

# **SPECIAL ISSUES IN ADOPTION**

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**HANDLING YOUR FIRST (OR NEXT)**

**TERMINATION & ADOPTION**

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**CHAPTER 8**

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Texas Academy of Family Law Specialists  
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Panelist, *District Judge's Forum*, Dallas Bar Assoc., Family Law Bench Bar, February 2017

Panelist, *As Family Courts Judges See It: Top Mistakes Attorneys Make in Litigating Divorce*, National Business Institute, Dallas, TX, October 21, 2016

Panelist, *District Judge's Forum*, Dallas Bar Assoc., Family Law Bench Bar, February 2016

Panelist, *District Judge's Panel*, Jeff Coen Family Law Nuts & Bolts, Dallas Bar Assoc, Dallas Volunteer Attorney Program and the Family Law Section, September 2015.

Co-Author and Speaker, *Psychological Testing in Custody Evaluations Involving Substance Abuse and Sexual Accusations*, Sex, Drugs & Surveillance Course, Houston, TX, January 9-10, 2014

Co-Author and Speaker, *Understanding Possession Schedules: Principles and Strategies*, Advanced Family Law Seminar, San Antonio, TX, August 5-8, 2013

Speaker, *Alienation, Protection or Manipulation? Innovations/Breaking Boundaries in Custody Litigation*, UTCLE, Austin, TX January 24-25, 2013

Contributing Author, *Title 4 Protective Orders and Family Violence*, Lexis Nexis Texas Annotated Family Code, by Debra H. Lehrmann, 2011 - 2012 Editions

Speaker, *Private Termination and Adoption*, Advanced Family Law Seminar, San Antonio, TX, August 10-14, 2008

Co-Author and Speaker, *Private Termination and Adoption*, 8<sup>th</sup> Annual Family Law on the Front Lines, UTCLE, Galveston, TX, June 19-20, 2008

Speaker, *Understanding the Special Considerations of Navigating a Domestic Violence Case*, Family Law Section of the Dallas Bar Association and Central Dallas Ministries, Dallas, TX, October 2006

Speaker, *Family: Custody vs. Adoption, Navigating Family Courts*, Legal Workshop for Grandparents, Dallas County KinCare Legal Symposium, Dallas, TX, October 2006

Speaker, *The Empowerment of Protective Orders*, Texas Institute of Continuing Education, Learning to Make the Fax Family Code Work for You, Dallas, TX, October 2006

Panelist, *Dos and Don'ts In The Courtroom*, Dallas Bar Association's 15<sup>th</sup> Annual Bench Bar Conference, Horseshoe Bay, September 2006

Contributing Author, *Title 4 Protective Orders and Family Violence*, Lexis Nexis Texas Annotated Family Code, by Debra H. Lehrmann, 2006 Edition

Panelist, *The Fifth Annual ACR Judge's Panel*, The Association for Conflict Resolution, Dallas, TX, September 2005

Speaker, *Pro Bono & Family Law*, Dallas Bar Association, Dallas, TX, June 2005

Panelist, *A Practical Guide to the Court-Appointed Representation of Children in Family Law Cases*, Dallas Bar Association Family Law Section, Dallas, TX, January 2005

Speaker, *Economic Contribution and Relocation*, TAFLS Trial Institute, New Orleans, LA, January 2005

Speaker, *Family Violence and Possession*, Dallas Family Court Services Training, Dallas, TX, November 2004

Speaker, *Ramifications of Affirmative Findings of Family Violence*, North Texas Legal Services, Dallas, TX, August 2004

Speaker, *Grandparent Access*, August 2004

Co-Author and Speaker, *Ramifications of Affirmative Findings of Family Violence*, Family Violence Conference, Texas Center for the Judiciary, Galveston, TX, March 2004

Panelist, *High Conflict Families: Methods Founded in Therapeutic Jurisprudence*, AFCC Conference, Dallas, TX, October 2003

Speaker, *Predicates and Objections: Rapid-fire Offers and Rulings*, TAFLS Trial Institute Cancun, January 2003

Co-Author and Speaker, *Trying the Complicated Temporary Order, etc.*, Advanced Family Law Course, State Bar of Texas, August 2002

Panelist, *District Judges Panel: 10 Bad Things That Good Lawyers Do*, Family Law On the Front Lines, University of Texas School of Law, Galveston, TX, April 2002

Speaker, *Tips and Examples for More Effective Presentation of Expert Testimony*, Advanced Expert Witness Course, State Bar of Texas, Dallas, TX, February 2002

Panelist, *Panel Discussion on Mental Health Experts, Panel Discussion on the Tracing Expert, Daubert Prove-up of Psychological Testing & Diagnosis*, Advanced Expert Witness Course, State Bar of Texas, February 2001

Speaker, *Relocation of Children: Legal Issues and Mental Health Evidence*, State Bar of Texas Telephone CLE, January 2000

Speaker, *Discovery Rules, A Discussion & Analysis of the New Rules of Discovery*, 25<sup>th</sup> Advanced Family Law Course, State Bar of Texas, August 1999

Panelist, *Living in Dangerous Times: Family Violence etc.*, Assoc. Judge/IV-D Master's Seminar, State Bar of Texas, August 1999

Panelist, *Impact of the New Rules of Discovery, etc.*, State Bar of Texas 1999

Co-Author and Speaker, *Rebutting the JMC Presumption-What the Judge Must Hear*, 24<sup>th</sup> Advanced Family Law Course, State Bar of Texas 1998

Speaker & Panelist, *Discovery Update*, 23<sup>rd</sup> Advanced Family Law Course, State Bar of Texas, August 1997

Speaker, *Settlement Agreement Enforcement & Your Ethical Problems*, 20<sup>th</sup> Annual Marriage Dissolution, State Bar of Texas 1997

Panelist and Lecturer, *Relocation Issues and the Texas Family Code*, Dallas Bar Assoc. Family Law Bench Bar 1997

Speaker, *Discovery Update*, 22<sup>nd</sup> Annual Advanced Family Law Course, State Bar of Texas, August 1996

Speaker, *Expectation of Experts B Bench Perspective*, Dallas County America Society of Appraisers 1996

Speaker, *Putting Power in Your Pen: Effective Drafting Techniques B Family Law (A Practitioner's Perspective) (A view from the Bench)*, Annual Meeting of the Legal Assistants Division of the State Bar of Texas 1996

Panelist and Lecturer, Dallas Bar Assoc. Family Law Bench Bar 1996

Author and Speaker, *Social and Psychological Studies*, Advanced Family Law Course for Legal Assistants, State Bar of Texas 1996

Author and Speaker, *Part Two: Securing Alimony and Enforcement*, Family Law Practice After the New Legislation, University of Houston Law Foundation 1996

Co-Author, *Attorney Guide to Family Court Services*, assisted in preparation with Linda Hahn 1995

Speaker, *Legislative Changes*, Irving Bar Association Family Law Section 1995

Speaker, *Objective Assessment Techniques and Judicial Decision-Making in Custody Evaluations*, Co-speaker with Dr. Jeffrey C. Siegel, Texas Psychological Association Annual Convention 1994

Speaker, *The Changing Role of the Psychologist in Child Custody Determinations*, Co-Speaker with Dr. Jeffrey C. Siegel and Cynthia Pladziewicz, J.D., Texas Psychological Association Annual Convention 1994

Speaker, *Temporary Hearings*, Dallas County Pro Bono Project 1994

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Northeastern University School of Law  
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## Derek Bragg

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**Practice Description**

Mr. Bragg primarily practices family law focusing on issues surrounding divorces, property division, contested custody matters, adoption and termination suits, enforcement and modification of child and property related issues.

Mr. Bragg also represents clients in complex commercial litigation, contract disputes and business torts, as well as represents bankruptcy creditors involved in Chapter 7, 11 and 13.

**Representative Experience**

Mr. Bragg has represented numerous clients in family law matters in Dallas County, Collin County, Denton County, Tarrant County, Ellis County and Rockwall County. His litigation experience includes modifications of child related issues, contested divorces, marital property division, termination and adoption, child support, paternity, enforcement matters, and possession and access issues.

