

IN RE: ADOPTION BY W.A.T. OF A.T.T.
Court of Common Pleas of the 39th Judicial District of Pennsylvania,
Franklin County Branch
Orphans' Court Division, No. 2003-52

Same-sex adoption; Statutory requirements; Consents; Clearly sufficient evidence

1. In Pennsylvania, adoption is purely a matter of statutory law as adoption was unknown at common law.
2. In order to effect an adoption, the Adoption Act (23 Pa.C.S.A. §§ 2101 through 2910) must be strictly complied with.
3. Any individual may be adopted, regardless of his age or residence.
4. Any individual may become an adopting parent.
5. As to the consents necessary incident to an adoption, the Adoption Act, as it relates to this case, provides that consent is required of "the parents or surviving parent of an adoptee who has not reached the age of 18 years."
6. Because the biological father in this case was a sperm donor, it was not necessary to seek his consent to the adoption based on the Donor Agreement, which specifically divests a sperm donor of any attribute of fatherhood with respect to any child conceived by his donated gametes.
7. The Adoption Act also mandates that the form of consent by a parent for a child under the age of 18 include the following language: "I understand that by signing this consent I indicate my intent to permanently give up all rights to this child."
8. The Pennsylvania Supreme Court held in In re Adoption of R.B.F. and R.C.F., 569 Pa. 269, 803 A.2d 1195 (2002), that "Section 2901 of the Adoption Act, 23 Pa.C.S.A. 2901, affords the trial court discretion to determine whether, under the circumstances of a particular case, cause has been shown to demonstrate why a particular statutory requirement has not been met."
9. Petitioner is entitled to an opportunity to show cause, under Section 2901, why the purpose of the relinquishing provision would be fulfilled by maintaining the child's relationship with its biological parent; that is, why petitioner cannot meet the statutory requirement.
10. Petitioner may properly argue that the only means to preserve family integrity in this context ordinarily achieved through termination of an existing legal parent's rights would be through preservation of that parent's rights.
11. If a petitioner's form of consent does not meet the statutory requirements, petitioner can establish by clearly sufficient evidence that it is in the child's best interest that the court enter a decree of adoption.

Appearance:

Stephen D. Kulla, Esq., Counsel for Petitioner

OPINION

Walsh, J., January 20, 2004

Background

On October 8, 2003, W.A.T. filed a petition seeking to adopt A.T.T., born September 2, 2003. Concurrently with the filing, Petitioner also filed a Consent by A.T.T.'s biological mother, L.D.U., to the adoption. Petitioner and L.D.U. are lesbian life partners. At birth, L.D.U. gave W.A.T.'s last name to A.T.T. As of the time of the adoption hearing, L.D.U. had pending a petition to change her last name to that of W.A.T. Those proceedings have since concluded.

Evidentiary hearing on the adoption was held on Monday, November 10, 2003 and from the evidence received, we make the following:

Findings of Fact

1. Petitioner W.A.T. and the child's biological mother, L.D.U. live in Chambersburg, Franklin County, Pennsylvania and have lived here since March, 2003.
2. The child sought to be adopted, A.T.T., was born September 2, 2003 to L.D.U. at the Washington County Hospital in Hagerstown, Maryland.
3. A.T.T.'s biological father is a sperm donor and the child's conception resulted from the artificial insemination of L.D.U.
4. The identity of A.T.T.'s biological father is confidential and remains unknown pursuant to a Donor Agreement between biological father and Pacific Reproductive Services, a professional corporation; and L.D.U. is the recipient of the donated sperm through Pacific Reproductive Services, a licensed sperm bank in the state of California.

5. The Program Donor Agreement, at Item 11, provides in its entirety as follows:

11. DONOR understands that, under the provisions of California Family Code §7613(b), he is providing his semen to a medical facility supervised by a licensed physician for use in the artificial insemination of a woman who is not a wife, and that, as such, he will be treated in law as if he were not the natural father of a child thereby conceived. DONOR further understands that he will have no rights or obligations with respect to either the recipient of his semen or any children conceived as a result of artificial insemination with the use of his semen. DONOR acknowledges and agrees that, by providing his semen to PACIFIC for use in artificial insemination, he will have no right in law to demand, request or compel any guardianship, visitation, or custody right with any child conceived as a result of any artificial insemination utilizing his semen.

