REPRESENTING A BIRTH PARENT IN A PRIVATE CONTESTED ADOPTION CASE

A Primer for Assigned Counsel

Written by the Working Group on Pro Bono Attorney
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CHAPTER 1 – INTRODUCTION

You have been assigned to represent an indigent birth parent facing termination of parental rights in an adoption proceeding. In the Matter of the Adoption of a Child by J.E.V. and D.G.V., 226 N.J. 90 (2016), the Supreme Court concluded indigent parents who face termination of parental rights in contested adoption proceedings have the right to appointed counsel. The termination of one's parental rights plainly "implicates a fundamental liberty interest." Id. at 109 (citing N.J. Division of Youth & Family Services v. B.R., 192 N.J. 301, 305 (2007)). "When parental rights are terminated, the tie between parent and child is severed completely and permanently." Ibid.

The Office of the Public Defender (OPD) is not legislatively authorized to provide representation to indigent parents in private contested adoptions. Consequently, judges must appoint pro bono counsel from the private bar to advocate for these indigent litigants. The purpose of this manual is to provide guidance in navigating contested adoption proceedings. Questions specific to your matter should be referred to the Surrogate in the county where the case is filed. A sample appointment letter located as Appendix A to this manual is similar to the one you should have received and provides helpful information.

Once the case assigned to you is concluded at the trial level, your client may wish to appeal the court's determination. Rule 1:11-3 governs the extent of the pro bono attorney's obligation on appeal. That rule provides:

> The responsibility of an attorney of record in any trial court with respect to the further conduct of the proceedings shall terminate upon the expiration of the time for appeal from the final judgment or order entered therein.

As the Supreme Court in J.E.V. concluded that indigent parents have the right to counsel on appeal, appointed trial counsel's obligation includes filing an appeal if requested by the parent to do so. Trial counsel also can file a notice of motion seeking to be relieved as counsel simultaneously with the notice of appeal.

CHAPTER 2 - CONTESTED ADOPTION PROCEDURES

Once an objecting parent files an objection to an adoption, the objecting parent is then entitled to receive notice of all hearings. Although no other filings are required of the objecting parent, if any pleadings or motions are filed, they are generally handled at the first Case Management Conference. The Case Management Conference is usually held on the date that has been set for a preliminary hearing, or such other hearing as may have been scheduled.

Counsel appointed by the court should immediately contact the client and file a notice of appearance with the Surrogate in the county of venue, with a copy of the notice to the attorney for the plaintiffs (the adopting parent or parents) or to the plaintiffs themselves if proceeding pro se.

At the first Case Management Conference, if there is a question as to parentage, DNA testing should be ordered if the objecting parent is the putative father since the result of DNA testing may resolve the objection.

Once issues involving DNA have been concluded, a Case Management Conference for scheduling purposes should be held. At that time, the court enters an order as to the dates by which all requests for written discovery shall be exchanged, the date by which depositions of all fact witnesses should take place, and the date of a follow up Case Management Conference. At this or any subsequent Case Management Conference, the issue of experts should be addressed and depending on whether experts will be retained, the court will enter dates by which the experts must be retained, all interviews, evaluations and testing must be completed, reports must be submitted and exchanged, and depositions of the experts completed.

A further Case Management Conference may be scheduled either during discovery to review the status and progress of discovery or at the request of any of the parties if the court's assistance is needed. Once all discovery is completed, a trial date will be set.

The court, depending on the circumstances of the case, may order with regard to the objecting parent, background checks, and a limited home study if it will assist the court. The adoptive parents, unless stepparents, will have had either a home study or a limited home study in the nature of an Adoption Complaint Investigation (ACI) performed and submitted to the court. In a stepparent adoption, since only criminal and child abuse checks are required, if the court deems it necessary or advisable, a limited home study may also be ordered.

Depending on the circumstances of the case, although not required under the New Jersey adoption statute, N.J.S.A. 9:3-37 et seq., the court has the discretion to appoint a guardian ad litem for the child. Appointment of an attorney from the Office of the Law Guardian is not required nor is it authorized under the adoption statute.

The trial is conducted by the court sitting without a jury. The proceeding itself is closed and all documents relating to the adoption are sealed pursuant to the adoption statute.

For a flowchart of the contested adoption process, please refer to Appendix B of this

manual.

For additional information regarding an overview of adoption in New Jersey, please refer to Appendix C of this manual.

CHAPTER 3 – TERMINATION OF PARENTAL RIGHTS

The adoption statute, N.J.S.A. 9:3-37 et seq., governs private (non-Division of Child Protection and Permanency (DCP&P)) adoptions, and provides in part: "This act shall be liberally construed to the end that the best interest of children be promoted and that the safety of children be of paramount concern. Due regard shall be given to the rights of all persons affected by an adoption." If the court finds from "clear and convincing evidence," In re Adoption of a Child by J.E.V., 442 N.J. Super. 472, 483 (App. Div. 2015), aff'd, 226 N.J. 90 (2016), that the adoptive parent has satisfied the requirements of the statute, the court shall terminate those rights and grant the adoption assuming that the adoption is in the best interest of the child.

N.J.S.A. 9:3-46 sets forth the standards which must be applied in order for the court to terminate the parental rights of a birth parent who has objected to the adoption. This section has been addressed and interpreted in several notable cases by the New Jersey Supreme Court. See In the Adoption of a Child by J.E.V. and D.G.V., 226 N.J. 90 (2016); In the Matter of the Adoption of Children by G.P.B., Jr., 161 N.J. 396 (1991); In the Matter of the Adoption of a Child by J.D.S., 353 N.J. Super. 378 (App. Div. 2002), certif. denied, 175 N.J. 432 (2003).

There are two standards for termination of parental rights in a contested adoption matter depending on whether the child was placed for adoption. The two standards are the "best interest" standard and the "placed for adoption" standard. The "best interest" standard is used when the child was not placed for adoption, and the "placed for adoption" standard is used when the child was placed for adoption.

The "best interest" standard is statutorily defined as "whether a parent has affirmatively assumed the duties of a parent." N.J.S.A. 9:3-46(a). In this regard, the statute requires that:

> [T]he court shall consider, but is not limited to consideration of, the fulfillment of financial obligations for the birth and care of the child, demonstration of continued interest in the child, demonstration of a genuine effort to maintain communication with the child, and demonstration of the establishment and maintenance of a place of importance in the child's life.

Ibid.

The "placed for adoption" standard requires the court to find:

> During the six-month period prior to the placement of the child for adoption:
>
> (1) That the parent has substantially failed to perform the regular and expected parental functions of care and support of the child, although able to do so, or
>
> (2) That the parent is unable to perform the regular and expected parental functions of care and support of the child and that the parent's inability to perform these functions is unlikely to change in the immediate future.

N.J.S.A. 9:3-46(a)(1) and -46(a)(2).

Regular and expected parental functions of care and support are statutorily defined as:

> (a) The maintenance of a relationship with the child such that the child perceives the person as his parent;
> (b) Communicating with the child or person having legal custody of the child and parenting time rights, or unless prevented from so doing by the custodial parent or other custodian of the child or a social service agency over the birth parent's objection; or
> (c) Providing financial support for the child unless prevented from doing so by the custodial parent or other custodian of the child or a social service agency.

N.J.S.A. 9:3-46(a).

"A parent must fail in at least two of the three listed functions before a court should terminate parental rights. Conversely, fulfillment of only one function will not provide a defense to an action to terminate parental rights." In re Adoption of Children by G.P.B., 161 N.J. 396, 407 (1999). See generally In re Adoption of a Child by J.E.V., 442 N.J. Super. 472, 484-85 (App. Div. 2015), certif. denied, 226 N.J. 90 (2016) (contrasting the two standards); see also In re W.P., 308 N.J. Super. 376, 385 (App. Div. 1998).

CHAPTER 4 – ROLE OF THE COUNTY SURROGATE

The New Jersey Court Rules provide that all filings for adoptions are with the Surrogate in the appropriate county. This includes agency placements, private, stepparent, grandparent, or any other relative adoptions, as well as requests for judicial surrenders of parental rights. In addition to all filings relating to adoptions, all requests for Hague Emigration orders and pre-birth orders in gestational carrier matters are also filed with the Surrogate's office. The Surrogate is the clerk for all filings and pleadings involving adoptions and is charged with reviewing all filings to make sure that the requirements of the statute and the court rules are followed. If there are any deficiencies, the party filing the pleadings is contacted by Surrogate staff.

