THE DEVELOPMENT OF ADOPTION LAW

by Alice Bussiere, JD[1]

ABSTRACT. Adoption law in the United States, since its inception in 1851, has reflected changes in society and in child welfare practices. The author reviews its evolution from an issue involving property and inheritance, to a means of helping children and creating the ideal nuclear family, to the current understanding that virtually all children needing permanent homes are "adoptable" and that families can take many forms. She also recounts changes in the perceived "best interests" of all members of the adoption triad over time, and the growing recognition of links between adoption and child welfare policy. Finally, she discusses current controversies including open adoption; rights of birth parents, including unmarried fathers; and the role of culture and race.

History shows adoption as a unique and ever changing phenomenon.

-Sokoloff, 1993, p. 25.

INTRODUCTION

This article will provide a short history of the law of adoption and a brief introduction to some of the more controversial legal issues involved in the adoption of children in the United States today. Its purpose is not to discuss fully all of the legal issues that may arise in adoption, but rather to provide a brief background for future articles that will explore many of these issues in more depth.

THE SCOPE OF ADOPTION LAW

Adoption of children is governed by a complicated matrix of legal mandates. Most adoptions involve state law, many involve federal law, and some involve international law as well.

All states regulate adoption by statutes that prescribe adoption procedures; determine who can adopt, who can be adopted, and who can place children for adoption; and dictate the legal effects of adoption on the child, the birth family and the adopting family. The law of adoption is also shaped by judges who make decisions based on the facts of each case concerning questions such as whether the rights of birth parents should be terminated and whether adoption is in the best interest of the child. These decisions sometimes establish principles that become precedents for decisions in other cases.

Although adoption has traditionally been a matter of state law, in recent years federal law has become increasingly important in adoption law. In 1978 Congress passed the Indian Child Welfare Act (ICWA), which created federal standards for the placement of Native American children; in 1980 the federal Adoption Assistance and Child Welfare Act (AACWA) created fiscal incentives

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and procedures to promote the adoption of foster children; and in 1994 and 1996 the Multiethnic Placement Act (MEPA) and the Interethnic Adoption Provisions added specific federal prohibitions against discrimination based on race, ethnicity, and national origin in adoptive placements.

Interstate and intercountry adoptions complicate the picture even more. Interstate adoptions usually involve the Interstate Compact on the Placement of Children (ICPC), which has been enacted by most states and establishes procedures that must be followed when children are placed across state lines. Interstate adoption may also involve the federal Parental Kidnaping Protection Act (PKPA) and the Uniform Child Custody Jurisdiction Act (UCCJA), which govern the jurisdiction and power of the courts when parties to disputes over child custody live in different states. Intercountry adoptions are governed by the federal immigration and Nationality Act and the laws of the country of the child's birth.

THE HISTORY OF ADOPTION LAW

Early Adoption Law

The law of adoption has developed in the United States over the last 150 years. Historians generally credit Massachusetts with passing the first adoption law in 1851 (Presser, 1972; Hollinger, 1996a), although earlier civil laws in Texas and Louisiana provided for adoption by deed (Cole, 1983; McCauliff, 1986). Adoption of children by unrelated families clearly occurred before 1850, however. Evidence from wills dating back to 1693 shows that individuals made bequests to and provision for adopted children in colonial times (Howe, 1983; Kawashima, 1982), and many children were bound out or apprenticed to families who needed them as workers, without any formal legal procedure (Cole, 1983; Sokoloff, 1993). Individuals wanting formal recognition of an adoption obtained it by having the state legislature pass a private bill (Cole, 1983).

The 1851 Massachusetts law was a reform effort designed to protect children (Presser, 1972). Under this law, the welfare of the child became the primary consideration in legal adoption procedures (Cole, 1983; Presser, 1972). For the first time, judges had the authority to determine whether the adoptive parents had sufficient ability to bring up the child and whether it was "fit and proper" that the adoption take place (Howe, 1983).

This emphasis on the welfare of children was a new idea. Although adoption of children had existed for centuries (Cole, 1983), perceiving it as a benefit to children rather than as a means to create an heir or to protect family property was unprecedented (United Nations, 1956; Delupis, 1975; McCauliff, 1986). By 1929, all states had enacted adoption statutes, and most made the best interest of the child the standard for adoption (Sokoloff, 1993).

