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Mary M. Beck
beckm@missouri.edu

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Juvenile & Adoption Law

Adoption of Children in Missouri

Mary M. Beck*

I. INTRODUCTION

In the United States, 127,441 adoptions occurred in 1992—the last year for which reliable statistics are available.¹ Another 500,000 American children live in foster care.² For the children involved, adoption may well be the most significant event of their lives—determining whether they live in poverty, obtain an education, and have a participating father.³ For America, the effects of adoption in inculcating the work ethic and boosting education for 127,441 children annually⁴ significantly serves the nation's economy as well as its call for family values. President Clinton directed an Executive Memorandum to the Department of Health and Human Services to recommend strategies for doubling the number of American children adopted annually by the year 2002.⁵ Congress has passed legislation authorizing federal tax credits to adoptive parents for qualified adoption expenses⁶ and providing a financial incentive to states for each foster child or special needs child adopted over a base number.⁷ Promoting

* Assistant Clinical Professor of Law, Director of the Domestic Violence Clinic, University of Missouri-Columbia; B.S.N. 1970, M.S.N. 1971, St. Louis University; J.D. 1988, University of Missouri-Columbia. Professor Beck teaches the Family Violence Clinic and Family Violence and the Law.

1. VICTOR E. FLANGO & CAROL R. FLANGO, *THE FLOW OF ADOPTION INFORMATION FROM THE STATES* 22 (1994).

2. Mimi Hall, *Measure to Speed Up Adoptions Becomes Law*, USA TODAY, Nov. 20, 1997, at 7A.

3. NATIONAL COMMITTEE FOR ADOPTION, *ADOPTION FACTBOOK: UNITED STATES DATA, ISSUES, REGULATIONS & RESOURCES 203-06* (1989) [hereinafter *ADOPTION FACTBOOK*].

4. FLANGO & FLANGO, *supra* note 1, at 18. The 1992 figure represents a 7% increase over the number of adoptions in 1991 and suggests that the number of adoptions in America is increasing. *Id.*

5. Department of Health and Human Services, *Adoption 2002: A Response to the Presidential Executive Memorandum on Adoption Issued December 14, 1996*, 1 (last modified Feb. 18, 1997) <<http://www.acf.dhhs.gov/programs/cb/special/2002toc.htm>>.

6. I.R.C. §§ 23, 137 (1994). Adoptive parents are provided with tax credits up to \$5,000 (\$6,000 for special needs child). Parents with income under \$75,000 receive the full credit. No credit is available to adoptive parents whose income exceeds \$115,000, and the credit is ratably reduced for parents whose income falls in between. I.R.C. §§ 23, 137 (1994).

7. Hall, *supra* note 2, at 7A; Adoption and Safe Families Act of 1997, H.R. 867, 105th Congress. A base number formula is utilized to authorize payments to each state of \$4,000 per foster child adoption and \$6,000 per special needs adoption.

safe and permanent homes for its children is an important item on America's agenda.

American couples faced with an unplanned pregnancy have essentially three legal options—to keep the baby, to relinquish the baby for adoption, or to obtain an abortion. In 1986, 6.5 adoptions and 422.9 abortions occurred per one thousand live births in the United States.⁸ Missouri has slightly fewer adoptions (.07%) but many fewer abortions (15.58%) than the national average and ranks twenty-third out of the fifty states in the number of adoptions completed annually.⁹ Generally, the larger a state's population, the greater the number of adoptions that can be predicted. Missouri's adoption rate, near the middle of the fifty states and near the average per one thousand live births, is deceptive, because Missouri is the fifteenth most populous state and its rate of adoption is lower than its population would portend. The purpose of this Article is to investigate the effect of Missouri law on adoption and to determine whether its provisions adequately protect the parties to adoption and whether its degree of clarity properly forestalls litigation. Two unfolding developments provide a backdrop for investigating Missouri adoption law—a contested adoption case currently on appeal in both Missouri¹⁰ and Pennsylvania,¹¹ and recent large scale amendments to Missouri's statutes affecting adoption, Missouri Revised Statutes §§ 192, 210, 211, 453, and 568.¹²

The contested adoption involves "Baby Boy W.," who was born in Nodaway County in rural northern Missouri in 1995. He was born to an African-American twenty-two year old college student and her twenty-five year old Caucasian boyfriend.¹³ Two days after his birth, the birth parents consented to the adoption of Baby Boy W. and appeared before a judge in a hearing for that purpose. That same day, Baby Boy W.'s custody was transferred to his adoptive parents who are residents of Pennsylvania. The biological parents have since filed multiple motions to withdraw their consents to the adoption in both Missouri and Pennsylvania. The legal issues in Missouri are different from the issues in Pennsylvania although the analyses turn on similar questions. The heart of the first Missouri appeal was the birth parents' desire to change their mind and claim of duress by force of the circumstances of having a biracial child

8. ADOPTION FACTBOOK, *supra* note 3, at 96. In the same year, Missouri had 5.8 adoptions and 267.1 abortions per 1000 live births. ADOPTION FACTBOOK, *supra* note 3, at 96.

9. FLANGO, *supra* note 1, at 19, 20.

10. *In re D.C.C.*, 935 S.W.2d 657 (Mo. Ct. App. 1996).

11. *In re B.B.W.*, No. A620496 (Chester County, Pa., Apr. 28, 1997), *rev'd*, No. A620496 (Pa. Super. Ct. Oct. 15, 1997).

12. H.B. 343, 89th Gen. Assembly (Mo. 1997) (signed into law by Governor Carnahan in August 1997).

13. Appellants' Brief at 2, *In re D.C.C.*, 935 S.W.2d 657 (Mo. Ct. App. 1996) (No. 54259).

out of wedlock.¹⁴ The heart of the second and pending Missouri appeal is the birth parents' allegations that their consents were procured by fraud, misrepresentation, and coercion.¹⁵ The heart of the Pennsylvania conflict is that Pennsylvania permits at will revocation of consents to adoption,¹⁶ while Missouri does not.¹⁷ The Missouri Court of Appeals has affirmed the trial court's first denial of the birth parents' motion to withdraw their consents, and appeal of the second dismissal is pending.¹⁸ The Pennsylvania trial court has granted full faith and credit to the Missouri Court of Appeal's order, and appeal of that decision is pending in Pennsylvania.¹⁹

In 1997, Missouri enacted comprehensive adoption legislation with the passage of House Bill 343 (H.B. 343).²⁰ The efforts behind passage of H.B. 343 reflect the devotion of various legislators, the Missouri Department of Social Services, attorneys, agencies, and citizens toward improving laws affecting permanency for children.²¹ However, two controversies among entrenched interests hamper efforts to develop consistent adoption procedures throughout Missouri, a critical situation that defies statutory reform.²² These controversies

14. Mot. to Withdraw Consents and/or in the alternative Mot. to Set Aside Order of Transfer of Custody at 1, *In re D.C.C.*, 935 S.W.2d 657 (Mo. Ct. App. 1996) (No. 54259); Appellants' Brief at 2, *In re D.C.C.*, 935 S.W.2d 657 (Mo. Ct. App. 1996) (No. 54259).

15. Mot. to Withdraw Consents and/or in the alternative Mot. to Set Aside Order of Transfer of Custody at 1, *In re D.C.C.*, 935 S.W.2d 657 (Mo. Ct. App. 1996) (No. 54259).

16. 23 PA. CONS. STAT. ANN. § 2711(c) (West 1991).

17. Missouri did not permit revocation of consents to termination of parental rights nor consents to adoption in absence of fraud or duress until the 1997 amendments added MO. REV. STAT. § 453.030(7) (Supp. 1997) which permits withdrawal of consent prior to a judicial review and acceptance of the consent. Even if this Section had existed at the time Baby Boy W.'s birth parents consents to his adoption, they would not have been able to enlist its support because their consents were reviewed and accepted by a judge prior to their motion to withdraw their consents.

18. *In re D.C.C.*, 935 S.W. 2d 657 (Mo. Ct. App. 1996).

19. *In re D.C.C.*, No. A620496 (Pa. Super. Ct. Oct. 15, 1997). The reader is advised that the author has filed an *Amicus Curiae* brief in Pennsylvania in this case on behalf of the American Academy of Adoption Attorneys supporting the adoptive parents' position.

20. H.B. 343, 89th Gen. Assembly (Mo. 1997) (signed into law by Governor Carnahan in August 1997).

21. The reader is advised that the Author consults with Missouri Senators and Representatives in drafting bills, testifying before legislative committees considering adoption bills, and consulting with the Division of Family Services in its efforts to develop rules and regulations.

22. The views expressed are the Author's alone and do not necessarily represent the beliefs of the Division of Family Services nor Missouri legislators.

pit rural against urban factions and independent adoption proponents against agency adoption proponents.

What the 1997 legislation does not address is as revealing of Missourians as what it does address. Missouri's new adoption legislation does *not* regulate births and adoptions resulting from assisted reproductive technology or surrogacy nor does it address same-sex parent adoptions—critical adoption issues of the 1990s.²³ The absence of such laws leaves the door wide open to litigation arising out of legally undefined arrangements and robs Missouri children and parents of opportunities to find and build families.

The sagas of Baby Boy W. and of Missouri's adoption legislation are ongoing. Battles like the one for Baby Boy W. will continue to be waged. Missouri's adoption law will continue to evolve, and the conflicts between urban and rural areas, and independent adoption proponents and agency adoption proponents will continue unabated. The real solution to such contested interstate adoption cases is fifty-state passage of the Uniform Adoption Act ratified by the National Commission of Commissioners for Uniform State Laws in 1995.²⁴ Passage of the Uniform Adoption Act also would resolve the special interest and geographic controversies within Missouri. While the fifty states passed the Uniform Child Custody Jurisdiction Act to promote the welfare of children, it seems far less likely that the states will forego their own adoption procedures to enact a uniform law. And yet the sentiment expressed by the Nodaway County trial judge in the case of Baby Boy W. is representative of the feelings of most Americans:

What concerns me is while all us adults are talking about fine points of law we have a little boy that is now a year old. And while Mr. Fischer [guardian ad litem] is trying to represent him he is continuing to grow. And what I would like to do is get this resolved permanently as quickly as possible.²⁵

Judge Andrew's extrapolated point is that children are the vulnerable part of the adoption triangle, the ones most in need of protection. Children do not wait. They develop loving relationships with the mothers and fathers in their lives, while the attorneys, the adoptive parents, and the birth parents battle in courts and while the legislators strive to reconcile special interests in every state.

23. ADOPTION FACTBOOK, *supra* note 3, at 19; Laura Parker, *Daddy, Father, Son: Adoption By N.J. Gays Sparks Praise, Criticism*, USA TODAY, Dec. 19-21, 1997, at 1A-2A.

24. UNIF. ADOPTION ACT, § 9 U.L.A. 45 (1988). The Uniform Adoption Act was unsuccessfully introduced as Senate Bill 202 during the 1995 Legislative Session by Senator Wiggins, a member of the National Commission of Commissioners for Uniform State Laws.

25. Transcript of March 24, 1997 hearing, at 25, *In re D.C.C.*, 935 S.W.2d 657 (Mo. Ct. App. 1996) (No. 52206) (Judge John C. Andrews presiding). Baby Boy W. now is over two years old.

It is unlikely that congress will enact federal law to preempt state adoption procedures.²⁶ Rather, the executive and legislative branches of the federal government have promoted national adoption policy by offering financial incentives to individuals and the states to encourage adoptions.²⁷

II. ADOPTION BACKGROUND

References to adoption in legal codes existed as early as the Code of Hammurabi.²⁸ Early Roman Law permitted adoption as a means of continuing the adoptive parents' family.²⁹ American adoption law is said to have derived from the Roman Law, but is distinguished on the basis that its primary objective was always to serve the best interests of the child.³⁰ In colonial America, apparently, orphaned children's best interests were served by indenturing them in the homes of a master who provided food, shelter, and training in a trade.³¹ The Ninth and Tenth Amendments to the U.S. Constitution relegated family law to the states, and all fifty states have enacted laws governing the adoption of children.³² In 1851, Massachusetts was the first state to develop adoption legislation. The Massachusetts statute required written consent of the birth parents, joint petition for adoption by both adoptive parents, a judicial decree of adoption, and legal severance of the tie between the child and the birth parents.³³ In 1857, Missouri enacted its first adoption statute, which enabled free white persons to adopt a child by executing, acknowledging, and recording a deed in the county of their residence.³⁴

26. A federal court has intervened in at least one case where dueling state courts did not resolve jurisdiction. *Rogers v. Platt*, 641 F. Supp. 381, 384-86 (D.D.C. 1986), *rev'd*, 814 F.2d 683 (D.C. Cir. 1987). The *Rogers* court held that under the Parental Kidnaping Prevention Act [hereinafter PKPA], only one state could have jurisdiction and all other states are required to give full faith and credit to child custody determinations of other states if the original state had proper subject matter jurisdiction under its own laws and under PKPA criteria which incorporate Uniform Child Custody Jurisdiction Act [hereinafter UCCJA] principles especially home state preference. *Rogers* found jurisdiction in the state of birth where both sending and receiving states had significant connections with the child.

