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## Children's Rights in Intercountry Adoption: Towards a New Goal

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# CHILDREN'S RIGHTS IN INTERCOUNTRY ADOPTION: TOWARDS A NEW GOAL

Stacie I. Strong\*

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## I. INTRODUCTION

Each year, hundreds of thousands of children languish in foster or institutional care worldwide,<sup>1</sup> while at the same time, thousands of adults, married and unmarried alike, are denied children because of "shortages."<sup>2</sup> How did this tragedy occur, and why does it continue to be repeated daily in countries around the world? The unfortunate truth is that many of the legal and societal norms now in place effectively prohibit needy children from finding suitable homes. While potential parents in Western countries cry out for babies of their own, millions of children live in physical and psychological poverty in underfunded orphanages around the world<sup>3</sup> and governments refuse to recognize the problems inherent in the current methods of intercountry adoption.

The problems with the present system are rooted in its traditional and highly paternalistic approach to children's rights. For years, courts and children's advocates have claimed to be working in the best interest of the child.<sup>4</sup> Regardless of the fact, however, that it is in everyone's best interest to place children in homes where they are wanted as soon as possible, many children are still trapped within the child care system. One problem is that, for the most part, judicial procedures designed to protect children focus almost exclusively on infants,<sup>5</sup> despite the fact that infants are not the only ones who need homes. Older children are equally in need of adoption. Although they are not as likely as infants to be adopted<sup>6</sup> either inside or outside their home country,<sup>7</sup> certainly the

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<sup>1</sup> Margaret Liu, *International Adoptions: An Overview*, 8 TEMP. INT'L & COMP. L.J. 187, 187 (1994).

<sup>2</sup> *Id.* at 190.

<sup>3</sup> Howard E. Bogard, Comment, *Who Are the Orphans?: Defining Orphan Status and the Need for an International Convention on Intercountry Adoption*, 5 EMORY INT'L L. REV. 571, 574-75 (1991).

<sup>4</sup> Wendy Anton Fitzgerald, *Maturity, Difference, and Mystery: Children's Perspectives and the Law*, 36 ARIZ. L. REV. 11, 54 (1994). However, family law often ignores the child's needs and perspective despite its rhetoric. *Id.* at 15.

<sup>5</sup> By making blanket assumptions about the inability of children to make decisions for themselves, the courts protect infants while trampling on the rights of older, more mature children. *Id.* at 30. For example, the United States Supreme Court has said that restrictions on juveniles' constitutional rights are permissible as long as there is no undue burden. *Baird v. Bellotti*, 443 U.S. 622, 634, 640 (1979). That Court also recognized the arbitrary and artificial nature of a fixed age of majority but refused to address the issue. *Id.* at 633 n.12, 643 n.22.

<sup>6</sup> Most people prefer to adopt infants. Liu, *supra* note 1, at 190.

<sup>7</sup> Although there are no firm statistics regarding the ages of children who are (or could be, if the legal reforms suggested herein were implemented) involved in intercountry adoption, anecdotal evidence suggests a significant number are between the ages of four and fourteen. See Arthur Golden, *In Peru: Help for a Few Children — San Diegan Aids Victims of War, Want*, SAN DIEGO UNION-TRIB., June 5, 1993, at A1 (commenting on the high number of older Peruvian street children); Donatella

increasing number of older children available for adoption suggests the need to address their particular concerns.<sup>8</sup> By addressing the needs of older children, we can reduce the total number of children trapped in the morass of institutional care. For example, far too many infants and toddlers must wait months or years to become eligible for adoption. All children (either on their own or through guardians *ad litem*) can use the procedures advocated herein for older children to make themselves available for adoption. The end result will be one everyone can agree upon: more children in homes of their own.

However, before society will accept the changes suggested herein, it first must understand the reasons why adoption into a family is crucial to a child's development and why institutionalization and foster care are insufficient and temporary solutions to the problem. Part II of this Article looks at the statistical evidence and psycho-social theories concerning adoption and analyzes the legal traditions surrounding both domestic and intercountry adoption. Part II concludes that if children are to be served properly, the international community must promote the adoption of children, even if it means prioritizing adoption outside the home country over foster care inside the home country. The second step comes after the restrictions on domestic and intercountry adoption have been loosened. At that point, children themselves must be empowered to make some of the decisions regarding their futures. Part III looks at the current status of children's rights, especially with regard to how and when children can choose the families in which they live. If we are to serve children's needs adequately, international organizations must advocate giving children the power to make their own decisions. Finally, Part IV analyzes the current rights of children to voice their opinions about intercountry adoption and suggests what measures should be taken by the international community to enforce these sorts of rights in the future.

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Lorch, *Ugandan Orphans Survive on Own After Parents Die of AIDS; Many Children Stay on Farmland in Nation Struggling with Disease*, DALLAS MORNING NEWS, Mar. 21, 1993 (Bulldog ed.), at 22A (suggesting the rising number of older Ugandan orphans is due to loss of parents to AIDS); Carol J. Williams, *Postscript: Orphans Continue to Haunt Romania*, L.A. TIMES, Oct. 6, 1992, at 5 (noting continued institutionalization of older Romanian orphans).

<sup>8</sup> See *supra* text accompanying note 7. The fact that international conventions on intercountry adoption contain some special provisions for older children points to the probability that older children are, in fact, being adopted despite the lack of statistical evidence. See, e.g., Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption, May 29, 1993, art. 4(d)(1), 32 I.L.M. 1134 (1993) [hereinafter Convention on Intercountry Adoption].

## II. ADOPTION

A. *Legal Bases for Adoption*

For years, the international community, as well as virtually every national government, has advocated special care, guidance, and protection for children.<sup>9</sup> Since colonial times, American children have been entitled to the necessities of life, including protection from abuse and the opportunity to start a life of their own.<sup>10</sup> Many countries recognize similar entitlements. However, not all children enjoy even these bare essentials of life; millions around the world live in varying levels of physical and emotional deprivation.<sup>11</sup>

Traditionally, the family was responsible for the care and upbringing of children, with the state deferring to parental judgment in most matters.<sup>12</sup> Parents did not need to raise their children in their own home to retain parental authority, however. In the seventeenth century it was common for children to be placed in other households to work and be educated.<sup>13</sup> Today, it is far less common for children with responsible parents to be raised outside their natural home, but it can happen.

The state relies on its *parens patriae* powers to intervene in domestic matters when there are custody disputes, foster care issues, or acts of juvenile delinquency.<sup>14</sup> The court may also become involved when there

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<sup>9</sup> See 1989 *Convention on the Rights of the Child*, G.A. Res. 44/25, 1 U.N. GAOR, 44th Sess., Supp. No. 49, at 166, U.N. Doc. A/44/49 (1989) [hereinafter 1989 *Convention*]; *Declaration of the Rights of the Child*, G.A. Res. 1386 (XIV), U.N. GAOR, 14th Sess., Supp. No. 16, at 19, princ. 2, U.N. Doc. A/4354 (1959). American statutory protection is found on the federal level in the Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. § 620 (1991). However, most family and adoption law is generally deemed to be a matter of state concern. See Liu, *supra* note 1, at 201 & n.119.

<sup>10</sup> JOSEPH M. HAWES, *THE CHILDREN'S RIGHTS MOVEMENT: A HISTORY OF ADVOCACY AND PROTECTION* 1 (1991). In addition, some level of education was required so that the children, when grown, would not be a burden to the family, community, or government. See *id.* at 1-2.

<sup>11</sup> Bogard, *supra* note 3, at 574-75. An estimated 38,000 American children live without these essentials of life. *Id.* at 573. Millions of others suffer through hunger, prostitution, abuse, and even murder. Fitzgerald, *supra* note 4, at 15.

<sup>12</sup> Jonathan O. Hafen, *Children's Rights and Legal Representation — The Proper Roles of Children, Parents, and Attorneys*, 7 NOTRE DAME J.L. ETHICS & PUB. POL'Y 423, 427 (1993).

<sup>13</sup> HAWES, *supra* note 10, at 6. In those days, most people were farmers, and children were needed to assist with the farm work. *Id.* Because most labor was gender-specific, families sometimes needed a different mix of girls and boys than had occurred in the natural family and took in children to meet that need. *Id.*

<sup>14</sup> Hafen, *supra* note 12, at 427. These state powers of intervention are not a recent development; they stretch back to at least the seventeenth century. HAWES, *supra* note 10, at 6; see also Fitzgerald, *supra* note 4, at 16 (regarding parental and state authority over children).

is parental misconduct, such as abuse or neglect.<sup>15</sup> In addition, some commentators have recognized a nascent right of judicial intervention when a child seeks the courts' assistance in exercising an individual right based on actions not connected with parental misconduct.<sup>16</sup>

Orphans present special problems to the state.<sup>17</sup> Normally, the state prefers to place orphans with family members.<sup>18</sup> However, there are times when no family members are available to take the child. In these cases, the child may be placed in an orphanage or in foster care on a temporary basis. Once a child is taken from his or her home, there are three placement options. Ideally, orphanages should be used only for a brief time while the child is waiting to be placed in foster care or adoptive homes.<sup>19</sup> Because foster care provides some of the benefits of family life, it is better for the child's emotional well being than institutionalization, but placement in a foster home should not preclude adoption.<sup>20</sup> Adoption is the best choice for most children, although it can be the most difficult to achieve, especially with older or special-needs children.<sup>21</sup>

### B. *Placement Opportunities for Orphans: Adoption as the Best Choice*

Although each case should be decided on its own merits, juvenile courts and other state actors should follow a preferential ranking of alternative care options when intervening in child placement matters. First, children should not be removed from their homes unless there is an ade-

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<sup>15</sup> Hafen, *supra* note 12, at 427.

