

ADOPTIONS

Volunteer Lawyers Program Alabama State Bar

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PREFACE

Involvement in the adoption process brings a level of personal and professional satisfaction rarely found in any other area of the law. In the past there have been questions and debate surrounding the role of lawyers and the practice of adoption. This is no longer. Attorneys throughout the state participate in adoptions at every level.

This manual is designed to assist the attorney who is unfamiliar with adoption procedure. It is a simple guide that highlights several key areas and steps of the adoption process. No attempt has been made to provide a comprehensive or complete treatise of the area. Hopefully, the manual will provide the attorney a level of comfort with the major areas of Alabama's adoption laws and procedure they do not already have. While many materials and sources have been used in the compilation of this work, two in particular have proved invaluable: Camille W. Cook & Penny Davis, *The New Alabama Adoption Code: A Step Forward*, 42 Ala. L. Rev. 63 (1990). and Bryant A. Whitmire, *Alabama's New Adoption Code*, 1991 Ala. B. Inst. for Continuing Legal Educ., at H 1.

Camille Cook and Bryant Whitmire served on the committee for the Children's Code for Alabama. Penny Davis teaches and writes in the area of family law. Without their preceding work, this manual would not be possible.

Beth Marietta Lyons, Esq., Editor

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ADOPTIONS*

A. ADOPTION OF A MINOR

I. THE NEW CODE

Alabama's adoption laws have changed dramatically in recent history. 1990 saw the repeal of the previous adoption laws and the passage of the new Alabama Adoption Code.¹ Even practitioners unfamiliar with adoption procedure should find the new Code concise, clear, and comprehensive.

II. WHO MAY ADOPT²

Any adult may adopt a child. No couple may be prevented from adopting a child because of their marriage status or age. Additionally, the prospective adoptive parents may not be denied an adoption because they work outside the home. However, the Department of Human Resources (DHR) can require the couple to remain at home for sixty days. This is to ensure a parent-child bond.

III. WHO MAY BE ADOPTED³

The following persons may be adopted:

- (1) A minor.

IV. THE CLIENT

Know your client. One attorney advises the following:

[d]etermine who you are representing, by who contacted you first for legal assistance. Advise the mother, if you are going to represent her, and request another attorney to represent the couple. If you are representing the couple, the natural mother and father need to sign an Acknowledgment of Non-Representation stating that you do not represent them.⁴

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¹ Ala. Code § 26-10A-1 to 38 (1992).

² Ala. Code § 26-10A-5 (1992 & Supp. 2004). Section 26-10A-5(a) does not require the petitioners to have custody of the child in order to petition for adoption. L.E.D. and L.M.D.V. DHR, 2004 Ala. Civ. App. LEXIS 149 (2004).

³ Ala. Code § 26-10A-6(a) (1992 & Supp. 2004).

⁴ Bryant A. Whitmire, *Alabama's New Adoption Code*, 1991 Ala. B. Inst. for Continuing Legal Educ., at H 6.

V. JURISDICTION⁵ AND VENUE⁶

Adoption matters are brought in the probate court. The practicing attorney should be cautioned that if all necessary consents cannot be obtained, the process for termination of parental rights generally requires removal to another court. Upon removal, the provisions of the Child Protection Act⁷ apply in the proceeding to terminate parental rights.⁸

Venue may be had where the minor resides or has legal residence, where the petitioner resides or is in military service, or where the agency having custody of the minor is located.

In 1999 the Alabama Legislature passed the Uniform Child Custody and Enforcement Act, which, by its terms, does not affect adoptions.⁹

VI. UNRELATED ADOPTION-OVERVIEW

A. INVESTIGATION OF THE PETITIONER¹⁰

The Code requires the investigation of the petitioner and the prospective home of the adoptee. There are two types of investigations: a pre-placement investigation and a post-placement investigation. A pre-placement investigation must occur within 24 months of the petition to adopt the child unless waived by the court for good cause shown. The post-placement investigation must take place within 45 days of the placement of the child in the home. The investigation must include or meet each of the requirements enumerated in Alabama Code section 26-10A-19. Moreover, the Code provides which agencies or individuals are eligible to conduct the investigation.

