

# ADOPTION

*The material in this handout represents general legal principles. The law is continually changing; although the information in the handout was current as of the date it was drafted, some provisions in this pamphlet may have changed. It is always best to consult an attorney about your legal rights and responsibilities regarding your particular case.*

Adoption is a major step in the life of everyone involved. Its intended effect is to legally eliminate absolutely and forever all the rights and duties of the biological parents, and transfer those same rights and duties to the adopting parents. Once completed, the law ceases to recognize the biological parents as parents of the adopted child. Once an adoption is completed, it is intended to be final and irreversible. Note that while some states allow a form of "open" adoption in which the birth parent retains some rights, the general rule is that adoption terminates all birth-parent rights in the child. Traditionally, those who give up their parental rights under adoption have surrendered all their rights and responsibilities toward the child. The adoptive parents become the "real parents" of the child. Legally, the birth parents never existed. In such a case, the birth parents have no right to visitation of the child nor do they have a right to any other involvement in the child's life.

"Open" adoption is a more modern trend, though it is not recognized in all states. In this type of adoption, the birth mother surrenders all of her legal rights, but the adoptive parents agree to let her visit the child on a schedule that is acceptable to everyone involved. This prevents adopted children from being cut off from their biological family.

However, once a certain point is passed, the birth parents cannot "change their minds" and reinstate their parental rights. Thus, this decision is not one that should be made without consulting both a doctor and a counselor, whether legal or otherwise.

Adoption is a statutory creation that varies from state to state. However, there are elements common to all states: court proceedings; the termination of the parental rights of the biological parents, either by consent or involuntarily; a judicial review and determination of the suitability of the adopting parent, morally, financially and otherwise; and a final decree of adoption, normally including a change of surname and the amendment of the adopted child's birth certificate, which acts and decree are intended to finally and conclusively terminate all rights and responsibilities of the biological parents in favor of the adoptive parents. Typically, parental rights can be terminated involuntarily only if there is "clear and convincing evidence" that this would be in the best interests of the child. However, parental rights can be terminated voluntarily any time a court approves and finalizes a consent agreement between one or both of the biological parents. Death of biological parents also terminates their parental rights. There are special rules for children born out of wedlock. In such cases, consent of the putative biological father is not required unless he has established his paternity by court proceedings, or has acknowledged the child as his and provided substantial support. Usually, children over 14 must consent to their adoption and to any name change. Even adults may be adopted.

Basically, there are two methods of arranging adoptions. The first is private, where the adoptive parents deal directly, or through a private attorney, with the biological parents. Typically, the child has not been born yet. While no adoption agency will be involved, court procedures still apply. A party to the adoption files a petition for adoption with the state court. A social services agency will investigate the adoptive parents' background, and all states require adoptive parents to prepare for the adoption with a social worker. This preparation includes a "home study," consisting of interviews and a home inspection, to determine whether they are "fit." Generally, the prospective adoptive parents will be required to pay the birth mother's medical, legal and other associated expenses while the social services agency conducts its investigation and before the adoption process actually begins. However, the adoptive parents have no guarantee that the birth mother will consent to adoption, since this consent cannot be given until the child is born. It is illegal for anyone to pay money for a child, but some states permit a small amount to be paid, under court supervision, to assist the birth mother with living expenses. Unless the court permits otherwise, this amount is capped at \$3,500.

The second method of adoption is through an agency. The adoption agency will have its own suitability standards—which may include limitations on age, religious affiliation, income or marital status—in addition to those imposed by court procedures. Typically, the child has been born and may be housed in a foster home or with the agency. The child may be allowed in the adoptive home on a trial basis while court procedures are pending. Of course, there are fees associated with agencies in return for their help in finding a child and handling the legal work.

When it comes to selecting the best adoption agency, there is a vast array of choices. Local or regional organizations may offer an extensive list of agencies but do not typically provide an assessment of the agencies' reliability. One method of sorting through them is to seek a personal referral from a parent or parents who have successfully adopted. There are also many resources to be found on the internet. Sites such as [www.AdoptiveFamilies.com](http://www.AdoptiveFamilies.com) have searchable indexes of agencies and also provide lists of suggested questions to help the prospective parents vet possible agencies for reliability and affordability.

