



WEST VIRGINIA ADOPTION LAW OUTLINE

2016

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1. Things to Know to Start

- a. Who can Adopt?
 - i. **W. Va. Code §48-22-201**
 - ii. People who can adopt:
 1. Any person not married
 2. Any person with his or her spouse's consent
 3. Any husband and wife jointly
 - iii. Adopting parties must petition the Circuit Court of the county wherein the person resides
- b. Does the Spouse have to agree?
 - i. Yes-both spouses must agree.
 - ii. **W. Va. Code §48-22-201**
 1. Non step-parent adoption: one spouse can adopt, but the other spouse must give consent to the adoption if that spouse doesn't join in the petition.
 - iii. **W. Va. Code §48-22-301(b)(3)**
 1. Step parent adoption: the spouse of the step parent (child's birth or legal parent) must assent to the adoption by joining as a party to the petition for adoption.
- c. What if the father is unknown?
 - i. **W. Va. Code §48-22-117, 502**
 1. An "unknown father" is a biological father whose identity the biological mother swears is unknown to her before the adoption.
 2. If the biological father, or potential biological father, is unknown, a "Notarized Affidavit of Unknown Father" must be filed with the court. This motion will be sealed.
 3. Sixty days before the final hearing, the court must determine whether the biological father is known or unknown.
 4. If the father is determined unknown by the court, the court may decide that notice needs to be published. A Motion to

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Dispense with Publication can be filed and approved by the court if publication is not likely to lead to the potential biological father receiving notice.

- d. How long does the child have to live with the adoptive parent(s)?
 - i. **W. Va. Code §48-22-501**
 1. The Final Hearing cannot be held until child has resided with adoptive parent(s) for six consecutive months immediately prior to adoption.
- e. Does the child have to have been born in West Virginia?
 - i. No, it doesn't matter where the child was born.
 - ii. Adoptive parents must be West Virginia residents at the time the Adoption Petition is filed.
 - iii. If child was born outside of West Virginia, contact the birth state's Vital Statistics Department for documents required to change the birth certificate.
 - iv. Contact information for each state's Vital Statistics Department:
 1. <http://www.cdc.gov/nchs/w2w/index.htm>
- f. Does the child have to agree to the adoption?
 - i. **W. Va. Code §48-22-301(f)**
 1. Yes, if the child is twelve years old or older.
 2. Child must consent to the adoption in front of the judge.
 - a. Judge makes sure that:
 - i. The child understands the nature and significance of consent, and
 - ii. The consent is freely and voluntarily given.
 3. This can be waived in extraordinary cases by the court
 4. Court still must determine that the adoption is in the child's best interest.
 - ii. Children under twelve can still provide testimony as to their desire to be adopted.

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- g. Is there a waiting period before an adoption can be granted?
 - i. **W. Va. Code §48-22-501**
 - 1. Yes, there is a “waiting period.”
 - 2. The adoption hearing may be held no sooner than:
 - a. Forty-five days after the filing of the Adoption Petition, and
 - b. Only after the child has lived with the adoptive parent(s) for a period of six consecutive months.
- h. What are the legal effects of an adoption?
 - i. **W. Va. Code §48-22-703**
 - ii. The adoptive parent(s) are legally the child’s parents.
 - iii. Once the adoption is final, the child is treated as if he/she was born to the adoptive parents during marriage.
 - iv. All legal rights and obligations of parents other than the adoptive parents are terminated.
 - v. Not all obligations to pay past child support are eliminated.
 - vi. If the adoptive parents divorce, custody of the child will be the same as in any other divorce.
 - 1. Child support will also be determined.
 - vii. The minor child will have the right to inherit from the adoptive parent(s).

2. Residency

- a. **W. Va. Code §48-22-201**
 - i. Jurisdiction—The adoptive parent(s) must be residents of West Virginia.
 - ii. Venue—Adoption Petition must be filed in the Circuit Court of the County in which the adoptive parent(s) resides.

