Adoption Law 101 by Harlan S. Tenenbaum, Esq.

Adoption is the legal equivalent of biological parenthood, and adoption itself is a legal process. It is the permanent legal transfer of all parental rights and obligations for a child from one person or couple to another person or couple. In order for those rights to be allowed to transfer, the rights of the biological parent(s), aka birth parent(s), need to be terminated, either voluntarily or involuntarily, and the adoptive parent(s) to whom the rights will transfer must be qualified to adopt. Thus, in order for an adoption to take place, a person available for adoption must be placed in the home of a person or persons eligible to adopt. All states, the District of Columbia, and the U.S. territories Guam, Puerto Rico, American Samoa, the Northern Mariana Islands, and the Virgin Islands have laws that specify who is eligible to adopt, who is eligible to be adopted, how one becomes eligible for adoption, the necessary legal steps for adoption, and rules regarding confidentiality in the adoption. In addition, most states, the District of Columbia, and the territories have laws addressing what persons or entities have the authority to make adoptive placements. While the overall approach of these laws is similar, the fine points often dramatically differ. In this module, it is our goal to share with you both an overview of the general legal issues involved in adoption and the specific laws affecting adoption in your state.

The Parties To An Adoption: 1. Who Can Adopt?

Please understand that adoptive parents do not need to be famous celebrities, phenomenally wealthy, or perfect in every way. Very few people are. Generally speaking, state adoption laws provide that married couples who file a joint petition, stepparents who wish to adopt their step-children, and single adults may be eligible to adopt so long as the adoption is in the best interests of the child. The ultimate question under the best-interests of the child standard is whether the proposed adoption would serve the child's well being, not whether it would serve the well being of the biological parents, prospective adoptive parents or anyone else. In an effort to determine the best interests of the child the courts typically examine the specific circumstances of a case including the conditions of both the prospective adoptive parents and the child.

General Requirements

There is not necessarily a "right" age at which one is deemed able to adopt. In most states, a person must be at least eighteen years of age to adopt, unless he or she is the child's stepparent or is the spouse of an adult adoptive parent. Some states establish a higher minimum age; four states set the age at 21; and two specify age 25, while in approximately seven states, the adopting parents must be at least 10 years older than the person to be adopted. In Puerto Rico, the adopting parent must be at least 14 years older; and in Idaho, the parent must be at least 15 years older. On the other hand, several states do not specifically prescribe a minimum age, thereby leaving it to the courts to determine on a case-by-case basis whether adoption by a minor would be in the best interests of the child to be adopted. While many state statutes do address minimum age requirements to adopt, adoption statutes do not establish a maximum permissible age. Again, the courts decide in accordance with the best interests standard because the court may be concerned that older petitioners might not be physically capable of raising a young child, or that their death or serious illness would leave the child without a parent.

Moreover, a person need not be in perfect health, have a perfect background, or, in most states, be a resident of the state to be eligible to adopt a child. Several states have outlawed discrimination against disabled adoption petitioners, and in many cases, even a prospective adoptive parent's criminal record does not necessarily disqualify them from being allowed to adopt, unless the conviction is recent or one which involved a violent crime, substance abuse, or inappropriate conduct with children. Some states do require petitioners for adoption be state residents, with the required period of residency ranging from 60 days to one year, but the majority of states do not.

Typically, prospective adoptive parents who are not related to the child whom they wish to adopt must undergo an investigation or "home study." The home study is an evaluation (required by state law) of the prospective adoptive family and of the physical and emotional environment into which the child would be placed. It consists of a series of interviews with a social worker, including at least one visit to the prospective adoptive parent's home.

Physical exams, to ensure that the prospective adoptive parents are healthy, as well as criminal background and FBI Child Abuse History Clearance checks, personal references, and employer references are also typically required. The home study assists the court in determining whether the prospective adoptive parents would be suitable for a child, and helps reveal factors about the parents or the child that might affect the adoption.

In most states, either a division of the state government, a licensed adoption agency or social worker, or other qualified individual/organization licensed to perform home studies must perform the home study. If a prospective adoptive couple or individual has not been approved for adoption after the conclusion of their home study process, they will not be allowed to adopt a child.

