LexVid 2023: A Legal Guide Through the Adoption Process and Applicable Federal Laws



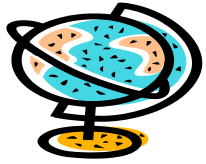
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Overview on Types of Adoptions

- International adoptions are most commonly Agency placements
- Adoptions within the United States can be either Agency or Non-agency
- Non-agency adoptions may be called parental, independent, direct or private
- Foster care placements are Agency placements – but they are public agency (e.g., Department of Social Services or similar names) instead of private agency



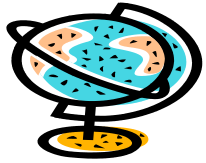
International Adoptions (Generally Agency)



- Done by experienced **agencies and a handful of qualified attorneys – but typically agency based**
- In some countries a full adoption will occur whereas in others the adoptive parent(s) may only be given guardianship
- Different countries have different requirements and/or restrictions in terms of the characteristics of the adoptive family
  - May be age restrictions
  - Single parents or same-sex parents may not be able to adopt
  - May be medical restrictions



International Adoptions (Cont.)



- Were dropping in numbers prior to COVID and then severely dropped
- Can take a year and longer to accomplish
- Hard to get a newborn given amount of time it takes for child to be cleared to adopt
- Medical, prenatal care and background information often difficult to obtain – many infants have been abandoned
- Can be risky with volatile countries

The Hague Convention

- The Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption (Convention) is an international agreement to safeguard intercountry adoptions. Concluded on May 29, 1993 in The Hague, the Netherlands, the Convention establishes international standards of practices for intercountry adoptions. The United States signed the Convention in 1994, and the Convention entered into force for the United States on April 1, 2008.

International Adoptions

- The Hague Conference has 82 Members; 70 of the Hague Members have ratified the Hague on ICA
  - **ONLY APPLIES TO ADOPTIONS BETWEEN MEMBER COUNTRIES**
- US ratified the Hague in 2007.
  - The US took longer than any other nation to implement the treaty.
    - It took 14 years for the US to have the treaty enter into force after signing
  - By comparison:
    - Mexico: 3 years
    - Vietnam: 2 years
    - China: 6 years



The Hague Convention

- For countries belonging to the Hague – adoptions follow a more uniform and safe-guarded process and only Hague accredited providers (agencies and attorneys) can be utilized.
- However, in 2014, the UAA was passed.

The Inter-country Adoption Universal Accreditation Act of 2012 (UAA).

- The President signed the UAA into law on January 14, 2013. The new law took effect 18 months thereafter on July 14, 2014.
- Under the UAA, adoption service providers working with prospective adoptive parents in non-Convention adoption cases need to comply with the same accreditation requirement and standards that apply in Convention adoption cases.
- Requires the Hague Accreditation of all Adoption Service Providers and eliminated independent or private international adoptions entirely
    - DoS delegated accreditation to COA, a private nonprofit in New York with no experience in adoption
    - Currently Proposed Regulations would radically alter accreditation
- International Adoptions have been plummeting down in numbers



Federal Law

- INA (Immigration and Nationality Act)
  - Provides the path for foreign born children adopted by American parents to enter the United States

- IAA (Intercountry Adoption Act)
  - Implemented the Hague Convention; designated the Department of State as the Central Authority; only applies to adoptions between US and other Hague Partner Countries

International Adoptions

- CCA (Child Citizenship Act)
  - Gives US citizenship to children adopted by American citizens who meet the following requirements:
    - Have at least one American citizen parent;
    - Be under 18 years of age;
    - Live in the legal and physical custody of the American citizen parent;
    - Be admitted as an immigrant for lawful permanent residence.
    - The adoption must be full and final (whether from sending country or US adoption).

International Adoptions

- Accuracy for Adoptees Act
  - Allows adoptees to have their names and ages changed
  - Requires that a Federal Certificate of Citizenship for foreign born child reflect the child's name and date of birth as indicated on a State court order or State vital records document issued by the child's State of residence after the child has been adopted in that State.



International Adoptions (cont.)

- Role of the local attorney (usually not Hague accredited) is to:
  - Guide the adoptive parent(s) to the right experienced agency (Hague accredited if necessary) for that particular country
  - Stress the importance of getting certified translations of all the paperwork
  - Provide an overview of the general process
  - Handle the re-adoption (also sometimes called a finalization or domestication of a foreign adoption)

International Adoptions (cont.)

