

*LORMAN EDUCATION SERVICES*

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*FORMS OF ADOPTION PERMITTED BY THE  
ADOPTION CODE*

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## FORMS OF ADOPTION PERMITTED BY THE ADOPTION CODE

### I. THE ADOPTION CODE AUTHORIZES A NUMBER OF FORMS OF ADOPTION IN ADDITION TO THE “TRADITIONAL” ADOPTION OF A CHILD BY AN UNRELATED COUPLE.

- A. Step-parent adoption
- B. Relative (intrafamily) adoption
- C. Guardian adoption
- D. Adult adoption
- E. The Adoption Code does not prohibit adoption by a single parent (living alone or with a domestic partner), or adoption by a gay or lesbian parent.
  - 1. Some agencies decline to process these types of adoptions, and/or to issue favorable home studies for these hopeful parents.
  - 2. The Adoption Code has been interpreted as prohibiting “second parent” adoptions, defined as adoption of a child by two same sex parents involved in a domestic partnership.
    - a. This is because MCLA 710.24(1) can be construed to permit dual adoption petitioners only when they are husband and wife.
    - b. This interpretation has been criticized by GLBT advocacy groups who contend that the language of MCLA 710.24(1) only requires that a married person join with his or her spouse in an adoption petition, but does not preclude unmarried others from jointly filing an adoption petition.
    - c. To date no lawsuit is pending to adjudicate these positions, but the Michigan Judicial Institute’s bench book on adoption concurs with the interpretation that prohibits second parent adoptions.

### II. STEP-PARENT ADOPTIONS.

- A. A step-parent adoption occurs when the second spouse of a biological parent of a child seeks to adopt the child.
  - 1. The marriage between the biological parents of the child can be terminated by:
    - a. Divorce



may be terminated pursuant to MCLA 710.51(6). *In re Hill*, 221 Mich.App 683, 691; 562 NW2d 254 (1997)

6. Even if the statutory grounds are established by clear and convincing evidence, the court is not obligated to terminate the rights of the non-custodial parent if the court concludes that such termination is not in the best interests of the child. *Id.*
  7. MCLA 710.51(6)(a) contains two alternative tests regarding the payment of support. If a support order has been entered the only inquiry is whether the non-custodial parent substantially complied with the support order, regardless of any ability to pay support. If no support order has been entered, the inquiry is into the non-custodial parent's ability to pay support, and finding such ability, whether the non-custodial parent regularly and substantially paid support.
  8. A non-custodial parent who pays child support only upon the commencement of enforcement actions against him may nonetheless be found not to have "substantially complied" with the order. *In the Matter of B.T.B., Minor*, Michigan Court of Appeals, No. 244971, unpublished May 22, 2003.
  9. There is no incarceration exception to MCLA 710.51(6). Non-custodial parents who are incarcerated are deemed to retain the ability to support their children, and to have contact with them in the form of letters, phone calls, gifts, and jailhouse visits. *In re Caldwell*, 228 Mich.App 116, 121; 576 NW2d 724 (1998)
  10. If the non-custodial parent is repeatedly blocked from visiting the child by the custodial parent, the non-custodial parent may be found to lack the ability to visit the child during the statutory two year period. *In re ALZ*, Mich App 264, 273-276; 636 NW2d 284 (2001). However, a single rebuff by the custodial parent in a pattern of failure of the non-custodial parent to visit can be treated as not impacting the non-custodial parent's ability to visit. *In the Matter of B.T.B., Minor*, Michigan Court of Appeals, No. 244971, unpublished May 22, 2003. However the determination of whether the custodial parent's conduct constituted a bar to the non-custodial parent's ability to visit or communicate is a factual issue that frequently depends upon the sophistication of the non-custodial parent, the efforts that the non-custodial parent has made to attempt to visit or contact the child, and the existence and terms of personal protection or similar court orders. Frequently the resolution of these factual issues depends upon the trial court's evaluation of the credibility of the witnesses, which is rarely disturbed by an appellate court.
- D. In a step-parent adoption, the parental rights of the custodial parent are never terminated. MCLA 710.51(5). Similarly, the child is never made a ward of the

court. MCLA 710.51(3). This differs from the situation in a “traditional” adoption of a child by an unrelated adoptive parent, where the parental rights of both biological parents must be terminated before the court may enter a placement order, and the child is made a ward of the court during a six month supervisory period following the formal placement with the adoptive parents.

- E. Typically, no formal home study is required in a step-parent adoption. However, the court typically conducts its own investigation into the suitability of the new marital home for an adoption. One criteria is often that the biological parent and the second spouse be married for at least six months prior to the filing of the adoption petition.
- F. An individual who was adopted by a step-parent, whether as a minor or as an adult, may rescind that adoption pursuant to MCLA 710.66 if:
  - 1. The adoptee is now an adult; and
  - 2. The biological parent whose rights were terminated concurs in the rescission. MCLA 710.66(1).
  - 3. Upon receipt of a petition for rescission, the court may conduct such investigation as it deems appropriate. MCLA 710.66(4). The court must hold a hearing. *Id.* However, the Adoption Code is silent as to the standards that the court must apply in determining whether to grant the rescission petition.
  - 4. The order of rescission makes the adult adoptee once again an heir at law of the biological parent whose parental rights were previously terminated, and of that parent’s lineal and collateral kindred. It terminates the adult adoptee’s status as heir of the step-parent, or the lineal or collateral kindred of the step-parent. MCLA 710.66 (6).