Stepparents and Relatives

Regarding stepparent adoptions, most state adoption acts provide for a simplified process whereby waiting periods, home studies, and, in some states, even the adoption hearing may be waived. Stepparent adoptions occur when a surviving or divorced spouse with a minor child or children re-marries, and the new spouse seeks to gain parental rights for the child(ren). In order for a stepparent to adopt his or her stepchild, his or her spouse must consent to the adoption, and the parental rights of the other birth parent must be terminated.

As for relative adoptions, under all state laws, a relative holds no automatic special priority ranking nor has an absolute right to adopt a child after the birth parents' deaths or termination of their parental rights. Instead, the relative's blood relations, as well as the relative's prior relationship with the child are factors which are considered in determining the best interests of the child. In addition, courts have shown a marked inclination to honor the wishes of birth parents to place a child with otherwise fit relatives.

Foster Care

Many prospective adoptive parents may be eligible to adopt through foster care. Similar home study requirements need to be met in order to be eligible to become foster parents, and where at one time as a condition for receiving temporary custody of a child foster care agencies required prospective foster parents to agree in writing not to seek to adopt the child, this traditional attitude has largely changed.

Courts and child welfare professionals alike recognize that arbitrary removal from the foster home for adoption by strangers when a child has spent much of his or her young life in foster care, may cause the child added hardship from severing a secure relationship. Some statues grant a preference to foster parents who have cared for the child for a specified period, though the court retains ultimate authority to grant or deny the adoption in the best interests of the child. Where adoption by foster parents is in the best interests of the child, the court may grant the petition even where a blood relative of the child files a competing petition.

Placement Preferences

While controversial, the race of the prospective adoptive parents, if different than the race of the child sought to be adopted, does not affect the eligibility of prospective adoptive parents under the law except in the case of Native American children. In 1994 and 1996 respectively The Multiethnic Placement Act and the Interethnic Adoption Provisions were passed by Congress to ensure that adoption and foster placements are not delayed or denied based on race, color, or national origin. They prohibit states and other entities that are involved in foster care or adoption placements, and receive federal financial assistance under title IV-E, title IV-B, or any other federal program, from delaying or denying a child's foster care or adoptive placement on the basis of the child's or the prospective parent's race, color, or national origin. In addition, they prohibit these states and entities from denying to any individual the opportunity to become a foster or adoptive parent on the basis of the prospective parent's or the child's race, color, or national origin.

In 1996, Congress re-enforced its position on this matter in the Small Business Jobs Protection Act of 1996 (SBJPA), which contained provisions seeking to end the practice of matching adoptive parents with children of the same race. The legislation prohibits private and public child placement agencies from denying any person the opportunity to become an adoptive or foster parent, or from delaying or denying the placement of a child for adoption or into foster care, "on the basis of the race, color, or national origin of the adoptive or foster parent, or the child." Violations are actionable under title VI of the Civil Rights Act of 1964. 42 U.S.C. § 1996B(1),(2).

However, Congress' rejection of race-matching in these laws stands in marked contrast to the lawmakers' recognition of tribal identity in the Indian Child Welfare Act of 1978 (ICWA). The SBJPA expressly exempts the ICWA from its provisions. ICWA is a federal law mandating that placements of American Indian children can be governed by their tribe. The Act provides that "[I]n any adoptive placement of an Indian child under state law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families." If either parent has Native American heritage, the appropriate tribe must be contacted to establish whether the parent was an enrolled tribal member as defined by the tribe and whether the child qualifies for membership. If the child does, the agency or individuals responsible for placing the child for adoption must notify the tribe so that the tribe can notify relatives. If extended family members cannot care for the child, the tribe then has the authority to place the child for adoption if the tribe decides to intervene in the case.

Other controversial areas with regard to eligibility are religion and sexual orientation. In most states, by statute or case law, courts deciding whether to approve an adoption are mandated or authorized to consider the religion of the prospective adoptive parents and of the child (or the child's birth

parents). Religious differences are less significant where the birth parents consent to adoption by a petitioner of a different faith, and when the child is an infant, but with older children issues of religious differences may have an affect on a court's willingness to grant the adoption petition.

