Conditional Surrenders of Foster Children

By Margaret A. Burt

THE LAW

Chapter 3 of the Laws of 2005 clarified once and for all that a birth parent can legally surrender a child to an agency for the purposes of adoption with conditions naming the adoptive parents and/or for contact in some form after the surrender and adoption. Although the law now specifies procedures for enforcement of the terms of the agreement both before and after the adoption finalization, there are issues that remain unclear until there is more case law. Specifically of concern is the question of the ability of the parent to revoke the surrender prior to a finalization if there are problems with the terms as well as the ability of the court to order modifications to the terms before or after the adoption. A review of some of the caselaw PRIOR to the new bill may shed some light but it will remain with the courts to rule as to the viability of these older decisions given the new statute.

THE CASE LAW BEFORE THE STATUTE

The limited number of published cases in this area suggests that the vast majority of conditional surrenders have gone quite smoothly regarding enforcement. It is also possible that some birth parents are not attempting the contact that had been agreed upon at the time of the surrender.

In 1993, Queens County Family Court reviewed the issue of conditional surrenders in **In Re Custody of Alexandra C.,** 157 Misc2d 423, 596 NYS 2d 958 (Queens County Family Court 1993) Although predating the perm law by more than a dozen years, the court allowed a birth father to surrender his daughter, who was then in foster care, adding agreed upon terms of ongoing, albeit limited visitation. While indicating that it would be helpful for more statutory guidance, the court found that a biological parent could condition his surrender on some specified contact with the child that would survive the adoption. Further the court stated that if the biological parent were denied the specified visitation, the biological parent would retain standing to return to court and seek enforcement of the visitation conditions. The court stated that the biological parent who sought such enforcement after the adoption would not have an automatic right to the visitation, nor would the biological parent be able to void the surrender or the adoption. The biological parent who claimed that the terms of the visitation were not being honored would simply be able to file in court and the court would review the situation at that time based on the current best interests of the child. This case simply seems to foreshadow what is now statute.

The First Department decided a very important case in 1995 that seems to be the model for the 2005 statute. In **Matter of Gerald** 211 AD2d 17, 625 NYS2d 509 (1st Dept. 1995) the court reviewed a conditional surrender situation involving a child in the Bronx. Here the lower court had refused to allow a biological mother to surrender her foster child with conditions for minimal visitation, finding that the law did not allow for such conditions. The Appellate Court reversed the trial court and sent the matter back to Family Court to review the specifics of the conditions that the parties wanted. The Appellate Court found that the lower court should not refuse a proposed surrender of a foster child out of hand simply because the parent wished to condition the surrender with some visitation. The court ruled that if the lower court found that conditions of visitation to the surrender were in the child's best interest, the court should allow the conditional surrender. Most importantly, the court specifically stated that if a foster child were surrendered with visitation conditions, the biological parent wouldn't have an automatic right to visitation. If the biological parent brought a post adoption petition seeking visitation that she claimed was denied by the adoptive parents, that the court would then hear the issue and decide on the visitation based on the then current best interests of the child. Again this case law is basically moot given that its decision now seems incorporated in the statute.

In 1997 two more Appellate Division cases discussed conditional surrenders, each one again ruling that biological parents could sign surrenders of foster children with conditions for visitation. Each case also ruled that if the parent sought enforcement of the visitation rights after the adoption, that the court would give the biological parent standing. However, the actual decision would need to be based on the child's current best interests. **Matter of Patricia YY**., 238 AD2d 672, 656 NYS2d 414 (3rd Dept. 1997), **Matter of Sabrina H.,** 245 AD2d 1134, 666 NYS2d 531 (4th Dept. 1997) Prior to the statute being passed, three out of four of the Appellate Courts had ruled that if there are problems after the adoption, the adoption would not be void nor the surrender vacatable. The birth parents would simply have standing if they chose to bring a post adoption action and current best interests would be the measure. This all seems to be clearly picked up now in statute.