Although the welfare of children was a primary consideration, formal adoption procedures codified in law also protected both birth parents and adoptive parents from making uninformed and precipitous decisions (Cole, 1983). Thus, the law served to protect all three members of the adoption triad - the child, the birth parents, and the adoptive parents (Kawashima, 1982).

The focus of adoption in the 19th century continued to be on older children who had been bound out to families or left by parents who could no longer care for them. At the time, child welfare experts generally counseled against the placement of infants in adoptive homes. Early in the

twentieth century the adoption of infants became more common, as child welfare experts recognized the importance of early attachment and bonding between the child and the adoptive family (Hollinger, 1996a). As late as the 1940s, however, agencies were concerned about placing children of "uncertain background." As a result, they often kept infants in study homes for six months to a year before placing them for adoption, in order assess the children's physical and mental development (Sokoloff, 1993).

Replicating the Birth Family

By the 1950s, placement of children for adoption in the first year of life began to be common (Howe, 1983), and through the 1960s most adoptive parents sought to adopt infants (Cole, 1983). Adoption practice attempted to emulate the "ideal family" to as great an extent as possible (Boskey, 1988). Adoption agencies promoted their ability to guarantee a perfect child, and children with perceived defects were assumed to be unadoptable (Cole, 1983). The law sometimes reflected these attitudes by making the physical or mental condition of a child an issue to be considered in deciding whether to grant an adoption, and agency policies or practices frequently screened out prospective adoptive parents based on age, marital status, or life style (Bussiere, 1990).

Agencies sought to make the adoptive family as much like a birth family as possible, and tried to match children and families with similar characteristics. Children were issued new birth certificates with the adoptive parents' names, adoption records were sealed, and identifying information about the child's birth family and past remained secret (Sokoloff, 1993).

To give adoptive families a fresh start and to protect birth parents from the stigma of illegitimacy, states closed adoption records. Minnesota passed the first law making court adoption records confidential in 1917 (Melina & Roszia, 1993), and other states passed similar laws over the next few decades, generally making court adoption records and birth records inaccessible except by court order (Hollinger, 1996a). By the early 1950s, most states had laws protecting the anonymity of the birth parents (Baran & Parmor, 1993).

Expanding the Idea of Adoption

In the1960s and 1970s the idea of adoption as a replacement for the birth family began to change. Concepts about which children should be adopted and which families should be approved for adoption expanded beyond the perfect infant and the infertile couple. In the 1970s and 1980s, the notion that adoption should involve a complete break between children and their birth families, along with the emphasis on closed records, were reexamined.

Who Can Adopt and Who Can Be Adopted. In the 1960s child welfare professionals began to give more attention to children who had been considered unadoptable because they were older or because they had special circumstances such as physical or mental disabilities. Child welfare professionals and civil rights advocates also raised concern about the lack of services provided to minority children (Cole, 1983). New programs soon demonstrated that appropriate families could be found for most children who needed permanent homes, including those previously regarded as unadoptable (McKenzie, 1993), and interest in adoption began to expand beyond the infertile couples who were looking for a child who could have been born to them. At the same time, the number of healthy infants available for adoption began to decline (Hollinger, 1996a), and prospective adoptive parents began to consider older children, children with special needs, and

children from other countries.

As these developments expanded perceptions of which children should be adopted, state and federal laws began to promote adoption for children with special needs. In 1965 New York passed the first adoption subsidy statute to reduce the financial disincentive to adoption for children with special needs, and over the years most states followed suit (Bussiere, 1996). In 1980 Congress passed the Adoption Assistance and Child Welfare Act, which provided federal support for adoption assistance programs. The Act also required states to institute case plans and regular case reviews to ensure that foster children who could not return home were placed in a permanent home as quickly as possible. More recently, President Clinton has made adoption a priority and has set a goal of permanently placing 54,000 foster children by the year 2002 (Clinton, 1996).

At the same time, agencies began to broaden their views on who constituted an appropriate adoptive family. Those who had previously been excluded, such as older couples with children and single parents, came to be seen as appropriate adoptive parents for some children. Recently one commentator has suggested going even further and scrapping most criteria for adoptive parents in favor of a minimalist approach that would license prospective adoptive parents if they pass a threshold criminal and child abuse background check (Bartholet, 1993). Professor Bartholet would do away with the matching of children and families in favor of a first come first served approach. By contrast, traditional agency practice values assessment of the family and the child to determine whether the prospective parents will meet the needs of the child and whether the child will benefit from placement with that family (CWLA, 1988).

