

## **ADOPTION RULES IN TEXAS**

*This outline is provided to give clients a general understanding of the processes and issues that may be involved in the clients case. This is an outline that may not be up to date and the outline is far from comprehensive. It is not a substitute for legal advice and is not intended to assist in the prosecution of any case. It is offered solely as information to make the litigation process more decipherable to the client. It is not intended and should not be used as a substitute for legal advice.*

### **A. Affidavit of Relinquishment of Parental Rights --- Predicate to Adoption**

To facilitate the placement of infants and small children for adoption without putting the mother through the trauma of a court appearance or other formalities, parental rights may be relinquished by a witnessed affidavit that is verified before a notary public. [{} 161.103] This procedure is most commonly used when a child born out of wedlock is placed for adoption. The mother signs the Affidavit of Relinquishment. This procedure is also used when a culpable parent decides not to contest a petition for termination filed by the state.

#### **1. Cannot Be Signed Until Forty-Eight Hours After Child's Birth**

The affidavit cannot be executed until at least 48 hours have elapsed after the child's birth. This assures that an unwed mother who, during pregnancy, decided to give up the child can change her mind after the child is born. Since many children placed for adoption are born to teenagers, the affidavit may be made by any parent, "whether or not a minor."

#### **2. Affidavit Irrevocable After Entry of Termination Decree**

The Affidavit of Relinquishment of Parental Rights is revocable by the mother until the decree terminating the parent-child relationship is entered by the district court. But once the decree is entered, the affidavit is irrevocable. [Stewart v. Reese, 698 S.W. 2d 236 (Tex. App. 1985)]

### **B. Affidavit of Status of Child--Establishes that Mother Is Unmarried**

If the child will be born out of wedlock, the Affidavit of Relinquishment must be accompanied by a separate affidavit signed by the mother, stating that the mother is not and has not been married to the child's father, that they have not attempted to marry, and that paternity has not been established under the laws of any jurisdiction. [ ' 161.105]

#### **1. Gives Information Regarding the Father--Satisfies Due Process Concerns**

The affidavit also must state one of the following: (i) the father is unknown and no probable father is known; (ii) the name of the father, but the affiant does not know his whereabouts; (iii) the father has executed a voluntary paternity statement and an Affidavit of Relinquishment of Parental Rights; (iv) the name and

whereabouts of the father; *or* (*v*) the name of the probable father. This information will enable the court to satisfy due process requirements as to the father; *i.e.*, notice by personal service if the father is identified, or notice by publication if the father is unknown.

## **2. May Be Executed After First Trimester of Pregnancy**

Unlike the Affidavit of Relinquishment, which cannot be executed until after the child's birth, the Affidavit of **Status** of Child can be executed at any time after the first **trimester** of pregnancy. If the mother has decided to relinquish the child for adoption immediately after its birth and the termination petition has been filed during pregnancy (*see* below), early execution of this affidavit will facilitate the adoption process by enabling the court to give notice to the alleged father, or notice by publication if the father's address or identity is unknown.

## **3. Termination Petition May Be Filed After First Trimester of Pregnancy**

To facilitate the placement of children for adoption immediately after the child's birth, section 161.102 permits the petition for termination of the parent-child relationship (and for termination of the rights of the alleged or probable father) to be filed at any time after the first trimester of the child's pregnancy. This will permit early notice to the father through information provided by the mother in the Affidavit of Status of Child.

## **4. Termination Order Cannot Be Entered Until Child Is Five Days Old**

Because the mother may change her mind after the child's birth, the statute provides that no hearing on the petition for termination may be held and no termination order can be entered until the child is at least five days old. Moreover, although both the petition and the Affidavit of Status may be executed before the child's birth, the Affidavit of Relinquishment cannot be validly signed until after the child's birth.

