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TIME TO DECIDE? THE LAWS GOVERNING MOTHERS’ CONSENTS TO THE ADOPTION OF THEIR NEWBORN INFANTS

ELIZABETH J. SAMUELS

Adoption in the United States is a complex patchwork of law and practice that involves payments of nearly two billion dollars annually in fees and expenses. The adoptions that involve domestically born, voluntarily placed infants raise unique issues. In these as in all adoptions involving parental consent, two generally accepted goals of ethical and humane practice are first, avoiding unnecessary separation of families by ensuring that birth parents make informed and deliberate decisions and second, protecting the finality of placements. The two goals are ideally complementary, but in the case of domestic infant adoptions, there is a danger that pressure to increase the number of adoptions is causing the second one to eclipse the first.

This Article surveys the present day "adoption market" in which these adoptions take place and in which demand for adoptable infants far exceeds supply. It examines best practices for conducting the adoptions, reviews the state laws governing mothers’ consents to the adoption of their newborn infants, and evaluates those laws in light of cases around the country in which mothers have sought, usually unsuccessfully, to set aside their consents. Most state laws, in contrast to the laws of many other countries, provide that consent may be given and become irrevocable almost immediately after the child’s birth. Under the laws in more than half the states, irrevocable consent can be established in fewer than four days. The Article concludes that the laws of most states do not sufficiently promote mothers’ deliberate decisionmaking. It recommends laws that make it more likely mothers will be offered skilled, unbiased counseling; will receive clear, complete information; and will have adequate time to decide.

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I. INTRODUCTION

(1) The Act protects minor children against unnecessary separation from their birth parents . . . .

(2) The Act protects birth parents from unwarranted termination of their parental rights. . . . The Act attempts to ensure that a decision by a birth parent to relinquish a minor child and consent to the child’s adoption is informed and voluntary. Once that decision is made, however, . . . [it is] final and irrevocable.¹ Preface to the Uniform Adoption Act of 1994

Even as the senior justice on this court with fifteen years experience as an associate professor at a law school, I am allowed three days to cancel a contract to purchase consumer goods signed at my home—a document that is far less important than [an affidavit of relinquishment by a newborn infant’s young mother] and a setting that is far more comfortable than a hospital.²

Justice Tom Rickhoff, Texas Court of Appeals

All successful adoptive families may, like all Tolstoy’s happy families, resemble one another. They each create a new set of lifelong kinship ties. Adoptive families are formed, however, in many different ways. Stepparent adoptions, the adoption of children from foreign countries, the adoption of children out of foster care, and the adoption of healthy infants born in this country are distinct social and legal events. We must acknowledge the differences among these types of adoption in order to formulate sensible policies and enact beneficial laws.

While children in foster care who cannot return to their families face a critical shortage of permanent homes,³ the prospective adopters of voluntarily

¹. UNIF. ADOPTION ACT, Prefatory Note, 9 U.L.A. 14 (1994); see also MD. CODE ANN., FAM. LAW § 5-303(b) (1999) (“The purposes of this subtitle are to: . . . (2) protect children from unnecessary separation from their natural parents; . . . [and] (4) protect natural parents from making a hurried or ill-considered decision to give up a child . . . .”); N.C. GEN. STAT. § 48-1-100(b) (2003) (“The primary purpose of this Chapter is to advance the welfare of minors by (i) protecting minors from unnecessary separation from their original parents . . . . Secondary purposes of this Chapter are (i) to protect biological parents from ill-advised decisions to relinquish a child or consent to the child’s adoption . . . .”); TENN. CODE ANN. § 36-1-101 (2001) (including, among its primary purposes, seeking “to ensure . . . that [c]hildren are removed from the homes of their parents or guardians only when that becomes the only alternative [that] is consistent with the best interest of the child”).


placed "domestic white infants" have faced an acute shortage of available children. This Article focuses on the laws governing mothers' consents to the adoption of their newborn infants. Its focus is on mothers rather than on both parents, not because the law governing the consent of fathers is less important or less problematic, but because mothers' consents involve distinct considerations and because recent scholarship has examined the law governing mothers' consents much less than it has considered the legal treatment of fathers whose children are placed for adoption.

Two principal and widely accepted goals of domestic infant adoption are (1) preventing the unnecessary separation of family members by ensuring that birth parents make informed and deliberate decisions and (2) protecting the finality of adoptive placements. Ideally, these goals are complementary and can be balanced. There is, however, a danger of the second goal eclipsing the first. Many state laws appear to value an increase in infant adoptions over the goal of encouraging careful deliberation. Most domestic infant adoptions involve powerful market forces as well as powerful emotional pressures, and they occur in the context of a national commitment to encourage adoptions of older children and children with special needs. Infant adoption service...
providers' livelihoods or profits generally depend on successfully arranging adoptions for their primary clients, typically relatively prosperous, well-established, and socially favored married couples who have suffered agonies of infertility and who, in their efforts to adopt, often face great difficulties and pay high fees. Mothers in the stressful situations that lead them to consider placing their infants for adoption are not an organized group and are relatively powerless and socially disfavored.

This Article surveys and evaluates the laws governing mothers' consents in light of the numerous reported cases in which mothers have attempted to set aside their consents. It also seeks to identify the legal rules that most effectively create incentives for the kind of "best practices" in adoption services that promote deliberate decisionmaking and finality—in other words, practices that promote ethical and humane adoptions. The state laws that currently govern mothers' consents to adoption of newborn infants vary widely but fall into a few basic types. As a general rule, consents may be set aside in all jurisdictions for fraud, duress, or undue influence, usually for limited periods of time after consent has been given or after the adoption has been granted. In the absence of such wrongdoing, which is difficult to establish, mothers in many states are afforded a limited opportunity to revoke their consent. The state laws governing consent follow a number of different patterns. Under a few states' laws, mothers may sign consents before the birth but then have a brief period of time after the birth to revoke consent. Under some state laws, consents may be signed any time after the birth but are then revocable for a specified period. Under other state laws, consents may not be signed until a specified number of hours or days after birth and are then revocable for a specified period. A different group of state laws provides that irrevocable consents may be signed at any time after birth. Other state laws provide that irrevocable consents may be signed after a specified number of hours or days after birth.

Many of these state laws do not ensure that best practices will be followed in all infant adoptions. Evidence of this fact can be found, sadly, in what one court has referred to as "the multitude of cases in which a natural parent seeks to regain her child." These cases reveal an absence of the skilled and unbiased counseling that would provide mothers with sufficient information and support to make deliberate and final decisions. They also reveal a lack of adequate legal advice. Perhaps most starkly, they highlight the very short

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SERVICES FOR ABUSED OR NEGLECTED CHILDREN AND THEIR FAMILIES 4-5 (rev. ed. 2000) [hereinafter CWLA STANDARDS].

10. See infra Part III.
11. See infra Part IV.
12. See Katherine G. Thompson, Contested Adoptions: Strategy of the Case, in 2 ADOPTION LAW AND PRACTICE, supra note 6, § 8.02(1)(b).
13. See infra Part V.
periods of time that are provided under a majority of state laws after which a
mother’s consent may effectively be given and become irrevocable.\textsuperscript{15} In a
number of other countries—including a majority of European countries and
Australian states—consent may not be given or does not become final for a
period of approximately six weeks.\textsuperscript{16} In approximately half the U.S. states,
however, irrevocable consent can be established in as short a period as less
than four days after birth; in approximately ten percent of the states, it can be
established in less than seven days after birth; and in approximately fifteen
percent of the states, it can be established in less than two weeks after birth.\textsuperscript{17}

In Part II, this Article introduces the issues it will address by relating the
story of one recent case in which a mother unsuccessfully tried to revoke her
consent and contest her child’s adoption. Part III surveys the present-day
adoption market in which domestic infant adoptions take place, and Part IV
examines best practices for conducting infant adoptions. After a review of
applicable state laws in Part V, Part VI analyzes reported cases in which
mothers have sought to revoke their consent. Finally, Part VII considers the
most practicable legal rules for promoting ethical and humane adoptions.

II. A CONTESTED ADOPTION

In a sense, the social and legal systems have failed in any case in which
an infant’s mother asks a court to overturn her consent. If the first purpose of
adoption is to provide a home for a child, rather than a child for adults who
wish to adopt, and if the mother is not unfit and wishes to raise her child, how
are we to understand such a contest? If a mother has had sufficient
information, support, and time to make and come to terms with a firm
decision, why is she seeking to revoke her consent? What kinds of
circumstances lead to these contests? Some answers to these questions are
suggested by the facts of a recent case in which a mother unsuccessfully
pursued her claim through the Kansas court system and in a petition for
certiorari to the United States Supreme Court. How did her situation arise
under Kansas law, and how might it have developed in a different kind of legal
system?

The mother who placed her child for adoption in this case was neither very
young nor childless. She was a twenty-nine-year-old pharmacist, a single
mother raising one child, when she became pregnant with a second.\textsuperscript{18}
According to the intermediate appellate court’s unpublished opinion in \textit{In re

\begin{itemize}
  \item \textit{See infra} Part V.
  \item \textit{See infra} notes 56-61.
  \item \textit{See infra} Part V.
  \item \textit{In re} Baby Girl W., No. 87,291, slip op. at 2 (Kan. Ct. App. Apr. 5, 2002), \textit{aff’d}, 43
\end{itemize}
Adoption of Baby Girl W.,¹⁹ she became pregnant in early 2000 and sought counseling at Catholic Charities.²⁰ During periodic counseling sessions from May through July, she and a counselor discussed the possibility of—but did not make plans for—adoption.²¹ The mother apparently felt like "the black sheep" of her family.²² She was concerned about the father’s lack of involvement as well as how to tell her family she was pregnant.²³ A friend told her in August that the friend’s brother-in-law and his wife hoped to adopt.²⁴ The mother spoke with the wife, permitted Catholic Charities to speak with the couple, and later met with the couple on two occasions, but she remained undecided about whether to place the child for adoption.²⁵ In late September she had a brief meeting with an attorney provided by Catholic Charities.²⁶ She was still undecided when she entered the hospital on December 20.²⁷

Baby Girl W. was born that evening, and the next day the mother told a hospital social worker she still had not reached a decision.²⁸ She expressed concern both about her mother’s disapproval of adoption and about her attempts to reconcile with the father of her older child. The hospital social worker advised her that foster care was available to give her more time to decide.²⁹ The following day, on which she was scheduled to be released from the hospital, she was told she had to reach a decision before five p.m., at which time Catholic Charities would close for the weekend.³⁰ She thereupon authorized the Catholic Charities counselor to come to the hospital to conduct the relinquishment process.³¹ The counselor, who up to this time had assumed the mother had decided against adoption, arrived in the late afternoon; discussed the mother’s situation with her, including the grandmother’s disapproval of placing the child; and presented her with the paperwork, which she then signed in the presence of a notary public.³² That evening the adoptive parents left the hospital with the child.³³ In court, the counselor testified that the mother understood her relinquishment was irrevocable.³⁴ The mother

²⁰. Id. at 2-3.
²¹. Id. at 3.
²². Id.
²³. See id.
²⁴. Id. at 4.
²⁵. Id. at 4-5.
²⁶. Id. at 5.
²⁷. Id. at 6.
²⁸. Id. at 6-7.
²⁹. Id. at 7.
³⁰. Id. at 7-8.
³¹. Id. at 8.
³². Id. at 8-9.
³³. Id. at 11.
³⁴. Id. at 8-9.
maintained that she was weak and tired from not having slept for twenty-four hours and that she was affected by Percocet, the narcotic she was taking for pain.\footnote{35} She testified she did not recall whether she was told the consent was irrevocable.\footnote{36}

At home the next day, December 23, the mother decided she had made a mistake and, according to her testimony, called but was unable to reach Catholic Charities.\footnote{37} That evening she called the prospective adoptive parents to say she had made a mistake and did not want to place the child for adoption.\footnote{38} On January 3, a Catholic Charities representative signed the relinquishment document, giving the agency the power to place the child and consent to the adoption.\footnote{39} On January 26, the mother filed a petition to set aside her relinquishment,\footnote{40} a petition that she pursued unsuccessfully through the Kansas courts\footnote{41} and in a petition for certiorari to the U.S. Supreme Court.\footnote{42}

If these circumstances had arisen before 1968, the mother would have been able to revoke her consent at any time before the court granted the adoption.\footnote{43} The Kansas courts had established this rule, as had many of the state courts that had considered the question.\footnote{44} In Kansas between 1968 and 1990, under a statutory provision, she could have revoked her consent until the adoptive parents filed it in court, unless she had acknowledged her consent before a judge, in which case it would have been irrevocable.\footnote{45} During that period, written consents, once filed in court, were revocable only if the consenting party could prove before the final decree that consent “was not freely and voluntarily given.”\footnote{46} Under the Kansas law passed in 1990, which applied in this case, the mother’s consent would have been voidable if she had given it within twelve hours of the baby’s birth, rather than two days after the birth, or if she could have proved “by clear and convincing evidence that the consent was not freely and voluntarily given.”\footnote{47}

\begin{thebibliography}{99}
\item[35.] \textit{Id.} at 9.
\item[36.] \textit{Id.} at 9-10.
\item[37.] \textit{Id.} at 11.
\item[38.] \textit{Id.}
\item[39.] \textit{Id.} at 18.
\item[40.] \textit{Id.} at 11.
\item[41.] \textit{Id.} at 24.
\item[44.] \textit{See In re Adoption of Thompson}, 283 P.2d 493, 498 (Kan. 1955).
\item[45.] Berenson, \textit{supra} note 43, at 352 n.17.
\item[46.] \textit{Baby Girl H.}, 739 P.2d at 4.
\item[47.] KAN. STAT. ANN. §§ 59-2114, 59-2116 (1994). In a 1984 case, the mother gave her consent the day of the birth and three days later told the attorney who was representing both her and the adoptive parents that she wanted the child back. \textit{In re Adoption of Baby Boy Irons}, 684 P.2d 332, 335, 337 (Kan. 1984). The court shifted the burden of proving voluntariness to the adopters on the grounds that the mother was in a confidential relationship with both her doctor
\end{thebibliography}
The legislature passed the applicable 1990 law in response to a 1987 case in which an eighteen-year-old mother gave her consent before a judge at the hospital approximately one hour after birth. In that case, the Kansas Court of Appeals suggested that the legislature consider adding a waiting period during which consent would not be valid. In another case that arose after this law was enacted, a young woman became pregnant while in high school, had no counseling before she entered the hospital, and had no independent legal representation, which is required in Kansas for birth parents who are minors. She gave her consent twelve hours and fifteen minutes after the birth of her child. The next day she decided to revoke her consent and delegated her mother to ask the prospective adoptive mother to return the child. Ultimately, the Kansas Court of Appeals affirmed the trial court’s denial of her motion to revoke her consent.

How might this mother’s and Baby Girl W’s mother’s situations have developed if they had lived in a jurisdiction in which the law had been designed to ensure that mothers’ decisions are well informed, deliberate, and final? In the Australian state of Victoria, the applicable law falls near the opposite end of the spectrum from Kansas law and the laws of many other U.S. states. While domestic infant adoptions in the United States are generally very costly for the adoptive parents, in Victoria adoptive parents pay only the nominal cost of the court adoption order. The prospective adoptive parents do not have contact with the mother before the birth, and the mother may not

and the attorney and that there were suspicious circumstances because the attorney was the doctor’s daughter. . at 339-40. The court nonetheless found that the mother’s consent was voluntary, explaining that if she felt unduly pressured by the doctor’s continual encouragement to place the child, she could have sought medical services from another physician and could have sought advice from family and friends. . at 341.

give legally binding consent until the child is fifteen days old. After giving consent, she has a twenty-eight-day period in which she may withdraw consent, a period similar to the periods available in all Australian jurisdictions.

A number of countries do not have revocation periods but impose much longer periods than Victoria's before which consent may not be accepted, periods ranging from six weeks to two months. France, for example, provides for a period of two months. Six weeks is the specified minimum period under the European Convention on the Adoption of Children, which has been ratified by eighteen nations. When changes to the thirty-five-year-old

57. See Adoption Act, 1984, § 42(2)-(3) (Vict.).
58. Id. § 41(1)(a). She may also extend the period an additional fourteen days. Id. Other Australian states and territories have similar periods for withdrawing consent. A Queensland government review of adoption legislation reports that its revocation period is thirty days and “[a]ll other Australian jurisdictions have a 25, 28 or 30 day (as in Queensland) revocation period.” DEP’T OF CHILD SAFETY, QUEENSL. GOV’T, ADOPTION LEGISLATION REVIEW 73, at http://www.childsafety.qld.gov.au/adoptions/publications/documents/cp_full.pdf (last visited May 10, 2005). Queensland law provides that

an adoption order cannot be made if the birth mother signed the consent documents within five days of giving birth, unless the Director-General is satisfied that the mother was in a fit condition to give the consent. . . . [Nevertheless,] this provision is never used and consents are not taken during that five day period. Most consents are usually signed between 10 and 14 days following the child’s birth.

Id. at 69. With respect to other Australian jurisdictions,

[the period after birth during which parents cannot give consent is longer in all other Australian jurisdictions than it is in Queensland. The most recent legislation, the Adoption Act 2000 (NSW), states that parents’ consent to a child’s adoption cannot be given until 30 days after the birth of the child and 14 days after the person is given the consent documents and mandatory written information. The New South Wales Law Reform Commission in its Report on the Review of the Adoption of Children Act 1965 (NWS) considered that: “a 30 day hiatus after the birth of the child will mean that birth parents are truly able to experience the impact of separation from their babies, and ultimately to make a more informed and realistic decision.”

Id. at 70 (citation omitted).
59. COUNCIL OF EUR., EUROPEAN COMM. ON LEGAL CO-OPERATION, FINAL ACTIVITY REPORT: ADOPTION 42 (2004) [hereinafter FINAL ACTIVITY REPORT]. Other examples include Norway (two months) and Ukraine (two months). Id. at 61, 82. Under Romanian law, consent may not be given until forty-five days after birth. MICHAEL W. AMBROSE & ANNA MARY COBURN, U.S. AGENCY FOR INT’L DEV. IN ROM., REPORT ON INTERCOUNTRY ADOPTION IN ROMANIA 15 (2001).