In contested adoption matters, objecting parents or anyone else who is entitled to notice of a proposed adoption, is directed to file any such objection with the Surrogate's office. This requirement is set forth in the statute as well as in the court rules. In fact, the required notice forms which must be served on parents who have not signed irrevocable surrenders or who have not had their rights judicially terminated, specifically set forth the requirement for filing the form with the Surrogate's office and include the address and telephone number.

The Surrogate's office often receives telephone inquiries from birth parents with questions about how to object or what should be done. The Surrogate's office cannot and does not give any legal advice, but directs those individuals to follow the instructions contained in the form and to consult with an attorney about the case.

Throughout the course of a contested adoption, all filings should be directed to the Surrogate's office with a copy sent to the judge's chambers, unless the court directs otherwise. While the direct involvement of the Surrogate's office in adoption files may differ from county to county, the procedures and forms should be consistent since New Jersey has a statewide practice pursuant to the New Jersey Court Rules and adoption statute, N.J.S.A. 9:3-37 et seq. A listing of all of the county Surrogate offices with relevant contact information can be found as Appendix D in this manual.

The Surrogate's office is required to use the Judiciary's Adoption Case Management System to complete name checks in adoption matters for each person 18 years of age or older, including the plaintiff, residing in the adoptive family's household (except the birth parent if parental rights are not being terminated). This name check is used to determine if an individual has a criminal or domestic violence history. The form letter that the Surrogate sends to the plaintiffs for the name checks is included as Appendix E in this manual.

Relevant rules applicable to contested adoptions are set forth below. The New Jersey Court Rules should be consulted for the full text and current version.

A. Case Initiation

Pursuant to R. 1:5-6(b)(4), actions for adoptions are filed with the Surrogate of the county of venue.

Venue for an action for adoption is established under N.J.S.A. 9:3-42. An adoption shall be instituted in the Superior Court, Chancery Division, Family Part of the county in which the prospective parent resides, or in the county where the child resided immediately prior to placement for adoption, or if the child is less than three months of age, the county in which the child was born; except that whenever the child to be adopted has been received into the home of a prospective parent from an approved agency, the action may be instituted in the Superior Court, Chancery Division, Family Part of any county in which the approved agency has an office.

B. Court Rules Relevant to the Role of the Surrogate

Rule 5:10-4. Surrogate Action

(a) Review of Complaint Prior to Docketing. Prior to docketing, the Surrogate shall review the complaint to ensure that proper venue is laid in accordance with R. 5:10-1, and that it contains the following:

(1) all information required by R. 5:10-3,

(2) a current address and any prior addresses within the last five years for each plaintiff,

(3) the names, dates of birth and all residences within the past five years of all other adults in the adoptive home,

(4) the marital, domestic union, or civil union status of each plaintiff and the name of the spouse or partner, if such person is not also a plaintiff, and

(5) a home study report that is consistent with the information set forth in the complaint.

(b) Jurisdiction.

(1) Upon the filing of a complaint for the adoption of a child, if it appears therefrom that there is jurisdiction and that each plaintiff is qualified, as required by statute, and that the complaint is substantially complete in all respects, the complaint shall be docketed. At the time of docketing, the Surrogate's staff shall conduct a party look-up in the Judiciary case management system to determine if any of the parties exist in the court's system. If a party exists in the system, the party's demographic information shall be copied into the adoption case using the process in the Judiciary's case management system.

(2) The court shall fix a day for preliminary or final hearing as provided by statute. The Surrogate shall provide the entire adoption file to the court for review no later than five business days before the first adoption proceeding.

(3) Upon the court fixing a day for preliminary or final hearing in private placement adoptions, the Surrogate shall append to the court's order a form promulgated by the Administrative Director of the Courts informing the child's parents of the procedure to object to the adoption, the right to legal

counsel, and how to apply for a court-appointed attorney. The signed order and form shall be returned to the plaintiff for service of the form and notice of the hearing on the child's parents pursuant to N.J.S.A. 9:3-45.

(4) If there is a lack of jurisdiction or lack of qualification on the part of a plaintiff the court shall dismiss the complaint forthwith. If a complaint is not substantially complete in all respects, the court shall order the plaintiff to file an amended complaint or shall dismiss the complaint without prejudice, as the situation requires.

Rule 5:10-8. Preliminary Hearing

(a) Order. If the court shall enter an order for a preliminary hearing as provided by statute, the plaintiff shall mail a copy of the order, together with a copy of the complaint, to the approved agency appointed by the order to make an investigation and report. At least 5 days prior to the day fixed for the preliminary hearing, the approved agency shall file its report with the court and mail a copy thereof to the plaintiff. The medical histories of the biological parents shall also be submitted to the court and shall be retained in the court's file. If no medical history is available or if the biological parent or parents refuse to complete one, the approved agency shall note that in its report to the court.

(b) Background Checklist and Certification by Approved Agency. The approved agency shall provide to the court a background checklist and certification on a form prescribed by the Administrative Director of the Courts, which shall include criminal history record information and child abuse record information. If the approved agency discovers a pattern of arrests or domestic violence restraining orders against the plaintiffs or other household members over the age of 18 that may impact approval of the home, the form submitted to the court shall include this information. The agency shall certify that, considering all criminal, domestic violence or child abuse records known to the agency, it is in the best interest of the child that the adoption be finalized.

(c) Hearing; Notice. At any time during or after the preliminary hearing, the court may require the production of additional testimony, may subpoena additional witnesses, or may direct that notice of the proceeding shall be given to any persons whose interests may be prejudiced or affected by the entry of a judgment of adoption. The court shall direct that notice of the proceeding be given to the biological or legal parents of the child unless notice has been waived by them, or the court dispenses with notice on proof by affidavit of diligent inquiry establishing that notwithstanding such inquiry the location of the biological or legal parents cannot be ascertained, or unless a court of competent jurisdiction has, on notice to the biological or legal parents, terminated their parental rights. The court may continue the hearing as the situation requires and shall direct the manner in which any required notice shall be given, except that no notice shall be given by publication.

(d) Dismissal; Amendment; Right to Object. If in the course of the preliminary hearing the court determines that there is lack of jurisdiction or lack

of qualification on the part of a plaintiff, or that the child is in the custody of an approved agency and such agency has not consented to the filing of the complaint and entry of a judgment of adoption, the complaint shall be dismissed forthwith. If the court determines that a complaint is not substantially complete in all respects, the plaintiff shall be required to file an amended complaint or the complaint shall be dismissed without prejudice, as the situation requires. Whenever a right to object to an adoption, or right to object to placement of a child for adoption exists, written objection shall be filed with the Surrogate of the County of venue. The notice of right to object shall include the proper address and telephone number for the Surrogate. If an objection is made, notice of such objection shall be sent by the Surrogate to the person, or agency, filing the original action and to the court.

Rule 5:10-12. Judgment of Adoption; Procedures for Closing and Sealing Adoption Records

(a) Judgment. A separate judgment of adoption shall be entered for each adoptee and shall include the following:

(1) The identity of the child being adopted, using only the initials of the child's birth name, except in stepparent or second parent adoptions or in foreign adoptions or readoptions where the full birth name of the child may be included.

(2) The gender, date of birth, and city and state or foreign country of birth of the child.

(3) The date of placement of the child with the adopting party.

(4) The name of the adoption agency, if the placement was made by an approved agency, and that the agency has consented to the adoption.

(5) Reference to any prior order of the court wherein parental rights and/or federal Indian Child Welfare Act issues were addressed.

(6) Termination of all parental relationships, rights, and responsibilities, including the right of inheritance through intestacy, of the birth parents or other guardians of the child, except those rights that have vested prior to the entry of the judgment of adoption.

(7) Confirmation that all federal Indian Child Welfare Act requirements have been fulfilled pursuant to Rule 5:10-6.

(8) Granting the adoption, which establishes between the child and the adopting party all parental relationships, rights, and responsibilities, including the right of inheritance through intestacy.

(9) The new name by which the child shall be known.

(10) An order directing the New Jersey Bureau of Vital Statistics or authorizing a registrar in the child's state of birth if other than in New Jersey, to

issue a birth certificate in the child's new name and listing the adoptive parent as the child's parent.

(b) Filing. An original and copy of the judgment shall be filed with the court.

(c) Costs. If costs are allowed by the court to an approved agency, they shall be included in the judgment.

