STATE OF NEW YORK

4765--A

2017-2018 Regular Sessions

IN SENATE

February 27, 2017

Introduced by Sen. AVELLA -- (at request of the Office of Court Administration) -- read twice and ordered printed, and when printed to be committed to the Committee on Children and Families -- recommitted to the Committee on Children and Families in accordance with Senate Rule 6, sec. 8 -- reported favorably from said committee, ordered to first report, amended on first report, ordered to a second report and ordered reprinted, retaining its place in the order of second report

AN ACT to amend the domestic relations law, the family court act and the social services law, in relation to conditional surrenders of parental rights in family and surrogate's court

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Subdivisions 1 and 2 of section 112-b of the domestic relations law, subdivision 1 as added by section 63 of part A of chapter 3 of the laws of 2005 and subdivision 2 as amended by chapter 41 of the laws of 2010, are amended to read as follows:

1. Nothing in this section shall be construed to prohibit the parties to a proceeding under this chapter from entering into an agreement regarding communication with or contact between an adoptive child, adoptive parent or parents and a birth parent or parents and/or the adoptive child's biological siblings or half-siblings**, provided, however, that such an agreement shall not be legally enforceable unless the judicial approval of the agreement has been incorporated into a written order entered by the court in accordance with subdivision two of this section**.

2. Agreements regarding communication or contact between an adoptive child, adoptive parent or parents, and a birth parent or parents and/or biological siblings or half-siblings of an adoptive child shall not be legally enforceable unless the terms of the agreement are incorporated into a written court order entered in accordance with the provisions of this section. **An agreement for contact or communication between the child and his or her siblings or half-siblings where the child and/or**

EXPLANATION--Matter in *italics* (underscored) is new; matter in brackets [-] is old law to be omitted.

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siblings or half-siblings are fourteen years of age or older shall not be enforceable unless such child and such sibling or half-sibling consent to the agreement in writing. The court shall not incorporate an agreement regarding communication or contact into an order unless the terms and conditions of the agreement have been set forth in writing and consented to in writing by the parties to the agreement, including the attorney representing the adoptive child. The court shall not enter a proposed order unless the court in which the surrender was executed or the court that approved the surrender of the child determined and stated in its order that the communication with or contact between the adoptive child, the prospective adoptive parent or parents and a birth parent or parents and/or biological siblings or half-siblings, as agreed upon and as set forth in the agreement, would be in the adoptive child's best interests. Notwithstanding any other provision of law, a copy of the order entered pursuant to this section incorporating the post-adoption contact agreement shall be given to all parties who have agreed to the terms and conditions of such order.

With respect to surrenders executed on or after January first, two thousand nineteen, an agreement regarding communication or contact following an adoption is only enforceable if approval of the agreement has been incorporated into an order in conjunction with a surrender executed before a judge; provided, however, that an agreement regarding communication or contact following an adoption of a child from an authorized agency made in conjunction with an extra-judicial surrender may be enforceable if the following additional conditions have been met: (i) the party or parties surrendering the child attest in a sworn affidavit that it would be an undue hardship to appear in court to execute the surrender; and (ii) the party or parties surrendering the child were represented by counsel and such counsel was present at the execution of the surrender and informed the surrendering party or parties of the requirements for enforceability of the post-adoption contact agreement.

§ 2. Paragraph (iv) of subdivision (a) of section 262 of the family court act, as amended by chapter 3 of the laws of 2012, is amended to read as follows:

(iv) the parent or person legally responsible, foster parent, or other person having physical or legal custody of the child in any proceeding under article ten or ten-A of this act or section three hundred fifty-eight-a, three hundred eighty-three-c, three hundred eighty-four or three hundred eighty-four-b of the social services law, and a non-custodial parent or grandparent served with notice pursuant to paragraph (e) of subdivision two of section three hundred eighty-four-a of the social services law;

§ 3. Paragraph (b) of subdivision 2 of section 383-c of the social services law, as amended by chapter 41 of the laws of 2010, is amended to read as follows:

(b) (i) If a surrender instrument designates a particular person or persons who will adopt a child, such person or persons, the child's birth parent or parents, the authorized agency having care and custody of the child and the child's attorney[~~,~~] may enter into a written agreement providing for communication or contact between the child and the child's parent or parents on such terms and conditions as may be agreed to by the parties. Such terms and conditions shall be set forth in writing and consented to in writing by the parties to the agreement, including the attorney representing the child.

