Adoption Law: Congratulations for Now–Current Law, the Revised Uniform Adoption Act, and Final Adoptions

Eric C. Czerwinski

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I. Introduction

In 1993, Jim and Colette Rost wanted to expand their family but were unable to conceive any more children. The Rosts opted for an open adoption, where the adoptive parents and birth parents could meet before the adoption and the birth parents would not be completely excluded from the child's life. The State of Ohio, where the Rosts lived, discourages open adoptions; therefore, the Rosts contacted an attorney in California. The attorney introduced the Rosts to a young, unmarried couple, Cindy Ruiz and Richard Adams, who were expecting twin girls. The two couples agreed to the adoption with the Rosts giving Ruiz $10,000 in a trust fund to cover expenses. Both Cindy Ruiz and Richard Adams signed papers consenting to the adoptions. Colette Rost flew to California to be in the delivery room and returned to Ohio ten days later with the twins. According to California law, the Rosts had done everything necessary to adopt the two little girls.

Three months after the birth of the twins, Richard Adams decided he wanted the babies back and instituted proceedings to reverse the adoptions. Adams based his claim on the 1978 Indian Child Welfare Act (ICWA), which provides that when the parents of a Native American child wish to place their child for adoption, preference must be given to members of their tribe or to other Native Americans. On the adoption papers, Adams listed his heritage as Irish, German, Welsh, and Spanish. To reverse the adoption, Adams stated that he was one-sixteenth Pomo Indian. Thus, under the ICWA, the children would have to be returned to Adams or placed with another Native American family.

In June 1995, a Los Angeles judge found for Adams and ordered the immediate return of the twins. The judge found that under the ICWA, the court must give preference to other members of the tribe, regardless of what heritage was listed

3. Id.
5. Rainey, supra note 2, at B1.
8. Id.
10. The judge has not authorized release of his opinion, so the facts and holding are culled from newspaper stories.
on the adoption papers.\textsuperscript{11} The Rosts appealed, and a California appellate court stayed the order pending a hearing.\textsuperscript{12} In January 1996, an appellate judge ordered a new hearing to determine if Adams had a significant relationship with his tribe.\textsuperscript{13}

While this story is somewhat unusual as it involves a federal statute, it represents a growing trend in American jurisprudence. In recent years, adoption law has come under fire as the rights of adoptive parents, birth parents, and children have been placed before the courts. Adoptions that were once declared final are now being reopened and reviewed. Public outcry over these cases has prompted the National Conference of Commissioners on Uniform State Laws and many state legislatures to review their adoption laws with the purpose of making final adoptions irreversible.

In August 1994, the National Conference of Commissioners on Uniform State Laws approved a revised Uniform Adoption Act (UAA).\textsuperscript{14} The revised UAA is designed to respond to many of the problems identified by the current case law and to create a more uniform body of law upon which all states can rely. While the revised UAA is aimed toward compatibility with existing law, many changes have been incorporated to make the adoption process and subsequent adoptions more stable and final.\textsuperscript{15} The American Bar Association approved the revised UAA at its February 1995 meeting and sent the revised UAA to the state legislatures for approval.\textsuperscript{16}

In April 1995, the Oklahoma legislature considered the revised UAA but considered passage to be premature. Instead, the legislature established the Adoption Law Reform Committee\textsuperscript{17} (Committee) composed of legislators, lawyers, judges, law professors, and child welfare professionals.\textsuperscript{18} The Committee is charged with reviewing the current state of adoption laws and recommending future laws.\textsuperscript{19} The Committee members will serve until June 30, 1997, at which time the Committee will make final recommendations, or the legislature will extend the Committee's work.\textsuperscript{20} This slow and deliberate process will allow the Oklahoma legislature to carefully scrutinize any adoption law before passage, thus ensuring that the best interests of all parties in the adoption process are served.

