



By Tami Maisel

Adoption, Michigan Style

An overview

and update of private
placement
adoption

FAST FACTS

Agency and attorney-assisted direct placement adoptions co-exist in Michigan.

The Revised Michigan Adoption Code provided amongst other things, a way for birthparents to arrange for direct placement of their child.

Once adoption is finalized, the adoptive parents have the same rights and duties as though the child had been born to them.

Consent of the birthmother is a cornerstone of direct placement adoption.

DeBoer v Schmidt or the "Baby Jessica" case was the most publicized Michigan case arising from private adoption.

Several safeguards in the Michigan Adoption Code make the "Baby Jessica" scenario unlikely under Michigan law.

Direct placement provisions of the Michigan Adoption Code balance the rights of each birthparent, child, and adoptive parent.

Michigan was one of the last six states still prohibiting attorney-assisted direct placement adoption when the Legislature amended the Michigan Adoption Code effective January 1, 1995. Prior to that, adoptions were limited to child placement agencies except for stepparent and certain related party adoptions.

In an agency adoption, birthparents relinquish their parental rights to the agency who then completes the process and ultimately consents to the adoption. Individual agencies may have an internal policy that facilitates a birthparent's participation in the adoption process. However, the agency has the legal authority to select adoptive parents and complete the adoption without participation or guidance by the birthparents.

In direct placement adoption, birthparents consent to the termination of their parental rights for the purpose of their child's adoption by specified adoptive parents.¹ If the identified adoption is not finalized, parental rights may be reinstated without further hearing.²

The two types of adoptions, agency and attorney-assisted direct placement, now co-exist in Michigan, despite a contentious legislative beginning. Written and verbal testimony heard by the Senate Committee³ expressed fears that attorneys would become "baby brokers" and that adoption would become a "business" with children as the "commodity."

Several adoption agencies speculated that of the services essential to the adoption process, 90 percent are social services and only 10 percent are legal services. They further testified that agencies had been providing the necessary legal services for many years with few problems.

Adoption social workers wrote to express concern that attorneys could not provide the education and support which

is a priority in child placing agencies. They also noted that agency services are available to all members of the adoption triad (birthparents, the adoptee, and adoptive parents) both before and after the adoption.

On the other hand, adoptive parents cited frustration with agency fees, long waiting periods, and unfair or arbitrary



agency criteria in determining placements. They also noted the reluctance of birthparents simply to hand their child over to an agency, with no guarantee their preferences would be honored, and no recourse if they were not.

The legislative analysis concluded: "The result is that birthparents and adoptive parents are leaving Michigan to carry out direct placement adoptions in other states, where birthparents may exercise greater control over the placement of

their children, and the adoptive parents may have greater access to adoption."⁴

LEGISLATIVE CHANGES

The Revised Michigan Adoption Code effective January 1, 1995 (as amended, the "Code") provided the process for three major changes:

1. Birthparents may arrange for "direct placement" of their child. They are able to personally select an unrelated individual or couple to be the adoptive parent. This direct placement process is commonly referred to as "private" or "independent" adoption.
2. A child may be placed in the prospective adoptive home immediately following birth and prior to termination of either birthparent's parental rights. This is referred to in the Code as "temporary placement" of the child.
3. An adoption attorney may assist Michigan residents with direct placement adoptions, although the preplacement assessment must still be performed by an adoption agency.

The Code imposes additional requirements on attorneys who participate in direct placement adoption, including the requirement that they register with the Office of Children's Ombudsman.⁵ This was challenged and the Michigan Attorney General concluded that it violated the constitutional authority of the Michigan Supreme Court to regulate the practice of law in the courts.⁶

The requirements are still in the Code but appear to be widely ignored in practice. The Ombudsman's office indicated that it will continue to accept new adoption attorney registrations on a voluntary basis. Approximately 245 attorneys have registered to date.

OVERVIEW OF PROCEDURE

A direct placement adoption begins with identification of birthparents, prospective adoptee, and adoptive parents. An attorney may not “solicit” biological parents or guardians for the purposes of adoption.⁷ Nor may an attorney receive compensation for referring birthparents or prospective adoptive parents to each other or assisting in evaluating a potential adoptive parent, birthparent, or adoptee.⁸

The Code expressly prohibits dual representation of both the birthparents and adoptive parents.⁹ Separate legal counsel must be retained for the birthmother, typically at the expense of the prospective adoptive parent.