<sup>16</sup> *Id.* at 427-28. The right to abortion or First Amendment rights might be included in this category. See *Bellotti v. Baird*, 443 U.S. 622, 650 (1979); *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 511-13 (1969).

<sup>17</sup> "Orphans," as used here, applies both to children whose parents are dead and to children whose parents are alive but unable or unwilling to take responsibility for their care. See *infra* text accompanying notes 70-73 for a discussion of legal abandonment.

<sup>18</sup> See HAWES, *supra* note 10, at 7 (citing historical preference); see also 1986 *United Nations Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally*, G.A. Res. 41/85, 41 U.N. GAOR, 41st Sess., Supp. No. 53, at 265 arts. 3-4, U.N. Doc. 41/85 (1986) [hereinafter *Declaration on Children*].

<sup>19</sup> Bogard, *supra* note 3, at 576-77.

<sup>20</sup> *Id.* at 577-78.

<sup>21</sup> See *id.* at 579-80. Some commentators have accepted the need for institutionalization in the case of mentally or physically handicapped children, but more recent discussions have found merit in placing all but the most severely affected children in family environments. *Id.* at 577 & n.33; cf. U.N. DEP'T OF INT'L ECONOMICS & SOCIAL AFFAIRS, REPORT OF AN EXPERT GROUP MEETING ON ADOPTION AND FOSTER PLACEMENT OF CHILDREN at 2, U.N. Doc. ST/ESA/99, U.N. Sales No. E.80.IV.1 (1980).

quate reason for doing so.<sup>22</sup> The most often-quoted rationale for removal is that it is in the best interest of the child.<sup>23</sup> Some child developmentalists have debated whether this is always the case. In some circumstances, developmentalists have concluded that removal may *not* be in the best interest of the child, psychologically speaking. For instance, there is the problem of whether a child has formed emotionally bonded relationships at the time of removal; if a child has not yet formed such an attachment, his or her ability to do so is affected throughout life.<sup>24</sup>

There are other problems with using a best interest standard. For example, some commentators have noted that prior to making a removal decision a court may be virtually uninformed about the child's history or future placement options. Decisions made in such circumstances cannot be logically said to be in the child's best interest.<sup>25</sup> Even if the court does have the necessary information, predictions of how a child will react to removal are unreliable.<sup>26</sup> For these reasons, many experts advocate keeping a child in a familiar environment for as long as possible.

Once removal is indicated, the state must decide how to care for the child. For the most part, adoption is seen as the best alternative, when it is available. Foster care is the next best option, while life in an orphanage is viewed as the least attractive alternative. Regardless of the benefits of foster and adoptive care, children who are removed from their homes often spend at least some time in a group care situation. Experts agree that in these cases, institutionalization should last only as long as is necessary.<sup>27</sup> Even the most nurturing orphanage cannot replace the emotional

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<sup>22</sup> ANN M. HARALAMBIE, *THE CHILD'S ATTORNEY: A GUIDE TO REPRESENTING CHILDREN IN CUSTODY, ADOPTION, AND PROTECTION CASES* 193 (1993). Physical, emotional, and sexual abuse are commonly accepted reasons for removing a child from his or her home, but parental neglect or the inability to provide for the child's basic needs can also constitute an adequate reason for removal.

<sup>23</sup> Fitzgerald, *supra* note 4, at 53-56; Liu, *supra* note 1, at 189; *see also* Convention on Intercountry Adoption, *supra* note 8, arts. 1, 21(1).

<sup>24</sup> HARALAMBIE, *supra* note 22, at 193. One example of when a best interests analysis might require a child to remain at home would be when a child is malnourished because his or her parents cannot afford to provide a proper diet. If this child has not yet formed emotional bonds, he or she would be better served by the state's providing supplemental nutrition at home rather than by forced removal to an institution, for although the child would be sure to receive adequate nutrition at the institution, it would come at the cost of his or her emotional well-being. The situation would be different, of course, if, even after governmental intervention, the child was found to be receiving an inadequate diet due to parental misconduct.

<sup>25</sup> HAWES, *supra* note 10, at 102.

<sup>26</sup> *Id.* There is a high incidence of runaways in the foster care system. Kevin M. Ryan, *Stemming the Tide of Foster Care Runaways: A Due Process Perspective*, 42 CATH. U. L. REV. 271, 271 (1993).

<sup>27</sup> Bogard, *supra* note 3, at 576.

and social bonds that are formed within a family unit.<sup>28</sup> Child developmentalists are not the only ones who believe children need families. Various legal bodies have also recognized the right and need of a child to grow up in a family environment.<sup>29</sup>

Foster care is often considered an appropriate alternative to institutionalization of orphans, but it too is unable to meet all of the physical and emotional needs of children.<sup>30</sup> For instance, a child may not be able to form significant emotional bonds while in foster care due to the uncertainty of the duration of the placement and the probability of successive foster homes.<sup>31</sup> With each new home, a child becomes less able to trust.<sup>32</sup> In America, the federal government has recognized the inadequacy of foster care and forced child welfare agencies to specify permanent plans for a foster child's placement after a certain amount of time has passed.<sup>33</sup> However, that is not always the case in other countries.<sup>34</sup> Despite the shortcomings of the foster care system, the United Nations has given preference to domestic foster care over intercountry adoption.<sup>35</sup>

After reviewing other options, adoption appears to be the best alternative for children who are left without proper homes of their own.<sup>36</sup> Only

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<sup>28</sup> HARALAMBIE, *supra* note 22, at 192.

<sup>29</sup> Convention on Intercountry Adoption, *supra* note 8, pmb.; see 42 U.S.C. § 675; see, e.g., *Pfoltzer v. County of Fairfax*, 775 F. Supp. 874 (E.D. Va. 1991) (noting the purpose of child welfare legislation is to restrict foster care in favor of permanent placement).

<sup>30</sup> Ryan, *supra* note 26, at 281 & n.44 (noting foster care can be harmful if used for more than short periods of time).

<sup>31</sup> HARALAMBIE, *supra* note 22, at 193; see also HAWES, *supra* note 10, at 103; Richard Pérez-Peña, *Report Finds the Limbo of Foster Care is Growing Longer*, N.Y. TIMES, Dec. 22, 1994, at B1.

<sup>32</sup> HARALAMBIE, *supra* note 22, at 193. Some child development experts have based their opinions regarding the inadequacy of foster care on the concept of "psychological parenting," or the day to day interaction of an adult with a child that fulfills the emotional and physical needs of the child. See HAWES, *supra* note 10, at 103-04 (discussing the theories of Joseph Goldstein, Anna Freud, and Albert Solnit, leaders in child advocacy issues).

<sup>33</sup> See Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. § 620 (1991); see also HARALAMBIE, *supra* note 22, at 193; Fitzgerald, *supra* note 4, at 63, 67. However, one recent report suggests that the Child Welfare Administration guidelines are not being followed in a number of cases. Pérez-Peña, *supra* note 31, at B1, B9 (citing cases where adoptable children remained in foster care for up to five years).

<sup>34</sup> See, e.g., *Declaration on Children*, *supra* note 18.

<sup>35</sup> 1989 Convention, *supra* note 9, art. 21(b); *Declaration on Children*, *supra* note 18, art. 18; see also Ahilemah Jonet, *International Baby Selling for Adoption and the United Nations Convention on the Rights of the Child*, 7 N.Y.L. SCH. J. HUM. RTS. 82, 93 (1989); cf. Convention on Intercountry Adoption, *supra* note 8, pmb.

<sup>36</sup> Bogard, *supra* note 3, at 579, 582; but cf. HARALAMBIE, *supra* note 22, at 193 (arguing adoption may not be in the best interest of all children).



adoption gives a child the loving, permanent home that is necessary to meet that child's physical and emotional needs. Adoption is not without its problems, however. In some cases, an older child must give his or her consent prior to adoption proceedings.<sup>37</sup> Even if consent is not legally required, a child's wishes should be considered because a successful adoption is unlikely without the child's cooperation.<sup>38</sup>

### C. *Intercountry Adoption*

#### 1. The Need for Intercountry Adoption

At first, adoptions were so rare that adoption law was of only domestic concern.<sup>39</sup> However, the demand for healthy babies in Western countries has grown to the point that internal adoption alone cannot meet the need.<sup>40</sup> Observers have pointed to higher rates of contraception, abortion, and single parenthood as reasons why there are fewer babies available in these countries.<sup>41</sup> On the other hand, a number of lesser developed countries have an excess of orphans, due to the stigma of illegitimacy, absence of contraception and abortion services, and governmental instability.<sup>42</sup> Recent events such as the war in Bosnia-Herzegovina, the famine in Somalia, and the AIDS epidemic in Uganda have increased the number of older children, as well as the number of infants, available for adoption.<sup>43</sup> The United Nations has recognized the

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<sup>37</sup> In the United States, numerous state adoption laws require consent from the child if he or she is over a certain age, although a judge who finds good cause may override the child's opinion. HARALAMBIE, *supra* note 22, at 197. International law also recognizes the need for consent of the child in certain instances. Convention on Intercountry Adoption, *supra* note 8, art. 4(d)(1).

