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FOR THE SAKE OF THE CHILD: MOVING TOWARD UNIFORMITY IN ADOPTION LAW

Marja E. Selmann

Abstract: Adoption is governed by state law, which varies dramatically among states, and thus encourages forum shopping and complicates interstate adoption. A new Uniform Adoption Act (UAA), likely to be completed and approved by the National Conference of Commissioners on Uniform State Laws in 1994, offers states the opportunity to move toward greater uniformity. The UAA balances all of the participants' interests while keeping the child's best interests foremost.

"Baby Jessica Case Scares Away Adoptive Parents."¹ "Mother Files to Bar Adoption by Gay Couple."² "Florida No Longer Discourages Mixed Race Adoptions."³ "Adults in Tug of War over Toddler: Dad Fights Adoption by Ex-Lover's In-Law."⁴ "'Unique' Adoption Ruling; Both Sides Cheer Settlement that Shares Vt. Boy."⁵ "Adoption Code Needed."⁶

As these recent newspaper headlines suggest, adoption is a complex balancing act. The needs and interests of the biological parents, the adoptive parents, the agency or attorney arranging the adoption, the state, and, most importantly, the child are often in conflict.⁷ Most adoptions are regulated by state law,⁸ and one state may weigh the interests of the participants differently than another.⁹ Thus, the resolution of the tensions among various interests depends largely on the state in which an adoption takes place. This lack of uniformity encourages forum shopping and creates problems in interstate adoption when parties must comply with the laws of multiple states.¹⁰

Achieving more uniform treatment of adoption cases requires, at a minimum, more uniform adoption laws. Although previous attempts at

1. Melissa Fletcher Stoeltje, *Houston Chron.*, Dec. 5, 1993, at Lifestyle 1.

2. *N.Y. Times*, Sept. 20, 1993, at A14.

3. *St. Louis Post-Dispatch*, Dec. 12, 1993, at 6A.

4. Jonathan Sidener, *Ariz. Republic*, Oct. 11, 1993, at A1.

5. Judith Gaines, *Boston Globe*, Aug. 21, 1993, at Metro/Region 1.

6. *USA Today*, Aug. 27, 1993, at 10A.

7. *See infra* Part III.

8. Joan H. Hollinger et al., *Adoption Law and Practice* § 1.01[1] (1988) [hereinafter Hollinger].

9. *Id.*

10. *See infra* Part II.A.

creating uniformity in adoption law have largely failed,¹¹ a new Uniform Adoption Act (UAA) is now in the final draft stage and may be completed as early as August 1994.¹² The UAA contains many well thought out provisions that every state should incorporate into its adoption laws.

This Comment begins by briefly outlining the history of adoption law, including previous attempts to create uniformity. Part II explores the reasons for adoption law's complexity. Part III discusses the various interests that must be balanced in adoption proceedings and suggests a methodology for analyzing adoption law. Part IV examines present state laws and the proposed UAA provisions governing three specific aspects of adoption law that currently vary dramatically from state to state:¹³ (1) the procedure for obtaining consent and the time period within which consent may be revoked, (2) policies of matching a child and adoptive parents on the basis of race, and (3) open adoption. It also argues that these provisions of the proposed UAA promote the best interests of the child while providing an optimal balance of the other competing interests. Part V recommends that every state adopt some or all of the UAA in order to reduce forum shopping and the legal complications involved in interstate adoptions.

I. THE HISTORY OF MODERN ADOPTION LAW: GUARDING THE BEST INTERESTS OF THE CHILD

Adoption originally entailed nothing more than an informal transfer of a child. Today, detailed statutory arrangements create the full legal relationship of parent and child. From the earliest statutes to the present, adoption law has purportedly focused on "the best interests of the child," a standard that has also evolved and expanded over time.

11. See *infra* Part II.B.

12. The Uniform Adoption Act will be considered by the National Conference of Commissioners on Uniform State Laws (NCCUSL), the organization responsible for drafting the UAA and other uniform acts, at its August convention. Telephone Interview with Joan Hollinger, Reporter for the Uniform Adoption Act (April 4, 1994); Interview with Robert Aronson, Professor, University of Washington School of Law, in Seattle, WA (Oct. 6, 1993) (Professor Aronson is one of Washington's representatives to the NCCUSL.).

13. There are many other aspects of adoption that vary from state to state, such as the process for terminating parental rights, the required notice to an unwed biological father, and the openness or confidentiality of adoption records. The three aspects chosen for discussion in this Comment illustrate the need for uniform adoption law that places the child's interests above all others.

A. *The Evolution of Adoption Law*

Modern American adoption law is entirely a creature of statute.¹⁴ In the United States, adoption was handled by private legislative acts and informal arrangements until 1851,¹⁵ when Massachusetts passed the first adoption statute.¹⁶ This statute contained specific requirements for approving an adoption, including a judicial finding that the adopters were “suitable” and that adoption would serve the “moral and temporal” or best interests of the child.¹⁷ Judges based their adoption decisions primarily on economic rather than psychological concerns, inquiring into little beyond the adoptive parents’ financial solvency.¹⁸ Background checks and probationary periods were not part of the procedure and most adoptions were completed in one day.¹⁹

Every state’s adoption statute now specifies that the standard for making adoption determinations²⁰ is the best interests of the child.²¹ As part of protecting the child’s interests, states generally require a background investigation of the adoptive parents by child welfare professionals and a probationary period before an adoption is finalized.²² These safeguard procedures are relatively simple; the difficulty lies in determining just exactly what a child’s best interests are.

B. *Defining the “Best Interests of the Child”*

The best interests standard is nebulous and largely undefined.²³ Some states list factors that may or may not be considered in making the

14. Hollinger, *supra* note 8, §1.02[1].

15. *Id.* §1.02[2].

16. 1851 Mass. Acts 324. See Burton Z. Sokoloff, *Antecedents of American Adoption*, *The Future of Children*, Spring 1993, at 17, 18 (special issue on adoption); Hollinger, *supra* note 8, §1.02[2].

17. Hollinger, *supra* note 8, §1.03[2].

18. *Id.*

19. *Id.*

20. “Best interests of the child” is the standard employed at some phase in most child custody determinations, including custody disputes between parents in a divorce and terminations of parental rights. Thus, the law defining “best interests of the child” extends beyond adoption law. See, e.g., *In re* Petition of D.I.S., 494 A.2d 1316, 1322 (D.C. 1985) (noting that the best interests standard is applicable to child custody disputes between spouses, between a natural parent and a foster parent, and in child neglect proceedings, in addition to adoption).

21. Hollinger, *supra* note 8, § 1.01[2][b].

22. *Id.*

23. See, e.g., *In re* A.V.D., 62 Wash. App. 562, 572, 815 P.2d 277, 283 (1991) (“Washington courts have held that the factors involved in determining the ‘best interests’ of a child are not capable of specification; rather each case must be decided on its own facts and circumstances.”).

determination, such as race, religion, sexual orientation, family relationship, or status as a foster parent,²⁴ but states lack specific guidelines for determining exactly what is in the child's best interests.²⁵ Thus, many people have criticized the standard, not for its intent, but for its indeterminacy.²⁶ One author compared the statutory admonition to decide in the child's best interests to telling the manager of a factory to maximize output at the least cost.²⁷ Neither provides much specificity.

One influential force in shaping child custody determinations, including adoption, in the last 20 years has been a book entitled *Beyond the Best Interests of the Child*.²⁸ The authors point out the artificiality of suggesting that some "best" arrangement waits somewhere for the child, and propose instead a framework for choosing the best of the immediately available placement alternatives.²⁹ This framework rests on three basic ideas. First, children need continuity in their relationships, surroundings, and environmental influences.³⁰ Repeated disruption causes developmental delays and damages a child's ability to form deep, stable emotional attachments.³¹ Placement should reflect a child's need to develop close, long-term bonds with a parental figure.³² Second,

24. See, e.g., Minn. Stat. Ann. § 259.255 (West 1992) (giving relatives first priority in adoption, followed by parents of the same racial or ethnic heritage); Conn. Gen. Stat. Ann. § 45a-726a (West Supp. 1994) (giving decision makers permission to consider the sexual orientation of adoptive parents); Del. Code Ann. tit. 13 § 911 (1993) (requiring placement to abide by natural parents specification of religion, if any); N.J. Rev. Stat. Ann. §30:4C-26.7 (West 1981) (giving foster parents who have had child for two continuous years preference and first consideration in adoption).

