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Whose Rights Should Prevail? Toward a Child-Centric Approach to Revocation of Birthparent Consent in Domestic Infant Abortion

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WHOSE RIGHTS SHOULD PREVAIL? TOWARD A CHILD-CENTRIC APPROACH TO REVOCATION OF BIRTHPARENT CONSENT IN DOMESTIC INFANT ADOPTION

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INTRODUCTION

Laws governing infant adoption in the United States have undergone dramatic changes over the past several decades. A number of high-profile legal custody battles[1] between birthparents and adoptive parents in the late 1980s and early 1990s created media spectacle followed by public outcry.[2] Courts seemed to be torn between conflicting legal goals: the solidly established right to parent formed by the biological bond between a person and his or her natural offspring, enforceability of contract

1. For example, in *Petition of Doe*, 638 N.E.2d 181 (Ill. 1994), the Illinois Supreme Court reversed the findings of the trial court, returning four-year-old "Baby Richard" to his natural father after finding that the adoptive parents and their attorney had not made sufficient effort to notify him of the adoption proceedings. The trial court had found that the natural father's consent to adoption was not needed when he failed to show interest in the child during the first 30 days of the child's life, despite the fact that he was out of the country during the pregnancy and the child's mother had told him that the child had died. The "Baby Richard" case became the impetus for Illinois' putative father registry. Likewise, *Matter of Baby M.*, 537 A.2d 1227 (N.J. 1998), created fanfare when a surrogacy contract conflicted with public policy in allowing monetary gain through adoption. The natural father did not have a custody right superseding the rights of the surrogate mother through biological connection alone, but a best interests of the child analysis, particularly in light of surrogate mother's willingness to sell her story to the media, justified awarding custody to the natural father, with visitation granted to the surrogate mother. Finally, "Baby Jessica" was taken from her adoptive home at the age of two and a half after the Supreme Court of Michigan held in *In re Clausen*, 502 N.W.2d 649 (Mich. 1993), that neither the adoptive parents nor the child had standing to demand a best interests hearing, but that such a hearing would only be considered on determination of unfitness of the natural parents. There was evidence that the adoption attorney obtained the birthmother's consent before expiration of the 72-hour statutory waiting period, and that the birthfather was not notified of the adoption proceedings. The adoptive parents were treated as third-party strangers to the child, though their home was the only home she had known her entire life.

2. *See, e.g.*, Darlene Gavron Stevens, *Adoption Reformers Target Baby Richard Case*, CHI. TRIB., Jan. 6, 1994, § 2, at 1; Janan Hanna, *1 Year Later, Legacy of Baby Richard Case Is Fear*, CHI. TRIB., April 29, 1996, § 1, at 1 ("What if the birth parents change their mind? What if a biological father resurfaces and a judge invalidates the adoption? Would it be less risky to adopt from a foreign country?"); Iver Peterson, *Baby M's Future*, N.Y. TIMES, April 5, 1987, § 4, at 1 ("Last week, in a decision that created law in the legislative vacuum surrounding surrogate motherhood, Judge Harvey R. Sorkow of New Jersey Superior Court awarded custody of one-year-old Baby M to William Stern, the child's natural father, and his wife, Elizabeth. He stripped Mary Beth Whitehead, the surrogate mother, of all parental rights, and ruled that the contract she had signed with the Sterns—and reneged on—was legal," despite material misrepresentations by the Sterns); *Justice for All in the Baby M Case*, N.Y. TIMES, Feb. 4, 1988, at A26 ("At a stroke, New Jersey's Supreme Court brought clarity and justice to the Baby M case, which so tormented the nation last spring: Mary Beth Whitehead-Gould retains her rights as a parent. William Stern and his wife retain the right to raise his child. New Jersey acquires a convincing judgment that a 'surrogate parent' contract for money amounts to an illegal bill of sale for a baby."); Jon D. Hull, *The Ties That Traumatize*, TIME MAG., April 12, 1993, at 48 ("Sometime before midnight on April 20, two-year-old Jessica DeBoer of Ann Arbor, Michigan, is scheduled to disappear, leaving behind a heartbroken couple she calls Mommy and Daddy, a dog named Miles, her yellow bedroom and just about everything she has ever known . . . to begin life anew as Anna Lee Schmidt.").

in adoption and surrogacy agreements, and an ever-evolving "best interests of the child" determination which, at times, seemed to give the courts an *ad hoc* power to override all other considerations.[3] No uniform approach to adoption of infants exists among the fifty states. In the midst of heightened public awareness of adoption controversy, the National Conference of Commissioners on Uniform State Laws ("Uniform Law Commission") submitted its 1994 version of the Uniform Adoption Act.[4] The Act has been the subject of much commentary over the past two decades, but has only been enacted in one state, and the current consent and revocation statutes in that jurisdiction do not reflect their counterparts in the Uniform Adoption Act.[5]

In particular, the high-profile cases that captured media attention and involved withdrawal—or attempted withdrawal—of birthparent consent to adoption seem to have had more impact on the shaping of subsequent adoption legislation governing birthparent consent and revocation of birthparent consent than the approach taken by the Uniform Law Commission. For example, in 2007 the Supreme Court of Illinois credited the "Baby Richard" case from 1994[6] with prompting the legislature to change Illinois adoption laws and to create the state's putative father registry.[7] The purpose of the resulting laws was to "give protection to both the biological parents and the adoptive parents . . . not jeopardizing either group."[8] "[T]he thrust of the Bill . . . is to put some type of . . . finality and some type of predictability into our adoption laws as they exist right now."[9]

Two decades later, though overhaul of adoption laws across the United States has been nearly universal, there is still no uniformity among the states in approach to voluntary relinquishment of parental rights: the very issue at the heart of the controversial cases that sparked reform.[10] This Note attempts to track the development of domestic adoption laws as they affect birthparent consent in infant adoptions, the competing policies driving these developments, and the way states have attempted to reconcile that friction. Part I of this Note provides an underpinning of adoption

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3. Carrie L. Wambaugh, *Biology Is Important, But Does Not Necessarily Always Constitute a "Family": A Brief Survey of the Uniform Adoption Act*, 32 AKRON L. REV. 791, 828 (1999) ("[T]here is no mandatory overall rule of construction for applying the 'best interests' standard").

4. UNIF. ADOPTION ACT, 9 U.L.A. 11 (Supp. 2013). The 1994 version replaced the original 1953 Act and its 1969 amended version.

5. *See* John J. Sampson, *Uniform Family Laws and Model Acts*, 42 FAM. L.Q. 673, 684 (2008); *see also* UNIF. ADOPTION ACT, 9 U.L.A. 11–15.

6. *See supra* note 1.

7. J.S.A. v. M.H., 863 N.E.2d 236, 251 (Ill. 2007).

8. *Id.* (quoting The 88th Ill. Gen. Assem., House Proceedings, June 30, 1994, at 115 (statement of Rep. Wojcik)) (brackets omitted).

9. *Id.* (quoting The 88th Ill. Gen. Assem., House Proceedings, June 30, 1994, at 115 (statement of Rep. Dart)).

10. *See infra* APPENDIX A: Survey of Relevant Consent and Revocation Statutes by State (describing the disparity in approaches of consent and revocation statutes).

terminology by outlining the actors involved, the basic elements required for infant adoption in the United States, and how birthparent consent fits in the mix. Part II gives a brief historical background of adoption statutes in the United States, including more recent attempts at uniformity in adoption laws across the fifty states. In Part III, this Note addresses competing policy interests and the friction that arises among the dueling rights of the various actors in the adoption process. Part III also attempts to grasp a firm definition of the ever-elusive "best interests of the child" standard, taking the position that the child's interest in stability and permanency must be the ultimate goal of the law in the adoption context. Part IV categorizes current statutes across the fifty states into three distinct groups, drawing heavily on data compiled in APPENDIX A concerning certain identified criteria in each state's adoption laws. Finally, Part V proposes a model statute that falls squarely into the most conservative of these categories, balancing the interests and rights of the various actors with the best interests of the child being held paramount. The proposal argues, first, for only a very brief delay of birthparent consent after the child's birth and, second, for no subsequent revocation period. Though the primary purpose of this limitation is stability for the child, this Note will show that this design best serves each of the other actors as well.

I. ADOPTION IN GENERAL

Fundamental to a discussion of reform to laws governing consent and revocation in adoption proceedings is identification of the actors involved. Adoption brings about a unique relationship for a limited—or in some cases, protracted—period of time between three distinct entities with varying and sometimes conflicting rights and interests. Commonly known among adoption professionals as the "adoption triad," the parties to this relationship are the child, the birthparents, and the adoptive parents.[11] Various other players may become involved on behalf of one or more of these actors: the court, a state or private agency, or a lawyer. But the needs and rights of the members of the triad are what are at issue here.

Joan Heifetz Hollinger, adoption advocate and co-drafter of the 1994 Uniform Adoption Act, writes:

> Adoptive relationships have six principal elements, each of which is said to be a necessary legal prerequisite for, or a consequence of, adoption, or a socially and psychologically desirable characteristic of adoption. These are: (1) the necessity of parental consent from a child's original parents—usually referred to as "birth parents"—or a sound basis for terminating parental rights, as a jurisdictional

11. *See Adoption Triad*, ADOPTION.COM, www.adoption.com/topics/adoption-triad (last visited Dec. 24, 2013).

> prerequisite for an adoption proceeding; (2) selection of suitable adoptive parent(s) in order to serve the child's best interests; (3) the characterization of adoption as a non-contractual "gift" and not a bargained-for-exchange; (4) the "asserted-equivalence" doctrine, that an adoptive parent-child relationship replaces "in all respects" the child's relationship to her birth family; (5) the confidentiality of adoption proceedings and records; (6) the permanence and autonomy of adoptive relationships, subject to the same statutory and constitutional protections that would initially apply to a child's original family.[12]

It is to the first of these elements that this Note is dedicated, though each of the others certainly comes to bear in the analysis. While it is hardly possible to discuss child custody without, for example, bringing in a discussion of the "best interests of the child" standard, of primary significance, at least in its status as a threshold matter if not in importance, is the determination of birthparent consent to adoption, alternately referred to as voluntary relinquishment of parental rights: "Because of the fundamental nature of parental rights, the issue of the requirement of parental consent to an adoption is determined without regard for the best interests of the child."[13] Adoption proceedings can only commence if parental rights are first terminated, either voluntarily by consent or relinquishment, or involuntarily through a state-initiated termination proceeding for unfitness.[14]

"[E]ver since the first adoption statutes were enacted in the 1850s, parental consent, or a legitimate reason for dispensing with the need for consent, has been an essential, albeit not a sufficient, jurisdictional prerequisite for a valid adoption."[15] But many questions revolving around birthparent consent remain unanswered: Who must give consent? When is a birthfather's consent required? When can consent be given, and to whom? Is consent final at the moment it is given, or should there be a period of time for the birthparent to change his or her mind? And what procedures should be implemented to guard against abuse of birthparent vulnerability during the time of consent?

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12. Joan Heifetz Hollinger, *State and Federal Adoption Laws*, *in* FAMILIES BY LAW: AN ADOPTION READER 37, 38–39 (Naomi R. Cahn & Joan Heifetz Hollinger eds., 2004).

13. *In re* Adoption of T.L.C., 46 P.3d 863, 870 (Wyo. 2002) (citations omitted).

14. *Id.* at 868.

15. Naomi R. Cahn & Joan Heifetz Hollinger, *Introduction* to FAMILIES BY LAW: AN ADOPTION READER, *supra* note 12, at 4.

II. THE HISTORIC PERSPECTIVE

Adoption was not a recognized practice under British common law.[16] Rather, orphans were cared for through indentured servitude, apprenticeships, or as wards of the state in publicly funded orphanages.[17] These practices were subsequently imported to America and held sway through much of the nineteenth century.[18] But statutes enabling adoption began to be enacted in many states in response to specific individual needs arising in legislative petitions: particularly, petitions for name change and inheritance rights for wards of individuals unrelated or tenuously related by blood.[19] These were particularized, rather than general statutes, and only effective for the particular private adoption each authorized.[20] In 1850, Texas enacted a more generalized statute that allowed a person to file an adoption petition with the court, but it only covered inheritance rights in its scope.[21]

Experts recognize *An Act to Provide for the Adoption of Children*, enacted by the Massachusetts legislature in 1851, as the first modern American adoption statute.[22] The Act provided for a much broader treatment of adoption, including a comprehensive look at such modern adoption concepts as who may adopt, who may be adopted, the necessity for consent in writing, a prohibition against a married person adopting a child without his spouse's assent, filing of an adoption petition with the court, a final decree of adoption issued by the court, rights and status of the adopted child as a full member of the adoptive family "as if such child had been born in lawful wedlock of such parents," and severance of birthparent rights.[23] Though the Act makes no mention of a "best interests of the child"

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16. Janet Hopkins Dickson, Comment, *The Emerging Rights of Adoptive Parents: Substance or Specter?*, 38 UCLA L. REV. 917, 923 (1991).

17. *Id.* Enter the picture of Dickens' novels and Victorian mothers stealing away in the night, leaving their infants in orphanage doorways to be cared for.

18. *Id.*

19. *See* Naomi R. Cahn, *Perfect Substitutes or the Real Thing?*, *in* FAMILIES BY LAW: AN ADOPTION READER 19, *supra* note 12, at 19–20 [hereinafter Cahn, *Perfect Substitutes*].

20. *Id.* at 20.

21. *Id.*

22. *Id.* at 22–23.