In the 1970s and 1980s thinking also changed about the role of foster parents and other long term care givers as adoptive parents. Recognition of a child's need for continuity led to a dramatic shift from agency policies that overtly prohibited foster parents from adopting children in their care to policies that encourage foster parent adoptions. The publication in 1973 of *Beyond the Best Interest Of the Child* introduced the importance of the concept of a child's "psychological parent" and sense of time. In 1977 the United States Supreme Court recognized the importance of foster family relationships but stopped short of saying that they were legally equal to biological family relationships (Smith v. O.F.F.E.R., 1977).

Thinking also changed about the role of foster parents and other long term care givers as adoptive parents. The rights of foster parents expanded rapidly over the next decade (Hardin & Bulkley, 1983), and many states passed statutes giving preference to foster parents or other care givers in the selection of adoptive parents for that child (Boskey, 1996). Some states also gave foster parents or other long term care givers procedural rights, such as the right to intervene in an adoption proceeding or to initiate an adoption (Oppenheim & Bussiere, 1996).

In spite of these developments, some long term care givers still find that they are not allowed to adopt children in their care. In practice, preferences for relatives and same race placement policies have sometimes impeded adoption by unrelated caregivers or required them to appeal in order to adopt children who live with them (Id.; Bartholet, 1991).

Confidentiality and Openness. As attitudes about the perfect adoption changed, so did thinking about openness in adoption. In the 1960s and 1970s, Bowlby and Kubler-Ross's writing about grief and loss resonated with birth parents who had been unable to resolve their conflicts about giving up a child, and as the stigma surrounding non-marital births began to lessen, confidentiality became less important to many birth parents (Melina & Roszia, 1993). In the 1970s, many

adoptees began to show increased interest in their birth families and heritage, and some searched for birth families to establish a relationship with their blood relatives (Haralambie, 1996). The adoption of older children who knew and often had relationships with their birth parents, siblings, and extended family members, and could not just wipe these relationships from their minds, also changed the dynamic.

These developments led professionals to reconsider whether closed adoptions always served the interests of birth families and adoptees, and to be willing to explore a greater degree of openness. The concept of open adoption, in which the birth family and the adoptive family have some contact, was introduced in 1976, and the practice has grown rapidly since then (Sokoloff, 1993; Appell, 1995). Recently the development of cooperative adoption has taken the concept even further. In cooperative adoption all of the adults interested in the child collaborate, both before and after the legal adoption takes place, to meet the adoptee's needs for stability and access to his or her heritage (Appell, 1995).

Ideas about the propriety of disclosing information concerning a child's birth family and medical history also changed dramatically. In the 1920s anonymity and secrecy were the norm and were assumed to further the best interest of the child, the adoptive family, and the birth family (Blair, 1996). As the importance of biological and genetic information became more clear, however, adoptive families began to demand more comprehensive information about the children they were adopting (Hollinger, 1996a). Child welfare professionals came to believe that adoptive parents should receive a medical history and information about the child's family background in order to understand the child and his or her special needs and to maximize the child's abilities (Child Welfare League of America, 1988).

In 1981, the United States Department of Health and Human Services Model Act for the Adoption of Children with Special Needs included a list of information that should be provided to adoptive parents before adoption. Texas, in 1989, passed the first comprehensive legislation requiring a state child welfare agency to compile and provide to adoptive parents a report concerning the child's health, social, educational, and genetic history (Texas Family Code). Other states soon followed with legislation requiring varying degrees of disclosure. As of 1993, 21 states had requirements concerning the collection and disclosure of the child's medical history, 36 states required collection and disclosure of the medical history of the birth parents, and several required disclosure of the child's social history, the child's educational history, or the birth parent's social history (DeWoody, 1993).