Mr. Bragg has successfully argued family law issues in front of the Second Court of Appeals.

**Publications, Seminars, and Cases**

- Dallas County Family Law Bench Bar: Presenter and Speaker of "Child Custody Evaluator: The Good, The Bad, and The Ugly"
- Authored "The Surcharge of Ad Valorem Property Taxes and BAPCPA", ABI Journal, April 2013

**Awards & Honors**

Texas Super Lawyer Rising Star (2016, 2017, 2018)

2016 American Institute of Family Law Attorneys "10 Best" Family Law Attorneys for Client Satisfaction in Texas

2016 American Institute of Family Law Attorneys Top 10 Family Law Attorney under 40

**Affiliations and Memberships**

Member, Dallas Bar Association

Board Member, Family Law Section of the Dallas Bar Association

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Thank you to Elizabeth Brennan and Karen J. Langsley for allowing us to reproduce and use parts of their paper, *Family Law: LGBT Parentage and Adoption Update and Probate Issues for LGBT Clients*, State Bar of Texas, *LGBT Legal Issues in Changing Times: What Every Texas Practitioner Needs to Know*, December 13, 2017.



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## SPECIAL ISSUES IN ADOPTION

### I. INTRODUCTION

“Every child deserves a home and love.”<sup>1</sup> Dave Thomas, an adopted child and founder of Wendy’s, started the Dave Thomas Foundation for Adoption to increase the number of adoptions in the United States. His hope was that each child would have a permanent family. Despite Dave Thomas’ work to increase adoptions, there are still thousands of children in Texas alone in the foster care system.<sup>2</sup>

There are many legal, political and social implications impacting the adoption process. There are federal and state laws that affect a child’s likelihood of being adopted and who can adopt. With the rise of disrupted adoptions, the legislature and the adoption community are trying to address how to prevent failed adoptions. In addition, with the use of Facebook, other social networking sites, and DNA and genealogy sites, the relationship between and adopted child and his or her birth family has forever changed.

This paper addresses a variety of issues that may arise as you handle your first (or next) adoption.

### II. INDIAN CHILD WELFARE ACT

The Indian Child Welfare Act (“ICWA”) was enacted in 1978.<sup>3</sup> “It established minimum federal jurisdictional, procedural and substantive standards aimed to achieve the dual purposes of protecting the right of an Indian child to live with an Indian family and to stabilize and foster continued tribal existence.”<sup>4</sup> The Guidelines for State Courts and Agencies in Indian Child Custody Proceedings provide minimum Federal standards and best practices to ensure compliance with ICWA. Included in Texas Child Protective Services’ (“CPS”) Handbook are “Child-Placing Requirements of the Indian Child Welfare Act and Related Guidelines and Regulations”<sup>5</sup> and “Checklist for Compliance with the Indian Child Welfare Act”.<sup>6</sup>

What is the purpose of ICWA?

- ICWA regulates states regarding the handling of child abuse and neglect and adoption cases;
- ICWA sets minimum standards for the handling of these cases;
- ICWA affirms the rights of Tribal Courts to adjudicate child abuse and neglect and adoption cases involving children on the reservation;
- ICWA establishes a preference for Tribal courts to adjudicate child abuse and neglect cases in situations of concurrent jurisdiction; and
- ICWA affirms and supports Tribal jurisdiction in child welfare proceedings.<sup>7</sup>

When does ICWA apply?

ICWA applies when (1) there is the presence of an Indian child and (2) the child custody proceedings involve foster care placement, termination of parental rights, pre-adoptive placement or adoptive placement.<sup>8</sup> “Indian child” means any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.<sup>9</sup> ICWA does not apply in a divorce proceeding.<sup>10</sup>

<sup>1</sup> Ostrower, Francie, Ph.D. *Awareness to Action: A Case Study of the Dave Thomas Foundation for Adoption’s Philanthropic Strategy*. Urban Institute Center on Nonprofits and Philanthropy. September 2010, at page 7.

<sup>2</sup> Regional Statistics About Children in DFPS Care, August 2018, [https://www.dfps.state.tx.us/Doing\\_Business/Regional\\_Statistics/default.asp](https://www.dfps.state.tx.us/Doing_Business/Regional_Statistics/default.asp),

<sup>3</sup> Texas Department of Family and Protective Services Policy Handbook, Appendix 1226-A: *Child-Placing Requirements of the Indian Child Welfare Act and Related Guidelines and Regulations*, [https://www.dfps.state.tx.us/handbooks/CPS/Files/CPS\\_px\\_1226a.asp](https://www.dfps.state.tx.us/handbooks/CPS/Files/CPS_px_1226a.asp)

<sup>4</sup> National Indian Law Library, ICWA Guide Online, Introduction, <https://narf.org/nill/documents/icwa/ch1.html>; see Guidelines for State Courts and Agencies in Indian Child Custody Proceedings, 80 Fed. Reg. 10146 (2015).

<sup>5</sup> Texas DFPS Appendix 1226-A.

<sup>6</sup> Id.

<sup>7</sup> Tribal Law and Policy Institute. *The Indian Child Welfare Act Summary*, <http://nc.casaforchildren.org/files/public/community/programs/Tribal/indian-child-welfare-act-summary.pdf>

<sup>8</sup> ICWA § 1911(a).

<sup>9</sup> ICWA § 1903(4).

<sup>10</sup> ICWA § 1903(1).

What actions must an agency and state court take to determine if a child is an Indian child?

Agencies must ask whether there is reason to believe a child who is subject to child custody proceeding is an Indian child.<sup>11</sup> State courts must ask at the start of any State court child custody proceeding whether there is reason to believe the child who is the subject of the proceeding is an Indian child.<sup>12</sup> Many courts in Texas have a form/questionnaire that asks the parent(s) of the subject child if the child is part of an Indian tribe.

Who are the typical parties in an ICWA case?

- Indian child
- Tribe (if tribe intervenes)
- Parent(s) or Indian custodian
- State<sup>13</sup>

What are an Indian Child's rights under ICWA?

- To Tribal identity and entitlements;
- NOT to have family broken up;
- To be placed with an Indian family; and
- To have information regarding the child's Tribal identity protected and preserved.<sup>14</sup>

What are a Tribe's rights under ICWA?

- To receive notice of a child custody proceeding involving an Indian child;<sup>15</sup>
- To intervene at any time until the case is dismissed;
- To request transfer of jurisdiction to Tribal court from State court;
- To get records;
- To establish child welfare programs;
- To petition the Secretary of the Interior for resumption of jurisdiction; and
- To full faith and credit from Federal and State courts for any child custody proceeding in Tribal court<sup>16</sup>

A U.S. Supreme Court case, *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989) determined that it is necessary to protect the tribal interest in the child, which is distinct from, although on parity with, the interest of the parents.<sup>17</sup>

What are a parent or Indian custodian's rights under ICWA?

- To designate an Indian custodian;
- To a court appointed attorney in any removal, placement or termination of parental rights;
- To have notice of the proceedings;
- To object to transfer of child custody matter to tribal court when Indian child is not domiciled or residing with the reservation of the Indian child's tribe<sup>18</sup>;
- To have state make active efforts to provide remedial services to prevent the break-up of family; and
- To a translator.<sup>19</sup>

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<sup>11</sup> Guidelines for State Courts and Agencies in Indian Child Custody Proceedings, 80 Fed. Reg. 10146 (B.2) (2015).

<sup>12</sup> *Id.*

<sup>13</sup> Tribal Law and Policy Institute. *The Indian Child Welfare Act Summary*.

<sup>14</sup> *Id.*

<sup>15</sup> ICWA § 1912(a)

<sup>16</sup> ICWA § 1911, 1912, 1918, and 1931.

<sup>17</sup> *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989)

<sup>18</sup> ICWA § 1911(b).

<sup>19</sup> ICWA § 1912 and 1913.

What are the rights of an adopted Indian child?

An Indian child, upon reaching the age of eighteen, has a right to apply to the court that granted the adoption for information regarding his/her tribal relationships and biological parents.<sup>20</sup>

Who has jurisdiction over a custody proceeding involving an Indian child?

