

# The Uniform Adoption Act: Reporter's Ruminations

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## I. Introduction

The debates surrounding adoption law reform are manifestations of profound contradictions in American society about the meaning of “family” and the ways different kinds of families are authenticated. The National Conference of Commissioners on Uniform State Laws (NCCUSL) was perhaps insufficiently aware of these contradictions when, at the dawn of the 1990s, it embarked on what turned out to be the arduous, at times bitterly divisive, task of drafting a comprehensive, preferably uniform, adoption act. Given the many laws and policies that impede the formation of adoptive families, the Uniform Adoption Act (UAA) promulgated by NCCUSL in 1994 and endorsed by the ABA in 1995 contains a thorough yet flexible set of rules and procedures intended to reduce these impediments. The Act assiduously protects the interests of all parties, and most of all, of minor children in need of secure and permanent ties to the people who are actually committed to and capable of parenting them.

Adoption has long been regarded as a “perfect solution” for otherwise parentless children, birth parents unable to raise their biological children, adoptive parents unable to have biological offspring but eager to have and raise children, and government entities hoping to shift the public costs of caring for dependent children to the private realm. Much empirical research substantiates the successful outcomes for children

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raised by adoptive families.<sup>1</sup> Yet, by legitimizing a parent-child relationship between "strangers," adoption strikes some raw personal and cultural nerves. The "perfect solution" is perceived by many as a legal fiction that defies our society's commitment to family as defined by blood and genes. From this biocentric perspective, adoption does not tell a story of benefit and satisfaction, but of loss and grief: the "natural" parents' loss of the opportunity to raise biological offspring, the adoptive parents' loss of the opportunity to have "natural" children, and the child's loss of biological kin. These losses are said to be noncompensable: an "unnatural" and fictive relationship cannot be expected to heal these "primal wounds."<sup>2</sup>

Once it became apparent that the UAA would make adoption less complicated in order to "promote the welfare of children" in need of "stable and loving homes,"<sup>3</sup> it also became clear that efforts to facilitate adoption violate widespread beliefs in the biological roots of personal

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1. A useful overview of the research is in the Special Issue on Adoption, 3 *THE FUTURE OF CHILDREN* (Spring 1993), especially, David M. Brodzinsky, *Long-Term Outcomes in Adoption*, 153-66.

According to Brodzinsky, when viewed historically and in the context of what lives adopted children might have led if they had not been adopted, "the literature is overwhelmingly supportive of the benefits of adoption for these children. . . ." He and others also note that like any "solution" to a complex human dilemma, adoption has unanticipated as well as anticipated consequences, including some that may pose greater risks to the psychological well-being of adoptees than to comparable groups of youngsters raised by their biological parents.

See also Steven L. Nickman, *Challenges of Adoption*, HARVARD MENTAL HEALTH LETTER, Jan. 1, 1996; Bruce Bower, *Adapting to Adoption: Adopted Kids Generate Scientific Optimism and Clinical Caution*, 146 *SCIENCE NEWS*, Aug. 13, 1994, at 104; BENSON, A. R. SHARMA & E. C. ROEHLKEPARTAIN, *GROWING UP ADOPTED* (1994).

2. Although extensive, the adoption-as-primal-wound literature is more often anecdotal and passionate than it is supported by credible research findings. See, e.g., BETTY JEAN LIFTON, *LOST AND FOUND* (1979); NANCY VERNIER, *THE PRIMAL WOUND: UNDERSTANDING THE ADOPTED CHILD* (1994); newsletters of Concerned United Birthparents (CUB), the American Adoption Congress (AAC), and various adoptee-search organizations. More dispassionate, yet sympathetic and clinically oriented accounts of adoption as loss are ELINOR ROSENBERG, *THE ADOPTION LIFE CYCLE* (1992), and Paul Brinich, *Adoption from the Inside Out: A Psychoanalytic Perspective*, in *THE PSYCHOLOGY OF ADOPTION* (D.M. Brodzinsky & M.D. Schecter, eds., 1990); for an anthropological perspective, see JUDITH S. MODELL, *KINSHIP WITH STRANGERS: ADOPTION AND INTERPRETATIONS OF KINSHIP IN AMERICAN CULTURE* (1994).

3. Unif. Adoption Act, 9 U.L.A. Part 1 (West Supp. 1995) [hereinafter cited as UAA]. The 1994 UAA supersedes revised versions of the 1953 proposed Uniform Adoption Act, as enacted by fewer than ten states. The new Act is altogether different than its predecessors, except that it shares their view that adoption is a beneficial institution. A brief overview of the Act is in Joan Heifetz Hollinger, *Revisiting the Issues: The UAA*, 5 *THE FUTURE OF CHILDREN* 205 (Winter 1995). The Prefatory Note of the Act of 1994 opens with following statement:

The guiding principle of the Uniform Adoption Act is a desire to promote the welfare of children and, particularly, to facilitate the placement of minor children,

identity.<sup>4</sup> Although many adoptive families and other pro-adoption advocates acknowledge and affirm the differences between biologically based and adoptive families, many others vehemently deny those differences in the belief that adoptive families function best when structured "as if" they were "natural" families.<sup>5</sup> At nearly every meeting of the UAA drafting committee and the full Commission, tensions emerged between those who want to encourage adoption and those who view adoption as an unwelcome "last resort."<sup>6</sup>

Some of the most bitter disagreements, however, arose among those of us who support adoption, a phenomenon often masked in media

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who cannot be raised by their original parents with adoptive parents who can offer them stable and loving homes. The Act is premised on a belief that adoption offers significant legal, economic, social and psychological benefits not only for children who might otherwise be homeless, but also for parents who are unable to care for their children, for adults who want to nurture and support children, and for state governments ultimately responsible for the well-being of children.

4. See, e.g., DAVID SCHNEIDER, *AMERICAN KINSHIP* (1980) (describes American view of family and personal identity as being inextricably associated with the capacity to reproduce ourselves from one generation to the next); ARTHUR SOROSKY, ANNETTE BARAN & REUBEN PANNOR, *THE ADOPTION TRIANGLE* (1978) (a methodologically suspect work based on interviews with self-selected respondents; claims to find pervasive desire among adoptees to search and be reunited with their biological families); Annette Baran and Reuben Pannor, *Perspectives on Open Adoption*, 3 *FUTURE OF CHILDREN* 118 (1993) (describes adoption as a "flawed institution," favors long term foster care, guardianships, or co-parenting open adoptions). See also the work of BETTY JEAN LIFTON, *JOURNEY OF THE ADOPTED SELF: A QUEST FOR WHOLENESS* (1994) (describes adoption as a destructive institution that makes adoptees feel as they were not born, disconnected from their biological roots, forced to lead artificial lives "outside the natural realm of being").

5. Among the most adamant defenders of the "as if" position among contemporary pro-adoption advocates is Bill Pierce, founder and director of the National Council for Adoption (NCF), which lobbies on behalf of a dwindling number of traditional adoption agencies that remain committed to anonymity between birth and adoptive families and strict rules ensuring confidentiality and sealed adoption records.

For discussion of the history and ideological underpinnings of the notion that adoptive families are and should be a complete substitute for biological families, see Joan H. Hollinger, *Aftermath of Adoption: Legal and Social Consequences*, *ADOPTION LAW & PRACTICE* (J.H. Hollinger, ed., 1988; Supp. 1995) [hereinafter *ADOPTION LAW & PRACTICE*]. See also ELIZABETH BARTHOLET, *FAMILY BONDS: ADOPTION & THE POLITICS OF PARENTING* (1993); Katherine T. Bartlett, *Rethinking Exclusive Parenthood*, 70 *VA. L. REV.* 879 (1984).

6. By the time the UAA was approved by the entire Conference at NCCUSL's 103rd Annual Meeting in Chicago in August 1994 by a vote of 49 states and D.C. in favor and two states (Alabama and Kentucky) opposed, the Drafting Committee had met fifteen times and earlier drafts had been discussed at four other annual meetings. In addition to the 11-12 members of the Drafting Committee, the ABA advisor, and the Reporter, regular attendees at the meetings were members of the NCCUSL Executive and Review Committees and representatives of numerous professional organizations, including the ABA Family Law Section (generally pro-adoption), the American Adoption Congress (AAC) (highly skeptical about adoption, committed to the view that adoption is worst resort for birth parents and their children), the American Academy of Adoption Attorneys (AAAA) (professional organization established in 1990, now

coverage that treats adoption advocates as if we speak with one voice.<sup>7</sup> Most prominent among these divisive issues were: Should a single structure be imposed on all adoptive families regardless of the diversity of family arrangements now visible in American society? When should a birth parent's consent to adoption become final and irrevocable? Should the UAA recognize, prohibit, or otherwise provide for post-adoption visitation agreements between adoptive and birth families? Under what conditions should the UAA permit adoptees and birth parents to learn each others' names and whereabouts if they have not had any contact while the adoptee was a minor? The issue of visitation was the most volatile flash point between those who want adoptive parents to be "unfettered" and those who believe that adoption can be secure and permanent without hiding from the social, ethnorracial, and biological reality of a child's birth family.<sup>8</sup>

These tensions and disagreements continue to permeate discussions of the UAA in the media and in legislative task forces throughout the

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consists of more than 300 lawyers engaged in interstate and intercountry adoption practice); Concerned United Birthparents (CUB) (committed to the adoption as "last resort" position), the National Committee for Adoption (NCF), the New England Genealogical Society (NEGS), Michigan Families for Private Adoption, and the Pro-Adoption Coalition of Iowa. Some meetings were also attended by staff from the Child Welfare League of America (CWLA), the Interstate Compact administrators, the National Association of Social Workers, the American Academy of Pediatricians, and the ABA Children and the Law Center, as well as by a number of individual adoptees, adoptive parents, and birth parents.

Committee members and many Commissioners received a steady barrage of letters from members of the adoption triad, recounting their personal histories and expressing strong feelings about the emotionally charged issues on the committee's agenda. Throughout the committee's stormy five-year life, the co-chairs, Robert Robinson of Maine and Orlan Prestegard of Wisconsin (our sole member who had also been on the drafting committee for NCCUSL's Adoption Act of 1953), conducted the meetings with remarkable patience, good humor, and tolerance for the extraordinarily wide array of opinions expressed on just about every provision we drafted, "revisited," or "redacted."

7. For example, while many pro-adoption advocates, like the NCF, are also opposed to abortion, many favor adoption as one of a number of legitimate reproductive choices. Some pro-adoption advocates strongly favor transracial and cross-cultural adoptions; others believe in more traditional matching policies; some believe adopted children deserve, if at all possible, to be raised by married couples; others are less troubled by the increased interest in adoption among unmarried individuals.

