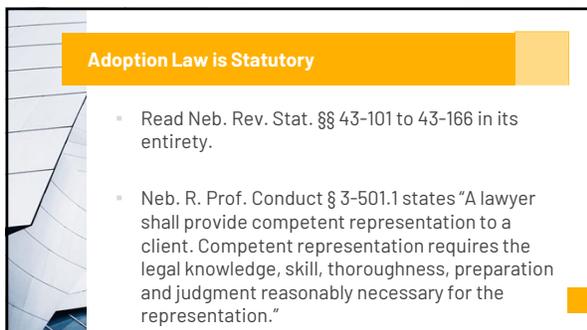




Ethics of Adoption Law and Avoiding Pitfalls

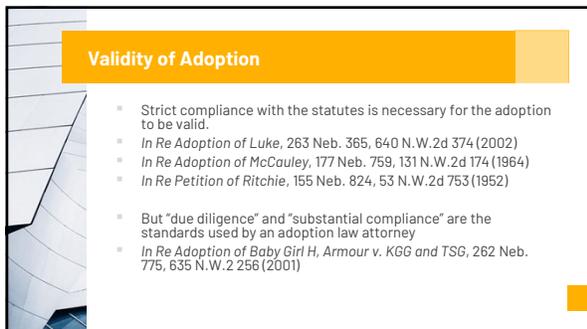


Tana M. Fye
Fye Law Office



Adoption Law is Statutory

- Read Neb. Rev. Stat. §§ 43-101 to 43-166 in its entirety.
- Neb. R. Prof. Conduct § 3-501.1 states "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, preparation and judgment reasonably necessary for the representation."



Validity of Adoption

- Strict compliance with the statutes is necessary for the adoption to be valid.
- *In Re Adoption of Luke*, 263 Neb. 365, 640 N.W.2d 374 (2002)
- *In Re Adoption of McCauley*, 177 Neb. 759, 131 N.W.2d 174 (1964)
- *In Re Petition of Ritchie*, 155 Neb. 824, 53 N.W.2d 753 (1952)
- But "due diligence" and "substantial compliance" are the standards used by an adoption law attorney
- *In Re Adoption of Baby Girl H, Armour v. KGG and TSG*, 262 Neb. 775, 635 N.W.2 256 (2001)

Not Covered in this Webinar

- Adult adoptions
 - Different (and less strenuous) requirements for adult adoptions as compared to child adoptions
- Not covering adult adoptions in this webinar
- Foreign adoptions
 - Many additional requirements to be aware of
 - Recommend working closely with an agency that specializes in international adoptions

Who is the Client?

- Neb. R. Prof. Conduct § 3-501.7 prohibits concurrent conflicts of interest
 - "Directly adverse"
 - "Significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person"
- But, a lawyer can undertake the representation if:
 - (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
 - (2) the representation is not prohibited by law;
 - (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
 - (4) each affected client gives informed consent, confirmed in writing."

Who is the Client?

- If the person reasonably believes that you are his or her lawyer, then for purposes of the ethics rules, you probably are.
- Neb. R. Prof. Conduct § 3-501.14 deals with diminished capacity.
- This rule may apply in adoption law, particularly when dealing with children, biological parents who are also minors, or biological parents who are lower functioning adults.

Who is the Client?

- Scenario: The Department of Health and Human Services contracts with the child's Guardian ad Litem to file the adoption. The Guardian ad Litem believes the adoption to be in the best interests of the child, and is willing to file.
- Question: Who should the attorney file on behalf of or as?
- Best Practice: The Guardian ad Litem should file as the Guardian ad Litem, along with the Petitioners (the adopting parent(s))

Who is the Client?

- Scenario: Potential adoptive parents have been approached by a pregnant woman about adopting her unborn baby. The biological father is on board with the plan. The adoptive parents call you and ask you to help them.
- Question: Who does the attorney represent?
- Best Practice: The attorney represents the adoptive parents. The attorney makes clear in conversations with, and in writing, that he/she does not represent the biological parents.
- Even better best practice: A separate attorney is brought in to consult with, advise, and represent the biological parent(s).

Who is/are the Petitioner(s)?

