

INTERCOUNTRY ADOPTIONS: ARE THE BIOLOGICAL PARENTS' RIGHTS PROTECTED?

INTRODUCTION

The number of international adoptions has increased drastically in recent years.¹ In the United States, the number of international adoptions increased from 7,093 in 1990 to nearly 22,884 in 2004.² The international adoption phenomenon began after World War II when Americans became aware of the plight that abandoned children in Japan and Europe faced in the aftermath of the war.³ “During the 1950s, proxy adoptions, which allowed U.S. citizens to adopt in foreign courts in absentia, were the most widely publicized means of international adoption.”⁴ After adoptions from Japan and Europe began to slow, the Korean War created a new interest in the children of war-torn Asia.⁵ Similarly, as a result of the Vietnam War, 3,267 Vietnamese children were adopted by American parents between 1963 and 1976. These adoptions effectively ceased at the end of the Vietnam War.⁶ Since the early 1970s, United States citizens increasingly have adopted children from Colombia and other Latin American countries; however, these adoptions often are motivated by reasons of infertility and frustration with attempts at domestic adoption, not by sympathy for the victims of war.⁷

1. U.S. Department of State, *Immigrant Visas Issued to Orphans Coming to the United States*, http://travel.state.gov/family/adoption/stats/stats_451.html (last visited on Nov. 7, 2005).

2. *Id.*

3. The Adoption History Project, *Adoption History: International Adoptions*, <http://darkwing.uoregon.edu/~adoption/topics/internationaladoption.htm>. “After World War II and during the early Cold War, the adoption market globalized as wars, refugee migrations, famines, and other disasters made the plight of dependent and orphaned children abroad more visible to Americans.” *Id.*

4. *Id.*

5. IRVING J. SLOAN, *THE LAW OF ADOPTION AND SURROGATE PARENTING* 85 (1988).

The emergence of intercountry adoption developed as a result of World War II. As American forces occupied Germany and Japan they came into contact with children whose families had been disrupted. These contacts led to the adoption of German and Japanese children by American families . . . From 1948 through 1962 American families adopted 1,845 German and Japanese children. Eight hundred and forty Chinese children were also adopted in this period. The adoption of many Asian children across racial lines was a previously unthinkable practice in most American communities. . . . Between 1953 and 1981 38,128 Korean children were adopted by American families. The adoption of Korean children by American families continues today.

Id.

6. *Id.* at 86.

7. *Id.* at 86–87.

The reasons why citizens decide to adopt internationally include the decline in infants available within the United States for private adoption, the contested nature of domestic adoption, and the “bureaucratic hurdles” and delays citizens encounter when dealing with adoption agencies.⁸ Citizens also adopt internationally because of the undesirable age and special needs of adoptive children in the U.S. foster care system and a desire to avoid a continuing relationship with the birth parents.⁹ Adoptive parents¹⁰ naturally fear having to return their adopted child to the biological parents, and therefore feel more comfortable in the international situation where the biological parents are overseas.¹¹ Additionally, “a great many [adoptive parents] are also motivated by a desire to raise children whose lives would otherwise be profoundly marred by poverty, disease, war, homelessness, or discrimination in their countries of origin based on their ethnoracial background or religion.”¹²

Studies show that children who are adopted internationally function well in their adoptive countries.¹³ Almost half of all intercountry adoptions

8. Joan H. Hollinger, *Intercountry Adoption: A Frontier without Boundaries*, in FAMILIES BY LAW: AN ADOPTION READER 215 (Naomi R. Cahn & Joan H. Hollinger eds., 2004) [hereinafter Hollinger, *Intercountry Adoption*]. See also JOAN H. HOLLINGER ET AL., ADOPTION LAW AND PRACTICE 8-5 (2004) [hereinafter ADOPTION LAW AND PRACTICE].

During the 1990s, several highly publicized contested adoptions have involved the efforts of a thwarted birth father to prevent the involuntary termination of his parental rights and block an adoption of his biological child by prospective adoptive parents who have had custody of the child since shortly after the child’s birth.

Id. It is likely that the media attention given to these highly contested adoptions has increased the fear in prospective adoptive parents that one day the biological parents will reassert their parental rights. This fear may be well founded, as “[s]tudies have shown that some biological mothers are unable to achieve closure after the adoption has taken place and continue to suffer from the loss of their child for many years.” *Id.* at 13-8. These mothers might be compelled to recover their child if they are unable to achieve closure.

9. Hollinger, *Intercountry Adoption*, *supra* note 8, at 215. See also HOLLINGER, ADOPTION LAW AND PRACTICE, *supra* note 8, at 13-9.

10. The term “adoptive parents” is used in this Note to refer to the people or person who adopt a child. Likewise, the term “biological parents” refers to the people, person or agency who place a child up for adoption.

11. See Hollinger, *Intercountry Adoption*, *supra* note 8.

12. *Id.* at 215. Though there are many positives about intercountry adoptions, there are a few potential negative issues related to them as well. See HOLLINGER, ADOPTION LAW AND PRACTICE, *supra* note 8, at 10-4. These issues include “the potential for exploitation of the poor by the rich, and the loss of adoptees of certain connections with their past and ‘their people.’” *Id.* Furthermore, “Countries which allow international adoption typically have laws and regulations that present serious difficulties for prospective parents.” *Id.*

13. Hollinger, *Intercountry Adoption*, *supra* note 8, at 6. Studies conclude that intercountry adoptees “function as well as most other adoptive and biologic families in similar socioeconomic circumstances. Even children who suffered from untreated illnesses and severe neglect in their early lives have been able to recover and flourish.” See also HOLLINGER, ADOPTION LAW AND PRACTICE, *supra* note 8, 10-16 to 10-18. The empirical studies that have focused on international adoption

by U.S. citizens are of children from China and Russia.¹⁴ Many children are adopted from China because the country's "strict population control policies, endemic poverty, and cultural traditions that favor sons over daughters have led to the abandonment of hundreds of thousands of infant girls, with the healthiest often made available for adoption by foreigners."¹⁵

Many countries have responded to the increased popularity of international adoptions by signing treaties and enacting laws addressing the subject. Two of the most important developments in the laws governing intercountry adoptions are The Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (the Hague Convention)¹⁶ and the U.S. Intercountry Adoption Act (IAA).¹⁷ The

provide no basis for concern as to the welfare of the vast majority of the adoptees and their families. The studies show them to be

functioning well, and comparing well on various measures of emotional adjustment with other adoptive families, as well as with biologic families. This is rather strikingly positive evidence since most international adoptees have had problematic preadoptive histories that could be expected to cause difficulties in adjustment. The studies show that adoption has for the most part been extraordinarily successful in enabling even those children who have suffered extremely *severe* forms of deprivation and abuse in their early lives, to recover and flourish.

Id.

14. Hollinger, *Intercountry Adoptions*, *supra* note 8, at 215.

15. *Id.* at 216. *See also* ChineseAdoptions.org, *Chinese Adoptions*, <http://www.chineseadoptions.org/> (last visited Nov. 9, 2005).

The world's fourth largest country (after, Russia, Canada, and the U.S.), China is the nation most people turn to when they decide international adoption is the right way to build their family. From 1983 to 2002, Americans adopted 33,637 children from China.

In the 1950s, Mao Tse-Tung urged his people to have lots of children to strengthen the country. The population growth from this edict led the government in the 1970s to be worried that China would be unable to feed her citizens. So, the Chinese government implemented the One Child Policy in 1979. The goal of this policy was to keep China's population below 1.3 billion by the year 2000. Today, China is home to over 1.2 billion people. Couples who violate the One Child Policy are subject to fines (equal to three years' salary!), community ostracism, and even jail time.

Baby boys are more valued in Chinese society than are baby girls because boys carry on the ancestral name, inheritance laws pass property on to sons, and sons are responsible for taking care of aged parents. Because of this many couples will abandon baby girls. A heartbreakingly cruel choice, yes, and an event that happens all too often—hundreds of thousands of baby girls are abandoned every year in China.

The babies are abandoned in public places (such as busy streets, railway stations, and in front of public buildings) so they will be found quickly. The babies are abandoned as infants—usually when they are only a few days old. In addition to little girls, handicapped babies and sick babies (both boys and girls) are also abandoned because most parents in China don't have the money to provide for their special needs. Once found, the abandoned babies are given a medical exam and then taken to orphanages.