27. *See supra* notes 6, 7.

28. Lisa J. Trembly, *Untangling the Adoption Web: New Jersey's Move to Legitimize Independent Adoptions*, 18 SETON HALL LEGIS. J. 371, 376 (1993).

29. *Id.*

30. *Id.*

31. ADOPTION FACTBOOK, *supra* note 3, at 18 (13th Amendment prohibition on involuntary servitude halted the indenture of orphans in 1865).

32. ADOPTION LAW AND PRACTICE § 1.01[1] (Joan H. Hollinger ed., 1996).

33. ADOPTION FACTBOOK, *supra* note 3.

34. The law had no chapter number but was placed just before divorce law on February 23, 1857. The Missouri statute likened adoption to a conveyance of real estate and provided that the adopted child should have the same rights against the person

Adoption has been influenced by recent social and political events. Foreign adoptions increased after World War II and after the Korean War.³⁵ In the 1950s, the field of social work professionalized adoption procedure.³⁶ The legalization of abortion in the 1970s decreased the number of infants for adoption.³⁷ That decrease in adoptions was exacerbated by an increased tolerance for single motherhood, by welfare aid to unmarried mothers, and by strengthened rights of unmarried fathers.³⁸ In the 1980s, adoption of special needs children increased and open adoption became acceptable.³⁹ The adoption issues of the 1990s include regulating surrogate parenting, providing special services for abandoned and HIV-positive babies, increasing international adoption,⁴⁰ and regulating adoption of children by homosexual couples.⁴¹

The number of American adoptions per one thousand unmarried live births is much greater than adoptions per *married* live births.⁴² Therefore, the majority of children adopted are born to unmarried women. That adoptions occur more often in unmarried live births is not surprising, because research demonstrates that unmarried women who complete an adoption plan experience favorable results as compared to those who rear their children as single parents. Relinquishing mothers are less likely to live in poverty, less likely to receive public assistance, and more likely to complete vocational training and be employed twelve months after the birth.⁴³ Relinquishing single mothers live in higher income households after the birth and suffer no more negative psychological consequences than mothers who rear the children as single parents. Research also supports positive outcomes for the adopted child in terms of reduced poverty, increased education, and living with two parents.⁴⁴ In 1986,

executing the deed for support and maintenance and for proper and humane treatment as a child had against lawful parents. It also permitted a married woman to join in the deed of adoption with her husband, and authorized the county court to change the name of the adopted child. In 1889, the statute was numbered Chapter 29 and was amended only to the extent that its limitation to free white persons was deleted. 1889 Mo. Laws Ch. 29 §§ 968-971.

35. ADOPTION FACTBOOK, *supra* note 3, at 18.

36. ADOPTION FACTBOOK, *supra* note 3, at 18.

37. ADOPTION FACTBOOK, *supra* note 3, at 18.

38. ADOPTION FACTBOOK, *supra* note 3, at 18.

39. ADOPTION FACTBOOK, *supra* note 3, at 18.

40. ADOPTION FACTBOOK, *supra* note 3, at 19.

41. *See* Parker, *supra* note 22, at 1A.

42. ADOPTION FACTBOOK, *supra* note 3, at 4.

43. ADOPTION FACTBOOK, *supra* note 3, at 148-49 (citing Christine A. Bachrach, *Adoption Plans, Adopted Children, and Adoptive Mothers*, 48 J. MARRIAGE & FAM. 243 (1986); S.D. McLaughlin et al., *Do Adolescents Who Relinquish Their Children Fare Better or Worse Than Those Who Raise Them?*, 20 FAM. PLANNING PERSPECTIVES 25 (1988)).

44. ADOPTION FACTBOOK, *supra* note 3, at 62, 205-06 (citing P. M. Brinich & M. A. Brinich, *Adoption and Adaptation*, 170 J. NERVOUS & MENTAL DISEASE 489 (1982);

878,477 births occurred to single mothers, while one million potential adoptive parents wished to adopt.⁴⁵ Adoption has the potential to improve the lives of a significant number of single women and married couples, and to provide permanent, safe and loving homes for many children.

Adoptions fall into two categories—adoptions arranged by licensed child-placing agencies (agency adoption) and adoptions arranged independent of agency involvement (independent adoption).⁴⁶ Agency adoption may be conducted by government or private agencies. Direct placement adoptions occur when the birth parents and the adoptive parents connect with each other without the assistance of an intermediary.⁴⁷ Private placement adoptions occur when an adoption intermediary introduces the adoptive parents and the birth parents.⁴⁸ Identified adoption occurs when an adoptive couple locates a birth mother who wishes to place her child with them, and an agency conducts the adoptive parent and birth parent investigations.⁴⁹ Not all agencies will assist in identified adoptions. Public agencies handle 39.2% of adoptions; private agencies handle 29.4%; and independent adoptions account for 31.4% of adoptions.⁵⁰ Twice as many birth mothers making a voluntary adoption plan choose independent adoption as those who choose agency adoption,⁵¹ and commentators indicate that independent adoptions have become the method of choice for birth mothers.⁵²

A tension exists between the proponents of agency adoptions and proponents of independent adoptions, but “[t]he majority of commentators support independent adoptions. . . .”⁵³ Independent adoption is acclaimed for avoiding or minimizing foster care and making rapid placement of children with their adoptive parents, thus promoting the early parent-child bond.⁵⁴ Independent adoption permits parents who might be excluded by agency policies to adopt.⁵⁵ For example, agencies may implement policies pertaining to

K. S. Marquis & R. A. Detweiler, *Does Adopted Mean Different? An Attributional Analysis*, 48 J. PERSONALITY & SOC. PSYCH. 1054 (1985)).

45. *Adoption Factbook*, *supra* note 3, at 157.

46. Sharon Fast Gustafson, *Regulating Adoption Intermediaries: Ensuring that the Solutions Are No Worse than the Problem*, 3 GEO. J. LEGAL ETHICS 837, 842 (1990).

47. Gustafson, *supra* note 46, at 842. Missouri authorizes adoptive placement by intermediaries which may include an attorney, a physician, or a clergyman of the parents. MO. REV. STAT. § 453.014(4) (Supp. 1997).

48. Gustafson, *supra* note 46, at 842.

49. Robert K. Landers, *Independent Adoptions*, 2 CONG. Q. ED. RES. REP. 645, 649 (1987).

50. ADOPTION FACTBOOK, *supra* note 3, at 61 (percentages from 1986).

51. Gustafson, *supra* note 46, at 842 n.21.

52. Gustafson, *supra* note 46, at 845.

53. Trembly, *supra* note 28, at 396.

54. Trembly, *supra* note 28, at 397.

55. Trembly, *supra* note 28, at 398.

religion⁵⁶ or age,⁵⁷ whereas the criteria for independent adoption is a satisfactory home study.⁵⁸

The most distinguishing characteristic of independent adoptions is that the parties have more control.⁵⁹ The birth parents personally select the adoptive parents from profiles or personal meetings, and the parties frequently develop relationships in person or over the phone. A birth parent's decision to make an adoption plan is typically an exquisitely painful and unselfish decision to further the interests of the child. The birth mother who controls the adoptive parent selection gains security in her decision and confidence in her choice by personalizing the adoption plan. Fewer birth mothers change their minds and cancel adoption plans in independent adoption than in agency adoption, presumably because of the comfort level derived from personal knowledge of the adoptive parents.⁶⁰ Additionally, agencies have ranked independent adoptive placements as equally successful, if not more successful, than the placements of children made by agencies.⁶¹ Adoptive parents benefit in independent adoptions by developing a relationship with the birth parents so that they can gain perspective on the birth parents' decision to relinquish the child for adoption. Thus, the adoptive parents later can assure the adoptee of the love and devotion demonstrated by the birth parents in making the adoption plan and impart general information about the birth parents to the adoptee.

The National Committee for Adoption disfavors independent adoption and open adoption, citing two studies reporting that independent placements are less successful than independent adoptions.⁶² The National Committee cites various reasons for disfavoring independent adoptions, including: 1) the selling of babies on the black market, 2) open adoptions in which the parties know each other's identities, 3) failed adoptions in which adoptive parents return their child, 4) custody battles prior to finalization of the adoption, 5) couples who could not gain approval for adoption from an agency completing independent adoptions, 6) incomplete transmission of information on the health and history of the child,

56. Landers, *supra* note 49, at 649 (agency refused adoption application from couple where wife had different religion from husband).

57. ADOPTION FACTBOOK, *supra* note 3, at 161 (age cut off typically around 45 years of age).

58. A home study is a written assessment of the adoptive parents, including: a report on the condition of their home; their level education; their financial, marital, medical, and psychological status; and a criminal background check. MO. REV. STAT. § 453.070.3 (Supp. 1997).

59. Trembly, *supra* note 28, at 399.

60. Trembly, *supra* note 28, at 403.

61. Trembly, *supra* note 28, at 401.

62. ADOPTION FACTBOOK, *supra* note 3, at 169 (citing C. Amatruda & J. Baldwin, *Current Adoption Practices*, 38 J. PEDIATRICS 208-12 (1951); H. C. WITMER ET AL., *INDEPENDENT ADOPTIONS* (1963)).

7) failure to complete the legal process, and 8) inadequate counseling of the birth mother.⁶³

The studies cited by the National Committee to support its position, having been published in 1951 and 1963, are outdated. State laws have changed such that open adoption is a common option, black marketing in babies is, of course, prohibited, with exchange of all moneys in adoption typically disclosed to the court. The adoption laws of many states apply equally to independent and agency adoption, such that adoptive parents and birth parents must undergo home study in both independent and agency adoptions, and the information resulting from such studies increasingly is filed with the court.⁶⁴ Additionally, counseling is routinely made available for birth mothers in independent adoptions and often is mandated in agency adoptions.

Comprehensive adoption law remedies the problems historically associated with independent adoptions. But no legislative amendments can eliminate outlaws who would take custody of children without complying with statutory procedures. States should build safeguards into their statutes to protect all parties to adoption and these safeguards should apply equally to independent and agency adoptions. The control available to the parties in independent adoption is desirable in that it provides more choices to biological and adoptive parents and ultimately promotes adoption. Independent adoption can be permitted without sacrificing security with carefully drafted legislation that: 1) identifies individuals who may act as intermediaries placing a child for adoption, 2) authorizes separate counsel for the birth parents at the adoptive parents' expense, 3) prohibits or exposes dual legal representation of birth parents and adoptive parents, 4) requires that the birth parents be offered counseling and that they sign

63. ADOPTION FACTBOOK, *supra* note 3, at 170. The ninth reason cited by the National Committee for disfavoring independent adoptions was that birth mothers are more likely to change their minds after engaging in independent adoptions, according to a television investigation and survey in California. However, the television reports' findings are questionable in light of more credible data reported by Lisa Trembly. *See supra* note 28 and accompanying text.

