

## NOT DESIGNATED FOR PUBLICATION

No. 102,250

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

IN THE MATTER OF THE ADOPTION OF BABY BOY L.

## MEMORANDUM OPINION

Appeal from Sherman District Court; JACK L. BURR, judge. Opinion filed December 24, 2009. Reversed and remanded with directions.

*Dawn M. Porter*, of Porter Law Office, of Topeka, for appellant.

*Martin W. Bauer and Teresa L. Mah*, of Martin, Pringle, Oliver, Wallace & Bauer, L.L.P., of Wichita, for appellee.

Before HILL, P.J., CAPLINGER and LEBEN, JJ.

LEBEN, J.: In this case, we consider the competing interests of a birth mother and a married couple who—approved by the adoption agency to which the mother surrendered the child—seek to adopt her child. The mother had initially surrendered the child to that adoption agency for adoption by a different couple, both of whom she had

met through the agency. But the agency stopped that adoption after an incident of domestic violence in that couple's home. The agency then selected the couple now before us, although the mother had by then indicated a desire to have the child returned to her.

The district court ruled in favor of the prospective adoptive parents, concluding that the mother had unconditionally given up her parental rights and that the adoption agency had "not abused its discretion" in placing the child with the prospective adoptive parents. But the New Jersey law applicable to this case gave the discretion to make a final placement decision to the court, not the adoption agency. We therefore reverse the district court and return the case to that court for it to determine the appropriate placement.

#### *Factual Background*

Baby Boy L. was born in Georgia on June 28, 2007. His father, Tori, surrendered his parental rights and has not appeared in this adoption proceeding. His mother, Megan, had arranged before the baby's birth to have him adopted.

She had contacted American Adoptions, Inc., a company with offices in Kansas. American Adoptions had shown Megan information about some prospective adoptive parents, and Megan had selected Peter and Sheila, who lived in New Jersey. American Adoptions is an approved adoption agency in many states, including New Jersey. Megan

knew Peter and Sheila only through American Adoptions, but she had considerable contact with them during her pregnancy through phone calls and emails.

Three days after Baby Boy L. was born, Megan signed three documents. The first was entitled, Affidavit of Biological Parent Regarding Governing Law. In it, she noted that her permanent residence was in Georgia but that she planned "to place my child with certain adoptive parents known to me as [Sheila and Peter], who are residents of New Jersey, for the purpose of adoption." She acknowledged that a petition for adoption would be filed in New Jersey, and she agreed that "New Jersey law will govern the adoption proceedings." The second document was entitled, Surrender of Custody and Consent to Adoption. Because the interpretation of this document is disputed, we include all of its provisions to provide context for those in dispute. In one paragraph, which Megan stresses on appeal, she surrenders the baby "for placement with adoptive parents" Peter and Sheila. In the next paragraph, which American Adoptions stresses on appeal, she consents "to the adoption of said child by such person or persons as may be approved" by American Adoptions:

#### "SURRENDER OF CUSTODY AND CONSENT TO ADOPTION

"WHEREAS I, [Megan], being the birth mother of BABY BOY [L.], who was born on June 28, 2007 . . . in Doctor's Hospital, located at 616 19<sup>th</sup> St., Columbus, Georgia, am unable properly to support, care for and educate said child; and

"WHEREAS, after full opportunity to consider freely the action being taken, I am convinced that it would be of permanent advantage to surrender custody and to consent to the adoption of said child; and

"WHEREAS, AMERICAN ADOPTIONS has agreed to provide for the care, custody and supervision of said child and to take such action as may be possible to effect adoption of said child;

"NOW, THEREFORE, I, [Megan], birth mother, in consideration of such agreement, do hereby surrender custody of BABY BOY [L.] to AMERICAN ADOPTIONS, for placement with adoptive parents who I know by their first names, PETER AND SHEILA.

"I DO HEREBY CONSENT to the adoption of said child by such person or persons as may be approved by the said AMERICAN ADOPTIONS in accordance with the laws of the State of New Jersey or any other state of the United States. I DO FURTHER CONSENT to such change of name of said child as may be requested in a complaint for adoption presented by such person or persons so approved.

"I DO HEREBY DECLARE that I have been fully informed and am fully aware of the contents of this document; that I understand I cannot be relieved completely of obligations for support, education, and maintenance of said child except upon the termination of my parental rights; and that I desire that this document be accepted by all persons as expressing my irrevocable intention to make permanent surrender of custody, and to give consent to adoption, as herein expressed.

