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Legal Requirements for adoption proceedings

11 May 2015

Open Adoption Forum

Association of Children's Welfare Agencies

Relevant Legislation and Rules

- *Adoption Act 2000 NSW*
- *Adoption Regulation 2003*
- *Uniform Civil Procedure Rules 2005*
– Part 56
- *Evidence Act 1995 NSW*

FORMAL REQUIREMENTS

In both contested and uncontested adoption matters, there are a number of formal matters which must be proven or steps taken before adoption can proceed.

It is not sufficient to let the Court draw inferences as to these matters.

The evidence that you file in the Supreme Court must therefore cover the following matters:

1. When the application is filed, that the children were present in the state: s. 23(2)(a) *Adoption Act 2000* ("the Act") and r. 56.8(b) of the *Uniform Civil Procedure Rules 2005* ("UCPR").
2. The proposed adoptive parents must be resident or domiciled in the state: ss. 23 and 28 of the Act.

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3. The proposed adoptive parents are of good repute and are fit and proper persons to fulfil the responsibilities of parenthood: s. 28(1)(b) of the Act and r. 56.8(l) of the UCPR.
4. The proposed adoptive parents must meet the age requirement: s. 28(3) of the Act.
5. If the proposed adoptive parents are a couple, that they have been living together for "a continuous period of not less than 2 years": s. 28(4) of the Act.
6. That a copy of the Mandatory Written Information (MWI) is given to any person whose consent is required (other than the Minister) before the person consents or refuses to consent to the adoption: s. 59 of the Act.

Note: the Court has also indicated that it needs to be satisfied that the MWI provided to a person, complies with the requirements under s. 57 of the Act and cl. 33 of the *Adoption Regulation 2003* ("the Regulation").

If a person (ie child or parent) is giving formal consent, the MWI must be given to the person at least 14 days before the giving of consent: s. 60(b) of the Act.

Continued...

7. The Court may not make an adoption order, unless a report in writing concerning the proposed adoptive parents has been provided to the Court: s. 91(1) of the Act.

Note: The Court Report must be filed at the time the Summons is filed, or if there is a preliminary hearing, before the preliminary hearing: r. 56.7 of the UCPR .

8. If the applicant is a sole applicant, but they have a spouse, there must be spousal consent: s. 27 of the Act.
9. That the proposed adoptive parents have been selected in accordance with the Act: s. 90 and Part 3 or Part 3A of the Act.

In particular for local/dual authorisation, s. 42 (expression of interest), s. 43 (application to adopt), and s. 45 (adoption assessment and selection). For children in out of home care, s. 45D (application to adopt), s. 45F (adoption assessment and selection).

Other Evidence

The Act also requires that evidence be filed in relation to:

1. If a child is over 18 years of age, evidence that the child was in the "care responsibility" of the applicants prior to reaching 18 years: s. 24(2)(b) of the Act.
2. The names of the child, including all names that the child has or has had, and the facts relating to any change of the child's name: r. 56.8(d) of the UCPR.
3. Evidence of the names it is proposed the child should have on the making of an adoption order, and why this is in the child's best interests: r. 56.8(e) of the UCPR; s. 101 of the Act.
4. The name, place of residence and occupation of each person with whom the child resides and of each applicant: r. 56.8(f) and (g) of the UCPR.
5. Whether there have been any proceedings relating to the interest, welfare or adoption of the child, whether any orders have been made, the terms of those orders, and whether they remain in effect: r. 56.8(p) of the UCPR.

EVIDENCE IN RELATION TO CONSENTS

In relation to any consents:

1. Evidence must clearly show that a person was counselled not more than 30 days or less than 72 hours before the Instrument of Consent ("the Instrument") is signed: cl. 39 of the Regulation.

Note: further requirements if it is a new born baby

2. The Instrument must contain the information set out in cl. 34 of the Regulation.
3. Before a person signs the Instrument, a counsellor must sign on the Instrument clarifying certain matters: s. 61(3).

Continued...

4. The Instrument must be witnessed by a person other than the counsellor, and he/she must sign on the Instrument certifying that he/she is not aware of any mental, emotional or physical unfitness of that person to give consent, before witnessing the signing of the Instrument: s. 62 of the Act.