B. CONSENT/RELINQUISHMENT¹¹

⁵ Ala. Code § 26-10A-3 (1992).

⁶ Ala. Code § 26-10A-4 (1992 & Supp. 2004).

⁷ Ala. Code § 26-18-1 et seq.

⁸ *T.S. v. J.P.*, 674 So. 2d 535, 538 (Ala. Civ. App. 1995).

⁹ Ala. Code § 30-3B-102(4) (Supp. 2004).

¹⁰ Ala. Code § 26-10A-19 (1992).

¹¹ Ala. Code § 26-10A-7 (1992 & Supp. 2004).

Obtaining all the necessary consents is critical to having a valid adoption. The adoptee's natural mother, the agency to which the adoptee was handed over or which has permanent custody,¹² the presumed father, the putative father, and the adoptee, if he is over 14 years of age, must all give their consent. Note, however, that a putative father's consent is required only if he filed notice of intent to claim paternity prior to or within 30 days of the birth of the child, as required by the Alabama Putative Father's Registry Act.¹³ If no such intent is filed, the putative father is deemed to have irrevocably and implicitly consented to any adoption.¹⁴ Usually, the mother will appear in the probate court for a pre-birth consent hearing in which the judge will explain the legal consequences to her. Generally, a minor parent must have a guardian ad litem appointed before their consent is valid.¹⁵ However, if a court determines by conclusive evidence that a minor father has impliedly consented to adoption, neither notice nor the appointment of a guardian ad litem is necessary.¹⁶ Keep in mind that consent may be given before or after the birth of the child, each having different requirements that must be met.

Consent may also be implied. Consent may be implied if a parent: (1) abandons the child for a period of six months, including pre-birth abandonment if the father is aware of the pregnancy, (2) leaves the child without identification for thirty days, or (3) neglects to respond to a notice of adoption,¹⁷ Similarly, if the putative father fails to timely file his notice of intent to claim paternity under the Putative Father's Registry Act, he will be deemed to have irrevocably and impliedly consented to the adoption.¹⁸ The putative father's filing for legitimation and adjudication for paternity and custody no longer is sufficient if he fails to comply with the registry.¹⁹ Amendments to the consent statutes are not given retroactive effect if they impair vested rights.²⁰

¹² *Ex parte* R.C., 592 So. 2d 589, 592 (Ala. 1991).

¹³ Ala. Code § 26-10C-1(i) (Supp. 2004). This act was held constitutional by the Alabama Court of Appeals in *M.V.S. v. V.M.D.*, 776 So. 2d 142, 150 (Ala. Civ. App. 1999), *cert denied*, 776 So. 2d 155 (Ala. 2000). But see *Ex parte* S.C.W., 826 So. 2d 844, 848-851 (Ala. 2001) (failing to register within prescribed time period was not an irrevocable consent because the putative father had filed for legitimation and adjudication for paternity and custody).

¹⁴ Ala Code § 26-10C-1(i).

¹⁵ Ala. Code § 26-10A-8 (1992 & Supp. 2002).

¹⁶ Ala. Code § 26-10A-8(c).

¹⁷ Ala. Code § 26-10A-9 (1992 & Supp. 2002).

¹⁸ Ala. Code § 26-10C-1(i).

¹⁹ *Ex parte* S.C.W., 826 So. 2d at 848-851. But see subsequent amendment of the Putative Father's Registry Act that made it the exclusive procedure available for the natural father to receive notice of or to contest the adoption of the child. Ala. Code § 26-10C-1(i).

