Adoption Law and the Family at the Dawn of the 21st Century

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During the past several years, adoption law has been in the news across the nation due to several heart-wrenching and high-profile cases where biological and proposed adoptive parents disputed possession of a child[1]. The cases have not only sparked a nationwide discussion about adoption procedures and policies, but have served to highlight the changing nature of family in our society and how we as a society are treating our children.

Children enter the adoption process in two ways. Sometimes the birth mother, with or without the birth father, voluntarily places the child with adoptive parents directly or with the assistance of a private or public agency. In other cases there is an involuntary termination of parental rights, usually as a result of the behavior of the birth parents. The child then becomes a ward of the state, enters the foster care system, and awaits adoption. Changing demographics over the past several decades have caused changes at both points of children's entry to the adoption process.

In terms of demand, the number of persons wanting to create a family through adoption has remained high. As potential biological parents put off having children to later in life, this inevitably gives rise to more fertility problems. We also now have single persons, gay men, lesbians, and older couples who want the opportunity to have children, with adoption being one of the few available options. As to the supply of children available for adoption, there has been an explosion of children born to unwed teenagers, many of whom opt to parent their children,

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and steadily increasing numbers of children in foster care who may eventually be available for adoption.[2] In addition to these realities of supply and demand, there seems to be widespread consensus that children need permanency and stability to thrive.

Yet, there are many persons who want to adopt children and for a variety of reasons their desires are being foiled. Several issues are at the heart of this dilemma. First, there is a nationwide debate about how we as a society define "family" and what arrangements work best for children. Second, given the ever-increasing numbers of children in foster care, we must as a society decide how much effort should be expended to correct the family problem that led to the children being placed in foster care. Third, in the area of substantive adoption law and policy, we must find ways to respect the rights and interests of all participants in the adoption process without losing sight of the best interests of children. Finally, given the current turmoil in the area of adoption, more and more people will be turning to assisted reproductive technology and we as a society must come to terms with the enormous legal and ethical issues that will arise and how this in turn will affect adoption.

THE STATE OF THE AMERICAN FAMILY

There is currently a lively debate among American sociologists as to how children are being affected by the significant changes in the American family that have occurred in the past 50 years.[3] The debate has spilled beyond scholarly discussion to involve the rhetoric of politicians, jeremiads from clergy, and controversial depictions of all varieties of family in popular culture. Reduced to its most basic elements, the debate is really about whether children function best in a traditional family consisting of a married man and women or whether other

configurations of the family -- such as single parents, unmarried parents living together, divorced parents with or without stepparents, and gay and lesbian individuals and couples -- can also provide an environment suitable for the raising of children who may or may not be the biological offspring of the parent figures.

One group in the debate claims statistics and studies show that children raised in traditional husband-wife families are the most well-adjusted, do best in school, avoid teen pregnancy, violence, and mental illness.[4] The other side argues that it is the individual parenting and nurturing that occurs in any family, rather than the actual structure and marital status of its members, that is critical.[5]

While research has not yet produced definitive conclusions, this is a debate that cannot long remain unresolved as it has enormous ramifications for adoption practice and the placement of children in permanent homes. Children continue to enter the foster care system in enormous numbers; parental rights continue to be terminated; children continue to be born to teenage mothers; and older persons, gays and lesbians, single persons, and unmarried couples continue to want to adopt children.

Minnesota's adoption code has recently been amended to specifically provide that adoption laws and practices in the state shall recognize the diversity of Minnesota's population and the diverse needs of persons affected by adoption.[6] The adoption code no longer requires that petitioners be married, although it does not specifically provide that two unmarried people may adopt a child.[7] The local district courts have their own policies, however, as to whether they allow adoptions by single persons, unmarried couples or same-gender couples. Given the

large number of children in need of stable and nurturing homes, it would behoove our society to widen its acceptance of a broader concept of "family," fund more programs to prepare young people to more successfully enter into stable relationships and prepare for parenthood, and provide resources to help families, of whatever structure, to be better able to care for and nurture their children.[8]

THE CRISIS IN FOSTER CARE

At least since passage of the federal Adoption Assistance and Child Welfare Act of 1980, it has been the stated policy and mandate of child welfare agencies across the country to make "reasonable efforts" both to prevent the unnecessary separation of children from their parents and to facilitate the reunification of foster children with their birth parents. Because of the demographic trends as discussed above, more children are being removed from dysfunctional, neglectful, and often abusive families.[9] As with the high profile adoption disputes referenced at the beginning of this article, there have also been high profile cases of foster children returned home to abusive families, only to meet violent deaths.[10] The strict application of the family preservation and reunification policies where children remain outside of their birth home for years while futile efforts are made to "fix" the birth family is now coming under scrutiny.

