

PARENTING THROUGH ADOPTION
A BRIEF SUMMARY OF
MINNESOTA ADOPTIONS

Beginning with the earliest statutes on adoption, the manner in which adoptions have been done; the social, ethical, medical, religious, and moral issues that have been involved; and the attitudes of the public in general towards adoptions themselves have shifted like quick sand. As attempts were made to reflect the changing moral and ethical views surrounding adoption, changes in statutes have made it clear particularly in the last 10 to 15 years that there has been a dramatic revolution in people's attitudes. From those earliest statutes, where noncustodial fathers, whether they had been married or not married to the birth mother, had no rights whatsoever; and children continued to inherit from their biological parents and not their adopted parents: to the current status where unmarried fathers having substantial rights, and adopted children inherit from their adopted parents, it still remains clear that adoption is a creation of statute and it is controlled by the language contained within the statutes. Thus, every state is different, and each has its own rules and policies.

In Minnesota while many people believe that August 1, 1994, brought the most significant and far-reaching amendments to the Minnesota Adoption Statutes which had been undertaken in many years, the 1997 and 1998 legislatures have brought equally significant changes. With the exception of the addition of the Minnesota Heritage Act to the Minnesota Statutes in 1983, which was eliminated by the 1997 legislature, and the Federal Indian Child Welfare Act of 1978, few changes have been so far reaching as these two amendments. The changes in procedure created by the 1994 Act which mirror the changes occurring around the country, have both clarified and further confused many of the issues that surround adoption. The 1997 and 1998 changes served to clarify and correct several problems and clarify several policies.

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

Terminology

As has been true in most states during the last several years, the law effective August 1, 1994, attempted in many ways to clarify some of the legal issues previously clouded or not dealt with by Minnesota Adoption Statutes. Since it was by then clear that the manner in which people approached adoption had become varied and difficult to limit, the legislature tried to, at least, provide some uniformity to the process regardless of how the process began. Thus, 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. While at times clarifying it, it also at times has made it more confusing. Nevertheless, 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. Previously, while the term "placement" had been used in Minnesota Statutes with respect to when a child is living with non-biological parents with an intent that an adoption occur, the statute now specifically defines what "placement" means. It means the transfer of physical custody of a child from the birth parent or legal guardian to a pre-adoptive home. The statute goes on to say that a petition can not be filed by an adoptive couple unless the child was physically placed by a licensed child placing agency or pursuant to the requirements of a newly created adoption called a "direct placement adoption."
2. Agency Adoption. This is an adoption where a child is "physically placed" by a licensed child placing agency. This is a change in the law in that it no longer makes any 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."
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 prior to the birth of the child.
4. Independent Adoption or Designated Adoption. These are "generic" terms which have no specific definition in statute. Independent adoption had some meaning as a term of art prior to the new statute, and has been used interchangeably with direct placement adoption. Designated adoption is also 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.

Based upon similar statutes across the country, new statutory provisions effective July 1, 1997, have provided the first statutory authority under Minnesota law dealing with the question of "openness" in an adoption. If it is done properly, any and all "contact" agreements between birth parents and adoptive parents will be enforced.

The statute applies to "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 fail 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.

Thus, the statute has opened up a way to legally enforce an agreement to have ongoing contact between birth parents, adoptive parents, and birth relatives if the proper procedure is followed, the proper agreements are entered into, and the proper court order is issued.

Care should be taken to be sure that at the time an adoption is finalized both adoptive and birth parents obtain certified copies of any order for contact since obtaining that order from a closed adoption file may be difficult later on.

General Procedures Necessary in Direct Placement Adoptions

The statute 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. 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 parties, 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. It is used when a child looks like it is going to arrive early, or other extraordinary circumstances exist, and is supported by somewhat less information and documentation than the pre-adoptive custody order. A pre-adoptive custody order must be obtained within 14 days after issuance of the temporary pre-adoptive custody order. 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 study, according to statute, must be paid for by the adoptive parents. The study itself is also used in an agency adoption.

Also, the statute now 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, must include recommendations regarding the suitability of the study to the adoptive parents, adoptive parents are required to authorize access to private data, and prospective adoptive parents must provide fingerprints, although the usefulness of those fingerprints has yet to be

thoroughly explained. The 1997 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 submit an affidavit 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." In some circumstances the birth mother is exempt from making good faith efforts to identify and locate the birth father. They include an indication the child was conceived as a result of incest or rape, that efforts to locate the father by the birth mother or anyone acting on her behalf could reasonably result in physical harm to the birth mother or child, or that efforts to locate the father by the birth mother or anyone on her behalf could reasonably result in severe emotional distress of the birth mother or child.

