TRADE-OFFS IN FORMULATING A CONSISTENT NATIONAL POLICY ON ADOPTION*

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Just as the courts must consider the trade-off between the best interest of the child and parental rights in involuntary termination of parental rights, policy on international adoption must consider the trade-offs between the best interest of the child and the long-term interests of the nation. We argue that countries that suspend international adoptions do not maximize social welfare. A consistent national policy to maximize the well-being of the children and society at large would be to devote resources today to the oversight of international adoption in accord with child protections under the Hague Convention, while at the same time developing a domestic system of care that provides for the physical and developmental needs of orphaned children in the context of permanent families.

Keywords: *adoption*; *international adoption*; *rights of the child*; *social welfare*; *termination of parental rights*

INTRODUCTION

In June 2001, Romania suspended all international adoptions. The suspension came on the heels of an adverse report from the European Union in response to Romania's membership application. More recently, regulatory changes in Romania limited adoptions to grandparents and siblings. Many adoptions from Guatemala have also been suspended since September 2001. Suspensions continue while Guatemala implements effective adoption safeguards to limit child trafficking and other unethical practices (U.S. State Department, The Bureau of Consular Affairs, 2001).

The suspensions in Romania and Guatemala were motivated by (1) suspicions about human rights abuses against the children who were said to be removed from the country without appropriate consent of the birth family; (2) complaints that foreigners were robbing these countries of their children and robbing the children of their cultural heritage, even when child trafficking was not at issue; and (3) concerns that receiving countries were not following procedures for postplacement follow-up (Adoption Council of Canada, 2004).

Yet, it is clear that the vast majority of international adoptions are arranged with proper consents and that the vast majority of children are offered opportunities in their adoptive families that they could never realize in their countries of origin (O'Connor et al., 2000; Van Ijzendoorn, Juffer, & Poelhuis, 2005). This article explores the trade-offs in policy that arise from the divergence of the interests of the child and the interests of the country of origin. To understand these trade-offs, we begin with an exploration of the trade-offs in the interests of the child and the rights of the parent in respect of termination of parental rights and subsequent adoption. We proceed to the case of policy for international adoption. We conclude that suspension of international adoption is not a policy in the best interests of children without parents *or* their countries of origin.

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A consistent national policy to maximize the well-being of the children and society at large would be to devote resources today to the oversight of international adoption in accord with child protections under the Hague Convention, while at the same time developing a domestic system of care that provides for the physical and developmental needs of legally orphaned children in the context of permanent families.

THE INTERESTS OF THE CHILD IN CASES OF ABUSE AND NEGLECT

In valid private and international adoptions, termination of parental rights is voluntary. Birth parents are either verifiably deceased or willingly relinquish their parental rights by signing the appropriate consent forms. The interests of the birth parents and child are in alignment. However, neglected or abused children and their birth parents often have divergent interests (Dobbin, Gatowski, & Maxwell, 2004; Lutz, 2003). The parent has a right in law to the care, custody, and companionship of his or her child, but "[c]hildren, too, have fundamental rights—including the fundamental right to be protected from neglect and to 'have a placement that is stable [and] permanent'. . . . [The court's] task is to . . . [balance] the interest of parents and children in each other's care and companionship, with the interest of abandoned and neglected children in finding a secure and stable home" (*In re Jasmon O.*, 1994, p. 1307).

Prior to 1980, the bulk of the weight in child welfare policy was placed on the interest of the child to be protected. Federal law did not contain incentives to create permanency for children, either through reunification with their birth parents or through adoption. The median length of stay in care was nearly 4 years, and many children experienced multiple placements. In the mid 1970s, the child welfare community became concerned about *foster care drift*.