What about an enforcement procedure brought after the adoption has occurred – how will the court look at the best interests question? A couple cases had been decided before the statutory change in 2005:

In **Matter of Ronald D., Sr. v Jane Doe, as Adoptive Parent of Crystal,** 176 Misc2d 567, 673 NYS2d 559 (Family Court, Jefferson County 1998) a biological father sought enforcement of the terms of his conditional surrender of his foster child. The conditions did not involve visitation. Instead, it had been agreed in the surrender that the father would receive every year a photo of the child, and progress reports and report cards. After the child was adopted, the biological father returned to court, claiming that he was

not receiving these materials. Apparently the adoptive parent had not been made aware of the agreement. The court ordered that the materials be made available to the birth father. He had specifically conditioned his surrender on this agreement and there was no indication that furnishing the materials now would be violative of the child's best interests. Since the agency had accepted the surrender with these conditions, it became their obligation to inform any adopting parent of the conditions. The adoptive parent must obey the conditions given the agreement and the fact that providing the materials would not affect the child's interests.

In **Matter of Daijuanna Priscilla M.,** 290 AD2d 298, 735 NYS2d 544 (1st Dept. 2002) the birth mother had surrendered a foster child for adoption with the condition that she have visitation. Some years after the adoption, the adoptive parent refused to provide the visitation when the biological mother sought it. The adoptive parent was concerned that the biological mother was using drugs and that she had gone several years without actually visiting. The biological mother returned the matter to court arguing that the surrender should be voided as fraudulent or alternatively that the visitation should be enforced. The Appellate Court noted that the birth mother had an attorney when she surrendered. She had been specifically told by the Judge at that time that the visitation after the adoption was not enforceable per se but would depend on the child's continuing best interests. The court found that the surrender was not fraudulent in that at the time all the parties understood and intended to abide by the conditions. The court went on to find that although the mother had standing to seek enforcement of the visitation, current best interests of the child governed the enforcement. Based on expert testimony provided by the child's therapists, it wasn't in the child's best interests to enforce the visitation. This case is an excellent illustration of why a clause should be negotiated that ends the contact provisions if the birth parent does not seek the contact for a specified time period.

What about before the finalization? Will the court allow the birth parent to revoke the surrender if there are problems with the terms before the child is adopted?

In **Matter of Jesse F., 193 AD2d 839, 597 NYS2d 511 (3rd Dept. 199**3), the biological father of a teenager in foster care had signed a surrender, conditioned on some limited visitation with the boy. Before an adoptive home was located for the child, the visitation with the father became problematic from the agency's point of view. The agency, anticipating the father's complaint, did not themselves end the visits but brought an action in court seeking a modification of the terms of the surrender by specifically ending the visitation and arguing that in was not in the child's best interests for the visits to continue. The Appellate Court ruled that in signing the surrender, the father had given up his parental rights to contact and that the conditions to the surrender simply allowed the court to review the situation later under a current best interest's test. The father was not allowed to void the surrender but was permitted to argue as to the visitation being in the child's best interests. Given proof presented by experts of the child's difficulties with the

visitation, the court limited the visits to only when the agency felt it was appropriate for the child. Note that this type of situation may or may not be seen as a "failure of a material condition" situation. It may not still be valid case law given that the statute now says that in this situation the court "shall enforce" the terms but says nothing about being able to modify the terms.

Also in a couple other reported cases of this situation, the courts did allow the parent to revoke the surrender when prior to the finalization the terms became problematic. **Matter of Shannon F. and Kelly P.,** 175 Misc. 2d 565, 669 NYS2d 476 (Family Court, Richmond County 1998) **Matter of Christopher F.,** 260 AD2d 97, 701 NYS2d (3rd Dept. 1999), and **Matter of William W.,** 188 Misc2d 630, 729 NYS2d 259 (Wayne County Family Court 2001) The **Christopher F.,** case specifically held that a surrender can be revoked by the birth parent, pre-adoption, if the birth parent no longer wishes to surrender the child when there is a failure of an identified person to be able to adopt.

The following cases have been reported since the effective date of the statute:

Matter of TR and NS 807 NYS2d 837 (Chemung County, Family Court 2005) - here the surrenders of two children had been conditioned on specified persons adopting and now those persons were not willing to adopt. The Family Court allowed the birth parents to revoke the surrender finding that the agreement conditions could not be honored and the surrenders were not valid. The court found that the new legislation did not require the court to use "best interests" as the test where there was a substantial failure of a material condition

Matter of Carrie W. 37 AD3d 1059, 830 NYS2d 406 (4th Dept. 2007)
A Cayuga County mother had surrendered her rights to her three children with an agreement that the children would be adopted by the paternal grandfather and his wife. The agreement contained a clause that she would be allowed to visit the children every week as long as she did not miss two visits within a 12 month period unless there was a crisis beyond her control. The birth mother filed a petition to enforce the visitation and claimed that the grandfather was not permitting visits. The mother however had not visited the children in a year and the mother had not alleged any "crisis beyond her control". Further her petition did not allege why the visitation would be in the children's best interests. The Fourth Department found that the Family Court had properly dismissed the petition without a hearing.