8. The issue of post-adoption visitation—whether it should be permitted or prohibited, enforceable or left to the parties' moral commitment, limited to older children and stepchildren or available to all adoptions—was debated at nearly every Drafting Committee meeting and erupted at several NCCUSL Annual Meetings. *See especially* NCCUSL 1992 and 1993 Annual Meeting Transcripts, at 185, 188, and 191. Speaking in favor of open adoptions, Comm. Allan G. Rodgers (Mass.) warned: "We ought to be very careful about making adoption so strict that we are going to cause a number of people to try to deal with children outside the adoption process altogether." 1993 Transcript, at 191. [Transcripts on file with Reporter.]

country.<sup>9</sup> They also serve as a lightning rod for already smoldering professional rivalries about who should control access to adoption: private or public agencies, lawyers or agencies, lawyers and agencies or unlicensed intermediaries, social workers, lawyers, and child welfare experts who favor traditional "closed" adoptions, or those who support more "open" adoptions. Most deeply threatened by the UAA, and especially by the anti-discrimination provisions that would enable more diverse people to adopt and be adopted, are a number of child welfare agencies and social workers who fear the loss of the virtually unlimited authority they have long exercised over many kinds of adoption.<sup>10</sup>

While people within and beyond NCCUSL debate whether a single set of legal requirements and consequences can be imposed on all adoptions, the rapidly changing demography of adoption has long since belied the notion that one model suits all. The faces within adoptive families have changed substantially since the 1970s and may change even more dramatically as we enter the next century. Fewer and fewer fit within the traditional model of infertile couples seeking to reinscribe the "natural" families they cannot have by adopting an infant matching their own appearance. Despite estimates that nearly 2 million couples are involuntarily childless, only a small percentage of them, and of single individuals, seek to adopt unrelated infants.<sup>11</sup> Whether attracted by the allure, however overstated, of technologically assisted reproduction,<sup>12</sup> or frightened off by judicial rulings that exalt the "preemptive"

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9. See, e.g., Mark Hansen, *Fears of the Heart*, A.B.A. J., Nov. 1994, at 58; Susan Chira, *Law Proposed to End Adoption Horror Stories*, N.Y. TIMES, Aug 24, 1994; *Images of Adoption & of Confusion*, L.A. TIMES, editorial, Dec. 25, 1993. See also Marvin Olasky, *The War on Adoption*, NAT'L REV., June 7, 1993, at 38.

10. For a history of how child welfare agencies came to have virtually uncontrolled discretion as gatekeepers to adoption, see Brian Gill, *The Jurisprudence of Good Parenting* (1996) (unpublished dissertation, Univ. Cal. Jurisprudence & Social Policy); *ADOPTION LAW & PRACTICE*, *supra* note 5, at ch. 1, ch. 13. See also memos criticizing UAA by CWLA and NASW (copies available from NCCUSL or from CWLA and NASW).

11. U.S. BUREAU OF THE CENSUS, STAT. ABSTRACT OF THE UNITED STATES, 1987, Table 95, at 65 (10th ed. 1986); *New Study Challenges Estimates on Odds of Adopting a Child*, N.Y. TIMES, December 10, 1990, at B10 (concludes that only about 200,000 women are actively seeking to adopt a child—an estimate only 1/10 as large as others have made, but probably more reliable).

12. BARTHOLET, *supra* note 5, at chs. 9-10; Joan Heifetz Hollinger, *From Coitus to Commerce: Legal & Social Consequences of Noncoital Reproduction*, 18 U. MICH. J.L. REV. 866 (1985) (discusses negative impact on adoption of new techniques for producing children in laboratories). See also Arthur Caplan, *Doctors Who Play God*, Hearst papers, May 31, 1955; Ellen Goodman, *The Biological Burglary Case*, syndicated column, June 14, 1995 (discussion of UC Irvine infertility clinic scandal involving alleged transfers of the "wrong" fertilized embryos to women hoping to gestate their own genetically related child).

rights of biological parents to their child "wholly apart from any consideration of the so-called best interests of the child,"<sup>13</sup> many childless couples and individuals are hesitant about adoption.<sup>14</sup>

Of the 130,000 to 150,000 adoptive families formed each year, many are not prompted by infertility. Perhaps half or more of these adoptions are by stepparents or relatives who may have long performed parenting responsibilities for the children they adopt and who may also be caring for other younger or older biological children. Perhaps another 20 percent of adoptive families are comprised of older children adopted by unrelated adults who have been their foster parents and who understand that these children do not present a "clean slate," but bear the psychosocial legacy of what may have been severe mistreatment by their biological parents. A small but increasing number of adoptions are being approved for those who want to create nontraditional families that reach across racial, ethnic, and cultural boundaries, not just biological ones. Still other adoptive families are being formed by gays and lesbians who seek to legitimize their status as de facto stepparents of their partners' child or who, in some states, are being actively recruited by public agencies to adopt children with special needs.<sup>15</sup>

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13. *In re Doe*, 638 N.E.2d 181 (Ill. 1994), *reh'g denied* July 1994, *cert. denied*, 115 S. Ct. 499 (1994), Petition of Kirchner, No. 78101 (Ill. Sup. Ct., Feb. 28, 1995) (grants birth father's *habeas corpus* petition for immediate transfer of four and a half year old son to his custody). See Don Terry, *Storm Rages in Chicago over Revoked Adoption*, N.Y. TIMES, July 15, 1994, at A1; Adrienne Drell, *Adoptive Parents Plea: Let's Meet to Ease Richard's Move*, CHI. SUN-TIMES, April 14, 1995, at 10.

14. See C.A. Bachrach, K.A. London, & P.L. Maza, *On the Path to Adoption: Adoption Seeking in the United States, 1988*; 53 J. OF MARR. & FAM. 705-18 (1991) (concerns about the costs of adoption, the complexity of adoption laws and regulations, and doubts about the characteristics of the children available for adoption from public agencies, are among the reasons childless women cite when asked what dissuades them from pursuing adoption). See, e.g., Sarah Jay, *When Children Adopted Overseas Come with Too Many Troubles*, N.Y. TIMES, June 23, 1996, at A1 (even the thousands of prospective adoptive parents who turn to other countries where abandoned children are in need of permanent homes are finding that these adoptions are hardly risk free).

15. Everyone who does research on adoption is handicapped by the persistent lack of accurate data about the numbers of adoptions completed each year, the kinds of adoptive placements, and the types of children, birth families, and adoptive parents entering into adoptions. One thing that is clear, however, is that the percentage of Caucasian mothers placing their newborn children for adoption has decreased dramatically from the 1960s to 2-3% in the 1990s, while the percentage of black and Hispanic mothers relinquishing children voluntarily has remained at fewer than 2%. See C.A. Bachrach, Stolley & K.A. London, *Relinquishment of Premarital Births*, 24 FAM. PLANNING PERSPECT. 27 (1992).

While the Immigration and Naturalization Services (INS) calculates that during the past decade, approximately 8,000 to 10,000 adoptees born outside the United States were adopted annually by U.S. citizens who reside in this country, no federal agency or national organization keeps track of adoptions completed in this country. Flango, *How Many Children were Adopted in 1992?* 74 CHILD WELFARE (Sept.-Oct. 1995)

The final version of the UAA clearly embodies a core meaning for adoption: “each adoptive parent and the adoptee have the legal relationship of parent and child and have all the rights and duties of that relationship,”<sup>16</sup> and, except with respect to adoptions by de facto as well as de jure stepparents, once an adoption is final, “the legal relationship of parent and child between each of the adoptee’s former parents and the adoptee terminates.”<sup>17</sup> Yet, these provisions, along with many others, are not inimical to the formation of the different kinds of adoptive families briefly described here. By carving cautious and at times quite wavy lines through the thicket of conflicting views about the consequences of adoption, the UAA ends up combining a substantial amount of regulation and oversight of the process by which adoptive families are formed with a considerable amount of deference to the parties’ own choices about how to shape their families.

## II. UAA Scope and Goals

In all states, adoptive placements by private and public agencies are now permitted, and in all but a handful of states, some version of direct placement by a birth parent—often called “independent” or “private” adoption—is also lawful. Nonetheless, current laws governing direct and agency placements vary greatly from one jurisdiction to another, thereby exposing innocent children and their birth and adoptive parents to needless risk. The rising numbers of interstate placements are ostensibly subject to the Interstate Compact on the Placement of Children (ICPC) whose procedures are notoriously ambiguous and inconsistently applied, thus increasing the risks for even the most harmonious placements. Similarly varied and inconsistent are current laws pertaining to stepparent adoptions, adoptions of adults, and recognition in the United States of adoptions finalized in other countries.

By specifying the individuals and agencies who are authorized to place minor children for adoption and clarifying the legal requirements, as well as various behavioral options available at each stage of the adoption process, the UAA will facilitate the completion of uncontested

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(calculates the numbers of children in the child protection system who are available for adoption after their parents’ rights have been terminated).

Some states, maintain accurate data on the numbers of adoption in each fiscal year, broken down between agency and independent adoptions. See Richard P. Barth, Devon Brooks & Seema Iyer, *Adoption in California: Current Demographic Profiles and Projections* (Child Welfare Research Center, 1995) (showing the total number of adoptions completed in California 1990-94 ranged between 6,500-7,000, of which 2,500-3,000 have been independent (non-agency) placements).

16. U.A.A. § 1-104.

17. *Id.* at § 1-105.

adoptions and expedite the resolution of contested proceedings. The UAA would standardize the minimum requirements for valid consents, relinquishments, and pre- and post-placement evaluations, as well as to encourage full disclosure and judicial scrutiny of adoption-related fees and expenses. The UAA is intended to bolster the finality of adoptions and allow birth and adoptive families to decide for themselves how "open" or "closed" they want their relationships to be.

Although the UAA applies to every type of adoption, the scope of the Act is nonetheless somewhat limited. First, except for section 1-108 authorizing states to recognize the validity of foreign adoptions without requiring another judicial proceeding in the United States, and section 2-108 authorizing adoptions of children born in other countries and lawfully placed for adoption in an American state, the UAA says little about intercountry adoption. This is because the U.S. State Department asked NCCUSL to refrain from regulating adoptions undertaken in other countries pending a decision by the federal government about implementing the 1993 Hague Convention on Intercountry Adoption.<sup>18</sup> Second, as a state law, the UAA cannot amend and is bound by the federal Indian Child Welfare Act (ICWA) when an adoption involves an Indian child as defined by ICWA.<sup>19</sup> Third, because NCCUSL is not authorized to raise or mandate the use of public funds for child welfare programs, the UAA does not deal as much as the drafting committee

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18. Signed by 55 countries in May 1993, the Hague Convention on Intercountry Adoption has yet to be ratified or implemented in the United States. Many of the difficulties that plague discussions of the UAA (1994) have delayed implementation of the Convention, especially the professional rivalries between private and public agencies, lawyers, and immigration experts at the state and federal level, about criteria for approving adoptive parents and general control of the process. See Peter H. Pfund, *Intercountry Adoption: The 1993 Hague Convention: Its Purpose, Implementation, and Promise*, 28 FAM. L.Q. 53 (1994); Richard Carlson, *Emerging Law of Intercountry Adoption*, 30 U. TULSA L.J. 243 (1994).

U.A.A. § 1-108 contains a standard rule of comity for recognizing and giving full effect in this country to foreign adoption decrees issued pursuant to the foreign "country's law or to any convention or treaty on intercountry adoption which the United States has ratified." This provision should obviate the need for U.S. residents who adopt children in another country to file a second adoption petition in their home state, as is now done in a number of states, at additional financial and emotional cost for adoptive families. To implement section 1-108, state regulations could allow adoptive parents simply to obtain a certification of their foreign adoption decree from a local court without the necessity of a hearing, and then request a delayed registration of birth or certificate of adoption from the appropriate state agency. Michigan has implemented this procedure. MICH. COMP. LAWS § 710.21b, 1994 Mich. Pub. Acts 241-242.

