

**NBI ADOPTION LAW PRIMER: A PRACTICAL OVERVIEW OF ADOPTION
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I. The Home Study

A. What is it?

1. Assessment of the person(s) seeking to adopt
2. Done by local licensed child-placement or adoption agency
3. Usually about \$2000 -\$2500, “sliding scale” often the norm
4. Typically requires:
 - a. Criminal record check and child protection services (CPS) clearances for all adults in the household
 - b. Medical clearance
 - c. Medical, educational, vocational, mental health histories
 - d. Financial wherewithal
 - e. Recommendations from non-relatives
5. Agency must “certify” or recommend that the person(s) is/are suitable to adopt
6. 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.)
7. Significant training on adoption issues usually is provided as part of the home study process

B. Home Study – When Required and When Not?

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

**II. Agency vs. Non-Agency Adoptions (Prix Fixe vs. A La Carte) –
Understanding the Fundamental Distinctions**

A. International Placements

1. International adoptions are most commonly agency placements
2. Done by experienced agencies and attorneys – but typically agency based

3. If the other country is a member of the Hague International Treaty then the agency or attorney must have Hague accreditation
 4. In some countries a full adoption will occur whereas in others the adoptive parent(s) may only be given guardianship
 5. Different countries have different requirements and/or restrictions in terms of the characteristics of the adoptive family
 6. May be age restrictions
 7. Single parents or same-sex parents may not be able to adopt
 8. May be medical restrictions
 9. Role of the local attorney (usually not Hague accredited) is to:
 - a. Guide the adoptive parent(s) to the right experienced agency (Hague accredited if necessary) for that particular country
 - b. Stress the importance of getting certified translations of all the paperwork
 - c. Provide an overview of the general process
 - d. Handle the re-adoption (also sometimes called a finalization or domestication of a foreign adoption)
 10. 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)
 11. Countries and agencies vary in terms of the number and timing of post-placement visits required
 12. US Birth certificate from a re-adoption is **NOT** evidence of citizenship
 13. 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
 14. 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)
- B. Domestic Placements - Adoptions within the United States can be either Agency or Non-agency
1. Agency
 - a. Agency takes legal custody and then gives the adoptive parent(s) physical custody; after a certain period.
 - b. 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).
 - c. Agency placements typically are “prix fixe” or “all inclusive.” In other words – the agency typically locates the expectant mother, screens the situation, counsels the placing parent(s) on the adoption plan, provides adoptive

parent counseling, prepares the adoptive parent home study (although it may already have been done by another agency), takes the entrustment(s)/ relinquishment(s), and terminates parental rights (often using an agency attorney to help with this).

- d. Agency typically does not “represent” either the adoptive parent(s) or the placing parent(s)
- e. Role of adoptive parents attorney is:
 - i. 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).
 - ii. to finalize the adoption in the adoptive parent(s) home state once the required time frame for the agency to consent has passed.
- f. 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.
- g. 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
- h. 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
- i. Public Agencies
 - i. Include Department of Social Services or “public” agency placements
 - ii. Include involuntary terminations of birth parent rights
 - iii. Role of attorney is to finalize the public agency (vs. private agency) placement
 - iv. In public agency or foster care placements - watch out for subsidy issues!!
 - v. Watch out for continuation of benefit issues!!

2. Non-Agency

- a. Non-agency placements or adoptions may be called parental, independent, direct or private.
- b. Typically include close relative placements, adult adoptions, step-parent/second-parent adoptions and non-relative placements.

- c. Procedures for close relative, adult, step-parent and second-parent placements typically are streamlined and not as complicated as a non-relative independent placement.
- d. Usually are “a la carte”
 - i. Adoptive family pays separately for: adoptive family’s attorney, placing parent(s)’ attorney, adoption or child-placement agency services, attorney for the baby (*guardian ad litem*) if required.
 - ii. Living expenses, medical bills and other lawful expenses may be paid directly by the adoptive family.
 - iii. Usually the “*a la carte*” route is less expensive than the “all inclusive.”
- e. The role of an adoption (or licensed child placement agency) in an independent placement is very different than the role the agency typically plays in an agency adoption.
- f. In an independent adoption the agency serves more of a support role than quarterbacking the whole placement as would happen in an agency placement.
- g. The adoption agency role includes:
 - i. Preparing the home study
 - ii. Providing placing parent counseling and obtaining background information
 - iii. 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.
 - iv. Conducting post-placement visits and supplemental reports to court.
- h. The role of the adoption agency in an independent adoption typically does not involve locating the birth parent (except in hard to place situations).
- i. the adoptive family typically engages in the search process.
- j. This represents much of the cost savings between an agency placement and an independent placement; sometimes an agency will actually distinguish this amount as a “match” fee.
- k. The Search Process by the Adoptive Family
 - i. Networking-word of mouth still very important
 - ii. Internet – social media, e-blasts, etc.
 - iii. Agency services
 - iv. Websites (adoption.com; parentprofiles.com, etc.)
 - v. Attorneys
 - vi. Family, neighbors, church, work, medical providers

- l. The birth parent(s) typically gives both legal and physical custody directly to the adoptive parents
- m. 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.
- n. 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.