Matter of Rebecca O. 46 AD3d 687, 847 NYS2d 610 (2nd Dept. 2007)
In 2004, a biological mother surrendered her child for adoption with conditions that she be allowed to visit 4 times per year and also be able to send cards, letter and pictures. Six months after the surrender the child was adopted and the contact attempts were rebuffed.

The birth mother sued the adoptive mother in Suffolk County Family Court for enforcement of the terms of the contact and under a best interest analysis; the Family Court ordered that the contact should be permitted. The adoptive mother appealed to the Second Department. The Appellate Court found that the new conditional surrender law gave the birth mother standing to seek enforcement of the surrender terms and that best interests of the child should be the standard for enforcement. The record supported that the contact was in the child's best interest and the adoptive mother must provide the contact.

Matter of Jack 844 NYS2d 855 (Family Court, Monroe County 2007)

In a private adoption agency surrender, Monroe County Family Court refused to accept the extra judicial surrenders of the birth parents. The court found that the surrenders did not encompass the entire agreement of the parties in that there was some post adoption contact agreed upon that was not adequately described. The surrender forms used were not in compliance with the required procedures of SSL 384. The parties wanted the agreement for post adoption contact to be exempt from court review or enforceability. The intention of the legislature is to have judicial scrutiny of post adoption agreements and have such agreements reviewed by a best interest analysis before being approved of by the court. The parties were ordered to submit surrenders with conditions clearly outlined for the court to review.

Matter of Heidi G., 68 AD3d 1174 (3rd Dept. 2009)

A Warren County birth mother filed an enforcement petition under DRL §112-b for visitation with her two children who had been adopted. She had signed a conditional surrender to receive annual photos and an annual visit. The agreement also stated that the visits would be suspended if they were deemed detrimental to either child by a therapist. Family Court ordered a therapeutic visit with the birth mother and a counselor but the children apparently refused to attend and the visit did not take place. The lower court did receive an evaluation of the children and dismissed the petition without a hearing. The birth mother appealed to the Third Department who remanded the matter for a hearing. The oldest child had since turned 18 and so issues regarding her are now moot. But as to the younger child, the court should hear testimony to determine if visitation is or is not in the child's best interests and should not base its ruling on unsworn statements made at court appearances and the psychological report.

Matter of Carrie B., 81 AD3d 1009 (3rd Dept. 2011)

A Tompkins County mother's parental rights were terminated in 2005 and the children were adopted by the birth mother's adopted mother. Three years after the termination, the

birth mother filed a visitation petition which was dismissed without a hearing by the Family Court for lack of standing. The Third Department affirmed. The mother argued that she was the adopted sister of the children and that as such she had a right to seek visitation. Of course she had no right to seek visitation as the children's mother as her rights were terminated which ends any standing she would have had as the mother. Under DRL § 71 siblings can sue for visitation but only if they can allege equitable circumstances. The statue speaks of siblings of the "whole or half blood" and not adoptive siblings but even if the statute contemplates sibling relationships that were created in such a way, there are no equitable circumstances. She had permanently neglected these children and had an opportunity to be heard on that issue. The mother also argued on appeal that the statute was unconstitutional in that a parent who surrenders can seek to negotiate post adoption contact terms but a parent who contests the termination and asserts their rights is denied that option. However, there was no evidence that the mother was denied a surrender or penalized in some way for wanting to contest the permanent neglect which she in fact defaulted on.

Matter of Dustin K.R., 76 AD3d 794 (4th Dept. 2010)

In a private adoption with an agreement for post adoption visitation, the Fourth Department was called upon to interpret the clauses of the agreement on an appeal from Genesee County Family Court. The birth mother and the adoptive parents had entered into an agreement that the mother would be allowed monthly visits with the child for a six hour period and that the transportation costs for such visits would be the birth mother's to pay. The agreement further stated that if the adoptive parents relocated over 250 miles away then the visits would be six times a year, consisting of two six hour visits over a two day period with the adoptive parents paying for the mother's transportation and housing expenses. The adoptive couple did in fact move and the question before the court was if the move was over or under the 250 mile mark. The mother argued that the move was more than 250 miles as she would have to travel by bus and the bus route was over 250 miles and further that the adoptive parents had known her only option was public transportation. She moved for summary judgment that the adoptive parents had to pay for her transportation and give her the alternative visit schedule. The adoptive parents argued that the trip was less than 250 miles if you drove a car and that the birth mother had known that this was the area that they had contemplated moving to when the terms were arranged.

