



## **Independent Adoption**

### **Implications for Parents and Providers under Hague Intercountry Adoption Act and Regulations**

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Independent adoptions (those where a placement agency is not utilized and the parents themselves arrange an adoption abroad) are expressly permitted under the IAA and Hague regulation Section 96.13. This comes as a surprise to many who assume that this will no longer be permitted under Hague Intercountry Adoption Act and regulations. The relevant regulation states “Prospective adoptive parent(s) acting on own behalf do not require accreditation, approval, or supervision to adopt” in a convention country. They may adopt without the assistance of a US placement agency if the convention country’s laws and regulations allow it. An international adoption completely lacking agency involvement is not actually possible in any country since all parents wishing to adopt internationally must always obtain an agency approved home study under CIS rules. In the case of parents seeking to adopt independently from a convention country, they will be required to obtain their home study through a Hague accredited, temporarily accredited or an agency supervised by a Hague accredited entity willing to act as a primary provider. A non-Hague accredited provider’s study will not be legally acceptable in a convention country.

Hague implementation changes considerably the reality of an independent inter-country adoption for parents. Many parents have traditionally turned to independent adoption to maintain control and lower their costs. They have been able

to “shop” for services in an arena where agencies have traditionally held a monopoly and often maintained artificially inflated fees. Ambitious and adventurous parents have been able to take advantage of having friends, contacts and relatives abroad able to do much of the legwork and day to day translation and communication. They have been able to personally assure the process was ethical. They have had the ability to hire adoption assistance a la carte only paying for services they actually required to get the job done completely eliminating the role of the agency beyond the home study and possibly post placement reporting. They reap the benefits of their own work and also assume the risks. Further complicating the picture is a lack of control and even guidance in some cases concerning ethical practices.

As some know, attempting independent adoption is not always successful. Unfortunately, there are no statistics that would indicate if independent adoption is any more or less successful than agency assisted. But up until Hague implementation, it has been unquestionable that as a matter of US law, it was permissible if the sending country permitted it. Under Hague, parents will still be able to act on their own behalf and cut some costs. However, they will also now have no choice but to pay for some additional agency services that may or may not be of any actual benefit to them but will still be mandated.

Under the Hague scheme there must be a Hague “primary provider” in the US for every Hague adoption placement. But it is not mandated that there be a Hague accredited “placement agency”. An accredited home study agency will automatically be designated the primary provider under Hague in the absence of a Hague Placing agency, even if parents desire to procure only home study services. Under section 96.14(a), “if just one accredited agency, temporarily accredited agency, or approved person is involved in providing some of the six ‘adoption services’ listed in § 96.2, (*such as a home study*) and the other providers are supervised providers, public bodies, public authorities, or exempted providers (parents acting on their own behalf), the sole accredited agency, temporarily accredited agency, or approved person must act as the primary provider.”

This mandate triggers other responsibilities on the part of both a home study provider and parents. **Parents themselves are held to Hague standards and obligations.** In the regulation’s commentary on 96.13, exempting parents from accreditation and supervision, the regulations state “Please note that this provision only provides an exemption from requirements related to accreditation and approval. The requirements for intercountry adoption procedures will address how prospective adoptive parent(s) acting on their own behalf must comply with the Convention, the provisions of the IAA, and other applicable laws when completing an adoption.”

In other words, their actions throughout the adoption will have to comply with the same rules and procedures as an agency or other provider would. This adds an additional layer of law that must be understood and complied with by parents than would be the case where they rely on a placement agency. Though Parents must comply with Hague regulation, not clear is whether parents are responsible for “supervising” their own providers abroad. They would face no accreditation repercussions for failing to do so. Will they be expected to have the same level of knowledge of the relinquishment and process of assignment of their child at the visa exit interview? There are no answers yet but all adoptions will have to pass muster with National Benefits Center and USCIS in order to successfully adopt. Might they be required to prove MORE since they cannot be presumed to have complied as an accredited provider or provider supervised by an accredited provider would? Will CIS have more extensive investigations where independent adopters are concerned? Or will they take the information provided in the I-800 and its accompanying papers at face value? No one knows at this time.