In response to the problem of foster care drift, Congress passed the 1980 Adoption Assistance and Child Welfare Act (Pub. L. No. 96-272). The Act gave approximately equal weight to safety and permanence, with a preference for providing permanence within the context of the birth family. The Act required child welfare agencies to make "reasonable efforts" to preserve and reunify birth families. On the other hand, the Act codified permanency planning as a standard of child welfare practice (42 U.S.C. § 671(a)(15) (2007)) and each state has recited similar statutory language (e.g., Iowa Code § 232.102(7) (2007)). Permanency planning is based upon the idea (now codified in the Preamble and Article 20 of the United Nations Convention on the Rights of the Child) that each child is entitled to be raised in a stable, loving family environment. In practice, permanency planning means that the child's case worker works toward a stated goal for permanency for the child who has been removed from her birth family. If possible, the first choice is for the child to be reunified with her birth parents. If reunification is not possible, the goal is often changed to adoption, and the child welfare agency petitions the court for termination of parental rights.[1]

The 1997 Adoption and Safe Families Act (ASFA) (Pub. L. No. 105-89) maintained the reasonable efforts requirement, but under ASFA, the placement goal that is in the best interests of the child must be the goal that is in the "interests of the child's health and safety."[2] ASFA exempts states from pursuing reasonable efforts and allows the child welfare agency to immediately petition for termination in cases in which a parent has "subjected the child to aggravated circumstances" (42 U.S.C. § 671(a)(15)(D) (2007)). Aggravated circumstances include abandonment, sexual abuse, the involvement of a parent in the

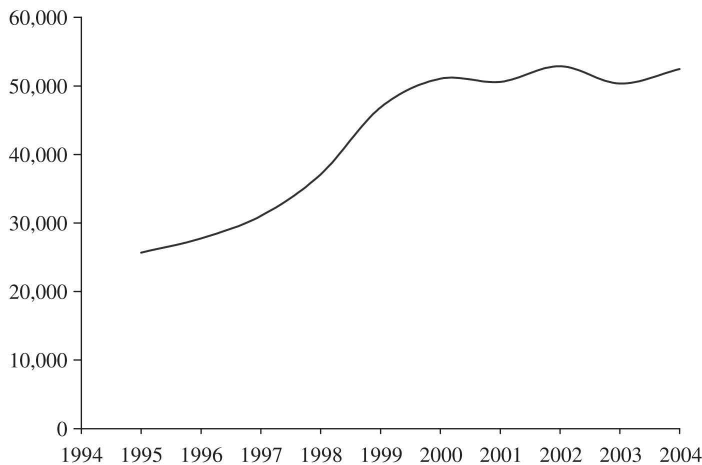

Figure 1 Adoptions from Foster Care
Source: United States Department of Health and Human Services, 2006.

murder or manslaughter of another of his or her children, and the involuntary termination of the parent's rights with respect to another child. Since ASFA, many states have changed their laws, adding specific circumstances under which the child welfare agency is required to petition without delay for termination of parental rights.[3]

Further, ASFA encourages *concurrent* planning for adoption while the goal for a child may still be reunification. The ASFA reduced the number of months a child can remain in foster care without a permanency hearing from 18 to 12 months (42 U.S.C. § 675(5)(C) (2007)). Moreover, with some exceptions, ASFA requires states to petition the court for termination of parental rights if a child has been in foster care for 15 of the most recent 22 months.[4] The *15 of 22* timeline applies even if adoptive parents have not yet been identified.[5]

In other words, ASFA delinks the best interests of the child standard from a preference for reunification in social work practice and requires faster movement toward involuntary termination of parental rights and adoption. The transition from a statutory focus on safety only, to safety then reunification, to safety and permanence through adoption reflects changes in the way Congress values the benefits to the child from adoption, relative to the way it values the benefits to the parents' interests in companionship and care.

In concordance with the higher value placed on permanence through adoption expressed in ASFA, Congress established policies to induce states to promote the adoption of children from foster care (Hansen, 2007). States have taken steps to increase adoptions, including increasing the number of social workers devoted to adoption (Cornerstone Consulting Group, Inc., 2001), increasing contracts with private agencies (Blackstone, Buck, & Hakim, 2004) and increasing average subsidies paid to families (Hansen, 2006). As a result, adoptions from foster care have approximately doubled since 1995 (see Figure 1).