(d) Certified Copies. Prior to sealing the record of the proceedings the clerk shall, upon payment of the appropriate fee, provide the plaintiff, the plaintiff's attorney, the Clerk of the Superior Court, and the approved agency which made the adoptive placement with certified copies of the judgment.

(e) Report of Adoption. Upon receipt of a check payable to the Treasurer of the State of New Jersey, the Surrogate shall submit the report of adoption along with the certified judgment of adoption to the Bureau of Vital Statistics and Registration if the child was born in New Jersey or if the adoption is a foreign readoption. If the child was born in another state, the Surrogate shall submit the report of adoption along with the certified judgment of adoption to the Bureau of Vital Statistics or such other agency of the state in which the child was born, along with a check supplied by the plaintiff or plaintiff's attorney made payable to the appropriate entity of that state.

(f) Sealing of Adoption Records. All records of proceedings related to adoption, including the complaint, judgment and all petitions, affidavits, testimony, reports, briefs, orders and other relevant documents, shall be filed under seal by the clerk of the court and shall at no time be open to inspection or copying unless the court, upon good cause shown, shall otherwise order. An index of all adoption proceedings shall be maintained by the clerk of the court, but no index of adoption proceedings shall be open to inspection or copying or be made public except by order of the court.

(g) Closing of Child Placement Case (FC docket). When an adoption case is sealed and there is a related child placement case (FC docket), the child placement case shall be closed to reflect the adoption, but only when the Division of Child Protection and Permanency (the "Division") provides the court with a Notice of Change. If the adoption occurs out of state, the Division shall provide the court with both the judgment of adoption and the Notice of Change in order to close the child placement case. These documents shall be provided to the court presiding over the child placement case no later than 30 days after the adoption judgment is entered.

Rule 5:10-13. Requests to Unseal Adoption Cases; Procedure

(a) The Surrogate shall accept for filing a post-judgment request to unseal an adoption, which request may be by motion or by notarized letter, and shall forward the request and a proposed order to the court. The court may, if necessary, schedule a hearing to consider the request to unseal the adoption.

(b) The court shall determine whether good cause exists to grant the request to unseal the adoption. The court shall provide to the Surrogate the signed court order denying or granting the request to unseal the adoption.

(c) If the court grants the request to unseal the adoption, the Surrogate shall provide a copy of the order unsealing the adoption to the requesting party and shall make available to the requesting party copies of the documents on file as directed by the court's order. If the Surrogate determines that an adoption did not occur in the county in which the request was received, the Surrogate shall send a letter to the requesting party indicating that there is no record of the adoption in that county and that no further action will be taken on the request.

(d) If the court denies the request to unseal the adoptions, the Surrogate shall provide a copy of the court's order denying the request to the requesting party and shall include in the sealed court file, if any, a copy of the written request and the order denying the request to unseal the adoption.

CHAPTER 5 – FEES AND COSTS

A. Waiver of Filing Fees for Indigent Defendants

Even if litigants are represented by private counsel, they may be eligible for fee waivers.

1. New Standards for Fee Waivers

In April 2017, the New Jersey Supreme Court revised and standardized the process for, and review of, fee waivers for indigent litigants. The Court issued an Order on April 5, 2017 supplementing and relaxing R. 1:13-2, Proceedings by Indigents and R. 2:7, Appeals by Indigent Persons. The Order was published as part of Administrative Directive #03-17 in a Notice to the Bar on April 26, 2017. Through that notice, the Administrative Office of the Courts (AOC) also promulgated a Fee Waiver Packet (CN 11201) containing information and forms that litigants must use when filing for a fee waiver. The Notice to the Bar and Fee Waiver Packet are located on the Judiciary website at the following links:

https://www.njcourts.gov/notices/2017/n170426d.pdf
https://www.njcourts.gov/forms/11208_filingfeewaiver.pdf

The policy permits waiver of court filing and/or copy fees for litigants by reason of poverty. Litigants can qualify for a waiver if they meet the following financial eligibility criteria:

(a) Their household income is not more than 150% of the federal poverty level (FPL); and

(b) They do not have more than $2,500 in liquid assets.

In addition to meeting these two criteria, litigants must file a fee waiver application with supporting documentation showing their income and assets. The application, which is uniform statewide, lists the wide range of information courts require to assess eligibility for fee waivers and how that information must be documented. By establishing these new limits for both income and spendable assets, as well as a uniform application specifying the types of financial information needed, the court and the AOC have developed more consistent criteria for determining eligibility for fee waivers.

Financially eligible litigants can have fees waived regardless of whether they are represented by counsel. Litigants who might qualify for a fee waiver and are represented by private counsel must file a fee waiver application supported by financial documentation in order to receive the waiver. The new policy continues the automatic fee waiver for low-income individuals who are represented by Legal Services of New Jersey (LSNJ), a regional Legal Services program, or pro bono attorneys who accept clients from these service providers. Pursuant to R. 1:13-2, such individuals meeting the above financial eligibility criteria are exempt from having to pay filing and copying fees by rule and are not required to file for a fee waiver through the new waiver process described below. The same is true for clients represented by other public interest or legal services organizations and law school clinical or pro bono programs, which have been certified under R. 1:21-11. Their clients are also exempt from the

payment of fees and, accordingly, of having to file fee waiver requests in individual cases. This exemption is expressly stated on both the bar notice and the instructions for the fee waiver packet. A list of certified programs can be found at the following link: http://www.judiciary.state.nj.us/supreme/apps/pbos/probonoorganization/Chart

There are several other express conditions of the fee waiver policy worth noting. Litigants who are granted a fee waiver may still be required to pay filing and copying fees if they are later awarded more than $2,000 in the same matter. The court will determine the repayment amount and issue an order for repayment. Moreover, any papers filed in an action that a court determines to be frivolous, malicious or that constitutes an abuse of process may result in the denial of a fee waiver and copying fees in noncriminal matters unless otherwise provided by law.

2. Preparing the Fee Waiver Application

The fee waiver application may be filed prior to or at any time during a lawsuit filed in the Superior Court or the Tax Court. A special rule applies when a fee waiver is requested for a matter in the Appellate Division or Supreme Court. Other than by counsel, requests for fee waivers can be filed only by the person seeking the waiver. Even an individual with a Power of Attorney cannot file for another person.

Attorneys representing clients on a pro bono basis through a legal services provider need only submit a letter informing the court that the client is being represented pro bono on referral from that provider. There is no special format for that letter. For low-income clients who are not referred by pro bono service providers, they must apply for and receive a fee waiver. This requires completing and submitting two forms (Form A - Certification/Petition/Application in Support of a Fee Waiver and Form B - Order Waiving Filing Fees) which are part of the Fee Waiver Packet.

The information provided by individuals on Form A will be used by a judge to determine whether the individual qualifies for a fee waiver. The individual must also complete part of Form B. A judge will review Form A, decide whether to grant or deny it based on the information and documentation provided, and then sign the Order (Form B) either granting or denying the application.

Completing Form A - Certification/Petition/Application in Support of a Fee Waiver

Form A is the court-authorized application for requesting a fee waiver. Form A asks for personal and case identifying information as well as documentation proving income and assets. The significance of Form A is it specifies the wide range of documentation that courts now require to prove qualification for a fee waiver. Form A can therefore be used to counsel clients who are anticipating or responding to litigation about what they will need to submit to the court for a fee waiver. Litigants applying for waivers must attach 6 months of bank statements and 2 months of documentation to Form A for all public benefits, entitlements, and other forms of support (e.g., child support/alimony) they receive. Litigants who are employed on salary need to provide 2 months of pay stubs. Form A also contains a chart of all other sources of income and assets that must be disclosed to the court. Although not listed on Form A, the general instructions in the Fee Waiver Packet further note that the court may request additional income verification

including state and federal tax returns. Significantly, Form A does not require disclosure, nor provide space for, any debts or other outstanding financial obligations.

Because many low-income litigants may not have bank accounts, that fact should be noted as a separate attachment to Form A along with all of the other financial information being submitted in support of the fee waiver.

Finally, both the general instructions and Form A emphasize that the fee waiver application, like most other court filings, is a publicly accessible document. Litigants (and, accordingly, their attorneys) are cautioned against providing full confidential personal identifiers, such as numbers for Social Security, driver's licenses, vehicle plates, insurance policies, active financial accounts, and active credit cards. See R. 1:38-7(b) regarding redaction of personal identifiers.

