

CHAPTER 10: Adoption

10.1 INTRODUCTION

This chapter is focused on the finalization of an adoption arising from a Child Protective Act (CPA) proceeding. If a child cannot be reunified with his or her family, termination of parental rights and adoption is the next preferred permanency goal, because it ensures a permanent, lifetime family for the child. At this point, a permanency plan will have been approved in the CPA case with a permanency goal of termination of parental rights and adoption. The termination(s) of parental rights will already have been completed. In most cases, the child will be in a foster placement that will be the child's adoptive placement. In some cases, the child will be in the process of transitioning to or stabilizing in a foster placement that will be the child's adoptive placement. The Department, pursuant to the permanency plan, may be continuing to provide services to address the child's special needs or to ensure the stability of the placement. The department will have assigned an adoption specialist to the case. The focus of efforts at this point is ensuring that the proper documentation is provided to the court in the adoption proceeding to finalize the adoption, and accessing adoption assistance.¹

10.2 THE ADOPTION PROCESS

A. Jurisdiction and Venue

An adoption proceeding is initiated when the person(s) proposing to adopt the child files a petition to adopt with the court. Generally, the petition to adopt is filed with the court where the prospective adoptive parents reside.² However, where the child is the subject of a CPA proceeding, the court in the child protection proceeding has exclusive jurisdiction over the child and retains that jurisdiction until the child's permanency plan is finalized and the CPA

Note re Terminology: In this manual, "prosecutor" refers to both a county prosecutor and/or a deputy attorney general; "GAL" refers to both a guardian *ad litem* and/or a CASA; "Indian child" refers to all native children as defined by the ICWA; and "IDHW" and "the Department" are used interchangeably to refer to the Idaho Department of Health and Welfare.

¹ See 42 U.S.C. §§ 622(b)(8)(A)(iii) (2012), 675(5)(C) (2012). The federal government has put in place numerous incentives to support adoptive placements, detailed in the Fostering Connections to Success and Increasing Adoptions Act of 2008, Pub. L. No. 110-351, 122 Stat. 3949, and strengthened again with 2014's Preventing Sex Trafficking and Strengthening Families Act, Pub. L. No. 113-183, 128 Stat. 1919. Program instructions for both acts are available on the Administration for Children and Families website. Permanency planning and termination of parental rights are discussed in previous chapters of this manual.

² IDAHO CODE ANN. § 16-1506(1) (Supp. 2014).

proceeding is terminated or until the child turns eighteen, whichever comes first.³ Where the permanency goal is termination of parental rights and adoption, the child's permanency plan is not finalized until the adoption is finalized.

Idaho's adoption statute therefore provides that if the adoption arises from a CPA case, the adoption petition is filed in the CPA case.⁴ In many cases, however, the prospective adoptive parents live in a different county within the state, or a different state, or sometimes a different country. The adoption statute also gives the judge in the CPA case the discretion to relinquish jurisdiction over the adoption proceeding.⁵ Neither the adoption statute nor the CPA set forth a procedure for obtaining that relinquishment. The recommended best practice is for the prosecutor to ask the court in the CPA proceeding for a relinquishment order at a review or permanency hearing and for the Department to provide a copy of the order to the prospective adoptive parents to attach to the adoption petition. A template for an order of relinquishment can be found on the Idaho Supreme Court Child Protection website.

If the adoptive parents reside in another state or another country, then the adoption proceeding is initiated in that state or country. If the adoption proceeding is initiated in another state, it may be appropriate to ask the judge in the CPA proceeding to contact the court in the state where the adoption proceeding is pending to expedite the scheduling of the adoption proceeding.⁶ International adoptions are beyond the scope of this manual.

If the adoption is filed in Idaho, Idaho law requires that the petitioners in an adoption proceeding have resided in the state for at least six consecutive months before the filing of the petition.⁷

B. Social Investigation/Home Study

Idaho law requires that a thorough social investigation of all members of the prospective adoptive family must be made, in accordance with rules promulgated by the Department. The adoption cannot be finalized if the report of investigation does not include a positive recommendation.⁸

The statute requires that the investigation be made prior to placement, but allows an exception for exigent circumstances. If the court finds exigent circumstances such that a social investigation could not be completed before the child is placed in the home, the child may remain in the home unless the best interests of the child are served by another placement. The social investigation must then be initiated within five days of placement.⁹ In most cases arising

³ §§ 16-1603(1) (2009), 16-1604(1) (Supp. 2014).

⁴ § 16-1506(1) (2009).

