

OFFERING THE DIFFERENT ADOPTION OPTIONS
ARLENE L. KASARJIAN, ATTORNEY AT LAW
KONOWITZ & GREENBERG, P.C.
WELLESLEY HILLS, MA

A. PRIVATE PLACEMENT ADOPTIONS

There are several ways to adopt a child in Massachusetts: through a private agency, a public agency, the Massachusetts Department of Children and Families (“DCF”), if adopting a child through foster care or without either in limited circumstances where the child is a relative.

Private placement adoptions are adoptions which are handled by a private adoption agency working with a prospective adoptive family, as opposed to adoptions of children in foster care handled by DCF.

Massachusetts is an agency state which means that only licensed adoption agencies may legally place children for adoption. Families residing in Massachusetts seeking to adopt a child must utilize the services of private adoption agency licensed by the state or DCF, regardless of where the child is born. The Department of Early Education and Care (“EEC”) which regulates adoption agencies, requires, at a minimum, that interested families have a home study conducted by a Massachusetts licensed adoption agency. These agencies may provide for private domestic or international adoptions, or they may contract with DCF to provide services for adoptions from foster care.

Placement of a child by an agency is not required if any of the following apply:

1. The petitioner is a blood relative of the child to be adopted;
2. The petitioner is a step-parent of the child to be adopted; or
3. The petitioner was nominated in the will of a deceased natural parent of the child as a guardian or an adoptive parent. M.G. L. c. 210, §2A.

Private placement adoptions are fee-based and vary depending on the type of adoption and the agency. Some agencies are full service adoptions which for one comprehensive fee provide services such as advertising, matching expecting parents and/or children after birth with prospective adoptive families, conduct a home study, post placement visits with the adoptive family, services related to the Interstate Compact for the Placement of Children (“ICPC”) and adoption finalization. Other agencies charge “a la carte” fees for each service based on the needs of each family. Therefore, it is critical to fully understand the fee structure of an agency before beginning the process of adoption.

M.G. L. c. 210 §11A, authorizes only adoption agencies licensed in Massachusetts to search for or locate a child for adoption, as well as place a child in Massachusetts, and accept consideration or payment for placing a child. This means that Massachusetts attorneys are prohibited from direct involvement to place, advertise and search for a child, but are not prohibited from networking or referring a family to sources who can assist a family in finding a child to adopt. Not even prospective adoptive parents can advertise for a child to adopt in Massachusetts. Unlike Massachusetts, some states permit attorneys and facilitators to engage in these services. A few notes of caution. Facilitators who match children with families are not agencies, nor are they licensed. Fees charged by attorneys and facilitators outside of Massachusetts are not regulated. In addition, facilitators and attorneys outside of Massachusetts do not always know or understand the Massachusetts adoption requirements which is why having a Massachusetts adoption attorney guide you through the process is critical to a successful placement and eventual adoption.

An experienced attorney can anticipate and help to avoid certain dilemmas and complications, and guide a family toward an agency and resources that meet their needs. There are many issues that may present themselves in the course of an adoption that could result in a failed placement or a disruption. For example, adoption involves the termination of the birth parents' rights. In some cases both birth parents participate, and in other cases, only the birth mother is involved. The birth mother may not have named the birth father, the birth father may be unknown or the named birth father may not be the biological father, despite the representations made by the birth mother. In addition, a birth parent's rights in one state often differ from a birth parent's rights in Massachusetts. Each of these situations presents a potential legal risk to the adoption and security of the placement. An adoption attorney will not only be able to ensure that the proper steps are taken, but also is in a position to advise the adoptive family and/or agency of the risks involved and whether to proceed with the placement.

