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## Intercountry Adoption from a Louisiana Perspective

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## COMMENTS

### Intercountry Adoption from a Louisiana Perspective

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Intercountry adoption (ICA) refers to “the adoption of a [minor] child born in one nation by adults who are citizens of another nation, who will ordinarily raise the child in their own country.”<sup>1</sup> This comment

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1. Elizabeth Bartholet, *International Adoption: Overview, in Adoption Law and Practice*, 10-1, 10-6 (J. Hollinger ed., 1988).

provides information and advice for Louisiana attorneys who want to help their clients accomplish such an adoption. After providing an overview of the background and current attitudes toward ICA, the comment examines foreign, international, federal, and state laws relevant to the process. The appendix provides a tabular summary of the steps under federal immigration and Louisiana adoption laws for adopting a child from another country. The comment closes with some specific suggestions for changes at the federal and state levels to facilitate ICAs. Because most ICAs are between parents and children not related by blood,<sup>2</sup> this discussion will not include ICAs between blood-related family members, which involve different issues and rules at both state and federal levels.

### I. BACKGROUND

ICAs have been controversial since their inception, primarily because the children have usually been from the poorer countries ("sending states"), such as Korea and Vietnam, and the prospective parents in the more developed, richer ones ("receiving states"), such as the United States.<sup>3</sup> In fact, for some developing countries ICA has a negative image: "what the West has generally viewed as charitable, humane—even noble—behavior, developing countries have come to define as imperialistic, self-serving, and a return to a form of colonialism in which whites exploit and steal natural resources."<sup>4</sup> Some writers in the receiving states have also reacted negatively; a British Interdepartmental Review of ICA characterized it as "originally a humanitarian movement in response to the needs of young victims of war" that "has more recently tended to develop as a service for childless couples."<sup>5</sup>

These negative reactions have prompted policies and regulations restricting ICAs in sending states and receiving states, including the United States.<sup>6</sup> Although commentators agree that internal adoption is generally best, because it allows children to live within their native culture, this option is not always available.<sup>7</sup> Unfortunately, the homeless

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2. Howard Altstein & Rita J. Simon, *Introduction*, to *Intercountry Adoption: A Multinational Perspective* 1, 5 (Howard Altstein & Rita J. Simon eds., 1991).

3. Bartholet, *supra* note 1, at 10-4.

4. Altstein & Simon, *supra* note 2, at 2.

5. Jennifer Horne-Roberts, *Intercountry Adoption*, 142 *New L.J.* 286, 286 (1992).

6. Bartholet, *supra* note 1, at 10-34.

7. Ahilemah Jonet, *International Baby Selling for Adoption, and the U.N. Convention on the Rights of the Child*, 7 *N.Y.L. Sch. J. Hum. Rts.* 82, 93 (1989); Howard E. Bogard, Comment, *Who Are the Orphans?: Defining Orphan Status and the Need for an International Convention on Intercountry Adoption*, 5 *Emory Int'l L. Rev.* 571, 573 (1991).

children in most sending states far outnumber the available native adoptive parents, a situation that will probably continue into the foreseeable future.<sup>8</sup> Thus, the need for ICA is real and significant. Crisis conditions in sending states like Romania have highlighted the problem: in 1989 as many as one-half of the children in at least six of the Romanian orphanages (some of which lacked heat, hot water, and sewage facilities) did not survive the winter.<sup>9</sup> Although extensive media coverage led to improvement of the orphanage system in that country, such conditions are common in third world states that lack the resources to care for sudden increases in the number of orphans that accompany national disasters.<sup>10</sup>

Need, then, is the most compelling reason to facilitate ICA, which primarily involves children "overwhelmingly . . . from the low end of the social and economic spectrum," and disproportionately from the racial or ethnic minorities of their birth countries (e.g., dark-skinned children from India, part black children from Brazil, and part Indian children from some Latin American countries).<sup>11</sup> In fact, ICA "can and often does mean the eager adoption by Americans of children abroad whose caste and class, age and physical or emotional condition would label them 'special needs' kids at home and would severely limit their chances of finding permanent homes."<sup>12</sup>

Of course, ICA has also given children to parents who have been frustrated by the long waits required by their home adoption systems.<sup>13</sup> Such frustration has become more common as adoption, while becoming "increasingly accepted as a means of family formation," has declined in "response to both increased availability of abortion services and the increased acceptability of unwed parenthood."<sup>14</sup>

A risk, which has received some notoriety, is the development of a market for stolen children. Indeed, some writers believe that the "internationalization of selling babies from one country to parents of another has reached epidemic proportions."<sup>15</sup> Weak adoption laws and

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8. Bogard, *supra* note 7, at 573; Bartholet, *supra* note 1, at 10-36.

9. Bogard, *supra* note 7, at 571 n.4.

10. *Id.* at 572 n.8.

11. Bartholet, *supra* note 1, at 10-8, 10-16.

12. Fred Powledge, *The New Adoption Maze and How to Get Through It* 161 (1985).

This book is an excellent source of information for prospective adoptive parents because it is written to be easily understood by a reader with no legal background. The chapter on intercountry adoption includes helpful information and advice from parents who have been through the process. The chapter also names and describes specific organizations that can be helpful with ICA.

13. *Id.* at 161.

14. Arnold R. Silverman, *Nonrelative Adoption in the United States: A Brief Survey, in Adoption in Worldwide Perspective* 1, 5 (R.A.C. Hoksbergen ed., 1986).

15. Jonet, *supra* note 7, at 82. See also Jane T. Ellis, Note, *The Law and Procedure of International Adoption: An Overview*, 7 *Suffolk Transnat'l L.J.* 361 (1983).

procedures in developing countries have been cited as exacerbating the problem,<sup>16</sup> and the immigration and state laws discussed later in this paper reflect efforts to guard against this problem.<sup>17</sup> But in reality, the chance that a given child was stolen for an adoption is probably quite remote.<sup>18</sup> ICA involves "overwhelmingly the children of poverty, whose biological parents surrender or abandon them because the parents cannot afford to keep and raise them."<sup>19</sup>

In spite of obstacles of political controversy and restrictive policies and laws, the fact remains that many children are available for and are in extreme need of ICA. Moreover, ICAs have generally been successful.<sup>20</sup> In response, the number of ICAs has increased dramatically over the last decade. Between 1977 and 1987, Americans adopted 77,908 children from other countries.<sup>21</sup> ICAs are currently estimated to account for over ten percent of all nonrelative adoptions in the United States, and a larger percentage of infant adoptions.<sup>22</sup> These numbers may decline in reaction to "nationalistic resentment against the practice" in some countries.<sup>23</sup> Unfortunately, however, that rhetoric does not do away with the need for ICAs; to date the number of these adoptions has not approached potential or actual demand.<sup>24</sup>

#### A. Barriers to ICA

An attorney approached by a client wishing to seek an ICA should warn the client at the outset of the formidable barriers, which include cost; a maze of foreign, U.S. immigration, and state procedural requirements; often scanty or inaccurate information on the particular child; and the possible necessity of extended travel abroad. Indeed,

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16. Jonet, *supra* note 7, at 90.

17. Louisiana has a statute specifically outlawing the sale of minor children, though the penalty is set at not more than \$1000 or imprisonment for not more than six months, or both. La. R.S. 14:286 (Supp. 1992). Louisiana Children's Code articles 1200-1201 also require that the adoptive parents disclose expenses of the adoption (for either agency or private adoptions) as part of the adoption procedure in Louisiana. A New York case, *In re Juan P.H.C.*, 496 N.Y.S.2d 630 (Surr. Ct. 1985), and a New Jersey case, *In re Adoption by N.P. and F.P.*, 398 A.2d 937 (N.J. 1979), discuss the problem of applying criminal sanctions to the adoption process.

18. Bartholet, *supra* note 1, at 10-17.

19. *Id.*

20. *Id.* at 10-1.

21. Altstein & Simon, *supra* note 2, at 4.

22. Bartholet, *supra* note 1, at 10-7.

23. Altstein & Simon, *supra* note 2, at 4. Ecuador, Brazil, and the Philippines have halted or restricted ICAs. *Id.* at 4.

24. Bartholet, *supra* note 1, at 10-1.

ICA can be a long, complicated, and frustrating experience for prospective parents, taking from a few months to a year or longer.<sup>25</sup>

Costs are estimated at \$5,000 to \$12,000, and have been reported to be as high as \$15,000 to \$20,000 in particular areas.<sup>26</sup> But in general, the costs of most ICAs, while substantial, are comparable to those for domestic adoptions.<sup>27</sup> ICA costs include the fee for the home study (an immigration requirement), domestic agency fees, fees to foreign agencies or intermediaries, and travel expenses for countries that require the adoptive parents to go there for the adoption procedure.<sup>28</sup>

ICAs do, of course, have other problems not generally associated with domestic adoption. Because of conditions in the sending states, the children often arrive with a variety of combinations of usually minor health problems, including eye and ear infections, malnutrition, lice, skin disorders, and intestinal parasites.<sup>29</sup> Also, the client should not expect to receive a newborn infant; as a result of the procedures involved, the child will be at least a few months old at arrival.<sup>30</sup> And, depending on the domestic and foreign agencies involved, the clients may have to commit themselves to the adoption on the basis of only a brief description of the child that may be inaccurate regarding, for example, age and health problems.<sup>31</sup> Once the child arrives, the adjustment period may be more challenging than with a child from the same culture because the child adopted through ICA will probably be unlearning his or her native culture while at the same time learning American ways.<sup>32</sup> Parents who have adopted through ICAs comment on the aggressiveness of these children (even babies), which can make them somewhat difficult to raise since they may not be "very sym-

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25. Dean E. Hale, *Adopting Children from Foreign Countries: A Viable Alternative for Clients Who Are Stymied by the American Scene*, 4 Family Advocate 30, 31 (1981).

26. Bartholet, *supra* note 1, at 10-10; Pamela R. Zeller, Note, *Latin American Adoptions in Connecticut—Is There Any Room for Lawyers?*, 10 U. Bridgeport L. Rev. 115 (1989) (costs of adopting a Latin American child in Connecticut are estimated at \$9,000-\$12,000); and Altstein & Simon, *supra* note 2, at 2-3 (costs for ICAs from Lebanon in response to the civil war there were \$15,000-\$20,000 in 1989). Silverman, *supra* note 14, at 7, reports that an informal survey of lawyers handling independent adoptions in the New York Metropolitan area reveals that a domestic adoption of a white infant costs \$6,000 to \$7,000, whereas an adoption from Asia or Latin America would cost \$3,000 to \$8,000 (note that Silverman's figures predate those of the other sources cited).

27. Bartholet, *supra* note 1, at 10-10; Silverman, *supra* note 14, at 7.

28. Bartholet, *supra* note 1, at 10-10.

29. *Id.* at 10-15.

30. *Id.*

31. *Id.* at 10-17. The client should be advised that those who travel to the sending state to adopt usually have better access to information about the child. *Id.* at 10-17, 10-18.

32. Powledge, *supra* note 12, at 189.

pathetic with the idea of being told what to do."<sup>33</sup> These children often have in common a background as survivors, and the adoptive parents frequently comment on their visible survivalist instincts.<sup>34</sup>

Related to the cultural adjustment is the fact that ICAs are generally transracial adoptions. Although the National Association of Black Social Workers has issued a statement condemning the adoption of black children by white parents as a "particular form of genocide," studies have suggested that transracial adoption is often as beneficial to the child as adoption by parents of the same race, and more beneficial than continued foster care.<sup>35</sup> These realities lead to the conclusion that opposition to transracial adoption sacrifices the welfare of individual children "for political expediency and for a particular group's vision of what is best."<sup>36</sup> In the ICA context, studies examining the adjustment of Korean children adopted by American families agree that the children generally adjusted well to their adoptive homes.<sup>37</sup> To the charge that the child's sense of identity may be impaired, adoptive parents commonly respond that "ethnic identity is microscopic when compared with no identity at all, which is the fate that may have been in store for their children if they had not been adopted."<sup>38</sup> Perhaps most telling is the following quotation from a paper written by a child of ICA for a college class: "It is difficult to predict whether this conflict of identification with the 'wrong' race will ever be resolved, but this minor problem that results from transracial adoptions is far outweighed by the social, emotional, and psychological advantages that I never would have had if I had not been adopted."<sup>39</sup>

### *B. Scope of International, Foreign, Federal, and State Law Involved*

The legal procedures of ICA are complex because the adoption is subject to three jurisdictions—those of the sending state, the United

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33. *Id.* at 187.