\textsuperscript{11} Susan Estrich, Indian Rights Win, Two Children Lose, USA TODAY, July 13, 1995, at 9A.
\textsuperscript{12} Rainey, \textit{supra} note 1, at B1.
\textsuperscript{13} CBS \textit{This Morning} (CBS television broadcast, Jan. 22, 1996) (interview with Colette and Jim Rost).
\textsuperscript{14} \textit{Uniform Adoption Act} is Approved, FAIRSHARE, Nov. 1994, at 26.
\textsuperscript{15} UNIF. ADOP. ACT, Prefatory Note, 9 U.L.A. 2 (Supp. 1995).
\textsuperscript{17} See 10 OKLA. STAT. § 60.51 (Supp. 1995).
\textsuperscript{18} Id. § 60.52(A).
\textsuperscript{19} Id. § 60.53.
\textsuperscript{20} Id. § 60.52(B).
Before changing the existing law, it is important to understand how the courts have interpreted the existing law. Courts have focused on four key factors in reversing adoptions: the best interest of the child, consent, notification, and racial preference. While each of these factors is important, the goal of finalizing adoptions must take precedence.

The implied purpose of all adoption laws is to place children in safe and stable home environments to promote proper development. Stability can only be achieved by finality in the adoption process. While courts have focused on legitimate policy concerns in reversing adoptions, those concerns must give way to the interests of all parties in having a final decree. The revised UAA furthers the goal of finality and should be adopted with little revision.21

This comment will review the current Oklahoma UAA, case law, and the provisions of the revised UAA for each of the four factors. Part II will address the best interest of the child. Part III will focus on consent. Part IV will review notification. Finally, part V will address racial preferences. In addition, the strengths and weaknesses of the revised UAA will be analyzed and recommendations will be made.

II. The Best Interest of the Child

Courts have long struggled with the concept of the best interest of the child, the promotion of which is the underlying purpose behind all adoption statutes. While adoption statutes indicate that the child's interest is to be protected by the courts, many courts place this direct determination on hold while other issues are resolved. Only when a court is unable to conclusively hold that an adoption should be affirmed or reversed does the court focus on the interest of the child.

A. The Current State of the Law

The Oklahoma UAA does not define the child's best interest, nor does it state conclusively that the child's best interest must be considered before an adoption is granted or denied. The law refers to the best interest of the child only in passing by stating that it may be considered among the other factors.22 The statute leaves the child's interest solely to the discretion of the judge and only when all other factors have been considered.23 Because of this discretion, no cases in Oklahoma have been decided directly based on the child's best interest. Instead, case law from other jurisdictions must be consulted to understand the parameters of the concept.

In Lehr v. Robertson,24 a putative father attempted to reverse the adoption of his child even though the father had never established a relationship with the

22. 10 OKLA. STAT. §§ 60.10, 60.14, 60.15 (1991).
child. In affirming the adoption, the United States Supreme Court stated that the paramount consideration in any adoption proceeding should be the best interest of the child. Further, the Court held that the need for emotional stability is critical to proper adolescent development, and that such stability can only be achieved in a safe home environment.

In a contrary opinion, In re Baby Girl Claussen, the Supreme Court of Michigan held that a hearing to determine the best interest of the child is not required until the fitness of the parents is determined; if parental fitness is not contested, the child's best interest is never raised. In fact, the court stated that the child's best interest test is not required in all adoptions and should not become a benchmark on which to base adoption proceedings. In Claussen, the adoption was denied based on a lack of consent by the birth parent, and the child's best interest was never determined even though the child had lived with the adoptive parents for several years prior to the hearing. The court reasoned that other grounds existed for returning the child to the birth parent; therefore, the child's best interest could be ignored. The later case of In re Baby Boy Janikova modified the effect of the Claussen decision. In Janikova, the Supreme Court of Illinois held that to determine the fitness of the parents, the child's best interest must be considered. Further, all past conduct may be relevant to determine the home environment into which the child will be placed. The Janikova court appears to take a more reasoned approach regarding a court's role in adoption proceedings. As most statutes indicate, a court is to protect the best interest of the child. A court that ignores this duty fails to fulfill its purpose in adoption proceedings.

In the Rosts' dilemma set forth in the Introduction, the judge found that the ICWA overruled consideration of the child's best interest. Evidence was introduced that the birth mother had filed for a restraining order against the birth father after he had repeatedly abused her and the couple's other children. While this evidence would indicate that the child's best interest would not be served by reversing the adoption, the judge felt compelled by the ICWA to reverse the adoption regardless of the child's best interest.