We argue that the problem faced by a nation in formulating its international adoption policy is directly analogous to the problem faced in formulating domestic adoption policy in cases of abuse and neglect. The interest of the child in permanence supersedes the interests of the birth parents in termination *cum* adoption cases because the child benefits

from permanence today; delay erodes the benefits to the child, and the cost of providing quality foster care is high. In the same way, the interest of the child in permanence through international adoption supersedes the interest of the nation in retaining its orphans because the child can benefit from permanence with an available and qualified adoptive family today, because the main benefits of suspending adoption to the nation are realized only far into the future (when the child becomes an adult), and because the costs of providing quality care in an underdeveloped child welfare system are quite high.[6]

TRADE-OFFS IN INTERNATIONAL ADOPTION

We face difficult, seemingly impossible, choices in the formulation of our national policy on adoption (Rycus, Freundlich, Hughes, Keefer, & Oakes, 2006; Schweitzer & Pollack, 2006). How do we allocate our limited budgets in such a way as to maximize the value to, or protect the interests of, all parties to adoption (Outley, 2006)? We must be cognizant of the need to find permanent families today for children who need families. At the same time, we must recognize the importance of supporting fragile birth families and preserving the most valuable assets of our nations—our children.

The Hague Convention Report of 2000 clearly identified the trade-off inherent in formulating a consistent national policy on adoption in its statement of the principle of *subsidiarity*, which is the requirement that ratifying nations put effort into domestic child welfare and placement. The Preamble to the 1993 Convention recognizes that intercountry adoption may offer the advantage of a permanent family "to a child for whom a suitable family cannot be found in his or her State of origin. . . . [But we must] give due consideration to possibilities for placement of the child within the State of origin before consider[ing] the option of intercountry adoption" (Parra-Aranguren, 1993, p. 10). This principle implies that the intercountry adoption system within the country of origin should have the capacity to explore national alternatives for the child. This also suggests the need for the service to be in some way connected to or integrated within the broader national child protection system, including the system of national adoption.

Finding the policy balance lies in determining, nation by nation, the value placed on the rights of the child today and the value of preserving families or the group *in situ* tomorrow (Pew Commission on Children in Foster Care, 2004). We must decide how to act today and how to plan for tomorrow: How many children will be allowed to find families abroad, today and tomorrow, and how many will remain at home, today and tomorrow? These may at first seem like exclusively political or emotional decisions. As policy makers, we must avoid allowing these decisions to be made in an adversarial or nationalistic way. We need to undertake an honest and systematic analysis of the trade-offs.

The trade-offs make the problem of formulating adoption policy an economic problem, in the most basic sense of the word *economic*. Economics is the study of the allocation of our limited resources between alternate uses that we value. The problem in adoption policy is economic because we have only limited resources for child welfare services—including the protection of children, the provision of temporary foster care, and the regulation and promotion of adoption—but we have competing needs that we value. The needs of birth parents are many; the needs of adoptive families are great; and the needs of children without parents are so large as to be inestimable. An economic analysis will allow us to define a solution for adoption policy that will be efficient in the sense of maximizing the benefits to society at the lowest possible cost.

Assume for the sake of simplicity that all of the children who need parents are pretty much alike. Disregard their ages, special needs, their uniqueness, just for the moment. Assume that their only *disability* is the disability of being without parents, which is, of course, the greatest disability of all. Let us also agree for the moment that the aim of each country's national adoption policy is to achieve the greatest net benefit from adoption that is possible for all parties combined. Economists call this utilitarian principle "maximizing social welfare."

The basic rule for maximizing social welfare is to divide resources in such a way as to equalize the net benefits obtained from the last dollar spent on every option that we value. Each child should be placed in either international adoption or a domestic placement so that the net benefits to all parties from the child's adoption could not be greater if we changed a child's placement. A numerical example will illustrate the point.