The witness must also satisfy/ensure certain matters as set out in cl. 36 of the Regulation.

Therefore the Instrument is one document comprising three parts in the following order:

statement of counsellor;
statement of person qualified to witness consent; and
signed consent.

5. An adult has 30 days after the Instrument is signed to revoke their consent, and the Secretary/Principal Officer must (ie it is mandatory) give notice to a person not less than 7 days before the revocation period ends: s. 74 of the Act.

Note: the Court may take judicial notice, without verification, of an Instrument of Consent if it appears on its face to have been given in accordance with ss. 61 and 62 of the Act.

ADOPTION PLANS

In terms of the Adoption Plan:

1. There are a number of “required particulars” for an Adoption Plan: cl. 29 Regulation.
2. You should address in evidence why the arrangements in the Adoption Plan are in the child’s best interests and proper in the circumstances – consider whether you need any expert evidence in relation to frequency/duration/supervision of contact: s. 90(2) of the Act.
3. You must file evidence about the facts and circumstances relating to the making of the Adoption Plan: r. 56.8(k) of the UCPR.
4. Since October 2014, there is a requirement to consult with birth parents about plans, and they can sign even if they do not consent to the adoption itself: see s. 46(2A) and (2B)

DETERMINING ADOPTION ORDERS

His Honour Justice Brereton has indicated in contested matters that the issue of dispense consent under s. 67(1)(d) (ie for out of home care adoptions) can be subsumed into the issue of the making of the adoption order (ie the same matters are relevant to both decisions).

This is primarily because, in respect of both issues, the Court must consider what is in the best interests of the child.

Evidence must therefore be filed in relation to the matters set out in s. 8(2) of the Act.

Note that s. 8 applies to all adoptions, not just OOHC, so you must always turn your mind to the matters outlined in that section

s. 8(2) of the Adoption Act

(2) In determining the best interests of the child, the decision maker is to have regard to the following:

a) any wishes expressed by the child.

In terms of wishes of the child, also note s. 90(1)(b) of the Act and 56.8(o) of the UCPR.

b) the child's age, maturity, level of understanding, gender, background and family relationships and any other characteristics of the child that the decision maker thinks are relevant.

This may include evidence about:

- the troubled background of the children, including exposure to verbal and physical violence or drug use whilst in the care of the birth parents.
- matters such as the birth parents lack of insight, or the fact that exposure to risk occurred at a time when the child was, by virtue of his/her young age extremely vulnerable and completely dependent on birth parents.
- the outcome and findings in the Children's Court.

c) the child's physical, emotional and educational needs, including the child's sense of personal, family and cultural identity.

Evidence could include facts about the needs of the child at the time the child was assumed into care, and evidence that these needs were not being met at that time, as well as evidence of present needs and how these are met.

Also note that s. 90(1)(h) of the Act requires the Court to be satisfied that the culture, any disability, language and religion of the child is and, as far as possible, identity, language and cultural and religious ties have been taken into account.

Continued...

- d) any disability that the child has,
- e) any wishes expressed by either or both of the parents of the child,
- f) the relationship that the child has with his or her parents and siblings (if any) and any significant other people (including relatives) in relation to whom the decision maker considers the question to be relevant,

Best evidence would be of the quality/nature of the relationship rather than just information about how often the child might see them or general statements such as "the child is not attached to the birth parents",

- d) the attitude of each proposed adoptive parent to the child and to the responsibilities of parenthood,
- e) the nature of the relationship of the child with each proposed adoptive parent,

Again best evidence would be to provide examples, or observations from caseworkers

Continued...

- i) the suitability and capacity of each proposed adoptive parent, or any other person, to provide for the needs of the child, including the emotional and intellectual needs of the child.

Note you can demonstrate capacity by showing an improvement in the child's progress and development since being placed with the applicants.

- j) the need to protect the child from physical or psychological harm caused, or that may be caused, by being subjected or exposed to abuse, ill-treatment, violence or other behaviour, or being present while a third person is subjected or exposed to abuse, ill-treatment, violence or other behaviour.

