

January 22, 2014

Lisa M. Rhode, Esquire
Counsel
Orphans' Court Procedural Rules Committee
601 Commonwealth Avenue, Suite 6200
P.O. Box 62635
Harrisburg, PA 17106-9555

RE: Comments on Proposed Amendments and Additions to the Pennsylvania Orphans' Court Rules

Dear Attorney Rhode,

On behalf of the Pennsylvania Interbranch Commission for Gender, Racial and Ethnic Fairness, the Commission's G.L.B.T. Rights Committee submits the attached Comments on the Proposed Amendments and Additions to the Pennsylvania Orphans' Court Procedural Rules. In light of the Commission's concern with the need for standardized procedures for second-parent adoptions, our Comments address only the Amendments pertaining to adoptions.

Our Committee first wishes to congratulate your Committee on your excellent work in drafting the Proposed Amendments and Additions. This must have been a time-consuming and tedious task and we appreciate your dedication to completing it. As for the sections on adoptions, we are in general agreement with the amendments, but have a number of recommendations for making them more responsive to the needs of those seeking second-parent adoptions.

Second, as you know, our Committee conducted extensive research into the experiences of individuals throughout the Commonwealth who have petitioned local courts for second-parent adoptions. Specifically, the Committee conducted a survey of all 67 counties as to how each individual county handles second-parent adoptions. The results of the survey made it very clear that the process of handling these adoptions varied considerably among counties. In sum, the Committee found that the parties involved in the second-

Lisa M. Rhode, Esquire
January 22, 2014
Page Two

parent adoption process are being treated differently than other adoption petitioners, and in ways that make it almost impossible for them to obtain the adoptions in some counties. Some of the findings include the following:

- Many of the counties indicated that they treated second-parent adoptions like step-parent adoptions, but the evidence showed that they do not do so. Almost all of the counties who responded to the survey required families going through the second-parent adoption process to engage in a home study, criminal and child abuse background checks for the legal/biological parent and the adopting parent, and fingerprinting for both. The step-parent adoption process does not normally require these steps.
- Litigants in second-parent adoptions often must attend multiple hearings to deal with the termination of parental rights of an unknown sperm donor, to file additional paperwork and pay an additional fee to file the Report of Intention to Adopt, and to hire a private home study agency to prepare a report on their behalf. Many of these litigants are unable to afford the cost of complying with these additional requirements.
- Some litigants wait more than a year to finalize their second-parent adoptions because the court in their particular county is requiring not only a home study report but three post-placement reports following the home study report, and also requiring the social worker who prepared the report to appear at the hearing to testify.
- These restrictive requirements are in place even when one parent is the biological parent, the parties used an unknown sperm donor, and the child has been in the care and custody of the petitioner and legal/biological parent since he/she was born.

Our Committee sought to remedy this situation by drafting a separate proposed Second-Parent Adoption Procedure Rule that specifically deals with the problems that face those individuals seeking second-parent adoptions. In contrast, much of the relevant language pertaining to procedures for second-parent adoptions within the Proposed Amendments and Additions is contained within an Explanatory Comment to Rule 15.11 that references the holding of the Supreme Court's decision in *In Re: RBF*.

Lisa M. Rhode, Esquire
January 22, 2014
Page Three

Our concern with this approach is that explanatory comments to a Rule are not officially part of the Rule. See *Commonwealth v. Lockridge*, 810 A.2d 1191, (Pa. Sup. Court 2002) (“the Comments are not part of the Rules and have not been officially adopted or promulgated by this court.... a court may rely on the Comments to construe and apply the Rules”); see also PA ST RCP Rule 129 (“Construction of Rules. Titles, Provisos, Exceptions and Headings. Use of Notes and Explanatory Comments”), at (e) (“A note to a rule or an explanatory comment is not a part of the rule but may be used in construing the rule.”); *Laudenberger v. Port Authority of Allegheny County*, 496 Pa. 52, 59, 436 A. 2d 147, 151 (1981) (“These explanatory notes have not been officially adopted or promulgated by this Court, nor do they constitute part of the rule. However, they indicate the spirit and motivation behind the drafting of the rule, and they serve as guidelines for understanding the purpose for which the rule was drafted.”).

