

## Jane's Top Twelve Adoption Issues

### 1. TAKE THE PAPER

An adoption petition must be filed when presented with the applicable filing fee or waiver of fee, as filing is a clerical, not judicial, act. Whether an adoption decree will later be entered depends on what documents or actions are taken after the filing of the petition. The petition simply starts the process. 48-2-306 allows subsequent filing of any required information.

The filing of the petition has several important legal consequences. Filing gives the petitioner standing to file a termination of parental rights action, if that is needed to clear a parent, or the ability to notice parents who have not consented in order to clear them in the adoption. The right of an unwed father to claim his consent is necessary is linked to his actions prior to the filing of the petition. In addition, once a petition is filed, the death of a joint petitioner or the petitioner in a stepparent adoption will not prevent the finalization of that adoption.

### 2. JURISDICTION v. VENUE

Jurisdiction determines whether NC has authority to act in an adoption and is necessary for a valid adoption. NC has jurisdiction under 48-2-100 if the (1) petitioner has lived or been domiciled in NC for 6 months prior to the filing of the petition, (2) the adoptee has lived in NC for 6 months or from birth, or (3) the adoptee is in the legal custody of a county DSS or private adoption agency.

Under (1), domicile means the petitioners' permanent legal residence, which may be different from their present residence. Military families, students, and missionaries may be domiciled in North Carolina, but live elsewhere. They can file in the county that has been their domicile for the past 6 months.

Under (2) or (3) above, out of state adoptive parents may file petitions here. Under (2), the petition must be filed while the adoptee is still in NC. Under (3), the fact that the child is in the legal custody of an agency allows an out of state petitioner to file here. 48-1-109 provides that authorized out of state agencies may prepare preplacement assessments and reports to the court in these cases, although they must meet NC requirements.

The petition form has blocks (paragraph 1) to indicate the basis for jurisdiction in each adoption.

Once it is has been determined that NC has jurisdiction, venue - or the county where the petition may be filed - lies in (1) the county of the petitioner's residence or domicile, (2) the county where the adoptee resides, or (3) the county where

the agency that placed the child is located. 48-2-101. A placing agency is the agency that will consent to the child's adoption. Unlike lack of jurisdiction, incorrect venue does not invalidate an adoption.

### **3. CITIZENSHIP OR IMMIGRATION STATUS**

Citizenship or documented immigration status is not required to adopt or be adopted in North Carolina. However, an adoption by an undocumented immigrant may present best interest issues if he/she is subject to future deportation or if sufficient background information cannot be gathered for a preplacement assessment or report to court, depending on the facts of the case.

Adoption of an undocumented immigrant child can present issues outside Chapter 48, such as the applicability of the international Hague Convention on Adoption or federal Special Juvenile Immigration Status. Petitioner should seek the advice of an immigration attorney to determine how federal immigration law could affect or be affected by a NC adoption.

### **4. PLACEMENT**

Paragraph 6 of the petition provides a space for the date the adoptee was "placed for adoption." DSS or a private agency will choose a date after the child was cleared for adoption and the family was chosen. In private adoptions, the placement date will be a date after the placing parent (parent with custody or both parents if married and living together) consented to the adoption, even if another parent must still be cleared.

If a parent with custody has not consented to the adoption, the child has not been "placed" under 48-3-201(a), and the petitioners should ask for a waiver of the placement requirement under 48-2-301(a). The new petition form will add space to request waiver. The need for waiver occurs most frequently in relative adoptions when the relative-petitioner already has custody from Chapter 50 or 7B action, or the parent with custody will not consent or is not available.

While generally this waiver is warranted, there can be situations where the petitioner does not have even physical custody of the child and is still trying to adopt. For example, a grandparent seeking adoption where a county DSS has custody, and the juvenile court has denied placement with the grandparent.

Remember if there is an issue of fact in a motion before the clerk, such as waiver of placement, a transfer to district court is required pursuant to 48-2-601(a1).

## **5. PREPLACEMENT ASSESSMENT (PPA)**

Preplacement assessments, or adoptive home studies, are required in agency and unrelated independent adoptions. They are not required in most relative adoptions (when parents place directly with relatives listed in 48-3-301(b)) and stepparent adoptions. The content of a PPA is governed by 48-3-303.

In independent adoptions, the petitioners must give the placing parent a copy of their approved preplacement assessment before placement of the child with them. Even if the PPA is filed with the petition, check to see that the PPA was completed prior to the child's placement.

If that does not occur, the petitioners must provide the PPA when it is completed to the placing parent, who has up to and including 5 business days after receiving the PPA to revoke. 48-3-608(b). The petitioners must complete and file the DSS-5219, Certificate of Delivery of PPA, as proof of delivery. If they cannot find the placing parent after a diligent search, then the PPA can be sent by certified mail to the parent's address in the consent, and the 5 business days are counted from the date of delivery or last attempted delivery. 48-3-307.

