

PARENTING THROUGH ADOPTION
A BRIEF SUMMARY OF
MINNESOTA ADOPTIONS

The creation of family through adoption is one of the most satisfying and exciting things that parents can do. It is, however, like other ways of parenting, not without risk. There are many issues to be avoided and since at the end it is a legal process, consideration of and understanding of those legal issues is critical.

What follows is an extremely limited attempt to provide general information regarding some of the issues currently involved in adoptions and to provide a framework within which those people thinking about adoption might work as they become involved in this type of "family building."

Terminology

Working in adoption is often like using a foreign language. Because of this, the law attempts to clarify some of the legal issues. In an effort to set specific procedures to be followed in what had previously been called "independent adoptions" or "designated adoptions," the statute attempts to give more direction and definition to that process. It is important for anyone contemplating adoption to be aware of and have some understanding of, at a minimum, the following terminology:

1. Placement of a Child. As might be expected, "placement" means the actual transfer of physical custody of a child from the birth parent or "legal guardian" to a "pre-adoptive home". In particular, the law goes on to say that a petition for adoption cannot be filed by an adoptive couple unless the child was physically placed by a licensed child placing "agency" or pursuant to the requirements of obtaining a Court Order in a "direct placement adoption."
2. Agency Adoption. This is an adoption where a child is "physically placed" by a licensed child placing agency. It makes no difference in what manner the adoptive parents and the birth parents connected with one another, but rather relates directly to the manner in which a child is "placed", and by whom the child is "placed".
3. Direct Placement Adoption. This is an adoption where the child is "physically placed" by a birth parent or "legal guardian" other than an agency under specifically defined procedures, particularly involving the obtaining of a court order allowing the placement usually prior to the birth of the child. This is also often referred to as an "independent" or "private" adoption. (See more information further on.)
4. Designated Adoption. Designated adoption is a non legal term used by some persons simply to indicate that the birth parents have "designated" a specific couple or person to adopt a child.
5. Open Adoption. The term is used to refer to what knowledge or information sharing will exist between adoptive parents and birth parents following the completion of the adoption until the child reaches the age of majority. This can include a very "closed" situation with no

information or contact; to a more “open” adoption where there is a sharing of letters and photos on an annual basis, to a very open adoption which may even include visitation by the birth parents. These agreements are negotiable between the parties and were generally thought to be unenforceable following an adoption. These agreements are often referred to as “cooperative agreements.” The enforceability of such agreements has now changed radically and the agreements can now be enforced by Court Order if a “Contact” Order is used.

6. Contact Agreement and Order. Minnesota law allows for a Court to issue an Order confirming “communication or contact agreements” between adoptive parents and birth parents; adoptive parents and “birth relatives” with whom the child resided before being adopted; and adoptive parents and any other birth relative if the child is being adopted by a birth relative upon the death of both birth parents. “Birth Relative” is defined as a parent, stepparent, grandparent, brother, sister, uncle, or aunt of the person being adopted. The relationship can be either by blood or by marriage.

The statute goes on to say that an agreement among these people is enforceable if it is done according to the requirements of the statute. These requirements include:

1. The terms of the agreement must be contained in a written court order.
2. An order may be requested at any time before the adoption is granted, but must be issued within thirty days of being requested or thirty days after the adoption, whichever is earlier.
3. The terms of the proposed order must be approved in writing by the adoptive parents, the birth parents or birth relatives, and an agency if the child is under the custody or guardianship of an agency. A birthparent must approve contact between a relative and adoptive parent in some cases.
4. The identity of the parties need not be disclosed to make the agreement enforceable.
5. The court must find that the agreement is in the child’s “best interests”.
6. The court shall mail a certified copy of the order to the parties or their attorneys.

If after the order is entered one of the parties fails to comply with it, the order may be enforced in family court. However,

1. Failure to comply is not grounds to set aside an adoption.
2. Failure to comply is not grounds to revoke a consent after the consent becomes irrevocable.
3. Mediation is required before going to family court to enforce the order.
4. If you go to court, the winning party may be awarded attorney’s fees.
5. An order for contact or visitation cannot be modified in a family court unless it is in the child’s best interest, and

- a. The change is agreed to by the adoptive parents and the birth relatives, or
- b. Exceptional circumstances have arisen since the order.
- c. Also, a copy of the court order must be given to the birth parents.