19. ICWA, 25 U.S.C. § 1901 *et seq.* See *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989) (any state court ruling that would permit individual Indian parents to defeat the ICWA's jurisdictional scheme is inconsistent with congressional intent to ensure tribal survival).



would have liked with the adoption of dependent children who have been abused or neglected, or have other special needs that qualify them for financial assistance from federal or state funded programs.<sup>20</sup> Of necessity, the UAA focuses on the legal aspects of adoptions. This focus is fully consistent, however, with the efforts of others to increase public as well as private funding for counseling, health care, and other important pre- and post-adoption services. Fourth, at the insistence of many NCCUSL members who believe that most states will not enact proposed laws that require substantial departures from local rules of procedure, the UAA leaves many procedural details for states to spell out, focusing instead on those procedures that most deserve to be more uniform throughout the country.

The UAA supplements, but does not displace, existing federal child protection, family preservation, and permanency planning laws. For example, if a child is subject to a state-initiated dependency proceeding, an adoption proceeding under the UAA cannot begin until a court terminates the rights of the child's parents and authorizes the public social services agency to seek a permanent adoptive placement for the child. At that point, the UAA requires that in selecting an adoptive parent, the agency must accord some preference to individuals, including foster parents and relatives, who have previously cared for the child for six or more months.<sup>21</sup> The UAA also is consistent with, but goes beyond, the federal Multiethnic Placement Act's restrictions on the racial or ethnic matching policies that are prevalent throughout the country. Under the UAA, privately as well as publicly funded agencies are barred from delaying or denying a child's placement solely on the basis of the child's race, national origin, or ethnic background.<sup>22</sup> The child's guardian *ad litem* or any individual with a favorable pre-placement evaluation may seek equitable relief against an agency for violating the prohibitions against racial or ethnic matching. In order to expand the pool of suitable prospective adoptive parents for dependent children, any agency receiving federal or state adoption-assistance funds must

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20. When it became apparent that the committee would not be able to draft its own separate article on children with special needs who are eligible for different kinds of federally or state funded adoption assistance, it invited Mark Hardin of the ABA Center on Children and the Law in December 1991 to discuss how the proposed Act could address some of the adoption-related issues affecting dependent children. Mr. Hardin declined an invitation to draft a separate article on dependent and special needs children and we were unable to find anyone else to deal with this enormous task. Some of the misunderstanding and misconceptions about the UAA project might have been alleviated if the Act had included more provisions intended specifically for children with special needs.

21. U.A.A. § 2-104(b).

22. *Id.* at § 2-104(c).

actively recruit adoptive parents for children whose minority status or other special needs make them difficult to place for adoption.<sup>23</sup>

In addition to supplementing the state's child protection laws, the UAA explicitly applies to:

1. the voluntary direct placement of a minor child with prospective adoptive parents personally selected by a birth parent who has legal and physical custody of the child and who formally consents to the child's adoption;<sup>24</sup>
2. the voluntary relinquishment to an agency of a minor child by a birth parent for purposes of adoption<sup>25</sup> with the understanding that the agency will place the child with prospective adoptive parents selected by the parent from the agency's applicant pool or selected by the agency in accord with the statutory nondiscriminatory preferences listed in section 2-104;
3. the proposed adoption of a minor child by the spouse or the unmarried partner, including same sex partner, of the child's custodial parent, subject to the consent of that parent, who will retain his or her parental rights, and further subject to the consent or involuntary termination of the parental status of the child's noncustodial parent, if any;<sup>26</sup>
4. the proposed adoption of a minor child by someone with whom the child has not been formally placed according to (1) or (2), *supra*, and who is not an authorized foster parent, but who has had physical custody of the child for at least six months and is allowed by a court to petition to adopt the child. This is subject to the UAA's other requirements for a valid adoption, including an appropriate basis for terminating the parental status of any existing legal parent,<sup>27</sup> and additional justifications for conferring full parental authority on the child's informal *de facto* parent;<sup>28</sup> and

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23. *Id.* at § 2-105.

24. U.A.A. art. 2, pts. 1 & 4.

25. *Id.* at art. 2, pt. 4.

26. *Id.* at art. 4.

27. *Id.* at § 3-301(a)(2) & Comment.

28. The UAA thereby addresses the interests of minors in having certain *de facto* or "informal adoptions" recognized as legal adoptions. For example, a minor may have been left by one or both parents with a relative or a friend for an extended period of time without a formal consent to adoption or any "regular" pre-placement procedures. The Act would allow these individuals to seek court permission to file a petition for adoption. If an individual in this category is reasonably likely to prove, upon clear and convincing evidence, that termination of the relationship between the parents and the minor is justified, U.A.A. art. 3. Pt. 5, the court may grant permission and set the stage for this informal arrangement to "ripen" into a legal adoption, U.A.A. § 3-301. Of course, the individual would have to be favorably evaluated during the

5. the proposed adoption of an adult by another adult, subject to their mutual consent, and judicial determination that the adoption is intended to create a parent-child relationship.<sup>29</sup>

### III. Significant Features

#### A. Best Interest Standard

The UAA's goal is to promote the welfare of minor children by ensuring that they will be raised by birth or adoptive families who are committed to and capable of caring for them, and by facilitating only those adoptive placements that are genuinely conducive to a child's welfare. The Act therefore aims to protect children against unnecessary separation from their birth parents, against placement with unsuitable adoptive parents, and against harmful delays in determining their legal status. Why, then, is there no "purposes and policies" provision, or, alternatively, an express rule of construction that the child's welfare or best interests be the paramount consideration for all proceedings under the Act?

During the UAA's prolonged gestation, one of the only issues on which all of us, inside and outside the drafting committee, agreed upon was that the deciding factor in any adoption or other adoption-related proceeding was whether or not the child's best interests were served. Most of us similarly agreed that the traditional rule that adoption statutes "should be strictly construed because in derogation of the common law," was too narrow because blind to the need for any child welfare law on the eve of the twenty-first century to address rapid and unanticipated changes in familial relationships. Efforts to include a rule of "liberal construction" to promote the minor child's welfare were, however, persistently overridden by the Style Committee and others who want

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proceeding and the court would have to determine that the proposed adoption was in fact in the minor's best interests.

Many children, especially in minority communities, are left by their parents with relatives or others under informal circumstances. For the child's sake, it makes no sense to prevent a relative who has acquired custody in this manner from attempting to adopt the child simply because the relative has not been officially "pre-evaluated." Moreover, these informal placements cannot be supervised before they occur—they do not come to the attention of public or private agencies or to the courts unless the relative files a petition to adopt or requests appointment as a foster parent under the state's child protection laws. *Cf. Bennett v. Jeffreys*, 356 N.E.2d 277 (N.Y. 1976) (prolonged separation of child from biological mother, who voluntarily left child with an unrelated acquaintance, is "extraordinary circumstance" warranting judicial inquiry into "best interests of child" in custody dispute between mother and de facto parent).

29. See *In re Robert Paul*, 471 N.E.2d 424 (N.Y. 1984) (adult homosexual may not adopt his male lover if intent is to circumvent marriage laws instead of to create genuine parent-child relationship).

NCCUSL Acts to achieve their purposes through carefully crafted substantive provisions that do not rely on general rules of construction or statements of purpose susceptible to inconsistent, often ideologically motivated, pulls and tugs.<sup>30</sup> Another objection to a best interests rule of construction is that best interests is not the determining factor in some proceedings under the Act, for example, the unqualified right of a birth parent to reclaim a child under certain circumstances and for a specified time.<sup>31</sup>

Reluctantly, I am coming to appreciate that a general best interests standard may be of limited value in deciding a particular case. For example, in a contest between a thwarted birth parent and a custodial adoptive parent, is the child better off remaining with the adoptive parent who is a biological stranger, or being transferred to the biological parent who is a psychological stranger? How are short-run as opposed to long-term interests to be weighed?

Another striking example of how malleable rules of construction can be is evident in recent appellate court opinions on whether a particular state's laws permit adoptions by unmarried heterosexual or homosexual couples. While some courts say the statutes must be strictly construed to conform to their exact language, others insist that they be strictly construed to promote the welfare of the prospective adoptee. Still others insist that they must be liberally, not strictly, construed to promote the adoptee's welfare.<sup>32</sup> Even more noteworthy about these cases is that

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30. Two of the possible, but later rejected, formulations for a rule of construction to promote the minor child's best interests were: (1) "This [Act] shall be strictly construed and interpreted to protect and promote the best interest of any individual who is adopted or is a potential adoptee"; and (2) "This [Act] shall be liberally construed to protect and promote the best interest of an individual who is adopted or is to be adopted, but due regard shall be given to the interests of any other individual affected by an adoption." Cf. other NCCUSL Uniform Acts that contain statements of purpose, for example, the Uniform Commercial Code and the Uniform Child Custody Jurisdiction Act.

31. If a birth parent does not execute a formal consent to an adoption within a time agreed upon in her written placement agreement with the prospective adoptive parents, U.A.A. § 2-102(d), or decides to revoke her executed consent or relinquishment within eight days of the child's birth, U.A.A. §§ 2-408 or 2-409, she has an absolute right to reclaim custody of the child regardless of whether that is in the child's best interests. Other examples are a proceeding to determine whether and how to give notice to an alleged father, which ultimately turns on the futility of giving notice by publication, not on whether notice would be in the child's best interests, U.A.A. § 3-404, and a proceeding to open otherwise sealed records in which a "compelling reason" to justify access is not necessarily in an adoptee's best interests, U.A.A. § 6-105, although many of us argued that it should be.

32. See, e.g., decisions permitting de facto stepparent adoptions: *In re Jacob*, 85 N.Y.2d 651 (1995); *In re M.M.D.*, 662 A.2d 837 (D.C. Ct. App. 1995); *Petition of K.M.*, 653 N.E.2d 888 (Ill. App. Ct. 1995); *Adoption of B.L.V.B.*, 628 A.2d 1271 (Vt. 1993); *Adoption of Tammy*, 619 N.E.2d 315 (Mass. 1993); *In re Adoption of J.M.G.*, 550 A.2d 622 (N.J. Super 1993).

*But cf.* decisions that de facto stepparent adoptions are not contemplated by states:

their outcomes are not predictable from the particular rule of construction invoked by the court. While the New York Court of Appeals relies on an allegedly strict construction of legislative purpose to conclude that second parent adoption by a custodial parent's unmarried partner is lawful regardless of the partner's sexual orientation, a Colorado appellate court invokes an allegedly liberal construction of its statute to conclude that an adoption by a lesbian de facto stepparent of her partner's child is not possible.<sup>33</sup>

In its final version, the UAA does not contain a general best interests or mandatory rule of construction, even though, despite the pitfalls of such a rule, it might have improved the Act's chances for broader public acceptance. Nonetheless, as explained in Joel Tenenbaum's article, the UAA is replete with specific provisions, including the ultimate judicial decision to grant or deny an adoption, in which the determinative factor is best interests, avoidance of detriment, or promotion of the child's welfare. In addition, innumerable other provisions are implicitly concerned with promoting a child's welfare. Several salient examples are the provisions pertaining to domestic violence. First, one of the things that can raise a "specific concern" about the suitability of a prospective adoptive parent is prior liability for domestic violence or child maltreatment.<sup>34</sup> Second, in weighing the importance of ascertaining the identity and whereabouts of a birth father, the balance may tip in support

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*In re Adoption of T.K.J. & K.A.K.*, 65 U.S.L.W. 2043 (Colo. Ct. App. 1996); *In re Angel Lace M.*, 516 N.W.2d 678 (Wis. 1994). See also *In re Baby Z.*, 1996 Conn. Super. Lexis 1091.