64. The increased requirement for and regulation of assessment information occurs in the wake of a line of tort actions for wrongful adoption against adoption agencies. These cases have developed where adoptive parents have sued agencies for money damages over a problem with the agency's disclosure of information about an adoptive child. These actions have included intentional misrepresentation, *Burr v. Board of County Commissioners*, 491 N.W.2d 1101 (Ohio 1986), deliberate concealment, *Trout v. County of Los Angeles, Department of Adoptions*, 247 Cal. Rptr. 504 (Ct. App. 1988), negligent disclosure, *Meracle v. Children's Service Society*, 437 N.W.2d 532 (Wis. 1989), and negligent withholding, *M.H. v. Caritas Family Services*, 475 N.W.2d 94 (Minn. Ct. App. 1991), *rev'd in part*, 488 N.W.2d 282 (Minn. 1992). States can protect parties to an adoption as well as adoption intermediaries and agencies by specifying who has the duty to disclose, how it may be fulfilled, and identifying the parameters of any immunity. *See generally* Madelyn DeWoody, *Adoption & Disclosure of Medical & Social History: A Review of the Law*, 72 CHILD WELFARE 195 (1993).

a statement to that effect, 5) identifies the same requirements of adoptive parent home studies in both independent and agency adoptions, and 6) requires adoptive parents to file a financial accounting with the court.⁶⁵

III. THE INSTRUCTIVE CASE OF BABY BOY W.

A. *The Facts of the Case*

This case is important to a survey of Missouri adoption law because it involves an independent adoption which complied with Missouri's law but is nonetheless under appeal in two states. This raises the question of how Missouri law should have or could have better protected the parties and avoided this litigation.

Baby Boy W. was born in Missouri on December 10, 1995, and is known in Missouri as D.C.C.⁶⁶ Baby Boy W.'s adoptive parents (hereinafter "adoptive parents") have raised Baby Boy W. since two days after his birth. He is now two years old and knows only his adoptive parents. Baby Boy W.'s biological parents (hereinafter "birth parents") were residents of Missouri at the time of the birth and adoption, and continue to reside in Missouri. The birth parents executed consents to adoption in Missouri and testified in a Missouri court hearing on December 12, 1995 before Circuit Judge John Andrews. The adoptive parents testified on the same day before the same judge who ordered temporary transfer of custody of Baby Boy W. to his adoptive parents. Seven days later, following authorization by the Pennsylvania and Missouri Interstate Compacts for Placement of Children, another hearing was held, and the circuit judge transferred custody of Baby Boy W. to his adoptive parents, authorizing them to cross state lines. There was full compliance with the Interstate Compact for Placement of Children.⁶⁷

The birth parents filed for leave to withdraw their consents in Missouri on January 8, 1996. Their motion to revoke consents was supported by affidavits which did not specify grounds for revocation beyond the birth parents' change of mind. On January 11, 1996, argument during a non-evidentiary hearing focused on the availability under Missouri law of revocation of consents absent fraud or duress. The birth parents' attorney stated during argument that they were under duress by force of circumstances at the time of their consents.⁶⁸ The

65. See generally Maria L. Tenuta, *Independent Adoptions in Minnesota: A Decade of Controversy and Opposition Mandates Legislative Reform*, 13 *HAMLIN J. OF PUB. L. & POL'Y* 381 (1992).

66. Appellants' Brief at 4, *In re D.C.C.*, 935 S.W.2d 657 (Mo. Ct. App. 1996) (No. 54259).

67. Interstate Compact Placement Request, *In re D.C.C.*, 935 S.W.2d 657 (Mo. Ct. App. 1996) (No. 54259) (filed Jan. 2, 1996).

68. Transcript of Jan. 8, 1996 hearing, at 47-48, *In re D.C.C.*, 935 S.W.2d 657 (Mo.

trial court denied the birth parents' motion, and the birth parents appealed to the Missouri Court of Appeals on January 24, 1996.⁶⁹ The Missouri Court of Appeals affirmed the trial court's denial of leave for the birth parents to withdraw consents in October 1996.⁷⁰

The birth parents again filed a motion to withdraw consents and/or set aside the transfer of custody in December 1996. In this second motion, the birth parents allege fraud and coercion both by the adoptive parents and their attorney, as well as duress by force of circumstances.⁷¹ The birth parents did not have separate counsel at the time of relinquishment.⁷² Their second motion to withdraw consents alleged that the attorney who assisted them with their first motion provided ineffective assistance.⁷³ In March 1997, the trial court dismissed the second motion on the basis of collateral estoppel.⁷⁴ The birth parents' appeal of the dismissal currently is pending before the Missouri Court of Appeals.

The adoptive parents were and are residents of Pennsylvania. The adoptive parents filed their intention to adopt with their home study in the Pennsylvania Orphans' Court in January 1997.⁷⁵ The adoptive parents' Petition to Adopt was filed in Pennsylvania on July 11, 1996. The birth parents filed a motion to object to consents in Pennsylvania on July 3, 1996, and the hearing judge sustained that motion in April 1997. The adoptive parents filed exceptions, and a reviewing trial court triumvirate subsequently overruled the initial trial court order and denied and dismissed the birth parents' motion to object to the consents.⁷⁶ The birth parents' appeal of that dismissal now is pending in the Pennsylvania

Ct. App. 1996) (No. JU 95-41) (Judge John C. Andrews presiding).

69. Docket Sheet for Circuit Court of Nodaway County at 1, *In re D.C.C.*, 935 S.W.2d 657 (Mo. Ct. App. 1996) (No. JU 95-41).

70. *In re D.C.C.*, 935 S.W.2d 657 (Mo. Ct. App. 1996).

71. Mot. to Withdraw Consents and/or in the alternative Mot. to Set Aside Order of Transfer of Custody at 1, *In re D.C.C.*, 935 S.W.2d 657 (Mo. Ct. App. 1996) (No. 54259).

72. Transcript of Dec. 19, 1995 hearing, at 5, 25, *In re D.C.C.*, 935 S.W.2d 657 (Mo. Ct. App. 1996) (No. JU 95-41) (Judge John C. Andrews presiding) (The only attorney attending the hearings other than the court appointed guardian ad litem was the attorney who identified himself as representing the adoptive parents.).

73. Mot. to Withdraw Consents and/or in the alternative Mot. to Set Aside Order of Transfer of Custody at 1, *In re D.C.C.*, 935 S.W.2d 657 (Mo. Ct. App. 1996) (No. 54259).

74. Respondents' Brief at 1, *In re D.C.C.*, 935 S.W.2d 657 (Mo. Ct. App. 1996) (No. 54259).

75. Appellants' Brief at 3, *In re B.B.W.*, No. A620496 (Pa. Super. Ct. Oct. 15, 1997).

76. Judges Wood and Ott concurred while Judge Endy dissented on the basis that Missouri's irrevocable consent to adoption with execution permitted 48 hours after birth violated the Due Process Clause of the 14th Amendment. *In re B.B.W.*, No. A620496 (Pa. Super. Ct. Oct. 15, 1997).

Superior Court. The birth parents also filed a motion for visitation in the Pennsylvania Court, which was denied.

B. The Case In Missouri

The opinion of the Missouri Court of Appeals handed down in October 1996 distilled the birth parents' complaints as follows: that the "trial court abused its discretion in denying [the birth parents'] request to withdraw consent to the adoption. . . . They claim . . . they were under emotional duress when they agreed to the adoption."⁷⁷ The opinion reviewed the facts that a Missouri trial court authorized the birth parents' consents to adoption after a hearing and that the trial court denied the birth parents' subsequent motion to revoke those consents. The appellate court considered the grounds upon which the birth parents requested leave to revoke and found:

Although the parents now claim on appeal that they were under 'duress by force of circumstances' when they agreed to the adoption, the transcript of the December 12, 1995 [hearing], belies their contention. At the hearing, they testified that they had discussed the adoption and fully understood the consequences of their decision and that they voluntarily agreed to the adoption. . . . [The birth mother] acknowledged reading the consent form and said that she understood that her parental rights would be terminated if the court accepted her consent to the adoption and the child was adopted. She said that she had talked with a counselor and had carefully considered this decision. She also said that she had not been threatened or coerced and that her decision was voluntary. She also indicated that she believed the adoption was in the child's best interests.⁷⁸

The appellate court then discussed with particularity the birth parents' contentions vis-a-vis the testimony and circumstances of the birth parents. The court concluded both that the trial court had sufficient evidence to support its decision and that no abuse of discretion existed in the circuit court's failure to convene a separate hearing to hear additional evidence on the motion to revoke consents to adoption.⁷⁹ The court then reviewed Missouri case law and concluded that "leave of the court to withdraw written consent to adoption will not be awarded for the mere asking or upon the whim of the consenter."⁸⁰

The birth parents filed a second motion to withdraw their consents to adoption two months after the Missouri appellate court decision adverse to them. The trial court dismissed the motion based upon collateral estoppel, and the birth parents appealed. The analysis of this second appeal, currently pending before

77. *In re D.C.C.*, 935 S.W.2d 657, 658 (Mo. Ct. App. 1996).

78. *Id.* at 659.

79. *Id.*

80. *Id.* at 658.

the Missouri Court of Appeals, turns on four questions: Will equity bar the birth parents' second motion to withdraw consents which plead grounds knowingly omitted from the original motion? Is the birth parents' second motion a Rule 74.06 motion which operates as an independent action in equity to examine a judgment procured by fraud and, thus, not barred by collateral estoppel?⁸¹ If applied, would collateral estoppel bar consideration of factual issues pled in the second motion that were not decided in the first motion? And finally, do the birth parents have the right to intervene in the adoption proceeding after an affirmed decision denying their motion to revoke their consents?

Equity should bar the birth parents' second motion. The birth parents first motion was denied after a hearing and adjudication, and the trial court's denial of the motion was affirmed on appeal. The birth parents knowingly omitted grounds of fraud from their first motion that they added to their second motion, and their second motion stated that the alleged fraud was known at the time of the first motion.⁸² Equity does not give them a second chance.⁸³ Additionally, the appellate court specifically repudiated allegations of duress.⁸⁴ Missouri should not permit the birth parents to make successive motions pleading new allegations each time the previous motion has been denied and appealed unsuccessfully.

The birth parents' second motion was not properly grounded in Rule 74.06, and, thus, should not bar application of collateral estoppel. Rule 74.06 motions are independent actions in equity to set aside a prior *judgment* of the court on the basis of fraud.⁸⁵ Thus, a proper Rule 74.06 motion bars collateral estoppel. However, the birth parents' motion did not cite Rule 74.06, and more importantly, the motion requested withdrawal of the birth parents' *consents*, not the judgment on their consents. Rule 74.06 remedies fraudulent court orders, but the birth parents' allegation of fraud goes to the consents, not to the court's order pertaining to their consents. The birth parents executed their own consents and, according to their testimony, executed them knowingly and voluntarily; the court did not order the birth parents' consents to adoption. Case law shows that the proper procedure to revoke consents to adoption is a motion or petition for leave to revoke alleging fraud or duress.⁸⁶ The birth parents filed just such a motion and lost. Thus, the court of appeals should not now allow the birth parents to cure the defeat of their first motion with a Rule 74.06 motion, because it was not the trial court's denial of the motion that allegedly was obtained by fraud. The

81. MO. SUP. CT. R. 74.06.

82. Mot. to Withdraw Consents and/or in the alternative Mot. to Set Aside Order of Transfer of Custody at 1, *In re D.C.C.*, 935 S.W.2d 657 (Mo. Ct. App. 1996) (No. 54259).

83. *Hockenberry v. Cooper County State Bank*, 88 S.W.2d 1031 (1935).

84. *In re D.C.C.*, 935 S.W.2d at 659.

85. MO. SUP. CT. R. 74.06.

86. *In re Baby Girl Peggy*, 850 S.W.2d 64 (Mo. 1993); *In re D.C.C.*, 935 S.W.2d 657 (Mo. Ct. App. 1996); *In re RVH*, 824 S.W.2d 28, 29-30 (Mo. Ct. App. 1991).

birth parents' argument that their motion to revoke was grounded in Rule 74.06 is unavailing.⁸⁷

Collateral estoppel should bar relitigation of the factual issues in this case. The collateral estoppel analysis includes the following: whether the party against whom collateral estoppel is asserted was a party in the previous action; whether the prior adjudication resulted in a judgment on the merits; and whether the issue in the previous adjudication was identical to the issue in the present action.⁸⁸ The birth parents filed both motions. Thus, the parties against whom collateral estoppel is asserted are identical in both motions. The birth parents argue that the decision on the first motion was not a final judgment on the merits because no evidentiary hearings were held after the motions were filed. But the trial court indicated that it denied the birth parents' first motion to revoke after consideration of evidence from the prior hearing, the motion, the affidavits in support, the argument, and the relevant statutes and cases.⁸⁹ Its decision was denominated a "judgment" and was in fact unsuccessfully appealed.⁹⁰ The motion was argued, adjudicated and appealed; it is a final judgment on its merits and should satisfy collateral estoppel.