Suppose there are 100 children without parents in a country who must be placed either internationally through adoption or domestically within a child welfare system. Set the benefits of international adoption to the child equal to $100 for each child. This is an arbitrarily chosen index value. Suppose we value subsidiarity (i.e., opportunities for domestic placement) more than we value international adoption, so we place a value of $150 on placement of each child domestically.[7]

While the benefits of each placement option may be reasonably assumed to be approximately the same for each child, provision of services to children is likely to have increasing marginal costs. That is, a policy that stresses subsidiarity has costs that increase with the number of children placed domestically. The costs of providing child protective services, the costs of continuing to care for children without parents as they wait for a permanent domestic placement, and the cost of domestic adoption exchanges undoubtedly increase with the number of children served, especially if we are committed to high-quality, family-based substitute care.[8] The more children need to be placed, the more expensive it will be to recruit placements, to find and supervise a sufficient number of social workers to monitor the placements, for example. The net benefits of subsidiarity must then fall as the number of waiting children increases. That is, the larger the number of children placed, the more it costs to provide services of constant quality to each one. Placing 10 children then costs more than twice the placement for 5. Similarly, policing international adoption has increasing costs. Again, to keep the numbers simple, let us begin by assuming that the cost of placement of any kind equals $1 multiplied by the number of children placed. It costs us $1 to place the first child, $2 more to place the second, and so on.

What then is the best division of our scarce resources? How many services should be provided to keep children in their country of origin, in birth or adoptive families, and how many children should be placed abroad to maximize the net benefits to all? What division of resources allows us to protect our national interest in our children while at the same time doing the best job we can to help children who need families now?

In this numerical example, the benefits to all are maximized when we allow 25 international adoptions. What if we allowed only 20? The value to the 21st child would be $100, the cost of placing her in an adoptive family would be $1*21 = $21. The net value would be $79. The net value of placing that same child domestically would be less—just $19 (= $100 – $81).

A quota of 20 on international adoptions clearly is not optimal. Society loses even more from a suspension. If our example country insists on placing all 100 children in domestic placement, the welfare lost is $625. The source of the loss in welfare, again, is the increasing cost of finding and maintaining quality placements at home.

A final, but critical, element must be considered. We must account for the value of time. Families abroad are available today to nurture the children without parents. The benefits of adoption are available to waiting children right now through international adoption. High benefits for subsidiarity cannot be obtained today in many nations for most children without parents. It is necessary first to build a safe child welfare system at home if we hope to secure the benefits of subsidiarity.[9]

Therefore the value of domestic adoption for many waiting children around the world can only be realized far into the future, and benefits in the future are not worth as much as benefits today. We would all prefer to have a dollar today than a dollar tomorrow. Similarly, children are better off in families today than in families tomorrow, all other things equal. We must therefore discount future benefits in order to compare them to benefits that can be realized today.

Suppose the value of time to a child, or the cost of waiting, is $10 per year. The benefits of subsidiarity are reduced from our previous estimate: the benefit is $140 per child rather than $150. What does accounting for the value of time do to our decision about the best division of our scarce resources for adoption? The wisest solution now is to place fewer children domestically and more children through international adoption. After accounting for time, providing the greatest benefits to all means allowing 30 children to experience safe and stable families abroad today.

Because outcomes in adoption are systematically associated with age at adoption (see, e.g., Finch, Fanshel, & Grundy, 1986), it does not make sense for children to allow long wait. Moreover, allowing early placements abroad allow countries to avoid the high costs of long-term foster care. For all practical purposes, what makes sense is to allow as many children as possible to be placed through international adoption today.

We should devote resources to the protection of waiting children's rights to a nurturing and stable family today. The right of the child to a nurturing and stable family must, of course, be facilitated by enforcement of the child's rights to liberty—the right not to be sold or trafficked. Resources must be devoted to the proper facilitation of adoptive placement under the Hague Convention.