A tribe has jurisdiction over a child custody proceeding involving an Indian child where the child is domiciled or resides on an Indian reservation and when the child is a ward of the tribal court, regardless of child's domicile or residence, and it has concurrent jurisdiction where the child is domiciled or resides off an Indian reservation and is not a ward of the tribe's court.<sup>21</sup>

§ 1911(b) establishes concurrent but presumptively tribal jurisdiction over an Indian child who resides off a reservation.<sup>22</sup> ICWA requires the state court transfer the child custody proceeding to the tribal court upon a petition of the tribe or the parent or Indian custodian, absent good cause to the contrary or objection from the child's parents.<sup>23</sup> If a tribe chooses to cede concurrent jurisdiction, state child welfare caseworkers and court officials are obligated to abide by ICWA requirements.<sup>24</sup>

What notice is required and by whom?

In any involuntary proceeding in a state court where the court knows or has reason to know that an Indian child is involved and the foster care placement of a the child, or the termination of parental rights to the child is sought, the party seeking the foster care placement or termination of parental rights to an Indian child shall notify the parent or Indian custodian and the Indian child's tribe by registered mail, return receipt requested, of the pending proceedings and their right of intervention.<sup>25</sup>

Thus, in cases involving removal of a child by CPS (i.e. involuntary removal), CPS has a duty to notify the Indian child's parent or Indian custodian and the tribe.<sup>26</sup>

Why is notice required?

Notice is required to a parent because parents have a fundamental interest in the care, custody, and management of their children<sup>27</sup>. Due process requires that before a person's rights can be affected in a court proceeding they be given notice and the opportunity to be heard.<sup>28</sup>

Notice enables a tribe or the Bureau of Indian Affairs to investigate and determine whether the child involved in the custody proceedings is an Indian child.<sup>29</sup> It further ensures that a tribe will be afforded the opportunity to assert its rights under the Act irrespective of the position the parents, Indian custodian or state agencies and intervene in the proceeding if it so desires.<sup>30</sup>

Does ICWA apply in voluntary removal or placement proceedings involving an Indian child?

Certain provisions of ICWA still apply to proceedings in which a parent or Indian custodian agrees to removal or placement of the Indian child.<sup>31</sup> Voluntary proceedings require a determination of whether the child is an Indian child and compliance with ICWA and the regulation's provisions relating to the placement preferences.<sup>32</sup> The Guidelines for Implementing the Indian Child Welfare Act, December 2016, include a chart of which requirements apply to voluntary proceedings.<sup>33</sup>

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<sup>20</sup> ICWA § 1917.

<sup>21</sup> ICWA § 1911(a) and (b); National Indian Law Library, ICWA Guide Online, Jurisdiction.

<sup>22</sup> ICWA § 1911 (b); National Indian Law Library, ICWA Guide Online, Jurisdiction.

<sup>23</sup> ICWA § 1911.

<sup>24</sup> National Conference of State Legislators, *The U.S. Supreme Court and the Indian Child Welfare Act*, <http://www.ncsl.org/research/state-tribal-institute/the-supreme-court-and-the-indian-child-welfare-act.aspx>

<sup>25</sup> ICWA § 1912(a).

<sup>26</sup> *Id.*

<sup>27</sup> National Indian Law Library, ICWA Guide Online, Notice.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> U.S. Department of the Interior Office of the Assistant Secretary – Indian Affairs Bureau of Indian Affairs, *Guidelines for Implementing the Indian Child Welfare Act*, <https://www.bia.gov/sites/bia.gov/files/assets/bia/ois/pdf/idc2-056831.pdf>.

<sup>32</sup> *Id.* at b.2.

<sup>33</sup> *Id.* at b.3.

The only explicit requirement of notice in § 1912(a) relates to *involuntary* proceedings, but some believe the best practice is to provide notice even in voluntary proceedings.<sup>34</sup> In a private adoption, where the birth mother voluntarily opts into a termination and adoption, notice to the tribe is not required under ICWA. This is distinct from an involuntary termination and adoption through a government agency, where the state is required to notify the tribe.

How and when is voluntary consent given?

- Child must be over 10 days old.
- Consent is in writing and recorded before a judge.
- Consent is accompanied by the judge's certificate ensuring that terms and consequences of the consent were:
  - Fully explained in detail and fully understood by parents or Indian custodian.
  - Fully explained in English or interpreted into a language understood by the parents or Indian custodian.
- Consent signed by Indian parent or custodian should contain
  - Name and birth date of child
  - Name of child's tribe
  - Child's enrollment number or other indication of membership in the tribe
  - Name and address of consenting parent or custodian
  - Name and address of prospective parents, if known
  - Name and address of agency, if known<sup>35</sup>

Under § 1913(c), in any voluntary proceeding for termination of parental rights or adoptive placement of an Indian child, the consent of the parent may be withdrawn for any reason at any time prior to the entry of the final decree of termination or adoption.<sup>36</sup>

Who can intervene in a proceeding under ICWA?

§ 1911(c) expressly grants an Indian custodian and an Indian child's tribe the legal right to intervene in a foster care placement or termination of parental rights proceeding at any point in the proceeding.<sup>37</sup> § 1912(a) gives an Indian child's parents the right to intervene.<sup>38</sup>

What are the requirements for placement of an Indian child in foster care?

No foster care placement may be ordered in a proceeding involving an Indian child without (1) active efforts to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and (2) clear and convincing evidence that continued custody by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child, supported by the testimony of a "qualified expert witness".<sup>39</sup>

Foster Placement Preferences: in the absence of good cause to the contrary, in any foster care or pre-adoptive placement, a preference shall be given to:

1. A member of the Indian child's extended family;
2. A foster home licensed, approved, or specified by the Indian child's tribe;
3. An Indian foster home licensed or approved by an authorized non-Indian licensing authority; or
4. An institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.<sup>40</sup>

<sup>34</sup> National Indian Law Library, ICWA Guide Online, Notice.

<sup>35</sup> National Indian Child Welfare Association, *A Guide of Compliance with the Indian Child Welfare Act*, page 10, <https://www.nicwa.org/wp-content/uploads/2018/01/Guide-to-ICWA-Compliance-2018.pdf>

<sup>36</sup> ICWA § 1913(c).

<sup>37</sup> National Indian Law Library, ICWA Guide Online, Intervention (5.2).

<sup>38</sup> ICWA § 1912(a).

<sup>39</sup> ICWA § 1912(d) and (e).

<sup>40</sup> ICWA § 1915(b).

What are the requirements for termination of parental rights?

No termination of parental rights may be ordered in a proceeding involving an Indian child without (1) active efforts to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and (2) evidence beyond a reasonable doubt that continued custody by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child, supported by the testimony of a “qualified expert witness”.<sup>41</sup>

Adoptive Placement Preferences: in the absence of good cause to the contrary, in any adoptive placement, a preference shall be given to:

1. A member of the child’s extended family;
2. Other members of the Indian child’s tribe; or
3. Other Indian families.

What are the consequences for failing to adhere to ICWA?

If any provisions of section § 1911, 1912, and 1913 of ICWA are not satisfied, such failure to satisfy may be grounds for a tribe, parent or Indian custodian whose Indian child was removed, or child to ask the court to invalidate the orders.<sup>42</sup>

Practitioner Notes: (1) Pay close attention to the timing of notice to the tribe and make sure notice occurs early in the case, as the tribe can intervene at any point in the case. (2) Also, note that the standards of evidence for removal and termination are different than those under the Texas Family Code.

*Brackeen, et al. v. Ryan Zinke, et al., Cherokee Nation, et al.*

The Brackeens, a non-Indian couple, fostered an Indian child for over a year and attempted to adopt the child. A Texas court denied the adoption based on ICWA. The Brackeens, along with other non-Indian adoptive parents attempting to adopt Indian children, and the states of Texas, Louisiana, and Indiana sued, arguing that ICWA “provides special rules in child placement proceedings depending on the race of the child.”<sup>43</sup> The Brackeens later successfully petitioned for adoption, but the lawsuit challenging ICWA continued.