⁵ *Id.*

⁶ The Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) allows courts in different states to communicate informally regarding scheduling. § 32-11-109 (Supp. 2014).

⁷ § 16-1506(1) (2009).

⁸ § 16-1506(3); *see also* IDAHO ADMIN. CODE rr. 16.06.01.750-771 (2014) for regulations regarding the investigation process. In adoptions not arising from a CPA case, where the prospective adoptive parent is married to the birth parent or is a grandparent of the child, no social investigation is required unless ordered by the court.

⁹ § 16-1506(3).

under the CPA, the child will already be residing in the proposed adoptive home as a foster placement. The Department begins a social history of the child, which includes the child's parentage and medical history, and other circumstances of the child, when the child first enters foster care. The Department conducts pre-adoptive home studies of the potential adoptive placements, which is an investigation and report of a proposed adoptive placement. When the termination of parental rights is finalized, the Department updates and merges the social history and the adoptive home study into the social investigation report that is filed with the court.

The pre-placement social investigation must be completed within 60 days of its initiation, and the report must be filed with the court within 30 days of service of the petition to adopt upon the Department. The statute provides that the petition must be served on the Director of the Department of Health and Welfare by registered mail or by personal services within five days "by the court receiving the [p]etition".¹⁰ The general practice is for the petitioners to prepare a proposed order for social investigation for signature by the court, and a certificate of service for signature by the clerk, and to submit those documents to the court along with the petition for adoption, which is discussed further below.

The statute does not prescribe the contents of the report, but does specify that the investigative report must include:

1. All reasonably known medical and genetic information regarding the child and the biological parents.
2. Reasonably known or available providers of medical care or services to the natural parents.
3. The source(s) of the information contained in the report.¹¹

The social investigation and report is completed by the Department, a licensed children's adoption agency, or a certified adoption professional. The Department has a list of licensed Idaho Children's Adoption Agencies and Idaho Certified Adoption Professionals, and contact information for agencies in other states that would qualify under Idaho law. If an agency other than the Department completes the home study, a copy must be provided to the Department. The statute also specifies that a copy of the medical and genetic information compiled in the investigation must be provided to the adopting family prior to entry of the final order of adoption.¹²

C. Consent to Adopt

The adoption statute has detailed provisions as to the persons from whom consent is required in adoption proceedings, most of which will not apply in an adoption arising from a CPA proceeding.¹³ Where consent is required, the recommended best practice is for the person consenting to the adoption to execute a written consent in the presence of the court, and for the court to confirm that the consent was executed knowingly and voluntarily.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* § 16-1504 (Supp. 2014).

1. Parents

In an adoption arising from a CPA proceeding, parental rights have been terminated previously so no consent from the parent(s) is required.¹⁴ Certified and conformed copies of the decree terminating parental rights should be submitted to the court to establish a record that the consent requirement has been met. The decree(s) is often included in the social investigation report; many attorneys include the decree(s) with the petition to adopt.

If the child is an Indian child, the Indian Child Welfare Act has special rules that apply to consent to termination of parental rights. Before proceeding with an adoption, it is important to make sure that the termination complied with the requirements of the ICWA.¹⁵ Chapter 11 of this Manual provides a more detailed analysis of the Indian Child Welfare Act.

2. Department

In an adoption arising from a CPA proceeding, consent is required from the Department, as the guardian and legal custodian of the child.¹⁶ The Director of IDHW executes a written consent that is filed with the court prior to the hearing on the petition. The Department's practice is to have the assigned caseworker sign a second consent in the presence of the court at an adoption hearing held in Idaho.

3. Spouse of the Adoptive Parent

The statute requires consent from the spouse of the person petitioning to adopt the child, if the spouse is not joined in the petition.¹⁷

4. The Adoptive Child

If the child to be adopted is 12 years of age and older, the consent of the child is required, "unless he does not have the mental capacity to consent."¹⁸

D. Notice of the Adoption Proceeding

The adoption statute has complex, detailed provisions as to the persons to whom notice must be given in adoption proceedings intended to address a wide variety of factual scenarios.¹⁹ Notice

¹⁴ § 16-1504(7). The adoption statute purports to eliminate the consent requirement for a father who is not married to the mother and does not comply with statutory requirements to establish his paternity. *See* § 16-1504(2)-(5). There are issues as to the constitutionality of these statutes, which are discussed in more detail in Chapter 12 of this manual. The recommended best practice is to not rely on these statutory provisions while the constitutional issues remain unresolved. To ensure permanency for the child, it is strongly recommended that all putative fathers be joined in the proceeding to terminate parental rights, concluding with either a decree terminating parental rights or a decree establishing non-paternity.

