

ASHCRAFT FRANKLIN YOUNG & PETERS, LLP

Attorneys and Counselors at Law
150 Allens Creek Road
Rochester, New York 14618

ADOPTIONS

An Overview of the Rights Of Biological Parents

Gregory A. Franklin, Esq.

1. INTRODUCTION

An adoption, for the adoptive parents, is the realization of their dreams and the creation of their family. The same adoption likely has a vastly different meaning for the birth parents. In a legal context, an adoption is a legal proceeding which terminates the "parent-child" relationship between a child and the birth parents, and creates an identical parent-child relationship between the child and the adoptive parents. There is probably no other area of the law which is as emotionally charged as the area of adoptions, and there is no other area where the results of a legal misstep can have such devastating effects. This overview will discuss the adoption process from the perspective of the birth parents, with an emphasis on the laws of the State of New York.

2. CHOICES

One of the most difficult decisions each participant in the adoption process has to make is the choice of which avenue to pursue. There are three principal avenues through which individuals and couples are able to adopt in the United States: private domestic adoption, agency adoption, and international adoption. Birth parents must make similar choices - to place their child with a licensed agency, or to employ the strategies of a private adoption. Each birth parent will find his or her own "best" method, which should be the one which meets their particular needs and with which they are most comfortable.

3. PRIVATE ADOPTION

The most common form of adoption in the United States is referred to as "private adoption." In a private adoption, the adoptive parents take an active role in seeking out a birth mother who is willing to place her child with them. The search may take many forms: advertisements in newspapers, letters to doctors and other health-care professionals, and networking with family and friends, among others. Many birth parents also take an active role - networking through their doctor, social worker, minister or family friends, searching for the adoptive parents who best meet their particular criteria.

Once the adoptive parents and birth parents have located one another, certain steps must be followed to ensure that the process is as smooth and uncomplicated as possible. An attorney experienced in adoptions should be consulted by each of the parties as early in the process as possible. Significantly, each party must have their own legal counsel, since New York prohibits the birth mother and the adoptive parents from being represented by the same attorney.

(a). Legal Rights of the Birth Mother.

There are two means by which a birth mother may give her consent to a private adoption - by signing a consent form, and consenting to the adoption in front of a judge. In the first of these options, the birth mother may sign an "extra-judicial" consent form (not in the presence of a judge) at any time after the birth of the adoptive child. The birth mother then has 45 days after executing the form in which to reconsider her decision. If she decides to revoke her consent, she must send a written notice to the court where the adoption is to take place. The court will hold a hearing to determine the child's best interests - whether to remain with the adoptive parents, or to be returned to the biological mother. At this hearing, the birth mother has no preference over the adoptive parents - both parties will present their cases, and the decision will be up to the judge. Following the 45th day, the birth mother's rights terminate automatically. Alternatively, a birth mother may give her consent to the adoption in the presence of a judge. In that case, called a "judicial consent", the birth mother's rights will be irrevocably terminated, with no additional time for revocation being allowed.

(b). Rights of the Birth Father.

Consideration of the birth father's rights is an integral element in every adoption, and cannot be responsibly or safely overlooked. A significant number of birth fathers support, or at least acquiesce to, the adoption process. New York law draws a distinction between married and unmarried birth fathers. The husband's consent to the adoption is always required, even in cases where he is not the child's biological father. The unmarried birth father's rights, however, must be asserted in order for them to be maintained. For his interest to be protected, an unwed father must have both a biological connection with the child and demonstrate full parental responsibility; in other words, he must both be a father and behave like one.

The birth father may, of course, give his consent in the same manner as the birth mother. If he is denying paternity of the child, he may also give his consent prior to the birth of the child, which is something which the birth mother cannot do. If he has not given his consent to the adoption, the birth father is entitled to "notice" of the planned adoption if he meets one of several requirements:

1. if he has been found by a court to be the father of the child;
2. if he has filed a notice of intent to claim paternity of the child;
3. if he is recorded on the child's birth certificate as the child's father;
4. if he has been married to the birth mother within six months before or after the birth of the child and before the birth mother has signed a written consent to the adoption;
5. if he has been identified by the birth mother as the child's father in a written sworn statement;

6. if he has paid, or attempted to pay, for the support of the child and visited, or attempted to visit, with the child;
7. if he has lived with the birth mother in the six months prior to the birth of the child;
8. if he has publicly acknowledged paternity of the child;
9. if he has taken steps to establish legal responsibility for the child; and/or
10. if he has promptly shown a willingness to assume full parental responsibilities (both financial and emotional) for the child.

(c). Rights of Other Parties.

Under New York Law, virtually no parties aside from the birth father and mother have any rights to consent to the adoption, or to gain custody of the child. Even if the birth parents are minors, the consent of their parents or guardian is preferred, but not essential. Although their legal rights are therefore minimal, the emotional needs of the grandparents of the adoptive child should be respected. Obviously, the support which they can offer to their child will be of enormous benefit, and can help smooth the adoption process.

(d). Payment of Expenses.

The birth mother may request, either directly or through her attorney that the adoptive parents pay for some of the expenses in connection with her pregnancy and the placing of the child. New York is very strict about what expenses may be legally reimbursed to the birth mother, and limits payments to three general categories: medical expenses of the mother and child, reasonable living expenses, and legal fees.

