

Maine Joint Adoption Practice and Procedure in Light of Adoption of M.A.: Second Parent Adoption

What is this Document?

This document is intended to assist members of the public who are considering joint adoption when a child is already a member of the family. This includes circumstances when a child already lives in the home and is legally related to one parent but not the other, such as where one parent gave birth to or adopted the child but not the other.

Even though a foster child is also a part of the family, this document does not address the special rules and requirements for adopting from the Department of Health and Human Services (DHHS).

Please bear in mind that this is a general overview and cannot provide guidance as to all issues that may arise in the course of an adoption proceeding. As a general matter, the practices and procedures governing step-parent adoptions should apply given that step-parent adoption also involves an existing parent and another person jointly petitioning to adopt a child. This overview provides what its signatories believe is the best reading of the Law Court opinion Adoption of M.A. and its integration into existing adoption law and practice, particularly in light of the joint petition process for step parent adoptions. The following references should be helpful:

- Adoption of M.A.: http://www.glad.org/GLAD_Cases/ME_Adoption_dec.pdf
- Maine Adoption Law: <http://janus.state.me.us/legis/statutes/18-A/title18-Ach9sec0.html>
- Note that the adoption law is codified at Title 18-A Maine Revised Statutes Annotated, sections 9-101 and following. Thus references to 18-A M.R.S.A. section [] in this document refer to specific sections of the adoption law.

Since the Adoption of M.A. decision marks the first time that joint adoptions have been permitted for unmarried couples, it may take time to standardize the best practices among the 16 individual Judges of Probate in the counties around the state. Please be aware that some Probate Court Judges may disagree with some or even all of the legal interpretation and analysis offered here. You should always seek your own legal counsel to represent you and address your particular situation. If the Probate Courts develop disparate or burdensome practices for handling these petitions, further appeals to the Law Court may be necessary to clarify and standardize the law and the process.

What Happened in the Law Court?

In the case known as Adoption of M.A., 2007 ME 123, the Maine Law Court unanimously stated that the Probate Courts may consider a joint adoption petition by unmarried petitioners. While that case involved a lesbian couple who were seeking to adopt jointly the two children that had been placed with them in foster care, the decision applies generally to families where neither person is a legal parent or where one person is a parent and the other parent is not currently recognized as a legal parent. Further background on the case, the arguments presented by the parties and friends of the court, and the national overview of these issues is available at: http://www.glad.org/GLAD_Cases/ME_Adoption_FactSheet_Final.pdf .

Why Should We Consider Adopting Our Own Children?

Adoption is the only means currently available to establish a legal parent-child relationship between a child and a non-birth or non-adoptive parent. It is important for a child to have a legal relationship with both of his or her parents as a matter of both emotional and legal security. While the process will involve time, money and judicial review of your family, it is the best available legal protection for parents and children vis-à-vis one another.

Adoption creates a legal tie between a child and his or her parents, reinforcing both emotional security and legal rights.

- Adoption ensures that both parents are legally obligated to support the children in their minority and sometimes beyond.
- In the event of either parent's death or disability while the child is a minor, the child may receive substantial Social Security and other benefits based on the deceased or disabled parent's work record, and may also be the beneficiary of worker's compensation benefits, of a wrongful death action, and of intestate succession.
- Adoption means that either parent can provide workplace benefits to the child, including medical, dental and life insurance
- Adoption means both parents are authorized to make medical and school-related decisions.
- Adoption also ensures that each child may continue his or her relationship with both parents in the event the parents separate.
- As the Law Court stated in Adoption of M.A., "Most importantly, a joint adoption affords the adopted children the love, nurturing, and support of not one, but two parents."
Adoption of M.A., 2007 ME 123 ¶ 26.

What Rights Does an Adopted Child Have?

An adopted child has all of the same rights that a biological child born to the adoptive parents would have. In some cases, the child may retain inheritance rights from his or her biological parents. See 18-A M.R.S.A. sec. 9-105.

Does the Adoption of M.A. Decision Apply Only to Adoptions Through DHHS?

No. The adoption law provision governing who may adopt states:

“A husband and wife jointly or an unmarried person, resident or nonresident of this State, may petition the Probate Court to adopt a person, regardless of age, and to change that person’s name.”

18-A M.R.S.A. sec. 9-301.