On October 4, 2018, a United States District Court found that ICWA is unconstitutional, as it gives Native American families preferential treatment in adoption proceedings for Indian children based on race, in violation of the Fifth Amendment’s equal protection clause. Additionally, the Court found that ICWA is “structured in a way that directly requires the states to adopt and administer comprehensive federal standards in state created causes of action,”<sup>44</sup> in violation of the anti-commandeering doctrine.

### III. SAME-SEX ADOPTIONS

Pre-*Obergefell*, same-sex couples utilized legal avenues to create and maintain parent-child relationships with children not biologically theirs.<sup>45</sup> In some states, same sex-couples could adopt jointly, and in other states, one member of the couple would adopt and the second member would adopt later (a second-parent adoption or a co-parent adoption).<sup>46</sup> Now, after *Obergefell*, married same sex spouses can utilize stepparent adoption to solidify the parent-child relationship.<sup>47</sup>

The Texas legislature has made clear its intent to favor stability and finality in parent-child relationships.<sup>48</sup> In fact, in 1995, it shortened the time period, from two years to six months, in which a judgment of adoption can be challenged, either collaterally or directly.<sup>49</sup> Courts have firmly held that the stability of the family relationship is in the best interest of Texas children.<sup>50</sup>

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<sup>41</sup> ICWA § 1912(f).

<sup>42</sup> ICWA § 1914.

<sup>43</sup> Chad Brackeen, et al. v. Ryan Zinke, et al., Cherokee Nation, et al., No. 4:17-cv-00868-O at 21 (N.D.T.X. October 4, 2018).

<sup>44</sup> *Id.* at 38.

<sup>45</sup> Elizabeth Brenner & Karen J. Langsley, *Family Law: LGBT Parentage and Adoption Update and Probate Issues for LGBT Clients*, State Bar of Texas, LGBT Legal Issues in Changing Times: What Every Texas Practitioner Needs to Know, December 13, 2017, page 15.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

Heterosexual couples who have a baby are not required to adopt their own child to confirm that a parent-child relationship exists.<sup>51</sup> Many same-sex couples feel they should not have to do so either.<sup>52</sup> However, when one parent is not related to the child biologically, the safest way to ensure a legal parent-child relationship is through adoption.<sup>53</sup>

#### Standing to Adopt

§ 102.003 of the Texas Family Code provides general standing to file suit.<sup>54</sup> This includes “a person, other than a foster parent, who has had actual care, control, and possession of the children for at least six months ending not more than 90 days preceding the date of the filing of the petition.”<sup>55</sup>

§ 102.005 is a separate statute addressing standing to request termination and adoption, which grants standing to specific persons who may not have standing under § 102.003. § 102.005 provides that “an original suit requesting only an adoption or for termination of the parent-child relationship joined with a petition for adoption may be filed by:

1. a stepparent of the child;
2. an adult who, as the result of a placement for adoption, has had actual possession and control of the child at any time during the 30 day period preceding the filing of the petition;
3. an adult who has had actual possession and control of the child for not less than two months during the three-month period preceding the filing of the petition;
4. an adult who has adopted, or is the foster parent of and has petitioned to adopt, a sibling of the child; or
5. another adult who the court determines to have had substantial past contact with the child sufficient to warrant standing to do so.”<sup>56</sup>

A non-biological, non-adoptive parent would claim standing under (1) if the petitioner is married to the child’s legal parent. If the couple is not married, standing may be found under (3) or (5).

#### Coparent Adoption

Prior to *Obergefell*, the parent-child relationship between both adults in a same-sex couple and any child they chose to raise could only legally exist through a biological relationship or by judicial decree.<sup>57</sup> While *Obergefell* likely extends the marital presumption of parentage to a same-sex spouse of a parent who is biologically related to a child, coparent adoption may still be the only guarantee that a legal parent-child tie exists.<sup>58</sup>

Coparent adoption is the term of art used when a child has two legal parents of the same gender.<sup>59</sup> This comes from the concept that a mother’s rights to her child need not be terminated for another woman to become a mother of the child by adoption.<sup>60</sup> The same is true for fathers.<sup>61</sup> In other words, a child can legally have two moms or two dads.<sup>62</sup> Texas courts have recognized that coparent adoptions favor stability and finality in parent-child relationships.<sup>63</sup>

Nothing in the Texas Family Code, which is written in general neutral language, precludes two adults of the same gender from adopting a child.<sup>64</sup> TEX. FAM. CODE § 162.001 says, “Subject to the requirements for standing to sue in chapter 102, an adult may petition to adopt a child who may be adopted.”<sup>65</sup>

#### Statement to Confer Standing

§ 102.003(14) provides that an original suit may be filed at any time by “a person who has been named as a prospective adoptive parent of a child by a pregnant woman or the parent of the child, in a verified written statement to confer standing executed under Section 102.0035, regardless of whether the child has been born.”<sup>66</sup>

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> TEX. FAM. CODE § 102.003

<sup>55</sup> *Id.*

<sup>56</sup> TEX. FAM. CODE § 102.005

<sup>57</sup> Brenner at 15.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*, citing *See Berwick v. Wagner*, 01-12-00872-CV (Tex.App—Houston [1<sup>st</sup> Dist.] September 11, 2014).

<sup>64</sup> *Id.* at 16.

<sup>65</sup> TEX. FAM. CODE § 162.001.

<sup>66</sup> TEX. FAM. CODE § 102.003(14).

§ 102.0035 allows a pregnant woman or parent of a child to sign a “statement to confer standing” to a prospective adoptive parent.<sup>67</sup> This gives the prospective adoptive parent (the parent’s spouse/partner) standing under TEX. FAM. CODE § 102.003(a)(14) to bring an original suit for adoption.<sup>68</sup> A statement to confer standing may help if the original parent later challenges the adoption, as it serves as evidence of the legal parent’s intent for his or her partner/spouse adopt the child.<sup>69</sup>

### Texas Cases on Coparent Adoption

The two leading cases in Texas addressing co-parent adoption are as follows<sup>70</sup>:

#### 1. *Goodson v. Castellanos*

Goodson adopted a child from Kazakhstan. Both Goodson and Castellanos filed a joint petition for adoption, which was granted.<sup>71</sup> In the course of their breakup, Castellanos filed a suit affecting the parent-child relationship.<sup>72</sup> After a jury trial, Castellanos was named sole managing conservator of the child.<sup>73</sup>

On appeal, Goodson claimed that the Texas adoption was void because the district court lacked subject matter jurisdiction over an adoption of a child by two members of the same sex.<sup>74</sup> The appellate court disagreed, ruling that a court issuing an adoption order is a court of general jurisdiction that “may hear and determine any cause that is cognizable by courts of law or equity and may grant any relief that could be granted by either courts of law or equity.”<sup>75</sup> Further, the Texas Family Code “specifically authorizes district courts to issue adoption orders.”<sup>76</sup> Since the court had subject matter jurisdiction, and the court had power to enter the judgment, “Goodson may not collaterally attack the adoption decree.”<sup>77</sup>

Goodson also tried arguing that the coparent adoption “violates the public interest of the state of Texas that a child have at most one parent of each sex.”<sup>78</sup> The court again disagreed.<sup>79</sup> It said:

“[T]here is no direct statement of public policy found in the family code or the constitution prohibiting the adoption of a child by two individuals of the same sex.”<sup>80</sup>

Additionally, the appellate court was not happy with Goodson asking the court to void an order she herself had requested (in other words, calling “King’s X” isn’t favored by the courts):

“It would be inequitable and unconscionable to allow Goodson to invoke the jurisdiction of a court for the sole purpose of creating a parent-child relationship between Castellanos and K.G. and then subsequently allow her to destroy that same relationship because her relationship with Castellanos had ended.”<sup>81</sup>

This case is the primary one quoted in subsequent decisions to support coparent adoptions in Texas.<sup>82</sup>

#### 2. *Hobbs v. Van Stavern*

Hobbs was the child’s biological mother who conceived the child through donor insemination.<sup>83</sup> When the child was three years old, Hobbs and Van Stavern co-petitioned the court for an order terminating the sperm donor’s parental rights (if any) and for Van Stavern to adopt the child, which the court granted.<sup>84</sup> When the parties broke up, Van Stavern

<sup>67</sup> TEX. FAM. CODE § 102.0035.