## **C. Putative Father Signs Affidavit of Waiver of Interest in Child**

If a child born out of wedlock is placed for adoption, the rights of the putative father also must be addressed in the termination proceeding. If the man acknowledges that he is the father, the appropriate procedure would be to have him execute a voluntary paternity affidavit followed by an Affidavit of Relinquishment of Parental Rights, *supra*. It may be, however, that the man named by the mother believes that he is not the father of the child. In this situation, section 161.106 authorizes the execution of a witnessed, notarized Affidavit of Waiver of Interest in the Child. By this affidavit, which may be executed before or after the child's birth, the man disclaims any interest in the child and waives notice or

service of citation in any SAPCR with respect to the child. The affidavit may contain a statement that the affiant does not admit being the father or having had a sexual relationship with the child's mother. In addition to facilitating the adoption process, this affidavit works to the man's advantage by providing him with an opportunity to disclaim any interest in or responsibility for the child and removing him from involvement in any further proceeding. This affidavit *cannot* be used against the man in a later proceeding to establish his paternity of the child.

**D. Involuntary Termination of Rights of Alleged or Probable Father**  
*In re Unnamed Baby McLean*, 725 S.W.2d 696 (Tex. 1987), the Supreme Court ruled that, under the Equal Rights Amendment to the Texas Constitution, the rights of the biological father must be equated with those of the mother of the child. This made it necessary to enact legislation providing for the involuntary termination of the rights of an alleged or probable father. The biological father's right may be terminated in one of two ways. [ ' 161.002]

### **1. Culpable Acts**

The rights of the alleged or probable father may be terminated if he has committed any of the culpable acts that would warrant terminating parental rights.

### **2. Failure to Respond to Citation**

In the *Baby McLean* case, a child was born to an unwed mother; the father was married to another woman. Opposing the child's adoption, the father sought to be adjudicated the child's parent under the voluntary legitimation statute, and sought appointment as the child's managing conservator. The court stated: "A father who steps forward, willing and able to shoulder the responsibilities of raising a child should not be required to meet the higher burden of proof solely because he is male." The legislature responded by providing for termination of the rights of a father who does not "step forward." The rights of the alleged or probable father can be terminated if, after being served with a citation, he does not respond by filing either an admission of paternity or a counterclaim for paternity.

### **D. Effect of Decree Terminating Parent-Child Relationship**

A decree terminating the parent-child relationship is a final judgment and, absent a motion for new trial or an appeal, cannot be modified. The decree divests the parent and child of all legal rights, privileges, duties, and powers with respect to each other, with one exception discussed immediately below.

### **E. Inheritance Rights From and Through Natural Parents**

The child retains its right to inherit from and through his natural parents even though subsequently adopted by a new family [see Tex. Prob. Code Ann. '40], *unless* such right of inheritance is terminated by the decree.

## . **ADOPTION**

### **F. Adoption of Child Establishes Parent-Child Relationship**

On entry of a decree of adoption, the parent-child relationship exists between the adopted child and the adoptive parents as if the child were born to the adoptive parents during marriage.

#### **1. Any Adult (Single or Married) Can Adopt a Child**

Any adult, whether single or married, and whether a resident or nonresident, can adopt a child as long as the court finds that the adoption is in the child's best interest. [ ' 162.001] If a petitioner is married, both spouses must join in the petition for adoption. [ ' 162.002]

#### **2. No Discrimination on Basis of Race or Ethnicity**

In determining the best interest of the child, the court may not deny or delay the adoption or otherwise discriminate on the basis of race or ethnicity of the child or the prospective adult parents. Except with respect to persons subject to the Indian Child Welfare Act of 1978, an adoption agency cannot act on a presumption that placing a child with a family of a certain racial or ethnic group is in the child's best interest. Ethnicity can be a factor only if an independent psychological evaluation indicates that placement with a family of a particular race or ethnicity would be detrimental to the child. [ "162.015, 162.308]

#### **3. Child Must Have Resided with Petitioner for Six Months**

In general, a petition for the adoption of a child cannot be granted unless the child has lived in the home of the petitioner for at least six months. However, this *requirement can be waived* if the court finds that waiver is in the child's best interest.

#### **4. Relationship with Living Parents Must Have Been Terminated**

Before a petition for adoption can be considered, the parent-child relationship as to each living parent must be terminated. The termination proceeding can be joined with the adoption proceeding. In the case of an adoption by a stepparent, only one parent's rights are terminated as long as "a parent is presently the spouse of the petitioner." That parent must join in the petition for adoption.