²⁰ *Ex parte* F.P. and R.P., 857 So. 2d 125 (Ala. 2003)

Just as there are individuals whose consent is needed, there are individuals who do not have to consent. A parent who is presumed dead, an alleged father who denies paternity in writing, a father unknown to the court, a parent whose rights have been terminated, a parent who has been adjudged incompetent or who the court finds mentally incapable of consenting, and a parent who has relinquished the child for adoption to DHR or a licensed child placing agency is not required to give consent.²¹ Also, a putative father who did not file notice of intent to claim paternity prior to or within 30 days of the birth of the child, as required by the Alabama Putative Father's Registry Act,²² is not required to give consent or has implicitly consented.²³

Effective June 11, 1999, the Legislature recognized 'prebirth abandonment,' requiring a father to support his unborn child. Prebirth abandonment is the failure of the father, with knowledge of the pregnancy, to offer financial support for a period of six months prior to birth. With this enactment, 'prebirth abandonment' is recognized as implied consent to an adoption, or relinquishment of parental rights.²⁴

In 2002, the statute was amended in response to a prior judicial decision, to clarify that an implied consent could not be withdrawn.²⁵

C. NOTICE²⁶

If a person will not consent to the adoption, serve them with notice. If they do not answer or respond within 30 days, their consent is no longer necessary. The mother may not know who the father is or where he is located. Constructive notice may be made as provided in Ala. Code § 26-10A-17. Notify all other necessary people of the pending adoption. Fathers of illegitimate children may have some rights to notice.²⁷ Notwithstanding, in 1999 the Code was amended to provide that no notice was necessary for a minor father if there was conclusive evidence that he had impliedly consented to the adoption.²⁸ Likewise, no notice is necessary for the father or putative father if the court finds that he has impliedly consented to the adoption.²⁹ The court must have proof of notice served on those enumerated in section 17 unless waived. Notice may be served on the natural parents prior to birth.³⁰

²¹ Ala. Code § 26-10A-10 (1992).

²² Ala. Code § 26-10C-1.

²³ Ala. Code § 26-10A-9 (1992 & Supp. 2004).

²⁴ Ala. Code § 26-10A-9(1).

²⁵ Ala. Code § 26-10A-8 (1992 and Supp. 2004).

²⁶ Ala. Code § 26-10A-17 (1992 & Supp. 2004).

²⁷ *See generally* Stanley v. Illinois, 405 U.S. 645 (1972); Quilloin v. Walcott, 434 U.S. 246 (1978); Caban v. Mohammed, 441 U.S. 380 (1979); Lehr v. Robertson, 463 U.S. 248 (1983).

²⁸ Ala. Code § 26-10A-8(c).

²⁹ Ala. Code § 26-10-A-17(a)(10).

³⁰ Ala. Code § 26-10-A-17.

D. ADOPTION FINANCES³¹

Payment of all fees and expenses may only be made with prior court approval unless the fees are placed in escrow pending court approval. The fees and expenses are normally approved by the judge unless found unreasonable. File a petition with the court listing all fees and expenses. Usual expenses consist of hospital and doctor bills, rent and food money for the mother, and any incurred legal expenses. The prospective parents must sign an affidavit accounting for all expenses paid.

Never, under any circumstances, can the adopting parents offer money to the natural mother to give up her child, nor can the mother accept any money in return for the relinquishment of the child. Both the natural parents and adopting parents must sign an affidavit to this effect. Furthermore, it is illegal for any one to receive money for bringing the natural mother and prospective parents together. This is to prevent the sale of babies. The Code provides sanctions for any of these actions.

E. HEALTH FACILITIES³²

If the mother signs a health facility release, the child can leave the hospital and be placed with the adopting couple immediately. It is against the law for the hospital to release the child to someone other than the natural parent without this release. The mother may not sign the release before the birth of the child.

F. PLACEMENT,³³ PETITION,³⁴ AND INTERLOCUTORY DECREE³⁵

Once the child is placed with the couple, file a petition with the court within thirty days. It is best to file the petition at the earliest possible date. The petition should include all necessary information required in section 16. Upon receiving the petition, the court will issue an interlocutory decree. This allows the couple to take any necessary action the child could require such as medical care. The interlocutory decree does not involve a hearing. It is sent to the attorney and should give the date of the dispositional hearing.