As for gay and lesbian adoption, two states expressly prohibit homosexuals or same-sex couples from adopting children. Utah also evidently prohibits adoption of a child by homosexuals because the state permits adoption only by persons legally married to each other, or by single persons not living in a cohabitation relationship outside marriage. In other states, courts apply the best interests test to determine whether to grant adoption petitions filed by gays or lesbians with standing to adopt.

The Parties To An Adoption: 2. Who Can Be Adopted?

Every state in the United States allows for the adoption of a child who is eligible to be adopted. Some states specifically require the child must be under the age of 18, a few other states allow parties to petition the court for the adoption of persons over age 18 but under age 21, and the majority of states allow the adoption of any person, regardless of age.

Adoption of Sibling Groups

To date no statute or court has articulated a right of a child not to be separated from his or her siblings in adoption. While many believe that it is very important for the emotional health and development of siblings to remain together in an adoption, courts and authorities have to balance between the desire not to separate the siblings and the difficulty of finding adoptive parents willing and able to adopt siblings together. The adoption touchstone remains the best interests of the child.

Courts, however, separate 35,000 children from their brothers and sisters in foster and adoptive homes each year. According to some estimates, 75% of sibling groups end up separated after they enter foster care, and a greater number of former foster children search for their siblings than for their birth parents.

Adoption of Children From Another State

Children who are born or reside in one state and are eligible for adoption may be adopted by parents residing in another state so long as the requirements of the Interstate Compact on the Placement of Children are met. An interstate compact is an agreement between two or more states which serves as both a statute in the state and a binding contract between the states. The Interstate Compact on the Placement of Children seeks to protect children transported interstate for foster care or adoption, and to maximize their opportunity for placement in a suitable environment with persons able to provide the necessary and desirable level of care. It provides that "[n]o sending agency shall send, bring or cause to be sent or brought into any other part state, any child for placement in foster care or as a preliminary to a possible adoption unless the sending agency shall comply with each and every requirement set forth in this article and with the applicable laws of the receiving state governing the placement of children therein" (Compact, Art. III(a)).

All states have enacted the Interstate Compact on the Placement of Children, and it applies to both agency adoptions and private placements. Before placing a child, sending agencies must notify the receiving state's compact administrator. The receiving state's authorities must investigate and,

if they are satisfied, they notify the sending state that the proposed placement does not appear contrary to the child's best interests. When such notification is given, and only upon the receipt of such notification, the child is allowed to be sent or brought into the receiving state. The "sending agency" may be either an entity or a natural person. Until the child is adopted, reaches majority, becomes self-supporting or is discharged with the receiving state's concurrence, the sending agency retains jurisdiction over the child in matters relating to custody, supervision, care, and disposition. In addition, the sending agency continues to have financial responsibility for support and maintenance of the child during the period of the placement (Id.Art.V(a)).

Violation of the Compact is punishable under the child placement laws of either state and may be a ground for suspending or revoking the violator's license to place or care for children.

Foreign Born Children

All states also permit the adoption of foreign-born children. This practice, largely unknown before World War II, began in earnest with returning soldiers and media coverage of the plight of children and other refugees. Interest was heightened during the Korean and Vietnam wars and it continues to this day. Last year more than 18,000 children were adopted internationally by United States residents, a number that exceeds the number of international adoptions completed by citizens of all other nations combined. The last five years witnessed approximately a 15% annual increase in the number of intercountry adoptions. Russia was the greatest source for intercountry adoptions, followed in descending order by China, South Korea, Guatemala, Romania, Vietnam, India, Ukraine, and Cambodia.

There are several reasons for these expanding figures, but the primary ones include the small number of healthy U.S. infants available for adoption, adoption agencies' stringent rules and sometimes arbitrary preferences regarding who may adopt, and the fear prospective adoptive parents have of birth parents interfering with their family after adoption as inspired by an ill-informed media. Proponents therefore believe international adoption serves the interests of both American parents and the foreign children themselves because for many of these children international adoption represents the only realistic opportunity for them to become part of a permanent family.

Most observers agree that intercountry adoption will continue to grow in the United States. This country recently ratified The Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption, a multilateral treaty that sets out uniform international legal procedures to safeguard the interests of children, birth parents, and adoptive parents. The Convention recognizes adoption as a positive alternative for children unable to remain with their birth families but unlikely to be adopted in their own nation. It applies to all adoptions of children immigrating to the United States from another country party to the Convention, and all adoptions of children emigrating from the United States to another country party to the Convention.