### **G. Social Study Required; Time for Hearing**

The court must order the making of a social study by the TDPRS or some other agency or person "into the circumstances and conditions of the child and of the home of" the adopting parent or parents. [ ' 162.003] The cost of the social study is paid by the person(s) seeking to adopt the child. A hearing on the adoption is held no earlier than 40 days and no later than 60 days after appointment of the social study investigator. The court can shorten the 40-day minimum, but supposedly cannot extend the hearing date beyond the 60 days. [162.004]

### **H. Criminal History Record of Adopting Parent Must Be Furnished**

The court must order the person seeking to adopt a child to furnish his own criminal history record information. [ ' 162.085]

#### **1) Child Over Age Twelve**

A child age 12 or older must give his consent to the adoption in court or in writing. The court may waive this consent requirement if the child's best interest would be served thereby. [ ' 162.010(c)]

#### **2) Managing Conservator**

A court-appointed managing conservator must consent to the adoption unless, of course, the managing conservator is the petitioner. However, the court may waive this requirement if it finds that the managing conservator's consent is being refused without good cause. [ ' 162.010(a)]

### **J. Nonlicensed Adoption Placement Activities a Misdemeanor**

A person who is not the child's natural or adoptive parent or guardian or a licensed adoption agency commits a misdemeanor if he serves as an adoption intermediary between a prospective adoptive parent and an expectant parent. However, a professional does not commit an offense if she gives legal or medical advice to a parent who identified a prospective adoptive parent on his own and then sought professional advice, or to a prospective adoptive parent who identified a parent on his own and then sought advice. [ ' 162.025]

### **K. Procedural Aspects**

#### **1) Venue---County Where Child or Petitioner Resides**

As was pointed out earlier, the general rule is that, unless the SAPCR is tied to a divorce action, SAPCR venue lies in the county where the child resides. However, a suit for adoption may be brought in the county where the child resides *or* in the county where the petitioners reside. [103.001(b)]

#### **2) Court Attendance by Adopting Parents, Child Age Twelve or Older**

The court may waive appearance of one of the adopting parents at the adoption hearing if such appearance "would be unduly difficult." If the

child to be adopted is age 12 or older, he must attend the hearing unless his appearance is waived by the court.

### **3) Abatement of Proceeding on Death or Divorce**

If there is only one petitioner and the petitioner dies, or if there are two petitioners and both die, the proceeding abates and the petition for adoption is dismissed. If, however, only one of two petitioners dies, "the proceeding continues uninterrupted."

If the petitioners are divorced, the proceeding abates and the petition for adoption is dismissed unless the petition is amended to request adoption by one of the original petitioners.

### **4) No Direct or Collateral Attack After Two Years**

The validity of an adoption decree is not subject to attack more than two years after the decree is entered. [ ' 162.012] If, however, the termination of the parent-child relationship on which the adoption is based is invalid, the adoption may be subject to challenge notwithstanding the two-year limitation period. [Schiesser v. State, 544 S.W. 2d 373 (Tex. 1976)]

## **L. Social, Health, Educational, and Genetic History ("SHEG") Report**

Before placing a child for adoption, the TDPRS, an authorized agency, the child's parent or guardian, or whoever else places the child for adoption must compile and submit to the court a report containing the information set out below. *No adoption can be granted until the report is filed of record. (Exception.'* No report is required if the adopting party is a stepparent, grandparent, uncle, or aunt of the child.) However, the validity of a final adoption decree is not subject to attack if the report was not properly filed. [ ' 162.005]

### **1. Purpose--To Provide Means to Locate Each Other If Both Parties So Desire**

The Texas statute does not go as far as England's Children Act of 1975, under which an adopted child is entitled by right to learn the identity of her birth parents upon reaching adulthood. Under the Texas statute, the identity of the parents and information about the family must be set out in the report that is filed of record, but the adopted child, upon reaching adulthood, is entitled only to a *report summary* that is "edited to protect the confidentiality of birth parents and their families." The Human Resources Code authorizes adoptees, birth parents, and siblings to apply to the TDPRS registry for a "match" that will enable the child, parents, and siblings a means of voluntarily locating one another--but the complete report is released *only if both sides are looking.*

### **2. Contents of SHEG Report**

#### **1) Social History**

To the extent known, past and existing relationships among the child, his siblings, parents, extended family, and other persons who had physical

possession of the child.

