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Forming Families by Law

Adoption in America Today

By Joan Heifetz
Hollinger and
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Adoptive families are created through the law, not by biology or blood. Although there is a long history in this country of some children being raised by adults other than their biological parents, legal recognition of these families was not generally available until states began enacting formal adoption laws in the mid-nineteenth century. Today, an adoption decree is only available from state courts—and in some instances Indian tribal courts—once they find that the necessary legal prerequisites have been satisfied and that the proposed adoption is in the best interests of the child. The decree confers the legal status of parent and child on people who are not each other's biogenetic parent or child. Except for adoptions by the spouses or non-marital partners of birth parents with whom they intend to coparent, the other major consequence of an adoption decree is that it severs the legal and economic relationship of the child to both biogenetic parents and provides that the child becomes "for all purposes" the child of the adoptive parents. The adoptive family replaces and becomes the permanent legal equivalent of the child's birth family, subject to the same rights, responsibilities, and constitutional protections as other legally recognized families. Once the state court decree is final, it is entitled under the U.S. Constitution's Full Faith and Credit Clause to be recognized as valid by every other state.

By legitimizing a parent-child relationship between biogenetic strangers, adoption strikes some skeptics as an imperfect legal fiction that defies common understandings of family as defined by blood and genes. From



Martin Gill of Miami, Florida, has taken care of his foster children, John and James, since 2004. His adoption case, which is now before an appellate court, presents a significant challenge to Florida's law against gays.

this perspective, adoption is less a story of the personal and societal benefits that follow from the creation of new families than of loss: the "natural" parents' loss of the opportunity to raise biological offspring, the adoptive parents' loss of the opportunity to have "natural" children, the child's loss of biogenetic kin, and the state's loss of its commitment to preserve "natural" families when it relieves itself of the burdens of caring for dependent children by shifting responsibility for their well-being to adoptive parents.

In fact, a substantial body of research testifies to the success of adoption. On a variety of outcome measures, adopted children do as well as children living with their biogenetic parents and significantly better than children whose parents are indifferent or abusive, or children who spend years in foster care, group homes, or other institutional settings. These outcomes are especially positive for children placed as infants but are also evident for older children and for those who are adopted into families with different racial, ethnic, or religious backgrounds. Although

adopted children with a legacy of pre- or postnatal maltreatment often have developmental delays or psychological difficulties, longitudinal research has found that by early adulthood these conditions are largely overcome.

Adoption Law and Practice

A complex, confusing, and conflicting system of laws and policies facilitates, but also significantly impedes, the formation of adoptive families. Since the 1950s, the basic consequences of adoption have become fairly standardized: the child is treated in all legal and economic respects as the child of the adoptive parents. By contrast, the laws pertaining to most other aspects of adoption are anything but uniform. Moreover, while still primarily the product of state laws, adoptive relationships, like other parent-child relationships, are increasingly affected by a multitude of federal laws and regulations, as well as by constitutional doctrines and international treaties.

The necessary prerequisites for a valid adoption are (1) parental consent or a constitutionally sound

reason for dispensing with parental consent but requiring, instead, the acquiescence of the child's public or private custodian; (2) the consent of the child, if of sufficient age or maturity; (3) a determination that the prospective parents are eligible and suitable to adopt; (4) proof that any payments for adoption-related expenses were not intended to induce a birth parent's consent or relinquishment; and (5) a judicial finding that the adoption is in the child's best interests.

The criteria for satisfying these prerequisites differ substantially from one state to another. For example, parental consent, or proof that a parent has forfeited the right to block an adoption, has always been a necessary prerequisite to judicial consideration of an adoption petition. State common law and federal constitutional doctrines honoring family privacy and parental autonomy have incorporated cultural traditions and theories of natural law and delegated duties that endow biogenetic parents with superior rights to the possession and control of their offspring. Central to these doctrines is the presumption that biogenetic parents are fit to raise their children without interference by the state, which has no authority to separate children from their parents simply in order to seek a "better" placement.