General Procedures Necessary in Direct Placement Adoptions

As stated, Minnesota law specifically sets out a procedure that may be used in a “direct placement adoption” in order to have clear legal authority for the child to be placed with the adoptive parents without an adoption agency. In general, that is as follows:

1. Pre-Adoptive Custody Order. This allows the adoptive couple to get an order from the court in their county so that the child may be placed with them at the time of birth. The order may be obtained up to 60 days prior to the anticipated birth of the child. The request for the order is supported by a statement that the adoptive parents will be filing an adoption petition, an affidavit from birth parents indicating support for the placement, an itemized statement of expenses, the names of attorneys for each party, an indication that birth parents have provided medical and social history, have been notified of their rights, and name of the agency doing the adoption study.
2. Emergency Order. This is an order allowing the court to give "temporary pre-adoptive custody" to proposed adoptive parents for up to 14 days. The request for the order must describe the extraordinary circumstance which prevented the completion of the regular requirements necessary for the pre-adoptive custody order.
3. Adoption Study. This is a written report which must be completed before the child is placed in the adoptive home. (There may be a 14-day gap under the temporary pre-adoptive custody order if the homestudy is underway). The study needs to be filed with the district court at the time the petition is filed. In a direct placement adoption, the report must be filed to support the motion for pre-adoptive custody.

The adoption study, sometimes referred to as a "homestudy" must be completed by a licensed child-placing agency and must be thorough and comprehensive.

The law has specific requirements for inclusions in the adoption study, including a check of all criminal convictions for anyone over the age of 13 living in the household; a check of juvenile records for each person over 13; current medical and social health history; an assessment of potential parenting; an assessment of ability to provide adequate financial support for the child; and an assessment of the level of knowledge and awareness of adoption issues. Further, the study must include at least one in-home visit with prospective adoptive parents. The study is good for 12 months.

In certain “relative” or “foster parent” situations an “adoption study” is not required. The statute also eliminated the need for an adoption study for certain close relatives. It also eliminated the need for studies by certain previously licensed foster parents.

4. Birth Parent Counseling and Affidavits. The birth mother must also submit affidavits in support of the placement, indicating an agreement with the placement. The birth mother must also submit a separate affidavit if the birth father fails to submit one supporting the placement. That additional affidavit must describe the birth mother's "good faith efforts" or efforts made on her behalf to identify and locate the birth father "for purposes of securing his consent."
5. Adam Walsh Check. This is a Federal law that requires criminal history checking and use of fingerprints for adoptive parents.

Termination of Parental Rights/Consent to an Adoption

In order for an adoption to occur, any legal connection between birth parents and children must be eliminated. Under Minnesota law there are several ways this can occur. They are as follows:

1. In Court Termination of Parental Rights. Under this procedure, the law allows a parent to go into court and voluntarily consent to the termination of his/her parental rights when "good cause" is shown. This requires an in court hearing before a judge or referee and the signing of a "consent to termination of parental rights" at the time of the hearing. In general, courts will allow the voluntary termination of parental rights in an infant situation where the parents are unable to care for the child and the adoption is imminent. There is also a procedure for involuntary termination of parental rights.
2. Consent to Adoption. The form is referred to as the 10-day form. It allows a birth parent to sign a form, with a representative from an agency witnessing it, consenting to a child being adopted. The consent can go to an agency for placement or it can go directly to adoptive parents. If done properly with the proper form, once a consent is signed, then 10 working days later (14 calendar days), the consent becomes irrevocable and the birth parent may not withdraw the consent unless there has been a showing that the parent had been defrauded. A similar consent may be signed in a court hearing under certain circumstances.
3. Adoptive Father or Putative Father Registry: In order to protect his rights to parent a child, a father, unlike a mother, must register his decision on the Minnesota Fathers' Adoption Registry monitored by the Bureau of Vital Statistics.

In general, the registry works as follows:

- A. Any putative father may register.
- B. Search of the registry is required in nearly every adoption.
- C. A birth mother, agency, attorney or county agency may request a search of the registry at any time.

- D. If no putative father has registered, then any many is barred from objecting to the adoption.
- E. If a putative father has registered then at any time after conception an interested party may serve the putative father with (1) adoption registry notice; (2) intent to claim parental rights with entry of appearance form and (3) denial of paternity with entry of appearance and consent to adoption form. This may be done by personal service or by certified mail.

If done by certified mail, the receipt must state the name and address of the putative father and date of mailing, and it must also be attached to the original by court.

- F. Putative father's response to notice.

If within 30 days of receipt the putative father files a completed intent to claim parental rights with entry of appearance form stating his intent to bring a paternity action and begin a paternity action, he:

- (a) is barred from any action to assert interest in pending adoption;
- (b) has waived and surrendered his right to notice of any adoption proceeding; his consent is not required; and
- (c) he has abandoned child.

- G. A putative father who has not timely registered is considered to have timely registered if he proves by clear and convincing evidence that:
 - 1. Was not possible for him to register within time specified;
 - 2. Failure no fault of his own; and
 - 3. Registered within ten days after possible (lack of knowledge of pregnancy or birth is not acceptable reason for failure to register).

Reimbursement of Birth Parent Expenses.

