

**Matter of Advocates for Adoption, Inc. v New York
State Office of Children and Family Services**

2008 NY Slip Op 33522(U)

December 30, 2008

Supreme Court, New York County

Docket Number: 107213/08

Judge: Herman Cahn

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Cahn

Justice

PART 49

^{FOR}
ADVOCATES ADOPTION

INDEX NO. 107213-08

- v -

NEW YORK STATE OFFICE

MOTION DATE _____

MOTION SEQ. NO. 1

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION IN MOTION SEQUENCE.

FILED
JAN 12 2009
COUNTY CLERK'S OFFICE
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 12/30/08

[Signature]

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 49

-----X

In the matter of the Application of :
ADVOCATES FOR ADOPTION, INC. :
and JUDITH S. LEE, :

Petitioners, :

for a Judgment Pursuant to Article 78 :
of the Civil Practice Law and Rules :

Index No. 107213/08

- against - :

NEW YORK STATE OFFICE OF CHILDREN :
AND FAMILY SERVICES and GLADYS CARRIÓN, :
in her capacity as COMMISSIONER of the :
NEW YORK STATE OFFICE OF CHILDREN :
AND FAMILY SERVICES, :

Respondents. :

-----X

Herman Cahn, J.

Petitioners Advocates for Adoption, Inc. and Judith S. Lee (together "AFA") bring this Article 78 proceeding against Respondents New York State Office of Children and Family Services ("OCFS") and its commissioner Gladys Carrión, to challenge its denial of AFA's application for reauthorization.

BACKGROUND

AFA is a not-for-profit adoption agency in New York. Lee is AFA's Executive Director. OCFS is the state agency, and the successor to the Department of Social Services ("DSS"), that is charged, *inter alia*, with authorizing and supervising adoption agencies within the State. In 1995, when AFA was incorporated, OCFS granted its application to become an authorized adoption agency.

In November 2006, AFA applied to OCFS for renewal of its authorization to operate as an adoption agency. By letter dated January 23, 2008, OCFS denied AFA's application on the grounds that "substantive programmatic deficiencies exist which warrant denial of AFA's application for approval." Pet, Ex A at 1. The letter also informed AFA to cease the intake of new clients and to submit to OCFS, within 30 days, a plan to close down.

OCFS' grounds for denial of AFA's application was based primarily on AFA's alleged conduct in connection with three incidents. The first incident involved a Pennsylvania birth mother of an unborn child and the prospective adoptive parents of the child. The adoptive parents were AFA's clients. They had made a complaint to OCFS about the incident. OCFS' alleges that AFA had advised the adoptive parents to pay bail for the birth mother's adult son. According to the adoptive parents, who made the payment, they believed it was a fee associated with the adoption because AFA had informed them that it was legal and that their failure to make the payment might jeopardize the prospective adoption.

For the protection of the parties involved, all fifty States have agreed to cooperate in facilitating guidelines for interstate adoptions, that include provisions as to which expenses may be passed to individuals seeking to be adoptive parents.

OCFS contends that the payment was not an allowable adoption expense and would have resulted in OCFS denying the prospective adoption, had it proceeded to completion. AFA, however, contends that it relied on the representations of the birth mother's Pennsylvania attorney, who informed it that the payment was legal. In any event, the adoption was not consummated because the birth mother changed her mind, upon giving birth. OCFS alleges that, when AFA conveyed this information to the adoptive parents, it did not document any explanation given to the adoptive parents, regarding the failed adoption, or any offer of

counseling or other services to the adoptive parents. OCFS contends that this failure was a violation of its regulations regarding the provision of adequate services to prospective adoptive parents. *See* 18 NYCRR 421.2(c).