6. The record is devoid of any consent to the adoption by A.T.T.'s biological father/sperm donor.
7. The record contains a consent to the child's biological mother in the following form:

Consent No. 3

life partner

(Consent of the adopting parent's ~~spouse~~, unless both join in petition.)

I, L.D.U., do hereby certify that I am 26 [sic] of age, that I have read the petition in the above captioned matter and fully understand the contents thereof and do hereby, without reservation and without undue influence or coercion exerted upon me by any person, give my consent to the adoption of said child as prayed for in the foregoing petition. Dated this October 2, 2003.

The Consent is properly witnessed and has been signed by L.D.U. over a line under which is subscribed "Signature of ~~spouse~~ Life Partner."

8. The Program Donor Agreement, offered and received into evidence, is fully and appropriately redacted to protect the identity of A.T.T.'s biological father/sperm donor.
9. L.D.U. is not married but has been in a relationship with W.A.T. for 2½ years.
10. L.D.U. and W.A.T. have been living together for about 3½ years, having met in college, and having known each other for 8 years.

11. L.D.U. is 26 years of age and W.A.T. is 30.

12. L.D.U. describes their relationship as loving, committed and special and long-term. Both L.D.U. and W.A.T. testified that they "went into this together" and that both want to raise a child together.

13. L.D.U. testified that she loves W.A.T. as if she were her spouse. She further testified credibly that if marriage were allowed in Pennsylvania between two people of the same gender, she and W.A.T. would intend to be married.

14. At birth, the child was given the last name of W.A.T.; and L.D.U. testified that she is intending to change her last name to that of W.A.T.

15. L.D.U. has already filed a petition to change her last name from U. to T.

16. L.D.U. testified that she was fully aware that if the adoption is permitted, in the event that she and W.A.T. separate, W.A.T. would have rights as if she were also the natural parent of A.T.T. including the right to seek custody and the obligation to pay child support.

17. L.D.U. is trained as a nursing assistant and caregiver but is not currently working and, as the biological mother of A.T.T., is presently a full-time parent. W.A.T. is employed at Target Distribution in Chambersburg and her employer provides health insurance to her as well as to L.D.U. and A.T.T.

18. L.D.U. and W.A.T. are the joint owners of a three (3) bedroom home in Chambersburg.

19. L.D.U. intends to return to school to obtain her nursing degree and will be out of the home on shifts opposite those of W.A.T. so that both she and W.A.T. may raise A.T.T.

20. There was credible evidence that A.T.T. is in good health and that there is no medical contraindication to his being adopted.

21. There was credible evidence that Petitioner W.A.T. is in generally good health and that seizures related to her history of epilepsy are under control by medication. There was further credible evidence that her family physician sees no contraindications or any reason why she would not provide a child with a safe and caring home.

22. L.D.U. testified that her family, including her parents and sister, are aware of her committed relationship to W.A.T. and that they are very supportive.

23. W.A.T. testified that she has a baccalaureate degree with a major in English and minors in business, coaching and psychology.

24. W.A.T. described L.D.U. as her partner for life.

25. W.A.T. testified that she and L.D.U. have already had rings designed and made and that when A.T.T. is at an appropriate age, they intend to travel to L.D.U.'s home state of Massachusetts for a civil commitment ceremony in the presence of their families.

26. W.A.T. loves, cares for and supports A.T.T.

27. W.A.T. and L.D.U. have benefited from support groups and have gone through counseling to properly and realistically deal with "our situation in terms of lesbians making the best possible arrangements for their child."

28. W.A.T. and L.D.U. have given careful thought and have sought support for raising a child under their particular circumstances. There was credible and convincing evidence that both L.D.U. and W.A.T. have gone into this with their eyes wide open.

29. The Pennsylvania State Police Central Repository has reported that W.A.T. has no criminal record and the Commonwealth of Pennsylvania's Childline and Abuse Registry has certified that no record exists for W.A.T. as a perpetrator of an indicated or founded report of child abuse.

30. W.A.T.'s parents have observed the development of her relationship with L.D.U., strongly approve of it and favor the adoption.

31. There was presented credible corroborating evidence that W.A.T. and L.D.U. are in a loving and committed relationship; and that they have thought long and hard about dealing with the barriers that A.T.T. may come face as the son of two female parents.