The law specifically recognizes the benefits to all persons of allowing adoptive parents to reimburse birth parents for expenses incurred "in connection with the adoption." More specifically, the statute indicates that prospective adoptive parents or someone on their behalf may pay the following expenses of the birth parent:

- 1. Reasonable counseling, medical, and legal fees which should be paid directly to the provider.
- 2. Reasonable expenses for transportation, meals and lodging incurred for the placement of the child or in order to receive counseling, legal or medical services related to the pregnancy, birth or placement.

3. Reasonable expenses for adoption services provided by an agency at the request of the birth parent which shall be paid directly to the agency.
4. Reasonable living expenses of the birth mother needed to maintain an adequate standard of living which payments may cover expenses incurred during the pregnancy, and incapacity; but not for a period longer than six weeks following the delivery. Payment here shall not be contingent upon placement of the child for adoption, consent to adoption, or cooperation or completion of the adoption.
5. Reasonable living expenses does not include lost wages, gifts, educational expenses, or other similar expenses of the birth mother.
6. A contract for reimbursement to adoptive parents by birth parents of payments made in this area is void and against public policy under any circumstances.
7. It is a gross misdemeanor for anyone to give or for a birth parent to accept money or anything of value or compensation for the placement of a child for adoption.
8. Adoptive parents are not entitled to get money paid back for expenses if the birth mother chooses to not place the child.

Interstate Adoptions

In today's mobile society, it is quite frequent that children are placed from one state to another throughout the adoption process. When this happens, it invokes the terms of the Interstate Compact on the Placement of Children (ICPC). All states have passed this statute, and the statute is essentially a notice statute. It requires that the state which the child is coming from notify the state where the child is being placed of the fact that the placement is occurring. This allows the "receiving" state to be sure that the placement is with a proper and approved family. Unfortunately, each state has its own set of rules interpreting the ICPC so care should be taken to plan ahead to meet the individual requirements of each state.

Tax Credit

There are some specific tax consequences to adoption. A qualified tax specialist should be consulted before any deduction or credit is taken. In general, however, the new tax law (for 2008) provides an adoption tax credit for qualifying expenses paid to adopt each eligible child up to \$11,650. The credit may be allowed for the adoption of a child with special needs even if you do not have any qualifying expenses. Although the credit generally is allowed for the year following the year in which the expenses are paid, a taxpayer who paid qualifying expenses in the current year for an adoption which became final in the current year may be eligible to claim the credit on the current year return. The tax year the tax benefit can be taken should be

reviewed by a tax specialist. Also, the maximum exclusion from income for benefits under your employer's adoption assistance program has increased to \$11,650 as of 2008. These amounts are available in full for income up to \$174,730 or less and gradually reaches zero when income reaches \$214,730. You cannot claim the credit or exclusion if your income is \$214,730 or more. During the adoption process, you may not have been able to obtain an existing or new Social Security Number (SSN) for the child who may already have been placed in your home. If you are eligible to claim the child as your dependent, and you don't have the child's SSN, then you will need to request an Adoption Taxpayer Identification Number ("ATIN") issued by the Internal Revenue Service to identify the child while final domestic adoption proceedings are pending. Additional information is available at www.irs.gov and again, we strongly urge that you seek advice from a tax specialist when taking these credits.

Foreign Adoption – Automatic Citizenship

Since 2001, most foreign born children adopted by U.S. parents are given automatic citizenship. However, issues still remain. Although citizenship automatically attaches when the child lawfully enters the U.S., parents will want to acquire written proof of such citizenship. That can be accomplished by applying for a passport or by applying for a certificate of citizenship.

Naturalization Process – The new law eliminates the need to go through the previous naturalization procedure in order for your child to qualify for citizenship. **This does not eliminate the need to obtain proof of your child's citizenship from INS.** The State Department has developed a relatively simple process for doing this which is at www.state.gov.

State Court Action – Also, it is important to understand that the new law deals only with the naturalization process and does not change the advisability of obtaining a court order from a state court clearly establishing that the legal parent-child relationship exists between you and the child. This step is very important for a number of legal and practical reasons.

Legal Reasons – It is often legally important to obtain a state order as to the adoption for a number of reasons. The statutes of the child coming from the other country is not always clear. The notice of the child's immigration status can be a concern. Also, the application of the Hague International Convention on Adoption may affect the child's legal right.

First, although you have adopted a child in a foreign country, that country does not have the same constitutional and legal protections of our country. For instance, in the United States, once a court has taken jurisdiction, heard testimony and rendered a court order, that court order cannot and will not be overturned by a court in this state or another state except under very rare and unique circumstances. Foreign governments do not necessarily operate under constitutions which mandate that once a court order has been signed that it cannot be changed. Further, children are adopted from foreign countries in which the relationship of that government and our government is often strained. It is a concern that the adoption could someday potentially be caught up in an international problem and you need to prove this child is your adopted child. Confirmation of these rights through a state adoption is often beneficial.

