TIME TO DECIDE?
U.S. LAWS GOVERNING MOTHERS’ CONSENTS
TO THE ADOPTION OF THEIR NEWBORN INFANTS

Elizabeth J. Samuels, University of Baltimore School of Law, U.S.A.

The focus of the research I am discussing today is the laws of the United States that govern the situation in which the mother of a newborn infant considers voluntarily placing her child for adoption. Fathers’ situations are no less important or problematic, but I have focused on mothers because their somewhat different situations have been the subject of much less scholarly research and writing. A lengthy paper I have prepared on the subject will appear in the *Tennessee Law Review*.\(^1\) I am especially happy to have the opportunity to discuss this work at an international conference because United States laws are so different from what I understand to be the laws of many other nations. While this fact may make my subject and my concerns sound especially foreign, I believe it also makes it especially important for those of us in the U.S. to solicit foreign perspectives.

Two principal and widely articulated goals for domestic infant adoption in the United States are first, preventing the unnecessary separation of family members by ensuring that birth parents make informed and deliberate decisions, and second, protecting the finality of adoptive placements.\(^2\) Ideally, these goals are complementary and can be balanced with one another, but many of our state laws appear to allow an interest in increasing the number of infant adoptions to outweigh the goal of encouraging careful deliberation. Given the context in which domestic infant adoptions occur, and the nature of the cases that have arisen around the country in which mothers have sought, almost always unsuccessfully, to revoke their consents, my paper concludes that the majority of our state laws do not provide adequate incentives for the generally accepted “best practices” that characterize ethical and humane adoptions.

To assess the state laws it is important to understand the context in which domestic infant adoptions occur. But before I briefly describe that context, I will briefly describe the case that inspired my interest and also provide an introduction to our state laws. The case involved an educated woman in her late twenties, a pharmacist, who was

---


2. The Uniform Adoption Act of 1994, for example, proclaims it will “protect birth parents from unwarranted termination of their parental rights” by ensuring that “a decisions to relinquish a minor child and consent to the child's adoption is informed and voluntary. Once that decision is made, however, . . . [it is] final and irrevocable.” Uniform Adoption Act (1994), Prefatory Note, 9 U.L.A. 14 (1994). *See also* Md. Fam. Law Code Ann. § 5-303(b)(xxxx) (legislative findings) (“The purposes of this subtitle are to: . . . (2) protect children from unnecessary separation from their natural parents; . . . (4) protect natural parents from making a hurried or ill-considered decision to give up a child.”); N.C. Gen. Stat. § 48-1-100 § 48-1-100 (xxxx) (primary purpose to advance welfare of minors includes protecting minors “from unnecessary separation from their original parents” and secondary purposes include “to protect biological parents from ill-advised decisions to relinquish a child or consent to the child's adoption”); Tenn. Code Ann. § 36-1-101 (2003) (seeks to ensure “children are removed from the homes of their parents or guardians only when that becomes the only alternative which is consistent with the best interest of the child”).
raising a child as a single mother when she again became pregnant. According to the intermediate appellate court’s unpublished opinion in In re the Adoption of Baby Girl W., she became pregnant in early 2000 and sought counseling at a local Catholic Charities, a private social services agency. During periodic counseling sessions from May through July, she and a counselor discussed the possibility of -- but did not make plans for -- adoption. In August, a friend told her that the friend’s brother-in-law and his wife hoped to adopt. The mother spoke with the wife, permitted Catholic Charities to speak with the couple, and later met with the couple on two occasions but remained undecided about whether to place the child for adoption. In late September she had a brief meeting with an attorney provided by Catholic Charities. She was still undecided when she entered the hospital December 20.

Baby Girl W. was born that evening, and the next day the mother told a hospital social worker she still had not reached a decision. She expressed concern both about her mother’s disapproval of adoption and about her attempts to reconcile with the father of her older child. The hospital social worker advised her that foster care was available to give her more time to decide. The following day, on which she was scheduled to be released from the hospital, she was told she had to reach a decision before five p.m., at which time Catholic Charities would close for the weekend. She thereupon authorized the Catholic Charities counselor to come to the hospital to conduct the relinquishment process. The counselor, who up to this time had assumed the mother had decided against adoption, came in the late afternoon, discussed the mother’s situation with her, including the grandmother’s disapproval of placing the child, and presented her with the paperwork, which she then signed in the presence of a notary public. That evening the adoptive parents left the hospital with the child.

At home the next day, the mother decided she had made a mistake and, according to her testimony, called but was unable to reach Catholic Charities. That evening she called the prospective adoptive parents to say she had made a mistake and did not want to place the child for adoption. Approximately ten days later, a representative of the agency nevertheless signed the relinquishment document, giving the agency the power to place the child and to consent to the adoption. The mother, representing herself, unsuccessfully sought to set aside her relinquishment through the courts of her state and in a petition for certiorari to the U.S. Supreme Court. Under the state’s law, her consent would have been voidable if she had given it within 12 hours of the baby’s birth,

---

5 See id. at 4-5.
6 See id. at 5.
7 See id. at 6.
8 See id. at 7.
9 See id. at 11.
10 See id. at 18.
11 See id. at 11.
rather than two days after the birth, or if she had satisfied the courts “by clear and convincing evidence that the consent was not freely and voluntarily given.”

This case was somewhat atypical for a domestic infant adoption in that the mother received counseling services and they involved a number of sessions. It was typical, however, in that the birth and adoptive parents had identified one another without the assistance of an adoption agency and that the law permitted the birth mother to give irrevocable consent to the adoption very soon after the birth of the child. The state laws that currently govern mothers’ consents to adoption of newborn infants vary but fall into a few basic types. As a general rule, consents may be set aside in all jurisdictions for fraud, duress, or undue influence, usually for limited periods of time after consent has been given or after the adoption has been granted. In the absence of such wrongdoing, which is difficult to establish and is very rarely established, mothers in many states are afforded a limited opportunity to revoke their consent. Under a few state laws, for example, mothers may sign consents before the birth, consents that may then be revoked for a brief period of time after the birth. Under some state laws, consents may be signed any time after the birth and are then revocable for a specified period.

