

WELFARE (SOCIAL SERVICES): ADOPTION.

Circuit court may not waive order of reference to local director of social services for investigation and report to be undertaken in stepparent adoption proceeding when consent by noncustodial birth parent has not been obtained.

The Honorable Rossie D. Alston Jr.
Judge, Circuit Court of Prince William County
December 27, 2001

You ask whether, pursuant to §§ 63.1-219.48(C) and 63.1-219.49(A) of the *Code of Virginia*, the circuit court has the discretion to waive an order referring a stepparent adoption matter to the local director of social services.

You relate that the custodial natural mother and stepfather of a child have petitioned the court to adopt the child. You relate further that the natural father of the child has been properly served, but has not consented to the adoption. You inquire whether the court must issue an order referring the matter to the local director of social services or whether the court has discretion to waive such a requirement.

"[L]egal adoption in England and in the United States exists only by statute. There is no such thing as a common-law legal adoption."¹ Article 4, Chapter 10.2 of Title 63.1, §§ 63.1-219.48 and 63.1-219.49, contains the statutory requirements for stepparent adoption. Specifically, § 63.1-219.48(C) enumerates five circumstances wherein the court may proceed to order a proposed adoption without referring the matter to the local director of social services, none of which are applicable to the situation you present. Relative to your inquiry, § 63.1-219.48(C) provides:

When the custodial birth parent of a child born to parents who were not married to each other at the time of the child's conception or birth marries and the new spouse of such custodial birth parent desires to adopt such child, on a petition filed by the custodial birth parent and spouse for the adoption and change of name of the child, the court may proceed to order the proposed adoption and change of name without referring the matter to the local director of social services if (i) the noncustodial birth parent consents, under oath, in writing to the adoption

The mechanism in § 63.1-219.48(C) for adoption of a stepchild is more expedient than the detailed procedure set forth in alternate adoption statutes for the general placement of children for adoption by a parent or guardian with the requirement of judicial consent imposed therein.² Pursuant to § 63.1-219.48(C)(i), the natural mother and her spouse may file a petition for stepparent adoption and proceed with the adoption through an order by the court without referring the matter to the local director of social services, so long as the natural father consents to the adoption.³ Consent by the noncustodial birth parent, therefore, is a requisite element for implementing an adoption pursuant to this provision.

Section 63.1-219.49(A) provides that "[f]or adoptions under [Article 4], an investigation and report [by the local director of social services] shall be undertaken only if the court in its discretion determines that there should be an investigation before a final order of adoption is entered." Although this section grants the court the discretion to determine whether an investigation and a report are necessary in stepparent adoption proceedings, it is my opinion that it does not provide to the court the discretion to waive the order of reference in the circumstances you present.

Sections 63.1-219.48(C)(i) and 63.1-219.49(A) were enacted as part of a general recodification of adoption statutes.⁴ This recodification, however, was not intended to change the policy of such statutes; rather, it reflects only a reorganization of the prior law.⁵ Additionally, as a general rule, a statute that is recodified is presumed to be incorporated into the new Code without substantive change, unless it clearly appears from new language that the legislature intended a change.⁶ In this case, however, the General Assembly enacted no change in the language of these statutes. Waiving the order of reference in the situation you present, wherein the consent of the birth father has not been obtained, results in negating the consent requirement of § 63.1-219.48(C)(i). There is no indication from the recodification of these statutes that such a result was intended.

Accordingly, it is my opinion that when consent by the natural father has not been obtained, the circuit court may not waive an order of reference to the local director of social services for an investigation and report to be undertaken in a stepparent adoption proceeding under § 63.1-219.48(C)(i).

¹Shepherd v. Sovereign Camp, 166 Va. 488, 495, 186 S.E. 113, 116 (1936).

²See 1997 Op. Va. Att'y Gen. 215, 215-16 (citing former § 63.1-220.3, now recodified at § 63.1-219.26, §§ 63.1-219.37 to 63.1-219.43).

³1989 Op. Va. Att'y Gen. 350, 351 (citing § 63.1-231, predecessor statute to § 63.1-219.48).

⁴See 2000 Va. Acts ch. 830, at 1747, 1776-77.

⁵See Robert E. Shepherd, Jr., *Legal Issues Involving Children*, 34 U. Rich. L. Rev. 939, 964 (2000).

⁶1991 Op. Va. Att'y Gen. 205, 206-07.

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