"MORE THAN 72 HOURS HAS ELAPSED SINCE THE BIRTH OF SAID CHILD.

"IN WITNESS WHEREOF, I have hereunto set my hand and seal this 1<sup>st</sup> day of July , 2007 at 11:50 a.m.

"/s/ [Megan]"

The third document, entitled Affidavit of Surrendering Parent, essentially served as an acknowledgment of various rights that Megan was giving up. She acknowledged that if she signed the Surrender of Custody and Consent for Adoption form, she was "giving up all of [her] rights as a parent over [her] child forever" and that "American Adoptions will become the only guardian of [her] child." She also acknowledged that if she signed the Surrender of Custody and Consent for Adoption form, "even if [she] change[s] [her] mind at any time in the future, [her] child will not be returned to [her] because the surrender is irrevocable and binding."

As expected, Baby Boy L. was placed in Peter and Sheila's home, a New Jersey adoption case was opened, and a final hearing was scheduled for February 29, 2008. Before that could take place, however, there was a report of a verbal argument between Peter and Sheila that escalated to Sheila coming after Peter with a kitchen knife in the presence of their 10-year-old son. Sheila was arrested, and divorce proceedings began between the two. American Adoptions, along with child-welfare authorities, took Baby Boy L. from their home.

According to notes in its files, American Adoptions sought to bring Baby Boy L. to Kansas City, where its national offices were located. On April 4, 2008, he was transferred to foster care in Independence, Missouri, and American Adoptions began to

seek a new adoptive placement for him. That same day, a representative of American Adoptions sent an email to Megan, though it didn't mention the problem with Peter and Sheila. Megan learned the following day about it in a phone conversation with Sheila. Shortly thereafter, Megan told American Adoptions that she wanted Baby Boy L. returned to her if Sheila couldn't go forward with the adoption. A representative of American Adoptions told Megan that she could seek to have American Adoptions consider her for placement just as any other potential adoptive parent might be considered. But the representative also told her that it could take up to a year for her to regain custody and that such a prolonged period in foster care would not be in the baby's interest.

Megan instead filed lawsuits in Georgia and New Jersey seeking custody of Baby Boy L. American Adoptions proceeded with a proposed placement with the newly selected adoptive parents, Stacy and Anita, in Kansas. Eventually the Georgia and New Jersey cases were dismissed, and the Kansas adoption proceeding was tried in the district court.

Megan argued to the district court that her surrender was a conditional surrender under New Jersey law, conditioned upon his adoption by Peter and Sheila. Because that condition wasn't fulfilled, she argued that Baby Boy L. should be returned to her.

American Adoptions and the new prospective adoptive parents, Stacy and Anita, argued that Megan had unconditionally and irrevocably given up her parental rights and that American had appropriately carried out its duty to find a home for Baby Boy L. that met his best interests.

The district court found that Megan's surrender of her rights was not conditioned on his adoption by Peter and Sheila. The court found that American Adoptions had "not abused its discretion or responsibility in placing the child for adoption with a two parent family not connected with the dispute between Peter and Sheila." The court terminated Megan's parental rights and ordered that Stacy and Anita could complete the adoption.

#### *Discussion*

All of the parties agreed, both in the district court and on appeal, that the issues before us are governed by New Jersey law based on the declaration that Megan signed in Georgia and the initial filing of an adoption proceeding in New Jersey. Our review of the New Jersey statutes has led us to conclude that the district court erred by deferring to American Adoptions to exercise discretion in determining Baby Boy L.'s best interests following Peter and Sheila's failed adoption rather than having the court play that role. Because resolution of the case before us rests on matters of statutory interpretation, we determine the case based on our independent review of the statutes involved. While we

do consider the way in which the district court has interpreted the statutes, its determination is not binding upon us. *Frick v. City of Salina*, 289 Kan. 1, 7, 208 P.3d 739 (2009)

