A Primer on Adoption Law

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A Primer on Adoption Law

BY DOUGLAS E. ABRAMS, J.D., & SARAH H. RAMSEY, J.D., LL.M.

ABSTRACT

This article surveys major aspects of adoption law encountered by judges, lawyers, and child-care professionals. The authors, whose new Children and the Law casebook is already required reading in nearly three dozen law schools, analyze both historical and contemporary materials, and both statutory and case law.

INTRODUCTION

Historical Overview and the Present Landscape

Adoption was unknown at common law and did not become part of statutory law in the United States until the mid to late nineteenth century. The first modern adoption act was enacted in Massachusetts in 1851, oddly enough with little fanfare or public notice. Not only did the act depart from English law, which had long prohibited permanent transfer of parental rights and obligations to third persons; the act also specified that the child was the prime beneficiary of the adoption process. When considering whether to approve an adoption petition, the court would determine whether approval would serve the child's interests.

Today all states have statutes providing for adoption of children. The various acts are marked by both similarities and significant differences because efforts at nationwide uniformity have largely failed. Only five states have enacted the 1969 Revised Uniform Adoption Act, and only one state (Vermont) has enacted the Uniform Adoption Act (1994). Other states have maintained individual differences while enacting various provisions of these model acts wholly or in modified form.

Differences in statutory language from state to state may affect the outcome in adoption cases presenting apparently similar facts. Because of similarities among adoption acts, however, lawyers handling an adoption should remain alert to other jurisdictions' statutory and decisional law, which may provide persuasive authority. Where parties to an adoption proceeding reside in different states, conflict of laws rules may also require application of another jurisdiction's adoption law.

Between 2% and 4% of American families have an adopted child. Courts grant at least 140,000 to 160,000 adoptions annually (that is, considerably more than a million each decade), though estimates remain inexact because the Census Bureau, other federal agencies, and most states do not systematically track the total number. Accurate records are maintained only of international adoptees who enter the United States with the cooperation of immigration authorities, and of "special needs" children who receive federal and

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state assistance.

In 1997, the President of the American Bar Association reported that “across our nation, in every state, hundreds of thousands of children spend each day waiting in foster care, housed with temporary caretakers as wards of the state. These are not unwanted children. Though their biological parents may not be willing or able to care for the children, often others would gladly take legal custody through adoption if they were able to complete the process.” The President reported one common obstacle to adoption — “a shortage of qualified lawyers who can help families on a pro bono or reduced-fee basis” — and urged the organized bar to recruit and train lawyers for service. N. Lee Cooper, Free the Children: A Cumbersome Adoption Process is Keeping Families Apart, 83 A.B.A.J. 8 (May 1997).

Strict and Liberal Construction

Reciting the historical pedigree of American adoption law, many decisions hold that adoption statutes are in derogation of the common law and thus are strictly construed. On the other hand, many adoption statutes mandate liberal construction to further the best interests of the child.

Even where liberal construction controls interpretation of substantive adoption provisions, courts may strictly construe procedural provisions, which are designed to protect the child by enabling the court to decide based on the most complete information available. Much adoption procedure is set out in a state’s adoption act itself. Because adoption is a civil proceeding, the state’s general civil procedure code and general civil court rules may govern procedural matters not explicitly addressed in the adoption code, including matters relating to service of process, pleadings, discovery, conduct of the proceeding, and post-proceeding matters.

The Effect of Adoption

Adoption is “the legal equivalent of biological parenthood.” Smith v. OFFER, 431 U.S. 816, 844 n.51 (1977). Except where the adoptive parent is a stepparent or other partner of the birth parent, a valid adoption permanently and irrevocably extinguishes the parent-child relationship between the child and the birth parents and creates a new relationship between the child and the adoptive parents. Where the adoptive parent is a stepparent or partner, the adoptive parent replaces the birth parent whose rights have been terminated but the child’s relationship with the other birth parent continues.

Adoptive parents thus assume the constitutional rights of parenthood, including the due process right to direct the child’s upbringing. The adoptive parents and the adoptee also secure new rights and obligations under a variety of federal and state laws, including tax laws, workers’ compensation laws, social security and other entitlement laws, welfare laws, inheritance laws, and family leave laws. See, e.g., Buchea v. United States, 154 F.3d 1114, 1116 (9th Cir. 1998) (girl could not sue for her biological father’s wrongful death because she had previously been adopted by her maternal grandparents and thus was no longer the birth father’s “child”).

Incest statutes are a major exception to the principle that a valid adoption extinguishes the child’s relationship with the biological parents. Under statutes prohibiting marriage or sexual relations between parent and child, brothers and sisters, and other close relatives of the whole or half blood, proof that one of the parties had been validly adopted is not a defense to an incest prosecution. See, e.g., State v. Sharon H., 429 A.2d 1321 (Del.Super.Ct. 1981).

WHO MAY ADOPT A CHILD?

Statutory Standing and the “Best Interests of the Child” Test

A child is adopted only when the court enters a final decree approving the adoption. The court enters the decree only when it determines that adoption by a petitioner or petitioners with standing to adopt would be in the best interests of the child.

As a general matter, adoption acts confer standing on married couples petitioning jointly, stepparents wishing to adopt their stepchildren, and frequently on single persons. Courts determine the best interests of the child by examining the circumstances of the case, including the conditions of the prospective adoptive parents and the child.

“[C]ourts have not demanded perfection in adoptive parents.” In re Michael JJ, 613 N.Y.S.2d 715, 716 (App.Div.1994). Adoption may be in the child’s best interests, for example, even where the prospective adopt-
tive parents have relatively modest means. Adoption seeks to "provide the best home that is available. By that is not meant the wealthiest home, but the home which...the court deems will best promote the welfare of the particular child." State ex rel. St. Louis Children's Aid Society v. Hughes, 177 S.W.2d 474, 477 (Mo.1944).

An adoption petition is not necessarily defeated by the prospective adoptive parents' nondisclosure or misrepresentation in connection with the adoption. In In re Baby Girl W., 542 N.Y.S.2d 415, 416 (App.Div.1989), for example, the court approved the adoption even though the petitioners misrepresented their educational backgrounds, employment histories and financial condition during the preadoption investigation, and equivocated when asked to explain discrepancies. The court concluded that adoption was in the best interests of the child because "the petitioners' character flaws are offset by their proven ability to care for the child."

Even a prospective adoptive parent's criminal record does not necessarily defeat the adoption petition. In In re Alison V, 621 N.Y.S.2d 739, 739-40 (App.Div.1995), for example, the court held that the 34-year-old petitioner's convictions for disorderly conduct and hindering prosecution when she was seventeen years old did not preclude her from being considered as an adoptive parent because she had engaged in no further criminal activity, had been steadily employed by the same employer for twelve years, and had been a foster parent. A more recent conviction, however, or one involving substance abuse or misconduct with children, might be a different matter.

The best-interests-of-the-child standard means that the ultimate question is whether the proposed adoption would serve the child's welfare, and not whether it would serve the welfare of the birth parents, the prospective adoptive parents or anyone else. For example, the court should not be moved by pleas that the infertile prospective adoptive parents need a child for their emotional wellbeing, or to help shore up their shaky marriage. Some critics charge that in recent years, however, adoption law has frequently focused not on the best interests of the child but on the interests of childless couples, assertedly sometimes at the child's expense.

**Determining Standing and "Best Interests"**

### Single persons

Most states require married couples to petition jointly unless the petitioner is the child's stepparent. Some states permit single persons to petition to adopt a child. Two single persons, however, normally may not petition jointly. See, e.g., In re Jason C. (N.H.1987).

### Stepparents

Most stepparents do not adopt their stepchildren because they cannot unless the parental rights of the noncustodial birth parent are terminated by consent or court order. Most stepparent adoptions involve stepfathers adopting their wives' children born in or out of wedlock. Because an uncontested stepparent adoption generally gives the law's imprimatur to a family structure already in existence, adoption acts often exempt these adoptions from requirements relating to confidentiality, home studies, probationary periods, and similar matters. Critics warn, however, that exemption and relaxation may prevent the court from discovering child abuse in the home.

What if the surviving stepparent wishes to adopt the child of his deceased spouse? If no competing petition is filed, the court would likely approve the adoption unless the stepparent appears unfit. If a close relative also petitions to adopt the child, however, the stepparent may lose because he (like the close relative) is a legal stranger to the child. The stepparent's position would appear most tenuous where the law grants the relative a preference. On the other hand, the stepparent's position would appear stronger if the child has resided with him for a significant period and if uprooting would likely cause the child psychological harm. The best-interests-of-the-child standard would determine the outcome.