- Time frames for doing the re-adoption can vary (e.g., in Virginia, adoptive parent(s) can file for re-adoption after 6 months if there are three post-placement visits vs. one year if no post-placement visits)
- Countries and agencies vary in terms of the number and timing of post-placement visits required
- US Birth certificate from a re-adoption is **NOT** evidence of citizenship

International Adoptions (cont.)

- Note: Some states have a simple route to obtain a US birth certificate but this is NOT a re-adoption
- Reasons for doing a re-adoption:
  - May be necessary if full adoption not done in foreign country
  - Negates any underlying procedural irregularities in the foreign adoption
  - Puts foreign born child on equal footing with US born children
  - Results in US issued birth certificate
  - May be used to change name, birth date and/or age of child (but watch out for VISA/passport irregularities!)

International Adoptions (cont.)



- Watch out for immigration issues!! If you don't practice immigration law – be sure to refer the adoptive parent(s) to an immigration attorney and document your file
- If child did not get a Certificate of Citizenship when came into the US and did not come in on the right visa in order to get citizenship – then the adoptive family may have to do a re-adoption and obtain a certificate of citizenship after meeting the necessary requirements (again – refer them to an immigration attorney)

Domestic Adoptions: Agency vs Non-Agency Legal Difference

- Non-Agency are called Parental, Independent, Private or Direct Placements
- Biggest **Legal** Distinction:
  - In **agency placements** the agency takes legal custody and gives the adoptive parent(s) temporary physical custody; after a certain period of time which varies from state to state (usually three to six months) the agency then consents to the placement (typically called an agency finalization)
  - versus in **parental or independent placements**, the birth parent(s) typically gives both legal and physical custody directly to the adoptive parents

Pure Agency = All Inclusive



- Some all inclusive agency placements also will include finalizing the adoption
- Some will not – in which case the adoptive parents will hire their own attorney to finalize
- I call this the “airline ticket” to the “all inclusive” resort – it may or may not be included & sometimes is optional as part of the agency’s services

Domestic Adoptions: Agency

- Agency typically does not “represent” either the adoptive parent(s) or the placing parent(s)
- Role of adoptive parents attorney is:
  - to provide legal oversight during the adoption process (such as review of the agency’s contract with the adoptive parents and negotiation of any changes, provision of any interstate compact advice for interstate placements, and review or oversight of how the placing parent rights will be addressed and terminated by the agency).
  - to finalize the adoption in the adoptive parent(s) home state once the required time frame for the agency to consent has passed if finalization is not included.

Direct Parental Placement Adoptions (Non-Agency)



- Usually are "*a la carte*" – not "all inclusive"
- Adoptive family pays separately for: adoptive family's attorney, placing parent(s)' attorney, licensed adoption or child placement agency services (including for home study), attorney for the baby (*guardian ad litem)* if required.
- Living expenses, medical bills and other lawful expenses may be paid directly by the adoptive family.
- Usually the "*a la carte*" (parental) route is less expensive than the "all inclusive" (agency).

Direct Parental Placement– Role of the Adoption Agency



- The role of an adoption or licensed child placement agency in a parental placement is very different than the role the agency plays in an agency adoption.
- In a **parental placement or independent** adoption, the agency serves more of a support or “a la carte” role than quarterbacking the whole placement as would happen in an agency placement.



Parental Placement – Role of the Attorney

- In a **parental/independent placement** – the adoptive parent(s)' attorney – or the adoptive parent(s)' attorney in conjunction with the placing parent(s)' attorney - now serve(s) in the quarterback role.
- Most placing mothers also will have their own attorney. In some cases, a placing father will as well.



Role of the Adoption Agency in Direct Parental Placement - Support Services

- The adoption agency support role in a parental/independent placement includes:
  - Preparing the home study
  - Providing placing parent counseling and obtaining background information
  - Where required, providing the adoption report to court which typically includes the information regarding the child and birth of the child, the background information on the placing parents, the fees and monies paid as part of the placement.
  - Conducting post-placement visits and supplemental reports to court.

Direct Parental Placement – Role of the Adoption Agency (cont.)