25. Id. at 250.
26. Id. at 257.
27. Id.; see also Robin DuRocher, Balancing Competing Interests in Post Placement Adoption Custody Disputes, 15 J. LEGAL MED. 305, 330-31 (1994).
29. Id. at 661.
30. Id.
31. Id. at 662.
32. Id. at 660.
33. 638 N.E.2d 181 (Ill. 1994).
34. Id. at 183.
35. Id. at 184.
36. Estrich, supra note 11, at 9A.
37. Räney, supra note 2, at B1.
38. Estrich, supra note 11, at 9A.
In most cases, the best interest of the child is an afterthought in deciding whether to affirm or to reverse an adoption. Although the underlying purpose of the adoption statutes is to protect the child's interest, primary consideration is given to other issues such as consent and notice. Only when a court is unable to reach a conclusion does the interest of the child become important. While a few courts have recognized the need to elevate the child's interest in adoption proceedings, most courts have centered on other considerations. Few cases have been resolved solely on the issue of the best interest of the child, regardless of the overwhelming need of the child and a court's duty to protect the child.

B. The Revised UAA

One of the stated underlying purposes of the revised UAA is to protect the best interest of the child. While everyone agrees the child's best interest is important in any adoption proceeding, there is no clear definition of what that interest is. As shown by the case law, the child's best interest is usually used as a factor of last resort when other grounds do not exist for the decision. Although a list of factors would be difficult to create because of the great diversity in factors, the revised UAA attempts to refine the definition of the child's best interest and to require that standard in adoption proceedings.

The prefatory note to the revised UAA states that one of its purposes is to promote the interest of the child by requiring individuals who raise the child to be "committed to, and capable of, caring" for him or her. Throughout the text of the revised UAA, the child's best interest is cited as a compelling reason for any decision. In fact, the use of strict time limits promotes a rapid conclusion of the proceedings to secure a stable environment for the child. Even when the adoption petition is denied, the court must still look at the child's best interest before determining custody. In some cases, custody may be given to the parent attempting to adopt the child, even though that adoption has been denied. The greatest weakness in relying on this standard is that no guidelines are established to direct a court on the types of factors to consider. Instead, the revised UAA leaves the child's best interest to the determination of the judge on a case by case basis, which forces inconsistency in applying the factors.

The revised UAA does little to change existing Oklahoma law. Neither the revised UAA nor the Oklahoma UAA provides any standards as to what constitutes the child's best interest. Instead, both schemes leave the child's interest to be determined by a judge without any standard guidelines or factors to

40. Id.
41. Id. § 3-704, 9 U.L.A. 62 (Supp. 1995).
42. DuRocher, supra note 27, at 342. The commentary states that some of the provisions citing the child's best interest are in fact contradictory; however, that opinion depends upon the interpretation given to the provisions.
43. See generally Myra G. Sencer, Note, Adoption in the Non-Traditional Family — A Look at Some Alternatives, 16 Hofstra L. Rev. 191 (1987). The note focuses on such factors as age, marital status, and sexual preference as commonly considered alternative factors.
consider. In fact, the lack of standards presents the weakest part of both the Oklahoma UAA and the revised UAA. Before the revised UAA is adopted, it needs more revision to create uniform standards.

III. Consent

A review of current case law indicates that consent is the most important factor used to reverse adoptions. Consent is a key factor in all adoptions because courts are reluctant to take a person's rights away without consent or a judicial determination. Further, society as a whole places great value in keeping children with their birth parents to promote stability. The idea of separating children from their birth parents is abnormal in traditional society.

However, society has recognized that there are circumstances where adoption is necessary to protect a child. To accomplish that goal, adoption procedures attempt to limit the amount of time a child is left without a parent. To expedite the process, the consent of a birth parent allows a court to dispense with a separate hearing to terminate parental rights. However, consent is not without flaws. Questions of whose consent is needed, whose consent is not required, or whose consent may be dispensed with remain fundamental problems that courts must face. All states have some provision within their adoption laws requiring the consent of the birth parents. Although the wording of the different statutes may vary, the Oklahoma provision illustrates the problems.