Under other state laws, consents may not be signed until a specified number of hours or days after birth and are then revocable for a specified period. A different group of state laws provide that irrevocable consents may be signed at any time after birth. Other state laws provide that irrevocable consents may be signed after a specified number of hours or days after birth. Overall, in approximately half the U.S. states, irrevocable consent can be established in as short a period as less than four days after birth; in another approximately 10 percent of the states, it can be established in less than seven days after birth; and in another approximately 15 percent of the states, in less than two weeks after birth. The trend among the states during the past half century has been to shorten these periods of time.

The domestic infant adoptions in the United States to which these laws apply are arranged primarily by private agencies and independent facilitators. The infant adoption “market” – and it does operate very much like a market -- is characterized by high fees for adoptive parents, demand at least for healthy white infants that outstrips available

---

12 Kan. Stat. Ann. § 59-2114 (xxxx). In a 1984 case, the mother gave her consent the day of the birth and three days later told the attorney who was representing both her and the adoptive parents that she wanted the child back. The court shifted the burden of proving voluntariness to the adopters on the grounds that the mother was in a confidential relationship with both her doctor and the attorney and that there were suspicious circumstances because the attorney was the doctor’s daughter. It nonetheless held the mother’s consent was voluntary, explaining that if she felt unduly pressured by the doctor’s continual encouragement to place the child, she could have sought medical services from another physician and could have sought advice from family and friends. See In re Adoption of Baby Boy Irons, 684 P.2d 332, 335-37, 339-42 (Kan. 1984).

13 See, Katherine G. Thompson, Contested Adoptions: Strategy of the Case, in 2 Adoption Law and Practice § 8.02(1)(b) (Joan Heifetz Hollinger et al. eds., 2004).

14 See Appendix A.

15 Id.

16 In contrast to the cost of public agency adoptions, which range from zero to $2,500, the cost of a domestic private agency adoption ranges from $4,000 to more than $30,000 and of a domestic independent
supply,\textsuperscript{17} and extensive marketing aimed both at prospective adopters and pregnant women who might consider placing their infants for adoption.\textsuperscript{18} Families that adopt infants tend to have higher incomes than those that adopt older children and children with special needs, and it is the families that adopt infants that generally benefit more from the tax benefits available to promote adoption.\textsuperscript{19} Adoption services providers in the U.S. include public and private agencies, nonprofit and for-profit private agencies, lawyers, physicians, and other “facilitators,” “a new breed of adoption entrepreneurs who specialize in finding pregnant women for prospective parents.”\textsuperscript{20} Public agencies principally arrange adoptions of older children and children with special needs,\textsuperscript{21} while most adoptions of domestic newborns are handled by private agencies and by independent,\textsuperscript{22} non-agency intermediaries.\textsuperscript{23} Since 1970, according to historian Barbara Freundlich, adoption from $8,000 to more than $30,000, or reportedly to even as much as $50,000. Madelyn Freundlich, Adoption and Ethics, Vo. 2, The Market Forces in Adoption (2000), 16-17. For every domestically born white baby, it is estimated that there are approximately six would-be parents. Id. at 9. According to Adam Pertman, author of the leading popular account of adoption in America today, “far more [than six] want infants but don’t try to adopt because they perceive the process as too daunting and the cost as too high.” Adam Pertman, Adoption Nation: How the Adoption Revolution Is Transforming America 46 (2000). Marketing by adoption facilitators and agencies to prospective adoptive parents is prevalent, as is advertising by both agencies and prospective adoptive parents who seek babies. The author of Fast Track Adoption, a book for prospective adoptive parents, counsels that “the most effective way to connect with prospective birth mothers is to use direct advertising. . . . Couples who launch an effective advertising campaign can often reduce their wait by months or even years.” Susan Burns, Fast Track Adoption 21 (2003). (Children in foster care who are available for adoption are advertised as well, and individual children have even been featured on the Internet by their parents or their parents’ representatives. See Freundlich, Market Forces, supra note 16 at 105-20.) To find potentially available infants, adoption agencies use “billboards, newspaper ads, radio and TV commercials, and even tray liners at fast-food outlets.” Rickie Solinger, Beggars and Choosers 125 (2001), quoting Sheila Rule, “Couples Taking Unusual Paths for Adoptions,” New York Times, July 26, 1984, at 1. Individuals and firms help prospective adoptive parents market themselves to potential birth mothers with advertisements, biographies and photographs, scrapbooks, videotapes, and so forth. Freundlich, Market Forces, supra note 16 at 106-07. For example, Freundlich points out that the structure of the tax credit “does not benefit families who adopt children in foster care – typically families of moderate means who incur few up-front costs in adopting but who may be in greater need of ongoing financial supports to meet the special needs of the children they adopt.” Freundlich, Market Forces, supra note 16 at 21. See also Pertman, supra note xxxx at 266. Pertman, supra note 17 at 49. With the Internet as “the main catalyst,” there has been a “huge increase” in the number of adoptions in which generally white couples and birth parents identify one another. Id. In 1998 in the public child welfare system, the median age of children whose adoptions were finalized was 4.8 years and only 6.2 percent were younger than one year old. See Kathy S. Stolley, Statistics on Adoption in the United States, The Center for the Future of Children, The Future of Children, Adoption, Vol. 3, No. 1, 35 (Spring 1993). As of Sept. 30, 2001, of the children in foster care waiting to be adopted, 97% were older than one year, 65% were older than five years, and 33% were older than ten years. U.S. Dept. of Health & Human Serv., Admin. for Children & Families HHS, Admin. On Children, Youth and Families, Children's Bureau, The AFCARS Report, http://www.acf.hhs.gov/programs/cb/publications/afcars/report8.htm (modified March 28, 2003). Definitions of the term “independent adoption” vary. For the purposes of this paper, the term refers to adoptions that do not involve either a public or a licensed private agency. In H. Joseph Gitlin, Adoptions: An Attorney’s Guide to Helping Adoptive Parents 43 (1987), the author defines an “independent adoption”
Melosh, even private agency adoptions have “declined sharply, in what amounts to a massive de facto deregulation of child placement.”\(^{24}\) Both agency and independent, non-agency adoptions are subject to limited regulation and operate under a largely “laissez faire” regime.\(^{25}\) As adoption law scholar Joan Heifetz Hollinger concludes with respect to agency adoptions, the “standards which agencies must meet for licensing purposes are generally \textit{minimum} standards.”\(^{26}\) As Melosh summarizes the situation, “after 1970, most placements have been made as private agreements executed between consenting adults, with minimal involvement from the state.”\(^{27}\) It is highly unlikely that this context in which domestic infant adoptions take place will change significantly in the coming years.

