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Legal Representation of Birth Parents

A. The Importance of Separate Representation for Birth and Adoptive Parents

Whether a child is placed for adoption privately or through an adoption agency, a birth parent making an adoption plan should have his or her own attorney. Legal representation for the birth parent ensures that the laws governing the adoption are complied with, that the birth parent is making a knowing and voluntary decision to place her child for adoption, and that she understands her legal rights and the laws governing the adoption. In addition, the attorney is her advocate, ensuring that her rights are protected and concerns are heard throughout the process.

The birth parent's attorney should be experienced in adoptions (as are those who are members of the Academy of Adoption and Assisted Reproduction Attorneys), and should not be the same attorney that represents the adoptive parents. Even in those few states that permit dual representation, it is inadvisable due to the potential for a conflict of interest between the parties. Because birth parents often make an adoption plan due to financial reasons, the legal fees for the birth parent's representation are paid by the adopting parents. A third party fee agreement should be signed by the adopting parents, which should make clear that although they are paying the fees for the birth mother's attorney, the attorney's legal and ethical obligations are to represent the interests of the birth parent, not the adoptive parents. The attorney should also have the birth parent sign a retainer agreement that makes this point clear. The retainer agreement with the birth parent should also inform the birth parent of the attorney-client privilege that ensures confidentiality of communications between the attorney and the birth parent, except with respect to matters that must be disclosed in an adoption, such as background medical, family and social history information, information pertaining to the health of the baby and information regarding the birth father (if his identity is known).

While legal representation of a birth parent adds to the cost of the adoption for the adoptive parents, its importance cannot be overstated, and becomes apparent when the adoption does not proceed according to plan. At the initial stages of the adoption, the birth and adoptive parents are working toward the same goal. The birth parent wishes to place the child for adoption with the adopting parents and the adopting parents wish to accept placement of the child. But

when a birth parent changes her mind about placing the child for adoption, the parties are suddenly in an adversarial position. Whether or not the birth parent can successfully reclaim her child will depend on many factors, but if the birth parent was separately represented by her own counsel with experience in adoption matters, it can avoid or dispel claims that laws were not complied with, that she did not understand what she was signing, or that she did not make a knowing and voluntary decision to place her child for adoption. In addition, by ensuring that her attorney does not also represent the adoptive parents, the birth mother's attorney will not be required to withdraw from representing the birth parent due to the conflict of interest (although the adoptive parents will no longer be paying the attorney's legal fee). In short, the attorney's separate representation of the birth parent protects not only the birth parent, but the integrity of the adoption plan.

B. The Attorney's Role in Agency and Private Placement Adoptions

In an agency adoption, the attorney's role is typically more limited than in a private placement adoption, particularly in cases where the attorney is retained to represent the birth parent after the parties have made the decision to proceed in an adoption plan. The attorney will meet with the birth parent privately to explain such matters as the attorney's role in the adoption, the confidential relationship between the attorney and the birth parent, the laws governing the adoptive placement, the birth parent's legal rights, and the documents that the birth parent will be signing. If the attorney is representing the birth mother, the attorney should address the birth mother's selection of the adoptive parents and what information she has obtained about them, and discuss the birth father and any related issues with respect to him. The attorney should also discuss medical costs and living expense assistance with the birth mother to assure her that any uncovered medical expenses will be paid by the adoptive parents and to ensure that any living expense assistance that she is receiving is reasonable, legal, and meets her needs. If some contact with the adoptive family is desired by the birth parent, the attorney should address that as well, and should advise the birth parent about whether she has the right to a legally enforceable agreement for post adoption contact in her state or in the adoptive parents' state, if the parties reside in different states. Prior to signing a surrender to the agency, the attorney should ensure that the birth parent is satisfied with the counseling that she has received, that she understands her alternatives to adoption, and that she does not wish to receive additional counseling before signing her surrender. The attorney will be present when the birth parent signs her consent to the adoption and surrender of the child to the agency.