<sup>38</sup> HARALAMBIE, *supra* note 22, at 197-98.

<sup>39</sup> *Id.*

<sup>40</sup> See David Todd, *Children New Commodity in Red-Hot World Market*, VANCOUVER SUN, Oct. 1, 1991, at F4; see also Elizabeth Bartholet, *International Adoption: Overview*, in ADOPTION LAW PRACTICE 10.02[2] (J. Hollinger ed., 1988); Liu, *supra* note 1, at 190.

<sup>41</sup> Liu, *supra* note 1, at 190; Todd, *supra* note 40.

<sup>42</sup> See Bart Eisenberg, *Road to Foreign Adoptions Gets Rockier*, CHRISTIAN SCI. MONITOR, Feb. 28, 1990, at 13. The recent outbreaks of war in Eastern Europe have been one highly-publicized cause of large numbers of orphans, although the ravages of war have often been a reason for intercountry adoption. See Claude Forrell, *Australia: A Strong Case for Ending Intercountry Adoption*, REUTER TEXTLINE, Sept. 18, 1991, available in LEXIS, News Library, ARCNWS File.

<sup>43</sup> See *Kids Flee Bosnia During War's Lull; More Than 100 Children Are Evacuated to Italy as a Serbian Leader Vows to Back a Truce*, ORLANDO SENTINEL TRIB., July 19, 1992, available in LEXIS, News Library, ARCNWS File; Lorch, *supra* note 7; Keith B. Richburg, *Legacy of Woe Awaits "Lost Generation" of Somalia*, WASH. POST, Sept. 13, 1992, available in LEXIS, News Library, ARCNWS File; see also Liu, *supra* note 1, at 87-89. In these types of situations, where entire societies are in chaos due to health crises or civil war, intercountry adoption may be the only hope for orphans. When

need to place some of these third world children in homes outside of their native countries, but that solution has met some resistance from the sending states (states which send children out to other countries) who perceive such procedures as "imperialistic."<sup>44</sup>

Intercountry adoption is not without its disadvantages. There may be some problem of acceptance of a foreign-born child in the community where he or she is to be placed.<sup>45</sup> Integration may be more difficult if the adoption is trans-racial or transethnic.<sup>46</sup> In addition, critics note that the isolation and insecurity on the part of the adoptee can be multiplied when he or she is taken from a familiar culture,<sup>47</sup> and the child may be curious about his or her religious, ethnic, genetic, and cultural heritage.<sup>48</sup> However, these emotions are similar to those felt by children adopted within their own country and race.<sup>49</sup> In addition, the conscious "culture shock" that many point to as a reason to limit intercountry adoption will not occur if the child is adopted as an infant. It is even possible that some older children will recognize that life will be different in another country,

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families can barely survive themselves, they are not likely to open their hearts and homes to additional children.

<sup>44</sup> Bogard, *supra* note 3, at 580-81.

<sup>45</sup> *See id.* at 582; *see also* Forrell, *supra* note 42.

<sup>46</sup> *See* Bogard, *supra* note 3, at 582 & n.63. There has been extensive discussion of trans-racial adoption, some of which contains valid concerns about the welfare of the child and some of which seems more concerned with perceived racism or systemic injustice than with the welfare of an individual child. For a general discussion of these concerns, see Elizabeth Bartholet, *Where Do Black Children Belong? The Politics of Race Matching*, 139 U. PA. L. REV. 1163, n.5 (1991); Timothy P. Glynn, *The Role of Race in Adoption Proceedings: A Constitutional Critique of the Minnesota Preference Statute*, 77 MINN. L. REV. 925, n.4 (1993); Martin Mears, *Adoption, Bigotry and Race*, NEW L.J. 452 (1990). Without going into the particular theories for and against trans-racial adoption, it seems logical to conclude that adoption within the same race is preferable since adjustment will be easier for the child, but should not preclude adoption elsewhere. As with intercountry adoption, the problems associated with orphanages and long-term foster care seem much more disadvantageous to a child than the adjustment problems associated with trans-racial adoption into a family that has been sensitized to potential problems. *See* Eisenberg, *supra* note 42 (a parent noting "You don't just adopt a child. . . . You must also, in a sense, adopt the country itself."). The volatility of the trans-racial adoption dilemma is illustrated by the case of one British woman who was told, "It would be better for that child to die in the arms of its blood brothers than to be brought up here." Barbara Simpson, *U.K.: Red Tape Rebels — The Controversy Over Intercountry Adoption*, REUTER TEXTLINE, Feb. 26, 1991, available in LEXIS, News Library, ARCNWS File.

<sup>47</sup> Bogard, *supra* note 3, at 582. This concern will obviously only affect older children.

<sup>48</sup> *Id.*

<sup>49</sup> HARALAMBIE, *supra* note 22, at 202-04.

yet still want to leave their native lands.<sup>50</sup> This is not to say that internal adoptions are not preferable to intercountry adoption; internal adoption is undoubtedly the best possible solution to the orphan problem. However, if the adoptee is willing to leave or is an infant,<sup>51</sup> the disadvantages to the child<sup>52</sup> of intercountry adoption are slight when compared to the disadvantages of living in an institution or in a series of foster homes.<sup>53</sup> Despite some legitimate concerns, the fact is that many children who have been adopted into different countries actually fare very well.<sup>54</sup>

## 2. The Legal History of Intercountry Adoption

Intercountry adoption has had a dubious history.<sup>55</sup> Bureaucratic red tape has taken its toll on parents and children alike, forcing some well-meaning but frustrated adoptive parents to resort to illegal means to get adoptive children out of their native lands.<sup>56</sup> Concerns about baby brokering (the purchase of infants from biological parents or corrupt government officials) have led some third-world countries to tighten their laws regarding intercountry adoption.<sup>57</sup> In India, for example, the Supreme Court enumerated a list of guidelines which requires non-domestic prospective parents to be sponsored by a government-recognized agency that

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<sup>50</sup> Bogard, *supra* note 3, at 571-72. These children may not be aware of the differences between their homeland and their adoptive land, or may have an unrealistic view of other countries, but their desire to leave should not be discounted if their wishes remain the same after full disclosure of the realities of life in their prospective new home. In addition, the procedures now in place for intercountry adoption require the adoptive parents to be identified prior to adoption procedures being initiated in either country, so the child is able to meet the prospective parents and learn about his or her new home in great detail before giving his or her consent to the adoption. See *infra* part II.C.2 for a discussion of intercountry adoption procedures.

<sup>51</sup> The differences between adoption of infants and older children will be discussed in part IV.

<sup>52</sup> Here again, the best interest of the individual child may be confused with the perceived best interest of the country, as when government officials resist intercountry adoption due to fears of "imperialism" and declines in population. See *supra* note 44 and *infra* note 142 and accompanying text.

<sup>53</sup> Although foster care can consist of a single long-term placement, it is more common for children to be bumped from one home to another, adding to their feelings of loss and isolation.

<sup>54</sup> See Liu, *supra* note 1, at 193 & n.60.

<sup>55</sup> See *id.* at 191-93.

<sup>56</sup> Carroll Bogert, *Bringing Back Baby*, NEWSWEEK, Nov. 21, 1994, at 78; Elizabeth Grice, *A Baby? You Must be Joking, Dear*, THE DAILY TELEGRAPH (London), July 14, 1993, at 15; see also Liu, *supra* note 1, at 194; Simpson, *supra* note 46.