Best practices in adoption, according to most adoption professionals and organizations involved in adoption, include making counseling available for women considering placing their babies for adoption.\(^{28}\) Skilled counseling, the Child Welfare
League of American (CWLA) advises, helps provide assurance that “[i]nformed decisions will be made.” 29 Counseling for mothers should include providing information about alternatives to adoption, options within adoption, legal steps and consequences involved in adoption, and possible effects of adoption on themselves and their children. In addition to providing mothers with these kinds of information, counselors should understand “the ambivalence and denial that birth parents often experience.” 30 Finally and most importantly, as Patricia Roles points out in a guide for counselors, if a “young woman must make her own decision because she has to live with it for the rest of her life,” then the ideal counselor is “a neutral, unbiased [one] who has no vested interest in the outcome of her decision.” 31

With respect to laws regarding counseling, eleven states require counseling for birth parents in some or in all adoptions; some of those states specify how much counseling, such as one, two, or three sessions, and some specify the timing of the counseling, such as before consenting. 32 Twenty states have statutory requirements that birth parents in some or all types of adoptions be made aware that counseling is available. 33 These state laws, while desirable, do not guarantee that an appropriate amount of counseling will be available or that the counseling will be unbiased. There is an inherent, troubling potential for bias and for conflict of interest. Counselors, agency officials, and intermediaries of course may have strong biases based on their philosophical, religious, or social views. An important factor that can affect the neutrality of counseling is the conflict that inheres in providing services simultaneously to birth parents and adoptive parents. The advocacy group Concerned United Birthparents (CUB) advises pregnant women and new mothers not to expect that an agency or a pregnancy counselor “will have only your best interest in mind. They do not, and they cannot. Adoption agencies, like it or not, have to make money to operate. The paying client is the adoptive parent, so services are usually geared toward them.” 34 In addition, as social worker and author James L. Gritter observes, professionals involved in adoption “[m]ost of the time find it easier to identify with adoptive parents than with birthparents, who are typically less established.” 35 There is also a risk of conflict when counseling by other providers is paid for by the prospective adoptive parents.

It would be presumptuous to think that social workers can help every parent to reach an appropriate decision concerning their child. In the first place, some parents will not need a social worker to help them make up their minds. They will do so, one way or another, and stick to it. Others may explore offers of counseling and other services but feel they are perfectly able to cope alone.

John Triseliotis et al., Adoption: Theory, Policy, and Practice 97 (1997).

29 CWLA Standards of Excellence, supra note 22 at 131, Standard 8.22 Position on Independent Adoption.


32 See Appendix A.

33 See Appendix A.

34 Heather Lowe, What You Should Know If You’re Considering Adoption for Your Baby 6 (pamphlet published by CUB).

35 Gritter, supra note 30 at 210.
As a lower cost and simpler measure for insuring that necessary information is adequately conveyed to mothers, orally and in writing, states can and some states do require that specific information be provided at specified times, orally and in specific written formats, and that provision and receipt of the information be confirmed in writing. For example, Florida’s statute includes a disclosure form, which must be provided to all prospective birth and adoptive parents and which includes statements about legal representation, consents, alternatives to adoption, and the right to counseling.\(^{36}\) California’s statute directs its State Department of Social Services to “prescribe the format and process for advising birth parents of their rights” and to include specific information about alternatives to adoption, alternative types of adoptions, and rights to legal representation and counseling.\(^{37}\)

With respect to legal representation, only a handful of states require separate legal representation in all adoptions or in adoptions in which the birth parents are minors or disabled,\(^{38}\) and in practice most birth parents are not represented.\(^{39}\) It is doubtful we will see more widespread requirements for separate representation because of the costs involved for the adoptive parents or the state. There are risks for mothers without representation, of course, but as debates about representation in adoption reveal, there are also risks when they have separate counsel paid by the adoptive parents as well as when they are represented by the adoptive parents’ lawyer.\(^{40}\) The prevailing although not unanimous view is that it is unethical to represent both birth and adoptive parents.\(^{41}\)


\(^{39}\) “In the vast majority of adoptions where the child is adopted on the basis of a consent to adoption, the petitioners are represented by a lawyer but the consenting parties are not.” H. Joseph Gitlin, Adoptions: An Attorney’s Guide to Helping Adoptive Parents 22 (1987).

\(^{40}\) See generally, Pamela K. Strom Amlung, Comment: Conflicts of Interest in Independent adoptions: Pitfalls for the Unwary, 59 U. Cin L. Rev. 169 (1990); Linda Jean Davie, Note: Babes and Barristers: Legal Ethics and Lawyer-Facilitated Independent Adoptions, 12 Hofstra L. Rev. 933 (1984). Adoptive parents may pay birth parents’ legal fees except in a number of states in which the specified expenses that adoptive parents may pay do not include legal costs. Amlung at n. 109 and accompanying text.