### Grandparents and other relatives

Grandparents or other relatives sometimes seek to adopt a child whose birth parents have died, have had their parental rights terminated, or have become unable to care for the child because of physical or mental disability, substance abuse or other cause. A relative holds no substantive due process right to adopt the child after the birth parents' deaths or termination of their parental rights. See, e.g., Mullins v. State, 57 E3d 789 (9th Cir.
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The relative's blood relation to the child, however, is a factor to consider in determining the best interests of the child. See, e.g., Dunn v. Dunn, 380 S.E.2d 836, 837 (S.C.1989).

Some decisions grant relatives a preference. See, e.g., In re D.L., 486 N.W.2d 375, 379 (Minn.1992). In most states, however, a relative holds a preference only where the statute or applicable rule grants one. See, e.g., In re Adoption of Hess, 608 A.2d 10, 13 (Pa.1992). The preference usually depends on the relative's prior relationship with the child. See, e.g., Fla. Stat. § 63.0425 (where child placed for adoption has lived with the grandparent for at least six months, the grandparent has first priority to adopt the grandchild unless the deceased parent has indicated a different preference by will or unless the stepparent wishes to adopt). Courts, however, show a marked inclination to honor the wishes of birth parents to place a child with otherwise fit relatives.

Foster parents

A substantial number of adoptions each year are by the child's foster parents. Until relatively recently, public and private child placement agencies often required prospective foster parents, as a condition for receiving temporary custody of a child, to agree in writing not to seek to adopt the child. The purpose was to discourage emotional bonding while the agency sought to reunify the child with the biological family or to free the child for adoption.

The traditional attitude has largely changed. Where foster parents petition to adopt, courts tend to refuse to enforce no-adoption agreements where adoption by the foster parents is in the best interests of the child. See, e.g., Knight v. Deavers, 531 S.W.2d 252 (Ark.1976). Courts and child welfare professionals alike now recognize that where a child has spent much of his or her young life in foster care, arbitrary removal from the foster home for adoption by strangers may cause the child added hardship from severing a secure relationship. The hardship may be severe because many foster children already suffer from emotional or physical disability, frequently worsened by severed relationships before the adoption petition is filed.

Some statutes grant a preference to foster parents who have cared for the child for a specified period, though the court retains ultimate authority to grant or deny the adoption in the best interests of the child. See, e.g., N.Y. Social Servs. Law § 383(3) (more than two years). Where adoption by foster parents is in the best interests of the child, the court may grant the petition even where a blood relative of the child files a competing petition. See, e.g., Petition of Dep't of Social Servs., 491 N.E.2d 270 (Mass.Ct.App.1986) (three-year-old child's best interests served by adoption by foster parents with whom she had been placed when she was four days old rather than by the paternal aunt and uncle).

Where the adoption agency's consent is necessary for adoption, its refusal to consent to adoption by the foster parents may defeat the petition. In most states that address such consent, however, agency refusal is persuasive only and the court may decide in the best interests of the child. See, e.g., State ex rel. Dep't of Institutions, Social and Rehabilitative Servs. v. Griffis, 545 P.2d 763 (Okla.1975).

The petitioners' age

In most states, a person must be eighteen or older to adopt a child, at least unless he or she is the child's stepparent or is married to an adult petitioner. Some states establish a higher minimum age. See, e.g., Ga. Code § 19-8-3 (twenty-five). A few states prescribe no minimum age, leaving it to the courts to determine on a case-by-case basis whether adoption by a minor would be in the best interests of the prospective adoptee.

Where the adoption act precludes minors from adopting a child but does not specify that a married minor may adopt, the act's silence does not necessarily disable married minors from adopting. Marriage emancipates a minor, and emancipation confers rights of adulthood.

When older persons petition to adopt children, courts decide in accordance with the best interests standard because adoption statutes do not establish a maximum permissible age. The court may be concerned that older petitioners might be physically incapable of raising a young child, or that their death or serious illness would leave the child orphaned.

Where the petitioners are the child's grandparents or other relatives, the factors discussed above come into play. In In re Adoption of Christian, 184 S.2d 657, 658 (Fla.Dist.Ct.App.1966), for example, the court approved a 68-year-old grandmother's petition to adopt her 13-year-old granddaughter. On the other hand, in Sonet v. Unknown Father, 797 S.W.2d 1, 5 (Tenn.Ct.App.1990), a
woman approximately seventy years old petitioned to adopt a child who was nearly three; the court denied the petition based on the petitioner's age, her lack of parenting ability with no foreseeable improvement, and the child's failure to thrive in her care.

**Gays and lesbians**

One member of a gay or lesbian partnership may wish to adopt the other's child, who may have been conceived by reproductive technology or who may be the biological or adoptive child of the other's prior heterosexual marital or extramarital relationship. In In re Angel Lace M., 516 N.W.2d 678 (Wis.1994), the sharply divided court held that the adoption act granted the lesbian companion no standing to adopt, regardless of whether adoption might be in the best interests of the child. Other courts, however, have found standing under their state acts. See, e.g., In re Jacob, 660 N.E.2d 397 (N.Y.1995); Adoption of Tammy, 619 N.E.2d 315 (Mass.1993).

As individuals or couples, gays or lesbians may also wish to adopt children of persons other than their partners. Two states expressly prohibit homosexuals or same-sex couples from adopting children. See Fla. Stat. § 63.042(3); Miss. Code Ann. § 93-17-3(2). Utah also evidently prohibits adoption of a child by homosexuals because the state permits adoption only by persons legally married to each other, or by single persons not living in a cohabitation relationship outside marriage. See Utah Code § 78-30-1(3). In other states, courts apply the best interests test to determine whether to grant adoption petitions filed by gays or lesbians with standing to adopt.

**Disabled petitioners**

Several states have outlawed discrimination against disabled adoption petitioners. Typical is Wis. Stat. § 48.82(5): "Although otherwise qualified, no person shall be denied [eligibility to adopt a child] because the person is deaf, blind or has other physical handicaps."".

**Adoption of siblings**

Neither the United States Supreme Court nor any state supreme court has articulated a constitutional right of a child not to be separated from his or her siblings in adoption. Nor does any statute prohibit, or create a presumption against, adoption of siblings into separate homes.

The rationale for avoiding separation of siblings is straightforward. "Young brothers and sisters need each other's strengths and association in their everyday and often common experiences, and to separate them, unnecessarily, is likely to be traumatic and harmful. The importance of rearing brothers and sisters together, and thereby nourishing their familial bonds, is also strengthened by the likelihood that the parents will pass away before their children." Obey v. Degling, 357 N.E.2d 601, 602 (N.Y.1975). "[W]hen these children become adults, they will have only each other to depend on." In re Patricia Ann W., 392 N.Y.S.2d 180, 187 (N.Y.Fam.Ct.1977).

Sometimes, however, courts and authorities are torn between the desire to keep siblings together and the difficulty of finding adoptive parents willing and able to adopt siblings together. The children's longterm interest in sibling association may yield to their shortterm interest in leaving foster care for permanent adoption into available homes. A child's special needs may also affect the outcome. See, e.g., Morgan v. Department of Social Services, 313 S.E.2d 350, 353-54 (S.C.Ct.App.1984) (ordering adoption by foster parents who had helped cure girl of severe emotional problems, though other parents had adopted her half-brothers).

The adoption touchstone remains the best interests of the child. "[A] sibling relationship is but one factor, albeit an important one, that a judge should consider in custody cases." Adoption of Hugo, 700 N.E.2d 516, 524 (Mass.1998). Courts hearing adoption petitions acknowledge that "[w]herever possible brothers and sisters should be kept together." In re L.B.T., 318 N.W.2d 200, 202 (Iowa 1982). The principle also applies to half-siblings. See, e.g., Crouse v. Crouse, 552 N.W.2d 413, 418 (S.D.1996).

Courts, however, separate 35,000 children from their brothers and sisters in foster and adoptive homes each year. See William Wesley Patton and Sara Latz, Severing Hansel from Gretel: An Analysis of Siblings' Association Rights, 48 U. Miami L. Rev. 745, 754-60 (1994). According to some estimates, 75% of sibling groups end up separated after they enter foster care, and a greater number of former foster children search for their siblings than for their birth parents. See National

Courts have sometimes granted separated siblings visitation rights with each other. See, e.g., In re Adoption of Anthony, 448 N.Y.S.2d 377, 381 (Fam.Ct. 1982). Post-adoption visitation orders opposed by the adoptive parents, however, will face careful constitutional scrutiny after the parents' rights analysis in Troxel v. Granville, 530 U.S. 57 (2000). In Troxel, all nine Justices reaffirmed that parents hold a substantive due process right to direct their children's upbringing, and six Justices (the plurality and dissenting Justices Stevens and Kennedy) concluded that third-party visitation cases require a case-by-case weighing of interests, with the parents' interest and wishes counting heavily.

