*, 413 A.2d 928 (D.C. 1980).

The court has blank subpoena forms that are available at the Family Court Central Intake Center, Room JM-520.

Vouchers (litigation and expert services)

Parties eligible for court-appointed counsel in neglect cases are also entitled to "investigative, expert, or other services necessary for adequate representation." D.C. Code §16-2326.1. Authorization to secure such services, known as "vouchering," is obtained by *ex parte* submission of a voucher form to the neglect judge. Vouchers are obtained from the CCAN Finance Office (Defender Services Branch of the court's Budget and Finance Office).

Thus, it may be possible for the guardian ad litem to obtain approval for a voucher for services necessary to the litigation (*e.g.*, expert witness fees, depositions). Although vouchers are available through the neglect case, the voucher will be approved because the requested service relates to both cases. In addition, when the neglect and adoption cases are consolidated, judges are generally willing to approve vouchers for services more directly related to the adoption.

Evidence

SCR-Adoption 43 provides that evidence is to be competent, material and relevant.

The District of Columbia is primarily a common law evidence jurisdiction, although there are a few statutory provisions and court rules addressing particular evidence issues. Graae and Fitzpatrick, *The Law of Evidence in the District of Columbia* (Fourth Edition) (Bar Association of the District of Columbia) is a useful reference. D.C. follows the federal rules in many respects, but there are some differences. Imwinkelreid's *Evidentiary Foundations* (LexisNexis) is also a useful and practical reference book on evidence.

Common evidence issues

Absent social workers and other witnesses; hearsay generally

One common problem that may be encountered in marshaling evidence in an adoption case is locating witnesses with first-hand information about the history of the case and past events.

For example, if the child is adjudicated neglected and has been "in the system" (under the neglect jurisdiction of the court and in foster care or third party placement) for several years, it is possible that the social worker who is currently assigned to the case has not always been the social worker on the case. In fact, the case may have gone through several social workers. The prior social workers may no longer work at the agency and may even have moved out of the jurisdiction. Other professionals who have worked with the birth parents, adoptive parents or the child in the past may also be difficult to track down.

The problem, then, is finding competent, non-hearsay evidence about past events if the witness who would ordinarily have first-hand knowledge is unavailable.[59]

If there are records or case files documenting past events, you may be able to get them admitted under the business records exception to the hearsay rule. See Superior Court General Family Rule Q. For example, many social services agencies require that social workers keep, as part of the case file, a "running record" or log of narrative entries summarizing significant contacts in the case. Social workers also prepare written reports in connection with the neglect proceedings (§16-2319 (disposition reports), §16-2323 (review reports)). To the extent that those documents contain objective information ("Ms. Doe did not come to the visit") they may qualify

[59]Some lawyers do not object to, and some judges permit, the current social worker to testify to information learned from reading the case record. This position appears to be based on the notion that because it is part of the social worker's job to familiarize him/herself with the case records, the information is purged of its hearsay quality. This analysis seems questionable.

as business records. However, statements incorporating more subjective information (opinions, diagnoses) may not qualify as business records. *Durant v. United States*, 551 A.2d 1318 (1988); *New York Life Insurance Co. v. Taylor*, 79 U.S.App.D.C. 66, 147 F.2d 297 (1944). As a practical matter, however, many judges and lawyers do not appear to be cognizant of this distinction so you may be able to get both subjective and objective information admitted, particularly as the dividing line may not always be clear.

Also keep in mind that the business record exception addresses only one level of hearsay -- the prior social worker's statement. The records may contain multiple levels of hearsay (the social worker's recording of information that s/he was told by others). Under a traditional evidentiary analysis, each level of hearsay must be "justified." For example, if the birth parent made statements to a prior social worker that are recorded in the running record ("Ms. Smith said that she wants to enter a drug treatment program"), there is double hearsay: Ms. Smith's statement and the social worker's entry in the record. In this example, Ms. Smith's statements are admissions of a party-opponent and are therefore admissible; and if the social worker's record is a business record, then the record (including the Ms. Smith's statement) is admissible.

Note that the District of Columbia is a common law evidence jurisdiction, although there are several statutes and rules dealing with certain evidence-related issues. Graae and Fitzpatrick, *The Law of Evidence in the District of Columbia* (Fourth Edition) (Bar Association of the District of Columbia) is a useful reference. D.C. follows the federal rules in many respects, but there are some differences. Imwinkelreid's *Evidentiary Foundations* (LexisNexis) is also a useful and practical reference book on evidence.

Criminal convictions, civil protection orders and other orders

A record of most of an adult's arrests and all criminal charges and convictions in the District of Columbia can be obtained through the D.C. Superior Court Criminal Division clerk's office.[60] The main criminal information office (Room 4001) can generate a computer print-out summarizing of the individual's criminal record.[61] In addition, the court files themselves are

[60] Criminal court records in most states are usually open to the public. Many states also make basic docket information available on-line through a court website. Counsel will have to inquire of the particular jurisdiction's courts as to the various ways to obtain information and records (in person, by mail or phone, on-line). Local public defender and legal services offices can also be helpful in this regard. In Maryland, docket information for most but not all Maryland courts is available on-line through the Maryland Judiciary Case Search database at http://casesearch.courts.state.md.us/inquiry/inquiry-index.jsp. Basic information for many Virginia criminal cases is also on-line but can only be searched by county.

Information regarding civil cases is also often on-line. Some states post information on-line about non-confidential family/domestic relations cases, others (such as D.C.) do not.

open to the public and can be reviewed and copied. "Open cases" are available in the felony and misdemeanor clerk's office; files for "closed cases" are available in the information office. The closed files are kept in the clerk's office for several years, after which they are microfiched and stored offsite. Copies of files in storage can be ordered through the clerk's office. In addition, certain basic docket information is available on line through the court's website at http://www.dccourts.gov/internet/CCO.jsf.

A certified copy of the appropriate court order reflecting the criminal conviction and sentence is admissible as a self-authenticating public record (SCR-Adoption 44). Judicial notice of a D.C. conviction and sentence is probably also an appropriate way to get information into evidence, particularly if supported by a proffer of some documentation corroborating the information.

Civil protection orders cases are cases brought under D.C. Code §16-1001 *et seq*. Under certain circumstances, individuals can file for restraining orders against individuals with whom they have an intra-family relationship as defined by the statute. Those files are open to the public and housed in the Domestic Violence Unit's clerk's office, Room 4242. The DV unit clerks will do a name search in the court database.

Evidence of court findings and orders in the neglect case

If there is a companion neglect case, there may be court orders that would be helpful to get into evidence in the adoption. For example, the child will have been adjudicated neglected either after a trial, in which case there will be findings of fact, or by means of a written stipulation signed by a parent, which will contain factual admissions and well as the court's finding that the child was neglected.[62] There may be visitation orders or orders for parents to submit to drug-testing that you will want to have admitted into evidence.

Certified copies of such orders can be admitted as self-authenticating public records, or the court can take judicial notice of them.

It is probably improper for the adoption court to take judicial notice of the entire neglect file. *Cf.* Federal Rule of Evidence 201.

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[61] A D.C. criminal record can be researched through the individual's name. It is helpful the person's middle name or birth date but the search can be done by first and last name.

[62] Although the burden of proof for a neglect adjudication is "preponderance of the evidence," it is proper for the adoption court to consider the adjudication findings from the neglect case when making its determination. *S.S. v. D.M.*, 597 A.2d 870 (D.C. 1991).

Evidence of drug test results

A birth parent may have been ordered in the neglect case to submit to drug testing. Those tests are usually done through the Pre-trial Services Agency Juvenile Drug Testing Unit, Room C-210 in the courthouse. A print-out of the test results is available and, with a witness from PSA to lay the necessary evidentiary foundation, this record should be admissible under the business record exception to the hearsay rule. It is also possible to subpoena someone from PSA who can explain the test results, the technology and the testing protocols if necessary, but these tests are universally relied on by the court in both criminal cases and neglect cases and testimony concerning the testing system and procedures may not be necessary.