A mother’s consent to the adoption of her child shall not be accepted unless it is given at such time after the birth of the child, not being less than six weeks, as may be prescribed by law, or, if no such time has been prescribed, at such time as, in the opinion of the
Convention were recently suggested in a report by the Council of Europe’s European Committee on Legal Co-operation, no change to this period was suggested.61

Under Victoria’s law, Baby Girl W’s mother, in addition to having had more time, would have had to give her consent in the presence of a court official or a person designated either by the government or an approved government-funded agency.62 At least seven days before giving her consent, she would have had to receive counseling by a person approved by the Secretary of the Department of Human Services or an approved government-funded agency.63 She would also have had to receive from that counselor the “names and addresses of organizations that provide family support services,” as well as written information concerning “the effect of an adoption order” and “alternatives to adoption.”64

To evaluate legal approaches as diverse as those of Kansas and Victoria, and to consider what approaches best promote the goals of both deliberate decisionmaking and finality in the United States, it is necessary to examine “the adoption market,” the standards of best practices in adoption services, the variety of state laws governing consent by mothers, and the recurring problems in practice suggested by reported cases around the country.

III. THE ADOPTION MARKET

While adoption alters and hopefully enhances the lives of children and families, it is also a nearly $2 billion-a-year U.S. business that is growing fast.65

Sue Zeidler, Reuters News Service

People assume that adoption is a benevolent, philanthropic response to the needs of orphans, but it’s not always. In some ways, it’s just

competent authority, will have enabled her to recover sufficiently from the effects of giving birth to the child.


For examples of national laws, see Adoption and Children Act, 2002, c. 3, § 52(3) (Eng.) (England and Wales, six weeks); FINAL ACTIVITY REPORT, supra note 59, at 31 (Croatia, six weeks); Zdenka Králíčková, Adoption in the Czech Republic: Reform in the Light of the Child Welfare Laws, in THE INT’L SURV. OF FAM. L. 133 (Andrew Bainham ed., 2003) (Czech Republic, six weeks).

61. FINAL ACTIVITY REPORT, supra note 59, at 10-19.

62. See Adoption Act, 1984, § 34(1)-(2) (Vict.).

63. Id. § 35(1).

64. Id. Under special circumstances, the counselor may decide that a period of less than seven days but no less than twenty-four hours is appropriate. See id. § 35(2).

another giant industry in which people see a way to get rich. 66
Maureen Hogan, Executive Director, National Adoption Foundation

Infant adoptions in the United States are arranged primarily by private agencies and independent facilitators. The infant adoption market is characterized by high fees, demand for children that outstrips available supply, and marketing aimed both at prospective adopters and pregnant women who might consider placing their infants for adoption. Families that adopt infants tend to have higher incomes than those that adopt older children and children with special needs, and the families that adopt infants generally benefit more from available tax benefits. The market features and the role of money in infant adoption raise ethical questions related to the decisionmaking of mothers.

Some adoption professionals and observers argue that adoptions should be arranged, as they are in some other countries, only by public child welfare agencies or highly regulated non-profit agencies. 67 In the U.S., however, only three states limit the placement of children with unrelated adoptive parents to licensed agencies, 68 and even in those states parties can arrange what are in effect independent adoptions by identifying one another and then using an agency to handle the arrangements. 69 Adoption services providers in the U.S.

67. According to the CWLA, for example:
Adoption as a child welfare service for children is best provided through an authorized public child welfare agency or voluntary, nonprofit adoption agency for those children who will not be raised by their birth parents and who can benefit from permanent family ties established through legal adoption. Adoption services are provided by social workers and other professionals, and encompass counseling for birth parents; assessment and preparation of prospective adoptive parents; assessment, preparation, and placement of children in adoptive families; and support for adoptive families, birth families, and adopted individuals following adoption.

CWLA STANDARDS, supra note 9, at 9. The CWLA also advises that “[a]ll adoptions should be completed through licensed child-placing agencies. Independent (nonagency) adoptions, with the exception of adoptions by relatives and stepparents, should be eliminated . . . .” Id. at 130.
68. See CONN. GEN. STAT. ANN. § 45a-727(3) (West Supp. 2004); DEL. CODE ANN. tit.13, § 904 (Supp. 2002); MINN. STAT. ANN. § 259.22 (West 2003) (providing that a court may waive the limitation if it is in the best interest of the child). In Massachusetts, a licensed private or public agency must place the child or must give its written consent to the petition by the adopters. MASS. GEN. LAWS ANN. ch. 210, § 2A (West 1998). In Michigan, direct placements with Michigan residents are permitted with the assistance of an adoption attorney or agency. MICH. COMP. LAWS ANN. §§ 710.23a(3), 710.23d(b) (West 2002).
69. Lawyer Mark T. McDermott, former president of the American Academy of Adoption Attorneys, notes that even in states that prohibit non-agency adoptions, “parties are able to achieve what is, in spirit, an independent adoption: the adoptive parents and birthparents identify each other without intervention by an agency and then arrange for the parental rights
include public agencies, nonprofit and for-profit private agencies, lawyers, physicians, and other "facilitators"—"a new breed of adoption entrepreneurs who specialize in finding pregnant women for prospective parents." 70 With the Internet as "the main catalyst," there has been a "huge increase" in the number of adoptions in which generally white couples and birth parents identify one another. 71 Public agencies principally arrange adoptions of older children and children with special needs, 72 while most adoptions of domestic newborns are handled by private agencies and by independent, 73 non-agency intermediaries. As the Packard Foundation's Center for the Future of Children explains, "public agencies have been required to focus on abused or neglected children waiting in foster care, while private agencies and intermediaries have tended to focus on finding voluntarily relinquished healthy babies for childless adults." 74 Since 1970, according to historian Barbara Melosh, even private agency adoptions have "declined sharply, in what amounts to a massive de facto deregulation of child placement." 75 Reliable statistics are not available on the relative number of private agency versus independent, non-agency to be relinquished through an agency so that the adoption becomes a 'directed agency adoption.'" 76 Mark T. McDermott, Agency Versus Independent Adoption: The Case for Independent Adoption, 3 FUTURE OF CHILD.: ADOPTION 146, 146 (1993).

70. PERTMAN, supra note 66, at 36.
71. Id. at 37.
72. In 1998, in the public child welfare system, the median age of children whose adoptions were finalized was 4.8 years and only 6.2% were younger than one year old. See Kathy S. Stolley, Statistics on Adoption in the United States, 3 FUTURE OF CHILD.: ADOPTION 26, 35 (1993). As of Sept. 30, 2001, of the children in foster care waiting to be adopted, 96% were older than one year, 64% were older than five years, and 32% were older than ten years. See CHILDREN'S BUREAU, U.S. DEP'T. OF HEALTH & HUMAN SERVS., THE AFCARS REPORT, at http://www.acf.hhs.gov/programs/cb/publications/afcars/report8.htm (last modified Mar. 28, 2003).
73. Definitions of the term "independent adoption" vary. For purposes of this Article, the term refers to adoptions that do not involve either a public or a licensed private agency. H. Joseph Gitlin defines an "independent adoption" as "a nonagency adoption of an unrelated child where the lawyer acts as a facilitator, or intermediary, between the parent(s) and adopting parent(s) and the actual placement (choice of adopting parents) is made by the birth parent(s)." H. JOSEPH GITLIN, ADOPTIONS: AN ATTORNEY'S GUIDE TO HELPING ADOPTIVE PARENTS 43 (1987). The CWLA uses the terms "independent adoption" and "private adoption" interchangeably, defining them as "adoption that takes place without the involvement of legally regulated agencies, often involving physicians, lawyers, or others who, for a fee, identify and/or place a child with adoptive parents." CWLA STANDARDS, supra note 9, at 143. For an excellent review of agency-facilitated and of independent or "private-placement" adoption, see Jana B. Singer, The Privatization of Family Law, 1992 Wis. L. REV. 1443, 1444, 1478-86.
74. Ctr. for the Future of Children, Overview and Major Recommendations, 3 FUTURE OF CHILD.: ADOPTION 4, 5 (1993); see also 2 FREUNDLICH, supra note 3, at 77-79 (discussing the demographics of children who are available for adoption).
adoptions, but both these types of providers are subject to limited regulation and operate under a largely "laissez faire" regime. As adoption law scholar William M. Schur concludes with respect to agency adoptions, the "standards which agencies must meet for licensing purposes are generally minimum standards." As Melosh summarizes the situation, "after 1970, most placements have been made as private agreements executed between consenting adults, with minimal involvement from the state."

Indisputably, "many more families are seeking healthy infants than there are healthy infants available for adoption." The number of adoptions has dropped in the United States from approximately 175,000 in 1970 to 118,779 in 1990. About half of adoptions are by relatives, most commonly stepparents, and the overall proportion of adoptions of infants and very young children has declined. For every domestically born white baby, there are approximately six would-be parents. According to Adam Pertman, author of the leading popular account of adoption in America today, "far more [than six] want infants but don't try to adopt because they perceive the process as too daunting and the costs as too high." Greater infertility rates, delayed childbearing, wider tolerance of unmarried pregnancy, and increased acceptance of unmarried parenting all contribute to the disparity between supply and demand. Delayed childbearing and rising infertility have led to "a large number of infertile individuals" who "typically look to adopt newborns in this country or very young, healthy children from other countries."

The imbalance of demand and supply, and perhaps the intensely personal nature of the demand, probably account for some part of the increase in the cost of adoption as well as the periodic reported instances of adoption frauds.

76. Estimates of the percentages of adoptions arranged by private agencies versus independent providers vary. See generally McDermott, supra note 69, at 146 (stating that "more newborns are placed each year through independent adoption than through private agency adoption"); Stolley, supra note 72, at 31 (estimating that similar percentages of adoptions are arranged by private agencies and independent providers).

77. PERTMAN, supra note 66, at 37.

78. William M. Schur, Attorney's Role in Private Agency Adoption, in 2 ADOPTION LAW AND PRACTICE, supra note 6, § 7.01(2). But see Singer, supra note 73, at 1481, 1485 (indicating that while private adoptions "minimize state intervention," adoption agencies are "heavily regulated").

79. MELOSH, supra note 75, at 288.

80. CWLA STANDARDS, supra note 9, at 4.


82. Id.

83. See 2 FREUNDLICH, supra note 3, at 8-9.

84. PERTMAN, supra note 66, at 34.

85. CWLA STANDARDS, supra note 9, at 3.

86. Id. at 4.

87. Judge Richard L. Posner has made the controversial claim that legalizing regulated
and scandals. A publication of the Child Welfare League of America (CWLA) notes that “concerns increasingly are expressed that adoption—particularly infant adoption in the United States and international adoption—has been transformed into a service which has, as its core purpose, the finding of healthy babies for adults who wish—and can pay large fees—to adopt.” As adoption policy expert Madelyn Freundlich explains, “[a]lthough ‘donative’ intent may stand as the theoretical basis for infant adoption and may have greater appeal than a pure market analysis, it presents difficulties in actual application given the escalating sums of money involved in the adoption of very young children.”

In contrast to the cost of public agency adoptions, which range from zero to $2,500, the cost of a domestic private agency adoption ranges from $4,000 to more than $30,000, and the cost of a domestic independent adoption ranges from $8,000 to more than $30,000, or reportedly to as much as $50,000. Adoption cancellation insurance is available to protect families against expenditures that do not lead to a successful adoption. Marketing to prospective adoptive parents is prevalent by adoption facilitators and agencies, as is advertising by both agencies and prospective adoptive parents seeking babies. The author of Fast Track Adoption, a book for prospective adoptive parents, counsels that “the most effective way to connect with prospective birth mothers is to use direct advertising. . . . Couples who launch an effective


88. See, e.g., David M. Smolin, The Two Faces of Intercountry Adoption: The Significance of the Indian Adoption Scandals, 35 SETON HALL L. REV. 403 (2005); Hugh Dellios & Bonnie Miller Rubin, Guatemala Delays Foreign Adoptions; Abductions Spark Push for Reform, CHI. TRIB., Sept. 14, 2003, at C19; Noelle Knox, Romania to Make Its Ban on International Adoptions Permanent, USA TODAY, June 16, 2004, at 9D (“[R]omania agreed that the only way to end rampant corruption in the system was to end international adoption.”); Maureen O’Hagan, Guilty Plea in Federal Adoption Fraud Case; Seattle Agency Woman Was Praised as a Humanitarian, SEATTLE TIMES, June 24, 2004, at B1 (reporting that a woman pled guilty to “visa fraud, money laundering and currency structuring, admitting that some Cambodian children she had adopted out as orphans did, in fact, have parents”); Walter F. Roche Jr., U.S. Enforcement Needed, Marshallese Official Says; Illegal Adoptions Likely to Continue Despite New Law, Authority Warns, BALTIMORE SUN, May 7, 2004, at 3A.

89. 3 FREUNDLICH, supra note 3, at xiv (2001).

90. 2 id. at 16-17.

91. See NAT’L ADOPTION INFO. CLEARINGHOUSE, U.S. DEPT. OF HEALTH & HUMAN SERVS., COSTS OF ADOPTING 1-3 (June 2004), available at http://naic.acf.hhs.gov/pubs/s_cost/s_costs.pdf [hereinafter COSTS OF ADOPTING]; Zeidler, supra note 65; see. e.g., 2 FREUNDLICH, supra note 3, at 12, 14; PERTMAN, supra note 66, at 228; Gay Jervey, Priceless, MONEY, Apr. 2003, at 119-24. For analyses of specific adoption costs, see 2 FREUNDLICH, supra note 3, at 19 and COSTS OF ADOPTING, supra, at 2-4.

advertising campaign can often reduce their wait by months or even years.  

Children in foster care who are available for adoption are advertised as well, and individual children have even been featured on the Internet by their parents or their parents' representatives. To find potentially available infants, adoption agencies use "billboards, newspaper ads, radio and TV commercials, and even tray liners at fast-food outlets." Individuals and firms help prospective adoptive parents market themselves to potential birth mothers with advertisements, biographies, photographs, scrapbooks, videotapes, and so forth. Social worker and author James L. Gritter reports that "[i]mpoverished pregnant women are unapologetically considered 'targets' for creative marketing schemes." He "will never forget," he writes, "a comment by a social worker from Nebraska ... 'People from the West Coast do a lot of advertising in Nebraska,' she explained, 'because they view our expectant mothers as corn-fed, disease-free stock.'

Families adopting independently appear to have higher incomes than those adopting through public agencies. According to Melosh, "[i]t seems evident ... that the market model of adoption has increased the economic disparities between adoptive families and others." Federal tax benefits for adopters generally provide greater benefits to families involved in the more expensive healthy newborn and international adoptions, although the benefits are promoted as a means to increase adoptions of children out of foster care.

93. SUSAN BURNS, FAST TRACK ADOPTION 21 (2003). She notes: Although there is always the potential to spend an unlimited amount of money on adoption advertising, those who spend excessively usually do so because they lack an effective strategy. ... [W]hen advertising is properly planned, it is possible to limit the total costs to $3,000. In many cases advertising can be done for substantially less.

Id. at 25.

94. 2 FREUNDLICH, supra note 3, at 105-20.


96. 2 FREUNDLICH, supra note 3, at 106-07.


98. Id.

99. See COSTS OF ADOPTING, supra note 91, at 1, 3; MELOSH, supra note 75, at 289.

100. MELOSH, supra note 75, at 289.

101. Fees for intercountry adoptions are estimated to range from $7,000 to $25,000, but these adoptions may include additional expenses such as parents' travel and in-country stays, escorting fees, and foster care. COSTS OF ADOPTING, supra note 91, at 4.

102. For example, in 1996 when House Minority Leader Dick Gephardt endorsed the tax credit, he stated, "With 400,000 kids still in foster care in this country, now is the time to provide incentives for families wishing to adopt. ... We simply have to make adoption more affordable." Associated Press, Clinton Backing Republican Proposal for Tax Credit to Families That Adopt, DAILY RECORD, May 7, 1996, at 10. Similarly, a Missouri state tax credit aimed at encouraging the adoption of children out of foster care instead supported international adoptions:
The tax benefits even may have contributed to increasing adoption costs. In 2003, the maximum benefits increased to $10,160 for the tax credit and for the amount excludable from income for qualifying expenses under an employer’s adoption assistance program, both of which can be claimed in full if the adopters’ modified adjusted gross income is $152,390 or less. Freundlich suggests that the tax benefits may have “simply served to increase the cost of an adoption by an equivalent amount . . . . The rising cost of adoption may be associated, at least to some degree, with the availability of such subsidies.”

According to Pertman, who is now executive director of the Evan B. Donaldson Adoption Institute, “[s]ince Congress enacted a $5,000 tax credit for adoptions in 1997, a growing number of practitioners have been raising their charges about $5,000.” Freundlich points out that “[t]he structure of the tax credit does not benefit families who adopt children in foster care—typically families of moderate means who incur few upfront costs in adopting but who may be in greater need of ongoing financial supports to meet the special needs of the children they adopt.” Yet, she reports, efforts to increase the tax credit have met with less legislative concern about fiscal impact than efforts to increase the availability of adoption subsidies for adopting children with special needs.

The role of money in adoption raises ethical questions with respect to the impact on mothers’ decisionmaking processes. As Freundlich frames two of these questions,

To what extent do prospective adoptive parents’ expenditures to cover a birth

A $2 million Missouri tax credit that many hoped would have encouraged families to adopt the state’s foster children is instead being used almost exclusively to help underwrite the cost of adopting children from other countries.

According to a report released Monday by state Auditor Claire McCaskill, 90 percent of the tax credits in 2002 went to parents who adopted children internationally.

And while McCaskill said she supported those kinds of adoptions, she questions whether the tax incentive program was accomplishing its aim.


103. Both the credit and the exclusion can be claimed if they are claimed for different expenses. Smaller credits and exclusions may be claimed up to an income of $192,390, at which level the benefits are no longer available. INTERNAL REVENUE SERV., U.S. DEP’T OF THE TREASURY, PUB. NO. 968, TAX BENEFITS FOR ADOPTION 1-3 (2004), available at http://www.irs.gov/publications/p968/ar01.html.

104. 2 FREUNDLICH, supra note 3, at 21.


106. PERTMAN, supra note 66, at 189.

107. 2 FREUNDLICH, supra note 3, at 21; see also PERTMAN, supra note 66, at 199-200 (discussing how adoption is increasingly becoming an activity for the affluent).

108. 2 FREUNDLICH, supra note 3, at 95.
mother’s medical costs or other living expenses create a sense of indebtedness that may affect her decision-making? ... Does a birth mother ultimately “owe” it to the prospective adoptive parents to follow-through on the adoption because a good deal of money has been expended on her behalf?  

Pertman reports that there are Internet sites on which prospective parents who sign up with an adoption attorney or agency can receive passwords for chat rooms and “receive instructions about how to use financial incentives to persuade ambivalent pregnant women to relinquish their children.”  

An adoptive father explains, “We were led to understand, in so many words, that the more we gave her, the more obligated she’d feel to give up her child, which she ultimately did . . . .”  

A woman who stayed in a Texas-based agency’s home for pregnant women while deciding whether to place her child reported that “they got you to the point of feeling like you were supposed to give up your baby as the price of admission for all the generous benefits they gave you.”  