The entry of an interlocutory decree does not stop the running of the time periods for an implied consent or relinquishment.³⁶

³¹ Ala. Code § 26-10A-23 (1992).

³² Ala. Code § 26-10A-15 (1992).

³³ *Id.*

³⁴ Ala. Code § 26-10A-16 (1992).

³⁵ Ala. Code § 26-10A-18 (1992 & Supp. 2004).

³⁶ Ala. Code § 26-10A-18 (1992 & Supp 2004).

G. WITHDRAWAL OF CONSENT/RELINQUISHMENT³⁷

Always remind the hopeful parents of the natural parent's right to withdraw their consent. If a pre-birth consent was obtained, the natural parent may withdraw it within five days of birth. With a post-birth consent, they have five days within signing.

After this, certain restrictions are imposed. The natural parent may withdraw their consent within fourteen days of the child's birth or signed consent, whichever ever comes last, but must have the court's permission. If fraud, duress, mistake, or undue influence is used to obtain the child, the natural parent has until the final decree. Being confused and pressured were not deemed sufficient to allow a minor mother to withdraw her consent when she had competent legal advice from her guardian ad litem at the time of her consent and more than 14 days had passed from the time of her consent.³⁸ However, in one case, the court held that if a father had given an implied consent by abandoning his child for six months, he could revoke his consent.³⁹

Except for cases involving kidnapping, a natural parent may not challenge a consent or relinquishment in an adoption after one year from the date of the final decree. Subsequently, the Code was amended to provide that an implied consent could not be withdrawn.⁴⁰

A consent or relinquishment may be withdrawn upon the dismissal of the adoption after a contested hearing.⁴¹

H. DISPOSITIONAL HEARING⁴²

Prior to the dispositional hearing, the following steps must be completed and sent to the probate court: (1) a home study of the adopting parents and child in the home;⁴³ (2) a birth certificate for the child or the affidavit that one has been applied for;⁴⁴ (3) the adoptive parent's affidavit stating they have paid no money for the child;⁴⁵ (4) the natural parent's affidavit stating they have not

The hearing should be held within 90 days of the filing of the petition. Bring the adoptive parents and child with you to the hearing. The judge will issue the final decree.

³⁷ Ala. Code § 26-10A-13 to 14 (1992 & Supp. 2004).

³⁸ *H.S. v. G.H.*, 640 So.2d 959, 960 (Ala. Civ. App. 1994).

³⁹ *K.L.B. v. W.M.F.*, 864 So. 2d 333 (Ala. Civ. App. 2002)

⁴⁰ Ala. Code § 26-10A-9(b) (1992 and Supp. 2004).

⁴¹ Ala. Code § 26-10A-14(a) (3) (1992 and Supp. 2004)

⁴² Ala. Code § 26-10A-25 (1992).

⁴³ *Whitmire*, *supra* note 4, at H 12.

⁴⁴ *Id.*

⁴⁵ *Id.* at H 11.

I. CONTESTED HEARING⁴⁶

When a motion is filed contesting the adoption, the court shall give notice by certified mail to all of the parties. The guardian ad litem shall appear at the hearing to represent the adoptee. The court may order further discovery and investigation.⁴⁷

On motion of the court or either party, the hearing may be transferred to the court having jurisdiction over juvenile matters. All references to the names of the parties shall be by initial only.⁴⁸

If the contest fails, the court shall order the contestant to reimburse the petitioners for their legal costs incidental to the contest, unless just cause is otherwise shown by the contestant.⁴⁹

If the adoption is denied when there is a contested hearing, unless good cause is otherwise shown by the contestant, the court shall order reimbursement to the petitioners for all of the medical and living expenses of the minor child that they incurred incidental to the care of the child while in their care.⁵⁰

VII. FAMILY/STEPARENT ADOPTIONS⁵¹

Adoption by a relative or stepparent usually requires less formality and some of the procedures are waived. Prepare the petition for adoption with the court. Along with the petition for adoption, include a birth certificate. Have the natural parents sign affidavits that no monies were paid for the child. They must also sign a consent form. If one refuses or cannot be found, serve them with notice of petition to adopt as provided in Alabama Code section 26-10A-17. If they do not answer within 30 days, their consent is no longer necessary.