It is unclear who is entitled to access to the test results from court-ordered drug testing in a neglect case. However, Pre-trial Services' protocols for releasing drug test results without a subpoena changes periodically so it is advisable to check with them (202-220-5782). Because of Pre-trial Services' confidentiality policies, petitioner's counsel may not be able to get information or a copy of the test results without a subpoena, although the social worker or the guardian ad litem usually can.

Evidence from children

D.C. does not have "child witness" statutes establishing any special procedures or criteria for calling and examining child witnesses, or creating special rules of evidence concerning the admissibility of hearsay statements from children.

Child witnesses

In practice, it is relatively unusual for children to testify at adoptions, either because they are too young[63] or because neither party wishes to subject the child to appearing in court (or be perceived as being insensitive to that issue). However, occasions may arise when a party may wish to call the child as a witness.

In *In re Jam. J.*, 825 A.2d 902 (D.C. 2003), the D.C. Court of Appeals addressed the question of whether and under what circumstances the court can prevent a party from calling a child as a witness in a neglect case, or place restrictions on the conditions under which the child testifies, and discussed existing case law in D.C. and other jurisdictions. *See also In re K.S.*, 966 A.2d 871 (D.C. 2009); *In re N.D.*, 909 A.2d 165 (D.C. 2006).

[63] Competence of child witnesses has been addressed by the Court of Appeals, primarily through criminal cases. *See*, *e.g.*, *Galindo v. U.S.*, 630 A.2d 202 (D.C. 1993).

The Court of Appeals addressed the issue of *in camera* interviews of a child by a judge in a custody case in *N.D. McN. v. R.J.H., Sr.*, 979 A.2d 1195 (D.C. 2009).

Child hearsay

D.C. has no statutes concerning children's hearsay statements. Thus, in order to introduce a child's out-of-court statement for the truth of the matter asserted, the statement presumably would have to fall within a recognized hearsay exception (or not be hearsay).

The hearsay exception that is probably used most frequently is "state of mind." This exception could allow for the admission of a child's statements about what the child wants or how the child felt about someone or some occurrence.

Expert testimony

In some cases it may be helpful to present expert testimony concerning the mental and emotional status of the birth parent, or the child's mental and emotional development and needs. In addition to these kinds of individual evaluations of the birth parent or the child, it may also be of benefit to have expert testimony in the record about the nature and quality of the relationship of the child with the adoptive parent and/or birth parent. An evaluation of the birth parent, adoptive parent, and the child for the express purpose of analyzing the child's relationships with the adults and his/her needs in connection with those relationships in aid of the court's determination is commonly referred to as a "bonding assessment" or "attachment assessment."

Pursuant to Adoption Rule 35 (physical and mental examination of persons), the court probably has the authority in most adoptions to require evaluations.[64] The neglect statute also gives the court the authority to order mental evaluations in neglect cases. D.C. Code § 16-2315.

A party can retain the services of an expert to perform the evaluation. In addition, the Youth Forensic Services Division (YFSD) of the D.C. Department of Mental Health, known as

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[64] In addition, the neglect court also has the power to order mental (and physical) evaluations. D.C. Code §16-2315. The court can specify by whom the evaluation is to be done and may also require CFSA to pay for it. D.C. Code §16-2320(a)(5). Otherwise, the form order that is used allows the social worker to designate an appropriate individual or facility to perform the evaluation. Social workers will usually look for a free service (such as Youth Forensic Services Division, *infra*) or for someone who accepts Medicaid. Some private foster care agencies are willing on occasion to pay for a private evaluation.

A party to the neglect case could also request a voucher from the neglect judge to pay for a private evaluation. The adoption judge will also usually be willing to approve a voucher if there has been limited consolidation of the adoption case with the neglect case.

the Assessment Center, will perform court-ordered evaluations in Family Division cases for no charge.[65] Although technically a part of a D.C. agency, the Assessment Center was created for the sole purpose of performing psychiatric and psychological evaluations for the court (comparable to the Adult Forensic Services Division, which provides similar services in criminal cases). The Assessment Center can perform bonding/attachment evaluations as well as psychiatric and psychological evaluations of adults or children.

The Assessment Center requires a court order before doing an evaluation and also requires that certain referral materials be provided by the social worker. The Assessment Center customarily welcomes any additional materials or information that any counsel wishes to submit. The psychiatrist or psychologist must be subpoenaed to testify. A referral packet of background information must be submitted by the social worker.

With regard to previously existing mental or physical health testimony and records, D.C. Code §14-307 creates a doctor/mental health professional-patient privilege. However, D.C. Code §4-1321.05 provides that notwithstanding the provisions of §14-307, the privilege shall not be grounds for excluding evidence in any proceeding concerning the welfare of a neglected child, provided that a judge has determined that the privilege should be waived in the interest of justice.

Close of trial; issuance of decree

Contested cases

At the conclusion of the contested show cause hearing, the judge may rule from the bench or may take the case under advisement. In either case, written findings of fact and an order waiving the birth parent's consent will be issued (and petitioner's counsel may be asked to submit proposed findings of fact). Once the parent's consent has been waived after a contested show cause hearing, the judge will usually not require any further presentation of evidence and instead rely on the adoption report to address the issue of the suitability of the proposed adoptive parent, although judges do occasionally want to hear additional evidence.

Consent cases

If both parents have consented, some judges will nonetheless usually require an evidentiary hearing. Because the parents have consented, the judge does not have to hear evidence about and make a determination concerning whether consent should be waived (in

[65] The Assessment Center is located at 300 Indiana Avenue, N.W., Room 4023 (202-724-4377).

particular, about the fitness of the parent). Instead, the expectation is that brief evidence about the petitioner and child will be presented.

Generally

Even if the petitioner prevails at a hearing, the court may not yet be in a position to grant the petition and enter a decree of adoption because the adoption report required by §16-307 is not complete. Two common reasons that the report may not be complete by the time of the hearing are (1) the adoption subsidy agreement has not yet been signed, and (2) if the adoptive parents do not live in D.C., approval by the state of residence pursuant to the Interstate Compact on the Placement of Children (D.C. Code §32-1041 *et seq*.) has not yet been obtained.[66]

The court will usual schedule further status hearings to monitor the status of the case (typically, those status hearings will be combined with review hearings in the neglect case). At such time as the final adoption report is filed, the court will enter a final decree of adoption.

The judge may request the petitioner to submit a proposed final decree (together with the notice of issuance of decree that is sent to the birth parent's counsel) or prepare the decree her/himself. SCR-Adoption 7(f) sets forth some requirements for the wording of an adoption decree.

Judges are now usually asking parties if they wish to have a ceremonial adoption hearing (which the child, family and friends can attend and photographs can be taken) or whether they wish to have the decree issued from chambers without a hearing.

Certified copies of the decree of adoption will be mailed to petitioner's counsel. The court customarily provides four certified copies of the decree. The birth parent does not get a copy of the decree but instead receives a notice, issued simultaneously, that a final decree has been entered.

What happens to the neglect case?

If no appeal is taken in the adoption case, the neglect case will usually be closed (jurisdiction terminated). The neglect judge may do this automatically upon receipt of the adoption decree, or petitioner's counsel, the guardian ad litem or the government can file a motion. If an appeal of an adoption is taken, the customary practice is not to close the neglect case until the appeal has been decided, on the theory that if the adoption decision is reversed, the neglect case will be there as a "safety net." However, someone may nonetheless seek to

[66] The ICPC approval process typically resembles what is necessary to recertify a foster home license.

close the neglect case on the assumption that if the adoption is in fact reversed, the neglect case also re-opens automatically (an assumption that may be shared by the Court of Appeals).