Thus, we have concluded that while we view them as a good start, the Explanatory Comments are not sufficient to address the problems we detailed above. However, we also no longer see the need for a separate Rule for Second-Parent Adoptions. Instead, we have added language to several of the existing Rules in your Proposed Amendments and Additions to address the specific deficiencies in the existing system for dealing with second-parent adoptions in the Commonwealth. Our proposed changes are set forth below in BOLD and are UNDERLINED. Your Proposed Amendments and Additions have been set forth in plain font so that our changes are more apparent.

Rule 15.11 Adoption¹

(a) ***Petition***. A petition for adoption under 23 Pa.C.S. § 2701 shall contain the following averments:

¹ The GLBT’s Committee’s Comments are in bold and underlined. [Bold brackets] indicate language that should be removed as we believe such language to be errors/typos in the Proposed Amendments and Additions.

Lisa M. Rhode, Esquire
January 22, 2014
Page Four

(1) the name, address, marital status, age, occupation, racial background and religious affiliation of the petitioner(s);

(2) the name of the Adoptee;

(3) the relationship, if any, of the petitioner(s) to the Adoptee;

(4) whether the Adoptee has resided with the petitioner(s), and if so, the length of time that Adoptee has so resided with the petitioner(s);

(5) the Intermediary's name and address, if any;

(6) whether the home study and preplacement report under 23 Pa.C.S. § 2530, the Report of an Intention to Adopt under 23 Pa.C.S. § 2531, and the Report of Intermediary under 23 Pa.C.S. § 2533 have been filed, and if not filed, the date when it is anticipated that such reports will be filed; **however if the Prospective Adoptive Parent is the unmarried same-sex partner (or unmarried heterosexual partner) of the parent of the Adoptee, then no such Report of an Intention to Adopt under 23 Pa.C.S. § 2531 or Report of Intermediary under 23 Pa.C.S. § 2533 is necessary. A home study and preplacement report under 23 Pa.C.S. § 2530 and any postplacement reports are also unnecessary unless the Court finds good cause to require these reports due to exceptional circumstances;**

(7) if there is no Intermediary, if no Report of the Intermediary has been or will be filed, or if the Adoptee has attained eighteen (18) years of age, all vital statistics and other information required in the Report of the Intermediary, so far as is applicable;

(8) whether a birth certificate or certification of registration of birth of the Adoptee is attached to the petition as an exhibit, and if not attached, the reasons why it is not attached, the efforts made to obtain the birth certificate or certification of registration of birth, and the evidence available to establish a date and place of birth of the Adoptee;

(9) whether all the consents required by 23 Pa.C.S. § 2711 are attached to the petition as exhibits;

(10) if any of the exhibits listed in subparagraph (a)(6) or (a)(9) are not attached to the petition, specific averments explaining why such exhibits have not been attached and the reasons showing cause why the Court may enter a decree of adoption under 23 Pa.C.S. § 2901, notwithstanding the absence of all legal requirements having been met;

(11) whether the Agency or Intermediary, if any, counsel representing the Agency or Intermediary or counsel representing any other party to the adoption has informed the Prospective Adoptive Parent(s) and the Adoptee who has attained twelve (12) years of age of the opportunity to enter into a Contact Agreement, or the reason(s) why such notice has not or cannot be given;

(12) whether a proposed, executed agreement for post-adoption contact and/or communication is attached to the petition as an exhibit, and if so, an averment as to one of the following:

(A) the Contact Agreement and Court order approving the Contact Agreement are attached as exhibits to the petition; or

(B) a proposed, executed agreement for post-adoption contact and/or communication has been submitted and is pending before the Court; or

(C) a proposed, executed agreement for post-adoption contact and/or communication is being filed with this petition or under a separate petition simultaneously with the filing of this petition;

(13) the proposed new name of the Adoptee if a change in name is desired;

(14) that the petitioner(s) desire to have the relationship of parent and child established between the petitioner(s) and the Adoptee; and

(15) that each petitioner has read and understands the petition and believes its filing to be in the Adoptee's best interests.