25. In custody determinations between biological parents, lists of comparative factors, such as who has the stronger relationship with the child and who has been the primary caregiver are more common. See, e.g., Wash. Rev. Code § 26.09.187(3)(a) (1992). Perhaps such lists are less common in adoption because adoption is seldom a choice between two parental figures who have already established relationships with the child.

26. See, e.g., Lucy Cooper & Patricia Nelson, *Adoption and Termination Proceedings in Wisconsin: A Reply Proposing Limiting Judicial Discretion*, 66 Marq. L. Rev. 641, 643 (1983) ("The problem with the best interest standard is that it has no content without further definition."); Sanford N. Katz, *Foster Parents Versus Agencies: A Case Study in the Judicial Application of 'The Best Interests of the Child' Doctrine*, 65 Mich. L. Rev. 145, 153 (1966) ("[The] doctrine has no absolute definition. Nor is there uniformity in the results of the cases in which the doctrine has been applied.").

27. Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, Law & Contemp. Probs., Summer 1975, at 226, 255 (quoting Lon Fuller).

28. Joseph Goldstein, Anna Freud, and Albert J. Solnit, *Beyond the Best Interests of the Child* (rev. ed. 1979) [hereinafter *Beyond the Best Interests*] (originally published in 1973).

29. The authors call this the "least detrimental alternative." *Id.* at 53.

30. *Id.* at 31-32.

31. *Id.* at 32-33.

32. *Id.* at 31.

children perceive the passage of time differently than adults.³³ While a few months may seem like a relatively short time to an adult, to a small child it is an eternity.³⁴ The time frame for placement decisions should take into account this difference in perception, and not exceed a child's ability to withstand loss and uncertainty.³⁵ Third, no one can predict with absolute certainty the outcome of a particular placement.³⁶ A child suffers more harm from waiting for the "perfect" placement than from moving immediately to a setting that provides at least a stable and loving environment.³⁷ Based on these three precepts, the authors conclude that the child's need for a speedy and permanent arrangement should take precedence over the interests of the various adults involved.³⁸

Courts have cited *Beyond the Best Interests of the Child* in hundreds of child custody cases,³⁹ particularly when recognizing the child's need for continuity of care. Courts now regularly consider psychological factors in determining the child's best interests and strive to select from the choices available rather than wait for a "best" placement.⁴⁰ However, despite this tightening focus on the best interests of the child, different states still approach adoption quite differently.

II. THE COMPLEXITY OF ADOPTION LAW AND THE NEED FOR UNIFORMITY

Adoption law is complicated because each state has developed its own law to address the infinite variety of situations that occur in adoptions. The resulting lack of uniformity among states' adoption laws creates difficulties in coordinating interstate adoption and encourages forum

33. *Id.* at 40.

34. *Id.* at 40-41.

35. *Id.* at 42.

36. *Id.* at 51.

37. *Id.* at 51-52.

38. *Id.* at 62, 105-11.

39. A Lexis search of all state and federal case databases on June 10, 1994 located 236 cases citing *Beyond the Best Interests of the Child*, including decisions in 47 states and two United States Supreme Court decisions. In *Bowen v. Gilliard*, the Supreme Court quoted the book for the principal that "[c]ontinuity of relationships, surroundings, and environmental influence are essential for a child's normal development." 483 U.S. 587, 623 (1987).

40. See, e.g., *In re Adoption of Michelle Lee T.*, 117 Cal. Rptr. 856, 860 (Ct. App. 1975) ("The question is not whether a particular set of circumstances is in the best interest of the child, but whether a particular set of circumstances relative to an alternative set of circumstances is in the best interests of the child."); *In re Petition of D.I.S.*, 494 A.2d 1316, 1323 (D.C. 1985) (defining best interests as the least detrimental alternative).

shopping. So far, none of the attempted uniform or model adoption acts has been particularly successful in facing the challenge of satisfying the differing needs and interests of multiple states. However, the proposed UAA may change that.

A. *Causes of Complexity*

Adoption law must address a broad spectrum of situations.⁴¹ Regulations that may help in the adoption of an infant by unrelated adults may unnecessarily hinder the adoption of a hard-to-place older child. Intrafamily adoptions may allow or require more openness than adoption by unrelated adults. Adoptions of foreign-born children and Native American children raise challenging issues of national sovereignty and cultural preservation that require other specific legal protections.⁴² Any adoption law must be flexible enough to address each of these different situations and yet detailed enough to provide clear legal guidance.

Furthermore, many different laws and jurisdictions regulate adoption. Like most family law, adoption is governed primarily by state law. Because of different priorities, needs, and values, states have developed significantly different adoption laws.⁴³ In addition, federal law governs aspects of international, Native American, and special needs adoptions.⁴⁴

41. See Joan H. Hollinger, *Adoption Law*, The Future of Children, Spring 1993, at 43, 44-45 (special issue on adoption) [hereinafter Hollinger, *Adoption Law*]. Approximately half of the over 100,000 adoptions taking place each year are intrafamily, either by stepparents or relatives. The remaining half are unrelated adoptions which include adoptions of infants, adoptions of older children and special needs children, and international adoptions. Kathy S. Stolley, *Statistics on Adoption in the United States*, The Future of Children, Spring 1993, at 26, 29 (citing *The 1989 Adoption Factbook*).

42. See, e.g., The Indian Child Welfare Act, *infra* note 44, at 25 U.S.C. § 1901(5) (1988) (In implementing tribal jurisdiction over child custody cases, Congress noted: "[T]he States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families."); Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, May 29, 1993, 32 I.L.M. 1134 (recognizing the importance of particular protections for intercountry adoption).

43. Hollinger, *supra* note 8, § 4.01[3].

44. Federal immigration and naturalization law applies to international adoptions. 8 U.S.C. §§ 1101, 1151-1154, 1434 (1988), 8 C.F.R. § 204.1-3 (1993). The Indian Child Welfare Act of 1978 gives Native American tribes jurisdiction over the adoption of many Native American children, superseding applicable state law. 25 U.S.C. §§ 1901-1963 (1988). The Adoption Assistance and Child Welfare Acts include guidelines and reimbursements for adoption of special needs children. 42 U.S.C. §§ 670-76 (1988). In addition, provisions in tax, welfare, and social security laws affect aspects of adoptive relationships. See Hollinger, *Adoption Law*, *supra* note 41, at 45-46; Hollinger, *supra* note 8, § 1.01.

Modern trends make this mosaic of adoption laws particularly troublesome. In our increasingly mobile society, interstate adoption is more and more common. Sorting out which state's laws apply and complying with the requirements of more than one state increases the cost and time involved in adoption.⁴⁵ The variation in adoption law from state to state also encourages forum shopping. Adoptive parents may go where they are most likely to find a child, satisfy the state's standards for parental fitness, and acquire speedy termination of the birth parents' rights. Birth mothers may go where they have the greatest say in who adopts their child, where reimbursement for expenses is the highest, or where a birth father's rights can be terminated with minimal notice. The result is that some states become known as baby markets⁴⁶ while others are avoided.⁴⁷ Greater uniformity in adoption laws will prevent such forum shopping.⁴⁸

B. Attempts To Design Uniform Adoption Laws

Various bodies have attempted to create uniform adoption laws.⁴⁹ The National Conference of Commissioners on Uniform State Laws

45. Mark T. McDermott, *Agency Versus Independent Adoption: The Case for Independent Adoption*, *The Future of Children*, Spring 1993, at 146, 151 ("Because many independent adoptions involve more than one state, the lack of uniformity leads to confusion, unnecessary delay, increased expense, unanswerable questions, and varied interpretations.").

46. Texas, for example, has been called by some critics the "Texas Baby Train." This reputation is due in part to having more licensed adoption agencies than either California or New York, relatively unrestricted financial support for the birth mother, and irrevocable relinquishment of parental rights. Joan M. Cheever, *Lone Star State Legislators Prepare to Apply the Brakes on the So-Called Baby Train*, *Nat'l L.J.*, Aug. 17, 1992, at 8.