## **6. BACKGROUND INFORMATION**

Background information is provided by the birth parents to the adoptive parents in every adoption except stepparent adoptions. This information is captured on two forms, the DSS-5102 and 5103. Not only does this benefit the adoptive parents as they care for the child, but it is of special benefit to the adult adoptee throughout his life.

Parents, an agency, a relative, or any knowledgeable person can fill out these forms, so please be a background information "nag" and push for as much information as possible from whatever sources are available.

## **7. REVOCATION OF CONSENTS AND RELINQUISHMENTS**

Birth parents have 7 days to revoke. In counting those days, the date the consent (in independent adoptions) or relinquishment (given to agency with custody of the child) was executed is not counted. Begin with the next day and end on the 7<sup>th</sup> day that is not a weekend or holiday when the courthouse is closed.

Revocations must be in writing, but no specific form is required. The written revocation may be delivered in three ways – by personal delivery by the end of the 7<sup>th</sup> day, by deposit in overnight delivery service as late as the 7<sup>th</sup> day, or by deposit with the Post Office, certified mail, as late as the 7<sup>th</sup> day. Thus, with the

last two methods, more than 7 days will need to pass to insure that revocation has not occurred.

In addition, as noted above in #5, a placing parent who has not received the adoptive parents' PPA before the child is placed has up to and including 5 business days after that late PPA is received to revoke.

There can be an extended revocation period for relinquishments as well. If the birth parent executes a "designated" relinquishment which only allows the agency to place the child for adoption with the persons specified in the relinquishment, the parent can chose to be notified if the adoption will not be completed, and in that event, will have 10 days following notice from the agency to revoke. 48-3-704. If the birth parent does not revoke within 10 days, the relinquishment becomes a general one for any adoptive parent chosen by the agency.

So clerks may see a relinquishment designating Jane and John as adoptive parents, but Sally and Joe are the petitioners. In order for that designated relinquishment to operate as a general relinquishment and authorize the agency to consent to the adoption by Sally and Joe, the clerk would need (1) the agency's notice to the birth parent that the adoption by Jane and John will not occur, (2) proof of delivery of the notice or date of last attempted delivery to address in relinquishment after a diligent effort to find the birth parent, and (3) the passage of at least 10 days with no revocation by the birth parent.

## **8. NOTICE TO FATHERS IN ADOPTION**

Note that a summons is not issued in an adoption. Instead notice is given and must be served following the requirements for Rule 4 service – by personal service, certified mail, publication. 48-2-401(g); 48-2-402(a).

In independent adoptions, an unwed father who has not consented to the adoption, denied paternity, or had his rights terminated must be given notice under 48-2-401(c)(3) that the adoption petition has been filed. He has 30 days, 40 if notice is by publication, to respond and claim his consent to the adoption is necessary. Likewise, notice must be given to a married father who has not consented, had his rights terminated, or been judicially found not to be the father.

Frequently, the identity or whereabouts of the father are unknown. Before notice may be given by publication, the petitioner must make a diligent effort to find the father and cannot publish locally unless there is no reliable information on his whereabouts. When publication is used, rather than actual notice, the petitioner must file an affidavit showing due diligence to find the father and how the newspaper location was chosen. Rule 4(j1)(j2) of the Rules of Civil Procedure.

48-2-402(b) sets out what information must be included in the publication notice for unknown parents. In summary, the father must be able to identify himself from reading the notice.

So in cases where notice is given by publication, the clerk should confirm that diligent efforts were first made to locate the father, that the correct location for publication was chosen, and that the notice's content was sufficient.

## 9. CLEARING FATHERS IN THE ADOPTION AFTER NOTICE

If either a married or unwed father does not respond to proper notice, the clerk must find his consent is not necessary under 48-2-207(a) and 48-3-603(a)(7), and the final decree of adoption will terminate his parental rights by operation of law. 48-1-106.

If a married father does respond and does not consent, his rights must be terminated in order for the adoption to proceed because his consent is required under 48-3-601 by virtue of the fact that he is a married father.

If an unwed father does respond and does not consent or deny paternity, a hearing must be held to determine whether his consent is required under 48-3-601, which provides that an unwed father's consent is required only if he has taken certain "daddy-like" actions prior to the filing of the petition. 48-2-207(b). Those actions are acknowledging paternity, paying child support, and communicating or visiting or attempting to do so with the child and/or mother. This hearing should be transferred to a district court judge pursuant to 48-2-601(a1) because it will involve issues of fact.

If the court finds the unwed father's consent is not necessary, the adoption will proceed without it, and the final decree will terminate his parental rights. If the court determines his consent is necessary, the petition cannot go forward unless the unwed father consents, denies paternity, or his rights are terminated.