Name change; new birth certificate

The adoption decree will contain a provision that the adoptee's name is changed if a name change was requested by the petitioner.

A new birth certificate will be created automatically. The court forwards the necessary paperwork to the Vital Statistics office which then generates a new birth certificate. D.C. Code §16-314, §§7-209, -210. The adoptive parent can obtain a copy of the new birth certificate from the Vital Records Division, D.C. Department of Public Health, 825 North Capitol Street, N.E., Washington, D.C. 20002, 671-5000.

Appeals

Appeals in adoptions are for the most part governed by the generally applicable laws and rules governing appeals: D.C. Code §11-721 and the rules of the District of Columbia Court of Appeals. A useful overview of D.C. appellate law and procedure can be found at http://www.dccourts.gov/internet/documents/FundamentalsRev.pdf.

The time for taking an appeal is governed by Court of Appeals Rule 4, which provides that a notice of appeal in a civil case shall be filed within 30 days after entry of the judgment or order from which the appeal is taken. Note, however, that if a magistrate judge presided over the adoption, SCR-General Family D(e) applies, which imposes a 10 day period to seek review by an associate judge. Orders issued by magistrate judges are not final for purposes of appeal and must be reviewed by associate judge before they can be appealed to the Court of Appeals. D.C. Code §11-1732(k) and 1732A(d); D.C.App.R.3(a)(2); *Bratcher v. United States*, 604 A.2d 858 (D.C. 1992). The review by an associate judge is not a de novo proceeding; the associate judge sits as an appellate court. See, e.g., *Weiner v. Weiner*, 605 A.2d 18 (D.C. 1992). When a motion for review is filed, the current protocol is that the Presiding Judge of Family Court will issue a written order assigned the motion to a Family Court associate judge.

The adoption decree is the appealable final order in the adoption case. In *In re Petition of S.J.*, 772 A.2d 247 (D.C. 2001), the Court of Appeals in a *per curiam* opinion held that an order in an adoption case waiving the birth parent's consent is not an appealable final order.

If an appeal of an adoption is taken, the customary practice is not to close the neglect case until the appeal has been decided, on the theory that if the adoption decision is reversed, the neglect case will be there as a "safety net." However, someone may nonetheless seek to

close the neglect case on the assumption that if the adoption is in fact reversed, the neglect case also re-opens automatically (an assumption that may be shared by the Court of Appeals).

Adoptions are not automatically stayed pending appeal. A party who wants a stay would have to follow generally applicable law and procedures for seeking a stay pending appeal. See D.C.App.R. 8.

Motion to break seal

At this time, the trial record will not be transmitted to the Court of Appeals unless the trial court breaks the seal in the adoption case, nor will a transcript be produced. *See* §16-311. As a result, a motion to break seal needs to be filed. Typically, the appellant would file this motion, but counsel for the appellee should monitor this because the need for a motion to break seal is not widely known. Counsel for appellee can also file the motion.

Adoptions and Termination of Parental Rights Motions (TPRs)

As discussed elsewhere in this manual, the parental rights of an adjudicated neglected child can be involuntarily terminated in one of two ways:

(1) through an adoption proceeding, or

(2) through a separate motion to terminate parental rights filed in the neglect case pursuant to D.C. Code §16-2351 *et seq.*

Because there are two alternatives, question may arise such as:

-- should a Termination of Parental Rights (TPR) be done first, and then an adoption?

-- should both an adoption and a TPR be filed? If so, how is that handled?

Either the GAL or the government can file a TPR.[67] At one time, the common practice was for GALs to file TPRs, terminating parental rights before an adoption was filed. At this time, however, TPRs filed by GALs are relatively infrequent. By contrast, at one time, the government rarely if ever filed TPRs. However, pursuant to the D.C. "Adoption and Safe Families Act" amendments to the statute, the District must file a TPR under certain circumstances and thus more TPRs are being filed by the government. D.C. Code §16-2354(b)(3).66 However, the District will often treat a pending adoption case as the functional equivalent of a TPR for purposes of satisfying the requirements of the statute in this regard and, if an adoption is filed, either not file a TPR or request that a pending TPR be held in abeyance. However, the TPR could go forward even though an adoption has also been filed; the TPR and adoption could be consolidated and tried together. SCR-Adoption 42; *In re D.S.*, 600 A.2d 71 (D.C. 1991).

The following is a brief look at some of the considerations that may come into play in making a decision about whether both a TPR and an adoption should be pursued. One reminder first: it is not <u>necessary</u> to terminate parental rights in a separate TPR proceeding in order for an adoption to be filed and granted. If parental rights have been terminated prior to the adoption, then the birth parents have no legal connection to the child and are not entitled to notice of or to participate in the adoption proceeding. If parental rights are intact at the time an adoption is filed and heard, it means that the birth parent is entitled to notice and an

[67] There is a separate unit in OAG that usually handles any termination of parental rights motions filed by the government.

opportunity to contest the adoption, but the court has the authority to grant the adoption over the objection of the birth parent.

Possible advantages of a TPR:

1. A TPR (done first, prior to the filing of an adoption) eliminates the need for a more direct battle between the adoptive parent and the birth parent. While the adoptive parent may be a witness in the TPR, the government or guardian ad litem files and litigates the TPR movant. Some adoptive parents might prefer not being the moving party.

2. A TPR can sometimes be heard more quickly than an adoption (but not always). Process is issued immediately upon filing and thus the guardian ad litem can proceed to effect service as soon as the TPR is filed. (However, if the parent must be located, CFSA's "diligent search" unit may be more effective in that regard.)

3. One possible advantage associated with having a TPR proceeding before the adoption is that it could help avoid a "T.J." issue. In *In re T.J.*, 666 A.2d 1 (D.C. 1995), the Court of Appeals ruled that under certain circumstances, the birth parent's choice of custodian will be entitled to a presumption that the choice is in the best interests of the child. Thus, if the birth parent's rights are terminated, the possibility that s/he could consent to a subsequent competing individual's adoption (or guardianship or custody) is eliminated.

4. If a TPR and an adoption are litigated together, there could be an advantage to having the government directly responsible for the litigation in connection with the TPR.

Possible disadvantages of a TPR:

1. Loss of control over the litigation. If there is no consolidated adoption case, the adoptive parent will simply be a witness in the TPR, not a party. (While the court has some discretion under the TPR statute to permit intervention, it has generally not been the practice for adoptive parents to move to intervene.) Similarly, if there is also an adoption case pending, it may not be helpful to have the government actively litigating if there are concerns about differences in strategy.

2. If a TPR is litigated separately, without an adoption, and the TPR is appealed, the adoptive parents would probably have to wait for the TPR appeal to be decided before the court would grant the adoption. While legally there may be no significant differences between awaiting the outcome of a TPR appeal and then finalizing the

adoption as opposed to awaiting the outcome of an adoption appeal, some adoptive parents might simply prefer having a final decree of adoption entered so that everything will be resolved by the appellate decision, rather than having to wait for the resolution of the TPR appeal before filing or moving forward on an adoption. In addition, a TPR is automatically stayed upon appeal, D.C. Code §16-2363, whereas an adoption is not.

3. If both a TPR and an adoption are filed, depending on the timing and sequence, the filing of the second case might delay the entire process, as the court will generally consolidate the cases. Thus, the original case would have to "wait" until the second case is at issue (i.e., at least until the parties have been served in the second case).

Interstate Compact on the Placement of Children (ICPC)

The Interstate Compact on the Placement of Children is a uniform law set forth at D.C. Code §4-1421 *et seq*. The ICPC was designed to regulate the interstate placement of children by courts and adoption agencies.[68]

The core requirements of the ICPC are:

- A child shall not be placed in the receiving state unless the sending state complies with the ICPC and applicable laws of the receiving state concerning placement of children.

- Prior to placing a child, the sending state shall furnish written notice to the receiving state.