34. *Id.* at 188.

35. Homer H. Clark, Jr., *Children and the Constitution*, 1992 U. Ill. L. Rev. 1, 25-26, 28. The NABSW issued this statement in 1972 and affirmed it in 1985. Although most research has positively evaluated transracial adoption, this stance "helped to generate a reconsideration of transracial placements," and "the adoption of black children by white families has been dramatically reduced in the last decade." Silverman, *supra* note 14, at 8.

36. Christopher L. Blakesley, *On Adoption, in II Louisiana Family Law*, Ch. 8, at 8-57 (1993). See also Elizabeth Bartholet, *Where Do Black Children Belong? The Politics of Race Matching in Adoption*, 139 U. Pa. L. Rev. 1163, 1164-65 (1991); Margaret Howard, *Transracial Adoption: Analysis of the 'Best Interests Standard'*, 59 Notre Dame L. Rev. 503, 517 (1984); Rita J. Simon & Howard Alstein, *Transracial Adoptees and Their Families: A Study of Identity and Commitment* 143 (1987).

37. Silverman, *supra* note 14, at 4.

38. Powledge, *supra* note 12, at 188.

39. *Id.* at 190.

States government, and the planned state of residence. Each of these jurisdictions has its own set of regulations, and each reviews the child's status for adoption and the fitness of the parents according to different standards.<sup>40</sup> Using an established agency specializing in ICA is recommended because determining the law of the sending state can be quite difficult, particularly since it may be subject to changes, including the abolition of ICAs.<sup>41</sup> Such an agency can provide most of the services needed in the United States and abroad for the child's immigration and can generally save parents considerable time and expense.<sup>42</sup> Independent adoptions, although often successful, are subject to problems that can be avoided through agency adoptions.<sup>43</sup> For example, using an authorized agency is the best way to avoid unwitting entanglement in the black market for babies.<sup>44</sup> In addition, some sending states prefer that the adoption be handled by U.S.-based international adoption agencies.<sup>45</sup> Finally, if the adoption fails, such agencies are in the best position to locate another suitable home for the child quickly because these agencies maintain lists of adoptive parents as well as foster homes for interim placement.<sup>46</sup>

A primary problem in ICA is determining whether a child is eligible for adoption, which involves the definition of terms of art such as "orphan," "abandonment," and "consent." Conflicting criteria legislated by different states, and restrictive criteria of the U.S. Immigration and Naturalization Service of the Department of Justice, require special attention because these diverse jurisdictions have conflicting laws and policies.<sup>47</sup> Some countries, for example, may not allow single parents to adopt.<sup>48</sup> Requirements also vary regarding such factors as the age of the parents, infertility or family size, length of the parents' marriage, religion, and child care plans.<sup>49</sup> The Korean government, for instance, requires that parents be married to each other for at least

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40. Bartholet, *supra* note 1, at 10-12.

41. *Id.* at 10-12, 10-13, 10-5. A list of intercountry adoption agencies based in the United States and domestic agencies that handle ICAs is provided in Blanche L. Gelber, *International Adoption: Legal Requirements and Practical Considerations*, in *Adoption Law and Practice*, Appendix 11-A (J. Hollinger ed., 1988). No agencies are listed for Louisiana, but there are four listed in Texas, two in Georgia, and two in Florida.

42. Hale, *supra* note 25, at 32-33.

43. Silverman, *supra* note 14, at 6.

44. Jonet, *supra* note 7, at 106-07, writes that "it is crucial that only authorized agencies make the placement of babies" for ICA, and that independent adoptions should be eliminated to "curb the black market of babies."

45. Hale, *supra* note 25, at 31.

46. Ellen F. Epstein, *International Adoption: The Need for a Guardianship Provision*, 1 B.U. Int'l L.J. 225, 244 (1982).

47. Bartholet, *supra* note 1, at 10-28; Hale, *supra* note 25, at 32.

48. Powledge, *supra* note 12, at 162.

49. Hale, *supra* note 25, at 32.

five years, that parents be between 25 and 45 years of age, that at least one parent be a U.S. citizen, and that there be less than 40 years difference between the age of the child and that of the younger parent.<sup>50</sup> Differences also exist between sending states in the availability of infants under 18 months old.<sup>51</sup> To narrow the focus, clients should first decide on a particular country, or at most a few countries, from which they wish to adopt. The agency conducting the home study may require this as a prerequisite for the study or for putting the clients on a waiting list.<sup>52</sup>

Even within the United States, there are problems. State statutes govern the status of adoption created by the relationship between the parent and child, but the incidents of that status are governed by both state and federal law.<sup>53</sup> State law also determines whether a foreign adoption decree is recognized on the basis of whether the adoption was legal in the sending state, whether U.S. constitutional requirements were met, and whether the adoption is consistent with state law and public policy.<sup>54</sup>

## II. INTERNATIONAL LAW

Treaties currently in effect will have no appreciable effect on the process of ICA for adoptive parents in the United States. This section, therefore, will describe only briefly the main treaties in existence. Although uniform and binding international standards and requirements for ICA are highly desirable, the adoption requirements of different states will probably never be completely uniform because of differences in cultural, ethical, and political values.<sup>55</sup> Two primary international conventions on ICA, the European Convention on the Adoption of Children (effective 1968) and the Hague Convention on Jurisdiction, Applicable Law, and Recognition of Decrees Relating to Adoption (drafted 1964), have become outdated and lack specificity and clarity.<sup>56</sup>

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50. Powledge, *supra* note 12, at 166.

51. Bartholet, *supra* note 1, at 10-28.

52. *Id.*

53. Ellis, *supra* note 15, at 364, citing Restatement (Second) of Conflict of Laws § 263 (1969) [hereinafter Restatement]. Federal laws and regulations control the rights of nationality and citizenship, whereas states govern rights including the child's right to the parents' name, support from the parents, recovery in wrongful death actions, and succession rights. *Id.*

54. *Id.* at 366-67, citing Restatement, *supra* note 53, §§ 78, 136.

55. *Id.* at 368; Bogard, *supra* note 7, at 583.

56. Bogard, *supra* note 7, at 611. Signatories to the European Convention include Denmark, France, West Germany, Greece, Ireland, Italy, Luxembourg, Malta, Norway, Sweden, and the United Kingdom. *Id.* at 590 n.98. The Hague Convention has not received the ratification necessary to be in force, reflecting "skepticism surrounding a complete jurisdictional and legalistic unification of intercountry adoption policies." *Id.* at 592.

More recent instruments include the Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption, Nationally and Internationally, adopted by the U.N. General Assembly in 1986,<sup>57</sup> the 1989 U.N. Convention on the Rights of the Child,<sup>58</sup> and the Tentative Draft Convention on International Co-operation and Protection of Children in Respect of Intercountry Adoption, drafted by the Hague Conference on private international law.<sup>59</sup>

The 1986 U.N. Declaration recognizes the legitimacy of ICA and the best interest of the child as the primary concern, but it also reflects some of the ambivalence regarding ICA. The Declaration characterizes ICA as a last resort, to be used only for children who cannot be cared for in their own country in either adoptive or foster homes.<sup>60</sup> Its objectives are to promote national adoption, decrease intercountry adoption, and avoid placement of children through ICA without sufficient consideration of alternative arrangements that might be possible in their native countries.<sup>61</sup> The 1989 U.N. Convention, like the Declaration, gives preference to foster care within the child's birth country over ICA, which it also considers a last resort.<sup>62</sup> Although encouraging national adoption may well be in the best interest of the child, the same may not be said of giving priority to foster care over ICA. The "consensus regarding the superiority of national adoptions over intercountry adoptions" is paralleled by "a consensus regarding the superiority of inter-country adoption to foster care."<sup>63</sup>

The 1989 U.N. Convention is presently in force—92 nations have ratified it, and three more have acceded to it; the United States has not taken action on it.<sup>64</sup> The 1989 U.N. Convention is suppletive in nature; it allows the contracting states to substitute their own laws for

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57. U.N. General Assembly Resolution 41/85, 41 U.N. GAOR Supp. (No. 53), at 265, U.N. Doc. 41/85 (1986). The U.N. General Assembly Resolutions, of course, are not binding, unless they have created customary international law. See Mark W. Janis, *An Introduction to International Law*, 5-7, 43-45 (1988).

58. G.A. Res. 44/25, 1 U.N. GAOR Supp. (No. 49) at 166, U.N. Doc. A/44/49 (1989).

59. Sept. 1991, Prel. Doc. No. 61. This will be a binding agreement when signed and ratified.

60. Bartholet, *supra* note 1, at 10-40, citing Article 17 of the 1986 Declaration on Adoption.

61. Jonet, *supra* note 7, at 93.

62. Bogard, *supra* note 7, at 578 n.39, citing Article 21(b) at 169 of the 1989 U.N. Convention; Horne-Roberts, *supra* note 5, at 287.

63. Jonet, *supra* note 7, at 93.

64. Clark, *supra* note 35, at 36 and n.291. Among the nations that have ratified the 1989 Convention are Bulgaria, Czechoslovakia, Denmark, Finland, France, Italy, Norway, Poland, Portugal, Romania, Spain, Sweden, Yugoslavia, and the former Soviet Union. *Id.*

those of the Convention wherever the state considers its laws to be more in the best interests of the child.<sup>65</sup> This "results in variable definitional criteria,"<sup>66</sup> which common law lawyers may at first find somewhat disconcerting. But suppletive law is a common, perhaps universal mechanism in civilian legal systems. Suppletive laws materially aid lawmakers and individuals by providing a system of generally accepted rules and principles that may be applied where the parties do not expressly agree otherwise or where public policy has not prompted imperative legislation.<sup>67</sup> These authoritatively established guides have pragmatically confirmed their usefulness and validity as legislative provisions.<sup>68</sup> The mechanism of suppletive law may be particularly appropriate, considering that many of the Convention's articles "can only be viewed as aspirational objectives toward which the law should aim."<sup>69</sup>

The United States is represented on the draft committee of the Hague Draft Convention, which plans to meet in 1993 to finalize the terms of the Convention on International Co-operation and Protection of Children in Respect of Intercountry Adoption.<sup>70</sup> The Convention is being designed to provide regulations that will be binding on the ratifying states, so national legislation should be effective within that framework.<sup>71</sup> The Draft Convention's objective is to safeguard the best interests of the children being adopted. As a means of accomplishing this objective, the Convention provides for the establishment of a central authority in each state to facilitate ICAs. All adoptions in the member states would have to go through their respective central authorities. The Draft Convention includes specific criteria for these authorities, such as nonprofit status, and specific duties, such as submission of reports with certain information on the adoptions processed.<sup>72</sup> The Convention's goals include standardizing adoption procedures and providing for reciprocity between the contracting states.<sup>73</sup>

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65. Bogard, *supra* note 7, at 590 n.98, citing Article 41, at 171, of the 1989 U.N. Convention.

66. *Id.*

67. James J. Morrison, *Legislative Technique and the Problem of Suppletive and Constructive Laws*, 9 Tul. L. Rev. 544, 545-48 (1935), reprinted in Symeon C. Symeonides, *An Introduction to the Louisiana Civil Law System*, 506 (6th ed., 1991).

