AVOIDING CONTESTED ADOPTIONS & LIMITING ATTORNEY LIABILITY – LexVid



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PRIMARY TYPES:

- Lack of Due Diligence
- Insufficient Information Obtained or Sought
- False Information Provided
- Incarcerated Birth Parent
- Mentally Ill/Drug-Alcohol Addicted Birth Parent
- Indian Tribe Intervention under ICWA or Birth Parent Able to Claim ICWA Protection
- Grandparent Intervention cases
- Legal Malpractice
- Birth Parent in Active Military
- Breach of Fiduciary Duties

Practical considerations:

- Cost to the Parties
  - Financial
  - Emotional & Mental
- Stress
- Risk
- Sufficiency of Resources
- Negative Publicity
- Implications for Child in the Future



Practical Considerations



- Significant thought needs to be given to how the child may at some point in time view having been the subject of a contested adoption
- Will the child find out or be told at some point he or she was “taken away”
- How do the prospective adoptive parents honestly feel about fighting a birth parent for the child?
- What is truly “best?”

Expenses

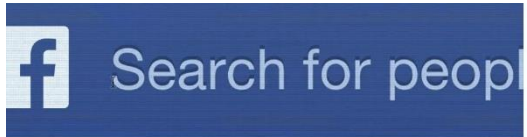


- Contested adoptions can be very expensive. The parties can incur enormous costs for attorney fees, attorney costs, expert witness fees, and the cost of a guardian ad litem if the guardian ad litem fee is assessed by the court against the parties.
- The adoptive parents typically also pick up the cost of the placing parent's attorney as well as their own attorney

Scenario 1 – Inadequate Search/Effort or Lack of Due Diligence



- Agency/AP attorney send required notice to BF in prison and notice letter comes back saying BF just left; agency/attorney do nothing more to locate him/her, OR
- Agency/AP attorney send required notice to very old last known address for BP and do nothing more to locate him/her, AND
- Court orders Agency/AP attorney to go back and locate the BP and BP objects to the adoption.



Avoiding a Contested Adoption Due to Inadequate Search/Lack of Due Diligence

- No excuse to not locate someone in today's age of technology – or at least be able to show extensive efforts:
  - Facebook – including Messenger
  - My Space
  - Instagram
  - Google searches
  - Paid people finder searches
  - Contacting his/her friend's or relatives
  - Reverse phone look ups, etc.
  - Private Investigator



Scenario II – Insufficient Information Obtained or Sought

- Birth Mother writes “unknown” for birth father on background forms
- Agency makes placement assuming birth mom can sign an affidavit of unknown paternity
- No one asks birth mom what she meant
- Child placed in home
- Attorney hired for birth mom asks about birth father being “unknown”



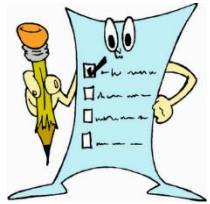
And What is her Answer?

- “I put ‘unknown’ because it is one of two guys – one of them is the guy I was living with.”
- Both “known” possible dads want to parent – and can.
- How could this have been avoided?
  - Simply ask questions about the answers put on background forms;
  - And then ask more.



Avoiding a Contested Placement Due to Inadequate Questioning

- Questionnaires to Birth Mothers regarding birth father information should be extensive
- An attorney or agency social worker should question the birth mother on all information placed on questionnaires regarding the birth father and should question her extensively about the birth father outside of the questionnaire info



Scenario III – Inadequate Questioning and/or Fraud/False Information

- Birth mom avoids giving full info about birth father
- Child placed in AP home
- After pressed – turns out birth mother lives with birth father AND
- Turns out birth mom told birth dad the child died in birth and was cremated
- AND birth dad and his family had a funeral for the child



Whoops – I told a little lie.