A Massachusetts adoption attorney can also help a family seeking to adopt outside of Massachusetts. First, an experienced attorney may be able to recommend a particular agency, attorney or intermediary out of state and then work closely with those resources to ensure the family is protected in the process. Second, if a family decides to advertise on its own outside of Massachusetts, since Massachusetts does not permit advertising, it can be done only in states that permit advertising. An attorney can provide guidance to ensure the family stays in compliance with the relevant laws regarding advertising. Third, if the adoptive family locates a birth mother or birth parents that are looking to make an adoption plan, the attorney may be able to refer the birth parents to an attorney and/or agency in their home state to navigate the adoption process in

that state, including compliance with the Interstate Compact on the Placement of Children (“ICPC”).

B. VENUE: WHY IT’S SO IMPORTANT?

Venue is important because it is the venue that will determine what law applies, and whether the court has the authority to act on the adoption. Massachusetts allows for out of state adopters to finalize the adoption in Massachusetts, so long as the agency, that has custody of the child, is a Massachusetts licensed adoption agency. Many other states have the same policy. Venue is also critical, so as to not give the appearance of “forum shopping” or attempting to thwart the rights of either of the parents, particularly the birth father. Unscrupulous attorneys have been known to “whisk” an expectant mother out of one state to another, merely to avoid giving notice to the expectant father. States vary in how one may receive notice, and under what circumstances. There have been cases where attorneys have been disbarred, adoption agencies closed involuntarily, and children ordered back to the birth parents, because of improprieties which disguised forum shopping.

C. THE CRUCIAL ELEMENT OF CONSENT

Consent refers to the agreement by a parent, or a person or agency acting in place of a parent, to relinquish a child for adoption and to release all rights and duties with respect to that child.

Adoption is meant to create a permanent and stable home for a child. Therefore, a validly executed relinquishment and consent to adopt is intended to be final and irrevocable. As a result, the right of a birth parent to revoke consent is strictly limited.

In Massachusetts a consent is irrevocable upon signing. M.G. L. c. 210 §2 specifies all the requirements for consent in Massachusetts. While each state has its own unique requirements, most states require that the consent be in writing and either witnessed and notarized. In Massachusetts, the parent(s)'s consent must be signed in front of a notary public and in the presence of two competent witnesses. Id. The notary public may be affiliated with an adoption agency. The consent is not involuntary or irrevocable if the notary public who executed the consent is also employed by the adoption agency. The consent is considered effective if given voluntarily and based on a full understanding of all the facts necessary to consent. Adoption of Thomas, 559 N.E.2d 1230, 1990.

Generally, the birth mother and the birth father, if he has properly established paternity, hold the primary right of consent to adoption of their child. Either one or both parents may have these 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. M.G.L. c. 119 §24. In Massachusetts, an adoption decree will not be entered regarding a child born to an unmarried mother without the mother's consent. In re Adoption of a Minor, 178 N.E.2d 264, 1961; Adoption of Derrick, 614 N.E.2d 987, 1993. The birth father has certain due process rights regarding notice to potential adoption proceedings. Adoption of Alex, 562 N.E. 2d 78, 1990. There is no age requirement limitation on the consenting parent. A minor child who is at least twelve years old may legally give and withhold consent to a proposed adoption. M.G. L. c. 210 §2; White v. Laingor, 746 N.E.2d 150, 2001. Although there is no limitation on the minor parent, the judge may consider the minor parent's maturity level and level of understanding and a guardian ad litem may also be appointed to represent the minor parent. Adoption of Thomas, 559 N.E.2d 1230, 1990.

Once a child is surrendered for adoption, no adoption may occur without the consent of the Department of Social Services (now known as DCF), unless the petitioner is a blood relative. Adoption of Derrick, 614 N.E.2d 987, 1993. The mother's consent cannot be coerced. If she retained her mental faculties and understood the legal effects of her decision at the time of the consent, withdrawal of the consent will not be permitted at a later date. Adoption of Thomas, 559 N.E.2d 1230, 1990. The only way to withdraw consent made with a complete understanding is with permission from the probate judge. Adoption of Derrick, 614 N.E.2d 987, 1993.

Without either the proper termination of parental rights, or consent, in accordance with applicable law, there can be no adoption. Adoptions have been known to be set aside, because the consent of a necessary party, and/or proper notice to that party was not given.