Procedures governing the timing, content, formality, and revocability of consents vary greatly. State laws that define "unfitness" as a ground for an involuntary termination of parental rights also vary, as do the laws that determine the rights of unwed fathers to participate in an adoption proceeding. The U.S. Supreme Court has ruled that the mere existence of a biogenetic link to a child is not by itself sufficient to merit constitutional protection. Only unwed fathers who promptly grasp the unique "opportunity interest" arising from this connection and establish a genuine parental relationship have a right to consent to, or veto, a proposed adoption. Men who fail to take certain formal steps to

establish their parentage, for example, by signing a state registry, may even be denied a right to be notified of an adoption. Yet states differ on whether to require birth mothers to disclose the identity or whereabouts of alleged fathers or to protect men who are actually caring for and supporting their child but not those who are unable to assume a parental role because their efforts to do so were thwarted by the birth mother.

By contrast to the protections accorded biogenetic parents, persons who wish to parent through adoption find their personal values and most intimate behaviors subject to intense scrutiny and bureaucratic regulation. A powerful cast of social workers and counselors evaluate the "suitability" of prospective parents. Child welfare experts, lawmakers, and public policy groups, including the American Bar Association, have long since eschewed policies that categorically excluded some prospective adopters, for example, on the basis of marital status, age, income, race, ethnicity, physical disabilities, gender, or sexual orientation. A more inclusive approach is now favored based on individualized assessments of each applicant's parenting capacity. Nonetheless, the lack of reliable tests of parental suitability, along with evidence of "matching" policies that remain implicitly and, in some states, explicitly discriminatory, contribute to the resentment many adoptive parents feel about intrusive and costly home studies. Instead of having to prove their fitness to parent on the basis of criteria that arguably have little to do with their actual capacity to be loving and competent parents, adoptive parents want more preadoption preparation and postadoption assistance to alleviate the unanticipated, or insufficiently disclosed, needs of the children they adopt. These concerns are especially acute in the international context, where many prospective parents may be discouraged from pursuing adoption by the onerous suitability criteria in the federal

regulations implementing the Hague Convention on Intercountry Adoption or by narrow interpretations of who qualifies as an adoptable child under federal immigration law.

Modern Adoptive Families

The faces within adoptive families have changed dramatically while the total number of adoptions has declined from an estimated high of 170,000 to 200,000 per year during the 1960s to an estimated 130,000 to 140,000 per year in the past decade.

A substantial number of these adoptions are by stepparents, grandparents, or other relatives who are already caring for children whose lives were disrupted by their parents' divorce, separation, or remarriage, or who have been removed from their parents involuntarily by state child protection agencies. No more than 15 to 20 percent of contemporary adoptions conform to the traditional model of a healthy white infant placed voluntarily by an unwed mother with an infertile married white couple. As reliable contraceptives and abortion have become more accessible, and as the social stigma of out-of-wedlock birth has dissipated, fewer and fewer of the skyrocketing number of unwed mothers are placing their newborns up for adoption. Since the 1970s, the percentage of white unwed mothers who place infants for adoption has plummeted from 3 or 4 percent to 1 percent. The percentage of African American and Hispanic unwed mothers who place infants has consistently been less than 1 percent.

Interest in adoption has not abated. Estimates are that more than 250,000 people consider adoption each year. While the number of these people using assisted reproduction has increased dramatically, many continue to pursue adoption, but, unlike a generation ago, fewer are determined to reinscribe the "natural" families they cannot have by adopting an infant matching their own appearance. Increasingly, infertile couples and individuals, as well as adults who can or already have biological

children, are adopting across racial, ethnic, and national boundaries. Many are not averse to adopting older children or children with disabilities.

The driving force is the stepped-up efforts by state agencies to secure permanent families for the hundreds of thousands of children whose birth parents' rights are terminated because of neglect or abuse and who cannot be raised by other family members. On average, these children have been adrift in foster care for three years or more. African American children, who are disproportionately represented at all stages in this system, wait far longer. Largely because of recent federal legislation and funding initiatives, approximately 50,000 children are now being adopted from foster care every year, a number that has more than doubled since the 1980s, but is still far less than half of the nearly 130,000 foster children and youth waiting to be adopted.