Note that it is important to file evidence in relation to the child's background of neglect or exposure to risk. Also be aware that the Court may consider what position the child would be in if the child were to return to the birth parents care.

- k) the alternatives to the making of an adoption order and the likely effect on the child in both the short and longer term of changes in the child's circumstances caused by an adoption, so that adoption is determined among all alternative forms of care to best meet the needs of the child.

Alternatives may include: a parental responsibility order in favour of the applicants; a parental responsibility order in favour of the Minister (the status quo); restoration to the birth parents; or a short delay (perhaps up to a year) in the making of the order.

Clearly Preferable

Finally, evidence needs to be filed as to why the making of an adoption order for the particular child the subject of the application, is clearly preferable in the best interest of the child than any other action that could be taken by law in relation to the care of the child: s. 90(3) of the Act.

Conclusion

- There is currently an Adoptions Working Party, chaired by Brereton J of the Supreme Court:
 - To devise a Practice Note to assist new practitioners and agencies regarding how adoption matters run;
 - To upload templates onto the Supreme Court website – the Delegate's Affidavit will have a number of headings which acts like a check list of the matters I have just discussed



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Questions?



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Preparing “best evidence” for adoption proceedings

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Drafting “best evidence” - Context

There are a number of rules which must be followed when drafting evidence.

If these rules are not followed, then objection can be taken to the evidence, and it will not be admitted as evidence in the proceedings

Four key rules are set out in *Evidence Act 1995*

Examples of the Rules of Evidence:

1) The evidence must be **relevant**:

If accepted, the evidence could rationally affect the assessment of the probability of the existence of a fact in issue in the proceeding.

For example, details of how PAPs have assisted a child with speech exercises might persuade the Court that the PAPs are capable of providing for the child's developmental needs as set out in s. 8(2)(i).

Examples of the Rules of Evidence:

2) **Hearsay** evidence is not admissible:

Hearsay is the legal term for testimony or evidence in proceedings where the witness does not have direct knowledge of the fact asserted, but knows it only from being told by someone.

In general the witness will make a statement such as, "*Becci told me Tom was in town,*" as opposed to "*I saw Tom in town*".

Examples of the Rules of Evidence

- 3) A person's **opinion** is not admissible in adoption proceedings

- 4) Also be careful that documents are not **“privileged”**

However...

- Whilst the Rules of Evidence apply in adoption matters, there is some scope to seek to rely on evidence which does not entirely satisfy those rules because of:
 - s. 126 of the *Adoption Act 2000 (NSW)*;
 - in respect of hearsay evidence, the “business records” exception; and
 - in respect of opinion evidence, the deponent has “specialised knowledge” or “lay opinion” is allowed

Section 126: Matters admissible in evidence

“Except as otherwise provided by this Act or the regulations, the Court, in the hearing of any proceedings or in determining any application or matter under this Act or the regulations, may act on any statement, document, information, or matter that may, in its opinion, assist it to deal with the matter of the proceedings or before it for determination whether or not the statement, document, information or matter would be admissible in evidence”.

Business Record Exception

Applies if the document forms part of the records kept by an organisation (such as FACS, Anglicare, Barnardos etc) in the course of, or for the purposes of, a business; and

if the representation was made:

- a) by a person who had or might reasonably be supposed to have had personal knowledge of the asserted fact, or
- b) on the basis of information directly or indirectly supplied by a person who had or might reasonably be supposed to have had personal knowledge of the asserted fact.

Opinion Rule Exceptions

- if the opinion is based upon specialised knowledge; and
- The opinion is not an expert opinion and is based on what a person saw, heard or perceived about an event, and that evidence is necessary to obtain an adequate understanding of the event (known as lay opinion)



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Practically: How to draft “best evidence”



Direct Evidence

Where possible, rely upon “direct evidence”

Does anyone know what this means?

Direct Evidence

- If you cannot obtain direct evidence, then you can rely on business records.
- However, if you rely on business records, then the source/primary document (rather than any summary of that source document or secondary document) will be the best evidence.