## **2) Health History**

The child's health status at the time of placement: birth, medical, psychological, and psychiatric history; record of immunizations; and available results of medical, psychological, psychiatric, and dental examinations.

## **3) Educational History**

To the extent known, information about the enrollment and performance of the child in school, results of educational and standard tests, and special educational needs.

## **4) Genetic History**

Description of parents and grandparents, including: health and medical history; cause of and age at death; height, weight, hair and eye color; nationality and ethnic backgrounds; general level of educational and professional achievement; religious background; existence of other children born to either of the child's parents.

## **5) Abuse of Child**

The report must also include any history of physical, sexual, or emotional abuse suffered by the child.

## **M. Summary Given to Adoptive Parents; Kept on Record for Ninety-Nine Years**

The agency or party that prepares the report must give a summary of the report, "edited to protect the confidentiality of birth parents and their families," to the adoptive parents. Thus, the adoptive parents will have the child's health history but not the child's social or genetic history. Both the report and the report summary are to be kept on record by the TDPRS for 99 years.

## **N. Child Entitled to See Report Summary When an Adult**

On request, the TDPRS is required to furnish a copy of the report summary to: the adopted child when he is an adult; the progeny of the adopted child if the adopted child is dead and the progeny is an adult; the surviving spouse of the adopted child if the adopted child is dead and the spouse is parent of a child of the deceased adopted child; the managing conservator guardian; or the custodian of the adopted child. The full report that contains the social and genetic information is released *only* if both the adoptive child and the natural parents (or a sibling) are attempting to locate each other.

## **O. Subject to the Foregoing, Adoption Records**

### **1. Are Sealed**

As the foregoing discussion indicates, Texas generally follows the prevailing view that adoption records are sealed, and are not subject to disclosure on the basis of a unilateral request by the child. In *Aimone v. Finley*, 447 N.E.2d 868

(Ill. App. 1983), *cert. denied*, 465 U.S. 1095 (1984), the Illinois court ruled that the possibility that an adopted person might have inheritance rights from his natural parents (whomever they were) was insufficient cause to open sealed adoption records. Although the claimant had a statutory right to inherit from his natural parents, an expectation of a possible inheritance did not constitute a vested right, and so the claimant failed to establish a due process violation.

#### **P. Adoption of Adult**

Texas permits any adult resident of the state to petition the district court or statutory county court in the county of his residence to adopt another adult. A petition filed by a married person must be joined in by the spouse. The adult adoptee must give his consent to the adoption in a writing that is acknowledged before a notary public. "On entry of the decree of adoption, the adopted adult is the son or daughter of the adoptive parents for all purposes, and of the natural parents for inheritance purposes only. However, the natural parents may not inherit from or through the adopted adult." [" 162.501 *et seq.*]

On the theory that adults are capable of making their own decisions, the court is not required to make a finding that the adoption is in the adoptee's best interest. The court's only duty is to make certain that the adoptee consents to the adoption, which is established by the adoptee's written, acknowledged consent and by his appearance at the adoption proceeding.

#### **Q. Special SAPCR Standing Rules for Adoption Cases**

A SAPCR (*Suit Affecting the Parent Child Relationship*) seeking only an adoption, or a termination of the parent-child relationship joined with an adoption, may be brought by (i) a stepparent of the child; (ii) an adult who, as a result of a placement for adoption, has had possession of the child during the 30-day period preceding the filing of the petition; (iii) an adult who has had actual possession of the child for at least two of the three months preceding the filing of the petition; or (iv) an adult "whom the court determines to have had substantial past contact with the child sufficient to warrant standing to do so." [" 102.003 *et seq.*]

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