The question frequently arises as to what constitutes "reasonable living expenses". These expenses depend, of course, on the needs of the birth mother. The goal of the law is that the birth mother need not be out-of-pocket for her expenses, but may not to make a profit on the adoption placement. This is point is extremely important, since it is illegal in New York, and most other states, for a birth mother to be paid for placing her baby. In order to understand which expenses will likely be construed as "reasonable living" expenses, one can look to those expenses which a woman will normally incur as part of a pregnancy - the purchase of maternity clothes, vitamin supplements and more food than usual, for example. In some cases, adoptive parents may assist a birth mother with her rent and utility expenses, if she has no other source of income. Alternatively, if the birth mother is working and must take several weeks off from her job around the time of the birth, and is not paid by her employer for this time, she may be entitled to be reimbursed for several weeks of her net pay.

It is strongly recommended that the attorneys handle the financial details to ensure that the adoption is not jeopardized by a well-intentioned but illegal payment to the birth parents. Care should be taken to ensure that no impermissible payments are made - this is an important factor in the court's review of the adoption, and an impermissible payment could threaten the adoption and result in the child being removed from the adoptive home, not to mention the imposition of criminal sanctions for those involved.

(e). Obligation to Proceed With the Adoption.

Prior to executing a written consent to the adoption, or appearing before a judge, a birth parent may change their mind about the adoption. In that case, the adoption will not proceed, even if the adoptive parents have paid for expenses of the birth parent. A question commonly asked by adoptive parents is whether they will be entitled to be reimbursed if they have made living expense payments to a birth mother who changes her mind and does not complete her adoption plan. Contracts of any kind between the birth parents and adoptive parents are not enforceable. There is no legal right to this reimbursement; practically speaking, there are few birth mothers who have the resources to reimburse the adoptive parents.

(f). Future Contact.

Many birth parents and adoptive parents agree to future contacts. These contacts may be limited to an exchange of letters and photographs several times a year, or may include more extensive relationships. As noted in connection to the payments by the adoptive parents of the expenses of a birth mother, contracts between the parties are not enforceable. However, the moral obligation among the parties is enormous, and no adoptive parent should lightly make any promise to the birth parents.

4. AGENCY ADOPTION

In addition to state and local departments of social services there are literally hundreds of private agencies in the United States which can place children for adoption. Some private agencies specialize in domestic adoptions, adoptions for children who are "hard to place" (ie: those with a disability or who are beyond infancy), or international adoptions. The legal procedures are similar to those in private adoptions and, particularly for special needs cases, the fees to the adoptive parents may be substantially lower. While agencies can place the most sought-after newborn babies, their waiting lists are often many years long. It is very common for adoptive couples to utilize an agency for the home study and other assistance, but to pursue a private adoption. In an agency situation, the birth mother will relinquish her child directly to the agency, rather than to the adoptive parents. Unlike a private adoption, the birth mother can make her consent conditional upon certain things, such as continuing contact with the adoptive parents. These conditions will be enforced by a court if they are violated.

5. INVOLUNTARY TERMINATION OF BIRTH PARENT RIGHTS

No adoption may be finalized until the legal rights of both biological parents have been resolved. In many cases, one parent (usually the birth mother) has given her consent to the adoption. However, the law provides a mechanism for the involuntary termination of parental rights if the other parent does not voluntarily give their consent. This is most common where the child was removed from the birth parent's custody because of neglect, for example, or where the father's identity is not known.

In an agency adoption, these legal steps will usually be taken by the agency's attorney. In a private adoption, the adoptive parent's attorney will coordinate the terminations. The first step in the termination is to provide notice of a hearing to the parent. The notice may be personally served upon the parent or, with the court's direction, notice of the hearing may be published in a newspaper. If the parent does not appear at the hearing, their rights are usually terminated at that time. On the other hand, if the parent objects to the termination, the court will hold further hearings to determine whether the parent has legally abandoned or neglected the child. If the court finds this to be the case, the adoption may usually proceed to finalization.

6. CONFIDENTIALITY

It is important throughout the adoption process that all of the parties' needs for confidentiality and privacy be respected. An increasingly popular form of private adoption involves some degree of openness and communication between the birth mother and the adoptive parents. While it is less common, agreements for contact may also exist in agency adoptions. This contact may be as little as a few telephone calls or a brief meeting before the placement of the child with the adoptive parents, or it may extend to the presence of the adoptive parents in the delivery room at the birth of the child, or frequent letters or visits after the adoption has been finalized. Each party may feel comfortable in dealing directly with the other, or they may prefer that all discussions take place through their respective attorneys or agencies. The agency or attorney should help the parties clarify their expectations, resolve any differences, and suggest creative solutions which will further the process. The bottom line for all of the parties is to trust their instincts, go along with what is comfortable and practical and, most importantly, to consider the best interests of the child above all other considerations.

7. OPEN RECORDS

In New York, adoption records are sealed. They may be re-opened, with the permission of a court, only in the most limited circumstances. These circumstances might include essential, emergency medical information, or information about whether the child is eligible for membership in an American Indian tribe. All other information is confidential and sealed. Some other states have recently enacted laws which open sealed records, or enable an adoptive person to obtain a copy of their original birth certificate. There is some talk of revising the laws in New York, but there is no great likelihood of this happening in the near future.

A birth parent and adoptive child have the option of registering with the State of New York's Adoption Registry. Using this registry, if both the parent and child register and request information about one another, a link may be made. If both parties do not request the link, however, the state will not help to facilitate the reunion.

The "open records" issues are generally less significant in a private adoption, since it is likely that the parties will have shared a great deal of information, including identifying information. This is much less likely in an agency adoption.

The information presented above is intended to provide a general overview of the adoption process in New York. It is not intended to be a comprehensive summary of the law, and individual circumstances may differ.