All of this renders an independent adoption a much more risky venture until questions are settled. Typical Parents presumably come to adoption with no understanding of the regulations. Adoption Service Providers (ASPs) who have spent the last few years getting accredited are still grappling with the difficulty of complying with the regulations and sorting through their intricacies as they develop policies and procedures appropriate to each countries laws and practices.

Many Hague countries are just now developing accreditation schemes and therefore much will depend on the structure of the adoption laws and procedures abroad. Competent and central authorities and accredited entities abroad may be deemed sufficient to assure the foreign portion of the adoption complies with US law and the parents may be able to rely on the home study agency to assure the pre-adoption requirements are met but the interface between the two and Hague compliance will have to be managed by either the Parents, an accredited entity, or a supervised provider. This area is uncharted territory in adoption right now. Those who are the first to attempt independent adoptions under Hague will be pioneers.

At a minimum, it would appear that an agency would have to obtain some ironclad assurance that parents intend to act in conformance with both US and the other country’s laws to assure a Hague compliant process. This requires that the parents have at the least a cursory understanding of the process and providers at both ends (Home study and foreign central/ competent /accredited authorities) willing to assist them that can be trusted to know and follow the law

A home study agency being automatically designated the primary provider will trigger Hague obligations on the part of the agency. For instance, the parents might wish to obtain a home study alone and then submit their own paperwork to a central authority abroad. They would hope that they will only pay for home study services and whatever other services they procure on their own abroad. But the home study agency cannot allow this. Once a Hague accredited agency is involved they are required to assure that the various elements of the adoption are in place. All Primary Providers are required by the regulations to provide certain services for convention adoptions.

Though a parent may not want or even need an agency to provide more than a home study, the Hague regulations **mandate** that the primary provider make a service plan for ALL convention adoptions that demonstrates how EACH of the six adoption services governed by Hague will be properly provided. As the primary provider, the home study agency will have to work with the parents to craft a very specific agreement that will allow the parents to act on their own behalf ( NOT subject to the Home Study Agency's supervision since they are "exempt" ) where desired while assuring all Hague requirements are met. The agency must accept responsibility for post placement or post adoption reports according to both state and Hague requirements. Agencies also have mandated reporting duties and may have convention communication responsibilities even where the parents choose to assume this task. They must also include in their service plan how they will assist in the event of a dissolution. This puts the Home Study Agency/Primary Provider in the position of having to assume the risk for the dissolution of a child they did not screen, choose or place. Is it legally possible for parents to waive this responsibility?

Another factor for Home Study Agencies is their routinely limited scope of practice. In order to even create a Hague compliant service plan, they will be required to have specific knowledge of the parent's process that accounts for all phases of the adoption. They will also need to fully understand the Hague placement process even if they don't routinely place children. Agency's who have the necessary knowledge and expertise to draft such a service plan may be in the competing business of providing adoption services in the sending country and disinclined to assist a parent whose goal is elimination of their placement fee.

If an agency has the knowledge and is willing to provide required services with a consumer friendly eye to minimizing their own involvement, unexpected circumstances might prompt parents to request assistance from the Agency when an adoption is stalled or hits legal problems. Some agencies might then point to their service plan and say "not my problem". Others might step in and attempt to assist. Does that adoption then morph into the agency performing "placement" activities?

Does a Home Study Agency that communicates with a Central Authority for a parent automatically become a “Placement Agency” for legal/accreditation purposes under Hague? Will this trigger further duties on the Agency’s part to “supervise” the parent’s self-hired facilitator/ translator if they did? These situations raise many questions not yet settled or possibly even yet considered by DOS and the accreditors to date. There are many situations that may be hybrids of independent and agency adoptions. These are in “no-man’s land” from a legal and regulatory perspective until guidance is issued.

For those agencies that have both the ability and willingness to assist independent adopters, there are more questions than answers. There are many possibilities, all of which raise complex issues for the agency taking on this somewhat risky scenario and limit their ability to provide only the service that the parents actually want. Liability is a concern. Certain types of blanket waivers are disallowed under Hague. Could an Agency assisting with an independent adoption legally ask parents to sign one? At least so far as their (APs) own actions may lead to a failed adoption or illegal actions? Theoretically, I would hazard a guess that they are, but the line where parental activity leaves off and agency action takes over (or vice versa) is not delineated if the agency has ANY involvement in the foreign process, even communication with the central authority.