Completing Form B – Order Waiving Filing Fees

Form B is a pre-printed form of a court order with some blank spaces to be completed. Litigants complete all personal and case information and check off their filing status. Form B is submitted with the fee waiver application for review, approval, or denial by a judge.

3. Filing the Fee Waiver Application

Courts require that filing fees be submitted at the same time as the legal papers in the case are filed. As with other filings, if legal papers are submitted to the court clerk's office without first paying the filing fee or submitting an accurate and complete fee waiver application, they will be marked "received, but not filed" and returned. See R. 1:5-6. Litigants then have 10 days to refile with the required fee or completed fee waiver application.

The general instructions state that fee waiver applications are to be submitted to the courthouse of the county where the case is going to be filed or already filed. For cases in the Supreme Court, Appellate Division or Tax Court, the completed forms should be submitted to the respective clerk's office. Litigants are also required to send copies of the application (without the financial attachments) to all named parties and provide proof of service to the court where the application is filed.

Rule 2:7-1 governs the filing of appeals by indigents, including filing for fee waivers. Pursuant to the instructions in the Fee Waiver Packet, the application must first be submitted to the court from which the appeal is being taken. If the trial court denies the fee waiver, litigants are then permitted to file the fee waiver application with the Clerk of the Appellate Division within 20 days of that denial. In appealing the decision of an administrative agency, the fee waiver application is filed directly with Appellate Division Clerk.

4. Review of the Fee Waiver Application

A judge will review the fee waiver application and decide whether to approve or deny it. The policy is silent as to which judges will conduct that review. Presumably, that judicial role is left to the Assignment Judge's discretion.

If the fee waiver is granted the clerk will file the papers, but if the waiver is denied litigants must pay the filing fee within 10 days after the denial. Failure to remit the fee may result in the administrative dismissal of the complaint. For all documents other than the complaint, the filing will be deemed received, but not filed. The fee waiver policy does not have any special rule for appealing a judge's decision, other than as noted above with regard to appeals to the Appellate Division after a trial court denial of a fee waiver that is part of an appeal.

5. Conclusion

The new policy and guidelines for litigants who seek fee waivers by reason of poverty is an effort by the judiciary to standardize the fee waiver application and review process. While the policy sets a comparatively low financial eligibility level (150% of the FPL) for granting waivers, balancing the judiciary's funding needs with access to the courts for low income litigants, the process provides clearer and more consistent statewide guidance for obtaining a waiver of filing and copying fees.

CHAPTER 6 - CASE PREPARATION

Every contested adoption case requires an attorney to have knowledge of the discovery rules to defend a contested adoption. Even before the court has scheduled the first Case Management Conference, an attorney should be familiar with those sections of the New Jersey Court Rules governing discovery in a contested Family Part case, what discovery an attorney will need in the case going forward, and the time in which to complete discovery. Under the Rules, discovery may be served and conducted prior to the scheduling of the Case Management Conference once the complaint is filed. Discovery consists of Interrogatories, Notices to Produce Documents, Requests for Admissions, Depositions, Subpoenas, and the retention of experts.

Discovery is governed by R. 4:17, Interrogatories to Parties, R. 4:18, Discovery and Inspection of Documents and Property, Copies of Documents, R. 1:9-1 and 1:9-2, Subpoenas, R. 4:22, Requests for Admissions, R. 4:14, Depositions upon Oral Examination, and R. 5:5-1, Discovery. In addition, R. 5:5-1, which governs discovery in a family court action, states:

> **Rule 5:5-1. Discovery**
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> Except for summary actions and except as otherwise provided by law or rule, discovery in civil family actions shall be permitted as follows:
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> (a) Interrogatories as to all issues in all family actions may be served by any party as of course pursuant to R. 4:17.
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> (b) An interrogatory requesting financial information may be answered by reference to the case information statement required by R. 5:5-2.
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> (c) Depositions of any person, excluding family members under the age of 18, and including parties or experts, as of course may be taken pursuant to R. 4:11 et seq. and R. 4:10-2(d)(2) as to all matters except those relating to the elements that constitute grounds for divorce, dissolution of civil union, or termination of domestic partnership.
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> (d) All other discovery in family actions shall be permitted only by leave of court for good cause shown except for production of documents (R. 4:18-1); request for admissions (R. 4:22-1); and copies of documents referred to in pleadings (R. 4:18-2) which shall be permitted as of right.
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> (e) Discovery shall be completed within 90 days from the date of service of the original complaint in actions assigned to the expedited track and within 120 days from said date in actions assigned to the standard track. In actions assigned to the priority or complex track, time for completion of discovery shall be prescribed by case management order.

Pursuant to R. 4:10-1, unless the court orders otherwise under R. 4:10-2, the frequency of use of these discovery methods is not limited.

A. Interrogatories to Parties – R. 4:17

Rule 4:17-1 governs the service and scope of interrogatories. Rule 4:17-1(a) provides any party may serve upon any other party written interrogatories relating to any matters which may be inquired into under R. 4:10-2. The interrogatories may include a request, at the propounder's expense, for a copy of any paper.

Rule 4:17-4(a) governs the form of Answers to Interrogatories and provides as follows:

> (a) Form of Answers; By Whom Answered. Except as otherwise provided in this rule, interrogatories shall be answered in writing under oath by the party upon whom served, if an individual, or if a public or private corporation, a partnership or association, or governmental agency, by an officer or agent who shall furnish all information available to the party. If a party in unavailable, the interrogatories may be answered by an agent or authorized representative including a liability carrier who is conducting a defense, whose answer shall bind the party. The party shall furnish all information available to the party and the party's agents, employees, and attorneys. The person answering the interrogatories shall designate which of such information in not within the answerer's personal knowledge and as to that information shall state the name and address of every person from whom it was received, or if the source of the information is documentary, a full description including the location thereof. Each question shall be answered separately, fully and responsively either in the space following the question or on separate pages. Except as otherwise provided by paragraph (d), of this rule, if in any interrogatory a copy of a paper is requested, the copy shall be annexed to the answer. If the interrogatory requests the name of an expert or treating physician of the answering party or a copy of the expert's or treating physician's report, the party shall comply with the requirements of paragraph (e) of this rule.

In answering interrogatories, it is important to note that R. 4:10-1(b)(3) governs claims of privilege and provides privileged information need not be disclosed if the claim of privilege is made pursuant to R. 4:10-2(e). Nor need information be disclosed if it is the subject of an identified protective order issued pursuant to R. 4:10-3. Objections to interrogatories is governed by R. 4:17-5 as follows:

> **Rule 4:17-5. Objections to Interrogatories**
>
> (a) Objections to Questions; Motions. A party upon whom interrogatories are served who objects to any questions propounded therein may either answer the question by stating "The question is improper" or may, within 20 days after being served with the interrogatories, serve a notice of motion, to be brought on for hearing at the earliest possible time, to strike any question, setting out the grounds of objection. The answering party shall make timely answer, however, to all questions to which no objection is made. Interrogatories not stricken shall be answered within such unexpired period of the 60 days prescribed by R. 4:17-4(b)

as remained when the notice of motion was served or within such time as the court directs. The propounder of a question answered by a statement that it is improper may, within 20 days after being served with the answers, serve a notice of motion to compel an answer to the question, and, if granted, the question shall be answered within such time as the court directs.

(b) Objections to Request for Copies of Papers. A party served with interrogatories requesting copies of papers who objects to the furnishing thereof shall, in lieu of complying with the request, either state with specificity the reasons for noncompliance or invite the propounder to inspect and copy the papers at a designated time and place. The propounder of a request for a copy of a paper which is not complied with, may, within 20 days after being served with the answers, serve a notice of motion directing compliance with the request or for other appropriate relief.

(c) Interrogatory Motions; Form. Motions to strike interrogatories or to compel more specific answers thereto shall include a short statement of the nature of the action and shall have annexed thereto the text of the questions and answers, if any, objected to.

(d) Costs and Fees on Motion. If the court finds that a motion made pursuant to this rule was made frivolously or for the purpose of delay or was necessitated by action of the adverse party that was frivolous or taken for the purpose of delay, the court may order the offending party to pay the amount of reasonable expenses, including attorney's fees incurred by the other party in making or resisting the motion.

Rule 4:17-2 allows interrogatories to be served, without leave of court, after the commencement of the action by plaintiff or served upon or demanded from any party with or after service of the summons and complaint upon that party. Rule 4:17-3 requires that answers to interrogatories must be answered within 60 days from the date of service or by time limit set by the court.