23. The Act reads, in its entirety:

> BE it enacted by the Senate and House of Representatives, in General Court assembled, and by the authority of the same, as follows:
>
> Sect. 1. Any inhabitant of this Commonwealth may petition the judge of probate, in the county wherein he or she may reside, for leave to adopt a child not his or her own by birth.
>
> Sect. 2. If both or either of the parents of such child shall be living, they or the survivor of them, as the case may be, shall consent in writing to such adoption: if neither parent be living, such consent may be given by

standard, many of the elements reviewed in a modern best interests analysis are present in its language, and subsequent legislation modeled after the Massachusetts Act began to explicitly include considerations for the welfare of the child.[24]

> the legal guardian of such child; if there be no legal guardian, no father nor mother, the next of kin of such child within the State may give such consent; and if there be no such next of kin, the judge of probate may appoint some discreet and suitable person to act in the proceedings as the next friend of such child, and give or withhold such consent.
>
> Sect. 3. If the child be of the age of fourteen years or upwards, the adoption shall not be made without his or her consent.
>
> Sect. 4. No petition by a person having a lawful wife shall be allowed unless such wife shall join therein, and no woman having a lawful husband shall be competent to present and prosecute such petition.
>
> Sect. 5. If, upon such petition, so presented and consented to as aforesaid, the judge of probate shall be satisfied of the identity and relations of the persons, and that the petitioner, or, in case of husband and wife, the petitioners, are of sufficient ability to bring up the child, and furnish suitable nurture and education, having reference to the degree and condition of its parents, and that it is fit and proper that such adoption should take effect, he shall make a decree setting forth the said facts, and ordering that, from and after the date of the decree, such child should be deemed and taken, to all legal intents and purposes, the child of the petitioner or petitioners.
>
> Sect. 6. A child so adopted, as aforesaid, shall be deemed, for the purposes of inheritance and succession by such child, custody of the person and right of obedience by such parent or parents by adoption, and all other legal consequences and incidents of the natural relation of parents and children, the same to all intents and purposes as if such child had been born in lawful wedlock of such parents or parent by adoption, saving only that such child shall not be deemed capable of taking property expressly limited to the heirs of the body or bodies of such petitioner or petitioners.
>
> Sect. 7. The natural parent or parents of such child shall be deprived, by such decree of adoption, of all legal rights whatsoever as respects such child; and such child shall be freed from all legal obligations of maintenance and obedience, as respects such natural parent or parents.
>
> Sect. 8. Any petitioner, or any child which is the subject of such a petition, by any next friend, may claim and prosecute an appeal to the supreme judicial court from such decree of the judge of probate, in like manner and with the like effect as such appeals may now be claimed and prosecuted in cases of wills, saying only that in no case shall any bond be required of, nor any costs awarded against, such child or its next friend so appealing. [Approved by the Governor, May 24, 1851.]

Law of May 24, 1851, ch. 324, 1851 Mass. Acts 815.

24. Cahn, *Perfect Substitutes*, *supra* note 19, at 23.

As modern adoption statutes developed in all fifty states through the latter part of the nineteenth and early part of the twentieth centuries, legislators sought to satisfy competing interests among the various actors, but with the primary goals being the child's best interests and the protection of biological parents' constitutional rights in the securing of informed, voluntary consent.[25] The results, however, were varied as the states' approaches to adoption regulation sought to reconcile the complex and "conflicting mixture of competing rights" that ultimately led to the series of highly-publicized decisions in various jurisdictions outlined above.[26] Such anomalies raised public awareness and sparked a cry for reform in legislatures across the United States.

Also, until the latter part of the twentieth century, society found acceptable certain harsh language to describe each member of the adoption triad: The child was considered a "bastard" or "illegitimate," the birthmother was "promiscuous" or "irresponsible," and the adoptive family was "barren."[27] While the language has softened, much of the stereotype and echoes of the stigma remain.[28] In modern adoption, vestiges of suspicion in public opinion linger, bleeding over into legislation which is often overly wary of agency practice, adoptive and birthparent motives, and a "gray market" view of much of adoption culture.[29]

In the wake of cries for reform and a need to renew public sentiment about the institution of adoption, two separate and very different movements developed, each attempting to reconcile variance in adoption law across the United States: The Uniform Adoption Act ("UAA")[30] and The Interstate Compact on the Placement of Children ("ICPC").[31] The UAA was first enacted in 1953 and amended for the last time in 1994.[32] The 1994

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25. *See* Robin DuRocher, *Balancing Competing Interests in Post-Placement Adoption Custody Disputes: How Do the Scales of Justice Weigh the Rights of Biological Parents, Adoptive Parents, and Children?*, 15 J. LEGAL MED. 305, 309 (1994).

26. *Id.*

27. Dickson, *supra* note 16, at 926.

28. *Id.*

29. *See id.* at 934 (implying that all adoptions, whether agency or independent, have been historically viewed through this skeptical lens); *see also Independent Adoption*, ADOPTION.COM, http://www.encyclopedia.adoption.com/entry/independent-adoption/180/1.html (last visited Dec. 30, 2013). *See generally* Melinda Lucas, *Adoption: Distinguishing Between Gray Market and Black Market Activities,* 34 FAM. L.Q. 553–64 (2000) (discussing that independent adoption—adoption facilitated by an intermediary, such as an attorney, medical professional, member of the clergy, or other adoption facilitator, rather than a public or private adoption agency—is sometimes called "gray market adoption" (a play on the term "black market adoption" used to describe illegal activity) by its detractors).

30. UNIF. ADOPTION ACT, 9 U.L.A. 11 (Supp. 2013).

31. SECRETARIAT TO THE ASS'N OF ADM'RS OF THE INTERSTATE COMPACT ON THE PLACEMENT OF CHILDREN, AM. PUB. HUMAN SERV. ASS'N, GUIDE TO THE INTERSTATE COMPACT ON THE PLACEMENT OF CHILDREN 10 (2002), *available at* http://www.aphsa.org/content/dam/AAICPC/PDF%20DOC/Resources/Guidebook_2002.pdf [hereinafter ICPC GUIDE].

32. 9 U.L.A. 11, 133 (Supp. 2013).

amendment really constituted an entire rewrite of the Act.[33] It was intended as "a comprehensive codification of adoption law, covering everything from birth parent consent to adoption records confidentiality."[34] Commentators around the time of its final amendment hailed the 1994 Act as "a major initiative in the field of children's rights"[35] that "strives to provide some certainty in the quagmire of adoption law."[36] However, the UAA never received much support in state legislatures and was subsequently downgraded to a model act.[37]

The ICPC is a statutory agreement initiated in 1974 that has been adopted and is currently utilized in all fifty states, as well as the District of Columbia and the Virgin Islands.[38] It seeks to guarantee that certain agreed-upon practices take place before a child is transported from one state to another.[39] "The primary purpose of the ICPC is to ensure that children placed out-of-state are placed with care-givers who are safe, suitable and able to meet the child's needs."[40] ICPC workers in each state involved in an adoption evaluate a checklist of requirements that must be met as well as the home study prepared for the adoption and other pertinent paperwork before approving the removal of the child from his or her state of birth.[41] While the ICPC does not resolve the issue of differences between adoption requirements in various states, it has for decades provided a means for working through the differences to provide as smooth a transition from one jurisdiction to the next as is possible in the current regime.[42] Effectively, The ICPC has served as a stop-gap in the absence of uniformity among state adoption laws.

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33. Sampson, *supra* note 5, at 684 ("Despite the innovation found in many of its provisions, the UAA immediately attracted controversy, not support. After quick enactment by a single state, it soon fell into obscurity. The main complaints were an excess of complexity, unacceptable alteration of known procedures, and the substantial length of the text. Downgraded to a model act, it remains available on the NCCUSL website for review.").

34. *Adoption Act (1994)*, UNIFORM LAW COMMISSION, http://www.uniformlaws.org/Act.aspx?title=Adoption%20Act%20%281994%29 (last visited Dec. 30, 2013).

35. Wambaugh, *supra* note 3, at 831.

36. Sarah Clarke Wixson, *And Baby Makes Three: The Rights of the Child, the Adoptive Parents and the Biological Parents Under the Uniform Adoption Act*, 33 IDAHO L. REV. 481, 497 (1997).

37. Sampson, *supra* note 5, at 684.

38. ICPC GUIDE, *supra* note 31, at 3.

39. *Id.* at 3–4.

40. *ICPC FAQ*, AM. PUB. HUMAN SERV. ASS'N, http://www.icpc.aphsa.org/content/AAICPC/en/resources/ICPCFAQ.html (last visited Jan. 12, 2014).

41. ICPC GUIDE, *supra* note 31, at 4–5.

42. *See generally* ICPC GUIDE, *supra* note 31.

III. POLICY CONCERNS: COMPETING INTERESTS AND RIGHTS OF THE VARIOUS ACTORS

One commentator noted, "Two principal and widely accepted goals of domestic infant adoption are (1) preventing the unnecessary separation of family members by ensuring that birth parents make informed and deliberate decisions and (2) protecting the finality of adoptive placements."[43] However, as this argument is framed, it becomes necessary to be ever mindful of a tendency to slip into a view of the child as belonging, in a proprietary sense, to one set of parents or the other. Stability and permanency and a sense of belonging are essential to the psychological well-being of a child.[44] While the parenting instinct is a natural desire to protect those in our care who are most vulnerable, danger lies in the parental tendency to become possessive to the point of overshooting the interests of the child, with parental interests—whether biological or adoptive—taking over:

> The law's commitment to respect parental rights does not mean that children are to be regarded as property. However, sometimes they are treated as such. This misperception is reinforced by language that emphasizes the rights rather than duties of adults. The filing of a birth certificate is thought of as an assignment of a child to adults rather than the other way around. Likewise, divorce decrees award custody of the child to one of the competing adults rather than awarding a custodial parent to the child.
>
> The vocabulary of placement ought to be reconceptualized to force focus where it belongs—on parental responsibility to satisfy a child's fundamental right to caring parents.
>
> The child's best interests will be served by providing the least detrimental alternative.[45]

This should not be read to strip biological parents or adoptive parents of their rights and interests. Rather, interests of the parents are subordinate in

43. Elizabeth J. Samuels, *Time to Decide? The Laws Governing Mothers' Consents to the Adoption of Their Newborn Infants*, 72 TENN. L. REV. 509, 511 (2005).

44. *See* JOSEPH GOLDSTEIN, ALBERT J. SOLNIT, SONJA GOLDSTEIN & ANNA FREUD, THE BEST INTERESTS OF THE CHILD: THE LEAST DETRIMENTAL ALTERNATIVE 9 (The Free Press 1996).

45. *Id.* at 227–28.

the adoption context to those of the child, except when—as would happen without deviation in a perfect world—those interests run in concert.[46]

As the argument has been framed here—with a view of the conflict as between keeping the biological family together for the sake of stability for the child and, in cases where the biological family has been disrupted, keeping the adoptive family together for the sake of stability for the child—the crux of the conflict becomes the window of time when final decisions for the child's fate are being determined.[47] Where the child's interests are the ultimate aim, resolution of this conflict can only be attained by determining an elusive "if": If the biological family is to remain together, then it is in the child's best interests for birthparents to be allowed generous periods of time to consider consent to adoption as well as to revoke that consent.[48] But if the child is to ultimately be adopted, then it is in the child's best interests for the process to take place smoothly and quickly and without threat of later disruption.[49] Birthparents' and adoptive parents' interests each run parallel to *both* conflicting interests of the child, to a degree, and "in a better society" would run entirely in congruity.[50] But in the real world in which we live, the various actors have divergent interests in the time surrounding the birth and possible adoption of the child,[51] and often the child's interests are in conflict with one another.[52] At this point in the analysis, a closer look at the interests of the various actors in the adoption triad is warranted.

A. Birthparents' Interests

Despite the stigma often attached to women who "give up their babies" for adoption, the vast majority of birthmothers who seek an adoption plan have made an immensely unselfish choice.[53] Adoption is a loving alternative to abortion, a carefully and deliberately considered

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46. See *id.* at 228 ("Were we living in a better society, there would be no need for this volume. But there is a need to try to contribute, even in a small way, to making our world a little less unperfect for our children.").

47. *See generally id.* at 41–45.

48. Naomi R. Cahn, *Family Issue(s)*, *in* FAMILIES BY LAW: AN ADOPTION READER 270, *supra* note 12, at 271 [hereinafter Cahn, *Family Issue(s)*].

49. *Id.*

50. *See* GOLDSTEIN ET AL., *supra* note 44, at 228. Birthparents *should* desire finality in adoption proceedings for the child. Likewise, adoptive parents *should* desire that birthparents are afforded as much opportunity to make an informed decision as possible. And both parties should hope for the ultimate outcome that will serve the child best.

51. Cahn, *Family Issue(s)*, *supra* note 48, at 271 ("An emphasis on the rights of the biological mother suggests a longer time period for reconsideration of adoption, while a recognition of the rights of adoptive parents suggests that a shorter time period may be appropriate.").

52. *See infra* notes 94–97 and accompanying text.

53. National Council for Adoption, *The Rights of Adopted Children Should Be Protected*, *reprinted in* ADOPTION: OPPOSING VIEWPOINTS 82, 83 (Mary E. Williams ed. 2006).

option, and a decision not lightly entered into.[54] "Society should honor and respect birthparents, and especially birthmothers, for these loving, unselfish decisions."[55]

But blood ties are extremely hard to break, and birthparents should be afforded every consideration when making such a lasting decision: "[T]he earliest and most hallowed of the ties that bind humanity, in all countries considered sacred, is the relationship of parent and child. Therefore, parents have the first and natural right to their children."[56] And the United States Supreme Court has long recognized the fundamental right of a parent to order the welfare and upbringing of his or her offspring.[57] Consent and revocation limits have been set in deference to this primary relationship. But do they go far enough? Some commentators think not.

One recent study concluded that a later date before which a birthmother is allowed to consent coupled with a prolonged revocation period would better suit the birthmother's interests.[58] While this study found that "there is no magic formula that perfectly balances the need for deliberate and final decisions with the need to establish children in permanent homes," a timeframe consisting of four to seven days mandatory waiting period before signing consent along with a minimum three week revocation period would satisfy these conflicting goals adequately.[59] The finding was based in large part on a comparison between American models, which, though disparate, trend toward shorter consent and revocation periods, and European and Australian models, which trend toward longer periods, averaging six to eight weeks.[60] In particular, Professor Samuels uses as an example a case where a younger birthmother gave valid consent in Kansas, which allows consent a short time after birth (twelve hours) with no possibility of revocation.[61] Though there were suspicious circumstances surrounding the adoption, Kansas courts ultimately found no evidence of fraud or duress and dismissed the birthmother's petition to set aside her consent.[62] The article goes on to compare the outcome of this Kansas case with its hypothetical outcome in Victoria, Australia.[63] Though the girl would have been allowed to revoke her consent under the more liberal standards in Australia, it appears unclear how any of this, *ipso facto*, means

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54. *Id.*

55. *Id.*

56. *In re* Adoption of Voss, 550 P.2d 481, 485 (Wyo. 1976) (citing *In re* Adoption of Bryant, 189 N.E.2d 593 (Ind. App. 1963)).