Fraud & “Wrongful Adoption”

- A case sometimes might be brought by a placing parent who believes that he or she was defrauded with regard to his or her due process rights or adequate notice regarding an adoption.
- Fraud cases commonly are brought against the birth mother when she defrauds the birth father with regard to her adoption plan. For example, the birthmother might lie and claim that she miscarried or that the child died in childbirth or was stillborn.
- Whether or not the adoptive parents or an adoption agency also can be sued in fraud as well usually depends on whether they were involved at all in the fraudulent activity committed by the birth mother.

Fraud & “Wrongful Adoption”

- Another type of fraud case – often dubbed “wrongful adoption” - is where an adoptive family believes that the adoption agency or the placing parents fraudulently represented information regarding the child. In such instances, the placing parents may have lied about extensive drug or alcohol use or the adoption agency may have fraudulently represented a child's physical or mental health condition.
- Fraud cases typically demand a high burden of proof and are difficult cases in which to prevail.
- That said – the more disclosure and honesty in adoptions – the less chance for fraud actions

Birth Mother's Plan

- All Birth Mother's should be made to feel empowered about their adoption plan
- For their plan to work – any and all birth father info must be disclosed
- Many Birth Mothers need to be educated on the importance of sharing any and all information about possible birth fathers in order to protect THEIR plan and that failure to be truthful can ruin the plan.

The Two-Timing Birth Mother

- Birth mom and her parents tell attorney they want an adoption plan
- They want to place to a state that makes it very hard for the birth father to contest
- Birth mom also is telling birth father she will raise the child with him – but maybe they should look at adoption – but no she will parent with him
- Birth mom then selects Utah agency and family

Tortious Interference with Parental Relations

- In 2012, in Wyatt v McDermott, et. al, the Virginia Supreme Court recognized for the first time a cause of action for tortious interference with parental relations.
- The birth father (who was deprived of the right to parent his son), sued the adoptive parents, the adoption agency in Utah, the adoption agency's attorney, and the birth mother's attorney.

Tortious Interference with Parental Relations (cont.)

- The birth father sued under various causes of action including fraud and conspiracy but also tortious interference.
- While the case was brought in federal court, since the cause of action of tortious interference with parental relations had not been expressly previously recognized in Virginia (although tortious interference with contractual relations or business expectancy had long been recognized), the federal court certified the question to the Virginia Supreme Court which found that there was such a cause of action in Virginia.

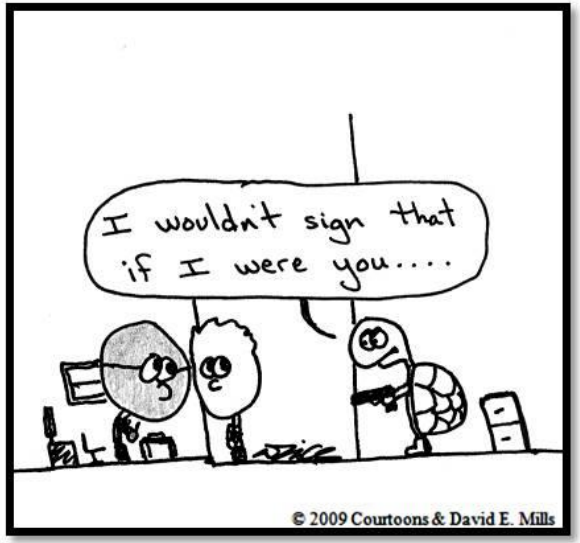
Tortious Interference

- Under the facts of the case, it actually was the birth mother who was most culpable of defrauding the birth father, however she was not sued because she had gotten back together with the birth father.
- This cause of action of tortious interference with parental relations - means that attorneys, adoption agencies and adoptive parents need to be very careful in how a birth parents rights are addressed so as not to be subject to liability.
- Also, in the case, it took a while for the adoptive parents to realize that their homeowners insurance could pick up the costs of their defense.
- Note that such tort cases often may be brought by personal injury attorneys who take the case on a contingency basis.