The prospective adoptive parents typically assume financial responsibility for other expenses of the birthmother, some of which are mandatory and others discretionary. Adoptive parents *must* pay for (1) birthparent counseling services, unless waived; (2) the preplacement assessment; and (3) any other court ordered investigations.¹⁰

Adoptive parents *may* pay for medical expenses of the birthmother and child not otherwise covered by insurance, legal expenses for the birthparents in connection with the adoption

proceedings, extended counseling services for the adoption triad, and living expenses of the birthmother before the child’s birth and a maximum of six weeks after the birth.¹¹

The court must review all attorney fees and expenses. Fees contingent upon release of parental rights or cooperation in completion of the adoption are not permitted. Expenses are not recoverable if a birthparent later withholds consent to the adoption.¹²

It is the prerogative of the birth and prospective adoptive parents whether to exchange identifying information or to meet each other.¹³ The parties may agree to withhold all identifying information or to any of several variations of the “open” adoption concept wherein birthparents anticipate ongoing contact during and/or after the adoption. Any post adoption arrangements are entirely dependent on the parties’ good faith. They are not judicially enforceable.¹⁴

The birthmother may place a child with the prospective adoptive parents immediately after birth by making a “temporary placement” of the child with the assistance of an adoption attorney. A temporary placement may occur prior to any legal proceedings and does not require notice to or consent of the birthfather.¹⁵

To accept direct placement, the prospective adoptive parents must have a satisfactory preplacement assessment. This assessment, commonly referred to as a “home study,” is a written determination by a state licensed child placing agency that the persons are suitable adoptive parents. The determination is based on criminal background checks, personal interviews, references, a visit to the home, and other factors as required by the Code.¹⁶ An individual may have more

than one home study.¹⁷ The process typically takes six to ten weeks to complete.

A home study may be requested before identification of a birthparent or child. It is effective for one year and may be maintained by yearly updates. A current home study allows potential adoptive parents to accept temporary placement on short notice and avoid legal complications that may result in a birthmother’s choice of alternative adoptive parents. It must also be attached to the Petition for Adoption and is a prerequisite to formal placement.

Within two business days after temporary placement, the adoption attorney must report the transfer of physical custody to the family division of the circuit court (the “court”) in the resident county of the prospective adoptive parents. A Petition for Adoption must be filed within 30 days after temporary placement or the court notified that the child has been returned to its parent.¹⁸ The court will refer the matter to the local prosecutor if it appears that neither has occurred.¹⁹

FORMAL PLACEMENT AND ADOPTION

A “temporary placement” becomes a “formal” placement upon court ordered termination of all parental rights. A formal placement does not have to be preceded by a temporary placement. However, a child may not be placed in a home for the purpose of direct placement adoption until a temporary or formal placement has occurred.²⁰

Voluntary termination of parental rights for direct placement adoption is obtained by the “consent” of the birthparents. Birthparents may “consent” to termination of their parental rights for the purpose of a specific identified adoption. This differs from a “release” of parental rights to a child placing agency which then assumes legal authority for

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Adoption in the Media:

Baby Jessica

Perhaps the most publicized Michigan case arising from a private adoption is the Baby Jessica case in Ann Arbor. Prospective adoptive parents will typically confront questions such as: "Aren't you afraid of becoming the next Baby Jessica?" It is therefore important to prepare clients with a basic understanding of the facts.

The "Baby Jessica" case was brought before the Michigan Supreme Court as *DeBoer v Schmidt*. 442 Mich 648 (1993). The DeBoers were Michigan residents who traveled to Iowa for the purpose of private adoption, which was at the time illegal in Michigan. The case was not governed by Michigan adoption law. Nor was it representative of a disrupted adoption, since the adoption never occurred.

Baby Jessica was born in Iowa on February 8, 1991. On February 25, 1991, the Iowa district court terminated the parental rights of the birthmother and named birthfather. The DeBoers were granted custody pending their Petition for Adoption filed in Iowa on the same day. They returned to Michigan with Baby Jessica.

The proceedings were challenged shortly after the DeBoer's return to Michigan. Nine days after, the birthmother sought to revoke her release because it was obtained by the DeBoer's attorney 40 hours after Jessica's birth rather than waiting for expiration of the 72-hour period required by Iowa law.

On March 27, 1991, less than two months after Jessica's birth, Daniel Schmidt filed a petition to intervene in the adoption proceedings alleging he was the true biological father. The DeBoers objected to court ordered blood tests and delayed confirmation of Schmidt's paternity until September 1991. The results confirmed that the birthmother had lied as to the identity of Jessica's father. Schmidt sought custody asserting he had not given consent to the adoption.