- In all adoptions (private and DHHS) the adopting parent(s) need to be listed as the Petitioner(s)
- If it is a stepparent adoption, both the biological parent and the adopting stepparent (the spouse) need to file as petitioners.
- If the person who is adopting is married, the spouse needs to join in the Petition
- The Petition needs to be verified (i.e. signed and notarized by the Petitioner(s))

Reimbursement of Expenses

- Can be reimbursed: attorney fees, counseling, medical expenses, lost wages because of pregnancy (with a doctor's note), pregnancy related items such as vitamins and maternity clothes
- Note: attorney fees cannot be contingent upon the adoption being completed
- See particularly Neb. R. Prof. Conduct § 3-501.8 regarding one person paying attorney fees for another.
- Cannot be reimbursed: ordinary living expenses

Open Adoptions and Contact Agreements

- Previously only permitted in situations where the child was a state ward
- Now statutes governing contact agreements in both private and DHHS adoptions
- See. Neb. Rev. Stat. §§ 43-155 to 43-160 for "Exchange of Information Contracts"
- See Neb. Rev. Stat. §§ 43-162 to 43-166 for "Communication or Contact Agreements"

Open Adoptions and Contact Agreements

- If child is 14 years of age or older, they need to consent to the agreement
- GAL needs to consent to the agreement
- Noncompliance with the agreement is not grounds to set the adoption aside
- This language should be included in every agreement:

NO ADOPTION SHALL BE SET ASIDE DUE TO THE FAILURE OF THE ADOPTIVE PARENT OR PARENTS OR THE RELINQUISHING PARENT OR PARENTS TO FOLLOW THE TERMS OF THIS AGREEMENT OR A LATER ORDER MODIFYING OR TERMINATING THIS AGREEMENT. DISAGREEMENT BETWEEN THE PARTIES OR A SUBSEQUENT CIVIL ACTION BROUGHT TO ENFORCE, MODIFY, OR TERMINATE THIS AGREEMENT SHALL NOT AFFECT THE VALIDITY OF THE ADOPTION AND SHALL NOT SERVE AS A BASIS FOR ORDERS AFFECTING THE CUSTODY OF THE CHILD. THE COURT SHALL NOT ACT ON A PETITION TO ENFORCE, MODIFY, OR TERMINATE THIS AGREEMENT UNLESS THE PETITIONER HAS PARTICIPATED IN, OR ATTEMPTED TO PARTICIPATE IN, MEDIATION IN GOOD FAITH OR PARTICIPATED IN OTHER APPROPRIATE DISPUTE RESOLUTION PROCEEDINGS IN GOOD FAITH TO RESOLVE THE DISPUTE PRIOR TO FILING THE PETITION.

Relinquishment of Parental Rights

- Biological parents MUST wait at least 48 hours after the birth of the child before relinquishing parental rights
- Relinquishment counseling needs to be offered to the biological parents before they relinquish
- Need a separate witness and notary. Not one person witnessing and notarizing.
- If DHHS or a child placement agency is involved, need to make sure that they've *accepted* the relinquishment. The acceptance needs to be in writing.

Consent of Biological Parents

- Consents of biological parents are not required if they have relinquished parental rights
- Pay particular attention to the statutes that deal with when biological parent consents are required, when they are not, and when substitute consent can/must be given

Consent of Others

- Required from the County/Juvenile Court when the child is the subject of a 3(a) juvenile case
- Required from the District Court when the child is the subject of a child custody, paternity, visitation/parenting time, or child support case
- Consent of the child is required if he/she is age 14 or older.

Consent of Others

- If DHHS has custody after the termination of parental rights, they will need to consent to the adoption.
 - Some disagreement about whether their consent is required where parental rights have not been terminated.
 - Some disagreement about whether a biological parent can seek adoption of their child who is a state ward.
 - Even in these situations, consent of the County/Juvenile Court would still be required before the adoption could occur.
- If another licensed child placement agency is involved, they will need to consent to the adoption.