The courts also began to recognize the importance of providing accurate information to adoptive families. The tort of wrongful adoption for failure to disclose medical information about a child was recognized in 1986 in an Ohio case (Burr v. Board of County Commissioners) in which, for the first time, adoptive parents were awarded money damages for intentional misrepresentation of a child's history. Other courts expanded the bases on which a wrongful adoption lawsuit could be based to include willful misrepresentation of information, deliberate concealment of information, negligent misrepresentation of information voluntarily offered by the agency, and negligent withholding of information that misleads the adoptive parents (DeWoody, 1993; Blair, 1996).

The trend toward openness also affected the confidentiality of identifying information that would allow adoptees and birth parents to locate each other. The growing number of adoptees in search of their genetic roots led to the development of private registries which allow adoptees and birth parents to exchange information by mutual consent. States began to create other mechanisms to

permit the disclosure of information, including state registries, release of information by mutual consent without a formal registry, and the development of intermediaries who locate birth parents and ask their permission to share information with the adoptees. Some states have gone even further, permitting disclosure of identifying information without consent (Haralambie, 1996). That issue, however, is currently being litigated.

A Search for Uniformity

The 1990s have seen a renewed effort to achieve uniformity of laws governing domestic and international adoption.

Domestic Adoption Law. Because domestic adoption is regulated by state law, there is considerable variation across the country. Past efforts to create uniformity have proven unsuccessful. In 1953 the National Conference of Commissioners on Uniform State Laws (NCCUSL) created a uniform adoption act which was not passed by any state; in 1971 NCCUSL created another model act which was adopted in only a few states; in 1981 the United States Department of Health and Human Services created a Model Act for the Adoption of Children with Special Needs, which was not adopted in its entirety by any state; and during the 1980s the Family Law Section of the American Bar Association worked on a model adoption act but never obtained approval of the ABA House of Delegates (Tenenbaum, 1996; Hollinger, 1993).

In 1994, after five years of discussion and debate, NCCUSL adopted a now Uniform Adoption Act (UAA). The UAA is an attempt to resolve many contentious issues. Some of these issues are: When should unwed fathers have the right to notice of adoption proceedings or the right to consent to an adoption? When should revocation of a valid consent to adoption be permitted? Should the law require that birth parents receive counseling before giving consent? What kind of screening should occur before a child is placed with adoptive parents? What information should remain confidential and what information should be released without consent of all parties? Should open adoption agreements be enforceable, and if so, how? What should happen to the child if an adoption cannot be finalized? (Tenenbaum, 1996).

The debate that accompanied the development of the UAA revealed that basic assumptions about adoption still differ. UAA Reporter Professor Joan Heifetz Hollinger noted that these debates “are manifestations of profound contradictions in American society about the meaning of 'family' and the ways different kinds of families are authenticated" (Hollinger, 1996b, p. 345).

Trying to create a uniform law brings these issues to a head. For example, making adoption easier in order to promote permanence for children may conflict with strongly held ideas about the importance of birth families; facilitating communication and information sharing among all members of the adoption triad may conflict with the autonomy of the adoptive family and the traditional concept of making the adoptive family as much like a birth family as possible; reducing preplacement screening of adoptive parents may impair the ability of child welfare professionals to protect children or to make the best placement for the child (Hollinger, 1996b).

The drafters of the UAA had to make choices on these issues. In some areas the UAA is the result of compromise. For example, concerning confidentiality of records, the Act strikes a middle ground. It requires certain information about the child to be provided to the adoptive parents, permits disclosure of nonidentifying information to adult adoptees, provides for disclosure of certain identifying information by mutual consent, and requires a court order in other

circumstances. With respect to open adoptions, the Act implicitly permits communication between the adoptive and birth families by agreement but contains no explicit provision for post-finalization communication except in step-parent adoptions.

In other areas the UAA goes beyond current law. For example, it applies the Multiethnic Placement Act provisions that prohibit delaying or denying placement based on race to private as well as publicly funded agencies. It also goes beyond the mainstream of case law on unmarried fathers by permitting termination of a birth father's rights in certain circumstances even if the father can demonstrate compelling reasons why he has not assumed parental responsibilities. These provisions will permit termination of a father's parental rights in cases where the father has been misled or misinformed and has acted in good faith.

The Act also extends current law by creating a custody hearing if the adoption does not go forward or is over turned on appeal and, in some circumstances, when consent is revoked. These provisions will allow adoptive parents to keep custody of the child even if the requirements for adoption have not been met when a court determines that continued custody is in the child's best interest.