B. Request for Production of Documents

Rule 4:18-1(a) Scope

(a) Scope. Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on behalf of that party, to inspect, copy, test, or sample any designated documents (including writings, drawings, graphs, charts, photographs, sound recordings, images, electronically stored information, and any other data or data compilations stored in any medium from which information can be obtained and translated, if necessary, by the respondent into reasonably usable form), or to inspect, copy, test, or sample any designated tangible things that constitute or contain matters within the scope of R. 4:10-2 and that are in the possession, custody or control of the party on whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party on whom the

request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of R. 4:10-2.

Rule 4:18-1(b) allows requests for the production of documents to be served, without leave of court, after the action is commenced upon the Plaintiff or upon any other party after service of the summons and complaint. Rule 4:18-2(b)(2) requires responses within 35 days of service or by a date set by the court.

C. Subpoenas

Rule 1:9-1 For Attendance of Witnesses; Forms; Issuance; Notice in Lieu of Subpoena

A subpoena may be issued by the clerk of the court or by an attorney or party in the name of the clerk or as provided by R. 7:7-8 (subpoenas in certain cases in the municipal court). It shall state the name of the court and the title of the action and shall command each person to whom it is directed to attend and give testimony at the time and place specified therein. If the witness is to testify in a criminal action for the State or an indigent defendant, or has been subpoenaed by a Law Guardian in an action brought by the Division of Child Protection and Permanency pursuant to Title 9 or Title 30 of the New Jersey Statutes, the subpoena shall so note, and shall contain an order to appear without the prepayment of any witness fee. The testimony of a party who could be subpoenaed may be compelled by a notice in lieu of subpoena served upon the party's attorney demanding that the attorney produce the client at trial. If the party is a corporation or other organization, the testimony of any person deposable on its behalf, under R. 4:14-2, may be compelled by like notice. The notice shall be served in accordance with R. 1:5-2 at least 5 days before trial. The sanctions of R. 1:2-4 shall apply to a failure to respond to a notice in lieu of a subpoena.

Rule 1:9-2. For Production of Documentary Evidence and Electronically Stored Information; Notice in Lieu of Subpoena

A subpoena or, in a civil action, a notice in lieu of subpoena as authorized by R. 1:9-1 may require production of books, papers, documents, electronically stored information, or other objects designated therein. The court on motion made promptly may quash or modify the subpoena or notice if compliance would be unreasonable or oppressive and, in a civil action, may condition denial of the motion upon the advancement by the person in whose behalf the subpoena or notice is issued of the reasonable cost of producing the objects subpoenaed. The court may direct that the objects designated in the subpoena or notice be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit them or portions of them to be inspected by the parties and their attorneys and, in matrimonial actions and juvenile proceedings, by a probation officer or other person designated by the

court. Except for pretrial production directed by the court pursuant to this rule, subpoenas for pretrial production shall comply with the requirements of R. 4:14-7(c).

Rule 1:9-3. Service

A subpoena may be served by any person 18 or more years of age. Service of a subpoena shall be made by delivering a copy thereof to the person named together with tender of the fee allowed by law, except that if the person is a witness in a criminal action for the State or an indigent defendant, the fee shall be paid before leaving the court at the conclusion of the trial by the sheriff or, in the municipal court, by the clerk thereof. A subpoena which seeks only the production of documents or records may be served by registered, certified or ordinary mail and, if served in that manner, shall be enforceable only upon receipt of a signed acknowledgment and waiver of personal service.

Rule 1:9-4. Place of Service

A subpoena requiring the attendance of a witness at a hearing in any court may be served at any place within the State of New Jersey.

D. Enforcement of Failure to Obey Subpoena

Rule 1:9-5. Failure to Appear

Failure without adequate excuse to obey a subpoena served upon any person may be deemed a contempt of the court from which the subpoena issued.

Rule 1:10-3. Relief to litigant

Notwithstanding that an act or omission may also constitute a contempt of court, a litigant in any action may seek relief by application in the action. A judge shall not be disqualified because he or she signed the order sought to be enforced. If an order entered on such an application provides for commitment, it shall specify the terms of release provided, however, that no order for commitment shall be entered to enforce a judgment or order exclusively for the payment of money, except for orders and judgments based on a claim for equitable relief including orders and judgments of the Family Part and except if a judgment creditor demonstrates to the court that the judgment debtor has assets that have been secreted or otherwise placed beyond the reach of execution. The court in its discretion may make an allowance for counsel fees to be paid by any party to the action to a party accorded relief under this rule. In family actions, the court may also grant additional remedies as provided by R. 5:3-7. An application by a litigant may be tried with a proceeding under R. 1:10-2(a) only with the consent of all parties and subject to the provisions of R. 1:10-2(c).

E. Experts

The trial court has the inherent power to appoint its own experts. Township of Wayne v. Kosoff, 73 N.J. 8 (1977). Rule 5:3-3 governs appointment of experts in family actions, which provides:

> **Rule 5:3-3. Appointment of Experts**
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> (a) Medical, Mental Health, and Social Experts. Whenever the court, in its discretion, concludes that disposition of an issue will be assisted by expert opinion, and whether or not the parties propose to offer or have offered their own experts' opinions, the court may order any person under its jurisdiction to be examined by a physician, psychiatrist, psychologist or other health or mental health professional designated by it. No such appointment, however, shall be made of an expert who is providing or has provided therapy to any member of that person's family. The court may also require a social investigation by a probation officer or other person at any time during the proceeding before it.
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> (b) Custody/Parenting Disputes. Mental health experts who perform parenting/custody evaluations shall conduct strictly non-partisan evaluations to arrive at their view of the child's best interests, regardless of who engages them. They should consider and include reference to criteria set forth in N.J.S.A. 9:2-4, as well as any other information or factors they believe pertinent to each case.
>
> (c) Economic Experts. Whenever the court concludes that disposition of an economic issue will be assisted by expert opinion, it may in the same manner as provided in Paragraph (a) of this rule appoint an expert to appraise the value of any property or to report and recommend as to any other issue, and may further order any person or entity to produce documents or to make available for inspection any information or property, which is not privileged, that the court determines is necessary to aid the expert in rendering an opinion.
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> (d) Selection of Experts. Experts appointed hereunder may be selected by the mutual agreement of the parties or independently by the court. The court shall establish the scope of the expert's assignment in the order of appointment. Neither party shall be bound by the report of the expert so appointed.
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> (e) Investigation by Experts. Any expert appointed by the court shall be permitted to conduct an investigation independently to obtain information reasonable and necessary to complete his or her report from any source, and may make contact directly with any party from whom information is sought within the scope of the order of appointment. The parties shall be entitled to have their attorneys and/or experts present during any examination by a court appointed expert. The expert shall not communicate with the court except upon prior notice to the parties and their attorneys who shall be afforded an opportunity to be present and to be heard during any such communication between the expert and the court. A request for communication with the court may be informally conveyed by the expert by letter or telephonic means, whereafter further communications with the court, which may be conducted informally by

conference or conference call, shall be done only with the participation of the parties and their counsel.

(f) Submission of Report. Any finding or report by an expert appointed by the court shall be submitted upon completion to both the court and the parties. At the time of submission of the court's experts' reports, the reports of any other expert may be submitted by either party to the court and the other parties. The parties shall thereafter be permitted a reasonable opportunity to conduct discovery in regard thereto, including, but not limited to, the right to take the deposition of the expert.

(g) Use of Evidence. An expert appointed by the court shall be subject to the same examination as a privately retained expert and the court shall not entertain any presumption in favor of the appointed expert's findings. Any finding or report by an expert appointed by the court may be entered into evidence upon the court's own motion or the motion of any party in a manner consistent with the rules of evidence, subject to cross-examination by the parties.

(h) Use of Private Experts. Nothing in this rule shall be construed to preclude the parties from retaining their own experts, either before or after the appointment of an expert by the court, on the same or similar issues.

(i) Payment; Costs. When the court appoints a medical, mental health, or social expert pursuant to R. 5:3-3(a), an economic expert pursuant to R.5:3-3(b), or should the parties agree on the selection of an expert consistent with R.5:3-3(c), the court may direct who shall pay the cost of such examination, appraisal, or report.