<sup>57</sup> See Eisenberg, *supra* note 42; Rita Sebastian, *Children: Sri Lanka to Plug Loopholes in Adoption Law*, INTER PRESS SERVICE, Apr. 13, 1991, available in LEXIS, News Library, ARCNWS File; Alessandra Stanley, *Nationalism Slows Foreign Adoptions in Russia*, N.Y. TIMES, Dec. 8, 1994, at A1, A12.

provides pre-adoption screening and ongoing supervision until the adoption is complete.<sup>58</sup> The Court felt these provisions would both protect children and avoid baby-brokering problems.<sup>59</sup> Concerns about the safety of adoptive children and the suitability of prospective parents have led the governments of Western nations to restrict entry visas and adoption procedures as well.<sup>60</sup>

However, despite the troubles that have plagued its past, it seems logical that once concerns about baby brokering and the suitability of prospective parents are met, intercountry adoption should be viewed as a viable opportunity for orphaned children. Governments on both sides of the adoption process should smooth the way for legitimate adoptions, since it is truly in the best interest of the child and the parent that the legal aspects of the adoption not increase the emotional anxiety and duration of an already arduous event. However, the legal standards put into place by the various countries work against the possibility of adoption, even when all parties are willing. Leaving cultural bias against intercountry adoption aside, the two key legal problems with the national systems hinge on the definition of a child as an orphan and with the requirement that the adoption be legally valid in both the sending and the receiving country.<sup>61</sup>

A child may be adopted in the child's native country or in the country of the prospective parents.<sup>62</sup> The child's native country, which is often referred to as the sending state, determines whether the child is to be adopted at home or abroad.<sup>63</sup> Under either method, the child must be legally free to be adopted in both countries before the procedure takes

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<sup>58</sup> Laxmi Kant Pande v. Union of India, 1984 A.I.R. (S.C.) 469; *see also* Laxmi Kant Pande v. Union of India, 1986 A.I.R. (S.C.) 272 (elaborating on guidelines); Laxmi Kant Pande v. Union of India, 1987 A.I.R. (S.C.) 232 (elaborating on guidelines); Nimala Pandit, *Inter-Country Adoption: The Indian View*, in PARENTHOOD IN A MODERN SOCIETY: LEGAL AND SOCIAL ISSUES FOR THE TWENTY-FIRST CENTURY 267, 268-73 (John Eekelaar & Petar Sarcevic eds., 1993). These guidelines are similar to those in the Convention on Intercountry Adoption, *supra* note 8, arts. 5, 9, 21. However, unlike the United Nations, the Indian government recognizes the need for prompt action in placing a child, and allows the child to be eligible for intercountry adoption after he or she has had one month of exclusive domestic eligibility. Pandit, *supra*, at 271.

<sup>59</sup> *See* Pandit, *supra* note 58, at 268-69.

<sup>60</sup> The United Kingdom has traditionally been one of the most difficult bureaucracies for adoptive parents to navigate. *See* Cassandra Jardine, DAILY TELEGRAPH, Jan. 24, 1991, at 11; Simpson, *supra* note 46. American federal law also requires prospective parents to meet stringent financial, mental, and moral standards. Liu, *supra* note 1, at 207.

<sup>61</sup> Bogard, *supra* note 3, at 583.

<sup>62</sup> *Id.* at 584.

<sup>63</sup> *Id.*

place.<sup>64</sup> Unfortunately, every country has different standards for determining when a child is legally free to be adopted ("orphaned"), thus creating numerous problems.<sup>65</sup> The two key issues in almost every adoption statute for defining when a child is orphaned are consent and abandonment.<sup>66</sup>

Consent to adoption must be in a form recognized by both the sending and receiving countries before it will be valid.<sup>67</sup> Consent may come from any of the following: "(1) both biological parents, (2) an unmarried biological mother, (3) the father of an illegitimate child, (4) a step-father, (5) a parent whose spouse is deceased or not available, (6) a guardian, (7) an agency responsible for the child, or (8) the child if over a certain age."<sup>68</sup> Each country has its own standards for sufficiency of consent. Problems occur when consent is valid in one of the two countries but not the other.<sup>69</sup>

Abandonment is the second crucial element in intercountry adoption proceedings. Abandonment is usually defined as a voluntary act which includes the intent to abandon, as well as the physical surrender of parental duties.<sup>70</sup> Proof of abandonment precludes the need for parental consent. The United States breaks abandonment into two types, conditional and unconditional, but only recognizes the latter as a legitimate predecessor to adoption.<sup>71</sup> Although the term is not specifically defined, unconditional abandonment apparently does not exist if the parent intends to return to the child at any time in the future. Essentially, the child can be deserted for any length of time, but until "parental rights are formally relinquished or the parents are divested of their rights in a legal proceed-

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<sup>64</sup> *Id.* If a child does not meet the standards of adoption in both countries, the process will be terminated, even if it is partially completed. See Olga A. Dyuzheva, *Adoption and the Abandonment of Children in the Former Soviet Union*, in PARENTHOOD IN A MODERN SOCIETY: LEGAL AND SOCIAL ISSUES FOR THE TWENTY-FIRST CENTURY, *supra* note 58, at 235, 237 (citing conflict of laws problems in intercountry adoptions of Russian children by American adoptive parents). For adoption requirements for American parents and children from Korea, Ecuador, and Romania, see Liu, *supra* note 1, at 191-99, 202.

<sup>65</sup> See Bogard, *supra* note 3, at 584.

<sup>66</sup> *Id.* at 584-85.

<sup>67</sup> *Id.* at 585.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*; see Dyuzheva, *supra* note 64, at 237.

<sup>70</sup> Bogard, *supra* note 3, at 586.

<sup>71</sup> *Id.* The exacting American definition of abandonment has not only hurt the chances for foreign-born children to be adopted here, but also has relegated hundreds of thousands of American children into a state of permanent unadoptability. Liu, *supra* note 1, at 206 & n.174.

ing," the child is unable to be adopted in the United States.<sup>72</sup> This fluke in American adoption law has been blamed as one of the reasons for the extensive baby brokering that occurred in Romania; parents of children who had been *de facto* but not *de jure* abandoned would offer to give up their parental rights to the highest bidder.<sup>73</sup>

The result of these international legal discrepancies is a decrease in intercountry adoptions.<sup>74</sup> For example, if the adoption is valid in the sending country but not in the receiving country, the child will not be given an immigration visa, and will also become unadoptable in his or her home country because parents have been found.<sup>75</sup> On the other hand, if the adoption is valid in the receiving country but not in the sending country and the child is somehow allowed to immigrate, the adoption will become void and the child will face deportation.<sup>76</sup> Finally, for those prospective parents who abide wholly by the law, insurmountable legal difficulties may force them to cease attempts to adopt a child from a certain sending state, thus lessening the possibilities for adoption for children of that state.<sup>77</sup> For example, Russian law finds legal abandonment to have occurred after a six months' absence by the parents.<sup>78</sup> Since U.S. law does not recognize a mere absence of six months as legal abandonment, American citizens cannot adopt Russian children who fall into this category.<sup>79</sup> The problem is exacerbated by the refusal of Russian authorities to attempt to obtain signatures from parents indicating formal abandonment (a process which would allow American citizens to adopt Russian children) since there is no need to do so under their domestic system.

The reason for the difference between American and Russian approaches is that the Russian system was devised with the primary emphasis on the welfare of the children, not of the parents.<sup>80</sup> The current American system, which requires formal abandonment or legal adjudica-

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<sup>72</sup> Bogard, *supra* note 3, at 586. See *id.* at 596-603 for a more lengthy discussion of American statutory problems concerning intercountry adoption; see also Liu, *supra* note 1, at 208-10 (analyzing the laws of various American states).

<sup>73</sup> Bogard, *supra* note 3, at n.62.

<sup>74</sup> *Id.* at 586-89; see also Bogert, *supra* note 56, at 79 (regarding restrictive American procedures).

<sup>75</sup> Bogard, *supra* note 3, at 587-88.

<sup>76</sup> *Id.* at 588-89.

<sup>77</sup> *Id.*; Liu, *supra* note 1, at 207.

<sup>78</sup> Dyuzheva, *supra* note 64, at 237. Russian family law is currently in a state of flux, and it is uncertain how new provisions on intercountry adoption will affect domestic laws such as this. See Stanley, *supra* note 57, at A12; cf. Martha Shirk & Mark Schlinkmann, *Door Reopens for Americans Seeking Russian Babies*, ST. LOUIS POST-DISPATCH, Feb. 18, 1995, available in LEXIS, News Library, CURNWS File (noting law passed by Russian Parliament on February 10, 1995 may make intercountry adoption even easier than before).

<sup>79</sup> Dyuzheva, *supra* note 64, at 237.

<sup>80</sup> *Id.*

tion of abandonment, gives precedence to parental interests.<sup>81</sup> However, as will be discussed later, American courts are moving towards a greater respect for children's rights, even when those rights are directly opposite to the interests of biological parents. Biological parents' rights are no longer guaranteed by the courts.<sup>82</sup> Therefore, American legislatures should follow suit and eliminate regulations which automatically favor parental interests over the interests of children.<sup>83</sup>

### 3. United Nations Actions Regarding Intercountry Adoption

Recently, over sixty countries signed the United Nations Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption (Convention).<sup>84</sup> It is hoped this instrument will facilitate the adoption of children across national borders and eliminate the problems of baby brokering and bureaucracies. Although this document has a number of positive aspects, it is somewhat vague and still untested.

The Convention recognizes the importance of raising a child in a family environment, yet also states that internal placement is preferable to intercountry adoption.<sup>85</sup> This notion of prioritizing internal placement, while laudatory in its attempt to keep children in a familiar environment

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<sup>81</sup> See Fitzgerald, *supra* note 4, at 16 (noting state and parents have legal superiority over child in deciding what is in child's interest); Pérez-Peña, *supra* note 31, at B1 (citing a "bureaucracy that is fixated on returning [children] to their natural parents"); see also Dyuzheva, *supra* note 64, at 237 (stating Russian system ignores parental rights).