D. EXPLORING OTHER ADOPTION ALTERNATIVES

1. When and How to Use Independent Options

An independent adoption is an adoption that takes place without the involvement of a licensed private or public agency. The prospective adoptive parents are advised by an adoption attorney, instead of working with an adoption agency. Typically, the prospective adoptive parents take an active role in identifying a birth mother, usually by networking, advertising, or through the internet, and the birth parents give their consent directly to the adoptive parents. Massachusetts is one of a handful of states that prohibit private placement of children with adoptive parents to whom the children are not related. M.G.L. c. 210, §11A. Therefore, independent adoptions are not an option in Massachusetts.

2. Circumstances when it's Appropriate to Adopt an Adult

There may be times when it is appropriate to adopt as an adult. The greatest advantage of doing so, besides the love and kinship felt, is that the adult adoptee needs no consent from either legal parent to be adopted. Some adopt later in life to memorialize the true parent/child relationship that has blossomed over the years. Others adopt their step-children for inheritance purposes. This is often endorsed by judges who recognize the significance of a legal parent/child relationship in the face of potentially confrontational family relations.

3. Guidelines for Adopting Relatives

Although the statute does not require a home study or a licensed agency be involved in the adoption of a step-child, or blood relative, it makes sense to go through the process for several reasons, all of which are in the best interests of the child. First, it is important to confirm that the adopter is free of any criminal behavior that could put the child at risk. Second, the home study process allows the adopter an opportunity to explore his/her reasons for adopting, to ensure that this is an appropriate step for all concerned. And, often times, the adoption may be the result of a family member having a child out of wedlock, and another choosing to raise the child as his/her own. An adoption professional, skilled in counseling, can assist all family members in establishing a plan for success and address many questions, which, at first, may appear to be uncomfortable, but should not be swept under the rug.

E. UNDERSTANDING STEP-PARENT ADOPTIONS

In addition to the above, it is important to remember, that step-parent adoptions require the consent of the legal parent, unless deceased. Psychologically, the legal parent may resist, for fear

of being regarded as a “bad” parent, regardless of his/her involvement or lack thereof. If appropriate, this may be an excellent opportunity for all to consult an adoption specialist, versed and experienced in the many conflicting emotions to assist all of the parties in putting the child first.

F. EXAMINING AND ENSURING FOSTER PARENT RIGHTS

A foster parent provides temporary care of a child who is either in the custody of DCF or an adoption agency. Custody of the child remains with the agency, leaving the foster parent with very limited rights. Where a child is in the custody of DCF and is removed from a foster home, the foster parent or a pre-adoptive parent may have a right to an administrative fair hearing or to file a grievance. See 110 CMR 7.113, 7.113A and 110 CMR 10.06. Foster parents may be entitled to a hearing before a child is removed from their home. If so, the court must determine the child's best interests by reviewing specific case circumstances such as length of time in the home and the foster family's suitability. Cennami v. Department of Public Welfare, 363 N.E. 2d 539 (Mass. Ct. App. 1977).

The Adoption and Safe Families Act of 1997 (“ASFA”) is a federal law intended to improve the safety of children, to support families, and to facilitate and expedite placement in adoptive and other permanent homes for children who need them. Under ASFA, foster/pre-adoptive parents including relative caregivers have a right to notice and the opportunity to be heard by the court regarding the children in their care. The new law requires notification of foster/pre-adoptive parents and relative caregivers of court permanency hearings and trials involving the child. However, while ASFA confers additional rights to foster parents as it relates to notice and an

opportunity to be heard in a legal proceeding, a foster parent is not made a party to the proceeding itself. Any involvement in a contested matter is left to the discretion of the judge. Regardless of how long the foster parents may have been parenting the child; whether the child was placed with the permission of one of the parents, or the expectation that the placement was for the purposes of adoption, neither or any other law conveys an automatic right of intervention in any action concerning the child in their care. At best, given the facts of the case, the foster parents may file a Petition for Declaration of De Facto Parentage, to secure any of their rights.