Given the dramatic numbers of children in foster care and the fact that children in foster care provide the largest source of children for adoption, the treatment of children in foster care of necessity has enormous impact on adoption policy. What is alarming is not just the numbers of children in foster care, but the long durations children spend in foster care without any specific plan for permanency, the repeated moves from home to home, and the increasing severity of the

behavioral issues for many of these children, often resulting in extended placements in residential treatment facilities.

It is now high time to more judiciously apply these family preservation and reunification theories. It is clear that the age and race of a child have huge and independent effects on the odds of adoption. As minority children are over-represented in the foster care system and as the system often allows children to age in the system and diminish their chances for adoption, the current policies driving this situation clearly hinder the use of adoption as a means to provide these children with stable and nurturing families.[11]

The Minnesota Supreme Court and the Legislature have taken some preliminary steps to address this foster care problem. Both the Court and the Legislature have stated that while the county agency must make reasonable efforts to prevent placement out of the home or work to reunite the child with the family at the earliest possible time, this requirement is not unlimited. A court may order the cessation of reasonable efforts and move to termination of parental rights if it finds that the provision of further services for the purposes of rehabilitation and reunification is futile and therefore unreasonable under the circumstances.[12]

In 1997 the Legislature enacted other provisions to address this issue, including requirements to: (1) more aggressively recruit relatives and consider foster parents for adoptive placement[13]; (2) mandate the holding of permanent placement hearings no later than 12 months after the child is placed out of the home of the parent[14]; (3) provide notice of the permanent placement hearing to persons with whom the child is currently residing or has resided for a year of longer or who have demonstrated an interest in the child[15]. While these reforms were much

needed, their effectiveness in moving children out of foster care sooner and towards permanency, including adoption, will depend on how diligently social workers, attorneys, and courts apply these mandates.

ISSUES IN ADOPTION PRACTICE

The high-profile adoption cases cited at the beginning of this article raised some of the central issues still unresolved in adoption practice.

■ PARENTAL RIGHTS VERSUS BEST INTERESTS. First among these difficult issues is whether the best interests of the child should take precedence over the rights of birth parents. This issue is especially critical in cases where an adoptive placement unravels after the child has been with prospective adoptive parents for a period of time. In such circumstances the dispute centers on whether the rights of the birth parents to possession and control over the child supersede the right of the child and adoptive parents to maintain their bonding and attachment.

Those who advocate that the rights of the birth parents ought to supersede the rights of the adoptive parents rely on a line of United States Supreme Court cases stating that parents have a constitutionally protected liberty interest to raise their children without undue interference by the state[16]. This view presumes that the best interests of children coincide with the interests of their birth parents. Advocates on behalf of birth parents say parental rights to their children should only be terminated if it is demonstrated that parents have so egregiously neglected their parental duties and responsibilities as to forever relieve them of the right to parent their children as they see fit. [17]

Advocates on the other side of this issue say birth parents' biological relationship to the

children should be subservient to the social relationship – the bonding and attachment - that has developed between the children and those who actually have parented them and are committed to parenting them. Such nonbiological relationships, they argue, deserve protection as furthering what is best for the child. Advocates of this position argue that regeneration of birth parents' rights to their children reflects a profoundly anti-adoption and pro-natalist position ungrounded in child development and child psychology theories. They advocate that a family defined by social relationships rather than mere biology is more favorable to the child's development.[18]

While the laws in most states seem still to favor the rights of birth parents, as in *Baby Jessica* and *Baby Richard*, public opinion in these cases seemed to favor the adoptive parents from whom these children were forcefully removed in wrenching scenes broadcast across the nation. In Minnesota, while appellate case law strongly affirms the rights of birth parents[19], the termination of parental rights statute[20], the adoption code[21], and case law provide that termination and adoption is not to occur unless it is in the best interests of the child. It would thus be an easy step for a court to move our practice in the direction that apparently is favored by a majority of our citizens and focus this debate more on what is truly in the best interests of each individual child rather than giving undue weight to blood ties alone. A strict best interest analysis is not as precise as a biological parent preference and will, where contested, require a trial that could favor the party with the most resources and the most recent contact with the child. Nevertheless, if our goal is to place children in settings where they will have the best chance to thrive, the best practice would be to assess bonding and attachment and minimize the accident of birth as the focus of the inquiry.