47. One private adoption attorney commented, "Nobody likes to adopt in California," primarily because of the length of time before adoptions are finalized and the ease with which the biological parents can revoke their consent. Telephone Interview with Mark Demeray, Washington attorney (Oct. 21, 1993).

48. Uniform adoption laws will not, by themselves, create complete uniformity. Interpretation of the law will vary so long as judges are given broad discretion in deciding adoption cases, particularly in applying the best interests standard. *See supra*, Part I.B. Many commentators have criticized the best interests standard for permitting personal opinion and bias to shape the law. *See, e.g.*, Cooper & Nelson, *supra* note 26, at 643 ("It may become a mere facade behind which social workers, lawyers and judges hide when making decisions based on intuition, personal likes and dislikes, armchair psychology, and ideology so deeply rooted that the decision makers are unaware that it is mere ideology."); Mnookin, *supra* note 27, at 263 (noting that the same case given to different judges may easily result in different decisions). Although judicial discretion in determining the best interests of the child is an interesting subject worthy of greater exploration, it is beyond the scope of this Comment. Even though uniform adoption laws are not likely to be interpreted uniformly, they are at least a significant step in the right direction.

49. Another possible approach is for the federal government to make federal funding for adoption contingent on following a uniform law. To some extent, this is already happening in areas of

(NCCUSL),⁵⁰ the federal government, and the American Bar Association (ABA) have all in turn tried their hand at drafting proposed uniform acts. None has gained significant approval.

In 1953 the NCCUSL and the ABA made the first attempt at creating uniformity in adoption law by approving a Uniform Adoption Act, revised in 1969 and amended in 1971.⁵¹ However, only a few relatively unpopulous states ever approved any version of the act.⁵² While other states have incorporated portions of the act or comparable provisions,⁵³ the act failed to create any substantial uniformity.

Other bodies have attempted to draft complete uniform adoption laws, but none has made it past the draft stage.⁵⁴ In 1979, the Model Adoption Legislation and Procedures Advisory Panel⁵⁵ submitted a Model State Adoption Act with Commentary⁵⁶ to the Secretary of the United States Department of Health, Education and Welfare. The Secretary ultimately rejected the panel's proposal,⁵⁷ offering instead the more modest Model Act for the Adoption of Children with Special Needs.⁵⁸ The Family Law

adoption, such as special needs adoption. *See, e.g.*, The Adoption Assistance and Child Welfare Act, 42 U.S.C. §§ 670-76 (1988).

50. The National Conference of Commissioners on Uniform State Laws (NCCUSL) is a nonprofit organization composed of judges, lawyers, law professors, and state legislators appointed by the governors of every state. The NCCUSL's purpose is to draft proposed uniform legislation on a variety of topics subject to legislative authority. *See Hollinger, Adoption Law, supra* note 41, at 46 and 57 n.14.

51. Unif. Adoption Act, 9 U.L.A. 11 (rev. 1971).

52. Hollinger, *supra* note 8, Appendix 4-A (Supp. 1992). NCCUSL approval of the 1971 Revised Uniform Adoption Act has been withdrawn pending consideration of the new proposed Uniform Adoption Act. *Id.*

53. Hollinger, *supra* note 8, § 4.01[3].

54. Other acts have been more successful in addressing particular aspects of adoption. The Uniform Parentage Act, substantially adopted by eighteen states, attempts to clarify the legal status of married and unmarried parents in all types of custody disputes, including adoption proceedings. 9B U.L.A. 295 (1979). The Interstate Compact on the Placement of Children, accepted by every state, provides protection for placing children across state lines. Hollinger, *supra* note 8, § 3-A.03. Unfortunately, bureaucratic hassles and delays have made it less than entirely effective. *Id.* § 3-A.08 (Supp. 1992) (citing criticism from state courts).

55. Joseph Califano, Secretary of Health, Education and Welfare, appointed the panel to give special interest groups a forum for discussing and resolving their interests. Hollinger, *supra* note 8, § 4.01[3] n.23.

56. 45 Fed. Reg. 10,622 (1980).

57. Hollinger, *supra* note 8, § 4.01[3].

58. 46 Fed. Reg. 50,022 (1981).

section of the ABA also spent the 1980s drafting a Model State Adoption Act,⁵⁹ but it never won ABA approval.⁶⁰

In the most recent effort, a committee of the NCCUSL spent the last several years drafting an entirely new Uniform Adoption Act (UAA). The committee sought advice from many interested groups,⁶¹ including the ABA drafters,⁶² in an effort to create a widely acceptable act. The UAA may gain NCCUSL approval as early as August 1994, at which time the Commission will offer it to the states.⁶³

The UAA faces significant challenges. First, it must avoid the pitfalls of previous uniform acts, particularly the danger of catering heavily to one interest group.⁶⁴ Furthermore, it must overcome each state's resistance to changing its laws.⁶⁵ Moral perspectives on family issues are not consistent throughout the country, making it difficult to pass a uniform law on such a sensitive topic as adoption. Finally, in order for a uniform adoption law to succeed, it must take into account the multiplicity of competing interests involved. Despite the considerable challenges to be faced, the significant benefits of uniformity⁶⁶ make any step in that direction valuable.

59. Draft ABA Model State Adoption Act, 19 Fam. L.Q. 105 (1985).

60. Hollinger, *Adoption Law*, *supra* note 41, at 46.

61. Organizations interested in different adoption issues attend the drafting committee meetings and advocate their positions. Carol McHugh, *Experts: Adoptions Contests Not Common—But Risks Are*, Chicago Daily L. Bull., Aug. 30, 1993, at 3.

62. Hollinger, *Adoption Law*, *supra* note 41, at 46.

63. See *supra* note 12. Three states have already considered or are considering large portions of the proposed UAA and several other state legislatures have requested copies of the proposed statute. McHugh, *supra* note 61 (discussing interview with Joan Hollinger, reporter for the UAA drafting committee).

64. For example, the Model State Adoption Act with Commentary submitted to the Department of Health, Education and Welfare, severely curtailed private attorneys' involvement in adoption. 45 Fed. Reg. 10622, 10627 (1980). This led to opposition by the ABA. See Dee Samuels, *Preface to the Model Adoption Act*, 19 Fam. L.Q. 103 (1985). In turn, when the Family Law Section of the ABA proposed their model state adoption act, some criticized it for not regulating private attorneys enough. See, e.g., Michele Galen, *Baby Brokers; How Far Can a Lawyer Go?*, Nat'l L.J., Feb. 9, 1987, at 1 (discussing criticism of inadequate regulation).

65. Hollinger, *supra* note 8, § 4.01[3]. As a further complication, states with highly developed adoption laws are likely to resist adopting a "common denominator" uniform law. *Id.*

66. See *supra* Part II.A.

III. BALANCING THE INTERESTS OF ADOPTION PARTICIPANTS

There are many competing and complementary interests involved in every adoption. While some adoption literature refers to "the adoption triangle"⁶⁷ and a few authors even recognize "the adoption rectangle,"⁶⁸ in reality, there are at least five interests operating. The child, the biological parents, the adoptive parents, the agency or attorney arranging the adoption, and the state all have a considerable stake in the adoption.⁶⁹ While all of these parties' interests merit consideration, the most important factor should be the best interests of the child.

Biological parents are interested in having some control over the decision whether adoption is their best option. The biological mother and father may or may not have common interests. They may be unified in the decision to give up their child or they may have distinctly divergent opinions about the adoption.⁷⁰ One biological parent may even be attempting to have the other's parental rights terminated so that a stepparent adoption can take place.⁷¹ The biological parents also may have differing ideas about the type of adoption that will work best for them, whether speedy or drawn out, through an agency or arranged privately. Some may want complete confidentiality while others want to personally choose the adoptive parents or remain in contact with their children.⁷²

67. See, e.g., A. Sorosky et al., *The Adoption Triangle* (1978) (recognizing the adoptive parents, the biological parents, and the child).

68. See P. Sachdev, *Unlocking the Adoption Files* (1989) (adding the agency as a fourth participant); Marianne Berry, *Risks and Benefits of Open Adoption*, *The Future of Children*, Spring 1993, at 125, 135 (same).

