

MAINE STATE LEGISLATURE

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Department of Human Services

STATE HOUSE, AUGUSTA, MAINE

Date August 1, 1978

Edgar Merrill, Interstate and Education Specialist

From Carmen L. Coulombe, Assistant Attorney General *CLC*

Subject Holt Adoption Program, Inc - Indian children

In a letter dated January 12, 1978, Holt Adoption Program, Inc. informed you that they were planning to have courts in India appoint American couples and an agent of Holt living in India as joint guardians of an Indian child to be placed with the American couples. The prospective parents would sign an agreement with Holt promising to adopt the Indian child and giving Holt the authority to supervise a six month placement and consent to the adoption.

The Holt agency then posed the following questions in connection with this plan:

- 1) Can your state admit children who come to the United States under these circumstances?
- 2) If not, what additional requirements are there?
- 3) Are there any additional documents or arrangements which must be made?
- 4) Can guardians in your state adopt their wards?

Question 1: Can Maine admit children who come to the United States under these circumstances?

Immigration is a matter of federal responsibility. This state cannot prohibit the entry of a child in this state if all the requirements of the Immigration and Naturalization Act and appropriate regulations have been met.

Adoption however is a state responsibility and Maine may enact legislation to regulate the adoption of foreign born children once they are legally within the United States. Support for this position is implicit in 8 U.S.C.A. §1101(b)(1)(F) and 8 C.F.R. §204.2(d)(2) which require that petitioners seeking to bring a child into the United States for the purpose of adoption submit evidence of compliance with the preadoptive requirements of the state of proposed residence.

The Interstate Compact on Placement of Children, 22 M.R.S.A. §§4191 et seq. applies to preadoptive placements such as the ones contemplated by the Holt agency. There must be compliance with its requirements therefore in order to satisfy the Immigration statute and regulation cited above.

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The Compact requires the sending agency to notify the appropriate public authorities of its intent to send or cause the child to be sent to Maine, furnish necessary information regarding the child and the proposed placement and await the written approval of the proper authorities that the proposed placement does not appear to be contrary to the interest of the child. The sending agency must also retain jurisdiction and financial responsibility for the child if the placement should fail. 22 M.R.S.A. §4193.

Under the circumstances described in the January 12th letter, it is difficult to determine who would bear the sending agency responsibilities under the Compact. Holt would among others fit within the definition of sending agency, 22 MR.S.A. §4192(4); the proper public authority in Maine is the Department of Human Services, 22 M.R.S.A. §4243.

In order to comply with the Immigration laws, therefore, the American couple seeking a visa for the Indian child would have to submit proof to the Immigration authorities that Maine law permits them to adopt the Indian child under the circumstances described by Holt, that the Department has given written approval to the placement and that the joint guardianship arrangement, together with the agreement, permits the "sending agency" to carry out its responsibilities under the Compact.

Question 2 and 3: If the Interstate Compact requirements are met prior to placement of the child with prospective adoptive parents in Maine, additional legal documents may or may not be necessary depending on the nature of the guardianship acquired by the parents and the Holt agency. This issue will be discussd further in the response to Question 4.

Question 4: Can Maine guardians adopt their wards?

Maine adoption laws do not expressly preclude guardians from adopting their wards. 19 M.R.S.A. §531 states:

Any husband and wife jointly, ...resident or nonresident of Maine, may petition the probate court to adopt a person.... Jurisdiction to grant such adoption and change of name shall be in the county where the person to be adopted lives or the county where... the petitioners reside....

The proposed guardianship arrangement poses a problem regarding consent to the adoption.

19 M.R.S.A. §532 states that:

When the parental rights of a minor living in the State have been terminated voluntarily

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or by judicial determination to a duly licensed public or private agency in another state or country in accordance with the laws of such state or country, consent shall be given by such duly authorized agency and no notice need be given to the parents.

In Maine, the appointment of a guardian for a minor does not terminate the parent's rights. If competent, the parent(s) may in conjunction with the guardian determine what care and education the minor will receive, 18 M.R.S.A. §3553 and unless there is a finding that the parent is unfit, or has abandoned the child and ceased to provide support the parent must be the one to consent to the adoption even if the child has a legal guardian, 19 M.R.S.A. §532.

If there is proof that the guardianship proceeding was equivalent to a termination of parental rights or a surrender and release, the remaining issue is whether the Probate Judge will consider the termination of parental rights to have been made to a duly licensed private agency since the guardianship is shared by an individual as agent for Holt and the prospective adoptive parents.

Therefore, unless there is proof that the guardianship proceeding in India is equivalent to a termination of parental rights or a surrender and release to a duly licensed private agency, the natural parent(s) will have to be notified of the adoption proceeding. In addition, unless there was a finding by the Indian court either that the parent(s) was unfit or had abandoned and failed to support the child, the parent(s) will have to give consent to the adoption with some proof that it was freely and knowingly given. 19 M.R.S.A. §532.

If all the requirements under Maine law are met for the legal guardian to give consent, Holt agency, under the terms of the agreement with the adoptive parents and because of the adoptive parents' personal interest, should give the necessary consent. The Indian agent for Holt should probably also give consent if Indian law does not recognize Holt as the joint guardian.

Conclusion: On the facts presented, it is not possible to determine whether the proposal developed by Holt would be acceptable under Maine law. The Department of Human Services needs assurance that someone has the authority to act as sending agency and assume the Compact responsibilities prior to and during placement and 2) the Department of Human Services must have more information regarding the nature of the Indian guardianship proceedings which will assure the Department of Human Services that the necessary consent is available or had been obtained for a valid adoption under Maine law.