<sup>82</sup> Elizabeth Barholet, Address at the Duke University Law School Symposium on Family Law (May 9, 1994).

<sup>83</sup> See 8 U.S.C. § 1101(b)(1)(F) (1990); 8 C.F.R. § 204.2 (d)(1)(viii) (1990); see also Bogard, *supra* note 3, at 599-603; Pérez-Peña, *supra* note 31, at B9 (stating that "[t]here has to be a point where you give up on parents who have given up on their kids"). However, this presumption in favor of biological parents in American statutes may be overcome by the provisions of the Convention, which gives the sending country the power to define abandonment. Convention on Intercountry Adoption, *supra* note 8, art. 4. America, as a primarily receiving state, will therefore not be involved in decisions regarding the definition of abandonment. However, some sending countries may have equally pro-parent provisions which are not addressed by the Convention on Intercountry Adoption and which may limit the number of children to become available for adoption. While parental interests should not be dismissed completely, they should be tempered so that children are not at the mercy of their biological parents. One way to avoid that problem is to give children a voice of their own in the adoption process.

<sup>84</sup> Convention on Intercountry Adoption, *supra* note 8, pmb. Unfortunately, the instrument may take years to be ratified domestically. Bogert, *supra* note 56, at 78-79.

<sup>85</sup> Convention on Intercountry Adoption, *supra* note 8, pmb. This instrument does not state that foster care in the child's home state is preferable to intercountry adoption, however, which leaves open the argument that adoption anywhere is superior to foster care. *But cf.* 1989 Convention, *supra* note 9, art. 21(b) (stating that internal foster care is preferred over intercountry adoption).

whenever possible, could be used to unnecessarily restrict intercountry adoption. It would be better if the Convention limited the amount of time that a country was able to prioritize internal adoption, after which period intercountry adoption would be given the same status as domestic foster care.<sup>86</sup> If such a provision is not added, the tension between the two stated objectives of the Convention may create problems in the future if a prospective adoptive parent from another country attempts to prioritize intercountry adoption over internal foster care.

The logistical problem of numerous bureaucracies and governmental agencies is solved in the Convention by the creation of Central Authorities in all signatory states. The purpose of the Central Authorities is to facilitate adoption of and by residents of their states. Through this new option, the United Nations hopes to avoid some of the independent brokering problems of the past.<sup>87</sup>

The Convention places the duty of determining whether a child is adoptable on the state of origin.<sup>88</sup> By allowing only one country to decide whether a child is adoptable, the Convention seems to avoid the problem of competing definitions of abandonment or consent. The receiving state determines whether the adopted parents are suitable, although the sending state may review the decision and revoke an adoption if the adoption is to take place in the sending country and has not yet

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<sup>86</sup> This approach would be similar to the Indian one month moratorium on intercountry adoption, which gives adequate but not excessive preferential treatment to domestic adoption. See Pandit, *supra* note 58, at 268. A limitation on prioritization of domestic placement would not mandate intercountry adoption after the term of domestic preferability; it would only recognize the child's eligibility to be adopted by foreign parents. The American system has also recognized the need to move quickly in adoption proceedings, and requires a permanency plan to be instituted within 18 months of a child's placement in foster care. 42 U.S.C. § 675(5)(C) (1991). However, 18 months is half a lifetime to a 3 year old child, and an eternity to pre-teens. Cf. Ryan, *supra* note 26, at 281 & n.44 (arguing that foster care is harmful if used for extended periods of time).

Russia has also recently decided to prioritize domestic adoptions by creating a computer network to facilitate matches between prospective Russian parents and adoptive children. See Stanley, *supra* note 57, at A12. Unfortunately, many experts feel it will take years to implement such a system, during which time external adoptions will virtually cease to occur. *Id.* But cf. Shirk & Schlinkmann, *supra* note 78.

<sup>87</sup> Convention on Intercountry Adoption, *supra* note 8, arts. 6-13; see also Forrell, *supra* note 42 (citing Australian support for governmentally regulated intercountry adoption rather than private adoption); Todd, *supra* note 40 (stating that many children who were neither orphaned nor abandoned were adopted by wealthy foreigners).

<sup>88</sup> Convention on Intercountry Adoption, *supra* note 8, art. 4. The concept of consent is not forgotten in this new document. Necessary parental consents should be informed, voluntary, and not induced by payment. *Id.* Where applicable, the consent of the child shall be sought as well. *Id.*



occurred.<sup>89</sup> The receiving state cannot refuse to recognize an adoption unless it is manifestly against public policy.<sup>90</sup> Only time will tell if this Convention solves all of the problems of intercountry adoption, but it is certainly an effort in the right direction.

### III. CHILDREN'S VOICES IN THE ADOPTION PROCESS

#### A. *The History of the Children's Rights Movement*

For years, children have competed with both state and parental interests in the adoption process.<sup>91</sup> At first, parents were given almost complete freedom to decide what to do with their children, with the state only intervening to protect the children when parental conduct exceeded the community's accepted norms of behavior.<sup>92</sup> In cases concerning orphans, the state often made its decision without consulting the child.<sup>93</sup> Within the last thirty years or so, the children's rights movement has dramatically increased children's voices in the legal proceedings that affect them.<sup>94</sup> Today, a child is appointed a guardian *ad litem* whose sole purpose is to look out for the child's best interest in legal proceedings.<sup>95</sup>

Some commentators have credited Hillary Rodham Clinton with writing some of the earliest and perhaps most influential pieces in favor of children's rights.<sup>96</sup> Her initial three-tiered approach advocated giving children more control over the important decisions in their lives by (1) abolishing the presumption of legal incapacity due to minority, (2) granting children the same procedural rights as are given adults whenever legal action is taken against them, and (3) rejecting the presumption of unity of interests between the parent and the child when it can be proven that the child has independent interests and the competency to assert those interests.<sup>97</sup> Although many considered Clinton's approach noteworthy, neither the courts nor the legislatures have adopted it wholeheartedly.<sup>98</sup>

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<sup>89</sup> *Id.* arts. 5, 21.

<sup>90</sup> *Id.* art. 24. However, a broad, parent-oriented definition of public policy could ruin the Convention's efforts to eliminate the problems concerning definitions of consent and abandonment.

<sup>91</sup> John E. Coons et al., *Deciding What's Best for Children*, 7 NOTRE DAME J.L. ETHICS & PUB. POL'Y 465, 471 (1993); see also Fitzgerald, *supra* note 4, at 16.

<sup>92</sup> Hafen, *supra* note 12, at 427.

<sup>93</sup> HAWES, *supra* note 10, at 7-9, 96. As was stated previously, children over a certain age (usually 14) had a voice in choosing their guardians. *Id.* at 7-8.

<sup>94</sup> *Id.* at 96-97.

<sup>95</sup> *Id.* at 113-14.

<sup>96</sup> Hafen, *supra* note 12, at 433.

<sup>97</sup> Hillary Rodham, *Children Under the Law*, 43 HARV. EDUC. REV. 487, 507 (1973).

<sup>98</sup> See Hafen, *supra* note 12, at 434-36 (discussing problems with Rodham's proposals).

However, procedural protections are increasing<sup>99</sup> and the presumption of unity of interests is decreasing as children's ability to engage attorneys on their own behalf grows.<sup>100</sup> As of yet, no move has been made to abolish the presumption of legal incapacity, although some would argue that children's ability to hire attorneys is evidence of change in this direction.

Most agree that the children's rights movement is an outgrowth of the civil and women's rights movements of the 1960s, but it is certain that the Supreme Court has never extended to children the same range of constitutional rights and protections it has afforded women and minority groups.<sup>101</sup> Instead, children have been given the right of decisionmaking in some limited circumstances, such as in abortion cases.<sup>102</sup> If children can be trusted to make such momentous decisions as whether to continue or terminate a pregnancy (something girls as young as twelve or thirteen must do with increasing frequency), then certainly they should be able to decide whether they wish to terminate ties with biological parents so that they may be eligible for intercountry adoption.

### B. *Definitions and Goals of the Children's Rights Movement*

A consensus has never been reached as to the appropriate definition of children's rights, nor have experts agreed on the goals that the children's rights movement should have. Instead, rights advocates usually take one of two positions: that of the liberationists or that of the protectionists. While both camps contend they are acting in the best interest of children, they support opposing means to that end, with one theory supporting independent decisionmaking by children while the other does not.

#### 1. The Liberationist Theory

Child liberationists believe children should have virtually the same rights that adults possess, and would erase many of the legal distinctions between children and adults.<sup>103</sup> Clinton's views would easily fit within

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<sup>99</sup> A line of cases beginning with *In re Gault* exemplify this trend toward greater procedural protection for children. *In re Gault*, 387 U.S. 1 (1967) (providing for due process and the right to counsel in juvenile court); *see also* *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 511-13 (1969) (recognizing juveniles' First Amendment rights for the first time). *But see* *Bellotti v. Baird*, 443 U.S. 622, 633, 650 (1979) (noting children lie within the protection of the Constitution yet requiring either judicial or parental consent prior to a minor's obtaining an abortion).