Termination of Parental Rights

- Clear and Convincing Evidence is the standard if alleging abandonment or other grounds to terminate parental rights
- Lots of pitfalls with terminating the parental rights of unknown fathers—more than can be covered today
- There will be an entire webinar on this topic on April 25 at Noon (Central)

Indian Child Welfare Act (ICWA)

- Need to inquire about Native American ancestry.
- ICWA applies if the child is a member of a tribe, or if the parent is a member of a tribe and the child is eligible for membership.
- If there is Native American ancestry, the attorney needs to give notice to the tribe(s) and treat the case as an ICWA case until the tribe(s) indicate that it is not.
- Placement preferences apply if the case is an ICWA case.
- The Indian Child's Tribe becomes a party to the adoption and has the ability to object to placement and the adoption, even if the biological parents are not objecting.
- See *Mississippi Band of Choctaw Indians v. Holyfield*, 480 U.S. 30, 109 S.Ct. 1597, 104 L.Ed.2d 29 (1989)

Interstate Compact on the Placement of Children (ICPC)

- Triggered whenever a child crosses state lines for purposes of adoption
- Except if the child is an "immediate family member" of the adopting parent
- The Interstate Compact Office needs to approve.
- Adoption laws of both states need to be met.

Where do you file?

- Must be filed in the County Court or the Separate Juvenile Court
- Cannot be filed in the District Court
- Should be filed in the County of residency, or if the child is a state ward it can be filed in the County of residency or the county where the juvenile case is being heard
- To file in Nebraska, the Petitioners need to be residents of the State of Nebraska, unless the child is a state ward in which case the Petitioners are not required to be Nebraska residents

Requirements Prior to the Hearing

- Child residing with the adoptive parent(s) for at least 6 months prior to the filing of the petition
- National Criminal History Check
- DHHS Central Registry Check
- Home Study
 - Required unless waived by the Court
 - Routinely waived in stepparent adoptions, but you will need to file a motion and proposed order
- Report of Adoption

Adoption Hearing

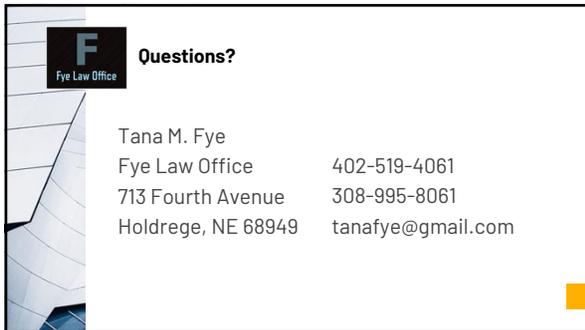
- The hearing will need to be set between 4-8 weeks after the date of filing of the petition
- All children being adopted and all adopting parents need to appear at the hearing in person.
- Questions/evidence presented at the hearing
- Have Decree of Adoption and any other orders ready for the judge to sign immediately at the conclusion of the hearing.
- No pictures during the hearing, unless the judge specifically allows for them.
- Judges typically allow photographs after the hearing.

Birth Certificates

- If the child was born in the State of Nebraska, the new birth certificate will go to the attorney, and usually arrives within a few weeks.
- If the child was born in another state, the Clerk Magistrate will need to send the Report of Adoption to the other state.
- The Court costs are likely to be different, based on how much the other state charges for a new birth certificate.
- These take much, much longer to arrive.

Citations and Resources

- Neb. Rev. Stat. §§ 43-101 to 43-4812
- Neb. R. Prof. Conduct §§ 3-501.0 et seq.
- Sapp, S.K., *Understanding Adoption Procedures in Nebraska*, Nebraska State Bar Association publication (2016)
- *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 109 S.Ct. 1597, 104 L.Ed.2d 29 (1989)
- *In Re Adoption of Luke*, 263 Neb. 365, 640 N.W.2d 374 (2002)
- *In Re Adoption of McCauley*, 177 Neb. 759, 131 N.W.2d 174 (1964)
- *In Re Petition of Ritchie*, 155 Neb. 824, 53 N.W.2d 753 (1952)
- *In Re Adoption of Baby Girl H, Armour v. KGG and TSG*, 262 Neb. 775, 635 N.W.2 256 (2001)



F
Fye Law Office

Questions?

Tana M. Fye
Fye Law Office 402-519-4061
713 Fourth Avenue 308-995-8061
Holdrege, NE 68949 tanafye@gmail.com