- The role of the adoption agency in a parental/independent placement adoption typically does not involve locating the birth parent unless they have a “match only” service
- Rather the adoptive family typically engages in the search or networking process
- The marketing and administrative costs charged by an agency for an all inclusive adoption represents much of the cost savings between an agency placement and a parental placement.

Direct Parental Placement/Independent Adoptions
THE SEARCH PROCESS BY THE ADOPTIVE FAMILY

- Networking-word of mouth still very important
- Internet – social media, e-blasts, etc.
- Agency match only services
- Websites (adoption.com; parentprofiles.com, adoptimist, parentfinder, etc.)
- Attorneys
- Family, neighbors, church, work, medical providers, etc.
- Are growing in numbers



What is a Facilitator?

- A “facilitator” is NOT a licensed child placement or adoption agency
- Typically a “facilitator” is simply a person or company that charges a broker or match fee for locating an expectant birth parent
- Most states – including Virginia - prohibit payments to facilitators – so it is important to advise clients accordingly
- “Licensed” facilitators are still just facilitators – and if state law prohibits payments to facilitators then payment to a “licensed” facilitator is still illegal.

Consenting in Domestic Adoptions: Agency vs Direct Parental

- In **agency placements** the placing parent typically signs an “entrustment” or “entrustment agreement.” in some states it may be called a “relinquishment.” These usually are taken outside of court.

- In **parental/independent placements**, the placing parent typically signs a “consent.” However, in some states it also may be called a “relinquishment.” Consents may be required to be signed in court or out of court depending on the state.

Entrustment – Wait and Revocation



- In states where the entrustment or relinquishment or consent are “irrevocable” upon signing – there is typically at least a 48 hour “wait” period after birth.
- In most states that do not have a mandatory “wait” period – the entrustment or relinquishment can be revoked for a certain period after signing. This is called the revocation period.

Consent (Wait) & Revocation



Consent and Revocation Periods typically apply to:

- How long a placing parent must wait before signing a consent or entrustment or relinquishment (most commonly about three days after birth); always advisable for the placing mother to not be on heavy pain medications after having given birth at time of execution
- A revocation period is the length of the time period after signing that a placing parent has to “revoke” or “undo” his or her consent. These typically vary from a little as a few days as up to thirty days after signing. Under some state laws, the revocation period may be “waived” upon signing.

Termination of Parental Rights

Parental rights in adoptions may be terminated in a variety of ways including most commonly:

- By voluntary consents, relinquishments or entrustments (signed in court or out of court depending on state law and type of adoption)
- By a birth father signing of a Denial of Paternity or a Waiver
- Via notice and failure to object or appear
- Via a birth father's failure to register with a Putative (or Birth) Father Registry (more on this later)
- In some states the placing mother may have a constitutional right to refuse to name or disclose the birth father's identity

Termination of Parental Rights (cont.)

- In some states the placing mother may be able to affirm that the identity of the birth father is not reasonably ascertainable and/or that his whereabouts are unknown
- Via abandonment
- Via finding that an objecting parent is unfit or is objecting contrary to the best interests of the child (the statutes governing contested placements vary widely from state to state)



Cost of Adoptions

- The most inexpensive adoption is from the foster care system or where the child is eligible for subsidies
- These result in the adoptive parents getting their legal fees and home study costs covered by state and federal funds
- And the child oftentimes also will have subsidy money awarded.

Comparative Cost of Adoptions

- The most expensive adoptions tend to be international – generally ranging from $40,000 to $60,000; although adoptions from more impoverished countries like Haiti can be substantially less.
- Domestic agency adoptions typically range from $35,000 up to $70,000. Have gone up since COVID.
- The least expensive non-public adoptions tend to be in-state independent placements where no living fees or medical bills for the placing parent need to be paid – these generally are under $20,000. sometimes much less.