The lower court found that it was possible, but with practical difficulty, to use public transportation to reach the new location under 250 miles but ruled that the alternative visit schedule would be placed into effect in any event. The adoptive parents appealed. The Fourth Department ruled that the lower court erred in its interpretation of the agreement. The agreement was ambiguous as to how the 250 miles would be calculated and the court should not have relied on extrinsic evidence based on its own research to

reach the conclusion that it was possible to use public transportation to reach the new residence in less than 250 miles. Further, the court erred in concluding that the alternative visitation schedule would be in effect after concluding that the travel distance was less than 250 miles. The matter was reversed and remitted for a full hearing.

Matter of S.D., 29 Misc 3d 623 (Queens County Family Court 2010)
A Queens County father surrendered his daughter with the specific condition that the foster parents adopt her. When the foster parents were no longer an adoptive resource, the matter was returned to court and with all the parties in agreement, the condition was changed to one where the biological older sister of the child would adopt. The sister then was no longer an option and the child had turned 17 years old and was refusing to be adopted by anyone. The subject youth expressed a desire to return to live only with her father and would agree to no other plan. No parties objected to that and the court found that it had the jurisdiction to revoke the surrender given that the condition could not be honored and as well to reinstate the parental rights of the father. The parties should be returned to their legal positions at the time of the original surrender.

Matter of Mya V.P., __AD3d__, dec'd 12/30/10 (4th Dept. 2010)
The Fourth Department reversed and remanded a Niagara County Family Court's ruling on the enforcement of a post surrender contact agreement. The biological mother had surrendered the child with an agreement that she would have visitation but that if she missed any two visits in a 12 month period, then the agreement could be voided by the adoptive parents. The adoption was finalized. In June of 2008 the mother missed a visit as she had been incarcerated. In August of 2008, the adoptive parents ended the visitation. The lower court properly applied the principles of contract law. Since the mother was also going to miss her December 2008 visit as she would still be incarcerated at that point, the mother was not ready, willing and able to perform her obligation to visit and therefore the adoptive parents were entitled to void the visitation agreement. However, the Fourth Department found that DRL §112-b requires that the court also must determine that enforcement of an order must be in the child's best interests and the lower court did not make such a finding. Since the lower court did in fact "enforce" the order by dismissing the petition from the birth mother as per the terms agreed upon, there should have been findings on the child's best interests. The court remanded the matter for those findings.

Matter of MT v ET NYLJ 6/11/10 at 27 (Family Court, Suffolk County 2010)
A foster mother who intended to adopt freed children moved to vacate the surrender terms of the birth father. The foster mother alleged that the father had continued to abuse drugs and that the contact was no longer in the children's best interests. The Suffolk County Court ruled that the foster mother had standing to bring the proceeding given that the children had lived with her for more than a year and that she was a party to the permanency hearings. The court agreed that the contact should cease, it would be

perhaps a year of services before the father could be in a position to safely have contact with the children who have been in care for 3 years. The surrender will not be vacated as that would likely simply result in a successful termination in any event.

Matter of Kristian J.P., 87 AD3d 1337 (4th Dept. 2011)

A Cattaraugus County couple sued under DRL §112-b to enforce their post adoption contact agreement. The Fourth Department ruled that the lower court properly determined, after a full hearing, that it was no longer in the best interests of the children to enforce the agreed upon contact. The birth parents had been expressly warned when they signed the surrenders that the post adoption contact was subject to a modification if it was no longer in the children's' best interests. In an issue of first impression, the Fourth Department ruled that the lower court had authority to issue an order of protection to keep the birth father away from the children and the adoptive couple. Since an enforcement of contact under DRL § 112-b is in the nature of a visitation order, the court had authority to issue an order of protection. The Family Court had not specified how long such an order would issue and so the Fourth Department found that the order could continue until the 18th birthday of the child.