F. Depositions upon Oral Examination – R. 4:14

Depositions are governed by R. 4:14. Rule 4:14-1 provides that after commencement of the action, any party may take the testimony of any person, including a party, by deposition upon oral examination. The attendance of a witness may be compelled by subpoena as provided in R. 4:14-7. The type of notice of the examination and general requirements are governed by R. 4:14-2. Notice of the oral examination by deposition must be given not less than 10 days in advance in writing to every other party to the action. A court may, for cause shown, enlarge or shorten the time for taking the deposition. Rule 4:14-2(d) allows the notice to provide that the person being deposed be requested to produce documents and tangible things in accordance with R. 4:18-1.

G. Request for Admissions – R. 4:22

Rule 4:22-1. Request for admission

A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters of fact within the scope of R. 4:10-2 set forth in the request, including the genuineness of any documents described in the request. Copies of documents shall be served with the request unless they have been or are otherwise furnished

or made available for inspection and copying. The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party.

Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by the party's attorney, but, unless the court shortens the time, a defendant shall not be required to serve answers or objections before the expiration of 45 days after being served with the summons and complaint. If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify the answer or deny only a part of the matter of which an admission is requested, the party shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless stating that a reasonable inquiry was made and that the information known or readily obtainable is insufficient to enable an admission or denial. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial, may not, on that ground alone, object to the request but may, subject to the provisions of R. 4:23-3, deny the matter or set forth reasons for not being able to admit or deny.

Requests for admission and answers thereto shall be served pursuant to R. 1:5-1 and shall not be filed unless the court otherwise directs.

The party who has requested the admissions may move to determine the sufficiency of the answers or objections. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of this rule, it may order either that the matter is admitted or that an amended answer be served. The provisions of R. 4:23-1(c) apply to the award of expenses incurred in relation to the motion.

Rule 4:22-2. Effect of Admission

Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. Subject to the provisions of R. 4:25-1 governing amendment of a pretrial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will be prejudicial to maintaining the action or defense on the merits. Any admission made by a party under this rule

is for the purpose of the pending action only and is not an admission for any other purpose nor may it be used against that party in any other proceeding.

H. Enforcement of Discovery

Rules 4:23-1 through 4:23-5 govern the failure of a party or witness to make discovery and set forth the methods of enforcement and sanctions, including counsel fees and costs.

CHAPTER 7 - CASE PROCESSING

A. Case Management Conference

Upon appointment as counsel, you may request a Case Management Conference if one has not been scheduled already. At the Case Management Conference, a discovery schedule should be set, as well as discussing any expert evaluations. In addition, you may request mediation. More specifically, after an adoption complaint is docketed and a contesting parent files an objection, the court may order the matter to mediation with or without the request of a party. Mediation is discussed in Chapter 8. Sample Case Management Orders are included as Appendix F in this manual. The Frequently Asked Questions section of this manual addresses the procedure to be followed if your client is incarcerated. In addition to discovery, issues to be discussed at the Case Management Conferences may include visitation, the Indian Child Welfare Act of 1978 and the appointment of a guardian ad litem.

1. Visitation

Visitation may also be addressed at a Case Management Conference. First you should determine whether there have been any prior court orders with regard to visitation, under a non-dissolution docket (FD), dissolution docket (FM), child abuse and neglect docket (FN), termination of parental rights docket (FG), kinship legal guardianship docket (KLG) or domestic violence docket (FV). If your client does not have a copy of the prior orders you may complete the Records Request Form (CN 10200) located on the Judiciary website at the following link: http://www.njcourts.gov/forms/10200_records_req.pdf. If there has been a prior visitation order, you should determine whether there has been compliance with the order. If there has been compliance and regular visitation, you may request that it continue. If, through no fault of your client, there has been noncompliance with previously scheduled visitation set forth in a court order, you may request enforcement of the visitation provisions and have same incorporated in a Case Management Order.

If the objecting parent has not had visitation with the child for a considerable time and/or has never met the child, you may request therapeutic visitation be established. Note the ultimate issue is the best interest of the child, so a specific plan, often with a licensed therapist would have to be determined to reintroduce the child to the previously absent parent.

Visitation may be further complicated if the objecting parent is incarcerated. You should have a conversation with the objecting parent to determine if he/she is seeking visitation. You should contact the jail/prison and learn about its visitation policy, including contact vs. noncontact visitation rooms and be prepared to present the policy and jail's schedule for permitted visitation to the court so that a visitation order, if appropriate, can be determined.

2. Indian Child Welfare Act

The Indian Child Welfare Act of 1978 (ICWA)[1] is a federal law that seeks to keep American Indian children with American Indian families. Congress passed ICWA in 1978 in response to the high number of Indian children being removed from homes by both private and public agencies. The intent of Congress under ICWA was to "protect the best interests of Indian children and to promote the stability and security of Indian children and families." 25 U.S.C. § 1902. ICWA sets federal requirements that apply to state child custody proceedings involving an Indian child who is a member of or eligible for membership in a federally recognized tribe.

Rule 5:10-6. Indian Child Welfare Act

> At the first hearing following the filing of the adoption complaint, the court shall determine whether there is reason to believe that the child or either biological parent may be a member, or eligible to be a member, of a federally recognized Indian tribe, pursuant to the [ICWA]. If so, the court shall order an investigation, including notification to the appropriate tribe, to determine if ICWA applies. The ICWA findings shall be made on the record and documented in a court order.

3. Guardian ad Litem

There is a distinct difference between a law guardian, as provided by R. 5-8A, who must be an attorney-at-law, and a guardian ad litem, as provided for by R. 5:8B, who need not be an attorney-at-law. The role of the law guardian for an incapacitated person or a minor is to advocate the client's cause, whereas the basic role of the guardian ad litem is to assist the court in its determination of the incapacitated person's or minor's best interest. With respect to adoption proceedings, there is no express authorization for a law guardian. However, there is reference in the statutes to appointment of a guardian ad litem. Thus, N.J.S.A. 9:3-38(e) defines a guardian ad litem as "a qualified person, not necessarily an attorney, appointed by the court under the provisions of this act or at the discretion of the court to represent the interests of the child whether or not the child is a named party in the action." Appointment of a guardian ad litem is made pursuant to the inherent authority of the court, acknowledged by the adoption statute, to take that action to protect the child's best interest. Before an appointment of a guardian ad litem is made, there should be an articulated showing, on notice and an opportunity for all parties to be heard, as to the need for a guardian ad litem in a contested adoption action. Moreover, the order of appointment should delineate, at least to the extent practical, the reasons for the appointment as a guide to the appointee of the nature of the services expected by the court to be performed. It is plain that the appointment must not be routine but must be reserved for those actions in which the child or the court clearly requires the specific assistance the appointee can render as a guardian ad litem. See In the Matter of Adoption by E.T. and T.T., 302 N.J. Super. 533 (App. Div. 1997). See Chapter 11 – Frequently Asked Questions regarding payment for the expenditures of the appointee.

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[1] For additional information on ICWA, see Appendix H of this manual.

B. Preliminary Hearing (R. 5:10-8 and N.J.S.A. 9:3-48)

For matters where a child is placed in a home not by an approved adoption agency, a preliminary hearing shall be scheduled 60 to 90 days from the complaint filing date. "The preliminary hearing shall be in camera and shall have for its purpose the determination of the circumstances under which the child was relinquished by his parents and received into the home of the plaintiff, the status of the parental rights of the parents, the fitness of the child for adoption and the fitness of the plaintiff to adopt the child and to provide a suitable home." N.J.S.A. 9:3-48(b).

1. Order

Rule 5:10-8(a) states:

> If the court shall enter an order for a preliminary hearing as provided by statute, the plaintiff shall mail a copy of the order, together with a copy of the complaint, to the approved agency appointed by the order to make an investigation and report. At least 5 days prior to the day fixed for the preliminary hearing, the approved agency shall file its report with the court and mail a copy thereof to the plaintiff. The medical histories of the biological parents shall also be submitted to the court and shall be retained in the court's file. If no medical history is available or if the biological parent or parents refuse to complete one, the approved agency shall note that in its report to the court.

2. Background Checklist and Certification by Approved Agency

Rule 5:10-8(b) states:

> The approved agency shall provide to the court a Background Checklist and Certification on a form prescribed by the Administrative Director of the Courts, which shall include criminal history record information and child abuse record information. If the approved agency discovers a pattern of arrests or domestic violence restraining orders against the plaintiff or plaintiffs or other household members over the age of 18 that may impact approval of the home, the form submitted to the court shall include this information. The agency shall certify that, considering all criminal, domestic violence or child abuse records known to the agency, it is in the best interest of the child that the adoption be finalized.