## 10. WAIVER OF 90 DAYS

Chapter 48 has no minimum or maximum time frames in which to complete an adoption. The statutes presume it will take a minimum of 90 days and a maximum of 180 days, but those can be shortened or extended. 48-2-601(b)(c) and 48-3-603(a)(1).

The purpose of the 90 days is (1) to allow notice to be given to anyone, if needed, with 30 or 40 days to respond, (2) to allow 60 days for the Report to Court to be completed, and (3) to allow for a sufficient placement period in order to find the adoption is in the best interest of the adoptee.

In DSS cases, there is usually no one to notice, the report can be done in less than 60 days, and the child has been in the home far more than 90 days prior to the filing of the petition. Moreover, older foster children are waiting for the closure the decree brings and the new birth certificate that allows them to use their new name in school, on their sports teams, etc.

## 11. WAIVER OF REPORT TO COURT

A post-placement report to court must be prepared by a county DSS or licensed child placing agency and is required in all adoptions except it can be waived in the discretion of the clerk in (1) grandparent adoptions where the child has lived with the grandparent for at least two years and (2) stepparent adoptions where the couple has been married two years and the child has resided with them.

Waiver in grandparent adoptions is not allowed if the consent of the minor (12 or older) is to be waived by the clerk (because of physical or mental incapacity), the minor has revoked a consent already given, or the child is eligible for adoption assistance. Waiver in a stepparent adoption is not allowed if the minor's consent is to be waived, the minor has revoked a consent, or both the minor's parents are deceased.

Even if the report to court is properly waived, the clerk must still determine that the adoption is in the child's best interest, and to that end, many clerks will conduct a criminal record check on the petitioner, as must the agency preparing the report to court. In addition, the clerk needs to confirm grandparent and stepparent status through the use of marriage and birth records, as would the agency.

## 12. DISMISSALS

There are three types of dismissals in adoptions with different outcomes. A petitioner may voluntarily dismiss without prejudice a petition and re-file a second petition within 12 months. Any consents given by parents remain valid, and custody of the child does not change.

If the petitioner voluntarily dismisses the petition with prejudice OR the clerk dismisses the petition pursuant to 48-2-604 (after at least 5 days notice and an opportunity for a hearing), any consents are voided, and custody returns to the person having custody prior to the filing of the petition. 48-2-604; 48-3-609(a).

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January 2015

## OBTAINING LEGAL CLEARANCE ON FATHERS

### Clearing unwed fathers:

1. Father executes consent (DSS-1802) or relinquishment (DSS-1804). Not required if man convicted of 1<sup>st</sup> or 2<sup>nd</sup> degree rape and adoptee conceived.
2. Father executes denial of paternity (DSS-5118).
3. Father's parental rights terminated in district court action - G.S. 7B-1100, et seq.
4. Father given notice of the adoption under 48-2-401(c)(3) and does not respond in 30 days. Clerk issues order that his consent is not necessary under 48-3-603(a)(7) and 48-2-207(a). In non-agency adoptions, notice can be given by publication with 40 days to respond. Agencies must terminate rights if the petitioners cannot give actual notice. 48-2-402(c).
5. Father responds to notice of adoption, but his consent is not required under 48-3-601(2)(b) because he has not (a) married the mother (b) legitimated the child (c) acknowledged paternity AND was obligated for support under a written agreement or court order or provided, in accordance with his financial means, reasonable and consistent support payments during and after the pregnancy, or for the child, or both, AND regularly visited or communicated with the mother or minor or attempted to do so, OR (d) received the child into his home and openly held him out as his biological child. Consent not needed order then issued under 48-2-207(b). 48-2-601(a1) requires transfer to district court for hearing.
6. If the father is deceased, a certified copy of his death certificate or other sufficient proof of death. 48-3-603(a)(6).

### Clearing legal fathers (married and child born during marriage or within 280 days after divorce or written separation agreement/order):

1. Father executes consent (DSS-1802) or relinquishment (DSS-1804). Not required if man convicted of 1<sup>st</sup> or 2<sup>nd</sup> degree rape and adoptee conceived.
2. Married father cannot execute a denial of paternity. 48-3-603(a)(5).
3. Father's parental rights terminated in district court action - G.S. 7B-1100, et seq.
4. Father is given notice of adoption and does not respond within 30 days. Clerk issues an order finding that his consent is not necessary under 48-3-603(a)(7) and 48-2-207(a). In non-agency adoptions, notice can be given by publication with 40 days to respond. If he responds, must terminate his rights. Agencies must terminate rights if no actual notice. 48-2-402(c).
5. There has been a judicial determination that he is not the father of the child OR another man is the father. 48-3-603(a)(2).
6. If the father is deceased, a certified copy of his death certificate or other sufficient proof of death. 48-3-603(a)(6).