¹⁵ The ICWA is discussed in Chapter 11 of the manual.

¹⁶ § 16-1504(1)(f). In the rare instance where the adjudicatory decree in the CPA proceeding vests legal custody of the child with an authorized agency other than the Department, then the consent of that agency, as the custodian of the child, will be required. § 16-1619(5).

¹⁷ § 16-1503 (2009). Consent is not required if the non-petitioning spouse is not capable of giving consent.

¹⁸ § 16-1504(1)(a) (Supp. 2014).

¹⁹ § 16-1505(1) (2009).

is required to any person whose consent to the adoption was required. Additional notice requirements will be driven by the facts of the case and counsel are strongly encouraged to review the notice provisions with great care.

The notice “need not disclose the name of the mother of the child who is the subject” of the adoption.²⁰ It must be served as least 20 days prior to the final dispositional hearing.²¹ The notice must also state that if the person served wishes to object to the adoption she or he must do so within 20 days of being served. If a person fails to make objection within the 20-day period, she or he waives the right to further notice.²²

In an adoption arising from a CPA proceeding, notice is required as follows:

1. Parent(s)

The statute requires notice to parents of a termination proceeding. However, in an adoption proceeding arising from a CPA proceeding, parental rights will have been terminated, and so no notice to the parent is required.²³ Certified and conformed copies of the decree terminating parental rights should be submitted to the court to establish a record that the notice requirement has been met. The standard practice is for the decree(s) to be included in the social investigation report; many attorneys include them with the petition to adopt.

2. Department

In an adoption arising from a CPA proceeding, notice to the Director of the Department is required, both because the Department is the guardian and legal custodian of the child and because of the requirement for a social investigation, discussed above.²⁴

3. Spouse of the Adoptive Parent

The statute provides for notice to the spouse of the person petitioning to adopt the child, if the spouse is not joined in the petition.²⁵

4. Child

If the child to be adopted is twelve years of age or older, notice to the child is required.”²⁶

²⁰ § 16-1505(3).

²¹ § 16-1505(4).

²² § 16-1505(4), (5)(b).

²³ § 16-1505(1). The adoption statute purports to eliminate the consent and notice requirements for a father who is not married to the mother and does not comply with statutory requirements to establish his paternity. *See* § 16-1504(2)-(5). The putative father statute was amended in 2013. The constitutionality of the revised statute has not been evaluated by a court. The 2013 revisions did not change the notice provisions in §16-1505. For this reason, ambiguity may exist in certain cases regarding whether a putative father is entitled to notice of an adoption. To ensure permanency for the child, it is strongly recommended that notice required by § 16-1505 be provided.

²⁴ § 16-1504(1)(f) (Supp. 2014). In the rare instance where the adjudicatory decree in the CPA proceeding vests legal custody of the child with an authorized agency other than the Department, then the consent of that agency, as the custodian of the child, will be required, and therefore notice to that agency is required. § 16-1619(5).

²⁵ § 16-1505(1)(c) (2009). As a matter of best practice, consider serving the guardian *ad litem* (GAL) appointed in the child protection case, the attorney for the GAL (if one is appointed), and/or the attorney for the child.

E. Service

Notice of the petition to adopt must be personally served. If reasonable efforts to effect personal service are unsuccessful, a court may order service by registered or certified mail to the last known address of the person to be notified and/or by publication. The statute specifies that if service is by publication, the court will designate the parties to be identified in the notice, but the notice will not include the names of the adoptive parents. For others entitled to notice, service by certified mail, return receipt requested, is sufficient.²⁷ As noted in the discussion above regarding the social investigation and report, the petition must be served on the Director of the Department by registered mail or personal service.²⁸ Court rules also require service of process on the Attorney General.²⁹

Proof of service on all those required to be given notice of the adoption must be filed with the court before the final hearing on the adoption petition.³⁰

F. Petition

The adoption statute provides that the petition must contain the following information:

- The name(s) and address(s) of the petitioner(s).
- The name of the child to be adopted.
- The name by which the adopted child will be known if the adoption is granted.
- The degree of relationship, if any, of the child to the petitioner(s), and
- The names of any person or agency whose consent to the adoption is necessary.³¹

In addition, the petition should contain the following information:

- A statement that the petitioners have resided in the state of Idaho for six months.³²
- The marital status of the prospective adoptive parents.³³
- The ages of the prospective adoptive parents (demonstrating that they are at least fifteen years older than the child being adopted or are at least 25 years of age),³⁴ and
- That the parental rights of the mother and the father have been terminated.