The child should have lived with the adopting couple for one year unless waived by the court. The placement investigation is unnecessary unless ordered by the court. Because baby selling is not associated with adoptions by relatives or a stepparent, the affidavit of fees and expenses is not needed. A hearing is held before the Probate Judge who issues the final decree.

Once a final decree of adoption has occurred, the adopted child is treated in the same manner as a natural child of the adopting parents. Therefore, upon the divorce of grandparents who adopted their grandchildren, the court properly applied the child support guidelines of Rule 32 of the Rules of Judicial Administration.⁵²

⁴⁶ Ala. Code § 26-10A-24 (1992 & Supp. 2004).

⁴⁷ Ala. Code § 26-10A-24(b) and (c).

⁴⁸ Ala. Code § 26-10A-24(e) and (f).

⁴⁹ Ala. Code § 26-10A-24(i) (Supp. 2004).

⁵⁰ Ala. Code § 26-10A-24(h) (Supp. 2004).

⁵¹ Ala. Code § 26-10A-27 (1992); Ala. Code § 26-10A-28 (1992).

⁵² *Pruitt v. Pruitt*, 669 So. 2d 931, 933 (Ala. Civ. App. 1995).

VIII. GRANDPARENT VISITATION⁵³

The natural grandparents of the adoptee may be granted post-adoption visitation rights when the adoptee is adopted by a stepparent, grandfather, grandmother, brother, half-brother, sister, half-sister, aunt or uncle and their respective spouses, if any. The constitutionality of this section was upheld in *Ex parte D.W.*⁵⁴

A trial court must determine, after careful consideration of the evidence, whether the grandparent's continued participation in their grandchild's life after that child has been adopted is a benefit to the child that outweighs any potential detriment.⁵⁵

IX. APPEALS⁵⁶

File any appeal within 14 days from the final decree with the Court of Civil Appeals. Appeals from any adoption have priority over other matters except those given priority by statute or rule of court. During the appeal, the trial court may enter further orders concerning the custody of the adoptee pending appeal.

IX. RECORDS⁵⁷

Adoption records are confidential and only specific individuals at different stages of the adoption have access to them. Before the final decree, only the petitioners, their attorney, the investigator appointed under Alabama Code section 26-10A-19, or the adoptee's appointed attorney may access the records. Others must have order of court for good cause shown. Only interested parties and their counsel have access to the hearings. The hearings are confidential. The court, at its discretion, may allow others. After the final decree, all the information is sealed. The original birth certificate becomes part of the records. No one, other than an adult adoptee as provided in section 22-9A-12, can have access without court permission. Otherwise, the parties in interest must give their consent before the release of any identifying information.

The adopting parents, natural parents, or adult adoptee can have access to non-identifying information if they request it from DHR or the investigator. All others must have the court's permission and with good cause. The Code does provide a mechanism for the access of non-identifying information not otherwise available. The court, in order to prevent the disclosure of any identifying information, will appoint an intermediary or agency to contact the parties and obtain the necessary non-identifying information if there is a compelling need. The information may only consist of the following: (1) health and medical histories of the adoptee's natural parents; (2) the

⁵³ Ala. Code § 26-10A-30 (1992).

⁵⁴ *Ex parte D.W.*, 835 So. 2d 186, 190 (Ala. 2004).

⁵⁵ *Weathers v. Compton*, 723 So. 2d 1284, 1287 (Ala. Civ. App. 1998).

⁵⁶ Ala. Code § 26-10A-26 (1992).