3. Order Upon Preliminary Hearing

Rule 5:10-9 Order Upon Preliminary Hearing

> If upon completion of a preliminary hearing the court is satisfied to proceed with the adoption, an order shall be entered reciting the findings required by statute as a basis therefor, fixing a day for final hearing, appointing an approved agency as next friend, unless such appointment shall be dispensed with as provided by statute, and declaring that, from the date of such order:

(a) The rights, duties, privileges and relations theretofore existing between the child and each biological or legal parent or other custodian or guardian theretofore appointed for such child shall be in all respects at an end;

(b) The child may be known by the name proposed in the complaint, except that the birth record shall not be amended pending entry of judgment;

(c) The plaintiff or the plaintiffs may act in their own names in providing for the health and education of the child; and

(d) The plaintiff or plaintiffs shall not remove the child from this State, other than for vacations or temporary visits, except upon order of the court.

An order entered pursuant to this rule shall be deemed final for the purposes of appeal.

C. Final Hearing

Rule 5:10-11. Final Hearing

In each action in which no order is entered for a preliminary hearing, the clerk of the court shall cause at least 5 days' notice of the time and place of the final hearing, together with a copy of the complaint, to be mailed to the approved agency which placed or approved the placement of the child in the home of the plaintiff and which consented to the adoption. Such agency shall file a written report at the final hearing as to all circumstances of the case, which will enable the court to make a proper decision in the matter.

D. Judgment of Adoption (R. 5:10-12)

Rule 5:10-12 governs the Judgment of Adoption and procedures for sealing records. The text of this rule can be found in the Role of the County Surrogate section of this manual.

CHAPTER 8 – MEDIATION

A. Description of Mediation

Child welfare mediation is a useful tool as an alternative dispute resolution technique in Family court matters. The program is offered in all counties in the Superior Court, Family Division through a referral process. A judge may make a referral to mediation or one of the parties may make the referral. While attendance is mandatory once ordered by the judge, the agreements entered into by the parties are voluntary.

Mediation is a no-cost proceeding where the parties meet to resolve issues concerning the child who is the subject of litigation, or in this case, the child subject to the adoption proceeding. A trained, neutral mediator meets with and facilitates communication between the parties who have been ordered to mediation. The parties to the mediation usually include the parents and their attorneys, adoption agency representatives, the guardian ad litem (if any), the child if appropriate given the child's age and maturity, the adoptive parents, and anyone else who has an interest in the welfare of the child or children involved in the case.

During the mediation session, the mediator helps participants discuss concerns they have about the child, the family, the adoption agency and/or the legal process. With few exceptions, whatever is said in the mediation session is confidential, subject to applicable laws. The mediator assists the parties in attempting to obtain a mutually acceptable agreement by promoting an understanding of the issues and in developing options to assist the parties in making informed decisions. While the mediator helps to keep the conversation positive and focused on the child, the mediator does not make any decisions and does not have the authority to impose a settlement.

B. Process

After an adoption complaint is docketed (FA docket) and a contesting parent files an objection, the court may order the matter to mediation. The process set forth in Administrative Directive #15-17, entitled, "Family – Children in Court – Child Welfare Mediation Program Procedures Manual -- Statewide Implementation" may be applied to contested adoptions. The "Child Welfare Mediation Program Procedures Manual" (Manual), which sets forth the detailed procedure, is appended to the Directive. The Directive and Manual are included as Appendix G in this manual. The Directive and Manual provide, among other things, the following:

1. The court may order mediation with or without the request of a party.
2. Completion and processing of the following documents will be necessary when appropriate: a writ/notice to produce an incarcerated parent; request for security for an incarcerated parent;[2] interpreter request form.
3. Court-ordered participants must attend mediation.
4. A court staff mediator will conduct the mediation.
5. If the parties enter into an agreement, the mediator drafts the consent agreement, which is then reviewed by the court.

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[2] Court staff may be required to coordinate the incarcerated parent's participation in the mediation by telephone, video conference or other remote participation.

6. If the court endorses the consent agreement, the court signs the consent agreement, which then becomes an executed consent order.
7. If the mediation results in surrender of parental rights, the surrender would take place in court before a judge. See Chapter 9 – Voluntary Surrender
8. If no agreement is reached, the parties continue to trial with the option of scheduling a second mediation.

New Jersey law does not include provisions for "open adoption" or post-adoption enforcement of agreements. Therefore, any agreements reached during mediation addressing post-judgment events are not legally enforceable. For example, if the prospective adoptive parents agree to share photos of the child with the parents on a yearly basis, as well as arrange an annual visit during the month of the child's birthday, the parents have no legal basis to enforce that agreement should the adoptive parents fail to follow through with the terms of the agreement following the entry of the Judgment of Adoption.

C. Confidentiality

Child welfare mediation is considered a private and confidential process. New Jersey law contains certain exceptions to this confidentiality. Any allegations of abuse or neglect that are made known during the mediation must be reported to the Division of Child Protection and Permanency (DCP&P). If information concerning serious threatened harm to anyone is revealed during the mediation, the appropriate authorities or the potential victim may be notified.

CHAPTER 9 – VOLUNTARY SURRENDER

At any time during the court process, the objecting parent may choose to no longer contest the adoption and enter a voluntary surrender. Pursuant to N.J.S.A. 9:3-38(j), a surrender of custody and consent for adoption means the voluntary relinquishment of all parental rights by a birth parent, previous adoptive parent, or other person or agency authorized to exercise these rights by law, court order or otherwise, for the purposes of allowing a child to be adopted. Surrenders can be either general or specific; however, if the objecting parent decides to surrender, it will be a specific surrender as authorized by N.J.S.A. 9:3-41(d), which is a surrender for the purpose of having the child adopted by a person specified by the surrendering parent.[3]

The court may accept a surrender by the contesting parent at any time during this process. The contesting parent may also withdraw his or her objection to the adoption at any time during the process. If the objection is withdrawn, the court will terminate the objecting parent's rights in order to effectuate the adoption.

Prior to the surrender, the objecting parent should be offered counseling sessions. If the adoption fails for any reason, the surrender will automatically be vacated and parental rights reinstated.

When executing the surrender in court, the attorney representing the surrendering parent, the attorney representing the adoptive parent, or the judge may ask the surrendering parent questions involving the surrender. Below are sample questions.

1. Parent's background information
    a. Address: Date of birth:
    b. How far did you go in school?
        i. Do you speak, write and understand English?
        ii. Do you need an interpreter? If yes, language_____
    c. Do you need accommodation for a disability?
2. Are you or the child a member of or eligible to be a member of, a federally recognized American Indian Tribe?
3. Do you understand that this form will be submitted to the court to memorialize your voluntary decision to surrender your parental rights?
4. Are you making it voluntarily and of your own free will?
5. Did anyone force, coerce, threaten, or pressure you into making this decision?
6. Did anyone offer or promise you anything to convince you to make this decision?
7. Do you understand that this surrender will permanently end the relationships and all contacts between you and the child?
8. Do you understand that you are not entitled to any further notice of the adoption proceedings for the child?

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[3] A surrender of parental rights to a person specified by a birth parent is also referred to as an identified surrender.

9. Are you currently under the influence of drugs, alcohol or prescription medication which may affect your ability to make a decision?
10. Are you suffering from any mental or physical disability, which could affect your judgment?
11. Are you aware that you are entitled to pre-surrender counseling?
    a. Do you want counseling?
    b. Are you waiving your right to counseling?
12. Do you understand that you have a right to a trial in this case?
13. Have you been advised by your lawyer of all your rights and legal alternatives to this surrender and adoption in this matter?
14. If you surrender, you are giving up your right to such a trial. Are you waiving your right to trial of your own free will?
15. Do you understand that the court cannot enforce any visitation promises made by anyone?
16. Did you have sufficient time to think about this important decision?
17. Do you understand that this surrender is irrevocable?
18. Do you understand that the adoptive parents will have full authority and control over the child, with the ability to make decisions concerning medical, legal and social matters for the child, including the future maintenance, keeping care, and education in the adoption of the child.
19. Do you believe that surrender of your parental rights is in your child(ren)'s best interest?
20. Did your lawyer or the judge answer all of your questions?
    a. Are you satisfied with the services of your lawyer?
21. Do you have any questions regarding this surrender?