33. See, e.g., *In re Jacob*, 85 N.Y.2d 651 (1995) (Statutory analysis of Justice Kaye allowing an individual, whether heterosexual or homosexual, who is the unmarried partner of a child's biological and legal parent, to become the child's second parent by adoption without requiring the bio-custodial parent to relinquish parental rights. Kaye begins with the traditional maxim: because adoption is "solely" the creature of statute, the statute "must be strictly construed." But instead of going from there as many earlier courts have done to emphasize strict, and hence, likely to be narrow, construction of the statutory language, she takes the maxim in a different direction: "What is to be construed strictly and applied rigorously in this sensitive area of the law . . . is legislative purpose as well as legislative language." This leads to the mandate that the statute "must be applied in harmony with the humanitarian principle that adoption is a means of securing the best possible home for a child." Relying on these traditional, conservative principles of statutory construction, Kaye then deftly announces a rule that will permit some of our least traditional families to be clothed in the mantle of legal legitimacy.)

But see *In re Adoption of T.K.J. & K.A.K.*, 1996 Colo. App. Lexis 176 (rule of strict construction used to deny standing to each of two women living together who sought to adopt the other's biological child as if it were two stepparent adoptions, saying: "Adoption is a creature of statute, and our statutes are to be given a liberal construction to carry out their beneficial purpose of promoting the welfare of the child; but if a proposed adoption fails to conform to statutory requirements, the effort to adopt must fail.").

34. U.A.A. § 2-203(d)(7).

of a mother's refusal to disclose his name when she is legitimately afraid that she or the child will be the unprotected targets of his abusive, violent behavior.<sup>35</sup> Third, a parent's conviction for a crime of violence or of violating a protective order may be a basis for terminating parental rights if the circumstances suggest that the parent is unfit to raise the child.<sup>36</sup> While not mentioning best interests, these three provisions still express the UAA's commitment to children's interests by protecting them against being raised by birth or adoptive parents with a history of violent or abusive behavior.

### *B. Protection for Birth Parents*

The UAA protects birth parents against unwarranted termination of their parental rights. Minor children may not be adopted without parental consent or appropriate grounds for dispensing with parental consent. Numerous procedures—including access to both psychological and legal counseling as well as to information about the meaning of and options to adoption—ensure that a decision by a parent to relinquish a minor child and consent to the child's adoption is informed and voluntary. No parent can be required to consent or relinquish at any particular time, although neither document is valid unless executed after the birth of a child.<sup>37</sup>

Once a birth parent decides that he or she is fully prepared to go ahead with a consent to a direct adoptive placement, or with a relinquishment of a child to an agency, the parent must express that decision orally and in writing before someone who is neutral and not involved in any actual or potential conflict with anyone else interested in securing the adoption. This can be a judge or court-appointed officer, the parent's own lawyer, or a social worker other than an employee of the agency to whom the child is being relinquished. The individual who presides over the execution of the parent's consent or relinquishment must be knowledgeable about the procedure and confirm that the parent appeared to understand the significance and consequences of what he or she was doing, and did so voluntarily. Upon being properly executed,

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35. U.A.A. § 3-404(e). For a helpful discussion of the psychological implications of requiring a mother to name the child's father, see Deborah L. Forman, *Unwed Fathers & Adoption: A Theoretical Analysis in Context*, 72 TEX. L. REV. 967, 1025-34 (1994).

36. U.A.A. § 3-504(c)(3). See Amy Haddix, *Unseen Victims: Acknowledging the Effects of Domestic Violence on Children through Statutory Termination of Parental Rights*, 84 CAL. L. REV. \_\_\_\_\_ (1996) (includes favorable analysis of UAA provisions); Howard A. Davidson, *Report to President of ABA, The Impact of Domestic Violence on Children* (1995).

37. U.A.A. Art. 2, Pt. 4 & Comments.

a consent or relinquishment should with very few exceptions be both final and irrevocable.<sup>38</sup>

No one is fully satisfied with the Act's resolution of one of the most intractable issues the drafters faced: how much time should a birth parent have to revoke a consent or relinquishment and reclaim the child? After years of acrimonious debate,<sup>39</sup> the Conference limited the time for an unqualified revocation to approximately eight days (192 hours) after a child's birth.<sup>40</sup> For the many birth parents who do not consent or relinquish until weeks or months after a child is born, there is no general right to revoke, except for fraud or duress, if the consent or relinquishment is otherwise valid and is not explicitly contingent on obtaining the consent or termination of the rights of the other parent.

Among the rationales for what many believe is an unacceptably short revocation period is that the UAA is so front-loaded with due process protections against the risk that a parent, especially a birth mother, will make a hasty or uninformed decision to relinquish a child, that she would not benefit from having more than a few days to reverse her earlier voluntary decision. Having a longer time would allegedly make it more difficult for the parent to achieve closure on this emotionally difficult decision.<sup>41</sup> More importantly, it would undermine the sense

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38. *Id.* at §§ 2-404 to -407.

39. The Drafting Committee itself never achieved a consensus, as illustrated by the disagreements expressed in NCCUSL's 1994 plenary session between members Rosselle Pekelis (Wash.) and John McLaugherty (W. Va.). NCCUSL 1994 Annual Meeting Transcript, at 297-99. The Committee of the Whole spent several hours at the 1994 Annual Meeting debating various alternatives to Commissioner Arthur Bonfield's motion to allow a 14-day revocation period for all consents or relinquishments, regardless of how long after a child's birth they are executed, and to further require the child to be returned to the parent's custody if revocation occurs within the 14 days. Ultimately, all versions of Bonfield's motion were defeated, and the 192 hours revocation rule, U.A.A. §§ 2-404, 2-408, 2-409, was agreed upon by the Committee of the Whole. [Transcript on file with Reporter].

40. U.A.A. §§ 2-408 & 2-409.

41. *See, e.g.*, the comments of Comm. Martha Walters (Ore.):

The question is [not how long does she have before she decides to consent, but] how long does she have to change her mind? The mothers I have dealt with do not want to have too long a chance to change their minds. It prolongs things for them to have to rethink about the decision. They would like that period to be short.

NCCUSL 1994 Annual Meeting Transcript, at 293.

But, contrast, the comments of Comm. Joel Siegal (N.J.):

We are dealing with mothers here who are often the disadvantaged, the poor, minorities, uneducated, have all sorts of pressures being placed upon them. We should have a much longer period [than what is in the Act]. It's intrinsically a situation where you can have undue influence.

NCCUSL 1994 Annual Meeting Transcript, at 294.

of connectedness and legitimacy that is beginning to form in the new adoptive family.<sup>42</sup> In addition, the longer the time a birth parent has to revoke, the more resistance there will be from adoptive parents asked to give up custody of a child. Indeed, under existing laws in many if not most states, when birth parents have what appears to be as little as ten or as many as 120 days to revoke, what they actually end up with is “best interests” litigation in which the likelihood of their actually ending up with the child’s custody is inverse to the length of time the child has been in the adoptive parents’ care. This is not fair to a birth parent who has been incorrectly led to believe that a right to revoke means not only a right to withdraw consent, but a right to reclaim custody of the child.<sup>43</sup> In the long run, then, it may be more fair, as well as honest, to make clear to birth parents that once they formally execute what they and others take to be a voluntary consent or relinquishment, they cannot undo it except in extraordinary circumstances.

The UAA’s commitment to ensuring the integrity of adoptions by being scrupulously attentive to the constitutionally protected rights of birth parents is reflected in its handling of involuntary termination proceedings, as well as with respect to the voluntary consents and relinquishments discussed above. Equally basic to the Act, however, is the recognition that much of our constitutional jurisprudence on parental rights is the counterpart of the state’s reliance on parents to support,

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42. Although many Commissioners repeatedly spoke in favor of minimizing the likelihood of disruption for newly formed adoptive families, several argued that in the early weeks after a placement, the interests of the birth mother may continue to outweigh those of the adoptive parents. Perhaps no one expressed this justification for a somewhat longer period of revocation more eloquently than Comm. Sandra Stern (N.Y.):

. . . in other areas of the law we recognize that there can be a distinction between intellectual knowledge and emotional knowledge. Right after the momentous event of a birth, recovery from anesthesia and possibly from a Caesarean, she may know that if she gives this baby up for adoption, that she won’t see it again, but she doesn’t have an opportunity to appraise what that is going to be like emotionally until she has had a little bit of time to experience the new state of motherhood. . . . As far as the interest of the prospective adoptive parents are concerned, we have called that an interest, but they really don’t have an interest in the baby in the sense that you would if this were a commercial transaction. I think they have an expectation, and we realize that their lives, too, will be altered if they don’t become adoptive parents. But I think that the interests of the mother should be weighed a little bit more heavily at least for several weeks.

NCCUSL 1994 Annual Meeting Transcript, at 288.

43. See cases cited and discussed in *Consent to Adoption and Contested Adoptions*, in *ADOPTION LAW & PRACTICE*, *supra* note 5, at ch. 2 & 8.



raise, and nurture their children.<sup>44</sup> Parents who fail to perform these functions cannot expect unlimited protection of their interests in maintaining a legal relationship to a child. Nor can they expect courts to support their desires to block a proposed adoption by others, especially if they have failed to take advantage of the unique opportunity to become a responsible parent which is based on their original biological ties to their child. These biological ties may give them a headstart on establishing protected parental rights, but are not by themselves sufficient to bestow or maintain full parental rights.

Even "thwarted" fathers, who have been prevented by the misdeeds of others from functioning as parents, may be prevented from blocking a proposed adoption of a child if there is clear and convincing evidence that it would be detrimental to the child to deny the adoption.<sup>45</sup> "Wrongs" inflicted on adults are not automatically remedied in the UAA by turning the child over to the aggrieved adult.<sup>46</sup> Decisions to continue or dismiss an adoption proceeding, as well as decisions about a child's ultimate custody, focus on the needs and welfare of the child and not simply on the "rights" of adults. In the unlikely event that an adoption under the Act will be denied before entry of a final decree, or set aside on appeal, the UAA requires the court to determine the child's custody. In this custody proceeding, the individuals who are no longer able to adopt the child may seek to maintain custody if the child's welfare warrants it.<sup>47</sup> As I have previously emphasized, a child

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44. See Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 CARDOZO L. REV. 1747 (1993); Mary Shanley, *Unwed Fathers' Rights, Adoption, & Sex Equality*, 95 COLUM. L. REV. 60 (1995); Janet L. Dolgin, *Just a Gene: Judicial Assumptions about Parenthood*, 40 U.C.L.A. L. REV. 637 (1993).

45. U.A.A. § 3-504(d) & (e).

46. The UAA's success in reconciling and combining potentially disparate or conflicting themes was noted by Justice Kogan in his partial concurrence in Florida's Baby Emily case. *In re Adoption of Baby E.A.W.*, 658 So. 2d 961 (Fla. 1995) (unwed father's emotional abuse of birth mother during her pregnancy may be evidence of pre-birth abandonment warranting the termination of his right to veto the child's adoption by adoptive parents selected by birth mother). Justice Kogan notes that, in the UAA, parental rights and best interests doctrines are both important and are reflected in the shifting burdens of persuasion and proof in the section 3-504 termination provisions. These disparate doctrines are also given different weights at different times. For example, the Act's sensitivity to the child's sense of time calls for efforts to resolve conflicts over a parent's status within approximately six months of the adoptive placement, after which the child's best interests begin to outweigh the deference to parental rights. See also Comment to § 2-401, § 3-504.

