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Adoption in Maryland Moves Forward

by John R. Greene

The recent revision of the adoption law in Maryland was important. The revision of the Adoption Code and the Rules has resulted in the law of termination of parental rights and adoption, in Maryland, more cohesive and straight-forward.

The Adoption Code that existed prior to January 1, 2006, was a compilation of many divergent amendments that had been passed over the years (Md. Code Ann. Family Law, Section 5-301 et seq.). It had not been comprehensively revised for almost 50 years. It was set forth in relatively few sections which covered most aspects of guardianship (with right to consent to adoption) and adoption. It did little to distinguish between the different types of guardianship/adoption actions that were brought in Maryland - public agency, private agency or independent proceedings. It was hard

to determine what applied to each of these truly separate types of actions with separate proceedings. This was certainly apparent considering the little distinction it made between public and private agency adoptions that involve a two-step procedure with termination of parental rights and appointment of guardianship. That process was followed by the separate adoption proceeding, versus independent adoption actions (actions which do not involve agencies) that are only one-step with termination of parental rights and adoption occurring contemporaneously.¹ The code prior to 2006 often could baffle the inexperienced practitioner as to applicability of the various sections to each type of case. Additionally, the code was outdated and fragmented as a result of the lack of comprehensive review of the code for decades.

The opportunity for change of the adoption law in Maryland came in 2000, as a result of an initiative of the Administrative Office of the Courts' Legislative Subcommittee of the Foster Care Improvement Project. This subcommittee was composed of judges, masters, public defenders, Legal Aid attorneys, assistant attorneys general and practitioners and was chaired by the Honorable Pamela North of the Circuit Court for Anne Arundel County. The subcommittee had been charged with revising the Child in Need of Assistance (CINA) statute (Md. Code Ann. Family Law). Upon completing the revision and obtaining legislative approval of the revised CINA Code, the subcommittee quickly realized that the Adoption Code as it existed conflicted with many of the changes made to the CINA Statute. The subcommittee also quickly realized

¹ In a Child In Need of Assistance case, where a Department of Social Services finds that reunification of a family is inappropriate, it will proceed for guardianship and termination of parental rights through a guardianship procedure. Once termination of the parents' rights and guardianship is granted, it will permit adoptive parents it has chosen to proceed forward with a separate action to complete the adoption. Similarly private child placement agencies also proceed with a similar two step process - where the agency is working with parents who seek to place their child for adoption, the agency obtains guardianship and also terminates the parents' rights in one action. Following that process, the adoptive parents who have been chosen may proceed for adoption in a separate proceeding. In contrast, in independent adoptions, or where placement is arranged by other than a child placement agency, the adoption does not involve a two step process. There, the adoptive parents file one procedure for adoption seeking a Decree of Adoption which terminates the parents' rights and grants the adoption concomitantly.

that the existing Adoption Code could not be amended to make the necessary changes reflecting the CINA changes without changing the entire code. The procedure for public agency cases could not be merely amended to result in a coherent code or even extracted from the Adoption Code and still leave the remainder of the code intact. Therefore, the subcommittee realized that this offered an opportunity to update the entire code to make it more user friendly for all types of terminations of parental rights and adoptions in Maryland.

Changing the Code

The first major decision of the subcommittee in revising the code was to determine that it was best to divide the statute into three sections. Over a course of four painstaking years, the appropriate language was created, a separate section for each of the three types of actions – public agency guardianship and adoption, private agency guardianship and adoption, and independent adop-

tion. While recognizing that they were creating a much longer statute because this change necessitated restating similar provisions in one or possibly all three sections, the subcommittee chose clarity as to what applied in each proceeding over brevity and the existing confusing amalgam.

presented a total rewrite of the statute to the legislature in 2004. Responding to legislative concerns, a revised version was presented and passed by both legislative bodies and signed by the governor in 2005, effective January 1, 2006.

Once enacted, the termination of rights and adoption became somewhat

The code previously did not give any recognition to genetic testing in the definition and determination of a child's biological father for purposes of notice and involvement in the case. The revision rectified this oversight to include a person to be a "father" of a child upon positive genetic testing (Sections 5-306(7), 5-3A-6(7), 5-3B-6(7)).

Once it had divided the code into three sections, it scrutinized every provision and proposed many other changes to offer a more cohesive and updated statute. After more than four years of study and hundreds of hours of tedious debate and review, the subcommittee

easier. A practitioner who now has such a case need only go to that specific section of the code to know what applies to that case, be it Public Agency Termination and Adoption (Family Law, Section 5-301 et seq.), Private Agency Termination and Adoption (Section 5-3A-01 et seq.),

and Independent Adoption (Section 5-3B-01 et seq.). As a result, there was no more confusion over what provisions applied to which type of case.

There were many other changes to the statute. For example, one change that may seem relatively insignificant, but is an important change—the term “natural parent” that was used throughout the prior statute has been replaced with the acceptable and less anachronistic term “parent.” (See e.g., Family Law, Section 5-301(f)(2004)). Another change recognized the results of genetic testing. The code previously did not give any

recognition to genetic testing in the definition and determination of a child’s biological father for purposes of notice and involvement in the case. The revision rectified this oversight to include a person to be a “father” of a child upon positive genetic testing (Sections 5-306(7), 5-3A-6(7), 5-3B-6(7)).