Direct Parental Placement/Independent Adoptions

- Can be done for less than $20,000, sometimes even under $15,000, if in state, not contested and no living or extraordinary medical expenses for the placing parent need to be paid:
  - Adoptive Parent's attorney: $3,000-$6,000
  - Birth Mother's attorney: $1000-$3000
  - Guardian ad litem (baby's attorney): $500
  - Adoption agency support services including home study, counseling, post-placement visits and reports: $4,000 - $6,000

Comparative Cost of In-State versus Interstate Parental Placement Adoptions

- Interstate independent or parental placements typically cost $20,000 to $30,000 where substantial living expenses and/or medical bills do not need to be paid.
- The added cost primarily is attributable to more work needing to be done by attorneys in both states to comply with the ICPC approval process.
- The NEICE (national electronic) system if ever passed would help reduce costs in interstate placements with electronic ICPC filings and transmittals. Many states have gone to electronic filings though.
- As with in-state adoptions, when substantial living expenses and/or medical bills for the placing parent need to be paid, then the costs of the placement can be much higher.

Costs & High Demand Can Be a Barrier to Some Adoptions



Costs of Adoption

Recommendations to AP's on how to afford adoption:

- Federal Adoption Tax Credit (more information to follow)
- Employer Assistance (including the military)
- Taking out a loan against retirement until the Federal Adoption Tax Credit comes through
- Family Gifts/Assistance
- Fund Raising (church, GoFundMe, etc.)
- Grants – Family Formation Charitable Trust. www.fertilitywithinreach.org
- Equity Lines of Credit



Special Types of Adoptions

- Parental placements also typically include close relative placements, adult adoptions, step-parent/second-parent adoptions and non-relative placements
- Procedures for close relative, adult, step-parent and second-parent placements typically are streamlined in most states and not as complicated as a non-relative parental placement.



Special Types of Adoptions: Step-Parent

- Step-parent adoptions typically occur when one spouse is the biological or adoptive parent of the child and the other spouse is not.
- If the other biological (or adoptive) parent of the child is living, it usually requires that person's consent or at least notice to the "other" parent and an opportunity to be heard
- Some states have "abandonment" statutes which allow for easier termination of the "other" parent's rights if he or she has not been involved in the child's life

Special Types of Adoptions: Step-Parent (cont.)

- Same-sex female step-parent adoptions typically only require including a copy of he sperm donor release or cryo-bank affidavit.
- Contested step-parent adoptions can be expensive, contentious and oftentimes unsuccessful when the “other” parent has been involved in the child’s life and is not an “unfit” parent.
- The standard varies from state to state.
- Step-parent adoptions sometimes may be accomplished consensually via an “open adoption” agreement.

Special Types of Adoption – Second Parent

- Some states allow “second parent” adoptions either by statute or as a matter of common law or practice.
- This type of adoption can enable non-married individuals to become legal parents.
- In some states it can allow for unique parent situations (e.g., biological mom and her father).
- California and some other states adopting the current UPA law now permit multiple parent adoptions



Special Types of Adoption - Relative



- Many states have streamlined procedures where the adoption is among relatives
- The definitions of “relative” vary widely from state to state
- If the adoption is an interstate adoption – the Interstate Compact on the Placement of Children (ICPC) exempts certain relative placements from compliance with the Act
- BE CAREFUL – the definitions of a relative in the ICPC may vary from the definitions in state law, making interstate compliance still applicable

Special Types of Adoption – Interstate Relative

- Interstate Compact exception (as stated in the Virginia statute- Code section 63.2-1000, Article VIII):

  This compact shall not apply to:

  (a) The sending or bringing of a child into a receiving state by his parent, step-parent, grandparent, adult brother or sister, adult uncle or aunt, or his guardian and leaving the child with any such relative or nonagency guardian in the receiving state.

Special Types of Adoption – Interstate Relative

- Compare the foregoing ICPC definition to the broader definition of a “close relative” under Virginia law (Virginia Code section 63.2-1242.1(A)):

  For the purposes of this chapter, a "close relative placement" shall be an adoption by the child's grandparent, great-grandparent, adult nephew or niece, adult brother or sister, adult uncle or aunt, adult great uncle or great aunt, stepparent, adult stepbrother or stepsisters, or other adult relatives of the child by marriage or adoption.

ALSO - BE CAREFUL – in an interstate relative adoption, while one state might allow for a streamlined procedure, another state may not. For example, Virginia has a streamlined procedure but if the child is coming from Colorado – Colorado requires that an adoption agency be involved in the giving of *any* birth parent consent.