In light of that wording, the legal question addressed by the Court was “whether a joint petition for adoption filed by two unmarried persons is procedurally barred because the statute addresses joint petitions only in connection with a husband and wife, but not in connection with two unmarried persons.” 2007 ME 123 ¶ 8. It answered: “We conclude that section 9-301 does not prohibit a joint petition by two unmarried persons.” 2007 ME 123 ¶ 31.

The Law Court did not limit its conclusion by stating that joint petitions are permissible in any one particular context such as DHHS adoptions, private adoptions or agency adoptions in which there is currently no legal parent. Instead, it stated that the provision governing who may adopt “does not prohibit a joint petition by two unmarried persons.”

The reasoning employed by the Law Court in reaching its conclusion also counsels that joint petitions are generally available and are not limited to any particular factual context. For example, in analyzing this question, the Court looked to the plain meaning of the law as written. “The adoption statute expressly permits unmarried persons to adopt children and does not expressly prohibit a child from being adopted by two unmarried persons.” 2007 ME 123 ¶ 15. Unsurprisingly, most of the Law Court’s analysis focused on the child at the heart of the adoption proceeding and promoting his or her interests. A multitude of factors compelled the Court to interpret section 9-301 in a way that protects children’s interests.

Among other things, the Court pointed to past precedents highlighting the welfare of the adopted child as the controlling consideration in construing the adoption law, the child’s and state’s interests in obtaining a permanent home for foster children (foster children remain foster children until they are adopted), the enormous legal and emotional benefits to the child through adoption, and simplifying legal proceedings to avoid multiple proceedings involving the same child. 2007 ME 123 ¶¶ 24-28.

What is the Process?

As stated above, the most likely guidance as to joint adoption practice and procedure after Adoption of M.A. comes from the legal experiences with joint step parent adoptions. In step parent adoptions, one legal parent jointly petitions with his or her new spouse so that they may both be parents to the child. While a new spouse may be a new parent figure to the child, in many gay and lesbian families, the other parent has been a parent to the child for most or all of his or her life.

The law requires the Probate Court judge to ensure that the petitioners have completed all the statutory requirements and that the adoption will serve the adoptee’s best interests.

As a general matter, the case commences with the filing of an adoption petition. When there is more than one child, a petition must be filed on behalf of each and the petitions can be consolidated for court consideration at the same time. The contents of the petition are described below.

There are certain legal documents and forms that must be filed in conjunction with the petition, including the child's birth certificate as well as materials related to criminal background checks, fingerprinting, and information about other custody or legal actions involving the child.

Home studies are not required in typical step parent adoption cases. In some circumstances, the attorney may also believe it is advisable to file a motion (request that court do something) waiving any requirement of a home study on the family. See the question below about home studies.

Ultimately, the judge must determine if all of the proper consents have been filed, if all other required information has been gathered about the petitioners and the child, and if the adoption is in the child's best interests. 18-A M.R.S.A. sec. 9-308.

How Long Will This Take?

It's very hard to say right now. For a step-parent adoption, the process usually takes 3-6 months. In the beginning especially, it will likely take longer for these petitions. Of course, each of the 16 Probate Courts has a different work flow that may also affect timing.

What Goes in the Petition?

The Petition (attached as Form A-1) requires:

- basic information (e.g. name, dob, residence) of the petitioners and the child;
- information particular to the child (e.g. birth name, other names, proposed new name);
- information showing that the petition was properly filed in the county chosen;
- information about the legal custody of the child;
- names and addresses of all persons "that affect the custody, visitation or access to the adoptee";
- the relationship of the petitioner to the adoptee;
- acknowledgments that proper consents have been filed (see question below regarding notice and consent);
- various acknowledgments about forms to be filed.

What Can I Expect to Pay for this Proceeding?

Working with an experienced attorney is the best course of action. It is customary to pay an attorney a retainer fee and then the attorney bills the client for the work (usually on an hourly basis) against the retainer fee. Expect the retainer to be around \$1000, but depending on the circumstances, the retainer could be as much as twice that amount. Amounts not billed against the retainer are returned to the client at the conclusion of the case. Note that some attorneys may charge a flat fee for services rather than an hourly fee.

Court filing fees must also be paid, and you should clarify with your attorney whether those fees are paid separately or out of the retainer amount. The fee for each petition is \$65, and each child needs a separate petition. A fingerprint check (required for the non-legal parent) is an additional \$49 per person. In York County, there is an additional \$10 “preservation fee.”

If for some reason a Probate Court requires publication of a legal notice of the pending adoption to a specific person involved in the custody of the child, a topic which is addressed below, those fees can run from \$200 - \$1,500 depending on the newspaper(s) in which publication is ordered.