47. U.A.A. §§ 2-408, 2-409, 3-506, 3-704, and Comments. The consequences for the child, the birth parents, and the adoptive parents are more fully discussed in Joan Heifetz Hollinger, *Adoption and Aspiration: The Uniform Adoption Act, the DeBoer-Schmidt Case, and the American Quest for an Ideal Family*, 2 DUKE J. GENDER L. & POL. 15 (1995). See also Alexandra Dylan Lowe, *Parents and Strangers: The*

should not be treated as misaddressed parcel which, upon discovery of the error, has to be shipped to the rightful owner.<sup>48</sup>

Prompt hearings are required for contested adoptions and a guardian *ad litem* or lawyer must be appointed for minors whose well-being is threatened by protracted or contested proceedings.<sup>49</sup> A parent with sole legal and physical custody of a minor child—usually the birth mother—may select an adoptive parent herself, transfer the child's custody directly to that individual, and execute her formal consent to the child's adoption either at the time of the placement or at a later time mutually agreed upon with the adoptive parents.<sup>50</sup> The prospective parents must file a petition for adoption within thirty days of the placement.<sup>51</sup> Once the petition is filed, diligent efforts must be made to notify the child's other parent or any alleged parent, whose rights have not previously been determined, that an adoption proceeding is underway.<sup>52</sup> Birth mothers are strongly encouraged to help locate the child's father and a parent who "knowingly misidentifies the minor's other parent with an intent to deceive the other parent, an agency, or a prospective adoptive parent" is subject to a civil penalty.<sup>53</sup> In addition, if both parents have legal custody or a right of visitation with the child, neither parent can act on his or her own to make a direct adoptive placement without first

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*Uniform Adoption Act Revisits the Parental Rights Doctrine*, 30 FAM. L.Q. 379 (Summer 1996); Gilbert A. Holmes, *The Tie That Binds: The Constitutional Rights of Children to Maintain Relationships with Parent-Like Individuals*, 53 MD. L. REV. 358 (1994). At least one state appellate court has found that a custody hearing to determine a child's custody in the wake of a failed adoption is constitutionally compelled in order to protect the liberty interests of a child in maintaining familial ties to the adoptive parents with whom they were originally placed with the expectation that the placement would be permanent. *In re Bridget R.*, 49 Cal. Rptr. 2d 507 (Cal. Ct. App. 1995), *review denied*, Cal. Sup. Ct., May 1996. Even the U.S. Supreme Court has recognized the importance of a child's interest in maintaining ties with would-be adoptive parents despite constitutional flaws in the handling of the birth father's status. *Rothstein v. Lutheran Soc. Servs. of Wisconsin*, 405 U.S. 1051 (1972).

48. Joan Heifetz Hollinger, *Whose Child Is This? Reflections on DeBoers-Schmidt Case*, NAT'L L.J., August 9, 1993.

49. Because of the potential fiscal burden on states if lawyers are appointed to represent minors in adoption or termination proceedings, the Drafting Committee was reluctant to mandate the appointment of a lawyer for a minor except in contested proceedings. Since 1994, many children's advocates have become more outspoken about the need to appoint a lawyer, and not simply a guardian *ad litem*, to represent the child's views, and not simply the child's "best interests," in any proceeding pertaining to the child's custody. *See Special Issue: Ethical Issues in the Legal Representation of Children*, 64 FORDHAM L. REV. (Mar. 1996); *Proposed ABA Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases*, 29 FAM. L.Q. 375 (1995). *See also* letter to Reporter from Marvin Ventrell, Director, Nat'l Ass'n of Counsel for Children (NACC), February 6, 1996.

50. U.A.A. §§ 2-101, 2-102(d) & Comments.

51. *Id.* at § 3-302.

52. *Id.* at art. 3, pt. 4.

53. *Id.* at § 7-105(f).

notifying and attempting to obtain the other parent's consent to the placement.<sup>54</sup> Nonetheless, if the court concludes that the identity or location of the nonplacing or alleged other parent is unknown, the adoption proceeding may move along without further delay.<sup>55</sup> Individuals who have behaved in ways that manifest a commitment to parenting their biological offspring are protected; individuals who have not shown any interest in parenting are assumed to have forfeited their "right" to object to the custodial parent's placement decision.

### C. Discouraging Illegal Placements

The UAA discourages unlawful placement activities within and across state and national boundaries by keeping track of minor children once they have been placed for adoption<sup>56</sup> and imposing specific sanc-

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54. U.A.A. § 2-101(c). The Commissioners were determined to discourage "at risk" adoptive placements by one parent when the other parent, though divorced or separated from the custodial parent, was nonetheless involved in the child's life, but just happened to be out of town when the placement occurred; the favorite examples being the parent who returned from the Gulf War or from an archaeological dig to discover that the other parent had placed the child with strangers. Balanced against the desire to protect what one Commissioner described as "something akin to a right of first refusal for a noncustodial parent," NCCUSL 1994 Annual Meeting Transcript, at 98, was the desire to avoid "warehousing" a child in foster care while a custodial parent, eager to move forward with an adoptive placement, attempts to locate the other parent, who may often have no interest in the child. Transcript, at 70-119. Section 2-101(b) and (c) tries to accommodate these concerns.

55. U.A.A. § 3-404 & Comment. If a birth mother places a child directly with adoptive parents, or relinquishes the child to an agency, and the father's identity or whereabouts are unknown, the court must determine after an appropriate inquiry of the birth mother and others whether the father can be identified and located for the purpose of providing him notice of the adoption proceeding. U.A.A. § 3-404. This inquiry must include an examination of putative father registries in any state where the mother may have lived during the pregnancy or since giving birth. U.A.A. § 3-404(b)(5). If the court determines that the father's identity or whereabouts is unknown, the court has the option of ordering notice by publication, or dispensing altogether with publication if it finds it "is not likely to lead to receipt of notice" by the father. U.A.A. § 3-404(d). Once this is done, or, in the event that the father is located and notified, but fails to respond and to file a paternity action within the requisite time, the court may terminate his parental rights and allow the adoption to proceed. U.A.A. § 3-504(a) and (b).

56. *See, e.g.*, U.A.A. art. 2, pt. 3: requires reports to state agency (e.g., Dep't of Social Services) that adoption petition has been filed, or other arrangements made, for care of newborns released from health-care facilities pursuant to adoptive placement agreement by birth mother; U.A.A. § 2-107: Interstate Compact on Placement of Children (ICPC) must be followed for interstate placements; U.A.A. § 2-108: relevant federal law and international conventions must be followed for adoptive placements in this country of foreign born children; U.A.A. § 3-302: petitions for adoption must be filed promptly; U.A.A. § 3-502: court authorized to make interim custody orders during pendency of any proceeding under UAA to protect minor's welfare; U.A.A. § 7-107: State agency to investigate alleged violations of the UAA and compel compliance.

tions against unlawful activities.<sup>57</sup> After considerable discussion of the futility of policing individuals eager to find or to place an adoptable child, the Drafting Committee decided not to attempt to prohibit birth parents and adoptive parents from seeking "assistance" from others, including lawyers, doctors, social workers, ministers, rabbis, and even casual acquaintances. Nonetheless, the UAA declares that it is illegal for anyone without a favorable pre-placement evaluation to seek an adoptable child or for anyone to charge a fee for an adoptive placement, consent, relinquishment, or for a promise to do any of these things. In so doing, the UAA treads, or more accurately, trips, over a wavy line between prohibiting the purchase of children,<sup>58</sup> and allowing payments for a host of other adoption-related services. Lawful payments are subject to judicial approval<sup>59</sup> and to the requirement that service providers furnish a written description of their services "and a schedule of fees."<sup>60</sup>

A second wavy line is drawn between violations of the Act which are not considered serious enough to prevent the court from granting an adoption otherwise determined to be in the child's best interests and violations that are so egregious that it would be contrary to the child's best interests to approve the adoption;<sup>61</sup>

The UAA supports the finality of adoptions by strictly limiting the time for appeals or other challenges and by presuming that an

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57. U.A.A. art. 7.

58. *Id.* at § 7-102.

59. *Id.* at § 7-103.

60. U.A.A. § 2-102(e). Concerns about "baby selling" have been prominent throughout the history of adoption in this country. See VIVIANA A. ZELIZER, *PRICING THE PRICELESS CHILD* (1985); Comment, *Moppets on the Market: The Problem of Unregulated Adoption*, 59 *YALE L.J.* 716 (1950); Steven Pressman, *The Baby Brokers*, *CAL. LAW.*, July 1991, at 30; See *ADOPTION LAW & PRACTICE*, *supra* note 5, Introduction, ch. 1. Although NCCUSL Commissioners agreed that payments to reimburse a birth mother for adoption-related medical and other expenses should never be contingent upon the mother's consent to the adoption, some Commissioners were eager to come up with a way to protect adoptive parents against losing substantial sums of money on an adoption that falls through. NCCUSL 1994 Annual Meeting Transcript, at 224-26. After further debate, the Conference approved a provision that relieves would-be adoptive parents from liability for certain payments, if an adoption is not completed, unless they have agreed in writing with a service provider to make the payment regardless of the outcome of the adoption proceeding. U.A.A. § 7-103(b).

61. U.A.A. § 3-703(c) & Comment. See, e.g., *Yopp v. Batt*, 467 N.W.2d 868 (Neb. 1991) (despite a possible violation of licensing requirements for adoptive placements, adoption granted because in child's best interests); *In re Adoption of Child by I.T.*, 164 N.J. Super. 476, 397 A.2d 341 (1978) (adoption approved because innocent adoptive parents and child should not suffer as result of lawyer's failures to follow Interstate Compact procedures). *But cf.* *Adoption of P.E.P.*, 407 S.E.2d 505 (N.C. 1991) (adoption set aside because of blatant violations by lawyer and adoptive parents of statute prohibiting payments for child-placing).

adoption decree issued in accord with the Act's procedures is valid. Unlike current laws in most states, which are unclear about both the grounds and the length of time available for challenging the validity of a final adoption, the UAA provides that a final adoption may not be challenged by anyone for any reason more than six months after the decree is issued. Even if a challenge is begun within that time, the adoption may not be set aside unless the challenger proves with clear and convincing evidence that the adoption is contrary to the child's best interests.<sup>62</sup>

#### *D. Expanding the Adoption Pool*

The UAA encourages different kinds of people to adopt and to be adopted, subject, however, to the requirement that any proposed adoption be for the purpose of creating a parent-child relationship, and that, if the adoptee is a minor, a court make an ultimate best interests determination. Implicit in the UAA is a broad anti-discrimination principle: no one may be categorically excluded from being considered as an adoptive parent. As suggested above, the Act even permits *de facto* stepparent or second parent adoptions in which the custodial parent does not have to relinquish his or her parental rights. With the consent of a custodial parent, another individual, including the parent's gay or lesbian partner, may adopt the custodial parent's child, subject to the general requirement that the adoption serve the child's best interests and to a more specific requirement that the court find "good cause" for permitting an individual, not married to the child's legal parent, to become a second parent.<sup>63</sup>

Although no one may be prevented from becoming an adoptive parent simply on the basis of general characteristics or affiliations, the suitability of particular individuals, including, of course, their suitability as adoptive parents for specific children, must be determined through

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62. U.A.A. § 3-707 and Comment. There are at least three justifications for limiting efforts to challenge the validity of an adoption to six months after a decree is issued. First is the interest in not undermining the security of the child and the adoptive family. Second is the hope that if the UAA requirements have been followed in good faith, there will not be many cases in which a challenge is warranted. Third is the belief that reasonable time limitations for challenging a decree do not run afoul of constitutional due process concerns because the state has an independent interest in promoting the finality of adoptions. In addition to cases cited in the Comment, see *David B. v. Superior Ct. of San Francisco*, 26 Cal. Rptr. 2d 586 (Cal. Ct. App. 1994) (not unconstitutional for statute to bar challenges to order terminating parental rights as soon as order becomes final; even though agency's efforts to notify unwed father were "woefully deficient," and contrary to due process, unwed father had ample opportunity to come forward before termination order was entered).