See example: Jane's contact with her mother – page 31 of handout

Tips when drafting evidence

- Use subheadings in the affidavit
 - the Judge can then tick things off like a check list
 - see rule 56.8 of the *Uniform Civil Procedure Rules 2005*
- There should only be one point/issue raised per paragraph
 - see rule 35.4 of the *Uniform Civil Procedure Rules 2005*
- Let annexures or exhibits “speak for themselves”
 - this avoids the deponent taking issues out of context or giving a misleading account of events
 - avoids criticism from the court: see *Re Liam* [2005] NSWSC 75

Example of a misrepresentation

The affidavit states:

- 1) During the contact visit on 1 April 2014, I heard the father tell the child “*Mummy is in hospital. Mummy’s tummy is not well.*” The child then said to the father “*Doctor going to make her better. Did you hurt mummy?*”.
- 2) During transportation back from the visit the child stated to me three times “*I hate daddy*” and then added “*I love mummy*”.

However...

It later becomes evident during the hearing that the file note which is called for also states (which is omitted from the affidavit above), that during the contact visit the child said to the father: “*I love you daddy, I want to come home with you*”. The child is also recorded as initiating affection towards the father, and keeping close to him throughout the visit.

How would I draft this paragraph?

“The mother was unable to attend contact with the child on 1 April 2014, due to being in hospital as a result of appendicitis. The contact visit was overall a positive experience for the child, although the child made some inconsistent comments about his feelings for his father. A copy of the file note is at pages 1 to 2 of Exhibit XX-1.”

Example – let exhibits “speak for themselves”

“On 22 December 2009 Community Services received the following information from QEII in relation to the mother’s residential stay: *“Emie was never observed to provide a nutritious diet without prompting from the clinical staff and did not monitor Jeremy’s intake. The situation did not improve during the admission despite guidance and support. Emie stated on admission that she is pregnant. On the admission examination Jeremy was observed to have six dental cavities which may reflect the quality of the child’s routine dietary intake and oral hygiene. Jeremy’s behaviour reflected disorganised attachment, which may put her at risk, as she was confident to be in the company of strangers. Jeremy sought to be soothed from staff and other parents even when Emie was present. Emie was observed to make her own needs paramount over Jeremy. Emie stated that she had attended at least 16 parenting courses but could not define what benefit they were to her in her parenting capacity. Emie appraised to comprehend and repeat back all the education and guidance given to her during the admission but was observed to be unable to put the knowledge into practice.”* A copy of the report from QEII is at pages 1-20 of Exhibit XX-1.”

Tips when drafting evidence

- The deponent must set out his/her qualifications, as this will justify why they can give some of the evidence they do.
- The deponent must either swear or affirm the affidavit – not both.
- An affidavit must be written from the perspective of the deponent

Tips when drafting evidence

- Ensure that annexures are complete (no missing pages), that you include “clean copies” of documents (no lines or markings).
- If possible include sealed copies of Court documents
- Never annex original documents to an affidavit; these should be included in an Exhibit if requested to be filed so they can be returned to you.

Tips when drafting evidence

- An affidavit must include “facts” not submissions
 - Although note that in adoption matters there are some matters the deponent should form an opinion on (for example, why a name change is in the child’s best interests, or why adoption is clearly preferable in the best interests of the child to any other action that can be taken at law).
- Avoid duplication or repetition in your evidence (both the affidavit and exhibit)

Tips when drafting evidence

Disclose all relevant information, even if it is negative to your case.

- see rule 56.3 of the *Uniform Civil Procedure Rules 2005*

Tips when drafting evidence

Make a concession if appropriate, which helps to reduce the size of the Exhibit and sometimes the issues in dispute

See example in hand out at pages 33 and 34:
Rachel's contact with her mother

Tips when drafting evidence

- A good file note has as much detail as possible, rather than generalised statements:
 - Example: *“I observed the child was securely attached to the mother”* verses *“I observed the child was attached to the mother. For example, whilst I was at the home on 8 March 2013, the child sought the mother out for comfort when she fell over. I also heard the child say to her mother ‘I love you mummy’”*.
 - Include dates and details of whether you observed/ heard the information. Example: Jane’s monthly review – page 32.