G. Objections to the Adoption

Although adoptions are generally uncontested, Idaho law provides a procedure for objections to an adoption.³⁵ A person who has been served with notice must file written objections within

²⁶ §§ 16-1505(1)(a) 2009), 16-1504(1)(a) (Supp. 2014).

²⁷ § 16-1505(6) (2009).

²⁸ § 16-1506(3).

²⁹ IDAHO. R. CIV. P. 4(d)(5).

³⁰ § 16-1505(7).

³¹ § 16-1506(1).

³² *Id.* Residency is a jurisdictional requirement.

³³ If the person adopting a child is married, the consent of the person's spouse is required. § 16-1503.

³⁴ The person adopting a child must be at least 15 years older than the child or at least 25 years of age or older unless the person adopting the child is the spouse of a parent. § 16-1502. A minor may consent to the adoption of a child on the same basis as an adult. § 16-1504(6) (Supp. 2014).

³⁵ § 16-1505(5) (2009).

twenty days after service. The written objection must set forth the “specific relief sought” and must be accompanied by a “memorandum specifying the factual and legal grounds upon which the written objection is based.”³⁶ If a person fails to file written objections within twenty days of service, notice of any further proceedings in connection with the adoption is waived and the person “forfeits all rights in relation to the adoptee, and is barred from thereafter bringing or maintaining any action to assert any interest in the adoptee.”³⁷

H. Hearings

The prospective adoptive parents and the child must appear in person at the hearing on the adoption petition. At the time of the hearing, the prospective adoptive parents must execute an agreement “to the effect that the child shall be adopted and treated in all respects as [their] own lawful child should be treated.”³⁸

At the hearing, the judge must examine each of the parties appearing at the hearing separately and must review the investigative report.³⁹ The court must find that the interests of the child will be promoted by the adoption.⁴⁰

I. Decree/Order of Adoption

Based upon the examination of all of the parties and of the investigative report, an order of adoption may be entered if the judge is “satisfied that the interests of the child will be promoted by the adoption.”⁴¹ The order must declare, “the child shall thenceforth be regarded and treated in all respects as the child of the person adopting.”⁴² Several additional provisions of the adoption statute make clear that the standard for approval is the best interests of the child. For example, the adoption notice provision states that “[e]xcept to those persons whose consent to an adoption is required . . . , the sole purpose of notice under this section is to enable the person served to present evidence to the court relevant to the best interest of the child.”⁴³ Likewise, section 16-1506 provides that “[i]n all disputed matters under this chapter . . . the paramount criterion for consideration and determination by the court shall be the best interests of the child.”⁴⁴

Upon entry of the decree of adoption, the prosecutor in the CPA proceeding should file a motion and proposed order to vacate the CPA proceeding as to the child. The motion should be accompanied by a copy of the decree of adoption or an affidavit of the caseworker establishing where and when the final adoptive decree was entered. If the motion is accompanied by the appropriate documentation, most Idaho courts will enter the order without further hearing.

³⁶ § 16-1505(5)(a).

³⁷ § 16-1505(5)(b).

³⁸ § 16-1506(1).

³⁹ §§ 16-1506(1), 16-1507.

⁴⁰ § 16-1507.

⁴¹ *Id.*

⁴² *Id.*

⁴³ § 16-1505(9).

⁴⁴ § 16-1506(4).

10.3 FINALIZING PERMANENCY AND ADOPTION ASSISTANCE

A. Federal Requirements Regarding Finalization of Permanency

The federal Adoption and Safe Families Act requires that reasonable efforts extend beyond the permanency planning hearing to actual achievement of permanency for a child and closure of the case.⁴⁵ Adoption recruitment is one of the activities that judges must now determine to be reasonable. Adoption recruitment includes:

- Adequate programs to recruit and identify prospective adoptive parents, both locally and beyond state boundaries.
- Adequate support to approve adoptive families including completion of home studies in a timely manner, preparation of adoption assistance agreements, interstate documentation, and provision of relevant information to the family regarding the child, and
- Appropriate and accessible post-adoption services to support and stabilize a child in the adoptive home.⁴⁶

B. Adoption Assistance: Federal Adoption Assistance for Special Needs Children

Federal adoption assistance is administered under the Federal Title IV-E adoption assistance program.⁴⁷ Payments to the parents of an eligible child with special needs can take the form of either one-time (nonrecurring) adoption assistance or ongoing (recurring) adoption assistance. These funds are paid through IDHW and are available for children being adopted from foster care.