69. See, e.g., *In re Sage*, 21 Wash. App. 803, 806, 586 P.2d 1201, 1203 (1978) (suggesting that the court must be sensitive to the interests of the natural parents, the adoptive parents, and the state, as well as the child).

70. See, e.g., *In re Adoption of Baby Girl K.*, 26 Wash. App. 897, 615 P.2d 1310 (1980) (noting that father resisted mother's petition to revoke her written surrender of the child); Michael K. McIntyre, *Mother Says Baby Better Off Adopted*, *Plain Dealer*, Nov. 23, 1993, at 1B (discussing case in which mother lied about father's identity, claiming to have been raped at a party, to avoid obtaining consent from estranged husband.) Many biological mothers attempt to prevent biological fathers from having any role in the adoption. However, these efforts to exclude the biological father, along with other forms of involuntary termination of parental rights, are a sensitive and complex subject that is beyond the scope of this Comment.

71. See, e.g., *Doe v. Doe*, 284 S.E.2d 799 (Va. 1981) (denying father's and stepmother's petition to have mother's parental rights terminated so stepmother could adopt child).

72. See Annette Baran & Reuben Fannor, *Perspectives on Oper. Adoption*, *The Future of Children*, Spring 1993, at 119, 122. Berry, *supra* note 68, at 129.

Adoptive parents are primarily interested in finding a child. For some, a child with particular characteristics may be important, while for others, the child's race or age is a significantly secondary consideration to simply finding a child.⁷³ Adoptive parents generally want to avoid long delays in the adoption process. They typically want reassurance that they have received all the facts about the child they are adopting.⁷⁴ Adoptive parents also desire finality as soon as possible because their developing relationship with the child suffers while the potential exists for a biological parent to change his or her mind.⁷⁵

The agency or attorney arranging the adoption also has an agenda. In addition to the financial incentives inherent in being paid for their services, many agencies and attorneys hold particular religious or political beliefs that affect the types of placements they make.⁷⁶ Some attorneys and agencies placing children for adoption want careful regulation of adoption,⁷⁷ while others resent any government interference in what they feel should be a completely private transaction.⁷⁸

The state has two distinctly different interests in adoption proceedings.⁷⁹ First, it is responsible for acting as *parens patrie*⁸⁰ for the

73. See, e.g., *Florida No Longer Discourages Mixed-Race Adoptions*, St. Louis Post-Dispatch, Dec. 12, 1993, at 6A (relating story of a family whose request to adopt a thirteen-year-old friend of their adopted son was denied solely because of racial differences).

74. See, e.g., *M.H. v. Caritas Family Services*, 488 N.W.2d 282 (Minn. 1992) (permitting negligent misrepresentation action against agency based on agency's failure to disclose incest and child health problems in child's background); *Adoption Agency Settles*, Nat'l L.J., Mar. 1, 1993, at 6 (describing settlement agreement in which adoption agency paid over \$1 million in damages for failing to provide medical information about two adopted children).

75. See *Beyond the Best Interests*, *supra* note 28, at 35–36.

76. Some religiously affiliated adoption agencies will place children only with adoptive parents of the same faith. See, e.g., *Scott v. Family Ministries*, 135 Cal. Rptr. 430 (App. 1976) (rejecting agency rule allowing Cambodian children to be placed only with members of evangelical Protestant sects). Many agencies and caseworkers refuse to make transracial placements. See, e.g., Arnold R. Silverman, *Outcomes of Transracial Adoptions*, *The Future of Children*, Spring 1993, at 104, 105–106 (explaining the National Association of Black Social Workers' vehement opposition to transracial adoption).

77. L. Jean Emery, *Agency Versus Independent Adoption: The Case for Agency Adoption*, *The Future of Children*, Spring 1993, at 139, 140 (voicing opinion of the Child Welfare League of America that independent adoption should be more carefully regulated, if not eliminated).

78. See, e.g., Richard A. Posner, *Forum: Adoption and Market Theory: The Regulation of the Market in Adoptions*, 67 B.U. L. Rev. 59 (1987) (advocating a free market for adoption).

79. Cf. *Santosky v. Kramer*, 455 U.S. 745, 766 (1982) (suggesting in the context of termination proceedings that the state has a interest in preserving and promoting the welfare of the child and a fiscal and administrative interest in reducing the cost and burden of such proceedings).

80. "Parent of the country." The term refers traditionally to the role of state as sovereign and guardian of persons under legal disability. *Black's Law Dictionary* 414 (6th ed. 1990).

child, protecting the child's welfare and seeking a solution that best meets that child's needs.⁸¹ Second, the state has an interest in the efficient administration of adoptions. The state passes laws regulating adoption; funds various aspects of adoption, such as subsidizing special needs adoptions⁸² and foster care preceding adoption; and provides the court system to approve adoptions.

Finally, the child has the most important stake in adoption. Children need safe, loving homes that meet their psychological as well as physical needs. They need speedy determinations that reflect a child's sense of time, and protection from disruption of established emotional bonds.⁸³ Every state (and the UAA⁸⁴) at least theoretically recognizes the child's overriding interest by its use of the "best interests of the child" standard in determining adoption outcomes.⁸⁵ Meeting the child's needs furthers society's interests as well. Healthy, well-adjusted children are more likely to do well in school and engage in socially appropriate behavior.⁸⁶ They are also more likely to be good parents as adults.⁸⁷

Adoption legislation should respect the needs of every participant in an adoption. Granted, this is a lot to ask from a piece of legislation. However, while meeting every participant's interests fully is impossible, a careful balancing of all the interests, with the focus always on the child's best interests, should lead to a workable adoption law.

IV. A CLOSER LOOK AT THE UNIFORM ADOPTION ACT—A CAREFUL BALANCING OF INTERESTS

Although the UAA contains many provisions worthy of discussion, this Comment analyzes only three that concern aspects of adoption that vary dramatically from state to state: the procedure for obtaining consent, racial matching policies, and open adoption. The UAA addresses each of

81. See, e.g., *Care and Protection of Robert*, 556 N.E.2d 993, 1000 (Mass. 1990) ("The Commonwealth, as *parens patrie*, has a strong interest in the welfare of the children of the Commonwealth.")

82. See, e.g., La. Rev. Stat. Ann. § 46:1790 (West Supp. 1994); Me. Rev. Stat. Ann. tit. 19 § 541 (West Supp. 1993); Wash. Rev. Code § 74.13.109 (1992).

83. David M. Brodzinsky, *Long-term Outcomes in Adoption*, *The Future of Children*, Spring 1993, at 153, 159 (reporting studies that indicate children who experience multiple changes in caretaking environments before adoption are more likely to experience adjustment difficulties).

84. Unif. Adoption Act (March 16, 1994 draft) [hereinafter UAA] § 3-703(a) ("A court shall grant the petition for adoption if it determines that the adoption will be in the best interest of the minor.").

85. See *supra* notes 20–21 and accompanying text.

86. Brodzinsky, *supra* note 83, at 156.

87. See *Beyond the Best Interests*, *supra* note 28, at 7.

these areas with provisions that consider the interests of all the parties involved while maintaining the ultimate focus on the best interests of the child.

A. *Consent and Revocation of Consent*

State laws vary dramatically in the types of safeguards they employ to ensure that the biological parents' decision to relinquish their child is informed and voluntary.⁸⁸ Taking the best pieces of these state laws, the UAA provides substantial safeguards while facilitating a fairly speedy termination of parental rights.

1. *Current State Law*

Specific areas of variance among state laws include the procedures for obtaining consent, the time period (if any) during which consent can be freely revoked, and the test used for determining if a later revocation of consent will be permitted. Every state insists, either by statute or case law, that a mother cannot give irrevocable consent to the adoption of her child before it is born.⁸⁹ A few states allow formal consent to be executed at any time, including before the child's birth,⁹⁰ but permit revocation of consent within a short time afterwards.⁹¹ The majority of states, however, do not allow consent to be given before the child's birth.⁹² This safeguard probably derives from the view that a mother

88. Consent is not required if the court has determined that the parent has abandoned the child by failing to provide sufficient care or the state has intervened to terminate the parent's rights. *See, e.g.* Minn. Stat. Ann. § 259.24 (West 1992); Wis. Stat. Ann. § 48.415 (West 1987). In many states, if an alleged father has been given notice of the pending adoption and does not appear to contest it, his parental rights may be terminated. *See, e.g.*, Wash. Rev. Code § 26.33.120(3) (1992).