Matter of Mia T. 88 AD3d 730 (2nd Dept. 2011)

A father to a Suffolk County foster child signed judicial surrenders that included conditions that the children would be adopted by their foster mother, that he would have monthly visits with the children and a visit on Father's Day that he could communicate by phone with the children and he could send pictures and cards. Before the children were adopted, the foster mother filed a petition to rescind the surrender or in the alternative to vacate the contact agreements in the best interests of the children. The lower court held a hearing and vacated the visitation terms of the surrender. The father appealed and the Second Department reversed. FCA §1055-a permits any party to file a petition to enforce the agreement terms before the adoption but it does not give the court the power to terminate or vacate the agreement. The court can refuse to enforce the contact agreement if someone files to enforce the agreement and only if that is in the best interests of the children. Further the foster parent is not a party to a surrender of a birth child and cannot seek to vacate a surrender. The foster mother had no standing to seek to vacate the contact agreement .

Matter of Brown v Westfall 2012 NY Slip Op 51598 (U) (Yates County, Family Court 2012)

A Yates County birth mother sued the adoptive parents to enforce the contact terms of a judicial surrender she had executed for a child in foster care. There had been an agreement for annual visitation but it required that the birth mother call the adoptive parents to set up the visitation. The birth mother admittedly did not make the call as

agreed and testified that she had lost the number for the adoptive parents when she had to obtain a new phone. The birth mother did call DSS to obtain the adoptive parents number again but did not reach them until after the time frame that had been set for her to make the annual contact with the adoptive parents. Although this is a breach of the terms, the Yates Family Court found that the birth mother's excuse was not unreasonable and the annual visitation should still occur. Prior to the surrender, the birth mother had visited the child twice a week for 2 years and after the surrender, the birth mother had a successful visit with the child as per the agreement.

Matter of Andie B., 102 AD3d 128 (3rd Dept. 2012)

In a significant decision, the Third Department held that post adoption contact agreements (a "PACA") can be incorporated into a adoption order in a private adoption under DRL § 112-b. The Appellate Division reversed Broome County Family Court's denial of a motion to incorporate a PACA into the adoption order. All the parties, birth mother, adoptive parents and the lawyer for the child were in agreement that the PACA was in the child's best interests. The Third Department acknowledged that DRL §112-b, regarding the legality and enforceability of PACAs, is found under title 2 of the adoption article labeled "Adoption from an Authorized Agency" but the title is not part of the act and nothing in the statute limits its application to agency adoptions. Further it refers to not prohibiting the parties in the all chapter 3 proceedings from entering into PACAS and chapter 3 includes procedures for private adoptions. The adoption court must follow the procedures outlined in DRL § 112-b and the court must determine that the PACA is in the best interests of the child.

Matter of Kaylee O. 111 AD3d 1273 (4th Dept. 2013)

A birth mother sought to enforce the post adoption contact (PACA) provisions in her surrender. The Erie County Family Court ruled that it was not longer in the child's best interests to require visitation. On appeal, the Fourth Department found that the PACA was in fact not enforceable. SSL § 383-c(2)(b) clearly states that the PACA is not enforceable if the court did not approve of the terms and thereafter incorporate the terms in the adoption order. There was no proof that the adoption court had ever incorporated the PACA terms in the adoption order. The Appellate Court also commented that the lower court correctly determined that it was no longer in the child's best interests to have visitation in any event.

Matter of Shapphire W., 120 AD3d 1584 (4th Dept. 2014)

A Cattaraugus County birth mother judicially surrendered her child with a condition for biannual visits. The agreement was for 2 visits a year, once each in July and December, for 2 hours each. The birth mother was to contact the adoptive parent by the first Monday in July and December respectively to arrange the visits. The child was adopted. The parties then agreed orally to a visit to occur after Thanksgiving instead of the one in

December. The birth mother did not contact the adoptive parent in July for a visit at all and then did not contact the adoptive parent until mid November, instead of the first week of November for the next visit. The adoptive parent would not permit the November visitation. The birth mother filed a petition to enforce the agreement. The family court found that the birth mother's cell phone had been destroyed and she had lost the adoptive parent's phone number. However, she did not make sufficient efforts to obtain the phone number from others and therefore the birth mother was in violation of the agreement. Further the lower court found that it was no longer in the child's best interests for the visits to continue. At the visits that had occurred before the alleged violation, the birth mother would not always pay attention to the child, who had special needs. The Fourth Department found no reason to disturb these findings.