Another ethical question related to the decision-making process of mothers is whether in the “adoption market,” adoption services inevitably will focus on satisfying the desires of the “paying customers,” the prospective adoptive parent “who is likely to be the primary, if not exclusive, ‘client’ because he or she pays the fee for the services.” The claim is made that prospective birth mothers are increasingly powerful because they are gaining the opportunity to select adoptive parents, but as Freundlich concludes, the mothers “generally do not feel empowered in the adoption process,” and the “adoptive parents, because they usually bring greater social and financial advantages compared to those of most birth parents, hold greater power with adoption service providers.” Adoptive parents not only pay high fees for adoption, they are also the objects of increasing competition in an adoption marketplace in which the number of service providers has grown rapidly and in which those service providers may be able to remain in the market “only if healthy infants can be speedily provided.”

109. 2 id. at 23-24.  
110. PERTMAN, supra note 66, at 187.  
111. Id. at 188.  
112. Id. at 197.  
113. 2 FREUNDLICH, supra note 3, at 26.  
114. 2 id. at 27.  
115. See 2 id. at 33.  
116. 2 id. at 32.
IV. BEST PRACTICES

Adoption ought never be organized as a proprietary tussle between birthparents and adoptive parents. Rather, it is better understood as an exercise in cooperation. 117

James L. Gritter, Adoption Social Worker

This Part examines the practices that characterize ethical and humane infant adoption services, the kind of services that prevent unnecessary family separation and promote finality. These practices fall within the areas of adoption counseling, the structure of adoption services, the legal representation of the parties to adoption, and the timing of adoption consents.

A. Counseling

Adoption professionals and most organizations involved in adoption agree that counseling services should be available for women considering placing their babies for adoption. 118 Laws in eighteen states require that some counseling be offered, generally by an adoption agency, while another ten states require some quantum of counseling services. 119 Skilled counseling, the CWLA advises, helps provide assurance that "[i]nformed decisions will be made by both the birth and adoptive parents." 120 Counseling for parents, as explained in a comprehensive guide to adoption practices, can help parents to "own" their decisions, 121 that is, can help them feel "in control through having a real choice." 122 Having felt as if she had a real choice is a factor associated with "positive resolutions" for birth mothers, as is having an opportunity to talk, to reflect, and "to anticipate future pain." 123 Counseling for mothers should include providing information about alternatives to adoption, options within adoption, legal steps and consequences involved in adoption, and possible effects of adoption on themselves and their children. Ideally,

117. Gritter, supra note 97, at 23.
118. Of course, not every woman will wish to receive counseling. A recent book on adoption policy and practice discusses this point:
   It would be presumptuous to think that social workers can help every parent to reach an appropriate decision concerning their child. In the first place, some parents will not need a social worker to help them make up their minds. They will do so, one way or another, and stick to it. Others may explore offers of counseling and other services but feel they are perfectly able to cope alone.
TRISELIOTIS ET AL., supra note 81, at 97.
119. See infra Part V.
120. See CWLA STANDARDS, supra note 9, at 131.
121. TRISELIOTIS ET AL., supra note 81, at 113.
122. Id. at 100.
123. Id.
counseling will also help mothers resolve issues that arise with the fathers and family members.

Information should be provided to mothers both orally and in writing. As social worker Patricia Roles puts it in her guide for counselors, published by the CWLA, "[o]nly with all the facts can anyone make a well-thought-out, informed decision. Supplying written information is most useful because it allows the client to read and digest the material when she feels ready."\(^{124}\) Information provided orally may be insufficient because the recipient may be "in a state of shock or denial and unable to retain all the information."\(^{125}\)

Initially, information should be available to pregnant women and new mothers about what alternatives are available for the care of their children, how to determine the support needed to rear their children, and how to access the resources they will need.\(^{126}\) The CWLA advises agencies to "support birth parents and extended family members, whenever possible, in providing for their children's safety and protection."\(^{127}\) A similar view is expressed by adoption counselor and author James L. Gritter, who advises that if possible, "[t]he obvious first effort is to find ways to relieve these circumstances"\(^{128}\) that have led the mother to consider adoption.

Secondly, information should be provided about adoption, which as Gritter points out, "at its best is often a bittersweet mixture of triumph and sadness. . . . Women who are thinking about adoption should not base their ideas on propaganda; they deserve a reasonable description of its costs and benefits."\(^{129}\) If mothers choose adoption, they should have information about and understand options within adoption and the consequences of different options, including possible degrees of openness.\(^{130}\) Openness before birth may mean that the pregnant woman and adoptive parents meet, spend time together, and in some cases, all be present at the birth. Openness after the adoption may range from the adoptive parents occasionally providing photographs of and reports about the child to a schedule of regular visits.\(^{131}\) There is especially intense debate over the advisability of having prospective adoptive parents present at birth. The support and advocacy group Concerned United Birthparents (CUB)\(^{132}\) advises women against having the prospective adoptive

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124. 2A PATRICIA ROLES, SAYING GOODBYE TO A BABY 15 (1989).
125. 2A id.
126. See CWLA STANDARDS, supra note 9, at 28.
127. Id. at 13.
128. Gritter, supra note 97, at 213.
129. Id. at 88.
130. See id.
131. The CWLA describes open adoption as an "arrangement that recognizes the child's connection to both the birth family and the adoptive family by supporting interaction among the birth parents, adoptive parents, and the child through telephone calls, correspondence, or personal contact, depending upon the particular situation." CWLA STANDARDS, supra note 9, at 142.
132. CUB describes itself as a group that includes
parents in the delivery room because "they make it next to impossible to change your mind." Even those more amenable to the idea counsel caution because it "may make birthmothers feel obligated to relinquish the child even if they want to change their mind. They may not want to let the couple down. It is important therefore to be clear with all parties involved that the decision may be changed after the birth."134

In addition to information about options within adoption, mothers should receive accurate and clear information about legal steps and consequences involved, and they should receive copies of all papers they sign.135 For example, they should be informed about whether they may give binding consent before the birth, after the birth, or only after the passage of a certain number of hours or days after the birth. They should be informed about whether they have any right to revoke their consent and, if so, when and how to do so and whether revocation means automatic return of the child or a judicial best-interests determination. If any agreements are contemplated between the mother and the prospective adoptive parents, such as agreements concerning providing information about the child's development, they should be informed about whether and under what circumstances the agreements are enforceable.

Mothers should also have information about the ways that placing a child for adoption may affect them in the short and long term. The CWLA standards advise that "[i]n all instances, birth parents and other family members should receive counseling to help them understand the grief and loss" that they may experience.136 While studies are limited, those that have been conducted "suggest that relinquishment is a very stressful event and that many mothers are haunted by it for years later."137 The studies constitute "a growing body of recent research data which has supported the claims of birth parents that relinquishing a child is indeed a profound loss experience, and that

birthparents, adoptees, adoptive parents, other adoption affected people and professionals. CUB's purposes are providing mutual support for coping with the ongoing challenges of adoption, working for adoption reform in law and social policy, preventing unnecessary family separations, assisting adoption separated relatives in searching for family members, and educating the public about adoption issues and realities. Concerned United Birthparents, What is CUB?, at http://www.cubirthparents.org/page9.htm (last visited May 10, 2005).

134. 2A ROLES, supra note 124, at 18.
135. See GRITTER, supra note 97, at 217; 2A ROLES, supra note 124, at 18.
136. CWLA STANDARDS, supra note 9, at 28.
137. TRISEIOTIS ET AL., supra note 81 at 99; see also Diana S. Edwards, American Adoption and the Experiences of Relinquishing Mothers, PRACTICING ANTHROPOLOGY, Winter 1999, at 18 (discussing her research documenting birth mothers' experiences).
this loss even can have long-term deleterious results.\textsuperscript{138} Researchers have found among "birth mothers unresolved anger, pathological mourning, guilt, searching in waking life or in dreams and memories, [and] being stirred by anniversaries such as the child's birthday. Continuing distress, cycles of blame, guilt and personal anguish arising from the parting decision are some of the lingering feelings."\textsuperscript{139} Similarly, long-term effects have been reported both by counselors who have interviewed and worked with birth mothers and by birth mothers who have written about their experiences. For example, adoption counselor and author James L. Gritter reports that "few . . . birthparents are prepared for the grief they encounter. Most find it far more forceful and complex than they anticipated. They are amazed at the intensity of its grip and dismayed at its staying power."\textsuperscript{140} In a similar vein, CUB advises mothers, "Placing your child for adoption profoundly and irreversibly changes your life. . . . After the first years, the grief is not static; while never fully disappearing, it does ebb and flow."

Offering a more positive view of the effects on birth mothers, some U.S. research, which is primarily focused on teen women, "has suggested educational and economic benefits for single women when they choose adoption instead of parenting and important benefits for their children when they are placed with adoptive families."\textsuperscript{141} In addition, the possible negative


\textsuperscript{139} TRISELIOTIS ET AL., supra note 81, at 45 (citing P. BOUCHIER ET AL., PARTING WITH A CHILD FOR ADOPTION (1991); D. HOWE ET AL., HALF A MILLION WOMEN (1992); WINKLER & VAN KEPPEL, supra note 138; R. Pannor et al., Open Adoption as Standard Practice, 63 CHILD WELFARE 245 (1984); S. Wells, What Do Birth Mothers Want?, 17 ADOPTION & FOSTERING 22, 22-32 (1993)).

\textsuperscript{140} Grittter, supra note 97, at 109; see, e.g., JAYNE E. SCHOOLER & BETSIE L. NORRIS, JOURNEYS AFTER ADOPTION: UNDERSTANDING LIFELONG ISSUES 84 (2002) ("She may not feel her grief initially, but will find it surfacing later in her life at major milestones. 'The grieving never stopped. It only went below my threshold of awareness for periods of time,' said Carol Schaefer, a birthmother and author . . . .").

\textsuperscript{141} LOWE, supra note 133, § 12.

\textsuperscript{142} 3 FREUNDLICH, supra note 3, at 86 (citing F. FURSTENBERG, JR. ET AL., ADOLESCENT MOTHERS IN LATER LIFE (1987); Greg J. Duncan & Saul D. Hoffman, Teenage Welfare Receipt and Subsequent Dependence Among Black Adolescent Mothers, 22 FAM. PLANNING PERSP. 16
effects on birth mothers may be lessened when they have had sufficient resources and support to make an informed and deliberate choice, as discussed throughout this Part about best practices. Based on many years of work in adoption, Gritter observes that "the degree of control birthparents have over the situation powerfully affects their long-term satisfaction with the arrangement."143 Practitioner and researcher John Triseliotis adds, "It is now recognized that many of the issues raised by birth mothers with researchers might have been resolved if they had had the support of trained and experienced professionals who were not directly involved with the adoption decision."144 Social worker Patricia Roles agrees that when "a birthparent can take responsibility for her decision and feel that she has a choice," she can "incorporate the experience into her adult life without being hindered by regret, blame or anger."145

Mothers also should have information concerning the effects of adoption on children. As Gritter writes, "advantages [of adoption for the child] are accompanied by significant losses. . . . A pregnant woman considering adoption for her child needs to consider the ratio of losses and gains posed by the adoption choice."146 For the adopted person as well as for the birth and adoptive parents, adoption is now thought to be "a lifelong process."147 Psychologist and researcher David M. Brodzinsky concludes that while "most adopted children appear to cope quite well with the challenges, conflicts, and demands of adoptive family life," a review of the limited research available suggests that "adopted children are at an increased risk for psychological and academic problems in comparison to their non-adopted counterparts."148 Adopted children are thought to face some unique developmental challenges.

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143. Gritter, supra note 97, at 89; see also id. at 196 (discussing the birth mother’s perspective of owning her decision).

144. Triseliotis et al., supra note 81, at 99; see also Winkler et al., supra note 138, at 50-51 ("Damaged self-esteem and a strong sense of worthlessness (complicated by shame and guilt) resulted from the way in which their needs and experiences were ignored by members of the adoption community.").

145. 2A Roles, supra note 124, at 19.

146. Gritter, supra note 97, at 87.

147. Winkler et al., supra note 138, at ix; see also Naomi Cahn, Perfect Substitutes or the Real Thing?, 52 Duke L.J. 1077, 1148-54 (2003) (discussing “adoptive families and assimilation”).

"[U]nlike children growing up with their birth parents," Triseliotis observes, "those adopted have to accomplish or be aided to accomplish a number of additional psychological tasks, which most of them do successfully."149 Those tasks include attaching to new parents, understanding the meaning of adoption, acknowledging the differences involved in having two sets of parents, and "dealing with the sense of loss of the original parents and the element of rejection that it conveys."150 Adoptees in traditional closed adoptions wonder about their birth parents and why they were placed for adoption.151 According to psychologist Robin C. Winkler, their "fantasies vary on a continuum; they may be occasional and have little significance for behavior, or they may be constant preoccupations and be of great significance to many areas of functioning."152 It is widely believed, Triseliotis writes, that adoptees can best resolve their identity issues by acknowledging rather than denying their "biological roots and heritage, including race and ethnicity."153

Counseling services for mothers, whenever possible, should include communication and consultation with the fathers and with family members. When there is disagreement among family members, the CWLA recommends that "skillful counseling should be provided to help all parties reach agreement whenever possible."154 Studies of unmarried pregnant women's decisionmaking have reported that the women's parents are important influences.155 In Triseliotis's view of desirable practices, "[s]ocial workers can use mediation and other skills to help defuse conflict and promote a better family relationship and/or create a generally more supportive environment for

149. TRISELIOTIS ET AL., supra note 81, at 35. Another book for practitioners explains, "While all children follow the same path of development, adopted children are exposed to a unique set of tasks which tend to complicate their development." WINKLER ET AL., supra note 138, at 85.
150. TRISELIOTIS ET AL., supra note 81, at 35.
151. WINKLER ET AL., supra note 138, at 11.
152. Id. For literature on adoptees' development and adjustment, see, for example, ALEXINA McWINNIE, ADOPTED CHILDREN AND HOW THEY GROW UP (1967); RONALD J. NYDAM, ADOPTEEs COME OF AGE (1999); and ELINOR B. ROSENBERG, THE ADOPTION LIFE CYCLE: THE CHILDREN AND THEIR FAMILIES THROUGH THE YEARS (1992).
153. TRISELIOTIS ET AL., supra note 81, at 14; see also H. DAVID KIRK, SHARED FATE: A THEORY OF ADOPTION AND MENTAL HEALTH (1964) (analyzing a range of acceptance issues in the adoptive relationship).
154. CWLA STANDARDS, supra note 9, at 29.
155. Freundlich reports on research in the 1980s and early 1990s involving pregnant teen women and showing that their mothers most influenced the decision. 3 FREUNDLICH, supra note 3, at 78. She describes research published in 1996 involving pregnant women ages fourteen through thirty-six that also identified the involvement of their parents as a "key factor," but unlike the earlier studies, in the direction of choosing parenting rather than adoption. 3 id. at 80.
the mother and the expected baby, without taking the decision away from the birth parent."  

In addition to providing mothers with the kinds of information discussed above, counselors should understand "the ambivalence and denial that birth parents often experience."  

Pertman suggests that

[o]ne of the most productive functions adoption professionals can serve is to catch the warning signs of a change of mind as early as possible. Doing so benefits everyone concerned—the pregnant women who endure less angst by making their determinations sooner rather than later, and the adoptive parents who are spared the heartbreak of anticipating children who will never arrive.  

For mothers, Gritter observes, "Seldom is adoption selected as a true preference—it almost always involves a pronounced element of necessity. The idea of adoption . . . only emerges as a possible outcome when something is seriously askew."  

Statistics support the observation that adoption is not a "preferred" option for unmarried pregnant women. Between 1989 and 1995, the percentage of unmarried white women placing children for adoption was approximately 1.7%, and the percentage for African-American women was even smaller.  

Among women today who believe they have settled on adoption before the birth, it is estimated that "at least half ultimately discover that they can't go through with it once they actually see their babies as living, breathing realities.

B. Structure of Adoption Services

Even when counseling is available and includes the fathers and family members, there is an inherent troubling potential for imposition of biases and conflicts of interest. According to the National Association of Social Workers Code of Ethics, the "best-known ethics code to which social workers in the United States subscribe," social workers have a fundamental responsibility to facilitate their clients self-determination, expand choice and opportunity

156. TRISELIOTIS ET AL., supra note 81, at 96.  
157. CWLA STANDARDS, supra note 9, at 28-29; see also Gritter, supra note 97, at 91-107 (discussing the ambivalence of birth parents).  
158. PERTMAN, supra note 66, at 109.  
159. Gritter, supra note 97, at 94.  
161. PERTMAN, supra note 66, at 109.  
163. See NAT'L ASS'N OF SOC. WORKERS, CODE OF ETHICS § 1.02 (1999).
for all people, and, when necessary, “take reasonable steps to ensure” that their employers’ practices are consistent with the code of ethics. Complicating the adoption counselor’s task is the fact that in a crisis, the counselor has the potential to exercise “immense power.” “There are times, especially when frustration runs high, when the decisionmaker would love to have some powerful, decisive person come along and take the decision out of her hands.”

As Roles points out in her guide for counselors, if a “young woman must make her own decision because she has to live with it for the rest of her life,” then the ideal counselor is “a neutral, unbiased [one] who has no vested interest in the outcomes of her decision.” She continues, “If a client feels pressured toward any particular choices, a power struggle will result where the client will be forced to defend her position, rather than consider all the options.” Gritter observes, “To the worker who is trying to arrange adoption, [the woman’s] ambivalence is an exasperating, frustrating impediment to overcome. To the worker striving to help the expectant mother settle on the best decision, it is the central issue, a normal and expected aspect of the work to be done.”