\(^{41}\) In an informal opinion in 1987, the American Bar Association Standing Committee on Professional Ethics and Grievances concluded that a lawyer may not ethically represent both parties. See ABA Ethics Opinions, Informal Opinion 87-1523, Simultaneous Representation of Adoptive and Biological Parents in Private Adoption Proceeding, Feb. 14, 1987. Dual representation is expressly permitted, however, in at least two states, Kansas and California. In re Adoption of Baby Girl T., 21 P.3d 581, 589 (Kan. Ct. App. 2001) (if conflict arises, attorney may choose one party to continue representing); Fam. Code. § 8800 (West xxxx) (but attorney must have written consent of parties and avoid multiple representation “whenever a birth parent displays the slightest reason for the attorney to believe any controversy might arise,” and
Regardless of possible conflicts of interest, it also is difficult to legislate the timing and quality of representation a pregnant woman or a new mother will receive.\footnote{42}

Another means of creating incentives for best practices is to require that the birth parents’ consents be taken in the presence of a judge or other neutral government official. This procedure is recommended as a key, if imperfect, safeguard by adoption law scholar Joan Heifetz Hollinger,\footnote{43} and its efficacy is suggested by the relative paucity of reported disputes in which the procedure was employed. However, only ten state statutes require that either in some or in all types of adoptions the mother’s consent be taken in the presence of a judge or juvenile court referee or in the presence of a court’s authorized agent.\footnote{44} It is unlikely that many other states will add this safeguard, given the increased costs and potential delays that it involves.
The reported cases in which mothers have attempted to withdraw or revoke their consents suggest that a great disimcentive to best practices is the short time frames provided in the majority of the states for giving consent and for the consent becoming irrevocable. This, in the words of one court, “multitude of cases in which a natural parent seeks to regain her child” is reviewed in my forthcoming article and reveals a number of common scenarios in almost all of which the mother, like the mother in the case I described earlier, gives her consent within hours or two to three days after the birth, regrets the decision as quickly as within a day or two, and is unable to revoke it. Typically, she has not received skilled and unbiased counseling and, almost without exception, she has not had independent legal representation.

Rules that prohibit giving such hasty irrevocable consents are an even more effective safeguard than information requirements, and equally practicable. Such rules require no or only modest expenditures by the states. In the period after birth and before consent is final, an infant may be cared for by the mother, the father, or both parents, either independently or with assistance, or by foster parents. No short-term or long-term harm has been demonstrated by proponents of very quick irrevocable consents from a period of a few days or weeks between a child’s birth and placement in an adoptive home. In any event, such speedy consents are not necessary for early placements. If a child’s parents and the prospective adoptive parents are confident the parents’ decisions are final, and if they all wish for an early placement, the child’s parents can place the child in the adoptive home before consent has been given or become final. Speedy

---

45 In re Adoption of BGD, 719 P.2d 1373, 1376 (Wyo. 1986).
46 See Samuels, Time to Decide?, supra note 1 at Part VI.
47 While foster care before placement is disfavored compared with care by the baby’s mother, Triseliotis, Adoption, supra note 28 at 63 (“Temporary placement in a foster home is not good from the child’s point of view, but this is sometimes inevitable to allow more time to the mother in which to make up her mind or for the father to be located and make up his mind.”), no research or historical experience suggests that a period of a few days to a few weeks in foster care damages newborn babies who then return to their birth families or move into secure adoptive placements. “Attachment behavior” usually appears in infants between six and nine months of age, according to the studies described in John Bowlby’s influential works on attachment and the grief children experience when separated from adults to whom they are attached. John Bowlby, Attachment and Loss, Vol. I, Attachment 200-201 (1969). Bowlby notes that “when infants of twenty-six weeks and less are placed in a strange place without [their] mother[s] they appear to accept strangers as mother-substitutes without noticeable change in level of responsiveness and show little or none of the protest and fretting typical of the slightly older child.” John Bowlby, Attachment and Loss, Vol. III, Loss 434 (1980).
48 For example, the Uniform Adoption Act specifies procedures for placement of a child before a consent is executed:

[T]he parent or guardian who places the minor shall furnish to the prospective adoptive parent a signed writing stating that the transfer of physical custody is for purposes of adoption and that the parent or guardian has been informed of the provisions of this [Act] relevant to placement for adoption, consent, relinquishment, and termination of parental rights. The writing must authorize the prospective adoptive parent to provide support and medical and other care for the minor pending execution of the consent within a time specified in the writing. The prospective adoptive parent shall acknowledge in a signed writing responsibility for the minor's support and medical and other care and for returning the minor to the custody of the parent or guardian if the consent is not executed within the time specified.

consents are also unnecessary to ensure suitable adoptive placements for children, given the great demand for newborns.

Prohibiting hasty consents create incentives for service providers to follow best practices in adoption. Service providers and prospective adoptive parents face potentially great costs, financial and emotional, when a mother who has tentatively agreed to adoption, and often has received financial support, decides in the end not to place her child. The chance she will do so is greatest if she has been inadequately counseled or improperly pressured but then is afforded adequate time to consider and to reconsider her decision. Therefore, if hasty consents are not permitted, adoption services providers and prospective adoptive parents have a powerful incentive to follow best practices from the outset, practices that facilitate deliberate decisionmaking and that make adoption more a cooperative process than a “proprietary tussle.”49 In other words, prohibiting hasty consents promotes best practices among those who might be most tempted to disregard them -- whether for philosophical, religious, emotional, or financial reasons -- in order to meet the compelling desires of prospective adoptive parents.