Discussion

In Pennsylvania, adoption is purely a matter of statutory law as adoption was unknown at common law. In re Adoption of E.M.A., 487 Pa. 152, 409 A.2d 10, 11 (1979). In order to effect an adoption, the Adoption Act^[1] must be strictly complied with. Id. Further, "any individual may be adopted, regardless of his age or residence." 23 Pa. C. S. §2311. "Any individual may become an adopting parent." 23 Pa. C. S. §2312. As to the consents necessary incident to an adoption, the Adoption Act, as it relates to this case, provides that consent is required of "the parents or surviving parent of an adoptee who has not reached the age of 18 years." 23 Pa.C.S. §2311(a)3).

In the instant case, L.D.U.'s consent was attached to the petition. It was, however, the consent of only L.D.U.; there was no corresponding consent from the child's biological father/sperm donor. The Program Donor Agreement, quoted above in relevant portion in factual findings at Item 5, provides a sufficient underpinning for our conclusion that it was not necessary to seek a consent from the biological father/sperm donor in this case. The Donor Agreement specifically divests a sperm donor from any attribute of fatherhood with respect to any child conceived by his donated gametes. Specifically, it provides that "he will be treated in the law as if he were not the natural father of a child thereby conceived." In becoming a party to the Donor Agreement, biological father acknowledged that he "understands that he will have no rights or obligations with respect to . . . any children conceived as a result of artificial insemination with the use of his semen"; and that "he will have no right in the law to demand, request or compel any guardianship, visitation, or custody right with any child conceived as a result of any artificial insemination utilizing his semen." See Finding of Fact, Item 5, *supra*. Finally, we recall that the biological father/sperm donor remains anonymous, pursuant to the Program Donor Agreement. There is no possibility of obtaining his consent under the circumstances. Although the Program Donor Agreement does not specifically say that a sperm donor relinquishes his right to consent or to withhold consent to the adoption of a child conceived as a result of his donation, we have no problem finding that the Program Donor Agreement implicitly divests him of that right. In so doing, it removes at least one hurdle from the adoption process involving a child conceived with his donated sperm. Other Pennsylvania courts have at least impliedly reached similar results. See, for example, L.S.K. v. H.A.N., 813 A.2d 872, 2002 Pa. Super. 390.

There is, however, another statutory hurdle. The Adoption Act also mandates that the form of consent by a parent for a child under the age of 18 include the following language: "I understand that by signing this consent I indicate my intent to permanently give up all rights to this child." 23 Pa.C.S. §2711(d) (1). That statutorily mandated language is absent from the consent filed by biological mother, L.D.U., in this case. Fortunately, the Pennsylvania Supreme Court has provided clear guidance on the matter.

In In re Adoption of R.B.F. and R.C.F., 569 Pa. 269, 803, A.2d 1195 (2002), the court consolidated for appeal two Superior Court cases, one each from Erie and Lancaster Counties. In each of those cases, the trial courts either denied or dismissed petitions of same-sex domestic partners in which the partner sought to adopt the biological child or children of the petitioners' same-sex partner. In both cases, statutorily mandated language requiring the consenting parent permanently to give up his rights to his children was intentionally omitted from the consent of the biological parent.^[2] In each of the companion cases, the Supreme Court vacated and remanded the matters for evidentiary hearing in order to afford the petitioners an opportunity to "set forth a factual basis for finding that the purpose of the relinquishment provision would be fulfilled by maintaining the children's relationship with their existing parent." In re Adoption of R.B.F. and R.C.F., 803 A.2d 1195 at 1201. The Supreme Court specifically held that "Section 2901 of the Adoption Act, 23 Pa.C.S. §2901, affords the trial court discretion to determine whether, under the circumstances of a particular case, cause has been shown to demonstrate why a particular statutory requirement has not been met." Id. at 1196-1197. Under the reasoning and the holding of R.B.F., petitioner is entitled to an opportunity to show cause, under Section 2901, why the purpose of the relinquishment provision would be fulfilled by maintaining the child's relationship with its biological parent; that is, why petitioner cannot meet the statutory requirement.^[3] Petitioner here may properly argue, as the Supreme Court noted in R.B.F., that the only means to preserve family integrity in this context ordinarily achieved through **termination** of an existing legal parent's rights would be through **preservation** of that parent's rights. R.B.F. at 803 A.2. 1201.