89. Hollinger, *supra* note 8, § 2.11[1][a]. Consent is also, of course, a necessary element of the adoption of an older child. However the timing of such a consent is much less critical. *See id.*

90. *See, e.g.*, Ala. Code § 15A-26-10A-13 (1992); Wash. Rev. Code § 26.33.080(3) (1992); *see also* Haw. Rev. Stat. § 571-61 (1993) (allowing consent to be given following the sixth month of pregnancy).

91. *See, e.g.*, Ala. Code § 15A-26-10A-13 (1992) (allowing consent to be withdrawn for a limited time after the birth if the court finds that it is in the child's best interests); Haw. Rev. Stat. § 578-8 (1993) (not permitting judgment to be entered until after the birth of the child and allowing consent to be withdrawn until the child is placed with the prospective adopters); Wash. Rev. Code § 26.33.110 (1992) (permitting revocation of consent until a judicial hearing is held, which cannot be held within 48 hours of the child's birth).

92. *See, e.g.*, Ariz. Rev. Stat. Ann. § 8-107(B) (1989) (no sooner than 72 hours after birth); Conn. Gen. Stat. Ann. § 45a-17 (not within first 48 hours after birth); Ill. Ann. Stat. ch. 750 § 50/9 (Smith-Hurd 1993) (not less than 72 hours after birth); La. Rev. Stat. Ann. § 9.422.7 (no sooner than the

cannot fully understand the significance of relinquishing her child until she has actually experienced giving birth.⁹³ Some states have more relaxed rules regarding the father's consent, permitting a father to give his consent, which may be irrevocable, before the birth of the child.⁹⁴ Some states require a parent who is a minor⁹⁵ to obtain the consent of a parent or guardian,⁹⁶ or to consult with counsel or an appointed guardian ad litem.⁹⁷

The standards and period for revoking consent to an adoption vary between states. Some states permit revocation for any reason within a few days of giving consent.⁹⁸ Unqualified revocation is more likely to be permitted for consents witnessed by lay persons than for judicially witnessed consents.⁹⁹ The reasons required for revocation after those few days have elapsed vary, with some states allowing revocation based only on fraud or duress, and others allowing it if withdrawal is reasonable

fifth day after birth); Minn. Stat. Ann. § 259.24 (West 1992) (any time after birth); Tex. Fam. Code Ann. § 15.03(a) (West 1986) (after birth).

93. See Hollinger, *supra* note 8, § 2.11[1][a].

94. See, e.g., Ill. Ann. Stat. ch. 750 §§ 50/9, 50/10, 50/12a (Smith-Hurd 1993) (permitting consent at any time but allowing revocation within 72 hours of child's birth); Tex. Fam. Code Ann. § 15.041 (West 1986 and Supp. 1994) (allowing irrevocable consent before the child's birth). While based on the practical consideration that the father may disappear before the child's birth, statutes that treat the mother and father differently may raise constitutional questions. Hollinger, *supra* note 8, § 2.11[1][b].

95. Consent is not generally voidable simply because the parent is a minor. See, e.g., Cal. Fam. Code § 8814 (West Supp. 1994) (minority of parent does not invalidate consent); Ill. Stat. Ann. § 50/11 (Smith-Hurd 1993) (consent not voidable because of minority).

96. See, e.g., Mich. Comp. Laws Ann. §§ 710.28(2), 710.43(4) (West 1993) (if parent is unemancipated minor, then the parent's parents, guardian, or guardian ad litem must also execute release).

97. See, e.g., Wash. Rev. Code § 26.33.070 (1992) (court will appoint guardian ad litem for parent who is a minor to help assess whether consent was informed and voluntary).

98. See, e.g., Alaska Stat. § 25.23.070 (1991) (permitting consent to be revoked for any reason within ten days after consent executed, and up until time of final decree if revocation is in the child's best interests).

99. Compare, e.g., Alaska Stat. § 25.23.070 (1991) (permitting lay-witnessed consent to be revoked for any reason within ten days after consent executed, and up until time of final decree if revocation is in the child's best interests) with Wash. Rev. Code § 26.33.160 (1992) (making consent irrevocable once court approves consent, although consent is revocable for up to one year upon a showing of fraud, duress or lack of mental capacity).

under the circumstances and in the best interests of the child.¹⁰⁰ Revocation for one of these reasons may be permitted for many months or until the adoption is finalized.¹⁰¹ Thus, in some states adoptive parents can be quite sure after a couple of days that the child is now theirs, while, in others, adoptive parents may wait months before being sure that the biological parents will not take the child back.

2. *The UAA Approach*

The UAA takes a middle-of-the-road approach.¹⁰² As in the majority of states currently, neither the mother nor the father may consent before the birth of the child.¹⁰³ The witness to the consent, who may not be the lawyer representing the adoptive parents or an agency employee,¹⁰⁴ must certify that the contents and consequences of giving the consent were explained, and that he or she believed that the parent read, understood, and signed the consent voluntarily.¹⁰⁵ A parent who is a minor must have had independent legal counsel.¹⁰⁶

Consent given within 72 hours of the child's birth may be revoked for any reason within 120 hours after its execution.¹⁰⁷ Consent may also be revoked anytime before a final decree of adoption is entered if the individual who executed the consent establishes by clear and convincing evidence that it was obtained by fraud or duress.¹⁰⁸

100. Compare, e.g., Ariz. Rev. Stat. Ann. § 8-106(E) (1989) (disallowing revocation of consent unless consent obtained by fraud or duress) and Wash. Rev. Code § 26.33.160 (1992) (permitting revocation of court approved consent within one year upon showing fraud, duress, or lack of mental capacity) with Alaska Stat. § 25.23.070 (1991) (allowing revocation until adoption decree is final if in the child's best interests).

101. See, e.g., Alaska Stat. § 25.23.070 (1991) (allowing revocation until adoption decree is final if in the child's best interests); Wash. Rev. Code § 26.33.160 (1992) (permitting revocation of court approved consent within one year upon showing fraud, duress, or lack of mental capacity).

102. The UAA requires "consent" to an adoption and "relinquishment" to an agency which then has the right to consent to adoption. The procedures for "consent" and "relinquishment" are similar, so they have been treated together under the heading of consent here.

103. UAA § 2-404(a).

104. *Id.* § 2-405(a)(3), (4)

105. *Id.* § 2-405(d).

106. *Id.* § 2-405(c).

107. *Id.* §§ 2-404(a), 2-408(a)(1)

108. *Id.* § 2-408(b)(1).

3. *The UAA Provides Speedy Permanent Placement with Safeguards To Protect All the Participants*

The UAA's particular combination of safeguards provides optimal balancing of all the participants' interests and needs, while also ensuring the fairly speedy permanent placement of the child. A fully voluntary and informed consent that will not be challenged later through fraud or duress claims provides the greatest stability for everyone.

The UAA wisely follows the majority of states in not allowing parents to consent to the adoption of their child before the birth. What may previously have been a life complication becomes, at birth, a human being to whom the parents have a connection. Allowing revocation of consent for any reason for five days after the birth furthers the goal of obtaining truly informed consent. The birth mother will have recovered from the immediate pain, exhaustion, and often, sedation, of labor, and both birth parents will have had time to rethink before being bound by their decision. The UAA's requirement that a disinterested person witness and explain the consent helps ensure that the biological parents are fully aware of the consequences of executing a consent. The UAA's focus on voluntary and informed consent decreases the chance that a biological parent will later challenge the adoption based on fraud or duress.

Allowing biological parents an extended period of time in which to revoke their consent for less than fraud or duress threatens the security of the adoptive parents and child and leaves the child in limbo.¹⁰⁹ Adoptive parents may distance themselves from the child until they are sure that it is truly theirs.¹¹⁰ Or, when the adoptive parents have become attached to the child, they may engage in desperate legal tactics in an effort to hang onto "their" child, although the law is on the biological parents' side.¹¹¹

The UAA's provision not permitting an agency's or adoptive parents' attorney to witness the execution of a consent to adoption protects the agency or attorney.¹¹² The birth parents are not pressured by the agency

109. See, e.g., *In re Baby Boy C.*, 630 A.2d 670, 675 (D.C. 1993) (describing child's uncertain status in the family and family members' feelings of being under threat due to the delayed adoption).