68. *Id.*

69. Clark, *supra* note 35, at 37. For example, the articles give disabled children the right to special care, and all children the right to the best health-care facilities. *Id.*

70. Bogard, *supra* note 7, at 594-95 n.130; Horne-Roberts, *supra* note 5, at 286. In addition to the United States, the draft committee has representatives from the Federal Republic of Germany, Venezuela, the Philippines, Finland, Ireland, Lebanon, China, Uruguay, and Belgium. Bogard, *supra* note 7, at 594-95 n.130.

71. Horne-Roberts, *supra* note 5, at 286.

72. *Id.*; Bogard, *supra* note 7, at 595 n.130.

73. Horne-Roberts, *supra* note 5, at 286; Bogard, *supra* note 7, at 595 n.130.

## III. LAWS OF THE SENDING STATES

For cultural, societal, and religious reasons, countries have varying criteria for determining which children are available for adoption (and specifically for ICA). Variations exist in requirements for consent procedures (including reasonable notice) and abandonment, concepts of due process, and public policy objectives.<sup>74</sup> In fact, there is a basic fallacy in comparing U.S. adoption laws to those of other states under the assumption that a society's legal relationships are governed by rules of positive law, statutes, and codes, when for many states these are insignificant in family relationships.<sup>75</sup> The U.S. immigration petitions address these problems to some extent in, for example, their specific requirements for documentation of irrevocable surrender of parental rights. As discussed in the next section, if the child does not meet the U.S. immigration definition of "orphan," the adoption will be meaningless, regardless of the foreign definition or lack of definition, because the adoptive parents will as a practical matter not be able to bring the child into the United States.

The law of the sending state determines whether adoption in general is legal, whether ICA is possible, who may adopt, and whether the adoption must take place in the sending state or the child may be released for adoption in the United States.<sup>76</sup> Some countries, such as South Korea and India, allow the child to be released to a guardian and escorted to the United States for adoption.<sup>77</sup> But many others, particularly Latin American countries, require the adoptive parents to come there for part of the adoption procedure, which can take as long as several months.<sup>78</sup> The term of art "orphan" is a key one. In terms of U.S. immigration law, it essentially means that to be eligible for adoption the child must have lost both parents or been abandoned by them, or released for adoption by a sole remaining parent. Part of the initial process, therefore, is determining whether the child is legally an "orphan" in both the sending state and the United States, and ensuring that any consent documents required by either country from the child's parents or guardians are obtained.<sup>79</sup> In addition, requirements of the sending state for eligibility of the adoptive parents must be checked—for example, to determine whether single parents are al-

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74. Bogard, *supra* note 7, at 587.

75. Paul D. Rytting, Comment, *Immigration Restraints on International Adoption*, 1986 B.Y.U. L. Rev. 809, 817.

76. U.S. Department of Justice, Immigration and Naturalization Service, *The Immigration of Adopted and Prospective Adoptive Children*, M-249Y, 20 (1990) [hereinafter DOJ]; Bogard, *supra* note 7, at 584; Bartholet, *supra* note 1, at 10-24.

77. Bartholet, *supra* note 1, at 10-11.

78. *Id.*

79. Bogard, *supra* note 7, at 584-85.

lowed to adopt or whether a married couple is required to have been married for a certain number of years.<sup>80</sup> In sum, the attorney for the couple seeking to adopt must become familiar with the law of the foreign state, or must associate herself with an attorney in that state.

Whatever the sending state's documentary requirements may be, they will usually have to be satisfied for adoption proceedings to begin or for a child to be assigned. The adoptive parents will have to submit much the same type of documentation on themselves as required by the U.S. immigration service (e.g., marriage certificate) and documents relating to employment and salary.<sup>81</sup> The sending state may also require its own home study, including visiting the temporary dwelling of the parents in that country.<sup>82</sup> Besides the usual documentation showing marital and economic status, though, the parents may be asked for more unexpected items, such as brain and chest X-rays, certification of honesty by religious authorities, and psychiatric or psychological examinations.<sup>83</sup> These documents will have to be translated into the language of the sending state.<sup>84</sup> Such documentation must be properly authenticated and sent by appropriate, approved means to the foreign state. The process for authenticating documents is explained in the following section.

#### IV. U.S. FEDERAL IMMIGRATION LAWS AND REGULATIONS

The United States Immigration and Naturalization Act regulates immigration of adopted foreign children into the United States. This law determines whether the child is eligible for preferential visa status as an immediate relative, which, in turn, determines whether the child will be admitted into the United States. The most basic requirements are that the child meet the definition of "orphan," the parents be found to be capable of caring for the child, and the adoption be legal under the law of the child's birth country and the state laws of the prospective parents.<sup>85</sup>

By taking advantage of the advance processing now allowed by the Immigration and Naturalization Service (INS) of the Department of Justice, the parents may begin the paperwork before a particular child is located. Going through the INS first avoids the situation in which the child is legally adopted in the sending state, but ineligible

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80. Zeller, *supra* note 26, at 125-26.

81. *Id.* at 127; Bartholet, *supra* note 1, at 10-29, 10-30.

82. Bartholet, *supra* note 1, at 10-30.

83. Zeller, *supra* note 26, at 127 n.89, citing Peruvian documentation requirements.

84. *Id.* at 127.

85. Bartholet, *supra* note 1, at 10-24; 8 U.S.C. § 1101(b)(1)(F) (Supp. 1992); 8 C.F.R. §§ 204.2(d)(1)(i), 204.2(d)(2) (1992).

for immigration into the United States because INS criteria are not met for the child to obtain preferential orphan status and a visa. If the child cannot qualify for a visa, but is legally adopted in the sending state, the government of that country may withdraw all care and classify the child as having parents.<sup>86</sup> If the child is legally adopted in his or her own country and allowed to immigrate, but the adoption is later found defective in some way (e.g., if the consent were invalid), the INS could declare the adoption void and even deport the child.<sup>87</sup> The child would then be unprotected in the foreign nation.

#### A. Orphan Status

To qualify for a preference visa for immediate family members, the child must meet the definition of "orphan."<sup>88</sup> Children of U.S. citizens, as immediate family members, are exempt from quota limitations in applying for permanent residence status.<sup>89</sup> The definition of "child" is divided into six categories, one of which defines the criteria for orphans eligible to qualify as immediate family members.<sup>90</sup> Under the definition of 8 U.S.C. § 1101(b)(1)(F), an "orphan" is a child who has lost both parents through their death, disappearance, abandonment, or desertion, or by being separated or lost from them. A child with only one parent could become an "orphan" if the parent could not properly care for the child or if that parent, in writing, irrevocably released the child for adoption and emigration.<sup>91</sup>

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86. Bogard, *supra* note 7, at 588.

87. *Id.* at 588-89; See *Johns v. Department of Justice of the United States*, 653 F.2d 884 (5th Cir. 1981) which involved a deportation order for a four-year-old child adopted as an infant by an American couple in Mexico after her biological mother claimed that she had not consented to the adoption. The court ruled that the INS had discretion to execute deportation proceedings, and that the record concerning the child's birth and entry into the United States was inadequate to determine whether the child was being held illegally or unconstitutionally by the INS. *Id.* at 888-89, 893, 896.

88. 8 U.S.C. § 1101(b), § 1151(b) (Supp. 1992).

89. *In re Handley*, 17 I. & N. Dec. 269 (1978); 8 U.S.C. § 1151(b) (Supp. 1992).

90. *In re Handley*, 17 I. & N. Dec. at 269; 8 U.S.C. § 1101(b)(1)(F) (Supp. 1992).

91. Under 8 U.S.C. § 1101(b)(1)(F) an "orphan" is defined for immigration purposes as being unmarried, under twenty-one years old, and

a child, under the age of sixteen at the time a petition is filed in his behalf to accord a classification as an immediate relative under section 1151(b) of this title, who is an orphan because of the death or disappearance of, abandonment or desertion by, or separation or loss from, both parents, or for whom the sole or surviving parent is incapable of providing proper care and has in writing irrevocably released the child for emigration and adoption; who has been adopted abroad by a United States citizen and spouse jointly, or by an unmarried United States citizen at least twenty-five years of age, who personally saw and observed the child prior to or during the adoption proceedings; or who is coming to the

Although the restrictiveness of this definition has been criticized as a barrier to otherwise legal ICAs,<sup>92</sup> its requirement that the child be irrevocably released or no longer supported by his or her biological parents does have the advantage of helping to ensure that constitutional requirements are met regarding the biological parents' surrender of their parental rights.<sup>93</sup> Note that 8 U.S.C. § 1101(b)(1)(F) provides, however, that a child with two parents may not be classified as an orphan if the parents simply wish to voluntarily surrender the child for adoption. Because of this restriction, many children legally adoptable under the laws of sending states, and under the laws of virtually all of the states in the United States, may not be brought into this country by prospective parents.<sup>94</sup>

Another factor to consider regarding orphan status is whether the sending state recognizes any distinction between legitimate and illegitimate children. A surviving natural mother must always be shown to be incapable of providing proper care to the child according to the standards of the child's country and to have irrevocably released the child for adoption and emigration.<sup>95</sup> In countries distinguishing between legitimate and illegitimate children, the natural father of an illegitimate child must either have irrevocably released the child in writing for emigration and adoption, or be shown to have disappeared or abandoned or deserted the child.<sup>96</sup>

Some countries, however, have laws eliminating all legal distinctions between legitimate and illegitimate children. The INS considers all children in such countries to be legitimate or legitimated and therefore to have two legal parents (although paternity must be established).<sup>97</sup> The mother of a child born out of wedlock may not be considered the "sole parent," even if the parents do not live together, and the child could not qualify as an orphan under the criteria for a child of a sole parent (unless the child's paternity has not been acknowledged

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United States for adoption by a United States citizen and spouse jointly, or by an unmarried United States citizen at least twenty-five years of age, who have complied with the preadoption requirements, if any, of the child's proposed residence: *Provided*, That the Attorney General is satisfied that proper care will be furnished the child if admitted to the United States: *Provided further*, That 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 chapter.

92. Barcholet, *supra* note 1, at 10-4; Ellis, *supra* note 15, at 387.

93. Ellis, *supra* note 15, at 378-79 n.109.

94. Barcholet, *supra* note 1, at 10-31 n.54.

95. DOJ, *supra* note 76, at 18.

96. *Id.*; 8 C.F.R. § 204.2(d)(1)(vi) (1992).

97. DOJ, *supra* note 76, at 18-19.

before the civil authorities in that country).<sup>98</sup> Therefore, children in these countries or in any country where the child born out of wedlock has been legitimated cannot qualify for orphan status unless one parent dies or both parents have abandoned the child.<sup>99</sup> Those seeking to adopt should be aware that INS "officials and consulates abroad have often been strict in applying the law, denying visas to children where any possibility exists that they fall outside the narrowest interpretation of the orphan definition."<sup>100</sup>

Although the definition of "orphan" classifies a child in that category "because of the death or disappearance of, abandonment or desertion by, or separation or loss from, both parents," these terms are not defined.<sup>101</sup> This lack of clarity, as well as the attitude of the INS, means that the attorney must assume that the most restrictive definition of eligibility will be applied. Thus, great care must be taken in researching the child's background to be sure that the definition is met.<sup>102</sup> The Code of Federal Regulations gives some further criteria for determining when a child is considered abandoned, but leaves many questions unanswered, as the next section shall explore.

#### B. *Abandonment and Consent*

In stating the requirements for documentation accompanying the orphan petition, the Code of Federal Regulations provides that

A child who has been unconditionally abandoned to an orphanage shall be considered as having no parents. However, a child shall not be considered as having been abandoned when he/she has been placed temporarily in an orphanage, if the parent or parents intend to retrieve the child, or the parent or parents . . . otherwise exhibit that they have not terminated their parental obligations to the child.<sup>103</sup>

This definition has been criticized as prohibiting thousands of uncared-for children from meeting U.S. immigration requirements because they "simply cannot meet the enigmatic criteria necessary to be classified as unconditionally abandoned."<sup>104</sup> While it is desirable to protect against abuse of parental rights and to allow parents to remedy their position,

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98. *Id.* at 19.