Counselors, agency officials, and intermediaries of course may have strong biases based on their philosophical, religious, or social views. They may favor family preservation, regardless of the circumstances, or they may believe adoption is invariably the best option when a mother is unmarried or has limited economic and social support. The views of the volunteers and professionals in the child welfare community have varied over time. In the late nineteenth and early twentieth century, the expectation of child welfare workers was that unmarried pregnant women would keep their children. According to historian Barbara Melosh, child welfare workers in the 1920s and 1930s were reluctant advocates of adoption at a time when increasing numbers of couples sought to adopt, but workers later endorsed adoption as a solution for a child born out of wedlock. After World War II, “adoption became social policy,” and “[r]eversing their former reluctance to separate single mothers and their children, social workers came to consider adoption the best solution for unwed mothers and their children.” Their “zeal for relinquishment was driven partly by the conviction that women pregnant out

164. Id. § 6.04(b).
165. Id. § 3.09(d).
166. TRISELIOCS ET AL., supra note 81, at 97.
167. GRITTER, supra note 97, at 103.
168. 2A ROLES, supra note 124, at 14.
169. 2A id.
170. GRITTER, supra note 97, at 103-04.
171. See MELOSH, supra note 75, at 17-20; see also Naomi Cahn, Birthing Relationships, 17 WIS. WOMEN’S L.J. 163, 179-84 (2002) (discussing the change in attitude towards adoption that began in the 1920s).
172. MELOSH, supra note 75, at 105-06.
of wedlock were by definition unfit mothers" whose pregnancies were evidence of neuroses.\textsuperscript{173} Although professional ethics, then as now, dictated that social workers support pregnant women in reaching their own decisions, social workers "believed strongly that adoption was the best decision for most, and this commitment inevitably colored their relationships with women considering relinquishment."\textsuperscript{174}

Another factor that can affect the neutrality of counseling is the conflict that arises from providing services to birth parents and adoptive parents simultaneously. It is natural for service providers to attend to the clients who are paying for the services—the prospective adoptive parents,\textsuperscript{175} and it is easier for many providers to sympathize with the adoptive parents, who are more established in life and have struggled to conceive a child. CUB advises pregnant women and new mothers not to expect that an agency or a pregnancy counselor "will have only your best interest in mind. They do not, and they cannot. Adoption agencies, like it or not, have to make money to operate. The paying client is the adoptive parent, so services are usually geared toward them."\textsuperscript{176} Gritter observes that professionals involved in adoption "[m]ost of the time ... find it easier to identify with adoptive parents than with birthparents, who are typically less established."\textsuperscript{177} Roles's guide for counselors concludes that an "agency with a vested interest in a client's decision ... opens itself to potential abuse and neglect of birthparents' rights."\textsuperscript{178} Triseliotis goes as far as to conclude that a social worker involved in arranging an adoption should not simultaneously work with a birth parent choosing between different alternatives.\textsuperscript{179} "In other words, the birth parents need to have their own separate social worker. This can help to preserve objectivity, impartiality and continued support where needed."\textsuperscript{180}

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\textsuperscript{173} Id. at 110.\\
\textsuperscript{174} Id. at 123.\\
\textsuperscript{175} See supra Part III.\\
\textsuperscript{176} LOWE, supra note 133, § 6.\\
\textsuperscript{177} Gritter, supra note 97, at 210.\\
\textsuperscript{178} 2A ROLES, supra note 124, at 13.\\
\textsuperscript{179} TRISELIO{}TIS ET AL., supra note 81, at 95.\\
\textsuperscript{180} Id. The availability of peer support is also recommended for birth parents considering placing their children for adoption. Triseliotis notes, for example, that "[i]n some instances it will be helpful for the parent to meet others who have faced the same dilemma and to discuss the advantages and disadvantages of the various outcomes." Id. at 97. Roles agrees that referring birth parents "to support networks or groups for birthparents can be helpful." 2A ROLES, supra note 124, at 20; see also WINKLER ET AL., supra note 138, at 51 (suggesting that birth parents meet with others who can "relate their personal experiences"); LOWE, supra note 133, § 7 (suggesting that birth mothers talk to women who have been through the relinquishment process).
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C. Legal Representation

It is in independent adoptions, the most common type of domestic infant adoption,181 that questions about legal representation most frequently arise. Is it permissible for one lawyer to represent both the adoptive and birth parents? Should the parties be required to have separate representation in all cases or only in cases in which birth parents are minors or under some other disability? In an informal opinion in 1987, the American Bar Association Standing Committee on Ethics and Professional Responsibility concluded that a lawyer may not ethically represent both parties.182 Dual representation is expressly permitted, however, in at least two states, Kansas183 and California.184 It is expressly prohibited by statutes in a number of states, including Kentucky, Maine, Maryland, Michigan, Minnesota, New York, and Wisconsin,185 and Florida prohibits intermediaries from providing legal representation or advice to birth parents.186 Louisiana requires separate representation in all private adoptions,187 and a small number of states, including Kansas, Maryland, Montana, and Vermont, require separate representation for minor parents.188

181. See supra Part III.
183. In re Adoption of Baby Girl T., 21 P.3d 581, 589 (Kan. Ct. App. 2001) (noting that dual representation is permitted if certain conditions are met).
184. CAL. FAM. CODE. § 8800(c)-(d) (West 2004). In California an attorney must have written consent of the parties before engaging in dual representation, but the attorney may not engage in dual representation “whenever a birth parent displays the slightest reason for the attorney to believe any controversy might arise.” CAL. FAM. CODE. § 8800(c). If a conflict arises after an attorney begins dual representation, the attorney must withdraw. CAL. FAM. CODE. § 8800(c). In addition, birth parents have the right to an independent attorney to whom prospective adoptive parents may be required to pay reasonable attorney’s fees up to $500 unless a higher fee is agreed to by the parties. CAL. FAM. CODE. § 8800(d).
185. KY. REV. STAT. ANN. § 199.492 (Michie 1998); ME. REV. STAT. ANN. tit. 18-A, § 9-106(a) (West 1964); MD. CODE ANN., FAM. LAW § 5-323(e) (1999); MICH. COMP. LAWS ANN. § 722.956(c)(ix) (West 2002); MINN. STAT. ANN. § 259.47 (West 2003); N.Y. SOC. SERV. LAW § 374(6) (McKinney 2003); WIS. STAT. ANN. § 48.837(8) (West 2003).
186. FLA. STAT. ANN. §§ 63.032, 63.085 (West 1997).
187. LA. CH. CODE ANN. art. 1121 (West 2004).
188. KAN. STAT. ANN. § 59-2115 (1994); MD. CODE ANN., FAM. LAW § 5-323(a)(1) (appointment of counsel also required for parent rendered by disability incapable of consenting and effectively participating in proceedings); MONT. CODE ANN. § 42-2-405(2) (2003); VT. STAT. ANN. tit. 15A, § 2-405(c) (2002). Alabama and Arkansas require appointment of a guardian ad litem for a minor birth parent. ALA. CODE § 26-10A-8 (Supp. 2004); ARK. CODE ANN. § 9-9-220 (Michie 2002). Maine requires the court to appoint an attorney for an indigent birth parent who is a minor, unless the birth parent refuses or “the court determines that representation is unnecessary.” ME. REV. STAT. ANN. tit. 18-A, § 9-106(b). New Hampshire requires representation if a birth parent is incompetent, mentally ill, or retarded. N.H. REV. STAT. ANN. § 170-B:5(II) (2002).
In practice, when separate representation is not required, birth parents generally are unrepresented. There are potential risks for mothers without representation, but as the debates about representation reveal, there also are risks when they are represented by either the adoptive parents' lawyer or separate counsel paid for by the adoptive parents.

Dual representation proponents argue that a conflict of interest between the parties is "often more hypothetical than real" because both parties "are usually strongly in favor of the adoption." Writing about how dual representation is permitted under some circumstances in California, lawyer Jed Somit also contends that separate representation increases costs and introduces the specter of runaway fees if the adoptive parents are liable for the birth parents' attorney's fees without limit. Separate representation "makes or at least stigmatizes as adversarial what is ideally a cooperative process." He offers the disheartening additional argument that, despite its dangers, dual representation may be preferable to separate representation because the birth parents' attorney is usually paid less and may provide inferior representation. In any event, it is claimed that "experienced adoption attorneys avoid dual representation" in the "[m]any situations" in which it is not suitable. If dual representation has been undertaken and a conflict arises, the lawyer should withdraw and the parties can then obtain separate counsel, or, as expressly permitted in some state court decisions, the lawyer may terminate the dual representation and choose which party to continue representing.

Opponents of dual representation, including the ABA, maintain there are "inherent conflicts" that "cannot be reconciled" between the biological parents' right to withhold or revoke consent and the prospective adoptive

189. "In the vast majority of adoptions where the child is adopted on the basis of a consent to adoption, the petitioners are represented by a lawyer but the consenting parties are not." Gitlin, supra note 73, at 22.


191. Jed Somit, Independent Adoptions in California; Dual Representation Allowed, in 2 Adoption Law and Practice, supra note 6, § 5.04(4)(c).

192. Id.

193. Id.

194. Id.

195. Id.

196. See id.

parents’ goal of securing consent and avoiding revocation.\textsuperscript{198} In this view, dual representation violates Rule 1.7(a) of the ABA Model Rules of Professional Conduct, which prohibits representing a client “if the representation of [that] client will be directly adverse to another client,” unless the lawyer reasonably believes it will not be and each client consents after consultation.\textsuperscript{199} Conflicts may arise over not only the ultimate issue of consent but also issues of financial support, the timing of consents and placements,\textsuperscript{200} and if contemplated by the parties, the nature and extent of future contact. The ability of parties to knowingly consent to dual representation is doubted, given the emotional and stressful nature of their situations: “It is difficult to believe [that they] can really grasp the essential point: that the same lawyer is advising the biological mother and the couple who desperately want to obtain her child.”\textsuperscript{201} Also, consent cannot be obtained from two interested parties: that is, the child being adopted and the state.\textsuperscript{202} Finally, the Model Rules indicate that costs for services performed by two lawyers should not exceed the cost of the same services provided by one lawyer. “If the savings by retaining a single attorney is obtained at the sacrifice of adequate, thorough representation of each party’s separate interest, it would seem a dubious benefit.”\textsuperscript{203}

Does any expression of doubt or ambivalence by a mother mean that the attorney must cease dual representation? Will a mother’s interests be compromised if a conflict arises and dual representation ceases when a revocation period is about to expire? If there has been dual representation, will adoptive parents be vulnerable to a challenge to the adoption based on a claim of undue influence or duress? If a conflict arises, is it permissible for the attorney to continue to represent the adoptive parents who are paying for the legal services, even though the dual representation has “removed the communications of the parties to one another and to the attorney from the privileged category”?\textsuperscript{204} If it is not permissible for the attorney to continue to represent one of the parties, will costs considerably increase in situations in which dual representation has been undertaken and terminated?

Those who favor requiring separate representation, whether in all cases or in a limited class of cases, emphasize the important nature of the adoption proceeding, the typical imbalance of power between birth parents and adoptive parents, the possibility of conflicts of interest, and the fact that many birth

\textsuperscript{198} ABA Informal Op., \textit{supra} note 182.
\textsuperscript{199} MODEL RULES OF PROF’L CONDUCT R. 1.7 (2002).
\textsuperscript{200} See Katherine G. Thompson & Douglas H. Reiniger, \textit{Private-Placement Adoptions in New York; Separate Representation Required}, in \textit{2 ADOPTION LAW AND PRACTICE, supra} note 6, § 6.01(3)(a).
\textsuperscript{201} \textit{Id.} § 6.01(3)(b).
\textsuperscript{202} See \textit{id.}
\textsuperscript{203} \textit{Id.} § 6.01(7).
\textsuperscript{204} See Arden v. State Bar of Cal., 341 P.2d 6, 11 (Cal. 1959).
mothers change their minds after the birth. Lawyers Katherine G. Thompson and Douglas H. Reiniger, for example, argue for separate representation because most mothers are young, lack financial resources, and are in such stressful, painful situations that their "capacity for rational decision-making at this time is not completely reliable." Prospective adoptive parents, in contrast, tend to be "somewhat older than most biological parents," are "usually well above-average in income and education," and are thus more financially able to retain an attorney. Even with separate representation, there is a danger of the mother's attorney being too closely associated with the prospective adoptive parents or their attorney if the mother's attorney has been recommended by the adoptive parents' attorney or is paid by the adoptive parents. The danger is described in a proposed model disclosure form:

There is a risk that since the money is coming from [Adopting Parents] through [Adopting Parents' Attorney's] office, I will be more attentive to their needs, and more cooperative with that law office, than I am to your interests . . . . However, I am an experienced attorney, and I believe I can represent the interests of my clients notwithstanding getting paid (or not getting paid) by another.

Reflecting a similar concern is the advice that birth parents obtain an attorney through referrals independent of the adoptive parents' attorney. "[T]he attorney for the adoptive parents should have little or no control over what lawyer represents the birth parent(s). . . . If the adoptive parents' attorney does

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205. See Thompson & Reiniger, supra note 200, § 6.01(2)(a)(iii).
206. Id. § 6.01(2)(a)(ii).
207. Id. § 6.01(2)(b)(i).
208. Id. § 6.01(2)(a)(ii).
209. Somit, supra note 191, § 5.04(3)(b). A similar concern was articulated by an Ohio appellate court:

We are compelled to emphasize that while there is no evidence of any impropriety as to the fee arrangement here, such may not always be the result. The better practice is that the birth mother be solely responsible for her fees, or if the adoptive parents agree to the payment of the birth mother's attorney fees, such payments must not be contingent upon the outcome of placement or adoption.

In re Adoption of Infant Girl Banda, 559 N.E.2d 1373, 1383 (Ohio Ct. App. 1988). Similarly, in a case involving an analogous issue, a justice of the North Dakota Supreme Court noted in a concurrence:

[T]he adoption agency is in the business, if you will, of obtaining babies for adoption . . . . While an agency's advising or attempting to persuade a parent to consent to termination of parental rights does not constitute duress . . . . a mother contemplating termination of her parental rights needs distance from the agency . . . . The means available to insure that distance is an attorney . . . not hired or paid by the adoption agency.

In re D.J.H., 401 N.W.2d 694, 704 (N.D. 1987) (Levine, J., concurring specially) (citations omitted).
participate in the selection process, he should give the birth parent at least three names of experienced attorneys . . .”).

D. Timing of Consents

There is nearly universal agreement that a woman should not consent to adoption before the birth because she cannot be sure of what her feelings will be after the child is born. Reportedly, some one half of the women who believe they have settled on adoption change their minds after the birth. The Wyoming Supreme Court noted that “[e]xperience has evidenced a host of cases in which a mother plans to give her unborn child to adoptive parents, only to change her mind after going through child-birth and the resulting mother-child attachment.” The guide for counselors published by the CWLA advises counselors to make sure birth parents understand that they are the child’s legal parents. “This means that they can see, hold, feed, or care for their baby. The level of contact is up to them. Many young people feel intimidated by those in authority and might not realize that they have these choices.”

Pertman reports that “[b]irth mothers typically want to spend time with their babies, and virtually all mental-health and social-work professionals advise them to do so. Some just hold their children for a few minutes, while others need days or weeks.” Citing research showing “that people need to face the searing issues in their lives in order to work through them with a minimum of psychic damage,” he suggests that “women who say good-bye without first saying hello generally can’t fully process their decisions and therefore never come to terms with them.” The birth parents’ organization CUB recommends that women either parent their children for a week or two or consider a brief period of foster care. For mothers who are minors, a foster care placement for mother and child together is a possibility.

CUB contends that women who sign irrevocable consents in the hospital shortly after birth are “rushed into signing without a chance to process all of the information.” CUB categorically advises women, “[N]ever sign papers

211. See supra Part IV.A.
212. PERTMAN, supra note 66, at 109.
214. 2A ROLES, supra note 124, at 17.
215. PERTMAN, supra note 66, at 213.
216. Id.
217. See LOWE, supra note 133, § 10.
218. See, e.g., Ala. Dept. of Human Res., Foster Care for Teen Mom[s] & Their Children, at http://www.dhr.state.al.us/page.asp?pageid=470 (last visited May 5, 2005) (noting that by providing care for a teenage mother and child, a foster family offers “a better environment in which a teenage mom can begin her role as a parent”).
219. LOWE, supra note 133, § 10.
in the hospital. . . . Adoption is a serious matter, one that should be finalized only in a courtroom or a legal environment, not a recovery bed.\textsuperscript{220} This advice is consistent with two studies in the United Kingdom concerning timing of consents. The researchers in those studies concluded that "most mothers saw six weeks after birth as a reasonable time" to be asked to give consent, without opportunity to revoke.\textsuperscript{221} Infants, of course, can be placed in the custody of their prospective adoptive parents as soon as the parties feel confident that the birth parents are unlikely to change their minds. For example, as Triseliotis notes, a number of agencies in Scotland place newborns directly from the hospital even though the mother has six weeks to change her mind, "provided the mother's decision about the future of her baby seem[s] final."\textsuperscript{222}

While foster care before placement is disfavored compared with care by the baby's mother,\textsuperscript{223} no research or historical experience suggests that a period of a few days to a few weeks in foster care damages newborn babies who then return to their birth families or move into secure adoptive placements. "Attachment behavior" usually begins to appear in infants between six and nine months of age,\textsuperscript{224} according to the studies described in John Bowlby's influential works on attachment and the grief children experience when separated from adults to whom they are attached. Bowlby notes that "when infants of twenty-six weeks and less are placed in a strange place without [their] mother[s] they appear to accept strangers as mother-substitutes without noticeable change in level of responsiveness and show little or none of the protest and fretting typical of the slightly older child."\textsuperscript{225} In fact, "[t]hough uprooting and re-attachment carry many risks," recent studies "suggest that the majority of children, especially when under . . . the age of about 9, seem to re-attach themselves to new families and do well."\textsuperscript{226} In international adoptions of very young children, children typically join their adoptive families weeks or months after birth.\textsuperscript{227} In domestic adoptions in the

\textsuperscript{220.} Id.
\textsuperscript{221.} TRISELIOTIS ET AL., supra note 81, at 98. The mothers were interviewed shortly after the birth of their children and again six months later. Id.
\textsuperscript{222.} Id. at 62.
\textsuperscript{223.} See id. at 63 ("Temporary placement in a foster home is not good from the child's point of view, but this is sometimes inevitable to allow more time to the mother in which to make up her mind or for the father to be located and to make up his mind.").
\textsuperscript{224.} 1 JOHN BOWLBY, ATTACHMENT AND LOSS 200-201 (2d ed. 1982).
\textsuperscript{225.} 3 id. at 434 (1980). "From the age of seven months onwards however a child in this situation not only notices the change but, by protest and crying and also by persistent fretting and rejection of the strange nurses, indicates his intense dislike of it." 3 id.
\textsuperscript{226.} TRISELIOTIS ET AL., supra note 81, at 36.
\textsuperscript{227.} For example, the author of Fast Track Adoption explains to prospective adoptive parents that a disadvantage of international adoption is the fact that "because complexities in law and procedures can produce many delays, there are few opportunities to adopt a newborn." BURNS, supra note 93, at 11.
past, many children were kept in care for six to nine months before placement in an effort to insure their physical and mental fitness. As noted in Melosh's historical account,

-wow while early placements appear to be typical now in the private adoption of domestically born infants, periods in temporary foster care were common in the past, both as a "safe-guard against hasty and ill-considered relinquishments" and to study the child's development in order to make sure that the child was fit to be adopted.

V. STATE LAWS

The legal rules on the timing of consents are ultimately a compromise between the interest in protecting biological mothers from making hasty or ill-informed decisions at a time of great physical and emotional stress, and the interest in expediting the adoption process for newborns.