The second incident involved a New Jersey adoption agency's home study of potential adoptive parents, notarized and on its letterhead, that was allegedly altered and transmitted by AFA to a New Jersey adoption agency. Home studies are reports that are typically generated in adoption situations that summarize the characteristics and suitability of prospective adoptive parents. *See* Judith S. Rycus, et al., *Confronting Barriers to Adoption Success*, 44 FAM CT REV 210, 213 (2006). OCFS alleges that AFA made an unauthorized alteration of the home study prepared by one adoption agency, Growing Families Worldwide Adoption Agency, Inc. ("Growing Families"), and transmitted it to another adoption agency, Better Living Adoption Services, Inc. ("Better Living"). It alleges that AFA altered the report from one reflecting two adoptive parents within the prospective adoptive placement (a two parent home study), to a report in which only one of two adults in the home was applying to be an adoptive parent (a single parent home study).

AFA contends that the incident occurred when it attempted to explain to Better Living how to prepare a home study for a same sex couple, where only one adoptive parent would be listed. However, when the explanation failed, AFA sent the report to Better Living, after making the alteration. It contends that it transmitted the report only as a reference to enable Better Living to prepare a new home study. It maintains that it never intended for the document to serve anything more than an educational purpose. Further, AFA asserts that it informed the Better Living employee involved to destroy the document after reading and understanding how to proceed in preparing the new home study.

The third incident involved prospective adoptive parents, who paid bail for a birth mother of an unborn child they anticipated adopting. The incident came to the attention of OCFS' when it conducted an on-site review of AFA, in April 2007, by reviewing a random sample of cases. OCFS alleges that AFA again improperly relied on the representations of an out-of-state attorney, the adoptive parents' Louisiana attorney, who informed it that the expense was allowed under Louisiana law. OCFS contends that the payment was not legal and would have resulted in its denial of the adoption placement.

On May 22, 2008, AFA filed this Article 78 petition. It challenges OCFS' determination to deny its application for a certificate of amendment as being based on "improper and discriminatory factors not mentioned in the [letter of denial]." Pet, ¶ 8. It contends that those factors include AFA's approval of interracial adoptions and adoptions to same sex and ultra-orthodox Jewish couples. It also claims that the penalty is disproportionate to its alleged offenses.

DISCUSSION

In Article 78 proceedings, the Court reviews whether the administrative decision made was supported by substantial evidence or was arbitrary or capricious. *See Nelson v Roberts*, 304 AD2d 20, 23 (1st Dep't 2003); *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale and Mamaroneck, Westchester County*, 34 NY2d 222, 230-35 (1974).

First Incident

As an authorized adoption agency, AFA is required to "protect the rights of adoptive families through responsible agency administration." 18 NYCRR 421.2(c). Further, adoption agencies must ensure that adoptive parents pay only for the "reasonable and necessary expenses" associated with the placement of an adoptive child. Social Services Law ("SSL") § 374(6); *see*

also Domestic Relations Law (“DRL”) § 115(8). These expenses may include the reasonable and necessary expenses that stem from the birth mother’s pregnancy and housing, the birth of the child and other such fees related to the adoption process. *See* SSL § 374(6); DRL § 115(8).

Both AFA and OCFS agree that the payment of bail for a birth mother’s adult son is not an allowable adoption expense associated with the placement of an adoptive child. However, AFA contends that it properly relied on the factual assertions of the birth mother’s Pennsylvania attorney, who assured it that the adoptive parents would not be responsible for the payment. Pet, ¶ 12. OCFS contends that, because the adoptive parents incurred a disallowed expense, it would have been required to deny the adoption, in accordance with the Interstate Compact on the Placement of Children, which requires the fifty States to “cooperate with each other in the interstate placement of children.” SSL § 374-a. Further, OCFS alleges that it had previously warned AFA to comply with New York law, with regard to fees associated with the adoption process, and the serious implications of non-compliance. It had also warned AFA not to rely on the representations of out-of-state attorneys on such matters.

OCFS also argues, in the alternative, that AFA failed to adequately protect the rights of the adoptive parents in this instance because there is evidence in the case record that they had requested AFA’s guidance regarding the bail payment. *See* 18 NYCRR 421.2(c). Therefore, OCFS contends that AFA either provided incorrect guidance or failed to provide the necessary guidance in a matter that was significant to a potential interstate adoptive placement.

