

## **REPRESENTING BIRTH MOTHERS IN VIRGINIA**

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### **A. Direct (Parental) Placements – In-State and Inter-State.**

(1) General Items to Cover. There are quite a number of fundamental items to cover with a birth mother. These include the following:

- The decision-making process including whether the adoption plan is being made voluntarily and without coercion
- Alternatives to adoption
- How the adoptive parents were selected and if any other adoptive parents need to be considered
- Whether sufficient information has been provided regarding the adoptive parents or more information needs to be provided
- Whether the birth mother has received counseling by a social worker, ensuring that the birth mother has the opportunity for such counseling (paid for by the adoptive parents) and encouraging such counseling – especially early on in the process – to ensure that the birth mother has thoroughly thought through her adoption plan
- Whether the birth mother wants to have a simultaneous meeting with the adoptive parent(s) and the benefits of such a meeting
- Whether the birth mother wants to know the last names and address of the adoptive parents (if not already known)

- The birth mother's prenatal care
- The birth mother's alcohol and drug use during the pregnancy
- Permissible payments by the adoptive parents under §63.2-1218 including the payment of the birth mother's attorney's fees
- Consent and revocation periods
- Whether background information forms have been completed
- Whether ICWA (the Indian and Child Welfare Act) applies
- Identification of any and all birth fathers
- How the birth father(s) rights will be terminated
- Health insurance coverage
- Pre-registration with the hospital as well as hospital procedures, the hospital plan (including whether the adoptive parent(s) will be in the delivery room and whether the birth mother wishes to see the child after the birth), and any documents to be signed at the hospital (such as Health Care Power of Attorney and HIPAA Compliant Medical Authorization and any hospital indemnification or release documents)
- How the birth certificate application will be filled out at the hospital and naming the baby
- Any ongoing contact arrangement(s) and the enforceability of same including the birth mother's duty to notify the adoptive parent(s) or agency of any changes in her contact information
- Whether the birth mother is competent to consent

- That the birth mother understands the implications under Virginia Code §63.2-1217, that any false or material misstatements made in the court of the adoption proceedings could result in a Class 6 felony conviction.
- The birth mother's whereabouts after placing the child from the hospital and before the consent hearing
- How the birth mother will get to the consent hearing.

(2) Protecting Your File.

It is advisable to have the birth mother execute an acknowledgement form of the topics covered. Below is an example of such a form for an in-state parental placement:

I, \_\_\_\_\_(name of Birth Parent), understand that the following topics and issues involved in Virginia adoption law have been addressed with me by Colleen Marea Quinn, Esquire, and that I am being provided a copy of this document for my records and future reference:

1. Alternatives to adoption, including but not limited to:
  - (a) Keeping the child (and using such support mechanisms as public support, food stamps, aid to dependent children, Medicare, child support from the birth father or other avenues of support via friends and family or through charitable or non-profit organizations).
  - (b) That the birth parent may keep the child and I may have visitation rights or some type of custody arrangement.
  - (c) That I may relinquish the child which includes placing the child for adoption with the person or persons of my choice.
2. Hospital procedures/forms.
3. The methods by which birth parents in Virginia may consent or be given notice.
4. That I must wait until the child is at least three days old in order to give my consent and then have seven days to revoke my consent. I

further understand that I can waive the seven day right to revoke provided that the child is at least ten days old and I have my own independent counsel. I understand that any revocation must be provided in writing to the court (and signed by me or my attorney) before the close of court on the seventh day after signing.

5. Allowable payments by the adopting parents include my legal fees, medical bills, travel expenses, child placement agency fees (including birth parent counseling) and, if I receive medical permission or orders not to work, living expenses.
6. Any exchange of photographs, letters or other future contract/communication arrangements between the adopting parents or the child and myself are not legally binding unless written into the Final Order.

I further understand that Virginia law allows for the payment of my attorney fees by the adopting parents but that the representation rendered to me by Colleen Marea Quinn, Esquire, is fully on my behalf.

Date: \_\_\_\_\_  
BIRTH PARENT

Date: \_\_\_\_\_  
WITNESS

(3) Inter-State Parental Placement Additional Issues.

The biggest item to cover for an inter-state placement, in addition to the items already addressed above, is the choice of law. If the adoption is happening in Virginia (and the adoptive parents are from out of state) then there really is no issue since Virginia law will apply to the placement. However, if the adoption is to take place under the law of the adoptive parent(s)' state, then the birth mother needs to be apprised of her rights under Virginia law as well as the law of the other state – and then expressly waive proceeding under Virginia law

and submit to the law of the other state. This should be put in writing in both an internal document such as the example above and must also be written in the birth mother's consent.