Clearly the development of the UAA has not stopped the debate. The Act has been endorsed by the American Bar Association, but is quite controversial among child welfare professionals (Child Protection Report, 1994; Sullivan, 1995). To date no state has adopted the UAA in its entirety, although some states have used the Act as a starting point in reforming their adoption laws (Elrod & Spector, 1997). Because of the lack of agreement on fundamental issues, it appears that the UAA is not likely to become the standard for all adoption issues. However, it has served to stimulate debate, and to cause states to reevaluate their adoption laws.

International Adoption Law. International adoptions are complicated not only by the variation among national laws governing adoption and termination of parental rights, but also by political considerations (Bartholet, 1996; Jaffe, 1995). While some view international adoption as the ideal solution to the problems of childless couples and homeless children who would otherwise be consigned to a life of poverty, others view it as exploitation of underdeveloped countries by richer nations and destruction of children's cultural and ethnic heritage (Bartholet, 1996). International adoption has also been subject to occasional scandals as a result of illegal or unethical practices by some intermediaries (Carro, 1994).

In 1993, the Hague Convention on Private International Law adopted the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption. The Hague Convention is the most ambitious effort to date to regulate adoption and promote intercountry cooperation (Jaffe, 1995). It recognizes the advantage of a permanent family for children for whom a family cannot be found in their country of origin, as well as the importance of standards to ensure that the adoption is in the best interest of the child and that the fundamental rights of children are respected.

The Convention requires participating countries to establish a Central Authority to carry out specific functions and to cooperate with the Central Authorities of other participating countries. The country of origin (the sending country) must determine that the child is adoptable; that an intercountry adoption is in the best interest of the child; and that appropriate consents have been obtained, including the consent of the child when applicable. Consent must be given freely and not induced by payment or compensation.

The receiving country is responsible for ensuring that the adoptive parents are eligible and suited to adopt, that the adoptive parents have been counseled as necessary, and that the child will be authorized to enter and reside permanently in the country with his or her adoptive parents. Agencies and individuals who act as adoption intermediaries must be accredited or approved by a Central Authority (Pfund, 1994).

The Hague Convention provides significant protections for children and provides for recognition of intercountry adoptions among the countries who are parties. However, it will be useful only to the extent that it is adopted by the countries involved in international adoption. To date, the United States has not ratified the Convention.

Increased Involvement by the Courts and the Public

In recent decades adoption issues have become the subject of public debate in the news media, in the courts, and in federal and state legislatures. Attention to the rights of children exploded after 1969 when the United States Supreme Court, in the case *In re* Gault, established a child's right to counsel in delinquency proceedings (Kramer, 1995). The case marked a turning point in the legal status of children, inasmuch as the Court recognized that children, as well as adults, have rights under the United States Constitution. Increased interest in civil rights in the 1960s and 1970s also fostered concern about the rights of birth parents, foster parents, and adult adoptees. Groups such as the Adoptees Liberty Movement Association (ALMA), the Council on Adoptable Children (COAC), Concerned United Birthparents (CUB), and the National Foster Parent's Association arose to represent many individuals who are personally involved in adoption (Cole, 1983; Sokoloff, 1993).

At the same time, federal and state child welfare reform laws gave courts a greater role in reviewing decisions concerning permanence for children, and legal representation for parents and children in termination of parental rights and adoption cases became more common (Cole, 1983). In 1981, the United States Supreme Court recognized a limited right to assistance of counsel for birth parents facing termination of parental rights (Lassiter v. Department of Social Services). In reaching this decision, the Court relied on a trend among the states to provide counsel for parents; by the time of the Court's decision in 1981, 33 states already had statutes giving parents the right to counsel. Since the Court's decision, most other states have passed laws providing for either mandatory or discretionary appointment of counsel for parents in termination of parental rights cases (Haralambie, 1996). States also began to provide attorneys or guardians ad litem for children, and this trend was accelerated by the Child Abuse Prevention and Treatment Act (CAPTA), which required states receiving federal funds under CAPTA to appoint a guardian ad litem for children in all abuse and neglect cases (Id.). As a result, adoption, which had formerly been the sole province of child welfare agencies, became more public, and more issues were contested (Cole, 1983).