Special Types of Adoptions - Adult



- Adoptee over age 18
- Pretty simple
- No consent of birth parents required
- No court hearing required
- Need at least 15 year age difference
- Subject to close scrutiny if trying to establish otherwise illegal relationship (e.g., obtaining inheritance from mentally incapacitated person)

Home Study – When Required?



- The home study is the anchor to almost ANY adoption
- However, a home study may not be required (and note that this varies widely from state-to-state) in the following adoptions:
  - step-parent or second parent
  - adult adoption
  - relative adoption with some variations
  - adoption by person named in a will where applicable

Home Study – What is it?



- Assessment of the person(s) seeking to adopt
- Usually done by local licensed child-placement or adoption agency or social worker
- Usually about $2500 -$3,500, “sliding scale” often the norm

Usually requires:

- Criminal record check and child protection services (CPS) clearances for all adults in the household
- Medical clearance
- Medical, educational, vocational, mental health histories
- Financial wherewithal
- Recommendations from non-relatives

Home Study – What is it? (cont.)

- Agency must “certify” or recommend that the person(s) is/are suitable to adopt
- Certification or recommendation oftentimes will be limited to a specific type of adoption and/or ethnicity and age of child (e.g., international, Caucasian child under age of two, bi-racial child under age of two, etc.)
- Significant training on adoption issues usually is provided as part of the home study process

Passing the Home Study



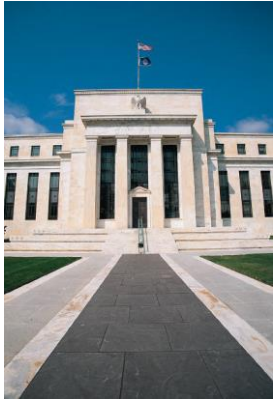
- Can be a bit intimidating and overwhelming
- Involves intrusion into past medical, mental health, financial, criminal history
- Certain crimes are “barrier” crimes and will prevent the person from being approved
- Need to be updated – in some states are only good for one or two years (Virginia it is three)

Gathering Background Information

- One role of the agency or adoptive parents attorney or placing parent's attorney in any adoption is to gather adequate background information including:
  - Family medical history and pre-natal care history
  - Social, educational, religion and nationality history (including Indian heritage)
  - Biological and/or Legal Father history
  - Hospital and Adoption Plan information

Special Additional Federal Laws Applicable to Adoption

- The Indian Child Welfare Act (ICWA)
- The Adoption Tax Credit
- The Servicemembers Civil Relief Act (SCRA) of 2003 (formerly the “Soldiers & Sailors Relief Act” of 1940)



The Indian Child Welfare Act (ICWA)

- In every adoptive placement, the adoption practitioner must be aware of – and address – the possibility that ICWA (the Indian Child Welfare Act) might apply.
- ICWA is a federal act that was put into place to protect Indian children from being removed from, or placed out of, Indian tribes without first considering whether an acceptable adoptive family could be found within the tribe.
- An ICWA inquiry starts by asking each placing parent if he or she has any Native American Indian heritage and, if so, then exploring the nature and degree of such heritage in great depth.



The Indian Child Welfare Act (ICWA) (cont.)

- If a placing parent has American Indian heritage, then it must be determined:
  - That the claimed tribe to which there is heritage is officially a federally recognized tribe; and,
  - That the child to be born qualifies as an "Indian child" under ICWA (which is based on the definition of an "Indian child" under ICWA as well as the member requirements and/or the definitions for the specific tribe at issue).



The Indian Child Welfare Act (ICWA) (cont.)



- Then, whether a tribe must be notified or involved depends in large part on (a) whether the placement is voluntary or involuntary and (b) if voluntary, then the placing parent's desires as to whether the tribe should be notified.
- Even if the tribe is not notified, the birth parent must sign an ICWA compliant consent which must be before a judge and can only be signed once at least ten days after birth have passed. The birth parent(s) also will have expanded revocation rights.

The Indian Child Welfare Act (ICWA) (cont.)



- This outline only gives an extremely basic overview of ICWA – which can be a very complicated area of the law. If a new adoption practitioner has a placement situation that may involve ICWA – he or she should consult with experienced ICWA adoption counsel. A great starting point is to read the Baby Veronica U.S. Supreme Court decision!
- Be aware of the Bureau of Indian Affairs (BIA) guidelines, and pending lawsuits challenging them including case that went up to SCOTUS - R.P. & S.P v. L.A. Dept of Children and Family Services, et. al.