Might an agency end up partially liable for actions they had no practical control over but assumed if they “participated” in the placement in some way if they were to intervene in an independent adoption that ran into problems? An agency might craft a specific legal agreement to protect itself under such circumstances to minimize risk, but might it also risk its accreditation doing so? Would it need to consult with accreditors or DOS any time a situation occurred with questions? If it inadvertently gets in “over its head” in a country where it does not routinely do any business, it may be risking its own existence.

A review of past country and agency closures due to trafficking and corruption shows that this has occurred with agencies that did not know what they were getting into in a foreign program or failing to step in when practices became illegal. An agency’s failure to personally and closely supervise its foreign agents or employees and failure to track exactly where the money went has allowed unethical and illegal activity to occur. Potentially, every independent adoption presents exactly this potential scenario but with actors who lack much if any experience and understanding of prohibited actions. An agency offering any assistance in such an adoption might be “sticking its neck out” and assisting an AP to accomplish an unethical or illegal adoption. Only if the sending country’s processes were transparent and the service plan complied with could lawful compliance be assured. If a parent agreed to a lawful

sum payable to the foreign central authority but then paid bribes or illegal payments under pressure, could the agency be held responsible?

Will parents even seek to “act on their own behalf” given the “add-ons” like service plans required from the home study agency that will necessarily increase costs? Will the loss of true independence and minimized difference in expense discourage parents from wanting to do it on their own to the extent possible?

Perhaps more of an issue will be finding a home study agency willing to venture into this murky area of adoption. Most placement agencies will see this as anathema to their bread and butter business. Placement fees are highly lucrative and are showing no sign of being reduced under Hague despite the requirement that the country’s standard of living as relates to fees will be a measurement of appropriateness of fees. To this author’s knowledge, no lowering of the outrageously high foreign fees has occurred. It seems the other measure of fees not constituting undue profit of the industry norms has been favored by accreditors and DOS. What’s in it for a home Study Agency other than a lot of risk for a modest fee to develop a service plan and comply with the other incidental Hague requirements?

Accredited agencies that conduct only home studies are few and far between since many choose not to undertake the expensive accreditation process since they were able to continue operation as exempt and supervised providers. Further, few may be qualified to negotiate this legally technical area. These agencies may have experience only with state law and producing home studies that meet country requirements dictated to them by placement agencies. Further, this area of practice affects insurance rates and underwriting as this will fall under neither home studies nor adoption placements. This activity may constitute the most liability exposure an agency undertakes yet it will be excluded from coverage.

Agencies who are capable may determine that there is not enough to be gained to risk entering this land mine filled arena of practice. Presumably, an independent adoption should cost less than a placement fee. But the amount of work may not be proportionally reduced for the agency in comparison to the anticipated discount the parents feel entitled to if they conduct their own adoption abroad. Creating a service plan requires knowledge of the foreign law, extensive research, as well as that parents are extremely well prepared for their own process and its Hague requirements. How much more education must be provided to a parent acting on his own behalf? How long and how much effort must be undertaken by a home study agency to “teach” a parent their obligations under Hague? How much thought, time and work will it take to craft a service plan that has to address, foreign law, US Hague regulatory requirements and realistically, education and some supervision of the parents to assure

they are both successful and compliant. It is unclear how much responsibility would be assumed by an agency for a stalled or failed adoption and whether any waivers would be valid. The agency will not receive the typically lucrative placement fees but will be providing burdensome reporting, planning, follow up, frequent advisement, communication and assumption of other risks.

Unfortunately, independent international adoption is likely to become an even more rare and difficult endeavor under Hague. But for those Parents who have the legal and practical ability as well as the inclination to act on their own behalf, it should remain a viable alternative. International adoption has become too much of a business and not enough of a child welfare activity. Independent adoptions uphold the spirit of truly “non-profit” adoption.

Only time will determine how independent adoption will be accommodated and if it will remain a cost effective alternative to agency placement programs. Hopefully, interpretation and regularized procedures under Hague will evolve to make independent adoptions both practical and less risky to all involved. Until then, any home study agencies undertaking this complex task would be well advised to work closely with the accreditors, legal advisors and DOS to avoid accreditations loss and potential legal issues.