A. The Current State of the Law

The Oklahoma UAA (the Act) provides that in order for an adoption to be legal, the consent of both birth parents must be given for legitimate births. The Oklahoma Act also requires the consent of both parents, if they are over the age of sixteen, for births outside of marriage. However, the Oklahoma Act provides several exceptions. Consent is not necessary when parental rights have been terminated by the courts, when a parent has failed to provide maintenance and support for the child for twelve months prior to the adoption, or when the father or putative father has failed to acknowledge or to attempt to certify paternity. The Act further provides that consent may be withdrawn within thirty days of being given, unless a court finds the adoption is in the child's best interest. While the statute appears unambiguous, the exceptions provide ample room for litigation.

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44. See 10 OKLA. STAT. § 60.5(1) (Supp. 1995). A "legitimate birth" is a birth within a marriage.
45. Id.
46. Id. § 60.6(1).
47. Id. § 60.6(2).
48. Id. § 60.6(3)(a).
49. 10 OKLA. STAT. § 60.10(A) (1991).
1. Termination of Parental Rights

The first exception under the Oklahoma Act is that consent is unnecessary when the courts have severed the parental rights. This exception has faced little litigation. Courts have applied this exception in cases of abuse or neglect. In such instances, the nonconsenting birth parent rarely challenges the adoption because a judge has already determined that the parent is unfit to raise the child. In addition, the parent may appeal the decision terminating his or her parental rights within the appropriate statute of limitations. However, once the issue of consent is decided and the adoption decree is issued, the parent may not attack the decree on consent grounds when parental rights have been judicially terminated.

2. Failure to Provide Maintenance and Support

Courts have faced a greater challenge under the second exception of the Oklahoma Act, dispensing with the consent requirement for a parent who has refused maintenance and support for the child for twelve months prior to the adoption. The term "support" implies more than mere financial support, which would be part of maintenance, to include such intangible actions as spending time with the child and providing emotional support. However, courts have been unable to place a specific value on intangible support when weighing the actions of a birth parent. Instead, courts look at support on a case-by-case basis to determine if the parent has taken an active role in the child's life.

Two United States Supreme Court cases provide the clearest examples of the maintenance and support exception. Both cases have been relied on in almost all jurisdictions, including Oklahoma, to establish some definition of "support." While neither case mentions consent specifically, each provides guidelines for the type of conduct that is included in support.

In Stanley v. Illinois, an unwed father's children were declared wards of the state upon the death of their birth mother. The Illinois law at issue in Stanley presumed that all unwed fathers were unsuitable to care for their children; therefore, parental rights were terminated. The Illinois law did not consider whether an unwed father had established a relationship with or had supported his children. The United States Supreme Court found flaw with the Illinois law. It held that a custodial father has a special relationship with the children and is

50. 10 OKLA. STAT. § 60.6(1) (Supp. 1995).
51. Title 10, section 1130(A) of the Oklahoma Statutes grants the courts power to terminate parental rights upon certain findings, including findings of abuse or neglect.
52. Id. § 1130(C).
53. See Id. § 29.1(G).
54. 10 OKLA. STAT. § 60.6(2) (Supp. 1995).
55. 405 U.S. 645 (1972).
56. Id. at 646.
57. Id. at 650.
entitled to a parental fitness hearing before the children can be removed from his
custody and placed for adoption.\textsuperscript{59}

In the related case of \textit{Quilloin v. Walcott},\textsuperscript{60} the Court held that a noncustodial
father is not entitled to the same protections as a custodial parent.\textsuperscript{61} In a holding
based on a law similar to that of Oklahoma's Act, the Court held that a putative
father who has failed to make any attempt to support and maintain the child may
lose his parental rights over the child.\textsuperscript{62} In both cases, the United States Supreme
Court considered the amount and the type of support the fathers provided for their
children and whether or not the fathers had acknowledged paternity.

3. \textit{Failure to Acknowledge or Prove Paternity}

The final exception under Oklahoma's Act is that consent is not required when
the father or putative father has failed to acknowledge or to attempt to certify
paternity.\textsuperscript{63} This exception has proven the most troublesome for courts. Courts
have been unable to state a clear test of what constitutes acknowledgment of
paternity. Instead, courts prefer a case-by-case approach. The problem is further
clouded by the issue of whether or not the father even knows of the child's
existence. It is impossible to certify paternity without some knowledge of the
child. Thus, the final factor for courts to consider is time. How long must a court
wait for a father to acknowledge paternity before determining that a father has
failed to acknowledge under the statute? Like most states, Oklahoma does not set
a fixed time limit.\textsuperscript{64} Therefore, the question remains open for courts to deter-
mine.