An alternative to the cost of private agency placement can be the state's social services department placement, depending on availability. Typically, the children available through state agencies are special needs children. Older children are also available for adoption through state agencies. In these cases, the state has already terminated parental rights.

## **BIRTH MOTHER CHANGES HER MIND**

While many states have a waiting period before an adoption is final, the period in which a mother may "change her mind" about the adoption is very short. If the court agrees, she must take the child back and assume all the rights and responsibilities regarding the child.

## **BIOLOGICAL FATHER'S RIGHTS**

Most states require that a biological father be given notice of a pending adoption. In such a case, the father may object to the adoption but only if the father is willing to assume full responsibility for the child himself. He cannot both refuse to allow the adoption to go forward and refuse to raise the child. In such a case, the state will terminate his parental rights.

## **ADOPTION RECORDS**

Adoption records are usually sealed to prevent access by the public. While there has been a movement to open up the records, there has been an equally strong movement to keep the records private. Provisions vary on a state-by-state basis. Some states allow an adopted child to have access to the records once they reach the age of majority. Other states only release the records if both the child and birth mother agree. Also, in some instances if the adopted child develops a serious health problem, the identity of the birth parents may be revealed if it is believed that the genetic information would be helpful.

## **FOREIGN ADOPTIONS**

Many agencies have long waiting periods before children are available for adoption. Parents often turn to adopting a child from another country. However, this is especially complicated. Anyone attempting to adopt a child from a foreign country will need to complete an often dizzying array of paperwork and work closely with U.S. Citizenship and Immigration Services ([www.uscis.gov](http://www.uscis.gov) or 1-800-375-5283). Most parents employ the services of an international adoption agency that specializes in facilitating adoptions from the parents' country of choice. (See the first section of this pamphlet for advice on finding a suitable agency.) In addition to the limitations imposed by an adoption agency, many countries impose their own criteria of suitability for adoptive parents. For example, as of 2006 the Chinese government will not approve the adoption of non-special needs children to parents under the age of 30. The U.S. State Department ([www.state.gov](http://www.state.gov)) has detailed information on the requirements to adopt in each country.

## **ADOPTION TAX CREDIT**

Section 23 of the Internal Revenue Code allows a credit against the income tax for qualified adoption expenses paid or incurred by the taxpayer. The taxpayer can claim a credit for qualified *domestic* adoption expenses regardless of whether or not the adoption eventually becomes final. The maximum amount of the credit is \$11,390; the taxpayer may claim the entire \$11,390 of allowable adoption expenses, regardless of expenses actually incurred, if the child is a "child with special needs." The amount of the credit is reduced for taxpayers with adjusted gross incomes over \$170,820 and is fully eliminated when such incomes reach \$210,820. (All dollar limits are for 2007, and are adjusted yearly for inflation.)

The \$11,390 limit is a per-child and not a per-year limit. The taxpayer is entitled to take the credit for qualified adoption expenses: (1) in the year that follows the year in which the taxpayer pays the expenses, or (2) in the tax year in which the expense is paid, if the adoption becomes final in that year.

Example: Taxpayer incurs \$3,000 of qualified adoption expenses with respect to an eligible child in 2003, \$4,000 in 2004, and \$4,000 in 2005 when the adoption is finalized. The taxpayer is entitled to a \$3,000 credit in 2004 and a \$7,630 credit in 2005.

In the case of a foreign adoption—that is, an adoption of a child who is not a citizen or resident of the U.S.—the credit for qualified adoption expenses is taken only in the year in which the adoption becomes final. Expenses of a foreign adoption are not eligible for the credit unless the

child is actually adopted and is limited to \$11,390, not to include more than \$5,000 of adoption expenses paid before 2002.

Example: Taxpayer incurs, with respect to a foreign child, \$6,000 of qualified adoption expenses in 2001, \$1,000 in 2002, and \$4,000 in 2005, the year in which the adoption becomes final. A credit for \$10,000 of expenses is eligible to be taken in 2005.