Id.

16. Hague Convention on Protection of Children and Co-Operation in Respect of Intercountry

Hague Convention, signed in 1993,¹⁸ establishes standards and procedures for the intercountry adoption process.¹⁹ The focus of the Hague Convention is to protect the best interests of the child rather than the rights of the biological parents of the child.²⁰ In the IAA, the United States implemented the Hague Convention. The IAA became the primary law dealing with intercountry adoptions.²¹

While the Hague Convention and the IAA cover intercountry adoption law, various state laws govern domestic adoptions within the United States.²² These state laws focus both on the best interests of the child and protect parental interests.²³ These state laws allow biological parents a specified amount of time to file a motion to reclaim parental rights after a domestic adoption proceeding.²⁴ This time period varies from state to

Adoption, May 29, 1993, 32 I.L.M. 1134 [hereinafter Hague Convention].

17. Intercountry Adoption Act, 42 U.S.C. §§ 14901–14954 (2004).

18. Hague Convention, *supra* note 16.

19. The Hague Convention sets up a framework of mandatory rules and procedures with the purpose of protecting the children involved and the interest of their birth parents and adoptive parents. *Id.*

20. One of the objects of the Hague Convention is to “ensure that intercountry adoptions take place in the best interest of the child . . .” *See generally* Hague Convention, *supra* note 16, art. 1. *See* HOLLINGER, ADOPTION LAW AND PRACTICE, *supra* note 8, at 10-34. The United Nations, “beginning in 1959, has issued Declarations that established legal ‘rights’ for children.” *Id.* These rights include the right to be nurtured in a family unit. *Id.* Thus, intercountry adoption can be viewed as a way to further these rights. *Id.* at 10-34, 10-35.

21. An act “to provide for implementation by the United States of the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, and for other purposes.” 42 U.S.C. § 14901(b)(1).

22. Joan H. Hollinger, *State and Federal Adoption Laws*, in *FAMILIES BY LAW: AN ADOPTION READER* 37 (Naomi R. Cahn & Joan H. Hollinger eds., 2004) [hereinafter Hollinger, *State and Federal Adoption Laws*] (“For the most part, adoption, like other family relationships, is subject to state rather than federal laws.”).

23. *Id.*

24. The length of time that adoption statutes allow for a birth parent to revoke consent to the adoption varies among the States. *See* HOLLINGER, ADOPTION LAW AND PRACTICE, *supra* note 8, at 1A-6. *See, e.g.*, ALA. CODE § 26-10A-13 (2005) (allowing revocation within five days after the birth of a child; fourteen days if in the best interest of the child); ALASKA STAT. § 25.23 (2005) (allowing revocation within ten days after consent is executed, or after ten day period if in the best interest of the child); ARIZ. REV. STAT. ANN. § 8-106(D) (2005) (allowing birth parent to revoke consent when consent was obtained by fraud, duress, or undue influence); ARK. CODE ANN. § 9-9-209 (2005) (allowing revocation within ten days of consent being signed or within ten days of the child’s birth); CAL. FAM. CODE § 8814.5 (2005) (allowing revocation within ninety days after giving consent); COLO. REV. STAT. § 19-5-104(7)(a) (2005) (allowing revocation within ninety days of relinquishment order, and there is evidence of fraud or duress); CONN. GEN. STAT. §§ 45a-71, 45a-719 (2005) (allowing birth parent to revoke consent if the consent was obtained under fraud, duress, or coercion); DEL. CODE ANN. tit. 13, § 909 (2005) (allowing revocation within sixty days after giving consent); D.C. CODE § 32-1007 (2005) (allowing revocation within ten days after giving consent); FLA. STAT. § 63.082 (2005) (allowing birth parent to revoke consent if consent was obtained by fraud or duress); GA. CODE ANN. § 19-8-26 (2005) (allowing revocation within ten days after signing written consent); HAW. REV. STAT. § 578-2(f) (2005) (allowing birth parent to revoke consent if it is in the best interest

state.²⁵ Some state laws require biological parents to prove that the

of the child); 750 ILL. COMP. STAT. 50/11 (2005) (allowing revocation within seventy-two hours after the birth); IND. CODE § 31-19-10-3 (2005) (allowing birth parent to revoke consent if it is in the best interest of the child or if it was obtained by fraud or duress); IOWA CODE § 600A.4 (2005) (allowing revocation within ninety-six hours after execution of the release); KAN. STAT. ANN. § 59-2114 (2005) (allowing birth parent to revoke consent if the consent was not freely and clearly given); KY. REV. STAT. ANN. § 199.500 (2005) (allowing revocation within twenty days after placement approval or twenty days after execution of consent); LA. CHILD. CODE ANN. arts. 1123, 1130 (2005) (allowing revocation before the fifth day following the birth of the child); ME. REV. STAT. ANN. tit. 18-A, § 9-202(D) (2005) (allowing revocation within three days from execution of consent); MICH. COMP. LAWS § 710.29 (2005) (allowing revocation within approximately twenty days); MINN. STAT. §§ 259.24 subd., 259.47 subd. 7 (2005) (allowing revocation within ten days after consent is executed; then denying revocation unless there is fraud); MO. STAT. ANN. § 453.030 (2005) (allowing consent to be withdrawn anytime until reviewed and accepted by the judge); MONT. CODE ANN. § 42-2-410 (2005) (allowing consent to be revoked if the parent and prospective adoptive parent mutually agree to revocation prior to an order terminating parental rights); NEV. REV. STAT. § 127.070 (2005) (stating that consents executed before the birth of the child or within seventy-two hours after the birth of the child are invalid); N.H. REV. STAT. ANN. § 170-B:10 (2005) (allowing revocation before the entry of the interlocutory decree and if it is in best interest of the child); N.J. STAT. ANN. § 9:3-46 (2005) (allowing revocation within twenty days after notice if the parent's surrender is not valid and the parental rights have not been judicially terminated); N.M. STAT. § 32A-5-21 (2005) (allowing birth parents to revoke consent when consent was obtained by fraud); N.Y. DOM. REL. LAW § 115-b (2005) (stating that extra-judicial consent may be revoked within forty-five days of its execution); N.C. GEN. STAT. § 48-3-608 (2005) (allowing revocation within twenty-one days following execution if infant is less than three months old or in utero, or seven days following execution for any other minor); N.D. CENT. CODE § 14-15-08 (2005) (allowing revocation before the final order if it is in the best interest of child); OHIO REV. CODE ANN. § 3107.084 (2005) (allowing revocation prior to the interlocutory order; prior to entry of final decree after hearing determines that it is in the best interest of child); OKLA. STAT. tit. 10, § 7504-2.7 (2005) (allowing birth parents to revoke consent when consent was obtained by fraud or duress, or if it is in the best interest of the child and the child has not been placed for nine months); OR. REV. STAT. § 109.312 (2005) (allowing birth parents to revoke consent if there was fraud or duress with respect to a material fact); 23 PA. CONS. STAT. § 2711 (2005) (allowing revocation until the court has entered termination order or adoption decree confirming consent); S.C. CODE ANN. § 20-7-1720 (2005) (allowing revocation if in the best interest of the child, or if the consent was given under duress or coercion); S.D. CODIFIED LAWS § 25-6-12 (2005) (allowing revocation prior to hearing granting adoption petition); TENN. CODE ANN. § 36-1-112 (2005) (allowing revocation within ten days of the surrender if petition to adopt has not been filed, or at any time prior to entry of order of confirmation of consent); TEX. FAM. CODE ANN. §§ 161.104, 161.1035, 162.011 (2005) (allowing revocation within eleven days after signing waiver, or at any time before order granting adoption); VT. STAT. ANN. tit. 15A, § 2-407 (2005) (allowing revocation within twenty-one days after execution of consent); VA. CODE ANN. § 63.1-219.4 (2005) (allowing revocation within fifteen days from execution of consent); WASH. REV. CODE § 26.33.160 (2005) (allowing revocation until the court approves the consent; consent may also be revoked one year after approval if there was fraud, duress, or a lack of mental competency); W. VA. CODE § 48-4-5 (2005) (allowing consent to be revoked if there is mutual consent of birth and adoptive parents, or within six months if there was fraud or duress); WIS. STAT. § 48.46 (2005) (allowing revocation within thirty days after the order terminating the parental rights); WYO. STAT. ANN. § 1-22-109 (2005) (allowing consent to be revoked if the consent was obtained by fraud or duress).