<sup>68</sup> Brenner at 16.

<sup>69</sup> *Id.* at 17.

<sup>70</sup> *Id.*

<sup>71</sup> *Goodson v. Castellanos*, 214 S.W. 3d 741, 745 (Tex. App.—Austin 2007, pet. denied); *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Goodson* at 745

<sup>74</sup> *Id.* at 746

<sup>75</sup> *Id.* at 747; Brenner at 17.

<sup>76</sup> *Goodson* at 748 (citing to TEX. FAM. CODE § 162.016); Brenner at 17.

<sup>77</sup> *Id.*

<sup>78</sup> *Goodson* at 750; Brenner at 17.

<sup>79</sup> *Goodson* at 751; Brenner at 17.

<sup>80</sup> *Id.*

<sup>81</sup> *Goodson* at 751-52; Brenner at 17-18.

<sup>82</sup> Brenner at 18.

<sup>83</sup> *Hobbs v. Van Stavern*, 249 S.W. 3d 1 (Tex. App.—Houston [1<sup>st</sup> Dist.] 2006, pet. denied); *Id.*

<sup>84</sup> *Id.*



filed a SAPCR to maintain her relationship with the child.<sup>85</sup>

When Hobbs attacked the validity of the adoption, the court responded that the attack was untimely, citing Family Code section 162.012(a) “Notwithstanding Rule 329, Texas Rules of Civil Procedure, the validity of an adoption order is not subject to attack after six months after the date the order was signed.”<sup>86</sup> Hobbs also claimed that appointing Van Stavern as a joint managing conservator of the child violated public policy because it was “tantamount to a proclamation validating same-sex relationships.”<sup>87</sup> Noting that Van Stavern had “little substantive argument and no citation to authority,” the court found that, because the Code permitted Van Stavern to seek custody, it was “constrained to follow the provisions of the Family Code as enacted” and overruled the public policy argument.<sup>88</sup>

#### IV. REHOMING/DISRUPTED ADOPTIONS

Sage, an experienced parent with four biological children and one adopted African-American daughter, wanted to adopt again.<sup>89</sup> She was open to adopting an HIV positive child, which she did – a 4-year-old girl from Ethiopia. But HIV was the least of Sage’s concerns. Very quickly, while still in Ethiopia, the girl began to spit in Sage’s face and tear apart the room. Sage believed the situation would improve when she returned home, but her daughter’s behaviors worsened. She was defiant, manipulative, and displayed sexual behaviors. Sage took her to therapy, where she was diagnosed with reactive attachment disorder, a condition where children do not establish healthy bonds with parents and display a host of symptoms such as aggression towards peers, withdrawal or attention seeking behavior. When Sage discovered that her adopted daughter was sexually abusing her biological daughter, she decided to find a new home for the 4-year-old.

This story – the child’s lack of attachment and defiant and sexualized behavior and the parent’s decision to find a new home for the child – is more common than one might think. The adoption community has been trying to address the issue of rehoming, or disrupted adoptions. Some state legislatures are now involved and drafting legislation to prevent rehoming and/or address the issue.

What is rehoming?

Rehoming occurs when adoptive parents decide they are unable or unwilling to care for their adopted child and seek a new home or “placement”.<sup>90</sup> The term originally referred to a pet owner who could no longer or was unwilling to care for his pet and attempted to find a new home for his pet.<sup>91</sup> Some advocates in the child welfare system do not support the term and prefer using “second chance placement”.<sup>92</sup>

What leads to rehoming?

(a) Child’s behaviors

While there is not much data on rehoming, there is evidence that many adopted children have had traumatic experiences and endured hardship.<sup>93</sup> This combined with reports from adoption agencies and parents suggest that many adoptive parents are unequipped to handle the challenges of a child with a difficult past.<sup>94</sup>

Children who have experienced trauma and or neglect often have “suboptimal brain chemistry.”<sup>95</sup> Because of early deprivation, a child’s brain fails to form the neurological pathways necessary to key developmental stages.<sup>96</sup> This impairment, as well as deep fears of being abandoned, without food, in an unfamiliar environment, hurt, and without control, all learned from an early age, can create maladaptive behaviors, which can include acting out violently or sexually and being unable to attach emotionally to others.<sup>97</sup>

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> Today. *It Takes More Than Love: What Happens When Adoption Fails*, <https://www.today.com/parents/it-takes-more-love-what-happens-when-adoption-fails-918076>

<sup>90</sup> Emma Martin, A (Re)Adoption Story: What is Driving Adoptive Parents to Rehome Their Children and What Can Texas Do About It, 5 Tex. A&M L. Rev. 537, 538 (2018).

<sup>91</sup> *Id.* at note 2.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 542.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 542-43.

<sup>97</sup> *Id.*

This lack of attachment has been diagnosed by psychiatrists as Reactive Attachment Disorder.<sup>98</sup> Attachment between a child and a parent is extremely important during the child's first year of life.<sup>99</sup> When a child is consistently safe and cared for by a caretaker, the child will become securely attached, emotionally and physically, to the caregiver.<sup>100</sup> However, when a child grows up with a caregiver who abuses or neglects him, the child does not feel safe and cared for, and may develop difficulty attaching to others.<sup>101</sup> This leads to, even infants, "encod[ing] that humans are unreliable and untrustworthy."<sup>102</sup> As the infant grows into a toddler and child, because of this lack of connection with others, the child may hurt others, act cruelly, steal, or lie.<sup>103</sup>

(b) Adoptive Parents Are Ill-Equipped, Unprepared or Unwilling

Adoptive parents are often unprepared for managing these extreme maladaptive behaviors in their adoptive child. Even experienced parents may require post-adoption training, as adopted children can pose significant challenges distinct from parenting biological children.<sup>104</sup>

When adoptive parents feel they can no longer provide their adopted child with the love and support he needs or when the adoptive child's behaviors negatively impact the other children in the home or become too overwhelming for parents to deal with, the adoptive parents may decide they have no option but to rehome their child.<sup>105</sup> Because of the cost and or barriers described above of going through a regulated rehoming, parents often turn to the internet for unregulated transfer of a child. There are online groups for parents to discuss their situations and attempt to find a new family for their adopted child. In some cases, adoptive parents are even willing to transfer custody of their adopted child to a complete stranger!

Again, a vulnerable child, who may have never bonded with a caregiver in infancy or otherwise, lacks the ability to attach, and may not speak English well, may now find himself with a new family – found on the internet and unvetted by any government oversight.

To get a better sense of the struggles adoptive parents are facing when they decide to rehome, it is best to read a real online post from adoptive parents:

Hello,

My husband and I adopted a little girl from Liberia, Africa 3 years ago. She is now 9 . . . though the physical size of a 7 year old. She *has not bonded to us* and is very depressed and unhappy. We have 6 other biological children, 5 of them younger[,] . . .two of who[m] are autistic. *She does not get the attention she deserves.* I will admit *this has been much harder than I thought* and *we have not bonded to her*, especially my husband. The strain on our marriage has been very difficult.

Our daughter is not an awful child by any stretch of the imagination. . . . She has had some issues, but nothing extreme. She has occasionally stolen food from home and school, and she sometimes wets the bed. If she is upset about something she will not speak and will ignore us for hours. She says she wants a mom and dad who really love her. I do not blame her. While we have been kind and met all of her basic needs and wants . . . *we cannot provide the love and physical affection she greatly desires. She deserves a mom and dad who can give her that.*

We have chosen to disrupt. . . .<sup>106</sup>

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<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 546.

<sup>105</sup> *Id.* at 543-46.

<sup>106</sup> *Id.* at 546.