3. Basis for Adoption

- a. Consent
 - i. **W. Va. Code §48-22-301-305**
 - 1. Whose consent is required (and exemptions)

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- a. Consent Required:
 - i. The parents or surviving parent of a marital child.
 - ii. The outsider father of a marital child who has been adjudicated to be the father of the child or who has filed a paternity action that is pending at the time of the adoption filing. (**W. Va. Code §48-22-113**)
 - iii. The birth mother of a non-marital child
 - iv. The determined father (**W. Va. Code §48-22-109**)
 - b. Exemptions: (consent not required)
 - i. Any person whose parental rights have been terminated (**W. Va. Code §3-49**)
 - ii. Any person whom the court determines has abandoned the child (**W. Va. Code §48-22-306**)
 - iii. In a stepparent adoption, the birth parent who is married to the petitioning adoptive parent. The birth parent/spouse must assent to the adoption by joining in the petition.
2. Revocation of Consent
- a. **W. Va. Code §48-22-305**
 - i. Consent may only be revoked if:
 - 1. The person who executed consent and the adoptive parent(s) agrees to its revocation prior to the entry of an adoption order.
 - 2. The person who executed the consent proves by clear and convincing evidence-in an action within six months of the date of the execution of the consent or prior to an adoption order is final (whichever is later)- that the consent was obtained by fraud or duress.
 - 3. The person who executed consent proves by a preponderance of the evidence, prior to the entry

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of a final order that a condition allowing revocation expressed in the consent has occurred.

4. The person who executed the consent proves by clear and convincing evidence, prior to entry of an adoption order, that the consent does not comply with the requirements.

3. When and how to execute consent

a. **W.Va. Code §48-22-302**

- i. Consent cannot be executed until seventy-two hours after the birth of the child.
- ii. The Consent must be signed and acknowledge in the presence of:
 1. A judge of a court of record;
 2. A person whom a judge designated to take consents;
 3. A notary public;
 4. A commissioned officer on active duty in the military service of the United States, if the person executing the consent is in military service;
 5. An officer of the foreign service to a consular officer of the United States in another country, if the person executing the consent is in that country.

4. Contents of Consent

a. **W. Va. Code §48-22-303**

- b. The elements necessary for consent can be found in the above statute.
- c. The consent must be written in plain English (or language the person giving consent understands).
- d. The consent must be notarized.

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- e. There is a LAWV Hot Docs consent form that can be printed and provided to a person who is consenting to the adoption.
 - f. The person executing the consent must receive a copy of the consent.
 - g. Consent can be conditioned on another person providing consent. If this is the case, the consent must specifically state this condition.
 - h. The consenting person must be advised of the availability of counseling and made aware that the attorney for the adoptive parent(s) cannot provide advice regarding the consent.
- b. Abandonment
- i. Abandonment criteria:
 - 1. **W. Va. Code §48-22-306**
 - a. The Court will presume a parent has abandoned a child when:
 - i. The parent goes more than six months without visiting or contacting the child AND
 - ii. Fails to financially help or support the child within that parent's means
 - 1. The six month time period for not visiting the child must be the uninterrupted six months preceding the filing of the petition.
 - b. The abandoning parent has the burden of proof to rebut the presumption.
 - ii. West Virginia Case Law on Abandonment
 - 1. **In re Adoption of C.R. (233 W.Va. 385, 2014)**
 - a. The involuntary payment of child support through The Bureau for Child Support Enforcement (BCSE) wage

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withholding was not sufficient to overcome the presumption of abandonment.

iii. Pleading Abandonment

1. **W. Va. Code §48-22-306**

- a. Lay out the details constituting abandonment of the minor child.
- b. Include when the parent last made contact, any financial support provided, including when and amount.
- c. State why the adoption is in the child's best interest in light of the abandonment.
- d. Try to counter any arguments the parent(s) might have as to why they have not abandoned the child.

c. Death

- i. If either or both of the child's biological parents are deceased, you will need to obtain a death certificate from the jurisdiction in which the parent died.
 1. If you are unable to obtain a death certificate, some other proof of death will need to be filed with the Adoption Petition.
 - a. An example could be an obituary, an affidavit from family, living birth parent, official at cemetery where person is buried, etc.
 2. The court prefers a death certificate, so if you cannot obtain one, be sure to explain in the petition as much information about the parent's death as possible.
- ii. Under **W. Va. Code §48-22-601(a)(5)**, Notice of Adoption must be served on a grandparent of the child if the grandparent's child is a deceased parent of the minor child being adopted when the minor child's parent did not execute a consent or have parental rights terminated prior to their death.
 1. If the grandparent of the deceased parent cannot be located or is also deceased, the petition needs give as much detail as is

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known as to why service cannot or should not be served on the grandparent(s).

