House
Legislative
Analysis
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DIRECT PLACEMENT ADOPTIONS

Senate Bill 721 (Substitute H-5)
Sponsor: Sen. Jack Welborn

First Analysis (5-25-94)
Senate Committee: Family Law, Mental Health, and Corrections
House Committee: Judiciary

THE APPARENT PROBLEM:

Michigan is one of a handful of states that continues to require out-of-family adoptions to be made through an adoption agency. Under the traditional model, a biological parent relinquishes a child to an adoption agency, which then, using its own standards and employing the results of its evaluations of prospective adoptive parents, chooses the adoptive parents and sees the process through the probate court; typically, birth parents do not know where a child was placed, nor do adoptive families know where a child came from. That model evidently was originally meant to guard against baby brokering and exploitation of children, plus protect the privacy of the parties and assure the integration of the adoptee into the adoptive family. However, it has increasingly been viewed as antiquated and unnecessarily restrictive.

While severing all ties with a biological family was once viewed as an element in affirming the adoptee's membership in the adoptive family, more recently openness in adoption has been viewed as an emotionally healthy alternative, allowing birth families, adoptees, and adoptive families to prevent or answer emotionally-charged questions raised by an adoption--such as why the child was put up for adoption, and what later became of him or her. Open adoptions also make it easier for adoptive parents to obtain medically important information about a birth family.

Michigan law does not forbid an adoption from being conducted through an agency with a degree of openness, but neither does it provide any assurances that birth and biological parents will be able to shape an adoption with the degree of openness that is mutually agreeable, whether that be complete mutual anonymity, continuing post-adoption relationships, or something in between. More to the point, many birth parents are reluctant simply to hand over their children to an adoption agency, with no guarantee that their preferences in adoptive parents will be honored. Adoptive parents are frustrated by long waiting periods and seemingly arbitrary agency criteria--criteria that may have more to do with limiting an agency's pool of applicants than determining parental fitness.

The result is that birth parents and adoptive parents are leaving Michigan to carry out direct placement adoptions in other states, where birth parents may exercise greater control over the placement of their children, and adoptive parents may have greater access to adoption. It has been proposed that Michigan, too, allow direct placement adoptions accompanied by certain procedural safeguards, while continuing to allow agency adoptions for those who prefer that alternative.

THE CONTENT OF THE BILL:

The bill would amend the adoption code to authorize direct placement adoptions in which a parent or guardian chooses the adoptive parents, subject to the approval of the probate court. Prior to formal court-approved placement, a parent, guardian, or adoption agency ("child placing agency" in the statute) could temporarily place a child with prospective adoptive parents following a preplacement assessment conducted by an adoption agency. A parent or guardian placing a child in a direct placement adoption would have to be assisted by an "adoption attorney" (someone who met continuing education and registration requirements) or an adoption agency. Adoptive parents would be explicitly allowed to pay for various services and expenses connected with the birth of the child and the adoption, including medical expenses, counseling, and legal representation for the birth parents; compensation for certain adoption services would be forbidden. The bill would take effect six months after it was enacted, but could not take effect unless Senate Bills 299 and 722 through 725

(all of which deal with adoption or foster care) also were enacted. A more detailed explanation follows.

Direct placement. In a direct placement, a parent or guardian would personally select a prospective adoptive parent; the selection could not be delegated. The prospective adoptive parent, an adoption attorney, or an adoption agency would provide certain information about a prospective adoptive parent before the child was placed with the prospective adoptive parent. That information would have to include the information contained in the preplacement assessment required by the bill, and could include additional information desired by the parent or guardian, but would not have to include identifying information. The parent or guardian and the prospective adoptive parent would decide whether to exchange identifying information and whether to meet.

Temporary placement. Temporary placement would be a transfer of custody of a child to a prospective adoptive parent prior to court-approved formal placement. It could be done by a parent or guardian in a direct consent adoption, or by the agency in an agency adoption. Generally, if a child was temporarily placed with a prospective adoptive parent under the bill, the prospective adoptive parent could consent to all medical, psychological, educational, and related services for the child; the parties could, however, make alternative arrangements. Temporary placement would only be allowed if the prospective adoptive parent was a Michigan resident who agreed to reside in Michigan with the child at least until a change of residence was approved by the court after formal placement occurred.