The parties have cited both New Jersey statutes and New Jersey administrative regulations adopted by the New Jersey Commissioner of Children and Families under statutory authority. See N.J. Stat. Ann. § 9:3-40 (West Supp. 2009). Although we will discuss both statutes and regulations, we focus primarily on the statutory provisions for two reasons. First, although New Jersey law presumes that regulations are valid, the regulation is invalid whenever it is inconsistent with the statute it purports to interpret. *NJSPCA v. NJ Dept. of Agriculture*, 196 N.J. 366, 385-86, 955 A.2d 886 (2008). Second, the purpose of the New Jersey adoption regulations is to provide standards that adoption agencies must meet, not to determine the rights of birth parents. See N.J. Stat. Ann. § 9:3-40 (West Supp. 2009) ("The Commissioner . . . shall promulgate rules and regulations relating to the qualification of agencies for approval to make placements for adoption in New Jersey."). Thus, the New Jersey adoption regulations that govern adoption agencies certainly take into account the statutory framework for New Jersey adoptions, but those regulations only hint at the statutes' meaning regarding the rights of a birth parent in an adoption. The actual rules that we must apply to determine the dispute between Baby Boy L.'s birth mother and prospective adoptive parents are the statutes, not the regulations.

New Jersey law recognizes, of course, that some adoptions may not work out. Indeed, for an agency adoption, New Jersey doesn't allow the filing of court proceedings to approve the adoption until the child has lived with the prospective parents for at least 6 months. N.J. Stat. Ann. § 9:3-47(a) (West Supp. 2009). If the court concludes that the adoption with the initial prospective parents is not in the child's best interests, then "the court shall deny the adoption and make such further order concerning the custody and guardianship of the child as may be deemed proper in the circumstances." N.J. Stat. Ann. § 9:3-47(d) (West Supp. 2009).

This statute, section 9:3-47(d), leaves the placement decision to the court when an adoption petition has been filed but the prospective adoptive parents are not approved. American Adoptions argues that when the parent has given up all parental rights, the adoption agency may place the child at its discretion. But an adoption always requires court approval, something American Adoptions conceded by filing the present case. Given the parties' stipulation that New Jersey law applies, New Jersey's section 9:3-47(d) applies to what is the equivalent of the New Jersey adoption proceeding's transfer to the Kansas courts. What we must determine is whether—despite the surrender documents she signed—Megan would have remained a lawful party before the court in a New Jersey proceeding under its section 9:3-47(d). If so, then her views regarding placement are

entitled to consideration when the court determines what orders are "proper in the circumstances."

Let's now discuss the statutory and administrative provisions that may tell us whether Megan's surrender of rights was indeed total and unconditional. The New Jersey statutes define a "surrender" to mean the "voluntary relinquishment of all parental rights." N.J. Stat. Ann. § 9:3-38(j) (West Supp. 2009). There's nothing partial or conditional about that. A person's right to object to an adoption depends upon whether that person is entitled to notice of the adoption. N.J. Stat. Ann. § 9:3-46(a) (West Supp. 2009). And notice is not required for a parent who has executed a valid surrender to an approved agency. N.J. Stat. Ann. § 9:3-45(b)(1) (West Supp. 2009).

But the statutory provision that specifies the procedural requirements for a surrender, N.J. Stat. Ann. § 9:3-41 (West Supp. 2009), seems to describe more than one type of surrender. In subsection (a), the statute directs that before an agency may accept a surrender it must "inform the person . . . that the instrument is a surrender of parental rights by the signatory and means the permanent end of the relationship and all contact between the parent and child." In subsection (d), the statute allows an agency to "receive [a] parent's surrender of his child for purposes of having the child adopted by a person specified by the surrendering parent." That sounds more like a conditional adoption in which the surrender is conditioned upon the ultimate adoption by that specified person(s).

Yet the statute uses the term surrender, which has been statutorily defined to mean the relinquishment of all parental rights. Perhaps those rights are all relinquished—but only if the condition (ultimate adoption by the specified person) is met.