(ii) If a surrender instrument does not designate a particular person or persons who will adopt the child, then the child's birth parent or

parents, the authorized agency having care and custody of the child and the child's attorney may enter into a written agreement providing for communication or contact, on such terms and conditions as may be agreed to by the parties. **Such terms and conditions shall be set forth in writing and consented to in writing by the parties to the agreement, including the attorney representing the child.**

(iii) Such agreement also may provide terms and conditions for communication with or contact between the child and the child's biological siblings or half-siblings, if any. If any such sibling or half-sibling is fourteen years of age or older, such terms and conditions shall not be enforceable unless such sibling or half-sibling consents to the agreement in writing.

(iv) If the court before which the surrender instrument is presented for approval determines that the agreement concerning communication and contact is in the child's best interests, the court shall approve the agreement **and incorporate such approval into a written court order, a copy of which shall be given to the parties**. If the court does not approve the agreement, the court may nonetheless approve the surrender; provided, however, that the birth parent or parents executing the surrender instrument shall be **informed that the agreement is not enforceable in a court of law and shall be** given the opportunity at that time to withdraw such instrument.

(v) Enforcement of any agreement prior to the adoption of the child shall be in accordance with subdivision (b) of section one thousand fifty-five-a of the family court act. Subsequent to the adoption of the child, enforcement of any agreement shall be in accordance with section one hundred twelve-b of the domestic relations law.

§ 4. Subdivision 4 of section 383-c of the social services law is amended by adding a new paragraph (g) to read as follows:

(g) A surrender of a child, executed on or after January first, two thousand nineteen, which is made in conjunction with an agreement containing conditions, including, but not limited to, identifying the prospective adoptive parent or parents or prescribing communication or contact with the child and the adoptive parent or parents and/or between the child and his or her biological siblings or half-siblings following the surrender and adoption of the child shall be executed before a judge; provided, however, that such an agreement made in conjunction with an extra-judicial surrender executed after such date may be enforceable if the following conditions have been met in addition to those delineated in paragraph (b) of this subdivision: (i) the party or parties surrendering the child attest in a sworn affidavit that it would be an undue hardship to appear in court to execute the surrender; and (ii) the party or parties surrendering the child were represented by counsel and such counsel was present at the execution of the surrender and informed the surrendering party or parties of the requirements for enforceability of the agreement.

§ 5. Subparagraphs (ii) and (iii) of paragraph (b) of subdivision 5 of section 383-c of the social services law, subparagraph (ii) as amended by chapter 601 of the laws of 1994 and subparagraph (iii) as added by chapter 479 of the laws of 1990, are amended to read as follows:

(ii) that the parent is giving up all rights to have custody, visit with, speak with, write to or learn about the child, forever, unless the parties have agreed to different terms pursuant to subdivision two of this section[~~,~~] and unless such terms are written in the surrender **or are written in an agreement approved by the court in an order in accordance with such subdivision**, or, if the parent registers with the

adoption information register, as specified in section forty-one hundred thirty-eight-d of the public health law, that the parent may be contacted at anytime after the child reaches the age of eighteen years, but only if both the parent and the adult child so choose;

(iii) that the child will be adopted without the parent's consent and without further notice to the parent, and will be adopted by any person that the agency chooses, unless the surrender paper **or an agreement approved by the court in an order in accordance with subdivision two of this section** contains the name of the person or persons who will be adopting the child; and

§ 6. Paragraph (b) of subdivision 2 of section 384 of the social services law, as amended by chapter 41 of the laws of 2010, is amended to read as follows:

(b) **(i)** If a surrender instrument designates a particular person or persons who will adopt a child, such person or persons, the child's birth parent or parents, the authorized agency having care and custody of the child and the child's attorney[~~,~~] may enter into a written agreement providing for communication or contact between the child and the child's parent or parents on such terms and conditions as may be agreed to by the parties. **Such terms and conditions shall be set forth in writing and consented to in writing by the parties to the agreement, including the attorney representing the child.**

(ii) If a surrender instrument does not designate a particular person or persons who will adopt the child, then the child's birth parent or parents, the authorized agency having care and custody of the child and the child's attorney may enter into a written agreement providing for communication or contact, on such terms and conditions as may be agreed to by the parties. **Such terms and conditions shall be set forth in writing and consented to in writing by the parties to the agreement, including the attorney representing the child.**

(iii) Such agreement also may provide terms and conditions for communication with or contact between the child and the child's biological sibling or half-sibling, if any. If **the child or** any such sibling or half-sibling is fourteen years of age or older, [~~such terms and conditions~~] **an agreement for contact or communication between the child and his or her siblings or half-siblings** shall not be enforceable unless such **child,** sibling or half-sibling consents to the agreement in writing.