- A child shall not be placed until the receiving state notifies the sending state that the proposed placement does not appear to be contrary to the best interests of the child.

ICPC approval has, in theory, already been obtained when children have been placed through the neglect case with foster parents or caretakers who live out of state. However, even if ICPC approval was obtained for the original placement, it is the position of CFSA and/or some receiving states that separate approval must be obtained in connection with the adoption. It is the general practice of CFSA to request ICPC approval in connection with the adoption, and for the court not to finalize the adoption until ICPC approval has been obtained.

In light of the fact that ICPC approval was already obtained for the original placement, and particularly when the petitioner is a licensed foster parent, the ICPC re-approval process should not be unduly burdensome and may be comparable to the process for recertifying the foster home license. The petitioner will likely have to provide some updated information to the out-of-state social services agency handling the ICPC process.

According to CFSA, certain states will not give ICPC approval until the child is "freed for adoption" – i.e., until parental rights are terminated. However, in adoption cases, parental rights are not terminated until the decree is signed – but the decree will not be signed without ICPC approval. The escape from this "catch-22" is for the judge to issue an order that the

[68] For more information on the ICPC, consult the American Public Human Services Association website, http://icpc.aphsa.org/.

consent of the birth parent has been waived. This kind of order apparently will satisfy the receiving states that D.C. customarily deals with, such as Maryland.

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Adoption Discovery Rules

1. Discovery

- Governed by Adoption Rules 26 through 37.
- Only available in "contested" cases.
- How you choose to undertake discovery is often a strategic decision based on the facts of your case.

2. Scheduling Order -- Adoption Rule 16

- Initial status conference required within 45 days after case becomes "contested."
- Following this conference, the judge can enter a scheduling order, which may set the deadline for any and all of the following:
    - The deadline for the document exchange required by Adoption Rule 26(a);
    - The dates that witness lists are to be exchanged for both fact and expert witnesses;
    - The deadline for all discovery requests;
    - The date that all discovery closes;
    - The deadline for filing motions; and
    - The trial date.
- Scheduling Order trumps all deadlines set forth in the discovery rules.
- Can only be modified by leave of Court on a showing of good cause.

3. General Discovery Provisions -- Adoption Rule 26

- Rule 26(b) is most relevant -- it sets the scope and limits of discovery. Parties are generally entitled to discovery on any relevant issue in the pending matter that is not privileged.
- Remember that all information that personally identifies the adoption petitioner is confidential. Also keep in mind other privileges such as attorney/client, work product, Fifth Amendment, physician/patient, etc.
- Rule 26(b)(4) governs the disclosure of information in connection with expert witnesses. You are entitled to know the identity of all other parties' experts, the subject matter on which any expert will testify, the substance of the facts and opinions to which the expert will testify, and a summary of the grounds for each opinion.
- You may seek a protective order under Rule 26(c) against "improper" discovery requests.
- You have an ongoing duty to supplement your discovery responses under Rule 26(f).

4. Depositions -- Adoption Rules 28, 30, 31 and 32

- Depositions are not generally used in neglect cases due to the associated expense.
- That said, you are entitled to take the deposition of any person related to the case. This may be particularly useful with expert witnesses.

- When setting the deposition, you must give reasonable notice to the deponent and all other parties to the proceeding. It is best to use subpoenas for this. *See* Adoption Rule 45.
- You can take a deposition orally or upon written questions. You can also require the deponent to bring documents to the deposition.
- Deposition testimony can be used at trial for impeachment, and other purposes.

5. Interrogatories -- Adoption Rule 33

- The total number is limited to 40 -- this includes all parts and subparts.
- You have 30 days to answer, though the court can order a shorter time period. Helpful hint: if you want to serve interrogatories, serve them more than 30 days before the trial date.
- Interrogatories must be answered fully and completely unless objected to (for example, if seeking confidential or privileged information). Any objection must be stated specifically.
- The answers to interrogatories can be used at trial to the extent permitted by the rules of evidence (for example, as party admissions or for impeachment). When answering these, you will want to consider how they can be used against your client. Do not be afraid to object if an objection is warranted.

6. Requests for Admissions -- Adoption Rule 36

- These can be served on any other party. They can, for example, ask that party to admit the truth of a fact, the application of law to a fact, or the genuineness of a document.
- Each request for admission must be separately listed.
- Requests for admission are deemed admitted unless denied or objected to within 30 days (or such period as set by the court). If you admit something, it is generally conclusively admitted for purposes of the proceeding. Therefore, take extra care with these.

7. Discovery Sanctions -- Adoption Rule 37 (*see also* Civil Rule 37)

- If a party fails to comply with their discovery obligations, you can file a motion to compel their compliance.
- You need to confer with the opposing counsel prior to doing this because you will need to note you've done this in your motion. It's also good practice.
- Note that Civil Rule 37 requires at least 10 days notice to opposing counsel before filing a motion to compel. Adoption Rule 37 is silent on this point, so it is not clear if that applies in the adoption context (arguably under Adoption Rule 1, it would not). You may see some judges requiring this, however.

8. Subpoenas -- Adoption Rule 45

- In adoption proceedings, all subpoenas must be approved by the Court prior to issuance. There is a special subpoena form for these proceedings.
- You can use subpoenas, for example, to get documents (*i.e.* medical records), give notice of depositions, or compel a witness' appearance at court.
- You can serve these in person or by mail.

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Practical Tips for Discovery

1. **Put Request in Writing:** Even when conducting informal discovery, it is important to memorialize the agreement in writing, particularly if you later need to attach the letter as an exhibit to your Motion to Compel.

2. **Weigh the Costs:** Determine the likelihood that you will receive discovery responses from the birth parent's counsel, because if you initiate discovery, the birth parent's counsel will likely reciprocate and this may mean free discovery for the birth parent that can be used against the Petitioner at trial, while the Petitioner may receive no discovery responses in return.

3. **Requests for Admissions:** Many judges are unlikely to deem responses to Requests for Admissions admitted because they believe that given the fundamental right at stake, that this would be too prejudicial against the birth parent.

4. **Do Not Delay:** If you are going to ask for discovery, it is helpful to ask for it as soon as possible, since any delay will likely be used in arguments against you by the birth parent's counsel as to reasons why s/he does not have to comply.

5. **Signature by Petitioner:** Only responses to interrogatories must be signed by the Petitioner, not responses to document requests.

6. **Rule Numbers:** In Domestic Relations Proceedings (e.g., custody and child support), the discovery rule numbers mirror the Superior Court Adoption Rule numbers.

Disclaimer

The following adoption case summaries were prepared by the Counsel for Child Abuse and Neglect (CCAN) Office and are meant to be used as a starting place for legal research. Each case summary reflects an interpretation of the case and is not a definitive statement of the law. Attorneys should read the entire case and not rely on the summary. The summaries are not guaranteed to be a complete compilation of all relevant case law.