<sup>100</sup> *But cf.* *Kingsley v. Kingsley*, 623 So. 2d 780, 782 (Fla. Dist. Ct. App. 1993) (stating a child who had successfully brought suit on his own behalf in the lower courts did not have standing).

<sup>101</sup> Hafen, *supra* note 12, at 441-42.

<sup>102</sup> *Id.* at 442; *see* *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992) (requiring parental consent or judicial determination that the girl's choice should be upheld).

<sup>103</sup> HAWES, *supra* note 10, at 115. John Holt, a supporter of children's rights, proposed a list of 11 rights that should be granted to children. *Id.* at 116. Among

the liberationist model, since she supports children's capacity to act as legal persons. Liberationists feel that children's greatest enemy is the system that has been put in place to protect them, and that the social and institutional discrimination and oppression of children stunt their development and cause them their greatest harm.<sup>104</sup> Those who believe in the liberationist approach doubt that parents or other adults can truly act in a child's best interest, and instead believe the best way to safeguard the quality of child care is to pass the control to the child.<sup>105</sup>

## 2. The Protectionist Theory

Child protectionists, on the other hand, support some rights for children, but are less inclined to grant full autonomy to young people.<sup>106</sup> Protectionists are strongly opposed to the liberationist model, and believe that child safety requires a much higher degree of control than liberationists advocate.<sup>107</sup> Supporters of the protectionist movement are often childcare workers who lobby for legislative solutions to issues of juvenile concern.<sup>108</sup> Whereas liberationists focus on the rights of the individual child, protectionists look at systemic abuses of children and work to bring about change on a more institutional scale.<sup>109</sup>

## 3. A Comparison of the Two Theories

Both models have their critics. Protectionists are most often attacked as being part of the problem, as perpetrators of a system of oppression.<sup>110</sup> Liberationists have been subject to more varied and vehement attacks, possibly because they are challenging the *status quo*, threatening those who are only comfortable with traditional ways of thinking and dealing

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these rights is "the right to seek and choose guardians other than one's own parents and to be legally dependent on them." *Id.* Presumably, this would include not only the right to consent to adoption but the right to terminate biological parents' rights as well.

<sup>104</sup> *Id.* at 115-17.

<sup>105</sup> *Id.* at 117; Fitzgerald, *supra* note 4, at 20-21; see also David A.J. Richards, *The Individual, the Family, and the Constitution: A Jurisprudential Perspective*, 55 N.Y.U. L. REV. 1, 23-28 (1980) (noting only a few cases in which the Constitution justifies paternalistic limits on the rights of minors); Sharon Elizabeth Rush, *The Warren and Burger Courts on State, Parent, and Child Conflict Resolution: A Comparative Analysis and Proposed Methodology*, 36 HASTINGS L.J. 461, 501 (1985) (stating children should be subject to the same legal standards as adults unless special circumstances exist).

<sup>106</sup> HAWES, *supra* note 10, at 117-18.

<sup>107</sup> *Id.* at 115, 117.

<sup>108</sup> *Id.* at 118.

<sup>109</sup> See *id.* at 118-20.

<sup>110</sup> *Id.* at 116-18.

with children.<sup>111</sup> Some anti-liberationists believe that if children are granted a broad range of rights, they would be free to do whatever they wished, including quitting school, disobeying parents, and leaving home at an early age.<sup>112</sup> Theorists note that if the liberationist argument is carried to its logical extreme, then parents should be equally able to leave a family they are dissatisfied with as are the children.<sup>113</sup> They also point out that it is unhelpful to grant children the right to live on their own if the children are unable to support themselves financially.<sup>114</sup>

Nevertheless, the anti-liberationists go too far in their rhetoric. It is not necessary to carry an argument to its extreme in order to find validity in it. One means of fulfilling the liberationists' desire to give children a louder voice in their futures while still addressing protectionists' concerns is to give children the capacity to control their lives, but in discrete measures. Such measures would strike a compromise between protectionists — who see adults, whether parents or guardians *ad litem*, as the most effective arbiters of what is best for children — and liberationists — who think children should have absolute and irrevocable decisionmaking capacity in all matters. Although this has already happened to some extent (as in abortion cases), there needs to be an explicit recognition of the circumstances under which children can make decisions for themselves. Additionally, society should recognize that children are able to make these decisions at younger ages than is commonly supposed;<sup>115</sup> in a number of international instruments, ten is recognized as the age of consent to a particular adoption,<sup>116</sup> and should be considered a gauge for the ability to terminate parental rights as well.

To implement these increased rights, children could be granted a type of decisional competency similar to the decisional competencies recog-

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<sup>111</sup> See *id.* at 115. One commentator makes the point that advocates for children's rights only prevail when their claims "coincide with politically powerful adult interests." Fitzgerald, *supra* note 4, at 89. This may be one reason why liberationists are under more vigorous attack than protectionists; liberationists defy state and parental authority over children, while protectionists support it.

<sup>112</sup> See LAURA M. PURDY, *IN THEIR BEST INTEREST? THE CASE AGAINST EQUAL RIGHTS FOR CHILDREN* 127-29 (1992).

<sup>113</sup> *Id.* at 129.

<sup>114</sup> *Id.* at 130. However, economically dependent adults do not have their rights taken away from them. Fitzgerald, *supra* note 4, at 96-97.

<sup>115</sup> Children in troubled third-world countries may be even more grown up than are American children. For example, in Somalia, children in their early teens are toting guns and waging war. Richburg, *supra* note 43. By age five, these children "ha[ve] seen more war, death and tragedy than any of these' aid workers from other countries." *Id.* In Uganda, 13 year olds become heads of households after their parents die of AIDS. Lorch, *supra* note 7. For a discussion of "maturity" in the context of the United States Constitution, see Fitzgerald, *supra* note 4, at 86-88.

<sup>116</sup> See, e.g., Convention on Intercountry Adoption, *supra* note 8, art. 4(d)(1).

nized in other areas of the law.<sup>117</sup> In this case, it is proposed that children who are effectively orphaned through parental death or desertion be allowed to make certain decisions regarding their opportunities for adoption. It is disingenuous to claim that a complete breakdown of the family will result if this type of decisional competency is recognized, since in these cases the family no longer exists. In fact, this proposition is extremely pro-family, as are a number of liberationist concepts.<sup>118</sup> In addition, this decisional competency does not propose that all children should have an absolute voice in all family matters. Anti-liberationists make a good point when they note that children who wield too much power within the family structure can cause themselves harm.<sup>119</sup> The most common scenario is the child whose parents are divorced, and who uses blackmail to pit one parent against the other in order to get what he or she wants: better clothes, more toys, fewer household chores.<sup>120</sup> The possibility of this type of misapplication of children's rights should not affect a child's right to be heard in intercountry adoption, however, because juvenile coercion is not an issue in cases where the family no longer exists due to parental death or desertion.

### C. *Children's Rights in Western Countries*

Despite all the legal and theoretical posturing about what should and could occur in family law matters, children's right to be heard in court is increasing, particularly in Western countries. The nations which have had the most recent and visible activity in the area of children's rights are the

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<sup>117</sup> Lois A. Weithorn, *Involving Children in Decisions Affecting Their Own Welfare: Guidelines for Professionals*, in CHILDREN'S COMPETENCE TO CONSENT 235, 243 (Gary B. Melton et al. eds., 1983). In adjudicating decisional competency, a court investigates whether a person who normally falls into a suspect class (such as a juvenile or mentally incapacitated adult) is capable of making decisions in a discrete area. For an example of decisional competency in other areas of the law, see RALPH REISNER & CHRISTOPHER SLOBOGIN, *LAW AND THE MENTAL HEALTH SYSTEM* 816-17 (1990) (stating psychiatric patients are often evaluated to establish their competency to make decisions regarding medical treatment, financial matters, and other areas which affect their lives). To date, the United States Supreme Court has recognized that children have the right and the capacity to have a voice in at least one type of far-reaching decision, namely whether to continue or terminate a pregnancy. See *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992); *Bellotti v. Baird*, 443 U.S. 622, 643 (1979). See Weithorn, *supra*, at 243-45 for a discussion of various tests of juvenile competency.

<sup>118</sup> See Holt's list of proposed rights in HAWES, *supra* note 10, at 116. These rights recognize the importance of a child being raised in a family, and are pro-family in that sense. However, Holt's proposals are not limited by a traditional definition of family, which may be the reason behind much of the opposition to this type of liberationist theory.

<sup>119</sup> PURDY, *supra* note 112, at 139-40.

<sup>120</sup> *Id.* at 141-42.

United States and the United Kingdom. Although it does not seem at this time that these rights have been extended to children in developing countries, particularly those countries which have an excess of adoptable children, it is possible and in many respects desirable that these rights eventually be granted to the children who need them the most.