25. SCOTT E. FRIEDMAN, *THE LAW OF PARENT-CHILD RELATIONSHIPS* 48 (1992).

Generally, once an order approving an adoption petition has been entered, the adoption becomes final and irrevocable after a designated period of time. This period varies from state to state. For example, in Delaware a natural parent has up to sixty days to withdraw her consent to the adoption, whereas in Texas that consent may be withdrawn at any time prior to

parental consent was obtained through fraud or duress in order to revoke consent to the adoption of their child.²⁶ Such protection of parents' rights under U.S. domestic law does not exist under Chinese law, the Hague Convention, or the IAA.²⁷

This Note will first evaluate the Hague Convention²⁸ from the standpoint of biological parents whose children have been adopted internationally. Then, this Note will analyze the IAA from the perspective of the biological parents involved in an intercountry adoption. Next, this Note will discuss the rights of biological parents in the United States in the domestic adoption context. It also will address the rights of foreign biological parents whose children are adopted internationally by U.S. citizens. Finally, this Note will discuss the adoption laws in China.

After comparing the provisions in the Hague Convention, the IAA, U.S. statutes, and Chinese adoption laws, it is apparent that only the United States provides rights for the biological parents after an adoption. This limited protection of biological parents' rights, which allows a specified period of time for the parents to revoke consent to the adoption of their child, should be part of the intercountry adoption norms. There is no right more fundamental than the right to protect and care for your child;²⁹ therefore, it is necessary for the laws governing intercountry adoptions to contain provisions that protect the biological parent-child relationship.

I. THE HAGUE CONVENTION: ARE THE BIOLOGICAL PARENTS' BEST INTERESTS PROTECTED?

The Hague Convention was enacted to "establish safeguards to ensure that intercountry adoptions take place in the best interests of the child"³⁰ While this is a laudable goal, and clearly the child's interests

the entry of an order granting the adoption petition. Other states provide that a natural parent may not withdraw his or her consent after either entry of an interlocutory adoption order or the final adoption decree. States may require the withdrawal of parental consent to be supported by good cause.

Id. at 48 (citation omitted).

26. See HOLLINGER, ADOPTION LAW AND PRACTICE, *supra* note 8, at 1A-1.

27. See discussion *infra* Parts I-III.

28. Hague Convention, *supra* note 16.

29. See *infra* note 151.

30. Hague Convention, *supra* note 16, at 1139. The Hague Convention was "convinced of the necessity to take measures to ensure that intercountry adoptions are made in the best interests of the child and with respect for his or her fundamental rights, and to prevent the abduction, the sale of, or traffic in children." *Id.* See IRVING J. SLOAN, THE LAW OF ADOPTION AND SURROGATE PARENTING 10 (1988). "The 'best interests' formula has consistently been upheld by the courts and is uniquely an

should be a primary concern, the Hague Convention's focus on the child undermines the parents' rights in an intercountry adoption.³¹

The discussion of biological parents' rights in the Hague Convention is extremely limited.³² The Hague Convention details specific guidelines for the proper form of consent to an adoption and the proper method to obtain that consent.³³ It states that competent authorities within the biological parents' State (the State of origin) must ensure that "the persons, institutions and authorities whose consent is necessary for adoption, have been counselled . . . and duly informed of the effects of their consent"³⁴ When discussing the effects of consent to an adoption, these competent authorities must inform the relevant parties as to "whether or not an adoption will result in the termination of the legal relationship between the child and his or her family of origin."³⁵ Also, the Hague Convention specifies that these parties must give "their consent freely, in the required legal form, and expressed or evidenced in writing."³⁶ These provisions in the Hague Convention highlight the importance of informed consent in intercountry adoptions. The fourth chapter of the Hague Convention, entitled "Procedural Requirements in Intercountry Adoption," requires the State of origin to submit a report on the child to the adoptive parents' State (the receiving State).³⁷ This report must include the necessary proof of consent for the adoption.³⁸

Consent is a prerequisite for an intercountry adoption because official recognition of an intercountry adoption greatly affects the rights of the biological parents, the adoptive parents, and the child.³⁹ Once the adoption

American contribution to the law of adoption." *Id.*

31. *See infra* note 151.

32. *See* Hague Convention, *supra* note 16.

33. *Id.* art. 4(c)(1).

34. *Id.*

35. *Id.*

36. *Id.* art. 4(e)(2). The Hague Convention also requires that "the consent of the mother, where required, has been given only after the birth of the child." *Id.* art. 4(c)(4). The Hague Convention also requires that the authorities of the receiving State must determine "the prospective adoptive parents are eligible and suited to adopt" and that they "have been counseled as may be necessary." *Id.* art. 5(a),(b).

37. *Id.* art. 15. The Central Authority, a body designated by the State to perform the duties required by the Hague Convention, of the State of origin "shall prepare a report including information about [the child's] identity, adoptability, background, social environment, family history, medical history including that of the child's family, and any special needs of the child." *Id.* art. 16(1)(a). The Central Authority of the State of origin must determine whether the "envisaged placement is in the best interests of the child." *Id.* art. 16(c).

38. The Central Authority of the State of origin must submit "proof that the necessary consents have been obtained . . . taking care not to reveal the identity of the mother and the father if, in the State of origin, these identities may not be disclosed." *Id.* art. 16(2).

39. *Id.* art. 26. An adoption "certified by the competent authority of the State of the adoption as having been made in accordance with the Convention shall be recognized by operation of law in the

is recognized under the Hague Convention, “the legal parent-child relationship between the child and his or her adoptive parents” is in effect.⁴⁰ At this point, the legal relationship between the child and his or her biological parents is severed.⁴¹ The Hague Convention states:

In the case of an adoption having the effect of terminating a pre-existing legal parent-child relationship, *the child* shall enjoy in the receiving State, and in any other Contracting State where the adoption is recognized, rights equivalent to those resulting from adoptions having effect in each such State.⁴²

This provision expressly grants the child the same rights that are afforded children who are adopted within the receiving State; however, it implicitly denies rights granted to the biological parents during the course of domestic adoptions in the State of origin.⁴³

Another provision of remarkable impact on the rights of the biological parents states, “[w]here an adoption granted in the State of origin *does not* have the effect of terminating a pre-existing legal parent-child relationship, it may . . . be *converted* into an adoption having such an effect. . . .”⁴⁴ This provision allows the Hague Convention to accomplish its goal of establishing permanency in intercountry adoptions by effectively severing the legal ties between the biological parents and the child.⁴⁵ This effect is also evident in many other provisions in the Hague Convention.⁴⁶

other Contracting States.” *Id.* art. 23(1). States do not have much leeway when determining whether to recognize the adoption. “The recognition of an adoption may be refused in a Contracting State only if the adoption is manifestly contrary to its public policy, taking into account the best interests of the child.” *Id.* art. 24.

40. *Id.* art. 26(1)(a). The recognition of an adoption under this Convention gives rise to “parental responsibility of the adoptive parents for the child.” *Id.* art. 26(1)(b).

41. *Id.* art. 26(1)(c). Recognition includes “the termination of a pre-existing legal relationship between the child and his or her mother and father, if the adoption has this effect in the Contracting State where it was made.” *Id.*

42. *Id.* art. 26(2) (emphasis added).

43. *Id.* art. 26. The fact that the parents are not mentioned in the text implicitly denies them the same rights granted to the children by this article.

44. *Id.* art. 27(1) (emphases added). This article specifies that the adoption can be converted into an adoption which terminates the parent-child relationship with the biological parents only if the law of the receiving State permits this change and the proper consents have been given. *Id.* This provision of the Hague Convention demonstrates the focus on the child’s interests, and the absence of safeguards for the protection of the biological parents’ rights.

45. *Id.* introduction.