That pledge would be part of a written document in which the prospective adoptive parent attested to understanding that temporary placement would not become a formal placement until the parents consented or released their parental rights and the court terminated parental rights and approved the placement. The prospective adoptive parent also would have to attest to understanding that he or she would have to relinquish custody within 24 hours after being served with a court order requiring the return of the child to the parent or guardian. Within 30 days of a temporary placement by a parent or guardian, the prospective adoptive parent would have to report to the court that either a petition for adoption had been filed, or the child had been returned to a parent or other person having legal custody. When an agency made a temporary placement, it similarly would have to report to the court.

The parent, guardian, or adoption agency would have to sign a statement documenting the transfer of custody and confirming that the person making the transfer had read a favorable preplacement assessment of the prospective adoptive parent completed or updated within the past year. If an adoption agency was making the placement, the statement would have to verify that the parent or guardian had been given an opportunity to review the preplacement assessment. Even if only one parent was making the placement, the document would have to include the names and addresses of both parents, including the name and address of the putative father, if known, of a child born out of wedlock. The document also would have to note that the parent or guardian retained full parental rights and that the temporary placement could be revoked by petitioning the probate court.

Within 48 hours after custody was transferred under a temporary placement, the adoption attorney or agency would have to report the transfer to the court, providing details and documents as prescribed by the bill. If, 45 days after custody had been transferred, the court had received no report that an adoption petition had been filed or that custody had been returned to the parent or guardian, the probate register immediately would investigate. If neither disposition had occurred, the register immediately would notify the prosecutor, who immediately would file for a custody hearing in the probate court.

Preplacement assessments. An individual seeking to adopt under direct placement could request at any time that an adoption agency prepare a preplacement assessment. He or she could have more than one preplacement assessment, and could request that an assessment in progress not be completed. A preplacement assessment could only be conducted by an adoption agency. In an agency adoption, the agency could require a prospective adoptive parent to be assessed by its employee, even if the individual had already received a favorable assessment from someone else. At the discretion of the court, a preplacement assessment could be used to meet the statutory requirement for investigation of a prospective adoptive parent who has filed an adoption petition.

Preplacement assessments would have to be based on personal interviews and visits at the homes of prospective adoptive parents, and would have to cover various aspects of the person being evaluated, including the following: age, ethnicity, and religious preference; marital and family status, including the presence of any other children or adults in the household; physical and mental health, including any history of addiction to alcohol or drugs; educational and employment history, and any special skills or interests; financial status; reason for wanting to adopt; any previous requests for assessments or involvements in adoptive placements; whether the person had ever been the subject of a domestic abuse or child neglect proceeding, and the outcome of that proceeding; whether the person had ever been convicted of a crime; whether the person had located a parent interested in placing his or her child with the person, together with a brief description of the parent and the child; and, anything that raised a specific concern about the person's suitability as an adoptive parent, including the quality of the home environment, the functioning of other children in the household, and any aspect of the individual's circumstances that may be relevant to a determination that the person was not suitable. (A "specific concern" in this last context would be one that suggested that placement of any child or a particular child in the home would pose a risk of physical or psychological harm to the child.) A preplacement assessment also would have to include a criminal history check, and a list of sources on which the assessment was based.

An unfavorable assessment or one that differed from the conclusion of an earlier assessment would have to include a justification of its conclusions. A person could ask the court to review an unfavorable assessment, and if the court found by clear and convincing evidence that the assessment's conclusion of unsuitability was not justified, the person with legal custody could place the child with the individual. If the court determined that the unfavorable assessment was justified, it would order that the child not be placed with the individual.

Foster parent adoptions. If the prospective adoptive parents had been the child's foster parents for at least 12 months, the court could waive the full investigation otherwise required by law. The foster family study, with information added as necessary to update or supplement it, could suffice, providing it had been completed or updated within the 12 months before the petition for adoption was filed.