⁵⁷ Ala. Code § 26-10A-31 (1992 & Supp. 2004).

health and medical history of the adoptee; (3) the adoptee's general family background, including ancestral information or geographical designation; (4) physical description; (5) the length of time the adoptee was in the care and custody of one other than the petitioner; (6) and circumstances under which child comes to be placed for adoption.

The adoptee may be able to access identifying information about the natural parents. However, there are certain restrictions. An adult adoptee may view their original birth certificate under § 22-9A-12. The consent to adopt form offers the natural parents the choice to release any identifying information. If the natural parents did not give their consent, the adoptee can also petition the court. The court will then appoint an intermediary who will try to contact the natural parents. If the natural parents consent, their identity may be released to the adult adoptee. If the natural parents object to the release of their identity, the court will have a hearing and weigh the interest and rights of all the parties.

X. EQUITABLE ADOPTIONS

Since adoption is purely statutory, courts have always required strict adherence to the statutory requirements.⁵⁸ Equitable adoptions have rarely been recognized in Alabama. Only when a definite contract to adopt has been clearly proven will equitable adoption be found to avoid an unfair result from the application of intestacy statute.⁵⁹ Equitable adoptions generally require a finding of intent to adopt.⁶⁰

B. ADOPTION OF AN ADULT

I. VENUE⁶¹

The petition to adopt may be filed in the probate court in which:

- (1) the adult resides or has legal residence;
- (2) the petitioner resides or is in military service;
- (3) the office of any agency or institution in Alabama having the guardian and custody of the adult is located.

⁵⁸ *Ex parte Sullivan*, 407 So. 2d 559, 562-63 (Ala. 1981).

⁵⁹ *C.H.H. v. R.H.*, 696 So. 2d 1076, 1078 (Ala. Civ. App. 1996).

⁶⁰ *J.N.H. v. N.T.H.*, 705 So. 2d 448, 452 (Ala. Civ. App. 1997).

⁶¹ Ala. Code § 26-10A-4 (1992 & Supp. 2004).

II. WHO MAY ADOPT⁶²

Any adult may petition the court to adopt another adult as provided in this chapter.

III. WHO MAY BE ADOPTED⁶³

The following persons may be adopted:

(1) An adult under any one of the following conditions:

- a) he or she is totally and permanently disabled;
- b) he or she is determined to be mentally retarded.
- c) he or she consents in writing to the adoption and is related in any degree of kinship (as defined by the intestacy laws of Alabama) or is a stepchild by marriage; or
- d) he or she consents in writing to be adopted by an adult man and woman who are husband and wife.

IV. CONSENT⁶⁴

A petition to adopt an adult may be granted only if written consent to adopt has been executed by the adult seeking to adopt and his or her spouse or by the guardian or conservator of the adult sought to be adopted pursuant to the requirements of Sections 26-10A-6 and 26-10A-11.

APPENDIX A: ANNOTATED BIBLIOGRAPHY

A. Statutes

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2. *Caban v. Mohammed*, 441 U.S. 380 (1979).
3. *Quilloin v. Walcott*, 434 U.S. 246 (1978).
4. *Stanley v. Illinois*, 405 U.S. 645 (1972).

Note: many adoption cases are referenced in Camille W. Cook & Penny Davis, *The New Alabama Adoption Code: A Step Forward*, 42 Ala. L. Rev. 63 (1990).

C. Alabama Cases

⁶² Ala. Code § 26-10A-5(b) (1992 & Supp. 2004).

⁶³ Ala. Code § 26-10A-6 (1992 & Supp. 2004). Subsections (c) and (d) were added in 2004.

⁶⁴ Ala. Code § 26-10A-7(b) (1992 & Supp. 2004).

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3. *B.W.C. v. A.N.M.*, 590 So. 2d 282 (Ala. Civ. App. 1991).
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15. *Ex parte D.W.*, 835 So. 2d 186, 190 (Ala. 2002).

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2. Ruth G. McRoy, Harold D. Grotevant & Kerry L. White, *Openness in Adoption, New Issues* (1988).
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