57. *See* Prince v. Massachusetts, 321 U.S. 158, 166 (1944) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.").

58. *See* Samuels, *supra* note 43, at 571.

59. *Id.*

60. *Id.*

61. *Id.* at 516 (discussing *In re* Baby Girl W., No. 87,291, slip op. (Kan. Ct. App. Apr. 5, 2002)).

62. *Id.* at 515.

63. *Id.* at 516–18.

that Kansas inadequately protected her rights.[64] Indeed, much of Professor Samuels' article, among other writings on protection of birthparents' rights with regard to consent and revocation,[65] seems to provide stronger commentary on best practices by social workers and adoption attorneys, and less help with regard to reasons why longer revocation periods actually serve birthparents' needs.[66] What these commentators also fail to address is that statutory waiting periods before consent can be given are statutory *minimums*; there is no requirement that a birthmother must relinquish her parental rights at that time or at any other time. As is clearly addressed in the model statute proposed in Part V of this Note, in most states' laws, in adoption counseling, and on the face of most consent forms, the birthmother may take as much time as she wishes to make an adoption plan, consider other alternatives, or take her baby home to parent.[67]

Often neglected in the discussion of birthparents' interests is the biological father of the child.[68] Though rationales for different treatment of birthfathers include one-night stands, abandonment of the pregnant mother, and the presumed lesser emotional toll taken on the father in childbirth, these situations do not always pan out in reality, nor do they necessarily warrant lesser consideration for the birthfather.[69] Nonetheless, distinctions are often made between birthfathers and birthmothers in statutory consent requirements.[70] Sadly, all that is often required of the birthfather is his signature.[71]

But frequently the birthfather cannot be found. Adoption agencies and attorneys generally do all that they can to locate a missing birthfather, as most courts require his signature or a showing that his consent cannot be

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64. *See generally id.* (describing the facts of and analyzing *In re Baby Girl W.*, No. 87,291, slip op).

65. *See, e.g.*, Origins Canada, *The Rights of Birth Mothers Should Be Protected*, *in* ADOPTION: OPPOSING VIEWPOINTS 59, 60 (Mary E. Williams ed. 2006) ("The adoption 'counselors' like to say 'It's your choice', [sic] all the while making it seem as if you have no other real options. They have lots of training in 'counseling' expectant mothers and grandparents-to-be so they can get more babies for customers. Do mothers (and fathers) really 'choose' adoption?"); *see also* Heather Lowe, *The Rights of Birth Mothers Must Be Protected*, *in* ADOPTION: OPPOSING VIEWPOINTS 45, 46–47, 51 (Roman Espejo ed. 2002) ("But adoption as it is practiced today is a disgrace. It's become an industry geared not toward 'the best interests of the child' (itself a worn out catchphrase with little real meaning) but toward serving people who think they have a God-given right to add a child to their home."). Ms. Lowe suggests as one of her reform points that irrevocable consent be abolished. She posits that a three-month window for decision would be preferable to a seventy-two-hour window, based primarily on the emotionally charged and overwhelming atmosphere that a birthmother finds herself in during that initial time after birth.

66. *See generally* Samuels, *supra* note 43.

67. See *infra* APPENDIX B: Proposed Statute §§ 4(e), 6(c).

68. *See* Jeanne Warren Lindsay, *The Rights of Birth Fathers Must Be Protected*, *in* ADOPTION: OPPOSING VIEWPOINTS 55, 56 (Roman Espejo ed. 2002).

69. *Id.*

70. *See infra* APPENDIX A.

71. Lindsay, *supra* note 68, at 56.

obtained.[72] Putative father registries have been established in twenty-seven states, with seven more states providing methods of registration through existing agencies, such as the state health department or department of children's services.[73] The putative father registry affords a man who believes he may be the father of a child an opportunity to register his belief and assert his claim to parenthood.[74] It also provides an avenue for the birthfather to be notified of the initiation and progress of adoption proceedings.[75] Failure to register his claim, lack of involvement with the mother during pregnancy, and lack of financial or emotional support for the mother are generally viewed in the same light as abandonment, and may preclude a birthfather from later asserting a claim.[76] Likewise, failure to notify a registered putative father of a pending adoption will likely be fatal to the adoption proceeding.[77]

B. Adoptive Parents' Interests

What types of people seek to adopt?[78] The answer, of course, varies greatly from situation to situation. Adoptive parents may be a childless couple suffering from infertility or a single mother or father wanting to share her or his home, or perhaps a couple with children, with room and love to spare. Some adopt for humanitarian reasons or because the situation of a particular orphan comes to their attention. Whatever the reason for seeking to adopt, there is no question that the demand from adoptive parents remains high; there is no shortage of people willing to adopt infants.[79]

But adoptive families often have many obstacles to overcome. First, the law favors familial connections stemming from birth, creating

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72. *Id.* at 60–61; *see also* APPENDIX B §§ 3(a), (b) (requiring "good faith and diligent effort" and "an affidavit of diligent search").

73. See APPENDIX A for a listing of which states have established putative father registries, which states have adopted other methods of registering possible fathers, and statutes responsible for their creation.

74. J.S.A. v. M.H., 863 N.E.2d 236, 247 (Ill. 2007).

75. *Id.*

76. Lehr v. Robertson, 463 U.S. 248, 262 (1983); *see also id.* at 262 n.18 ("[A] natural father who has played a substantial role in rearing his child has a greater claim to constitutional protection than a mere biological parent.").

77. CHILD WELFARE INFORMATION GATEWAY, U.S. DEP'T OF HEALTH AND HUMAN SERV., THE RIGHTS OF UNMARRIED FATHERS 3–4 (2010), *available at* https://www.childwelfare.gov/systemwide/laws_policies/statutes/putative.pdf.

78. Just as the stereotypical crack-addict fifteen-year-old birthmother and married-and-doesn't-want-his-wife-to-find out birthfather are largely after-school special promoted mythologies, the baby-hungry, I-have-more-money-than-I-know-what-to-do-with adoptive parents only exist in Hollywood (perhaps literally), contrary to Ms. Lowe's assertion, *see supra* note 65.

79. *See* CHILD WELFARE INFORMATION GATEWAY, U.S. DEP'T OF HEALTH AND HUMAN SERV., HOW MANY CHILDREN WERE ADOPTED IN 2007 AND 2008? (2011), *available at* https://www.childwelfare.gov/pubs/adopted0708.pdf.

what one author calls a "powerful blood bias" in favor of biological families, even in cases of older children who live under abuse or neglect at the hand of a biological parent.[80] Second, the law makes privacy of birthparents a major concern, giving them control over "openness" or "closedness" of the adoption,[81] while adoptive parents are expected to forgo any privacy in the process: "By contrast to the protections accorded biogenetic parents, individuals who wish to parent through adoption find their personal values and most intimate behaviors subject to intense scrutiny and bureaucratic regulation."[82] Third, uncertainty in the permanence of the adoption decree and the specter of a returning birthparent seeking reunion with the child, threatening the family bond that had been formed, drives adoptive parents to seek a "final, not a temporary expedient."[83]

Changes in the laws governing adoption have trended toward eliminating some of the uncertainty in the initiation of adoption proceedings, but particularly in states whose laws still allow liberal time periods for revocation of birthparent consent, much uncertainty still remains for adoptive parents.[84] Some adoptive parents—and sometimes birthparents—seek the aid of "interim care" families to fill the gap between consent and possibility of revocation.[85] An adoption agency or adoption attorney will arrange a fostering situation for whatever time period a birthmother feels that she needs to make a decision to give consent, or in the case of initiation of interim care initiated by adoptive parents, to avoid the heartache of having a child in the adoptive family's home for a period of time after receiving consent, only to have the child taken away on revocation.[86] And adoptive parents who do take the child into their home

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80. Elizabeth Bartholet, *Taking Adoption Seriously: Radical Revolution or Modest Revisionism?*, *in* FAMILIES BY LAW: AN ADOPTION READER 115, *supra* note 12, at 117.

81. Joan Heifetz Hollinger, *Overview of Legal Status of Post-Adoption Contact Agreements*, *in* FAMILIES BY LAW: AN ADOPTION READER 159, *supra* note 12, at 159.

82. Naomi R. Cahn & Joan Heifetz Hollinger, *Introduction* to FAMILIES BY LAW: AN ADOPTION READER, *supra* note 12, at 4.

83. Cahn, *Perfect Substitutes*, *supra* note 19, at 24.

84. Susan Yates Ely, *Natural Parents' Right to Withdraw Consent to Adoption: How Far Should the Right Extend?*, 31 U. LOUISVILLE J. FAM. L. 685, 685 (1993) ("[E]ven though various state statutes and cases in this area reflect an improvement in the consideration of the child's well-being, many laws governing revocation of consent are still too uncertain and weak. If public policy in the United States is to promote the adoption of unwanted children, weaknesses in the law concerning natural parents' revocation of consent can only discourage qualified prospective parents from adopting.").

85. *See, e.g.*, *Interim Care for Infants,* BARKER FOUNDATION, www.barkerfoundation.org/pregnancy-services/interim-infant-care (last visited January 12, 2014); *Interim Child Care*, SPENCE-CHAPIN, www.spence-chapin.org/unplanned-pregnancy/a4_interim_child_care.php (last visited January 12, 2014) ("After your child is born, you may need some additional time to make a permanent plan.").

86. Before the reader judges too harshly, realize that the best interests of the child are most readily served by permanency. A better solution than interim care would be for the birthmother to take the child home with her for the days or weeks that constitute the revocation period. If she is truly using that time to "make sure of her decision," time with the

during this uncertain period often are reluctant to fully commit too soon, doing damage to the bonding process between parent and child.[87]

The law with regard to the initiation of adoption proceedings has historically viewed adoptive parents—third parties to the parent-child relation, in the eyes of some—as "strangers without rights."[88] Birthparents control the process in its initiation: First contact with an adoption professional, social worker, attorney, or direct contact with a prospective adoptive family is voluntary, not coerced by any government or private entity, and susceptible to the birthparent's decision to walk away at any time prior to signing consent. But adoptive parents must be accorded some degree of certainty in the process once an adoption plan has been initiated. "Otherwise, in every case the adoption process would be subject to interruption at the whim of the natural parent."[89] Though the Supreme Court of the United States has recognized that adoptive relationships are the legal equivalent of biological parent-child relationships, such legal significance does not attach until an adoption is finalized.[90] During the time between birthparent consent and finalization of the adoption decree,[91] the child is without a legal parent.[92] In some jurisdictions, revocation is possible until the decree is final; in a handful, even after.[93]

C. The Interests of the Child

Is it not the burden of every actor in an adoption—birthparents, adoptive parents, the court, society at large—to protect the rights, interests, and well-being of the weakest and most vulnerable person involved in the process? Consider the keen insight shown by the dissent in the "Baby Jessica" case concerning protection of the child in the adoption context:

> The superior claim of the child to be heard in this case is grounded not just in law, but in basic human morality. Adults . . . make choices in their lives, and society holds them responsible for their choices. When adults are forced

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child would certainly serve those ends more readily. But in most cases, the adoptive family has custody of the child during that uncertain time. The emotional strain can be unbearable, and child psychiatrists have long held that a child in infancy feels that strain and is not best served by either prolonging the strain or by being moved to the care of a temporary caregiver. *See* GOLDSTEIN ET AL., *supra* note 44, at 41–43.

87. *Id.* at 13–14.

88. Petition of Doe, 638 N.E.2d 181, 190 (Ill. 1994)*; see also id.* at 188.

89. Ely, *supra* note 84, at 697 (quoting *In re* Appeal in Yuma County, 682 P.2d 6 (Ariz. Ct. App. 1984)).

90. Smith v. Org. of Foster Families for Equality and Reform, 431 U.S. 816, 844 n.51 (1977).

91. In most jurisdictions, a minimum of six months from the filing of the adoption petition by the adoptive parents.

92. *See* GOLDSTEIN ET AL., *supra* note 44, at 102–03.

93. *See* APPENDIX A; *see also* discussion *infra* Part IV(A).

> to bear the consequences of their choices, however disastrous, at least their character and personality have been fully formed, and that character can provide the foundation for recovery, the will to go on.
>
> The character and personality of a child two and one-half years old is just beginning to take shape. To visit the consequences of adult choices upon the child during the formative years of her life, and to force her to sort out the competing emotional needs of the [birthparents and adoptive parents], is unnecessarily harsh and without legal justification.[94]

Justice Levin points to the heart of the matter: *All* of the adults involved in the adoption process have made choices that have led them to this point. Their needs, while not inconsequential, should be subservient to those of the child. The child did not choose her circumstances. She did not choose her birthparents. She did not choose to be adopted, did not bring an adoption agency or social worker or attorney into her birthmother's life. She did not choose her adoptive parents. She has no window in which to give consent, or revoke consent, or to follow through with an adoption decree or not. She had no paper work to fill out, no homestudy to conduct. The child is ultimately at the mercy of the whims of those to whom she must entrust her safety and well-being. Does it really matter to the child in her infancy who cares for her and how care is executed? Commentators and psychoanalysts disagree: Perhaps a child is better left in a foster care situation during the first few months of her life while her fate is decided,[95] or perhaps these first formative months are crucial in her development and require the nurture, care, and bonding that only a permanent parent relationship can provide.[96]

Court systems in the United States have developed what is commonly called "the best interests of the child" standard to govern child custody disputes.[97] Much controversy and much confusion about the application of this standard has commentators wondering if it is not just "a euphemism for unfettered judicial discretion."[98] The 1851 Massachusetts adoption statute[99] makes no mention of such a standard, rather concentrating on eligibility for adoption and the legal effects of the

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94. *In re* Clausen, 502 N.W.2d 649, 670–71 (Mich. 1993) (Levin, J., dissenting).