99. *Id.*

100. Barholet, *supra* note 1, at 10-31.

101. 8 U.S.C. § 1101(b)(F) (Supp. 1992); Bogard, *supra* note 7, at 599; Gelber, *supra* note 41, at 11-13; Ellis, *supra* note 15, at 388.

102. Ellis, *supra* note 15, at 373.

103. 8 C.F.R. § 204.2(d)(1) (1992).

104. Bogard, *supra* note 7, at 600.

the definition does pose some problems. Under this definition, simple desertion of the child by the parents is insufficient to qualify the child as an orphan, apparently regardless of the length of the desertion or the slightness of the contact (or mere intent to have contact).<sup>105</sup> The INS has decided that in adoption cases, "abandon" means "to desert or give up with the intention of never again taking back one's rights."<sup>106</sup>

The crucial role of the parents' intent to abandon and its required proof are both troubling. The regulation has been criticized for not specifically including situations in which the parents simply refuse to perform natural and legal obligations to the child, yet INS cites its definition of "abandonment" as meaning "neglect and refusal to perform the natural and legal obligations of care and support or conduct which (shows) a settled purpose to (give up) all parental duties and all parental claims to the child."<sup>107</sup> The INS itself describes the problem as follows:

In the absence of other guidelines, it is *extremely difficult to find abandonment* when the child has not been unconditionally abandoned to an orphanage or when the child was not born of an adulterous relationship and cast from his or her home. The issue is very complicated. Each case must be decided on its individual merits at the discretion of the adjudicating officer.<sup>108</sup>

The INS decision in *In re Del Conte*<sup>109</sup> held that children with two legal parents who had not been abandoned to an orphanage met the definition of "orphan," but the extreme facts illustrate the narrowness of the exception. The children were conceived when the mother engaged in an adulterous relationship, and the legal father refused to support them; the parents irrevocably released them to the International Social Service for adoption in the United States. The INS noted that they had "been cast from the family circle because of the circumstances of their birth," and that "the fact that they have been thrust from the home for the purpose of surrendering them for adoption 3,000 miles away is in itself evidence of the finality of their rejection."<sup>110</sup>

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105. *Id.* at 586, 600.

106. DOJ, *supra* note 76, at 19.

107. Ellis, *supra* note 15, at 388; DOJ, *supra* note 76, at 20, citing 2 C.J.S. *Adoption of Persons* § 61 (1972).

108. DOJ, *supra* note 76, at 19.

109. 10 I. & N. Dec. 761 (1964).

110. *Id.* at 763.

In most cases, then, because the regulations omit any provision for voluntary release by two parents of a child for adoption, a couple would be forced to unconditionally abandon the child to an orphanage to ensure that she was eligible for adoption.<sup>111</sup> This specification that the abandonment be to an orphanage creates other potential problems, particularly because "orphanage" is not defined.<sup>112</sup> INS, however, specifically states that abandonment need not be to an orphanage or similar institution, but if it is not, the adoptive parents must obtain legal documentation from a competent authority of the sending state proving the abandonment.<sup>113</sup>

### C. Authentication of Documents

Documents required by the sending state as well as those required by the INS must be authenticated. Authentication of documents is the "procedure by which the authority of persons who issue or execute documents in one country may be recognized in another country"; it is known as "legalization" in most civil law jurisdictions.<sup>114</sup> Authentication is required to establish the genuineness of foreign public documents. It may be accomplished by either the cumbersome chain authentication method or, if the foreign state requiring the document is a party to the Hague Convention Abolishing the Legalisation of Foreign Documents, by a simplified procedure.<sup>115</sup>

#### 1. Chain Authentication

The procedure of chain authentication can be quite time-consuming and expensive.<sup>116</sup> Basically, chain authentication works as follows: the

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111. 8 U.S.C. 1101(b)(1)(F) (Supp. 1992); 8 C.F.R. § 204.2(d) (1992); Gelber, *supra* note 41, at 11-13 to 11-14; Bogard, *supra* note 7, at 601.

112. Gelber, *supra* note 41, at 11-14; Bogard, *supra* note 7, at 601.

113. DOJ, *supra* note 76, at 20.

114. United States Department of State, Authentication of Documents for Use Abroad, flyer, 8/92 WWCCSEAP 8204, 1 (1992) [hereinafter DOS, Authentication].

115. In October 1981, the United States became a party to the Convention Abolishing the Requirement of Legalisation for Foreign Public Documents, with Annex, Done at the Hague October 5, 1961; Entered into Force for the United States October 15, 1981; TIAS 10072; 527 UNTS 189. The following countries are currently parties to the Convention: Antigua & Barbuda, Argentina, Austria, The Bahamas, Belgium, Botswana, Brunei, Cyprus, Fiji, Finland, France, Federal Republic of Germany, Greece, Hungary, Israel, Italy, Japan, Lesotho, Liechtenstein, Luxembourg, Malawi, Malta, Marshall Is., Mauritius, Netherlands, Norway, Panama, Portugal, Seychelles, Spain, Suriname, Swaziland, Switzerland, Tonga, Turkey, United Kingdom, United States, and Yugoslavia. Treaties in Force: A List of Treaties and Other International Agreements of the United States in force on January 1, 1992.

116. Bruno A. Ristau, Convention Abolishing the Requirement of Legalisation for

notary provides the "authentic act"; the official seal of the court (or other appropriate governmental official) attests to the notary's authenticity; the official's authenticity is attested to by his or her superior, and so on up the chain to obtain the Official Seal of the Department of Foreign Affairs. The Foreign Affairs Official is then authenticated by the appropriate official in the U.S. embassy or consul, who, in turn, is authenticated by the Department of State in Washington, D.C.<sup>117</sup>

The specific process required for chain authentication of U.S. documents for sending states varies according to whether the documents involved are notarized documents, documents issued by state agencies (including state courts), documents issued by federal agencies and departments, or documents issued by federal courts.<sup>118</sup>

Notarized documents required by the sending state, such as letters of recommendation from employers or health care professionals, must be first taken to the clerk of the court in the parish or county where the notary is licensed to get a notarial certificate, which states that the notary was licensed on the date of the act. The document with the notarial certificate attached next goes to the secretary of state for a certification of the seal and signature of the parish or county clerk. The document must then be sent to the U.S. Department of State, Authentications Office.<sup>119</sup> The document then goes to the embassy of the country where the document will be used; the embassy will authenticate the seal of the Department of State.<sup>120</sup>

Documents issued by state agencies, including state courts, that sending states may require include marriage certificates and divorce decrees. Those issued under the seal of a state agency or court may generally be certified by the secretary of that state; this certification

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Foreign Public Documents Done at the Hague October 5, 1961, in 1 International Judicial Assistance: Civil and Commercial, Part VI, 241 (1990). Rule 44(a)(2) of the Federal Rules of Civil Procedure defines chain authentication and the requirements for authentication of a foreign public document; Rule 902(3) of the Federal Rules of Evidence specifies similar requirements.

117. Christopher L. Blakesley, Memorandum on Authentication (Dec. 14, 1992) (on file with the Louisiana Law Review).

118. DOS, Authentication, *supra* note 114, at 1-3; Telephone interview with Annie Maddux, Authentications Officer, Authentications Office, U.S. Department of State (Dec. 17, 1992).

119. The address is:

U.S. Department of State, Authentications Office  
2400 M Street, N.W., Room 101  
Washington, D.C. 20037

The Authentications Office telephone number is (202) 647-5002, and the fee is \$4.00 for each authentication of a notarized document.

120. DOS, Authentication, *supra* note 114, at 2; Maddux, *supra* note 118.

may then be authenticated by the Authentications Office. The embassy of the country where the document will be used provides the final authentication.<sup>121</sup>

Documents issued by a federal agency or executive department are directly authenticated by the Authentications Office; the final authentication is by the embassy of the country where the document will be used.<sup>122</sup> Documents issued by federal courts are sent for preliminary authentication to the Department of Justice.<sup>123</sup> The documents are then forwarded to the Authentications Office. The embassy of the country where the documents will be used makes the final authentication.<sup>124</sup>

The embassy of the sending state will know whether any of the chain of authentication may be omitted by direct authentication by the foreign embassy or authentication by a consular establishment of the foreign country outside of Washington, D.C. The foreign consul may authenticate the document without requiring all of the intermediate steps.<sup>125</sup>

## 2. *Hague Legalisation Convention Procedure*

The purpose of the Hague Legalisation Convention was to abolish "the requirement of diplomatic and consular legalization for public documents originating in one Convention country and intended for use in another."<sup>126</sup> The intention was "to simplify the series of formalities that complicate the utilization of public documents outside the state from which they emanate."<sup>127</sup> The Convention abrogates the federal and state authentication requirements.<sup>128</sup> Under the Convention, a cer-

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121. DOS, Authentication, *supra* note 114, at 2; Maddux, *supra* note 118.

122. DOS, Authentication, *supra* note 114, at 3.

123. Specifically, these documents are sent to:

Justice Management Division  
Security Program Staff  
Physical Security Group  
Room 6521, Department of Justice  
Washington, D.C. 20530

*Id.*

124. *Id.*

125. *Id.*

126. United States Department of State, Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents, CA/OCS/CCS:3/92, doc 3382, 2 (1992) [hereinafter DOS, Hague Convention].

127. Ristau, *supra* note 116, at 241.

128. *Id.* at 242; Fed. R. Civ. P. 44(a)(2); Fed. R. Evid. 902(3). The corresponding Louisiana rules for authentication are Louisiana Revised Statutes 35:551-:555, which requires authentication, or acknowledgment, of foreign documents requiring certification before a notary in the foreign state and authentication by the embassy or consular officials. Blakesley, *supra* note 117.

tificate called an *apostille* is the only formality required for legalization of a document (that is, "to certify the authenticity of the signature, the capacity in which the person signing the document has acted, and, where appropriate, the identity of the seal or stamp which it bears").<sup>129</sup> The *apostille* is dated, numbered, and registered. Article 1 of the Convention lists four categories of documents considered "public documents" covered by the Convention. These include documents emanating from officials connected with state courts or tribunals, administrative documents, any document executed before a notary, and official certificates placed on documents signed by persons in their private capacity (such as official certificates recording the registration of a document).

The *apostille* itself is a nine-line document that may be attached to the document being authenticated or may be placed on the document itself with a rubber stamp. It designates the country of origin, states that the document is a public document, identifies the signature on the document and the capacity of the signer, and identifies any seal or stamp. It includes a certification of the location, date, and identity of the certifying authority, and a serial number, a signature, and an official stamp.<sup>130</sup> The *apostille* itself is exempt from all certification.<sup>131</sup> Each issuing authority is, however, required to maintain a permanent registry of all *apostilles* issued, and an *apostille* may be verified by comparison with the registry or index.<sup>132</sup>

The competent local authority affixes the *apostille* to the document. For U.S. documents, the competent authorities for affixing the *apostille* are the Authentications Office, U.S. Department of State, for federal executive and administrative agencies; clerks and deputy clerks of the federal court system for U.S. courts; and the state secretary of state or official counterpart for states and territories.<sup>133</sup> In Louisiana, the secretary of state is authorized to issue the Convention *apostille* legalizing state documents.<sup>134</sup> The U.S. Department of State publishes a listing of the known authorities competent to issue the *apostille* in each member country for documents to be used in the United States, or the name of the nearest American embassy or consulate that may be contacted for that information.<sup>135</sup>

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129. Ristau, *supra* note 116, at 247.

130. *Id.*

131. *Id.*

132. *Id.*

133. DOS, Hague Convention, *supra* note 126, at 2-3. Costs for federal authorities are \$4.00 for the Authentications Office, and \$2.00 for U.S. courts. *Id.*

134. *Id.* at 3.

135. *Id.* at 6, listing at 6-11.