46. *See id.* For example, article 30 states that the authorities of the State of origin “shall ensure that information held by them concerning the child’s origin, *in particular information concerning the identity of his or her parents*, as well as the medical history, is preserved.” *Id.* art. 30(1) (emphasis added). This provision encourages the State of origin to withhold the identity of the biological parents from the adoptive parents and “preserve” it for the child to have in the future. Furthermore, article 29

II. THE INTERCOUNTRY ADOPTION ACT: HOW THE U.S. IMPLEMENTATION OF THE HAGUE CONVENTION PRECLUDES PROTECTION OF THE BIOLOGICAL PARENTS' RIGHTS IN THE UNITED STATES

The United States enacted the IAA in 2000⁴⁷ in order to implement the Hague Convention.⁴⁸ Following the Hague Convention, the IAA focuses on the “children’s best interests.”⁴⁹ One of Congress’ purposes in enacting the IAA was to assist U.S. citizens adopting children from abroad;⁵⁰ however, implicit in the act is a denial of the rights of the biological parents.⁵¹

In order for an intercountry adoption to take effect under the IAA, certain procedures must be followed, including the issuance of certificates of recognition.⁵² The recognition provisions of the IAA detail the legal effect of these certificates.⁵³ The adoptive parent receives the certificate only after the adoption has been granted, proper notification has been received from the central authority in the State of origin, and the

notes that the authorities of the State of origin “shall ensure that the child or his or her representative has access to such information, under appropriate guidance, insofar as is permitted by the law of that State.” *Id.* art. 29. This vaguely-worded provision may be interpreted to forbid the child or adoptive parents from ever being able to obtain that “preserved” information. The language of this provision does not guarantee that the identity of the biological parents would be available to the adoptive parents or the child, even if the biological parents wanted that information to be shared. It is also not clear from the language of the provision whether the biological parents have any right to obtain the identities of the adoptive parents.

47. 42 U.S.C. § 14901.

48. *Id.* (“An Act to provide for implementation by the United States of the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption.”).

49. *Id.* § 14901(b)(7). There are three purposes of the IAA:

to provide for implementation by the United States of the Convention . . . to protect the rights of, and prevent abuses against, children, birth families, and adoptive parents involved in adoptions (or prospective adoptions) subject to the Convention, and to ensure that such adoptions are in *the children’s best interests*, and to improve the ability of the Federal Government to assist United States citizens seeking to adopt children from abroad and residents of other countries party to the Convention seeking to adopt children from the United States.

Id. (emphasis added).

50. *Id.* § 14901(b)(3). As noted, the third stated purpose of the IAA is “to improve the ability of the Federal Government to assist *United States citizens* seeking to adopt children from abroad and residents of other countries party to the Convention *seeking to adopt children from the United States.*” *Id.* § 14901(b) (emphases added). The language of the third purpose of the IAA clarifies that its intention is primarily to protect U.S. citizens. The only intended assistance to foreign nationals arises when foreign citizens adopt a child from the United States.

51. *Id.* § 14901. The stated purposes of the IAA express no intention to protect the rights of the biological parents in the foreign country.

52. 42 U.S.C. § 14931.

53. *Id.*

requirements of the Hague Convention and the IAA have been met.⁵⁴ The adoption is recognized as final by the United States after the certificate has been issued.⁵⁵

Paralleling the Hague Convention,⁵⁶ a central concern of the IAA is the consent required for an adoption to be considered valid.⁵⁷ The IAA states that the biological parents must freely give their “written irrevocable consent to the termination of their legal relationship with the child, and to the child’s emigration and adoption.”⁵⁸ The Attorney General must be satisfied “that the purpose of the adoption is to form a bona fide parent-child relationship, and the parent-child relationship of the child and the natural parents has been terminated.”⁵⁹

The rights of the biological parents end once the parent-child relationship has been terminated by following the proper procedures for an international adoption and obtaining valid consent.⁶⁰ As the IAA markedly states, at that point “no natural parent or prior adoptive parent of any such child shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status under this Act.”⁶¹ This statement clearly indicates that the biological parents have no parental rights after the adoption is recognized.⁶²

54. *Id.* With respect to the issuance of certificates, the IAA provides:

The Secretary of State shall, with respect to each Convention adoption, issue a certificate to the adoptive citizen parent domiciled in the United States that the adoption has been granted or, in the case of a prospective adoptive citizen parent, that legal custody of the child has been granted to the citizen parent for purposes of emigration and adoption, pursuant to the Convention and this Act, if the Secretary of State—receives appropriate notification from the central authority of such child’s country of origin; and has verified that the requirements of the Convention and this Act have been met with respect to the adoption.

Id. § 14931(a)(1).

55. *Id.* § 14931(a)(2).

56. *See supra* notes 34–38 and accompanying text.

57. *See infra* notes 58–59 and accompanying text.

58. 8 U.S.C. § 1101(b)(1)(G)(i)(II) (2004). According to the IAA, “the child’s natural parents (or parent, in the case of a child who has one sole or surviving parent because of the death or disappearance of, abandonment or desertion by, the other parent)” must freely give their written consent to terminate their legal relationship with the child, if these biological parents still have legal custody. *Id.*

59. *Id.* § 1101(b)(1)(G)(IV).

60. *Id.* § 1101(b)(1)(G).

61. *Id.* § 1101(b)(1)(G)(V).

62. *Id.*

III. ADOPTION LAW IN THE UNITED STATES: ANALYSIS OF BIOLOGICAL PARENTAL RIGHTS

Adoption law in the United States has evolved throughout its lengthy history.⁶³ While domestic adoptions are governed by state law, the IAA controls intercountry adoptions.⁶⁴ Many states also have laws governing international adoptions, which are recognized in addition to the IAA.⁶⁵

Within the United States, state laws concerning domestic adoptions vary greatly.⁶⁶ These laws are neither uniform, nor are they consistently applied.⁶⁷ However, there is a general consensus among the states on the

63. See generally SLOAN, *supra* note 5, at 5–10 (outlining a historical background of adoption). “Our jurisprudence was largely acquired by inheritance from England. The English have an inordinately high regard for blood lineage and therefore the practice of adoption never acquired a foothold there.” *Id.* at 8. “Since the English common law did not know true adoption, there was no common law precedent for it in this country and the introduction of the practice in the United States was, therefore, inhibited here.” *Id.* at 8–9. “One influence on United States adoption law can be traced to the Spanish and French law” which was based on Roman civil law. *Id.* at 9. “The earliest adoption statute is variously reported to be that of Mississippi in 1846 and Massachusetts in 1851.” *Id.* U.S. statutes differ from the Roman Law in that “the primary concern of American laws was the welfare of the child rather than concern for the continuity of the adopter’s family.” *Id.* at 10. In fact, one of the important developments in U.S. adoption law is that most states now require “a thorough investigation before placing a child for adoption.” *Id.* See also SLOAN, *supra* note 5, at 83–91 (detailing the history of intercountry adoptions in the United States).

64. See SHAWN C. STEVENS, *INTERNATIONAL ADOPTION: A LEGAL RESEARCH GUIDE* (2004). The processes and laws governing intercountry adoptions differ from the state laws that control domestic adoptions.

The typical international adoption proceeds as follows: (1) the prospective parents decide to adopt; (2) the prospective parents fill out the Bureau of Citizenship and Immigration Services (BCIS) Form I-600A and have a home study done; (3) the BCIS approves the I-600A; (4) the foreign child is identified; (5) the prospective parents travel overseas and adopt the child; (6) BCIS Form I-600 is filed on behalf of the child; (7) the I-600 is approved if the child is an orphan; (8) finally, the child immigrates to the United States and automatically receives citizenship.

Id. The intercountry adoption process usually takes between six months and two years. *Id.* at 3. “Prospective parents in an international adoption typically will not have contact with the biological family. In contrast, in domestic adoptions, there is a potential for conflict to arise between birth parents and prospective adoptive parents.” *Id.*

65. *Id.* at 9. Individual state laws governing international adoptions fall into one of three categories: (1) states that grant full effect and recognition to foreign adoption decrees; (2) states that allow re-adoption for the validation of the adoption; and (3) states that have no statutory provisions. See *id.* at 9–40 (listing applicable statutory language of each state concerning intercountry adoption, if available).