95. Samuels, *supra* note 43, at 571.

96. GOLDSTEIN ET AL., *supra* note 44, at 19–20.

97. *See generally* 2 AM. JUR. 2D *Adoption* § 131 (2014) (presenting the best interests standard and the wide range of treatment it endures in the courts).

98. DOUGLAS E. ABRAMS ET AL., CONTEMPORARY FAMILY LAW 675 (West 3rd ed. 2012).

99. *See supra* note 23 and accompanying text.

adoptive relationship.[100] However, a similar statute passed in Pennsylvania in 1855 voiced a concern for "the welfare of the child" in adoption consideration.[101] Through its development, particularly in the last half of the twentieth century, the best interests of the child standard has taken many twists and turns in meaning and application, standing for a determination of stability and permanency for the child in one instance, and a weighing of which parent or parents would be "better" for the child, in the judge's opinion, in other cases.[102] Professor Welt demonstrates:

> The phrase, "best interests of the child," means one thing to a juvenile judge, another thing to adoptive parents, something else to natural parents and still something different to disinterested observers. The tendency is to apply intuition in deciding that a child would be "better" with one set of parents than with another, and then to express this intuitive feeling in terms of the legal standard of being "in the best interests of the child."[103]

Many courts recognize this tendency to substitute the judge's preferences for an objective determination of the child's well-being, and accordingly rule in favor of a balance between choices made by the various actors and the appropriateness of the particular outcome.[104]

Illustrative of the great confusion surrounding this standard is the classic decision of *Painter v. Bannister*.[105] *Painter* involved a custody battle over a seven-year-old boy between his biological father and maternal grandparents, who had cared for the boy since his mother's death two years earlier.[106] The contrast between lifestyle could not have been greater.[107] The grandparents were a picture of mid-western stability, providing a nice home with prospects for education and betterment for their grandson.[108] By contrast, the court described the child's father as "bohemian," "agnostic or atheist," and "a political liberal."[109] The court began its analysis with the following assertion: "It is not our prerogative to determine custody upon our choice of one of two ways of life within normal and proper limits and we will not do so."[110] But the court acknowledged that a pure choice based

100. Cahn, *Perfect Substitutes*, *supra* note 19, at 22–23.
101. *Id.* at 23.
102. Philip S. Welt, *Adoption and the Constitution: Are Adoptive Parents Really "Strangers Without Rights"?*, 1995 ANN. SURV. AM. L. 165, 221 (1995).
103. *Id.*
104. *See, e.g.*, *In re* S.N.W., 912 So.2d 368, 373 (Fla. Dist. Ct. App. 2005).
105. 140 N.W.2d 152 (Iowa 1966).
106. *Id.* at 153.
107. *Id.* at 154.
108. *Id.*
109. *Id.* at 154–55.
110. *Id.* at 154.

on the court's preferences would deliver custody to the grandparents, that the presumption for parental preference had been weakened, and that security and stability were the ultimate measures by which the decision should be made.[111] Thus, the court overcame blood preference for the biological father of this child, ruling in favor of custody for the grandparents, based largely on the relationship developed between the child and his grandparents, and regardless of an absence of a finding of unfitness in the father.[112]

It is not the aim of this Note to determine whether this case was rightly decided, or even whether the "best interests" standard was rightly applied. Rather, this case provides a ready illustration of the myriad ways the standard may be interpreted. Anna Freud, psychoanalyst and co-author of the celebrated *Beyond the Best Interests of the Child*,[113] commented on *Painter* that without actually interviewing the Painters and the Bannisters, she could not make a determination of whether she would agree with the court's ruling or not.[114] However, blood relationship would get little consideration from her, as apparently it did from the trial judge:

> The "blood-ties" between parent and child as well as the alleged paternal and maternal "instincts" are biological concepts which, only too often, prove vague and unreliable when transferred to the field of psychology. Psychologically speaking, the child's "father" is the adult man to whom the child attaches a particular, psychologically distinctive set of feelings. When this type of emotional tie is disrupted, the child's feelings suffer. When such separations occur during phases of development in which the child is particularly vulnerable, the whole foundation of his personality may be shaken. The presence of or the reunion with a biological father to whom no such ties exist will not recompense the child for the loss which he has suffered. Conversely, the biological father's or mother's unselfish love for their child is by no means to be taken for granted. It happens often enough that biological parents fail in their duty to the child, while other adults who are less closely related to him, i.e., who have no

111. *Id.* at 156.

112. *Id.* at 158.

113. Many references in this Note are attributed to this work, but in its collective form, a trilogy of works on the same subject, including the original, and published posthumously with regard to Dr. Freud, as GOLDSTEIN ET AL., *supra* note 44.

114. ANNA FREUD, *Painter v. Bannister: Postscript by a Psychoanalyst*, 7 WRITINGS OF ANNA FREUD 247, 247–55 (1967), *quoted in* ABRAMS ET AL., *supra* note 98, at 683–84.

> "instinctive" basis for their feeling, successfully take over the parental role.[115]

It is important to note that state intervention is appropriate only in two circumstances: (1) where the child's safety is endangered by the parent to such a degree that termination of parental rights is necessary to ensure safety, and (2) where, as in infant adoption, the birthparent has voluntarily sought to terminate her parental rights through consent to adoption.[116] At the point the intent to terminate rights is manifested, the child is patently "unwanted" and without a legal parent.[117] It is of utmost importance that the child remain in this state of flux for as short a period of time as is possible.[118] "Adoption, if available, offers to such children the best possible second chance to form the permanent relationships vital to their development."[119]

IV. CURRENT STATUTES GOVERNING INFANT ADOPTION IN THE UNITED STATES

A brief survey of adoption laws across the fifty states confirms that no consensus has yet been reached on how to best reconcile these policy concerns.[120] "The lack of coherence and uniformity in our adoption laws and practices exposes to needless risks all parties to an adoption, and, especially, the children who become enmeshed in protracted litigation about their legal status."[121] Despite efforts of the Uniform Law Commission to normalize adoption statutes and the Interstate Compact on the Placement of Children to reconcile their application across state borders, states in their respective legislative acts place emphasis on different actors and their interests in varied, sometimes conflicting, and often confusing ways. Families seeking to adopt across state borders are well-advised to keep abreast of conflicting laws from state to state, and many feel like they must become experts in the laws of various states before committing to an adoption plan outside their home state.[122]

More narrowly, attempts to navigate the quagmire of laws pertaining particularly to birthparent consent in infant adoptions and when

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115. *Id.*

116. GOLDSTEIN ET AL., *supra* note 44, at 101–03.

117. *Id.* at 102.

118. *Id.* at 43, 50.

119. *Id.* at 103.

120. Hollinger, *State and Federal Adoption Laws*, *supra* note 12, at 37 ("[S]tate adoption laws are not and never have been uniform, nor have they been consistently applied.").

121. *Id.*

122. One online magazine has recognized the need for an adoption law clearinghouse for prospective adoptive families. *Adoption and Law*, ADOPTIVE FAMILIES, www.adoptive families.com/adoption_law (last visited Jan. 12, 2014).

that consent can be revoked can be just as frustrating.[123] Attorneys and adoption agencies must be well-versed in these differences if they are to practice in multiple jurisdictions. They must also be cognizant of the likelihood that their clients—both birthparents and adoptive parents—will be ignorant of the intricacies of consent requirements and revocation allowances and ready to educate and guide through the process. This is particularly true when adoptive parents have travelled across state lines to adopt.

While the importance of understanding the detailed requirements for voluntary relinquishment in a particular jurisdiction cannot be stressed enough, it is outside the scope of this writing to examine these in any detail. Instead, this section will attempt to group states into general categories based on how liberally or narrowly their statutes treat birthparent consent and revocation.[124] The first category treated will be those jurisdictions that allow broad leeway for birthparents to withdraw their consent to adoption, in some cases allowing revocation for any reason or no reason thirty days after consent is given,[125] and in others leaving the possibility of revocation open even after entry of the final adoption decree.[126] The second consists of those states that have somewhat followed the approach recommended in the Uniform Adoption Act, providing for a brief revocation period.[127] The third category of states for purposes of this analysis provide a shorter or non-existent revocation period upon signing and in most cases provide a relatively brief waiting period after birth before consent can be given.[128] Finally, we will look at the approach taken by several states that do not fit neatly into any of these categories but rather take a hybrid approach dependent on the circumstances under which consent is given.

123. *See* APPENDIX A.

124. We recognize that this is not the only possible way to group states for analysis. For example, an interesting study might be an analysis of states by putative father registry, discussed *supra* Part III, and how particular states treat birthfather rights in general. Another interesting study might be a comparison of judicial versus non-judicial consent, discussed briefly *infra* Part IV(D).

125. *E.g.*, 23 PA. CONS. STAT. ANN. § 2711(c)(1) (West, WestlawNext through 2013 Act 104); IND. CODE ANN. § 31-19-10-3 (West, WestlawNext through 2013 First Reg. Sess. and First Reg. Tech. Sess.).

126. *E.g.*, S.D. CODIFIED LAWS § 25-6-21 (WestlawNext through 2013 Reg. Sess.); R.I. GEN. LAWS § 15-7-21.1 (Lexis Advance through 2013 Reg. Sess.).

127. *E.g.*, TENN. CODE ANN. § 36-1-112 (Lexis Advance through 2013 Reg. Sess.); GA. CODE ANN. § 19-8-9 (Lexis Advance through 2013 Reg. Sess.).

128. *E.g.*, FLA. STAT. ANN. § 63.082 (West, WestlawNext through 2013 1st Reg. Sess.); WYO. STAT. ANN. § 1-22-109 (Lexis Advance through 2013 Reg. Sess.).

A. Liberal Construction of Consent and Revocation

Twelve states allow for revocation of consent for thirty days after signing,[129] with seven of these allowing revocation up to and, in some cases, beyond finalization of the adoption decree.[130] While some of these states require a best interests determination in conjunction with revocation, some allow unconditional revocation.[131] It is important to note that for purposes of this analysis invalidation of consent based on fraud, duress, coercion, or other manner of undue influence is not factored in. All jurisdictions allow for invalidation of consent for a period of time, usually up to the time of finalization of the adoption decree, but sometimes beyond. This analysis makes a distinction, as do most courts, between allowances of revocation of validly executed voluntary consents by birthparents and the invalidation of a consent induced by fraud or coercion.

This grouping of jurisdictions allows for the least amount of change from the common law view of birthparent consent to adoption. Adoption statutes in some of these jurisdictions are construed strictly in favor of biological parents.[132] Longer periods of time for birthparents to make up—or to change—their minds seems to afford less opportunity for litigation.[133] But even some states that adhere to longer revocation periods have moved the ball away from finalization toward the thirty-day mark relative to signing consent. Take, for instance, Pennsylvania, whose current statute allows unconditional revocation up to thirty days after signing.[134] Pennsylvania courts recognized, before passage of this statute, that a birthmother could revoke a valid consent to adoption at any time prior to the final entry of the decree of adoption.[135] As late as 1994, this construction was still in place.[136] In addition, courts in Pennsylvania liberally construe what constitutes a valid revocation, including in some instances actions that can be interpreted as revocation.[137] However,

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129. These include Connecticut, Delaware, Indiana, Iowa, Kentucky, Maryland, New Hampshire, North Dakota, Ohio, Pennsylvania, Rhode Island, and South Dakota. *See infra* APPENDIX A.

130. Connecticut, Iowa, New Hampshire, North Dakota, Ohio, Rhode Island, and South Dakota.

131. *See* APPENDIX A.

132. *E.g.*, *In re* B.W., 908 N.E. 2d 586, 592 (Ind. 2009).

133. *See* Samuels, *supra* note 43, at 548. Note that litigation is not reduced, only diverted. In states where revocation is limited or not available, litigation concerning revocation is reduced, but litigation alleging fraud increases. While states that allow for liberal revocation of consent seem to hear fewer cases, one reason could be that birthparents have less incentive to cry fraud when they do not have to.

134. 23 PA. CONS. STAT. ANN. § 2711(c)(1) (West, WestlawNext through 2013 Reg. Sess.).

135. Commw. *ex rel.* Grimes v. Yack, 433 A.2d 1363, 1377 (Pa. Super. Ct. 1981).

136. *In re* Adoption of Stickley, 638 A.2d 976, 979 (Pa. Super. Ct. 1994).

137. *Id.* (Father's refusal to cash reimbursement check for child support payments construed as revocation of consent).

Pennsylvania changed its statute in 2006 to the current thirty-day revocation period.[138] While a birthmother is allowed by statute to revoke her consent for any reason, the Superior Court of Pennsylvania holds to a strict interpretation of the timing requirements.[139]

B. States That Have Adopted a Quasi-Uniform Adoption Act Approach

Vermont is the only state to have adopted the Uniform Adoption Act since it was drafted in 1994.[140] And Vermont acted very quickly by adopting the Act in 1996.[141] Interestingly, though, one area where Vermont's law deviates significantly from the Uniform Act is in the timing of consent and revocation with regard to infant adoption.[142] Though no state has adopted the Uniform Act's suggested revocation period of eight days, seven states have adopted revocation periods ranging between seven and ten days.[143] For instance, in Georgia, consent can be revoked for any reason

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138. *In re* Adoption of J.A.S., 939 A.2d 403, 406 (Pa. Super. Ct. 2007).

139. *Id.* at 408. In *In re Adoption of J.A.S.*, the trial court had held the birthmother's consent invalid *ab initio* because it failed to denote the marital status of the birthmother. However, the Superior Court held that the timeliness of the revocation, which was the first challenge to the original consent's validity, must be determined before reaching the issue of technical validity, because the statute specified a thirty-day revocation period but did not "explicitly state it is subject to strict construction." *Id.* The birthmother's attempted revocation 100 days after signing consent was not timely, and therefore not an effective challenge to the consent's validity. *Id.* at 409. Presumably, had the birthmother delivered her petition within the thirty-day window, she would not have had to argue invalidity at all.