October 2013

Adoptions Case Law

SUMMARIES OF ADOPTION CASE LAW

TOPIC	CASE	SUMMARY OF HOLDING
Adoption and grant of S.J.I.S. immigration status	In re C.G.H., decided September 5, 2013 http://www.dccourts.gov/internet/documents/12-FS-1198.pdf	Special Immigrant Juvenile Status findings can be issued in connection with an adoption proceeding.
Weighty consideration of parents' preference	In re Petition of R.W. and A.W. and Petition of E.A, decided August 22, 2013 http://www.dccourts.gov/internet/documents/11-FS-1217.pdf	Adoption reversed for failure to give weighty consideration
Step-parent adoption	In Re J.C.F. and H.A.Z., decided August 15, 2013 http://www.dccourts.gov/internet/documents/12-FS-718.pdf	Upheld waiver of father's consent.
Clear and convincing evidence of child's best interest supporting adoption despite father's right to presumption.	In Re C.L.O.; E.P., Appellant, and In Re A.H.; E.P., Appellant, 41 A.3d 502 (D.C. 2012) click here for opinion.	Even if E.P. did grasp his opportunity interest, the court-imposed waiver of his consent to the adoption is upheld as supported by clear and convincing evidence. The adoptive mother has been the child's primary caretaker for more than half of her life. The father had never been the primary caretaker, except for brief periods, for any of his seven children. The judge could credit the expert who recommended the adoption.
Weighty consideration to parent's choice of custodian overcome by clear and convincing evidence of child's best interests	In re Petition of K.D. and S.D., 26 A.3d 772 (D.C. 2011) http://www.dccourts.gov/internet/documents/10-FS-753+_MTD.PDF	The mother and the grandparents (mother's father and his wife) appeal from the court's order granting the foster mother's adoption petition. The mother supported the adoption petition of the grandparents. The court must give weighty consideration to the parent's choice of custodian. This can only be overcome by clear and convincing evidence that the parent's choice would be contrary to the child's best interests. The trial judge did not make an explicit finding on the issue of weighty consideration, but he did include a detailed discussion of the mother's choice of caretaker in his 53 page opinion which satisfied the weighty consideration requirement. The clearly contrary to the best interests of the child standard was satisfied by the evidence presented on the child's need for continuity of care, especially considering she had already been moved three times. Expert opinion established the risk of psychological harm in moving the child from a loving home where she had lived for a substantial time. Regarding the grandparents' claim that they were not allowed sufficient time to visit the child, the court held that the child could not be punished for the alleged wrongs of

		the bureaucracy.
No prejudice from counsel's alleged ineffective assistance	In Re Petition of R.E.S., 19 A.3d 785 (D.C. 2011) http://www.dcappeals.gov/dccourts/appeals/pdf/08FS451_MTD.PDF	This is the second time the Court of Appeals has considered the father's appeal from the adoption of his daughter by her foster mother. Father first appealed claiming ineffective assistance of counsel. The Court of Appeals held that the father had a statutory right to effective counsel and remanded the record for an inquiry on the performance of father's attorney. The trial court held hearings on this issue and ruled that the result would have been the same if the father's attorney had done everything the father requested. Father appealed again, claiming that the court failed to give weighty consideration to his preference for his daughter's caretaker and failed to allow him to call a social worker as a witness at the hearing. The Court of Appeals upheld the trial court stating that the best interest of the child is the decisive consideration in an adoption case, even though the parent has a fundamental liberty interest in the care, custody, and control of his child. In this case, even if the court assumed the deficient performance of counsel, it did not find that the father satisfied the burden of showing prejudice as a result of counsel's performance. The trial court gave weighty consideration to the father's preference for caretakers and had good reasons on the record to reject these caretakers. There was sufficient evidence and cross examination of the social worker at the original adoption trial so that further testimony and cross examination was not necessary on remand. In addition, there was a sufficient record showing the social worker did not show any bias in rejecting the relatives as caretakers.
To ensure stability for child, adoption upheld despite parents consent to competing relative adoption Child's opinion	*In Re Petition of T.W.M.*, 18 A.3d 815 (D.C. 2011) **http://www.dccourts.gov/internet/documents/10-FS-17+_MTD.PDF**	This is the second time the Court of Appeals has addressed this case. See *In re T.W.M.*, 964 A.2d 595 (D.C. 2009). The first appeal resulted in a remand with instructions to give weighty consideration to the parents' preference for a relative adoption which was competing with the foster parent adoption. The competing adoptions were re-tried with the foster parent prevailing. The Court of Appeals upheld the trial court finding that the child needed stability and would be harmed by removal from the foster parents' home after living there for most of her life. The trial court did not abuse its discretion in finding by clear and convincing evidence that adoption by the relative would be contrary to the child's

		best interests and by failing to question the child directly or indirectly about her opinion.
Consent to M.J. Hearing Adoption/TPR Trial	In Re: Petition of A.O.T., 10 A.3d 160 (D.C. 2010) http://www.dccourts.gov/internet/documents/09-FS-994+_MTD.PDF	Despite the passage of the Family Court Act which extended the use of magistrate judges in Family Court, the consent of the parties is still necessary for a magistrate judge to hear an adoption trial under the Family Court's General Rule D(c). (Issue now moot with revision of Rule D).
Clear and convincing evidence standard in competing adoptions when parent expresses preference Timing of appeals of competing adoptions	In Re C.A.B. & H.N.B., 4 A.3rd 890 (D.C. 2010) http://www.dccourts.gov/internet/documents/09-FS-858_MTD.PDF	A parent's preference for her child's caretaker may be overridden only be clear and convincing evidence. This standard applies regardless of whether or not the adoption proceeding concludes with the termination of the parent's rights. The clear and convincing standard must be applied at each step, including when the court compares competing adoption petitions against each other. Although the lower court used the incorrect preponderance of the evidence standard, reversal is not required because there was enough evidence to sustain the ruling under clear and convincing evidence. Appeals from competing adoptions should be filed after decisions are made on both adoptions and a final decree is issued.
Mother lacked standing to challenge notice to father; other arguments rejected	In Re Petition of T.J.L and B.J.L., 998 A.2d 853 (D.C. 2010), *available at* http://www.dcappeals.gov/dccourts/appeals/pdf/07-FS-553+_MTD.PDF	The Court ruled that the mother lacked standing to object to the trial court failure to serve personal notice of adoption petitions on the potential father. Court also rejects mother's arguments that the trial court did not allow her to participate fully in bifurcated hearing, relied too heavily on continuity factor, did not have sufficient evidence to grant one of two competing adoptions, and should have developed more evidence from one of petitioners.
Negative inference for mother's failure to attend adoption hearing, no abuse of discretion in granting adoption	In Re Petition of W.D. & M.A.D., 988 A.2d 456 (D.C. 2010), *available at* http://www.dcappeals.gov/dccourts/appeals/pdf/08-FS-1197_MTD.PDF	Adoption upheld over mother's claims of abuse of discretion and application of negative inference for mother's failure to attend adoption hearing. Four year old child had known adoptive parents for three years and lived with them for two years. Mother did not comply with services ordered by the court and did not visit consistently.
Service by posting	In re Petition of N.N.N., 985 A.2d 1113 (D.C. 2009), *available at* http://www.dcappeals.gov/dccourts/appeals/pdf/06-FS-872_MTD.PDF	Foster parent's adoption of child upheld over mother's claims of lack of personal jurisdiction, lack of service of adoption summons, and no basis for abandonment finding. Court acquired jurisdiction in neglect case, government made sufficient attempts at service before court allowed service by posting, and adoption was based on sufficient grounds so that