Infant adoptions are of course momentous, life altering events, not only for the child and both sets of parents but typically for both extended families as well. And the future of any adoptive family is, as it is for any biological family, uncertain. We cannot predict how a child’s personality, interests, and talents will mesh with those of the child’s parents and siblings, or how a child will respond to having been placed for adoption. We cannot know what opportunities a family will enjoy and what challenges it will face. Adoptive families, like biological families, are unfortunately not immune from divorce, death, emotional instability, substance abuse, and violence. When a state places its legal imprimatur on the unmaking of one family and the making of another, the state should at least insure to the greatest extent possible that all the individuals involved have followed or have been afforded “best practices,” the practices that ethics and humanity demand. For mothers considering placing their children for adoption, skilled, unbiased counseling is invaluable; complete, well communicated information is indispensable; and time is, perhaps, “the wisest counsellor of all.”50

APPENDIX A

The variety of state laws presents a complex picture, but in sharp contrast to the laws of many other countries,51 a majority of the laws provide for the possibility of

49 “Adoption ought never be organized as a proprietary tussle between birth parents and adoptive parents. Rather, it is better understood as an exercise in cooperation.” Gitter, Lifegivers, supra note 30 at 23.
51 In Victoria, Australia, for example, the mother may not give legally binding consent until the child is 15 days old. See Victorian Consolidated Legislation, Adoption Act 1984, § 42(3). After giving consent, she has a 28-day period in which she may withdraw consent, a period similar to the periods available in all Australian jurisdictions. See id. at § 41(1)(a). (She may also extend the period an additional 14 days. Id.) Other Australian states and territories have similar periods for withdrawing consent. A Queensland
irrevocable consent within a week of the birth, and in recent years the amendments to state adoption law timing requirements have generally shortened periods of time before which mothers may give consent and during which they may revoke. A majority of the laws do not require that consent be given in court or before an official appointed by a court or another state official. More than half the states do have some kind of statutory
government review of adoption legislation reports that its revocation period is 30 days and “[a]ll other Australian jurisdictions have a 25, 28 or 30 day (as in Queensland) revocation period. Queensland, Australia, Ministry for Families, Adoption Legislation Review, http://www.communities.qld.gov.au/family/adoPTION/publications/documents/pdf/cP_full.pdf 73 (visited 9/18/04). Although Queensland law provides that “an adoption order cannot be made if the birth mother signed the consent documents within five days of giving birth, unless the Director-General is satisfied that the mother was in a fit condition to give the consent, . . . this provision is never used and consents are not taken during that five day period. Most consents are usually signed between 10 and 14 days following the child’s birth.” Id. at 69. With respect to other Australian jurisdictions:
The period after birth during which parents cannot give consent is longer in all other Australian jurisdictions than it is in Queensland. The most recent legislation, the Adoption Act 2000 (NSW), states that parents’ consent to a child’s adoption cannot be given until 30 days after the birth of the child and 14 days after the person is given the consent documents and mandatory written information. The New South Wales Law Reform Commission in its Report on the Reviews of the Adoption of Children Act 1965 (NWS) considered that a 30 day hiatus after the birth of the child will mean that birth parents are truly able to experience the impact of separation from their babies, and ultimately to make a more informed and realistic decision
Id. at 70.
A number of countries do not have revocation periods but impose much longer periods than Victoria’s before which consent may be given, periods ranging from six weeks to two months. France, for example, provides for a period of two months. Council of Europe, European Committee on Legal Co-operation, Final Activity Report: Adoption 42 (2004). Other examples include Norway (two months), id. at 61; Ukraine (two months), id. at 82; Romania (45 days), Michael W. Ambrose & Anna Mary Coburn, Report on Intercountry Adoption in Romania (prepared for U.S. Agency for International Development in Romania) 15 (2001). Six weeks is the specified minimum period under the European Convention on the Adoption of Children, which has been ratified by 18 nations. Ratifications are listed at Council of Europe, European Convention on the Adoption of Children, CETS No.: 058, Status as of 4/7/2004, http://conventions.coe.int/Treaty/EN/cadreprincipal.htm (visited July 4, 2004). The European Convention on the Adoption of Children, Art. 5(4), provides that
consent to the adoption of her child shall not be accepted unless it is given at such time after the birth of the child, not being less than six weeks, as may be prescribed by law, or, if no such time has been prescribed, at such time as, in the opinion of the competent authority, will have enable her to recover sufficiently from the effects of giving birth to the child.
When changes to the 35-year-old European Convention were recently suggested in a report by the Council of Europe’s European Committee on Legal Co-operation, no change to this period was suggested, Final Activity Report: Adoption.
For some examples of national laws, see, England and Wales (six weeks), Adoption and Children Act 2002, ch. 38, §52; Croatia (six weeks), Council of Europe, European Committee on Legal Co-operation, Final Activity Report: Adoption 31 (2004); Czech Republic (six weeks), Zdeňka Králíčková, Adoption in the Czech Republic: Reform in the Light of the Child Welfare Laws, in International Society of Family Law, The International Survey of Family Law 133 (2003).
provision regarding counseling. A handful of states require separate representation for birth parents or for birth parents who are minors.

- In 9 states, the mother may give irrevocable consent any time after birth, and in a number of those states, consent may be given even before birth if it is followed by a post-birth reaffirmation or ratification.

(A consent is classified here as revocable rather than irrevocable only when a mother has an unqualified right to revoke, not a “right to revoke” that triggers a best interests contest between the mother and the prospective adoptive parents.)

---

52 For a history of consent laws, see Cahn, Perfect Substitutes or the Real Thing?, supra note xxxx at 1118-1126.
53 See supra n. 38.

For the purpose of this bulleted list, as more generally in this article, consent is classified as “revocable” only when a mother has an unqualified right to revoke, rather than a right to revoke that triggers a best interests contest between the mother and the prospective adoptive parents.

The total number of states in this bulleted list exceeds 50 because it includes the District of Columbia and because a small number of states have different rules for agency and independent adoptions and therefore appear on the list more than once. The numbers of states in different categories are excellent and useful approximations but are unlikely to be one hundred percent accurate because of possible changes in state laws and because they are based on two published summaries of state law, with examination of state statutes in instances in which the summaries are either unclear or inconsistent.

The web site describes the NCFA training program as follows:

When the U.S. Congress passed the Infant Adoption Awareness Act as part of the Children's Health Act in 2000, it established the Infant Adoption Awareness Training Program. Through the U.S. Department of Health and Human Services, a grant was awarded to the National Council For Adoption (NCFA) in Washington, DC to raise Infant Adoption Awareness among health service professionals and the public. Primarily focused on reaching teens and women facing an unplanned pregnancy, the National Council For Adoption went about designing both a training program and a mass media campaign to say to all involved “Thanks for Considering Adoption.”