66. Hollinger, *State and Federal Adoption Laws*, *supra* note 22, at 37.

67. *Id.* There is a historical controversy over whether adoption laws should “be ‘strictly construed’ so as to protect birth parents and their children from being separated . . . or ‘liberally’ construed to recognize ties between children and the ‘legal strangers’ who are committed to . . . providing them with a permanent loving family.” *Id.* at 37. In 1994, the Uniform Adoption Act [hereinafter UAA] was proposed with the purpose of achieving more uniformity in adoption laws. *Id.* at 38. Unfortunately, the UAA has not lived up to this purpose. “[S]ome of the UAA provisions have been criticized as too favorable to adoptive parents, others as too protective of birth parents’ rights

basic legal requirements for adoptions.⁶⁸ For example, a majority of states require an adoptive parent to be at least twenty-one years old.⁶⁹ Also, all states require that “a court order based on a finding that the essential requirements for the creation of an adoptive parent-child relationship” be granted, and that the adoption be in the best interests of the child.⁷⁰ There are six legal prerequisites for adoption: parental consent from the birth parents, suitable adoptive parents, adoption must be a gift not a bargained exchange, the adoptive relationship replacing the birth family relationship, confidentiality, and permanence.⁷¹

Consent is fundamental to a legal adoption in U.S. state law, just as in the Hague Convention and the IAA.⁷² “A court cannot approve an adoption without proof that the child’s birth parents have executed voluntary and informed consents, or, alternatively, that their parental

...” *Id.* Under the UAA, when an adoption decree is final, “the legal relationship . . . between each of the adoptee’s former parents and the adoptee terminates.” *Proposed Uniform Adoption Act of 1994, in FAMILIES BY LAW: AN ADOPTION READER 77* (Naomi R. Cahn & Joan Hollinger eds., 2004). Under the proposed UAA there would be no waiting period in which the biological parents could revoke consent to the adoption. *Id.*

68. *See infra* notes 69–71 and accompanying text.

69. SLOAN, *supra* note 5, at 11. Many statutes merely specify that the adoptive parent must be an adult; while others set a minimum age requirement of 21 years old. A few states allow “any person” or “any resident” to adopt. *Id.* Some states require a specific age difference between the adoptive parent and child. *Id.*

70. Hollinger, *State and Federal Adoption Laws, supra* note 22, at 38.

71. *Id.* at 38–39. *See also* MADELYN FREUNDLICH & LISA PETERSON, *WRONGFUL ADOPTION: LAW, POLICY, & PRACTICE 11* (1998) (discussing the increase in litigation instigated by adoptive families who were not provided with information about the child’s “physical, emotional, or developmental problems or with critical background information about the child’s birth family and history” before deciding to adopt the child). “[C]ourts have recognized a duty to disclose known material information about a child’s health and social background to prospective adoptive families.” *Id.* “Wrongful adoption” suits have recently been considered for international adoptions suits as well, due to the increase in the number of international adoptions and “the incidence of serious health, emotional and developmental problems among children adopted from abroad.” *Id.* at vi. “[T]he nature and scope of wrongful adoption liability” is unclear especially as it pertains to intercountry adoptions. *Id.* at 77.

72. *See infra* notes 73–83 and accompanying text. *See also* adoption.com, *Consent to Adoption*, <http://laws.adoption.com/statutes/consent-to-adoption.html> (last visited Nov. 9, 2005).

Consent plays a pivotal role in all adoptions; all adoptions are based upon the consent of persons or agencies legally empowered with the care or custody of the child. Consent refers to the agreement by a parent, or a person or agency acting in place of a parent, to relinquish the child for adoption and to release all rights and duties with respect to that child. In most States, the consent must be in writing and either witnessed and notarized or executed before a judge or other designated official. State legislatures have developed a range of provisions designed to ensure protection for children to prevent unnecessary and traumatic separations from their adult caretakers; for birth parents to prevent uninformed, hurried, or coerced decisions; and for adoptive parents to prevent anxiety about the legality of the adoption process.

Id.

rights were terminated.”⁷³ The clear purposes behind the consent requirements for adoptions are “to protect children from unnecessary and traumatic separations from the adults who are caring for them, to protect biological parents from hurried, uninformed or coerced decisions, and to protect adoptive parents from needless anxiety about the legality of the adoption.”⁷⁴ The consent provisions in the adoption laws “enable biological parents to voluntarily relinquish their rights, to relieve themselves of their obligations and to permanently sever all ties to their offspring.”⁷⁵

The necessity of the consent of parents and guardians differs depending on their biological connection and legal relationship to the child.⁷⁶ In

73. Hollinger, *State and Federal Adoption Laws*, *supra* note 22, at 39. “When a parent relinquishes a child to a licensed agency, or the agency acquires custody of the child after a court orders the involuntary termination of parental rights, the agency’s consent to a proposed adoption is necessary.” *Id.* See also SLOAN, *supra* note 5, at 2. “[T]he consents of the biological parents are usually required unless they are deceased or have legally relinquished all rights to the child, or are otherwise excused or excluded under some specific statutory provision.” *Id.* A valid adoption can require the consent of three types of people: the child (when the child is old enough; usually at least age fourteen), the natural parents, and the legal guardian or agency if the natural parents are deceased or their rights to the child have been surrendered. *Id.* at 26. Until the landmark Supreme Court decision in *Stanley v. Illinois* the consent of the biological mother was sufficient and the unwed biological father’s rights were ignored. *Id.* at 26–27 (citing *Stanley v. Illinois*, 405 U.S. 645 (1972)). In *Caban v. Mohammed*, the Supreme Court held that a state does not have to allow a father, who has made no attempt to assert his parental rights, the ability to veto the adoption of his child. 441 U.S. 380 (1979). Thus, those parents “who are situated differently may be treated differently.” SLOAN, *supra* note 5, at 28. The Supreme Court clarified this line of jurisprudence in *Lehr v. Robertson*, in which it held that notice to the unwed biological father is not required if he has not “demonstrated a ‘custodial, personal, or financial’ relationship with his child.” *Id.* at 29 (citing *Lehr v. Robertson*, 463 U.S. 248, 267 (1983)). The father cannot withhold consent to the adoption of his child if he has not “previously attempted to develop a relationship with his illegitimate child.” *Id.* Sloan notes that the consent of the biological parents is not required if “they have neglected, abandoned, or deserted the child; or have been deprived of custody judicially, or have voluntarily surrendered the child to a welfare or social agency; where they have been deprived of their civil rights or imprisoned for a felony; or are alcoholic abusers.” *Id.* at 30. In addition, the biological parents’ consent is not necessary if they are unknown or missing. *Id.*

74. HOLLINGER, *ADOPTION LAW AND PRACTICE*, *supra* note 8, at 2-1 (2003). Consent is necessary but not sufficient, for an adoption; the court must also determine if the adoption is in the child’s best interests. *Id.* at 2-6.

75. *Id.* Due to the permanency and finality of an adoption “for children and for their biological parents, courts will not approve an adoption before ascertaining whether the requisite parental consents are ‘voluntary and informed,’ or, alternatively, whether the parents’ behavior manifest such a profound disregard for parental responsibility that their consent may be dispensed with.” *Id.* at 2-7. Hollinger notes that due to the historical deference to parental autonomy, “[a]bsent a voluntary or provable forfeiture of parental rights and duties, the state has no license to remove children from their parents in order to seek a ‘better’ placement.” *Id.* at 2-8.

76. See *id.* See also adoption.com, *supra* note 72.

In all States, the birth mother and the birth father, if he has properly established paternity, hold the primary right of consent to adoption of their child. Either one or both parents may have these rights terminated for a variety of possible reasons, including abandonment, failure

general, the biological mothers and the men they are married to are legally entitled to the right of consent concerning their child's adoption.⁷⁷ In addition to the requirement of consent, there are also statutory guidelines for the timing of obtaining consent.⁷⁸ Some exceptions to the requirement that a parent must consent to an adoption exist.⁷⁹ However, the courts

to support the child, mental incompetence, or a finding of parental unfitness due to abuse or neglect. When neither birth parent is available to give consent, the responsibility can fall to other legal entities, such as: [a]n agency which has custody of the child; [a]ny person who has been given custody; [a] guardian or guardian *ad litem*; [t]he court having jurisdiction over the child; [a] close relative of the child; [a] best friend of the child appointed by the court.

Id. (citation omitted).