The matter is a close question. Portions of the New Jersey statute could support American Adoptions' argument that Megan completely surrendered her rights and thus was no longer entitled to notice or to participate; other portions could support Megan's argument that she may do both. Given some ambiguity, we find that three considerations tip the scale in favor of Megan's position. First, every parent has a constitutionally protected right to enjoy a relationship with his or her child. *In re Guardianship of K.H.O.*, 161 N.J. 337, 346, 736 A.2d 1246 (1999). Second, like most states, New Jersey follows the avoidance canon of statutory interpretation, which favors an interpretation that avoids a serious risk of an unconstitutional statute. New Jersey employs an especially strong version of the avoidance canon: when a statute's constitutionality is doubtful, a court may even engage in "judicial surgery" to free it from constitutional doubt. See *State v. Fortin*, 198 N.J. 619, 630-31, 969 A.2d 1133 (2009); *Moriarty v. Bradt*, 177 N.J. 84, 114-18, 827 A.2d 203 (2003). We believe that this New Jersey statute might risk violating the constitution if we were to interpret it so that a parent who surrenders a child for adoption by a specific couple is not even entitled to notice when that couple is later rejected by the adoption agency that accepted the surrender. We have chosen, then, to adopt an interpretation under which Megan remains entitled to notice and

to be heard in these circumstances. Third, our interpretation is consistent with New Jersey administrative regulations. As we've noted, those regulations govern the adoption agencies—a very important role in New Jersey since adoptions are supervised by those agencies without court involvement in most cases for 6 months after the child is placed in the prospective parents' home.

Although the statutes don't explicitly reference a "conditional surrender," the regulations define it as the "voluntary relinquishment of all parental rights . . . for purposes of allowing a child to be adopted by a person(s) specified by the surrendering parent." N.J. Admin. Code tit. 10, § 121A-1.6. That definition simply puts the title "conditional surrender" on the surrender to an identified party described in the statute at N.J. Stat. Ann. § 9:3-41(d) (West Supp. 2009). But the administrative regulations describe a role for the surrendering parent when, as occurred with Baby Boy L, an approved adoption agency determines that the adoption can't proceed with the prospective parent specified by the birth parent:

"If the agency determines that the adoptive parent(s) specified by the surrendering parent(s) can not be approved, the agency shall either:

- i. Return the child to the surrendering parent(s);
- ii. Discuss with the surrendering parent(s) an alternate choice of adoptive parent(s) and if they reach an agreement, place the child with the alternative adoptive parent(s); or

iii. If the agency can not meet the provisions specified in [i] or ii above, initiate appropriate action through the court to determine the legal status of the child." N.J. Admin. Code tit. 10, § 121A-5.4(d)(3).

Let's consider the three options the regulation gives to the agency in this circumstance. The first two options involve the surrendering parent: the agency may either return the child to the surrendering parent or may reach a new placement agreement with the surrendering parent. Either way, the regulation presumes a continuing role for the surrendering parent when a conditional surrender—defined as one in which an identified party is adopting the child—is involved. The third option could be satisfied through an adoption proceeding, such as the one filed here by American Adoptions, but one would presume that this option would allow for the surrendering parent to take part since the first two did so and the three options are all in the alternative.

Reading the statutory scheme in this way avoids constitutional doubt, and it also corresponds with a lay understanding both of the term "conditional surrender" and of the concept it identifies—the surrender of a child for adoption by a specified person. We believe that the average person entering into such an agreement would expect to be notified and consulted if the adoption did not proceed with the person specified.

Certainly, some portions of the documents purport to give up all of Megan's rights. But another portion said that she "surrender[ed] custody . . . for placement with adoptive parents who I know by their first names, PETER AND SHEILA." This segment is exactly the situation the statute describes as surrender for adoption "by a person specified by the surrendering parent" and the regulations call a "conditional surrender." Although American Adoptions arranged for an attorney to advise Megan about these documents, the counsel for the adoptive parents drafted them. Moreover, the documents obviously didn't tell the whole story—Megan knew Peter and Sheila by more than their first names, and even though the statute required that Megan be told that signing the surrender meant the end of *all* contact with her child, she expected—and had—significant further contact through Peter and Sheila after signing the surrender papers. At trial, Megan testified that Sheila was her "best friend," that she was going to be her son's godmother, and that she "would always be in [Peter and Sheila's] lives."

Both the New Jersey statutes and its administrative code contemplate that the final placement decision will be made by the court. See N.J. Stat. Ann. § 9:3-47(d) (West Supp. 2009); N.J. Admin. Code tit. 10, § 121A-5.4(d)(3). Thus, the district court in this case was wrong to defer to the adoption agency's decision, upholding it at least in part because the agency had not abused its discretion. We reverse the decision of the district court and remand the case for the district court to consider the appropriate placement. We note that the district court has already heard substantial evidence from the parties on

this issue, and we leave it to the district court to determine whether any additional evidence would need to be presented on remand.