

OPINIONS OF THE ATTORNEY GENERAL

VOLUME NO. 42

OPINION NO. 9

ADOPTION - Lawyer or doctor prohibited from acting as intermediary;
ATTORNEYS - Scope of permissible involvement in adoption placement;
SOCIAL AND REHABILITATION SERVICES, DEPARTMENT OF - Lawyer or doctor prohibited from acting as intermediary in adoption placement;
ADMINISTRATIVE RULES OF MONTANA - Section 46.5.405(1)(a);
MONTANA CODE ANNOTATED - Sections 40-8-103(10), 53-4-402, 53-4-407;
OPINIONS OF THE ATTORNEY GENERAL - 36 Op. Att'y Gen. No. 96 (1976).

HELD: No person, including a physician or an attorney, may assist in procuring or selecting an adoptive home for a minor child, even if requested by the child's natural parents, unless licensed as a child-placing agency under section 53-4-402, MCA.

13 March 1987

David M. Lewis, Director
Department of Social and
Rehabilitation Services
Room 301, SRS Building
Helena MT 59620

Dear Mr. Lewis:

You have asked my opinion on the following questions concerning the role of intermediaries in arranging an adoption:

1. May a person collect information on couples desiring to adopt a minor child and give such information to a birth mother wishing to place her child for adoption?
2. May a person notify prospective adoptive parents of the potential availability of

OPINIONS OF THE ATTORNEY GENERAL

a minor child for adoption and make arrangements for the couple to meet the birth mother wishing to place her child for adoption?

3. May a person act as a "middle man" between a prospective adoptive couple and a birth mother wishing to place her minor child for adoption for the purpose of meeting with each of the parties and arranging for an adoption so that the identities of the parties are not revealed to each other?
4. May a person refer a birth mother wishing to place her minor child for adoption to a lawyer representing clients who wish to adopt a child for the purpose of arranging an adoption between the parties?

The questions arise from the practice among certain individuals in Montana, primarily physicians and attorneys, of arranging adoptions. Although our statutes were amended in 1981 to allow parents to independently place children for adoption, the statutory proscriptions against individuals, other than personnel of the Department of Social and Rehabilitation Services or a licensed agency, arranging an adoption remain applicable to all persons who assist a natural mother or potential adoptive parent. Thus, an Attorney General's Opinion issued prior to the 1981 amendments holding that an attorney could not place a child for adoption is still controlling. 36 Op. Att'y Gen. No. 96 at 520 (1976). All of the questions you raise involve some form of assistance by an intermediary in completing an adoption and this conduct is uniformly prohibited.

Section 53-4-402, MCA, sets forth the parameters of who may act as a child-placing or adoption agency:

No person shall act as an agency for procuring or selecting proposed adoptive homes or placing minor children in proposed adoptive homes or soliciting persons to adopt minor children or arranging for persons to adopt minor children who is not the holder of a license secured under the provisions of this part. ...

Violation of this provision is a misdemeanor punishable by a fine not exceeding \$1,000. § 53-4-407, MCA. Administrative rules have also been promulgated that

OPINIONS OF THE ATTORNEY GENERAL

give further definition to what constitutes a child-placing agency for purposes of the licensing requirement. Section 46.5.405(1)(a), ARM, states:

(1) "Child placing agency" (agency) means any corporation, partnership, association, firm, agency, institution or person who places or who arranges for the placement of any child with any family, person, or facility not related by blood or marriage, either for foster care or for adoption.

(a) "To arrange for placement" means to act as an intermediary by assisting a parent, guardian or legal custodian to place or plan to place a child with persons other than persons related to the child. [Emphasis supplied.]

The factual situations that you have presented, including the furnishing of information about potential adoptive parents to natural mothers, fall within this interpretation of arranging for placement since the involved activities directly assist one party with placement of a child with another party.

In Montana Department of Social and Rehabilitation Services v. Angel, 176 Mont. 293, 577 P.2d 1223 (1978), the Supreme Court considered issues very similar to those you have raised. The basic question was whether a medical doctor who referred unwed mothers to couples who desired children was acting as an adoption agency. The doctor in Angel referred the natural mother and adoptive parents to a particular lawyer who then represented the adoptive parents in adoption proceedings in the courts. The practice was enjoined by the district court until a license was obtained. The Supreme Court affirmed that decision and held that the Legislature intended to make the procuring or soliciting of adoptive homes the exclusive function of licensed adoption agencies:

The granting of an exception to the licensing statutes for physicians or attorneys so that they can place children for adoption without a license can only be done by the legislature.

Montana Department of Social and Rehabilitation Services v. Angel, 176 Mont. at 297, 577 P.2d at 1225. While subsequent to Angel the Legislature authorized natural parents, in addition to the Department and licensed child-placing agencies, to place a child for adoption (1981 Mont. Laws, ch. 530, §§ 10, 11), the term "placement for adoption" in the Montana Uniform Adoption

OPINIONS OF THE ATTORNEY GENERAL

Act, §§ 40-8-101 to 128, MCA, has a unique definition for purposes of that statute, and the 1981 amendment to the act cannot be viewed as modifying the licensure requirements in section 53-4-402, MCA. See § 40-8-103(10), MCA ("'[p]lacement for adoption' means the transfer of physical custody of a child with respect to whom all parental rights have been terminated and who is otherwise legally free for adoption to a person who intends to adopt the child").

Lastly, this opinion should not be read as precluding physicians or attorneys from discharging their traditional medical and legal functions with respect to natural or possible adoptive parents. A physician may, for example, perform appropriate medical or psychological tests and testify concerning matters within his field of expertise relevant to a particular adoption proceeding. An attorney may similarly advise a party concerning adoption requirements and represent that party in adoption proceedings. Section 53-4-402, MCA, does not prohibit performance of these customary duties but it does preclude any person, including a physician or attorney, from procuring or soliciting adoptive homes for minor children. As indicated by Angel, the distinction between proper and improper conduct is clear.

THEREFORE, IT IS MY OPINION:

No person, including a physician or an attorney, may assist in procuring or selecting an adoptive home for a minor child, even if requested by the child's natural parents, unless licensed as a child-placing agency under section 53-4-402, MCA.

Very truly yours,

MIKE GREELY
Attorney General