## D. Immigration Procedure

### 1. Advance Processing

The safest and most efficient procedure to follow in obtaining a visa for a child is to begin with the advance processing now allowed by INS. Through this procedure, INS does the processing work on the adoptive parents before a child has been located so that only the processing work on the child remains to be done. This procedure may also be used if the child is known and the adoptive parents are going to the sending state and plan to file the orphan petition from the INS office or at an American consulate or embassy in that state.<sup>136</sup> If the adoptive parents plan to do this, they must complete advance processing before filing the petition in the sending state.<sup>137</sup>

Form I-600A, Application for Advance Processing of Orphan Petition, must be filed with the necessary supporting documentation.<sup>138</sup> Documentation includes the fingerprints of both spouses on Form FD-258, which the INS uses to check for arrest records. Any convictions, the nature of the offense, and rehabilitation are factors in the decision regarding ability of the petitioner(s) to care for the child. INS warns that although its policy is to expedite all orphan cases, the fingerprint checks still take time, which is another reason to use the advance processing procedure before a child is located.<sup>139</sup> Under normal conditions it takes six weeks to two months for the fingerprint check to be completed.<sup>140</sup>

Other documents required are proof of the adoptive parents' U.S. citizenship, proof of marriage for spouses, proof of termination of any prior marriages, and a favorably recommended home study. If single, the petitioner must be age twenty-five or over.

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136. DOJ, *supra* note 76, at 7. INS offices are located in Austria, England, Germany, Greece, India, Italy, Kenya, Korea, Panama, the Philippines, Hong Kong, Mexico, Singapore, and Thailand. *Id.*

137. This is necessary because a petition filed while advance processing is pending must be filed in the same office in which the advance processing petition was filed. DOJ, *supra* note 76, at 9. The DOJ booklet cited *supra* at note 76 provides helpful information on the INS processing requirements.

138. 8 C.F.R. § 204.1(b)(3) (1992); DOJ, *supra* note 76, at 15.

139. DOJ, *supra* note 76, at 15.

140. Powledge, *supra* note 12, at 177. One Chicago couple reported that they waited several months before being notified by INS that their fingerprints were illegible and had to be taken again. They also reported waiting all afternoon in the Immigration office because they were told that only fingerprints taken at the office were acceptable. When they received the notification that they would have to resubmit their prints, their attorney told them they could have the prints made on the required form anywhere (they did have to pay a \$15 charge). When they asked the Immigration office why they had not been told this, the response was, "but they charged you; we don't charge you." *Id.*

The home study is a report on the parents' ability to care for the child. It must be submitted within a year of the date of filing the advance processing application or the application will be considered abandoned. If advance processing is not done, the home study must be filed with the orphan petition.<sup>141</sup> Because it is usually best to adopt the child in both the sending state and the planned state of residence, the home study should be done by an agency authorized by the state.<sup>142</sup> The home study must include an evaluation of the "financial, physical, mental, and moral capabilities of the prospective parent or parents to rear and educate the child properly," a detailed description of the adoptive parents' current residence, and a detailed description of the living accommodations planned for the child.<sup>143</sup>

These rules are consistent with Louisiana's requirements that the home study be conducted by a licensed agency, board-certified social worker, licensed counselor, psychologist, or psychiatrist, who will evaluate the safety and suitability of home to ensure "that no child be placed in the home of strangers unless the home meets certain prescribed criteria and unless the adopting parents are well qualified and prepared to assume the responsibilities of parenthood."<sup>144</sup> As part of the home study, Louisiana also requires that the sheriff and Department of Social Services check the criminal records for any federal or state arrests and convictions and validated complaints of child abuse or neglect by the parents and prepare a certificate listing the results of this check.<sup>145</sup>

If the child will be adopted in the United States, the home study must also include a statement recommending the adoption signed by an official of the responsible state agency in the planned state of residence or of a licensed state agency. If the child has been adopted in the sending state, the statement may be signed by the appropriate

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141. 8 U.S.C. § 1154(d) provides that no petition may be approved on behalf of a child defined in section 1011(b)(1)(F) of this title unless a valid home-study has been favorably recommended by an agency of the State of the child's proposed residence, or by an agency authorized by that State to conduct such a study, or, in the case of a child adopted abroad, by an appropriate public or private adoption agency which is licensed in the United States.

142. Barholet, *supra* note 1, at 10-24. Using an agency with experience in international adoption for the home study is recommended; lists of such agencies are available from organizations including International Concerns Committee for Children (911 Cypress Drive, Boulder, CO 80303), and the Joint Council on International Children's Services (877 S. Adam, Birmingham, MI 48011). Barholet, *supra* note 1, at 10-27 n.47.

143. 8 C.F.R. § 204.2(d)(2)(i)(A)-(C) (1992).

144. La. Ch.C. art. 1171, and comment; La. Ch.C. art. 1172. The Louisiana Department of Social Services is responsible for drafting rules and regulations for the home study. La. Ch.C. art. 1173.

145. La. Ch.C. art. 1173.

official or agency in any state.<sup>146</sup> Finally, the filing fee must be included. The petitioners must specify on the advance processing application where they intend to file the orphan petition; the application will then be sent on to the appropriate foreign office after a favorable decision if the orphan petition is to be filed in the sending state.<sup>147</sup>

The INS notifies petitioners of decisions on advance processing applications. A favorable decision means that the petitioner qualifies for further processing, but not that the orphan petition will necessarily be approved (e.g., the child may not qualify as an orphan). The petitioner may appeal an unfavorable decision.<sup>148</sup> INS has made unfavorable decisions on the basis of factors including sporadic employment records, appearance on welfare records, arrest and conviction records, and delinquent rent payments.<sup>149</sup> Negative decisions have also resulted from the petitioners' apparent difficulty in caring for their present children.<sup>150</sup> The petition will also be denied if petitioners have not complied with state preadoption requirements.<sup>151</sup>

## 2. Orphan Petition

Once the child to be adopted is located, Form I-600, Petition to Classify Orphan as an Immediate Relative, must be filed, either while advance processing is still pending or within one year of a favorable decision.<sup>152</sup> As with the advance processing form, the orphan petition may be filed by a married U.S. citizen and spouse of any age (the spouse need not be a citizen) or an unmarried U.S. citizen at least 25 years old.<sup>153</sup>

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146. 8 C.F.R. § 204.2(d)(2)(i)-(ii) (1992); DOJ, *supra* note 76, at 14.

147. DOJ, *supra* note 76, at 10.

148. 8 C.F.R. § 204.1(b)(3) (1992); DOJ, *supra* note 76, at 9.

149. *In re* Suh, 10 I. & N. Dec. 624 (1962) (petitioner had a record of arrests and convictions for drunkenness and larceny); *In re* T—E—C, 10 I. & N. Dec. 691 (1964).

150. In *In re* T—E—C, 10 I. & N. Dec. 691 (1964), the INS denied the orphan petition submitted by petitioners who had six children of their own and were evidently struggling financially; in *In re* Russell, 11 I. & N. Dec. 302 (1965), the INS denied the petition of petitioners whose teenage daughter had been a discipline problem at school and had broken curfew (along with other misconduct) on the Navy base where she lived with petitioners.

151. In *In re* T—E—C, 10 I. & N. Dec. 691, the denial also considered that petitioners had not obtained a preadoption certificate from a court or placement recommendation from an approved agency as required by the laws of their state of residence.

152. 8 C.F.R. § 204.1(b)(3) (1992); DOJ, *supra* note 76, at 9. If the advance processing decision was unfavorable, the petition will be denied unless the petitioners can prove that they can now properly care for the child. If the advanced processing application is pending, the orphan petition must be filed at the same office. No additional filing fee is required if the orphan petition is filed within a year of the advance processing form. *Id.*

153. 8 C.F.R. § 204.1(b)(2) (1992); DOJ, *supra* note 76, at 6.

Documents concerning the child's background must accompany the orphan petition.<sup>154</sup> Translations of the documents must be provided with an affidavit provided by the translator attesting to the accuracy of the translation.<sup>155</sup> Proof of the orphan's age must be supplied, in the form of a birth certificate if available; if one is not available, an explanation and the best available evidence of the child's birth are required.<sup>156</sup> Death certificates of the orphan's parents, if applicable, are required. If the orphan has a sole or surviving parent, proof is required that the surviving parent cannot care for the child and has in writing irrevocably released the child for emigration and adoption.<sup>157</sup> Children of sole parents who meet the criteria of "orphan" include those with only one surviving parent and no stepparent, and illegitimate children with no stepparent.<sup>158</sup>

The natural father of an illegitimate child, in a country distinguishing between legitimate and illegitimate children, is not considered a parent if he has disappeared or abandoned or deserted the child or if he has in writing irrevocably released the child for emigration and adoption.<sup>159</sup> If the child is illegitimate, then evidence that the father has disappeared, abandoned, or deserted the child, or a release from the natural father, should accompany the release from the mother.<sup>160</sup> Under the orphan definition, the mother must not only provide the release, but must also be "incapable of providing the proper care."<sup>161</sup>

If the child was adopted in the sending state, a final copy of the decree of adoption (certified with a copy of the certified translation) must be included.<sup>162</sup> The decree provides the best documentation that the child was legally adopted under the laws of the sending state and, thus, not brought to the United States in violation of any foreign law. If the parents did not personally see the child prior to or during the adoption proceedings, or if married petitioners did not adopt the child jointly, they must submit a statement of willingness to readopt the child in the United States. INS may also request a statement from the

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154. 8 C.F.R. § 204.2(d) (1992).

155. Gelber, *supra* note 41, at 11-21.

156. 8 C.F.R. § 204.2(d)(1)(v) (1992); DOJ, *supra* note 76, at 11.

157. DOJ, *supra* note 76, at 2; 8 C.F.R. § 204.2(d)(1)(vi) (1992).

158. 8 C.F.R. § 204.2(d)(1) (1992); DOJ, *supra* note 76, at 2.

159. DOJ, *supra* note 76, at 18.

160. *Id.*

161. 8 U.S.C. § 1101(b)(1)(F) (Supp. 1992); DOJ, *supra* note 76, at 18. While INS provides that "it must be evident that the mother is incapable of providing proper care to the child" the required standard of proof is not explained. DOJ, *supra* note 76, at 18.

162. 8 C.F.R. § 204.2(d)(1)(viii) (1992).

state court or department with authority over adoptions or state attorney general that readoption is allowed.<sup>163</sup>

Proof that the preadoption requirements of the planned state of residence have been met must also be submitted if the child is to be adopted in the United States.<sup>164</sup> In Louisiana, state preadoption requirements include a home study and the required releases from any surviving natural parents. Louisiana residents may obtain a certificate for adoption valid for a minimum of two years with a favorable decision on a preadoption home study.<sup>165</sup> The home study conducted for the INS advance processing requirements could be submitted to obtain the certificate, which in turn could be used as proof that state preadoption requirements have been met.

If advance processing has not been done, and the child to be adopted has been located, then the orphan petition (Form I-600) must be filed with the documentation on the parents and home study required for advance processing (Form I-600A) in addition to that required for the orphan petition.

The clients should also be aware that for a child already in the United States, the orphan petition may be used only if the child is in parole status and not yet adopted in the United States.<sup>166</sup> Parole status allows an alien to enter the country without being admitted as an immigrant; it is an interim status only and unlike the processing for the orphan petition, it involves no background check of the child.<sup>167</sup> If an orphan petition is approved for such a child, then through a procedure called "adjustment of status" the child can become a lawful permanent resident (similar to the status achieved by applying for the immigrant visa in a foreign country).<sup>168</sup> A child in the United States illegally or as a nonimmigrant will be ineligible for the orphan petition.<sup>169</sup>

An INS case, *In re Handley*,<sup>170</sup> illustrates the strictness with which INS applies these rules and the consequences that can follow from not carefully following the steps of the procedure. In that case, INS denied the orphan petition for a child who had been paroled into the United States for a medical problem requiring prompt treatment. Her biological mother was unable to care for her and had irrevocably released the

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163. 8 C.F.R. § 204.2(d)(4) (1992); DOJ, *supra* note 76, at 13.