Joan Heifetz Hollinger

The variety of state laws presents a complex picture, but in sharp contrast to the laws of many other countries, a majority of the laws provide for the possibility of irrevocable consent within a week of the birth. In recent years, the amendments to state adoption law timing requirements have generally shortened periods of time before which mothers may give consent and during which they may revoke. A majority of the laws do not require that consent be given in court or before an official appointed by a court or another state official. More than half of the states have some kind of statutory provision regarding counseling. A handful of states require separate representation for birth parents or for birth parents who are minors. The following bulleted list provides a summary of state laws governing mothers' consents.

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229. Id. Melosh describes one agency's practices in the 1930s which "did not accept relinquishments until the babies had been determined 'fit' for adoption. . . . Therefore, the agency never placed children under six months of age; usually, children who came into the bureau's care as newborns were not placed in adoptive homes until they were nine months to a year old." Id.; see also id. at 38 ("Until after World War II, child welfare professionals counseled that adoptive placements should not take place until the children were at least six months old, allowing time for close observation and scientific testing.").
230. Joan Heifetz Hollinger, Consent to Adoption, in 1 ADOPTION LAW AND PRACTICE, supra note 6, § 2.11(1)(a).
231. See supra Part II.
232. For a history of consent laws, see Cahn, supra note 147, at 1118-26.
233. See supra Part IV.C.
234. In this bulleted list and throughout this Article, a consent is identified as revocable rather than irrevocable only when a mother has an unqualified right to revoke, not a "right to
In nine states, the mother may give irrevocable consent any time after birth, and in a number of those states, consent may be given even before birth if it is followed by a post-birth reaffirmation or ratification.

In three states, the mother may consent before birth. In Colorado she may revoke within four days after the birth; in Alabama she may revoke within five days; and in Washington she may revoke until the court approves the consent after a hearing, which may not be held sooner than two days after the birth.

In twenty-one states, the mother's consent is irrevocable when given but cannot be given for a specified period after birth: twelve hours in Kansas, twenty-four hours in Utah, two days in four states, three days in ten states, four days in Massachusetts, five days in Louisiana, seven days in Michigan, and fifteen days in Rhode Island.

In Wisconsin the "revoke" that merely triggers a best interests contest between the mother and the prospective adoptive parents. See infra Part VI.C. (describing "best interests" provisions and contests).

The total number of states in this bulleted list exceeds fifty because it includes the District of Columbia and because a small number of states have different rules for agency and independent adoptions and therefore appear on the list more than once. The numbers of states in different categories are excellent, useful approximations but are unlikely to be one hundred percent accurate because of possible changes in state laws and because they are based on two published summaries of state law, with examination of state statutes in instances in which the summaries are either unclear or inconsistent.

235. These states are California (in agency adoptions), Hawaii (consent to adoption irrevocable after placement), Idaho, Indiana, New York, North Dakota, Oklahoma, South Carolina, and Wyoming. 1 ADOPTION LAW AND PRACTICE, supra note 6, at app. 1-A; Nat'l Council for Adoption, supra note 6; see also HAW. REV. STAT. § 578-2 (2005) (party executing consent not required to appear in court); IDAHO CODE § 16-1506(2) (Supp. 2004) (same as Hawaii); In re Steve B.D., 723 P.2d 829, 835 (Idaho 1986) (holding that when consent is executed and the child is delivered to prospective adoptive parents, revocation triggers only a best interest inquiry).

236. HAW. REV. STAT. §§ 571-61, -63 (2005) (providing that parents may petition to terminate their parental rights after the sixth month of pregnancy, but judgment may not be entered until after birth and a written reaffirmation); N.D. CENT. CODE §§ 14-15.1-01 to -03 (2004) (providing that when the adopters have been selected by the birth parent, consent may be executed and filed before birth, with a hearing held no sooner than forty-eight hours after birth at which the court may require the birth parent to be present or may determine validity of consent without the birth parent present); People ex rel Anonymous v. Anonymous, 530 N.Y.S.2d 613, 617 (N.Y. App. Div. 1988) (suggesting that pre-birth consent may be reaffirmed or ratified after birth); see infra notes 299-304 and accompanying text (discussing an Indiana case in which the mother ratified her pre-birth consent after the birth).

237. COLO. REV. STAT. § 19-5-103.5 (2004); WASH. REV. CODE § 26.33.090 (2000); 1 ADOPTION LAW AND PRACTICE, supra note 6, at app. 1-A; Nat'l Council for Adoption, supra note 6.

238. Florida (or when notified in writing of being fit to be released from the hospital, whichever is earlier), Nebraska, New Mexico, Texas (agency adoptions), (two days); Arizona (or pre-birth, with post-birth ratification), Illinois, Maine, Mississippi, Montana, Nevada, New York, South Dakota, Oklahoma, South Carolina, and Wyoming.
irrevocable consent is given at a court hearing that is set within thirty days of a request for the hearing, but not before the birth.\textsuperscript{239}

- In seven states, the consent may be given immediately after birth but is revocable without qualification for a specified period: seven days in North Carolina; ten days in Arkansas and Georgia; fourteen days in Delaware; thirty days in Maryland; and in Alaska, until the court in which the adoption petition has been filed issues an order approving a guardian.\textsuperscript{240}

- In thirteen states, consent may not be given for a specified period after birth, and once it is given it may be revoked without qualification for a period of time. The revocation periods are measured in fixed increments in most of the states but in others are pegged to the happening of events, such as court approvals of consents. For those states in which the minimum period of combined time can be calculated, the number of days before which consent may become irrevocable ranges from seven to approximately thirty-five days.\textsuperscript{241} Under the federal Indian Child Welfare Act, consent given within ten days of birth of an Indian child is invalid, and a valid consent may be withdrawn "at any time" prior to the entry of a final decree of adoption.\textsuperscript{242}

- Ten state statutes require, either in some or in all types of adoptions, the

\begin{itemize}
  \item Hampshire, New Jersey, Ohio, West Virginia, (three days). \textit{1 Adoption Law and Practice, supra} note 6, at app. 1-A; Nat'l Council for Adoption, \textit{supra} note 6; \textit{see infra} notes 262-65, 407-08 and accompanying text (describing current Texas and Florida law); \textit{see also In re Adoption of Kreuger, 448 P.2d 82, 86 (Ariz. 1968)} (providing that voidable pre-birth consent "may be ratified by a subsequent act which sufficiently manifests a present intention to consent").
  \item WIS. STAT. ANN. §§ 48.41, .837 (2003).
  \item 1 Adoption Law and Practice, \textit{supra} note 6, at app. 1-A; Nat'l Council for Adoption, \textit{supra} note 6; \textit{see infra} note 255 and accompanying text (providing more information on current North Carolina law).
  \item \textit{Iowa} (seven days); Texas (in independent adoptions, twelve days, unless document that specifies the consent is irrevocable for a specified period up to sixty days); District of Columbia (thirteen days); Tennessee (fourteen days); Minnesota (approximately seventeen days, including a revocation period of ten working days); Vermont (twenty-two and a half days); Kentucky (twenty-three days); Virginia (twenty-five days); Pennsylvania (thirty-three days); California (in independent adoptions, the mother may not consent until discharged from the hospital or if her stay in the hospital is longer than five days, until she obtains from a physician a statement of competence to consent, plus a thirty-day revocation period, unless it is waived); Missouri (mother may not consent for two days, with consent revocable until reviewed and accepted by a judge); Connecticut (two days must pass before mother may consent, which remains revocable until approved by a court); South Dakota (mother may not consent for five days, revocable until final decree). \textit{1 Adoption Law and Practice, supra} note 6, at app. 1-A; Nat'l Council for Adoption, \textit{supra} note 6; \textit{see infra} notes 258-61, 262-65, 271-73 and accompanying text (describing the current laws in Tennessee, Texas, and Pennsylvania).
\end{itemize}
birth mother’s consent to be taken in the presence of a judge, juvenile court referee, or a court’s authorized agent. The federal Indian Child Welfare Act requires execution of consent in writing before a judge.

Ten states require counseling for birth parents in some or in all adoptions. Some of those states specify requisite amounts of counseling and some specify the timing of the counseling. Twenty states have statutory requirements that birth parents in some or all types of adoptions be made aware of the fact that counseling is available, with two states specifying counseling by a licensed adoption agency. Only a handful of these states specify how much counseling should be offered or mandate the counselor’s qualifications or affiliations.

243. Alabama (pre-birth consent, probate judge); Idaho (district judge, magistrate of a district court, or equivalent judicial officer); Maine (probate judge); Michigan (judge or juvenile court referee); New Mexico (judge, unless parent is represented by independent counsel); North Dakota (court); Oklahoma (judge); Vermont (probate judge or court’s authorized agent); Virginia (independent adoption, court); Wisconsin (court). 1 ADOP'TION LAW AND PRACTICE, supra note 6, at app. 1-A; Nat’l Council for Adoption, supra note 6; see, e.g., IDAHO CODE § 16-2005 (Michie Supp. 2004); N.M. STAT. ANN. § 35A-5-23 (Michie 1964).

In Illinois, the mother must execute her consent before one of a list of persons, including a representative of a licensed agency. These options include:

- the presiding judge of the court in which the petition for adoption has been, or is to be filed or before any other judge or hearing officer designated or subsequently approved by the court, or the circuit clerk if so authorized by the presiding judge or, except as otherwise provided in this Act, before a representative of the Department of Children and Family Services or a licensed child welfare agency, or before social service personnel under the jurisdiction of a court of competent jurisdiction, or before social service personnel of the Cook County Department of Supportive Services designated by the presiding judge.

750 ILL. COMP. STAT. 50/10 (West Supp. 2004).

244. 25 U.S.C. § 1913(a).

245. Connecticut (counseling within seventy-two hours of birth or as soon as medically possible by a person with a masters or doctoral degree from an accredited college or university); District of Columbia (for agency adoptions, counseling by a professional social worker regarding alternative services available, in addition to psychological and emotional counseling); Louisiana (two sessions with a licensed counselor before consenting); Massachusetts (for agency adoptions, education and counseling by a licensed clinician adequate to enable an informed decision); Montana (three hours prior to consenting); Nebraska (minimum of four hours of “education and support” services); Nevada (meeting with a licensed social worker specializing in adoption prior to reaching decision); New Mexico (if eighteen years of age or older, a minimum of one session not in the presence of her parents; if seventeen or younger, two sessions; court may waive); Ohio (minimum one session completed at least seventy-two hours before consenting); South Dakota; and Texas (does not require counseling per se but requires that agencies must meet with birth parents two times before placement or document why this is not possible). Nat’l Council for Adoption, supra note 6; see D.C. CODE ANN. § 4-1406(b) (2001); infra notes 459-61 and accompanying text (providing more information on California’s law).

246. California (in independent adoptions, a minimum of three sessions by a counselor with no contractual relationship with the adoptive parents or their attorney or any other
States that have sharply limited consent or revocation periods in recent years include Colorado, Louisiana, North Carolina, and South Carolina.\(^{247}\) In 2003 Colorado established an expedited procedure for relinquishing parental rights of children younger than one year of age.\(^{248}\) Before the new law, when a petition for relinquishment of parental rights was filed, the court scheduled a hearing at which the parent appeared and the court determined whether the parent had been counseled as well as whether "[t]he parent’s decision to relinquish is knowing and voluntary."\(^{249}\) Under the new law, the parent may sign an affidavit before the child’s birth.\(^{250}\) The affidavit, with the petition to adopt, may be filed four days after the birth and once filed is irrevocable.\(^{251}\)

individual or organization performing a service for them for a fee); Colorado (mother advised of “opportunity to seek independent counseling”); Florida; Iowa (counseling by a person qualified under Department of Human Services rules, with a requirement of a minimum number of hours of training); Maine (counselor certified by a licensed agency or the state’s Department of Human Resources); Michigan; Maryland; Minnesota (up to thirty-five hours, available from conception until six months after birth); Missouri; New Hampshire; New Jersey (counseling by a licensed adoption agency); New York (counseling by a licensed adoption agency); Pennsylvania (court inquires about whether counseling has been received and, if not, whether counseling is needed; court also has a referral list and funding available if birth parent cannot afford counseling); Tennessee; Utah; Vermont; Virginia; Washington (mother advised that financial assistance may be available through state and local governmental agencies); West Virginia; and Wyoming. Nat’l Council for Adoption, supra note 6; see also COLO. REV. STAT. § 19-5-103.5(1)(b)(1) (2004); IOWA CODE § 600A.4(2)(d) (Supp. 2004); ME. REV. STAT. ANN. tit. 18-A, § 9-202(b)(1) (1964); WASH. REV. CODE § 26.133.160(4)(b)(I) (2000).

New Mexico, which requires one or two counseling sessions, see supra note 245, also requires that the counseling be by “a certified counselor of the person’s choice,” and specifies that “[c]ounseling may be provided by a counselor, the department or an agency,” defining a “counselor” as “a person certified by the department to conduct adoption counseling in independent adoptions.” N.M. STAT. ANN. §§ 32A-5-3(I), 32A-5-21(A)(5), 32A-5-22(G) (Michie 2004).

247. In 1986 the Idaho Supreme Court also sharply limited birth mothers’ opportunities to have a court set aside their consents when it substituted a best interests standard for an estoppel rule. See In re Steve B.D., 723 P.2d 829, 835 (Idaho 1986). Under the estoppel rule, a mother had been permitted to revoke her consent during the pendency of the adoption proceeding if not estopped from doing so. Id. at 832. To determine whether she was estopped, the courts had considered a list of factors:

“the circumstances under which the consent was given; the length of time elapsing, and the conduct of the parties, between the giving of consent and the attempted withdrawal; whether or not the withdrawal was made before or after the institution of adoption proceedings; the nature of the natural parent’s conduct with respect to the child both before and after consenting to its adoption; and the ‘vested rights’ of the proposed adoptive parents with respect to the child.”

Id. (quoting In re Anderson, 589 P.2d 957, 963 (Idaho 1978)).

248. COLO. REV. STAT. § 19-5-103.5.


250. See COLO. REV. STAT. § 19-5-103.5(1)(b)(I).

251. COLO. REV. STAT. §§ 19-5-103.5(1)(b)(IV), -104(7)(a) (2004). The statute requires
Louisiana has dealt with independent adoptions by moving in stages from permitting birth parents to revoke consent any time before a final decree to making consents irrevocable if given more than four days after birth. In 1960 Louisiana’s cut-off for revocation was changed from the final to the interlocutory decree, and in 1979, to thirty days, with revocation triggering a best interest determination rather than automatic return of the child. North Carolina shortened its period for revocation in a series of reductions, ultimately reducing the pre-1983 period of six months to the present period of seven days. In South Carolina before 1986, the state courts had discretion to permit revocation of consent until the final decree of adoption, although the state supreme court noted in 1985 that “the more modern trend disallows the revocation of consent voluntarily given particularly where the adoptive parents have taken the child into their home in reliance upon the consent.” By statute since 1986, South Carolina does not permit revocation of a voluntary consent given any time after the birth.

Tennessee and Texas have recently limited their consent or revocation periods but nonetheless retain periods considerably longer than average. Tennessee law prior to 1986 provided a right to revoke consent for periods of thirty and ninety days respectively in agency and independent adoptions. From 1986 to 1995, the periods were each reduced to fifteen days and limited

that the affidavit advise the parent that consent may be withdrawn anytime before it is filed with the petition in court, but it does not state that the affidavit must inform the parent that the affidavit and petition may be filed four days after the birth. See COLO. REV. STAT. § 19-5-103.5(1)(b)(I)-(II). Apparently, there had been delays in scheduling the court hearings at which parents would appear and be examined by the court. Telephone Interview with Karen Kottmeir, Participant in Lobbying Efforts (Nov. 4, 2003). Rather than addressing the problem of the delays and adopting time limits within which hearings must be set, the law eliminated the hearings and provided for pre-birth consents.

252. LA. CH. CODE. arts. 1123, 1130 (2004).
254. See In re J.M.P., 528 So. 2d 1002, 1007 (La. 1988). In 1970 additional safeguards were added; the birth mother may not consent before the fifth day after birth and must be represented by an attorney at the execution of the consent. Id.
255. Consent is required in independent adoptions and agency adoptions in which the mother has not already relinquished the child to an agency. The time during which consent could be revoked was reduced in 1983 from six to three months. 1983 N.C. Sess. Laws ch. 83, § 1. In 1987 it was reduced to thirty days if consent was given to the director of Social Services of a licensed child placing agency. 1987 N.C. Sess. Laws ch. 541, § 1. In 1991 it was reduced to thirty days in all circumstances. 1991 N.C. Sess. Laws ch. 667, § 1. In 1995 it was reduced to twenty-one days if the child was younger than three months old and otherwise to seven days. 1995 N.C. Sess. Laws ch. 457, § 2. In 2001 it was reduced to seven days in all circumstances. 2001 N.C. Sess. Laws ch. 150, § 10.
to situations in which an adoption petition had not yet been filed.259 Under
current law, a mother may not surrender her child until the fourth day after
birth and may revoke her consent within ten days,260 gaining return of the child
unless "the child would likely suffer immediate harm to the child's health and
safety."261 In 1995 Texas instituted a forty-eight-hour waiting period before
parents may relinquish.262 In 1997 it eliminated an option of making
relinquishments in independent adoptions revocable until the termination of
parental rights or the decree of adoption.263 Instead, Texas made these
relinquishments either (1) revocable for ten days or (2) irrevocable, as was
previously permitted, for a period stated in the document, up to sixty days in
length.264 In an earlier period, parental consents in independent adoptions had
been revocable until the final decree.265

In Maryland in recent years, the legislature has rejected repeated attempts
to shorten the state's thirty-day revocation period,266 which was reduced from
ninety to thirty days in 1992.267 Bills were unsuccessfully introduced in 1996
seeking to reduce the period to seven days, in 1997 to eight days, in 2000 to
fifteen days, and in 2003 to fourteen days.268 Like Maryland, California and
Pennsylvania are among the states that have the very longest revocation
periods in the nation, but they have shortened their periods in recent years. In
1994 California shortened the revocation period in independent adoptions
from 120 days to ninety days and shortened it again in 2001 from ninety days
to thirty days.269 In California the mother can waive the revocation period
available in independent adoptions; however, California law affords a number
of additional safeguards to promote deliberate and final decisions.270

259. TENN. CODE ANN. § 36-1-117(b) (Supp. 1989).
262. TEX. FAM. CODE ANN. § 161.103(a)(1) (Vernon 2002 & Supp. 2004-05) (Historical and
       Statutory Notes).
266. MD. CODE ANN., FAM. LAW § 5-311(c) (2004).
269. See CAL. FAM. CODE § 8814.5(b) (West 2004) (Historical and Statutory Notes).
270. For example, waiver of the right to consent may only be signed in the presence of
designated authorities and may not be signed before an interview by a designated authority.
CAL. FAM. CODE § 8814.5(a)(2)(A), (c). In independent adoptions, adoption providers are
required to advise birth parents of alternatives to adoption; alternative types of adoptions; their
"right to separate legal counsel paid for by the prospective adoptive parents"; and their right to
a minimum of three counseling sessions, paid for by the prospective adoptive parents and given
by a counselor who does not have a contractual relationship with the adoptive parents, the
adoptive parents' attorney, or any other individual or organization performing a service for the
Pennsylvania recently made its period for revocation both more definite and in some cases shorter. Before mid-2004, consent could not be given less than seventy-two hours after birth and could be revoked until the earlier of either the termination of parental rights or the decree of adoption, a period of time that could be several weeks or months. While consent still may not be given sooner than seventy-two hours after birth, the period for withdrawal is now set at thirty days.