On December 27, 1991, the Iowa district court denied the DeBoer's Petition for Adoption and ordered them to return Baby Jessica to Iowa. The DeBoers continued to litigate in Iowa until the Iowa Supreme Court remanded the case to the district court which for the second time, on December 3, 1992, terminated DeBoer's rights as temporary custodian of Jessica and ordered her return. They refused. On January 22, 1993, the DeBoers were held in contempt of court. An Iowa

bench warrant was issued for their arrest.

After exhausting the appeals process in Iowa, the DeBoers sought refuge in their local circuit court. Baby Jessica became a cause célèbre in the media as the jurisdictional issues took a back seat to compelling images on the television screen. The DeBoers unsuccessfully litigated through our state court system to the Michigan Supreme Court and finally to the U.S. Supreme Court.

The legal issues are complex and human suffering unquestioned. However, it was the DeBoer's decision to continue to litigate, despite losses in court after court, which prolonged the inevitable result. Baby Jessica was returned to Iowa a child of 29 months, rather than as an infant.

Unlikely in Michigan

There are several safeguards in the code that make a Baby Jessica scenario unlikely under Michigan adoption law. First, a birthmother must appear in court and testify that her consent is knowing and voluntary. In Iowa, the birthmother never appeared at the termination hearing.

Second, in Michigan a birthfather showing up to claim custody under similar circumstances would be subject to a "best interests" hearing. In Iowa, there had to be proof of abandonment before "best interests" of the child was an issue.

Third, Michigan birthmothers are advised of their rights and options. They have independent legal representation and are offered free adoption counseling.

Fourth, a dispute should not last for over two years. All disputes arising under the code have priority on the Michigan court docket. MCLA 710.25.





TERMINATION OF THE FATHER'S RIGHTS

Consent of the birthmother is a cornerstone of direct placement adoption. The Code does not include any provision for involuntary termination of a birthmother's parental rights. It does provide for involuntary termination of an unwed father's parental rights. The U.S. Supreme Court has held that it is consistent with the Equal Protection Clause to treat the father of a child born out of wedlock differently than the unwed mother because the gender based classification is being applied where men and women are not similarly situated.²⁹

The Code contains a very useful provision to facilitate early notice to a putative father of the adoption plan and determine his interest in custody of the expected child.³⁰ A woman pregnant out of wedlock may file an *ex parte* petition stating her intent to consent to adoption and request the court to notify the putative father of his right to file a notice of intent to claim paternity.³¹ The *ex parte* petition and the notice must be personally served more than 30 days before the expected date of confinement³² and may include more than one alleged putative father.³³

A putative father who wishes to contest termination of his parental rights is classified into one of two categories for Code purposes. A Section 39(2) putative father may only have his rights terminated pursuant to MCLA 710.51(6) (commonly referred to as the "2 year no pay, no see" statute) or under the Child Protection Act. A Section 39(1) putative father is subject to a more restrictive "best interests" inquiry by the court.

To qualify under subsection (2) the putative father must have "... established a custodial relationship with the child or... provided substantial and regular support or care in accordance with the putative father's ability to provide such support or care for the mother during the pregnancy or for either mother

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selection of adoptive parents and finalization of adoption.

The consent to termination of parental rights and accompanying verified statements are executed by the birthparents at the consent hearing. The consent hearing must be held within seven days after request to the court.²¹ It is followed by a 21-day right to rehearing. However, the court of appeals has held in the instance of a release which "was both knowing and voluntary... rehearing on the specific ground of change of heart" alone is not a sufficient basis to vacate the release.²²

The Petition for Adoption may be filed in the county where either the petitioner or the adoptee resides unless jurisdiction has already been established by a temporary placement.²³ The petition must include verified statements by each adoptive parent that they have been informed of the availability of counseling services and whether they have received counsel-

ing.²⁴ All preplacement assessments must be attached to the petition. Any preplacement assessments initiated, but not completed, must also be acknowledged and explained to the court.²⁵

The court may enter an order of adoption six months after formal placement unless the court finds it in the adoptee's best interests to shorten or extend the six-month period.²⁶ Supervision during this six-month period typically includes court ordered reports evaluating the success of the placement and welfare of the adoptive child.