Tortious Interference



- The costs of defense can be extensive.
- The stress on the potential adoptive parents can be insurmountable.
- Attempts at resolution should be implemented as soon as possible.
- The “lawyering” can sometimes get in the way of what may be best for the child or the parties ability to connect directly to reach resolution.



tortoise interference with contract

Scenario IV – Incarcerated BP

- Agency/AP attorney sends required notice to BP in prison and state law says BP in prison cannot be proceeded against without a guardian, and
- BP emerges later contesting adoption OR judge finalizing adoption questions BP not having guardian and requires Agency/AP attorney to go back and do it right.

"Hey I was in prison man!"



Avoiding a Contested Adoption Due to Incarcerated BP

- When sending notice to an incarcerated BP – what do applicable state laws require? It may be that the law where the adoption is taking place does not require BP have an attorney or guardian – but the law of the state where he is incarcerated might.
- Always best to err on the side of caution

Scenario V - Birth Father Belongs to a Federally Recognized Indian Tribe

- Birth Mother is Elusive about the Identity and Whereabouts of the Birth Father
- Upon Birth – Birth Father appears and expresses his objection to the adoption
- Birth Father is a Member of a Federally recognized Indian tribe.
- Upon birth, Birth Father notifies the tribe and enrolls his child as an "Indian child."



Birth Father Belongs to Federally Recognized Indian Tribe

- Birth Father needs to be immediately engaged in and made to feel part of the adoption process
- Proper ICWA consent needs to be obtained if Birth Father is willing to consent (meaning before a judge and after child is ten days old)
- Associate an attorney experienced in ICWA issues

Unwanted Indian Tribe Intervention Under ICWA – How & When?



- Typically an Indian Tribe will only intervene after getting actual notice of an adoption proceeding
- Sometimes notice is not required
- Sometimes notice is by someone objecting to the adoption like the objecting birth parent
- It is critical to understand ICWA and the procedures and defenses immediately

Unwanted Indian Tribe Intervention Under ICWA – cont.

- Argue lack of standing – unless the child qualifies as an “Indian child” the tribe arguably has no standing
- And if it is a voluntary placement – they also arguably have no standing
- File a Motion to Dismiss and Brief the issues immediately with the court and set them for hearing

ICWA and Contested Adoptions



- The case of Baby Veronica (*Adoptive Couple v Baby Girl*) that went all the way to the US Supreme Court is a key example of how contested adoptions can arise out of the Indian Child Welfare Act ("ICWA)"
- In that case, the birth father used his tribal status under ICWA as the basis for blocking or objecting to the adoption but the US Supreme Court found that ICWA did not bar termination of his rights

Baby Veronica (cont.)

- “Baby Veronica,” turned 4 in Sept 2014 when she finally was returned to her adoptive parents.
- The father, Dusten Brown of Bartlesville, Oklahoma, was a member of the Cherokee Nation and was claiming rights as an Indian parent. South Carolina courts initially had awarded full legal custody of the little girl to a non-Indian couple – the prospective adoptive parents - who lived near Charleston, Matthew and Melanie Capobianco.

Baby Veronica (cont.)

- However, the birth father intervened claiming protection under ICWA and then won custody even though his rights previously had been terminated.
- At the end of July 2014, after the matter proceeded all the way up to the United States Supreme Court, the Capobiancos won the right to adopt the child. But they also agreed that, to avoid the shock of an abrupt removal of her from the father with whom she has been living for more than eighteen months after previously living with the adoptive family, they would go along with a more measured transfer that would unfold in Oklahoma. But Family Court Judge Daniel E. Martin, Jr., citing a sworn statement by a social worker named to carry out the transition plan, said that Brown did not show up at the appointed time and place to begin the transition. (cont.)

Baby Veronica (cont.)

- That failure, the judge concluded, violated his order requiring the transition plan, and thus that plan was scuttled, with the Capobiancos entitled “immediately” to take the child into their custody. The judge ordered the father to produce the child and turn her over to the Capobiancos, saying that the child “is being unlawfully withheld from her lawful parents.”
- The judge sent copies of his ruling to various federal and state officials, asking them to take prompt action to locate “Baby Veronica” and turn her over to the Capobiancos. The judge also asked courts in Oklahoma to help produce the child.