63. U.A.A. § 4-102(b) & (c).

pre-placement and post-placement evaluations by a reputable social worker or other state-licensed evaluator.<sup>64</sup> In contrast to current practice in most states which typically calls for pre-placement "home studies" for agency-supervised adoptions, but not for direct parent-initiated adoptions, the UAA requires pre-placement evaluations for all adoptions. Nonetheless, a pre-placement evaluation may be waived in order to remove bureaucratic impediments that have traditionally discouraged relatives and others from seeking to adopt children who have been left in their care for an indefinite period of time without any formal transfer of custody from the children's parents who may simply have abandoned them.<sup>65</sup>

Prospective adopters are assumed to be acting in good faith. Why should individuals who self-consciously seek to have a child through adoption be less capable of raising a child than those who produce children "naturally," often without any advance planning or any more knowledge about child-rearing?<sup>66</sup> An individual may not be found "unsuitable" unless the evaluator has well-substantiated "specific concerns" that placement of a child with the individual "would pose a significant risk of harm to the physical or psychological well-being" of the child.<sup>67</sup> A history of drug or alcohol abuse,

64. *Id.* at art. 2, pt. 2; art. 3, pt. 6.

65. *Id.* at § 2-201(b) & (c); § 3-301(a)(2).

66. Among those who ask why those who cannot bear children are any worse prospects as child-rearers than those who can and do bear children, few are as eloquent as BARTHOLET, *supra* note 5. At NCCUSL's 1994 Annual Meeting, Comm. John Langbein (Conn.) complained about the UAA's efforts to make pre-placement evaluations the norm in direct as well as in agency adoptions. "We are yielding," he said, "to the social worker constituency and doing a lot of demand creation in situations which could be quite intrusive . . . it is [highly objectionable] to have the level of arbitrary authority that is being assigned to social workers." NCCUSL 1994 Annual Meeting Transcript, at 195-202. Because many others noted that the UAA would "sell better" in states that were apprehensive about direct placements if the suitability of adoptive parents was at least minimally assessed prior to a placement, the UAA's pre-placement provisions were retained.

67. U.A.A. § 2-204. The Drafting Committee, and later, the Conference as a whole, debated whether a "specific concern" about an applicant's suitability, warranting further scrutiny by the evaluator, should be raised merely by any "risk of harm" to a minor child or only by a "significant risk of harm." Although the committee settled on "a risk," the Act says "significant risk" at the behest of the Style Committee and its liaison to the committee, Commissioner Frank Daykin. Comm. Daykin noted that because "there is an element of risk in everything we do," evaluators need more precise guidance as to which risks can be overlooked and which call for a second look. NCCUSL 1994 Annual Meeting Transcript, at 223-224. Although this may be a correct linguistic analysis, neither Comm. Daykin nor the Style Committee fully appreciated the importance of setting a somewhat more cautious tone in order to diffuse some of the complaints from social workers and child welfare groups that the Act simply distributes children willy-nilly to anyone who wants to adopt. The debate over "any risk" as opposed to "significant risk" of harm is illustrative of the more fundamental

prior involvement in a child abuse or dependency proceeding, failure to support a child or former spouse, and conviction for a crime of violence are among the behaviors that committee members felt would justify serious questioning of an individual's suitability to adopt. By contrast, marital or employment status, occasional illness, strong religious or anti-religious beliefs, or a desire to have biological as well as adoptive children, would not by themselves generally warrant an unfavorable evaluation. Further evidence that the UAA hopes to protect individuals against arbitrary or unreasonable exclusion is that anyone found "not suited" to adopt may seek judicial review of the unfavorable evaluation.

In both its pre- and post-placement provisions, the UAA manifests the drafters' skepticism about the claims of social workers to be able to winnow out all but the most capable adoptive parents. Nothing in the UAA precludes agencies from offering infertility counseling, information about the risks of parenting and, particularly, of adoptive parenting, or "sensitivity training" for those who adopt cross-culturally or transracially. Yet, the UAA implicitly, if not expressly, warns social workers against embarking on broad inquiries into the intimate details of an individual's life absent a specific concern about harms a minor child might suffer if raised by that individual. Indeed, if President and Mrs. Clinton pursue their announced interest in adoption after the November 1996 election, their chances of receiving a favorable pre-placement evaluation would be better under the UAA standards than if they have to undergo a more traditional and intrusive assessment of their motives and parenting skills.<sup>68</sup>

Although the UAA defers to the states to establish their own criteria for "qualified" evaluators, the Comments to section 2-202 suggest that independent social workers or psychologists may be as well-qualified as employees of child-placing agencies. This implicit linking of the UAA's interest in diversifying the pool of adoptive parents with a pitch for more competition among adoption gatekeepers, has further aroused the ire of child welfare agencies. They are so displeased with the UAA's efforts to limit their authority that they have hardly noticed the Act's

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difference between the tone of the UAA, which is to minimize scrutiny into the intimate details of prospective parents' lives, absent clear signs that a child is in danger, and the many child welfare groups and social workers who feel, perhaps correctly, that their professional expertise and ability to find "perfect parents" is challenged by the Act. See the many letters criticizing the Act's "suitability" criteria on file with NCCUSL and the Reporter.

68. Jan Hoffman, *Candidates, Yes. But for Parenthood?* N.Y. TIMES, June 2, 1996, § 4, at 1.

opening up of a whole new turf for them to compete in by offering to do pre-placement evaluations for individuals who hope to adopt through a direct non-agency placement.

#### IV. Relationship to Other Acts

The UAA clarifies the role in adoption proceedings of the Uniform Child Custody Jurisdiction Act (UCCJA), the federal Parental Kidnapping Prevention Act (PKPA),<sup>69</sup> and the Interstate Compact on the Placement of Children (ICPC). The UAA modifies the UCCJA to take account of the distinctive jurisdictional issues raised by adoptions of infants and by stepparent and other intra family adoptions that occur after custody or visitation orders have been entered by courts in different states.

Like most state appellate courts, and consistent with the latest pronouncements of the Association of Administrators of the ICPC (AAICP) and its Secretariat, the American Public Welfare Association (APWA), the UAA treats the ICPC as a set of procedural rules pertaining to interstate adoptive placements but subject to the more fundamental jurisdictional requirements of the UCCJA and PKPA. A particular state's authority to hear a petition for adoption is determined under UAA § 3-301—a modified version of the UCCJA. Once a court assumes proper jurisdiction, it will consider whether ICPC procedures were followed as part of its overall determination of whether or not to approve the adoption.<sup>70</sup>

The term "jurisdiction" is but one of numerous ambiguous or undefined terms in the ICPC. Within the context of the ICPC, "jurisdiction" is best understood as a synonym for "responsibility" for a child's care. The ICPC provides that a "sending agency" retains "jurisdiction" over the child until an adoption in "the receiving state" is final. In other words, the parent or other sending agency retains responsibility for the child's care, financial support, and supervision to the same

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69. 28 U.S.C.A. § 1738A *et seq.*

70. *In re Zachariah K.*, 8 Cal. Rptr. 2d 423 (1992) (UCCJA and not ICPC "sending agency" provisions determine which state's courts have jurisdiction over adoption and effort by birth mother to withdraw her consent); *J.D.S. v. Franks*, 893 P.2d 731 (Ariz. 1994) (UCCJA, not ICPC, determines jurisdiction; even though putative father continues to reside in Arizona, he may pursue his efforts to assert parental rights in the Florida proceeding); *In re Adoption of Child by T.W.C.*, 636 A.2d 1083 (N.J. Super. Ct. 1994) (UCCJA and PKPA determine which state has jurisdiction over adoption proceeding and, once placement from New York into New Jersey satisfies ICPC, choice-of-law issues concerning validity of consent are not determined by ICPC but by substantive adoption law of New Jersey, the forum state according to UCCJA criteria).



extent it would have had if the child had remained in the sending state.<sup>71</sup> This provision would be feasible if the term “sending agency” were limited to agencies, courts, or other licensed child welfare entities in the child’s so-called sending state. Because the term is peculiarly construed by the ICPC Secretariat and some courts as also including an individual parent, considerable confusion arises as to the scope of that parent’s post-placement “jurisdiction,” or more appropriately, responsibility. Under current practice and the UAA, agencies typically retain legal custody of, and thus, responsibility for children they place in the same or a different state until the adoption decree is entered. This is not the general rule, however, for a birth parent, and is expressly not the rule under the UAA. Once a parent in the sending state has executed an irrevocable consent to adoption, or had her parental rights terminated, her “jurisdiction” as a sending agency also terminates and legal custody passes to the prospective adoptive parent or to an agency in the receiving state. To conclude otherwise would be to burden a birth parent in an interstate placement with significantly more responsibility for her child’s care and support than that of a birth parent who placed her child within her own state. The UAA is premised on the view that once a birth parent has executed consent in a direct placement, or a relinquishment to an agency, she no longer has legal custody or “jurisdiction” over the child, regardless of whether the placement is in-state or interstate.<sup>72</sup>

A determination of jurisdiction, not in the ICPC sense of responsibility for a child’s care and support, but as a question of which state’s court has authority—subject matter jurisdiction—to hear a petition for adoption, should be made pursuant to UCCJA principles as incorporated into UAA § 3-101. Consistent with the UCCJA’s goal in divorce-related custody proceedings, the UAA’s goal for adoption proceedings is to have them heard in the forum with the closest connections to, and the most substantial evidence about, the proposed adoptive family. This is difficult to accomplish within the UCCJA itself because, despite the many court rulings that the UCCJA applies to adoptions, adoptions are not expressly included in the UCCJA definition of “custody determination” or “custody proceeding.”<sup>73</sup> Moreover, many interstate adoptions and most adoptions of infants do not fit within the UCCJA’s preferred “home state” basis for jurisdiction,<sup>74</sup> because the infant has not lived with the adoptive parent from birth.

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71. I.C.P.C. art. V.

72. U.A.A. § 2-407.

73. U.C.C.J.A § 2(2) and (3).

74. *Id.* at § 3(a)(1).

