Attachment 4

TO: ADOPTION STAFF
WASHTENAW COUNTY PROBATE COURT
JUVENILE DIVISION
FROM: Nancy C. Francis, Probate Judge
DATE: September 26, 1993
RE: Adoption Policy #5 (Maybe - or this might be the third #5; someday we'll have time to pull a policy manual together and get them numbered right!)

Staff has asked for guidance regarding petitions presented for action by the court. Two unmarried people have submitted a petition asking to adopt a child who is already the legal child of one of them. The legal parent is not the spouse of the other petitioner in either case. In one case, each person has submitted a separate petition that draws the court's attention to the other petition. In the other case the two people have submitted one petition that both have signed and in which they set out their plan. In this latter case, it appears that the interested persons are trying to take advantage of that mysterious concept in the statute of an individual wanting to adopt and a spouse concurring in the desire of this whimsical individual. (Not so mysterious in adult adoptions but very, very strange thinking regarding the adoption of children.) What is seen in this petition is, of course, not the required joinder of married people but what appears to be some sort of voluntary joinder.

Your first question is whether staff can accept such petitions for filing, that is, whether there is anything about such petitions that requires the adoption clerk to reject them on their face and second, if they can be accepted for filing what is the procedure then.

I.

As you well know my general attitude is that people can ask the court for pretty much anything. Open access means that unless the courthouse door is firmly and decisively shut by the statute or case law then anyone can come in and ask to be heard. The courts do belong to the people, after all.

The only time a clerk can reject the submission of a petition is when the court door *is* firmly and decisively shut. In these cases, I believe that it is not.

Jurisdiction: The Probate Court has jurisdiction over adoptions so the petitions are in the correct court.

Venue: For adoption, venue is the county in which the petitioner lives or in the county 'where the child is found'. The clerk can certainly look at a petition, use maps or county resources and determine where a petitioner lives but if the petitioner is relying on the alternate ground for venue, a legal decision may ultimately have to be made in each case. I understand that venue is based on petitioners' residences in all these petitions.

Since the Adoption Caseworker performs an intake function when the petition is submitted, s/he may decide there is no reasonable theory on which the child might be said to be found in the County and reject the venue; a petitioner could make a motion or ask for a preliminary hearing on this issue before the judge, who may or may not deny the petition on venue grounds.

Local site: Our court structure in this county is that adoptions will be handled in the Juvenile Division of Probate so if a petitioner has met the standards of jurisdiction and venue and is on Platt Road, then s/he is in the right local site.

Format.

1. *Stepparent Act:* A clerk or intake staff can reject such petitions or petition submitted under the stepparent adoption provisions of the Code. The stepparent adoption construct allows the parental rights of a custodial parent to be undisturbed coincidental with the granting of an adoption but only if the person wanting to adopt is married to that custodial parent. Thus those provisions are not applicable or adjustable to a petition brought by unmarried people.

2. *The case of two separate petitions.* A petition cannot be rejected at intake because, like the first case in question here, there is more than one single person petitioning to adopt the same child. The statute says, "if a person wants to adopt a child or an adult and give them his or her family name [or not]...then that person, and his or her spouse, if married, shall submit a petition for adoption to the Probate Court..." The Supreme Court concluded long ago that the Adoption Code has to be strictly construed. That not only means that the court cannot read things into the statute that the words do not allow to be there but it also means that the court cannot manufacture prohibitions that are not clear from the plain language of the statute.

In construing this statute as to who can file, I have looked at two primary items. First, the Legislature had every authority and power to word the statute to prohibit more than one person from filing a petition for the adoption of the same child or prohibiting the court from granting such an adoption. It did not do so. Louisiana has said that, for example, but Michigan has NOT. Second, there is absolutely nothing in the statutory language that prohibits more than one person from submitting a petition for the adoption of the same child. To read the statute to prohibit the filing of more than one single person's petition for adoption of the same child is to manipulate and twist the statute and read into it something that the Legislature most clearly did not intend to put into it. The clearest example of the truth of that (besides the lack of the Legislative prohibition and the many definitions within the statute) is that there could never be any competing adoption petitions before the court because an adoption dispute would always be decided by who wins the race to the adoption clerk's desk.