The Indian Child Welfare Act (ICWA) (cont.)

- Some states have “mini-ICWAs” (state ICWA statutes) that have even more restrictive requirements than ICWA (the worst ones being Oklahoma, Wisconsin, Minnesota, and Arizona).
- These may require notice to the Indian tribe and/or placement preferences with a tribal family not only in voluntary placements but even in domestic violence and other emergency situations.



Tax Issues



What is the Federal Adoption Tax Credit?

- A one-time tax credit for qualified adoption expenses paid to adopt an eligible child
- Was in jeopardy with the 2017 administration but was saved

Income Exclusion for Employer-Provided Adoption Assistance

- Some employers offer adoption assistance as a fringe benefit
- Provides payments and reimbursements to employees with expenses related to the adoption of a child
- IRS fringe benefits exclusion rules allow taxpayers to exclude the value of adoption assistance benefits from the employee's wages and from federal income tax withholding
- However, such benefits are still subject to Medicare, Social Security, and federal unemployment taxes

Tax Issues (cont.)

Definitions

- Eligible Child. An individual under the age of 18 or an individual who is physically or mentally incapable of self-care (Note: the tax credit is not available for stepparent adoptions or most adult adoptions)
- Qualified Adoption Expenses.
  - Reasonable and necessary adoption fees
  - Court costs and attorney's fees
  - Traveling expenses, including amounts spent on meals and lodging while away from home
  - Other expenses that are directly related to and for the principal purpose of the legal adoption of an eligible child

Tax Issues (cont.)

- What is the amount of the Federal Adoption Tax Credit and Income Exclusion? Changes each year but for the 2023 tax year:
  - Maximum of $15,950 per child
  - AP's with a modified adjusted gross income ("MAGI") below $239,230 are eligible to receive the full credit/exclusion
  - AP's with a MAGI between $239,230 to $279.230 are eligible for a partial credit/exclusion
  - AP's with a MAGI at or above $279, 230 are eligible for a credit/exclusion of $0
- The credit is a nonrefundable credit, which means it can only be taken up to the amount of the AP's tax liability
- Special needs children are treated differently and APs can claim the full credit whether or not they had expenses.



SCRA



- The Servicemembers Civil Relief Act (SCRA) of 2003 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

Interstate Adoptions



- Does not matter whether agency or independent/parental/private/direct placement – interstate placements require compliance with the Interstate Compact on the Placement of Children (ICPC)
- Conflict and choice of law issues need to be clarified and resolved
- Attorneys in both states should be consulted
- Adoptive parents must remain in the other state and not return to their home state until interstate approval is obtained

Interstate Placements (cont.)

- The unique aspects of Interstate Placements generally fall into two areas:
  - Determining whether ICPC applies and what is needed for to be obtained from both the sending and receiving states
  - Engaging in a conflict and choice of law analysis and determining under which state law the adoption will occur



Interstate Placements (cont.)

- Unless the “relative” exception to the ICPC applies – typically ICPC approval will need to be obtained.
- ICPC approval is initiated via the sign off of a “100-A” form by the sending parent or agency.
- It is critical to determine what the ICPC offices in each state will require before preparing the ICPC package for filing in the sending state
- Failure to properly file an ICPC approval package can result in adoptive parents waiting for weeks or even months to return home

Interstate Placements (cont.)

- BE CAREFUL – it is always advisable to consult with an experienced adoption attorney in both states to make sure there will not be any issues with obtaining interstate approval
- For example, Virginia ICPC will take the position that a birth mom whose rights have been completely terminated under the law of another state no longer has standing to sign the 100-A form
- Also – failure to obtain ICPC approval can be a basis to upset or challenge the underlying adoption.

Interstate Placements

- Choice of law analysis must first be to ask: Can the adoptive parents finalize in the state of the placing parent(s)?
- If not then doing the entire adoption in the state of the placing parent(s) will not be an option.
- In Virginia, for example, the entire adoption can be done in VA by adoptive parents who are out of state residents

Interstate Placements (cont.)
Conflict and Choice of Laws

- Upon initially being confronted with an interstate placement, an analysis and reconciliation of the varying laws must occur.
- One of the first aspects to determine as already noted is whether the adoptive family even has the option to finalize in the sending state. If not, then the adoption must be finalized in the adoptive family's home state.
- If the adoption can be done in either state then an analysis needs to be done regarding which state law is more favorable and what the total costs will be under each scenario.