164. 8 C.F.R. § 204.2(d)(3) (1992); DOJ, *supra* note 76, at 2.

165. La. Ch.C. arts. 1171-1173.

166. 8 C.F.R. § 204.1(b)(2)(iii) (1992).

167. 8 U.S.C. § 1182(d)(5) (Supp. 1992); *Huynh Thi Anh v. Levi*, 586 F.2d 625, 631 (6th Cir. 1978).

168. 8 C.F.R. § 204.1(b)(2)(iii) (1992); DOJ, *supra* note 76, at 6.

169. 8 C.F.R. § 204.1(b)(2)(iii) (1992).

170. 17 I. & N. Dec. 269 (1978).

child for adoption to a home for abandoned children in Peru. The petitioner told INS officials that he planned to adopt the child and apply for her permanent residency, which he and his wife subsequently did. When the INS, in processing the orphan petition, requested proof that the state's preadoption requirements had been met, the petitioners submitted a copy of the final Colorado adoption decree. The INS, finding that the child "had neither been adopted abroad nor was she coming to the United States to be adopted"<sup>171</sup>—since she was already living in Colorado, where she had been adopted—denied the petition on the ground that she did not qualify as an "eligible orphan" for immigration purposes under 8 U.S.C. § 1101(b)(1)(F).<sup>172</sup>

INS makes its decision on the orphan petition on the basis of the ability of the adoptive parents to care for the child, confirmation of the child's orphan status as defined by immigration law, and whether all other legal requirements have been met. The petitioner is then notified of approval or denial. A denial may be appealed.<sup>173</sup>

### 3. *Visa*

Once the petition is approved, the child will be eligible for a visa as an immediate family member and thus will not be put on a waiting list.<sup>174</sup> The child must still, however, qualify for the visa and could be excluded for, e.g., a contagious disease. After the orphan petition is approved, application may be made at the American consulate or embassy in the sending state for the immigrant visa.<sup>175</sup>

The consular office will conduct an orphan investigation as part of the visa processing. Although this usually is done quickly, the process can sometimes be lengthy.<sup>176</sup> The purpose of this investigation is to confirm that the child is an orphan and does not have an illness or disability not described in the orphan petition. If the investigation reveals that the child does not meet the criteria for orphan status, the petitioner has the choice of withdrawing the petition or submitting proof in revocation proceedings to rebut the finding. If the investigation reveals an illness or disability not described in the petition, the petitioners are given the information and may then decide if they still want to bring the child into the United States.<sup>177</sup>

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171. *Id.* at 270.

172. *Id.* at 269.

173. DOJ, *supra* note 76, at 12.

174. *Id.* at 6.

175. *Id.* The Attorney General sends a copy of the approved petition to the Department of State, which then authorizes the consular officer to grant preference status for the visa. 8 U.S.C. § 1154(b) (Supp. 1992).

176. DOJ, *supra* note 76, at 16.

177. *Id.* at 16-17.

If the INS believes that the orphan petition may "involve fraudulent adoption practices," such as child stealing or forged documents, an overseas orphan investigation is required before INS will approve the petition.<sup>178</sup>

#### 4. *Other Procedures*

A child may also be adopted without meeting the orphan definition if the child is adopted while under 16 years old and is in the legal custody of the adoptive parents for at least two years before immigration.<sup>179</sup> This procedure might be used by a U.S. military family that adopts a child while overseas.

The other, and least desirable option, is nonpreference status.<sup>180</sup> Under nonpreference status, a visa number must be available, which means a long waiting list. INS, in its 1990 publication on ICA, states that "at this writing, nonpreference visa numbers have not been available in years. It therefore may not be possible for a child to become an immigrant under nonpreference, depending on visa number availability at the time of application."<sup>181</sup>

#### 5. *Naturalization*

Upon entry into the United States, the orphan will be considered a lawful permanent resident rather than a U.S. citizen.<sup>182</sup> The child must surrender the visa and will receive a "green card" denoting legal residency.<sup>183</sup> The child will be subject to laws pertaining to aliens, with the parents responsible for compliance, until the child is naturalized. For this reason, and so that the child will have constitutional rights and protections, the parents should initiate naturalization procedures soon after the child's adoption and arrival.<sup>184</sup> No waiting period is required, but the child must be a lawful, permanent resident, adopted, and under eighteen.<sup>185</sup> The adoptive parents may apply for citizenship for the child by filing an application for a certificate of citizenship with the INS or by the naturalization process through the courts.<sup>186</sup> Parents should also check the law of the sending state to see if the child needs to renounce native citizenship.<sup>187</sup> For example, the Korean

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178. *Id.* at 17.

179. 8 U.S.C. § 1101(b)(1)(E) (Supp. 1992); DOJ, *supra* note 76, at 22.

180. 8 U.S.C. 1153(a) (Supp. 1992).

181. DOJ, *supra* note 76, at 23.

182. *Id.* at 24.

183. Gelber, *supra* note 41, at 11-25.

184. *Id.* at 11-25, 11-29; Ellis, *supra* note 15, at 376; DOJ, *supra* note 76, at 24-25.

185. DOJ, *supra* note 76, at 25.

186. *Id.*

187. Bartholet, *supra* note 1, at 10-32.

government requires notification so that it can nullify the original citizenship; if this is not done, and the child returns to Korea as an adult, that country could technically induct him or her into military service.<sup>188</sup> Some countries will not recognize such a renunciation and will continue to consider the child a citizen.<sup>189</sup>

For Louisiana parents planning to refinalize the adoption in this state, obtaining the naturalization certificate soon after the child's legal adoption in the sending state and arrival has another advantage. If the certificate is submitted with the other documents required for state refinalization of the adoption, the state registrar will add a notation to the child's new birth certificate making it acceptable as proof of U.S. citizenship to all state agencies.<sup>190</sup>

## V. LOUISIANA ADOPTION LAW

Even if the child has been legally adopted in her own country before arrival in the United States, commentators generally advise refinalizing the adoption in the adoptive parents' state of residence.<sup>191</sup> Many parents choose to take this step to ensure U.S. recognition of the foreign adoption.<sup>192</sup> Refinalization of the adoption may help prevent future legal problems, as well as offer practical benefits, such as giving the child a set of U.S. adoption documents.<sup>193</sup> The refinalization procedure follows the state's procedure for private adoption; the foreign decree provides evidentiary documentation.<sup>194</sup> Before granting the final adoption decree, most state courts require a waiting period of six months to a year to verify the child's compatibility with the adoptive family, a home study, proof of requisite consent, and a financial statement.<sup>195</sup>

### A. *Validity of a Foreign Adoption Decree in Louisiana*

Regardless of whether the parents decide to refinalize the adoption, they will probably want to know if a final decree from the sending state will be recognized in Louisiana. Louisiana law does not specifically address the validity of foreign adoptions, nor does it provide for a process of refinalizing such adoptions. The Louisiana Children's Code

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188. Hale, *supra* note 25, at 33.

189. Bartholet, *supra* note 1, at 10-33.

190. La. R.S. 40:79(C)(4) (Supp. 1993).

191. Gelber, *supra* note 41, at 11-28; Bartholet, *supra* note 1, at 10-31; Ellis, *supra* note 15, at 367.

192. Epstein, *supra* note 46, at 241.

193. Bartholet, *supra* note 1, at 10-32.

194. Gelber, *supra* note 41, at 11-28; Epstein, *supra* note 46, at 242.

195. Epstein, *supra* note 46, at 242.

does provide that a surrender or consent to adoption executed in accordance with the laws of another state is valid in Louisiana, and the comments refer to the Civil Code articles on conflict of laws.<sup>196</sup> The Children's Code also requires documentation that the surrender or consent to the adoption was validly executed under the laws of the foreign state.<sup>197</sup> These requirements are consistent with those of immigration law, and the documentation used for the orphan petition should be acceptable.

The validity of the decree of adoption itself would be governed by the conflict of laws articles of the Civil Code. Article 3519 provides for the determination of laws governing the status of natural persons as follows:

The status of a natural person and the incidents and effects of that status are governed by the law of the state whose policies would be most seriously impaired if its law were not applied to the particular issue.

That state is determined by evaluating the strength and pertinence of the relevant policies of the involved states in the light of: (1) the relationship of each state, at any pertinent time, to the dispute, the parties, and the person whose status is at issue; (2) the policies referred to in Article 3515; and (3) the policies of sustaining the validity of obligations voluntarily undertaken, of protecting children, minors, and others in need of protection, and of preserving family values and stability.<sup>198</sup>

The comments to this article list adoption as one of the subtopics traditionally "subsumed under the rubric of status."<sup>199</sup> Louisiana Civil Code article 3515 provides a flexible test for deciding conflict of law questions on the basis of which state involved would have its policies "most seriously impaired if its law were not applied to that issue."<sup>200</sup>

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196. La. Ch.C. art. 1128. The comments to this article refer to Civil Code article 15, which with former article 14 constituted the former conflict of laws article. These articles were repealed and replaced effective January 1, 1992, with Book IV, Conflict of Law articles 3515-3549.

La. Ch.C. art. 1128 reads as follows:

A surrender or consent to adoption executed by a nondomiciliary parent in accordance with the laws of the state of his domicile shall be recognized as valid and given the force and effect accorded it by the laws of the foreign state.

197. La. Ch.C. art. 1129 reads as follows:

A person asserting the validity of a surrender or consent executed in a foreign state shall produce sufficient proof of the laws of the foreign state governing the requirements for form and content and the force and effect accorded by a properly executed act.

198. La. Civ. Code art. 3519.

199. La. Civ. Code art. 3519, comment (a).

200. La. Civ. Code art. 3515.

Article 3519 therefore does not explicitly state that foreign adoptions are valid in Louisiana, but under the test prescribed, that should be the result since a state obviously has a great interest in having adoptions performed under its laws recognized in other states where the children go to live.<sup>201</sup>

The first draft of the current conflict of laws articles contained an article that specifically addressed the validity of foreign adoptions. It provided that "[a]n adoption decree validly rendered by the courts of another state shall have full effect in this state."<sup>202</sup> With the bewildering and often frustrating uncertainties prospective parents must face in the ICA process, having a simple, direct article addressing the issue could only be beneficial. This article should have been included in the Civil Code with the other conflict articles.

### B. Birth Certificate

Before adoption proceedings are initiated, the attorney must obtain a certified copy of the child's birth certificate, which will have to be attached to the adoption petition.<sup>203</sup> State law provides for the clerks of court to have the state registrar make a new certificate of live birth in the name given in the adoption decree with the names of the adoptive parents or parent as the child's parents.<sup>204</sup> The original birth certificate will be sealed and filed.

For a child born in a foreign country and adopted in Louisiana, a certified copy of the original foreign birth certificate (and a translation if it is not in English) should be submitted.<sup>205</sup> If these are not available, the court having jurisdiction of adoptions in the parish will use evidence submitted by the Department of Social Services to prepare the new birth certificate.<sup>206</sup> The birth certificate issued is required to show the "true or probable" place of birth, and will bear the annotation, "not proof of United States citizenship."<sup>207</sup> If the state registrar receives, with the other documents required, a certified copy

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201. This discussion assumes that the foreign adoption is not against state public policy and does not violate due process rights of the biological parents or child. Problems in this area were formerly more frequent (*see, e.g., Douleris v. Bambacus*, 127 S.E.2d 145 (Va. 1962)); the safeguards provided by current immigration requirements help assure that these standards are met.

202. Louisiana State Law Institute, Committee Draft #1, Conflicts Law: Chapter VII, Law Governing Status, prepared for Meeting of the Advisory Committee (Symeon C. Symeonides Rep. Nov. 6, 1987) (on file with Symeon C. Symeonides).