2. A judge still may determine that an attempt to serve grandparent(s) with notice be made either in person or by publication, even when whereabouts are unknown.

d. Unfit

- i. If a parent's parental rights have already been terminated by a court, copies of the termination should be included with the Adoption Petition. Case information (county, state, and case number) should be included.
- ii. A person whose parental rights have been terminated are not entitled to notice of the adoption and are not required to give consent to the adoption.
- iii. If the parent is "unfit" but has not had their parental rights terminated by a court, petitioner can still argue that the parent's rights should be terminated because the parent is unfit. Facts must be presented in the petition and at the hearing as to the basis that the biological parent's rights should be terminated.

4. Adoption Petition

a. **W. Va. Code §48-22-502**

- i. Information required to be in the Adoption Petition:
 1. The name, age, and residency of the petitioner(s).
 2. The name, age, and residency of the child.
 3. The name the child shall be known by after the adoption.
 4. Whether the child is possessed of property and a description of the property.
 5. Identity of anyone entitled to parental rights.
 6. The basis for termination of parental rights; if any.
 7. Whether the petitioner is at least fifteen years older than the child.

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8. Whether the child is an Indian Child under **25 U.S.C. §1901**, et seq.
- ii. Additional information that is beneficial to include in the petition:
 1. Where the child was born.
 2. How long the child has resided with the adoptive parent(s).
 3. If the child is twelve years old or older; whether the child consents to the adoption.
 4. The fact that petitioner is of good moral character and is able to properly maintain and educate the minor child.
 5. Any other relevant facts that indicate that the adoption is in the best interest of the child.

5. Additional Documents Needed to File for Adoption

- a. Civil Case Information Sheet
 - i. The Civil Case Information Sheet is a West Virginia Supreme Court form that is required for all cases filed.
 - ii. This form informs the court of the name and address of the parties, type of case, whether special accommodations are needed, counsel's information, type of service and time to answer.
 - iii. Form can be found on the court's website or LAWV HotDoc forms.
- b. Order Filing Petition and Setting Hearing
 - i. Order that sets a date and time for the adoption hearing and appoints a person/entity to conduct a home study (unless home study has been waived by the judge).
 - ii. Sample of form can be found in the training module and as a HotDoc form.
- c. Notice of adoption Proceeding
 - i. **W. Va. Code §48-22-601** directs who shall receive notice of the adoption proceedings.
 1. The following people must be served with notice of the adoption, unless notice has been waived, within twenty days after an adoption petition is filed.

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2. Any person whose consent to the adoption is required under **W. Va. Code §48-22-301**. Service does not need to be served on a person whose parental rights or guardianship status has been terminated.
 3. Any person that petitioner(s) knows is claiming to be the father of the child and whose paternity to the child has been established pursuant to **W. Va. Code §48-24-301**.
 4. Any person other than petitioner(s) who has legal or physical custody of the child or who has visitation rights with the child under an existing court order issued by a court in any state.
 5. The spouse of the petitioner if the spouse has not joined in the petition.
 6. If a biological parent is deceased, the parents of the deceased parent (the child's grandparents) if the deceased parent did not consent to the adoption or have their parental rights terminated prior to their death.
- ii. Certificate of Service is required for each person who receives notice.
- d. Child's Birth Certificate
- i. A certified birth certificate needs to be filed with the petition. Some courts may accept a photocopy of the birth certificate, but a certified one may be requested.
 - ii. Birth Certificates for children born in West Virginia can be obtained from the West Virginia Department of Health and Human Services. An application can be found at www.dhhr.org.
 - iii. If the child was born outside of West Virginia, contact the birth state's Vital Statistics Department.
 1. <http://www.cdc.gov/nchs/w2w/index.htm>
 - iv. There is typically a cost involved with obtaining a certified birth certificate.