Return to parent. A parent or guardian who wanted to regain custody of a child in temporary placement would petition the probate court to revoke the temporary placement and return the child. The adoption attorney or child placing agency involved in the temporary placement would have to assist the parent or guardian in filing the petition, if requested to do so by the parent or guardian.

Upon receiving such a petition, the court would immediately issue an ex parte order directing the prospective adoptive parent to return the child within 24 hours after receiving the order, unless the court opted to proceed under provisions authorizing appointment of an attorney or referral to the DSS for the filing of a petition under the abuse/neglect provisions of the juvenile code.

Custody hearings. The bill would provide for custody hearings in the probate court in temporary placement situations where a prospective adoptive parent refused to return a child to the parent, guardian, or adoption agency; where a prospective adoptive parent was either unwilling or unable to proceed with the adoption; where an adoption agency was unable to proceed because the parent or guardian was unavailable or unwilling to execute a release; or, as described above, where the prosecutor became involved because the 45-day deadline for action had not been met.

The court would have a number of alternatives, depending on circumstances: it could order the child returned to the parent, guardian, or adoption agency; it could appoint an attorney to represent the child or refer the matter to the Department of Social Services (DSS) for proceedings under the neglect provisions of the juvenile code; it could appoint a guardian as requested by a prospective adoptive parent or another individual interested in the welfare of the child; or it could make a temporary disposition under the juvenile code. The court could appoint a guardian ad litem for the child or a minor parent of the child.

Releases and consents. Under current law, when a child is given up for adoption through an adoption agency or the DSS, the parent or guardian executes a release; a consent is a consent to adoption by a specific individual. Parents may not at present execute consents except for in-family adoptions; in conjunction with providing for direct consent adoptions, the bill would delete this prohibition.

The probate court would have to hold a consent hearing within seven days after it was requested. A release or consent by a parent or guardian would have to be accompanied by a verified statement that confirmed all of the following: that the parent or guardian had received a list of support groups (and, if applicable, other specified information from the adoption agency); that the parent or guardian understands that he or she would receive counseling and whether he or she has received any; that the parent or guardian has not received or been promised anything of value except for lawful payments itemized on a schedule filed with the court; that the validity and finality of the release or consent is not affected by any separate agreement between the parent or guardian and the agency or prospective adoptive parent; that the parent or guardian understands that it serves the welfare of the child to keep the agency, DSS, or court informed of any health problems that the parent develops which could affect the child, and to keep his or her address current with the agency so that future inquiries on medical or social history could be answered.

Payment of expenses. The law now requires a prospective adoptive parent to notify the court of any consideration paid or thing of value exchanged in connection with the adoption, and the court may approve or disapprove fees and expenses. The bill would instead specify a number of expenses that the adoptive parent could pay. The sums paid would continue to be subject to court approval. A payment authorized by the bill could not be made contingent on a placement, release, or consent to adoption, nor on cooperation in the completion of the adoption. If an anticipated adoption was not completed, the person who had made the payments could not be reimbursed for them. Various documents accounting for and confirming any payments would have to be filed with the court at least seven days before formal court-approved placement of the child, and they would have to be updated at least 21 days before entry of the final order of adoption. When direct placement using an adoption attorney was involved, these documents would have to include the attorney's verified statement that he or she met the bill's qualification requirements for adoption attorneys, and that he or she did not request or receive any compensation for activities for which compensation was forbidden.

Compensation would be specifically forbidden for: assisting a parent or guardian in evaluating a potential adoptive parent; assisting a potential adoptive parent in evaluating a parent or guardian or adoptee; referring a prospective adoptive parent to a parent or guardian of a child for purposes of adoption; and referring a parent or guardian to a prospective adoptive parent for purposes of adoption.