1. Eligibility for Federal IV-E Adoption Assistance (either Non-recurring or Recurring)

A child is eligible for federal adoption assistance funds if two conditions are met.⁴⁸ First, the child must have “special needs.” A child with special needs is a child who:

- Cannot or should not be returned home to his or her parent(s), **and**
- Has a physical, mental, emotional, or medical disability, or is at risk of developing such disability based on the child’s experience of documented physical, emotional, or sexual abuse or neglect,⁴⁹ **or**

⁴⁵ 45 C.F.R. § 1356.21(b)(2)(i) (2012) (“The [State] agency must obtain a judicial determination that it has made reasonable efforts to *finalize* the permanency plan”)(emphasis added); *see also* CECILIA FIERMONTE, JENNIFER L. RENNE, & CLAIRE SANDT, MAKING IT PERMANENT: REASONABLE EFFORTS TO FINALIZE PERMANENCY PLANS FOR FOSTER CHILDREN 39 (Claire Sandt ed., 2002) [hereinafter MAKING IT PERMANENT] (“The purpose of the reasonable efforts inquiry is to (1) ensure that the agency is working diligently to secure a child’s adoption and (2) ensure the adoption process is thorough to reduce the risk of disruption later.”).

⁴⁶ This reasonable efforts requirement is found in 42 U.S.C. § 671(a)(15)(C) (2012). *See* MAKING IT PERMANENT, *supra* note 45 at 40-44 (discussing the nature of the state agency’s responsibility under the reasonable efforts provision in the context of a permanency plan of adoption). *See also* § 16-1622(2)(c) (Supp. 2014) (requiring the court to make written case-specific findings whether the Department made reasonable efforts to finalize the primary permanency goal in effect for the child).

⁴⁷ CHILD WELFARE INFORMATION GATEWAY, ADOPTION ASSISTANCE FOR CHILDREN ADOPTED FROM FOSTER CARE (Feb. 2011), available at https://www.childwelfare.gov/pubpdfs/f_subsid.pdf. The provisions for federal adoption assistance were part of the Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500. The Act is primarily codified at 42 U.S.C. § 673 (2012).

⁴⁸ 42 U.S.C. § 673(a)(1)(B).

- Is at an age which makes it difficult to find an adoptive home, **or**
- Is being placed for adoption with at least one sibling, **and**
- Has not been able to be placed without adoption assistance (attempts at placement for adoption were made, but were unsuccessful), except where it would be against the best interests of the child.⁵⁰

This eligibility determination is made by the Department pursuant to detailed federal regulations.

The second requirement for adoption assistance eligibility, which only applies to recurring adoption assistance, is that the child meets one of the following criteria:

1. The child was eligible for IV-E match funds at the time the child was removed from the home. Although there are other requirements, the key consideration for the court and for the attorney for the adoptive parents is that at the time of removal, in the first order sanctioning removal, the court made a finding that remaining in the home was contrary to the child's welfare and that removal was in the child's best interests.⁵¹
2. The child was eligible for supplemental security income (SSI) programs under the Social Security Act before adoption.⁵²
3. The child's parent was in foster care and receiving Title IV-E funds that covered both the parent and the child when the adoption was initiated.
4. The child previously received adoption assistance and his/her adoptive parent(s) died or the adoption was dissolved.
5. The child meets age or sibling status criteria established by the Fostering Connections to Success and Increasing Adoptions Act of 2008.⁵³

2. Nonrecurring Adoption Assistance

Nonrecurring adoption assistance is paid or reimbursed for one-time reasonable and necessary expenses directly related to the legal adoption of a child with special needs that have not been reimbursed from other sources or funds. These reimbursable expenses may include the home study fees, attorney fees, replacement of the birth certificate, and travel for visits to the child (including mileage, lodging, and meals). The federal maximum for this type of assistance is \$2,000 for each adoptive placement.⁵⁴

⁴⁹ Pursuant to federal law, this element of "special needs" is defined on a state-by-state basis. § 673(c)(1)(B); ADOPTION ASSISTANCE, <http://www.benefits.gov/benefits/benefit-details/822> (last visited April 29, 2015). In Idaho, the definition is found in IDAHO ADMIN. CODE r. 16.06.01.900.02(b) (2015).