"Equitable Adoption"

Suppose an adult agrees to adopt a child but fails to complete the adoption process and secure an adoption decree. The child lives in the adult's household, and the adult raises and educates the child and holds him out as a family member. If the adult dies intestate, may the child inherit? Some states would refuse to recognize the adoption for failure to comply with statutory directives. Denying inheritance may produce a harsh result, however, perhaps leaving the child in economic distress while property passes to more distant relatives by operation of law.

More than half the states recognize the equitable adoption doctrine, sometimes also called adoption by estoppel, virtual adoption or de facto adoption. The doctrine enables courts to enforce agreements to adopt where the adult failed to complete the adoption process through negligence or design, and thus where no court ever decreed the adoption. The agreement may be with the child, the child's birth parents, or someone in loco parentis.

Most claimants invoking the equitable adoption doctrine seek to share in the intestate adult's estate, though courts have also applied the doctrine in suits to recover damages for the adult's wrongful death, recover support from the adult, establish adoptive status under inheritance tax laws, or recover life insurance, workers' compensation or other death benefits following the adult's death. The adult might also seek to invoke the doctrine, for example in suits seeking damages for the child's wrongful death. In some jurisdictions recognizing the doctrine, however, courts hold that only the child may invoke it. See, e.g., Halterman v. Halteman, 867 S.W.2d 559 (Mo.Ct.App. 1993).

Equitable adoption does not confer adoptive status but, consistent with the maxim that equity regards as done that which ought to be done, merely confers the benefit the claimant seeks. Contract law has been the basis of most decisions recognizing equitable adoption. The claimant must prove (1) the adult's express or implied agreement to adopt the child, (2) the child's reliance on the agreement, (3) performance by the child's biological parents in relinquishing custody, (4) performance by the child in living in the adults' home and acting as their child, and (5) partial performance by the adults in taking the child into their home and treating the child as their own. See, e.g., Lankford v. Wright, 489 S.E.2d 604, 606-07 (N.C. 1997).

A handful of courts, however, reject the contract basis as frequently harmful to the best interests of the child. Even in the absence of an express or implied agreement to adopt, these decisions find equitable adoption "when a close relationship, similar to parent-child, exists" and the parties have acted for years as if the child had been adopted. Atkinson v. Atkinson, 408 N.W.2d 516, 520 (Mich.Ct.App. 1987).

In jurisdictions that recognize equitable adoption based on contract law, the judicial embrace has nonetheless been lukewarm, and claimants are rarely successful in establishing the requisite agreement to adopt. Where the suit asserting equitable adoption is filed after the putative adoptive parent's death, courts are wary of fraudulent claims. Most jurisdictions require the claimant to prove the agreement by a heightened standard of proof, such as clear, cogent and convincing evidence. The heightened standard may be satisfied without particular difficulty where the agreement is in writing, but proof of oral agreements without witnesses remains difficult.

ADOPTION INTERMEDIARIES AND THEIR REGULATION
Agency Adoptions and Private Placements

Particularly where the birth parents and the prospective adoptive parents are not related, intermedi-
Agency adoptions

In every state, an adoption may be completed through a state agency, or through a private child placement agency (sectarian or non-sectarian) licensed and regulated by statute. In recent years, most agency adoptions have concerned children who have special needs under applicable federal and state guidelines or who are older or otherwise difficult to place.

In an agency adoption of a newborn, the birth mother typically consents to termination of her parental rights and relinquishes custody of the child to the agency for adoption after receiving counseling about her options and the consequences of her decision, and after the agency secures information concerning the medical, genetic and health history of the child and the birth parents. If the mother consents before the child's birth, the adoption act generally requires that she reaffirm that consent within a short period after birth. The child remains in the agency's custody until placement with the adoptive parents. The agency tries to locate the father and secure his consent to termination of his parental rights, but does not deny services to birth mothers who refuse to name the father. If efforts to locate the father prove fruitless, the agency must move for involuntary termination. The agency's counseling of the birth mother should continue after placement.

During the adoption process and afterwards, the agency should also counsel the adoptive parents concerning the process and the changes adoption will likely make in their lives. The agency's eligibility standards for prospective adoptive parents may exclude persons based on such factors as age, marital status, race, religion, financial stability and emotional health. At one time, even discrimination based on outward appearances was encouraged because adoption was deemed an inferior way to constitute a family. If parents and children looked sufficiently alike and were within a particular age range, agencies and courts made it easier for the family to hide the fact that an adoption had occurred.

Nowadays officially sanctioned discrimination is the exception rather than the rule throughout American life, and Congress has even mandated an end to race matching in adoption (see infra § F). Discrimination in adoption resists eradication, however, because it frequently results from exercise of agency discretion rather than from written rules and regulations. See generally Jana B. Singer, The Privatization of Family Law, 1992 Wis. L. Rev. 1443.

Fees charged by adoption agencies have risen substantially in recent years and now can run as high as $7,000 to $10,000 or more, with the highest fees being charged by private agencies. Joan Heifetz Hollinger, Introduction to Adoption Law and Practice § 1.05[3][a], at 1-67, in 1 Hollinger, Adoption Law and Practice (2000).

Private placements

A private placement adoption is arranged without an agency by the birth mother dealing with the prospective adoptive parents either directly or through a lawyer, member of the clergy, physician or other intermediary. Most states facilitate private placements by permitting advertising by persons wishing to adopt.

All states permit private placement adoptions by stepparents or other members of the child's family. All but a handful of states also permit private placements to adoptive parents unrelated to the child. Even in the few states that prohibit non-relative private placements, birth parents may sometimes reach agreement privately with the prospective adoptive parents, and then work with an agency to direct the child to the designated persons.

In recent years, most healthy infants adopted by nonrelatives have been adopted in private placements, which normally do not provide the counseling that agencies offer birth parents and adoptive parents. The steadily increasing volume of private adoptions, however, is fueled in part by frustration with agencies' long waiting lists, restrictive guidelines, and sometimes intrusive investigations. A major reason for the increase is the contemporary shortage of adoptable children without special needs, and the resulting intense competition for these children among desirous adoptive parents.

The shortage of healthy infants available for adoption stems from several factors. Abortion and birth control are more widely available to unmarried women than in the past. Unmarried birth mothers today are also much more likely to keep their babies because the stigma of single parenthood and out-of-wedlock births has
markedly diminished in the past generation. An estimated 97% or more of unmarried women who deliver babies now choose to keep the child. As a result, prospective adoptive couples outnumber adoptable children by at least 20 to 1 and, according to some estimates, considerably higher. The odds are particularly daunting for would-be adoptive parents disfavored by agencies, such as older couples and single persons.

In private placements, adoptive parents may pay as much as $20,000, including their legal fees, the birth mother's legal fees and maternity-related expenses. Some observers believe that in some private placements, “under the table” payments may increase the amount considerably.

**Baby Selling**

Most states have enacted statutes prohibiting baby selling and baby brokering. The statutes regulate the money that can change hands in an adoption, limiting payments by prospective adoptive parents to reasonable amounts for such items as agency or other placement fees, counseling and attorneys' fees, the medical expenses of the birth mother and the child, and the birth mother's living expenses during the pregnancy. Some statutes also permit the prospective adoptive parents to excuse child support arrearages owed by the birth parent who consents to termination of parental rights, at least where one petition is the child's stepparent. Some decisions permit the parties to excuse support arrearages even in the absence of statute. See, e.g., In Adoption of C.L.R., 352 N.W2d 916, 919 (Neb.1984).

The policy behind baby selling statutes is that adoption should be a donative transfer, and not a commercial transaction in which the birth mother or intermediary sells a product for profit. Some observers believe, however, that these statutes are ineffective in preventing an underground adoption market in healthy babies. Because the demand for such babies far exceeds their numbers, desperate would-be adoptive parents may be willing to pay considerable sums to birth mothers and intermediaries regardless of statutory proscription.

Baby selling prosecutions are few and far between, in part because there is usually no complainant unless the birth mother has second thoughts. Proof beyond a reasonable doubt is difficult to establish because the line between proper and improper payments can be hazy. Sanctions imposed on birth parents are both quite rare and quite minor. Courts normally do not withhold approval of the adoption because unlawful payments usually surface in private adoptions, if at all, only in an accounting after the child has been placed. By that time, courts are loath to upset the child’s established relationship with loving adoptive parents.

Baby selling statutes apply to lawyers who act as intermediaries in private adoptions. In In re Thacker, 881 S.W.2d 307 (Tex.1994), for example, the court upheld disciplinary sanctions imposed on a lawyer convicted of purchasing five children from the same mother, including a set of unborn twins. In affirming Thacker's baby-selling conviction, the court of appeals found that the lawyer had paid the birth mother about $12,000 for the five children. Thacker v. State, 889 S.W.2d 380, 384-85 (Tex.Ct.App.1994), denying writ of habeas corpus, 999 S.W.2d 56 (Tex.Ct.App.1999). The state supreme court upheld the lawyer's disbarment on the ground that violation of the baby selling statute constitutes a crime involving moral turpitude.