140. UNIF. ADOPTION ACT, 9 U.L.A. 11 (Supp. 2013).

141. *Id.*; 1996 Vt. Acts & Resolves 262.

142. *Compare* VT. STAT. ANN. tit. 15A, § 2-404(a) *with* UNIF. ADOPTION ACT § 2-404, 9 U.L.A. 53.

> Time and Prerequisites for Execution of Consent or Relinquishment.
> (a) A parent whose consent to the adoption of a minor is required by section 2-401 of this title may not execute a consent or a relinquishment sooner than 36 hours after the minor is born. A parent who executes a consent or relinquishment may revoke the consent or relinquishment within 21 days after the consent or relinquishment is executed by filing a written notice in the court in which the consent was executed.

VT. STAT. ANN. tit. 15A, § 2-404 (West, WestlawNext through 2013 Sess.).

> Time and Prerequisites for Execution of Consent or Relinquishment.
> (a) A parent whose consent to the adoption of a minor is required by Section 2-401 may execute a consent or a relinquishment only after the minor is born. A parent who executes a consent or relinquishment may revoke the consent or relinquishment within 192 hours after the birth of the minor.

UNIF. ADOPTION ACT § 2-404.

143. These include Alaska, Arkansas, Georgia, Minnesota, North Carolina, Tennessee, and Virginia. *See infra* APPENDIX A.

at all within ten days of execution.[144] Georgia courts will not allow revocation after the ten-day period has expired, and have expressly denied requests to extend the period for "good and sufficient cause."[145]

But courts will consider a petition to set aside a surrender as invalid even after the revocation period has run, on grounds of fraud or duress in inducing the birthparent to sign consent.[146] Duress, for purposes of invalidating a consent to adoption, is defined as it is in all contract cases.[147] For instance, in one recent Georgia case, the Court of Appeals found that a state children's services caseworker's "suggestion" that it would be in the mother's best interest to surrender her parental rights was sufficient grounds to set aside the mother's consent, even though the statutory ten-day revocation period had elapsed.[148] But financial or emotional pressure, unless caused by an adverse party, particularly the other person seeking to enter the contract or someone acting on their behalf, does not constitute duress.[149] Nor does a self-inflicted crisis, no matter how extreme or to what extent internal influences may have affected the birthmother's judgment.[150]

C. Narrow Construction of Consent and Revocation

An increasing trend has been seen over the past decade of states reducing the statutory timeframe for both consent and revocation.[151] While there is no clear majority rule, the largest plurality of states—eighteen at the time of this writing—falls into this category.[152] These consist of states that have shorter mandatory waiting periods of twelve to ninety-six hours for

144. Hicks v. Stargel, 487 S.E.2d 428, 429 (Ct. App. Ga. 1997).

145. *Id.*

146. This is true in all fifty states, though the time frame varies for how long a birthparent has to bring a challenge on these grounds.

147. Mabou v. Eller, 502 S.E.2d 760, 762 (Ga. Ct. App. 1998) ("Duress is considered as a species of fraud in which compulsion in some form takes the place of deception in accomplishing an injury. . . . Duress which will avoid a contract must consist of threats of bodily or other harm, or other means amounting to coercion, or tending to coerce the will of another, and actually inducing him to do an act contrary to his free will.") (quoting Tidwell v. Critz, 282 S.E.2d 104, 107 (Ga. 1981) (citations omitted)).

148. *In re* K.W., 662 S.E.2d 255, 257 (Ga. Ct. App. 2008).

149. *Mabou*, 502 S.E.2d at 762.

150. Schumacher v. Sexton, 455 S.E.2d 348, 349 (Ga. Ct. App. 1995) *overruled by* In Interest of B.G.D., 479 S.E.2d 439 (Ct. App. Ga. 1996). The court in *B.G.D.* overruled *Schumacher* on grounds of "good and sufficient cause." Despite the fact that the mother in *Schumacher* was addicted to cocaine and claimed to be under the influence when signing consent papers, the trial court found, and the appellate court affirmed, that "she knowingly and voluntarily relinquished" her parental rights. *Schumacher*, 466 S.E.2d at 350.

151. Samuels, *supra* note 43, at 545.

152. Arizona, Colorado, Florida, Illinois, Kansas, Maine, Louisiana, Massachusetts, Mississippi, Missouri, Montana, Nevada, New Jersey, New Mexico, South Carolina, Utah, Washington, and Wyoming.

consent[153] and do not allow any revocation after consent is given.[154] And irrevocable means irrevocable. Though consent may be invalidated in these states by a showing of inducement by fraud or duress,[155] consent will be upheld in cases bordering on such a finding. Mistake is not a sufficient ground once the revocation period has passed,[156] nor is a birthparent's status as a minor.[157] Even potentially misleading statements by a social worker may be cured by the social worker reading and explaining the consent form to the birthparent.[158] One method employed by many jurisdictions for assuring the voluntariness of consent is the requirement of pre-consent interviews with birthparents by an adoption professional; a failure to conduct such an interview is prima facie evidence of inducement.[159]

D. Other Approaches

The remaining thirteen states are either some type of hybrid between the categories above, take no stance on waiting times for consent or revocation periods (or both), simply do not neatly fit into one of these categories, or are so ambiguous or equivocal that the scope of this Note does not allow us to delve into their respective statutes. However, two other distinct categories arise that are worth mentioning, if only in passing, that distinguish based on where consent is given or by whom consent is taken.

The first of these consists of two states that distinguish between consents given in the courtroom and those given outside the courtroom. New York law does not specify a waiting period after which consent can be given.[160] But judicial consent, executed in a courtroom in front of a judge, is irrevocable upon execution, while non-judicial consent can be revoked within forty-five days.[161] In Oklahoma, consent can be given any time after

153. With the exception of Louisiana, which makes a distinction between agency adoptions and private adoptions, requiring a five-day waiting period for private adoptions. *See infra* APPENDIX A.

154. With the exceptions of Missouri and Washington, which require approval of consent by a court. Consent is technically not valid until court approval is given. Approval is expedited, however, with Missouri requiring approval within three days of signing or the consent becomes irrevocable, and Washington requiring a forty-eight hour lapse between birth and approval or signing and approval. *See infra* APPENDIX A.

155. F.R. v. Adoption of Baby Boy Born November 2, 2010, No. 1D12-16, 2012 WL 1813520 (Fla. Dist. Ct. App. May 21, 2012) (finding that adoption agency's failure to translate documents into a language the birthmother could understand invalidated consent).

156. J.K. *ex rel.* D.K. v. M.K., 5 P.3d 782, 791 (Wyo. 2000) (finding that birthfather's belief that his consent was not final was unavailing).

157. *Id.* at 792.

158. *Id.*

159. J.S. v. S.A., 912 So. 2d 650, 658 (Fla. Dist. Ct. App. 2005).

160. N.Y. DOM. REL. LAW § 111 (WestlawNext through 2013 Ch. 340).

161. *Id*.

the child is born.[162] Judicial consent is likewise irrevocable, and non-judicial consent can be revoked within fifteen days.[163]

The other category consists of two states that distinguish between agency and non-agency adoptions in their consent and revocation laws. California allows consent to be given any time after birth in the case of an agency adoption,[164] with consent revocable only by mutual consent.[165] But in the case of direct placement, California allows consent when the birthmother is discharged from the hospital,[166] with a thirty-day revocation period.[167] Texas makes a similar distinction. Birthmother consent in Texas may be given forty-eight hours after the birth of the child.[168] Consent given to a state-licensed agency is irrevocable upon execution.[169] All other consents are revocable for eleven days, unless the consent expressly provides otherwise, but such a contractual revocation period may not exceed sixty days.[170]

V. PROPOSAL: WHICH STATUTORY SCHEME IS "LEAST DETRIMENTAL" TO THE CHILD'S INTERESTS?

The adoption statute proposed in APPENDIX B fits squarely within the narrow construction category described in Part IV(C) of this Note. The statute provides procedural and notice safeguards for birthparents.[171] It also mandates pre-consent counseling for the protection of the birthparents[172] in addition to a recitation of birthparents' rights and an explanation of the finality of relinquishment on the face of the consent form to be signed.[173] In support of finality of the adoption placement, an interest shared by all three members of the adoption triad, the minimum required delay in allowance of consent by the birthmother has been kept brief, allowing for relinquishment when seventy-two hours have elapsed after the birth of the child, or upon the release of the birthmother from the hospital, whichever is earlier.[174] The statute also makes such consent by the birthmother, as well as consent by

162. OKLA. ANN. STAT. tit. 10, § 7503-2.2 (WestlawNext through 54th Legis. Sess. Ch. 23).

163. *Id*.

164. CAL. FAM. CODE § 8700 (West, WestlawNext through 2013 Reg. Sess.).

165. *Id*. (stating that in an agency adoption, consent can only be revoked by mutual consent of both the birthparent and adoptive parent, but if the adoptive parent to whom consent was originally given fails to finalize the adoption, consent is then revocable for thirty days).

166. CAL. FAM. CODE § 8801.3 (West, WestlawNext through 2013 Reg. Sess.).

167. CAL. FAM. CODE § 8814.5 (West, WestlawNext through 2013 Reg. Sess.).

168. TEX. FAM. CODE ANN. § 161.103 (West, WestlawNext through 2013 Reg. Sess.).

169. TEX. FAM. CODE ANN. § 161.106 (WestlawNext).

170. TEX. FAM. CODE ANN. § 161.103 (WestlawNext).

171. *See infra* APPENDIX B §§ 1(c), 3(a)–(b), 4, 5.

172. *Id.*§ 6.

173. *Id*. § 4.

174. *Id.* § 4(b).

the birthfather, irrevocable upon signing.[175] This proposal is consistent with a trend seen in recent years toward expeditious pursuit of finality in the initiation of adoption proceedings,[176] is supported by the arguments set forth in this Note, and is desirable as a model for uniformity as states seek coherence in adoption regulation.

This Part will set forth the proposed statute section by section, with each section followed by brief commentary.[177] Finally, argument in support of key aspects of the statute, particularly with regard to policy concerns in support of shorter waiting periods for consent and the abolishment of revocation periods, will follow.

A. Proposed Statute

Section 1.

(1) Consent.

(a) Consent to an adoption or an affidavit of nonpaternity shall be executed as follows:
   1. If by an agency, by affidavit from its authorized representative.
   2. If by any other person, in the presence of the court or by affidavit acknowledged before a notary public and in the presence of two witnesses.
   3. If by a court, by an appropriate order or certificate of the court.

(b) A minor parent has the power to consent to the adoption of his or her child and has the power to relinquish his or her control or custody of the child to an adoption entity. Such consent or relinquishment is valid and has the same force and effect as a consent or relinquishment executed by an adult parent. A minor parent, having executed a consent or relinquishment, may not revoke that consent upon reaching the age of majority or otherwise becoming emancipated.

(c) A consent or an affidavit of nonpaternity executed by a minor parent who is 14 years of

175. *Id*. §§ 4(a), (b), (e).

176. Samuels, *supra* note 43, at 545.

177. The text of the entire proposed statute is included in APPENDIX B, *infra*, for the reader's convenience.

> age or younger must be witnessed by a parent, legal guardian, or court-appointed guardian ad litem.
>
> (d) The notice and consent provisions of this chapter as they relate to the father of a child do not apply in cases in which the child is conceived as a result of a violation of the criminal laws of this or another state or country, including, but not limited to, sexual battery, unlawful sexual activity with certain minors, lewd acts perpetrated upon a minor, or incest.

COMMENTS

Section (1)(a) provides who may assist a birthparent in executing consent and in what form consent must come, always in writing, under each possible circumstance.[178] For the purpose of consent to adoption, a minor birthparent is treated the same as an adult, and his or her consent cannot be revoked based on age, nor will it become revocable upon the birthparent reaching majority.[179] However, if the birthparent is fourteen years of age or less, a parent, legal guardian, or court-appointed guardian ad litem must witness the execution of consent.[180] Section (1)(d) provides that a birthfather who conceives a child as the result of a sex crime does not enjoy the same rights to notice and consent.[181]

Section 2.

> (2) A consent that does not name or otherwise identify the adopting parent is valid if the consent contains a statement by the person consenting that the consent was voluntarily executed and that identification of the adopting parent is not required for granting the consent.

COMMENTS

Section (2) provides that it is not necessary to name the adoptive parent or parents on the written consent, but the birthparent must acknowledge in writing that the consent was voluntary and that the adoptive parent was purposely not identified.[182]

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178. *See infra* APPENDIX B § 1(a).
179. *Id.* § 1(b).
180. *Id.* § 1(c).
181. *Id*. § 1(d).
182. *See infra* APPENDIX B § 2.

Section 3.

(3) Availability of Persons Required to Give Consent.

(a) A good faith and diligent effort must be made to have each parent whose identity is known and whose consent is required interviewed by a representative of the adoption entity before the consent is executed. A summary of each interview, or a statement that the parent is unidentified, unlocated, or unwilling or unavailable to be interviewed, must be filed with the petition to terminate parental rights pending adoption. The interview may be excused by the court for good cause.

(b) If any person who is required to consent is unavailable because the person cannot be located, an affidavit of diligent search shall be filed.

(c) If any person who is required to consent is unavailable because the person is deceased, the petition to terminate parental rights pending adoption must be accompanied by a certified copy of the death certificate.

COMMENTS

Every effort must be made to identify and get the consent of both birthparents.[183] Pre-consent interviews[184] are required by statute, and the adoption professional is required to write a summary of the interview or a statement of why a birthparent was unavailable to be interviewed.[185] Under the proposed statute, if a birthparent cannot be located, the adoption professional must file "an affidavit of diligent search" or, in the case of death of a birthparent, a certified copy of the death certificate.[186]

Section 4.

(4) Execution Procedure, Timing, and Irrevocability.

(a) An affidavit of nonpaternity may be executed before the birth of the child; however, the

183. *Id*. § 3(a).

184. *See infra* notes 202–205 and accompanying text (discussing Pre-Consent Counseling).

185. *Infra* APPENDIX B § 3(a).