■ BIRTH FATHERS. The issue of birth fathers' rights in the context of adoption law flows largely from the United States Supreme Court decision *Stanley v. Illinois*[22] where an unwed father, who had stepped up in a timely fashion to express and act upon his interest in the child, was found to have some say in the placement of his children. Stanley left unclear just how involved with his child a birth father must be in order to create a constitutionally protected right; accordingly, as has been true of the best interest standard, much litigation and legislation has followed the Court's decisions.

Minnesota faced its own birth father disputes in *Hisgun v. Velasco*[23] and *In the Matter of the Welfare of L.A.F.*[24] As a result of these cases and recommendations of the Minnesota Supreme Court Task Force on Foster Care and Adoption, the Legislature enacted the Putative Fathers Registry that will be effective January 1, 1998[25]. This statutory provision sets out a somewhat complicated procedure for potential birth fathers to register the possibility that they may be the father of a child from the time of conception through 30 days after birth. If they register, they will then be provided with notice and the opportunity to assert rights if the child is subsequently placed for adoption. If they do not register, any potential rights can be easily terminated. The statute is an effort to balance the interests of the birth father with the birth mother's and adoptive parents' interests in moving forward to finalization of the adoption. Time will tell if this will effectively address this difficult issue.

■ RACIAL ISSUES. The question of the role of race and culture has long been a troublesome issue in adoption. This issue first became a national concern in 1972 when the National Association of Black Social Workers took a strong stand against the placement of

African-American children in white homes. As a result of this issue being raised, in 1983 Minnesota enacted some of the strictest heritage preservation statutes in the nation. The Minnesota Supreme Court addressed this issue twice, in both cases affirming the legislation[26].

The steady criticism of this opposition to transracial adoptions led Congress in 1996 to pass amendments to the Multi-ethnic Placement Act that provide that no state may limit adoptions based on race, color, or national origin. The Minnesota Legislature responded to these mandates by amending the Adoption Code to specifically state that placement cannot be delayed or denied based on the race, color, or national origin of the adoptive parent or the child[27]. The Indian Child Welfare Act[28], passed in 1978, and the Minnesota Indian Family Preservation Act[29] created and still preserve unique treatment for Native American children in the context of adoption.

■ OPENNESS. One of the growing trends in adoption law and practice that has now received legislative action is the trend towards openness in adoption. This trend is a natural progression from the demographic and family developments discussed above. With fewer birth mothers placing their children voluntarily for adoption, the bargaining power of those who do place is much greater. Thus, many birth mothers are demanding more background information on the adoptive parents, periodic photographs and progress reports as to their child, and actual contact with the child after adoption. Openness is also occurring more regularly because older children are being adopted who have had contact with birth relatives.

The Minnesota Supreme Court recently issued two opinions which said open adoption agreements were legally unenforceable[30], only to be followed by legislation making such

agreements enforceable if certain requirements are satisfied[31]. Minnesota joins only a handful of states that have enacted such legislation making open adoption agreements legally enforceable.

Going hand-in-hand with the increasing openness in adoption is the increase in birth parents wanting to select their own adoptive parents with a minimal amount of state involvement. When adoptions result without the involvement of an adoption agency or county welfare department, these are called "independent" or "direct placement adoptions." Minnesota's Department of Human Services, the agency that supervises adoptions in this state, long resisted placements not done under the direct supervision of county agencies or licensed adoption agencies. Private attorneys challenged this position in the 1970s by convincing courts to waive consents by the Department of Human Services when in the best interests of the child. Finally, in 1994, legislation was enacted specifically allowing for direct placement adoptions and setting the procedures that need to be followed.[32]

This brief overview of significant issues in adoption practice and procedure indicates how the practice of adoption law has changed to reflect changes in the family and demographics. This area of law, fraught with emotion and filled with significant issues at the core of our society, has been slowly reactive to the societal and demographic changes. Judges, legislators, attorneys, social workers, and other participants in the process must try to be more proactive in formulating policies and practices that will further the best interests of the children by finding them permanent, loving, and nurturing homes.