Another item to explain to the birth mother is the interstate approval process and that the birth mother will have to sign a 100-A form in order to initiate that process. She also may have to sign other documents that are required by the receiving state such as an acknowledgment of counseling, an affidavit of fees and expenses paid, a summary description of the birth father(s), etc.

**B. Agency Placements – In-State and Inter-State.**

(1) General Items to Cover.

Again, there are quite a number of fundamental items to cover with a birth mother – many of which are the same as those noted above for a parental placement. Again – it also is recommended that the birth mother sign an acknowledgement that these items have been reviewed with her. These include the following:

- The decision-making process including whether the adoption plan is being made voluntarily and without coercion
- Alternatives to adoption
- How the agency was selected and if adoptive parents also were selected through the agency, then how they were selected and if any other adoptive parents need to be considered (not an issue for a

closed adoption where the adoptive parents are not selected or disclosed to the birth parent)

- Whether the choice of doing the adoption as an agency adoption or parental placement adoption was explained and a clear decision made as to the type of adoption wanted
- If applicable, whether sufficient information has been provided regarding the adoptive parents or more information needs to be provided
- Whether the birth mother has received counseling by the agency social worker, ensuring that the birth mother has been given the opportunity for such counseling and encouraging such counseling – especially early on in the process – to ensure that the birth mother has thoroughly thought through her adoption plan
- If applicable, whether the birth mother wants full or limited information about the adoptive parents including the last names and address of the adoptive parents
- The birth mother's prenatal care
- The birth mother's alcohol and drug use during the pregnancy
- Permissible payments by the agency under §63.2-1218 including the payment of the birth mother's attorney's fees
- Entrustment and revocation periods
- Whether background information forms have been completed
- Whether ICWA (the Indian and Child Welfare Act) applies

- Identification of any and all birth fathers
- How the birth father(s) rights will be terminated
- Health insurance coverage
- Pre-registration with the hospital as well as hospital procedures, the hospital plan (including whether the adoptive parent(s) will be in the delivery room and whether the birth mother wishes to see the child after the birth), and any documents to be signed at the hospital (such as Health Care Power of Attorney and HIPAA Compliant Medical Authorization and any hospital indemnification or release documents)
- How the birth certificate application will be filled out at the hospital and naming the baby
- Any ongoing contact arrangement(s) and the enforceability of same including the birth mother's duty to notify the agency of any changes in her contact information
- Whether the birth mother is competent to sign an entrustment
- That the birth mother understands the implications under Virginia Code §63.2-1217, that any false or material misstatements made in the court of the adoption proceedings could result in a Class 6 felony conviction.

(2) Inter-State Adoptions.

It is VERY important if the birth mother is going to proceed under the law of another state in an agency placement that she not only have her own legal counsel but that she execute a proper statutory waiver of Virginia law.

Virginia Code §63.2-1222 (J):

When any agency outside the Commonwealth, or its agent, that is licensed or otherwise duly authorized to place children for adoption by virtue of the laws under which it operates executes an entrustment agreement in the Commonwealth with a birth parent for the termination of all parental rights and responsibilities with respect to the child, the requirements of §§ [63.2-1221](#) through [63.2-1224](#) shall apply. The birth parent may expressly waive, under oath and in writing, the execution of the entrustment under the requirements of §§ [63.2-1221](#) through [63.2-1224](#) in favor of the execution of an entrustment or relinquishment under the laws of another state if the birth parent is represented by independent legal counsel. **Such written waiver shall expressly state that the birth parent has received independent legal counsel advising of the laws of Virginia and of the other state and that Virginia law is expressly being waived. The waiver also shall include the name, address, and telephone number of such legal counsel. Any entrustment agreement that fails to comply with such requirements shall be void.**

(Emphasis added). Thus, the birth mother needs to have the law of both Virginia and the other state explained to her and must sign a waiver that contains all the statutory requirements. This also means that the birth mother's Virginia counsel needs to also research the law of the other state – preferably also speaking to at least one qualified attorney in that state and obtaining copies of the actual statutory provisions.