186. *Id.* §§ 3(b), (c).

consent to an adoption may not be executed before the birth of the child except in a preplanned adoption. An affidavit of nonpaternity may be set aside only if the court finds that the affidavit was obtained by fraud or duress.

(b) A consent to the adoption of a child who is to be placed for adoption may be executed by the birthmother 72 hours after the child's birth or the day the birthmother is notified in writing, either on her patient chart or in release paperwork, that she is fit to be released from the licensed hospital or birth center, whichever is earlier. A consent by the birthfather may be executed at any time. The consent is valid upon execution and may be withdrawn only if the court finds that it was obtained by fraud or duress.

(c) If the consent of one parent is set aside in accordance with this chapter, any other consents executed by the other parent or a third party whose consent is required for the adoption of the child may not be used by the parent whose consent was set aside to terminate or diminish the rights of the other parent or third party whose consent was required for the adoption of the child.

(d) The consent to adoption or the affidavit of nonpaternity must be signed in the presence of two witnesses and be acknowledged before a notary public who is not signing as one of the witnesses. The notary public must legibly note on the consent or the affidavit the date and time of execution. The witnesses' names must be typed or printed underneath their signatures. The witnesses' home or business addresses must be included. The person who signs the consent or the affidavit has the right to have at least one of the witnesses be an individual who does not have an employment, professional, or personal relationship with the adoption entity or the prospective adoptive parents. The adoption

entity must give reasonable advance notice to the person signing the consent or affidavit of the right to select a witness of his or her own choosing. The person who signs the consent or affidavit must acknowledge in writing on the consent or affidavit that such notice was given and indicate the witness, if any, who was selected by the person signing the consent or affidavit. The adoption entity must include its name, address, and telephone number on the consent to adoption or affidavit of nonpaternity.

(e) A consent to adoption being executed by the birthparent must be in at least 12-point boldfaced type and shall contain the following recitation of rights:

CONSENT TO ADOPTION

You have the right to select at least one person who does not have an employment, professional, or personal relationship with the adoption entity or the prospective adoptive parents to be present when this affidavit is executed and to sign it as a witness. You must acknowledge on this form that you were notified of this right and you must indicate the witness or witnesses you selected, if any.

You do not have to sign this consent form. You may do any of the following instead of signing this consent or before signing this consent:

1. Consult with an attorney;
2. Hold, care for, and feed the child unless otherwise legally prohibited;
3. Spend time alone with the child;
4. Place the child in foster care or with any friend or family member you choose who is willing to care for the child;
5. Take the child home unless otherwise legally prohibited; and,
6. Find out about the community resources that are available to you if you do not go through with the adoption.

If you do sign this consent, you are giving up all rights to your child. Your consent is valid, binding, and irrevocable

> the moment you sign it except under specific legal circumstances. If you are giving up your rights to a newborn child who is to be immediately placed for adoption upon the child's release from a licensed hospital or birth center following birth, a waiting period will be imposed upon the birthmother before she may sign the consent for adoption. A birthmother must wait 72 hours from the time of birth, or until the day the birthmother has been notified in writing, either on her patient chart or in release papers, that she is fit to be released from a licensed hospital or birth center, whichever is sooner, before the consent for adoption may be executed. The birthfather may execute consent at any time. Once you have signed the consent, it is valid, binding, and irrevocable and cannot be invalidated unless a court finds that it was obtained by fraud or duress.
>
> If you believe that your consent was obtained by fraud or duress and you wish to invalidate that consent, you must:
>
> 1. Notify the adoption entity, by writing a letter, that you wish to withdraw your consent; and
> 2. Prove in court that the consent was obtained by fraud or duress.

COMMENTS

Section (4) contains the timing provisions which have been the central focus of this Note.[187] A birthmother may not give consent until seventy-two hours after the birth of the child.[188] However, if the birthmother is released from the hospital before this time expires, she may give consent on the day of her release from the hospital.[189] The birthfather may give his consent at any time, even before the birth of the child, provided that there is an adoption plan in place.[190] This is intended to avoid situations where a birthfather attempts to relinquish his rights to avoid parenting and support obligations, which he is not allowed to do.[191] It is also intended to provide certainty in the proceedings by ensuring that a birthfather's consent or nonpaternity affidavit may be secured at any time that the adoption professional or birthmother is able to locate him.

Consent by either parent is irrevocable upon execution.[192] The only ground for invalidating or setting aside birthparent consent is on a court

187. *Id*. § 4(b).
188. *Id*.
189. *Id*.
190. *Id*. § 4(a).
191. *See, e.g.*, *In re* Ryan B., 686 S.E.2d 601, 605 (W. Va. 2009).
192. *See infra* APPENDIX B §§ 4(a), (b).

finding "that it was obtained by fraud or duress."[193] In the event that the consent of one birthparent is invalidated, the valid consent of the other birthparent may not be used against him or her by the birthparent who gave invalid consent or by a third party.[194]

Sections (4)(d), (4)(e), and (5) contain procedural safeguards to reduce the possibility of fraud or coercion. For example, a birthparent consent must be executed in front of at least two witnesses and notarized, and the notary may not act as one of the witnesses.[195] The birthparent may choose at least one of the witnesses,[196] and must be informed in writing on the consent form itself of this right.[197] Section (4)(d) provides what information must be included about the witnesses and the adoption agency on the consent itself.[198] Section (4)(e) provides the text of the consent form, along with typeface restrictions.[199] The form contains written notice to the birthparent of pertinent provisions of the statute, along with a procedure to follow if the birthparent believes he or she is being defrauded, and the following options:

> You do not have to sign this consent form. You may do any of the following instead of signing this consent or before signing this consent:
>
> 1. Consult with an attorney;
> 2. Hold, care for, and feed the child unless otherwise legally prohibited;
> 3. Spend time alone with the child;
> 4. Place the child in foster care or with any friend or family member you choose who is willing to care for the child;
> 5. Take the child home unless otherwise legally prohibited; and,
> 6. Find out about the community resources that are available to you if you do not go through with the adoption.
>
> If you do sign this consent, you are giving up all rights to your child. Your consent is valid, binding, and irrevocable the moment you sign it except under specific legal circumstances.[200]

193. *Id*.
194. *Id.* § 4(c).
195. *Id*. § 4(d).
196. *Id*.
197. *Id*. § 4(e).
198. *Id*. § 4(d).
199. *Id*. § 4(e).
200. *Id*.

Section 5.

(5) A copy or duplicate original of each consent signed in an action for termination of parental rights pending adoption must be provided to the person who executed the consent to adoption. The copy must be hand delivered, with a written acknowledgment of receipt signed by the person whose consent is required at the time of execution. If a copy of a consent cannot be provided as required in this subsection, the adoption entity must execute an affidavit stating why the copy of the consent was not delivered. The original consent and acknowledgment of receipt, or an affidavit stating why the copy of the consent was not delivered, must be filed with the petition for termination of parental rights pending adoption.

COMMENTS

Section (5) provides that the birthparent must be given a copy of the signed consent at the time of execution, or the adoption agency must provide to the court a written explanation in case a copy could not be provided.[201]

Section 6.

(6) Counseling.

(a) Counseling of the birthmother is required in department, agency, and direct parental placement adoptions. If any other parent is involved in an adoptive placement, counseling of that parent is encouraged.

(b) Counseling must be performed by a person employed by the department or by a staff person of a licensed child-placing agency designated to provide this type of counseling. Unless the counseling requirement is waived for good cause by a court, a minimum of 3 hours of counseling must be completed prior to execution of a relinquishment of parental rights and consent to adopt. A relinquishment and consent to adopt executed prior to completion of required counseling is void.

201. *Id*. § 5.

(c) During counseling, the counselor shall offer an explanation of:

1. adoption procedures and options that are available to a parent through the department or licensed child-placing agencies;
2. adoption procedures and options that are available to a parent through direct parental placement adoptions, including the right to an attorney and that legal expenses are an allowable expense that may be paid by a prospective adoptive parent;
3. the alternative of parenting rather than relinquishing the child for adoption;
4. the resources that are available to provide assistance or support for the parent and the child if the parent chooses not to relinquish the child;
5. the legal and personal effect and impact of terminating parental rights and of adoption;
6. the options for contact and communication between the birth family and the adoptive family;
7. postadoptive issues, including grief and loss, and the existence of a postadoptive counseling and support program;
8. the fact that the adoptee may be provided with a copy of the original birth certificate upon request after reaching 18 years of age, unless the birth parent has specifically requested in writing that the vital statistics bureau withhold release of the original birth certificate.

(d) The counselor shall prepare a written report containing a description of the topics covered and the number of hours of counseling. The report must specifically include the counselor's opinion of whether or not the parent understood all of the issues and was capable of informed consent. The report must, on request, be released to the person counseled, to the

> department, to an agency, or with the consent of the person counseled, to an attorney for the prospective adoptive parents.

COMMENTS

At least three hours of pre-consent counseling for the birthmother are required in every adoption, and counseling is encouraged, but not required, for the birthfather.[202] Who may counsel a birthparent[203] and a list of issues that must be addressed are outlined in the statute, including procedural information, the legal significance of terminating parental rights, the emotional significance of terminating a parental relationship, the option of open adoption, the option to walk away from the adoption plan, and a list of available resources in case the birthmother decides to parent her child.[204] Finally, the counselor must provide to the court a written report outlining the counseling given.[205]

B. Rationale

The crucial provisions in this proposal are those that deal with the timing of consent and the disallowance of revocation. This Note has established in Part III why an abbreviated period of uncertainty is in the best interests of the child.[206] The desires of the adoptive family are likewise served by reducing this window of time.[207] But what needs to be emphasized is that brevity in delay of finality in the child's status also serves birthparents well. While proponents of longer revocation periods believe that putting off the birthparents' decision serves the birthparents' interests, the opposite is almost certainly the case. Advocates for birthparents' rights claim that hours or days after the birth of a child is too emotional a time to be making such life-changing decisions.[208] Conceding that the emotions surrounding the birth of a child make it difficult to make a non-emotional decision, it is still not readily apparent that the situation improves dramatically with the passage of a little time. If a ten-day revocation period is better than a three-day revocation period for a birthmother's peace of mind, then certainly by the same logic a twenty-one-day period, or a thirty-day period, or a ninety-day period would be vastly superior. But the longer the statutory revocation period, the greater the threat to the stability, permanence, and continuity of the adoptive family unit. A degree of uncertainty and anxiety will be present in the adoptive

202. *Id*. §§ 6(a), (b).
203. *Id*. § 6(b).
204. *Id.* § 6(c).
205. *Id*. § 6(d).
206. GOLDSTEIN ET AL., *supra* note 44, at 43.
207. Cahn, *Family Issue(s)*, *supra* note 48, at 271.
208. Samuels, *supra* note 43, at 545.

home until the day the family can breathe a collective sigh of relief: The new baby is finally "one of us." If a three-day window for the birthmother to change her mind forces her to make a decision in the midst of a very trying and emotional time, does a ten-day window really rectify that situation? And with whom is the child bonding and identifying as mom in the interim?

It would seem consistent with the interests of both birthparents to have made a final, rational decision before the emotions of childbirth add to the confusion in what, in most cases, is already a tough situation.[209] This is true even if the state does not allow for consent to be given until after birth in the case of the mother, allowing for consent to be given by the father at any time. Except in the rare case, consent is given willingly and voluntarily. In cases where fraud or duress is present, no state withholds the right to challenge consent as being invalid, whether it is subject to revocation or not.[210] Under the proposed approach, counseling and advice are mandated by statute and paid for by the prospective adoptive parents in an effort to aid the informed decision of the birthparents. In giving voluntary consent, the birthparents have presumably already thoughtfully considered their options. It would be the rare case indeed where the life circumstances that precipitated a birthmother seeking out an adoption plan, going through nine months of pregnancy, deciding to relinquish her parental rights and working with the birthfather to relinquish his parental rights, whatever those circumstances may be, have changed so drastically in the few days or weeks after signing consent that revocation is in the birthparents' interest. Rather, finality in the process and the birthparents' interests are better served when the decision made is as untainted as possible by emotion and the possibility of putting the decision off until later in an already difficult situation.[211]

CONCLUSION

It is the case that, contrary to popular wisdom, no one's interests are advanced by prolonging the process of finalization of an adoption plan. Both sets of parents—those who are connected to the child through biology and those who may ultimately end up providing the child with a lifetime of care and a family in which to belong—benefit from the finality, permanency, and predictability of a firm decision, once a decision is made. But of foremost importance, as the child's future hangs in the balance, it is

209. GOLDSTEIN ET AL., *supra* note 44, at 43.

210. *See infra* APPENDIX A.

211. For example, according to the Florida Legislature, "[a]n unmarried mother faced with the responsibility of making crucial decisions about the future of a newborn child is entitled to privacy, has the right to make timely and appropriate decisions regarding her future and the future of the child, and is *entitled to assurance* regarding an adoptive placement." FLA. STAT. ANN. § 63.022 (1)(b) (West, WestlawNext through 2013 First Reg. Sess.) (emphasis added).

to his or her needs that we must first attend. And the child's interests are clearly better served by finality, regardless of which family she ends up calling her own.

Viewed in this light, there is clearly no room for revocation periods in the adoption process. Relinquishment of parental rights should not be entered into lightly. Birthparents should take as much time as they need to make such a momentous decision. Statutory minimum waiting periods before consent can be given after birth help to ensure that birthparents are afforded an opportunity to reflect, even after the pre-birth decision has been made, and to understand that no one is expecting them to agree to an adoption plan against their will. But this period must also be kept to a minimum in the child's interest, to avoid foster care and needless ambiguity in the child's status. Adoptive parents, social workers, and adoption professionals must be patient and understanding, allowing birthparents the breathing room they need to make a final decision. But in the end, the child will need someone to care for him or her, and the final decision must be final.