(iv) If the court before which the surrender instrument is presented for **execution or** approval**,** determines that the agreement [~~concerning communication and contact~~] is in the child's best interests, the court shall approve the agreement **and incorporate such approval into a written court order, a copy of which shall be given to the parties**. If the court does not approve the agreement, the court may nonetheless approve the surrender; provided, however, that the birth parent or parents executing the surrender instrument shall be **informed that the agreement is not enforceable in a court of law and shall be** given the opportunity at that time to withdraw such instrument. Enforcement of any agreement prior to the adoption of the child shall be in accordance with subdivision (b) of section one thousand fifty-five-a of the family court act. Subsequent to the adoption of the child, enforcement of any agreement shall be in accordance with section one hundred twelve-b of the domestic relations law.

§ 7. Subdivision 3 of section 384 of the social services law, as amended by chapter 479 of the laws of 1990, the opening paragraph as amended by chapter 185 of the laws of 2006, the fifth undesignated para-

graph as added by chapter 680 of the laws of 2007, the sixth undesignated paragraph and the closing paragraph as added by chapter 76 of the laws of 2002, and subparagraphs (i) and (ii) of the sixth undesignated paragraph as amended by chapter 41 of the laws of 2010, is amended to read as follows:

3. Instrument **and intervention**. **(a)** The instrument herein provided shall be executed and acknowledged [~~(a)~~] **(i)** before any judge or surrogate in this state having jurisdiction over adoption proceedings, except that if the child is being surrendered as a result of, or in connection with, a proceeding before the family court pursuant to article ten or ten-A of the family court act, the instrument shall be executed and acknowledged in the family court that exercised jurisdiction over such proceeding and shall be assigned, wherever practicable, to the judge who last presided over such proceeding; or [~~(b)~~] **(ii)** in the presence of one or more witnesses and acknowledged by such witness or witnesses, in the latter case before a notary public or other officer authorized to take proof of deeds, and shall be recorded in the office of the county clerk in the county where such instrument is executed, or where the principal office of such authorized agency is located, in a book which such county clerk shall provide and shall keep under seal.

(b) A surrender of a child, executed on or after January first, two thousand nineteen, which is made in conjunction with an agreement containing conditions, including, but not limited to, identifying the prospective adoptive parent or parents or prescribing communication or contact with the child and the adoptive parent or parents and/or between the child and his or her biological siblings or half-siblings following the surrender and adoption of the child shall be executed before a judge; provided, however, that such an agreement made in conjunction with an extra-judicial surrender executed after such date may be enforceable if the following conditions have been met in addition to those delineated in paragraph (b) of subdivision two of this section:

(i) the party or parties surrendering the child attest in a sworn affidavit that it would be an undue hardship to appear in court to execute the surrender; and

(ii) the party or parties surrendering the child were represented by counsel and such counsel was present at the execution of the surrender and informed the surrendering party or parties of the requirements for enforceability of the agreement.

(c) Such record shall be subject to inspection and examination only as provided in subdivisions three and four of section three hundred seventy-two of this title.

(d) Notwithstanding any other provision of law, if the parent surrendering the child for adoption is in foster care the instrument shall be executed before a judge of the family court.

(e) Whenever the term surrender or surrender instrument is used in any law relating to the adoption of children who are not in foster care, it shall mean and refer exclusively to the instrument [~~hereinabove~~] described **in this subdivision** for the commitment of the guardianship of the person and the custody of a child to an authorized agency by his **or her** parents, parent or guardian; and in no case shall it be deemed to apply to any instrument purporting to commit the guardianship of the person and the custody of a child to any person other than an authorized agency, nor shall such term or the provisions of this section be deemed to apply to any instrument transferring the care and custody of a child to an authorized agency pursuant to section three hundred eighty-four-a of this [~~chapter~~] **title**.