In the 1990s adoption issues became even more visible as cases that raised significant issues in the courts attracted the attention of the news media. Children such as "Baby Richard" (In re: Kirchner, 1995) and "Baby Jessica" (In re: Clausen, 1993) became subjects of public debate. Adoption was also implicated in debates about broader social issues such as the meaning of "family," the importance of blood relationships, government intervention into family decisions, and the importance of race, ethnicity, and cultural heritage. Throughout these debates the primary concern has remained "the best interest of the child," but there has been considerable disagreement about what policies, practices, and laws further that interest.

The Rights of Birth Parents

Because adoption severs the legal relationship between the child and his or her birth family, contested adoptions involve the constitutional right of the parents and the child to family integrity. In 1972, the United States Supreme Court held that parental rights may not be terminated unless the parents are proved to be unfit to raise their children (Stanley v. Illinois), and in 1982 the Court imposed a standard of proof in termination cases that is higher than the standard in other civil cases (Santosky v. Kramer). These protections prevent courts from granting adoptions merely because the adoptive parents may provide a home with more advantages for the child (Hollinger, 1993).

The rights of unmarried fathers to these protections is still an evolving area of law. The 1972 case mentioned above struck down Illinois' statutory presumption that an unmarried father was an unfit parent (Stanley v. Illinois). In three subsequent cases the Court further refined the law by giving full due process rights to a father who had undertaken parental responsibilities (Caban v. Mohammed, 1979) but denying rights for fathers who had not undertaken those responsibilities (Quillion v. Walcott, 1978; Lehr v. Robertson, 1983).

States legislatures have varied in their approach to unmarried fathers. Some have given unmarried fathers the same rights as unmarried mothers; others have required fathers to take some affirmative step, such as establishing paternity or demonstrating a substantial relationship with the child, for their parental rights to be recognized (Haralambie, 1995). A growing number of states have established "putative fathers registries," which permit men who think they may have fathered a child to register. Many of these states deny parental rights to men who fail to register or otherwise establish their paternity; courts have disagreed, however, on whether and to what extent states may limit the rights of a father who falls to register if given the option (Haralambie, 1995).

Conflicts concerning the rights of birth parents often arise if a birth parent withdraws consent to adoption, if consent is found to be flawed, or if a previously unknown father appears after the mother has relinquished custody and the child has been placed in the adoptive home. Because of the importance of the rights at stake, birth parents can frequently regain custody of a child if the consent has not been properly obtained. When the losing party appeals a lower court decision, the case may be on appeal for years before a final resolution is reached, and an order to return a child may remove her from a home in which she has lived for years. If the child was placed across state lines the time may be even longer, as the courts sort out which state has jurisdiction. Indeed, many of the cases that have received much notoriety reflect precisely this situation.

Concerned that return to birth parents may cause harm to children who have lived for a significant period of time with prospective adoptive parents, some states have created a "best interest hearing" to determine where the child should live. These hearings permit the court to determine what placement is in the best interest of the child, regardless of whether the adoptive or birth parents have won the legal battle (Hollinger, 1996a). Critics of best interest hearings suggest that they stack the deck against birth parents regaining custody if the length of time the child has been in an adoptive home is the criterion for determining custody. Some courts have been reluctant to permit broad use of the best interest hearing, on the grounds that the availability of such a hearing could encourage prospective adoptive parents to resist return of the child to the birth parents, in the hope that retaining physical custody for long enough would enable them to prevail (see in re:

Haley A., 1996).

Culture and Race

In the 1960s one response to the shortage of adoptable white infants and the growing number of minority children who needed homes was to promote transracial adoption. This practice also created a great deal of controversy, however, and triggered a reevaluation of the importance of matching children with families who shared the child's race and culture. The shift in thinking is reflected in changes to the Child Welfare League of America Standards for Adoption Service. Prior to 1972, the standards provided that race should not be a factor in selecting an adoptive family. In 1972, however, the standards were revised to include a preference for placement within a child's racial or cultural group, on the assumption that shared race and culture would decrease the difficulty a child would have integrating into the family and community (Mason & Williams, 1985). The standards were changed again in 1988, to create a right of children to be placed in a family that reflects their ethnicity or race, balanced with a right not to have placement denied or significantly delayed when adoptive parents of other ethnic or racial groups are available. Policies that favor same race placement then came under criticism by some who viewed them as barriers to the placement of children who need permanent homes (Bartholet, 1993).