I am aware that Supreme Courts of other States, with adoption statutes similar to Michigan's have held that such adoptions are contemplated by the statute because there is an enduring rule of statutory construction that says the use of the word 'person' in a statute contemplates 'persons'. I have not yet researched that concept and whether it is a

principle of Michigan statutory construction. I think I can do that later because it is necessary to know that to make this decision. The plain language of the statute does not preclude the submission of individual petitions by individual unmarried people for the same child. (Further research on this point may also lead me to change my mind about what I have said further on in this policy statement about joint petitions and give me more planks of a solid platform from which to interpret our statute when it defines 'Petitioner' as 'the person or persons who file an adoption petition with the court'.) In another state with a similar law, the state Supreme Court has held that to deny adoptions to such petitioners would violate constitutional equal protection. Again I do not have to reach so high, in my opinion, the statute allows this type of petition within its plain and clear language. *What the court does with the petitions after filing is based on the law of best interests of the child.*

In this case, both petitions are seeking the same thing, that is, that both single petitioners be allowed to adopt the child together. That is not a reason to close the door to petitioner submitting a petition to the court for further proceedings. In a Michigan Court of Appeals case *In Re Adams* 189 Mich. App. 540 (1991) the holding of the court was that the natural parents of MA [an adult] could not petition (emphasis added by me) to adopt her pursuant to MCL710.24 *because they were both married to other parties rather than to each other.* (I'm quite sure that this case is the reason we've got stepparent rescission now...Legislators *can* understand modern family constructs if there is enough pressure put on them and if the outcome is not too different from the norm in their heads, never mind what's going on in real life.) Regardless of the rescission law, that holding still stands so this is one set of circumstances in which the courthouse door is decisively shut against submission of the petition because the Court of Appeals has closed it. It is very important to look at that case for what it holds and what it does not hold. There is only one set of circumstances that is governed by *Adams*; that is the situation where two married couples are petitioning to adopt the same person, together. Because the Adoption Code requires that the spouse of a married person join the petition for adoption, the Adams petition, on its face, asked that MA have four legal parents. Thus, she would be the first degree heir-at-law of four people meaning that the State would be artificially and deliberately putting MA in a better position than all other heirs-at-law, whether biological or adopted, in the State of Michigan and THAT is an equal protection issue. That this was the *Adams* court concern in its holding is quite clear. The only time that *Adams* actually analyzed the fact situation of the case in light of the Michigan statute (rather than in light of an anthology of legal snippets or some other state's law) was when it pointed out that *if this adoption were granted* (emphasis added by me) the desired outcome of the Adoption Code (that is, to replace the pre-adoptive line of inheritance with the post-adoptive line of inheritance) would be thwarted.
The *Adams* court essentially said this outcome would be so wrong that it should be nipped in the bud at the clerk's desk and such petitions should not even be allowed to be filed.

The holdings of the Court of Appeals are binding on trial courts so the situation of two married couples petitioning to adopt the same person together is another situation where the court door is firmly and decisively shut. However, the Court of Appeals' ruminations,

discussions, feelings and beliefs about issues, particularly those that are not necessary to dispose of the case in front of the court are *dicta* and not binding on a trial court...and there is a whole lot of that in *Adams* and it is not binding on this court.

I considered whether the *Adams* holding or reasoning in support of its holding presented a parallel analysis that governed the cases with which we are dealing and find that it does not. First (and most importantly), these petitions before the court seek the establishment of parental relationships with only two people, so the petitioners are not seeking any legal status for these children that gives them an edge above others. Second, there was no statement or hint in *Adams* that any move was planned that would have eliminated any of these actual or potential parental relationships before the adoption was granted. In other words there was nothing to indicate that the *Adams* petitioners were trying to reach the proper outcome under the Code. The cases that have come to you are for the adoption of minors and the Code outcome in those cases is that pre-adoptive parental rights and relationships will be replaced by the post-adoptive parental rights and relationships. The pleadings in these cases include plans for achieving this outcome. Moreover, the Code sections regarding the adoption of children provide a mechanism for implementing the plan. That is another major and significant difference between these cases and *Adams*; in the adult adoption process, there is no statutory mechanism or procedure that the parties could have committed to use to end up with two parents instead of four.