Federal laws and policies have spurred the increase in adoptions of children from state agencies. The Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115, identifies adoption as the most appropriate option for children who cannot be reunified with their birth families, sets strict time limits for states to approve and implement permanency plans, provides financial incentives to states that increase the number of adoptions from foster care, and encourages states to provide continuity for children by allowing their foster parents to adopt them once their biological parents' rights are terminated. In most states, a third or more of the children placed from foster care are being adopted by the individuals or couples who had served as their foster parents. The Multiethnic Placement Act (MEPA), Pub. L. No. 103-382, 108 Stat. 4056, prohibits federally funded state agencies from denying or delaying adoptive placements on the basis of race, color, or national origin but also mandates diligent recruitment of foster and adoptive parents who reflect the racial and ethnic diversity

of the children. The consequences of MEPA remain unclear. Recruitment efforts are underfunded and there is evidence of a pervasive resistance to MEPA among caseworkers who continue circumventing MEPA's core prohibitions on race-based placement decisions. Other federal laws require equal treatment of adoptive and biological children in family leave and employee benefit programs, allow income tax credits or reimbursements for adoption-related expenses, and provide subsidies and health care for adopted children with special needs.

Among the most striking developments in recent years is the growth of families headed by a single lesbian or gay adoptive parent, by a lesbian or gay adoptive couple, or by a lesbian or gay couple consisting of one biological parent and one adoptive parent. Based on data from the U.S. Census and the National Survey of Family Growth, the Williams Institute estimates that at least 270,000 children are living in households headed by same-sex couples and, as of 2005, approximately 65,500 adopted children were being raised by lesbian or gay parents.

Although a few states prohibit lesbians or gay men, or all unmarried couples, from adopting children, most states allow lesbians and gay men to adopt foster children. Some states even encourage it. Only Florida has a statutory ban on public or private adoptions by "practicing homosexuals" which, regrettably, the Eleventh Circuit Court of Appeals sustained against a federal constitutional challenge in *Lofton v. Secretary of Department of Children and Families*, 358 F.3d 804 (11th Cir. 2004). This categorical ban is now being challenged in Florida state courts as contrary to national child welfare standards because it irrationally denies many foster children the benefits of a permanent adoptive placement.

For the tens of thousands of lesbians and gays who have children through assisted reproduction and who want to establish joint legal

parentage of their children with their same-sex partners, adoption is the most appropriate option for the non-biogenetic parent. In these families, adoption is not a response to infertility but a way to ensure legal protection of an existing parent-child relationship not available through private contract or marriage. In the twenty or more states that allow second parent adoption, a lesbian or gay man is able to adopt a same-sex partner's child without requiring that parent to relinquish parental rights. As a result, the child has two legal parents. Courts that grant second parent adoptions do so based on statutory interpretations that emphasize the importance of either "strict" or "liberal" constructions of adoption statutes in order to promote the best interests of children.

Intercountry adoptions are the most prominent example of families being formed across ethnic and racial lines. Annual adoptions of children from other countries by U.S. citizens tripled between the 1980s and 2004, to nearly 23,000 per year. Most of these children come from China, Russia, and Guatemala. Now that the United States and more than seventy other countries are parties to the Hague Convention on Intercountry Adoption, such adoptions by U.S. citizens were expected to increase at an even faster pace. Instead, the future of intercountry adoption is in doubt. Since 2005, incoming adoptions from Hague and non-Hague countries have declined precipitously, by nearly 25 percent, to fewer than 17,500 in 2008. There are many reasons for this decline, including (1) the U.S. State Department's suspension of adoptions from Guatemala and Vietnam because of alleged baby trafficking and unethical practices, (2) Russia's and South Korea's sudden commitment to in-country adoption, (3) China's imposition of strict eligibility requirements for adoptive parents and its decision to limit placements of healthy young children while favoring intercountry adoption of older special needs children, and (4) prospective parents' growing concerns about

the prognosis for children who have endured prolonged neglect or institutional care. These developments are illustrative of the persistent tensions in intercountry adoption policy. These include protecting birth parents and children against abusive and exploitative practices, sustaining children's cultural connections to their countries of origin, and creating viable child welfare and adoption programs in impoverished or war-torn countries.