Baby Veronica

- At the end of September 2014, the birth father finally turned the child over to the adoptive parents.



Thus ended a four year legal battle – at great emotional and legal cost.



New BIA Guidelines

- To compound IWCA entanglements – the Bureau of Indian Affairs (BIA) recently issued highly controversial guidelines
- The Guidelines are not law but can be used to persuade a court to provide Indian tribes greater rights than the actual statutory language of ICWA provide
- A number of lawsuits have been filed challenging the BIA Guidelines – one is headed to SCOTUS as of early 2017.

Scenario VI – Birth Mother Has Mental Illness or Drug/Alcohol Addiction Issues

- During the adoption planning and background gathering process, the birth mother discloses that she is bi-polar/manic depressive and/or has drug or alcohol dependencies.
- Birth Mother is unrepresented and signing consent or executing a relinquishment or entrustment agreement.



Birth Mother Has Mental Illness or Drug/Alcohol Addiction Issues



- Always Have an Attorney or Court Appointed Attorney or Guardian for the Birth Mother if there is any question about her emotional or mental capacity; AND,
- Obtain testimony or an affidavit from her treating physician or psychiatrist or evaluator, AND
- Ensure sufficient adoption options counseling and document!!



"Of course you feel unwell. You have too much blood in your alcohol stream!"

Scenario VII – The Objecting or Intervening Grandparent

- Birth Father plans to Consent and says he will; his parents do not know about the child
- Birth Father does not sign the consent paperwork handed to him
- Because of his inaction, proper legal notice (and against the consent documents) are sent to Birth Father at his last known address
- Birth Father lives with his mom/dad
- Birth Father's mom now intervenes in the adoption and files for custody – and convinces Birth Father to object

Intervening Grandparent – How This Could Have Been Avoided

- Work harder with birth father to get consent paperwork signed before having to send notice paperwork.
- Find alternative addresses for sending notice paperwork to birth father as opposed to where his parents might receive it – possibly a work address?
- Engage in better communication with birth father about how notice paperwork will have to be sent if he does not sign consent paperwork.

Intervening Grandparent – How This Could Have Been Avoided

- In doing due diligence – find out from both birth parents who knows and who does not know about the adoption plan
- Of those that know – who supports? Who does not support?
- Of those who do not know – if they did know – would they support the adoption plan or would they fight it/try to prevent it from happening?

Grandparent Intervention

- Sometimes both biological parents want an adoption to take place but one or both of their parents object to the adoption
- The grandparents typically have standing to intervene
- The birth parents have an over- riding Constitutional right to make plans for their child – including adoption. See *Lehr v Robertson* – US Supreme Ct case


GRANDMA'S HOUSE
Kids Spoiled
While U Wait!
WILCOTT

Scenario VIII – Legal Malpractice By Attorney

- Adoptive Parents hire attorney who does not regularly do adoption law
- Attorney lets birth mom sign out of court consent when state law requires she sign a judicial consent
- Birth mom later challenges adoption
- Adoption is undone due to procedural irregularity
- Adoption parents have to return child who has been in their home for two years and who thought birth parent rights had been terminated.

Attorney Malpractice

- Imperative to Refer Adoptive Parents to only Qualified and Experienced Adoption Attorneys
- Not an area for a family to use an inexperienced, less expensive attorney – too much at stake with possibility of having to return a child

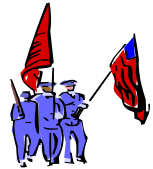
Legal Malpractice Cases (cont.)

- Legal malpractice cases often can arise where:
  - Attorney fails to comply with ICWA and state mini- ICWAs or
  - Attorney fails to comply with the interstate compact on the placement of children (ICPC) and the adoption therefore comes undone, or
  - Attorney fails to follow express procedural requirements.