These petitions are not competing petitions they are coordinated with or dependent upon each other. Like many petitions that come to the court, these are based on an anticipation that the child will achieve "orphan status" and thus become eligible for adoption in the course of the case. One petitioner is saying all parental rights will be terminated so an adoption can take place; the other petitioner (like so many birth/legal parents in adoption cases) is saying the other parent and I (when there is more than one) want this particular adoption so much that I/we are willing to give up our parental rights to achieve it. However, in the cases you have now, this legal parent is also an adoption petitioner not just a background figure because he or she is telling the court, from the beginning, that after the child becomes eligible for adoption, the adoption she wants is one by herself and the other petitioner. At the time she is filing the petition she does not need to adopt because she is already the parent but by filing a petition now, she is presenting the court with the full plan and allowing the agency and court to prepare an honest and complete adoption study and investigation and make accurate findings about the best interests of the child.

There is local, at least, historic precedent supporting the acceptance of these petitions for filing. The legal parents here are in the same position as those custodial parents who came before the Washtenaw County Probate Court during the tenures of Judges (John) Conlin, O'Brien, Hutchinson and (Loren) Campbell - before the passage of the stepparent adoption act. Those parents said "I want this person to adopt my child and be his/her legal parent so badly that I am willing to give up my own parental rights to make it happen but, Judge, I want my rights back so that both of us will be the child's legal parents." (Elly, you have been around long enough to remember those days.) Those judges made hundreds of stepparent adoptions happen in this county and did not deviate

from the statute in doing it. They recognized the standing of the legal parent to petition *even though the legal parent already had intact parental rights* because those rights were going to be terminated during the course of the case and if the rights of the non-custodial parent were also terminated then the child would be eligible for adoption and the stepparent and the erstwhile legal parent were allowed to adopt the child. That custodial parent, like the ones in the cases before us, was no different than the many parents who come before the court asking to release a child for adoption or consent to an adoption for their own reasons. What those pre-stepparent-act parents (and those in the present cases) wanted was to turn a family, in fact, into a family, in law, with all the protections that status would provide for the children. The Probate Judges of this County accepted the standing of that custodial parent, meticulously protected the rights of the non-custodial parent, required genuine and meaningful investigations and based their rulings on the best interests of the child. (This process is, in fact, exactly how Frank became the legal father of Joe.) There was never anything said or done in the Legislature or appellate courts indicating that there was anything wrong about the concept or procedure of the early Washtenaw stepparent adoptions. The Legislature - having pressure exerted on it by people in those particular blended families - simply provided, in later years, a process less painful to the legal parent.

3. *The 'joint' petition.* Even in those days, because the custodial parent and the stepparent were spouses they could, without question, submit a joint petition. The concept of joining the petition is only mentioned in the Code in relation to a spouse and to extend that concept to unmarried people is a fiction and a stretch of the statute that I am not willing to make. This could be a reason to reject a petition - but, without prejudice. The petitioners can reform it into two petitions and resubmit it. On the other hand, unless the parties are misidentifying themselves as married or designating their petition as a stepparent adoption petition*, setting out their plan and requests for relief in one pleading rather than two is a distinction without a difference. Most adoptions are 'cases' rather than 'controversies' and there is no opposing party to complain about the details and the fine print. Unless the single petition violates the above standards (*-*) or a party complains the court is willing to deem a single petition - in which the two petitioners state the plan and desire clearly - to be two separate petitions on one piece of paper rather than make them re-write and re-submit it.

Summary of the Answer on Accepting the Submitted Petition:

As long as there is proper venue and the petition is not couched as a stepparent adoption, the court cannot deny access to unmarried petitioners filing independent petitions seeking to adopt the same child.

II.

So, on to the next question...what happens then? The general rule is: we follow the statute. There is nothing different about our tasks here than in any other case. All the protections to the rights and best interests of the parties that we are required to give are to be given in these cases, too.