		abandonment finding was unnecessary.
Fit father's rights	In re Petition of S.M. and R.S., 985 A.2d 413(D.C. 2009), *available at* http://www.dccourts.gov/internet/documents/08-FS-1093+_MTD.PDF	Father appeals from the termination of his parental rights as part of the granting of the foster parents' petition to adopt his twins. Remanded based on the trial court taking insufficient account of the preference applicable to a fit father.
Parent entitled to effective assistance of counsel in adoption and TPR	In re Petition of R.E.S., 978 A.2d 182 (D.C. 2009), *available at* http://www.dcappeals.gov/dccourts/appeals/pdf/08FS451_MTD.PDF	Incarcerated father appeals from foster parent's adoption of his child, claiming ineffective assistance of counsel. Father had a right to meaningful participation in the adoption case, but he had no right to appear in person. He could have participated by telephone if his attorney had made these arrangements in a timely manner. Father cites the failure to make these arrangements as one of several grounds for his ineffective assistance of counsel claim. D.C. law gives the parent a statutory right to be represented by counsel in cases of termination of parental rights. The court holds that parents have a statutory right to effective assistance of counsel in adoption and TPR proceedings. In determining whether an attorney has provided effective assistance the Court adopted the Strickland standard, and will allow the issue to be raised on direct appeal. This requires 1) that counsel's performance was deficient and 2) there is a reasonable probability that but for counsel's deficient performance, the outcome of the trial would be different.
Written findings required prior to decree, bifurcation allowed, limit on cross examination	In re Petition of J.T.B., 968 A.2d 106 (D.C. 2009), *available at* http://www.dccourts.gov/internet/documents/08-FS-557.PDF	Magistrate Judge's issuance of final decree of adoption prior to issuing written findings of fact and conclusions of law was error, but the error was harmless. Extensive oral findings on the record complied with the spirit, if not the letter of the rule, along with the later re-issuance of the adoption decree after written findings so that the mother could appeal from written findings. The judge's decision to limit the mother's cross-examination was within the Court's discretion. The judge did not err by bifurcating the show cause hearing and the fitness hearing. Mother had sufficient opportunity at the show cause hearing to establish the points she claimed she was prevented from eliciting at the fitness hearing. Bifurcation and consolidation are addressed in Superior Court Adoption R. 42 and are permitted based upon the judge's discretion according to the circumstances of the case.
Parent's choice of custodian, need for clear and convincing evidence, parent's constitutional rights	In re T.W.M., 964 A.2d 595 (D.C. 2009), *available at* http://www.dcappeals.gov/dccourts/appeals/pdf/06-FS-1537+.PDF	Parents appeal from the granting of a foster parent adoption and the denial of a competing relative adoption. Reversed and remanded based on failure to give weighty consideration to parent's choice of custodian and abuse of discretion to deny adoption without clear and convincing evidence that adoption by relative

		was contrary to child's best interest.
Adoption petitioner's failure to disclose marriage	In re M.L.P., 936 A.2d 316 (D.C. 2007, *available at* http://www.dcappeals.gov/dccourts/appeals/pdf/04-FS-366+.PDF	In two cases, adoption decrees were upheld based on the best interests of the children even though the adoptive parent failed to disclose she got married while the adoption petitions were pending. In the other two cases, the dismissal with prejudice of the adoption petitions was upheld when the petitioner falsely claimed in her petitions that she was not married.
Parents withheld consent to adoption contrary to the best interests of the children; children w/foster parents 10 years and parents' progress toward sobriety too recent	In re J.B.N., 917 A.2d 112 (D.C. 2007), *available at* http://www.dcappeals.gov/dccourts/appeals/pdf/06-FS-148+.PDF	Trial court did not abuse its discretion in allowing petitioners to adopt the children, despite the lack of parents' consent. Children had been in and out of foster care for nearly a decade, and consideration of the factors for granting adoption against the parents' will favored petitioners. While the Court acknowledged that the parents had made great strides toward sobriety and toward building a relationship with the children, trial court did not err in considering past criminal behavior and drug relapses of the parents. A "wait-and-see" approach toward their progress and parenting abilities would be too great a gamble with the children's interests.
Mother's preference for a relative overcome by best interests of the adoptees in competing adoption between foster mother and relative	In re A.T.A., 910 A.2d 293 (D.C. 2006), *available at* http://www.dcappeals.gov/dccourts/appeals/pdf/04-FS-1046+.PDF	While a parent's preference is entitled to great weight in competing adoptions, it is not binding and can be overcome by the best interests of the adoptees. The appeals court established that the trial court had not abused its discretion but had carefully and correctly considered the six factors for granting an adoption against the parent's wishes. These factors are (1) continuity of care; (2) physical, mental, and overall health of all individuals involved; (3) quality of interaction and relationship of child with parent and caretakers; (3)(a) consideration of abandonment and the parent's efforts to maintain a custodial relationship or contact with the child; (4) to the extent feasible, the child's opinion; (5) any drug-related activity. D.C. Code § 16-2353 (b) (2001).
Adoption granted despite petitioner's advanced age and mother's visits (see dissenting opinion)	In re A.C.G., 894 A.2d 436 (D.C. 2006), *available at* http://www.dcappeals.gov/dccourts/appeals/pdf/03-FS-1540.PDF	Biological mother of minor child challenges TPR and adoption of child by paternal great-aunt claiming insufficient evidence to support termination and improper consideration of advanced age of petitioner who was seventy-seven at time adoption was filed. Court affirmed TPR and granted adoption based on several factors including mother initially abandoning child at age of two months, her failure to comply with court order requiring child support and reliance on petitioner to provide financially for child, and her failure to comply with case plan following incidents of sexual abuse by eleven-year old half-brother during weekend visits with mother. Advanced age of petitioner

		did not bar adoption because she made financial arrangements for child and arranged for two back-up caretakers in event that she could no longer care for the child. Dissent argued that TPR was too drastic and was not in best interest of child who benefited from positive and appropriate visits with mother. Also noted that advanced age of petitioner would likely not afford permanent placement. Recommended legal guardianship for petitioner and continued supervised visits with mother, requiring that mother pay reasonable child support.
Interstate Compact of Placement of Children (ICPC), parental preference, and adoption.	In re T.M.J., 878 A.2d 1200 (D.C. 2005), *available at* http://www.dccourts.gov/internet/documents/04-FS-987.PDF	The Court affirmed the dismissal of a Maryland grandmother's custody complaint under the Interstate Compact on the Placement of Children (ICPC). The court found that the ICPC allowed a child to be sent into a receiving state only when the receiving state notifies the sending state that placement is not contrary to the best interest of the child. Placement of the child with his grandmother was barred when Maryland did not grant ICPC approval. In the related foster parent adoption petition, waiver of the parents' right to consent was upheld despite parental preference for the grandmother over the foster parents.
Waiver of consent upheld where mother had continuing drug habit. Child's testimony not required.	In re J.L., 884 A.2d 1072 (D.C. 2005), *available at* **http://www.dccourts.gov/internet/documents/04FS832.PDF**	The trial court did not abuse its discretion in waiving consent to adoption where the biological mother maintained her drug addiction and was regularly late or absent for visitation, and the children were integrated into a family willing to adopt them. The court rejected the claim that the children themselves, as opposed to social workers, needed to testify as to their own opinions regarding their best interest. The existence of remedies such as objecting to hearsay evidence during the trial, and calling the children to testify provided the mother with sufficient opportunity to elicit the children's opinions. A judge is not required to hear directly from the children, and the record demonstrated that the statutory factors for TPR all weighed on the side of adoption.
Adoption of child with special medical needs and sibling by same sex couple upheld over mother's race, culture, and gender objections. Dissent seeks remand for non-handicapped sibling	In re F.W.& D.T, 870 A.2d 82 (D.C. 2005), *available at* http://www.dcappeals.gov/dccourts/appeals/pdf/03-FS-612+.PDF	Affirmed the waiver of mother's consent to the adoption of her two children by a female same sex couple. Held that the trial court was justified in finding that the mother withheld her consent to adoption contrary to the best interest of the child. The court noted that: 1) the court correctly weighed the TPR factors in waiving the mother's consent, 2) a court may satisfy it's evidentiary burden by crediting some testimony (regarding lack of bonding) over conflicting testimony, 3) race, culture, and gender are appropriately considered factors when examining the best interest of the child, but the