⁵⁰ 42 U.S.C. § 673(c) (2012).

⁵¹ 42 U.S.C. § 672(a)(1); 45 C.F.R. § 1356.21(b), (d).

⁵² See ADOPTION ASSISTANCE FOR CHILDREN ADOPTED FROM FOSTER CARE, *supra* note 47.

⁵³ 42 U.S.C. § 671(a)(31). See also ADMIN. FOR CHILDREN AND FAMILIES, U.S. DEP'T. HEALTH AND HUMAN SERVS., FOSTERING CONNECTIONS PROGRAM INSTRUCTION (2010), available at <http://www.acf.hhs.gov/sites/default/files/cb/pi1011.pdf> (last visited April 29, 2015).

⁵⁴ See CHILDREN'S BUREAU, U.S. DEP'T. HEALTH AND HUMAN SERVS., 8.2D.3 TITLE IV-E, ADOPTION ASSISTANCE PROGRAM, PAYMENTS, NON-RECURRING EXPENSES http://www.acf.hhs.gov/cwpm/programs/cb/laws_policies/laws/cwpm/policy_dsp.jsp?citID=50#745 (last visited April 29, 2015).

3. Recurring Adoption Assistance

Ongoing adoption assistance provides funds that may be used for any identifiable need of the child. These usually take the form of monthly payments to the parents of eligible children. The maximum payment amount may not exceed the amount that would have been paid for maintenance if the child had remained in a foster home in Idaho. Payments can continue until the child reaches age 18, and these payments continue even if the family moves to another state.⁵⁵

4. Family Income and Determination of Need

Federal law mandates that the resources of the adoptive parents cannot be considered when determining a child's eligibility for Title IV-E adoption assistance.⁵⁶ However, the circumstances of the family and the needs of the child may both be taken into consideration when determining the amount of assistance.⁵⁷

C. State Adoption Assistance

Under IDHW regulations, a child qualifies for state adoption assistance if the child has special needs but is not eligible for federal adoption assistance. Such a situation may arise if the appropriate federal findings were not made in the child's CPA case. The requirement for special needs is the same as the requirement for federal assistance, discussed above.⁵⁸ In addition, under Department regulations, children with special needs are eligible for Medicaid coverage. This coverage may end if the child moves to another state.⁵⁹

D. Federal and State Tax Credits

Federal and state tax credits are available for the tax year in which an adoption is finalized. The credits are non-refundable, which means they can be used only to decrease tax liability on income. The Idaho tax credit is available for certain qualified expenses. The amount of the federal credit depends on income. The credits can be substantial, so adoptive parents should contact their tax consultant for further information.

10.4 ADDITIONAL CONSIDERATIONS FOR PRIVATE COUNSEL COORDINATING WITH THE DEPARTMENT IN A CPA-RELATED ADOPTION

A. Retention of Counsel by the Adoptive Parents to Finalize the Adoption

IDHW usually advises the potential adoptive parents to seek private counsel to finalize the adoption. Counsel, in a CPA-related adoption, must coordinate with the Department's social workers to finalize the adoption. The attorney will be asked to make contact with the local

⁵⁵ See ADOPTION ASSISTANCE FOR CHILDREN ADOPTED FROM FOSTER CARE, *supra* note 47.

⁵⁶ 45 C.F.R. § 1356.40(c) (2012). See CHILDREN'S BUREAU, U.S. DEP'T. HEALTH AND HUMAN SERVS., 8.2A.2 TITLE IV-E, ADOPTION ASSISTANCE PROGRAM, AGREEMENTS, MEANS TEST, http://www.acf.hhs.gov/cwpm/programs/cb/laws_policies/laws/cwpm/policy_dsp.jsp?citID=81 (last visited April 29, 2015) to read the section of the Child Welfare Policy Manual that says that States cannot employ a "means test" in negotiating adoption assistance agreements.

⁵⁷ *Id.*

⁵⁸ IDAHO ADMIN. CODE r. 16.06.01.900.02.