Allowing the free flow of international adoption today frees resources that can be used to gain the benefits of subsidiarity tomorrow, and to gain them more quickly. For example, resources used today to house children without parents in group facilities can be used instead to recruit and train family-based caregivers or perhaps be used to take steps that reduce the disease and poverty that leaves so many children without parents.

CONCLUSION

Insisting that family preservation or national pride take precedence over the needs of individual children imposes significant costs on children who can realize their rights to a family today though international adoption. Further, strict adherence to the principle of subsidiarity today reduces the resources available to apply the principle tomorrow. In the long run, the benefits of subsidiarity may well be large enough to outweigh the costs of provision of services to support fragile birth families. The biggest obstacle to the success of this process is nationalistic pride. It is hard for people in one nation to admit that someone else in another nation could be the parent to a child born in the home nation. But we must not lay the cost of subsidiarity on the children who wait today. We must protect the rights of waiting children to be nurtured by a stable family, wherever that family may be.

NOTES

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1. The standard of proof in termination cases (except those under the jurisdiction of the Indian Child Welfare Act) is the standard of clear and convincing evidence, rather than the lesser standard of a fair preponderance of the evidence (*Santosky v. Kramer*, 1982). Grounds for terminating rights vary from state to state. Grounds include abuse, neglect, and alcohol- or drug-induced incapacity. Some states recognize physical or mental illness in the parent as sufficient grounds for terminating parental rights. Some states take into account the age of the child and his or her wishes, while others do not. Other factors that may be considered include the social activities of the parent; the strength of the emotional bond between the parent and the child; the ability of the parent to provide the child with food, shelter, clothing, and medical care; and the established life of the child with respect to school, home, community, and religious observance. In addition, some states consider the relationship the child has with foster parents, while others do not use that factor in determining termination. Felony conviction or incarceration of the parent are not automatic grounds for termination (Adamec & Pierce, 2000).

2. 42 U.S.C. § 671(a)(15)(A) (2007); see Lowry (2004) for a detailed discussion.

3. For example, if a child is abandoned, procedures to terminate parental rights must begin immediately in Alabama, Alaska, Connecticut, Georgia, Illinois, Indiana, Iowa, Kansas, Maine, Maryland, Michigan, Minnesota, Missouri, Nebraska, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Utah, West Virginia, and Wisconsin. If a parent has murdered another child, a petition for termination must be made immediately in Alabama, Connecticut, Georgia, and Illinois (Adamec & Pierce, 2000).

4. 42 U.S.C. § 675 (2007); 45 C.F.R. 1356.21 (2007); see also Welfare & Institutions Code § § 706.6(l), 727.3(i) (2007).

5. A compelling reason not to terminate parental rights must be based on the specific circumstances of the child and the family. Under ASFA, a compelling reason for not filing for termination after the *15 of 22* timeline has expired must be documented in the child's case plan to continue payments of the federal share of Title IV-E foster care funds. Compelling reasons include: adoption is not the appropriate permanency goal for the child, the child is an unaccompanied refugee minor, or there are international legal obligations or compelling foreign policy reasons that preclude termination.

6. We would argue that the logic supports passage and enforcement of the Multi Ethnic Placement Acts as well.

7. The cardinal value of these index numbers is unimportant. The net benefits to adoption have never been accurately calculated; however many tangible benefits have been documented (Rushton, 2004; Triseliotis, 2002; Van Ijzendoorn et al., 2005; Zill, 1995).

8. In the United States, if a child who enters care at age 8 stays in foster care until the age of majority, the total cost is about $74,000 (in 1995 dollars). If the child is adopted within about 2.5 years, the total cost including subsidy is under $50,000 (Barth, Lee, Wildfire, & Guo, 2006).

9. The United States is no more immune to this logic than Romania or Guatemala. It would not be optimal to prevent the adoptions of as many as 500 (mainly minority) children who leave the United States for adoptive homes elsewhere each year (Stahl, 2005).

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