(b) ***Exhibits.*** The petition shall have attached to it the following exhibits, **unless otherwise specified in the petition:**

(1) a birth certificate or certification of registration of birth of the child;

(2) the consent(s) required by 23 Pa.C.S. §[§] 2711, as applicable;

(3) unless previously filed, **or inapplicable to the particular adoption**, the Report of the Intermediary with the exhibits required under 23 Pa.C.S. § 2534;

(4) a verified statement from a representative of the Agency or Intermediary, counsel representing the Agency or Intermediary, or counsel representing any other party that notice was provided to the Prospective Adoptive Parent(s) and to the Adoptee if he or she has attained twelve (12) years of age regarding the opportunity to enter into a Contact Agreement and the specific date(s) on which such notice was given; and

(5) any Contact Agreement and the Court order approving the Contact Agreement, or if not previously approved, any proposed, executed agreement for post-adoption contact and/or communication for which Court approval is requested, unless the agreement is being submitted under a separate petition.

(c) ***Notice or Consent—Parents of Child.***

(1) Notice of the hearing on the petition for adoption shall be given to each birth parent as provided by Rule 15.3 unless:

(A) he or she has consented in writing to the adoption and his or her consent has been previously confirmed as provided in Rule 15.7;

(B) he or she has voluntarily relinquished his or her parental rights in a proceeding under Rule 15.5 or Rule 15.6;

(C) his or her parental rights have been involuntarily terminated in a proceeding under Rule 15.8; or

(D) **where the evidence shows that the Adoptee was conceived through anonymous donor sperm, or**

from a donor who donated sperm in a clinical setting and signed a contract waiving his rights and therefore no termination hearing was necessary.

(2) If, as part of the adoption hearing, the petitioner(s) is/are seeking Court approval for a proposed, executed agreement for post-adoption contact and/or communication, the petitioner(s) shall serve a copy of the petition for approval and the proposed agreement as provided in subparagraph (d)(1) of Rule 15.10 upon the individuals and entities therein listed, shall file a Certificate of Service as provided in subparagraph (d)(2) of Rule 15.10, and shall provide notice of the adoption hearing to these individuals and entities as provided in subparagraph (f)(3) of Rule 15.10.

(d) ***Investigation.*** A petition for adoption shall be subject to investigation as prescribed by local rules. The investigation report shall cover the matters alleged in the petition, any other matters that may affect the welfare of the child, and the information required by 23 Pa.C.S. §§ 2535 and 2724, **unless the petition for adoption is the petition of the unmarried same-sex partner (or unmarried heterosexual partner) of the parent of the Adoptee.**

(e) ***Hearing.*** The Court shall conduct a hearing on the petition for adoption to determine the desirability of the proposed adoption and whether the adoption will promote the Adoptee's needs and welfare. Upon a hearing, if the Court determines that the adoption can be granted, the Court shall enter a decree as provided in Section 2902 of the Adoption Act. See 23 Pa.C.S. § 2902.

(1) If the petition for adoption contains averments as provided in subparagraph (a)(10), the Court shall take evidence to determine if the petitioner has shown **good** cause for failing to meet the statutory requirements of the Adoption Act and has demonstrated that the Adoptee's needs and welfare nevertheless will be best served by entering a decree of adoption. The petitioner shall present evidence upon which the Court can find cause to dispense with a statutory requirement of the Adoption Act

Lisa M. Rhode, Esquire
January 22, 2014
Page Eight

at the adoption hearing or in a separate hearing, as the Court may determine. **If the Court determines that a home study and preplacement report under 23 Pa.C.S. § 2530 or any postplacement reports are required in the case of an unmarried same-sex partner (or unmarried heterosexual partner) of the parent of the Adoptee, then said reasons for requiring the home study are to be set forth in writing by the Court.**

(2) At the hearing on the petition for adoption, there shall be offered in evidence a report, certified by counsel for the petitioner(s), setting forth the amount of fees and expenses paid or to be paid to counsel, and any other fees, costs and expenses paid or to be paid to an Intermediary or any other person or institution, in connection with the adoption.