77. See HOLLINGER, ADOPTION LAW AND PRACTICE, *supra* note 8, at 2-8. "Biological mothers and the men married to them at or around the time they give birth have always been entitled to the legal right to consent to, or to veto, their child's adoption." *Id.* Divorced fathers, unwed fathers, fathers by artificial insemination, and parents whose rights have been terminated involuntarily, are not afforded equal protection under the consent laws. *Id.* at 2-8, 2-9. "Generally, a child may not be adopted without the consent of each living parent if the parents were married to each other when their child was conceived or born." *Id.* at 2-11. Biological fathers who were not married to the mother are not entitled to the right to consent to an adoption of their child; rather, they must earn the right by "formally acknowledging or establishing paternity of the child, or alternatively, by proving that they meet certain statutory criteria intended to 'establish that their relationship to their child is sufficiently 'parental' to warrant treating them as if they had been married to the mother at the time of the birth,' in order to earn their parental rights." *Id.* at 2-14. Hollinger also notes that "[i]f one parent is deceased or has been deprived of the right to consent as a result of a voluntary surrender or an involuntary termination proceeding, the consent of the other parent is required to effectuate an adoption." *Id.* at 2-12

78. See *id.* at 2-80 (discussing the time in which consent may be obtained from the mother and from the father). See also adoption.com, *supra* note 72.

Approximately 46 States and the District of Columbia specify in statute when a birth parent may execute a consent to adoption. Birth fathers can generally execute consent at any time, while a birth mother can usually only execute consent after the birth of the child. Sixteen States and the Northern Mariana Islands allow consent at any time after the birth, while 28 States require a waiting period before a consent can be executed. The shortest waiting periods are 12 and 24 hours, and the longest, in 15 States are 72 hours, or 3 days. Only two States (Alabama and Hawaii) allow the birth mother to consent before the birth of her child; however, the decision to consent must be reaffirmed after the birth. The manner in which consent can be executed varies considerably from State to State. In some States, consent may be executed by a written statement witnessed and/or notarized by a notary public. Other States may require an appearance before a judge, or the filing of a petition of relinquishment. Some States require that the parent be provided with counseling and have his/her rights and the legal effect of relinquishment explained to him/her prior to consent. In those cases where custody of the child has previously been placed with an agency, the head of the agency may sign an affidavit of consent. In most States, a birth parent who is a minor is treated no differently than other birth parents. However, in some States, the minor parent must be provided with separate counsel prior to execution, or a guardian *ad litem* must be appointed to either review or execute the consent. In other States and Guam, the consent of the minor's parents must be obtained.

Id. (footnote omitted).

79. See *id.* When a state seeks to protect a child from abusive, neglectful, and otherwise incapable parents, the parents' rights can be terminated involuntarily. At that point, a state agency is typically empowered to consent to the child's adoption. *Id.* As previously noted, in most

carefully scrutinize these statutory provisions for the waiver or forfeiture of the right to consent, because the provisions revoke a fundamental right of biological parents.⁸⁰

Unlike laws dealing with intercountry adoption, under which the biological parents have no rights after the recognition of the adoption,⁸¹ the biological parents in domestic adoptions in the United States are afforded an important positive right: the right to a waiting period in which they may revoke their consent to the adoption.⁸² Consent is deemed invalid when revoked, and when it was obtained by fraud, duress, or other wrongful conduct.⁸³

circumstances, the unwed father's consent is not required because he does not have the same rights as the biological mother. *Id.* at 2-82. Even in situations where the "biological mother has never executed a consent, or has executed one as a result of duress or fraud, she may nonetheless be precluded from regaining custody of her child, if the adopters or an agency can prove that independent grounds exist which justify dispensing with her consent. *Id.* at 2-83.

80. *Id.*

Because adoption severs all legal ties between biological parents and their children and because "the liberty interest of natural parents in the care, custody, and management of their child" is a fundamental right, requiring complete due process safeguards, courts traditionally are reluctant to terminate the rights of biological parents without their consent.

Id. at 2-84, 2-84.1. The traditional grounds for waiving parental consent in most adoption statutes include: abandonment, death of a biological parent, involuntary termination of parental rights, incompetency of parent, imprisonment for specified felonies, unfitness, and failure to support the child despite the ability to do so. *Id.* at 2-86, 2-87. The state usually bears the burden of proving that termination is justified. *Id.* at 2-87.

81. See *supra* discussion in Parts I and II.

82. See *supra* note 24. The length of the waiting period varies by state, and there is no consensus as to what constitutes an appropriate or adequate waiting period.

83. HOLLINGER, ADOPTION LAW AND PRACTICE, *supra* note 8, at 2-129. "A contest to an adoption can arise when a biological parent either alleges that no consent to the adoption was ever given, or attempts to exercise a right of revocation." *Id.* at 8-1. See also adoption.com, *supra* note 72.

Adoption is meant to create a permanent and stable home for a child; therefore, a validly executed relinquishment and consent to adopt is intended to be final and irrevocable. As a result, approximately five States, the District of Columbia, American Samoa and the Virgin Islands make no provisions for revocation of consent, and approximately 23 States and Puerto Rico only allow revocation when there are specific circumstances—generally when there is strong evidence of fraud, duress, undue influence, coercion, or misrepresentation. In other States, provisions are made for withdrawal or revocation of consent under specific circumstances or within specified time limits. Several States have specific time periods, generally ranging from three to 21 days, when revocation is allowed for any reason. In other States, revocation requires the mutual consent of the adopting family or a court finding that revocation is in the best interest of the child. In some States, the issue of consent may be reconsidered if an adoptive placement is not made with a specified family or within a specific period of time. In all cases, consent becomes final and irrevocable once a final decree of adoption has been issued by the court.

Id.

IV. ADOPTION LAW IN THE PEOPLE'S REPUBLIC OF CHINA

In 1991, the Standing Committee of the National People's Congress approved the Adoption Law of the People's Republic of China (the Adoption Law (P.R.C.)).⁸⁴ The Committee revised the Adoption Law (P.R.C.) in 1998.⁸⁵ The Adoption Law (P.R.C.) was enacted to "protect the lawful adoptive relationship and to safe-guard the rights of parties involved" in the adoption.⁸⁶ It states that the adoption must be in the "interest of the upbringing and growth of adopted minors,"⁸⁷ which is equivalent to the "best interest of the child" language contained in the Hague Convention and the IAA.⁸⁸ The Adoption Law (P.R.C.) also seeks to safeguard "the lawful rights and interests of both adoptees and adopters."⁸⁹

Just as U.S. law contains certain threshold requirements,⁹⁰ adoptive parents in China also have to meet certain requirements. First, the adoptive parents must be childless and "capable of rearing and educating the adoptee."⁹¹ In addition, they cannot suffer from a disease that would render them unfit to adopt.⁹² Finally, they must be at least thirty years old.⁹³ Under the Adoption Law (P.R.C.), only one child, male or female, may be adopted by any set of adoptive parents.⁹⁴ Furthermore, Adoption

84. Adoption Law (P.R.C.) (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 29, 1991, effective Dec. 29, 1991), available at <http://www.lawinfochina.com/display.asp?db=1&id=995&keyword=adoption.law> [hereinafter Adoption Law (P.R.C.)].

85. *Id.* The Adoption Law (P.R.C.) was "[a]dopted at the 23rd Meeting of the Standing Committee of the Seventh National People's Congress on December 29, 1991." It was revised "in accordance with the Decision on Revising the Adoption Law of the People's Republic of China adopted at the 5th Meeting of the Standing Committee of the Ninth National People's Congress on November 4, 1998." *Id.*

86. *Id.* art. 1.

87. *Id.* art. 2.

88. See Hague Convention, *supra* note 16, art. 1-3; 42 U.S.C. § 14901(b)(2).

89. Adoption Law (P.R.C.), *supra* note 84, art. 2. The law is designed to protect the rights of the children being adopted and the adoptive parents; yet, the biological parents' rights are neglected. The article further states that the adoption must be predicated on "principles of equality and voluntariness, and not in contravention of social morality." *Id.*

90. See *supra* notes 68-71 and accompanying text.

91. Adoption Law (P.R.C.), *supra* note 84, art. 6. There are two exceptions to the childlessness requirement. First, "[a]n overseas Chinese, in adopting a child belonging to a collateral relative by blood of the same generation and up to the third degree of kinship, may even be not subject to the adopter's childless status." *Id.* art. 7. Second, orphaned, disabled, or abandoned children can be adopted regardless of whether the adoptive parents are childless. *Id.* art. 11.

92. *Id.* art. 6.