**Federal and State Subsidies**

A significant number of children adopted each year are classified as “special needs” children. The definition of “special needs” differs from state to state, but the term generally includes older children, children of racial or ethnic minority groups, children with siblings who should be placed together if possible, children who test positive for HIV, children who suffered prenatal exposure to drugs or alcohol, abused or neglected children, and children with mental, emotional or physical disabilities.

Psychologists recognize that children freed for adoption thrive best in permanent adoptive homes rather than in prolonged foster or institutional care. Growing numbers of special needs children, however, suffer through multiple foster placements deprived of permanency for lack of available adoptive homes. Agency eligibility standards for prospective adoptive parents are frequently relaxed when an applicant wishes to adopt a special needs child, but adoption may nonetheless remain difficult because parents willing to adopt and nurture special needs children may face imposing obstacles, including financial ones, not faced by other adoptive parents.

In an effort to facilitate adoption of special needs
children, federal and state law provide financial assistance for parents willing to shoulder the responsibility. The federal Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. §§ 670-76, created an adoption assistance program under the Title IV-E of the Social Security Act. The program provides subsidies for persons adopting children who have one or more special needs according to the state's definition, and who are SSI (Supplemental Security Income) eligible or come from a family that meets the eligibility requirements of the former Aid to Families With Dependent Children program as of July 16, 1996. A child is "SSI eligible" usually because he or she has a disability. Eligibility for Title IV-E adoption assistance does not depend on the adoptive parents' financial circumstances.

The Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, encouraged adoption of special needs children by, among other things (1) providing incentive payments to states whose adoptions of foster children exceed the previous year's number, (2) requiring states to provide health insurance coverage for any special needs child with an adoption assistance agreement who the state determines would not be adopted without medical assistance, (3) guaranteeing that special needs children will not lose eligibility for federal adoption assistance if their adoption is dissolved or their adoptive parents die, and (4) prohibiting states from postponing or denying a suitable out-of-state adoptive placement while seeking in-state placement.

In 2001, Congress enacted Pub. L. No. 107-16, which increased to $10,000 a tax credit for all adoptions other than adoptions of children of the taxpayer's spouse. Taxpayers who adopt a special needs child are entitled to the credit regardless of their adoption costs. Taxpayers who adopt a child without special needs are entitled to a credit only to the extent of their unreimbursed qualified adoption expenses. The amount of the credit begins to be reduced when the taxpayers' adjusted gross income exceeds $150,000, and is completely phased out when the taxpayers' adjusted gross income reaches $190,000.

Various states also allow tax credits for parents who adopt special needs children. States may also maintain adoption subsidy programs to assist parents of special needs adoptees ineligible for the federal IV-E program. The state subsidies generally cover medical, maintenance and special services costs. Eligibility for state assistance generally depends on the adoptive parents' financial circumstances and the child's special needs.

Investigations or Home Studies

In agency adoptions and private placements alike, adoption acts require at least one investigation or home study of the prospective adoptive parents. Some states permit courts to waive this requirement for good cause. Many states do not impose the requirement where the prospective adoptive parent is the child's stepparent or other close relative.

The investigation or home study enables the court to determine whether the prospective adoptive parents would be suitable for the child, helps the parents probe their capacity to be adoptive parents and the strength of their desire to adopt, and helps reveal factors about the parents or the child that might affect the adoption. The investigation or home study may protect the child from a placement undesirable because of the parents' circumstances, such as a history of abuse or neglect or the parents' likely inability to manage special needs the child might have.

In agency adoptions, the agency must make an investigation or home study before placing the child with the prospective adoptive parents, with the child sometimes placed in temporary foster care in the interim. The agency must follow up with a further inspection shortly after placement. In private placements, however, the investigation or home study might not be done until after the parent or an intermediary has transferred the child. Public concern about lax regulation of private placements has led some states to require that, at least where the prospective adoptive parent is not the child's stepparent or other relative, a notice to adopt must be filed and an investigation or home study must be conducted before transfer. Transfer may not be made until the parents are certified as qualified. See, e.g., N.Y. Dom. Rel. L. §§ 115, 115-c, 115-d. These requirements recognize that because of the child's need for continuity, a meaningful post-transfer investigation or study may be impractical.

Except in stepparent adoptions and other unusual circumstances, the adoption does not become final until the child has been in the adoptive parents' custody for a probationary period which, depending on the state, may
range from three months to a year. The court signs the final adoption order if circumstances warrant after a final home investigation.

The Interstate Compact on the Placement of Children

Children are frequently moved from one state to another for foster care or possible agency or private adoption. In light of the sometimes significant differences between state adoption laws, movement sometimes results from forum shopping by parties seeking states with comparatively favorable provisions.

To enhance protection for children moved interstate, all states have enacted the Interstate Compact on the Placement of Children, first proposed in 1960. An interstate compact is an agreement between two or more states which is both a binding contract between the states and a statute in each state. A compact takes precedence over the state’s other statutory law. U.S. Const. art. I, § 10; United States Steel Corp. v. Multistate Tax Comm’n, 434 U.S. 452, 468 (1978).

The Interstate Compact on the Placement of Children seeks to protect children transported interstate for foster care or possible adoption, and to maximize their opportunity for placement in a suitable environment with persons able to provide the necessary and desirable level of care. Compact, Art. I(a). Most decisions hold that the Compact applies to both agency adoptions and private placements. See, e.g., In re Baby Girl —, 850 S.W.2d 64, 68 n.6 (Mo.1993).

The Compact provides that “[n]o sending agency shall send, bring or cause to be sent or brought into any other party state, any child for placement in foster care or as a preliminary to a possible adoption unless the sending agency shall comply with each and every requirement set forth in this article and with the applicable laws of the receiving state governing the placement of children therein.” Compact, Art. III(a). Sending agencies must notify the receiving state’s compact administrator before placing a child. The receiving state’s authorities must investigate and, if they are satisfied, must notify the sending state that the proposed placement does not appear contrary to the child’s interests. The child may not be sent or brought into the receiving state until such notification is given.

The “sending agency” may be either an entity or a natural person. Article VIII, however, excludes from the Compact’s scope the sending of a child into the receiving state by “his parent, step-parent, grandparent, adult brother or sister, adult uncle or aunt or his guardian and leaving the child with any such relative or non-agency guardian in the receiving state.”

The sending agency retains jurisdiction over the child in matters relating to custody, supervision, care and disposition until the child is adopted, reaches majority, becomes self-supporting or is discharged with the receiving state’s concurrence. The sending agency also continues to have financial responsibility for support and maintenance of the child during the period of the placement. Id. Art. V(a).

Where a child is sent or brought across state lines in violation of the Compact, the violation is punishable under the child placement laws of either state and may be a ground for suspending or revoking the violator’s license to place or care for children. Id. Art. IV. The Compact does not specify, however, whether violation may also be a ground for dismissing the adoption petition, a potent sanction indeed. Decisions tend to hold out the prospect of dismissal but ultimately refuse to make children pay the price of adult noncompliance. See, e.g., In re Adoption/Guardianship No. 3598, 701 A.2d 110, 124 (Md.1997).

A persistent barrier to the Compact’s effectiveness is counsel’s noncompliance, which may be unintentional due to lack of knowledge about interstate adoption requirements. Parties seeking redress for noncompliance with the Compact may file in the courts of the sending or the receiving state. Determining the jurisdictionally proper court may implicate the Uniform Child Custody Jurisdiction Act (which has been enacted in all states) and the federal Parental Kidnapping Prevention Act.

THE CONSENT REQUIREMENT
The Requirement of Informed and Voluntary Consent
The nature of consent

The general rule is that on a petition by persons with standing to adopt, the court may not consider the best interests of the child unless consents to adoption have been secured from all persons with a right to give or withhold consent. Receipt of all required consents does not complete the adoption, but merely enables the
court to order the adoption if it concludes all other requirements (including the best interests standard) have been satisfied.

Knowing and voluntary consent (or as some statutes call it, "release," "relinquishment" or "surrender") generally must be secured from both birth parents. A parent may execute a specific consent (authorizing adoption by particular named persons) or a general consent (authorizing adoption by persons chosen by the agency, an intermediary or the court). To preserve confidentiality, general consents are normally used in agency adoptions.

Consent is not required from a birth parent who is incompetent, whose parental rights have been terminated voluntarily or involuntarily, or who has abandoned or neglected the child for a period specified in the adoption act. If the birth parent is incompetent, the court may appoint a guardian of the child's person, with authority to consent in the parent's stead. In some states, the court in the adoption proceeding itself may determine whether to terminate parental rights; other states require that where termination is a predicate for adoption, the termination proceeding must take place before the adoption proceeding.

Because valid consent to adoption may terminate the parent-child relationship, adoption acts require formalities designed to bring home to the birth parent the gravity of consent. In almost all states, consent must be in writing. The act may specify that the consent be signed before a judge, notary or other designated officer. A particular number of witnesses may be required. The consent may have to be under oath.