To avoid the convoluted analyses that courts have used to force adoptions into one or another UCCJA category,<sup>75</sup> the UAA changes the UCCJA's basic "home state" provision,<sup>76</sup> to include the state in which a minor child has lived with a birth parent or a prospective adoptive parent for the requisite six or more consecutive months or, if an infant, since shortly after birth.<sup>77</sup> With respect to interstate adoptive placements that do not occur "soon after birth," but like all other placements, trigger the requirement that the adoptive parents file their petition within thirty days of the placement, section 3-101(a)(2) allows the adoptive parents to file in the state where they have lived for six or more months, even though the child was just placed with them. If this were not allowed, the petition could not be filed until the child lives with the prospective parents for six or more months, thus defeating the goal of having prompt proceedings to ferret out any difficulties before the child becomes too attached to the adoptive parents.<sup>78</sup> The

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75. See, e.g., cases cited in Comment to U.A.A. § 3-301 and discussed at greater length in § 4.02(6) and (7), § 4.07 in *ADOPTION LAW & PRACTICE*, *supra* note 5, and in Herma Kay, *Adoption in the Conflict of Laws: The U.A.A., not the U.C.C.J.A. is the Answer*, 84 CAL. L. REV. \_\_\_\_\_ (1996). See also *In re Adoption of Baby Girl B.*, 867 P.2d 1074 (Kan. Ct. App. 1994) (UCCJA principles determine which state has jurisdiction over adoption involving Kansas birth mother, Michigan prospective adoptive parents with custody of infant since she was a few days old, and Pennsylvania birth father who is contesting the adoption; court finds no "home state" under UCCJA and suggests that trial court choose the more convenient forum; ICPC not mentioned); *DeBoer v. Schmidt (In re Clausen)*, 501 N.W.2d 193 (Mich. 1993) (court ties itself in interpretive knots by finding that Iowa was "home state" under UCCJA with continuing jurisdiction over adoption and subsequent "custody orders" in this dispute between Iowa birth parents and Michigan would-be adopters, even though nearly three year old child resided in Michigan for all but two weeks of her life).

76. U.C.C.J.A § 3(a)(1).

77. U.A.A § 3-101(a)(1).

78. When is § 3-301(a)(2) called for? It is appropriate when a child lives for less than six months with a birth parent, then for several months with a relative or in a series of foster homes, and is eventually placed for adoption. Even if all of these events occurred in the same state—and the child had never lived anywhere but in State #1—there would be no "home state" under section 3-301(a)(1) (unless you could add up the time lived with different folks in the same state!). Surely, if the adoptive parents have lived in one state for six or more months, they should be able to file in that state soon after the child comes to live with them. They should also be able to file if there is substantial evidence in their state about the child and the child's proposed care, even if the child is physically in another state, for example, still in foster care but nonetheless available for adoption. Without subsection (a)(2), the prospective adopters would have nowhere to file within the requisite thirty days after placement.

Subsection (a)(2) is also consistent with the jurisdictional provisions of most current adoption laws which base subject matter jurisdiction on the adoptive parents being residents of the state for six or more months. If an interstate adoption is contested, it is still appropriate for the adoptive parents' state to hear the case and to resolve the contested issues either by staying the proceeding in order to resolve them in, for

UAA attempts to address another question about the relevance of the UCCJA and the PKPA to adoption proceedings. In the terminology of UCCJA § 2(4), an adoption of an infant is likely to be an “initial” decree. By contrast, an adoption of an older child may be both an initial adoption proceeding and a “modification decree.” This is because it may entail modifying a prior order for custody or visitation with the child in an adoption by a stepparent, or the termination of such an order in an adoption by a relative, foster parent, or unrelated individual<sup>79</sup> and, further, because anyone with an existing custody or visitation order has a right to notice of any petition for the child’s adoption.<sup>80</sup> To establish proper jurisdiction over an adoption of an older child or a stepchild in the state where the would-be adopters live, UAA § 3-301(c) therefore requires that the state that issued the prior custody or visitation order either no longer have jurisdiction to modify or decline to exercise it. Implicitly, the UAA suggests that if the original state continues to have jurisdiction to modify under the PKPA and the UCCJA,<sup>81</sup> but does not have jurisdiction over the proposed adoption, the adoption petition should be filed where the adopters live, but stayed in order to first terminate or modify the custody or visitation order in the original state.

Once a decree of adoption is entered in a state that has subject matter jurisdiction under UAA § 3-301, basic full faith and credit principles call for recognition of the adoption in other states. The PKPA is not necessary for purposes of recognition. Because an adoption decree, unlike a custody or visitation decree in the context of a divorce or

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example, the birth mother’s state, or by invoking choice of law rules that would apply the law of the birth mother’s state to determine the validity of the consent or attempted revocation.

79. U.A.A. § 1-105.

80. *Id.* at § 3-401(a)(4).

81. This is quite complex. Under P.K.P.A. § 1738A(d), the jurisdiction of a court of a state which has made a child custody determination consistently with the provisions of this section—that is, consistently with UCCJA!—continues so long as the requirement of subsection (c)(1) of this section continues to be met (again, the UCCJA and any local “add-ons”) and such state remains the residence of the child or of any contestant. If a child’s parents are divorced in State A, and custody and visitation orders are entered there giving the father and his parents some visitation, and the custodial mother later moves to State B, where she remarries and wants her new spouse, child’s stepparent, to adopt, State B has to contend with existing custody and visitation orders in State A. Does State A continue to have jurisdiction to modify those orders? Will it defer to State B? Can the stepparent adoption be commenced in State B, but stayed pending a modification or termination of the noncustodial parent’s and grandparent’s visitation orders in State A before the adoption is granted in State B? The UAA jurisdictional provisions address these questions, but it may be many years before courts begin to make more sense of the relationship between intrafamily custody and visitation orders and stepparent adoption proceedings.

dependency proceeding, is a final, nonmodifiable order, the PKPA's requirement that states accord full faith and credit to custody orders issued consistently with its jurisdictional provisions is irrelevant to adoption orders. Nonetheless, if an adoption is denied or set aside upon appeal, the UAA requires the court to determine the child's custody.<sup>82</sup> Is this, too, a final order which would not require the PKPA to be accorded full faith and credit elsewhere, or is it a potentially modifiable custody order in lieu of an adoption, and thus subject to future applications of both the UCCJA and PKPA?<sup>83</sup>

Consider one other scenario to which the relevance of the UCCJA and PKPA is, to say the least, unclear. If in conjunction with a decree under the UAA granting a stepparent adoption, the court issues a post-adoption visitation order, is that an order whose future recognition and enforcement requires conformity with the UCCJA and PKPA?

## V. Post-Adoption Communications

The UAA explicitly permits mutually agreed-upon communication between birth and adoptive families before, during, and after an adoption is finalized.<sup>84</sup> Agreements by adoptive parents to permit post-

82. U.A.A. § 3-704.

83. *See, e.g., In re Custody of K.R.*, 897 P.2d 896 (Colo. Ct. App. 1995) (order by California court dismissing couple's adoption petition after birth mother revoked her consent and ordering couple to return child to mother's custody is "custody decree"; jurisdiction over child continues in California and cannot be exercised in Colorado even though mother lives in Colorado). Was the Colorado court correct to construe the California court's order as a "custody decree," subject to the UCCJA's and PKPA's continuing jurisdiction provisions, or is it a final order dismissing the California adoption proceeding, and thus entitled to full faith and credit as a matter of basic constitutional law?

84. Birth parents and adoptive parents may decide for themselves how much contact to have and how much identifying information to share with each other. For example, in direct placements, a birth parent personally selects a prospective adoptive parent from among those favorably pre-evaluated and the parties can mutually agree to disclose their identities. U.A.A. § 2-102. Although the medical and social background information about an adoptee which must be furnished to an adoptive parent before placement is edited to omit identifying information, birth parents may waive their right to confidentiality and agree to disclose their identities to the adoptive parents. U.A.A. § 2-106(d). Before executing a consent in a direct placement or a relinquishment to an agency, a birth parent has an opportunity to indicate "in a signed document whether and under what circumstances the parent is or is not willing to release identifying information, and must have been informed of the procedure for changing the document at a later time." U.A.A. § 2-404(e). In an agency-supervised adoption, the agency and the birth parent may agree about the extent to which the birth parents will participate in the selection of a specific adoptive parent, and there is no bar to discussion or negotiation of agreements for post-adoption contact or visitation. U.A.A. §§ 2-103 and -104. Once an adoption is final, the UAA is for the most part silent about the extent to which birth and adoptive parents may remain in touch with each other. However, the mutual consent registry for disclosure of identities, Art. 6., is available for adoptees upon attaining age 18 and, before that, for their adoptive parents on their behalf.

adoption visitation by birth parents or other members of a child's original family are not barred, but neither are they expressly permitted except in the context of stepparent adoptions. In contrast to the deeply divided views of committee members and the Conference as a whole about post-adoption contact in adoptions by nonrelatives, a consensus emerged concerning the importance for adoptive stepchildren to maintain previously established visitation arrangements with the families of their noncustodial parent, subject to the agreement of the adoptive and custodial parents and a judicial determination, based on a list of specific factors, that the agreement is in the child's best interests.<sup>85</sup> For all other adoptions, however, the Act contains what appears to be a bright line rule that when a decree of adoption becomes final, "any previous order for visitation or communication with the adoptee terminates."<sup>86</sup> Note, however, that anyone with an existing order for visitation must be given notice of the adoption proceeding, and that the court has authority to request information about the proposed adoption from anyone else who had a previous relationship with the birth parents or adoptee.<sup>87</sup> Most important, perhaps, is that while an adoption terminates "previous orders," the Act contains no prohibitory language with respect to visitation or communication orders that might be issued in some circumstances in the future.

The vehement objections raised within NCCUSL and by some of our advisers to recognizing post-adoption agreements is based primarily on the belief that they are fundamentally inimical to the meaning of adoption, as creating "in all respects" a new family to replace the child's birth family.<sup>88</sup> Because adoptive families are entitled to the same constitutional protections against state intervention as are birth families, most Commissioners were unwilling to limit what one called the "unfettered authority" of adoptive parents to raise their new child in accord with their own parental prerogatives. This authority includes the freedom to decide who may or may not visit or communicate with the child. In this view, the prospect of enforceable post-adoption visitation obviously threatens the integrity and autonomy of adoptive families.

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85. U.A.A. § 4-113.

86. *Id.* at § 1-105(2).

87. *Id.* at § 3-401(a)(4) & (b)(3).

88. Many courts assume that "open adoption" agreements are incompatible with the meaning of adoption and not enforceable in the absence of legislation to the contrary. Some courts will uphold the validity of the adoption, but refuse to enforce the agreements; others will set aside the adoption on the grounds that the visitation agreement vitiates the basic consent to an adoption. These cases are cited and discussed in §§ 13.01-03 in *ADOPTION LAW & PRACTICE*, *supra* note 5.

Many believe that adoptive parents who profess a willingness to maintain contact with a birth parent do so only because they fear losing an opportunity to parent. In addition to taking advantage of vulnerable adoptive parents, open adoption agreements are said to be even more unfair to birth parents, who are allegedly induced to relinquish their children by what may turn out to be false assurances that they can maintain contact with the child once the adoption is final.<sup>89</sup> While some Commissioners understood that adoptive and birth parents might genuinely believe in the benefits of staying in touch with each other, they felt that these arrangements worked best when based on mutual trust and respect, not on any judicially or statutorily created "rights." Even the most outspoken proponents of open adoption, or at least, of allowing the parties to set the terms of their relationships by themselves, were loathe to endorse enforcement principles modeled on post-divorce enforcement of custody or visitation orders. Those who felt that these agreements might help resolve contested adoptions,<sup>90</sup> also believed that continuing contact was likely to be more beneficial to the birth and adoptive parents than to the adoptee, especially if an infant.