Adoptions of foreign born children involve federal immigration laws, and many states have now added to their statutes special procedures for recognizing and validating adoptions finalized overseas.

The Parties To An Adoption: 3. Who Can Place A Child For Adoption?

Generally, any person or organization that has the right of consent to a child may place that child for adoption. Such persons include birth parents or the child's legal guardian or guardian ad litem, and such organizations include State Departments of Social Services or child placing agencies. Most states allow "nonagency" placements of children for adoption, often referred to as "private" or "independent" adoption. These include the "direct placement" of a child by the birth parent with an adoptive family and/or the use of intermediaries in helping to arrange the placement. A handful of states require that all adoptive placements be made by the State Departments of Human or Social Services or child placing agencies that are licensed by the state.

Agency Adoptions

In every state, a state agency or private child placement agency (sectarian or non-sectarian) licensed and regulated by statute may complete an adoption. Typically, agency adoptions concern either newborn infant placement or children who have special needs under applicable federal and state guidelines or who are older or otherwise difficult to place.

In an agency adoption of a newborn, the biological mother usually consents to the termination of her parental rights and the transfer of those rights and custody of the child to the agency for adoption. This consent is typically obtained after receiving counseling about her options and the consequences of her decision to terminate her rights and place the child for adoption. Most agencies also secure information concerning the medical, genetic and health history of the child and the birth parents. The child remains in the agency's physical custody until placement with the adoptive parents, and in the agency's legal custody until the adoption is final. In cases where the agency is able to obtain the consent to the termination and transfer of parental rights of the birthfather, it does so. Where an agency is unable to locate the birthfather, or if the biological mother refuses to name a birthfather, the agency must move for involuntary termination. Most agencies' counseling of the birth mother continues after the child is placed with the agency.

During the adoption process and afterwards, the agency usually also counsels the adoptive parents concerning the process and the affect the adoption will likely have on their lives. The agency's eligibility standards for prospective adoptive parents may exclude persons based on such factors as age, marital status, race, religion, financial stability, and emotional health.

Private placements

A private placement adoption does not involve the use of a licensed adoption agency. Rather, it is arranged by the birth mother dealing with the prospective adoptive parents either directly or through a lawyer, member of clergy, physician or other intermediary. Most states facilitate private placements by permitting advertising by persons wishing to adopt, while other states specifically prohibit such types of advertising. State law on the topic of advertising also dramatically varies.

Private placement adoptions are permitted in most states by stepparents or other members of the child's family. All but a handful of states (Connecticut, Delaware, and Massachusetts) also permit private placements to adoptive parents unrelated to the child. Even in the few states that prohibit non-relative private placements, birth parents may sometimes reach agreement privately with the prospective adoptive parents, and then work with an agency to direct the child to the designated persons.

Private placement adoptions account for a slight majority of most healthy infant adoptions by non-relatives in the United States. In these types of placements, birth parents and adoptive parents are typically not provided the counseling that agencies offer. However, the steadily increasing volume of private adoptions is fueled in part by frustration with agencies' long waiting lists, and the contemporary shortage of adoptable children without special needs. At any given time in the United States approximately one to two million couples are looking to adopt. There are only approximately 120,000 domestic adoptions a year in the entire country. Approximately half of these adoptions are step-parent or relative adoptions, one-third are adoptions through foster care, and the remaining third, representing approximately 30,000 adoptions, are either agency adoptions or private placements of healthy infants. Prospective adoptive couples outnumber adoptable children by a tremendous number. Intense competition has resulted for these children among desirous adoptive parents.

Concerns have been raised about some aspects of private placements. For example, in agency adoptions, the state or private agency licensed by the state must perform and grant a favorable home study before placing the child with the prospective adoptive parents, with the child sometimes placed in temporary foster care in the interim. The agency then must follow up with further inspections after placement. In private placements, however, the home study might not be done until after the parent or an intermediary has transferred the child. Concern over lax regulation of private placements has led some states to require that, at least where the prospective adoptive parent is not the child's stepparent or other relative, a notice to adopt must be filed and an investigation or home study must be conducted before transfer. Transfer may not be made until the parents are certified as qualified.