Another improvement was to specifically require courts in this state to accept terminations of parental rights that have occurred in other states, pursuant to the laws of the other state. When there is an appropriate termination of parental rights in another state where the parent

lives, it does not matter that the law of the second state does not require termination of parental rights by a judicial procedure. If the termination is in compliance with the other state’s law, court order or not, full faith and credit is to be given to such termination of parental rights (Sections 5-305(b), 5-3A-05(b), 5-3B-04(b)).

The code revision also recognized and created a procedure to follow for enforcement of Post-Adoption Contact Agreements between parents and adoptive parents. In 1983, the Court of Special Appeals noted in *Weinschel v. Strople*, 56 Md. App. 252, 466 A.2d. 1301 (1983) that visitation agreements post-adoption between parents and adoptive parents were enforceable. The court sanctioned entering into such agreements, so long as they were not contrary to the best interests of the child. However, while the court recognized their enforceability, it never was clear as to how they were to be applied. This was corrected by revision of the code that included language in all three sections spelling out guidelines for such agreements: who can enter into the agreement; when such agreement shall be in effect; and, how they are to be enforced (Sections 5-308, 5-3A-08, 5-3B-07). Under these provisions, a parent and adoptive parents may agree on contact or visitation between the parent or other relatives of the adoptee (such as brother or sisters) and the adoptee and adoptive parents following the comple-

² This provision resolved many contested adoptions throughout Maryland. Most notably, in the cases brought by the Department of Social Services, such Agreements are now frequently the basis for successfully resolving issues to the satisfaction of the parent and the adoptive parents. Many parents agree to consent to an adoption after being permitted to retain the opportunity to be part of the adoptee’s life post-adoption. This is good for the parent while affording adoptive parents the comfort of concluding the termination process. These allow for some contact in the future and often include clauses that protect adoptive parents from improper contact or contact with former parents under the influence of drugs and alcohol.

tion of the adoption. The agreement is limited in duration to the child's minority. Most importantly, if the adoptive parents fail to comply with the terms of the agreement such non-compliance does not constitute grounds to set aside the adoption, but the agreement may be enforced so long as it is in the adoptee's best interests.²

The code revision also streamlined the Show Cause Order process. Historically, service by publication was granted due to the inability to identify or locate a parent, the petitioner had to publish the entire Show Cause Order in a newspaper (Family Law, Section 5-322(c)(3)(2004)). This could be exceedingly costly.³ The new

statute changed this by requiring notice by publication as a succinct paragraph giving the parent only what they need to know to protect their rights; that a case was filed regarding a certain child born to the parents; the date of birth; and, that he or she will lose their parental rights if they fail to file a Notice of Objection by a certain date with a certain court (Sections 5-316(f), 5-3A-15(f), 5-3B-15(f)). Consequently, petitioners now are required to spend less than a hundred dollars in most cases to achieve proper notice.

Additionally, in an effort to move the code into the future, the legislation also included language that for the first time required the petitioner to have the short notice placed on a Department of Human Resources website for publication there. *Id.* This was intended to give bet-

ter notice to a parent and to determine the efficacy of publication by way of the Internet with the hope that at some point in the future, publication by these means could be substituted for notice in newspapers.

Other changes included recognizing the growing population of non-English speaking persons in Maryland. For the first time, consents of parents were required to be in a language that the parent understands (Sections 5-321(a)(3), 5-3A-19(a)(2), 5-3B-21(a)(2)). It also made inroads into the often burdensome 30-day period that parents have been given to revoke their consent after they have consented to guardianship or adoption. In a public agency guardianship, the parent can now give a consent before a judge that becomes irrevocable with the parent having no further rights of revocation of consent (Section 5-321(a)(2)). In private agency guardianships and independent adoptions, the revision also eliminated the 30-day

² In one case this writer was required to publish in a newspaper in Flint, Michigan. It cost \$1200.00! While all publications are not this expensive, under the prior Code this created an unnecessary expense to Petitioners and often resulted in what was clearly a boon to newspapers.

³ A more in depth review will reveal many other subtle changes too numerous to describe here.

revocation period where the parent consents a second time after revoking a prior consent within the previous year for that child (Sections 5-3A-19(b), 5-3B-21(b)). Where the parent consents again, this consent cannot be revoked.⁴

These are just some of the more beneficial changes to the code that were made by the subcommittee and the legislature.