110. *Beyond the Best Interests*, *supra* note 28, at 35.

111. See, e.g., *In re Clausen*, 502 N.W.2d 649 (Mich. 1993). Widely known as the Baby Jessica case, the adoptive parents knew that the biological parents wanted their baby back within days of the baby being placed in their home, but fought to keep the child through numerous courts in two different states over a period of 29 months. Michelle Ingrassia & Karen Springin, *She's Not Baby Jessica Anymore*, *Newsweek*, Mar. 21, 1994, at 60.

112. Hollinger, *supra* note 8, § 2.11[2].

or adoptive parents' attorney into giving their consent; nor is there the appearance of their having been pressured. Ensuring that the process appears fair will likely reduce the effectiveness of unfounded claims that consent was obtained by fraud or duress. Safeguarding the process of giving consent to ensure that a biological parent fully understands the consent also reduces the chance of a later successful revocation. Because agencies and attorneys want their clients to be happy with adoption arrangements, it serves their interests to ensure that consent was freely and properly given in the first place in order to avoid messy appeals.

The state's interests in protecting the child's welfare and minimizing the cost to the state are not well-served by lengthy appeals and children waiting in foster care. Thus, the state benefits financially from the UAA provisions ensuring that consents are quickly and fairly obtained. At the same time, the state fulfills its role of guarding the child's needs.

Finally and most importantly, a process that protects the interests of the child protects everyone's interests. In ensuring that consent is informed and voluntary, the UAA places emphasis on the way in which consent is obtained rather than on a lengthy time period in which biological parents may change their minds. This protects the child by minimizing the delay in permanent placement. By limiting later revocation of consent to situations involving fraud or duress and permitting revocations only until the adoption is finalized, the UAA reduces the prospect of moving the child again. The UAA provisions on consent respect the child's sense of time by making quick permanent arrangements, and protect the child's interest in continuity of care by not risking switching the child between homes. While addressing the interests of all the other participants, the consent provisions protect the child first and foremost.

B. Racial Matching Policies

The importance of matching adoptive parents and children based on their race has been a hotly debated subject for decades.¹¹³ Some states explicitly encourage racial matching, while others freely permit transracial adoption. The UAA more closely follows the second group of states by not permitting race to be the sole factor in denying or delaying placement.

113. Although many international adoptions are transracial, this section focuses on domestic adoption.

1. Current State Law

Many state statutes permit or require an attempt to match a child's and adoptive parents' racial or ethnic backgrounds,¹¹⁴ and agencies often carry this policy even further.¹¹⁵ Proponents of racial matching base the policy on a desire to preserve the ethnic and cultural heritage of a child. In one notable example, the National Association of Black Social Workers passed a resolution in 1972 opposing the adoption of black children by anyone other than blacks which led to a dramatic drop-off in transracial adoptions.¹¹⁶ It argued that black children must remain physically, psychologically, and culturally in black families in order to develop a total sense of themselves, and decried transracial placement as cultural genocide.¹¹⁷ Similarly, vigorous opposition from tribal leaders to the significant number of Native American children being placed for adoption with white families led Congress to pass the Indian Child Welfare Act¹¹⁸ in 1978. The Act places child custody matters, including adoption, under tribal jurisdiction and makes adoption by anyone other than a member of a child's tribe extremely difficult.¹¹⁹ States are constitutionally permitted to consider race as a relevant, but not determinative, factor in adoption decisions.¹²⁰ However, state laws going

114. See, e.g., Minn. Stat. Ann. § 259.255 (West 1992) (stating that the best interests of the child are met by requiring due, not sole, consideration of the child's race or ethnic heritage in adoption placements and setting out a placement hierarchy which only the biological parents can override consistent with the child's best interests: first relatives, then persons with the same racial or ethnic heritage, and finally persons of a different racial or ethnic heritage who are knowledgeable and appreciative of the child's racial or ethnic heritage); Cal. Fam. Code § 8708 (West Supp. 1994) (requiring 90 day effort to place child with a relative first, and then with a family of the same racial or ethnic background).

115. In practice, many agencies avoid transracial placements. See, e.g., *Drummond v. Fulton County Dep't of Family and Children's Servs.*, 547 F.2d 835 (5th Cir. 1977), *cert. denied*, 437 U.S. 910 (1978) (describing agency efforts to avoid placing black child with his white foster parents); Valerie Finholm, *Transracial Adoptee Describes Hardships; Adoption Between the Races at Issue; One Life in Search of Cultural Identity*, The Hartford Courant, Jan. 31, 1994, at A1 (quoting adoption case worker as being proud of never having made a transracial placement in her ten years as a caseworker); *An Outrageous Racial Standard*, L.A. Times, Nov. 7, 1993 at M4 (describing how California child welfare agencies often preemptively deny requests for transracial adoption).

116. Silverman, *supra* note 76, at 105-106.

117. *Id.* at 106.

118. 25 U.S.C. §§ 1901-1963 (1988).

119. Silverman, *supra* note 76, at 107. The UAA defers to the Indian Child Welfare Act whenever the two statutes are inconsistent. UAA § 1-107. While the goal of increasing uniformity is important, issues of tribal sovereignty play a unique role in the adoption of Native American children.

to the extreme of absolutely prohibiting transracial adoption have been found to violate the Equal Protection Clause of the Fourteenth Amendment.¹²¹

Despite the arguments in favor of racial matching, the increasing trend among states is to move away from strict matching policies. Recently both Florida and Texas abandoned racial matching policies and now permit racial matching only if it will not delay placement.¹²² The move toward transracial placement is largely prompted by the large number of minority children, particularly black children, waiting in foster care for adoptive homes.¹²³ There are simply not enough minority homes to meet the need at this point.¹²⁴

While most people seem to agree that placing a child with a family of the same racial or ethnic heritage best promotes the child's development of racial or ethnic identity,¹²⁵ there is little consensus on what to do when not enough minority homes are immediately available. Proponents of transracial adoption say that the child should be placed in an otherwise

120. See, e.g., *DeWees v. Stevenson*, 779 F. Supp. 25, 28 (E.D. Pa. 1991) ("Because of the potential difficulties inherent in a trans-racial adoption, a state agency may consider race and racial attitudes in assessing prospective adoptive parents.")

121. See, e.g., *Compos v. McKeithen*, 341 F. Supp. 264, 267 (E.D. La. 1972) (declaring unconstitutional a Louisiana statute prohibiting interracial adoption); *In re Adoption of Gomez*, 424 S.W.2d 656 (Tex. Civ. App. 1967) (holding that a Texas statute forbidding a white to adopt a black child and a black to adopt a white child violated the Equal Protection Clause).

122. Tex. Fam. Code Ann. § 16.081 (West Supp. 1994) ("[T]he court may not deny or delay placement of a child for adoption or otherwise discriminate on the basis of the race or ethnicity of the child or prospective adoptive parents."); Tex. Hum. Res. Code Ann. § 47.041 (West Supp. 1994) (requiring same criteria to be used by persons arranging adoptions).

123. See, e.g., Robbie Morganfield, *Adoption Program Resurrected; Aim is to Place More Black Kids*, Houston Chron., Jan. 23, 1994, at C1 (stating that one-third of the children waiting to be adopted in Texas are black); *The Racial Divide in Adoption*, Chicago Trib., Jan. 3, 1994, at 10 (claiming that black children make up 75% of the children in substitute care in Illinois); Cynthia Tucker, *A Case for Adoption Across Racial Lines*, S.F. Chron., Nov. 26, 1993, at A25 (citing statistics from the Child Welfare League of America that of the 20,000 children awaiting permanent homes, 47% are white, 42% are black, 7% are Latino, and the rest are of other ethnic and racial groups).

124. See, e.g., Tucker, *supra* note 123 (noting that African-Americans, for example, make up only 12% of the population and tend to be less affluent, making them less likely to adopt, while the percentage of African-American children awaiting adoption is much higher).