In the instant case, we have held an evidentiary hearing, and have made our factual findings. The evidence establishes that L.D.U. and W.A.T. have known each other for 8 years, have lived together for 3½ years and have been in a committed relationship for 2½ years. They have moved to this community, have made friends and acquaintances, have purchased a home together, and have together and with eyes-wide-open ventured into the world of artificial insemination in order to create a family together. Their committed relationship is open and well known to their families and their families support their relationship. Both of them are committed to raising A.T.T. W.A.T. is currently gainfully employed and her employer provides health insurance for her as well as for L.D.U. and A.T.T. L.D.U. has plans to attend school again to obtain her nursing degree. They have thought through scheduling and testified credibly that they plan to

arrange their schedules so that when one of them is either working or in school, the other is available to nurture and care for A.T.T. Both testified credibly that they would marry if the law permitted them to do so; and that at an appropriate future time, they plan to participate in a commitment ceremony in the presence of their respective families. They appear to have realistically determined that there can be social difficulties in their future; and they have sought out support groups for couples similarly situated to deal with issues that are likely to impact them and A.T.T. as their family grows. They have discussed and planned for appropriate role modeling for A.T.T. In order to further "integrate" themselves into traditional norms, to the extent they are able, L.D.U. gave to her biological child the last name of W.A.T.; and L.D.U. has completed legal proceedings to change her last name to that of W.A.T.

All in all, we are unable to determine that W.A.T. is any less credentialed as to A.T.T.'s adoption than would be a step-parent/spouse of A.T.T.'s biological parent. The commitment of L.D.U. and W.A.T. to each other clearly is not demonstrably less, based on the evidence, than the commitment of many who are armed with a marriage certificate. Based on the evidence, it appears that the integrity of this family, planned from the outset by L.D.U. and W.A.T., is best preserved by permitting L.D.U. to retain her parental rights, even in the face of the language of the statute that requires her rights to be terminated. In re Adoption of R.B.F. and R.C.F., 803 A.2d 1195 at 1201. We are convinced that even though L.D.U.'s form of consent does not meet the statutory requirements, Petitioner W.A.T. has established by clearly sufficient evidence that it is in A.T.T.'s best interest that the Court enter a decree of adoption. 23 Pa.C.S. §2901; and In re Adoption of R.B.F. and R.C.F.

[1] 23 Pa.C.S. §§2101 through 2910.

[2] The implicated statutory section is quoted in its entirety with the intentionally omitted language underlined:

§ 2711. Consents necessary to adoption

(d) Contents of consent.--

(1) The consent of a parent of an adoptee under 18 years of age shall set forth the name, age and marital status of the parent, the relationship of the consenter to the child, the name of the other parent or parents of the child and the following:

I hereby voluntarily and unconditionally consent to the adoption of the above named child.

I understand that by signing this consent I indicate my intent to permanently give up all rights to this child.

I understand such child will be placed for adoption.

I understand I may revoke this consent to permanently give up all rights to this child by placing the revocation in writing and serving it upon the agency or adult to whom the child was relinquished.

I understand I may not revoke this consent after a court has entered a decree confirming this consent or otherwise terminating my parental rights to this child. Even if a decree has not been entered terminating my parental rights I may not revoke this consent after a decree of adoption of this child is entered.

I have read and understand the above and I am signing it as a free and voluntary act.

(2) The consent shall include the date and place of its execution and names and addresses and signatures of at least two persons who witnessed its execution and their relationship to the consenter.

[3] § 2901. Time of entry of decree of adoption

Unless the court for cause shown determines otherwise, no decree of adoption shall be entered unless the natural parent or parents' rights have been terminated, the investigation required by section 2535 (relating to investigation) has been completed, the report of the intermediary has been filed pursuant to section 2533 (relating to report of intermediary) and all other legal requirements have been met. If all legal requirements have been met, the court may enter a decree of adoption at any time.

The appellants in R.B.F. argued, and the Supreme Court agreed, that this section of the statute allows the trial court, in the exercise of its discretion and for good cause shown, to enter a decree of adoption even though all legal requirements have not been met.