### 1. The United States

In the United States, the impetus for legal change is coming from the courts. In a number of cases, children have terminated parental rights, a fact scenario which often increases the emotional tenor of the litigation and the amount of subsequent publicity. In what has been touted as a landmark case, *Kingsley v. Kingsley* involved a twelve year old boy who was "divorcing" his biological mother in favor of his foster parents.<sup>121</sup> The case's importance was not as much in the subject matter of the litigation, but in the procedural posture it took: the boy hired the attorney in his own right.<sup>122</sup> It is this sort of legal independence that encourages some children's rights advocates and discourages others. In the past, children's preferences in cases such as these have been made known through guardians *ad litem*.<sup>123</sup> Perhaps one reason why judges and parents are more comfortable with guardians *ad litem* bringing suits rather than individual children doing so is because they feel a guardian will apply an adult perspective to what is in the child's best interest. When children bring suit by and for themselves, some adults fear the children will not act in their own best interest and the law will be unable to stop them.<sup>124</sup> However, this concern is illusory, since the courts still have some responsibility to the child, and will not willingly abandon their role as safekeeper of minors.

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<sup>121</sup> *Kingsley v. Kingsley*, 623 So. 2d 780, 782 (Fla. Dist. Ct. App. 1993). Although many in the media hyped this case as revolutionary, some commentators have noted that the procedure itself, namely the termination of the biological parent's rights, is very common, though is usually instigated by the foster parents. HARALAMBIE, *supra* note 22, at 199.

<sup>122</sup> *Kingsley*, 623 So. 2d at 782; Sarah Tippit, *Boy in "Divorce" Suit Says He Wants to Stay with Foster Family*, REUTER LIBRARY REP., Sept. 25, 1992, available in LEXIS, News Library, ARCNWS File. However, the appellate court decided the lower court had committed an error, though a harmless one, in allowing Gregory to file suit on his own behalf. *Kingsley*, 623 So. 2d at 785. For a discussion of the *Kingsley* case, see generally George H. Russ, *Through the Eyes of a Child, "Gregory K.:" A Child's Right to be Heard*, 27 FAM. L.Q. 365 (1993); see also Fitzgerald, *supra* note 4, at 108.

<sup>123</sup> HARALAMBIE, *supra* note 22, at 199; see also *Kingsley*, 623 So. 2d at 784 (citing Florida cases and policy supporting the appointment of a guardian).

<sup>124</sup> Some commentators also raise the issue of manipulation of a child client by an attorney and the child's ability to pay; however, many adult clients are subject to the same problems, and no outcry is made on their behalf. Fitzgerald, *supra* note 4, at 108 & n.578.

Another reason why there may be continued resistance to the idea of children suing in their own right is because as children's voices in the courtroom become increasingly loud, other interests, including parental interests, necessarily suffer.<sup>125</sup> However, in other matters the courts have not hesitated to enforce one party's rights merely because the other party will suffer; in fact, most litigation results in a "zero sum equation," forcing one party to win at the other's expense. Children should no longer be viewed as their biological parents' possessions;<sup>126</sup> they are individuals in their own right. Therefore, neither of these two articulable concerns is a legitimate reason to limit responsible and competent children's access to the courts.

Another American child, Kimberly Mays, also won the right to terminate the rights of her biological parents.<sup>127</sup> In this factually unique case, Kimberly Mays was born to Regina and Ernest Twigg, but was taken home by Robert Mays and his wife, whom she considered her real parents for the first nine years of her life.<sup>128</sup> When the mix-up was discovered, the Twiggs were granted visitation rights, causing Kimberly great distress.<sup>129</sup> Eventually she sued to stop all contact between her and the Twiggs, and won.<sup>130</sup>

The key to these cases is the determination by the courts that biology alone does not determine parentage.<sup>131</sup> Instead, the judicial system has begun to recognize the concept of psychological parenthood, and to award custody on that basis.<sup>132</sup> Psychological parenthood is a concept

<sup>125</sup> *Id.* at 89.

<sup>126</sup> See Bartholet, *supra* note 82.

<sup>127</sup> *Custody and Caring*, CHRISTIAN SCI. MONITOR, Aug. 23, 1993, at 18.

<sup>128</sup> *Id.*

<sup>129</sup> Gail Appleson, *Mays Case Raises Questions About Children's Rights*, REUTERS, Aug. 19, 1993, available in LEXIS, News Library, CURNWS File.

<sup>130</sup> *Id.* Since the case was decided, Kimberly has suffered some setbacks in her relationship with Robert Mays. William Booth, *Tangled Family Ties and Children's Rights: Teen's Change of Mind Revives Debate*, WASH. POST, Mar. 11, 1994, at A3. However, this estrangement should not be used as an argument against children being able to decide for themselves which families they live with, but as evidence that the courts are more likely to support those decisions. Also, the facts of this case are unique and give rise to suspicions that the emotional trauma of the discovery of her birth parents and ensuing litigation was what caused Kimberly's problems, not the mere fact of choosing one set of parents over another. *Id.* By forcing visitation rights to the Twiggs against Kimberly's wishes (and in effect forcing Kimberly to acknowledge two sets of parents), the courts themselves may have created the problems.

<sup>131</sup> *Id.* Elizabeth Bartholet has also recognized that the importance of genetic parentage is decreasing in most areas of law except surrogacy cases. Bartholet, *supra* note 82.

<sup>132</sup> *Id.*; see also *Florida Verdict Confirms Recognition of Children's Rights by Courts is Increasing: Top Matrimonial Lawyers Say Consistency & Guidelines*

born in the field of developmental psychology, and refers to the nurturing and caregiving that allows a child to bond with a caregiver.<sup>133</sup> Some commentators recognize that it is psychological ties that make a family, not biological ones.<sup>134</sup> If we are truly concerned with the best interests of a child, then we will respect the psychological, not merely biological, bonds within a family. The result of these two Florida cases is an increased flexibility in legal standards. For perhaps the first time, courts are recognizing that children's voices in custody and adoption hearings must be heard, since only the children involved can decide who is their psychological parent.<sup>135</sup> Accordingly, courts are allowing children to terminate unwanted biological ties and to bring actions themselves instead of waiting for another party to bring it for them.

## 2. The United Kingdom

Family law in the United Kingdom is also changing, but in this instance the responsible party is the legislature, not the judiciary. In October 1991, the Children Act, which grants children the right to sue on their own behalf in matters of family law, went into full effect.<sup>136</sup> Soon after, several children brought actions to force their parents to act in certain ways. Unlike the American cases, the British cases did not always involve termination of parental rights. Instead, some of the British children sued for increased involvement and contact with their parents. For example, eleven year old Aaron Wilson and his ten year old sister Nicole used the law to obtain a court order to get their father to spend more time with them.<sup>137</sup> Of course, some children did use the Act to escape unpleasant home environments or unfit biological parents.<sup>138</sup> However, some of these placements were to other adult relatives, thus retaining and

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*Lacking*, PR NEWSWIRE, Aug. 18, 1993, available in LEXIS, News Library, CURNWS File.

<sup>133</sup> See HAWES, *supra* note 10, at 103; Fitzgerald, *supra* note 4, at 81; see also *supra* note 32 and accompanying text.

<sup>134</sup> See HAWES, *supra* note 10, at 103.

<sup>135</sup> A child need not be able to verbalize his or her preferences in order for a court to take them into account. See Fitzgerald, *supra* note 4, at 83. A child's acts can be just as or even more dispositive than words. See *id.*

<sup>136</sup> Fiona Millar, *Children: A Law that Cares at Last*, GUARDIAN, Jan. 4, 1993, at E10. The United Kingdom is also contemplating additional adoption reforms, including changes in intercountry adoption, which should be brought before Parliament in the fall of 1994. Clare Dyer, *Children to be Given More Say in Adoption*, GUARDIAN, July 12, 1993, at 4. For a draft of the proposed new law, see UK Department of Health, *Review of Adoption Law Published*, REUTER TEXTLINE, Oct. 19, 1992, available in LEXIS, News Library, ARCNWS File.

<sup>137</sup> Lawrence Donegan, *See You in Court, Dad*, GUARDIAN, May 18, 1993, at 16.

<sup>138</sup> See *id.* (discussing 13 year old girl seeking to leave adoptive family to rejoin her natural father); Millar, *supra* note 136 (discussing 14 year old girl asking to live with boyfriend's parents instead of father; 15 year old girl asking to live with grandparents



strengthening family bonds. The Act seems to follow the theories of the child liberationists, although it is yet to be seen how the law will be fully interpreted by the British courts. Unfortunately, initial reports indicate that the judiciary is unwilling to allow children the full range of their statutory rights and has taken control of a number of cases away from the children who initiated the cases and given it to guardians.<sup>139</sup>

#### IV. PROPOSALS FOR FUTURE ACTION

Part II of this Article dealt with the fact that there are far too many orphans in the world and that many of these children are unable to find loving homes because of legal barriers imposed by their governments. Part III introduced the possibility that children, at least in some Western countries, can sue to terminate the rights of biological parents. This section suggests that one way to address the international problem of orphans is to introduce the nascent system of children's rights to non-Western countries. The premise is that children everywhere should have the right to sue on their own behalf to better their lives. Not only should they be able to sue to create new family environments through adoption, but they should also be able to sue to terminate parental rights. Despite the fact that numerous countries and nongovernmental organizations have recognized the need for children to be raised in a family environment, the fact remains that some countries have more children than can be adopted internally. These children need homes, and intercountry adoption is a viable opportunity. Unfortunately, bureaucratic obstacles to intercountry adoption force children to remain in institutions far longer than is necessary. Prolonged stays in orphanages or foster homes harm these children physically and emotionally. Additionally, each passing month and year makes the children older and less likely to be placed, since adoptive parents often prefer infants or young children. If the legal community is to help these children, it must empower them.