Scenario IX – Birth Father in Military

- Agency Takes Entrustment from Birth Mother
- Birth Mother Gives Name and whereabouts of Birth Father and that he is active military and currently deployed in Iraq
- Agency sends notice to birth father to his last known address but knows he is deployed

Understanding SCRA



- The Servicemembers Civil Relief Act (SCRA) of 2003 (formerly Soldier's & Sailor's Relief Act) is found at 50 U.S.C. Appendix § 501 et seq.
- The purpose of the Act is:

  to enable servicemembers (SMs) to devote their entire energy to the defense needs of the Nation, and to provide for the temporary suspension of judicial and administrative proceedings and transactions that may adversely affect the civil rights of SMs during their military service. (50 U.S.C. App. § 502)



SCRA (cont.)



- **Who is covered?** (50 U.S.C. App. § 511) Those covered include:
- Members of the Army, Navy, Air Force, Marine Corps and Coast Guard on active duty under 10 U.S.C. 101(d)(1)
- National Guard members called to active duty by President or Secretary of Defense for over 30 days under 32 U.S.C. 502(f) (national emergency declared by the President and supported by federal funds)
- Commissioned members of the Public Health Service and the National Oceanographic and Atmospheric Administration



SCRA (cont.)



- Provides special protections for servicemembers covered by the Act including not being able to proceed against a birth parent who is on active duty who is unable to protect his or her interests (such as contesting an adoptive placement)
- Need to be certain to adhere to the procedural safeguards under the Act
- Failure to do so can result in the adoption being subject to procedural challenge and malpractice/negligence claims against the attorney or agency



Objecting Birth Parents

- The most common type of contested adoption is where one birth parent wants the placement (most commonly the mother) and the other birth parent objects.
- These risky situations for the adoptive parents vary greatly depending on the applicable state and federal laws.

For example, Virginia Law on Objecting BP

Virginia Code § 63.2-1205. Best interests of the child; standards for determining.

In determining whether the valid consent of any person whose consent is required is withheld contrary to the best interests of the child, or is unobtainable, the circuit court or juvenile and domestic relations district court, as the case may be, shall consider whether granting the petition pending before it would be in the best interest of the child. The circuit court or juvenile and domestic relations district court, as the case may be, shall consider all relevant factors, including the birth parent(s)' efforts to obtain or maintain legal and physical custody of the child; whether the birth parent(s) are currently willing and able to assume full custody of the child; …

Virginia Code 63.2-1205 (cont.)

whether the birth parent(s)' efforts to assert parental rights were thwarted by other people; the birth parent(s)' ability to care for the child; the age of the child; the quality of any previous relationship between the birth parent(s) and the child and between the birth parent(s) and any other minor children; the duration and suitability of the child's present custodial environment; and the effect of a change of physical custody on the child.

Challenge to VA's statute



- The VA "best interest" statute was challenged as unconstitutional in Copeland v Todd, 282 Va. 183, 715 S.E.2d 11 (2011) but was upheld.
- The case provides a good overview or analysis (as does the US Supreme Court opinion of Lehr v Robertson, 463 U.S. 248 (1983)) of a birth parent's fundamental rights to parent.

Adoption Options Counseling

- In a recent contested case in VA – the court strongly criticized the agency's limited attempts to provide adoption options counseling
- Such counseling also would have provided for a better assessment of the birth father's ability to parent
- In-person counseling is far preferable over phone or other long distance counseling

Pertinent Info to Obtain on Contesting BP That Might Assist in Case Resolution

- Past and current criminal record, driving record and employment record
- Drug and alcohol use
- Mental health issues and treatment
- Age
- Relationship with child and with other children
- Ability to hold a job and financial condition
- Provision of support of the child including during pregnancy of the birth mother

Pertinent Info to Obtain on Contesting Birth Parent That Might Assist in Case Resolution

- Child protective service charges
- Whether the child was conceived due to rape or statutory rape
- Family support or support by others
- Level of education and training
- Physical disabilities
- Efforts to maintain contact with the child
- Sincerity of interest in parenting
- Smoking/drug use around the child
- Overall ability to parent

Timing of Proceedings

- Delay tends to work in the favor of the party that has the temporary or interim custody of the child due to attachment bond growing
- The adoptive parents tend to have such custody usually via placement by the birth mom directly with them
- Unless the objecting birth parent has visitation and also can bond with the child – the objecting birth parent will be at a disadvantage