■ ASSISTED REPRODUCTIVE TECHNOLOGY. Because of the perceived risks and the significant complexities inherent in adoption as it is practiced today, many persons hoping to

create families have sought alternatives using assisted reproductive technology. Assisted reproductive technology brings into play the complexities of paternity law, aspects of contract law, notions of custody law, adoption proceedings, significant questions of public policy, and issues of enforceability. In these circumstances, children are being born to persons who may not be their legal parents and the biological connection is tenuous at best.

Our current laws are not well-equipped to deal with these unique situations and it is in this area that many of the complex and emotional issues now at play in the adoption context will soon emerge. In Minnesota, the only statute we have regarding assisted reproductive technology involves artificial insemination[33]. Woefully out-of-date, this particular statute applies only to a married husband and wife and requires the insemination to be done under the direct supervision of a medical doctor.

The procedures used in assisted conception include artificial insemination, in vitro fertilization, cryopreservation, gamete intrafallopian transfer, and embryo lavage and transfer. Inherent in all of these methods are the rights and interests of the donors and recipients with regard to custody, financial support, and contact with the child. The procedures will often require terminations of parental rights and adoptions to create the legal parent-child relationship that is sought through the assisted reproductive process. Careful drafting and full disclosure of the intentions of all the participants is critical.

Some of these forms of assisted reproduction can present some rather bizarre legal predicaments. For example, with in vitro fertilization and gamete intrafallopian transfer, because an egg is retrieved from one women and transferred to the uterus of another women, the resulting

child may have two natural mothers -- the genetic mother and the gestational or birth mother. With cryopreservation and the long-term storage of embryos, the potential is created for a child to be born years or even decades after the death of the genetic parents. With embryo lavage and transfer, there is a risk that the fertilized egg will not be successfully removed from the donor and that she will continue the pregnancy intended for the recipient[34].

Assisted reproduction is the next frontier beyond adoption law. The demand for these procedures will only increase because of the demographic developments discussed above and also because of the risks and ever increasing complexities found in adoption law. At present, these procedures, which raise enormously complex legal and ethical issues, are occurring in a largely unregulated environment[35]. Given the enormity of the potential problems, we should now begin considering changes to our laws to protect the important interests at stake.

CONCLUSION

At the dawn of the 21st century, the American family is in a state of flux and transformation. Adoption law and practice is now at the center of that situation and assisted reproduction issues are looming large. Whether we are focusing on changes to the family, the crisis in foster care, challenges to adoption practice and procedure, or the unknown future of assisted reproduction, the bottom line is the need to find permanent, safe, loving, and nurturing homes for our children. There are adults of all different backgrounds wanting to create families. We as a society must continue to address these issues so as to facilitate the creation of more families where our children will thrive and flourish. ■

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[1] See, In re B.G.C. ("Baby Jessica"), 496 N.W.2d 239 (Iowa 1992); In re Doe ("Baby Richard"), 638 N.E.2d 181 (Ill. 1994); In re Baby E.A.W. ("Baby Emily"), 647 So.2d 918 (Fla. Dist. Ct. App. 1994).

[2] The Future of Households, American Demographics (December 1993); Population Notes (March 1997)(a publication of the State Demographer's Office in Minnesota Planning); Sarah Glazer, Adoption: Do Current Policies Punish Kids Awaiting Adoption? CQ Researcher, (Nov. 26, 1993) vol. 3, n. 44, at 1037.

[3] Sharon K. Houseknecht and Jaya Sastry, Family "Decline" and Child Well-Being, 58 J. of Marriage and the Family 726 (August 1996).

[4] Barbara Dafoe Whitehead, Dan Quayle was Right, The Atlantic Monthly (April 1993) 47-84; David Blankenhorn, Fatherless America: Confronting Our Most Urgent Social Problem (1995); David Popenoe, A World Without Fathers, Wilson Quarterly (Spring 1996) 12-29.

[5] Judith Stacey, Brave New Families: Stories of Domestic Upheaval in Twentieth-Century America (1994); _____, The New Family Values Crusaders, The Nation (July 25-August 1, 1994) 119-22; James Garbarino, A Vision of Family Policy for the 21st Century, 52 J. of Social Issues 197 (1996).