The debates among social science and child welfare experts about the appropriate role of race, ethnicity, and culture in placement decisions soon became legal issues. These have been played out in the legal arenas of the courts, Congress, and state legislatures.

The Indian Child Welfare Act (ICWA). The first group of children to come to public attention in terms of the importance of cultural heritage was Native American children. In 1978, Congress passed the Indian Child Welfare Act (ICWA) in response to concerns about the large number of Native American children who were being removed from their families and their tribes and the failure of states to recognize the tribal relations and the cultural and social standards of Native American people (Dorsay, 1993; Mason & Williams, 1985). The Act was part of a series of laws designed to promote Native American self-determination (Jones, 1995), and Congress passed it not only to protect the best interest of Indian children, but also to promote the stability and security of Indian tribes and families.

ICWA applies to children who are members or are eligible to be members of an Indian tribe recognized by the Secretary of the Interior ("Indian children"), and it governs all custody proceedings including adoptions. ICWA gives a great deal of power to the tribes. Tribal courts have exclusive jurisdiction over Indian children who reside or are domiciled on the tribe's reservation and the right to exercise jurisdiction over other Indian children. Even when a state court has jurisdiction over a case, the tribe has a right to participate in the proceedings.

ICWA created a strict standard for removing Indian children from their families and stringent procedures for voluntary relinquishment of an Indian child. It also set forth specific placement preferences for Indian children which require placement first with an extended family member, second with another member of the child's tribe, third with another Indian family, and only then with a non-Native American family.

The courts have had numerous occasions to rule on ICWA issues. Some of these decisions were necessary because of ambiguities in the law, but others are attempts to resolve conflicts between ICWA's underlying principles and non-Native ideas about child welfare and family policy. For

example, while ICWA values tribal membership, child welfare policy often focuses on the nuclear family and the importance of a child's psychological bond to one adult or psychological parent (Jones, 1995). Where non-Native culture emphasizes family autonomy and privacy, ICWA recognizes the rights of the tribe as being at least as important as those of the parent (Dorsay, 1993).

A threshold issue under ICWA is whether certain children are covered by the Act at all. A recent California case addressed whether the Act applies to children with Indian lineage who are not part of an existing Indian family with significant ties to the tribe (In re Bridget R., 1996). The California Court of Appeal determined that blood alone was not enough to trigger ICWA. While some view this result as a victory for children's rights, others view it as a further erosion of cultural heritage and the rights of Native American tribes.

The Multiethnic Placement Act and the Interethnic Adoption Provisions. Prior to 1994, with the exception of ICWA, federal statutes did not address the role of race, culture, and ethnicity in the placement of children (Mason & Williams, 1985). Courts relied on civil rights laws and the constitutional right to equal protection in deciding cases concerning transracial placements and same race placement policies. Same race placement policies were generally overturned when race was the sole factor in denial of a placement, but consideration of race was allowed as one of a number of factors that could be used in determining the best interest of the child (Bussiere, 1996).

In 1994, Congress passed the Multiethnic Placement Act (MEPA) out of a concern that same race placement policies had gone too far. By that time, several states had passed statutes that created a preference for same race placement, and some mandated a period of time during which a same race placement had to be sought before a transracial placement could be made (Boskey, 1996). These laws, agency policies that preferred same race placements, and the growing number of African American children in foster care led to concerns that adoption of minority children was being delayed because of racial preferences (Bartholet, 1991). This view assumed that minority families were not available for all of the children needing adoptive homes and that white adoptive homes could be found. Others argued that race is an important factor to consider in placing children and that there was no conclusive evidence that same race placement policies were delaying adoption. They pointed to policies and practices that had systematically excluded minority families from adoption services and argued that appropriate recruitment and preparation of families from all communities would increase the number of placements for children, thus alleviating the need to promote transracial adoptions (Fenton, 1993).