Specifically-allowed expenses would be: agency services; medical expenses incurred in connection with the birth or any illness of the adoptee; counseling for a parent, guardian, or the adoptee; living expenses for the mother before the birth of the child and for up to six weeks after the birth; expenses incurred in compiling required information on an adoptee and his or her biological family; court costs and legal fees, including legal services performed for a biological parent or guardian; travel expenses or other expenses necessitated by the adoption; and preparation of a preplacement assessment and any court-ordered adoption investigation.

A first-time violation of the provisions on payment of expenses would be a misdemeanor punishable by up to 90 days in jail, a fine of up to $100, or both. A subsequent violation would be a felony punishable by imprisonment for up to four years, a fine of up to $2,000, or both. The court could enjoin a violator from further violations.

Supervisory period. In a direct placement, the child would be supervised during the period before adoption finalization by the adoption agency that investigated the placement with the prospective adoptive parents, or, in the court's discretion, by another adoption agency.

Agency roles. In an agency placement, the adoption agency or the DSS could involve the parent or guardian of the child in the selection of an adoptive parent, and could facilitate the exchange of identifying information or meetings between a biological parent and an adoptive parent (some agencies do this now). In addition, an adoption agency could assist a parent or guardian in making a direct placement. A parent or guardian could authorize an adoption agency to make a temporary placement under the bill. The authorization would have to be in writing and witnessed, and if the parent of the child being placed was an unemancipated minor, the document would also have to be signed by the parent or guardian of that minor parent.

Adoption solicitation, placement. Only a prospective adoptive parent could solicit biological parents or guardians of potential adoptees for the purposes of adoption. Only a biological parent, a guardian, the court, the DSS, or an adoption agency with authority to place a child could solicit adoptive parents. ("Solicit" here would mean a communication directed to a specific person; it would not include public communications not aimed at specific individuals.) Only a custodial parent, a guardian, an adoption agency, the DSS, or the court could place a child for adoption.

A first-time violation of these solicitation and placement restrictions would be a misdemeanor punishable by up to 90 days in jail, a fine of up to $100, or both. A subsequent violation would be a felony punishable by imprisonment for up to four years, a fine of up to $2,000, or both. The court could enjoin a violator from further violations.

Adoption attorneys/legal representation. To be an adoption attorney (in other words, to represent a party in a direct placement adoption), an attorney would have to: have completed at least 12 hours of continuing education in Michigan within the past five years in courses integrating the legal and social aspects of adoption; maintain up-to-date files of health professionals and agencies to whom referrals for counseling could be made; and register with the children's ombudsman to be created by Senate Bill 723.

An attorney or law firm would be prohibited from providing legal services to both a parent or guardian and a prospective adoptive parent. In an adoption -- whether direct placement or agency placement -- where the biological parent was a minor, the adoption attorney or agency providing services would have to provide the minor parent with an opportunity to discuss with an attorney not associated with the adoption attorney or agency the legal ramifications of consent, release, and termination of parental rights. That opportunity would have to be provided prior to the execution of a consent or release or the termination of parental rights.

Public information forms. The bill would require the probate court register to forward to the DSS the public information forms completed and filed under House Bill 4201. Those forms, developed by the DSS and to be completed by the adoption facilitator (whether attorney or agency), would provide specific information about facilitator fees and services, along with confidential and nonconfidential information regarding each adoption.

MCL 710.22 et al.

HOUSE COMMITTEE ACTION:

The House Judiciary Committee adopted a substitute bill that differed from the Senate-passed version in a number of respects, including its qualifications for adoption attorneys (the Senate version required previous adoption experience), and its list of services for which compensation is disallowed (the Senate version included payments for physical and legal transfer of a child).

FISCAL IMPLICATIONS:

The DSS reports that although most of the bill would not directly affect the department, the department has not yet completed its fiscal analysis. (5-23-94)

ARGUMENTS:

For:

By providing for direct consent adoptions, the bill would ensure that birth parents, if they wish it, have the opportunity to select adoptive parents for their children, or to participate in the selection process to the degree that they prefer. Various safeguards would help to ensure that birth parents understood the legal and emotional consequences of giving children up for adoption, that adoptive parents were capable and prepared to accept the adoptee into their home, and that babies were not treated as an item of commerce. There would be an exhaustive home study conducted by a licensed adoption agency prior to a child being placed in the home of prospective adoptive parents; birth and adoptive parents would have to have separate and independent legal counsel; reasonable counseling and legal expenses for birth parents would reimbursable by adoptive parents; and all expenses paid by the adoptive parents would be subject to requirements for detailed accounting and court approval. The bills would allow for adoptions that were emotionally healthier for all concerned, and put an end to unnecessary burdens of having to go to other states for adoptions.