(f)(i) Any person or persons having custody of a child for the purpose of adoption through an authorized agency shall be permitted as a matter of right, as an interested party, to intervene in any proceeding commenced to set aside a surrender purporting to commit a guardianship of the person or custody of a child executed under the provisions of this section. Such intervention may be made anonymously or in the true name of said person.

(ii) Any person or persons having custody for more than twelve months through an authorized agency for the purpose of foster care shall be permitted as a matter of right, as an interested party, to intervene in any proceeding commenced to set aside a surrender purporting to commit the guardianship of the person and custody of a child executed under the provisions of this section. Such intervention may be made anonymously or in the true name of said person or persons having custody of the child for the purpose of foster care.

(g) A copy of such surrender shall be given to [~~such~~] **the** surrendering parent upon the execution thereof. The surrender shall include the following statement: "I, (name of surrendering parent), this ___ day of _____, _____, have received a copy of this surrender. (Signature of surrendering parent)". Such surrendering parent shall so acknowledge the delivery and the date of the delivery in writing on the surrender.

(h) Where the parties have agreed that the surrender shall be subject to conditions pursuant to subdivision two of this section, the instrument shall further state in plain language that:

(i) the authorized agency shall notify the parent, unless such notice is expressly waived by a statement written by the parent and appended to or included in such instrument, the attorney for the child and the court that approved the surrender within twenty days of any substantial failure of a material condition of the surrender prior to the finalization of the adoption of the child; and

(ii) except for good cause shown, the authorized agency shall file a petition on notice to the parent unless notice is expressly waived by a statement written by the parent and appended to or included in such instrument and the child's attorney in accordance with section one thousand fifty-five-a of the family court act within thirty days of such failure, in order for the court to review such failure and, where necessary, to hold a hearing; provided, however, that, in the absence of such filing, the parent and/or attorney for the child may file such a petition at any time up to sixty days after notification of such failure. Such petition filed by a parent or attorney for the child must be filed prior to the child's adoption; and

(iii) the parent is obligated to provide the authorized agency with a designated mailing address, as well as any subsequent changes in such address, at which the parent may receive notices regarding any substantial failure of a material condition, unless such notification is expressly waived by a statement written by the parent and appended to or included in such instrument.

Nothing in this paragraph shall limit the notice on the instrument with respect to a failure to comply with a material condition of a surrender subsequent to the finalization of the adoption of the child.

§ 8. Subdivision 4 of section 384 of the social services law, as amended by chapter 185 of the laws of 2006, is amended to read as follows:

4. Upon petition by an authorized agency, a judge of the family court, or a surrogate, may approve such surrender, on such notice to such persons as the surrogate or judge may in his or her discretion

prescribe. If the child is being surrendered as a result of, or in connection with, a proceeding before the family court pursuant to article ten or ten-A of the family court act, the petition shall be filed in the family court that exercised jurisdiction over such proceeding and shall be assigned, wherever practicable, to the judge who last presided over such proceeding. The petition shall set forth the names and last known addresses of all persons required to be given notice of the proceeding, pursuant to section three hundred eighty-four-c of this title, and there shall be shown by the petition or by affidavit or other proof satisfactory to the court that there are no persons other than those set forth in the petition who are entitled to notice pursuant to such section. **At the time that a parent appears before a judge or surrogate to execute and acknowledge a surrender or for the judge to approve a surrender, the judge or surrogate shall inform such parent of the right to be represented by legal counsel of the parent's own choosing and of the right to obtain supportive counseling and of any right to have counsel assigned pursuant to section two hundred sixty-two of the family court act, section four hundred seven of the surrogate's court procedure act, or section thirty-five of the judiciary law.** No person who has received such notice and been afforded an opportunity to be heard may challenge the validity of a surrender approved pursuant to this subdivision in any other proceeding. However, this subdivision shall not be deemed to require approval of a surrender by a surrogate or judge for such surrender to be valid**, provided, however, that an agreement made in conjunction with a surrender that contains conditions, including, but not limited to, identifying the prospective adoptive parent or parents or prescribing communication or contact with the child and the adoptive parent or parents and/or between the child and his or her biological siblings or half-siblings following the surrender and adoption of the child shall be enforceable in a court of law only if the requirements of subdivisions two and three of this section have been met**.

§ 9. This act shall take effect on the first of January next succeeding the date on which it shall have become a law.