93. *Id.*

94. *Id.* art. 8. There is an exception to the one-child-only rule, that orphans, disabled children, abandoned infants, and children whose parents cannot be ascertained or found and who are under the care of a social welfare institution may be adopted regardless of whether the adoptive parents are

Law (P.R.C.) requires that parents “act in concert” when placing their child for adoption or when choosing to adopt a child into their family.⁹⁵

It is not clear from the Adoption Law (P.R.C.) what form of consent is required for a valid adoption.⁹⁶ The law simply states that the adoption shall take place on “a voluntary basis.”⁹⁷ The Adoption Law (P.R.C.) does not specify what constitutes a “voluntary basis”; therefore, it is not clear whether written consent or other documentation is needed to certify that the adoption was voluntary.⁹⁸ In article 13, the Adoption Law (P.R.C.) states that “[w]here a guardian intends to place an orphaned minor up for adoption, the guardian shall obtain *the consent* of the person who has obligations to support the orphan.”⁹⁹ Thus, the Adoption Law (P.R.C.) requires consent, but it does not specify the form of that consent.¹⁰⁰

The Adoption Law (P.R.C.) requires registration of the adoption with the civil affairs department to officially establish the adoptive relationship.¹⁰¹ After the date the adoptive relationship is established, the same legal provisions, rights, and duties apply to the relationship between adoptive parents and children, as would apply in a legal relationship between biological parents and children.¹⁰² As a consequence, “[t]he rights and duties in the relationship between an adopted child and his or her parents and other close relatives shall terminate with the establishment of the adoptive relationship.”¹⁰³

The Adoption Law (P.R.C.) addresses the possible ways to terminate an adoptive relationship in several different provisions.¹⁰⁴ One such provision states that in order to terminate the adoptive relationship, the

childless and regardless of how many children they adopt. *Id.*

95. *Id.* art. 10.

96. *See id.* art. 11.

97. *Id.* art. 11 (“Adoption of a child and the placing out of the child for the adoption shall both take place on a voluntary basis. Where the adoption involves a minor aged 10 or more, the consent of the adoptee shall be obtained.”).

98. *See id.*

99. *Id.* art. 13 (emphasis added).

100. *Id.* arts. 11, 13. This is markedly different from the specific provisions for consent found in the Hague Convention, the IAA, and U.S. state law. *See supra* discussion in Parts I–III.

101. Adoption Law (P.R.C.), *supra* note 84, art. 15 (“The adoption shall be registered with the civil affairs department of the people’s government at or above the county level. The adoptive relationship shall be established as of the date of registration.”). The Adoption Law (P.R.C.) also allows parties to enter into a private adoption contract. *Id.* However, the adoption must still be registered with the civil affairs department in order for the adoptive relationship to be recognized. *Id.*

102. *Id.* art. 23. The article also stipulates that “the legal provisions governing the relationship between children and close relatives of their parents shall apply to the rights and duties in the relationship between adopted children and close relatives of the adoptive parents.” *Id.*

103. *Id.* art. 23.

104. *See infra* notes 105–08 and accompanying text.

adoptive parents and the biological parents must agree to terminate the adoption, and the child must consent if he or she is over the age of ten.¹⁰⁵ In addition, the biological parents may demand termination of the adoption if the adoptive parents “fail[] to perform the duty of rearing the adoptee or commit[] maltreatment, abandonment, or other acts of encroachment upon the lawful rights of the minor adopted child.”¹⁰⁶ Adoption Law (P.R.C.) also states that an adopted child who is an adult and the adoptive parents may terminate the adoptive relationship if the relationship “deteriorates to such a degree that living together in the same household becomes impossible.”¹⁰⁷ The Adoption Law (P.R.C.) has additional special provisions for cases involving an adult adopted child.¹⁰⁸

In the case of a termination of the adoptive relationship, the “rights and duties in the relationship between the child and his or her parents and their close relatives shall be restored automatically.”¹⁰⁹ If it is the biological parents who request the termination of the adoption, the adoptive parents, under the Adoption Law (P.R.C.), “may demand an appropriate compensation from the [biological] parents for the living and education expenses paid during the period of adoption, except if the adoptive relationship is terminated on account of the maltreatment or desertion of the adopted child by the adoptive parents.”¹¹⁰ It is not clear from the Adoption Law (P.R.C.) whether or not there is a limited time period in which the biological parents may make a request for the termination of the adoptive relationship.¹¹¹ The Adoption Law (P.R.C.) also affects the rights

105. Adoption Law (P.R.C.), *supra* note 84, art. 26.

106. *Id.* This article also states that if the adoptive parents and the biological parents are not able to reach an agreement about the termination of the adoptive relationship, then a suit may be brought by the parties in a People’s Court. *Id.*

107. *Id.* art. 27. The parties may terminate this relationship by agreement or by bringing a suit in a People’s Court.

108. *Id.* art. 29. Note that in the case of an adult adopted child, the rights and duties are restored to the biological family only if it is decided through consultation that they be restored. *Id.*

Upon termination of an adoptive relationship, an adult adopted child who has been reared by the adoptive parents shall provide an amount of money to support the adoptive parents who have lost ability to work and are short of any source of income. If the adoptive relationship is terminated on account of the maltreatment or desertion of the adoptive parents by the grown-up adopted child, the adoptive parents may demand a compensation from the adopted child for the living and education expenses paid during the period of adoption.

Id. art. 30.

109. *Id.* art. 29. As the rights and duties return to the biological family, the rights and duties of the adoptive family are terminated. *Id.* The Adoption Law (P.R.C.) also mandates that the parties register the termination of the adoptive relationship with a civil affairs department. *Id.* art. 28.

110. *Id.* art. 30.

111. *See id.*

of biological parents by forbidding them from bearing another child after having placed a child for adoption.¹¹²

V. ANALYSIS

The rights of biological parents are fundamental and deserve the utmost protection by the law.¹¹³ The Hague Convention, the IAA, U.S. adoption statutes, and the Adoption Laws (P.R.C.) have failed to protect the fundamental rights of the biological parents in intercountry adoptions.¹¹⁴ The majority of U.S. state statutes have a provision granting the biological parents the option of revoking their consent to the adoption of their child in a domestic adoption.¹¹⁵ The Hague Convention, the IAA, and the Adoption Laws (P.R.C.), on the other hand, do not provide for this right.¹¹⁶ Rather, these laws appear to affirmatively deny the biological parents any rights.¹¹⁷

One could argue that limiting the biological parents' rights is necessary in order to create permanency in the adoptive relationships and protect the adoptive parents and children from the upheaval which inevitably arises from assertions of biological parents' rights.¹¹⁸ However, U.S. state law reasonably protects the fundamental rights of the biological parents by allowing them a limited amount of time to file a motion to revoke consent to their child's adoption within the United States.¹¹⁹ There are no statutes that unreasonably allow the biological parents an indefinite amount of time to re-assert their parental rights.¹²⁰

A major appeal of intercountry adoptions is that there is a lack of biological parental rights following the adoption.¹²¹ Thus, there is no fear in the minds of the adoptive parents that three months after the adoption, the biological parents from the foreign country will be knocking on the front door to reclaim their child.¹²² Intercountry adoptions should be encouraged because they result in the placement of these orphan children

112. *Id.* art. 19.

113. *See infra* note 151.

114. *See supra* discussion in Parts I–IV.

115. *See supra* note 24.

116. *See* Hague Convention, *supra* note 16; 42 U.S.C. §§ 14901–14954; Adoption Law (P.R.C.), *supra* note 84.

117. *See supra* discussion in Parts I–III.

118. *See* Hollinger, *Intercountry Adoption*, *supra* note 8, at 37–38.

119. *See supra* note 24.

120. *Id.*

121. *See* Hollinger, *Intercountry Adoption*, *supra* note 8, at 215–16.

122. *Id.*

into loving homes.¹²³ However, to protect the fundamental rights of biological parents¹²⁴ in the intercountry adoption context, the international adoption laws should contain provisions similar to those provisions in U.S. state law that allow for revocation of consent during a limited period of time.¹²⁵

CONCLUSION

There is no end in sight to the increasing popularity of intercountry adoptions.¹²⁶ There are varied reasons why people continue to choose to adopt internationally instead of domestically.¹²⁷ While there are opponents to the practice of intercountry adoption,¹²⁸ there are just as many

123. See *supra* note 9. See also HOLLINGER, ADOPTION LAW AND PRACTICE, *supra* note 8, at 10-20. Results of studies show that “[a] permanent adoptive family is vastly preferable from the child’s perspective to even the best foster or institutional care. Most of the children without permanent families in the poor countries of the world are not living in ‘the best’ temporary care situations, but rather in situations ranging from seriously inadequate to desperate.”

