

## Essentials of Adoption Law

### Qualifications and Criteria

#### Who May Adopt?

- Minn. Stat. §259.22. Any person who has resided in the State of Minnesota for more than one year may petition to adopt a child or an adult
  - By statute, residency period may be shortened to 30 days if in the child's best interests; may be waived entirely if the petitioner is "related" to the child as defined by 245A.02, subd. 13; or in other limited circumstances. Generally such a waiver is going to require a motion to the court with supporting affidavits, memorandum and proposed order.
  
- An "adoption study" (colloquially referred to as a homestudy) completed by a licensed agency is generally required in order for petitioners to adopt. Minn. Stat. §259.41. It must be current (within the past 12 months). *Id.* Generally the homestudy must be *complete, prior to the placement of the child*, except when an emergency placement order has been obtained pursuant to Minn. Stat. §259.47.
  - Exceptions do apply – most notably certain relatives may be exempt from at least some of the homestudy requirements. Minn. Stat. §259.22, subd. 1(b).
  - Homestudies, in order to be valid, have a number of requirements; most significantly in the past few years the criminal background check process has changed substantially with the additional requirements of the "Adam Walsh" checks. The background checks now do take longer than in the past as a result; and homestudies may therefore take longer to complete than in the past; prospective adoptive parents should be strongly encouraged to timely seek a homestudy from a licensed, qualified agency.
  
- Criminal Background issues
  - A valid homestudy must include a completed background study pursuant to Minn. Stat. §245C.33. Essentially this will entail a significant check of criminal records as well as child protection/vulnerable adult protection records; and sex offender registries.
  - Many offenses will come up on a criminal background check that are not "disqualifying" – i.e. a petitioner may still be approved to adopt. However, note that criminal checks with any results whatsoever, are significantly delayed (often by weeks) and thus delay the homestudy. Depending on the nature of the offense, a court may have questions and clients should be prepared to answer those.
  - The law is not clear on whether the court has the discretion to approve an adoption despite a "disqualifying" offense. What is at least clear, is that federal adoption assistance payments can be precluded for such an offense. Minn. Stat. §259.41, subd. 3.

- Stepparents
  - Stepparent adoptions are much simpler, in that many of the requirements that apply for a homestudy and execution of the consent to the adoption, are waived or simplified. Minn. Stat. §259.41, subd. 1(b); Minn. Stat. §259.24, subd. 5.

### **How Does It Actually Work?**

- Minnesota adoptions are venued in juvenile court, with some specific location requirements. Minn. Stat. §259.23.
- Minnesota allows both traditional agency adoptions (in which a licensed child placing agency, whether a private or state agency, places a child with prospective adoptive parents) and direct placement adoptions (in which the birth parent or parents directly places the child with the prospective adoptive parents, pursuant to court order, often called ‘independent’ or ‘open’ adoptions). See Minn. Stat. §259.22; §259.47
- The ‘connection’ between adoptive parents and birth parent(s), today happens in any number of ways – through friends, families, the Internet, marketing efforts by one or both, traditional agency selections, etc. Often, the choice of whether to proceed with an agency or a direct placement adoption, is dictated not by the manner in which the adoptive parents and birth parent(s) came together, but by what works best for their particular circumstances.
- Consents to adoption in Minnesota have multiple specific requirements, including triplicate originals and a number of specific witness/execution requirements. Minn. Stat. §259.24. These must be adhered to, or a consent may well not be valid.
- Expenses which may, or may not be, paid are regulated by Minnesota law; and criminal charges could result from violations. Minn. Stat. §259.55.
- Birth parents do have certain rights, including a right to counseling and to legal counsel; these rights may be waived but only voluntarily. See, for example, Minn. Stat. §259.47.
- Adoptive and birth parents may choose to enter into a “contact agreement” which becomes a court order, enforceable in family court, as to the terms of an open adoption arrangement. Certain requirements apply. Minn. Stat. §259.58.
- Adoptions may not be completed in Minnesota until the child has resided at least 90 days with the adoptive parents; although some exceptions do apply. Minn. Stat. §259.53, subd. 4.

### **Who May be Adopted?**

- Minn. Stat. §259.22, subd. 2 – generally a child, to be eligible to be adopted, must have been placed by the commissioner of human services or their agent, a licensed child placing agency, or by court order pursuant to Minn. Stat. §259.47 (direct placement adoption); however exceptions do apply and include:
  - Children over 14 years old;

- Children related to the petitioner, by definition;
- Children legally placed under the laws of another state, while the child and petitioner resided in that other state;
- And notably this placement requirement may be waived by the court in the best interests of the child (again, will generally require a motion to the court with supporting affidavits, memorandum, proposed order, etc)

### **Adoption Assistance**

Adoption Assistance, often colloquially referred to as “subsidies”, may be available in limited circumstances for some children/adoptive parents. This can be a very complex topic for which referral to experienced practitioners may be advisable. Minn. Stat. §259.67 is a starting point; however numerous additional regulations do apply in this area.

Essentially, to be eligible for adoption assistance, a child:

- must have had parental rights terminated (not through a consent to adoption; but instead by court order for the termination of parental rights, even if issued with the parent’s consent);
- must have been placed in the guardianship of a licensed child placing agency (i.e. direct placement adoptions are generally not eligible for this program);
- the child must meet certain criteria related to existing special needs or a risk of developing special needs;
- and the state’s adoption assistance program must then agree and enter into an adoption assistance agreement with the adoptive parents.