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- v. Once the adoption is final and the state in which the child was born receives the order to change the child's birth certificate, the child's original birth certificate will be sealed and only available with a court order to unseal the record.
 - vi. Some parents may want to keep an original certified birth certificate for their child with the names of the birth parents, so be sure the client is aware that they need to obtain or keep one because they most likely will not be able to get one in the future without good cause.
- e. Consent Forms(s)
- i. If consent to the adoption pursuant to **W. Va. Code §48-22-301** was required and received, a copy of the notarized consent must accompany the Adoption Petition when the case is filed.
 - 1. The following persons are required to consent:
 - a. The parents or surviving parent of a marital child.
 - b. The outsider father of a marital child who has been adjudicated to be the father of the child or who has filed a paternity action which is pending at the time of the adoption filing. (**W. Va. Code §48-22-113**)
 - c. The birth mother of a non-marital child
 - d. The determined father (**W. Va. Code §48-22-109**)
 - 2. Consent is not required of the following (Exceptions):
 - a. Any person whose parental rights have been terminated (**W. Va. Code §3-49**)
 - b. Any person whom the court determines has abandoned the child (**W. Va. Code §48-22-306**)
 - c. In a step parent adoption, the birth parent who is married to the petitioning adoptive parent. The birth parent/spouse must assent to the adoption by joining in the petition.

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- f. Guardianship/Custody Orders
 - i. If the adoptive parent(s) have court ordered guardianship or custody of the child being adopted, a copy of all orders needs to be included with the petition.
 - ii. The Adoption Petition should also list the county and case number for any case that involved the guardianship or custody of the minor child, whether or not guardianship/custody was granted.
- g. Death Certificate
 - i. If either or both of the child's biological parents are deceased, you will need to obtain a certified death certificate from the jurisdiction in which the parent died.
 - ii. Contact the Vital Statistics Department in the state in which the death occurred for information on how to receive a certified death certificate. There is typically a cost to obtain a death certificate.
 - iii. If you are unable to obtain a death certificate, some other proof of death will need to be filed with the Adoption Petition. An example could be an obituary, an affidavit from family, living birth parent, official at cemetery where person is buried, etc.
 - iv. The court prefers a death certificate, so if you cannot obtain one, be sure to explain in the petition as much information about the parent's death as possible.
- h. West Virginia Certificate of Adoption
 - i. The State of West Virginia Certificate of Adoption instructs the court to send information to the West Virginia Vital Statistics Department in order to have the child's birth certificate changed to reflect the name(s) of the adoptive parent(s) and the name of the child following the adoption.
 - ii. This form can be filed at any time before the adoption is final, but it is best to file it with the petition.

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iii. If the child was not born in West Virginia, contact the Vital Statistics Department in the state in which the child was born for information on what documents are required in order to have the birth certificate changed following an adoption. Most states have a form similar to the West Virginia form.

1. <http://www.cdc.gov/nchs/w2w/index.htm>

i. Fee Waiver (or Filing Fee)

i. For income qualifying petitioners, there is a Fee Waiver through the West Virginia Judiciary. If the client qualifies, the form can be completed and submitted with supporting documents (pay stubs, public benefits letter, social security letter, etc.).

ii. The Circuit Clerk's office will determine if the income guidelines are met and will either approve or deny the fee waiver.

iii. If the Fee Waiver is approved, the client will have all filing fees and court costs waived.

1. This does not include any costs that may be associated with publishing notice in a newspaper.

iv. If the Fee Waiver is denied, the regular civil case filing fee will need to be paid at the time of filing.

v. If the Fee Waiver is denied and you believe it should have been granted, a Motion to Review Fee Waiver (found at www.courts.wv.gov) can be submitted and the judge will review the Fee Waiver and either approve or deny the waiver.

vi. If petitioner does not qualify for a fee waiver, the fee for civil cases will need to be paid at the time of filing.