[6] Minn. Stat. § 259.20, subd. 1(2).

[7] Minn. Stat. § 259.21, subd. 7 and Minn. Stat. § 259.22, subd. 1.

[8] Leon Eisenberg, Is the Family Obsolete? The Key Reporter (Phi Beta Kappa publication) (Spring 1995) 1-5.

[9] Mary-Lou Weisman, When Parents are Not In the Best Interests of the Child, The Atlantic Monthly (July 1994) 43-63.

[10] See, Alexandra Dylan Lowe, New Laws Put Kids First: Reforms Stress Protection over Preserving Families, ABA Journal (May 1996) 20-21.

[11] Richard P. Barth, Effects of Age and Race on the Odds of Adoption versus Remaining in Long-Term Out-of-Home Care, 76 Child Welfare 285, 296 (March-April 1997). See also, Julia Danzy and Sondra M.Jackson, Family Preservation and Support Services: A Missed Opportunity for Kinship Care, 76 Child Welfare 31-44 (January-February 1997); Kathleen Wells and Elizabeth Tracy, Reorienting Intensive Family Preservation Services in Relation to Public Child Welfare Practice, 75 Child Welfare 667-692 (November-December 1996); Christopher G. Petr and Cindy Entriken, Service System Barriers to Reunification, Families in Society: the Journal of Contemporary Human Services (November 1995) 523-532.

[12] In re Welfare of S.Z., 547 N.W.2d 886 (Minn. 1996); Minn. Stat. § 260.012.

[13] Minn. Stat. § 257.072.

[14] Minn. Stat. § 260.191, subd. 3b.

[15] Minn. Stat. § 260.191, subd. 3a(b).

[16] Meyer v. Nebraska, 262 U.S. 390 (1923); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Wisconsin v. Yoder, 406 U.S. 205 (1972).

[17] Annette R. Appell and Bruce A. Boyer, Parental Rights v. Best Interests of the Child: A False Dichotomy in the Context of Adoption, 2 Duke J. of Gender L. & Policy 63 (1995).
[18] Elizabeth Bartholet, Beyond Biology: the Politics of Adoption and Reproduction, 2 Duke J. of Gender Law & Policy 5 (1995); Joan Heifetz Hollinger, Adoption and Aspiration: the Uniform Adoption Act: the DeBoer-Schmidt Case and the American Quest for the Ideal Family, 2 Duke J. of Gender Law Y Policy 15 (1995).
[19] See, e.g., In re Klugman, 256 Minn. 113, 97 N.W.2d 425 (1959); Wallin v. Wallin, 290 Minn. 261, 187 N.W.2d 627 (1971); Durkin v. Hinich, 442 N.W.2d 148 (1989).
[20] Minn. Stat. § 260.181, subd. 3 (list of 8 best interest factors for any placement outside of the home).
[21] Minn. Stat. § 259.29, subd. 1 and Minn. Stat. Sec. 259.57, subd. 2.
[22] 405 U.S. 645 (1972).
[23] 547 N.W.2d 374 (Minn.1996).
[24] 554 N.W.2d 393 (Minn. 1996).
[25] Minn. Stat. § 259.52.
[26] In re D.L., 486 N.W.2d 375 (Minn. 1992); In re S.T. and N.T., 512 N.W.2d 894 (Minn. 1994).
[27] Minn. Stat. § 259.57, subd. 2(c).
[28] United States Code, title 25, sections 1901-1923.
[29] Minn. Stat. §§ 257.35-257.3579.
[30] In re the Adoptions of C.H. and A.H., 554 N.W.2d 737 (Minn. 1996); In the Matter of the Welfare of D.D.G., 558 N.W.2d 481 (Minn.1997).
[31] Minn. Stat. § 259.58.
[32] Minn. Stat. § 259.47. LauraSue Schlatter and Robert V. Sauer, Adoption Law Before and After the 1994 Reforms, The Hennepin Lawyer (September-October 1995) 8-12.
[33] Minn. Stat. § 257.56.
[34] Emily McAllister, Defining the Parent-Child Relationship in an Age of Reproductive Technology: Implications for Inheritance, 29 Real Property, Probate, and Trust Journal 55, 56-65 (Spring 1994).
[35] Elizabeth Bartholet, Beyond Biology: the Politics of Adoption and Reproduction, 2 Duke J. of Gender Law and Policy 5 (1995).