Adoption assistance can be helpful, in that it can, at times:

- provide the adoptive parents with a one-time reimbursement, up to \$2000 currently, for non-recurring adoption expenses per child (such as legal or agency fees);
- can provide ‘backup’ medical coverage beyond the confines of the parent’s individual health insurance plan;
- can provide services such as respite care; specialized summer camps; or other services.

Once in place, adoption assistance agreements must be renewed each year. Adoption assistance is not ‘means tested’ and as such is not affected by the assets/income of the adoptive parents.

In recent years, the availability of these programs, particularly for children who do not yet have special needs but are at risk of developing such needs, has been sharply curtailed. In addition, requirements that the children be first at least attempted to be placed with prospective adoptive parents who would not request the adoption assistance, have been more stringently interpreted and applied, leading many adoptive parents to forego requesting a subsidy so as to avoid the risk of someone else taking the child without the subsidy. And, in order to become eligible, additional fees to an agency (to take guardianship); to an attorney (to do the required termination case), may make it not financially a cost-effective option. However, for some children, adoption assistance can be an important avenue to investigate.

## **Tax Credits**

Tax credits are available for adoption expenses, and can provide adopting families with a significant benefit in recouping some of the substantial costs of an adoption process. The tax credits do have an income ‘phase out’; and do vary a bit depending upon whether a child has special needs or not. In addition, the tax credits have been changed in recent years and are at times a political issue on a national level. IRS opinions do exist about when and how to claim the credit in certain circumstances (such as claiming the credit for expenses for a failed adoption). Prospective adoptive parents should be advised to consult with a qualified tax professional in order to ensure they receive the maximum potential tax credits available to them in their situation.

## **Additional Issues**

A number of additional issues should be considered. First, remember adoption is very state-specific; each of the 50 states have their own unique statutes and requirements as to adoption. Ensuring the law of your state is followed, is critical and not always as easy as it sounds given the wealth of contradictory information available about adoption.

### **A. The Indian Child Welfare Act (“ICWA”).**

The ICWA is a set of federal statutes which provides unique – and critical – requirements to be aware of whenever a child or the child’s birth parent or parents may have Native American heritage. See 25 U.S.C. §1901 et seq. If a child is eligible for the protections of these statutes, it can drastically and dramatically affect the decision-making process; who is entitled to notice of an adoption and who may become involved; what parties have what rights; what steps must be taken and when.

There are also other critical authorities to be aware of, including the Minnesota Indian Family Preservation Act (MIFPA), Minn. Stat. §260.751 et seq; as well as BIA guidelines, the Minnesota Department of Human Services Tribal State Agreement; and specific issues related to children of Native American heritage eligibility for the application of these statutes are noted throughout the various procedural rules that may apply to a given adoption or termination proceeding.

### **B. IEPA/MEPA**

Over the past 15 years, federal policy changed drastically in regards to the placement of children and considerations of racial heritage. First, Congress enacted the Multi-Ethnic Placement Act (“MEPA”), with language designed to broaden the race-based focus on adoption and foster care placements, in 1994. See 42 U.S.C. §622. Two years later, in 1996, when it was determined that this language was not strong enough to ensure placements were not being delayed or denied due to race considerations, Congress enacted the Removal of Barriers to Interethnic Adoption Act, (“IEPA”), codified at 42 U.S.C. §1996b. (together the two statutes, and their effects, are often colloquially referred to as “MEPA/IEPA”). These changes, were both statements of policy as well as enforced through a restriction on federal funding.

Specifically, federal law required that, by no later than January 1, 1997, in order to receive federal funding any State or state entity which is involved in adoption or foster care placements must have plans in place which prohibit any delay or denial of placement of children for foster care or adoption on the basis of the race, color, or national origin of the adoptive or foster parent, or the child, involved. 42 U.S.C. §671, subd. 18. And, with the Removal of Barriers to Interethnic Adoption Act of 1996, federal law stated:

**(1) Prohibited Conduct.** A person or government that is involved in adoption or foster care placements may not –

(A) deny to any individual the opportunity to become an adoptive or a foster parent, on the basis of the race, color, or national origin of the individual, or of the child, involved; or

(B) delay or deny the placement of a child for adoption or into foster care, on the basis of the race, color, or national origin of the adoptive or foster parent, or the child, involved.

42 U.S.C. §1996(b)(1). Thus, adoption placements could no longer be determined upon race or ethnicity. Children could not be delayed from their placements, based upon race or ethnicity.

Current discussions on a national level are occurring in a controversial manner surrounding these statutes; with some advocates claiming that MEPA/IEPA actually preclude the training of adoptive parents to be sensitive to racial and ethnic issues in the children they adopt and therefore advocating for an elimination of MEPA/IEPA; and others pointing out that not only is such training not precluded by the statute that if the statutes were eliminated a racial-preference practice would likely re-emerge.

### **C. Military Issues**

Military status is no legal bar for adopting families; although it may present unique logistical and cost challenges (particularly in obtaining a valid homestudy). Depending upon a military family's particular circumstances, military status may at times be a basis for requests to the court to shorten residency requirements or otherwise address their unique circumstances in a manner which meets both the best interests of the child and the family.

Be aware of the Soldiers and Sailors Civil Relief Act issues; particularly as they may apply to service requirements and birth fathers; if documents are required to be served and an interested party is in the military this can present complicating factors.