1. Is, or can the child be made legally eligible for adoption?

(a) If there is another parent, that person's rights must be dealt with properly according to the adoption code. If one parent was a zygote donor then we have to have sound, verified information from the lab or clinic that the person is unknown and unidentifiable and if the person waived all claims to and rights over any child resulting from the donation. If the zygote donor is known then there will have to be a termination of some sort through the Code. If that 'other' parent's rights cannot be properly terminated then all bets are off. (b) The custodial parent has to be willing to release rights and there must be an agency for him/her to release to and I understand that there is an agency in each of these cases.

2. Release of child five years or older.

If the case proceeds to the point of the custodial parent releasing his/her parental rights and the child is over the age of five years the court must be able to make a finding on the record that the release is in the best interests of the child. The agency study, supervision and the investigation should be completed by this time so the court will have lots of information about the family members and family unit. While each case will be different I assume that the reason for the release is that it is the only way to obtain the adoption and the purpose of the adoption is to make sure that the person who has been the other actual and psychological parent of the child will have the right to carry on that function in all circumstances, even in the event of the event of the death, incapacity or departure of the legal parent. If I find that to be true or some other equally good reason why the release is in the best in the best interests of the 5+-year-old child then I can accept the release.

3. The next task is for the court to determine from all the available information if the *adoption* in each case is in the best interests of the child(ren) based on the factors set forth in the Code.

1. *Sliding down the slippery slope.* When these questions first came up, one of you voiced concern about liberally allowing petitions to be filed because of all the different family configurations we would then be have to handle. In law school there was this wonderful description of that argument: if you let this one case through then it will be followed by the 'parade of horribles'. I said in our informal discussions about these, and I am even more convinced of it now, that the 'parade' does not present access issues but issues under the law of best interests of the child. That law is applied at the release hearing (with the child of 5+) and the adoption hearing for all children. Examples that have been raised include (a) romantically involved but unmarried male and female who live together and want to adopt the child of the other. They can file petitions but they have to understand that a court might have difficulty finding that a release of the legal parent's rights is in the best interests of the child because that is not the only way to achieve an adoption; these petitioners can simply marry and file under the stepparent adoption act. If I do not have to make a best interest finding at release I do have to make such a finding regarding the adoption itself. One of the best interests factors to consider is the 'permanence as a family unit of the proposed adoptive home'. The state does not bar these petitioners from marrying; if they

cannot make this single traditional gesture of commitment to their unity, how committed are they? The staff should not deny such people access but they can be warned about this possible pitfall in court with their petitions. (b) The extended family pairings who have been caring for abandoned young relatives in or outside of foster care. A grandmother and an aunt (or uncle and adult female first cousin) have lived together for a long time and provided the two-parent structure and environment for the children. One of them receives Social Security Retirement or Disability and wants to make sure that the minors can claim an opportunity to benefit from that and the other has present benefits through employment that are only available to the children if she is the legal parent. Again, each relative wants to make sure that if something happens to one of them, the other will be sure to be able to continue the children's present healthy established custodial environment. These individuals cannot marry because they are either too close in blood relationship or are of the same gender. (c) I know a man and a woman who live in another county in Michigan who were roommates in college and always the best of platonic friends and never romantically involved. After college they married other people, the man had children, both of them got divorced and happened upon each other again. They remembered that the most pleasant adult living they ever had was with each other. The man had custody of their children and their mother has deserted them. The old college friends and his children began living together. They have no passion for or physical interest in each other, they do not want to marry but they want to be sure that the established custodial environment continues for his children, regardless of what happens to him.

2. *The 'moral fitness' factor.* The court has to weigh all the best interest factors but I feel I must speak to the one that will dominate the passion of a good number of people in our community and state on this issue: 'the moral fitness of the adopting person or persons' when the petitioners are romantically-linked same sex parents. There are a few sides to this issue. First, there is old (well, old enough so it was effective when I was practicing law) Michigan precedent that the best interests of the child are not to be determined based on the popular prejudices of the community. Second, the State of Michigan has never found that the status of 'homosexuality' or 'bi-sexuality' equate to moral unfitness. As relevant examples, people in such relationships are allowed to be foster parents in Michigan; individual homosexual and bi-sexual people have been recommended by MCI as adoptive parents of children and approved as adoptive parents by many courts throughout the State. Third, the true concern of any rational evaluation is whether an adult, regardless of sexual orientation, exploits a child for the adult's sexual pleasure or whether the adult engages in conduct that imposes sexual knowledge and experience on a child before that child is physically, emotionally and intellectually ready for it. That is the information we need to look for in all the agency reports and in all our investigations in terms of moral fitness on the issue of sexual behavior. Because we are the same people who handle delinquency and child protection work we know very well that because someone is married it does not mean that person cannot be a child molester and we know

very well that because someone is heterosexual it does not mean s/he cannot be a pedophile.