124. See *infra* note 151.

125. See *supra* note 24.

126. See *supra* note 1. See also HOLLINGER, ADOPTION LAW AND PRACTICE, *supra* note 8, at 10-7.

The numbers continue to rise, and are expected to exceed 20,000 in 2002–2003, with most children now coming from China, Russia, South Korea, Guatemala, other former Soviet countries and many southeast Asian countries The increase in international adoption is related to the decrease in recent decades in the number of domestic children available for adoption and the number of healthy infants available International adoption is no longer a phenomenon keyed to wartime crises. The demand in the United States is steady and increasing.

Id.

127. See *supra* notes 8–9. See also HOLLINGER, ADOPTION LAW AND PRACTICE, *supra* note 8, at 10-10. For those with limited opportunities to adopt within the United States due to their marital status, age, or other reasons, intercountry adoption may be the best solution. “Despite restrictions of many countries’ adoption laws, the wide cultural variations in notions about appropriate adoptive parent screening leave at least some countries open to almost all adoptive applicants.” *Id.* See also *Foreign Adoptions*, <http://www.foreignadoptions.com> (last visited Jan. 7, 2006). “Adopting from a foreign country was a choice made by more than 21,000 American families in 2003. Adoptions from other countries has grown over 300% over the course of the last decade.” *Id.* “While the costs for international adoption can often be very high, many feel that the process is more predictable than domestic adoption.” *Id.* Some other advantages “include less stringent age restrictions for adopting parents and minimal, if any, risk that an adoption won’t move through to completion.” *Id.*

128. See HOLLINGER, ADOPTION LAW AND PRACTICE, *supra* note 8, at 10-30. Leaders often condemn the practice of international adoptions because “[i]t is said to represent for the countries a shameful admission to the world of the government’s inability to care of its own, the loss of a vital national asset, and perhaps the ultimate example of the exploitation by rich nations of the poor nations of the world.” *Id.* A common objection to intercountry adoptions is that the practice “represent[s] the destruction of [the childrens’] cultural and ethnic heritage, and [their] subjection to a life permeated by ethnic and racial discrimination.” *Id.* at 10-30, 10-31. Various governments have responded with creating policies to address problems with “baby-selling” scandals, hostility towards intercountry adoption, and anti-American sentiment. *Id.* at 10-31.

proponents, and the annual rate of intercountry adoptions is escalating.¹²⁹ The rights of biological parents must be protected in the face of this growing trend.

The Hague Convention¹³⁰ establishes safeguards to protect the best interests of the child during an intercountry adoption.¹³¹ It demands that biological parents are informed of the effect of the adoption, and that they give their consent in writing.¹³² While the Hague Convention specifically mentions the rights of the child in the adoption process, it fails to grant any affirmative rights to the biological parents, including the right to revoke their consent.¹³³

The IAA¹³⁴ also is designed to protect the child's best interests in an intercountry adoption.¹³⁵ Several provisions of the IAA evidence the importance of consent in the adoption.¹³⁶ The IAA requires that the consent to the adoption be voluntary, written, and irrevocable.¹³⁷ The IAA explicitly denies biological parents any rights under the Act after the adoption is completed.¹³⁸ Thus, the IAA also denies biological parents the right to revoke their consent.¹³⁹

Contrary to the Hague Convention and the IAA, biological parents in domestic adoptions under U.S. state law are afforded limited rights.¹⁴⁰ Valid consent is clearly important in U.S. state law.¹⁴¹ However, U.S. state

129. *Id.* Parents who want to adopt internationally have "created parent support organizations within the United States which advocate and seek to facilitate international adoption, and have pressed adoption agencies to develop programs abroad." *Id.* "The most powerful arguments for international adoptions relate to the plight of the poor children of the poor nations of the world. Millions of these children are growing up without homes and without decent food, shelter, medical treatment, or adult care and companionship." *Id.* at 10-32. "International adoption can provide part of the solution to the current problem, by bringing adults who are eager and able to provide homes together with the children who need them." *Id.*

130. Hague Convention, *supra* note 16.

131. *Id.* art. 1.

132. *See* discussion *supra* in Part I.

133. *Id.*

134. 42 U.S.C. §§ 14901-14954.

135. *Id.* § 14901.

136. *See* discussion *supra* in Part II.

137. *Id.*

138. *Id.*

139. *Id.*

140. *See* discussion *supra* in Part III.

141. *Id.* *See also* HOLLINGER, ADOPTION LAW AND PRACTICE, *supra* note 8, at 8-11.

The consent of the biological parent or guardian of the child must be obtained before a valid adoption can take place, unless there has been a waiver or forfeiture of parental rights

Therefore, [i]f it can be shown that the biological parent or guardian did not consent to the adoption, there may be sufficient grounds upon which to set it aside.

Id. "In order for a biological parent to have given a valid consent to the adoption, there must be compliance with the statutory requirements governing consent There is authority for strictly

law also affords the biological parents the right to a waiting period after the adoption, during which they can revoke their consent.¹⁴² The right to revoke consent is not absolute.¹⁴³ Rather, for biological parents to revoke their consent, they must comply with time periods and specific circumstances.¹⁴⁴

The Adoption Law (P.R.C.),¹⁴⁵ like the Hague Convention and the IAA, is designed to protect the best interests of the child.¹⁴⁶ Consent is required, but the specific form of the consent is not clear.¹⁴⁷ The Adoption Law (P.R.C.) provides several means to terminate the adoptive relationship.¹⁴⁸ Under the Adoption Law (P.R.C.), both the adoptive and biological parents must agree to end the adoptive relationship, or the adoptive parents must be found to have mistreated the child.¹⁴⁹ Unlike U.S. state law, the text of the Adoption Law (P.R.C.) contains no statutory waiting period for biological parents to unilaterally revoke their consent to the adoption.¹⁵⁰

U.S. state law is unique in providing at least minimal protections for the rights of biological parents. Perhaps this is a result of the concepts of liberty and fundamental rights that ring throughout our constitutional law jurisprudence.¹⁵¹ In order to protect parents' fundamental rights, and in the

construing consent requirements in order to protect the rights of biological parents." *Id.* at 8-21.

142. *See supra* note 24.

143. *Id.* *See also* HOLLINGER, ADOPTION LAW AND PRACTICE, *supra* note 8, at 8-13, 8-14. Even in states that favor biological parents' right to revoke consent, "that right is not without limits. It has generally been held that consent may not be withdrawn arbitrarily without careful scrutiny by the courts." *Id.* (footnotes omitted). Usually an adoption will proceed over the biological parents' objection if "the child is doing well with the adoptive parents and the biological parent has no better reason for revoking than temporary depression, change of mind, or other similar grounds." *Id.* at 8-17.

144. *See supra* note 24. *See also* HOLLINGER, ADOPTION LAW AND PRACTICE, *supra* note 8, at 8-8.1. "A biological parent will generally be deemed to have standing to contest the adoption, unless the parent's rights have been previously terminated in an appropriate judicial proceeding." *Id.*

145. Adoption Law (P.R.C.), *supra* note 84.

146. *Id.* art. 2.

147. *See* discussion *supra* in Part IV.

148. *Id.*

149. *Id.*

150. *Id.*

151. *See* HOLLINGER, ADOPTION LAW AND PRACTICE, *supra* note 8, at 8-8.13. "To date, federal courts have not found that prospective adoptive parents or foster parents have a constitutionally protected liberty interest in continuing to parent children for whom they have served as de facto parents." *Id.* In addition, federal courts have not found "that children have a constitutionally protected right to be parented by anyone other than their biological parents, unless their parents are deceased or are judicially determined to be unfit." *Id.* In addition, "[s]ome judges have even argued that strict compliance with consent requirements . . . may even be constitutionally mandated, because the legal consequences of a voluntary relinquishment of parental rights are the same as those resulting from an order of involuntary termination, which warrants constitutional scrutiny." *Id.* at 8-21 to 8-22 (footnotes omitted).

interests of fairness and consistency, international adoption laws should be amended to enable biological parents, for a limited amount of time after the adoption, to revoke consent to the adoption of their child. Laws that allow for a limited revocation of consent are by no means excessive; they simply provide a necessary protection for the biological parent-child relationship. There is no right more fundamental than the right of parents to protect and care for their children, and this right should be preserved and protected in intercountry adoptions.

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