### Options for Parents Wanting to Rehome

Parents who desire to rehome an adopted child have three options: (1) a formal, legal re-adoption, either through a private agency or CPS; (2) a transfer of guardianship in court; or (3) an unregulated transfer of the child entirely outside of the court's purview or knowledge, often using a power of attorney document.<sup>107</sup> The first two methods provide judicial oversight, ensuring the child is in a safe home and legally part of his/her new family.<sup>108</sup>

The two options involving judicial oversight may be difficult for parents.<sup>109</sup> Parents wanting to rehome their child must locate an adoption agency that will help find a new family or turn to CPS.<sup>110</sup> Most adoption agencies are not equipped to rehome children, and if they are, their services may be costly.<sup>111</sup> If parents turn to CPS, they may be investigated for child abuse and neglect, which could impact the parents' other children.<sup>112</sup> Further, there may be costs associated with the child's care until a new family can adopt.<sup>113</sup>

These barriers have led parents to the unregulated third option to rehome a child: transferring physical custody of the child and executing a power of attorney, which allows parents to legally give their power to make certain decisions to another person.<sup>114</sup> This may be helpful if a non-parent adult needs to make medical decisions for a child or make other decisions regarding the child for a limited time period, but an executed power of attorney does not make another person the child's legal parent or guardian.<sup>115</sup>

A power of attorney is not signed by a court, only notarized, nor is it recorded anywhere, so a child custody transfer could happen entirely outside of the court system.<sup>116</sup> Hence, such arrangements are without any judicial or governmental oversight.<sup>117</sup> Further, this gives the family giving up the child full discretion to choose who, including strangers, will have custody of their child.<sup>118</sup> There is no oversight or process for vetting the new adoptive family.<sup>119</sup> A google search of the terms "rehoming and failed adoptions" returns numerous stories about families posting on internet groups and forums, asking for another family to adopt their child.

### Texas Statutes Addressing Rehoming

The concept of rehoming contradicts Texas' goals of creating permanent families and finding placements that are in the best interest of the child.<sup>120</sup>

In 2017, the 85<sup>th</sup> Texas Legislature passed House Bill 834, which became law on September 1, 2017 and addresses rehoming. House Bill 834 included the following new and amended statutes:

1. Texas Family Code § 162.026: Regulated Custody Transfer of Adopted Child. A parent, managing conservator, or guardian of an adopted child may not transfer permanent physical custody of the child to any person who is not a relative or stepparent of the child or an adult who has a significant and long-standing relationship with the child unless:
  - (1) the parent, managing conservator, or guardian files a petition with a court of competent jurisdiction requesting a transfer of custody; and
  - (2) the court approves the petition.

This law is intended to prevent transferring custody of an adopted child to strangers, i.e. rehoming of an adopted child to a family found on the internet.

2. Texas Family Code § 162.603: Post-Adoption Support Information Provided by Licensed Child-Placing Agencies. A licensed child-placing agency shall provide prospective adoptive parents with information regarding:

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<sup>107</sup> *Id.* at 539.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 539-40.

<sup>112</sup> *Id.* at 540.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 542.

- (1) the community services and other resources available to support a parent who adopts a child; and
- (2) the options available to the adoptive parent if the parent is unable to care for the adopted child.

This is the Legislature's attempt to have child-placing agencies provide information to adoptive parents to inform them of (1) available resources such as therapy and family counseling services and (2) what to do should a parent be unable to care for an adopted child. This is in an effort to prevent the rehoming of adopted children.

3. Texas Penal Code: Sec. 25.081: Unregulated Custody Transfer of Adopted Child.

(a) In this section:

- (1) "Adopted child" means a person younger than 18 years of age who was legally adopted through a governmental entity or through private means, including a person who is in foster care or from a foreign country at the time of the adoption.
- (2) "Unregulated custody transfer" means the transfer of the permanent physical custody of an adopted child by the parent, managing conservator, or guardian of the child without receiving approval of the transfer by a court as required by Section 162.026, Family Code.

(b) Except as otherwise provided by this section, a person commits an offense if the person knowingly:

- (1) conducts an unregulated custody transfer of an adopted child; or
- (2) facilitates or participates in the unregulated custody transfer of an adopted child, including by transferring, recruiting, harboring, transporting, providing, soliciting, or obtaining an adopted child for that purpose.

(c) An offense under this section is a felony of the third degree, except that the offense is a felony of the second degree if the actor commits the offense with intent to commit an offense under Section 20A.02, 43.02, 43.05, 43.25, 43.251, or 43.26.

(d) This section does not apply to:

- (1) the placement of an adopted child with a licensed child-placing agency, the Department of Family and Protective Services, or an adult relative, stepparent, or other adult with a significant and long-standing relationship to the child;
- (2) the placement of an adopted child by a licensed child-placing agency or the Department of Family and Protective Services;
- (3) the temporary placement of an adopted child by the child's parent, managing conservator, or guardian for a designated short-term period with a specified intent and period for return of the child due to temporary circumstances, including:
  - (A) a vacation;
  - (B) a school-sponsored function or activity; or
  - (C) the incarceration, military service, medical treatment, or incapacity of the parent, managing conservator, or guardian;
- (4) the placement of an adopted child in another state in accordance with the requirements of Subchapter B, Chapter 162, Family Code; or
- (5) the voluntary delivery of an adopted child under Subchapter D, Chapter 262, Family Code.

This statute criminalizes the unauthorized transfer of custody of an adopted child, unless an exception applies.

4. Texas Penal Code Sec. 25.09: Advertising for Placement of Child.

- (a) A person commits an offense if the person advertises in the public media that the person will place, provide, or obtain a child for adoption or any other form of permanent physical custody of the child.
- (b) This section does not apply to a licensed child-placing agency that is identified in the advertisement as a licensed child-placing agency.

- (c) An offense under this section is a Class A misdemeanor unless the person has been convicted previously under this section, in which event the offense is a felony of the third degree.
- (d) In this section:
  - (1) "Child" has the meaning assigned by Section 101.003, Family Code.
  - (2) "Public media" has the meaning assigned by Section 38.01. The term also includes communications through the use of the Internet or another public computer network.

This statute criminalizes advertisements, through the use of the Internet, to place, provide, or obtain a child for adoption or physical permanent custody. This law is intended to curb internet advertisements that lead to unauthorized rehoming.

Are there other laws against informal custody transfers?

The Interstate Compact on the Placement of Children, an agreement between the fifty states, the District of Columbia and the U.S. Virgin Islands, requires that if a child is to be transferred outside of the family to a new home in a different state, parents must notify authorities in both states so the new parents can be vetted.<sup>121</sup> However, parents do not often notify state agencies about a rehoming transfer that was unauthorized and/or orchestrated online.<sup>122</sup> Further, the agreement is rarely enforced and each state determines how to punish persons who violate the compact, so there is little consistency.<sup>123</sup>

How have other states responded to the issue of rehoming?

(a) Criminalization of Rehoming and Limits on Advertising

Other states, like Texas, are addressing the issue of rehoming by criminalizing unregulated transfers and advertising of unregulated transfers.<sup>124</sup> Some states have already enacted or proposed laws requiring new adoptive parents to be informed of the legal implications of unregulated transfers with the hope that this will prevent unauthorized transfers of adopted children.<sup>125</sup>

(b) Limits on Power of Attorney

As stated previously, many families use a power of attorney document to transfer custody of their adopted child. Wisconsin has limited parents from using a power of attorney to permanently transfer guardianship rights to another adoptive placement.<sup>126</sup> In Wisconsin, a power of attorney cannot be used to terminate parental rights or deprive the parent of powers regarding care and custody of a child.<sup>127</sup> Further, any delegation of power granted through a power of attorney cannot extend for more than one year unless granted by the court.<sup>128</sup>

(c) Mandatory Reporting

Some states have enacted mandatory reporting regarding rehoming.<sup>129</sup> For example, Maine and Ohio require that certain people, such as teachers, medical practitioners, report to the child welfare agency if they suspect that a child is not living with his family or if they see other signs of an unregulated transfer.<sup>130</sup> Other states require the parents to be mandatory reports and to notify the state's child welfare agency or the adoption agency when they feel they can no longer care for their child.<sup>131</sup>

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<sup>121</sup> Twohey, Megan, *Americans Use the Internet to Abandon Children Adopted from Overseas*, Reuters Investigates: The Child Exchange. (Sept. 3, 2013), <https://www.reuters.com/investigates/adoption/#article/part1>.

<sup>122</sup> Twohey at Part 2.

<sup>123</sup> *Id.*

<sup>124</sup> Martin at 548.