APPENDIX A: SURVEY OF RELEVANT CONSENT AND REVOCATION STATUTES BY STATE*

State	Statute	When can consent be given?	Is consent revocable?	When can consent be revoked?	Putative father registry?
Alabama	ALA. CODE §§ 26-10A-7 to -14 (WestlawNext through 2013 Reg. Sess.).	Any time	Yes	(1) Within five days after birth or after signing consent, whichever is later, (2) within fourteen days if court finds grounds reasonable and within best interests of the child, or (3) until final decree upon finding of fraud, duress, mistake, or undue influence (after one year from final decree, consent may not be challenged on any ground unless the child has been kidnapped)	Yes
Alaska	ALASKA STAT. §§ 25.23.040–.090 (Lexis Advance through 2013 Reg. Sess.).	Any time after birth	Yes	(1) Within ten days after consent is given, (2) before adoption decree is entered if court finds in best interests of the child, but (3) irrevocable after entry of adoption decree	Filed with state registrar
Arizona	ARIZ. REV. STAT. §§ 8-106(A) to -107 (WestlawNext through 2013 Reg. and Special Sess.).	Seventy-two hours after birth	No	Irrevocable unless obtained by fraud, duress, or undue influence	Yes
Arkansas	ARK. CODE ANN. §§ 9-9-206 to -209 (Lexis Advance through 2013 Reg. Sess.).	Any time after birth	Yes	(1) Within ten days after signing or birth, whichever is later, but (2) irrevocable after entry of adoption decree	Yes

* For the purposes of this table, invalidation of consent by a finding of fraud, duress, misrepresentation, coercion, mistake, or undue influence is not considered voluntary withdrawal, though treatment of such situations in statutory language varies.

State	Statute	When can consent be given?	Is consent revocable?	When can consent be revoked?	Putative father registry?
California	CAL. FAM. CODE §§ 8602–8606, 8801.3, 8700, 8814.5 (WestlawNext through 2013 Reg. Sess.).	(1) Direct placement: When birthmother is discharged from the hospital; (2) Agency: Any time after birth	Yes	(1) Direct placement: thirty days after consent is given; (2) Agency: Only by mutual consent, unless placement is not finalized with specified adoptive parent, then birthparent has 30 days	Filed with Dept. of Children's Services
Colorado	COLO. REV. STAT. §§ 19-5-103 to -105, -203, 19-3-604 (Lexis Advance through 2013 Reg. Sess.).	Any time after birth	No	Only if, within ninety days of relinquishment order, fraud or duress can be established by clear and convincing evidence	No
Connecticut	CONN. GEN. STAT. §§ 45a-715 to -719 (West, WestlawNext through 2013 Reg. Sess.).	Forty-eight hours after birth	Yes	(1) Only by motion, court will make best interests of the child determination, but (2) irrevocable after final adoption decree entered	Filed with court of probate
Delaware	DEL. CODE ANN. tit. 13 §§ 907–909, 1103(a), 1106(c) (Lexis Advance through 2013 Reg. Sess.).	(1) Mother: After birth; (2) Father: Any time	Yes	Must file petition with court within 60 days of filing adoption petition; court will make determination within 30 days	Yes

State	Statute	When can consent be given?	Is consent revocable?	When can consent be revoked?	Putative father registry?
Florida	FLA. STAT. ANN. §§ 63.062–.064, .082 (West, WestlawNext through 2013 Reg. Sess.).	(1) Mother: Forty-eight hours after birth or upon release from the hospital, whichever is earlier; (2) Father: Any time after birth	No (Yes if child older than six months)	(1) Only on finding of fraud or duress, but (2) if child is over six months old at adoption, subject to a three-day revocation period or any time prior to the placement, whichever is later	Yes
Georgia	GA. CODE ANN. §§ 19-8-4 to -7, -9 (Lexis Advance through 2013 Reg. Sess.).	Any time after birth	Yes	Within ten days after signing	Yes
Hawaii	HAW. REV. STAT. §§ 578-2, 571-61 (West, WestlawNext through 2013 Reg. Sess.).	Any time after sixth month of pregnancy	No, but equivocal	Judgment may not be entered until after birth, and birthparents must file a reaffirmation of surrender not less than ten days prior to the proposal for entry of judgment; cannot be withdrawn after placement, unless the court finds in the best interests of the child	Forms provided
Idaho	IDAHO CODE ANN. §§ 16-1504, -1506, -1515 (Lexis Advance through 2013 Reg. Sess.).	Not addressed	Yes	Not addressed; if birthparent revokes consent, must reimburse adoptive parents for expenses	Yes

State	Statute	When can consent be given?	Is consent revocable?	When can consent be revoked?	Putative father registry?
Illinois	750 ILL. COMP. STAT. ANN. 50/8–/12.1 (West, WestlawNext through 2013 Reg. Sess.).	(1) Mother: Seventy-two hours after birth; (2) Father: Any time	No	(1) Only on finding of fraud or duress, but (2) not at all after twelve months from date of consent	Yes
Indiana	IND. CODE ANN. §§ 31-19-9-1 to -3 (West, WestlawNext through 2013 Reg. Sess.).	(1) Mother: Any time after birth; (2) Father: Any time	Yes (No by father signed before birth)	(1) Birthfather who consents before birth of the child cannot revoke consent, but (2) no later than thirty days after consent is signed, if court finds best interests of the child	Yes
Iowa	IOWA CODE ANN. §§ 600.7, 600A.4 (West, WestlawNext through 2013 Reg. Sess.).	Seventy-two hours after birth	Yes	(1) Within ninety-six hours of signing consent, or (2) prior to issuance of adoption decree upon a showing by clear and convincing evidence that good cause exists for revocation (*e.g.*, fraud, coercion, or material misrepresentation, or finding of best interests of the child)	Yes
Kansas	KAN. STAT. ANN. §§ 59-2114 to -2115, -2129, -2136 (West, WestlawNext through 2013 Reg. Sess.).	Twelve hours after birth; not more than six months prior to filing of petition for adoption	No	Only by clear and convincing evidence that consent was not freely and voluntarily given	No

State	Statute	When can consent be given?	Is consent revocable?	When can consent be revoked?	Putative father registry?
Kentucky	KY. REV. STAT. ANN. §§ 199.500–.502, 625.040 (West, WestlawNext through 2013 Reg. Sess.).	Seventy-two hours after birth	Yes	Within twenty days after placement approval or execution of consent, whichever is later	Yes
Louisiana	LA. CHILD. CODE ANN art. 1113, 1120–1123, 1193 (WestlawNext through 2013 Legis. Sess.).	(1) Agency adoption: Three days after birth; (2) Private adoption: Five days after birth; (3) Father: Any time	No	Only upon proof of duress or fraud, except in the case of a father signing consent before the fifth day after birth, in which case consent becomes irrevocable five days after birth	Yes
Maine	ME. REV. STAT. ANN. tit. 18-A, §§ 9-202, -302 (West, WestlawNext to 2013 First Reg. and First Special Sess.).	Any time after birth	No	Consent is final only for the adoption consented to; if that petition is withdrawn, necessary to hold review; consent not valid until three days after signing	No
Maryland	MD. CODE ANN., FAM. LAW §§ 5-338 to -341, 5-3B-21 to -26, 5-351 (West, WestlawNext through 2013 Reg. Sess.).	Any time after birth	Yes	Within thirty days of signing consent or thirty days after adoption petition is filed, whichever is later	No

State	Statute	When can consent be given?	Is consent revocable?	When can consent be revoked?	Putative father registry?
Massachusetts	MASS. GEN. LAWS ANN. ch. 210 §§ 2 to 2B, 3 (Lexis Advance through 2013 Legis. Sess. Act 175).	Four days after birth	No	Final and irrevocable from the date of execution	No
Michigan	MICH. COMP. LAWS ANN. §§ 710.29–.51 (West, WestlawNext through 2013 Reg. Sess. Act 181).	After full explanation of relinquishment by judge, referee, or other authority	Yes	After filing of petition to court, but not if child has been placed for adoption, unless termination is pending when petition is made	No
Minnesota	MINN. STAT. ANN. § 259.24(1)–(5) (West, WestlawNext through 2013 First Spec. Sess.).	Seventy-two hours after birth (but not later than sixty days after placement)	Yes	Within ten working days after consent is executed; after ten days, irrevocable except on finding of fraud	Yes
Mississippi	MISS. CODE ANN. §§ 93-17-5, 7, 15 (Lexis Advance through 2013 Reg. and First and Second Extraordinary Sess.).	Seventy-two hours after birth	No, but equivocal	Only upon action to set aside final decree, but no more than six months after entry of final decree	Filed with Dept. of Health

State	Statute	When can consent be given?	Is consent revocable?	When can consent be revoked?	Putative father registry?
Missouri	MO. ANN. STAT. §§ 453.030, 453.040 (West, WestlawNext through 2013 First Reg. Sess.).	Forty-eight hours after birth	Yes	Before being reviewed and accepted by a judge (within three days after signing)	Yes
Montana	MONT. CODE ANN. §§ 42-2-301–303, 405–418 (West, WestlawNext through 2013 Sess.).	Seventy-two hours after birth and after parent has received required counseling	No	Only with mutual agreement to revoke by birthparent and department, agency, or adoptive parent	Yes
Nebraska	NEB. REV. STAT. ANN. §§ 43-104–106.01 (West, WestlawNext through 2013 Reg. Sess.).	Forty-eight hours after birth	Not addressed	Not addressed	Yes
Nevada	NEV. REV. STAT. ANN. §§ 127.020–.110 (West, WestlawNext through 2011 Reg. Sess.).	(1) Seventy-two hours after birth; (2) Unmarried father: Any time	No	Only if adoptive family is found to be unsuitable or the placement is in violation of the law; may be invalid if (1) father of the child marries mother before birth, (2) consent is not executed within six months of birth, or (3) adoption petition not filed within two years of birth	No
New Hampshire	N.H. REV. STAT. ANN. §§ 170-B:3–B:12 (WestlawNext through 2013 Reg. Sess. Ch. 279).	Seventy-two hours after birth	Yes	(1) By preponderance of the evidence that surrender was obtained by fraud or duress, or (2) court determination of best interests of the child, but (3) may not be withdrawn for any reason after entry of the final decree	Yes

State	Statute	When can consent be given?	Is consent revocable?	When can consent be revoked?	Putative father registry?
New Jersey	N.J. STAT. ANN. §§ 9:3-41 to -43, -45.1 to -48 (West, WestlawNext through 2013 Legis. Sess. Ch. 169).	Seventy-two hours after birth; Alleged father may deny paternity at any time	No	Only at discretion of agency or upon proof of fraud, duress, or misrepresentation	No
New Mexico	N.M. STAT. ANN. §§ 32A-5-17 to -24, -36, -37 (West, WestlawNext through 2013 First Reg. Sess. Ch. 228).	Forty-eight hours after birth	No	Before decree, only by showing of fraud; After decree, for no reason	Yes
New York	N.Y. DOM. REL. LAW §§ 111–111-b; N.Y. SOC. SERV. LAW §§ 384–384-c (McKinney, WestlawNext through 2013 Legis. Sess. Ch. 340).	Not addressed	No/Yes	Judicial consent is irrevocable; Extrajudicial consent is revocable within forty-five days of execution by written notice, and only if unopposed; Any consent revocable on proof of fraud, duress, or coercion	Yes
North Carolina	N.C. GEN. STAT. §§ 48-3-601 to -609, -701, -706 (Lexis Advance through 2013 Reg. Sess.).	(1) Mother: Any time after birth; (2) Father: Any time	Yes	Within seven days of execution; Void if (1) shown by clear and convincing evidence that it was obtained by fraud or duress; (2) mutual agreement; (3) petition to adopt is voluntarily dismissed; or, (4) court dismisses petition to adopt	No

State	Statute	When can consent be given?	Is consent revocable?	When can consent be revoked?	Putative father registry?
North Dakota	N.D. CENT. CODE §§ 14-15-05 to -08, -14, -15, -19 (Lexis Advance through 2013 Reg. Sess.).	Any time after birth	Yes	Before entry of decree of adoption upon court finding that withdrawal is in the best interests of the child	No
Ohio	OHIO REV. CODE ANN. §§ 3107.06–.85 (West, WestlawNext through 2013).	Seventy-two hours after birth	Yes	Before entry of final decree of adoption (unless interlocutory order has been entered) upon court finding that withdrawal is in the best interests of the child	Yes
Oklahoma	OKLA. STAT. tit. 10, §§ 7503-2.1 to -2.7 (West, WestlawNext through 2013 First Extraordinary Sess.).	(1) Mother: Any time after birth; (2) Father of child born in wedlock: Any time after birth; (3) Putative Father: Any time	Yes/No	(1) Extrajudicial consent is revocable for any reason for fifteen days after execution of consent; (2) otherwise, consent is irrevocable, unless it can be shown that setting aside the consent would be in the best interests of the child *and*: (a) no petition for adoption was filed within nine months after placement for adoption (preponderance standard), (b) another necessary consent was not executed (preponderance standard), or (c) in cases of fraud or duress, before entry of the adoption decree or within three months of discovery of fraud (clear and convincing standard)	Yes
Oregon	OR. REV. STAT. §§ 109.312–.346, 418.270 (West, WestlawNext through 2013 Reg. and Spec. Sess.).	Not addressed	No, but conditional	Consent becomes irrevocable, unless fraud or duress concerning a material fact is proven, on signing of a waiver to appear in court and certificate of waiver. The waiver only goes into effect when all of the following conditions have been met: (1) Child is placed for adoption in the physical custody of person to whom consent is given; (2) Petition to adopt has been filed; (3) Court has appointed guardian for the child; (4) An approved home study has been filed by adoptive parent(s); (5) Adoptive parent(s) have received information about the child's social, medical, and	No