The birth parents' first motion was entitled "Motion for Leave of Court to Withdraw Consent of Parent to Adoption and Waiver of Notice Signed by Natural Father and Signed by Natural Mother," and the birth parents' second motion was entitled "Motion to Withdraw Consent and/Or in the Alternative Motion to Set Aside Order of Transfer of Custody." The gravamen of both motions was the birth parents' request to withdraw their consents to the adoption. However, the birth parents argue that the factual issues pled and decided were different in each motion. The issues were different because the birth parents knowingly failed to plead fraud, coercion, and misrepresentation in their first motion. They should not now be heard to complain that issues they failed to plead were omitted from consideration. Equity should bar them from supplemented subsequent motions after they have been heard and adjudicated

87. If the part of the birth parents' motion to set aside the transfer of custody order is grounded in Rule 74.06, it would have to fail because the birth parents lost the right to intervene in the adoption proceeding with the denial of the motion to revoke consents. *In re RVH*, 824 S.W.2d 28, 29-30 (Mo. Ct. App. 1991).

88. *Oates v. Safeco Ins. Co. of Am.*, 583 S.W.2d 713, 719 (Mo. 1979).

89. Transcript of Jan. 8, 1996 hearing, at 52, *In re D.C.C.*, 935 S.W.2d 657 (Mo. Ct. App. 1996) (No. JU 95-41) (Judge John C. Andrews presiding).

90. The birth parents' first motion was denied because the birth parents had no legal right to withdraw their consents since they had not plead specific grounds. Their attorney did argue duress by force of circumstances and the appellate court defeated that argument based upon their original testimony making specific findings as if such an allegation were plead. Fraud and coercion are equally inconsistent with the birth parents' original testimony particularly with their testimony that they considered the adoption for 4 months and consulted an independent counselor. *In re D.C.C.*, 935 S.W.2d 657, 659 (Mo. Ct. App. 1996).

when the judgment on the motion was final and appealable, and was in fact appealed.⁹¹

The threshold question is whether equity bars litigation of the birth parents' second motion which pled grounds knowingly omitted from the original motion. The answer should be yes. The fraud and Rule 74.06 issues play only if the ruling on the birth parents' first motion was procured by fraud. It was not. No adoption will be final if birth parents can continuously attack the validity of their consents, adding new allegations after others have failed to persuade the court in a proper motion to revoke. This analysis is bolstered by Missouri case law prohibiting birth parents' rights to intervene in adoption proceedings after decisions denying motions to revoke adoption consents have been affirmed.⁹²

C. *The Case in Pennsylvania*

The Pennsylvania Orphans' Court opinion reduced the decisive question to: "How should Pennsylvania treat the Missouri Court's affirmed decision denying the birth parents' leave to withdraw their consents to adoption when an adoption petition has been filed in Pennsylvania by the adoptive parents and Pennsylvania law permits free revocation of consents to adoption prior to decree?"⁹³ The hearing judge granted revocation of the consents, and the adoptive parents filed exceptions. A reviewing trial court triumvirate resolved the issue with a conflicts-of-law analysis indicating that the Pennsylvania cause of action was settled by the Missouri judgment, which was entitled to full faith and credit under the United States Constitution.⁹⁴

Under the U.S. Constitution, Article IV, section 1, the valid judgment of a state court is entitled to full faith and credit in the court of a sister state if there is proper jurisdiction, a final judgment, and a decision on the merits. Full faith and credit applies to judgments in adoption proceedings and has operated to require enforcement of final decisions on consents to adoption.⁹⁵ Additionally, the United States Supreme Court has held that full faith and credit does not prohibit a "receiving" state from re-examining the resolution of the birth parents'

91. *Hockenberry v. Cooper County State Bank*, 88 S.W.2d 1031, 1036-37 (Mo. 1935).

92. *In re RVH v. MMA*, 824 S.W.2d 28, 30 (Mo. Ct. App. 1991).

93. Respondents' Brief at 1, *In re B.B.W.*, No. A620496 (Chester County, Pa., Apr. 28, 1997).

94. *In re B.B.W.*, No. A620496 (Chester County, Pa., Apr. 28, 1997), *rev'd*, No. A620496 (Pa. Super. Ct. Oct. 15, 1997).

95. *Lemley v. Barr*, 343 S.E.2d 101, 105 (W. Va. 1986); *In re N.B.*, 599 So. 2d 911, 914 (La. App. 1992). Both West Virginia and Louisiana decided that the states of the birth parents' residences were the appropriate forum to decide issues pertaining to consents to adoption. Thus, full faith and credit has been accorded by receiving states to adoption consents executed in and under the law of the sending states in which birth parents resided.

rights where the “sending” state lacked personal jurisdiction.⁹⁶ The implication is that full faith and credit does prohibit a receiving state from re-examining the resolution of birth parents’ rights when the sending state had in personam jurisdiction over the birth parents. Because Missouri had in personam jurisdiction over the birth parents in *Baby Boy W.*, the birth parents should not be able to shop the Pennsylvania forum, and Pennsylvania should not re-examine the consents.

For purposes of a full faith and credit analysis, “the law of the foreign state governs the determination of whether the court of a foreign state has jurisdiction.”⁹⁷ Applying that tenet, the law of Missouri clearly determines whether Missouri’s jurisdiction is proper. Missouri courts have held that they maintain jurisdiction over the consent to adoption procedure when a child is born in Missouri, a contest evolves over the consents, and a contestant continues to reside in Missouri.⁹⁸ This posture is mandated by Article 5 of the Interstate Compact on the Placement of Children (ICPC).⁹⁹ In *Baby Boy W.*, Missouri manifested its intent to retain jurisdiction over the birth parents’ consents by its successive appointments of guardians ad litem.¹⁰⁰ Missouri’s intent to retain jurisdiction also was manifested by its requirement of submission of quarterly post-placement adoptive parent investigations to the Missouri Office of the ICPC until an adoption was decreed. Missouri had in personam and subject matter jurisdiction over the birth parents and their consents and manifested its intent to retain jurisdiction over *Baby Boy W.* Thus, Missouri law controls in a conflicts of law jurisdictional analysis.

Full faith and credit is applicable only to final judgments. Missouri case law is settled that judgments on motions for leave to withdraw consent to adoption are final judgments.¹⁰¹ These judgments are not modifiable judgments exempt from the purview of full faith and credit like post-dissolution custody decrees. Missouri case law clarifies that a Missouri trial court’s denial of a motion to revoke a consent to adoption is a final judgment that may be appealed. Once the judgment is affirmed, the trial court’s holding is final and unassailable. Missouri case law permits the interpretation that a refusal to permit revocation of consents to adoption has a finality like a termination of parental rights.¹⁰²

96. *May v. Anderson*, 345 U.S. 528, 528-29 (1953).

97. *Lemley v. Barr*, 343 S.E.2d at 105.

98. *In re Baby Girl Peggy*, 850 S.W.2d 64, 68 (Mo. 1993).

99. *Id.* at 68, 69.

100. John Frazee was appointed to represent the interests of *Baby Boy W.* in the initial hearing over the consents, and Zel Fischer was appointed to represent the interests of the *Baby Boy W.* in the appellate procedures. Docket Sheet for Circuit Court of Nodaway County at 1, *In re D.C.C.*, 935 S.W.2d 657 (Mo. Ct. App. 1996) (No. JU 95-41).

101. *In re LWF*, 818 S.W.2d 727, 734 (Mo. Ct. App. 1991); *In re ADA*, 789 S.W.2d 842, 843 (Mo. Ct. App. 1990).

102. *In re WHJ*, 511 S.W.2d 795, 803, 804 (Mo. 1974); *In re RVH*, 824 S.W.2d

Missouri courts specifically have held that birth parents who have been denied leave to withdraw their consents to adoption are precluded from intervening in the petition for adoption.¹⁰³ Thus, the choices for the child are either foster care or adoption.¹⁰⁴ The Missouri Supreme Court has noted that consent to adopt is irrevocable absent fraud, duress, coercion or other elements which would render the consent invalid.¹⁰⁵ For these reasons, Pennsylvania should regard the Missouri court's affirmed decision as final.

The birth parents attempted to revoke judicial consents—consents accepted by a court following testimony before a judge, not simply executed before a notary public or witnesses. Other states hold such judicial consents final and irrevocable.¹⁰⁶ Missouri amended its adoption statute¹⁰⁷ in 1997 to make consents irrevocable after review and acceptance by a judge but revocable if withdrawn prior to judicial review. That statutory provision was not in effect at the time of the adoption of *Baby Boy W.*, however. Regardless, the provision would not have improved the birth parents' position because they testified before

28, 29-30 (Mo. Ct. App. 1991); *In re LWF*, 818 S.W.2d 727, 734 (Mo. Ct. App. 1991). *Missouri ex rel. L.L.B. v. Eiffert*, 775 S.W.2d 216 (Mo. Ct. App. 1991) confuses the issue in that it specifically states that a consent to adoption does not terminate parental rights. Its facts are distinguishable. In *Eiffert*, a mother consented to the adoption of her child by her parents. *Eiffert*, 775 S.W.2d at 217-18. The adoptive parents filed an adoption petition predicated upon the birth mother's consent to the adoption and alleging abandonment of the birth father. The birth father resisted, and the trial court awarded him custody during the adoption proceeding. The appellate court held that the adoption proceeding was an improper forum to determine custody as between the two parents, and that the juvenile court could not deprive a birth mother of custody in an action in which she was not a party and did not even have the right to intervene. The appellate court's holding that birth mother's consent did not terminate her parental rights was made in response to the trial court's assumption that the birth mother lost all rights as a function of her consent to adoption even if the adoption to the named parents failed. The appellate court clarified that the birth mother's consent was to an adoption by named prospective adoptive parents and that it did not translate into a finding that she was unfit to have custody in the event that the adoption failed to go forward. *Id.* at 220. The *Eiffert* court stated that the birth mother had no right to intervene in the adoption and did not suggest that she could revoke her consent. *Eiffert* is not at odds with Missouri case law on the finality of consents to adoption.

103. *In re RVH*, 824 S.W.2d at 29-30.

104. *In re LWF*, 818 S.W.2d at 734.

105. *In re Baby Girl Peggy*, 850 S.W.2d 64, 70 (1993).

106. *In re EWC*, 389 N.Y.S.2d 743, 750 (N.Y. Fam. Ct. 1976) holds that judicial consents should be "the moment of truth and the end of indecision." Kansas requires that consent to adoption be acknowledged before a judge or otherwise authorized official, and that consent is irrevocable unless proven to be involuntarily given. KAN. STAT. ANN. § 59-2114 (1994). Kansas law also provides that consent to adoption is not valid if given by mother prior to 12 hours after birth. KAN. STAT. ANN. § 59-2116 (1994).

107. MO. REV. STAT. § 453.030.7 (Supp. 1997).

a judge regarding their consents. Thus, under Missouri's current black-letter law, the birth parents' consents would be absolutely irrevocable.

Full faith and credit requires enforcement of decisions made on the merits. In *Baby Boy W.*, the Missouri trial court authorized the birth parents' consents to adoption after a hearing in which they both testified as to their intentions and understandings vis-a-vis the consents they signed. After the judge considered the birth parents' motion to withdraw their consents, their affidavits in support, and the argument of their counsel, and after the judge denied the birth parents' motion, the appellate court reconsidered the grounds upon which the birth parents requested leave to revoke and found that the birth parents' allegations of duress did not comport with their testimony.¹⁰⁸ The appellate court concluded both that the trial court had sufficient evidence to support its decision and that no abuse of discretion existed in the circuit court's failure to convene a separate hearing to consider additional evidence on the motion to revoke consents to adoption. Therefore, Pennsylvania should regard Missouri's decision as having been made on the merits.