3. In this regard, and others, it is important to remember that some of the people who will probably approach us with such petitions have been vetted many times and there are past reports. Many of the couples may have been foster parents of the children in question (and/or others) so they have gone through all the initial foster parent screening and trainings and then have been re-certified (who knows how many times). There has probably already been an adoption by one partner through MCI or some agency contracted on its behalf that looked into the child's environment and the safety and influence of the other adult in that environment. All those reports should be made available to us and we should all review them thoroughly.

4. "All deliberate speed". First, if there is another actual biological or legal parent we will have to take all the necessary amounts of time to handle that person's rights properly. Second, unless there is good reason to waive the supervisory period then the families will have to go through that period. (If what I envision happening here is what actually happens then there probably will be a lot of waivers - same gender foster parents who have parented the same children together for some time and been observed and evaluated by DSS many times; same gender parents who have been parenting the children of one of them or each other's children for a long time in a family unit.) Third, however, the interval between the custodial parent's release of rights and the adoption should be instantaneous - the parent should just not be made to be out of control of his/her child for any length of time. The problem, of course, is that the rehearing and appellate rights kick in at the point of release and the petitioners would not be able to adopt for 20 (or 21 - *@!#^&@!) days. I think that in my own 'stepparent adoption' I signed a waiver of my appellate rights. My memory could be wrong here but, regardless, that is what we should offer, so a parent can choose to waive or wait.

In short (sorry), we may be compressing steps that usually span a year - into a day...but if anyone can do it, you all can!

Case Prefixes

DL	Delinquency
NA	Neglect/Abuse
TO	Traffic and Ordinance
AD	Adoption
PW	Parental Waiver

Petition Types for Neglect Cases

ONA	Original NA Petition
C.N.A.	Copy of NA Petition
ONAS	Original Supplemental Petition
CNAS	Copy of Supplemental Petition
OTM	Original Termination Petition
CTM	Copy of Termination Petition
OTMS	Original Supplemental Termination Petition
CTMS	Copy of Supplemental Termination Petition
OED	Original Educational Neglect Petition
CED	Copy of Educational Neglect Petition

Case Types (after case #)

DJ	Designated Juvenile Cases
DL	Delinquency
PJ	Personal Protection
TL	Traffic and Ordinance (all local petitions)
NA	Child Protective (Neglect/Abuse)
AB	Adult Adoptions
AC	Agency International Adoptions
AD	Direct Placement Adoptions
AF	Relative Adoptions
AG	Safe Delivery of Newborn Adoption
AM	Agency MCI Adoptions
AN	Non-Relative Guardian Adoption
AO	Agency Other Adoptions (2nd parent)
AY	Step-Parent Adoptions
RB	Release to Adopt; No Case
RL	Release to Adopt; NA Case
EM	Emancipation of Minor
ID	Infectious Disease
NB	Safe Delivery of Newborn Child
NC	Name Change
PH	Personal Protection (stalking)
PP	Personal Protection (domestic)
PW	Waiver of Parental Consent
VP	Violation, Out-County Adult PPO

Disposition Codes

RCED	Recission denied/withdrawn
RECG	Recission granted

Docket Codes for Adoption

PCI	Petition for Confidential Intermediary
RRI	Request for release of information

Parental Waiver Court Action Codes

FOH2
WAI
FDH
FDPE

Scot has added IDH (ID Father Hearing Held); CONH (Consent Hearing Held), 2PH (Second Parent Hearing Held), and FNH (Finalization Hearing Held) per your request.

Suzette

Hi Scot,

Can you add the following agency codes (for adoptions):

ACI - Adoption Consultant Inc.
ALC - Adoption Law Center
FFI - Forever Families, Inc.
MAD - Michigan Adoption Center
STAR - Starfish Family Services

Thanks.