55 Indiana, cross reference; Hawaii (parents may petition to terminate their parental rights after sixth month of pregnancy but judgment may not be entered until after birth and written reaffirmation), Haw. Rev. Stat. § 571-61, 63 (xxxx); North Dakota (in adoptions in which the adopters have been selected by birth parent, consent may be executed and filed before birth, with a hearing held no sooner than 48 hours after birth, at which court may require birth parent to be present or determine validity of consent without birth parent present), N.D. Cent. Code §§ 14-15-07 to -08, 14-15.1-01 to -02, 03 (xxxx); New York, Anonymous v. Anonymous, 139 AD.2d 189 (N.Y. App. Div. 1988) (suggests pre-birth consent may be reaffirmed or ratified after birth).
• In 3 states, the mother may consent before birth. In one of them she may revoke within four days after the birth, in one she may revoke within five days, and in one she may revoke until the court approves the consent after a hearing, which may not be held sooner than two days after the birth.  

• In 21 states, the mother’s consent is irrevocable when given but cannot be given for a specified period after birth: 12 hours in one state, 24 hours in another, 2 days in four states, 3 days in ten states, 4 days in one state, 5 days in one state, 7 days in one state, and 15 days in one state. In one other state, the irrevocable consent is given at a court hearing that is set within 30 days of a request for the hearing, but not before the birth.

• In 7 states, the consent may be given immediately after birth but is revocable without qualification for a specified period: 7 days in one state, 10 days in three states, 14 days in one state, 30 days in one state, and in one other state, until the court in which the adoption petition has been filed issues an order approving a guardian.

• In 13 states, consent may not be given for a specified period after birth and once given may be revoked without qualification for a period of time. The revocation periods are measured in fixed increments in most of the states but in others are pegged to the happening of events, such as court approvals of consents. For those states in which the minimum period of combined time can be calculated, the numbers of days before which consent may become irrevocable are 7, 12, 13, 14, approximately 17, 22 ½, 23, 25, 33, and 31 to 35 days. Under the federal Indian Child Welfare Act, consent given within

---

56 Colorado (4 days); Alabama (5 days); Washington (until court hearing, hearing not held sooner than 2 days after birth; court may require parent to appear personally). Alabama, Hollinger, Adoption Law, supra note 44 at App. 1-A; NCFA, Resources: State Laws, supra note 44; Colo. Rev. State § 19-5-103.5 (xxxx); Wash. Rev. Code § 26.33.090 (xxxx).

57 Kansas (12 hours); Utah (24 hours); Florida (2 days or when notified in writing that fit to be released from the hospital), Nebraska, New Mexico, Texas (agency adoptions) (2 days); Arizona (or pre-birth, with post-birth ratification), Illinois, Maine, Mississippi, Montana, Nevada, New Hampshire, New Jersey, Ohio, West Virginia (3 days); Massachusetts (4 days); Louisiana (5 days); Michigan (at a hearing held within seven days of request); Rhode Island (15 days); Wisconsin (at a hearing set within 30 days of request); Alabama, Hollinger, Adoption Law, supra note 44 at App. 1-A; NCFA, Resources: State Laws, supra note 44; [cite RE CURRENT FLORIDA LAW]; [cite RE CURRENT TEXAS LAW]; In re Adoption of Kreuger, 448 P.2d 82, 86 (Ariz. 1968) (voidable pre-birth consent “may be ratified by a subsequent act which sufficiently manifest a present intention to consent”).

58 North Carolina (independent adoptions, 7 days); Alaska (unless final decree has issued); Arkansas, Georgia (10 days); Delaware (14 days); Maryland (30 days). Alabama, Hollinger, Adoption Law, supra note 44 at App. 1-A; NCFA, Resources: State Laws, supra note 44; [cite RE CURRENT NORTH CAROLINA LAW]; [cite RE CURRENT DELAWARE LAW].

59 Iowa (7 days); Texas (in independent adoptions, 12 days, unless document specifies the consent is irrevocable for a specified period up to 60 days in which case); D.C. (13 days); Tennessee (14 days); Minnesota, approximately 17 days, including a revocation period of 10 working days; Vermont (22.5 days); Kentucky (23 days); Virginia (25 days); Pennsylvania (33 days); California (in independent adoptions, mother may not consent until discharged from hospital or if stay in hospital longer than 5 days, until has physician statement of competence to consent, plus a 30-day revocation period, unless it is waived); Missouri (2 days before may consent, consent revocable until reviewed and accepted by a judge); Connecticut (2 days before may consent, revocable until approved by a court); South Dakota (may not consent for 5 days, revocable until final decree). Hollinger, Adoption Law, supra note 44 at App. 1-A;
ten days of birth of an Indian child is invalid, and a valid consent may be withdrawn “for any reason at any time” prior to the entry of a final decree of adoption.\textsuperscript{60}

Ten state statutes require either that in some or in all types of adoptions the mother’s consent be taken in the presence of a judge or juvenile court referee or in the presence of a court’s authorized agent.\textsuperscript{61} The federal Indian Child Welfare Act requires that consent be executed in writing before a judge.\textsuperscript{62}

Eleven states require counseling for birth parents in some or in all adoptions; some of those states specify how much counseling, such as one, two, or three sessions, or three or four hours, and some specify the timing of the counseling, such as before consenting, within 72 hours of the birth, or at least 72 hours before signing consent.\textsuperscript{63} Twenty states have statutory requirements that birth parents in some or all types of adoptions be made aware that counseling is available, with two states specifying counseling by a licensed adoption agency. Only a handful of these states specify how much counseling should be offered or mandate the counselor’s qualifications or affiliations.\textsuperscript{64}

\textsuperscript{60} 25 U.S.C. § 1913 (xxxx).
\textsuperscript{61} Alabama (pre-birth consent, probate judge), Idaho (district judge or magistrate of a district court, or equivalent judicial officer); Maine (probate judge), Michigan (judge or juvenile court referee), New Mexico (judge, unless parent represented by independent counsel), North Dakota (court), Oklahoma (judge), Vermont (court or court’s authorized agent), Virginia (independent adoption, court), Wisconsin (court).