The law of Missouri determines questions of jurisdiction, finality, and whether a ruling has been made on the merits in the full faith and credit analysis. Missouri case law, including the appellate court opinion in *Baby Boy W.*, leaves no doubt as to the propriety of its assumption of jurisdiction over the parties in this case, the finality of the denials for leave to withdraw consents to adoptions in Missouri, and the adequacy of consideration given to the merits. Additionally, Pennsylvania Consolidated Statutes § 2711(c) directs Pennsylvania courts that "any consent given outside this commonwealth shall be valid for purposes of this section if it was given in accordance with the laws of the jurisdiction where it was executed."¹⁰⁹ The birth parents' consents were given in accordance with Missouri law, and Missouri courts considered and evaluated the motion to revoke consents to adoption in light of its law. As long as the consents are held valid and irrevocable in Missouri, they should be valid in Pennsylvania.

Pennsylvania should affirm its trial court determination because full faith and credit demands it. However, the same result could be achieved utilizing an analysis of the Parental Kidnaping Prevention Act (PKPA),¹¹⁰ the Interstate Compact for Placement of Children (ICPC), and the Uniform Child Custody Jurisdiction Act (UCCJA).

The UCCJA was approved by the National Conference of Commissioners on Uniform State Laws in 1968.¹¹¹ All fifty states now have enacted the UCCJA

108. *In re D.C.C.*, 935 S.W.2d 657, 659 (Mo. Ct. App. 1996).

109. 23 PA. CONS. STAT. ANN. § 2711(c) (West 1991).

110. 28 U.S.C. § 1738A (1994).

111. The Act was designed to avert forum shopping in post divorce child custody battles, because full faith and credit cannot be given to modifiable orders, and all dissolution decree custody provisions are modifiable. Prior to adoption of the UCCJA, divorced parents could shop forums to advantageously modify the custody provisions of their dissolution decrees. Herma Hill Kay, *Adoption in the Conflict of Laws: The UAA*,

in some form so that it “grants jurisdiction to state courts to decide child custody matters and prescribes limitations on the exercise of that jurisdiction.”¹¹² Because adoption of children is not modifiable, and because the UCCJA governs modifiable custody determinations and not the adjudication of birth parents’ rights, scholars differ on whether the UCCJA should apply to adoption.¹¹³ However, analysis of the UCCJA frequently is undertaken in contested interstate adoptions.¹¹⁴

The Parental Kidnaping Prevention Act (PKPA) is a federal jurisdictional statute which primarily gives full faith and credit to child custody determinations.¹¹⁵ Because the PKPA is a federal law, it supercedes the Interstate Compact for Placement of Children (ICPC), the UCCJA and other state laws with which it is inconsistent.

The ICPC is entered into among the party states by enacting the ICPC Act. It attempts to alleviate the complexities of interstate adoptions and to clarify financial responsibility for the placement. Because it is an interstate compact, it is superior in status to any state statute with which it is inconsistent, such as the UCCJA.¹¹⁶ Therefore, the PKPA is superior to the ICPC and the UCCJA, and the ICPC is superior to the UCCJA.

Notwithstanding the applicability and priority of these state and federal laws, application of existing case law construing the PKPA, the ICPC, and the UCCJA to the case of Baby Boy W. supports jurisdiction in Missouri. For example, in *In re Baby Girl Peggy*,¹¹⁷ a Missouri birth mother, who gave birth in Missouri and executed a Missouri consent, wished to revoke her consent. The case was complicated by an illegal transfer of custody of the infant to an Arkansas adoptive couple. In its opinion, the Missouri Supreme Court relied upon Article 5 of the Interstate Compact on Child Placement to retain jurisdiction over consents to adoption and custody questions. In determining jurisdiction over the consent procedure, the Supreme Court stated:

Under the Compact, even if the Circuit Court of Dunklin County[,] [Missouri] had entered an order giving the Arkansas couple custody, it would have retained jurisdiction until an adoption or some further order as set out in the statute was decreed. No adoption decree or other such order has been entered

not the UCCJA, is the Answer, 84 CAL. L. REV. 703, 712-16 (1996).

112. ADOPTION LAW AND PRACTICE, *supra* note 32, at 4-53.

113. Bernadette W. Hartfield, *The Uniform Child Custody Jurisdiction Act and the Problem of Jurisdiction in Interstate Adoption: An Easy Fix?*, 43 OKLA. L. REV. 621 (1990); Kay, *supra* note 111, at 703.

114. Kay, *supra* note 111, at 703-04.

115. The PKPA is codified at 28 U.S.C. § 1738A (1994) and immediately follows the general full faith and credit statute which is codified as 28 U.S.C. § 1738 (1994).

116. ADOPTION LAW AND PRACTICE, *supra* note 32, at 4-52, 4-56, 3A-35.

117. *In re Baby Girl Peggy*, 850 S.W.2d 64, 68-69 (Mo. 1993).

by a court of this state or any other state. . . . Therefore, the Compact also provides the Circuit Court of Dunklin County jurisdiction over the child.¹¹⁸

In a footnote immediately following the above cited text, the court stated, "The provisions of the UCCJA do not require a different result, although we need not address the Act's applicability here."¹¹⁹ Because a proper ICPC determination is superior to UCCJA provisions, the Missouri Court's statement was correct and its holding was consistent with the interplay of UCCJA, ICPC, and PKPA.

In *K.N. v. Cades*, with facts similar to Missouri's *In re Baby Girl Peggy and Baby Boy W.*, Pennsylvania held that it was the home state or the state with significant connections for the purposes of adoption.¹²⁰ The Pennsylvania court cited the jurisdictional provisions of the UCCJA and then held that the lower court had jurisdiction because of the significant connection of the child and the mother with the Commonwealth.

Both the child and her mother "have a significant connection with this Commonwealth," for the child was born, and the mother still resides, here. In addition, "there is available in this Commonwealth substantial evidence concerning the present or future care, protection, training, and personal relationships of the child," for one of the two homes available to the child that of her mother and grandparents is here.¹²¹

The Pennsylvania court emphasized the intent of the parties at the time of surrender in deciding to apply Pennsylvania law:

In any event, we see no reason to apply the law of another jurisdiction in deciding the custody and adoption of a child born in Pennsylvania to a Pennsylvania mother, when the adopting parents chose to avail themselves of the laws of Pennsylvania by filing a report of their intention to adopt the child with the lower court, and when the original expectations of all the parties were that specific provisions of Pennsylvania law would apply.¹²²

The facts in *K.N. v. Cades* are much like those in *Baby Boy W.* in that the original intent of the parties was that the law of the sending state would apply. In *Baby Boy W.*, the birth parents' intent to use Missouri law is evident in their execution and filing of Missouri consents to adoption in Missouri, voluntary unsubpoenaed testimony before a Missouri trial court judge, and appeals filed first in Missouri. The adoptive parents' intent to use Missouri law is made evident by their filing initial adoption documents for transfer of custody in

118. *Id.* at 69.

119. *Id.* at 69 n.7.

120. 432 A.2d 1010, 1013 (Pa. Super. Ct. 1981).

121. *Id.*

122. *Id.* at 1014.

Missouri, their in-person submission to Missouri jurisdiction, and their testimony before the same Missouri trial court judge. Additionally, the *K.N. v. Cades* court specifically emphasized that the facts in that case “imply the sort of forum shopping that the UCCJA was designed to prevent.”¹²³ The birth parents’ attempt at forum shopping in *Baby Boy W.* is just as apparent.

In *Rogers v. Platt*, upon similar facts, the United States District Court for the District of Columbia relied upon the PKPA to hold that the state of birth has PKPA jurisdiction.¹²⁴ In *Rogers*, both sending and receiving states had asserted jurisdiction over the child. The federal court held that under the PKPA, only one state can have jurisdiction and all other states are obliged to give full faith and credit to a determination by a court of that state.¹²⁵ The court determined that no home state could be ascertained in *Rogers*, and that both the receiving and sending states had significant connections. It then concluded that the state of birth trumps all other factors and found jurisdiction accordingly.¹²⁶

Upon similar facts, Missouri has relied upon the ICPC, Pennsylvania has relied upon the UCCJA, and a federal district court has relied upon the PKPA to find jurisdiction over the consents to adoption in the sending state. Likewise, in *Baby Boy W.*, all parties evidenced their intentions to abide by sending state law on the consents to adoption. These decisions applying uniform laws, state compacts, and federal laws, as well as the conduct of the parties, should require application of Missouri law to the consents to adoption in the instant case.

IV. MISSOURI ADOPTION LAW

In 1993, the Director of the Missouri Division of Family Services (DFS) appointed an advisory group called the Statewide Committee on Adoption.¹²⁷ Its job was to consult in the administration of DFS adoption services and to make recommendations regarding Missouri adoption law and policy. The Statewide

123. *Id.*

124. 641 F. Supp. 381, 384-86 (D.D.C. 1986), *rev'd by* 814 F.2d 683 (D.C. Cir. 1987). The appellate court reviewed the PKPA choice of state jurisdictional analysis of the District Court without disapproval. *Rogers*, 814 F.2d at 687. However, it dismissed the case upon an analysis of federal jurisdiction in which it adopted a minority view holding that the PKPA does not create a federal cause of action. The appellate court’s holding assumed that the PKPA is a rule of decision for state courts “that ‘has nothing to do with the conduct of individuals’ and as such does not create federal question jurisdiction.” *Id.* at 691.

125. *Id.*

126. *Id.* at 389.

127. Letter from Carmen Schulze, Director of Missouri Division of Family Services, to the author (Nov. 15, 1993) (on file with the author). Family Services is a division within the Missouri Department of Social Services. Benita Weitzel, retired Program Director for Division of Family Services, was the staff liaison for the Statewide Committee on Adoption and facilitated its work.

Committee formed a legislative subcommittee¹²⁸ to develop proposed legislation. Subcommittee members met frequently, until hammering out a compromise bill in 1995 for filing in the 1996 legislative session. Comprehensive adoption legislation which had its inception in that legislative subcommittee finally was passed and signed into law in 1997.¹²⁹

Entrenched debates hamper efforts in Missouri to achieve legislation satisfactory to all. First, Missouri's rural and urban sectors have different needs making the development of one statute to govern the entire state very difficult. Second, private and public adoption agencies have different philosophies about adoption than attorneys conducting independent adoptions, particularly regarding the issue of the degree to which the parties should exercise control in the adoption. Third, the eastern and western judicial circuits of the state interpret

128. The legislative subcommittee was chaired by the author and sought representatives from around the state with diverse interests in adoption. The subcommittee included a Kansas City Family Court Administrator, private attorneys from St. Louis and Kansas City who were members of the American Academy of Adoption Attorneys, juvenile officers from St. Louis City and County, private adoption agency personnel from Kansas City and St. Louis, a western Missouri legislator, law professors from the University of Missouri, and staff from the Department of Social Services including an attorney and the Director of the Interstate Compact for Placement of Children. The group articulated 29 concerns with Missouri's adoption laws, and developed 4 goals: (1) to protect children's rights to safety, basic needs, and a permanent stable home; (2) to clarify rights and responsibilities of all interested persons under state law; (3) to facilitate adoption keeping aware of constitutional rights of parties; (4) to conserve emotional and financial reserve of all interested parties. Statewide Committee on Adoption, Minutes of Legislative Subcomm. (April 12, 1994).