Most states specify that consent may not be executed until the child is born. See, e.g., Ariz. Rev. Stat. § 8-107(B) (not before child is 72 hours old). In some states this specification applies only to the birth mother; the birth father (who may disappear during the pregnancy) may consent either before or after the child's birth. See, e.g., 23 Pa. Cons. Stat. § 2711(c). In many states, consent may be revoked within the first few days after execution, or within the first few days or hours after the child's birth. The court then may determine whether revocation is in the best interests of the child. See, e.g., Ga. Code Ann. § 19-4-9 (ten days after signing).

In nearly all states, consent to the adoption must also be secured from the child where he or she is over a specified age. See, e.g., Cal. Fam. Code § 8602 (twelve or older). Some statutes authorize the court to dispense with the child's consent for good cause. See, e.g., N.M. Stat. § 32A-5-21 (ten or older, unless the court finds the child does not have mental capacity to make the judgment).

Where a child has been committed to the custody of a public or private child placement agency, the agency's consent may also be a factor. In a few states, agency refusal to consent divests the court of authority to grant the adoption. Many states make the agency's consent a prerequisite to adoption, but authorize judicial scrutiny by providing that the agency may not unreasonably withhold consent. See, e.g., Minn. Stat. § 259.24(1)(e), (7). Even where the adoption act seemingly makes agency consent mandatory without condition, many decisions hold that the agency's refusal to consent is nonetheless persuasive only. The court may grant the adoption if it finds agency's refusal to consent contrary to the best interests of the child. See, e.g., In re M.L.M., 926 P.2d 694, 697 (Mont. 1996). Under the familiar judicial approach to review of agency decisionmaking, however, the court will likely grant deference to the agency determination because of the agency's experience and expertise.

**Notice**

A person's right to consent (or withhold consent) to the adoption must be distinguished from the right to notice of the adoption proceeding. A person with the right to consent, such as a birth parent, is entitled to notice and may veto the adoption by withholding consent.

The adoption act, however, may also require notice to other persons, who may hold the limited right to address the court concerning the best interests of the child, but without the right to veto the adoption. To expedite the adoption process, some states provide that notice need not be given to a person who has executed a valid consent to adoption. Not requiring notice may make good sense because the person has no right to veto the adoption and may be difficult to locate. On the other hand, not requiring notice may encourage persons to secure consents from vulnerable birth parents under conditions approaching fraud or duress.

Most states permit minor birth parents to execute out-of-court consents without the advice of their parents or guardians, other family members or counsel. To help
reduce the adoption's vulnerability to later collateral attack, however, the adoptive parents' counsel may wish the minor to acknowledge her desires in open court.

**Forcible or statutory rape**

Several states authorize termination of the father's parental rights on the ground that the child was conceived as a result of a forcible rape or other nonconsensual sex crime committed by him. The father then may not veto adoption of the child. See, e.g., N.M. Stat. § 32A-5-19(C). Courts hold or assume that the federal and state constitutions impose no barrier to such terminations. See, e.g., Adoption of Kelsey S., 823 P.2d 1216, 1237 (Cal.1992).

Courts disagree about whether termination may be ordered, as a matter of law, where the child was conceived as a result of a statutory rape in the absence of force. See, e.g., Pena v. Mattox, 84 E3d 894 (7th Cir. 1996) (yes); In re Craig "V", 500 N.Y.S.2d 568, 569 (App.Div.1986) (no).

The Rights of Unwed Parents

The birth mother has traditionally held the right to veto an adoption by withholding consent, unless consent was excused by operation of law. Because this right emanated from the mother's legal right to custody of the child, the right applied regardless of whether she was married to the father at conception and birth. The right was meaningful because the mother's identity is ordinarily ascertainable from the birth certificate, hospital records or witness' testimony.

Before Stanley v. Illinois in 1972, the father's rights to notice of an adoption and to withhold consent was another matter. Where the child was conceived or born during marriage, the father's identity and whereabouts were ordinarily ascertainable and his consent to adoption was normally required, again unless excused by operation of law. See, e.g., Armstrong v. Manzo, 380 U.S. 545 (1965) (absence of notice deprived divorced father of due process and invalidated purported adoption by mother's new husband). Unwed fathers, however, held no right to notice of the child's impending adoption and no right to veto the adoption under the federal constitution or under the constitutions or statutes of most states. An unwed father could not secure these rights by acknowledging the child as his own, supporting the child, or seeking to establish a relationship with the child or the mother. As a matter of law in most states, unwed fathers held no legal relationship to their children.

**Stanley v. Illinois (1972)**

Joan and Peter Stanley lived together intermittently for eighteen years. When Joan died, their three children became wards of the state by operation of law and were placed with court-appointed guardians. As an unwed father, Peter was a non-parent — a legal stranger to his children — who held no statutory right to a fitness hearing before placement. In Stanley v. Illinois, 405 U.S. 645 (1972), however, the Supreme Court held that due process guaranteed the unwed father a fitness hearing before his children could be taken from him, and that the state violated equal protection by denying him a hearing while extending it to all other parents whose custody of their children was challenged.

Stanley was a dependency proceeding, but it immediately revolutionized adoption law. Previously a nonmarital child's adoption could be finalized on the mother's consent alone, regardless of whether the father appeared now or later to protest. By conferring due process and equal protection rights on the unwed father with respect to the child, however, Stanley and its progeny raised the specter that the father whose rights have not been terminated (including a father who cannot be located now) may appear sometime the future and contest the adoption.

Because Stanley concerned an unwed father who (as the majority read the record) had maintained a relationship with his children, the decision left open the question whether the decision conferred constitutional rights on all unwed fathers, or only on unwed fathers who had maintained such a relationship. Stanley itself sent conflicting signals. On the one hand, the Court spoke about Mr. Stanley's interest in "the children he has sired and raised"; on the other hand, the Court suggested service by publication on absent fathers.

The Court began answering the open question a few years later in two decisions concerning the constitutional rights of unwed fathers to veto adoptions. The first, Quilloin v. Walcott, 434 U.S. 243 (1978), concerned an unwed father who had never sought custody or visitation of his 11-year-old son, had supported the boy only irregularly, and had had several contentious visits with
him. The Court held that Stanley did not entitle the father to veto the adoption because he had "never exercised actual or legal custody over the child, and thus had never shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child."

In Caban v. Mohammed, 441 U.S. 380 (1979), a year later, the unwed father had lived with his two children and had supported and cared for them for several years until he and the mother separated. He continued to see the children often after the separation and continued to raise them. The Court held that Stanley granted Mr. Caban an equal protection right to veto the children's adoption because his "substantial relationship" with his children was different from Mr. Quilloin's "failure to act as a father."

Lehr v. Robertson (1983)

In Lehr v. Robertson, 463 U.S. 248 (1983), the unwed father contended that due process and equal protection gave him an absolute right to notice and opportunity to be heard concerning the proposed adoption of his two-year-old daughter by the man who had married the girl's mother when the child was eight months old. In the two years between the girl's birth and the adoption proceeding, the unwed father had never supported the child, had rarely seen her, and never lived with her or the mother.

The Supreme Court rejected the unwed father's due process claim because he had not developed a relationship with the child. Nor had he entered his name in the state's putative father registry, which would have signaled his intent to claim paternity and would have conferred a right to notice of the adoption. The Court concluded that the registry "adequately protected his opportunity to form such a relationship" with the child.

"The significance of the biological connection," Justice Stevens wrote for the Court, "is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development. If he fails to do so, the Federal Constitution will not automatically compel a State to listen to his opinion of where the child's best interests lie."

Lehr also rejected the unwed father's equal protection claim. Again the Court stressed that unlike the mother, he had never established any custodial, personal or financial relationship with his daughter. "If one parent has an established custodial relationship with the child and the other parent has either abandoned or never established a relationship, the Equal Protection Clause does not prevent a state from according the two parents different legal rights."

Lehr (like Stanley, Quilloin and Caban) concerned children who were at least a few years old when the adoption dispute arose, and children whose existence and whereabouts the fathers had known about since birth. The decisions do not explicitly speak to two recurrent questions:

Newborn adoptions. Many transfers of children to nonrelative adoptive parents occur at birth or within days (but not years) thereafter. Does due process or equal protection guarantee the unwed father a right to veto an adoption before he has had a meaningful opportunity to develop a relationship with the child?

The "thwarted" unwed father. Seeking to thwart the unwed father's efforts to develop the requisite relationship with the child, the mother may place the child for adoption at birth or shortly afterwards after hiding the child from him, after untruthfully asserting that she does not know the father's identity or whereabouts, after refusing to name the father, after forging his signature on consent documents, or after knowingly naming the wrong man. The unwed father may have a civil damage action against the mother, e.g., Kessel v. Leavitt, 511 S.E.2d 720, 734 (W. Va.1998) (fraud); Smith v. Malouf, 722 So.2d 490, 497-98 (Miss.1998) (intentional infliction of emotional distress and conspiracy), but damage recovery would not unravel the father's tangled rights with respect to the child.