Fees

Agencies and intermediaries all provide a service to prospective adoptive parents, and are allowed to charge a fee for the provision of that service. Agencies typically prepare the pre-placement and post-placement home studies of the adoptive family, social and medical histories of the birth family, and birth family counseling. In an independent adoption, a person or organization will often act as an intermediary to match up or bring together a prospective adoptive parent with a birth mother wishing to place her child. Nearly all states, have statutes which provide some regulation of the fees and expenses that adoptive parents are expected to pay when arranging an adoptive placement. All state laws allow adopting parents to pay "reasonable fees," which are connected directly with the cost of these services. Some typical fees include maternity-related medical and hospital costs, temporary living expenses of the mother during pregnancy, counseling fees; attorney and legal fees, guardian ad litem fees, travel costs, meals and lodging when necessary for court appearances, and foster care for the child, when necessary. Some states specify expenses that the adoptive parent is not permitted to pay, including educational expenses, vehicles, vacations, permanent housing, or any other payment for the monetary gain of the birth parent. In addition, other state's laws set time limits on how long after the birth of the child an adoptive parent is required to continue payments for the birth mother's living expenses or psychological counseling.

Some observers have commented that in some private placements, "under the table" payments also occur and may considerably increase the amount paid by prospective adoptive parents for an adoption. This practice is illegal and is often known as "baby selling." The philosophy behind the illegality of "baby selling," is that adoption should be a donative transfer, not a commercial transaction. Moreover, the U.S. Constitution forbids the purchase and sale of people, i.e. slavery.

Most states have enacted statutes which specifically prohibit "baby selling." These laws address and regulate the money that can change hands in an adoption. Limits are placed on the kinds of payments and amounts of payments by prospective adoptive parents for such items as intermediary or other placement fees, counseling and attorneys' fees, the medical expenses of the birth mother and the child, and the birth mother's living expenses during the pregnancy. In addition, many have enacted statutes to regulate the use of intermediaries. For example, some states restrict the activities of intermediaries, with language that prohibits "giving or accepting payment for the placement of a child, or obtaining a consent to adoption." Other states limit the fees that an intermediary may collect to a sum that is "reasonable and customary" compensation for actual services provided, while in some states, the statutes prohibit private intermediaries altogether by restricting all adoptive placements to licensed or state agencies.

In a way of monitoring and enforcing these issues pertaining to fees, most states have statutes requiring that an accounting of all adoption-related expenses be made to the court in which the adoption is to occur. Typically, this is done by the adoptive parents signing an affidavit that they paid a certain fee for the services and expenses involved in the adoption. In some states, this statement is attached to the adoption petition. In others, it must be filed prior to the court hearing on the adoption. Some statutes require receipts be attached. The court has discretion, in both private and agency adoptions, to review all sums paid for adoption-related expenses, including payments made to or on behalf of the birth parents, and may deny or modify those fees if the court finds any of them to be unreasonable, unnecessary, or not permitted by law.

Federal and State Subsidies

Congress recently enacted a law that increased and made permanent a tax credit for all adoptions other than adoptions of children of the taxpayer's spouse. This credit is now up to $10,000. It begins to be reduced when the taxpayers' adjusted gross income exceeds $150,000, and is completely phased out when the taxpayers' adjusted gross income reaches $190,000. Taxpayers who adopt a child without "special needs" are entitled to a credit only to the extent of their unreimbursed qualified adoption expenses.

The definition of "special needs" differs from state to state, but the term generally includes children who are hard to place in adoptive homes, e.g. older children, children of racial or ethnic minority groups, children with siblings who should be placed together if possible, children who test positive for HIV, children who suffered prenatal exposure to drugs or alcohol, abused or neglected children, and children with mental, emotional or physical disabilities. Adoption of these children has proven to be difficult in part because parents willing to adopt and nurture special needs children may face imposing obstacles, including financial ones, not faced by other adoptive parents.

Federal and state laws provide financial assistance for parents willing to adopt special needs children. The entire adoption tax credit as mentioned above applies to taxpayers who adopt a special needs child regardless of their adoption costs. In addition, the federal Adoption Assistance and Child Welfare Act of 1980, created an adoption assistance program under the title IV-E of the Social Security Act which provides subsidies for persons adopting children who have one or more special needs according to the state's definition, and who are SSI (Supplemental Security Income) eligible or come from a family that meets the eligibility requirements of the former Aid to Families With Dependent Children program. (A child is "SSI eligible" usually because he or she has a disability.)