In Illinois, the mother must execute her consent before one of a list of persons, including a representative of a licensed agency: “the presiding judge of the court in which the petition for adoption has been, or is to be filed or before any other judge or hearing officer designated or subsequently approved by the court, or the circuit clerk if so authorized by the presiding judge or, except as otherwise provided in this Act, before a representative of the Department of Children and Family Services or a licensed child welfare agency, or before social service personnel under the jurisdiction of a court of competent jurisdiction, or before social service personnel of the Cook County Department of Supportive Services designated by the presiding judge.” 750 Ill. Comp. Stat. 50/10 (West xxxx).

\textsuperscript{62} 25 U.S.C. § 1913(a) (xxxx).

\textsuperscript{63} California (agency adoptions, minimum 3 sessions, by counselor with no contractual relationship with adoptive parents or their attorney or any other individual or organization performing a fee for service for them), Connecticut (within 72 hours of birth or as soon as medically possible, by person with masters or doctoral degree from accredited college or university), District of Columbia (agency adoptions, by a professional social worker regarding alternative services available in addition to psychological and emotional counseling); Louisiana (2 sessions with a licensed counselor before consenting), Massachusetts (agencies, adequate education and counseling to make informed decision, by licensed clinician), Montana (3 hours prior to consenting), Nebraska (minimum of 4 hours of “education and support” services), Nevada (meet with a licensed social worker specializing in adoption prior to reaching decision), New Mexico (minimum 1 session if 18 or older (not in presence of her parents), 2 sessions if 17 or younger, court may waive), Ohio (minimum 1 session completed at least 72 hours before consenting), South Dakota. Texas does not require counseling per se but requires that agencies must with birth parents 2 times before placement or document why this is not possible. NCFA, Resources: State Laws, supra note 44; [cites re CALIFORNIA SAFEGUARDS]; D.C. Code § 4-1406(b) (xxxx).

\textsuperscript{64} California (independent adoptions), Colorado (advise opportunity to seek “independent counseling”), Florida; Iowa (by person qualified under department of human services rules, including requirement of a
States that have sharply limited consent or revocation periods in recent years include Colorado, Louisiana, North Carolina, and South Carolina. Colorado in 2003 established an expedited procedure for relinquishing parental rights of children younger than one year of age. Before the new law, when a petition for relinquishment of parental rights was filed, the court scheduled a hearing at which the parent appeared and the court determined whether the parent had been counseled and whether “[t]he parent’s decision is knowing and voluntary.” Under the new law, the parent may sign an affidavit before the child’s birth. The affidavit, with the petition to adopt, may be filed four days after the birth and once filed, is irrevocable. In Louisiana in independent adoptions, the state has gone in stages from permitting birth parents to revoke consent any time before a final decree to, in 1991, making consents irrevocable if given more than four days after birth. (In 1960, Louisiana’s cut-off for revocation was changed from the final to the interlocutory decree, and in 1979, to 30 days, with revocation triggering a best interest

minimum number hours training), Maine (certified by a licensed agency or the state’s Department of Human Resources), Michigan, Maryland, Minnesota (up to 35 hours, available from conception until 6 months after birth), Missouri, New Hampshire, New Jersey (by a licensed adoption agency), New York (by a licensed adoption agency), Pennsylvania (court asks whether received and, if not, whether needed, and also has referral list and funding available if birth parent cannot afford), Tennessee, Utah, Vermont, Virginia, Washington (and advise that financial assistance may be available through state and local governmental agencies), West Virginia, Wyoming. NCFA, Resources: State Laws, supra note 44; Colo. Rev. Stat. § 19-5-103.5(1)(b)(I) (xxxx); Iowa Code § 600A.4(2)(d) (xxxx); 18 Me. Rev. Stat. Ann tit. 18-A § 9-202(B)(1) § 9-202 (xxxx); Wash. Rev. Code § 26.133.160(4)(i) (xxxx).

New Mexico, which requires one or two counseling sessions, supra note xxxx, in one statutory section requires that the counseling be by “a certified counselor of the person’s choice,” in another specifies that “[c]ounseling may be provided by a counselor, the department or an agency,” and in a section of definitions, defines “counselor” as “a person certified by the department to conduct adoption counseling in independent adoptions.” N.M. Stat. Ann §§ 32A-5-3(J), 32A-5-21(A)(5), 32A-5-22(G) (xxxx).

65 The Idaho Supreme Court in 1986 also sharply limited mothers’ opportunities to have a court set aside their consents when it substituted a best interests standard for the estoppel rule under which a mother had been permitted to revoke her consent during the pendency of the adoption proceeding if not estopped from doing so. To determine whether she was estopped, the courts had considered a list of factors:

"the circumstances under which the consent was given; the length of time elapsing, and the conduct of the parties, between the giving of consent and the attempted withdrawal; whether or not the withdrawal was made before or after the institution of adoption proceedings; the nature of the natural parent's conduct with respect to the child both before and after consenting to its adoption; and the 'vested rights' of the proposed adoptive parents with respect to the child."


67 See Colo. Rev. Stat. § 19-5-103.5 (1)(b), (1)(b)(IV) (West xxxx). The statute requires the affidavit to advise the parent that it may be withdrawn anytime before it is filed with the petition in court, but it does not state that the affidavit must inform the parent that the affidavit and petition may be filed anytime after four days after the birth. See id. Apparently, there had been delays in scheduling the court hearings at which parents would appear and be examined by the court. Telephone interview with Karen Kottmeir, participant in lobbying efforts, Nov. 4, 2003. Rather than addressing the problem of the delays, and adopting time limits within which hearings must be set, [cite TO STATE LAWS THAT DO], the law eliminated the hearings and provided for pre-birth consents.