VI. PROBLEMS IN PRACTICE

I have heard of cases in North America, tragically, in which adoption consents have been signed even before the birth, or very soon after the birth. I have also heard of cases where attempts to revoke the consent the day after it had been signed have failed.

Evelyn Robinson, Australian social worker and author

What can be learned from appellate opinions about circumstances that have led to conflicts between adoptive parents and mothers who initially consented but then attempted to withdraw their consent to the adoption of their newborn infants? Litigated cases that resulted in appellate decisions do not necessarily represent every type of situation in which conflicts arise or the relative incidence of different situations, and some decisions reveal little of the circumstances that led to the litigation. The opinions nonetheless provide a valuable account of troubling cases and a valuable resource for contemplating whether following the best practices discussed in Part IV could have prevented conflicts, and if so, whether different legal rules could have promoted these practices.

The stories that appellate opinions relate fall roughly into four distinct categories. In one group of cases, the dominant reported fact is that consent was signed within hours or within a day or two of birth and, very often, was almost immediately regretted. In another group, two different but interrelated
factors are prominent. One factor is a failure either to initiate communication or resolve conflicts among the mother, father, and family members. The other factor is a lack of timely awareness of resources available to the mother to help her raise her child. In a third and somewhat different group of cases, mothers made timely revocations under what were apparently confusing laws that may invite litigation because they permit "revocation" but dictate judicial "best interests determinations" rather than return of the children. In these cases, courts engage in what would be considered an unlawful exercise in other circumstances, that is, deciding whether the child should be raised by a fit biological parent or by unrelated third parties with whom the child has lived for at most a few days or weeks before the revocation. Finally, a fourth source of conflict is apparent in situations in which mothers have consented in reliance on open adoption arrangements that are not legally enforceable. In each group of cases, the mothers almost without exception did not give their consents in person either before a judge or before an official designated by a court or another government agency.

A. Quick Consents, Quick Regrets

In the first group of reported cases, we learn merely that the mother consented shortly after birth and soon regretted her decision, a decision that might or might not have been different had the law required a longer period of time before consent could be given or could become irrevocable. It appears that these adoptions generally were not conducted in ways that facilitated deliberate and firm decisions. In most of the cases, the mothers received no counseling, and in almost all of them, they did not have legal representation. In the cases in which the mother received some counseling, it was generally either with adoption agency representatives or through very brief contacts with hospital social workers. In two of the cases, the social workers were actually colleagues of one of the prospective adoptive parents.

In some of the cases, the irrevocable consent was given within one to four days after birth, even though the possibility of adoption was discussed for the first time after the birth. In a 2001 Mississippi case, In re Adoption of J.M.M., the sixteen-year-old mother hid her pregnancy from her parents until she gave birth in their home. In the ensuing upheaval, her family immediately contacted a private adoption agency whose representatives visited her twice that day, took custody of the baby the next day, and as permitted by Mississippi law, obtained her signature on the irrevocable surrender two days later. The consent document was notarized by a representative of the agency. In the court's opinion, there was no indication that the mother was

275. 796 So. 2d 975 (Miss. 2001).
276. Id. at 977.
277. Id. at 978.
278. Id.
offered counseling or that she had legal representation. She unsuccessfullly appealed the adoption decree, which was entered less than thirty days after she signed the consent, on the grounds that she had signed under duress or as a result of undue influence and that her constitutional rights had been violated by the court's failure to rule on her motion to appoint a guardian ad litem for her.

An older mother in a 2001 Texas case gave birth at home and then drove herself, the infant, and her older children to the hospital. She "told hospital employees that she was divorced, was having financial difficulties, and did not think she could take care of another child." After discussions with a social worker contacted by the hospital, the mother on the second day after the birth signed an affidavit of relinquishment, giving a private agency the right to place the child for adoption. She had no legal representation. Under state law, her consent was irrevocable because it was given to a licensed agency more than forty-eight hours after the birth.

A 1993 dispute in Missouri involved an older mother who feared her child would have Down's Syndrome and whose doctor believed, because of complications during pregnancy, that the child might be stillborn. During her labor, she told a nurse she did not think she could "handle" a child with mental disabilities. A few hours after she gave birth to a healthy baby girl, a nurse at the hospital called a fellow employee who wished to adopt. The fellow employee then called the hospital social worker, who told him "they had not been able to get a commitment from the mother." The next morning, he and his wife brought a consent form to the hospital and asked the social worker to obtain the mother's consent. "Approximately 20 to 30 minutes later, [the social worker] returned with the consent form signed and notarized." Later that day, the couple took the baby home to Arkansas, where they petitioned to adopt the child. Two days after they took the baby,
the mother contacted an attorney, seeking the return of her child.\textsuperscript{291} More than two and a half years later, the Missouri Supreme Court remanded the case for a custody decision that would turn on the child's best interests.\textsuperscript{292}

In a 1989 West Virginia case, although the mother was counseled before the birth by a state protective services worker, the possibility of relinquishment was not mentioned to her.\textsuperscript{293} The day after the birth, the mother signed a form placing the child in foster care while she considered adoption; three days later, she signed the relinquishment form; seven days later, she asked if the baby could be returned to her.\textsuperscript{294} Approximately three weeks after she made her request, the child was placed for adoption.\textsuperscript{295} The trial court held that she had not been subjected to the kind of duress that invalidates consent,\textsuperscript{296} and the affirming appellate court noted that her "belief that she had ten days to retrieve the child appears to stem from a lack of attention on her part."\textsuperscript{297} "[I]t appears that if there was a misunderstanding, it stems primarily from both [her] and her mother's failure to listen to Ms. Velas when [Ms. Velas] explained the relinquishment papers."\textsuperscript{298}

Quick changes of heart after giving consent also occurred in cases in which, although adoption had been contemplated before the birth, there was no indication in the opinions that the mothers were offered or received counseling services. The birth mother in a 2003 Indiana case made arrangements before the birth with the prospective adoptive parents, one of whom worked with her maternal grandmother.\textsuperscript{299} She signed the consent prepared by the adoptive parents' attorney approximately six weeks before the birth and "ratified" it after the birth,\textsuperscript{300} as permitted by judicial decision in Indiana and perhaps in a small number of other states.\textsuperscript{301} She ratified it by delivering the child into the custody of the prospective adoptive parents, who took the child home from the hospital.\textsuperscript{302} Thirteen days later, the mother and

\begin{footnotes}
\begin{enumerate}
\item 291. Id.
\item 292. Id. at 71. The Missouri Supreme Court remanded the case for consideration of (1) whether to permit revocation of consent, keeping at the "pinnacle" of the decision the child's best interests, and (2) whether the child's best interests would be served by remaining with the prospective adoptive parents; by being returned to the mother or the father, with whom the mother lived; or by some other disposition. Id. at 70-71. The basis for the ruling was the parties' failure to comply with state law requirements for transferring custody of the child and for removing the child from Missouri to Arkansas. See id. at 66-70.
\item 294. Id.
\item 295. Id.
\item 296. Id. at 840-41.
\item 297. Id. at 843.
\item 298. Id. at 842.
\item 299. In re Adoption of Infant Child Baxter, 799 N.E.2d 1057, 1058 (Ind. 2003).
\item 300. Id. at 1059.
\item 301. Id. at 1061-62 (citing cases in accord from Arizona, Florida, and New York).
\item 302. Id. at 1059.
\end{enumerate}
\end{footnotes}
father changed their minds, but under the state’s law, their consent was irrevocable. 303 The mother and her mother contacted the prospective adoptive parents “on several occasions in the weeks following the child’s birth in an attempt to revoke . . . consent to the adoption and reclaim custody of the child. These informal efforts failed.” 304

In two Florida cases, the mothers likewise made adoption arrangements before the births of their children and also apparently received no counseling. 305 The mother in a 1988 case did not have independent representation, but the attorney acting as an intermediary had “explained the available options” to her. 306 She also had a mandatory interview with a state Department of Health and Rehabilitative Services caseworker “to insure that [her] consent was informed and voluntary.” 307 She consented to the adoption the day after the birth but on the following day asked the attorney to void her consent. 308 The appellate court affirmed the dismissal of her habeas corpus petition, despite what it viewed as a “harsh result.” 309

In a case decided three years earlier, the mother in an independent adoption consented several hours after the birth, which the prospective adoptive mother had traveled from Florida to Pennsylvania to attend. 310 The third day after the birth, the mother’s attorney told the prospective adoptive mother that the mother had changed her mind. 311 “Nevertheless, [the prospective adoptive mother] departed with the child as planned,” and the Florida courts later entered and affirmed a final judgment of adoption. 312

The mother in a 1996 Texas case had responded to a New York couple’s advertisement in TV Guide, had visited the couple, and had arranged with them for the adoption of her unborn child. 313 She signed the relinquishment twenty-six hours after the birth but changed her mind shortly thereafter. 314 There is no indication that she had independent legal representation or was offered

303. See id. at 1060.
306. Hindman, 534 So. 2d at 744.
307. Id.
308. Id.
309. Id. at 745.
310. C.L.W., 467 So. 2d at 1108.
311. Id.
312. Id. at 1108, 1111.
314. See id. Texas cases with similar facts include Swinney v. Mosher, 830 S.W.2d 187, 190 (Tex. Ct. App. 1992), in which the court found that the birth mother signed the consent documents on the day after the birth and advised the adoptive parents on the day after signing the consent that she had changed her mind and In re C.T., 749 S.W.2d 214, 215 (Tex. Ct. App. 1988), in which the court found that the birth mother signed the consent on the fourth day after the birth and attempted to have the child returned the next day.
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counseling. To the contrary, the agency arranging the adoption—apparently knowing she had changed her mind—"made every effort to finalize the adoption" in the two weeks following her consent before a new law would apply and impose a forty-eight-hour waiting period. The agency’s failure to meet this deadline led to the reversal of the lower court’s termination of parental rights, an outcome that the concurring justice found "tragic." He lamented, "If the affidavit had been signed twenty-two (22) hours later than it was, Baby Girl Sims would remain the adopted daughter of her new and obviously very devoted and loving parents.”

In a 1997 New York case, the mother gave her consent approximately eleven hours after the birth, while "crying and shaking" and "so anxious to leave [the hospital] that she . . . did not read the documents." The mother had responded to a newspaper advertisement and met with the prospective adoptive parents about five months before the birth. The prospective adoptive parents’ attorney told the birth mother that she could select an attorney herself, but the attorney also recommended one. She met with the recommended attorney, whose fees were paid by the prospective adoptive parents. She did not read the documents she signed, and the attorney did not read them to her or explain them. The court, expressing disapproval of consents executed just hours or a few days after birth, held the consent invalid because it did not comply with the statutory requirements that the document be explained to the birth mother and that she be given a copy.

In a 1990 New York case, the mother gave her consent two days after the birth but revoked it before the prospective adoptive parents took custody the following day. The intermediate court found that the birth mother’s lawyer had violated New York law by providing legal services to both her and the prospective adoptive parents and that he had physically transferred the baby “in flagrant disregard of [her] instructions.” The court of appeals approved the trial court’s return of the child, although as the dissent in the court below

315. Sims, 922 S.W.2d at 214-15.
316. Id. at 217.
317. Id. at 218.
318. Id.
320. See id. at 637.
321. Id.
322. Id.
323. See id. at 637-38.
324. See id. at 640-41.
326. Id.
327. In re Samuel, 581 N.E.2d 1338, 1339 (N.Y. 1991) (holding that her attorney did not have the authority under the circumstances to place the child).
had noted, timely revocation under New York law ordinarily requires a best interests hearing rather than return of the child.328

In other cases, mothers had a number of meetings with agency workers or were offered some kind of counseling. In a Nebraska case decided in 1995, a mother of four children decided on adoption before the birth because “she did not feel she could or wanted to raise another child.”329 She contacted the private adoption agency some four months before the birth and met with agency employees on five occasions.330 She did not have legal representation, and the day after the birth she consented to the adoption in the presence of agency employees.331 Less than three days later, she requested that the child be returned.332 The Nebraska Court of Appeals rejected her claim that she had

328. See Samuel, 562 N.Y.S.2d at 280 (Pine, J., dissenting). The court of appeals insisted that it was not altering the law:

As respondent urges, it would be absurd to conclude that every consent that is privately signed and immediately withdrawn by a birth parent nonetheless triggers the formal revocation mechanism that puts a birth parent on equal footing with a potential adoptive parent. . . .

. . . We emphasize that, contrary to appellants’ argument, our analysis adds no requirement of delivery of the consent document, or any other requirement to the statute. Samuel, 581 N.E.2d at 1339.

In cases in Oregon and Washington, mothers attempted to revoke their consents by invoking the federal Indian Child Welfare Act (ICWA). The fifteen-year-old mother in the 1994 Oregon case signed a relinquishment on the day of the birth and thirteen days later filed a document seeking to revoke her consent. In re Adoption of Quinn, 881 P.2d 795, 797-98 (Or. 1994). She also had contacted the prospective adoptive parents before the birth. Id. at 797. The prospective parents had hired a separate lawyer for her to advise her about the adoption process. Id. In the ensuing litigation, she claimed, contrary to an earlier assertion, that the ICWA applied to the adoption. Id. at 798, 799. Under the ICWA, binding consent may not be given for ten days after birth, and a birth parent may revoke consent until the final decree of adoption, 25 U.S.C. § 1913(a), (c) (2000), but the Supreme Court of Oregon ultimately held that there had not been sufficient admissible evidence introduced to establish that the ICWA applied. Quinn, 881 P.2d at 801.

In the 1992 Washington case in which the mother received counseling and consulted with family, friends, and women who had placed their children for adoption, the mother signed a consent two weeks before the birth. In re Adoption of Infant Boy Crews, 825 P.2d 305, 306-07 (Wash. 1992). The court approved the consent two days after the birth, and the mother requested the return of the child either four or eight days later. Id. at 307. The Supreme Court of Washington held that the ICWA does not apply when the child is “not being removed from an Indian cultural setting” and that even if it applied, it would not invalidate the concluded termination of parental rights. Id. at 310-11.

330. Id.
331. Id. at *7-8.
332. Id. at *1.
not understood the finality of her consent and concluded that “[a] change of mind is not sufficient to invalidate a relinquishment.”

In an earlier case in which the mother decided on adoption during her pregnancy, the mother met many times with the private adoption agency director, who was also a caseworker. At the first meeting, the caseworker testified that “he showed [her] all the documents she ultimately signed and . . . they went over the documents in detail.” The mother signed the required forms in the hospital two days after the birth. Two days later she requested the return of her baby. She claimed she had been told she would have six months to change her mind; the agency director testified that he had explained that the adoptive parents would finalize the adoption in six months. The Supreme Court of Nebraska held that she failed to satisfy her burden of proving that the relinquishment was involuntary.

The mother in a 1998 Oregon case consented on the day after the birth to what was to be an open adoption arrangement, but nine days later she delivered a written revocation to the adoption agency. A couple of months before the birth, she had contacted the agency because it arranged open adoptions in which birth parents could “have an ongoing relationship with the child and the adoptive parents.” She had met the prospective adoptive parents twice and spoken with them in telephone calls. After the birth, the adoption agency counselor read the required documents to her but did not explain them. The mother, who did not have legal representation, believed on the basis of previous explanations that she had six months during which she could revoke her consent, becoming liable for all costs. She retained counsel and filed objections in the two counties in which she believed the adoption petition might be filed. It was in a third county that the petition was subsequently filed and concluded, as permitted by the documents she had signed, without notice to her. She sued to set the adoption aside. Two and a half years later, the intermediate court of appeals allowed her suit to

333. Id. at *27.
335. Id.
336. Id. at 243.
337. Id. at 244.
338. See id. at 242, 244.
339. Id. at 244.
341. Id.
342. Id.
343. Id.
344. Id.
345. Id.
346. Id. at 228.
347. Id. at 226.
proceed on the ground she was not a party barred by law from questioning the validity of the adoption decree.\textsuperscript{348}

In a 2001 New York case in which adoption was not contemplated before the birth, it appears that, as in the Kansas case recounted at length in Part II, the mother’s consent was quickly taken and acted upon despite the fact that she was clearly experiencing a particularly high level of ambivalence.\textsuperscript{349} During her pregnancy and on the day the child was born, the eighteen-year-old mother expressed her desire to keep the child,\textsuperscript{350} but the next day she executed a document surrendering custody to an adoption agency after a Department of Social Services worker told her that the Department was going to file a neglect petition and seek temporary custody of her child “due to its concerns that [she] was unable to properly care for him.”\textsuperscript{351} According to the court, it was clear two days later that she intended to challenge the surrender.\textsuperscript{352}

\textbf{B. Family and Resource Issues}

A “sadly familiar pattern,”\textsuperscript{353} in the words of one court, involves a failure of the mother and either the father or family members to have adequately resolved differences and fully come to terms with the mother’s situation.\textsuperscript{354} In

\textsuperscript{348} Id. at 229. In a recent Missouri case, a Spanish-speaking mother met eight or nine times with an agency coordinator and an interpreter before the birth, gave her consent nine days after the birth at a hearing before a family court commissioner, and then attempted orally to withdraw her consent during the following three or four days. Baby Girl P. v. A.M., 159 S.W.3d 862 (Mo. Ct. App. 2005). The Missouri Court of Appeals remanded the case, holding that under the statute permitting withdrawal of consent until it is reviewed and accepted by a judge, there is no requirement that the withdrawal be in writing. \textit{id.} at 865. In \textit{Yopp v. Batt}, 467 N.W.2d 868, 872 (Neb. 1991), the birth mother’s doctor directed her to an attorney before the birth, and the attorney arranged the adoption. On the second day after the birth, she signed the papers after declining a hospital social worker’s offer to discuss the relinquishment. \textit{id.} at 873. She testified in court that the next day “she told her mother that she felt she did the wrong thing and that her mother told her to think about it for awhile.” \textit{id.} at 874. Three days later, she “indicated to her mother that she wanted the baby back.” \textit{id.} at 874. She then told her father about the pregnancy and birth and with him, met with the attorney to say she wanted the baby back. \textit{id.} The denial of her writ of habeas corpus was affirmed. \textit{id.} at 871, 881.