Again, another item to explain to the birth mother is the interstate approval process and that the birth mother will have to sign a 100-A form in order to initiate that process. She also may have to sign other documents that are required by the receiving state such as an acknowledgment of counseling, an affidavit of fees and expenses paid, a summary description of the birth father(s), and the like. Unless the out of state agency is licensed in Virginia or gets a Virginia agency to take custody (which agency then becomes the sending party), then in the normal course the birth mother will be the sending party. It also is



important to ensure that the birth mother signs the 100-A before all her rights are terminated or else she technically will then lack the authority to be the sending party.

### **C. Obtaining Health Insurance Coverage.**

If the birth mother does not have health insurance coverage – then it is very important that she secure some type of coverage. This is not to save the adoptive parents from having to pay medical bills. Rather, this step is to protect the birth mother. What if something should be wrong with the child and the adoptive parents change their minds? What if the birth mother has complications during the delivery and the child dies? What if the birth mother changes her mind?

The birth mother should be strongly encouraged to apply for public medical assistance or to otherwise procure private health insurance coverage. Virginia Code §63.2-1218 (ii) expressly provided that the adoptive parents can pay for:

payment or reimbursement for medical expenses **and insurance premiums** that are directly related to the birth mother's pregnancy and hospitalization for the birth of the child who is the subject of the adoption proceedings...

(Emphasis added). Accordingly, the adoptive parents can lawfully pay for the cost of the health insurance on the birth mother. This is generally a much better option than paying the actual medical bills and better protects the birth mother – especially in the event there are unforeseen complications.

### **D. Changing Adoptive Parents.**

The birth mother has the fundamental right to change her mind as to with which adoptive parents she would like to place. There are many legitimate reasons why she may change her mind. However, it is important to make sure that she is not changing adoptive parents for the purpose of obtaining unlawful payments or monies. For example, it is not uncommon for a birth mother to pick an adoptive family and then change her mind when she learns that the state in which the family resides will not allow the payment of living expenses. This is okay if the birth mother legitimately needs such expenses and finds a family in a state that lawfully allows the payment of such expenses. It is not permissible if what the birth mother really is doing is looking to “sell” her baby or may be looking for expenses to be paid yet not be truly intent on her placement plan. While one can never see into a crystal ball, it is important for the attorney representing the birth mother to be on the look out for adoption fraud.

**E. Identifying Birth Fathers.**

(1) What is “reasonably ascertainable?”

Whether an unmarried birth father’s identity is “reasonably ascertainable” for purposes of determining whether he is entitled to notice of the Putative Father Registry requires careful questioning of the birth mother. Under the Virginia Putative Father registry, all birth fathers that are acknowledged (as on the birth certificate or via some other legal acknowledgement), adjudicated (such as ordered to pay child support or given court ordered visitation or determined via court ordered DNA testing) or presumed (such as a legal birth father via marriage to the birth mother) are entitled to actual notice of the adoption proceedings.

Moreover, any unmarried possible (putative) birth father whose identity is “reasonably ascertainable” is entitled to notice of the Virginia Putative Father Registry and his right to register. Note that a statutory amendment is the works for 2009 that will state that not only must his identity be “reasonably ascertainable” but his whereabouts also must be known. This might solve the problem where the birth mother knows the full name of the birth father but has no idea where he is.

Sample questions to ask the birth mother in determining whether the birth father’s identity is reasonably ascertainable and his whereabouts include:

- Does she know his full name or only part of his name?
- How did she meet him?
- If she does not have his phone number or address, can she get back in touch with him through mutual friends or contacts?
- Does she know where he works?
- Does she know where any of his family or friends live or work?
- Does she know where he went to school?

Then it is incumbent on the birth mother to try and find the birth father and incumbent upon her attorney (or the adoptive parent(s)’ or agency’s attorney) to use internet search methods to try and locate the birth father if possible. If he cannot be found, then a judge should accept a certificate of proof of the Virginia Putative Father Registry (“VPFR”) as sufficient (but be forewarned that some judges are still requiring an Order of Publication to notify the birth father of the

VPFR when the identity is reasonably ascertainable but the fellow cannot be found - this is all the more reason for the statute to be amended).

(2) Can a Birth Mother refuse to say?

There is a court opinion out of Augusta County whereby the birth mother was permitted by the court to refuse to identify the birth father. This opinion has been used in other cases to permit the birth mother to refuse to state who the father is. The argument is more compelling if the birth mother is afraid of the birth father or if the child is the product of rape but the birth father has not yet been convicted (thus making his consent not required).