<sup>125</sup> *Id.* at 549.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 550.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

(d) More Information/Education/Training

New York requires that its child welfare workers and service providers are trained on how to prevent unregulated transfers and what to do when one is identified.<sup>132</sup>

Other states have revised and improved pre-adoption training and counseling to try to better prepare adoptive families for the challenges they may face.<sup>133</sup> And, others have focused on improving post-adoption services provided to adoptive families, such as counseling, training, and support groups.<sup>134</sup>

Some states require agencies to provide information of a child's health condition to prospective parents, which would include RAD, fetal alcohol syndrome, or post-traumatic stress disorder.<sup>135</sup> However, not all agencies keep adequate records of a child's health – especially international agencies.<sup>136</sup> Further, some agencies and orphanages may intentionally want to hide information about a child's past or health conditions in order to make them more adoptable.<sup>137</sup>

(e) Improve Home Studies

Some states have passed legislation to improve home studies to better screen families to ensure a good match between a family and an adopted child. Some agencies and states use evidence-based home study methods, which allow for a more holistic evaluation of potential placements.<sup>138</sup> A federal bi-partisan bill, the National Adoption and Foster Care Home Study Act, introduced in March 2017, would establish a national, research-based, and comprehensive home study assessment process for the evaluation of prospective foster parents and adoptive parents and provide funding to states to adopt the process.<sup>139</sup>

(f) Additional Requirements for International Adoptions

Some states have additional requirements for international adoptions, such as licensing standards and record keeping.<sup>140</sup> Wisconsin has mandated that parents who adopt a child in another country readopt that child in state court.<sup>141</sup>

(g) Adoption Subsidies Review

Arkansas requires that its state child welfare agency determine whether it should terminate an adoption subsidy because the adoptive parent is no longer caring for and supporting the child.<sup>142</sup> If the child is no longer living in the home with the adoptive parent, then the state will terminate the adoption subsidy to that parent.<sup>143</sup> This helps the state track where the child is living and ensures the state links its payments to the person who is actually caring for the child.<sup>144</sup>

(h) Mandate Further Research

States have introduced legislation to dedicate more state funds and resources to understanding the needs of adopted children.<sup>145</sup> California proposed a bill to create a task force “to review the challenges facing families with adopted children, to identify resources within the community that will assist families with these challenges, and to make recommendations to the Legislature as to the services that may be helpful to these families.”<sup>146</sup> Wisconsin has proposed legislation to collect information on whether certain children in the child welfare and juvenile justice systems had been adopted previously.<sup>147</sup>

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<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 551.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 556.

<sup>139</sup> H.R.1650, National Adoption and Foster Care Home Study Act, 115<sup>th</sup> Cong. (2017-2018).

<sup>140</sup> *Id.* at 552.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

## V. POST-ADOPTION ISSUES

An adopted child, due to his background, trauma, and/or lack of attachment, can suffer from a variety of challenges, many of which, if not properly treated, can lead to a failed adoption/rehoming.

### (a) Reactive Attachment Disorder

Reactive attachment disorder (“RAD”) is a rare condition of emotional dysfunction in which a baby or child cannot form a bond with his parents or caregivers due to early neglect or mistreatment.<sup>148</sup> While RAD is uncommon in the general population, a child who has experienced abusive, neglectful or otherwise problematic care is at risk for RAD.<sup>149</sup> Children with RAD have had problems or severe disruptions in their early relationships. Many have been physically, emotionally or sexually abused.<sup>150</sup> Others have experienced episodes of prolonged isolation or neglect.<sup>151</sup> Some have had multiple or traumatic losses or changes in their primary caregiver.<sup>152</sup>

RAD is characterized by problems with the formation of emotional attachments to others that are present before age five.<sup>153</sup> A child with RAD may appear detached, unresponsive, inhibited or reluctant to engage in age-appropriate social interactions.<sup>154</sup> For example, a child with RAD may not reach out when picked up or respond to a game of peekaboo.<sup>155</sup>

Children adopted domestically or internationally often experience a lot of trauma before adoption.<sup>156</sup> Children in orphanages may suffer from institutional neglect.<sup>157</sup> Children in foster care have often suffered from neglect and multiple transitions.<sup>158</sup>

Without treatment, RAD may persist for years and can have a permanent effect on the child’s emotional development and adult relationships.<sup>159</sup> Treatment for RAD usually involves both the child who has been diagnosed and his current caregivers.<sup>160</sup> It can include psychotherapy for the child, family therapy, and parenting training.<sup>161</sup>

### (b) Post Traumatic Stress Disorder

The American Psychiatric Association defines Post Traumatic Stress Disorder (PTSD) as a psychiatric disorder that can occur in people who have experienced or witnessed a traumatic event, such as a natural disaster, a terrorist act, war/combat, rape or other violent personal assault.<sup>162</sup> Oftentimes, PTSD is associated with war veterans, but PTSD can occur in people of any ethnicity, nationality or culture, and any age.<sup>163</sup>

Children who exhibit PTSD may exhibit detachment, difficulty sleeping, nightmares about the traumatic event, and irritability.<sup>164</sup> Young children may regress and begin wetting the bed, stop talking, or become overly clingy with parents.<sup>165</sup>

<sup>148</sup> Psychology Today, Reactive Attachment Disorder, <https://www.psychologytoday.com/us/conditions/reactive-attachment-disorder>.

<sup>149</sup> Parents. Reactive Attachment Disorder and Adoption, <https://www.parents.com/parenting/adoption/reactive-attachment-disorder-and-adoption/>; Child Mind Institute, *Reactive Attachment Disorder Basics*, <https://childmind.org/guide/reactive-attachment-disorder/risk-factors/>

<sup>150</sup> American Psychiatric Association. Position Statement on Reactive Attachment Disorder, Reaffirmed 2007, <https://www.psychiatry.org/File%20Library/About-APA/Organization-Documents-Policies/Policies/Position-2007-Reactive-Attachment-Disorder.pdf>.

<sup>151</sup> American Psychiatric Association Position Statement, Reaffirmed 2007.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> Child Mind Institute, *Reactive Attachment Disorder Basics*.

<sup>156</sup> Andy Steiner, *Judith Eckerle, M.D.: Children Adopted Internationally or Domestically Need Specialized Care*, Minnesota Post, August 26, 2016, <https://www.minnpost.com/mental-health-addiction/2016/08/judith-eckerle-md-children-adopted-internationally-or-domestically-n/>.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> Psychology Today, Reactive Attachment Disorder.

<sup>160</sup> Child Mind Institute, *Reactive Attachment Disorder Basics*.

<sup>161</sup> *Id.*

<sup>162</sup> American Psychiatric Association, What is Post Traumatic Stress Disorder?, <https://www.psychiatry.org/patients-families/ptsd/what-is-ptsd>

<sup>163</sup> *Id.*

<sup>164</sup> Child Mind Institute, *Quick Facts on Post-Traumatic Stress Disorder*, <https://childmind.org/article/quick-facts-on-post-traumatic-stress-disorder/>

<sup>165</sup> *Id.*

Treatment can include psychotherapy that helps children speak, draw, play or write about their trauma.<sup>166</sup> Medication may also be prescribed to help alleviate fear and anxiety.<sup>167</sup>

(c) Sexual Acting Out

Children who act out sexually are typically doing so for reasons related to anxiety, traumatic experiences, curiosity, poor impulse control, or other factors.<sup>168</sup> Some of the factors that have been linked to the development of sexual behavior problems include:

- Exposure to traumatic experiences, such as abuse, natural disasters, or accidents.
- Exposure to violence in the home.
- Excessive exposure to adult sexual activity or nudity in the home (including media exposure through television or the Internet)
- Inadequate rules about modesty or privacy in the home.
- Inadequate supervision in the home, often as a result of parental factors such as depression, substances abuse, or frequent absences.<sup>169</sup>

Treatment for a child that exhibits sexual behaviors should be provided by a licensed mental health professional with specific knowledge of child development, child mental health issues, the relationship between one's social environment and sexual behaviors, scientific research on treatment for childhood mental health disorders, sexual behavior problems, and cultural variations in parenting and attitudes toward sexuality.<sup>170</sup>

Treatment may include outpatient therapy, inpatient therapy, psychological testing, and parental training and education.<sup>171</sup>

(d) Impact on Other Children in the Home

An adopted child's maladaptive and/or age inappropriate behavior often negatively impacts other children in the home. Sometimes, the negative impact on the other children in the home becomes so severe that it leads to parents deciding to rehome their adopted child.