(f) **Adult—Change of Name.** When the person to be adopted is over the age of 18 years and desires to assume the surname of the adopting parent(s), evidence showing compliance with the law relating to change of name must be introduced before a decree will be made.

(g) **Decree.** The Decree of Adoption shall conform to the requirements of 23 Pa.C.S. §§ 2901- 2902, 2904.

Explanatory Comment: The Court, in its discretion, can dispense with any statutory requirement of the Adoption Act for cause shown. See 23 Pa.C.S. § 2901. As a result, if petitioner is unable to satisfy all the prerequisites or attach all the exhibits required by the Adoption Act, the petition for adoption should not be dismissed summarily. Rather, the petitioner should be afforded an opportunity to demonstrate why a statutory requirement has not or cannot be met and why the proposed Adoptee's best interest is nevertheless served by granting the adoption petition. For example, in *In re Adoption of R.B.F. and R.C.F.*, 569 Pa. 269, 803 A.2d 1195 (2002), the Supreme Court, after construing and relying upon section 2901, determined that the Adoption Act does not preclude two unmarried same-sex partners (or unmarried heterosexual partners) from adopting a child because the hearing judge for cause

Lisa M. Rhode, Esquire
January 22, 2014
Page Nine

shown can dispense with the statutory requirement that a consent to adopt under section 2711(d) include, *inter alia*, a relinquishment of parental rights by the parent consenting to the adoption.

If the petition for adoption contains averments as provided in paragraph (a)(10), the Court shall conduct an evidentiary hearing. If after reviewing the averments in the petition, the Court is satisfied that cause can be shown and the Adoptee's best interests will be promoted by the entry of a decree of adoption, then the Court should conduct one hearing on the adoption petition, taking evidence of why all the statutory requirements have not and need not be met as well as why the Adoptee's needs and welfare will be promoted by the adoption. Nothing prevents the Court, in its discretion, from conducting separate evidentiary hearings if the Court after reviewing the petition is uncertain that the averments establish sufficient cause for relieving the petitioner(s) of a statutory requirement under the Adoption Act. In all cases, however, the petitioner is entitled to a hearing and an opportunity to present evidence in support of the averments in the petition. See *In re Adoption of R.B.F. and R.C.F.* The Court, in its discretion, can dispense with any statutory requirement of the Adoption Act if the petitioner presents evidence establishing cause for failing to meet a statutory requirement. See 23 Pa.C.S. § 2901.

Per section 2733(c) of the Adoption Act, 23 Pa.C.S. § 2733(c), notice of the opportunity to enter into a Contact Agreement should be given to any Adoptee who reasonably can be expected to understand the opportunity, benefits and consequences of continuing post-adoption contact and communication with Birth Relative(s). Notwithstanding the statutory language, this Rule requires proof only that notice was given to an Adoptee who is twelve (12) years of age or older because the Court, without separate, independent evidence and observations, is not capable of determining which Adoptees are sufficiently mature and capable of understanding this notice and opportunity; and furthermore, only an Adoptee[s] who has attained twelve (12) years of age must consent to any proposed agreement for post-adoption contact and/or communication submitted to the Court for approval. See 23 Pa.C.S. § 2738(c)(3).

Lisa M. Rhode, Esquire
January 22, 2014
Page Ten

Thank you for the opportunity to submit our Comments. Once again, we congratulate you on your remarkable work and we are available at your convenience to answer any questions you might have about our submission.

Sincerely,

Helen Casale, Esq.
Chair, GLBT Committee

Lisette McCormick, Esq.
Executive Director
PA Interbranch Commission for Gender, Racial and Ethnic Fairness

cc: Daniel Durst
Interbranch Commission
Justice Debra M. Todd