The Court's next decision, Michael H., may suggest a new approach to these and other constitutional questions raised by the Stanley line of decisions.

In Michael H. v. Gerald D., 491 U.S. 110 (1989) (plurality opinion), the sharply divided Court suggested that a state may constitutionally protect a marital union by disregarding an unwed father who had maintained a relationship with the child.

The facts were suitable for a soap opera. Carole (married to Gerald D.) began having an adulterous affair with Michael H., became pregnant and gave birth to Victoria D. in 1981. The birth certificate listed Gerald as the father, and he always held Victoria out as his daughter. Blood tests, however, revealed a 98.07% probability that Michael was Victoria’s father. In the first few years of Victoria’s life, she remained with Carole but sometimes lived with Gerald or Michael. Victoria lived with Michael for a total of about eleven months. In 1984, Carole and Gerald reconciled.

California law presumed that a child born to a married woman living with her husband, who was not impotent or sterile, was a child of the marriage. The virtually conclusive presumption was rebuttable only by the husband or the wife, and only in limited circumstances. The Court rejected Michael’s contention that California’s statutory presumption survived. An unwed birth father seeking to veto an adoption based solely on his relationship with the child would similarly have no cognizable liberty interest if he had not established a legally recognized relationship with the mother.

Concurring Justice Stevens provided the fifth vote for the disposition, but did not embrace the plurality’s reading of the Stanley line of decisions, which he concluded “demonstrate that enduring ‘family’ relationships may develop in unconventional settings.”

Dissenting Justice Brennan (writing for himself and Justices Marshall and Blackmun) argued that the Stanley line had “produced a unifying theme: although an unwed father’s biological link to his child does not, in and of itself, guarantee him a constitutional stake in his relationship with that child, such a link combined with a substantial parent-child relationship will do so. This commitment is why Mr. Stanley and Mr. Caban won; why Mr. Quillioin and Mr. Lehr lost.”

Dissenting Justice White concluded that the plurality’s synthesis of the Stanley line “recanted” from the assurance Lehr had provided to unwed fathers who maintained relationships with their children.

**Putative father registries**

Most states enacted putative father registries after Lehr upheld their general constitutionality. Where a man believes he is or may be a child’s father, he must register (usually with the state department of health or similar agency) if he wishes to receive notice of a prospective adoption. Once the man receives notice, he may seek to establish paternity and assert his right to veto the adoption.

New York’s registry statute at issue in Lehr established no time limit within which the putative father must register to preserve his claim of right. In some states, however, the statute requires registration before the child is born or within a specified short period after birth. See, e.g., Ariz. Rev. Stat. § 8-106.01B (before the child’s birth or not later than 30 days after birth). Failure to register within the specified period constitutes waiver not only of the right of notice but also of the right to contest the adoption. Registry statutes with time limits are strictly construed against the putative father, both to avoid the lengthy custody battles the registries are designed to prevent, and to protect the birth mother. See, e.g., Shoecraft v. Catholic Social Servs. Bureau, Inc., 385 N.W2d 448 (Neb.1986). Strict construction has been upheld as constitutional. See, e.g., In re Adoption of
Douglas E. Abrams, J.D., et al
Reeves, 831 S.W.2d 607, 608 (Ark. 1992).

The wrinkle is that most men remain unaware of the registry's existence because they are not lawyers, and most prospective parents do not consult with lawyers about childbirth. A few states seek to publicize the registry in places likely to be frequented by unwed fathers, such as hospitals, local health departments and other such health facilities, motor vehicle department offices, and schools and universities. Publicity or no, however, the putative father's lack of knowledge of the registry's existence, or of the pregnancy and birth, does not excuse nonregistration. The rationale is that men "are aware that sexual intercourse may result in pregnancy, and of the potential opportunity to establish a family." In re Clausen, 502 N.W.2d 649, 687 (Mich. 1993) (Levin, J., dissenting).

Despite the statutory purpose to enable unwed fathers to protect their rights, registries are not foolproof. For one thing, each registry is a particular state's enactment, without reach or effect in other states. Assume two teenagers conceive a child while on summer vacation in state A, then return to their homes in states B and C respectively. With the help of her parents, the teenage mother in state C then places the child for adoption in state D, asserting that she does not know the father's identity or whereabouts. The father may have no idea that adoption proceedings are pending in state D, asserting that she does not know the father's identity or whereabouts. The father may have no idea that adoption proceedings are pending in state D, and registration in state A, the state of conception, would not protect him.

**OPEN ADOPTION**

**The Growth of Open Adoption**

In an "open adoption," the child has continuing post-decree relations with the birth parents or perhaps other members of the immediate or extended birth family. The continuing relations may include contact through visitation, correspondence, telephone calls, or otherwise. Informal adoption, frequently with arrangements for openness, was the norm in the first decades after Massachusetts enacted the first modern adoption act in 1851. Only in the early twentieth century did states begin to mandate sealing of adoption records to insure confidentiality and sever the legal and social relationship between the adoptee and the birth parents.

The walls of confidentiality are not impregnable. In recent years, the shortage of healthy adoptable children has helped fuel private adoptions with openness agreements between the birth parents and the adoptive parents. The shortage has given leverage to birth mothers who seek a future right of contact with the child as a condition of consent. Indeed, some adoption agencies facing loss of business now accommodate birth mothers who seek openness and might otherwise choose private placements. In light of the Stanley line of decisions, unwed fathers holding a right to veto the adoption may also insist on openness.

The growth of private open adoptions has also resulted from the changing demographics of adoption. In recent years, smaller percentages of adoptions have involved newborns and greater percentages have involved children over the age of two, including special needs children. More and more children have been adopted by their stepparents, relatives and foster parents. The result is that the birth parents, adoptees and adoptive parents frequently know one another's identities and whereabouts before the petition is filed. For better or worse, the child may have had a relationship with the birth parents and other relatives that a stroke of the judge's pen cannot easily undo.

Where practical necessity or private arrangement has not produced openness, however, confidentiality remains controversial as a policy matter. For some special needs and older foster children desperately needing adoptive homes, the openness option may help overcome judicial reluctance to order an adoption where complete severance of ties with birth parents or other close relatives may not be in the child's best interests. The option may also help overcome a birth parent's reluctance to consent to termination of parental rights, and thus may enable the child to secure an adoptive home without lengthy, and sometimes bitter, contested termination proceedings. Openness may also benefit an older child who has had a relationship with the birth parents or other close relatives. Finally, open adoption may enable disputing parties to settle contested proceedings without the trauma the child might otherwise suffer when birth parents and adoptive parents each hold out to the bitter end for an "all or nothing" outcome.

On the other hand, openness may deter many persons from adopting for fear they must "share" the child or might later lose the child. Openness also would sometimes produce continued relationships with abusive or
neglectful parents, or leave the child confused by loyalties to more than one set of adults.

Disagreement remains concerning judicial authority to order open adoptions. Some adoption acts authorize courts to order visitation or other contact between an adopted child and persons other than the adoptive parents, including the natural parents, when visitation or contact would be in the best interests of the child. See, e.g., Wis. Stat. § 48.92(2). Other adoption acts, however, expressly preclude post-adoption visitation orders unless the adoptive parents agree to permit visitation. See, e.g., Tenn. Stat. § 36-1-121(f).

Where the adoption act is silent about post-adoption visitation, courts disagree about whether it may be ordered in the best interests of the child. In In re S.A.H., 537 N.W.2d 1, 7 (S.D.1995), for example, the court held that visitation may be ordered when three factors indicate, by clear and convincing evidence, that it would serve the best interests of the child: (1) the child's psychological need to know his or her ancestral, ethnic and cultural background, (2) the effect of open adoption on the child's integration with the adoptive family, and (3) the effect of open adoption on the pool of prospective adoptive parents. Other decisions, however, have precluded courts from exercising inherent authority to enter post-adoption visitation orders on the ground that the adoption act, while silent about visitation itself, expressly terminates all rights and relationships between the adoptee and persons other than the adoptive parents. See, e.g., In re Adoption of C.H., 544 N.W.2d 737 (Minn. 1996).

After Troxel v. Granville, 530 U.S. 57 (2000), a court order granting birth parents or others visitation with an adopted child may raise constitutional questions if the order is opposed by the adoptive parents, who succeed to the birth parents' rights under the adoption act.

In the absence of express statutory authority, decisions disagree about the propriety of specific performance. See, e.g., Michaud v. Wawruck, 551 A.2d 738 (Conn.1988) (written visitation agreement between birth parent and the adoptive parents may be specifically enforced where enforcement is in the best interests of the child); Hill v. Moorman, 525 So.2d 681 (La.Ct.App.1988) (adoptive parents' written agreement to allow the birth mother reasonable visitation with the child was unenforceable).