In a private placement adoption, the birth parent's attorney has a greater role. The attorney must address the same issues discussed above when representing a birth parent in an agency adoption, but in addition, provide many of the services that are typically provided by an agency in an agency adoption. For example, the attorney must obtain background medical and social history information about the birth mother and birth father and obtain the birth mother's

prenatal medical records. If the birth mother is not receiving prenatal care, the attorney should assist her in obtaining care. Once the birth mother has selected the hospital where she will deliver the baby, the attorney should contact the hospital to advise them of the adoption plan, discuss their policies regarding adoption, and advise them of the birth mother's wishes during her hospital stay. If the birth father is not involved in the adoption planning, the attorney should have a lengthy conversation with the birth mother about him, including inquiring, for example, whether she knows his identity and whereabouts, whether he is aware of the pregnancy and adoption plan, whether he is supportive of the adoption plan, whether the birth mother is now or was ever in a relationship with him, and whether the birth father has ever lived with or supported the birth mother. In New Jersey and many other states, the birth mother has a legal right to refuse to identify the birth father and the attorney should discuss this right as well, including both the practical and legal ramifications of exercising this right, for example, the legal risk should the unidentified birth father come forward in a timely manner and contest the adoption and the practical consequences such as the inability to obtain background medical and social history information from the birth father.

Under New Jersey law, a birth parent making an adoption plan is legally entitled to adoption options and supportive counseling through a licensed adoption agency in his or her state of residence. The birth parent's attorney must ensure that the birth parent understands this important right and arrange for counseling for the birth parent if she desires it. Whether she receives the counseling or not, the attorney should discuss with the birth parent what alternatives to adoption, if any, she has considered. For example, has she considered parenting the child and obtaining public assistance, placing the child in day care so that she can remain employed, asking her family members to assist her in raising the child, or placing the child in foster care temporarily?

At the time an attorney is consulted to represent a birth mother, she may or may not be matched with an adoptive family. If she is already planning an adoption plan with an identified adoptive family, the attorney should obtain the facts about how the match was made, including the identity of any intermediary involved and whether any payments were made to the intermediary for the match or for other services. This information is important in order to determine whether any state laws regarding payments to intermediaries were violated. The attorney should also confirm that the birth parent is comfortable with her selection of adoptive parents and the information that she has about them. If the birth mother has not yet selected an adoptive family, the attorney should talk to her about the family that she desires and envisions for her child -- for example, does she desire a married couple or will she also consider a single adopter? If she desires a married couple, will she consider both same sex and different sex couples? What are her thoughts regarding the age and race of the adopting parents, where they live, their educational attainments and what they do for a living, children already in the home and whether one parent will remain at home with the child? When choosing a family, the birth parent will also want to know how open they are to the type and frequency of contact the birth parent desires after the adoption. The attorney can then assist her in locating a family by reaching

out to his or her colleagues in the field to obtain profiles of hopeful adoptive families who meet the birth mother's criteria, and then share those profiles with the birth mother.

Lastly, if the adoption is an interstate placement, the attorney representing the birth mother must file the interstate compact packet with the interstate compact office in the birth mother's state of residence. This submission is a packet of documents that are relevant and necessary to the placement, including the birth parent's consent to the adoption and supporting affidavits, the adoptive parents' home study, the adoptive parents' signed acknowledgment of any legal risks involved in the placement, a disclosure of fees paid in connection with the placement, and other documents required by the laws of the states involved in the adoption. The interstate compact is law in all states, and with certain exceptions primarily pertaining to adoptions between relatives, prohibits the child from leaving the state of the birth mother's residence until approval is given for the child to leave by both the state where the birth mother resides and the state where the adoptive parents reside.

C. Parting Words

I hope this gives you an understanding of the importance of legal representation for birth parents, and an overview of the role of the attorney when representing birth parents in both agency and private adoptions. It was not my intent to provide an exhaustive explanation of the attorney's role and the services performed on behalf of birth parents, but to impart a basic understanding of what attorneys do when representing birth parents and the vital role they play in an adoption. Good luck to you on your adoption journey!