Fashioning a compromise, Congress attempted to address the concerns of all sides. MEPA and the 1996 Interethnic Adoption Provisions prohibit agencies receiving federal funds from denying or delaying a placement based on race and from denying a prospective adoptive parent the opportunity to adopt based on race, but the law requires states to make diligent efforts to recruit adoptive parents who reflect the ethnic and racial diversity of children needing placement. In 1995 the United States Department of Health and Human Services issued guidance to agencies to assist them in implementing MEPA (United States Department of Health and Human Services, 1995). However HHS has not yet determined whether additional guidance is needed to implement the 1996 Interethnic Adoption Provisions. To date, none of these provisions has been interpreted by the courts, and the controversies surrounding race and adoption are likely to continue.

Gay and Lesbian Adoptive Parents

Although restrictions on who can adopt have largely been lifted, one area remains controversial - that of adoption by gay or lesbian parents. A few states have passed laws that prohibit adoption by homosexuals (Haralambie, 1996). Social science data, however, now demonstrate that sexual orientation has little to do with the quality of parenting, and an increasing number of courts are permitting gay and lesbian parents to adopt (Boskey, 1996).

A greater barrier to such adoptions are state laws requiring couples to be married in order to adopt a child together. Because gay and lesbian marriage is not legally recognized, states that prohibit one or more unmarried persons from adopting a child automatically prohibit adoption by gay and lesbian couples. Some courts have interpreted their state laws to permit unmarried partners to adopt, but that analysis is not universal (Id.).

CONCLUSION

Over the years the law governing the adoption of children has changed, reflecting shifting attitudes toward children and families, reforms in child welfare practice, developments in child psychology, and the supply of and demand for "adoptable" children. Recent debates about the Uniform Adoption Act suggest that a struggle for control of the adoption process may also be a factor (Child Protection Report, 1994; Hollinger, 1996b).

At times the law has imposed requirements and standards that seem confusing, conflicting, or outmoded to child welfare professionals and individuals involved in adoption. On the other hand, established child welfare practices, such as screening of adoptive families and selection of families based on the characteristics or needs of the child, have been criticized by legal professionals who say they are discriminatory or that they create unnecessary barriers to adoption.

These tensions are due in part to the interdisciplinary nature of adoption, which requires the cooperation of legal and child welfare professionals. Clearly the relationship between the law and child welfare practice has not always been smooth. In some circumstances legal reforms have necessarily lagged behind developments in child welfare and social science. For example, legislatures and courts are still sorting out whether and to what extent open adoption agreements should be enforceable (Appell, 1995). In other areas the law has forged ahead and required child welfare professionals to change their practices. Examples include Supreme Court rulings that required child welfare agencies to recognize the rights of birth fathers and the Multiethnic Placement Act's prohibition on categorical racial matching preferences.

In 1972 Presser noted that

> One of the lessons to be learned from the history of the law of adoption in America is that a legal reform prompted by lofty social and religious ideals can be accompanied by frustrating machinations in the courts. (p. 516).

He attributed the frustration in part to the discomfort that some judges have about the sentiments of reformers and in part to the courts' adherence to traditional legal principles.

On the other hand, when the law moves quickly, child welfare professionals sometimes protest. For example, the Child Welfare League of America and National Association of Social Workers have strongly attacked the Uniform Adoption Act, and many child welfare professionals have expressed serious reservations about provisions of the Multiethnic Placement Act.

While some of the debate can be attributed to resistance to change or to the different perspectives of lawyers and child welfare professionals, much of the discussion reveals honest differences of opinion about what is in the best interest of children. It is commonplace now to assert that children are not merely chattel and that their best interest should be foremost, but that is only the beginning of the inquiry.

How do we determine the best interest of the child when an adoption goes awry? Is it more important to preserve the relationship with the prospective adoptive family or with the child's birth family? What role should blood relationships play in setting placement preferences? How important is race? Does its importance change with a child's age? Does open adoption serve children? Does it discourage prospective adoptive parents? Does screening of adoptive families protect children or impede adoption?

Some of these are questions we can answer with research. For example, with carefully designed studies we can measure whether open adoption policies create a barrier to adoption or whether same race placement policies delay or deny adoptions. Other issues require thorough and sensitive discussion. For example, the importance of blood relationships and the role that race and culture should play in making placement decisions require much more attention and honest sharing of experience and opinion.

Adoption Quarterly is one vehicle for beginning that work. Our task is not merely to ensure that the law reflects the best thinking of those concerned with the welfare of children but to engage in frank interdisciplinary discussions about what we mean by the best interest of the child and what we know and do not know about how to further that interest.

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