125. See, e.g., *id.* (arguing for transracial adoptions, but acknowledging that, under ideal circumstances, children would be better off with parents of the same color and ethnic origin); Maureen McCauley Evans, *Love that Crosses Colors; Interracial Adoptions Bring Special Challenges but Many Kids Thrive*, Star Trib., Jan. 31, 1994, at 1E (quoting Rita Simon of American University in Washington, D.C., whose 20 years of research support use of transracial adoption, as saying she "never argued that transracial adoption is better than same-race adoption").

suitable available home.¹²⁶ Opponents argue that standards for adoptive parents need to be changed and more minority adoptive parents recruited.¹²⁷ Finding a balance between these positions is a challenge.

2. *The UAA Approach*

Under the UAA, placement by an agency¹²⁸ is based on a hierarchy among individuals with favorable pre-placement evaluations:¹²⁹ (1) an individual selected by the biological parents if the agency allows the biological parents to choose; (2) an individual who has adopted a sibling of the child; (3) an individual with characteristics requested by a biological parent, if the agency agrees to comply with the request and locates the individual within a stated time period; (4) an individual who has had physical custody of the child for six or more of the preceding 24 months or half the child's life, whichever is less, unless contrary to the best interests of the child; (5) any other person having a favorable pre-placement evaluation.¹³⁰ A minor's placement may not be denied or delayed solely on the basis of the minor's race, national origin, or ethnic background.¹³¹ Agencies are required to make a diligent search for and actively recruit prospective adoptive parents who are interested in and capable of adopting minors who are difficult to place for a variety of reasons, including their racial or ethnic background.¹³²

3. *The UAA Places Speedy, Permanent Placement Above Racial Matching*

The UAA allows an agency to match a child with parents on the basis of race so long as there is no delay in the placement (except in the case of a brief delay to accommodate a biological parent's specific request). This policy is supported by studies finding that delay of placement is a

126. For an eloquent argument in favor of transracial adoption, see Elizabeth Bartholet, *Where Do Black Children Belong? The Politics of Race Matching in Adoption*, 139 U. Pa. L. Rev. 1163 (1991).

127. See, e.g., *id.* at 1202 (explaining position of transracial adoption critics); Morganfield, *supra* note 123, (discussing contention of the National Association of Black Social Workers that the system sometimes makes it difficult for black families to qualify for adoption).

128. In independent adoptions, the adoptive parents are chosen directly by the biological parents so no statutory criteria for placing the child apply.

129. The prospective adoptive parents must have a favorable pre-placement evaluation and the placement must be in the best interests of the child in order to be approved. UAA § 2-104(a).

130. UAA § 2-104(a).

131. *Id.* § 2-104(b).

132. *Id.* § 2-105.

much more prominent reason for problems experienced by adopted children than transracial placement.¹³³

Biological parents may or may not participate in the decision whether to place a child transracially. Any interest the biological parents have in the race of the adoptive family is addressed by prioritizing the biological parents' choice of the adoptive parents or the characteristics of the adoptive parents. For the many minority children already freed for adoption and waiting in alternative care, there are no biological parents to express a preference.

Many adoptive parents simply want a child and are willing to adopt a child from a different racial or cultural background. The UAA in no way prevents adoptive parents from choosing to adopt a child of their own race or ethnic heritage. However, when an adoptive parent of the same race or ethnic heritage as the child is not immediately available, adoptive parents of other backgrounds are permitted to adopt that child. The UAA's provision giving long-term foster parents higher priority than a stranger is particularly important because many children are placed in foster care transracially. By allowing these foster parents to adopt despite the difference in race, the child's interest in continuity of care is protected.

Agencies may racially match as long as prospective adoptive parents of the same racial or ethnic heritage are available. The agencies are only restricted if a relative, stepparent, or foster parent of a different race wants to adopt or if no matching adoptive families are currently available. However, an agency's desire to racially match foster parents and place a child with racially matching relatives in no way contradicts the UAA's provisions. The UAA recognizes the importance of continuing to search for minority families by requiring agencies to diligently search for and recruit prospective adoptive parents for children who are difficult to place for a variety of reasons, including their racial or ethnic backgrounds.

The state benefits both administratively and as *parens patriae* from the UAA hierarchy. The state financially benefits when minority children

133. A twelve-year longitudinal study of transracial adoptions by Simon and Alstein, found that many more of the serious problems in adoptions were attributable to problems present at the time of placement in older children than to race. Silverman, *supra* note 76, at 113. Similarly, a study of black and Asian transracial adoptions by Feigelman found that although racial hostility had a negative impact on adjustment, delay in placement had a far greater impact. *Id.* at 115. See also, Hollinger, *Adoption Law*, *supra* note 41, at 48–49 (stating that research indicates the most salient factors in achieving a successful adoption are the child's age and medical and social history at placement, and not the racial, ethnic, or religious characteristics of the adoptive parents).

are placed in adoptive homes rather than left in group homes or foster care at state expense. The state also protects the child's welfare by placing the child's interest in finding a home above a policy favoring racial matching. Although the child's racial or ethnic identity may be affected by a transracial placement, the effect is less serious than the damage caused by delayed or multiple placements.¹³⁴

Studies show that transracially and inracially¹³⁵ adopted children have similar levels of academic achievement, self-esteem, and satisfaction with their families.¹³⁶ Some studies found differences in feelings about racial identity, but the researchers attributed a child's development of racial or ethnic identity primarily to the way in which the adoptive parents handled the issue.¹³⁷ Throughout the studies, researchers attributed most of the problem placements to factors such as older age at time of placement rather than to the difference in race between parents and child.¹³⁸ The child's interests are met by the UAA hierarchy because it emphasizes continuity of care and speedy placement whenever those principles conflict with racial matching, but otherwise allows race to be a factor considered in the best interests determination.

C. *Open Adoption*

Open adoption entails the sharing of information between adoptive parents and biological relatives or ongoing contact by the child's biological relatives with an adopted child. The term encompasses everything from short-term to life-long contact, from the sharing of occasional photographs or letters to regular visitation.¹³⁹ As used here, open adoption refers to an arrangement for future contact made at the time of the adoption rather than later efforts to obtain information or make contact. The UAA, recognizing that the law in this area is undeveloped and highly controversial, permits open adoption

134. See *supra* note 133 and accompanying text.

135. Inracial adoption refers to adoption by parents of the same race as the child.

136. See Silverman, *supra* note 76 (reporting results of various studies of transracial adoption placements); Tucker, *supra* note 123 (citing a twenty-year study of transracial adoptions recently completed by Rita Simon and Howard Alstein).

137. Silverman, *supra* note 76, at 110 (discussing research done by McRoy and Zurcher), 114 (citing study by Simon and Alstein).

138. *Id.* at 113 (citing study by Simon and Alstein), 115 (citing study by Feigelman and Silverman).

139. See Berry, *supra* note 68, at 126.

arrangements but contains no specific enforcement provisions except in the case of stepparent adoption.

1. *Current State Law*

Although many commentators have advocated open adoption in recent years,¹⁴⁰ Washington state is the only state with a statutory provision allowing an agreement for continuing contact between the child and the birth parents to be part of the court order for adoption.¹⁴¹ Other states have judicially recognized such agreements through visitation statutes permitting visitation with anyone when it would be in the child's best interests.¹⁴² Under the Washington law, breach of the agreement concerning future contact and communication does not affect the validity of an adoption or undermine the voluntariness of a biological parent's consent to the adoption, but civil remedies are available.¹⁴³ In other states, agreements are not judicially enforceable, but adoptive parents may agree to ongoing contact with the birth parents.¹⁴⁴ In some states, however, even a completely voluntary agreement is not permitted and adoption terminates any contact with a child's birth family.¹⁴⁵ Regardless of state law, many adoptions do include contact between the biological and adoptive parents before the child's birth and during and after the adoption proceedings. However, a contract for future contact that has not been judicially recognized is not enforceable in the courts.¹⁴⁶

2. *The UAA Approach*

The UAA permits adoptive parents and biological parents to agree to an open adoption. However, it provides an express enforcement

140. See, e.g., Baran & Pannor, *supra* note 72; Berry, *supra* note 68; Judy E. Nathan, Note, *Visitation After Adoption: In the Best Interests of the Child*, 59 N.Y.U. L. Rev. 633 (1984).