⁵⁹ IDAHO ADMIN. CODE r. 16.06.01.911.03.

adoption social worker and provide a written estimate of his/her costs and fees to finalize. In the initial contract, the attorney should ascertain from his/her clients:

- The name of and contact information for the adoption social worker
- The status of the adoption assistance application process
- The full name the child will be given at the completion of the adoption
- Whether the family knows the identity of the natural parents

The adoption social worker is the source of the following crucial information:

- The status of the case
- A reasonably anticipated timeframe for the adoption petition to be filed or heard
- What steps in the permanency plan remain to be completed by the prospective adoptive parent, if any, and how the attorney can assist in completing the steps
- The process to submit the attorney's fee and cost estimate
- Any anticipated problems or unique issues to the adoption
- Whether the child is an Indian child under the Indian Child Welfare Act⁶⁰

B. Preparing for the Adoption Action: the “Attorney Letter” from the Department

Once an attorney contacts the adoption social worker and confirms that she or he is the attorney for the prospective adoptive parents, the attorney will receive an “attorney letter” from the Department. This letter is a roadmap to completing the adoption process. It spells out:

- When the child was placed with the prospective adoptive parents
- Confirmation of the statutory requirement that the attorney provide a copy of the petition to the Department within five days of filing⁶¹
- Confirmation that the Department has thirty (30) days after the filing to provide the court with the report of the social investigation and the Director's consent to the adoption⁶²
- The Department's request that the attorney provide it with a copy of the completed notice of hearing that will be proposed to the court at the time the petition is filed
- That the final Departmental consent to the adoption, in addition to the Director's consent, must be given in court by the social worker and witnessed by the judge

A majority of Idaho courts will allow the clerk to set an adoption hearing at the time the petition is filed. If this is the case, the attorney should set the hearing for a future time that will allow completion of notice and the documentation necessary to finalize the adoption. As a matter of best practice, the attorney should already have discussed potential unavailable dates with the social worker who must be present at hearing. This will provide adequate time for the central office of the Department to prepare its report and to obtain the Director's consent.

Some judges require that the court file be complete before they will schedule the final hearing. If this is the case, the attorney must explain to the prospective adoptive parents that the hearing date will not be known until the Department has provided all of the required information to the court. Since the Department's information goes directly to the court, the attorney will

⁶⁰ The ICWA is discussed in detail in Chapter 11 of this manual.

⁶¹ § 16-1506(3) (2009).

⁶² *Id.*

know that the hearing may be scheduled when she or he receives a copy of the Director's consent from the Department's central office. This will alert the attorney that the court report has been sent to the court. Attorneys should allow 48 hours for the local clerk's office to process the report before scheduling the hearing.

In addition to confirming the information outlined above, the attorney letter will typically have the following documents attached:

- A certified birth certificate for the child being adopted
- The decree terminating parental rights of the mother
- The decree terminating parental rights of the father (or finding non-establishment of paternity)
- When appropriate, an order to relinquish jurisdiction over the adoption to another court

With regard to the relinquishment, if one is required because the adoption will not be filed in the same court handling the CPA proceeding, the attorney must be prepared to obtain an order of relinquishment. This can be problematical because an attorney for the prospective adoptive parents does not generally have access to the CPA case file. The attorney will need to work with the Department and with the prosecutor or deputy attorney general in the county where the child protection case is filed to obtain the order of relinquishment.

C. Post-Filing Recommendations

Once the petition is prepared and filed, copies should immediately be provided to the social worker and IDHW's central office. If the hearing was scheduled at the same time of filing, a notice of hearing should accompany the copies of the petition.

To obtain the consent of the Director of IDHW to the adoption, the social worker submits an adoption report to the court, copies of the family's home study, placement documentation, and legal documentation to the Department's central office. At the central office, the adoption file undergoes a quality assurance review. The file is then submitted to the Director for written consent. The Department has 30 days to complete this review and sign the consent. It is important to note that consent to the adoption is not signed by the Director until a copy of the petition to adopt is received by the central office.

Upon receipt of the Director's consent authorizing the social worker to consent to the adoption, the Department's central office sends a packet of information via certified mail or express courier to the clerk of the court where the adoption will be finalized. This packet includes the following:

- Adoption report to the court
- Director's written consent to the adoption
- Copies of the child's Child and Family Social and Medical Information Form
- Copies of the pre-adoptive parents' adoption home study and criminal history clearances
- Copy of the petition to adopt

The social worker brings to the hearing a document evidencing his/her consent to the adoption, which he/she will sign during the court hearing.⁶³

D. The Adoption Hearing

Prior to the scheduled hearing, the attorney should consider discussing the following matters with the client:

- Review the agreement of adoption and the proposed decree of adoption.
- Have the clients prepare as much of the original Idaho Certification of Adoption as possible before the meeting ends.
- Always have the client fill in the information on the second line of question number 22.⁶⁴

At the hearing, the attorney should consider asking the following questions:

- Has the adoptive parents have been provided all appropriate information regarding the physical and mental health of the child?⁶⁵
- Does the child has special needs?
- Will the Department will remain involved with the child?