6. Notice

a. **W. Va. Code §48-22-601**

b. Unless notice is waived, the following must be served with notice of the adoption proceeding within twenty days after a petition for adoption is filed.

c. Who must receive notice:

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- i. Any person whose consent to the adoption is required.
 1. But, notice does not need to be served upon a person whose parental relationship to the child or whose guardianship status has been terminated or who has waived service.
 - ii. Any person whom the petitioner knows is claiming to be the father of the child and whose paternity has been established pursuant to **W. Va. Code §48-24-101, et seq.**
 - iii. Any person other than the petitioner who has legal or physical custody of the child or who has visitation rights with the child under an existing court order.
 - iv. The spouse of the petitioner if the spouse has not joined in the petition.
 1. In a step parent adoption, the petitioner's spouse must join in the petition.
 - v. The court will require notice of the proceeding if at any time during the proceeding, the court becomes aware of a person who has revoked consent.
 - vi. The court will require notice of the proceeding if at any time during the proceeding, the court becomes aware of a person who, the court believes can provide relevant information based on a previous relationship with those involved.
- d. How to Serve Notice:
- i. Necessary Information
 1. **W. Va. Code §48-22-602(b)**
 - a. The notice must use plain language.
 - b. Must inform person that their parental rights, if any, may be terminated in the proceeding.
 - c. Inform person they may appear and defend any such rights within the require time after service.

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- d. Must provide that if person fails to timely respond, they may not appear in or receive further notice of the proceedings.
 - ii. Serving the Adoption Petition
 - 1. **West Virginia Rules of Civil Procedure-Rule 4**
 - a. Have a process server or county sheriff deliver it to the individual person;
or
 - b. Mail it by certified mail, restricted delivery, return receipt requested.
 - iii. Notice by Publication
 - 1. **West Virginia Rules of Civil Procedure-Rule 4**
 - a. Publication is a form of constructive service.
 - b. File an Affidavit of Unknown Residency for anyone to whom notice is required that the adoptive parent(s) cannot locate;
 - c. Receive an Order of Publication from the circuit clerk's office;
 - d. Publish the notice in the local newspaper for the recipient's last known residence.
- 7. **Home Study**
 - a. **W. Va. Code §48-22-701(b)**
 - b. A Home Study is typically conducted for adoptive parents.
 - c. When a Home Study is conducted, a report is filed with the court. The report will include:
 - i. A description of the family members, including medical and employment histories.
 - ii. A physical description of the home and surroundings.
 - iii. A description of the adjustment of the child and family.
 - iv. Personal references.

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- v. Other information the court deems necessary-including a criminal background check.
- d. A judge can waive a Home Study, which is often the case when a child has been living with Petitioners for a number of years. A Motion to Waive the Home Study can be filed in such cases.

8. Hearing

- a. **W. Va. Code §48-22-701**
- b. There must be forty-five days between the filing of the Adoption Petition and the Final Adoption Hearing.
 - i. While many adoptions can be completed in one hearing, some adoptions may necessitate multiple hearings depending on the circumstances surrounding the adoption petition.
- c. The adoptive child must have resided with the adoptive parent(s) for six continuous months before the adoption can be final.
- d. Adoption Hearings are closed. Only parties, attorneys, the judge, and court personnel are permitted in the adoption hearing.
 - i. Witnesses can be called as necessary but will not remain in the courtroom.
- e. The Court must determine the following in order to grant the adoption:
 - i. That no person retains parental rights to the child except the petitioner and petitioner's spouse (or joint petitioners).
 - ii. That all provisions of **W. Va. Code §48-22** were complied with.
 - iii. That the Petitioner(s) are fit to adopt the child.
 - iv. That it is in the best interest of the child to order such an adoption.

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9. Timeline

Consent

- Consent to Adoption must be done at least 72 hours after the child's birth.
It is best to get consent before filing for adoption, if possible.
Revocation of consent must comply with **W.Va. Code §48-22-305**.

File for Adoption

- File the adoption petition in the Circuit Court of the county where the adoptive parents reside.
The child must have resided with the adoptive parent(s) for 6 continuous months before the final hearing.
File all documents necessary documents with Adoption Petition.