Once the adoption is finalized, there is no distinction at law between a child born to parents or adopted. Adoptive parents have the same rights and duties as though the child had been born to them.²⁷ The adopted child becomes an heir at law of the adopting parents, including heir at law of their lineal and collateral kindred. Likewise, an adopted child is no longer an heir at law of either parent whose rights have been terminated or the lineal or collateral kindred of that parent.²⁸

or child after the child's birth during the 90 days before notice of hearing was served upon him. . . ."³⁴

A putative father not meeting the Code's Section 39(2) threshold criteria is subject to the court's scrutiny pursuant to subsection (1) of "his fitness and his ability to properly care for the child."³⁵ The Code directs the court to determine "whether the best interests of the child will be served by granting custody. . ." to the putative father³⁶ and specifically sets forth the factors to be considered in making that determination.³⁷

The "best interests of the child" are determined by examining the circumstances of the putative father, not the ability of the father's parents or relatives to care for the child. The court in *In Re Ballard*³⁸ stated: "When the noncustodial parent says I have really no ability to provide care for the child, but I'm offering a substitute for my care. . . that's really outside the bounds of the statute. . . Sections 39 and 22 make no provision for considering alternative care and custody arrangements. . . ."³⁹

WHEN BIRTHMOM LIES

Issues regarding application of Section 39(1) or (2) criteria are applicable to agency adoptions, as well as, direct placement and present added difficulty when the birthmother conceals her pregnancy. Such circumstances were recently addressed by the court of appeals which stated: "This case is troubling. We set forth the complete factual context to emphasize the numerous issues we believe the Legislature should consider. . . ."⁴⁰

In *Frisby v Freed*,⁴¹ the birthmother lied to the birthfather about her pregnancy until less than 30 days prior to the child's birth when she informed him of her adoption plans. (She was a senior in high school. He was a junior. The two had broken up shortly after the child was conceived.) He appeared to agree

with the adoption plan and provided no support or care for the birthmother.

Later, after having told his parents of the pregnancy, he changed his mind and contested termination of his parental rights. "He testified that up to that point he felt that the adoption agency worker was going to assist him in getting custody of Ryan. . . . He also testified that he was told cost was not an issue because the prospective adoptive parents were paying all the bills."⁴²

The case turned first on whether the Section 39 (1) or (2) standard was applicable and subsequently on the factors to be considered in determination of "best interests." The trial court acknowledged that the birthmother "may have thwarted. . . (the birthfather's) participation in the pregnancy and that the adoption agency could have given him better counseling, but concluded. . . (the birthfather) had not provided support or care and did not fall under subsection 39(2)."⁴³



Having made that determination, the trial court proceeded to determine whether granting custody to the birthfather was in the child's best interests. The most significant factor was the birthfather's custody plan, which was essentially to award custody to third party grandparents. The trial court stated, "this is not consistent with the intent of the statute."⁴⁴

The trial court heard testimony of numerous situations that evidenced the birthfather's immaturity. It considered *In Re Barlow*,⁴⁵ which stated that "age in and of itself is not a factor; but maturity is a factor." In addition, the trial court had the overwhelming impression that the birthfather was seeking custody only to satisfy his parents. At trial, he did not express love or affection for the child, only a sense of obligation.

The trial court ruled that it was not in the best interest of the child to award custody to the birthfather and entered an order terminating his parental rights. The court noted that parental assistance for child care is acceptable, but that total reliance on third parties as contemplated in this case did not provide the "permanency contemplated by the adoption statute."⁴⁶

On appeal, the birthfather argued that the 1998 amendment to Section 39(2) which added: ". . . *substantial and regular support or care in accordance with the putative father's ability to provide such support or care. . .*"⁴⁷ was intended to include fathers who have been deceived about a pregnancy.

The majority opinion of the court of appeals noted that the statutory language did not clearly address the situation and such interpretation was not consistent with the amendment's legislative history. They affirmed the trial court concluding that while they may "feel that it is unfair," the Legislature was the appropriate forum to determine whether it is appropriate to create a third subsection to address the issue of deceit.⁴⁸

MICHIGAN ADOPTION IN PERSPECTIVE

For perspective, one might return to the enumerated purposes of the Michigan Adoption Code. They are:

- To ensure that each adoptee in this state who needs adoption services receives those services;
- To provide procedures and services to safeguard and promote the best interests of each adoptee and protect the rights of all parties concerned. *If conflicts arise between the rights of the adoptee and the rights of another, the rights of the adoptee shall be paramount;* and

- To provide prompt legal proceedings so that the adoptee is free for adoptive placement at the earliest possible time.⁴⁹

Discussions of the Code provisions often miss the most important point. "Arguments tend to center on the relative rights of birthparents and prospective adoptive parents, of birthmothers and putative fathers . . . (T)he proper focus is the rights of the child; to paraphrase at least one jurist, adoption is for the child, not for the parents."⁵⁰