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89. See, e.g., the extensive debate at 1993 Annual Meeting about whether the UAA should or should not allow judges to approve consensual, but non-enforceable, visitation agreements; especially, the comments of Comm. Pounders (Tenn.) and David Peebles (Tex.), expressing concern that people who want babies will "do anything and promise anything" and the birth mother will "think she has gotten more than she's gotten" if visitation agreements are "rubber stamped" by courts during the adoption proceeding, but are not thereafter enforceable. NCCUSL 1993 Annual Meeting Transcript, at 158-190. Many Commissioners supported a Motion by Comm. James McKay (D.C.) that began as a mandate to the Drafting Committee to deny judicial recognition of agreements except in stepparent adoptions, but, by the time it was approved, had become a motion to leave to the Committee's discretion the decision about whether to prohibit these agreements or to simply not provide for their enforceability. 1993 Transcript, at 198.

90. Comm. Peter Langrock (Vt.), for example, was leery of recognizing or enforcing an agreement for post-adoption contact except in situations where it might resolve a contest and protect the stability of a threatened adoptive family. He himself was involved in one widely reported case that involved a Vermont couple whose proposed adoption of an infant, who had been in their custody for nearly a year, was being challenged by a birth father whose due process right to notice had clearly been violated by the birth mother and her attorney. The Probate Court judge facilitated a settlement in which the birth father and the adoptive mother were granted joint legal custody of the child, the adoptive mother and her husband (who became a non-adoptive stepfather!) were granted primary physical custody and required to support the child, and the birth father was given liberal visitation. M. Jacobbi, *Sharing Pete*, BOSTON GLOBE MAG., June 26, 1994. Other settlements reported from around the country are less cumbersome: adoptive parents are allowed to adopt subject to a "gentleperson's agreement" that they will honor a visitation agreement with a birth parent which the court has informally approved. See Annette Ruth Appell, *The Move Toward Legally Sanctioned Cooperative Adoptions*, 30 FAM. L.Q. 483 (1996).

Along with the National Council for Adoption (NCFA), a lobbyist for traditional adoptions, some Commissioners wanted all references to visitation agreements deleted from the UAA, lest people rush into them, disregarding their attendant legal and emotional risks. Only after vigorous debate were specific references to these agreements retained in the belief that it was much riskier to ignore such a significant aspect of contemporary adoption practice, especially for older children and children adopted by relatives or foster parents. A failure to refer to these agreements exposes adoptive parents to the risk of liability for fraud if they promise a birth parent she can continue to visit the child, while intending not to keep their promise, and she erroneously believes that the promise is enforceable. Moreover, unless the effect of visitation agreements and adoption decrees is clarified, more courts may agree with several ominous recent appellate rulings setting aside adoptions on the grounds that the existence of a visitation agreement vitiates a birth parent's consent to the adoption and destroys the legality of the would-be adoptive family.<sup>91</sup>

As finally approved, the UAA does clarify the relationship between post-adoption visitation and the legal status of an adoption. First, the Act contains a substantive rule that the validity of an adoption cannot be challenged for failure to comply with a post-adoption visitation agreement.<sup>92</sup> Second, the birth parent is put on notice of this rule. A consent or relinquishment must include an express acknowledgment that, once final, the proposed adoption "will remain valid whether or not any agreement for visitation or communication with the minor adoptee is later performed."<sup>93</sup>

91. See, e.g., *In re Adoption of C.R. Topel*, 571 N.E.2d 1295 (Ind. 1991) (execution of visitation agreement at same time as execution of consent to adoption vitiates father's consent to adoption of child by his former wife's brother and sister-in-law; it is not possible to relinquish all parental rights to adoptive parents while attempting to retain a right to visit the child); *In re M.M. et al.*, 619 N.E.2d 702 (Ill. 1993); *In re Donte*, 631 N.E.2d 257 (Ill. App. Ct. 1994) (although visitation with siblings would be in adopted children's best interests, public guardian's consent to adoption cannot be contingent on adoptive parents' agreement to allow post-adoption visitation by siblings).

92. U.A.A. § 3-707(c).

93. *Id.* at § 2-406(d)(1) & (2). The Act is not in conflict with the statutes in Washington and New Mexico and other open adoption proposals or cases discussed in Annette Ruth Appell, *The Move Toward Legally Sanctioned Cooperative Adoption: Can It Survive the Uniform Adoption Act?*, 30 FAM. L.Q. 483 (1996), which explicitly allow judicial recognition and enforcement of agreements for post-adoption visitation or communication, subject to a best interests determination. See, e.g., *Michaud v. Wawruck*, 551 A.2d 738, 742 (Conn. 1988) (subject to best interests finding, court may enforce separate agreement for post-adoption visitation by birth mother with two year old child which was negotiated in court when birth mother's parental rights were terminated). The UAA is also consistent with the laws of other states which similarly permit these agreements to be performed if

A small but eloquent group of Commissioners and several committee members continued to argue for specific recognition of post-adoption agreements in the context of adoptions of older children as well as in a variety of transracial and cross-cultural adoptions.<sup>94</sup> In the end, for pragmatic as well as some more philosophical reasons, we had to strike out provisions previously drafted in response to these pleas as well as to my own sense of the value of these arrangements for children who definitely need the security of an adoptive home, not simply foster care or guardianship, but who also have beneficial ties to their birth families or different ethnoracial communities.

The pragmatic concern was based on the Committee's fear that the entire Conference would vote to prohibit post-adoption agreements and not simply maintain a neutral stance if forced to vote one way or the other even on provisions limited to specific categories of children. By remaining neutral, the Act could coexist with a wide variety of different state responses.<sup>95</sup>

The other, more philosophical concern derives from our skepticism about forcing any families, and particularly adoptive families, into any set mold. Many people are not prepared to live their lives according to the views fashionable among some—but by no means all—adoption experts that adoptions cannot succeed unless the members of the birth family remain involved in the lives of adopted children long after the

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there is mutual consent, but leave the question of enforceability to be determined on a case by case basis.

Particularly noteworthy for older children is N.Y. Soc. Servs. L. § 383-c, eff. 1/1/91. This provision allows birth parents of children who have been in foster care to reserve certain visitation rights in a voluntary surrender of their children for adoption. A subsequent failure of the adoptive parents to honor the visitation arrangement will not vitiate the surrender or the adoption, but the birth parent may have standing to seek enforcement in a separate civil action, if it is in the best interests of the child. See *Matter of Gerald T.*, 625 N.Y.S.2d 509 (App. Div. 1995); *Matter of Alexandra C.*, 157 Misc. 2d 262, 268-69 (1995) (§ 383-c helps expedite the freeing of children in foster care for adoption by allowing birth parents to reserve certain visitation privileges).

94. See especially comments of Comm. Allan Rodgers (Mass.), Comm. Jerry Kurtz (Alaska), Committee Members Rosselle Pekelis, Authur Peterson, and Richard Morningstar (Mass), who resigned from the Commission in 1993; and many of our advisers, including some of the staunchest spokespersons for adoptive families as well as for adoptees.

95. Committee Members Rosselle Pekelis (Wash.), Rhoda Billings (N.C.), and Arthur Peterson (Alaska) were instrumental in convincing the Committee after the bitter debate at the 1993 Annual Meeting that the Act should take a neutral stance toward post-adoption visitation agreements. Because the Act is clear that these agreements can exist on the basis of mutual consent without vitiating the adoption, the Committee decided that it did not want to confront another effort by Comm. McKay and others to prohibit agreements altogether, *supra* note 89.



adoption is completed. The wisdom of this position remains highly controverted and often bespeaks a strong anti-adoption bias. Even among those of us who are more receptive to open adoptions, it is not clear whether the interests to be promoted by these agreements are those of the birth and adoptive parents or of the adopted child. To expect the UAA to require or to explicitly favor a particular set of behaviors for adoptive families is to engage in the very kind of "social engineering" that some of the Act's critics have complained about.

The Act's mutual consent registry is a "user friendly" approach to the bitterly contested issue of whether and when to disclose identifying information to and about the members of an adoptee's birth and adoptive families.<sup>96</sup> The registry can easily be tailored by different states to fit their own preferred policies, for example, by adding confidential intermediary services similar to those already available in nearly twenty states, easing the burden of proving good cause for release of information if consents are not filed with the registry, releasing original birth certificates to adult adoptees, or creating a prospective presumption that birth parents agree to release their identities to adoptees unless they file an explicit "do not contact" form.<sup>97</sup> I will leave for another occasion discussion of NCCUSL's ideologically and emotionally-charged debates about sealed records and access to identifying information.

## VI. Conclusion

The prospects for widespread enactment of the UAA remain clouded, despite its recent enactment in Vermont, and the enactment as of mid-1996 of many of its provisions in Michigan and to a lesser extent in a dozen or more other states. Although under consideration in a number of states, the UAA has been subjected to intense criticism from well-organized lobbying groups like the Concerned United Birthparents (CUB), the American Adoption Congress (AAC), and the Child Welfare League of America (CWLA). Most of the critics are either hostile to adoption or, at a time when we are experiencing a general cutback in many vital public services, want much more public agency control over adoption practices that the UAA leaves to a combination of private determination and judicial oversight.

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96. U.A.A. art. 6.

97. See discussion of sealed adoption records policies and alternative approaches, including registries, intermediary services, and judicial actions based on good cause, in § 13.01 in *ADOPTION LAW & PRACTICE*, *supra* note 5 (contains extensive bibliography of studies on adoptees and birth parents who search, as well as other writings on the sealed versus open records controversy).

In the final analysis, our adoption laws should protect all the parties, and especially innocent and vulnerable children, against harm. But the major challenge is to know exactly what harms we are worried about and what regulations and procedures are likely to prevent or mitigate them. In its desire to enable adoptions to occur for the benefit of more and more diverse children and parents, the UAA wisely steers clear of overly-regulating the behavior of the parties to an adoption. While clarifying the requirements for a valid and final adoption, the Act maintains a wise neutrality towards decisions by birth and adoptive families concerning their post-adoption contacts with each other.

Essential to the UAA is the recognition of the legitimacy of adoptive families as legally equivalent to biological families. Within this formal structure, the emotional and psychological aspects of adoptive parent and child relationships can flourish. Once it is clear that an adoptive family is in all ways an authentic family, it is also possible both within the UAA and in the multifaceted world beyond it, to acknowledge and affirm the differences between biological and adoptive parent-child relationships.<sup>98</sup> Precisely because the UAA does not allow genetic ties by themselves to trump the interests of children in having secure legal and emotional ties to the people who are actually parenting them, the Act will eventually gain more support among those who can get beyond the view that families are exclusively the product of “blood and genes.”

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98. As Bartholet says, adoption “should be recognized as a positive form of family, not ranked as a poor imitation of the real thing on some parenting hierarchy,” BARTHOLET, *supra* note 5, at 181. In convincing ourselves and others that the nurturing and social aspects of parenting are critical for children, it is important to keep in mind that, while biological connections should not be overlooked, they are not essential to decent parenting.