203. La. Ch.C. art. 1197.

204. La. R.S. 40:79 (repealed by 1991 Acts No. 235 § 17, effective Jan. 1, 1992).

205. La. R.S. 40:79(C)(1) (Supp. 1993).

206. La. R.S. 40:79(C)(2) (Supp. 1993).

207. La. R.S. 40:79(C)(3) (Supp. 1993).

of a certificate of naturalization, its date and number will be included in the birth certificate, and the birth certificate will then be accepted by all state agencies as evidence of U.S. citizenship.<sup>208</sup>

### C. *Refinalizing the Foreign Adoption*

Because Louisiana has no separate procedure for refinalizing a foreign adoption, the procedure for a private or agency adoption will probably have to be followed.<sup>209</sup> (The Children's Code defines "agency" as including the private agencies licensed by the Department of Social Services for placing children for adoption.<sup>210</sup>) Louisiana law allows a married couple of any age to adopt; a single person of eighteen may adopt under Louisiana law, but federal regulations make the minimum age for a single parent twenty-five.<sup>211</sup>

#### 1. *Pre-Adoption Requirements*

The first step in the Louisiana adoption procedure is obtaining the certification for adoption. This may be obtained through a favorable home study or by court order.<sup>212</sup> The home study obtained for advance processing or the orphan petition should suffice if it is done by a Louisiana licensed agency.<sup>213</sup> Because the Louisiana home study is valid for "a minimum of two years," obtaining it as part of the advance processing procedure should fit well within the overall timetable for the adoption and refinalization.<sup>214</sup> Louisiana gives priority status to the required check of criminal records by the sheriff and Department of Social Services.<sup>215</sup> The certificate for adoption may also be submitted

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208. La. R.S. 40:79(C)(4) (Supp. 1993).

209. Louisiana courts generally approve adoptions that are refinalizing a valid foreign adoption, but the procedure needs clarification. Telephone interview with Nancy Miller, Assistant Child Welfare Director, Office of Community Services, Louisiana Department of Social Services (Dec. 17, 1992).

210. La. Ch.C. art. 1169. Although the Code also allows private adoptions, using a state-licensed private agency for the home study and procedural matters is recommended, as noted earlier in the section on immigration requirements. The Division of Quality Assurance and Licensing of the State Department of Social Services regulates licensing of these agencies and has a list of them. Miller, *supra* note 209.

211. La. Ch.C. art. 1221.

212. La. Ch.C. art. 1171.

213. Miller, *supra* note 209. As noted in the discussion of home studies in the section on immigration law, the federal and state requirements for the study are basically the same.

214. La. Ch.C. art. 1173(A)(3). The Louisiana home study criteria allow prospective parents "to obtain the pre-adoption home study and seal of approval even well before a child has been found for them to adopt." Blakesley, *supra* note 36, at 8.

215. Although federal immigration requirements for advance processing of the orphan petition require a similar check, the state check is conducted through state law enforcement and will probably have to be done in addition to the federal one (which is done through the Federal Bureau of Investigation). Miller, *supra* note 209.

with the orphan petition as proof that state preadoption requirements have been met.

Louisiana law allows an alternative to the pre-adoption home study; prospective parents may apply for a juvenile court order approving placement of the child in their home. This alternative is intended for parents who are applying for placement of a particular child in their home.<sup>216</sup> It was designed to facilitate adoption by allowing qualified parents to obtain the certification for adoption (pre-adoption approval) without having the expense and delay of the home study.<sup>217</sup> Unfortunately, this useful option will not be available for ICAs because of federal immigration requirements.

## 2. *Final Adoption Decree*

The Children's Code provides the form for the Louisiana petition for adoption.<sup>218</sup> Along with the petition, an affidavit disclosing the fees and charges paid in connection with the adoption must be submitted.<sup>219</sup> A copy of the petition for adoption and attachments must be served by registered mail on the department and on any agency having legal custody of the child.<sup>220</sup>

The department then investigates the proposed adoption and submits to the court a confidential report regarding the child's availability for adoption, the child's physical and mental condition, and other factors related to the child's suitability for adoption by the petitioners, the moral and financial fitness of the petitioner, and the advantages and disadvantages of the proposed home for the child.<sup>221</sup> Within thirty to sixty days of service of process, the court will set a time and place for the hearing on the adoption petition. This time may be extended if the department is unable to complete its investigation, or it may be reduced to a minimum of fifteen days with written approval of the department and the petitioner.<sup>222</sup>

At the hearing, the court will consider the confidential report, the testimony of the parties, and if the child is twelve years old or more, the child's wishes.<sup>223</sup> The court will grant or refuse an interlocutory

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216. La. Ch.C. art. 1175.

217. *Id.* at comment. Zeller, *supra* note 26, at 119 n.30, reports home study costs of \$400 to \$800. Costs in Louisiana are estimated at \$200 to \$1500, Blakesley, *supra* note 36, at 8 n.78, citing Lucy S. McGough, Memorandum: Summary of the Children's Code (July 12, 1991).

218. La. Ch.C. arts. 1199 (agency) and 1221 (private).

219. La. Ch.C. arts. 1200, 1201, 1223.

220. La. Ch.C. arts. 1202, 1224.

221. La. Ch.C. arts. 1207, 1229.

222. La. Ch.C. arts. 1208, 1230.

223. La. Ch.C. arts. 1208(B), (C), 1230(B), (C).

decree on the basis of the best interests of the child.<sup>224</sup> However, the court may enter a final decree of adoption at the first hearing without entering an interlocutory decree under certain circumstances. For a child for whom the documentation of valid surrender has been obtained for immigration, the relevant circumstances would be whether the child was placed by an agency and the length of time she has already lived with the petitioner. For private adoptions, the child must have lived with the petitioners for one year before the hearing; for agency adoptions, the time requirement is only six months.<sup>225</sup> Whether the court enters a final decree also depends on its "due consideration" of the department's confidential report, the testimony of the parties, any other disputed issues, and the child's wishes if she is twelve or older.<sup>226</sup> With the scrutiny required by federal immigration law, allowing an award of the final adoption decree at the first hearing seems justified, assuming the time requirement is fulfilled.<sup>227</sup>

If the court awards an interlocutory decree instead of a final decree, several more steps are involved in the process. The parents must wait until the child has lived with them for at least one year, and six months must have passed since issuance of the interlocutory decree before they may file a petition for the final decree.<sup>228</sup> Before the final decree is issued, the department must make at least two visits to the home, the last within thirty days of the issuance of the final decree. Before the hearing for the final adoption decree, the department presents to the court a second confidential report covering the same areas as that submitted at the hearing for the interlocutory decree. The report provides information on any conditions that have changed since the initial report.<sup>229</sup> If the parents do not file for a final decree within two years of issuance of the interlocutory decree, the decree becomes null and void unless they can show good cause for an extension.<sup>230</sup>

Before the final decree is granted, the court for good cause may revoke the interlocutory decree on its own motion, a motion by the department, a motion by the petitioner, or by "any person interested in the child."<sup>231</sup> If the interlocutory or final adoption decree is denied

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224. La. Ch.C. arts. 1210, 1230.

225. La. Ch.C. arts. 1211, 1233. Note that this is one more reason to encourage the clients to use a licensed private agency.

226. La. Ch.C. arts. 1210, 1232.

227. However, because there is no set refinalization process, it remains unclear whether this will be the case. Miller, *supra* note 209.

228. La. Ch.C. arts. 1216, 1238.

229. La. Ch.C. arts. 1213, 1235.

230. La. Ch.C. arts. 1214, 1236.

231. La. Ch.C. arts. 1215, 1237. "Good cause" is defined in the comments as including "information questioning the suitability of the adoptive home, the fitness of the prospective

as not in the best interests of the child, the court may remove the child and appoint a legal custodian.<sup>232</sup> In the context of an ICA, this would be problematic legally because the foreign adoption decree would be recognized as valid. Would the child be allowed to stay with the parents under the foreign adoption decree, or be removed under the Louisiana proceeding? Clearly, a modified procedure needs to be formulated for Louisiana refinalization of ICAs.<sup>233</sup> In formulating such legislation, Louisiana could profit from examination of New York's domestic relations laws recently passed to accommodate refinalization of ICAs.

#### D. *New York's ICA and Refinalization Law*

New York law sets specific preadoption requirements for children for whom an orphan petition has been filed to allow their immigration for adoption in that state.<sup>234</sup> The law requires that written application be made for the court to order a preadoption investigation to determine whether the adoption is in the best interests of the child. The parents must appear before the court for examination, and the application must include authenticated evidence that the child is an alien under sixteen years of age and meets specified criteria to be classified as an "orphan." The statute's language on the "orphan" requirements tracks exactly the federal immigration requirements of 8 U.S.C. § 1101(b)(1)(F).<sup>235</sup> The comments to the law refer to the federal requirements, stating:

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adopting parents or other relevant matters contained in the confidential report prepared by the department of social services" and "proof of fraud or duress in execution of the surrender, which is preserved as a ground for nullification in Article 1147, if such a challenge is brought within ninety days of the surrender's execution." *Id.* at comments. Presumably proof of fraud in the surrender obtained for a foreign child would also fall within this article; however, the investigation required to ascertain orphan status for the orphan petition and visa will probably prevent this from being a problem.

232. La. Ch.C. art. 1220.

233. Epstein notes that if the state court denies the adoption, "troublesome guardianship questions arise" because the "adoptive parents have some protective interest over the child via the foreign adoption decree, but the United States court determined these parents inadequate to provide for the child's best interests." Epstein, *supra* note 46, at 243.

234. N.Y. Dom. Rel. Law § 115-a (McKinney 1988 and Supp. 1993).

235. N.Y. Dom. Rel. Law § 115-a.1(c) (McKinney 1988). That is, the statute requires that the child be an "orphan" "because of the death or disappearance of both parents, or because of abandonment, or desertion by, or separation or loss from, both parents, or who has only one parent due to the death or disappearance of, abandonment, or desertion by, or separation or loss from the other parent, and the remaining parent is incapable of providing care for such orphan and has in writing irrevocably released him for emigration and adoption, and has consented to the proposed adoption." *Id.*

The purpose of the pre-adoption procedure is to assure that the federal immigration requirements are satisfied, and, even more important, to avoid the harsh, if not tragic, circumstance of a child arriving in New York from a foreign country only to have the adoption petition denied on the ground that adoption is contrary to the child's best interests.<sup>236</sup>

If the orphan has no remaining parent, documentary evidence is required that "the person, public authority or duly constituted agency having lawful custody of the orphan . . . has in writing irrevocably released him for immigration and adoption and has consented to the proposed adoption."<sup>237</sup> The parent or parents must also provide documentary evidence that they "agree to adopt and treat the adoptive child as their or his or her own lawful child."<sup>238</sup>

The written application must include the facts establishing the child's status as an eligible orphan entitled to enter the United States with non-quota immigrant status under federal immigration law.<sup>239</sup> The application must include the circumstances surrounding the release and consent for the child's adoption, to the extent that they are known to the adoptive parent.<sup>240</sup> If after examining the report from the pre-adoption investigation, the court finds the adoption in the best interests of the child, it will issue a certificate under its seal stating that a preadoption investigation has been conducted, all applicable laws have been complied with, and the adoption is in the best interests of the child.<sup>241</sup>

The statute further provides for state refinalization of a foreign adoption decree.<sup>242</sup> Under this section, parents may apply for readoption of a child adopted by final order of adoption in a foreign country.<sup>243</sup>

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236. Alan D. Scheinkman, *Practice Commentaries*, in McKinney's Consolidated Laws of New York Annotated, Book 14, Domestic Relations Law 490, 491 (1988 and Supp. 1993). The comments also point out that "these procedures only apply to private placement adoptions; adoptions from authorized agencies are exempted from the statutory requirements." *Id.*

See also *In re Jose L.*, 483 N.Y.S.2d 929, 931-932 (Fam. Ct. 1984), in which the court commented that "[i]n enacting DRL § 115-a, the Legislature intended, in addition to satisfying federal immigration requirements, to ensure that a child is not brought here from a foreign country only to have the adoption ultimately denied."