However the Appellate Division did modify the trials court's decision. The agreement stated that if visitation was ever terminated then the birth mother could notify the adoptive parent every year by November 1st of the birth mother's current address and the adoptive parent was to supply a progress report and photographs the child. This term was specifically was to go into effect if the visits were terminated. Therefore the lower court erred in failing to grant the birth mother's petition to this extent and the order was ordered modified to reflect the birth mother's right to the photos and report.

Matter of Bentley XX., 121 AD3d 209 (3rd Dept. 2014)

A St. Lawrence County Family Court decision on a conditional surrender was reversed by the Third Department. The father had surrendered the child after the child had been in foster care from his birth until about 2 years of age. The surrender was conditioned on specific foster parents adopting the child. Before the adoption occurred, the foster parents separated and thereafter the adoptive father sought to adopt separately. The DSS notified the father and the AFC about the fact that the two adoptive parents would not be adopting and asked the court to modify the surrender terms to allow for the one adoptive parent (who was the child's maternal grandfather) to adopt as a single parent. The birth father did not want to agree to the modification of the terms. The family court held a hearing and ruled that the modification of the terms was in the child's best interests. The Third Department found that the statue, although quite detailed about procedures for substantial failures of material conditions of a conditional prior to adoptions did not give the court authority to modify the terms of the surrender. This would in effect "force" surrender terms on a parent. The statute does not give the court authority to modify the terms of a surrender without the parties consent and the parent can revoke the surrender in such a situation as prior case law has dictated. Also the statue did not abrogate or replace the prior case law that deemed that the birth parent could revoke the surrender when the substantial failure occurs prior to any adoption. Of course, the court noted, there is nothing that prevents the DSS from now going forward with TPR proceedings if there are

grounds. (NOTE: The court made no comment relative to simply having conditions that anticipate such an issue, as is commonly done, by having terms that say that "either one or both" adoptive parents will adopt or even a term that says that the parties agree that no revocation can occur if the adoptive parents cannot adopt.)

Matter of Jayden A., 123 AD3d 816 (2nd Dept. 2014)

The Second Department reversed and remanded for a hearing the Queens County Family Court dismissal of a birth mother's petition to enforce the terms of the PACA after her child had been adopted. The mother had surrendered the child when the child was almost 3years old and agreed to the child being adopted by his foster parents. The agreement also indicated that the mother would have a visit once every 6 months with the child. Almost 4 years later, the mother filed to enforce the visits claiming she had been denied visits for the last 3 years. She said the adoptive family would not let her visit as the birth father had threatened the adoptive parents. The birth mother argued that the visits with her would be in the child's best interests so that the child would not feel abandoned or hate her, his biological mother. When the parties appeared, the Judge dismissed the petition without a hearing noting that the visitation would not be in the child's best interests. The court stated that it had presided over the child's "lengthy neglect case" and that the mother had never complied with services. The court said that the "visits were going badly" and that the child was "well situated and happy". The AFC advised the court that the adoptive parents provided very good care for the child who had special needs. The lower court did not allow the birth mother's attorney to even speak until after the court had already dismissed the petition. When the mother's attorney objected to the failure to hold a hearing, the court stated that it was very familiar with the mother's history and that waiting so long to bring an enforcement proceeding was not in the child's best interests.

Although the statue does not mandate a hearing, the lower court erred in not holding one. While the lower court alluded to other proceedings with the birth mother, the court did not state the specific facts it based its decision on. The appellate division could not properly review the matter. Also information the lower court has that would have been relevant at the time of a termination, may not be relevant years later as it relates to the current visitation question. The fact that the child is special needs or is currently well cared for does not necessarily determine if it may be in his best interests for visits with the birth mother to resume.

There was a dissent. The dissenting Judge indicated that the trial court should not be required to hold a hearing when it had so much information about the child and the parent. A PACA does not confer on the parent an absolute right to visitation after an adoption and it is up to the court to determine if contact is in the child's best interests. The lower court had presided over 5 prior neglect proceedings regarding this mother and

had terminated her rights to 2 other children. At the time this petition was pending, the same court has before it a permanency hearing regarding another child who had recently been freed for adoption and a neglect proceeding regarding the mother's newest child. The lower court was very familiar with this mother, this child and the circumstances of the surrender. There was no controversy that the mother had not seen the subject child, who was now 7 years old, since he was 4 years old. The court can take judicial notice of all of its prior proceedings and orders. The AFC supported the dismissal and the court knew of the disruptive history the mother had as it related to visitation issues.