141. Wash. Rev. Code § 26.33.295 (1992).

142. See, e.g., Michaud v. Wawruck, 551 A.2d 738, 742 (Conn. 1988).

143. Wash. Rev. Code § 26.33.295(3), (4) (1992).

144. See, e.g., *In re Gregory B.*, 542 N.E.2d 1052 (N.Y. 1989) (noting that adoptive parents are free, at their election, to permit ongoing contact, but stating that the court could not make adoption contingent on such an agreement).

145. See, e.g., *Cage v. Harrisonburg Dep't of Social Servs.*, 410 S.E.2d 405 (Va. Ct. App. 1991) (ruling that a voluntary open adoption agreement, performable at the discretion of the adoptive parents, conflicts with statutory provision that the child becomes "for all intents and purposes" the child of the adoptive parents).

146. Just as, for example, divorcing parents cannot enforce a contract concerning custody or visitation that has not received judicial approval.

provision only in the case of stepparent adoptions.¹⁴⁷ In the case of a stepparent adoption the court will review a signed written agreement permitting the biological parent to visit or communicate with the adoptee after the adoption is finalized.¹⁴⁸ The court may approve the agreement if it finds that it is in the best interests of the child. In making that determination, the court may evaluate the preference of the adoptee, the length and quality of any existing relationship between the adoptee and the biological parent, the likely effect on the adoptee of allowing the relationship to continue, and the capability of the parties to the agreement to cooperate in performing its terms. In the case of a step-parent adoption, neither failure to comply with the agreement nor a later action to enforce, modify, or set aside the agreement is a ground for challenging the validity of the adoption.¹⁴⁹

3. *The UAA Allows Open Adoption Only When It Meets the Parties' Needs*

In discussion of open adoption, a number of benefits and risks are usually postulated. Both are supported to varying extents by empirical data. However, when all parties are willing to have an open adoption, as in the UAA provision, open adoption appears to benefit all parties.

In an open adoption, birth mothers may experience less separation grief because they had more control over the adoption process.¹⁵⁰ A birth mother who had a role in choosing the adoptive parents may feel more confident about her child's new home.¹⁵¹ Birth parents who are hesitating may be encouraged to choose adoption by the prospect of continuing contact. A young birth parent may not want to lose contact

147. UAA § 3-901. In an earlier draft of the UAA, the provision on open adoption included judicially recognized agreements for visitation or communication with a biological parent, stepparent, grandparent, or sibling of the adoptee. UAA § 3-803(c) (Oct. 14, 1993 draft). The provision was removed out of "political necessity." The drafting committee was aware of significant opposition to the provision and felt that eliminating a general express provision authorizing enforceable open adoption agreements was necessary to salvage the document as a whole. Telephone Interview with Joan Hollinger, *supra* note 12.

148. UAA §§ 3-901, 3-902.

149. *Id.* § 3-904.

150. Baran & Pannor, *supra* note 72, at 120; Berry, *supra* note 68, at 127.

151. Berry, *supra* note 68, at 129 (citing studies that found the availability of open options was related to the willingness to relinquish among teenage mothers).

with his or her biological child, but may also not feel ready to take care of a child.¹⁵²

While permitting ongoing contact, the UAA does not guarantee ongoing contact because it does not contain an express enforcement provision for all adoptions. Such a provision would have been a radical departure from the present law of most states, and as such, would have been likely to be divisive. However, the UAA does provide an express enforcement provision in the critical case of stepparent adoptions. In a stepparent adoption, more than in any other, the willingness of the biological parent to give up his or her parental rights is likely to be affected by the availability of future contact with the child. The need for an express enforcement provision protecting the biological parent's decision seems more pressing and necessary in this situation.

Adoptive parents will have fewer fears about their child's history in an open adoption and will be less likely to blame problems in the adoption itself on genetics than in the traditional closed adoption.¹⁵³ They will probably be reassured by the greater availability of information about the biological family.¹⁵⁴ Adoptive parents need not feel insecure and threatened by having a birth parent as part of their child's life¹⁵⁵ because, under the UAA, they control the contact. In the case of stepparent adoption, the adoptive parent is not in complete control of the situation because the biological parent can go to court to enforce the agreement if necessary. However, the adoptive parent has control over whether to enter into the agreement in the first place, and may petition to modify the agreement later if the situation warrants.

The UAA will please those attorneys and agencies who advocate open adoption,¹⁵⁶ while having little impact on those who do not. Agencies and attorneys may find that more children are available for adoption, as more birth parents feel comfortable giving their children up with an agreement for ongoing contact.¹⁵⁷

152. See, e.g., *In re A.V.D.*, 62 Wash. App. 562, 573 n.10, 815 P.2d 277, 280 n.10 (1991) ("It appears that an ideal solution here would have been an open adoption by the maternal grandparents. This would have assured V the permanence she needs and that the statute dictates while allowing her emotional connection with her father to continue despite his admitted inability to care for her. Under the statutory scheme, however, the trial judge lacked the authority to permit such a solution.")

153. Baran & Pannor, *supra* note 72, at 120; Berry, *supra* note 68, at 126, 131.

154. Berry, *supra* note 68, at 131.

155. *Id.*

156. See, e.g., Baran & Pannor, *supra* note 72, at 119 ("We believe that confidentiality and anonymity are harmful and that adoption should be open.")

157. Berry, *supra* note 68, at 127.

The state, as administrator and protector of the child, benefits from open adoption when children in alternative care are finally released for adoption by a biological parent who simply wants some communication with the child. The way in which the UAA approaches open adoption protects the state from nasty court battles when relationships sour by providing either no express enforcement provision, or, in the case of stepparent adoptions, separating the validity of the adoption from compliance with the contact agreement.

The adopted child benefits the most from open adoption. The child may avoid the identity confusion that often accompanies confidential adoption; open adoption may also alleviate many of the fears and fantasies adopted children sometimes have about their birth families.¹⁵⁸ Having grown up knowing something about his or her birth family, an adoptee will not be compelled to search for them upon gaining adulthood.¹⁵⁹ An older child may particularly benefit by maintaining contact with important people in his or her life while still growing up in a stable home. Open adoption may not be right for every child. However, under the UAA, all the parties have to agree in order to have an open adoption. In the case of a stepparent adoption, the judge has discretion to look particularly at the child's wishes if the child is old enough to have any, and the nature of the relationship between the child and the biological parent. If refusing to approve an agreement would be better for the child, as it might in the case of an abusive biological parent, the judge may reject such an arrangement. Either way, the child is well protected.

The empirical evidence indicates that open adoption can be a valuable alternative in some circumstances. Where adoptive parents planned for openness from the beginning and are in control of the contacts, most of them are pleased with the adoption.¹⁶⁰ Many feel that it is in the best interests of their children to know something about their biological families. The evidence suggests that open adoption is particularly appropriate with older children who remember their former living situations.¹⁶¹ The UAA list of considerations for the judge to weigh in stepparent adoptions, such as the child's preference and nature and duration of the previous relationship, helps the judge in allowing open adoption when it is most appropriate. Not making the adoption

158. *Id.* at 127-128.

159. *Id.* at 128; Baran & Pannor, *supra* note 72, at 120.

160. Berry, *supra* note 68, at 132.

161. *Id.* at 128.

contingent on the agreement reduces the potential manipulation of the adoptive parents by birth parents and ensures stability for the child.

V. CONCLUSION

The three provisions of the proposed Uniform Adoption Act discussed above are illustrative of the types of issues faced in adoption today. There are no easy answers or perfect solutions that will please everyone. The best available solution requires a careful balancing of the needs and interests of everyone involved, with the focus always on the best interests of the child.

Every state should seriously consider adoption of the UAA, or at least particular provisions of it. The result of widespread, uniform adoption laws will be a more predictable, efficient and fair adoption system. Uniform state statutes permit the development of a broader body of case law on which to rely. The issue of which state's laws apply to a particular adoption will disappear when states have the same law. Adoptions will take place in the most convenient place for the parties and fewer actions will be filed in multiple courts with extended appeals.

Uniformity in adoption law is not going to happen overnight. States will be reluctant to make dramatic changes in such a sensitive area of the law. Differing opinions will pull states in opposite directions on some of the more difficult issues. However, every step that is made toward uniformity makes adoption easier. And easier adoption is in the best interests of the child.