State	Statute	When can consent be given?	Is consent revocable?	When can consent be revoked?	Putative father registry?
				genetic history; and, (6) Person signing certificate of waiver and irrevocability has been given notice of right to paid-for adoption-related counseling and explanation of consequences of signing the certificate	
Pennsylvania	23 PA. CONS. STAT. ANN. §§ 2501–2505, 2711–2714 (West, WestlawNext through 2013 Reg. Sess.).	(1) Seventy-two hours after birth; (2) Putative father: Any time	Yes	(1) Birth father or putative father: thirty days after the birth of the child or execution of consent, whichever is later; (2) Birth mother: thirty days after execution of consent; but, (3) consent may be invalidated by a showing of fraud or duress (by a preponderance standard if the person giving consent is aged twenty-one or younger, by a clear and convincing standard in all other cases) sixty days after birth or execution of consent or thirty days after entry of the decree of adoption, whichever is earlier	Filed with Dept. of Public Welfare
Rhode Island	R.I. GEN. LAWS ANN. §§ 15-7-5 to -21.1 (West, WestlawNext through 2013 Reg. Sess.).	Fifteen days after birth	No, but ambiguous	Consent or court determination that right to consent has been terminated can only be challenged within 180 days after decree of adoption is entered; Any challenge brought must show by clear and convincing evidence that the adoption is not in the best interests of the child	No
South Carolina	S.C. CODE ANN. §§ 63-9-310 to -360 (West, WestlawNext through 2013 Reg. Sess.).	Any time after birth	No	(1) Consent may be withdrawn on showing that consent was not voluntarily given or was obtained by duress or coercion and upon court determination of best interests of the child, but (2) may not be withdrawn or invalidated for any reason after final decree of adoption	Yes

State	Statute	When can consent be given?	Is consent revocable?	When can consent be revoked?	Putative father registry?
South Dakota	S.D. CODIFIED LAWS §§ 25-5A-4, -16, 25-6-4 to -21 (WestlawNext through 2013 Reg. Sess.).	Five days after birth	Yes	Except in cases involving fraud, an action to assert a claim or right arising from an adoption proceeding must be brought within two years of finalization.	Filed with Dept. of Health
Tennessee	TENN. CODE ANN. §§ 36-1-110 to -143 (Lexis Advance through 2013 Reg. Sess.).	Three days after birth (may be waived by court for good cause)	Yes	(1) Within ten days of consent for any reason, but (2) after expiration of revocation period, may be set aside by the court on showing, by clear and convincing standard, of fraud, duress, intentional misrepresentation, or invalidity, but only if action is initiated within thirty days of execution of consent or entry of confirmation of consent	Yes
Texas	TEX. FAM. CODE ANN. §§ 161.003–.007, 161.102–.109, 162.010–.025 (West, WestlawNext through 2013 Third Called Sess.).	(1) Mother: Forty-eight hours after birth; (2) Father (or alleged father): Any time	Yes	(1) Any time prior to final adoption order by filing a signed revocation, or (2) if affidavit of consent fails to state a period of time of irrevocability (not to exceed sixty days after execution), consent can only be revoked within eleven days of signing, but (3) consent to Dept. of Protective and Regulatory Services or a licensed child-placing agency is irrevocable	Yes
Utah	UTAH CODE ANN. §§ 78B-6-111, -120 to -146 (West, WestlawNext through 2013 Second Spec. Sess.)	(1) Mother: Twenty-four hours after birth; (2) Father: Any time	No	Effective when signed and cannot be revoked	Yes

State	Statute	When can consent be given?	Is consent revocable?	When can consent be revoked?	Putative father registry?
Vermont	VT. STAT. ANN. tit. 15A, §§ 2-401 to -409 (Lexis Advance through 2013 Sess.).	Thirty-six hours after birth	Yes	(1) Within twenty-one days of execution of consent, (2) by agreement of birthparent and adoptive parent or agency that accepted consent, (3) before adoption decree is entered if fraud or duress is shown by clear and convincing standard, (4) if petition to adopt is not filed within forty-five days of placement for adoption, unless the court has extended the forth-five-day period, or (5) if a condition permitting revocation is shown by preponderance standard	No
Virginia	VA. CODE ANN. §§ 63.2-1202 to -1205, 63.2-1223 to -1229, 63.2-1241 (Lexis Advance through 2013 Reg. and Spec. Sess.).	(1) Mother: Three days after birth; (2) Father: Any time	Yes	(1) Within seven days after execution for any reason (may be waived if child is at least ten days old), or (2) until entry of final order of adoption upon proof of fraud or duress or with mutual consent of birthparents and adoptive parents	Yes
Washington	WASH. REV. CODE ANN. §§ 26.33.080–.130 (West, WestlawNext through 2013).	Any time, but may not be presented to the court until forty-eight hours after birth or forty-eight hours after signing, whichever is later	Yes	(1) Any time before consent is approved by the court, or (2) on showing of fraud or duress within one year after approval by the court	No

State	Statute	When can consent be given?	Is consent revocable?	When can consent be revoked?	Putative father registry?
West Virginia	W. VA. CODE ANN. §§ 48-22-301 to -306, 49-3-1 (West, WestlawNext through 2013 First Extraordinary Sess.).	Seventy-two hours after birth	Yes	(1) Conditional revocation may be provided for expressly in the written consent under the following circumstances: (a) other necessary consent is not executed, (b) termination of other parent's rights does not occur, or (c) adoptive parent named in the consent withdraws petition; (2) Absent express conditional revocation, consent can only be revoked prior to entry of final adoption order if: (a) birth parent and adoptive parents or agency agree to revocation, (b) if fraud or duress can be shown, by clear and convincing standard, within six months of execution of consent (if later than final entry), (c) a condition allowing revocation as expressly set forth in the consent has occurred (preponderance standard), or (d) the consent does not comply with other requirements (clear and convincing standard)	No
Wisconsin	WISC. STAT. ANN. §§ 48.41, .415, .837 (West, WestlawNext through 2013).	Must be given at judicial hearing, not before birth, but within thirty days of filing petition; Non-marital father may waive appearance at hearing in writing	Yes, but ambiguous	The judge must inform the consenting parent of the effect of a voluntary termination of parental rights; A parent who gave consent to termination of her rights may move the court for relief within thirty days after entry of the judgment on the following grounds: (1) mistake, inadvertence, surprise, or excusable neglect, (2) newly discovered evidence that entitles a party to a new trial, (3) fraud, misrepresentation, or other misconduct, or (4) a voided judgment or prior judgment on which the judgment was based that has been reversed or vacated	No
Wyoming	WYO. STAT. ANN. §§ 1-22-109, -110 (Lexis Advance through 2013 Reg. Sess.).	Any time after birth	No	Can only be revoked if obtained by fraud or duress; Exception: In the case of denial of adoption based on claim by putative father, the court may allow the mother to withdraw her consent	Yes

APPENDIX B: PROPOSED STATUTE

§ 1 Consent.

(a) Consent to an adoption or an affidavit of nonpaternity shall be executed as follows:

1. If by an agency, by affidavit from its authorized representative.
2. If by any other person, in the presence of the court or by affidavit acknowledged before a notary public and in the presence of two witnesses.
3. If by a court, by an appropriate order or certificate of the court.

(b) A minor parent has the power to consent to the adoption of his or her child and has the power to relinquish his or her control or custody of the child to an adoption entity. Such consent or relinquishment is valid and has the same force and effect as a consent or relinquishment executed by an adult parent. A minor parent, having executed a consent or relinquishment, may not revoke that consent upon reaching the age of majority or otherwise becoming emancipated.

(c) A consent or an affidavit of nonpaternity executed by a minor parent who is 14 years of age or younger must be witnessed by a parent, legal guardian, or court-appointed guardian ad litem.

(d) The notice and consent provisions of this chapter as they relate to the father of a child do not apply in cases in which the child is conceived as a result of a violation of the criminal laws of this or another state or country, including, but not limited to, sexual battery, unlawful sexual activity with certain minors, lewd acts perpetrated upon a minor, or incest.

§ 2 A consent that does not name or otherwise identify the adopting parent is valid if the consent contains a statement by the person consenting that the consent was voluntarily executed and that identification of the adopting parent is not required for granting the consent.

§ 3 Availability of Persons Required to Give Consent.

(a) A good faith and diligent effort must be made to have each parent whose identity is known and whose consent is required

interviewed by a representative of the adoption entity before the consent is executed. A summary of each interview, or a statement that the parent is unidentified, unlocated, or unwilling or unavailable to be interviewed, must be filed with the petition to terminate parental rights pending adoption. The interview may be excused by the court for good cause.

(b) If any person who is required to consent is unavailable because the person cannot be located, an affidavit of diligent search shall be filed.

(c) If any person who is required to consent is unavailable because the person is deceased, the petition to terminate parental rights pending adoption must be accompanied by a certified copy of the death certificate.

§ 4 Execution Procedure, Timing, and Irrevocability.

(a) An affidavit of nonpaternity may be executed before the birth of the child; however, the consent to an adoption may not be executed before the birth of the child except in a preplanned adoption. An affidavit of nonpaternity may be set aside only if the court finds that the affidavit was obtained by fraud or duress.

(b) A consent to the adoption of a child who is to be placed for adoption may be executed by the birthmother 72 hours after the child's birth or the day the birthmother is notified in writing, either on her patient chart or in release paperwork, that she is fit to be released from the licensed hospital or birth center, whichever is earlier. A consent by the birthfather may be executed at any time. The consent is valid upon execution and may be withdrawn only if the court finds that it was obtained by fraud or duress.

(c) If the consent of one parent is set aside in accordance with this chapter, any other consents executed by the other parent or a third party whose consent is required for the adoption of the child may not be used by the parent whose consent was set aside to terminate or diminish the rights of the other parent or third party whose consent was required for the adoption of the child.

(d) The consent to adoption or the affidavit of nonpaternity must be signed in the presence of two witnesses and be acknowledged

before a notary public who is not signing as one of the witnesses. The notary public must legibly note on the consent or the affidavit the date and time of execution. The witnesses' names must be typed or printed underneath their signatures. The witnesses' home or business addresses must be included. The person who signs the consent or the affidavit has the right to have at least one of the witnesses be an individual who does not have an employment, professional, or personal relationship with the adoption entity or the prospective adoptive parents. The adoption entity must give reasonable advance notice to the person signing the consent or affidavit of the right to select a witness of his or her own choosing. The person who signs the consent or affidavit must acknowledge in writing on the consent or affidavit that such notice was given and indicate the witness, if any, who was selected by the person signing the consent or affidavit. The adoption entity must include its name, address, and telephone number on the consent to adoption or affidavit of nonpaternity.

(e) A consent to adoption being executed by the birthparent must be in at least 12-point boldfaced type and shall contain the following recitation of rights:

CONSENT TO ADOPTION

You have the right to select at least one person who does not have an employment, professional, or personal relationship with the adoption entity or the prospective adoptive parents to be present when this affidavit is executed and to sign it as a witness. You must acknowledge on this form that you were notified of this right and you must indicate the witness or witnesses you selected, if any.

You do not have to sign this consent form. You may do any of the following instead of signing this consent or before signing this consent:

1. Consult with an attorney;
2. Hold, care for, and feed the child unless otherwise legally prohibited;
3. Spend time alone with the child;
4. Place the child in foster care or with any friend or family member you choose who is willing to care for the child;
5. Take the child home unless otherwise legally prohibited; and,
6. Find out about the community resources that are available to you if you do not go through with the adoption.

If you do sign this consent, you are giving up all rights to your child. Your consent is valid, binding, and irrevocable the moment you sign it except under specific legal circumstances. If you are giving up your rights to a newborn child who is to be immediately placed for adoption upon the child's release from a licensed hospital or birth center following birth, a waiting period will be imposed upon the birthmother before she may sign the consent for adoption. A birthmother must wait 72 hours from the time of birth, or until the day the birthmother has been notified in writing, either on her patient chart or in release papers, that she is fit to be released from a licensed hospital or birth center, whichever is sooner, before the consent for adoption may be executed. The birthfather may execute consent at any time. Once you have signed the consent, it is valid, binding, and irrevocable and cannot be invalidated unless a court finds that it was obtained by fraud or duress.

If you believe that your consent was obtained by fraud or duress and you wish to invalidate that consent, you must:

1. Notify the adoption entity, by writing a letter, that you wish to withdraw your consent; and
2. Prove in court that the consent was obtained by fraud or duress.

§ 5 A copy or duplicate original of each consent signed in an action for termination of parental rights pending adoption must be provided to the person who executed the consent to adoption. The copy must be hand delivered, with a written acknowledgment of receipt signed by the person whose consent is required at the time of execution. If a copy of a consent cannot be provided as required in this subsection, the adoption entity must execute an affidavit stating why the copy of the consent was not delivered. The original consent and acknowledgment of receipt, or an affidavit stating why the copy of the consent was not delivered, must be filed with the petition for termination of parental rights pending adoption.

§ 6 Counseling.

(a) Counseling of the birthmother is required in department, agency, and direct parental placement adoptions. If any other parent is involved in an adoptive placement, counseling of that parent is encouraged.

(b) Counseling must be performed by a person employed by the department or by a staff person of a licensed child-placing agency designated to provide this type of counseling. Unless the counseling requirement is waived for good cause by a court, a minimum of 3 hours of counseling must be completed prior to

execution of a relinquishment of parental rights and consent to adopt. A relinquishment and consent to adopt executed prior to completion of required counseling is void.

(c) During counseling, the counselor shall offer an explanation of:

1. adoption procedures and options that are available to a parent through the department or licensed child-placing agencies;
2. adoption procedures and options that are available to a parent through direct parental placement adoptions, including the right to an attorney and that legal expenses are an allowable expense that may be paid by a prospective adoptive parent;
3. the alternative of parenting rather than relinquishing the child for adoption;
4. the resources that are available to provide assistance or support for the parent and the child if the parent chooses not to relinquish the child;
5. the legal and personal effect and impact of terminating parental rights and of adoption;
6. the options for contact and communication between the birth family and the adoptive family;
7. postadoptive issues, including grief and loss, and the existence of a postadoptive counseling and support program;
8. the fact that the adoptee may be provided with a copy of the original birth certificate upon request after reaching 18 years of age, unless the birth parent has specifically requested in writing that the vital statistics bureau withhold release of the original birth certificate.

(d) The counselor shall prepare a written report containing a description of the topics covered and the number of hours of counseling. The report must specifically include the counselor's opinion of whether or not the parent understood all of the issues and was capable of informed consent. The report must, on request, be released to the person counseled, to the department, to an agency, or with the consent of the person counseled, to an attorney for the prospective adoptive parents.