The Rules Lag, But Also Move Forward

As these changes to the statute went into effect, it was realized that many of the existing rules governing these cases found in Maryland Rules, Rule 9-101 et seq. conflicted with the new law. Fortunately, a number of the original subcommittee members worked with the Rules Committee of the Court of Appeals to make the necessary changes. Unfortunately, once the rules were reviewed in depth, it became clear that the changes required other rules be completely rewritten also. Therefore, over the next 18 months, the group and the Rules Committee labored to produce a major rewrite of the rules.⁵ Finally, the new rules reflecting the revised code were approved and issued by the Court of Appeals on July 1, 2007. In general, the rules tracked changes in the code, giving much more distinction between the types of proceedings – public agency, private agency and independent. The most notable change in the rules now probably is the rejection of the prior two form consents which were included to be used in all cases. The group recognized that one size did not fit all when it came to these consents; agency termination of parental rights involved different issues than independent adoptions; periods of revocation of consents were different;

and there could be proceedings where the parents' rights could be preserved after adoption, such as in a stepparent adoption. The new rules were redrawn to offer five separate consents to be used by parents and two consents to be used by children in the various circumstances and procedures (Md. Rules, Rule 9-102.1 et seq.). The practitioner now merely has to go to that consent which is applicable to the type of case before him. As a result, there is little or no re-drafting required to obtain a consent specific to that proceeding.

Also, the different consents were importantly revised in a manner that makes them much more user friendly and understandable for the parent. They now include clear basic instructions and information the parent can understand, followed by the part the parent executes.

The Future of Adoption Law in Maryland

While this revision of the Adoption Code is a giant step forward, there are many issues that were not resolved that will continue to be debated and possibly changed by the legislature in the future. For example, will Maryland continue to have one of the longest parental revocation of consent periods in the United States? This has been a contentious issue within the legislature in the past and certainly will be in the future. The changes made to the language by this code revision have been a step forward, however many would argue that the rule is still too inflexible. It is argued that a parent should be permitted to waive the right to revoke the consent if they choose. Often, the parent (and the adoptive parent) find the 30-day period very difficult. Therefore, should the legislature choose to allow waiver of the revocation period or even reduce the revocation period from 30 days to a lesser time such as 15 days? These issues no doubt will continue to be debated.

Other issues will certainly be debated in the near future. On the horizon is the question of whether Maryland should

establish what is known as a putative fathers' registry. The legislatures in more than 30 states have enacted such legislation that creates a form of state registry which protects the rights of an unwed father. In these states, when a man believes he may have fathered a child out of wedlock, he may protect his rights to the child by filing a notice with the appropriate state agency within the statutory notification period. So long as the "putative" father files as required, he is allowed to challenge the adoption. Unlike Maryland, where the onus is on the adoption agency or the adoptive parents pursuing the adoption to locate the father and give notification, these states place the obligation on the alleged father to protect his own rights. If the putative father sleeps on his rights and does not take action to protect his rights, he loses them.

A putative fathers' registry will doubtlessly be the subject of increasing concern in the future with more states creating similar statutes. This development will also hasten legislation advancing in Congress for a national putative fathers' registry. Many commentators believe that in order to protect fathers' rights in our increasingly mobile society, the establishment of interlinking or a national database of linked registries is called for. See, *Beck, Toward a National Putative Fathers' Registry Database (Adoptions)*, Harvard Law Review (Summer 2002). Maryland will certainly be faced with considering this as congressional support for a national database is increasing and legislation in Washington, known as the Proud Fathers' Act, is moving forward and will soon be introduced.

Another important question for the future is whether the code is too restrictive in limiting what can be paid to a parent when there is an adoption – only legal fees, counseling and medical. With many states allowing payment of living expenses such as rent for a set period, generally with court approval, is Maryland too limited? Is it fair to prohibit Maryland adoptive parents from providing such expense payments with court approval when out of state citizens are

⁴ Unfortunately, pending the revision of the Rules, practitioners and courts were in a difficult situation with the Statute varying dramatically from what was outlined in the existing Rules. It was difficult in many cases to know what applied. During this period there was much confusion.

not so limited and may even be able to properly provide such payments to Maryland parents?

These are just three of the most significant issues on the horizon for consideration and possible change in Maryland. In addition to these, there are many other issues that remain and will no doubt be debated in the future.

Conclusion

The statutory code revision was not revolutionary, but it made huge improvements to the guardianship and adoption process in Maryland. While there are many aspects of termination and adoption law that may be discussed and refined further, these changes brought about by the laborious effort and countless hours spent by Judge North and her subcommittee, the legislature, and the Rules Committee have been a major step forward in the practice of adoption law. As a result, we now have a better "roadmap" for all adoptions in Maryland. ■

About the Author

John R. Greene has practiced law as a partner in the firm of Cohen & Greene, P.A. in Annapolis, for over 30 years. He has handled nearly 800 adoption cases of all types: domestic, agency, and international. From 2001-05, he was highly involved in rewriting the adoption law in Maryland, with special responsibility for revising the laws governing independent adoptions. From 2006-07, he was also highly involved in the rewriting of the Rules of Procedure governing adoptions.

He was recently elected to the Board of Trustees of the American Academy of Adoption Attorneys. In 2006, Mr. Greene received the President's Award from the academy, the most important award given annually for service to the academy and the field of adoption.

Most recently, he has been appointed to the Advisory Committee of the Congressional Coalition on Adoption. The coalition advises the U.S. House and Senate on adoption law. He has been selected as the chairman of the Coalition's Domestic Laws Committee responsible for advising Congress on domestic adoption law matters.