CULTURAL AND RELIGIOUS IDENTITY

Transracial Adoption

A brief history of transracial adoption in the United States

The term “transracial adoption” would describe any adoption in which the parents and child are of different races, including adoptions in which the child is white. Nearly all transracial adoptions in the United States, however, have involved white parents and black or biracial children.

The first recorded adoption in the United States of a black child by white parents took place in 1948. Transracial adoptions increased in the 1950s and 1960s. Then, in 1972, the National Association of Black Social Workers sternly condemned transracial adoption as "cultural genocide" and argued that "Black children should be placed only with Black families whether in foster care or adoption." National Assoc. of Black Social Workers, Position Paper (Apr. 1972). Transracial adoption continues to be controversial, although it is relatively rare. Compare, e.g., Ruth-Arlene W. Howe, Transracial Adoption (TRA): Old Prejudices and Discrimination Float Under a New Halo, 6 B.U. Pub. Int. L.J. 409 (1997) ("[w]idespread, unregulated occurrences of private placements of infants of African-American descent with non-African-American adoptive parents place these children at risk of alienation from their natural reference group") with Randall Kennedy, The Orphans of Separatism: The Painful Politics of Transracial Adoption, 38 American Prospect 38 (Spring 1994 )("[r]acial matching is a disastrous social policy both in how it affects children and in what it signals about our current attitudes about racial distinctions . . . . What parentless children need are not 'white,' 'black,' 'yellow,' 'brown,' or 'red' parents but loving parents").
Congressional legislation

In 1996, Congress enacted the Small Business Jobs Protection Act of 1996 (SBJPA), which contained provisions seeking to end the practice of matching adoptive parents with children of the same race. The legislation prohibits private and public child placement agencies from denying any person the opportunity to become an adoptive or foster parent, or from delaying or denying the placement of a child for adoption or into foster care, “on the basis of the race, color, or national origin of the adoptive or foster parent, or the child.” Violations are actionable under title VI of the Civil Rights Act of 1964. 42 U.S.C. § 1996b(1),(2).

The transracial adoption debate will likely continue. For one thing, the SBJPA does not prohibit agencies from delaying or denying placement on the ground that the prospective adoptive or foster parents lack the sensitivity needed to raise a child in a multiracial family.

The Supreme Court has not decided whether denial of an adoption on racial grounds would violate the Constitution. Some hints, however, may be provided in Palmore v. Sidoti, 466 U.S. 429 (S.Ct.1984), an appeal by a white divorced wife who lost custody of her young child after she remarried a black man. The trial court found neither birth parent unfit but stated that placement with the birth father was in the best interests of the child because “it is inevitable that [the child] will, if allowed to remain in her present situation and attains school age and thus more vulnerable to peer pressures, suffer from the social stigmatization that is sure to come.”

Palmore held that the order modifying custody violated equal protection. “The Constitution cannot control [racial and ethnic] prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.”

Native American Adoption

Congress' rejection of race-matching in the SBJPA stands in contrast to the lawmakers' recognition of tribal identity in the Indian Child Welfare Act of 1978, 25 U.S.C. § 1901 et seq. The Act provides that “[i]n any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families.” 25 U.S.C. § 1915(b). The SBJPA expressly exempts the ICWA from its provisions.

An estimated 1,000 to 2,500 Native American children are adopted each year. See Joan Heifetz Hollinger, Introduction to Adoption Law and Practice §1.05(2)(e), supra. The ICWA seeks to protect the best interests of Indian children, and to promote the security, survival and stability of Indian families and tribes by recognizing Indian children as tribal resources. 25 U.S.C. §§ 1901(1),(3), 1902.

Religion

By statute or case law, courts deciding whether to approve an adoption are mandated or authorized to consider the religion of the prospective adoptive parents and of the child (or the child's birth parents). Wis. Stat. § 48.82(3) is typical: "When practicable and if requested by the birth parent, the adoptive parents shall be of the same religious faith as the birth parents of the person to be adopted.”

Religious matching raises two fundamental questions. The first is whether the court may deny an adoption on the ground that the adoptive parents and the child (or the child's birth parents) are of different religions. Courts generally hold that where the statute requires religious matching when practicable or feasible without creating an inflexible rule of law, the First Amendment establishment and free exercise clauses are not offended when religious differences are considered as one factor in determining the best interests of the child. See, e.g., Petition of Gaily, 107 N.E.2d 21, 25 (Mass.1952) (religious matching was not practicable where the physically disabled two-year-old would likely not be adopted by anyone other than the petitioners). Some courts have held, however, that the First Amendment is violated when religious matching is the sole ground for denying an adoption by otherwise fit petitioners. See, e.g., In re Adoption of E, 279 A.2d 785 (N.J.1971). Religious differences are less significant where the birth parents consent to adoption by a petitioner of a different faith. See, e.g., In re Adoption of Anonymous, 261 N.Y.S.2d 439 (Fam.Ct.1965).

Should the child's age and maturity affect the weight the court gives to the adoptive parents' different religion? Where the child is a newborn or an infant too
young to express a religious preference, courts may consider the birth parents' preferences for the child, but these preferences are not determinative. See, e.g., Cooper v. Hinrichs, 140 N.E.2d 293, 297 (Ill. 1957). Older children who have practiced a religion, however, may have interests of their own that merit the court's recognition.

The second fundamental question is whether a court may deny an adoption on the ground that a prospective adoptive parent does not believe in a Supreme Being. Some decisions have considered a parent's failure to believe in God as indicating inability or unwillingness to direct the child's religious and moral upbringing. However, In re Adoption of E, supra, is typical of decisions holding that without other facts, a court may not find failure to believe in God controlling. "Sincere belief in and adherence to the tenets of a religion may be indicative of moral fitness to adopt in a particular case," but "we do not believe that any reasonable man no matter how devout in his own beliefs, would contend that morality lies in the exclusive province of one or of all religions or of religiosity in general."

INTERNATIONAL ADOPTION

Adoption of foreign children by Americans, largely unknown before World War II, began in earnest with returning soldiers and media coverage of the plight of children and other refugees. The Korean and Vietnam wars produced heightened interest, which continues to this day. Proponents believe international adoption serves the interests of both American parents and the foreign children themselves. In the United States, "very few children are available for adoption in comparison with the large number of people who, for infertility and other reasons, are eager to adopt. . . . For most of the homeless children of the world, international adoption represents the only realistic opportunity for permanent families of their own." Elizabeth Bartholet, International Adoption: Propriety, Prospects and Pragmatics, 13 Am. Acad. of Matrimonial Lawyers 181, 181-82 (1996).

International adoption is no longer a product solely of war. In fiscal year 1999, United States citizens adopted 16,396 children from abroad, a number that exceeds the number of international adoptions completed by citizens of all other nations combined. Russia was the greatest source for intercountry adoptions, followed in descending order by China, South Korea, Guatemala, Romania, Vietnam, India, Ukraine and Cambodia. See National Adoption Information Clearinghouse, www.cali.com/naic/pub/F_inter.html (visited June 10, 2001). International adoption accounts for only about 5% to 6% of U.S. adoptions annually, but the numbers are increasing rapidly.


POST-ADOPTION DISPUTES

Fraud or Negligence

A relatively small percentage of adoptions fail, frequently when the child manifests severe physical or emotional problems previously unknown to the adoptive parents, perhaps because the agency or other intermediary failed to provide them full and complete information at the time of adoption. Adoption law faces its greatest challenge when a party sues to recover damages or annul an adoption for negligence or fraudulent misrepresentation.

Burr v. Board of County Commissioners, 491 N.E.2d 1101 (Ohio 1986), was the first reported decision to impose liability on an adoption intermediary for nondisclosure of information about the adopted child's physical or mental condition. A number of jurisdictions now permit recovery for fraud or negligence, or both. See, e.g., Gibbs v. Ernst, 647 A.2d 882 (Pa. 1994). Some states have also enacted statutes mandating disclosure of material information by adoption agencies.
Instances of fraudulent misrepresentation by adoption agencies and other intermediaries have evidently declined since Burr, but nondisclosure and inadequate disclosure smacking of negligence persist. Periodic damage actions are likely to continue because adoption dockets include greater numbers of emotionally and physically disabled foster children and of international adoptees. Complete information about foster children is sometimes unavailable because of poor recordkeeping, rapid turnover of social welfare agency personnel, and frequent movement of the child from home to home. Private adoption agencies frequently do not receive full information from foster care authorities. International adoptees may have been anonymously abandoned by their parents or may have come from poorly administered orphanages without adequate medical histories.