\textsuperscript{350} \textit{Id.}

\textsuperscript{351} \textit{Id.}

\textsuperscript{352} \textit{Id.} at 771. The court found that she had revoked her consent within the thirty days permitted by the law applicable at that time, and therefore she was entitled to a best interests hearing to determine custody of the child. \textit{id.}

\textsuperscript{353} \textit{In re J.M.P.}, 528 So. 2d 1002, 1004 (La. 1988).

\textsuperscript{354} In addition to the cases discussed in the text, see generally \textit{In re Adoption of Baby Doe}, No. 03AP-917, 2004 Ohio App. LEXIS 666 (Ohio Ct. App. Feb. 17, 2004), a case in which the court found that the birth parents were persuaded to withdraw consent after their parents learned of the birth and expressed strong disapproval and \textit{In re Adoption of Infant Boy}, 573 N.E.2d 753, 755, 758 (Ohio Ct. App. 1989), a case in which the court found that the birth
a 1988 Louisiana case, for example, an eighteen-year-old who had concealed her pregnancy for six months consented to the adoption a week after the birth of her child. Her parents had given her an ultimatum that she could not continue to live with them if she kept her child. When the lawyer who placed the child with the prospective adoptive parents came to the mother’s house for her to execute the surrender, he brought his law partner to act as her attorney and advise her of her rights. She apparently had not been offered or received any counseling. Some time after she gave her consent, her parents “realized that [she] couldn’t get over the loss of the child.” They testified “that they had experienced a change of heart because of the suffering [she] had endured, that they regretted their actions . . . , and that they now stood ready to support” her. The Louisiana Supreme Court held that her surrender was valid but remanded the case for a new best interests hearing, available at that time in Louisiana in the case of a timely revocation.

In a 1998 Texas case in which a nineteen-year-old mother unsuccessfully appealed the termination of her parental rights, the mother had kept her pregnancy a secret from her family and had driven herself to the hospital, where she told staff members that she intended to place the child for adoption. Some hours after the birth, she met with a hospital social worker who discussed adoption procedures with her, “presented her with other options,” and contacted a private adoption agency at the mother’s request. An agency representative telephoned the same day, and the following day another agency employee met with her at the hospital to “explain[] the adoption process and the legal documents necessary to initiate the process.” The third day after the birth, she signed the final papers, relinquishing the child to the agency. Shortly thereafter, following a “confrontation” when her parents received a bill from the hospital, she sought return of the child from the agency, which was in the process of placing the child with the adoptive family. The Court of Appeals of Texas held, inter alia, that the legislature intended “to make an irrevocable affidavit of relinquishment mother’s father initially insisted upon adoption but changed his mind in part due to pressure from his own parents.

355. J.M.P., 528 So. 2d at 1004-05.
356. Id. at 1005.
357. Id.
359. J.M.P., 528 So. 2d at 1005.
360. Id. at 1017.
362. Id.
363. Id.
364. Id. at 403.
365. See id.
sufficient evidence on which the trial court can make a finding that termination is in the best interest of the child.\textsuperscript{366}

In another case in which the mother concealed her pregnancy and also had her first contacts about adoption after the birth, the mother was counseled by a hospital social worker.\textsuperscript{367} On the third day after the birth, she consented to an adoption by another hospital employee.\textsuperscript{368} The mother revoked her consent when her parents learned of the birth almost six weeks later but still within New York's forty-five-day revocation period.\textsuperscript{369} More than a year later, in a 1989 decision, she was granted the right to a best interests hearing "at the convenience of counsel."\textsuperscript{370}

In other cases, mothers who received some form of counseling while pregnant nevertheless similarly sought to revoke their consents after their families learned of the births. In a 1988 Utah case, a twenty-one-year-old woman contacted an agency three months before the birth and received about thirteen hours of counseling from the agency.\textsuperscript{371} She relinquished her rights in court thirty hours after the birth.\textsuperscript{372} A few days later, she "disclosed her pregnancy, the child's birth, and the planned adoption to her own mother . . . . She then contacted [the agency] seeking to revoke her consent."\textsuperscript{373} Her subsequently filed motion to set aside the consent was granted by the district court but vacated on appeal.\textsuperscript{374} In a 1994 California case, the adoption agency representative discussed with the college freshman mother the possibility of raising the child and encouraged her to tell her parents about the birth.\textsuperscript{375} The mother refused to consider telling family or friends because "[s]he could not disappoint her parents."\textsuperscript{376} When she eventually confided in them several months later, they "told her there must be something she could do to get the baby back."\textsuperscript{377} She and the birth father unsuccessfully sought rescission of their relinquishments.\textsuperscript{378}

In the well-known, lengthy, and complex adoption contest known as the "Baby Jessica" case, which arose in Iowa in the early 1990s, the mother's parents knew of the pregnancy before the birth and opposed adoption.\textsuperscript{379} Cara Clausen, the unmarried mother who lived in the small farming community in

\textsuperscript{366} Id. at 405.
\textsuperscript{368} Id.
\textsuperscript{369} Id.
\textsuperscript{370} Id. at 966.
\textsuperscript{371} In re Adoption of Infant Anonymous, 760 P.2d 916, 917 (Utah Ct. App. 1988).
\textsuperscript{372} Id.
\textsuperscript{373} Id.
\textsuperscript{374} Id. at 918, 920.
\textsuperscript{376} Id. at 296.
\textsuperscript{377} Id. at 298.
\textsuperscript{378} Id. at 298, 315.
\textsuperscript{379} Lucinda Franks, The War for Baby Clausen, NEW YORKER, Mar. 22, 1993, at 56.
which she had grown up, was "overcome with shame." The prospective adoptive parents' lawyer, according to scholar Joan Heifetz Hollinger, took her consent despite "classic warnings":

These included [her] efforts to deny or hide her pregnancy until shortly before she gave birth, her reluctance to discuss her plans with close friends or family members, her insistence on relinquishing the infant despite her own mother's entreaties to the contrary, and her wariness of saying much about the circumstances of the conception or her relationship to the birth father. It is not surprising that several days after leaving the hospital, [she] began to regret her decision.

The counseling she received consisted of a brief telephone call with the hospital’s social worker. The lawyer representing the prospective adoptive parents, Jan and Roberta DeBoer, "may have led [Clausen] to believe that he was representing [only the birth parents]... Alternatively, he may have told [her] that he could represent and provide legal services to [both parties]." The lawyer first contacted her two days before the birth. One day before the birth, she misnamed as the father the man she had begun dating when she broke off her relationship with the child’s actual biological father. Forty hours after the birth, rather than the seventy-two hours required by Iowa law, she signed her consent. Within three weeks, her parental rights were terminated and the DeBoers were awarded a temporary custody order.

Two days later she informed the biological father about the child. Truck driver Dan Schmidt, who was due to leave on a haul the next day, immediately asked his mother "to see what she could do to 'retrieve' the baby." Approximately two weeks later, he filed a request to vacate the terminations of parental rights. In the meantime, Clausen had filed a petition to revoke the release of custody, and the DeBoers had learned that she "want[ed] Jessi back." The litigation between the two couples was conducted in the courts of Iowa and Michigan, where the DeBoers lived, and culminated in an

380. Id.
382. Id.
383. Id.
385. Id. at 286, 316-17.
386. Id. at 316.
387. Id. at 317.
388. Id.
390. Id.
391. Faupel, supra note 384, at 317.
392. ROBBY DEBOER, LOSING JESSICA 23 (1994).
unsuccessful application to the U.S. Supreme Court for a stay of the Supreme Court of Michigan's order that the child be returned to her biological parents.\textsuperscript{393} The litigation had included an Iowa trial court order to return the child,\textsuperscript{394} issued when the child was eleven months old and affirmed eight months later by the Iowa Supreme Court.\textsuperscript{395} When the child was almost two and a half years old, the litigation was finally concluded and the child returned to Clausen and Schmidt, who had married and had had another child.\textsuperscript{396}

A failure of the mother and father to resolve their relationship lay behind a 1989 Florida case in which the father of the child opposed the adoption but had not agreed to marry the mother when she consented to adoption two days after the birth.\textsuperscript{397} The father then proposed marriage and came to Florida, where the mother had gone to give birth and place the child.\textsuperscript{398} "[W]ithin days" of giving her consent, the mother attempted to withdraw it.\textsuperscript{399} The parents subsequently married and unsuccessfully sought return of the child. The Florida Supreme Court ultimately held that the mother's consent was irrevocable and that the father had abandoned the child by failing to provide enough support during her pregnancy.\textsuperscript{400}

Economic distress and a lack of information about available help were the primary issues in a 1999 Florida case.\textsuperscript{401} The mother, who was unemployed and caring for a young daughter, contacted the adoption agency during her eighth month of pregnancy and consented to her son's adoption three days after his birth when she returned to the hospital and met with agency representatives in the hospital lobby.\textsuperscript{402} When she then returned home and told friends what had happened, they assured her they would support and help her.\textsuperscript{403} Less than twenty-four hours after signing the papers, she called the agency to say that she had changed her mind.\textsuperscript{404} When the Florida District Court of Appeal subsequently affirmed the denial of her motion to set aside the consent, she was living rent-free with a friend and working full-time as a housekeeper.\textsuperscript{405} The court, recognizing the "seemingly harsh result," suggested "that a 'cooling-off' period might be a wise option for the legislature to consider."\textsuperscript{406} The Florida legislature in 2001 provided a

\textsuperscript{393} Faupel, supra note 384, at 317-31.
\textsuperscript{394} Id. at 317.
\textsuperscript{395} B.G.C., 496 N.W.2d at 241; Faupel, supra note 384, at 317.
\textsuperscript{396} Faupel, supra note 384, at 331.
\textsuperscript{397} In re Adoption of Doe, 543 So. 2d 741, 742-43 (Fla. 1989).
\textsuperscript{398} Id.
\textsuperscript{399} Id. at 743.
\textsuperscript{400} See id. at 743-44, 749.
\textsuperscript{402} Id.
\textsuperscript{403} Id. at 1236.
\textsuperscript{404} Id.
\textsuperscript{405} Id.
\textsuperscript{406} Id. at 1237.
revocation period in agency adoptions of three business days or until placement with adoptive parents, whichever is later. In independent adoptions in which placements are made directly from the hospital, the legislature provided that irrevocable consent could not be given for forty-eight hours or until the mother is fit to be released, whichever is earlier.

C. Best Interests Determinations

A class of cases has arisen under state laws that permit withdrawal of consent if a court finds it to be in the child’s best interest. A number of jurisdictions include the possibility of a best interests determination as a safeguard during the time between the execution of an irrevocable consent or the expiration of a revocation period and the entry of an interlocutory or final adoption decree. New York, however, frames its law differently. When consent has been given extrajudicially, mothers have forty-five days “to revoke” their consent, but their revocation triggers a best interests determination in which they enjoy no preference, rather than automatic return of the child. Alabama also provides that revocation within fourteen rather than five days triggers a best interests determination.

It would not be surprising if a mother had difficulty appreciating that her “right to revoke” does not encompass a right to raise her child, especially when the mother is not educated in the law, has just given birth, and is in the stressful situation of considering placing her child for adoption. New York case law suggests mothers find the system at least confusing, if not actually misleading. In a 1999 New York case, for example, the birth parents claimed they “subjectively believed that they could unconditionally revoke their consents and automatically regain custody” during the revocation period, but the court found that a “failure to understand all of the legal ramifications of

408. FLA. STAT. ANN. § 63.082(4)(b). The law has been changed again since then; in all types of adoptions, a birth mother may not consent until forty-eight hours after the birth or “the day the birth mother has been notified in writing, either on her patient chart or in release paperwork, that she is fit to be released from the licensed hospital or birth center, whichever is earlier.” FLA. STAT. ANN. § 63.082(4)(b). In the case of a newborn, the consent is irrevocable. FLA. STAT. ANN. § 63.082(4)(b).
409. These jurisdictions include, for example, Alaska (until decree), Arkansas (until interlocutory decree), Hawaii (after consent and placement and until decree), Indiana (until final decree), Nebraska (until agency takes full responsibility or until independent adoption is final), New Hampshire (until interlocutory decree), North Dakota (until final decree), and Ohio (until interlocutory decree or, if none, until final decree). 1 ADOPTION LAW AND PRACTICE, supra note 6, at app. 1-A; Nat’l Council for Adoption, supra note 6; see, e.g., ALASKA STAT. § 25.23.070 (Michie 2004); HAW. REV. STAT. §§ 578-2(f), 578-12 (2003).
such a consent does not provide a basis to void it." In a case three years earlier, the court found the mother’s “alleged confusion concerning the meaning and effect of the extrajudicial consent [was] insufficient to warrant its vacatur.”

In best interests contests with prospective adoptive parents, mothers are likely to fare poorly. As a Florida court cautioned rhetorically, “[h]ow many parents could potentially be shown in a legal proceeding to be less good for their children than certain other would-be adoptive parents if the courts were empowered in such a proceeding to cause the adoption of children on that basis?" Mothers are at a further disadvantage because a widespread failure to expedite contested adoption litigation means that the child may have remained with the adoptive parents for a lengthy period, developing an attachment that will weigh against return of the child. “When the natural mother changes her mind and litigation is instituted,” a majority of the Idaho Supreme Court observed, “there will be a considerable passage of time before there is any resolution,” during which “strong ties and emotional attachments” form between the child and adoptive parents, ties that will be “as traumatic, if not more so” to sever than “the ties between the child and the natural parents.”

A justice dissenting in part opposed the court’s decision to substitute a best interests standard for its previous estoppel rule. He wrote that the delay is “wholly attributable to the system” and complained, “It borders on the asinine for this Court to issue an opinion ... critical of the time delay ... while at the same time it has not bothered to make any rule which will expedite appeals in adoption cases.”

Mothers are often unmarried, less settled, and less prosperous than the prospective adoptive parents. The attitudes they may face in court are reflected in the statement of a prominent family law scholar: “The transaction costs added by legislatures to protect natural parents’ custodial rights and ensure suitability of adoptive couples hurt more children than they assist. Virtually all couples trying to adopt children are suitable.”

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413. In re Adoption of Jarrett, 637 N.Y.S.2d 912, 914 (N.Y. App. Div. 1996). Similarly, mothers in cases in which adoptions would not be finalized for six months have claimed that they thought they could reclaim their children during that period. See, e.g., Hohndorf v. Watson, 482 N.W.2d 241, 242, 244 (Neb. 1992).
416. Id. at 834.
417. Id. at 839 (Bistline, J., concurring in part and dissenting in part).
418. Id. at 838 (Bistline, J., concurring in part and dissenting in part).
419. Margaret F. Brinig, The Effect of Transactions Costs on the Market for Babies, 18 Seton Hall Legis. J. 553, 558-59 (1994). The focus of the article “veers away from natural parental rights and moves toward what is in most cases de facto, rather than preemptively, best for children.” Id. at 559. In questioning “whether the focus on the rights of natural mothers is
"'Best interests' cannot always function because a home with two loving parents is the best placement for children—any other situation is always second best.'" As discussed in Part IV, the prospective adoptive parents may elicit greater sympathy than the mother, given the "adversity in their effort to adopt children." The mother may face disapproval because she considered placing her child for adoption and then changed her mind. As Gritter observes:

How curious [it is] that one moment these critics admire her contemplation of adoption and consider it a sign of maturity, and the next [moment] they consider it a cause for concern. The proposed act that one day was regarded as a "loving choice" is the next [day] referred to as "unloading responsibility."  

It appears from the generally brief analyses in reported appellate opinions that mothers fare poorly in comparison with married, more settled, and more prosperous prospective parents. In a 2000 New York case, for example, the mother was described as "nomadic," while the adoptive parents had "stable relationships." The evidence showed that "the biological mother had led a nomadic, unstable life, while the adoptive parents demonstrated the ability to establish and maintain continuous and stable relationships, and [were] far better suited to meet the day-to-day and life-long physical, emotional, and material needs of the child." In a 1989 case in Ohio, the court favored the prospective adoptive parents' "ideal situation." Reversing the trial court's best interests determination in favor of the mother, the appellate court discussed relations with the father and among members of the mother's family. It noted the prospective adoptive parents' reliance on a psychologist's report that, "[w]hile not disparaging to the natural mother, . . . concluded that the natural mother's situation . . . [did] not compare with the almost ideal situation in which the adoptive parents [could] raise a child."  

The Tennessee Court of Appeals in a 1990 case affirmed a decision that disfavored a single mother who was planning to work and go to school, relying appropriate," the author simply assumes, without analysis, that a state system with a short revocation period can guarantee voluntary consents—that "[o]nce the state guarantees that the birth mother's consent is voluntarily made, a short revocation period will suffice." Id. at 578.