### III. RELATIVE ADOPTIONS.

- A. The Adoption Code provides a streamlined process for adoption of a child by a relative of that child.
- B. The relationships that qualify for this treatment are those that are with an individual related to the child within the fifth degree by marriage, blood, or adoption.
  - 1. To calculate the degrees of kinship, start with the child on an imaginary family tree. Every step up or across on the family tree is one degree.
  - 2. Using this methodology, a grandparent is the second degree; a great aunt or uncle is the third degree; a cousin once removed is the third degree, and so on. Many courts have kinship charts that identify the degree of kinship.

3. Courts typically require documentation of the kinship through certified birth certificates of all the relatives that link the degrees, and marriage certificates or orders of adoption, where applicable.
  4. Relatives by marriage include step relatives. There is no extra link in degrees because of the step relationship.
- C. Consent is the mechanism for voluntary termination of the parental rights of biological parents in a relative adoption.
1. Consent must comply with all the formalities of MCLA 710.43 and MCLA 710.44.
  2. If either or both of the biological parents decline or fail to voluntarily consent, the adoption cannot proceed unless the parental rights are terminated pursuant to the Juvenile code for neglect or abuse.
- D. Although relative adoptions have many of the attributes of a direct placement adoption (e.g. the biological parent selects the adoptive parents and transfers physical custody to them), relative adoptions do not have to comply with the formalities of a direct placement adoption.
1. No home study is required in a relative adoption.
  2. The court typically conducts an investigation into the suitability of the relative's home prior to making a formal placement.
- E. Relative adoptions are sometimes a good substitute for a FIA neglect and abuse case against the biological parents.

#### IV. ADULT ADOPTIONS.

- A. The Adoption Code permits an adult (e.g. someone 18 or more years old) to be adopted by another individual or couple.
1. This type of adoption can cement family relationships in a step-parent situation that could not proceed as a stepparent adoption during the adult's childhood due to the refusal of the non-custodial parent to consent to the adoption.
  2. Adult adoptions can also be used for the purpose of making the adult an heir of the adoptive parent. This can be an effective estate planning or management tool in certain situations.
- B. The consent of the biological parents of the adult is not necessary in an adult adoption. Only the consent of the adult is necessary. MCLA 710.43
- C. The adult's consent must conform to MCLA 710.43 and MCLA 710.44.

## V. GUARDIAN ADOPTIONS

- A. If a guardian has been appointed for a biological parent or the child to be adopted, the guardian may consent to or release the child for adoption under limited circumstances. MCLA 710.28(d) and (e), and MCLA 710.43(d) and (e).
1. This release or consent is in lieu of the consent of the biological parent who would ordinarily release or consent. MCLA 710.28(1)(a)(ii) and (iii) and MCLA 710.43(1)(a)(ii) and (iii).
  2. A guardian may not be appointed for the biological parent or the child for the purpose of defeating the rights of the biological parent as an interested party in the adoption. MCLA 710.24a(7).
- B. No guardian may release a child for adoption or consent to the adoption of the child unless the court that appointed the guardian has given the guardian specific authority to do so. MCLA 710.28(3) and (4), and MCLA 710.43(3) and (4).
1. The Adoption code does not establish standards by which the court can decide when to grant authority to the guardian to release the child for adoption or consent to the adoption. Accordingly, courts have borrowed from the Juvenile Code to set parameters upon the guardian's authority. The concern is that the guardian not be used as a "back door" to defeat the biological parents' parental rights.
  2. If the guardian has been appointed for the child at a time when the biological parent(s) are living, the guardian must establish, in a proceeding conducted under the Juvenile Code, that grounds exist for the involuntary termination of the parents' parental rights before the court may grant authority to the guardian to release the child for adoption or consent to the adoption.
  3. The Juvenile Code permits the termination of the parental rights of biological parents who have established a limited guardianship for the child if the biological parents have not complied with the terms of the limited guardianship placement plan. MCLA 712A.19(b)(3).
  4. The Juvenile code permits the termination of the parental rights of biological parents whose child is the subject of a full guardianship if the parents have not substantially supported or regularly visited the child for a period of two or more years since the establishment of the guardianship. MCLA 712A.19(b)(3).
  5. The Juvenile code permits the termination of the parental rights of biological parents who have abandoned the child. If the identity of the biological parents are known, the termination may occur if the abandonment has lasted at least 21 days. If the identity of the biological parents is not known, the termination can occur if the abandonment has

lasted at least 90 days. MCLA 712A.19(b)(3).

- C. If the guardian is both a relative and a guardian, the Adoption Code is silent as to which adoption rules control. As a matter of policy, however, some courts require that the more restrictive guardianship rules apply.