The adoption credit is a nonrefundable credit that, along with certain other tax credits, is limited to the extent it can be absorbed by the taxpayer's tax liability. However, any unused adoption credit can be carried forward for up to five years.

Qualified adoption expenses are reasonable and necessary adoption fees, court costs, attorney fees, travel expenses (including amounts expended for meals and lodging while away from home), and other expenses which are directly related to and have the principle purpose of the taxpayer's legal adoption of an eligible child. You should note that in some states travel expenses are not covered as reasonable and necessary expenses. Expenses connected with the adoption of a child of the taxpayer's spouse don't qualify. Also ineligible are expenses of carrying out a surrogate parenting arrangement, expenses incurred in violation of law, or expenses reimbursed under an employer program or otherwise. For this purpose, the Armed Forces Adoption Reimbursement Program is an employer adoption assistance program.

An eligible child is either a person under the age of 18 at the time of the adoption, or a person physically or mentally incapable of taking care of herself or himself. A "child with special needs" is an otherwise eligible child who (1) is a citizen or resident of the United States, (2) who the state determines cannot be returned to the parent's home and (3) who it is reasonable to conclude cannot be placed with adoptive parents without adoption assistance because of a specific factor or condition, such as age, ethnic background, medical condition or handicap.

## **ADOPTION ASSISTANCE PROGRAM**

In addition to providing for an Adoption Expense Credit, the 1996 Tax Act enacted a new code section of the Internal Revenue Code, section 137, which provides for an exclusion from an employee's gross income for amounts paid by an employee's employer for qualified adoption expenses connected with the adoption of an eligible child by the employee, if such amounts are finalized pursuant to an adoption assistance plan. The total amount excludable by the employee from gross income for all tax years with respect to an adoption of a child is limited to \$11,390. The exclusion with respect to a foreign adoption is also limited to \$11,390. Limits are per-child, not per-year. The amount excludable for any tax year is reduced for taxpayers with adjusted gross income in excess of \$170,820 and is completely eliminated for taxpayers with adjusted gross income of \$210,820 or more.

Amounts paid by an employer for qualified adoption expenses under an adoption assistance program are not subject to income tax withholding. However, these amounts are subject to Social Security and Medicare taxes (FICA).

Qualified adoption expenses are defined with references to Section 23, the Adoption Tax Credit. An adoption assistance program is a written employer program under which the employer provides adoption assistance, and is defined to include the Armed Forces Adoption

Reimbursement Program, 10 U.S.C. Section 1052 (14 U.S.C. Section 514 for members of the Coast Guard).

It should be noted that the amounts are excludable from the employee's gross income for the year in which the employer pays the qualified adoption expense in connection with the adoption of an eligible child who is a citizen or resident of the United States at the time the adoption commenced. In the case of foreign adoptions, the exclusion is only available in the year the adoption becomes final.

An individual may claim both a credit and exclusion in connection with adoption of an eligible child, but may not claim a credit for any expense reimbursed by the individual's employer.

Example: In 2004, an individual pays \$10,000 in qualified adoption expenses to a private attorney for the final adoption in that year of an eligible child who is not a child with special needs. In the same year, the individual's employer pays an additional \$12,000 in qualified adoption expenses on behalf of the employee. Assuming the individual had adjusted gross income less than \$170,820, the individual may exclude \$11,390 of the \$12,000 paid by the employer from gross income, and may claim a credit for the \$10,000 paid by the individual. The remaining \$1,370 of adoption expenses paid by the employer may never be claimed and must be included in the individual's gross income in 2004.

Military members on active duty for 180 days or more may qualify for up to \$2,000 reimbursement of adoption expenses per child—not to exceed \$5,000 in any calendar year—from the Defense Finance and Accounting Service. The reimbursement will only occur after the adoption is finalized and certain requirements must be met in order to qualify for the reimbursement. A DD Form 2675 and its accompanying instruction can be obtained from the local Customer Service Office.

## **MORE INFORMATION**

Further information on Adoption Expenses may be found in I.R.S. Notice 97-9, Located in Internal Revenue bulletin 97-2, at page 35 or by referencing Tax Topic 607 at [www.irs.gov](http://www.irs.gov).

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