420. Id. at 560.
421. Id. at 564.
422. Gritter, supra note 97, at 101; see generally Cahn, supra note 171 (examining past and present cultural images of birth mothers).
424. Id.
426. Id. at 757-58.
427. Id. at 758.
on her mother for child care.\footnote{In re Adoption of Griggs, No. 89-159-55, 1990 Tenn. App. LEXIS 35, at *4-5, *10 (Tenn. Ct. App. Jan. 26, 1990).} The court compared the twenty-three-year-old unwed mother, who was raising her first child and had placed a second child in an open adoption, with the prospective adoptive parents, a thirty-year-old ambulance driver and his forty-two-year-old homemaker wife, the mother of a twenty-one-year-old son from a previous marriage.\footnote{Id. at *4-10.} The mother lived with her parents, who had been under some financial strain, and she would have had to depend on her mother to help look after her children,\footnote{See id. at *4, *10.} whereas the adoptive parents could "provide [the infant] with a suitable home" and it was "not contested that they [would] do their best for the child."\footnote{Id. at *10.}

Other opinions appear to focus simply on the fitness of the prospective adoptive parents. Two recent Ohio appellate panels, approving trial courts' best interests decisions in favor of adoptive parents, report only the findings about the adoptive parents, findings that indicate stable marriages and finances. The court in the 1999 case explains that the trial court did not abuse its discretion because the adoptive parents "demonstrated to the trial court the stability of their marriage and of [the father's] employment. [They] had previously adopted, and were raising, a biracial child."\footnote{In re Infant Male Jackson, Nos. C-980077, C-990008, 1999 Ohio App. LEXIS 5179, at *14 (Ohio Ct. App. Nov. 5, 1999).} In a 2003 case, the appellate court stated that the trial court found the six-month-old child "had bonded with the adoptive family, the child was thriving in her current placement, the adoptive parents were financially stable and able to provide stability and permanency, and both were in good health."\footnote{In re Adoption of Baby Doe, No. 03AP-917, 2004 Ohio App. LEXIS 666, at *8 (Ohio Ct. App. Feb. 17, 2004).} Under Texas case law, a mother's affidavit of relinquishment is itself "sufficient evidence on which the trial court can base a finding that termination is in the best interest of the child."\footnote{Denman v. Alternatives in Motion, No. 14-99-01262-CV, 2001 Tex. App. LEXIS 336, at *4-5 (Tex. Ct. App. Jan. 18, 2001).}

In contrast to most of the more recent opinions around the country, as well as to subsequent New York statutory law,\footnote{See N.Y. DOM. REL. LAW § 115-b(6)(d)(v) (McKinney Supp. 2005).} the approach described by the New York Court of Appeals in the highly publicized 1971 \textit{Scarpetta} case favored mothers if they were not found to be unfit or to have improper motivations: "In no case . . . may a contest between a parent and nonparent resolve itself into a simple factual issue as to which affords the better surroundings, or as to which party is better equipped to raise the child."\footnote{People \textit{ex rel. Scarpetta v. Spence-Chapin Adoption Serv.}, 269 N.E.2d 787, 792 (N.Y. 1971).}

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\begin{itemize}
\item \footnote{Id. at *4-10.}
\item \footnote{See id. at *4, *10.}
\item \footnote{Id. at *10.}
\item \footnote{In re Infant Male Jackson, Nos. C-980077, C-990008, 1999 Ohio App. LEXIS 5179, at *14 (Ohio Ct. App. Nov. 5, 1999).}
\item \footnote{In re Adoption of Baby Doe, No. 03AP-917, 2004 Ohio App. LEXIS 666, at *8 (Ohio Ct. App. Feb. 17, 2004).}
\item \footnote{See N.Y. DOM. REL. LAW § 115-b(6)(d)(v) (McKinney Supp. 2005).}
\item \footnote{People \textit{ex rel. Scarpetta v. Spence-Chapin Adoption Serv.}, 269 N.E.2d 787, 792 (N.Y. 1971).}
\end{itemize}
mother’s change of mind “‘is not an evil thing’” and “‘is to be accorded great sympathy, and, in a proper case, encouragement and favorable action.’”

D. Unenforceable Open Adoption Agreements

Open adoption arrangements are preferred by many mothers considering placing their infants for adoption. For these mothers, a promise of openness may influence their decisions to place their children as well as their selection of prospective adoptive parents. In open adoption arrangements, adoptive parents, and often adopted children, have contacts with birth parents through photographs, letters, telephone calls, or visits. Despite the increasing publicity such arrangements are receiving and their apparently increasing popularity, they are enforceable only to some degree and in some circumstances in fewer than twenty states. Some of the state statutes apply only to adoptions of children from the child welfare system, to adoptions by relatives, or to stepparent adoptions. Under most of the statutes that make agreements enforceable, the laws include a presumption that the agreements are enforceable unless there are grounds for modification.

The potential problems are obvious when an open adoption agreement is unenforceable. In a recent Texas case, the court held that a nineteen-year-old mother’s consent was involuntary and wrongfully procured because the adoption agency’s assurances that she would remain in the child’s life were “at worst deceptive and at best vague.” There was no evidence that she “was ever told that the post-adoption plan could not be legally enforced,” and the agency admitted in the litigation that the post-adoption plan was an “empty promise.” Similarly, a 1997 Kansas case appears to have been marked by conflict and confusion regarding post-adoption contact. At a time when the

437. Id. (quoting People ex rel. Anonymous v. N.Y. Foundling Hosp., 232 N.Y.S.2d 479, 483 (N.Y. App. Div. 1962)). The child in this case was not returned to the mother because the prospective adoptive parents fled to Florida, where the courts, refusing to enforce the New York custody order, found it was in the child’s best interests to remain with the adoptive parents. Scarpetta v. DeMartino, 254 So. 2d 813, 814 (Fla. Dist. Ct. App. 1971), cert. denied, 262 So. 2d 442 (Fla. 1972), cert. denied, 409 U.S. 1011 (1972).


439. CWLA STANDARDS, supra note 9, at 142.

440. Annette R. Appell, Enforceable Post-Adoption Contact Statutes: Part I: Adoption with Contact, ADOPTION Q., Nov. 4, 2000, at 81, 82 (describing and comparing the various adoption with contact statutes).

441. Id. at 84-86.

442. Id. at 84.


444. Id. at 762.
same attorney was representing both the birth mother and the prospective adoptive parents,445 the birth mother discussed with the attorney her "wish to have continued contact,"446 although she knew that any agreement about contact would not be legally binding.447 When the adoptive parents' attorney later briefed her new, separate attorney, the attorney did not mention her wish for contact.448 She claimed in court that when she consented, "she believed that the adopting parents had agreed to her future visitation[.]"449 The appellate court affirmed the trial court's refusal to set aside her consent, noting that there was "disputed evidence . . . as to whether there was any agreement regarding visitation" and that the adopting parents testified that there was no such agreement.450

VII. PRESCRIPTIONS

The best I can do is to repeat my sense that when independent adoptions succeed they do so because they give expression to the autonomous and informed decisions of the parties, and that the search for ways to insure that those decisions are indeed autonomous and informed is a critically important one.451 Joan Heifetz Hollinger

Laws governing mothers' consents should aim not only to require but also to create incentives for following best practices in adoption. In the litigation described in Part VI, the states' legal systems apparently failed to do so. The mothers often lacked accurate and complete information about the law, their alternatives to adoption, and the effects they might experience after relinquishing their children. The mothers lacked unbiased counseling services or any counseling services at all. When they consented, they often had failed to come to adequate understandings with the fathers of the children or with family members. In almost all of the cases, they consented very shortly after the birth, often in the hospital within hours or a few days after giving birth.

446. Id. at 613.
447. Id.
448. See id. at 612.
449. Id. at 616.
450. Id. In an earlier Kansas case in which the mother was offered but did not have separate counsel, the mother, before signing consent, asked the attorney why the documents did not mention the visitation that she expected to have with the child. See In re Adoption of J.H.G., 869 P.2d 640, 642 (Kan. 1994). He told her that "visitation was not supposed to be addressed in the documents, but that it was an issue between her and the adoptive parents." Id. In the lawsuit, in which the mother sought to set aside the adoption, the trial court found no agreement had been reached between the parties except an agreement that there would be no visitation for a minimum of six months after birth. See id. at 644.
Legal safeguards are unnecessary for infant adoptions conducted in a humane and ethical manner; they are essential for those that may not be. The most critical observers argue that we should transform our diverse and "[s]urprisingly loosely regulated" system into a social service in which payments by adoptive parents play no part. The hope for such a transformation seems quixotic in light of our long history of private agency and independent adoptions, as well as the powerful, numerous, and entrenched interests participating in the adoption market. As Pertman writes, "That's a worthy ideal, but it's probably unrealistic in our devoutly capitalistic society."

A number of the available legal safeguards, short of transforming adoption into a strictly social service, could be more widely enacted at little or no cost to the states. Other legal safeguards, while worthwhile, are more costly and complex, as well as inherently limited in their ability to promote deliberate decisionmaking and finality. With respect to legal representation, states should make clear by statute that attorneys may not simultaneously represent adoptive parents and birth parents. This will help to ensure that birth parents know that their interests are not and may not be represented by the adoptive parents' attorney. It is not likely many states will decide to require separate representation because of the costs that are involved either for the adoptive parents or the state. In any event, although such representation presumably makes it more likely a mother will understand her legal rights, there is also a risk of a conflict of interest, as discussed in Part IV, when the attorney is paid by prospective adoptive parents. If more mothers decide to place their children for adoption, more work will be available for all attorneys involved in adoptions.

Regardless of possible conflicts of interest, it is difficult to legislate the timing and quality of representation that a pregnant woman or a new mother will receive. The Kansas Court of Appeals found that its state law requiring representation for young mothers had been complied with in a case in which the prospective adoptive parents' attorney "less than an hour before the scheduled meeting [for signing consents] . . . realized that under Kansas law, [the birth parents] were to be provided independent legal counsel." An attorney whose office was in the same suite was enlisted and briefed for five minutes. He then advised the birth parents and took their consents, satisfying the requirement that "a minor parent shall have the advice of independent legal counsel as to the consequences of the consent or relinquishment prior to its execution" and the attorney "shall be present at the

452. Zeidler, supra note 65.
453. PERTMAN, supra note 66, at 194.
454. N.A.P., 930 P.2d at 612.
455. Id.
456. Id.
As a concurring North Dakota Supreme Court justice wrote, "[m]eeting with the client immediately before a termination of parental rights hearing for the first and only time does not allay the perception of lack of independent counsel. It fortifies my concern that providing counsel under such circumstances is but a perfunctory observance of a meaningless ritual." With respect to counseling services, there is at least potential utility in requiring that a number of counseling sessions be available, that the sessions be with a licensed social worker or therapist, and that the sessions be available both well in advance of giving consent and after consenting. Skilled and unbiased counseling is, as discussed in Part IV, an essential part of best practices. But as explained and illustrated at length above, this kind of counseling is far from guaranteed by most state law requirements. There are risks of conflicts of interest when the counseling is offered or arranged by the agency or individual handling the adoption, as well as when it is offered by other providers paid by the prospective adoptive parents. California attempts to minimize, but does not eliminate, this risk with statutory requirements. Birth parents in independent adoptions must be advised of their rights and offered three separate counseling sessions by an "adoption service provider," defined as a licensed agency or a licensed clinical social worker with five years of relevant experience. The counselor who advises the birth parents must not have any "contractual relationship with the adoptive parents, an attorney for the adoptive parents, or any other individual or . . . organization performing any type of services for the adoptive parents and for which the adoptive parents are paying a fee, except as relates" to the fee for the counseling. These requirements add costs. When a state strictly regulates counselors' qualifications, services, and affiliations, or itself provides counseling services, the state imposes or incurs substantial costs, a fact that helps explain why other states have not adopted such measures and why they are unlikely to do so.

Increased costs and potential delays also reduce the number of states that would consider joining the ten states that still employ in some or all independent adoptions a procedure in which mothers appear in court to relinquish parental rights or give their consent. This procedure is

457. Id. at 614.
459. Cal. Fam. Code § 8801.5(a), (d) (West 2004). The provider must also offer to interview the birth parent within ten working days after the placement of the child and immediately notify the state or delegated county agency if the birth parent is not interviewed or if there are any concerns regarding the placement. Cal. Fam. Code § 8801.7(a)-(b) (West 2004). The provider must assist the birth parent in obtaining return of the child if the birth parent wishes to revoke the consent. Cal. Fam. Code § 8801.7(b).
recommended as a key, if imperfect, safeguard by Hollinger, and its efficacy is suggested by the relative paucity of reported disputes in which the procedure was employed. Vermont added this procedure in a 1995 overhaul of its adoption law. The state now requires that consents to adoption by individuals and relinquishments to agencies must be signed in the presence of “a judge of a court that has jurisdiction over adoption proceedings” or “a person appointed by a probate judge to take consents or relinquishments.”

If the consent is executed by a minor, it must “be signed in the presence of the judge before whom the proceeding is pending.”

As suggested by the Part VI analyses of problems in practice, two of the most effective and practicable safeguards in the case of infant adoptions are similar to effective safeguards in the very different case of consumer contracts: information requirements and consent timing rules. At very low cost, states can, and some states do, require that specific information be provided at specified times, orally and in specific written formats, and that provision and receipt of the information be confirmed in writing. For example, Vermont requires, among other things, that (1) a parent “shall have been informed of the meaning and consequences of adoption” and “the availability of personal and legal counseling”; (2) the person before whom the consent or relinquishment is executed must certify both that he or she orally explained the contents and consequences of executing the document and that the person signing the consent read or was read the document and was offered a copy; and (3) the consent contain “specific instructions as to how

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462. Hollinger advises:
The attention of lawmakers should be directed at insuring that consents, when executed, are consents. Perhaps in all adoptions—agency as well as independent—voluntary relinquishments should be executed before a neutral party (judge? court officer?) who not only witnesses the signing of forms, but more importantly, queries the birth parent about her understanding of the consequences of her action. Risks are posed, however, even by this procedure. Not the least of these is that the birth mother’s resolve to relinquish her child will be subject to extensive and inappropriate scrutiny. Hollinger, supra note 451, at 377-78.


464. VT. STAT. ANN. tit. 15A, § 2-405(a).

465. VT. STAT. ANN. tit. 15A, § 2-405(b).

466. See, e.g., THEODORE EISENBERG ET AL., DEBTOR-CREDITOR LAW § 1.08 (Theodore Eisenberg ed., 2004) (describing truth in lending rescission rights for credit transactions in which a home is taken as collateral, other than transactions for purchase of the home). The contrast between consumer law protections and some adoption consent provisions was pointed out in a Florida decision: “It is ironic that a potential condominium purchaser’s contract with a developer is voidable within 15 days from the date of execution.” Hindman v. Bischoff, 534 So. 2d 743, 745 n.* (Fla. Dist. Ct. App. 1988).


468. VT. STAT. ANN. tit. 15A, § 2-405(d); see also VT. STAT. ANN. tit. 15A, § 2-406 (2002) (specifying what information and what kind of statements must be contained in consents and relinquishments).
to revoke the consent or relinquishment."469 Florida’s statute is an example of a law that includes a disclosure form, which must be provided to all prospective birth and adoptive parents and includes statements about legal representation, consents, alternatives to adoption, and the right to counseling.470 California’s statute directs its Department of Social Services to "prescribe the format and process for advising birth parents of their rights" and to include specific information about alternatives to adoption, alternative types of adoptions, and rights to legal representation and counseling.471

Even more effective than information requirements, and equally practicable, are rules that prohibit giving hasty irrevocable consents. Such rules require no or only modest expenditures. In the period after birth and before consent is final, an infant may be cared for by the mother, the father, or both parents, either independently or with assistance, or by foster parents. Proponents of very quick irrevocable consents have not demonstrated either short-term or long-term harm from a period of a few days or weeks between a child’s birth and placement in an adoptive home.472 In any event, such speedy consents are not necessary for early placements into adoptive homes. If a child’s parents and the prospective adoptive parents are confident that the parents’ decisions are final, and if they all wish for an early placement, the child’s parents can place the child in the adoptive home before consent has been given or becomes final.473 Speedy consents are also unnecessary to ensure suitable adoptive placements for children, given the great demand for healthy newborns.474

Prohibiting hasty consents creates incentives for service providers to follow best practices in adoption. Service providers and prospective adoptive parents face potentially great costs, financial and emotional, when a mother who has tentatively agreed to adoption decides not to place her child. The

469. VT. STAT. ANN. tit. 15A, § 2-406(a)(5).
470. FLA. STAT. ANN. § 63.085 (West Supp. 2005).
471. CAL. FAM. CODE § 8801.5 (West 2004).
472. See supra Part IV.
473. For example, the Uniform Adoption Act specifies procedures for placement of a child before a consent is executed:
[T]he parent or guardian who places the minor shall furnish to the prospective adoptive parent a signed writing stating that the transfer of physical custody is for purposes of adoption and that the parent or guardian has been informed of the provisions of this [Act] relevant to placement for adoption, consent, relinquishment, and termination of parental rights. The writing must authorize the prospective adoptive parent to provide support and medical and other care for the minor pending execution of the consent within a time specified in the writing. The prospective adoptive parent shall acknowledge in a signed writing responsibility for the minor’s support and medical and other care and for returning the minor to the custody of the parent or guardian if the consent is not executed within the time specified.
474. See supra Part III.
chance she will do so is greatest if she has been inadequately counseled or improperly pressured but then is afforded adequate time to consider and to reconsider her decision. Therefore, if hasty consents are not permitted, adoption services providers and prospective adoptive parents have a powerful incentive to follow best practices from the outset. These practices facilitate deliberate decisionmaking and make adoption more of a cooperative process than a proprietary tussle. In other words, prohibiting hasty consents promotes best practices among those who might be most tempted to disregard them—whether for philosophical, religious, emotional, or financial reasons—in order to meet the compelling desires of prospective adoptive parents.

The most advantageous laws provide both a period of time after birth before which consent may be given and a subsequent period of time for revocation. Mothers who feel they have sufficiently deliberated and firmly decided on adoption may give their legal consent not long after birth and then choose to neither entertain nor exercise their right to revoke. They may “walk away,” knowing that the adoption will be completed without further participation on their part. For mothers in less favorable circumstances, the revocation period offers an opportunity for reflection as they recover from giving birth and begin to experience the effects that the decision will have on themselves and their families. To successfully provide an opportunity for reflection, the right to revoke must be unqualified. Any period of time during which withdrawing consent could trigger a best interest contest should come after the period during which the mother has an unqualified right to revoke her consent.

To determine the optimal periods of time, there is no magic formula that perfectly balances the need for deliberate and final decisions with the need to establish children in permanent homes. Vermont departed from the trend in some states to shorten periods. In Vermont, mothers may not consent until thirty-six hours after the birth, and they have a twenty-one-day revocation period after they give consent.\(^{475}\) If the period before a mother may consent is four to seven days, most mothers will be out of the hospital, free of the strongest effects of medication, and probably more sensible of their right not to place their children despite any tentative arrangements made before birth. If the subsequent, unqualified revocation period is approximately three weeks, the total period of approximately four weeks will still be shorter than the period in the Australian and European models described in Part II, and shorter than the postpartum period of six to eight weeks between birth and the time when the mother’s body has returned as closely as possible to its pre-pregnant state.\(^{476}\) It may, nevertheless, be long enough for most mothers to recover from the effects of childbirth and long enough for counteracting to some extent

\(^{475}\) VT. STAT. ANN. tit. 15A, § 2-404(a) (2002).

\(^{476}\) THE MERCK MANUAL OF MEDICAL INFORMATION 1476 (Mark H. Beers et al. eds., 2003).
VIII. CONCLUSION

Infant adoptions are momentous, life altering events, not only for the child and both sets of parents, but also for the extended families. The future of any adoptive family is just as uncertain as it is for any biological family. We cannot predict how a child’s personality, interests, and talents will mesh with those of the child’s parents and siblings, or how a child will respond to having been placed for adoption. We cannot know what opportunities a family will enjoy and what challenges it will face. Adoptive families, like biological families, are unfortunately not immune from divorce, death, emotional instability, substance abuse, and violence. When a state places its legal imprimatur on the unmaking of one family and the making of another, the state should at least insure to the greatest extent possible that all the individuals involved have followed or have been afforded “best practices.” These are the practices that ethics and humanity demand. For mothers considering placing their children for adoption, skilled, unbiased counseling is invaluable; complete, well-communicated information is indispensable; and time is, perhaps, “the wisest counsellor of all.”