Nature of Proceedings

- Most of these cases are in juvenile or family court or at least start there
- Most tend to be decided by a judge rather then jury
- The judge's own personal views and paradigm can be a determinative factor (research the judge)
- The greater the evidence to present and time needed – typically the farther back the trial date

Enormous Cost of Contests

- Emotional cost & stress on the adoptive parents and placing parent – and objecting parent – can be huge
- Financial cost can be from tens to hundreds of thousands of dollars
- As adoption advocates – we should do everything we can to prevent adoptions from turning into long extensive drawn out expensive litigious stressful events

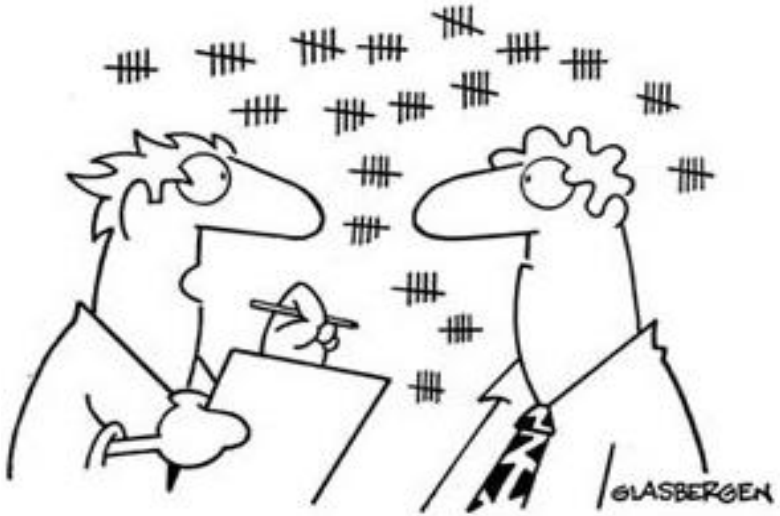
Mediation-Settlement



- Use post adoption continued contact agreements (PACCAs) or ongoing contact agreements as a possible settlement tool – the birth parent gets ongoing contact by consenting but also no longer will have a child support obligation (beware making a monetary “promise” though in exchange for a consent!)
- Be sure to respect and embrace the uninvolved BP and make he or she feel part of the process – sometimes the BP is simply objecting because he/she feels left out. Many BFs often do not even know the BM was pregnant.

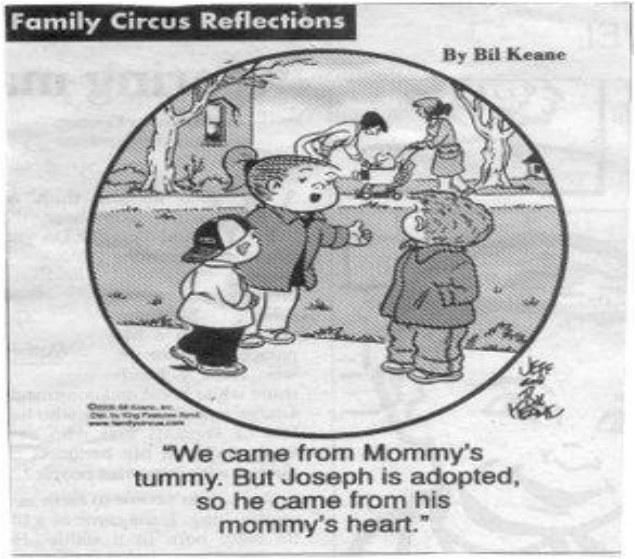
Liability for Breaches of Fiduciary Duties

- Attorneys have fiduciary duty when administering client funds – especially use of trust account for retainers and expenses on behalf of birth parents (e.g., living expenses)
- Agency Principals and Board of Directors of agencies have fiduciary duty to oversee and account for agency funds



"I'm aware that we have inventory software, but my way is easier."

Final Reflection



QUESTIONS?