If for some reason a Probate Court requires a home study, a topic which is addressed below, fees will run from \$1200-\$2100. If a judge orders a guardian ad litem to ensure the adoption is in the child’s interests without a home study, the cost would be a fraction of that of the home study.

What Forms Do I Need to File?

- Form A-1: Petition for Adoption and Change of Name.
- Child’s Birth Certificate
- Form A-4: Consent of Petitioning or Non-Petitioning Parent
- Form A-7: Child Custody Affidavit
- Form A-8: Confidential Statement To Accompany Petition for Adoption
- Form A- 22: Acknowledgment Adoption Registry
- VS9-R: State of Maine Certificate of Adoption
- Any divorce decrees if a Petitioner has been divorced
- Copies of any court orders that affected the custody of the child (Adoption Decrees, Co-Guardianship Orders, etc.).

Depending on your particular circumstances, there may be additional forms you need to file. Also note that you should strongly consider using the court’s forms and modifying them to say “Adopting Parent” rather than “Mother/Father”. Technically, if you produce your own forms, they may not deviate from the court-approved forms and whoever files the forms must certify that there are no changes as compared to the court-approved forms.

In What County Do We File the Petition?

In the county where the adoptee resides or where the petitioners reside. 18-A M.R.S.A. sec. 9-104 (b).

What Will My Child Have to Do?

If your child is 12 or older, the judge may interview the child and “determine the adoptee’s attitudes and desires about the adoption and other relevant issues.” See 18-A M.R.S.A. sec. 9-305.

If the child is 14 or older, he or she must sign a separate consent to the adoption. Form A-6.

Will My Petition Have to Appear in the Probate Court Notices Section of the Newspaper?

Likely not but it will depend on the child’s particular family circumstances as outlined below. Bear in mind that the law requires the consent of each of the child’s living parents to the petition, as well as the consent of any child over age 14. 18-A M.R.S.A. sec. 9-302. Of course, if a person who is a parent or is presumed to be a parent does not wish to relinquish his or her rights, then the only way to proceed with the adoption is to seek to terminate that person’s parental rights in a separate judicial proceeding.

Child Adopted by One Party Where the child has been adopted by one party, there is no other parent or person to be notified.

Known Sperm Donor Not Listed on Birth Certificate Where there is a known sperm donor, that person may sign Form A-14 before a notary public and waive any right to notice.

Person Listed on Birth Certificate If another person is listed as a parent on the birth certificate, that person must execute a consent (Form A-4) before a Probate Judge because that consent operates as a termination of that person’s parental rights vis-à-vis that child. Your attorney will likely want to discuss issues of terminating the rights where there is a known father.

De Facto Parent If another person is a de facto parent of the child, he or she can sign a third party custodian consent form in front of a judge. Form A-5.

Unknown Sperm Donors Even in cases involving unknown sperm donors, notice by publication is likely not to be required as long as a physician or sperm bank can certify that the petitioner obtained sperm from a sperm bank that provides confidentiality to its donors. The Law Court ruled that a notice requirement for unknown donors is not required since, given the promises of anonymity and confidentiality to the donor, the mother’s and child’s names will mean nothing to him, and the likelihood of the donor “actually be[ing] notified is so remote as to be non-existent.” Guardianship of I.H., 2003 ME 130 (2004) at ¶14. In short, where the Probate Court is satisfied that the biological father of a minor child is an anonymous sperm donor, the court may waive service on or notice to the donor. 2003 ME 130 at ¶16.

Do We Need to Have A Home Study?

The better view of the law is that a home study should not be required in these circumstances. Home studies anticipate a situation in which a child is leaving one family and being adopted into another, and the home study assures that the home is suitable for the child. For this reason, home studies are not ordered in cases involving step parent adoptions after a parent's new marriage. In the same vein, this situation does not involve the child leaving his or her home, but simply gaining another parent. In many cases, this "new" parent is not a new partner, but someone who has already been functioning as a parent to the child and may have been intimately involved in bringing the child into the family in the first place.

If the Court believes the law requires a home study, it may waive (dispense with) the home study and report if the petitioner is a blood relative of the child. 18-A M.R.S.A. 9-304 (a-1)(1)(ii). If the child has been adopted, the Probate Court may still waive a home study on the grounds that there is no permissible distinction between biological (blood) and adopted children. A lawyer can help prepare an affidavit of the petitioners explaining the family's circumstances and a motion requesting that the court waive the home study requirement.