Second, although our federal government is now granting citizenship on the basis of the foreign adoption, the federal government is not readily accessible if there is ever a problem.

Further, if there is ever a question, for instance, a divorce, a custody suit or an inheritance suit concerning your child, the decision concerning that problem will in all probability be made by a state court. That state court will honor a previous state court's ruling that this child is your adopted child. Although arguments can be made when a contest arises about international decrees, treaties and federal law, these arguments will result in extensive legal fees and there is no predictability as to the outcome of these arguments. However, if you have a previous court order from a state judge, it would be extremely unlikely for another state judge not to readily honor that court order.

Practical Reasons – There are also a number of practical reasons to obtain a state order. First, it gives you a document in English that is clearly understood by everyone such as insurance companies, schools and other offices. Further, if the state court order is ever lost, another copy of it can be obtained from the courthouse that issued it. Also, by obtaining a court order, you can obtain a Minnesota birth certificate for the child, showing that you are the child's parents and reflecting the actual country of birth of the child. This is important because unlike a foreign birth certificate, if it is lost, it can be easily replaced. Further, in the court proceedings you can obtain a name change for the child if that is desired.

Timing – Timing is very important. Legal procedures in these situations are often inexpensive and judges are usually very agreeable if there is not a contest. If you wait until there is a problem, then obtaining a court order from a state court will be much more expensive and uncertain. For this reason, it is important that you contact an attorney as soon as possible after returning to the United States with your child. Timing is even more important if you are utilizing a state court procedure which necessitates the use of your home study, in that if there is too long of a delay between your home study and the court action, it may be necessary to have your home study redone or updated.

Steps to Follow Upon Return With Your Internationally Adopted Child -

1. Contact an attorney to begin either "Recognition of Foreign Adoption Decree" or Readoption.
2. Apply for your child's social security number.
3. Obtain a US passport for your child.
4. Stay in contact with your adoption agency in regard to INS updates and procedures on securing a Certification of Citizenship for your child.

Some of the Common Pitfalls in Adoption.

1. *Keep Your Eyes Open.* In today's adoption field, the most important issue of all is that everyone understand that adoption is a legal process controlled by language in state law, not just a social worker's paradise, and that there are certain laws that apply to any adoption proceeding. Adoptive parents should not put their heads in the sand, but should ask all the important questions, pay attention to any red flags, be aware of what "risks" may be involved and do a continuing "risk analysis" of the individual situation that they are involved in.

2. Indian Child Welfare Act. The Federal Indian Child Welfare Act set and state priorities for preference of Indian Children. The Act specifically gives Native American Tribes rights that are often superior to the child's and the parents' both in terms of adoption and court procedure. It is for example a very high standard for Involuntary Termination of Parental Rights. The preferences under the Indian Child Welfare Act are as follows:
 - a. a member of the child's extended family;
 - b. other members of the Indian child's tribe;
 - c. other Indian families.

Steps should be taken to see if ICWA applies to your adoption.

3. Choosing an Attorney. Care should be taken to hire an attorney with experience in complex adoption issues. A consultation with such an attorney prior to placement of a child will avoid later problems.

Conclusion

Adoption provides many excellent opportunities to benefit children and create families. The freedom that exists now provides an ability for birth parents and adoptive parents to customize the adoption process and adoption experience to fit their needs and desires for what is in the child's best interests.

While it is vitally important that all persons in the process clearly understand what the risks are, and that those legal risks not be smoothed over or ignored, the issues are generally easily identifiable up front. While it is true that some of these legal issues require prospective adoptive couples and birth parents to focus on them as the process begins; it is also true that the vast majority of adoptions go through smoothly, easily and result in an extremely positive experience for all involved.

Couples contemplating an adoption should not be afraid of the process. Rather it is important that they understand the process and that they ask questions along the way so that they are fully informed, knowledgeable and can make reasonable, intelligent, understandable decisions about any of the risks. If adoption is approached this way, it should result in a smooth, successful, and relatively easy experience. It will result in the creation of a wonderful family.

The preceding is prepared for discussion purposes only and is not intended to provide specific

legal opinions on any case, nor should it be cited by anyone as a specific legal opinion.

Wright S. Walling, Esq.
(612) 335-4283
wright.walling@wbdlaw.com

Walling, Berg & Debele, P.A.
Suite 1100
121 South Eighth Street
Minneapolis, MN 55402
(612) 340-1150
wbdlaw.com

Jessica J.W. Maher, Esq.
(612) 335-4291
jessica.maher@wbdlaw.com

Stacia W. Driver, Esq.
612-335-4295
stacia.driver@wbdlaw.com