129. Recent adoptive legislative history reveals that Senator Harry Wiggins unsuccessfully introduced the Uniform Adoption Act in the 1995 Missouri legislative session in Senate Bill 202. Representative Vicky Hartzler (D) introduced the Statewide Adoption Committee Legislative Subcommittee's compromise bill in the 1996 legislative session in House Bill 1505 and persuaded Senators Roseann Bentley (R) and Betty Sims (R) to introduce the same legislation in Senate Bill 939. Both pieces failed. In the 1997 legislative session, Representative Vicky Hartzler re-introduced the subcommittee's bill in House Bill 291, and Senators Hartley and Simms introduced a much revised version in Senate Bill 225. In addition, Representative Glenda Kelly introduced a very limited adoption bill to allow open adoptions in Missouri in House Bill 343. When Representative Kelly's bill passed the House, Representative Hartzler garnered Representative Kelly's support in allowing a comprehensive adoption bill to be substituted for her bill in the Senate. After that agreement, the author of this article, Representative Hartzler, and adoption attorneys from around Missouri met with Senators Hartley and Sims who agreed to changes in their bill. The bill that the senators substituted for H.B. 343 passed but did not contain agreed upon changes. As a result, Senate Bills 674 and 687 have been introduced in the 1998 legislative session by Senators Bentley and Sims and House Bill 1637 has been introduced by Rep. Vicky Hartzler and Rep. Glenda Kelly to correct omissions in the 1997 legislation.

case law on transfer of custody differently, and the need for clarification is compelling.¹³⁰

The discord between the rural and urban areas is complex. Missouri has two large cities and 114 counties.¹³¹ The metropolitan areas of St. Louis and Kansas City arguably encompass eight counties, leaving 106 essentially rural counties in Missouri. In 1997, Missouri's population was reported to be 5,323,523.¹³² In the same year, the state completed 2,161 adoptions.¹³³ Just under half of the population (forty-seven percent or 2,519,704)¹³⁴ lived in the 106 rural counties, which completed just under half of the adoptions (forty-nine percent or 1,077 adoptions)¹³⁵ in the state. Thus, roughly the same number of Missouri's adoptions are completed in the rural areas as in the eight counties comprising Missouri's big cities. This means that, per county, more adoptions occur in the urban counties than the rural counties.¹³⁶

With their large caseloads, urban counties develop specific routines to handle adoptions efficiently and often involve adoption agencies and foster care. Each of the rural Missouri counties does few adoptions and has few or no adoption agencies operating within its borders. Generally, no foster care is available for private adoptions. Voluntary rural adoptions largely are arranged by clergy persons, physicians, attorneys, or the parties themselves and typically are completed by private attorneys.¹³⁷ Thus, rural adoptions largely are independent adoptions. Missouri law applies the same standard to promote the best interests of the child and the same safeguards to protect the rights of all parties in both independent and agency adoptions. Nonetheless, procedures may

130. See *infra* notes 144-45 and accompanying text.

131. GEORGE E. HALL & DEIRDRE A. GAQUIN, 1997 COUNTY AND CITY EXTRA: ANNUAL METRO, CITY AND COUNTY DATA BOOK 346, 360, 374.

132. HALL, *supra* note 131, at 346.

133. Telephone conversation with Brian Dowden, Administrator, Missouri Office of State Courts [hereinafter Dowden]. These figures were taken from computerized data reports of fiscal year 1997 supplied on January 29, 1998. The 1997 fiscal year ran from July 1, 1996 to June 30, 1997.

134. HALL, *supra* note 131, at 346, 360, 374. The rural population was calculated by subtracting the populations of 9 urban counties from the total Missouri population. The nine counties were Clay, Jackson, Platte, and Johnson for Kansas City metropolitan area, and St. Louis County, St. Louis City, St. Charles, Jefferson, and Franklin for the St. Louis metropolitan area.

135. Dowden, *supra* note 133 (total Missouri adoptions were reduced by the numbers of adoptions completed in Clay, Jackson, Platte, and Johnson for the Kansas City metropolitan area, and reduced by the number completed in St. Louis County and City, St. Charles, Jefferson, and Franklin for the St. Louis metropolitan area).

136. Dowden, *supra* note 133 (figures supplied indicate the number of adoptions completed per county during fiscal year 1997 that runs from July 1, 1996 to June 30, 1997).

137. Involuntary termination of parental rights and subsequent adoption are generally processed by Missouri's Division of Family Services.

vary from county to county while still satisfying statutory requirements. For example, count I of the actual adoption petition pertains to birth parents' rights and can be completed pursuant to Missouri Revised Statutes § 211 (termination of parental rights) or Missouri Revised Statutes § 453 (consent to adoption). Hearings for the birth parents are discretionary with the circuit and may or may not be held, and transfer of custody procedure may be accomplished with or without foster care, depending on the circuit. Rural Missouri's independent adoptions, like independent adoptions everywhere, generally afford the birth parents and adoptive parents more control in the adoption and afford attorneys more flexibility in accomplishing the necessary statutory compliance. Foisting urban routines, such as mandatory foster care and agency involvement, upon rural circuits would be cumbersome if not impossible.

Because rural Missouri cannot mount the concerted lobbying effort that the big cities can, the individual and collective adoption issues in the rural counties are not as well known to state legislators as are the big city issues. Nonetheless, rural Missouri deserves equal accommodation in the drafting of statutes on adoption because it completes adoptions for half the children adopted in Missouri.

The rural versus urban distinction naturally leads to the debate between adoption agencies and independent adoption intermediaries. This tension is not peculiar to Missouri. Adoption agency proponents support legislation to reduce the parties' control, which is greatest in independent adoptions. These agency proponents may believe that birth mothers will turn to "safer" agency adoptions if independent adoptions are less available. However, history reveals that attempts at finessing birth mothers to utilize agencies succeed only in markedly reducing the total number of adoptions.¹³⁸ Apparently, some birth mothers, when faced with a loss of control in the adoption process, turn to the alternatives of aborting or keeping the baby. Thwarting independent adoptions almost certainly would produce the same reduction in the total number of adoptions in Missouri, because few agencies operate in Missouri's rural areas. It is doubtful that the people of Missouri wish to promote a policy of thwarting independent adoptions, thus increasing the number of abortions.

Inconsistent transfer of custody procedures are utilized throughout Missouri because Missouri Revised Statutes § 453.110 does not anticipate the realities of rural areas and the physical requirements of the parties to adoption, and because the interpretation of Section 453.110 in *State Ex Rel., Koehler v. Lewis* is very narrow.¹³⁹ Missouri Revised Statutes § 453.110.1 indicates that transfer of custody may not be accomplished without first filing an appropriate petition with

138. Gustafson, *supra* note 46, at 851 (When Delaware and Connecticut legislated a statutory agency monopoly on adoptions, their states experienced sudden and marked declines in the numbers of adoptions completed.).

139. MO. REV. STAT. § 453.110 (Supp. 1997); *State ex rel. Koehler v. Lewis*, 844 S.W.2d 483 (Mo. Ct. App. 1992).

the court. It also provides that temporary placement of a child may not occur unless the parent retains the right to regain custody of the child.¹⁴⁰ *Koehler* was an agency adoption in which the birth mother gave birth in Livingston County and signed two sets of papers the next day. The first set of papers authorized placement of the baby with the adoption agency, while reserving the right to regain custody. The second set of papers waived the necessity of the birth mother's consent to the adoption of her baby.¹⁴¹ Following execution of the papers, the agency transferred the baby to foster care in another county, and, ultimately, the petition for adoption was filed in a third county. Livingston County objected. The court found that reserving the birth mother's right to regain custody was a sham in light of her conduct indicating her desire to complete an adoption plan and in light of her simultaneously executed waiver of consent to adoption.¹⁴² The court held the Kansas City based adoption agency conducted an illegal transfer of the child in violation of Missouri Revised Statutes § 453.110.1.¹⁴³

In the wake of *Koehler*, courts in eastern Missouri continued adoption practice uninterrupted. Agencies continued taking custody of babies shortly after birth without court order as long as the birth mother retained the right to regain custody.¹⁴⁴ The west side of Missouri became more cautious, believing that agencies or intermediaries could not take custody of a baby without a court order.¹⁴⁵ In Kansas City, a court order may be obtained promptly. But in the rural counties, judges ride circuits, and a court order may not be available for days. Additionally, there are no agencies to take temporary transfer of custody without a court order. As a result, newborn babies can spend expensive days waiting for transfer of custody in hospital nurseries.

To remedy this delay, the rural areas sometimes utilize power of attorney forms by which birth parents give power of attorney to the adoptive parents, and the baby is physically transferred to them. Such transfer is a matter of necessity

140. MO. REV. STAT. § 453.110.1 (Supp. 1997)

141. *Koehler*, 844 S.W.2d at 485.

142. *Id.* at 488.

143. The opinion states without comment that the agency conducted itself to avoid the circuit's policy of requiring all adoptions to exclusively utilize the Division of Family Services in all adoption proceedings within Livingston County. *Id.* This policy is inconsistent with MO. REV. STAT. § 453.014.1(4) (Supp. 1997), which authorizes placement by public agencies, private agencies, or independent intermediaries. Livingston County Court seemed to contest the \$10,600 fee charged by Catholic Charities (the adoption agency involved) to the adoptive parents. *Koehler*, 844 S.W.2d at 485.

144. Telephone conversation with Allan F. Stewart, Member of the American Academy of Adoption Attorneys in St. Louis, Missouri (Feb. 10, 1998).

145. Telephone conversation with Marie Cook, Executive Director of Associates in Adoption Counseling, Inc. in Kansas City, Missouri (Feb. 3, 1998). Adoption Counseling, Inc., is a Missouri Licensed Child Placing Agency in Kansas City.

for many rural areas where foster homes, interim care, and judges are not readily available. Additionally, birth parents actively want their relinquished child to go directly into the loving arms of adoptive parents. A power of attorney is legal under Missouri Revised Statutes § 475.024, but whether it overcomes the prohibition against transfer of custody without a court order in Missouri Revised Statutes § 453.110.1 has never been decided by a court. The need for amendment of the statute to clarify transfer of custody procedure is compelling. If undertaken, such amendment should account for the realities of adoption procedure in rural counties.

V. 1997 ADOPTION AMENDMENTS

The 1997 amendments to Missouri adoption law were accomplished via House Bill 343 (H.B. 343).¹⁴⁶ H.B. 343 made broad changes to certain provisions of Missouri law governing adoption, but left others untouched. Most notably, H.B. 343 accomplished the following: modified the putative father registry; directed the Department of Social Services to develop the birth parent's consent form;¹⁴⁷ clarified the procedure for execution of birth parent consents;¹⁴⁸ authorized revocation of birth parent consents for an indeterminate time;¹⁴⁹ increased the penalty for illegal transfer of custody;¹⁵⁰ directed the Department of Social Services to develop rules regarding the content of assessments of both the child¹⁵¹ and the adoptive parents;¹⁵² subjected intermediaries to the rules and regulations promulgated by the Departments of Social Services and Health;¹⁵³ and generally modified Chapter 211 (termination of parental rights) and Chapter 453 (adoption) for internal consistency.

H.B. 343 clarified that adoptive parents or agencies may file a three-count petition for adoption as follows: 1) consent to adoption (or termination of parental rights), 2) transfer of custody, and 3) finalization of the adoption.¹⁵⁴ Adoptive parents or the adoption agency also must file the birth parents' consent

146. H.B. 343, 89th Gen. Assembly (Mo. 1997) (signed into law by Governor Carnahan in August 1997).

147. MO. REV. STAT. § 453.030.8 (Supp. 1997).

148. MO. REV. STAT. § 453.030 (Supp. 1997).

149. MO. REV. STAT. § 453.030.7 (Supp. 1997).

150. MO. REV. STAT. § 453.110 (Supp. 1997).

151. MO. REV. STAT. § 453.026 (Supp. 1997).

152. MO. REV. STAT. § 453.070 (Supp. 1997).

153. MO. REV. STAT. § 453.014.2 (Supp. 1997).

154. MO. REV. STAT. § 211.444.1. (Supp. 1997) authorizes the court to terminate parental rights where a petition for adoption has been filed under MO. REV. STAT. § 453 (Supp. 1997), if the birth parent has consented in writing to the termination of his/her parental rights. It would appear that this consent may also be withdrawn prior to review and acceptance by a judge since it must comply with MO. REV. STAT. § 453.030 (Supp. 1997), which permits withdrawal at any time prior to review and acceptance by a judge.

documents, a financial affidavit listing all expenses associated with the adoption, a home study reporting the adoptive parents' suitability for adoption, and a study reporting the social and medical histories of the birth parents and the child. H.B. 343 reduces the time for finalization of adoptions from nine months to six months after the adoptive parents obtain lawful and actual custody of the child, and after a hearing in which favorable post-placement assessments and updated financial affidavits are filed with the court.¹⁵⁵

Missouri's law authorizes placement for adoption by public agency, private agency, and by independent intermediary.¹⁵⁶ The intermediary may be a clergyperson, physician, or attorney. Missouri's placement scheme does not permit placement for adoption by a birth parent, which is a problem in interstate adoptions in which the other state mandates placement by the birth parent.¹⁵⁷

H.B. 343 subjects adoption intermediaries to rules and regulations, promulgated by the Department of Social Services, which have traditionally been reserved for child placing agencies.¹⁵⁸ These rules pose serious problems for intermediaries because they mandate birth parent notification of certain rights,¹⁵⁹ but do not create a standardized form for use in all adoptions to secure such notification. Such a consent form satisfying these rules should be written into the statute, thus insuring the forms' availability to better safeguard the rights of all parties to adoption. Intermediaries, particularly rural attorneys who do few adoptions, do not have ready access to, or frequent need for, complex Department of Social Service rules. Where intermediaries proceed with adoptions without consulting the rules, adoptions could be challenged for failure to strictly comply with rules despite otherwise full statutory compliance. Also, attorneys could decline adoptions because obtaining, reading, and complying with Department of Social Services rules for the infrequent adoption will not be

155. MO. REV. STAT. §§ 453.080.2, 453.077.1 (Supp. 1997).

156. MO. REV. STAT. § 453.014.1(4) (Supp. 1997).

157. N.C. GEN. STAT. § 48-3-201 (1995). North Carolina is one of several states whose law on who may place a child for adoption is antithetical to Missouri's. North Carolina permits placement by a birth parent or an adoption agency, but not by an intermediary. Missouri does not permit placement by a birth parent but permits placement by an agency or an intermediary. In an independent interstate Missouri North Carolina adoption, an intermediary must place the child in Missouri but in a North Carolina, the birth parent must place the child in an independent adoption. The clash in state laws arises upon completion of the Interstate Compact Placement form 100A which is required in all interstate adoptions. In the form 100A spaces designating the entity responsible for planning for the child or the entity financially responsible for the child, Missouri requires the name of the intermediary and forbids the name of the birth parents. North Carolina requires the name of the birth parent but forbids the name of the intermediary.