Interstate Adoptions (cont.)
Conflict and Choice of Laws

- One state may allow the payment of living expenses for the placing parent while the other state may not; even if the law of the state that allows such payments is chosen as the governing law – this needs to be cleared with the ICPC office of the state that does not allow such payments
- Unique issues can arise where one state requires notice to a known putative birth father and the other state does not; again issues with interstate clearance may arise.

Interstate Placements (cont.)
Conflict of Laws

Examples of the variance in state laws and analysis:

- Where the placing mother is in Kansas, she can sign an irrevocable out of court consent within days and out of state residents can finalize in 90 days, in a parental placement the cost is fairly low.
- For a placing mom located in Florida, the entire adoption generally MUST be done as a Florida agency adoption typically at a cost of $25,000 on up.

Foster Care Placements

- Typically are Department of Social Services or “public” agency placements
- Usually involuntary terminations of birth parent rights
- Role of attorney is to oversee placement and assistance agreements and finalize the public agency (vs private agency) placement
- In public agency or foster care placements - watch out for subsidy issues!!
- Watch out for continuation of benefit issues!! Adoption assistance agreement should be in place before Final Order.



Foster Care Placements & The Adoption and Safe Families Act of 1997 ("ASFA")

- The Adoption and Safe Families Act of 1997 changed the focus of the child protection proceeding from family preservation & reunification to a focus on the child's health and safety.
- It forced states to streamline and expedite termination proceedings by requiring that:
  - a "permanency hearing" take place within 12 months of the child being placed into foster care.
  - Termination of parental rights must take place when the child has been in foster care for 15 of the most recent 22 months
- It also contained important and better protections for foster and pre-adoptive parents.

Making the Adoption Plan

No matter the type of adoption – the following prerequisites are critical for the placing parent(s):

- She/they receive adoption options counseling in person (not just by phone) and continued counseling is made available
- She/they complete exhaustive and comprehensive background forms that include medical, social, educational history, pregnancy information
- She receives prenatal care if possible and medical records are obtained

Making the Adoption Plan (cont.)

- She/they understand and map out the adoption plan including expected ongoing contact
- She/they not only pick out but ideally meet the adoptive parents
- Use of drugs/alcohol during pregnancy is explored as much as possible
- Persons opposed to and supportive of the adoption plan are identified
- Adoptive parent(s) must understand that no placing parent can 100% know that she or he will follow through with their plan



CLOSED Versus

OPEN Adoptions

What do they mean?

Domestic Adoptions: Agency vs Independent

- In the past world of “closed” agency adoptions, typically the placing parent(s) placed the child with the agency and did not “choose” or designate the adoptive family and also did not have ongoing contact
- While a completely “closed” placement is still an option, the placing parent(s) now more commonly are involved in the selection of the adoptive family – even if full identifying information is not disclosed
- The old way of differentiating between agency and independent adoptions, as “closed” vs “open” no longer really applies. Instead, in most states, in either type of placement there may be a wide spectrum of choice from completely closed to completely open or from no disclosed information about the adoptive family provided to the placing parent to full disclosure.

For example, Agency Placements within Virginia post-2007

- Birth mother can select and meet the family (a “directed placement”) or have no involvement with adoptive family, can exchange last names or choose not to do so
- If she selects – must be told she has the option to do agency or parental placement
- Birth mother must have separate social worker and must be told has right to own counsel

Compare: Parental Placements in Virginia post-2007

- Birth Parents can:
  - Pick and meet adoptive parents and exchange all background information
  - Pick but not meet at all; exchange general background information without ever meeting
  - Pick and meet and exchange background information but not last names and/or addresses



Ongoing Contact



- And in either agency or parental placements – ongoing contact is typically allowed
- In many states – ongoing contact agreements are enforceable by statute
- “PACCA” = “post-adoption continued contact agreements”

Open Adoption & Ongoing Contact Agreements

- The majority of states – including Virginia - either have open adoption statutes or allow enforceable post-adoption continued contact agreements (“PACCA’s”) by incorporating them into the adoption order.
- Usually the “ongoing contact” is simply the provision of pictures and letter updates to the birth parent(s) a couple of times a year; however, such agreements also may include open visitation.