Matter of Sierra L., 130 AD3d 1184 (3rd Dept. 2015)
An Otsego County mother of three surrendered her children with the condition that she receive a supervised visit each year that DSS would provide. The surrender occurred in the summer of 2006. The mother then claimed that DSS asked her not to visit so that the children could transition into an adoptive placement. Starting in 2009 she claimed that she then requested her yearly visits, was denied and then in 2014 she sought to enforce the visitation by filing a motion. Family Court denied her motion sua sponte for failure to state a cause of action. The Third Department reversed and remanded the matter for a hearing. The mother claimed that she believed her children had been adopted, but the record does not reflect if that is in fact true so the appellate court found that there was no way to determine if the matter should be governed by FCA §1055-a(b) or by DRL §112-b. If the children have been adopted then the adoption would have required that the conditions be included in an order and that the mother should have received a copy of the incorporation order. Again, with no record below, there is no way to know if the children were adopted and if at that time, the mother was provided with the required copy of the incorporation order. The Third Department ordered that the parties should appear before the court within 45 days of this decision at which time the mother should be provided with any relevant orders such that she may need to pursue her claim that she in entitled to the visitation.

Matter of Stephen M., 50 Misc3d 1216 (A) (Ulster County Family Court 2016)
The birth parents signed a surrender in Ulster County Family Court with a condition that the child should be adopted by a particular person and the surrender also stated that if that person was unable to adopt, that DSS could find another adoptive family. When the identified person indicated she was unwilling to adopt, the Family Court ruled that this was a failure of a material condition and allowed the parents to vacate the surrender. The child is now over the age of 14 and will not consent to being adopted and the goal is changed to return to parent.

Matter of Shaquana Michelle M.L., v Leake & Watts 139 AD3d 513 (1st Dept. 2016)
Bronx County Family Court properly denied a mother's motion for visitation and contact with her children who had been adopted. It was no longer in the children's best interests to continue contact as the mother was irrational, unstable and violent. She was hostile to

the children's adoptive parents and did not understand the significance and finality of the surrenders she had signed.

Matter of Naquan L.G., __AD3d___, dec'd 6/1/16 (2nd Dept. 2016)

The Second Department affirmed Queens County Family Court's denial of a motion by a mother to vacate her judicial surrenders of her children. The children had been in kinship foster care since 2008 based on neglect of the mother. In 2010 a termination was filed and in 2011 the mother executed voluntary surrenders of the children in court with counsel. Approximately 23 months later, the mother moved by order to show cause to vacate the surrenders. The Second Department noted that SSL §§ 383-c(3)(b) and 383-c(5)(c)describes the procedures needed to take a judicial surrender of foster children but the statute says nothing about remedies if the court does not follow the procedures. The law does state that fraud, duress and coercion in the inducement or execution of the surrender can be alleged and that other than that the surrendering parent cannot bring an action to revoke or annul the surrender. The instruments the mother signed stated in bold capital letters that the surrenders were immediate and final and that she could not cancel or change the surrender or regain custody. These were conditional surrenders that stated that the mother would be permitted contact "as mutually agreeable by the parties". There was an in court voir dire of the mother's understanding, mental clarity, satisfaction with her counsel and her understanding of the anticipated adoption and the visitation agreement. However in the 2 years since the signing, problems had occurred with the agreed upon visitation and the mother then filed to revoke her surrenders claiming that the court never advised her of the option of supportive counseling. Although it does appear that the court did not advise her of offering of supportive counseling, there is nothing in the law that allows for a revocation of a surrender for this failure.

There was a dissent. The dissent argued that the Family Court's colloquy was misleading and fundamentally unfair and that the mother should have been allowed to vacate the surrenders. The dissent found that the court's statements regarding the visitation agreement led the mother to believe she had "rights" regarding visitation when in fact the visitation was only to be by "mutual agreement" which in fact meant she would get no visits if the adoptive parent choose not to grant them. The dissent found this manifestly unfair as it was likely that the mother focused on what the Judge was saying to her and less on the legal paperwork. Further the dissent argued that if only fraud, duress or coercion allowed for a surrender to be vacated then there was no remedy for a lower court that did virtually nothing to ensure that the parent understood what they were doing.