CHAPTER 10 – APPEALS OF FINAL JUDGMENTS

Generally, litigants have 45 days to appeal a final judgment or order. R. 2:4-1(a). However, appeals from final judgments for termination of parental rights must be taken within 21 days from the date of the judgment. R. 2:4-1(a). That rule states in pertinent part: "[A]ppeals from final judgments terminating parental rights shall be taken within 21 days of their entry." Id. In the context of adoption, the shortened time frame for appealing a judgment that terminates parental rights is intended to support New Jersey's strong public policy "to promote the creation of a new family unit without fear of interference from the natural parents." In re Adoption of Child by W.P., 163 N.J. 158, 169 (2000).

A parent whose rights have been terminated has the ability to appeal the judgment. Where an indigent client requests trial counsel to file an appeal, the attorney must file a notice of appeal through eCourts-Appellate. If the client has been determined to be indigent in the trial court, a copy of the order granting that relief or a sworn statement to the effect that such relief has been granted must be filed, along with an affidavit that there have been no material changes to the client's financial circumstances since entry of the order. R. 2:7-4. A motion for transcripts at public expense must be filed at the same time.

If the attorney filing the notice of appeal seeks to be relieved as counsel, a motion for that relief must also be included with the notice of appeal. If a motion to be relieved as counsel is granted, the Appellate Division will confer with the vicinage Family Division to determine if a pro bono attorney is available to be appointed as counsel for the appeal. If, however, the Family Division is not able to provide the name of a pro bono attorney, the Appellate Division then will select a pro bono attorney for the appointment.

Attorneys are encouraged to review In re Adoption of a Child by C.J., 463 N.J. Super. 254, 257 (App. Div. 2020) in situations when they are unable to handle the assigned matter.

Rule 2:4-4(a) governs extension of time for appeal, and provides that "[t]he appellate court, on a showing of good cause and the absence of prejudice, may extend the time fixed by R. 2:4-1(a) . . . for a period not exceeding 30 days, but only if the notice of appeal or notice of petition for certification was in fact served and filed within the time as extended." R. 2:4-4(a). Despite the seemingly stringent 30-day period set forth in R. 2:4-4(a), the New Jersey Appellate Division has permitted litigants to appeal judgments terminating parental rights beyond this statutorily defined period. In fact, the Appellate Division has opined that it must take an "expansive approach in guardianship appeals." New Jersey Div. of Youth and Family Services v. J.C., 411 N.J. Super. 508, 512-13 (App. Div. 2010). However, if counsel is requested to file an appeal of the judge's decision to terminate parental rights, counsel should endeavor to file the appeal in the required period of 21 days from the date of judgment.

Indeed, in J.C. the court did not permit the late filing of the appeal. In doing so, the court further opined, "This court has considered applications for leave to appeal out of time in such matters with great liberality[.]" Id. at 511. However, and as set forth above, this "expansive approach" to an extension to file an appeal must be a weighed approach, with consideration given to both constitutionally protected parental rights, and a child's right to finality. Thus, in

J.C., the court held that the egregiousness of the biological parent's delay, coupled with the fact that the child at issue had been adopted nearly 16 months before the biological parent filed the appeal, warranted a denial of the parent's request for an extension to appeal. "Considering the overarching goal of permanency for children caught up in such litigation . . . it would simply be unconscionable for this court to permit an appeal at such a late date." Id. at 512-13.

Orders terminating parental rights following preliminary hearing are considered final orders for purposes of appeal pursuant to N.J.S.A. 9:3-48(c)(4). Counsel should endeavor to file the appeal in the required 21-day period following entry of order rather than waiting until entry of the judgment of adoption.

CHAPTER 11 – FREQUENTLY ASKED QUESTIONS

Q. My client wants to enter into a Post-Adoption Contact Agreement as part of the adoption. Are these agreements enforceable in New Jersey?

A. Agreements between adoptive parents and birth parents for post-adoption contact which could range from pictures, letters, and updates, to actual visits, may be entered into by and between the parties, but they are not enforceable in New Jersey. See In re Guardianship of K.H.O. 161 N.J. 337, 362 (1999). Nevertheless, parties frequently enter into these agreements but with this understanding regarding non-enforceability. It should be noted that most adoption agencies in New Jersey require the adoptive parents to provide, at a minimum, pictures, letters, and updates to the agency about the child which will then be forwarded to the birth parents if the birth parents wish to receive them.

Q: Does my client have to pay child support during the adoption proceedings?

A: Yes, unless otherwise ordered, your client is responsible to pay the ongoing child support obligation and child support arrears during the pendency of the contested adoption proceedings. Child support payments are only terminated upon the completion of the adoption. Your client is still responsible for past arrears post-adoption.

Q. Will the court provide an interpreter? Who pays for it?

A. Yes. Both the Federal Civil Rights Act of 1964 and the New Jersey Law Against Discrimination prohibit national origin discrimination. This means agencies receiving state or federal funds, including courts, must provide a free interpreter and translated materials. If the court fails to provide an interpreter when you ask for one, this may be considered national origin discrimination. The law does not permit the court to require you to pay for an interpreter. However, the law does not require the court to provide an interpreter for conversations with your client that occur outside the courtroom. The Judiciary's language access policy is set forth in Directive #01-17, which can be found on the Judiciary website at the following link: https://www.judiciary.state.nj.us/attorneys/assets/directives/dir_01_17.pdf

Q. The court is requiring that my parenting time/visitation be supervised. How can I arrange for a supervisor?

A. The parties can agree on potential supervisors, the court can order supervision through the New Jersey Family Court Supervised Visitation Program, or supervision can be arranged through a third-party service provider in each county.

Q: My client is incarcerated. How do I arrange to speak with my client? How do I get documents reviewed and signed?

A: New Jersey has three (3) types of facilities: Federal prisons, state prisons and county jails. You will need to call the facility and ask for the Warden's office. For county jails, the Sheriff's Department may be of help in arranging visits or calls. There will be someone

assigned in the administration to assist in communication with prisoners. Depending on the type of facility, you may be able to arrange to have phone or video conferences with your client. Make sure you are on time for scheduled calls, as the facilities cannot accommodate late starts or time overruns.

The facility will give you an address at which to send documents to your client. You will want to ask for your client's identification number and use that on all written communication. Be prepared for delays as mail goes through inspection and may be delayed in getting to the inmate.

For court appearances, provide the facility information to your judge's staff or the Surrogate's office. They will be able to arrange for your client to appear by video conference for most appearances.

You may find other helpful information at the following websites:
www.state.nj.us/corrections
http://www.state.nj.us/corrections/pages/InmateTelephoneSystemInfo.html
http://www.njcjwa.org/jails.html

Q. How do I handle expenditures or expenses on behalf of my client (e.g., cost for experts, transcripts, etc.)?

A. Rule 1:13-2(b) provides in relevant part that "no attorney assigned to represent a person by reason of poverty . . . shall be required to expend any personal funds in the prosecution of the cause." N.J.S.A. 9:3-53 controls the costs associated with private adoption matters, and indicates they are to be borne by the plaintiff. However, there may be situations where, after inquiry by the court, the plaintiff does not have the means to pay for certain defense costs. In these instances, counsel may research other avenues of payment and caselaw related thereto.

Specifically relating to costs on appeal, R. 2:5-3(d) provides in relevant part that "if the appellant is indigent and is entitled to have a transcript of the proceedings below furnished without charge for use on appeal, either the trial or the appellate court, on application, may order the transcript prepared at public expense." "[I]n those instances when it is not appropriate to shift the cost of a transcript on appeal to a plaintiff in an involuntary private adoption action, the OPD's duty to an indigent parent confronted with the loss of parental rights by operation of N.J.S.A. 9:3-46 shall include the duty to pay for a transcript on appeal. In view of that holding, the question of who pays shall no longer delay appellate review. That said, we encourage courts to restrict the required portions of a transcript to the minimum necessary for that review, thereby minimizing the impact on the public fisc." In re Adoption of a Child by J.D.S., 176 N.J. 154, 158-159.

APPENDIX

A. Sample Trial Court Appointment Letter

B. Flowchart – Contested Adoption Proceedings

C. Adoption in New Jersey – an Overview

D. County Surrogate Offices

E. Criminal and Domestic Violence History Check – letter

F. Sample Case Management Orders

G. Directive #15-17 – Child Welfare Mediation

H. Indian Child Welfare Act Summary

I. Sample Appellate Division Appointment Letter