Openness in Adoption

For much of the twentieth century, the assertion that families formed through adoption are in all respects the equivalent of families formed through procreation was based on the expectation that the psychological and emotional qualities of "normal natural" families would be replicated in adoptive families. The goal was to look and feel as close as possible to the biogenetically related children they cannot have. State laws that seal adoption records, substitute the names of adoptive parents for birth parents on birth certificates, and permit anonymity and strict separation between birth and adoptive families all reflect the equivalence model.

Since the 1970s this model has been subject to mounting criticism for trivializing the psychosocial and biogenetic differences between birth and adoptive families. Claims of equivalence are further undermined by the burgeoning numbers of adopted children and adoptive parents who do not resemble each other. Adoptive families continue to seek legal equivalence but are more likely to seek social and cultural acceptance by proclaiming their distinctive characteristics.

A key element of the acknowledgment-of-difference mantra is the attack on secrecy in adoption. This has spurred the successful efforts by adopted persons in some states to obtain their original birth certificates as well as efforts by adoptive parents and adoptees to learn more about their original families. Every state now mandates the release of "reasonably available" medical and nonidentifying

information to adoptive parents, preferably before they accept an adoptive placement, and to adopted persons when they reach adulthood. In addition, since the 1970s, states have established a variety of procedures for the consensual disclosure of identifying information between adoptees and their birth families. These procedures are cumbersome and underutilized and

Most adoptive parents now prefer, and even demand, greater openness.

fall short of the more direct contact desired by many adult adoptees and birth parents and that is often more readily obtainable through various private and Internet-based search services. About a dozen states now allow adoptees access to their original birth certificates when they are eighteen or older, but efforts to ensure access to adoption records or birth certificates appear to have stalled in other states. The fear of "open records" may stem from broader societal concerns about the privacy of personal information. By contrast, access to one's own birth certificate touches on a core element of an adopted person's identity and, as such, may eventually elicit more widespread support from state legislatures.

The trend toward more open adoptions is complicated by a shift in power from adoptive to birth parents in the context of domestic private adoptions. As the competition among would-be adoptive parents has intensified in response to the sharp decline in adoptable infants, a more distinctive "seller's market" has emerged. Birth parents are not only choosing the persons who will parent their children but are often asking to remain a part of the new adoptive family's life. Those who harbor doubts about meeting or having contact with birth parents are less likely to be able to adopt.

Although most adoptive parents

now prefer, and even demand, greater openness when it means access to the medical and psychosocial histories of the children they adopt, many are uneasy about continued contact with birth parents if it goes beyond annual exchanges of photographs or letters and encompasses visitation. As more countries encourage birth parents to provide some background information when they "abandon" a child, and as more adoptive parents come to understand that their children may someday want to establish ties to their countries of origin, openness may become a prominent aspect of intercountry as well as domestic adoptions. If so, U.S. immigration laws that discourage and penalize contact between prospective adoptive parents and birth families in other countries will be even more anachronistic than they now are.

As the legal edifice that once so completely separated birth and adoptive families crumbles, and as the diverse faces within adoptive families belie the goals of the traditional equivalence model, reliable guideposts are needed to assist birth and adoptive parents who are uncertain whether anonymity or ongoing contact is preferable for them and their children. In lieu of the multilayered, highly articulated, and prescriptive system of laws and child welfare practices that now regulate adoptive families, the well-being of adopted children and their families might be better served by less formal practices to be crafted over time by adoptive and birth families, who may learn to rely more on each other, and on their own negotiated arrangements, than on the purported wisdom of lawmakers and child welfare experts whose earlier dominion over the meaning of adoption is now being challenged.

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