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 two ways to do this. They are as follows:

1. In Court Termination of Parental Rights. Under this procedure the juvenile code 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. This is a form used from the adoption statute. It is defined by statute and is the form 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. At the time of the final adoption hearing, then the birth parents' rights are terminated completely. A similar consent may be signed in a court hearing under certain circumstances.
3. Putative Father: Effective January 1, 1998, the 1997 legislature eliminated the previous 60/90 day rule and created a mechanism for possible fathers to register with the state on a "father's adoption registry" formerly known as the "Putative Father Registry." Once registered, he can not be ignored if he fathered a child and he must be notified if the child is placed in an adoptive placement.

In general, the registry works as follows:

- A. Any putative father may register.
- B. Search is required in nearly every adoption. This includes relative adoptions, step parent adoptions, and interstate adoptions even where the child was born in another state.
- C. Birth mother, agency or county agency may request a search of the registry at any time.
- D. If no putative father has registered - verify 31 days after birth.
 - 1. Verification may be requested by the agency or the birth mother.
 - 2. A father who fails to register within 30 days after birth is barred.
- E. If a putative father has registered then at any time after conception an interested party (adoptive parents, agency, birth mom, attorney) 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 (constitutes proof of service).

- F. Putative father's response to notice.
 - 1. If he files a denial and completed consent or if he fails to respond 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.
 - 2. 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 within 30 days of receipt then his rights to the child must be either terminated or his consent to the adoption must be obtained before an adoption could occur.

- 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).
- H. Birth father entitled to counsel at public expense.
- I. Registry data is private.
- J. There is a criminal misdemeanor penalty for knowingly and intentionally registering false information.

Reimbursement of Birth Parent Expenses.

The statute 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.
- 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.

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 provides an adoption tax credit on adoptions for up to \$10,000 worth of expenses. That credit is available in full for income of \$150,000 or less and gradually reaches zero when income reaches \$190,000. The tax year the tax benefit can be taken should be reviewed by a tax specialist. Again, we strongly urge that you seek advice from a tax specialist when taking these credits.

INS – Automatic Citizenship

Recently passed legislation allows in many cases for children adopted by U.S. parents to 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. The Interim Rule published in the Federal Registrar explains the procedure for obtaining 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.** One current problem with the new law, is that although the law has been passed, regulations have not yet been developed by INS as to the method of obtaining proof of citizenship. It is important that you remain in contact with your agency or attorney and keep updated as to the best method by which to obtain proof of your child's citizenship.

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.

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.

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.

In general, 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 entities 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 the order. Second, 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, the birth certificate is easily accepted by insurance companies, schools, etc. Third, in the court proceedings you can obtain a name change for the child if that is desired.

State Court Proceedings – There are various procedures to obtain a state court order. One is just a readoption and another is just recognizing the foreign decree. It is important that you discuss, with an attorney who handles international adoptions, what procedure is available and advisable under your particular situation.

Timing – Timing is very important. Legal procedures are usually 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.

Choosing an Attorney – It is important in choosing an attorney, that you inquire if this attorney has handled international adoptions before from the country you adopted the child.

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. Statutory Preference Eliminated. As a result of Federal Legislation, the 1997 legislature repealed the Minnesota Heritage Act and eliminated the “preference” for placement of children based on race or relations. Now each child is entitled to an individualized determination of his/her best interests, and placement can not be delayed because of race, color, or natural origin. There does, however, remain a general support for placement of children with relatives and important friends.
3. Indian Child Welfare Act. The Federal Indian Child Welfare Act sets priorities for preference. The major distinctions are that the priorities are somewhat different, and 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 also has 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.

Conclusion

Adoption under the new statutes and new case law interpretations of those statutes, provide many excellent opportunities to benefit children and create families which did not previously exist. The new 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, of course, also result in the creation of a wonderful family.

<p>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.</p>		
<p>Wright S. Walling, Esq. (612) 335-4283 wright.walling@wbdlaw.com</p>	<p>Walling, Berg & Debele, P.A. Suite 1100 121 South Eighth Street Minneapolis, MN 55402 (612) 340-1150</p>	<p>Jody Ollyver DeSmidt, Esq. (612) 335-4284 jody.desmidt@wbdlaw.com</p>