C. What is a Facilitator?

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

III. Special Types of Adoptions

A. Step-Parent and Second Parent.

1. Step-parent adoptions typically occur when one spouse is the biological or adoptive parent of the child and the other spouse is not.
2. 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.
3. 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.
4. 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.
5. The standard varies from state to state.
6. The step-parent adoption often may be accomplished via an “open adoption” agreement.
7. Some states allow “second parent” adoptions either by statute or as a matter of common law or practice.
8. This type of adoption can enable a same-sex partner to become a legal parent.

9. In some states it can allow for unique parent situations (e.g., biological mom and her father).

B. Relative

1. Many states have streamlined procedures where the adoption is among relatives.
2. The definitions of “relative” vary widely from state to state
3. If the adoption is an interstate adoption – the Interstate Compact Placement Act exempts certain relative placements from compliance with the Act. But BE CAREFUL – the definition of a relative in the ICPC may vary from the definition in state law, making interstate compliance still applicable.
4. 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.
5. Interstate Compact exception (as stated in the Virginia statute Virginia Code 63.2-1000, Article VIII):
 - a. *(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.*
6. Compare this to the definition of “relative” under Virginia law, Virginia code 62.21242.1:
 - 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, or adult great uncle or great aunt.*

C. Adult

1. Most states have streamlined procedures for an adult adoption where the adoptee is age 18 or older.
2. Typically the consent of the adoptee’s biological parent(s) is/are not required.
3. Most states have certain restrictions such as there being a minimum number of years between the age of the adoptee and the adopter(s).

D. Re-adoptions or Domestications/Finalizations of Foreign Adoptions

1. 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).
2. Countries and agencies vary in terms of the number and timing of post-placement visits required.

3. US Birth certificate from a re-adoption is **NOT** evidence of citizenship.
4. 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.
5. 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).

III. Interstate Adoptions

- A. Conflict and choice of law issues need to be clarified and resolved
 1. Attorneys in both states should be consulted.
 2. Adoptive parent(s) must remain in the sending state with the child and not return to the receiving (home) state until interstate approval is obtained.
 3. The unique aspects of Interstate Placements generally fall into two areas:
 - a. Determining whether ICPC applies and what is needed in order for approval to be obtained from both the sending and receiving states.
 - b. Engaging in a conflict and choice of law analysis and determining under which state law the adoption will occur.
 4. Thus, upon initially being confronted with an interstate placement, an analysis and reconciliation of the varying laws must occur:
 - a. One of the first aspects to determine 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.
 - b. 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.
 5. Examples of the variance in state laws and analysis:
 - a. 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.
 - b. For a placing mom located in Florida, the entire adoption **MUST** be done as Florida adoption typically at a cost of \$15,000 on up.
 - c. Where a placing mom is in Maryland and the adoptive family in Virginia, the adoptive family cannot adopt as non-residents in Maryland and adoption should be done as a Virginia adoption.

- d. 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.
 - e. Unique issues can arise where one state permits same-sex placements and the other state does not; again issues with interstate clearance may arise.
- B. The Interstate Compact Placement Act (ICPC)
- 1. Does not matter whether agency or independent/parental/private/direct placement – interstate placements require compliance with the Interstate Placement Compact (ICPC).
 - 2. Unless the “relative” exception to the ICPC applies – typically ICPC approval will need to be obtained.
 - 3. ICPC approval is initiated via the sign off of a “100-A” form by the sending parent or agency.
 - 4. 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.
 - 5. 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
 - 6. Also – failure to obtain ICPC approval can be a basis to upset or challenge the underlying adoption.

IV. Comparative Cost of Adoptions Depending on Type

- A. The most expensive adoptions tend to be international – generally ranging from \$30,000 to \$45,000; although adoptions from more impoverished countries like Haiti can be substantially less.
- B. The least expensive 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 \$10,000.
- C. Interstate independent placements typically cost \$10,000 to \$15,000 where substantial living expenses and/or medical bills do not need to be paid.
- D. Domestic agency adoptions typically range from \$15,000 up to \$30,000. Many agencies work on a “sliding scale” basis based on the adoptive family’s income.
- E. 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.