158. MO. REV. STAT. § 453.014.2 (Supp. 1997); MO. CODE REGS. ANN. tit. 13, § 40-73.080 (1998) (promulgated pursuant to MO. REV. STAT. §§ 210.481-210.536 by emergency amendment on January 14, 1998).

159. MO. CODE REGS. ANN. tit. 13, § 40-73.080(2)(C)7A-G (1998).

cost effective. If attorneys decline to assist with adoptions, rural adoptions will fail.

Additionally, adoption agencies, social workers, and attorneys answer to different licensing boards and obey differing codes of ethics. This may put attorneys at odds with Department of Social Services rules, particularly when the rules require that the attorney act in the best interest of the child in recommending an adoptive family. For example, suppose a birth mother chooses a single, wealthy, Jewish, Caucasian mother to adopt her biracial, Baptist child instead of a biracial, Baptist couple of modest means. When both adoptive parents have favorable home studies, the attorney representing the birth mother is bound to follow her direction in making a legal placement that may not be the "best" placement for the child. This placement violates the rules.¹⁶⁰ The solution is to authorize the Department of Social Services to develop rules and regulations for child placing agencies, but to put essential requirements for all adoptions in the adoption statute, including, and especially, a standardized consent form.

Missouri requires that the consent to adoption or consent to termination of parental rights by the birth parent be written, notarized or witnessed, and executed no sooner than forty-eight hours after the birth of the child.¹⁶¹ The Department of Social Services is directed to develop a birth parent consent form in order to standardize the information provided to each birth parent and assure her or his understanding prior to signing her or his consent.¹⁶² Missouri consents may be executed by non-residents inside or outside the state and non-residents may finalize their adoption in Missouri if venue was originally proper.¹⁶³

In order to standardize the form and provide essential information, the form will have to be several pages in length. The length of the form may be cumbersome, but the importance of assuring birth parents full disclosure in executing documents affecting their parental rights warrants no less.

In *Baby Boy W.*, the birth parents alleged that they did not understand that their consent was irrevocable.¹⁶⁴ Had a standardized form been in use at the time of *Baby Boy W.*, the consent could have carried information explaining that execution of the consent was irrevocable and that the birth parents had the right to postpone execution. That might have prevented, or at least shortened, the litigation.

Traditionally, a birth parent consent was revocable only upon a showing of fraud or duress.¹⁶⁵ Under H.B. 343, a birth parent's consent may be withdrawn

160. MO. CODE REGS. ANN. tit. 13, § 40-73.080(2)(C)8.C (1998).

161. MO. REV. STAT. §§ 211.444.2, 211.444.3, 453.030.4, 453.030.5 (Supp. 1997).

162. MO. REV. STAT. § 453.030.8 (Supp. 1997).

163. MO. REV. STAT. § 453.010.1 (Supp. 1997).

164. Docket Sheet for Circuit Court of Nodaway County at 1, *In re D.C.C.*, 935 S.W.2d 657 (Mo. Ct. App. 1996) (No. JU 95-41).

165. The Missouri Supreme Court traced the history of Missouri adoption statute and reviewed the circumstances under which such a consent might be revoked in *In re*

at any time prior to its review and acceptance by a judge.¹⁶⁶ A number of problems exist with this provision, both as to its indeterminate time frame and to the issue of revocability. Most importantly, revocability is not the tradition in Missouri and it unnecessarily confuses the execution of consent. Missouri attorneys advise birth parents not to sign consents until certain of their decision to proceed with their adoption plan. It is difficult for an attorney to advise a birth parent when there is an indefinite period of revocability, ending whenever a judge decides to review the consent.

The decision to hold a hearing over consents traditionally was left to the protocol of the individual circuits with consideration for the circumstances of the parties. Some circuits have not routinely held hearings in which consents are reviewed, particularly the birth father's or potential birth fathers' consents. The statute does not require a hearing to review and accept birth parent consents, and in fact it does not require that consents even be reviewed. This leaves important questions unanswered: Is a hearing necessary to review and accept consents to adoption? Are unreviewed consents revocable until finalization of the adoption? Does a birth parent have the right to notice of the review and acceptance of her or his consent if it occurs in absence of a hearing?

Traditionally, Missouri has required a forty-eight-hour waiting period prior to the birth parents' consent to either adoption or to termination of parental rights, and has not authorized a period of revocability.¹⁶⁷ Legislating revocability for an indeterminate period is of little value. After decades of irrevocability, the sudden availability of undefined irrevocability will be confusing. Furthermore, birth mothers complain that the revocability of their consent forces them to remake the adoption decision every day until it is accepted and thwarts their efforts to move on with their lives. Revocability adds nothing when a birth mother understands that execution of a consent is permanent, that it may be postponed, and that it should not be signed while under the influence of drugs or medications. Standardized consent forms can provide that degree of information and more in plain, readable language. Meanwhile, adoptive parents who take an at-risk placement of a child risk their hearts and their pocketbook during extended periods of revocability because they develop important bonds with the child in their care for weeks and they venture money to pay agencies, attorneys and court costs. For these reasons, Missouri's provision permitting withdrawal of the consent until reviewed and accepted by a judge should be eliminated.

Baby Girl Peggy, 850 S.W.2d 64, 70 (Mo. 1993). That opinion comports with other Missouri opinions in demonstrating the seriousness with which Missouri considered its consents to adoption and the very limited circumstances under which such consents could be revoked, i.e. fraud, duress, coercion or other elements which would render the consent involuntary. *In re R.V.H.*, 824 S.W. 2d 28, 30 (Mo. Ct. App. 1991).

166. MO. REV. STAT. § 453.030.7 (Supp. 1997).

167. *In re R.V.H.*, 824 S.W.2d at 30.

Missouri presently does not mandate a hearing over birth parents' consents or review and acceptance by a judge. The parameters of the withdrawal of consent have been applied such that courts may refuse to review and accept a birth mother's consent until the birth father's consent has been obtained. When one or more of the possible birth fathers' whereabouts are unknown, which is a very common situation, he or they must be served by publication, which takes six to eight weeks.¹⁶⁸ This effectively postpones review and acceptance of the birth mother's consent and permits revocation for six to eight weeks. Depending upon the protocol of the circuit, the child may be placed in foster care or with his adoptive family in the interim. Birth mothers who have made an adoption plan dislike placing their child in foster care and report that foster care makes them feel as though their child is neglected and parentless. Mandatory foster care dissuades birth mothers from placing their child for adoption and robs children and adoptive parents of an important opportunity for early bonding.

Execution of consents by birth mothers should be authorized no sooner than forty-eight hours after birth. Execution of birth fathers' consents should be authorized at any time prior to or after birth¹⁶⁹ but should become binding no sooner than forty-eight hours after birth. The properly executed standardized consents of both birth parents should be revocable only for fraud or duress and should be absolutely irrevocable after a evidentiary hearing before a judge.¹⁷⁰

168. See MO. REV. STAT. §§ 453.030.3(2)(a)-(c) (Supp. 1997); MO. REV. STAT. § 192.016 (Supp. 1997) (1997 amendments to the putative father registry do not eliminate the necessity of serving a father who has abandoned the mother or child).

169. Permitting birth fathers to sign consents prior to birth enables adoptions to proceed in a timely fashion where birth fathers are out of the state or out of the country.

170. Eleven states (Arizona, Colorado, Florida, Hawaii, Idaho, Illinois, Kentucky, Mississippi, Nevada, Rhode Island and Utah) and the District of Columbia authorize irrevocable consents to adoption. Some states require a waiting period prior to execution of the consents and others do not. ARIZ. REV. STAT. ANN. § 8-106(E) (West 1988) provides that consent to adoption is irrevocable unless obtained by fraud, duress or undue influence, and ARIZ. REV. STAT. ANN. 8-107(B) (1996) provides that consent is invalid if given before 72 hours after birth. COLO. REV. STAT. § 19-5-104(6), (7) (Supp. 1997) provides for voluntary relinquishment without a waiting period and denies revocation except where fraud or duress are established within 90 days of the relinquishment order. FLA. STAT. ANN. § 63.082(5) (West 1992) provides that consent to adoption may be withdrawn only for fraud or duress and proscribes no waiting period. HAW. REV. STAT. § 578-2(f) (1993) provides that a consent to adoption which has been filed or received in evidence may not be withdrawn without a written judicial finding that such action would be in the best interests of the child. IDAHO CODE §16-1504 (1970) makes no provisions for a waiting period or a period of revocability. NEV. REV. STAT. § 127.070 (1989) provides that all consents to adoption executed prior to 72 hours after birth are invalid. NEV. REV. STAT. § 127.080 (1993) provides that a valid written consent to a specific adoption cannot be revoked. OR. REV. STAT. § 109.312(2)(a), (b) (1993) do not provide for a waiting period and do provide that a certificate of irrevocability may be filed concurrently or subsequently to the consent to adoption which is revocable only if fraud or duress are proved as to a material fact. R.I. GEN. LAWS § 15-7-6 (1996) provides

Furthermore, amended Section 453.040(4), which indicates that no consent is required from a father who denies paternity in a verified statement similar in form to a consent form, should be retained.¹⁷¹ Also, amended Section 453.040(5), which indicates that no consent is required from the father who, though served, fails to file an answer or make an appearance in a proceeding for adoption, should be retained.¹⁷²

A comprehensive consent form should be written into the statute for standardization and for easy access by all agencies and attorneys in big cities and in rural areas. The standardized form should offer a consent to adoption or a consent to termination of parental rights or a denial of paternity. The form should be plainly written in large, boldface type and include the following information: that the birth parent may postpone execution of the consent utilizing foster care or relative care; that the birth parent may execute a power of attorney to put the child with non-relatives for a brief time; that the birth parent has the right to separate legal counsel; that financial assistance through the state may be available if the birth parent chooses to keep the child; that the birth parent has the right to psychological counseling; that the birth parent has the right to confer with family; that the birth parent must be free of influence from mind altering drugs or alcohol before signing a consent; that the identification of the birth father is of extreme importance; that Indian ancestry must be disclosed; that the consent must be signed voluntarily and without pressure from other people; and that the consent is irrevocable upon signature.

Consent to adoption should name a specific adoptive couple who may be identified either in full or by first names only, depending upon the arrangement of the parties. If adoption by that named couple fails for any reason, such as death, the birth parents should have the opportunity to choose new adoptive parents or to retake custody of their child. Consent to termination of parental rights should be final and no resumption of custody should be permitted.