The adoptive parent's financial circumstances do not dictate eligibility for Title IV-E adoption assistance.

The Adoption and Safe Families Act also encourages adoption of special needs children. It provides incentive payments to states whose adoptions of foster children exceed the previous year's number, and requires states to provide health insurance coverage for any special needs child with an adoption assistance agreement who the state determines would not be adopted without medical assistance. The Act also guarantees that special needs children will not lose eligibility for federal adoption assistance if their adoption is dissolved or their adoptive parents die, and prohibits states from postponing or denying a suitable out-of-state adoptive placement while seeking in-state placement.

Various state laws also allow tax credits for parents who adopt special needs children, and some states maintain adoption subsidy programs to assist parents of special needs adopted children ineligible for the federal IV-E program. These subsidies generally cover medical, maintenance and special services costs. Unlike the Federal assistance, eligibility for state assistance generally depends on the adoptive parents' financial circumstances and the child's special needs.

The Legal Process: The Legal Steps In An Adoption

As mentioned above, adoption itself is a legal process. In order for a child to be eligible to be adopted, the parental rights of his or her biological parents need to be terminated so that the "new" parental rights of the adoptive parents may attach. This termination may be either voluntary, by means of a consent, or involuntary, by means of a court ordered termination. In some states, the court in the adoption proceeding itself may determine whether to terminate parental rights; other states require that where termination is a predicate for adoption, the termination proceeding must take place before the adoption proceeding. If the child is in the custody of a state or state licensed private agency, that agency must also consent to the child's being adopted by the adoptive couple.

Petitions in Adoption

The first legal step in any adoption is the filing of a petition with a court in which the child is to be adopted. Adoptions of children who were born out-of-state may occur in a court, so long as the procedures required under the Interstate Compact on the Placement of Children have been met. A petition is nothing more than a document filed with a court which is requesting the court to do something. As noted above, some states require the filing of separate petitions for the termination of parental rights and for adoption.

The information which must be filed in most termination of parental rights petitions include the name of the biological parents, the legal reason why their parental rights are being terminated, the birth name of the child, and to whom the parental rights are to be transferred. The information which most states require in the adoption petition include the name and address of the adoptive parents, the relationship, if any, which exists between them and the child to be adopted, the legal reason why the biological parents rights are being terminated or were terminated, a statement that adoption is in the child's best interests, and a statement that the adoptive parents are suitable to adopt the child. Once a petition is filed, a court will either schedule a hearing, or if none necessary, will issue an order granting what the petition requested, i.e. a termination of the parental rights, or after a certain period of time the adoption decree. Except in step-parent adoptions and other

unusual circumstances, the adoption does not become final until the child has been in the adoptive parents' custody for a probationary period which, depending on the state, may range from three months to a year. The court signs the final adoption order if circumstances warrant after a final home investigation.

Notice

As a general rule, all persons required to consent to the adoption must be given prior notice of the termination of parental rights hearing and/or adoption, unless they have given up their rights to such notice. The method of serving notice upon the parties varies from state to state. In many states, notice must be given to the individual in person, while in others notice may go through the mail. If the party cannot be found, or if his or her identity is unknown, many states allow notice to be given by publication in a newspaper. Once notice has been received or published, if the parties are interested in contesting the hearing, or appearing at the hearing, they are required to respond to the court within a specified time period, usually between 20 and 30 days, or to appear at the hearing mentioned in the notice.

In almost all jurisdictions, putative fathers are entitled to notice of proceedings to terminate their parental rights or adoption proceedings. Where a man believes he is or may be a child's father, in most states he must register with a putative father registry (usually with the state department of health or similar agency). A putative father registry is a vehicle by which a biological father (the "presumed" or "reputed" father) of a child can record his interest in the child. The state is then required to notify the father of legal proceedings regarding his child. In those states where there is a putative father registry, a birth father who fails to register in the prescribed manner and within the proper time period, may lose the right to consent. In jurisdictions without putative father registries, unwed fathers are required to file a notice of their paternity claim within a certain period of time, or they will have their rights terminated involuntarily.