Tips when drafting evidence

It is important for your legal representative (or those responsible for drafting evidence in your organisation) to be aware of all potentially relevant matters, so as to avoid issues arising during a hearing.

This will also enable him/her to make a forensic decision as to whether or not it is relevant to the case, to consider the best way of managing the issue, and to avoid delays.

Workshop - Examples

1. Letter from Dr Thomas Young, Paediatrician – page 35 of handout
2. File note dated 29 January 2013 from Caseworker Molly Andrews – page 36 of handout

What is wrong with this paragraph?

On 16 May 2013 paediatrician Dr Thomas Young reviewed Mike because of concerns about his impulsive and inappropriate behaviour. Dr Young reported that he had received feedback from Mike's current class teacher that there were similar levels of disruptive and inappropriate behaviour in this environment. Dr Young stated that Mike's behaviour was intrusive enough to justify a trial of stimulant medication and prescribed Ritalin. Dr Young noted that the other concerning aspect to Mike's behaviour was his limited capacity for empathy or concern for the impact of his behaviour on others and a tendency to be anti-social. Dr Young diagnosed Mike with Oppositional Defiant Disorder and recommended that the carers would benefit from intervention from a psychiatrist to assist with managing Mike's behaviours. Dr Young stated that he would like to review Mike in 1 month. A copy of Dr Young's letter is at page 1 of Exhibit XX-1.



Better drafting would be...

On 15 May 2013 paediatrician Dr Thomas Young reviewed Mike because of concerns about his impulsive and inappropriate behaviour. I understand from reading Dr Young's report, that he recommended a trial of stimulant medication and prescribed Ritalin. In his letter Dr Young also states that Mike's behaviours suggest a possible emerging Oppositional Defiant Disorder. A copy of Dr Young's letter is at page 1 of Exhibit XX-1.

What is wrong with these paragraphs?

1. On 29 January 2013 Caseworker Molly Andrews conducted a home visit to Kath's home to discuss Rebecca's progress and the proposed adoption proceedings. Kath advised that Rebecca is currently taking Ritalin, Catapress, Fluvoxamine, Risperdone and Movical. Kath also advised that Rebecca is continuing to receive Occupational Therapy and Speech Therapy. Ms Andrews asked if Rebecca had self-harmed since the incident last year when she used a razor on her stomach. Kath advised that there have been no further incidents of self-harm and Rebecca is now on the correct medication and receiving counselling every 6 weeks. Kath advised that she had tried, without success, to contact Rebecca's mother to establish contact. Ms Andrews spoke with Kath about the adoption process and explained that the Magistrate will decide whether to make the adoption order. Kath and Rebecca are going to Spain next week to visit Kath's family. Rebecca is excited to visit Barcelona. A copy of the file note of Ms Andrews' home visit is at page 1 of Exhibit XX-1.
2. Rebecca is a happy and settled child and is affectionate towards Kath. Rebecca refers to Kath as her "Mum". Rebecca frequently hugs Kath and when she arrives home from school she tells Kath about her school day. Rebecca enjoys having her own bedroom and loves her dog Billy.

Better drafting would be...

1. On 29 January 2013 Caseworker Molly Andrews conducted a home visit to Kath's home to discuss Rebecca's progress. I understand from perusing Ms Andrews' file note that during the home visit Ms Andrews discussed a number of matters with Kath, including Rebecca's current medication, supports and mental health. A copy of the file note of Ms Andrews' home visit is at page 1 of Exhibit XX-1.
2. I understand from discussions with Ms Andrews and from perusing file notes from home visits, that Rebecca is settled in her placement and sees Kath as her family. For example, Ms Andrews' file note from the home visit of 29 January 2013 records that when Rebecca arrived home from school she hugged Kath, referred to Kath as "Mum", was excited to show Ms Andrews her bedroom and introduce Ms Andrews to their dog, Billy.

Conclusion and Questions?

- Four key rules under the Evidence Act:
 - *Relevance, Opinion, Hearsay, privilege*
- Exceptions to the above rules:
 - *Business Records, s. 126, expert and lay opinion*
- Other tips when drafting evidence:
 - *Use direct evidence or source documents, let annexures speak for themselves, make concessions, one fact per paragraph*