Children must be present for the hearing.⁶⁶ If the child to be adopted is 12 years of age or older, she or he must be present at the hearing to execute the consent.⁶⁷ Three questions should be asked of the child:

- What are we doing here today?
- Is this what you want? Do you wish (clients) to be your Mother and Father forever?
- Do you understand the consent and do you want to sign it?

E. Post-Hearing Best Practices

After the hearing, counsel should provide copies of the following documents to:

- The Client(s):
 - Two court-certified copies of the decree of adoption (sometimes referred to as an order of adoption). Counsel should advise his or her clients not to give away the court certified copies to anyone. If requested, the clients should offer *copies* of the order; however, the original certified copy of the order should remain with the client. Also, the client should always retain the order even after the new birth certificate arrives. There have been instances where clients have applied for a passport for the child only to be asked to show proof of why the child's name was changed. The new birth certificate is not satisfactory to answer the question.
 - Conformed copy of the agreement of adoption.
 - Conformed copy of the Department's consent to adoption.

⁶³ §§ 16-1506(2) (2009), 16-2005(4) (Supp. 2014), 67-2405 (2010).

⁶⁴ Regarding the information on line 15, the client needs to give their residential address as of the day the child was born – not where they now live.

⁶⁵ § 16-1506(3) (2009).

⁶⁶ § 16-1506(1).

⁶⁷ § 16-1504(1)(a) (Supp. 2014).

- The Department Social Worker. (The following list anticipates the social worker will forward on all required documents to the Department's central office.)
 - Two court-certified copies of the decree of adoption. This is necessary for the family to receive adoption assistance and for the Department to end the child protection case.
 - Conformed copy of agreement of adoption.
 - Two court-certified copies of the Department's consent to adoption.

- Counsel
 - One court-certified copy of the decree of adoption . (If the child was born out of state, retain two court-certified copies in the file. The birth state may require a certified copy to issue the new birth certificate.)
 - Conformed copy of agreement of adoption.
 - Conformed copy of the Department's consent to adoption.
 - Some clerks' offices will retain the Idaho Certificate of Adoption and forward it on to the Idaho Bureau of Vital Statistics. If this is the case, counsel should also have the clerk provide him or her with a copy of the Idaho Certificate of Adoption after it is fully filled out and stamped by the clerk.

Counsel should remember that the adoption file will be sealed shortly after the hearing. Access to the file can then only come about after a motion has been filed to reopen the file and a court order issued allowing reopening.

Following the adoption proceedings, the Department will work with their prosecuting attorney or deputy attorney general to obtain an order to vacate the child protection case.

F. Securing the New Birth Certificate

The attorney for the prospective adoptive parents should accept the role of securing the new birth certificate. Idaho and out-of-state-requests for new birth certificates are routed through the Idaho Bureau of Vital Statistics. Sending it to the Idaho Bureau of Vital Statistics ensures it is properly forwarded to the state of the child's birth.

If the child was born in a foreign country, Idaho will issue the new birth certificate.

The attorney will receive a copy of the letter from the Bureau of Vital Statistics forwarding the Idaho Certificate of Adoption to the state in which the child was born. Thereafter, the attorney will receive a letter from the out-of-state Bureau informing him or her of the cost and required documents needed to secure the amended birth certificate.

The new birth certificates are always mailed to the attorney – never to the client. When the attorney's office receives them, the best practice is to make a copy for the file and to ask the social worker if she or he wishes a copy. The adoptive parents should then receive a copy, delivered in person.

CONCLUSION

The creation of a new, stable, and loving family through adoption is a life-changing, and sometimes life-saving, experience for children in foster care. Care must be taken that the adoption is processed correctly and that eligibility for adoption assistance is preserved whenever appropriate.

Although the focus of efforts is on ensuring that the proper documentation is prepared for finalizing the adoption, the adoption hearing is a milestone in the often-long journey to creating a new family. The participants should be encouraged to mark the event by inviting extended family, taking photos, bringing balloons, or whatever is best suited to their family. Courts are encouraged to conduct the hearing with ceremony befitting the event.⁶⁸

⁶⁸ Sample ceremony: Do you promise to shelter and protect this child/children, to support and encourage him/her/them, to teach and guide him/her/them throughout this life, and to love this child/these children, forever? I hereby pronounce that this child/these children, shall now and hereafter be known as _____, son/daughter of _____, brother/sister of _____.