Consent

All adoptions are based upon the consent to the adoption by persons or agencies legally empowered with the care or custody of the child. Consent refers to the agreement to relinquish a child for adoption and to release all rights and duties with respect to that child. This agreement is granted by a parent, or a person or agency acting in place of a parent. In most states, consents must be in writing and either witnessed and notarized or executed before a judge or other designated official. State laws are specific as to who may grant consents, when, and under what circumstances.

Who Must Consent

In all states, the birth mother and the birth father, if he has properly established paternity hold the primary right of consent to adoption of their child. Typically, both birth parents must knowingly and voluntarily consent (or as some statutes call it, "release," "relinquishment," or "surrender") to the termination of their parental rights and the adoption. Most state laws allow a parent to execute either a specific consent (authorizing adoption by particular named persons) or a general consent (authorizing adoption by persons chosen by the agency, an intermediary or the court). Consent is typically not required from a birth parent who is incompetent. In that case, the court may appoint a guardian of the child's person, with authority to consent in the parent's stead.

The overwhelming majority of states also require that older children give consent to their adoption, and that when a child has been committed to the custody of a public or private child placement agency, the agency's consent may also be a factor. Some statutes authorize the court to dispense with the child's consent for good cause. Many states make the agency's consent a prerequisite to adoption, but authorize judicial scrutiny by providing that the agency may not unreasonably withhold consent. Even where the adoption act seemingly makes agency consent mandatory without condition, many decisions hold that the agency's refusal to consent is nonetheless persuasive only. Receipt of all required consents does not in itself complete the adoption, but merely enables the court to order the adoption if it concludes all other requirements (including the best interests standard) have been satisfied.

When Consent Can Be Executed

Again, the overwhelming majority of states specify in statute when a birth parent may execute a consent to adoption. Birth fathers can generally execute consent at any time, while a birth mother can usually only execute consent after the birth of the child. Some states allow the mother to consent any time after birth, while others require a waiting period before a consent can be executed. These waiting periods range from 12 hours to 15 days, with the most common waiting period being 72 hours. Only two states (Alabama and Hawaii) allow the birth mother to consent before the birth of her child; however, the decision to consent must be reaffirmed after the birth.

The manner in which consent can be executed varies considerably from state to state. In cases where the custody of a child has been placed with either a state agency or state licensed agency, the head of the agency may sign an affidavit of consent. Birth parents face different requirements. Because of the importance of a biological parent's decision to terminate his or her parental rights of a biological child, state laws require formalities designed to bring home to the birth parent the gravity of their consent. In almost all states, consent must be in writing. The act may specify that the consent be signed before a judge, notary or other designated officer. A particular number of witnesses may be required. The consent may have to be under oath. In most states, a birth parent who is a minor is treated no differently than other birth parents. However, in some states, the minor parent must be provided with separate counsel prior to execution, or a guardian ad litem must be appointed to either review or execute the consent. In the case where a biological parent is unavailable to grant consent, either one or both parents may have their parental rights terminated for a variety of possible reasons, including abandonment, failure to support the child, mental incompetence, or a finding of parental unfitness due to abuse or neglect. When neither birth parent is available to give consent, most state laws provide that other legal entities may consent, such as an agency that has custody of the child, a person who has been given custody, a guardian or guardian ad litem, the court having jurisdiction over the child, a close relative of the child, and a best friend of the child appointed by the court.

Revocation of Consent

Validly executed relinquishments and consents to adopt are intended to be final and irrevocable. The purpose of adoption is to create a permanent and stable home for a child. As a result, some states make no provisions for revocation of consent, and others require strong evidence of fraud, duress, undue influence, coercion, or misrepresentation before allowing a revocation. Some states do allow for withdrawal or revocation of consent under specific circumstances such as the mutual consent of the adopting family or a court finding that revocation is in the best interest of the child.

Other states allow for withdrawal for any reason within specified time limits, generally ranging from three to 21 days. In other states, consents may be reconsidered if an adoptive placement is not made with a specified family or within a specific period of time. However, consent does become final and irrevocable once a final decree of adoption has been issued by the court.