If a Home Study is Ordered, What is Involved?

If a home study is ordered, the petitioners should advise the agency or social worker conducting the study that the child and parents are already a family. In some cases, the home study involves multiple visits to your home by a trained social worker from a licensed adoption agency or the Maine Department of Health and Human Services as well as interviews with you and your child/children. Among other things, the social worker will generally report on:

- your motivation for being adoptive parents;
- a physical description of your home, play areas and safety features;
- background checks on the adoptive parents;
- the adoptive parents' life experiences, family background, education;
- employment, relationship status and issues, and parenting experience;
- your current relationship and support systems, including how you communicate in your relationship and how you make child rearing and financial decisions;
- your relationships with other children;
- your family's beliefs, values and practices; and
- your schedule and child care plans.

There will also be interviews with others close to your family. These are more often thought of as references in which people say supportive things about your family and the adoption.

Once the information has been gathered and analyzed, the social worker then makes a recommendation as to whether or not the adoption petition should be granted.

Is There Any Alternative to A Home Study?

Judges are charged with ensuring that every adoption is in the child's best interests. At the same time, constitutional protections for family autonomy preclude judges from unnecessarily meddling in family affairs. If a Probate Court needs more information about a family, then it can appoint a guardian ad litem – usually an attorney – to examine the family's circumstances and make a report. This is a shorter process than the home study and can be paid for by the county in which the petition is filed.

What Will the Birth Certificate Look Like? Will It Say Our Child Is Adopted?

Your child's birth certificate can look like any other birth certificate. On the Form VS-9, at line 21, simply state that you do not want the birth certificate to reflect the adoption.

What is the Adoption Registry and How Does It Affect My Family?

The Maine Adoption Reunion Registry is a free voluntary service of the Maine Department of Health and Human Services. This program is designed to reunite birth families and adoptees when the adoptee reaches the age of 18 or older. At that time, if the adoptee and the biological family members individually register with the Registry, a match will be made and information shared so that there can be a reunion. This is a voluntary service and no match will be made without the joint voluntary registration for the parties.

What Organizations Supported This Outcome in the Courts?

Aside from the attorneys for the parent petitioners, the Maine Attorney General, Steven Rowe, filed a friend of the court brief on behalf of the petitioners as to the proper interpretation of the adoption law. He made several points to the Law Court, including this: "M.A. and R.A. have significant needs that are being met, and have been met, for the last five years by two individuals who have committed themselves to caring for the children. ... The abuse and neglect suffered by M.A. and R.A. has been replaced by care, attention, and devotion of a committed, unmarried couple."

All of the child welfare professionals who worked with the family in the Adoption of M.A. case, as well as many local and national child welfare groups, believe that the best interests of the child is paramount in any adoption. Local and national child welfare organizations also submitted a friend of the court brief on the parents' behalf and presented a "comprehensive, fair and balanced review" of the scientific and professional literature on parenting by gay and lesbian couples. These organizations included

- American Psychological Association, both the national and Maine chapter;
- National Association of Social Workers, both the national and Maine chapter;
- Maine Association of Psychiatric Physicians;
- Maine Chapter of the American Academy of Pediatrics;
- Maine Medical Association;
- Child Welfare League of America;
- Kids First;

- Community Counseling Center; and
- Evan B. Donaldson Adoption Institute.

They were represented by Portland attorney Michael P. Asen and their attorneys at Jenner & Block in Washington, D.C. The brief concluded:

“Empirical research has consistently shown that lesbian and gay parents do not differ from heterosexuals in their parenting skills, and their children do not show any deficits compared to children raised by heterosexual parents. It is the quality of parenting that predicts children’s psychological and social adjustment, not the parent’s sexual orientation or gender.”

Who Prepared This Document?

This document was prepared by Mary L. Bonauto of Gay & Lesbian Advocates & Defenders (GLAD), who litigated the Adoption of M.A. case with Patricia Peard and Judith Berry and has litigated numerous family law related appeals on behalf of same-sex families and their children in the six New England states. GLAD was assisted by the invaluable contributions of the family law and adoption attorneys starred below. Others listed below concur with the views expressed in this document. If you wish to state your concurrence with these views, send your request in writing to Amanda Johnston at ajohnston@glad.org.

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Who Can I Contact if I Need More Information, Resources, or Referrals?

For more information, you can call Gay & Lesbian Advocates & Defenders' Legal InfoLine, M-F from 1:30-4:30 p.m., at 1-800-455-4523.