**Annulling Adoptions**

Adoptive parents alleging fraud or negligence sometimes seek to annul the adoption rather than recover damages. A damage action leaves the adoptive family intact but awards compensatory or punitive damages, or both. Annulment, on the other hand, makes the adoption a nullity, and thus frees the adoptive parents of the rights and obligations that adoption creates.

Suits to annul adoptions tend to arise in three situations. The adoptive parents may find the child ungovernable and beyond their effective control; the child may manifest undisclosed severe emotional or physical disabilities unknown to the parents when they adopted; or an adopting stepparent may seek annulment when he or she later divorces the birth parent.

Except where the adoptive parents appear defrauded or where other extreme circumstances appear, courts normally deny annulment as contrary to the best interests of the child. Annulment is particularly unlikely where the child has been in the adoptive home for a substantial period of time, or where the child’s likely alternative is a return to state custody. “[P]ublic policy disfavors a revocation of an adoption because an adoption is intended to bring a parent and child together in a permanent relationship, to bring stability to the child’s life, and to allow laws of intestate succession to apply with certainty to adopted children.” In re Adoption of T.B., 622 N.E.2d 921, 924 (Ind.1993). Because the law “abhors the idea of being able to ‘send the child back’", id., only a strong showing of fraud will establish grounds for annulment. Many courts hold that a party may annul an adoption only where entitlement to annulment is established by clear and convincing evidence. See, e.g., In re Lisa Diane G., 537 A.2d 131, 132-33 (R.I.1988).

Adoption codes normally establish a short period within which finalized adoptions may be challenged. The limitations statutes, however, frequently reach only challenges for procedural irregularities or defects in the adoption proceeding itself. See, e.g., Md. Code, Fam. Law § 5-325 (one year). The period is not tolled during the child’s minority because tolling would defeat the purpose of the short period, which is to produce finality that protects children from the psychological trauma occasioned by disrupted lives.

A few states also create a limitations period for fraud challenges. See, e.g., Colo. Rev. Stat. § 19-5-214(1) (one year). Other states have enacted broad statutes of limitations that reach all challenges. See, e.g., Okla. Stat. tit. 10, § 7505-7.2(A)(2) (three months).

Where the adoption code’s statute of limitations reaches only procedural irregularities or defects, courts may permit challenges for fraud or other substantive irregularity under the state’s civil procedure act or rules relating to vacatur of final judgments generally. The act or rules may be based on Fed. R. Civ. P. 60(b), which permits vacatur on a showing, among other things, of fraud, misrepresentation or other misconduct of an adverse party or voidness of the judgment. Under general limitations doctrines, the limitations period for a fraud claim may be tolled until the allegedly defrauded party discovered or should reasonably have discovered the fraud. See, e.g., Mohr v. Commonwealth, 653 N.E.2d 1104, 1109 (Mass.1995).

**Adoptees’ Rights to “Learn Their Roots”**

**Introduction**

Entry of the adoption decree extinguishes the existing parent-child relationship, and creates a new parent-child relationship between adoptive parent and child. Statutes provide that when the court decrees an adoption, the child is issued a new birth certificate naming the adoptive parents as the only parents, the child assumes their surname, and the original birth certificate and all other sealed court records ordinarily may be
opened only on court order for good cause. In the absence of the severe necessity that establishes good cause, the birth parents may not learn the identity or whereabouts of the child or adoptive parents, and the adoptive parents and the child may not learn the identities or whereabouts of the birth parents.

Confidentiality legislation is grounded in the policy determination that closed records serve the interests of all parties to the adoption. The birth parents can “put the past behind them,” secure from embarrassment, and sometimes shame, arising from the adoption itself and perhaps the circumstances of the pregnancy and birth. The adoptive parents can raise the child as their own, free from outside interference and fear that the birth parent might try to “reclaim” the child. The adoptee avoids any shame from out-of-wedlock birth and can develop a relationship with the adoptive parents. By serving these interests of the members of the adoption triangle, confidentiality is also said to serve a state interest in encouraging persons to participate in the adoption process.

Confidentiality statutes lose their force when the court orders an open adoption, or specifically enforces a private agreement for such an arrangement. As a practical matter, confidentiality may also be impossible where the birth mother insists on maintaining contact with the child as a condition of her consent, where the adoption is otherwise concluded informally before the parties seek the decree, or where the child has had a pre-adoption relationship with the birth parents or other relatives.

In the absence of privately negotiated or court-mandated openness, however, a vast array of statutes and rules help assure confidentiality. Adoption proceedings are not open to the public. Adoption records are exempt from state freedom of information acts and open records laws. The adoption agency, the attorneys and other participants face criminal or contempt sanction for making unauthorized disclosure.

Federal and state courts have upheld the constitutionality of confidentiality statutes. Even where the court acknowledges the adoptee’s interest in disclosure, the state is found to have a rational basis for maintaining the birth parents’ interest in privacy, the adoptive parents’ interest in finality, and the state’s interest in fostering adoption. See, e.g., ALMA Society Inc. v. Mellon, 601 F.2d 1225 (2d Cir. 1979); In re Assalone, 512 A.2d 1383, 1390-91 (R.I.1986).

“Good Cause”

The good-cause requirement permits disclosure of identifying information (that is, the birth parents’ name, birth date, place of birth and last known address) only where the adoptee demonstrates urgent need for medical, genetic or other reasons. Even without such a showing, most states mandate or allow disclosure of an adopted child’s health and genetic history, without revealing identifying information. Some states also grant adoptees, when they reach majority, the right to nonidentifying information concerning their birth parents (that is, information about the parents’ physical description, age at the time of adoption, race, nationality, religious background, and talents and hobbies, without revealing the parents’ identities).

Psychological need generally does not establish good cause for release of identifying information. In In re Linda E.M. v. Department of Health, 418 N.E.2d 1302 (N.Y 1981), for example, the adoptee unsuccessfully sought release of her forty-year-old adoption records. She alleged that her inability to discover her natural parents’ identity had caused psychological problems because “I feel cut off from the rest of humanity... want to know who I am. The only person in the world who looks like me is my son. I have no ancestry. Nothing.” Linda E.M. held that “mere desire to learn the identity of one’s natural parents cannot alone constitute good cause, or the requirement...would become a nullity.” The court did state, however, that “concrete psychological problems, if found by the court to be specifically connected to the lack of knowledge about ancestry, might constitute good cause.”

Medical necessity may similarly not establish good cause, particularly where release of non-identifying information satisfies the adoptee’s needs. In Golan v. Louise Wise Services, 507 N.E.2d 275 (N.Y.1987), the 54-year-old movant had been adopted when he was less than fifteen months old. Suffering from a heart condition that produced a heart attack before the trial court heard the disclosure motion, he and his attending physicians asserted that genetic information would assist treatment and help enable the physicians to evaluate the severity of his condition.
The adoption agency supplied minimal details with all medical and historical information concerning his birth parents, except his biological father's name and hometown and the name of the college the biological father allegedly attended. (It had already knew his birth mother's name.) The court denied the disclosure motion, which sought to examine and reproduce any records or reports relating to his birth parents.

Disclosure Legislation

The efforts of many adoptees to locate their birth parents may be impeded not only by confidentiality statutes, but also by practical barriers. Poor record-keeping at some adoption agencies may make any sustained search fruitless, particularly after the passage of decades. Children adopted from orphanages overseas, sometimes after surreptitious abandonment by their birth parents, may have been subject to no record-keeping at all; the abandoned child might even have a birth certificate or other proof of date of birth.

Neither statutory mandate nor practical barriers, however, extinguish the desire of many adoptees for disclosure. Recent years have witnessed the growth of advocacy and support groups to assist adoptees' efforts to locate their birth families, to challenge the constitutionality of sealed-records statutes, and to lobby for open-records legislation. Adoptees have sometimes hired private search consultants and have found new search avenues on the Internet.

Most states have enacted registry statutes, which permit release of identifying information where the birth parents, the adoptive parents and the adult adoptee all state their desire for release. Passive registry statutes allow parties to state their desires, and active registry statutes authorize state authorities to seek out parties desires when one party expresses a desire for disclosure. In states without registry statutes, the parties' unanimous consent to disclosure may be insufficient to establish good cause and overcome the state's interest in secrecy. See, e.g., In re Estate of McQuesten, 578 A.2d 335, 339 (N.H. 1990).

A handful of states now grant adult adoptees an absolute right to their original birth certificates, e.g., Alaska Stat. § 18.50.500, or to the court records of their adoption proceeding, e.g., S.D. Codified Laws § 25-6-15. In In re Estate of McQuesten, 578 A.2d 335, 339 (N.H. 1990), the court upheld the constitutionality of legislation that allowed disclosure of sealed adoption records to adoptees twenty-one years of age or older. The court held that the legislation did not violate the state constitution by impairing the vested rights of birth parents who had surrendered children under the prior law, or by violating the rights to familial and procreational privacy and to nondisclosure of personal information.

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