69 See Moreland v. Craft, 244 So.2d 37, 41 (La. 1971).
determination rather than automatic return of the child.\textsuperscript{70} North Carolina shortened its period for revocation in a series of reductions, ultimately reducing the pre-1983 period of 6 months to the present period of 7 days.\textsuperscript{71} In South Carolina before 1986, it was within the court’s discretion to permit revocation of consent until the final decree of adoption, although the state Supreme Court noted in 1985 that “the more modern trend disallows the revocation of consent voluntarily given, particularly where the adoptive parents have taken the child into their home in reliance upon the consent.”\textsuperscript{72} By statute since 1986, South Carolina does not permit revocation of a voluntary consent given any time after the birth.\textsuperscript{73}

Tennessee and Texas in recent years have limited their consent or revocation periods but nonetheless retain periods considerably longer than average. Tennessee law before 1986 provided a right to revoke for periods of 30 and 90 days respectively in agency and independent adoptions.\textsuperscript{74} From 1986 to 1995, the periods were each reduced to 15 days and limited to situations in which an adoption petition had not yet been filed.\textsuperscript{75} Under current law, a mother may not surrender her child until the fourth day after birth and may revoke her consent within 10 days,\textsuperscript{76} gaining return of the child unless “the child would likely suffer immediate harm to the child’s health and safety.”\textsuperscript{77} Texas in 1995 instituted a 48-hour waiting period before parents may relinquish.\textsuperscript{78} In 1997 it eliminated an option of making relinquishments in independent adoptions revocable until the termination of parental rights or the decree of adoption; instead, it made these relinquishments either (1) revocable for 10 days or, (2) irrevocable, as was previously permitted, for a period stated in the document, up to 60 days in length.\textsuperscript{79} In an earlier period, parental consents in independent adoptions had been revocable until the final decree.

\textsuperscript{70} See In re J.M.P., 528 So.2d 1002, 1007 (La. 1988). In 1970 additional safeguards were added; the birth mother may not consent before the fifth day after birth and must to be represented by an attorney at the execution of the consent. \textit{Id.}

\textsuperscript{71} Consent is required in independent adoptions and agency adoptions in which the mother has not already relinquished the child to an agency. The time during which consent could be revoked was reduced in 1983 from six to three months, 1983 N.C. Sess. Laws chap. 83; in 1987, to 30 days if consent was given to the director of Social Services of a licensed child placing agency, 1987 N.C. Sess. Laws chap. 54, § 1; in 1991, to 30 days in all circumstances, 1991 N.C. Sess. Laws chap. 667; in 1995, to 21 days if the child was younger than three month old and otherwise to seven days, 1995 N.C. Sess. Laws chap. 457; and in 2001, to 7 days in all circumstances, 2001 N.C. Sess. Laws chap. 150. Relinquishments were similarly shortened in 2001 from 21 days if the child was less than three months old, and 7 days in all other circumstances, to 7 days in all circumstances, 2001 N.C. Sess. Laws chap. 150, § 1.


\textsuperscript{73} See S.C. Code Ann. § 20-7-17-20 (xxxx).


\textsuperscript{76} Tenn. Code Ann. § 36-1-112(a)(A) (xxxx).

\textsuperscript{77} Tenn. Code Ann. § 36-1-112(e)(2)(A) (xxxx).

\textsuperscript{78} See Tex. Fam. Code Ann. § 1161.103 (West 1996) (Historical and Statutory Notes).

In Maryland in recent years, the legislature has rejected repeated attempts to shorten the state’s 30-day revocation period, which was reduced from 90 to 30 days in 1992. Bills were unsuccessfully introduced in 1996 seeking to reduce the period to 7 days, in 1997 to 8 days, in 2000 to 15 days, and in 2003 to 14 days. Like Maryland, California and Pennsylvania are among the states that have the very longest revocation periods in the nation, but they have shortened their periods in recent years. California in 1994 shortened the revocation period in independent adoptions from 120 days to 90 days, and shortened it again in 2001 from 90 days to 30 days. In California, the mother can waive the revocation period available in independent adoptions; however, California law affords a number of additional safeguards to promote deliberate and final decisions. Pennsylvania recently made its period for revocation both more definite and in some cases shorter. Before mid 2004, consent could not be given less than 72 hours after birth and could be revoked until the earlier of either the termination of parental rights or the degree of adoption, a period of time that, depending on the county, could be several weeks or months. While consent still may not be given sooner than 72 hours after birth, the period for withdrawal is now set at 30 days.

---

82 For example, waiver of the right to consent may only be signed in the presence of designated authorities and may not be signed before an interview by a designated authority. See id. In independent adoptions, also adoption providers are required to advise birth parents of alternatives to adoption; alternative types of adoptions; their right to separate legal counsel paid by the prospective adoptive parents; their right to a minimum of three counseling sessions, paid for by the prospective adoptive parents, and given by a counselor who does not have a contractual relationship with the adoptive parents, the adoptive parents’ attorney, or any other individual or organization performing a fee for service for the adoptive parents. See Fam. Code § 8801.5 (West xxxx). Also, the adoption service provider is to offer to interview birth parents within 10 days after the placement for adoption, at which interview the provider re-advises birth parents of their rights, and if the interview does not take place, the provider is to notify designated authorities. Cal. Fam. Code § 8801.7 (West xxxx)
84 Martha Raffaele, Seattle Post-Intelligencer, Mar. 30, 2004 at xx (AP story). In agency adoptions, the earliest a hearing could be held on a parent’s petition to relinquish was 13 days after the birth, 23 Pa. Conn. Stat. Ann. § 2501(a), 2503(a) (xxxx), and in an independent adoption, the earliest a hearing could be held on such a petition was 43 days, 23 Pa. Conn. Stat. Ann. § 2502(a), 2503(a) (xxxx).
85 2003 Pa. Laws 21, § 2711, Consents necessary to adoption.