Legal Process of Adoption: Confidentiality

When a court enters an adoption decree, the existing biological parent-child relationship is eliminated, and a new parent-child relationship is created between adoptive parent and child. State statutes provide that the child is then issued a new birth certificate with the adoptive parents named as the child's parents, and the child assumes their last name. The original birth certificate and all other records regarding the case are sealed. These records ordinarily may be opened only on court order upon a showing of good cause. Without such a showing, the birth parents may not learn the identity or whereabouts of the child or adoptive parents, and the adoptive parents and the child may not learn the identities or whereabouts of the birth parents.

Under the "good-cause" requirement, disclosure of identifying information, that is, the birth parents' name, birth date, place of birth and last known address, is allowed only where the adopted person demonstrates urgent need for medical, genetic or other reasons. Most states mandate or allow disclosure of an adopted child's health and genetic history, without revealing identifying information. Some states also grant adopted persons, when they reach majority, the right to non-identifying information concerning their birth parents (that is, information about the parents' physical description, age at the time of adoption, race, nationality, religious background, and talents and hobbies, without revealing the parents' identities). Recently, there have been two significant developments in the world of adoption that have challenged these very notions. The first is open adoption, and the second is the movement for open records.

Open Adoption

In an "open adoption," the child has continuing post-adoption decree contact and/or relations with the birth parents or perhaps other members of the immediate or extended birth family. These may include visitation, correspondence, telephone calls, or otherwise. The growth of private open adoption reflects the changing demographics of adoption. Because more children have been adopted by their stepparents, relatives and foster parents, birth parents, adopted persons and adoptive parents frequently know one another's identities and whereabouts before the petition, is filed. Also private adoptions with openness agreements between the birth parents and the adoptive parents have been more commonplace in recent years, in part due to the shortage of healthy adoptable children. Birth mothers have gained leverage to seek a future right to contact with the child as a condition of consent. Many adoption agencies accommodate birth mothers who seek openness, and fathers holding a right to veto the adoption may also insist on openness.

Disagreement, however, remains concerning judicial authority to order open adoptions. Some courts use a best interests of the child standard to determine whether to order visitation or other contact between an adopted child and persons other than the adoptive parents, including the natural parents. Other adoption acts, however, expressly preclude post-adoption visitation orders unless the adoptive parents agree to permit visitation. Similarly, courts disagree about whether it may be ordered in the best interests of the child where the adoption act is silent about post-adoption visitation.

In addition, there appears to be confusion in many states as to whether or not to enforce private agreements for openness. In a few states, the adoption code expressly authorizes courts to specifically enforce such private agreements found to be in the best interests of the child. Several states do not recognize such agreements, and, in the absence of express statutory authority, decisions disagree about the propriety of specific performance.

Open Records

While the information that persons who were adopted may be able to obtain under existing law is acceptable to some, for many others it is deemed inadequate. Advocacy and support groups have been established to assist these individuals in their efforts to locate their birth families, to challenge the constitutionality of sealed-records statutes, and to lobby for open-records legislation. Moreover, a cottage industry appears to have grown with regard to searching for one's biological parent.

In a reaction to this, most states have enacted registry statutes, which permit release of identifying information where the birth parents, the adoptive parents, and the adult who was adopted all state their desire for release. These registry statutes fall into two categories: passive registry statues, or those that allow parties to state their desires, and; active registry statutes, those which authorize state authorities to seek out parties' desires when one party expresses a desire for disclosure. Some states however now grant adult adopted persons an absolute right to their original birth certificates. The issue of open records remains somewhat controversial, and there is no doubt that other statutes will change regarding this topic in the future.

Wrongful Adoption

Wrongful adoption is a tort action, based in fraud or negligence, which allows adoptive parents to recover for intentional or negligent misrepresentations made by an adoption agency or other intermediary regarding their adopted child's health history or genetic background. As a cause of action, it was virtually unheard of prior to 1980, when California became the first state to consider the interests of the adoptive child in the context of tort theory. Although the California Court did not allow the adoptive parents to recover, the decision framed the two major issues that have arisen in all subsequent wrongful adoption actions: (1) fraudulent misrepresentation, and (2) negligent misrepresentation.

Agencies have become increasingly careful to disclose all information to adoptive parents. The courts have consistently held that while agencies cannot be expected to be guarantors of adopted children, they must disclose information related to the child so that the adoptive parents have sufficient information to parent the child.