Against:

Although providing for open or direct consent adoptions is not by itself objectionable, allowing the parties to bypass adoption agencies is. In allowing parties to an adoption to work with private attorneys instead of nonprofit adoption agencies, the bill would do a disservice to birth parents, adoptive parents, and children. Agencies not only have expertise in making good placements, but they offer continuing services such as counseling and advice, and they have a long-term commitment to making an adoption a success. Agencies further operate within a system that requires them to be licensed, monitored, and regulated, including in the matter of fees.

With attorneys, on the other hand, there is a risk that pecuniary interests will conflict with the best interests of the child, and there is no continuity of services; neither would there be the basic protections offered by the program under which adoption agencies are licensed. Allowing attorneys to be adoption facilitators would open the process to fresh abuses and new problems. Rather than risk the consequences of attorney-assisted adoptions, it would be better to keep the system of agency-assisted adoptions and address concerns about some agencies' procedures through pursuing more selective reforms. After all, many, if not most, agencies in Michigan are providing adoptions where the birth parent(s) select the adoptive parent(s). In its attempt to address problems with a few agencies, the bill would give rise to a system where adoption would no longer be only a nonprofit service where the paramount concern is the best interests of the child; adoption instead would become an industry where parents with the financial resources to do so could retain an attorney and set out to acquire a baby.

Response:

There are no requirements for agencies to provide counseling and post-adoptive services now, and the quality of services provided vary widely, as does the quality in providing placement services. The bill at least would require parties to be informed of their options regarding counseling and allow adoptive parents to pay for birth parents' counseling, and a companion bill, Senate Bill 722, would require post-adoption services or referrals to be provided by all adoption facilitators, attorneys and agencies alike.

While it is likely that there would be the occasional "bad apple" handling attorney-assisted adoptions, just as there is with agency adoptions, stories abound of adoptions that were botched or nearly so because of a lack of legal expertise. The complexity and importance of adoption proceedings are such that all parties should have legal representation; one should not leave the matter to adoption agencies. Perhaps most importantly, the bill is necessary because with the current system parties to an adoption have no guarantees that an adoption agency will honor promises to place a child where requested by the birth mother.

Against:

The legislation would not adequately safeguard against abuses whereby babies in effect go to the highest bidder. Granted, a birth mother's expenses that were reimbursed by adoptive parents would have to be approved by the court, but in allowing so many expenses to be paid, the bills could pave the way for prospective adoptive parents who were more affluent than their competitors to buy a birth mother's favor. The bill's potential to engender baby selling would be increased by its woefully inadequate misdemeanor penalties for paying disallowed expenses or compensation for services: 90 days in jail and a $100 fine for a first offense. These penalties would not discourage determined prospective parents, who frequently are willing to pay tens of thousands of dollars to get a baby.

Against:

The bill ignores the rights of fathers. For one thing, there is no notice provided to the father at the time of temporary placement; although some efforts are made to notify him when the adoption petition is filed, this could be 45 days later. Further, a child could remain in temporary placement while the father's petition to revoke placement is pending. And, the procedures do not demand that due diligence be exercised to ascertain the name and address of a putative father. With the bill, mothers will leave other states to consummate Michigan adoptions without fathers' knowledge. The bill would perpetuate statutory and societal bias against fathers, implicitly suggesting that a child is better off with affluent strangers than his or her natural father.