Much deliberation and thought went into the revised Michigan Adoption Code. The direct placement provisions do not guarantee a successful adoption,

nor should they. Instead they strike a healthy balance between the rights of each birthparent, child, and adoptive parent, with the rights and welfare of the child paramount. It is a privilege for us, as attorneys, to participate in the creation of family through adoption, a privilege that requires competent legal representation and sensitivity to issues beyond our role as advocate. ♦



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FOOTNOTES

1. The use of plural for adoptive parent(s) is for convenience only. Children may be adopted by single men or women, as well as, married couples.
2. PCA 308, *Consent to Adoption by Parent*.
3. Senate Committee, *Family Law, Criminal Law, and Corrections*, Senator Jack Welborn, Chairperson.
4. House Legislative Analysis (5-25-94), Senate Bill 721.
5. MCLA 710.22(b). The statutory definition of an "adoption attorney" imposes three specialty requirements: (1) Completion in Michigan during the last five years of at least 12 hours of continuing legal education courses which integrate the legal and social aspects of adoption; (2) Maintenance of a current list of licensed professionals and agencies to whom referrals may be made for counseling services needed by an adoption client; and (3) Registration as an adoption attorney with the Office of the Children's Ombudsman.
6. Opinion of Michigan Attorney General, OAG 6488 (April 6, 1995). The opinion states: "The identification of specialty practice areas that may require additional licensing requirements has been committed to the Michigan Supreme Court rather than to the Legislature by the 1963 Michigan Constitution."
7. MCLA 710.55(1). "Solicit" is defined in the Code as "contact in person, by telephone, by letter or other writing, or by other communication directed to a specific recipient." It does not include public communication that is not directed to specific individuals.
8. MCLA 710.54(2)(a)-(d).
9. MCLA 710.55a(1).
10. MCLA 710.54(4)-(5).
11. MCLA 710.54(3).
12. MCLA 710.54(10).
13. MCLA 710.23a(3).



14. PCA 339, *Statement to Accompany Consent in Direct Placement*. When consenting to the release of a child for adoption, the birthparent is specifically informed that the finality of the consent is not affected by any "collateral or separate agreements" with the adoptive parents.
15. MCLA 710.23a(1).
16. MCLA 710.23f(5).
17. MCLA 710.23f(3).
18. MCLA 710.23d(3).
19. MCLA 710.23d(4).
20. MCLA 710.41(1).
21. MCLA 710.44(5). The birthparents must also sign a statement which verifies, among other things, that they: (a) have received a list of support groups and a copy of DSS-Publication 823; (b) have received or waived counseling related to the adoption; (c) understand that the validity and finality of the consent is not affected by any collateral or separate agreement between the birth and adoptive parents; and (d) have not received any money or item of value except for lawful payments which are itemized on a schedule filed with the court.
22. *In Re Burns*, 236 Mich App 291 (1999).
23. MCLA 710.24(1).
24. *Id.* at (3).
25. *Id.* at (4).
26. MCLA 710.56(1).
27. MCLA 710.60(1).
28. *Id.* at (2).
29. *Parham v Hughes*, 441 US 347 (1979) and *Lehr v Robertson*, 463 US 248 (1983).
30. MCLA 710.34(1).
31. PCA 313, *Petition to Issue Notice of Intent to Release or Consent* and PCA 314, *Notice of Intent to Release or Consent* which states in part: "Your failure to file a notice of intent to claim paternity before the expected date of confinement or before the birth of the child, whichever is later, is a waiver of your right to receive notice of the hearing and is a denial of your interest in custody of the child, which will result in the court's termination of your rights to the child."
32. MCLA 710.36(3)(b).
33. MCLA 710.34(1).
34. MCLA 710.39(2).
35. *Id.* at (1).
36. *Id.*
37. MCLA 710.22(f).
38. *In Re Ballard*, 219 Mich App 329 (1996).
39. *Id.*
40. *Frisby v Freed*, ___ Mich App ___ (Court of Appeals Docket No. 221581, decided August 8, 2000).
41. *Id.*
42. *Id.*
43. *Id.*
44. *In Re Freed*, No. 99-4496-AD (Michigan 18th Circuit Court, decided July 22, 1999).
45. *In Re Barlow*, 404 Mich 216 (1978).
46. *In Re Freed, infra*.
47. MCLA 710.39(2) (emphasis added).
48. *Frisby v Freed, infra*. See Justice Wilder for dissenting opinion.
49. MCLA 710.21a (emphasis added).
50. House Legislative Analysis (5-25-94), Senate Bill 721.