		health needs of child have priority, and 4) action by a social service agency toward reunification is not a condition precedent to TPR. An opinion concurring in part and dissenting in part expressed concern that failure to adequately distinguish the differing needs of the siblings warranted remand for individualized findings of fact and conclusions of law regarding the non-handicapped sibling.
Adoption upheld over mother's objection about holding decision in abeyance	In re H.B., 855 A.2d 1091 (D.C. 2004), *available at* http://www.dcappeals.gov/dccourts/appeals/pdf/03-FS-269.PDF	Court upholds adoption over mother's objection. Trial court did not abuse discretion by holding the adoption in abeyance after concluding that it might not have clear and convincing evidence to waive consent at the first show cause hearing. Court gave mother additional six months to demonstrate her fitness as a mother. When mother was unable to show fitness after six months, the adoption was granted. In addition, trial court did not exceed its role as fact finder by granting stay with suggestions for mother.
Adoption upheld over mother's objection based on child's best interest and TPR factors	In re J.G., Jr., 831 A.2d 992 (D.C. 2003), *available at* http://www.dccourts.gov/internet/documents/02FS131.PDF	Court upholds waiver of mother's consent in adoption of 4 year old by maternal great aunt where child placed with petitioner at age 7months, mother's visits were not consistent, mother did not provide support, and child was doing well in petitioner's home. Judge Wagner dissented finding insufficient evidence to support clear and convincing standard.
Notice required	In re W.E.T. and I.J.T., 793 A.2d 471 (D.C. 2002), *available at* http://www.dcappeals.gov/dccourts/appeals/pdf/99-FS-1271.PDF	Mother appealed from adoption decree and adoptive parents cross appealed from order setting aside decree and re-issuing it at a later date to allow for timely filing of mother's notice of appeal. Order setting aside and re-issuing decree upheld under Adoption Rule 60(d) based on court's failure to give notice of entry of decree under Adoption Rule 52(b). Adoption upheld based on clear and convincing evidence that mother withheld consent contrary to the best interests of the child. Court relied on mother's drug abuse, incarceration, and lack of consistent visitation with child compared with child's long term thriving in adoption petitioners' home.
Parents' consent withheld Evidence challenging fitness of adoptive parents not allowed	In re P.S. & F.E.S., 797 A.2d 1219 (D.C. 2001) http://www.dcappeals.gov/dccourts/appeals/pdf/99-FS-1217.PDF	In consolidated proceeding involving adoption petition and motion for termination of parental rights with respect to special needs child, the Superior Court entered order allowing adoption to proceed though birth parents had withheld their consent, dismissed motion for termination of parental rights as moot, and subsequently entered final decree of adoption. Birth parents appealed. The Court of Appeals held that: (1) determination that birth parents were withholding consent to adoption contrary to child's best interests was not abuse of discretion;

		and (2) trial court's refusal, at hearing to determine whether birth parents were withholding consent to adoption contrary to child's best interests, to allow birth parents to present evidence challenging fitness of prospective adoptive parents was not abuse of discretion.
Jurisdiction when child not committed	In re A.W.K., 778 A.2d 314 (D.C. 2001), http://www.dcappeals.gov/dccourts/appeals/pdf/97-FS-1771.PDF	(1) Although the lower court never formally committed the child to the Department of Human Services, the court placed enough responsibilities on the agency that the agency was exercising "legal care, custody, or control" of the child. Thus, under D.C. Code § 16-301(b)(3), the District of Columbia court had jurisdiction over the adoption even though the court had given third party custody to the petitioners for adoption who lived in New York. (2) The trial court did not err in considering only evidence of parental fitness during a hearing to determine whether a parent's refusal to consent to adoption was contrary to the child's best interests. A parent has no right in a hearing on this issue to probe into the lives of the petitioners for adoption. (3) The trial court did not abuse its discretion when it found that the birth parents were withholding consent contrary to the best interests of the child. The mother's incarceration and reliance on prostitution and boyfriends for financial support did not mitigate the evidence that she was an unfit parent. (4) The neglect judge acted within her discretion when, upon learning that the adoption judge had waived the requirement of parental consent to adoption, she terminated visitation between the child and his birth parents.
Standard/burden of proof for change to birth certificate	In re E.D.R., 772 A.2d 1156 (D.C. 2001), *available at* http://www.dcappeals.gov/dccourts/appeals/pdf/00-FS-881.PDF	The adoption judge erred in not correcting the date of birth of an abandoned Chinese infant when expert testimony of the child's physicians established by a preponderance of the evidence that the infant was born about 6 months later than the date on the foreign birth certificate. Because no fundamental right was at stake, preponderance of the evidence was the proper standard of proof.
Order waiving consent not a final order for appeal purposes	In re S.J., 772 A.2d 247 (D.C. 2001) *available at* http://www.dcappeals.gov/dccourts/appeals/pdf/01-FS-91.PDF	An order waiving parental consent to adoption is appealable under D.C. Code § 11-721(a)(2)(A) only after the adoption proceedings are over.
Interlocutory appeal of denial of counsel	In re J.A.P., 749 A.2d 715 (D.C. 2000), *available at* http://www.dccourts.gov/internet/	The birth mother filed an interlocutory appeal under D.C. Code § 11-721(d)(1995), challenging the Superior Court judge's order refusing to appoint counsel and provide expert

	documents/98FS1727.PDF	witness services for her in this contested adoption proceeding. The main issue raised on appeal was whether the failure to appoint counsel violated the mother's Equal Protection rights. In his opinion, the trial judge stated that, because his decision was so controversial and left room for great differences of opinion, an immediate appeal might advance the ultimate resolution of the case. The trial judge further stayed all other proceedings in the case, pending resolution of the appeal. The Court of Appeals dismissed the appeal on grounds that the grant of the application for leave to appeal by a motions division of the Court of Appeals was improvidently granted. Moreover, the Court held that no showing was made that a decision on the constitutional issue would affect or advance the ultimate disposition of the case. Finally, the Court stated that, "if [interlocutory] appeals are to serve the purpose for which they were intended, they must be used only when the alternative would mean greater delay and expense than would be caused by the interlocutory review itself."
Parent's Consent Not Determinative	In re J.D.W., 711 A.2d 826 (D.C. 1998)	The trial court granted a maternal aunt and uncle's adoption petition, despite the fact that the mother had signed a consent form in favor of the foster parents. Although the trial judge upheld the consent as valid and held that it could not be withdrawn, she held that the consent was withheld from the relatives out of spite and was, therefore, contrary to the child's best interest. The Court of Appeals upheld the trial court's decision, stating that where two parties are actively competing for adoption, the grant of consent to one party is tantamount to withholding consent to the other.
Biological parents trying to regain custody of their children who were adopted	A.J. v. L.O., 697 A.2d 1189 (D.C. 1997)	The biological parents sought custody of their children who were adopted five years earlier and had lived with the adoptive parent ever since. The Court held that the biological parents would have to demonstrate unfitness on the part of the adoptive parent, but they failed to meet this standard. The Court further upheld the adoptive parents' motion to dismiss the custody complaint.
Disclosure of information to adoptee	In re D.E.D., 672 A.2d 582 (D.C. 1996)	D.C. Code § 16-311, whose purpose is to protect adopted children, requires a specific showing of the benefit to be had by an adoptee when requesting information about his or her adoption. However, if the adoptee requesting the information is an adult and requests disclosure only to him or herself and has the consent of all other affected parties, the statute is respected.
Choice of custodian	In re T.J., 666 A.2d 1 (D.C. 1995)	The trial court must give effect to the mother's