Against:

The bill would not sufficiently protect the rights of birth parents. It extends excessive authority to guardians to conduct direct placement adoptions, and it does not specify some minimum period of time after birth during which a mother cannot place a child with prospective adoptive parents or

otherwise start the process of losing parental rights. Worse, procedures fail to ensure that a mother is notified of the potential consequences of her decision to yield up her child under "temporary" placement. Should she revoke the placement and the prospective adoptive parents refuse to return the child, the court could opt to refer the matter to the DSS for filing of an abuse/neglect petition. A mother's desire to have her child back could lead to foster care. Also, if the mother for some reason fails to file a petition to revoke the temporary placement, but also is unwilling to execute a release, the agency involved could petition the probate court for disposition, which could include proceedings under the abuse/neglect provisions of the probate code. The bill would establish another layer of litigation under which mothers would have to bear the costs of exercising their rights.

Against:

The bill's provisions for counseling are flawed. Counseling for birth parents and adoptive parents alike is widely viewed as extremely important in ensuring fairness and success in adoptions. The bill, however, merely implies that counseling must be offered by requiring that in a release or consent a parent or guardian sign a statement that includes confirmation that he or she "shall receive counseling." This is inadequate: it does not directly require that counseling be offered, it sets no standards for length or nature of counseling, and it ignores the need for counseling for adoptive family members. Further, it implies that a birth parent or guardian must accept counseling whether he or she wants it or not; there at least should be some provision for waiver of counseling.

Against:

The bill's focus is on making it easier for affluent couples to adopt the babies of their choice, and on making it easier for birth mothers to hand their babies over without the protections offered by the agency system. The bill thus could endanger federal foster care and foster care prevention funding that requires the state to make reasonable efforts to unify families.

For:

The importance of avoiding foster care and multiple placements for a child is widely recognized; uprooting children may engender a number of emotional and psychological problems for them and their adoptive families. However, prior to an adoption order, a child can be placed only in a licensed facility; thus, to avoid multiple placements for a child to be adopted, some adoption agencies have prospective adoptive parents get licensed as foster care homes, even though the placement is at the risk of a birth parent deciding against adoption and demanding the return of the child (reports are that such a change of heart rarely occurs, however). Through its provisions for temporary placement, the legislation would eliminate the unnecessary burden of foster care licensure for prospective adoptive parents bringing a child into their home, providing the family received a favorable preplacement assessment; additional safeguards would ensure the family understood that the birth parent could yet retrieve the child, and require that the placement was followed by either a petition to adopt or a return of the child to the parent or guardian.

Against:

The bill would require preplacement assessments to be done by adoption agencies. This would be unduly restrictive, as there are many in the state with the necessary expertise to conduct home studies who may not at present be employed by an adoption agency. It would be better to do as earlier proposals would have done and provide for certification of adoption specialists who would thereby qualify to do home studies.

Response:

The requisite expertise for this critical element in the decision to place a child lies with adoption agencies.

Against:

As with discussions regarding third-party custody legislation, many may find that discussions of the bill tend to miss the point. Arguments tend to center on the relative rights of birth parents and prospective adoptive parents, of birth mothers and putative fathers. Some may feel that the proper focus is the rights of the child; to paraphrase at least one jurist, adoption is for the child, not for the parents.

POSITIONS:

The Family Tree/Parents for Private Adoption supports the bill. (5-23-94)

Right to Life of Michigan supports the bill. (5-20-94)

The Coalition of Child Placing Agencies supports allowing direct placement adoptions under

protections of agency licensure, but does not support allowing adoptions to take place outside of regulatory protections provided by licensure. (5-24-94)

The Michigan Foster and Adoptive Parent Association supports the concept of the bill, but has not yet reviewed the substitute. (5-23-94)

The Department of Social Services has no position at this time. (5-23-94)

The Michigan Federation of Private Child and Family Agencies opposes a two-track system and supports open and direct consent adoption only within licensed nonprofit child placing agencies where accountability, continuity of care, and a full range of services can be maintained. The federation would support amendments to significantly reduce the payment of birth parent expenses by potential adoptive parents. (5-25-94)

Fathers for Equal Rights opposes the bill. (5-20-94)

Michigan Legal Services opposes the bill. (5-23-94)