Open Adoption & Ongoing Contact Agreements (cont.)

- In most instances, failure to comply will not be grounds to “un-do” the adoption. Instead, the only issue is the enforcement of the ongoing contact agreement.
- Usually the ongoing contact is contingent on it continuing to be in the child’s “best interest.”
- Such agreements can be a powerful tool in getting a birth parent to consent to an adoptive placement.

The New Psychology of "Openness"



New Psychology of Openness



- Lots of children's books now on adoption
- Most families develop a "My Birth Story" book – even published on an on-line photo-book site – which they begin to read to the baby as an infant – story book shows placing parents, hospital, judge – even sometimes the adoption attorneys involved!

Agency Placements Across State Lines

- Some states have “protective” statutes that protect the state residents from signing entrustments or relinquishments to adoption agencies in other states that limit the rights of the placing parents or are more restrictive than the law of the resident state
- Virginia has such a statute.



Agency Adoptions by a Birth Parent in Virginia to an Out of State Agency

- For an agency placement with a licensed or authorized out of state agency, a birth parent in Virginia can expressly waive, under oath and in writing, and if represented by independent legal counsel, the provisions of an entrustment agreement under Virginia law in favor of the entrustment under the law of the other state. Va Code 63.2-1222(J)
- Waiver must state in writing that birth parent has received independent legal counsel (including name, address and telephone number of such counsel) advising of Virginia law vs. the law of the other state.

  See Va. Code 63.2-1222(J).
- **Waiver that fails to comply with all the foregoing requirements shall be VOID!**

Termination of Parental Rights – The History of Putative or Birth Father Registries:

- The U.S. Supreme Court held PFR's constitutional in 1983 in *Lehr v. Robertson*
- Some 35 or so states have paternity registries in various forms
- Paternity Registries: not radical or new



Termination of Parental Rights – Embracing the Concept of Birth Father Registries



- States must protect safety and privacy of placing mothers
- Meaning:
  - Mothers need not name possible fathers
  - Mothers need not notify father of pregnancy
- *Lehr v. Robertson* decision suggests mother's right to privacy is constitutionally protected

Termination of Parental Rights – The Proposed National Registry: The Proud Father Act

- Drafted in 2006; not passed; bipartisan
- To be located in the Social Security Act
- Federal law would provide a database to collect and centralize registrations
- States continue to use their own substantive adoption law (including own registries in conjunction with the federal registry
- May be introduced again as the PAPA Act

Termination of Parental Rights – Putative Father Registries

- Distinction in most registries is made between whether the birth father is:
  - adjudicated (via court order)
  - acknowledged (such as placed on the birth certificate)
  - presumed (married/legal),
  - registered with PFR, and
  - not registered



Termination of Parental Rights – Putative Father Registries



- If the birth father is adjudicated, acknowledged, presumed or registered, then under most state schemes he typically will be entitled to notice of the adoption proceedings (this varies from state to state)
- If the birth father has not registered then typically he is not entitled to notice (again – varies from state to state)

Example: Birth Fathers and Birth Father Registry in Virginia

- If Birth Father is Adjudicated, Acknowledged, Presumed (Married/Legal), or Registered with Putative Father Registry – then he is entitled to an actual 15 day notice of the adoption proceedings
- If Birth Father is not any of the above but his identity is "reasonably ascertainable" and his whereabouts are known, he must be given notice of the right to register with the PFR and must do so within ten (if served) or thirteen (if certified mail) days of the service/mailing of the notice.

Practice Tip with Putative Birth Fathers (VA based)

- Attempt to contact before sending packet – many birth fathers can be upset at being “left out,” also watch for others (mother, wife, girlfriend) who live at same address
- Include Consent and Denial Forms Along with Ten Day Notice Letter (of VPFR)
- Include the actual VPFR form
- Include Background Forms
- Include clear cut instruction letter and invite dialogue
- Send by Federal Express with Proof of Service in addition to sending by certified mail

Final Reflection – Protect the Integrity of the Adoption