237. N.Y. Dom. Rel. Law § 115-a.1(c) (McKinney 1988).

238. *Id.*

239. N.Y. Dom. Rel. Law § 115-a.2 (McKinney Supp. 1993).

240. *Id.*

241. N.Y. Dom. Rel. Law § 115-a.4 (McKinney 1988).

242. N.Y. Dom. Rel. Law § 115-a-8 (McKinney Supp. 1993).

243. Alan D. Scheinkman, *Supplementary Practice Commentaries*, in Cumulative Annual Pocket Part, McKinney's Consolidated Laws of New York Annotated, Book 14, Domestic Relations Law 100 (1993).

In such proceedings, "proof of finalization of an adoption outside the United States shall be prima facie evidence of the consent of those parties required to give consent to an adoption."<sup>244</sup>

The comments remark that "at least some in the judiciary have been less than receptive to proceedings for 'readoption,'" but that the purpose of this section is "to expressly authorize 'readoption' proceedings," although they are not made mandatory by it ("when a petition is brought, the court would have to entertain it").<sup>245</sup>

The law facilitates readoption with its provision that the foreign adoption decree constitutes prima facie evidence of required consents. This provision contemplates "that, as a practical matter, it may be difficult to obtain proper New York consent forms from the biological parents in the foreign country."<sup>246</sup> The statute apparently assumes that foreign law regarding required consents will be the same as New York's, but even if the requirements are not the same (as regarding consent of an unwed father), the statute directs that the court consider the foreign adoption order as prima facie proof that the required consents have been obtained.<sup>247</sup> Of course, since the foreign order is given only prima facie effect, it could be rebutted by evidence that consent was not obtained.<sup>248</sup> But unless the foreign country overturns its own order of adoption or it is denied recognition here, the foreign order could remain outstanding, even if New York denies a state order.<sup>249</sup> Regarding some issues, as the New York requirement for notification of biological parents who have not consented to the adoption, if the foreign parents did contest the adoption in New York (which the comments characterize as "highly unlikely"), the New York court would probably have to decide on the basis of the facts in that particular case.<sup>250</sup>

## VI. COORDINATING FEDERAL AND STATE LEGISLATION FOR ICA

An overview of the complex ICA process reveals that many laws designed to protect children by regulating adoptions function effectively to prevent their adoption.<sup>251</sup> Although states are recognized as having jurisdiction over adoption, for ICAs federal immigration laws effectively preempt state laws in essential areas. While adoptions that meet state requirements will be valid adoptions, they will not be sufficient

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244. N.Y. Dom. Rel. Law § 115.a-8 (McKinney Supp. 1993).

245. Scheinkman, *supra* note 243, at 100-01.

246. *Id.* at 101.

247. *Id.*

248. *Id.*

249. *Id.*

250. *Id.*

251. Bartholet, *supra* note 1, at 10-41.

to allow immigration. Federal definitions of "orphan" and "abandonment," by restricting the number of children who can qualify for non-preference visas, greatly restrict the children available for adoption by Louisiana parents. In contrast to the restrictive federal criteria, Louisiana law allows voluntary relinquishment for adoption by both parents of a legitimate child, rather than requiring such a child to be abandoned to an orphanage.<sup>252</sup>

Federal immigration laws should be more deferential to state adoption laws in the context of ICAs. While immigration issues may be the province of the federal government, the actual adoption issues relating to the ability of parents to care for a child are within the realm of state jurisdiction.<sup>253</sup> Specifics such as the age requirements for adoptive parents and approval of the home study should be subject only to state regulation and approval, instead of a dual set of regulations. The federal preemption doctrine does not allow federal denial of state adoption law, as such. But federal immigration decisions can negate the opportunity to bring a child into the United States.

An INS decision (still cited by INS as a precedent controlling on INS officers), *In re Russell*, exemplifies this tension between state and federal authority over who may adopt a child from a foreign country.<sup>254</sup> In *Russell*, INS denied an orphan petition on the ground that the petitioners had failed to properly supervise their 16-year-old daughter, Karen. The Director of the American Red Cross Unit at the Naval Base in the Philippine Islands, where the family lived, submitted a favorable home study report, and the California State Department of Public Welfare certified that the state preadoption requirements had been met. The overseas orphan investigation was also favorable.<sup>255</sup> Karen was the child of the mother's first marriage. Karen's mother

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252. La. Ch.C. arts. 1114, 1193, 1196. Of course, the person making the surrender must be mentally capable of doing so knowingly. La. Ch.C. art. 1114.

253. Ellis, *supra* note 15, at 364; Restatement (Second) of Conflict of Laws § 78 (1969). The "traditional" abstention of the Supreme Court and federal courts from acting in domestic relations cases is supported by

such considerations as lack of familiarity with the law of domestic relations in general and with local variations on that law, the desirability of avoiding conflicts with state court decisions, the inability of federal courts to provide the continuing supervision which many cases demand and the consequent inability to provide full relief for the parties, and the prospect of a sizable increase in docket congestion in the federal courts resulting from the assumption of jurisdiction in such cases.

Homer H. Clark, Jr., *The Law of Domestic Relations in the United States* 419 (2d ed. 1988).

254. 11 I. & N. Dec. 302, 304 (1965); cited as controlling in DOJ, *supra* note 76, at 26.

255. *Russell*, 11 I. & N. Dec. at 302.

and her stepfather had been married only three years (since Karen was thirteen) when they filed the petition. Under these facts, it seems questionable for INS to override the favorable home study and California certification to hold that it had "not been established that the petitioner and his spouse will properly care for the children if they are admitted to the United States."<sup>256</sup>

A federal court of appeals in *Huynh Thi Anh v. Levi*,<sup>257</sup> a case holding that the disputed custody of four Vietnamese orphans was a matter of state jurisdiction, emphasized the position of the state in resolving domestic questions:

Traditionally, disputes involving domestic relations including child custody and adoption proceedings, have been thought to be wholly within the province of the state courts. The cases recognize the "local" nature of domestic relations problems, the strong interest of the states in addressing such questions without interference, and the expertise of local agencies and courts in monitoring and resolving domestic relations matters.

In the area of state law, Louisiana should legislatively provide for a refinalization procedure for ICAs. Validity of foreign adoption decrees should be specifically recognized, and the decree allowed to serve as the documentary basis for the refinalization process. The preadoption home study requirement could be modified for ICAs so that it could suffice for the final decree, rather than leaving open the possibility that the parents and child will have to go through the extra steps of first obtaining an interlocutory decree and then going through that finalization procedure. This would be especially practical since the legislatively provided alternative of the certification for adoption in lieu of the preadoption home study is not available for ICAs because of the immigration requirements for a preadoption home study.<sup>258</sup>

More emphasis on preadoption requirements that parallel federal immigration requirements for ICAs coupled with a more streamlined approach for finalization would shift the state investigation to the period before the child is brought into the United States (coinciding with INS advance processing). It could also help ensure that the state is not left in the position of recognizing a foreign adoption decree as valid, yet denying a Louisiana decree.

These changes in Louisiana law would decrease the uncertainty and potential length and complexity of the ICA procedure for Louisiana

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256. *Id.* at 302, 305. There were other problems with the adoption as well, but the court stated that it was affirming the denial on this ground.

257. 586 F.2d 625 (6th Cir. 1978).

258. *Id.* at 632.

citizens. More importantly, they would contribute to the goal of the Louisiana Children's Code of serving the best interests of the child.

*Mary C. Hester*

## VII. Appendix

## Steps in the Immigration and Adoption of A Child for ICA in Louisiana:

Steps in the Process	Timing Factors	Relevant Statutes
1. File Advance Processing Application, I-600A, with supporting documentation on parents (e.g., marriage certificate, proof of citizenship, fingerprint checks) and filing fee.	Allow time for obtaining and authenticating supporting documents required; e.g., fingerprint checks take 6 weeks to 2 months to process.	8 C.F.R. §204.1(b)(3).
2. Have home study by agency authorized in Louisiana; get La. certification for adoption with favorable decision.	File home study report with I-600A or within 1 year of it; La. certification for adoption is valid for a minimum of 2 years. (requires state law enforcement fingerprint check).	8 U.S.C. §1154(d); 8 C.F.R. §204.2(d)(2)(i)-(ii); La. Ch. C. arts. 1171-1173.
3. File Form I-600, Petition to Classify Orphan as an Immediate Relative, with supporting documentation on child, including translations and translator's affidavit for all documents not in English, proof that state preadoption requirements are met (La. certification for adoption, step 2), required releases from child's parent(s) or guardian, and final copy of decree of adoption if child is	File when child to be adopted is located; may be while advance processing is still pending or within 1 year of a favorable decision.	8 U.S.C. §1101(b)(1)(F); 8 C.F.R. §204.1(b)(2)-(3), §204.2(d).

adopted in sending state (recommended). If advance processing (step 1) is not done, supporting documentation for parents must be filed with this form with filing fee.

4. Apply for immigrant visa for child as immediate family member.

Apply for visa after orphan petition is approved at American consulate or embassy in the sending state.

8 U.S.C. §1154(b); 8 C.F.R. 204.1(b)(1)(iii)(C).

5. After visa is issued and child enters U.S., exchange visa for alien identification card ("green card"), which proves legal U.S. residence.

Obtain green card on arrival of child, who will remain an alien until naturalized.

§ U.S.C. §1201(e).

6. Have the child naturalized by applying with the Immigration and Naturalization Service for administrative procedure, or through the courts; check sending state law to determine whether child needs to renounce native citizenship.

Apply for naturalization any time after arrival if child has been adopted in the sending state; no waiting period, but must first be adopted and lawful permanent U.S. resident. For La., if naturalization certificate is obtained and submitted with the petition for state refinalization of adoption, the birth certificate issued

8 U.S.C. § 1452(b)(1); La. R.S. 40:79 (C)(4).

will be annotated to serve as proof to all state agencies of U.S. citizenship.

7. Initiate La. refinalization of the adoption by filing petition for adoption with certified copy of child's original birth certificate (and translation), certified copy of certificate of naturalization if obtained, certification for adoption (obtained through preadoption home study, step 2), documentation that surrender or consent to adoption was validly executed under laws of the sending state (as required for INS orphan petition, step 3), and affidavit disclosing fees paid for the adoption.

8. Serve copies of the petition for adoption and attachments by registered mail on La. Dept. Social Services and any agency having legal custody of the child.

Because the court will not issue a final decree of adoption before the child has been living with the parents at least 6 months for an agency adoption (at date of hearing), wait until this time has elapsed before petitioning (an interlocutory decree may be obtained earlier).

Within 30-60 days of service of process, the court sets a time and place for a hearing on the adoption petition; the time may be extended if the dept. is unable to complete its investigation of the

La. Ch.C. arts.  
1128, 1129,  
1171, 1173,  
1197, 1199,  
1200, 1201,  
1208, 1210,  
1211, 1221,  
1223, 1230,  
1232, 1233; La.  
R.S. 40:79(C).

La. Ch.C. arts.  
1202, 1207,  
1208, 1224,  
1229, 1230.

adoption and confidential report to the court, or it may be reduced to a minimum of 15 days with written approval of the dept. and petitioner.

9. Court holds hearing on adoption and grants or denies interlocutory or final decree of adoption.

For private adoptions, child must have lived with petitioners 1 year before hearing for court to award final adoption decree; for agency adoptions, time requirement is 6 months.

La. Ch.C. arts. 1208, 1210, 1211, 1230, 1232, 1233.

10. If court enters interlocutory rather than final decree, after child has lived with parents at least 1 year and after at least 6 months since issuance of interlocutory decree, file petition for final decree. Dept. makes home visits and submits confidential report to court.

Before final decree is issued, dept. must make at least 2 visits to home, the last w/in 30 days of issuance of final decree. If parents do not file for final decree within 2 years of issuance of interlocutory decree, it becomes null and void unless they can show good cause for an extension.

La. Ch.C. arts. 1213-1216, 1235-1238.