		choice of custodian where her parental rights have not been terminated, absent a showing of clear and convincing evidence that her choice of custodian would be clearly contrary to the child's best interest. The Court held that the child's best interests are the determining factor.
Two unmarried persons living together may adopt a child	In re M.M.D., 662 A.2d 837 (D.C. 1995)	The D.C. adoption statute permits two unmarried persons living together in a committed relationship to adopt a child. The fact that one of the two has already adopted the child does not preclude the subsequent adoption by both, because the stepparent exception in the adoption statute applies in such circumstances.
Surrogate contracts and jurisdiction	In re S.G., 663 A.2d 1215 (D.C. 1995)	Affirmed trial court's decision to dismiss wives' adoption petitions for husband's natural children born under a surrogate contract. Non-residents lacked jurisdiction, because D.C. licensed adoption agency did not have legal care, custody or control of children to confer jurisdiction under D.C. Code §16-301(b). Birth mothers' relinquishment of rights to agency was not sufficient to confer jurisdiction when fathers retained rights. Rights of natural parents must be determined in a constitutionally legitimate fashion. Current law prohibiting surrogate contracts not in effect at time of this case.
TPR and adoption reversed for abuse of discretion	In re L.L., 653 A.2d 873 (D.C. 1995)	The Court of Appeals reversed the trial court's denial of a TPR and adoption, holding that the trial court abused its discretion by misapprehending the applicable legal principles and finding that the father was fit and that it would be in the child's best interest to be reunited with him. The trial court also erred in rejecting the unrebutted expert testimony. Finally, the Court held that the option of long-term foster care is inconsistent with the child's best interest.
Foster parent adoption upheld over father's objection	In re Baby Boy C. (In re H.R.), 630 A.2d 670 (D.C. 1993)	The trial court did not abuse its discretion in granting the adoption petition of the foster parents over the objection of a fit father where the court's decision was based on the best interest of the child standard and its factual findings were supported by the evidence.
Child's best interest required adoption	In re L.W., 613 A.2d 350 (D.C. 1992)	The trial court correctly determined that the child's best interest required granting the adoption petition over the objection of the child's biological father, where the court gave adequate consideration to the father's status as the natural parent.
Denial of father's due process rights	In re M.N.M., 605 A.2d 921 (D.C. 1992)	A putative father who did not receive notice of the pending adoption until after it was granted was denied procedural due process rights. Therefore, even though the father's papers to intervene in the adoption were filed after the one-year statute of limitations had expired, he was entitled to the opportunity to voice "his

		opinion of where the child's best interest lies."
GAL can't be witness	S.S. v. D.M., 597 A.2d 870 (D.C. 1991)	Rule 3.7 of the D.C. Rules of Professional Conduct specifically prohibits the GAL from performing the dual roles of attorney and witness in an adoption proceeding; once the GAL has been called as a witness by the opposing party, new counsel must be appointed for the child. The court held that the judge was permitted to take judicial notice of findings of fact from the neglect case and base almost all of the findings of fact from the adoption hearing on evidence heard at the adoption show cause hearing.
Father's opportunity interest	In re Baby Boy C. (In re H.R.), 581 A.2d 1141 (D.C. 1990)	The Constitution requires that the "best interest" standard in the adoption statute incorporate a presumption that a fit natural parent be given custody of his or her minor child. Accordingly, the Court held that where a fit non-custodial father has not abandoned his opportunity interest in developing a relationship with his child, he should be awarded custody of his child unless it is demonstrated by clear and convincing evidence that this would be detrimental to the child.
Adoption upheld using TPR factors, mother did too little, too late	In re D.R.M., 570 A.2d 796 (D.C. 1990)	The Court upheld the trial judge's finding that the mother's belated visits with the child did not warrant a denial of the adoption petition. Further, the Court held that the judge's use of TPR standards was not erroneous where all relevant factors, including those set forth in the adoption statute, were carefully considered.
Jurisdiction for adoption under Parental Kidnapping Prevention Act	In re B.B.R., 566 A.2d 1032 (D.C. 1989)	The Court held that the PKPA prevented D.C. from entertaining the prospective parents' adoption petitions because California had a "significant connection" with the child, even though the child was brought to D.C. when it was two days old.
Preponderance of evidence standard in contest between non-parents	In re D.I.S., 494 A.2d 1316 (D.C. 1985)	The trial court properly applied the preponderance of the evidence standard in contest between non-parents in determining the child's best interest. Further, the Court held that the trial court correctly declined to consider the factor of race.
Race as a factor	In re R.M.G., 454 A.2d 776 (D.C. 1982)	In a divided opinion, the Court upheld the constitutionality of a statute, which specifies race as one of six factors to be considered in determining the best interest of a child in an adoption proceeding. The Court held that the statute was "necessary" to achieve a "compelling" government interest; the determination of a child's best interest.
Granting of TPR & adoption	In re P.G., 452 A.2d 1183 (D.C. 1982)	A finding of parental unfitness is not required prior to granting an adoption while simultaneously terminating parental rights.
Voluntary relinquishment can't	In re J.M.A.L. v. Lutheran Social	Parents can only rescind their relinquishment of

be revoked (old law)	Services, 418 A.2d 133 (D.C. 1980)	parental rights if all parties consent, or if the relinquishment was not given voluntarily. Here, mother relinquished parental rights to her eight-month old child, then two days later requested that the child be returned to her. The agency refused to return the child to the mother, and a week later the child was placed with prospective adoptive parents. DC Court of Appeals held that, absent consent of all the parties, including the agency, the only "cause" justifying court-ordered revocation of a natural parent's relinquishment of parental rights once filed with the court, was a conclusion that the relinquishment was not given voluntarily. Here, relinquishment was voluntarily given and thus could not be revoked. "While we must be vigilant to protect the rights of natural parents to raise and care for their children, nonetheless, adoption agencies require a predictable framework to effect proper placement… relinquishment should not be perceived as revocable, lest it be given too easily and equivocally."
Adoption may be granted without consent of parent[1]	In re J.O.L., 409 A.2d 1073 (D.C. 1979), *vacated by* Johnson v. J.O.L,449 U.S. 989 (1980).	The Court upheld the constitutionality of a statute, which permits the granting of an adoption petition without the consent of the natural parent if the court finds, after a hearing, that consent is withheld contrary to the child's best interest.
Adoption may be granted without mother's consent	In re C.E.H., 391 A.2d 1370 (D.C. 1978)	Upon a finding of abandonment, the trial court had the authority to grant the adoption petition without the mother's consent, provided that adoption was in the child's best interest.
Failure to appoint counsel to represent child	In re Douglas, 390 A.2d 1 (D.C. 1978)	Because the trial court's findings were supported by clear and convincing evidence, there was no error in the Family Division's failure to appoint counsel to represent the child's interests.
No denial of due process	In re J.S.R., 374 A.2d 860 (D.C. 1977)	The Court held that to permit an adoption over the natural mother's objection, absent a finding of parental unfitness, does not violate due process. Further, the standard for determining whether consent is being unreasonably withheld is clear and convincing. Finally, the Court upheld the constitutionality of the "best interest" standard.
Jurisdiction to enter adoption decree	In re J.E.G., 357 A.2d 855 (D.C. 1976)	The trial court had jurisdiction with which to enter an adoption decree because the adoptive parents resided in D.C.
Consent without fraud can't be withdrawn	In re S.E.D., 324 A.2d 200 (D.C. 1974), 08/15/74.	The Court upheld the trial court's finding that the father's consent was not fraudulently procured and that he was properly denied permission to withdraw his consent.

[1] Opinion vacated by subsequent appellate history.

Adoptions Case Law

Adoption consent can't be revoked	In re Adoption of a Minor Child, 127 F. Supp. 256 (D.D.C. 1954)	Mother tried to revoke consent to adoption five months after she had consented. Court held that her consent could not be revoked because the child had already bonded with its adoptive parents, who had devoted much time, energy, and money to the child. Nothing in DC law allowed the mother to revoke consent after the adoption was already in process. Court also relied on the fact that, if returned, the child would be raised by an unmarried mother, and would thus be recognized as illegitimate.
Minor's adoption consent can't be withdrawn without cause.	In re Adoption of a Minor, 144 F.2d 644 (D.C. Cir. 1944)	Two months after giving birth, mother revoked her earlier consent to have her child adopted. The adoptive parents had paid medical expenses for the birth, prepared a home for the child, and cared for the child since birth. Lower court denied the adoptive parents' petition for adoption, but Court of Appeals reversed, favoring placement with married adoptive parents over placement in an illegitimate home with the natural mother. Court stresses "the need for remedial action" regarding the problem of illegitimate children. Additionally, court finds no justification for allowing parental consent to be withdrawn without cause - even when that parent is a minor. Consent cannot be voided because of minority.

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