V. The Termination of Parental Rights

- A. Understanding Putative Father Registries

1. The History of Putative Father Registries
 - a. The U.S. Supreme Court held PFR's constitutional in 1983 in *Lehr v. Robertson*.
 - b. Some 35 states have paternity registries in various forms.
 - c. Paternity Registries: not radical or new.
 2. Embracing the Concept of Putative Father Registries
 - a. States must protect safety and privacy of placing mothers
 - b. Meaning:
 - i. Mothers need not name possible fathers
 - ii. Mothers need not notify father of pregnancy
 - c. *Lehr v. Robertson* decision suggests mother's right to privacy is constitutionally protected.
 3. The Proposed National Registry: The Proud Father Act
 - a. Drafted; not passed; bipartisan
 - b. To be located in the Social Security Act.
 - c. Federal law would provide a database to collect and centralize registrations.
 - d. States continue to use their own substantive adoption law (including own registries in conjunction with the federal registry).
 4. Putative Father Registries
 - a. Distinction in most registries is made between whether the birth father is:
 - i. adjudicated (via court order)
 - ii. acknowledged (such as placed on the birth certificate)
 - iii. presumed (married/legal),
 - iv. registered with PFR, and
 - v. not registered
 - b. 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).
 - c. If the birth father has not registered then typically he is not entitled to notice (again – varies from state to state).
- B. Denials of Paternity, Waivers, Consents, Relinquishments & Entrustments
1. Parental rights in adoptions may be terminated in a variety of ways including most commonly the following:
 - a. By voluntary consents, relinquishments or entrustments (signed in court or out of court depending on state law and type of adoption),
 - b. By a birth father signing of a Denial of Paternity or a Waiver,
 - c. Via notice and failure to object or appear, and
 - d. Via a birth father's failure to register with a Putative Father Registry.

- e. In some states the placing mother may have a constitutional right to refuse to name or disclose the birth father's identity.
 - f. 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.
 - g. Rights can be terminated via abandonment.
 - h. Rights can be terminated 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).
2. Termination of Parental Rights
- a. Denial of Paternity – birth father simply denies he is the father, varies from state to state but often can be signed before birth, some states have a revocation period including from a set number of days to date of birth or a until a set number of days after birth; is voluntarily signed.
 - b. Waiver – some states allow either birth parent, but most typically the birth father, to sign a waiver by which the birth parent waives any interest in the child and/or in the adoption proceedings and/or in receiving further notice regarding the child or the adoption proceedings; is voluntarily signed.
 - c. Consents – typically signed in independent placements and are voluntary.
 - d. Entrustments – typically signed in agency placements and are voluntary.
 - e. Relinquishments – used in both agency and independent placements and are voluntary.

C. Abandonment Statutes

1. Some states permit parental rights to be terminated based on the parent having “abandoned” the child by failing to support or have contact with the child for a defined period of time. For example, in Virginia under Virginia Code § 63.2-1202(H), no consent is required of a birth parent who, without just cause, has neither visited nor contacted the child for six months prior to the filing of the adoption petition. This must be shown by clear & convincing evidence and the birth parent still has the right to be noticed and heard. Payment of child support under the Virginia statute does not count as “contact.”

D. Understanding Consent and Revocation Periods

1. Consent and Revocation Periods typically apply to:
 - a. 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.

- b. 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.

VI. Open Adoption and Ongoing Contact Agreements

- A. 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
- B. 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
- C. 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.
- D. The majority of states have open adoption statutes or allow enforceable ongoing contact adoption agreements by incorporating them into the adoption order.
- E. 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.
- F. 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.
- G. Usually the ongoing contact is contingent on it continuing to be in the child’s “best interest.”
- H. Such agreements can be a powerful tool in getting a birth parent to consent to an adoptive placement.

VII. Special Federal Laws Applicable to Adoptions

- A. The Indian Child Welfare Act (ICWA)
 1. In every adoptive placement, the adoption practitioner must be aware of – and address – the possibility that ICWA (the Indian Child Welfare Act) might apply.
 2. 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.
 3. 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.

4. If a placing parent has American Indian heritage, then it must be determined:
 - a. That the claimed tribe to which there is heritage is officially a federally recognized tribe; and,
 - b. 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).
5. 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.
6. 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.
7. 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.
8. 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).
9. 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 egregious situations.

B. Adoption Tax Credit

1. H.R.3590 – The Patient Protection and Affordable Care Act; Section 10909. EXPANSION OF ADOPTION CREDIT AND ADOPTION ASSISTANCE PROGRAMS
 - a. Increases from \$10,000 to \$13,170 the dollar limitation on: (1) the tax credit for adoption expenses; and (2) the tax exclusion for employer-provided adoption assistance.
 - b. Allows an inflation adjustment to such limitation after 2010. Makes such credit refundable.
 - c. Extends through 2011 the general terminating date of the Economic Growth and Tax Relief Reconciliation Act of 2001 with respect to such credit and exclusion.

C. SCRA

1. The Servicemembers Civil Relief Act (SCRA) of 2003 is found at 50 U.S.C. Appendix § 501 et seq..
2. 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).

3. Who is covered? (50 U.S.C. App. § 511) Those covered include:
 - a. Members of the Army, Navy, Air Force, Marine Corps and Coast Guard on active duty under 10 U.S.C. 101(d)(1)
 - b. 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)
 - c. Commissioned members of the Public Health Service and the National Oceanographic and Atmospheric Administration
4. 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).
5. Need to be certain to adhere to the procedural safeguards under the Act.

VIII. Foster Care Placements & The Adoption and Safe Families Act of 1997 (“ASFA”)

- A. 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.
- B. It forced states to streamline and expedite termination proceedings by requiring that:
 1. a “permanency hearing” take place within 12 months of the child being placed into foster care.
 2. Termination of parental rights must take place when the child has been in foster care for 15 of the most recent 22 months.
 3. It also contained important and better protections for foster and pre-adoptive parents.