Protecting other children is an important concern when dealing with children who have sexual behavior problems, particularly if they have acted out with other children in the past. Children who have sexually acted out with their siblings present a unique challenge for parents and therapists.<sup>172</sup> Children who have experienced problematic sexual behaviors at the hands of their siblings can have a wide range of responses, including no reaction, heightened startled response, avoidance of the sibling, anxiety, depression, or other behavior problems.<sup>173</sup> Sexual behavior that was threatening, aggressive or painful can have a profound negative impact on the other children.<sup>174</sup>

Parents should find a qualified treatment provider to work with the child exhibiting sexual behaviors, address sibling contact and reunification, work with the parents/family, and develop a clear safety plan.<sup>175</sup>

## VI. FINDING AND CONNECTING WITH BIRTH FAMILIES

Many adopted children, at some point in their lives, want to try to find their birth parents. There are several ways to try to do so and several barriers to finding out their birth family history.

### Texas Central Adoption Registry

One way an adoptee can try to find out information about his birth family is by applying to a mutual-consent adoption registry. The Texas Vital Statistics Unit Voluntary Central Adoption Registry is part of a voluntary mutual-consent registry system mandated during Texas' 68<sup>th</sup> Legislative Session in 1983. It enables an adoptee, birth parent, or sibling to place his or her name on the registry to locate other family members who are also registered.

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<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> The National Child Traumatic Stress Network, *Understanding and Coping with Sexual Behavior Problems in Children*, [https://www.nctsn.org/sites/default/files/resources/understanding\\_coping\\_with\\_sexual\\_behavior\\_problems.pdf](https://www.nctsn.org/sites/default/files/resources/understanding_coping_with_sexual_behavior_problems.pdf)

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*



Who is eligible?

- Adult adoptees (born and/or placed in Texas)
- Birth parents
- Biological siblings of adult adoptees<sup>176</sup>

How does it work?

The Voluntary Central Adoption Registry system provides an avenue for adult adoptees, birth parents, and biological siblings to locate one another without having to go through the court system or spend excessive amounts of time and effort trying to find each other through other sources. A qualified applicant may apply with the child-placing agency that handled the adoption if the agency operates its own Voluntary Adoption Registry, with the state Voluntary Central Adoption Registry, or both. Participation in an adoption registry is not mandatory and an adult adoptee and/or birth relative has the right to refuse to participate.

A match occurs when an adult adoptee and his or her birth parent or an adoptee's biological sibling voluntarily place their name on an adoption registry. The adoption registry will release identifying information *after* the participants in the match complete the following:

1. A Consent to Release of Identifying information document that specifies the identifying information the participant wishes to release to the adoptee or birth relative.
2. A one-hour post-adoption counseling session that educates and prepares each for the reunion.
3. A written biography or history about the participant's life with copies of photographs or other visual media.

The Registry sends the biography to the other participant at the same time the identifying information is exchanged.

Many adoption agencies have their own adoption registries. If the agency through which an adopted adult was adopted/placed is now closed, the state may keep the closed agency's records.<sup>177</sup>

#### Texas Adoption Records

Pursuant to Texas Family Code 162.021, the court, on motion of a party or the court's own motion, may order the sealing of the file and minutes of the court, or both in a suit for adoption.

Pursuant to Texas Family Code 162.022, "the records concerning a child maintained by the district clerk after entry of an order of adoption are confidential. No person is entitled to access to the records or may obtain information from the records except for good cause under an order of the court that issued the order."

Thus, "adoption records are sealed by the court after an adoption has been granted and no identifying information about the biological family can be released without a court order."<sup>178</sup>

#### Obtaining an Original Birth Certificate

Adoptees are legally permitted to receive only a non-certified copy of their birth certificate. If an adoptee wishes to obtain one, he must be able to:

1. Identify the name of each parent listed on his original birth certificate.
2. Be at least 18 years old.
3. Submit a copy of a valid state-issued driver's license or government-issued photo ID.
4. Provide other legal documentation if his name has changed due to marriage or other legal reasons.<sup>179</sup>

There have been efforts to change this process. In 2017, Texas Senate Bill 329, which did not pass, would have provided an adopted adult born in Texas with a non-certified copy of his birth certificate without having to know the names of the parents listed on his birth certificate.<sup>180</sup>

<sup>176</sup> Texas Department of State Health Services, Central Adoption Registry, <https://www.dshs.texas.gov/vs/reqproc/adoptionregistry.shtm>.

<sup>177</sup> *Id.*

<sup>178</sup> Texas Department of State Health Services, Texas Vital Statistics Frequently Asked Questions, <https://www.dshs.texas.gov/vs/reqproc/faq/adoption.shtm#Adoption%20FAQ>

<sup>179</sup> *Id.*

<sup>180</sup> Texas S.B.329, 85<sup>th</sup> Leg. (2017).

### Obtaining a Health, Social, Educational, and Genetic History Report

Since 1995, Texas Family Code 162.005 has required that a Health, Social, Educational, and Genetic History report be completed on all private, non-relative adoptions and filed with the Department of State Health Services – Central Adoption Registry. The Central Adoption Registry also maintains health information on adoptees whose adoptions were completed by child-placing agencies that are closed and transferred their records to the state.

Adoptees over the age of 18 adoptive parents and children of an adoptee who has died can request a copy of the Health, Social, Educational and Genetic History on file by submitting a request for open records to the Central Adoption Registry. All identifying information will be removed. There may be cost associate with processing a request.<sup>181</sup>

### The Impact of Social Media on Finding Birth Families

With the rise of social media, adopted children have access to finding their birth families in a way they never have before. This is raising new questions about how and when is appropriate for an adopted child to talk to and meet their birth family and what level of oversight adoptive parents should have in the process.

Today, adoptive parents must plan for the likelihood of digital contact between their adopted child and his birth family.<sup>182</sup> Electronic communications invite complexities and issues that challenge even the wisest, most prepared adoptive parents.<sup>183</sup> A child may use social media to contact his birth family without his adoptive parents' knowledge. This prevents adoptive parents from providing guidance, protection, or supervision.<sup>184</sup> Meeting one's birth family is emotional, and a child may not understand the impact such a meeting, even if solely on social media, can have.

Adoptive parents are questioning if their efforts to control electronic contact between their child and his birth family will push the children to have more contact without their knowledge.<sup>185</sup> Is there a way for adoptive parents to appropriately monitor the communication between their child and his birth family?<sup>186</sup>

Further, adoptive parents cannot control the messages the adoptive child receives from his birth family. A birth parent, whose rights to a child were involuntarily terminated, might feel angry, hurt, and resentful.<sup>187</sup> As a result, the birth parent may reach out on social media and say something like "You were stolen from me. If you don't come back, I can't go on."<sup>188</sup> This puts the adoptive child in a lose-lose position, torn between communicating with his birth family and doing what he feels comfortable with, especially without the proper guidance from his parents, social worker, or therapist.

Many adoptees are also using genealogy websites to have their DNA tested and then using the results to attempt to locate biological family members. A google search on this topic will indicate the numerous websites, companies, and people available for attempting to locate one's birth family. This too is available at the fingertips of a teenager, without the knowledge of, and therefore oversight from, parents or other adults.

These new methods of finding one's birth family, fueled by the internet and social media, are oftentimes less expensive and more efficient than hiring an attorney and obtaining an order to unseal a court file – only to receive documents with the birth parent information redacted. Further, an adoptee can initiate the search on his own at his own pace without any court involvement. But, even for adults, this can be emotional and traumatic, and one must know how to establish appropriate boundaries with his birth family.

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<sup>181</sup> *Id.*

<sup>182</sup> Deborah H. Siegel, *Social Media and the Post-Adoption Experience*, Social Work Today, Sept./Oct. 2012, Vol. 12, No. 5 at p. 22, <https://www.socialworktoday.com/archive/091712p22.shtml>.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*