The drafters of H.B. 343 intended to clarify and protect the rights of unwed birth fathers by supplementing Missouri's putative father registry. An unwed father can assure himself notice of any adoption proceeding by filing with the putative father registry prior to birth or within fifteen days after birth,¹⁷³ and his consent is required before the adoption may proceed.¹⁷⁴ Where the putative

for a 15 day waiting period after the birth of the child before birth parents can waive their right to consent and provides no revocation period. UTAH CODE ANN. § 78-30-4.19 (1995) provides that a birth mother may not consent to adoption until at least 24 hours after birth, and UTAH CODE ANN. § 78-30-4.20 (1995) provides that a consent to adoption is irrevocable upon signature. WYO. STAT. ANN. § 1-22-109(d) (Michie 1995) provides that consent to adoption is irrevocable unless obtained by fraud or duress.

171. MO. REV. STAT. § 453.040(4) (Supp. 1997).

172. MO. REV. STAT. § 453.040(5) (Supp. 1997).

173. MO. REV. STAT. §§ 453.030.3(2)(b), 453.060.1(6) (Supp. 1997). Similar laws have been found constitutional. See *Friehe v. Schaad*, 545 N.W.2d 740 (Neb. 1996).

174. MO. REV. STAT. § 453.030.3(2)(b) (Supp. 1997).

father acknowledges paternity but fails to sign a consent to adoption or consent to termination of parental rights, he may thwart the adoption without intending to take responsibility for the child. Under Missouri Revised Statutes § 453.030.3(2), there is no automatic mechanism requiring the father who would thwart an adoption to also assume parental responsibility. Enlightened policy would clarify and protect the rights of unwed fathers, require the unwed father who does not agree with a mother's adoption plan to assume parental responsibility during the pregnancy¹⁷⁵ and after the birth, and promote permanent and secure homes for children. Therefore, the statute should be amended to provide the unwed father who wishes to thwart an adoption plan with a finite period of time in which to institute a paternity suit for the purpose of assuming a fair share of responsibilities for care, custody, and support of the child.¹⁷⁶

H.B. 343 directs the Department of Social Services to promulgate rules and regulations to specify content and procedure for child studies and adoptive home placements.¹⁷⁷ Such specification serves all parties to the adoption. The court, guardians ad litem for the adoptee, and the birth parents can evaluate the suitability of adoptive homes more thoroughly with extensive adoptive home studies. Adoptive parents can make informed adoption decisions with more information about the prospective adoptee as well.¹⁷⁸ However, the specification of assessment content should be in the statute rather than in rules and regulations, because assessments are required of every adoption and because social workers in rural circuits who do infrequent adoptions will have more access to the statute than rules and regulations changed regularly by the Division of Family Services. Changing the protocol for assessment is more cumbersome when it is written into the statute rather than the rule (simply because changing a statute requires legislation, while changing a rule is an administrative function), but placing assessment requirements into the statute insures their wider availability and reduces the likelihood that adoptions will be challenged because of a failure to comply strictly with rules and regulations.

H.B. 343 clarified permissible expenses to an adoption and mandated that adoptive parents file a notarized and detailed accounting with the court.¹⁷⁹ However, the legislature did not specifically authorize two expenses that are

175. State laws requiring unwed fathers to assume parental responsibility during the pregnancy or risk loss of their rights to veto adoptions have been held constitutional. *John S. v. Mark K.*, 43 Cal. Rptr. 2d 445 (Ct. App. 1995); *In re Baby Boy S.*, 912 P.2d 761 (Kan. Ct. App. 1996).

176. Indiana has a statute providing that birth fathers must file a paternity suit within 30 days of birth or risk loss of rights to stop an adoption. IND. CODE § 31-19-3-4 (Supp. 1997).

177. MO. REV. STAT. § 453.070 (Supp. 1997).

178. For a discussion of the line of wrongful adoption torts that have developed against agencies for improper disclosure of information to the adoptive parents, see *supra* note 58.

179. MO. REV. STAT. § 453.075 (Supp. 1997).

important to adoptions. The first omission is living expenses for the birth mother. It is typical for birth mothers to have little to no financial reserves, a fact that plays prominently in the decision to make an adoption plan. Thus, when an obstetrician or midwife recommends to a birth mother that she quit work, stay off her feet, or stay on bed rest during the pregnancy, she may be unable to pay her rent, utilities, or other miscellaneous expenses. Because Missouri traditionally has not permitted adoptive parents to pay living expenses, this birth mother may have to choose between becoming homeless or putting her unborn baby at risk by ignoring the pregnancy-related recommendations. Missouri's bigger cities and communities have homes for unwed mothers, but the rural circuits do not. Some birth mothers faced with this choice will move to another state, where living expenses are allowed in an adoption. Missouri should accommodate its birth mothers by authorizing the reimbursement of reasonable living expenses to birth parents who cannot work.

The second omission in Missouri's itemized adoption expenses is attorney fees for the birth parents. A potential conflict of interest exists in dual representation when one attorney represents more than one party to the adoption. A potential conflict also exists where the birth parents' attorney is reimbursed by the adoptive parents. Birth parents frequently consider adoption because they are not at a time in their lives when they can be financially secure. Therefore, birth parents rarely have the funds to hire attorneys. But no legal transactions affect relationships more important than those changed by an adoption, and all parties to an adoption need legal counsel. Adoptions present difficult issues with respect to attorney fees. The interplay of Missouri's statutes on trafficking of children vis-a-vis reimbursement of attorneys for the birth parents in an adoption have not been and are not clear because the adoption statute authorizes fees for legal expenses, but the trafficking statute authorizes fees only for legal services to the adoptive parents and any other conduct permitted under the adoption statute.¹⁸⁰ This raises the issue of whether this includes fees for the birth parents' attorney.

In *Baby Boy W.*, the court appointed a guardian ad litem for the child, but only one other attorney was involved in drafting documents for the birth parents and the adoptive parents, and he identified himself as representing the adoptive parents.¹⁸¹ The birth parents alleged that the attorney defrauded them and gave them misinformation about the revocability of their consents, and that he did not explain that he actually represented the adoptive parents.¹⁸² The law on the permissibility of adoptive parents paying birth parent legal fees is unclear. The birth parents in *Baby Boy W.* could have been provided separate counsel if

180. MO. REV. STAT. §§ 453.075, 568.175 (Supp. 1997).

181. Transcript of Dec. 19, 1995 Hearing before Judge John C. Andrews, Cir. Ct. of Nodaway County, Mo. pp. 5, 25.

182. Mot. to Withdraw Consents and/or in the alternative Mot. to Set Aside Order of Transfer of Custody at 1, *In re D.C.C.*, 935 S.W.2d 657 (Mo. Ct. App. 1996) (No. 54259).

Missouri's law were clearer and this might have eliminated the contest in Baby Boy W.'s adoption. Missouri should clearly establish that permissible adoption expenses include payment of legal fees for birth parents and permit dual representation only if the adoptive parents and birth parents acknowledge the dual representation in writing.

Under H.B. 343, international adoptions recognized as valid by the United States Department of Justice and the United States Department of Immigration and Naturalization Services are recognized in Missouri. The Missouri Department of Health must issue a birth certificate for the adopted child upon proper request and proof of adoption.¹⁸³ Additionally, Missouri courts must grant a decree of recognition of the international adoption and change the name of the adoptee if proper request is made.¹⁸⁴

The H.B. 343 amendments to the transfer of custody were very disappointing in that the provision was changed only to the extent that it increased the penalty for illegal transfer of custody. As discussed earlier, transfer of custody procedures vary widely from the eastern to the western circuits of the state and from the rural to the urban counties. Discordant interpretations of *Lewis v. Koehler* and the use of power of attorney to accomplish transfer of custody are factors in the quixotic mix of procedures. Routine procedure in one part of the state is considered illegal in another part of the state.¹⁸⁵ This absurd status of Missouri's transfer of custody procedures cries out for clarification, not increased penalty for succumbing to the quagmire of confusion. The legislature should eliminate entirely the current transfer of custody provision. In its place, the legislature should enact a provision that permits physical placement without court order under both a revocable and properly executed power of attorney pursuant to Missouri Revised Statutes § 475.024 to last no longer than two months (the time it takes to publish notice to a putative father whose whereabouts are unknown) and under a temporary relinquishment to an adoption agency retaining the right to regain custody. However, amended Section 453.110, which provides for transfer of custody without a hearing when certain criteria are satisfied, should remain.¹⁸⁶ Finally, transfer of custody procedure should require a hearing within three days of filing a petition for transfer of custody if a hearing is required or desired.

VI. CONCLUSION

The nation has recognized the importance of adoption to affected children, their parents, and the nation. President Clinton and Congress have provided significant financial incentives to couples and to states for completing adoptions.

183. MO. REV. STAT. §§ 453.170, 193.125 (Supp. 1997).

184. MO. REV. STAT. § 453.170.3 (1997).

185. See *supra* notes 144, 145 and accompanying text.

186. MO. REV. STAT. § 453.110 (Supp. 1997).

In Missouri, the earliest available statistics indicate that adoptions showed an annual increase in 1995 of three percent, a decrease in 1996 of four percent, and an increase in 1997 of six percent.¹⁸⁷ In each of these three years, adoptions comprised a steady eight percent of Missouri's total juvenile case dispositions. Thus, no clear increasing or decreasing adoption trend emerges in Missouri, and the situation in Missouri does not seem to correspond with the nation's increasing adoption rate. This suggests that Missouri law has not fostered adoption. The current information regarding the effect of Missouri's law on adoptions is anecdotal and urged unevenly upon legislators by special interest and geographically aligned coalitions. Public and private adoption agency proponents lobby to impose urban protocols upon independent adoptions without recognizing that half of Missouri's adoptions occur in rural counties,¹⁸⁸ where most adoptions are independent adoptions and where big city routines are neither available nor desired. Securing the best interests of the child *cannot* be accomplished by frustrating rural circuits, and *can* be accomplished without foiling independent adoptions.

Missouri progressed in fostering adoption with passage of the 1997 comprehensive adoption legislation in H.B. 343. Five Missouri women, Ms. Carmen Schulze, Director of Division of Family Services and four Missouri legislators, Representatives Vicky Hartzler and Glenda Kelly, and Senators Betty Sims and Roseann Bentley, have worked to pass adoption legislation that promotes the best interests of Missouri's children. But the job is not finished and the 1997 legislation needs to be amended to facilitate agency and independent adoptions—both within the state and between Missouri and other states. Missouri should authorize more control for the parties to adoption while providing meaningful safeguards for the children, birth parents, and adoptive parents. Missouri should standardize essential adoption procedures throughout the state in black-letter law sacrificing brevity for clarity.

The case of Baby Boy W. should serve as a guidepost for future amendments. The adoption of Baby Boy W. was a rural and independent adoption. The attorneys and judge conducting the adoption operate in a county that completed only five adoptions in fiscal year 1997.¹⁸⁹ They went beyond mere statutory compliance in conducting the adoption by holding hearings on the birth parents' consents, the temporary transfer of custody, and compliance with the Interstate Compact for Placement of Children, and by insuring psychological counseling to the birth parents in the months before the adoption. Nonetheless, a contest arose in which the birth parents claimed inadequate protection of their rights. Factors contributing to this contest include the absence of a separate attorney for the birth parents, and the absence of information on the consent form unquestionably informing the birth parents of their rights and the irrevocability

187. FLANGO *supra* note 1, at 18; Dowden, *supra* note 133.

188. Dowden, *supra* note 133.

189. Dowden, *supra* note 133.

of the document. Missouri can better protect parties to adoption by standardizing a thorough statutory consent form and by clearly authorizing the adoptive parents to reimburse expenses for a separate attorney for the birth parents.

Other provisions of Missouri's adoption law that should be amended include the addition of living costs to adoptive parents' authorized expenses, the broadening and clarification of realistic transfer of custody procedures, the exclusion of attorneys from the Department of Social Services rules, the clarification of putative father procedures so that fathers may secure rights to their children but may not thwart adoptions without simultaneously assuming parental responsibilities, clarification of Missouri's law on adoption following assisted reproductive technologies and surrogacy, and clarification of the availability of adoption by same-sex couples. Missouri's children deserve no less.