Second Incident

An authorized adoption agency must also maintain written records of each adoption that comply with its own policies and OCFS’ regulations and maintain records in connection with all adoption inquiries. *See* 18 NYCRR 421.3(c); 18 NYCRR 421.11(i).

OCFS argues that AFA violated these standards when it engaged in the unauthorized alteration of the Growing Family's home study and transmitted it to Better Living. This occurred after its explanation allegedly failed regarding the preparation of a single adoptive parent home study. OCFS contends that, in violation of the statutes, the case record in connection with the second incident contained no documentation of the communications that allegedly took place between AFA and the Better Living employee involved. OCFS found the explanation provided by AFA, that it transmitted the report for only the purpose of its serving as a reference, questionable. Indeed, OCFS found that Better Living had been serving same sex couples for several years and had been in the adoption business for more than two decades. Additionally, OCFS contends that, although AFA asserts that it instructed the employee involved to destroy the document after reading, the case file contains no documentation that AFA followed up with Better Living to ascertain whether it had in fact been destroyed.

Third Incident

Similar to the first incident, OCFS argues that AFA committed violations, when it both relied on the representations of an out-of-state attorney, and allowed adoptive parents to incur the expense of bail for a birth mother of an unborn child they anticipated adopting. It also contends that AFA violated its own policies. OCFS asserts that AFA's form, concerning possible birth mother expenses, signed by the adoptive parents, states that "[a]ll expenses must comply with Section 374(6) of the Social Services Law: i.e., 'in connection with or as a result of her pregnancy or the birth of the child.'" Pet, Ex A. However, as OCFS reiterates, payment of the birth mother's bail is not an allowable adoption expense associated with the placement of an adoptive child.

AFA contends that it interpreted the related law broadly, in that it finds the expense of bail payments permissible when they are “incidental to the . . . care of the adoptive child’s mother.” DRL § 115(8). Further, AFA alleges that it was informed by the adoptive parents’ Louisiana attorney that the payment was reasonable and necessary to ensure the birth mother’s health, safety and welfare during her pregnancy. Therefore, it argues that it cannot be held liable in the event that the attorney was incorrect. *See In re Adoption of Stephen*, 168 Misc 2d 943, 947 (Fam Ct Monroe County 1996) (finding that, where unauthorized payments were made upon the advice of counsel, “it [was] appropriate to require counsel to refund” the adoptive parents). However, AFA’s reliance on the case law is misplaced, since it had been previously warned by OCFS specifically not to rely upon the representations of out-of-state attorneys, and *In re Adoption of Stephen*, to the contrary, involved the representations of a New York attorney.

Other Allegations of Violations and Non-Compliance

In its denial letter, OCFS emphasized that the three incidents discussed above were not “isolated misjudgments by AFA.” Pet, Ex A at 11. Through another on-site inspection of AFA and a review of a random sample of eight cases, OCFS alleges that AFA committed various other regulatory violations. It found that in three cases AFA had failed to make progress notes related to adoption placements, and in four cases post-placement contact with adoptive parents had not taken place within the required five-days following placement. AFA, however, maintains that the records cited by OCFS were in fact complete and in compliance with the appropriate statutory law.

OCFS also alleges that AFA has been cited, by OCFS and its predecessor, the DSS, for various other violations of New York law and regulations, since its initial certification in 1995. It contends that, on those occasions, AFA provided assurance of its compliance with the

applicable statutes and regulations, including with regard to previous applications for renewal of its authorization to operate as an adoption agency. OCFS reasoned, however, that in light of the three incidents that form the basis of its decision, AFA has continued to fail to comply with legal standards.

The OCFS determination was supported by substantial evidence and was not arbitrary or capricious. The petition is dismissed.

The Court has considered AFA's remaining contentions and finds them to be without merit.

Accordingly, it is

ORDERED that the Petition is dismissed in its entirety; and it is further

ORDERED that the clerk shall enter judgment accordingly.

Dated: December 30, 2008

FILED
JAN 12 2009
COUNTY CLERK'S OFFICE
NEW YORK

ENTER:



J.S.C.