Home Study

- A home study will take place before the final hearing.
A report will be filed with the court.
Reporter will determine whether adoption is recommended.
A Motion to Waive Home Study can be filed and may be granted in cases where the child has lived with the adoptive parent(s) for a long period of time.

Hearing

- Adoption Hearings are closed and only parties and attorneys are permitted unless a witness is called.
Hearings are typically short (especially in an uncontested adoption) and judges will often sign a prepared order at the end of the hearing.

Post-Hearing

- File is sealed after entry of Final Order
Circuit Clerk's office mails the Certificate of Adoption to Vital Statistics.
New birth certificate will be issued and mailed to the adoptive parents.
New Social Security card can be issued with Order and Birth Certificate.
Child's school will need certified copy of Order and birth certificate.

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10. Case Scenarios

a. Case Scenario #1

- i. Jessica is Sam's biological mother. Jessica divorced Sam's biological father, Vince, six years ago when Sam was five.
- ii. Per the divorce order, Vince has parenting time with Sam every other weekend, rotating holidays, and two weeks in the summer.
- iii. Vince hasn't exercised parenting time with Sam in almost two years. He has called a few times, but during the day when Sam was in school.
- iv. Vince paid child support through the WV Bureau for Child Support enforcement on an irregular basis with the last payment about 3 months ago.
- v. Jessica does not currently know where Vince lives and his last known phone number is disconnected.
- vi. Jessica and Al have been married for four years and Sam has lived with them in West Virginia for four years.
- vii. Jessica and Al are seeking a step parent adoption.

b. Response

- i. Issues:
 1. Jessica will need to join in the petition to assent to a step parent adoption as Sam's biological parent.
 2. Determine whether Sam's name will be changed.
 3. Determine whether Sam will turn twelve before the hearing. If he does he will have to consent to the adoption in front of the judge.
 4. An Affidavit of Unknown Residency and Order to Publish Notice may be required if Vince cannot be located after due diligence is done to attempt to locate him.
 5. Adoption will likely be based on Abandonment even though there has been a recent payment through BCSE because

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voluntary income withholding was not found to be sufficient to overcome the burden of presumed abandonment in *In Re C.R.*

6. Jessica and Al can file a Motion to Waive a Home Study.

While never guaranteed, a court may determine that four years is a significant amount of time.

- a. However, they should be advised of the Home Study process and be prepared for one in case it is not waived.

ii. Documents:

1. Sam's birth certificate
2. Jessica and Vince's Divorce Decree
3. BCSE statement of payments

c. Case Scenario #2

- i. Jessica's sister, Tina, is Sam's biological mother. Tina was killed in a car accident three years ago.
- ii. Sam's biological father, Gary, is an over the road truck driver. Gary executed Guardianship papers giving Jessica and Al legal guardianship over Sam shortly after Tina's death.
- iii. Gary has been sending money occasionally to help take care of Sam but hasn't visited in the past year. Gary maintains a residence in West Virginia that he stays at when in town.
- iv. Jessica wants to adopt Sam.

d. Response

i. Issues:

1. Determine whether Al consents to the adoption. He can either join in the petition as a party, and become Sam's legal father, or consent to his wife adopting Sam.
 - a. Al will need notice of the adoption if he does not join in the petition, even if he consents.
2. Determine whether Jessica (and Al if joining in the Petition) are fifteen years older than Sam. If not, the court will need to

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make a specific finding that the adoption is in the best interest of the child notwithstanding the difference in age.

3. Determine when was the last time Gary visited Sam and provided financial support.
 4. Advise Jessica and Al that a Home Study will likely be conducted.
 5. Tina's parents will need to receive Notice of Proceeding for Adoption as the parents of a deceased parent (grandparent of the child being adopted).
 6. Gary will need Notice; unless he waives notice.
- ii. Theories:
1. Consent-Determine if Gary can be located and if he will consent to the adoption.
 2. Abandonment-Since Gary has not visited Sam and has only occasionally sent money, he may be presumed to have abandoned Sam. An argument as to whether Gary has financially supported Sam within his means will need to be evaluated.
- iii. Documents:
1. Sam's birth certificate
 2. Tina's death certificate
 3. Guardianship papers/court order
 4. Documentation of payments from Gary