Not every child is able to make these sorts of decisions. Certainly older children who are currently allowed to grant or withhold consent to an adoption should be given the opportunity to voice their concerns about terminating parental rights and about the possibility of leaving their home countries. Some younger children (for example, those ages four to ten) may be able to make or influence decisions regarding their own welfare as well.<sup>140</sup> Courts might use a sliding scale of intelligence and experience, such as that used in determining whether a child is competent to

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instead of mother; 11 year old girl asking to live with former foster parents instead of mother).

<sup>139</sup> See *The Voice of the Children*, GUARDIAN, Apr. 21, 1993, at 23.

<sup>140</sup> See Fitzgerald, *supra* note 4, at 86-88; see also *supra* note 135. In a liberal courtroom, the age of self-determinism may drop even lower.

testify at trial.<sup>141</sup> It is obvious, for example, that infants cannot be asked to make these life-altering decisions for themselves.

#### A. *Older Children*

In this context, "older" is a relative term. In cases where a child is above the age of consent, the courts in that country should treat that child's wishes as dispositive as to whether he or she will be eligible for intercountry adoption. To echo the words of the Convention on Intercountry Adoption, the state should only withhold adoption if it is "manifestly contrary to public policy."<sup>142</sup> As has been illustrated by the cases of children suing on their own behalf in the United States and the United Kingdom, juveniles are well able to weigh the benefits and risks involved in an adoption, even an intercountry adoption, and should be allowed to act accordingly. The state should not be able to keep a child in an orphanage or put him or her in a foster home indefinitely if the child is adamantly against it. In many cases, an adult point of view may be in direct opposition to the child's best interest. For example, some adults can be prejudiced against intercountry adoption because of their own fears of other cultures or because of their own concerns about the future of their country if too many children leave.<sup>143</sup> This type of prejudice can sentence a child to an orphanage forever.

In addition to making their wishes known as to eligibility for intercountry adoption, children who are in an orphanage despite the fact that one or both parents are or may be alive should be able to sue to terminate any parental rights the biological parents may still retain. This right should be granted due to the fact that lack of consent or the absence of clear-cut abandonment may be what is forcing the child to live in an endless purgatory of orphanages and foster homes. Enabling children to act on their own behalf would actually eliminate the problem of baby brokering, which has been touted internationally as the greatest evil associated with

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<sup>141</sup> Fitzgerald, *supra* note 4, at 14 (noting some commentators' support for *ad hoc* determinations of juvenile maturity).

<sup>142</sup> See Convention on Intercountry Adoption, *supra* note 8, art. 24. This public policy should not be determined by mere nationalistic concerns about diminishing populations or imperialistic Westerners; instead, there should be a global perspective on whether an international public policy has been breached. Clearly there will be concerns about the proper balance of national sovereignty and the role of nongovernmental organizations, but the human rights aspects of this matter should not be ignored merely because children are unable to organize a public plea for legal assistance.

<sup>143</sup> See Pandit, *supra* note 58, at 271; Bogard, *supra* note 3, at 582; see also Forrell, *supra* note 42. "[P]arents and the state tend to perceive only those claims which serve adult purposes and protect adult interests." Fitzgerald, *supra* note 4, at 17. Instead of viewing children's views as "inferior," perhaps they should be seen as merely "different." *Id.*

intercountry adoption.<sup>144</sup> Once a child has been given the right to terminate family ties, biological parents no longer have complete control over the child and are no longer able to hold the child "hostage" until a prospective parent has paid some type of "ransom." Although this concept may sound heartless or unfair to the parents, remember that the cases under consideration here are those where the adult is either unable to be located (and perhaps dead) or has already abandoned the child to an orphanage. To leave the child stranded in an unfit institution for life is a far greater cruelty than allowing for the termination of parental rights. Therefore, children of sufficient mental and emotional capacity should be given an explicit right to terminate parental rights and declare themselves eligible for intercountry adoption. This right should be recognized even though the Convention on Intercountry Adoption seems to have eradicated the problems associated with dual consent and abandonment. In the first place it is unclear how various countries, especially the United States, will implement the Convention. Secondly, not every country has become a signatory to the Convention. If we are truly in favor of acting in the best interests of children, then we will do all we can to facilitate their finding homes somewhere.

For younger children,<sup>145</sup> the courts must review the child's competency to determine whether the child is able to make the decision to be eligible for intercountry adoption. The court's determination should include an analysis of whether the child should be able to terminate parental rights. In some cases, it may be appropriate to appoint a guardian *ad litem*, and to factor in adult perceptions of what is in the child's best interests. However, the courts should not immediately assume that it is in the child's best interests to live in foster care in the home country rather than be adopted elsewhere. If a child suspects that the court or the guardian is not acting in his or her best interests, that child should be able to sue to assert his or her wishes more forcefully. If it becomes apparent that a certain country is habitually overruling children's wishes without proper consideration, perhaps a neutral body such as the United Nations should

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<sup>144</sup> See Convention on Intercountry Adoption, *supra* note 8, art. 4(3); Liu, *supra* note 1, at 194.

<sup>145</sup> There really should be no bright-line rule regarding legal incapacity, beyond which a child's opinion is totally disregarded. See Rodham, *supra* note 97, at 507. Some liberationists believe a child's viewpoint should be dispositive from the time the child can speak, but the more rational position would be to apply a balancing test that gives the child's voice more weight as he or she becomes more mature. The younger the child is, the more the state will be involved in the decision-making process, although always in consultation with the child. See Fitzgerald, *supra* note 4, at 83. In theory, this is the basic test now in place, but courts seem to have an unspoken belief that many children do not know what is best for them, and that parental interests should be given great respect. See *id.* at 16-17. The automatic primacy given to parental rights is one of the legal assumptions which should be eliminated. See generally Dyuzheva, *supra* note 64, at 237 (noting the Russian approach).

step in to review the decisions or to provide a court of final appeal. However, these solutions may be far too costly and complex for a child from an underdeveloped nation to understand and utilize.

### B. *Infants*

Infants have one advantage in adoption proceedings and one disadvantage. Their advantage is that they are the most desirable candidates for adoption, so they are most likely to be adopted within their home state.<sup>146</sup> For many infants, the issue of intercountry adoption will never arise. The disadvantage of their situation is that they are too young to voice an opinion in any matter concerning them.

When dealing with infants, it is obvious that the court will have to appoint a guardian to make decisions that are in the best interest of the child. However, the courts should adopt the approach as to what is in the best interest of the child that is suggested here, allowing him or her to leave the country if that is the best opportunity for a happy, productive future. In the past, biological parents have been able to thwart children's opportunities, either by refusing to consent to adoption or by abandoning children without properly terminating parental rights. These children can languish in an institution for years. Infants who were once easily adoptable become more difficult to place the older they get. Nations with an overabundance of homeless children should take heed of the increasing importance of children's rights, and not give absolute precedence to the rights of biological parents. There are times when it is in the best interest of the child to sever biological ties, even when the parent disagrees with or is unaware of that action. This is not to say that parents' rights should be terminated immediately upon their leaving their child for temporary care in an orphanage. If the parent is given notice that, as in Russia, a six-months' absence will result in legal abandonment,<sup>147</sup> parental rights have been duly respected. Courts should apply this standard even when the child is an infant, if it is the only way the child will have a chance to grow up happy and healthy. Of course, this view does not advocate termination of parental rights when the parent is involuntarily kept from asserting them.<sup>148</sup>

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<sup>146</sup> But consider countries such as China, where 98% of the orphanage population is female. There, even healthy baby girls are unlikely to be adopted due to the cultural bias in favor of sons and the governmental obstacles to families with more than one child. See Bartholet, *supra* note 82. In a nation where mortality rates for children in orphanages reach 20-70%, intercountry adoption is the only hope these children have for a normal life — or for any kind of life at all. See *id.*

<sup>147</sup> Dyuzheva, *supra* note 64, at 237.

<sup>148</sup> See Convention on Intercountry Adoption, *supra* note 8, art. 4(4).

## V. CONCLUSION

The orphaning of a child through parental death or desertion is a difficult thing to deal with for everyone. In the past, courts and state agencies have done their best to find homes for orphaned children, but it is time to recognize that not every country can support all of the homeless children left in its care. Intercountry adoption is a viable solution to these countries' problems.

Although recent international conventions have created a system which facilitates intercountry adoption, there is still more to be done. More countries should follow the lead of the United States and the United Kingdom, and give children more of a voice in decisions which affect them. Children should be allowed to terminate parental rights when necessary, thus allowing them to be adopted by parents from their own country or from other countries. Only by refuting the paternalistic and protectionist views of the past — views which give biological parents the nearly absolute right to determine their children's future despite the parents' inability to care for those children — can we begin to truly work in children's best interests.