Four recent decisions provide insight into the complex issue of certifying
paternity. In each case, the father failed to certify paternity before the adoption
proceedings were conducted. However, the application of four different standards
in each case causes the certification issue to become even more murky.

In \textit{Adoption of Baby Boy D},\textsuperscript{65} the putative father left the pregnant mother to
live with his brother. Although he was informed of both the pregnancy and the
mother's intent to place the child up for adoption, the father made no attempt to
prevent the adoption or to care for the mother or child.\textsuperscript{66} After the adoption was
finalized, the father filed suit to reverse the adoption on the grounds that he had
not consented.\textsuperscript{67}

The Oklahoma Supreme Court held that consent is not required when the
putative father fails to acknowledge or attempt to certify paternity.\textsuperscript{68} The Due

\begin{footnotes}
\footnote{59. \textit{Id.} at 658.}
\footnote{60. 434 U.S. 246 (1978).
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\footnote{61. \textit{Id.} at 256.}
\footnote{62. \textit{Id.}
}
\footnote{63. 10 OKLA. STAT. § 60.6(3)(a) (Supp. 1995).
}
\footnote{64. \textit{See} \textit{id.}
}
\footnote{65. 742 P.2d 1059 (Okla. 1987).}
\footnote{66. \textit{Id.} at 1061.}
\footnote{67. \textit{Id.} at 1060.}
\footnote{68. \textit{Id.} at 1067.
}
Process Clause of the United States Constitution only protects parents who have actually committed themselves to the parent-child relationship. In addition, the court found that requiring only the mother's consent to the adoption when a child is born out of wedlock facilitates the best interests of the child. A mother should have maximum flexibility in caring for the child. In this case, the court strictly interpreted the consent provisions of the Oklahoma Act, denying the father's attempt to reverse the adoption.

In another case, the Oklahoma Supreme Court appears to reject the strict standard it imposed in Adoption of Baby Boy D. In Tariah v. Hannah's Prayer Adoption Agency, the birth mother consented to the adoption of her three children stating that her husband was not the actual father of the children, and that she did not know his present location. The mother's consent was deemed sufficient, and the adoptions were finalized. Eighteen months later, the plaintiff filed a petition claiming to be the father of the children and contending that the adoptions were invalid because he had not given his consent.

The Oklahoma Supreme Court held that the rights of a putative father, including the right to consent to adoptions, may be terminated without a hearing if, after a reasonable search, his location cannot be determined. However, if a potential father can be identified by the courts or by the mother, he must be afforded an opportunity for a hearing before his parental rights can be terminated. The court found that an attempt at notice by publication was reasonable under the circumstances and that because the potential father could not be located, he was deemed to have waived his hearing. The court determined that a putative father who has failed to acknowledge or certify paternity may be adjudged to have terminated his rights. The court affirmed its original interpretation that a putative father could lose his parental rights for failure to acknowledge or to certify paternity. However, the decision did provide an opening for future cases by requiring a hearing, if possible, before the parental rights of a potential father could be terminated.

Other jurisdictions have faced similar problems. In the case of In re Baby Girl Claussen, the Supreme Court of Michigan held that a statutorily fixed time period between the birth and the consent to adoption must be strictly observed. Further, the court held that before a final judgment is entered, potential claimants

69. Id.
70. Id. at 1068.
71. Id. at 1068.
72. 903 P.2d 304 (Okla. 1995).
73. Id. at 305.
74. Id. at 306.
75. Id. at 305.
76. Id. at 307.
77. Id. at 307.
78. Id.
79. Id.
81. Id. at 651.
must be given reasonable notice and an opportunity for a hearing for parental rights to be terminated. The court rejected the Quillioin distinction between custodial and noncustodial parents. Instead, the court held that even without a custodial interest, a putative father has a constitutionally protected interest in the child and in establishing a relationship with the child. Finally, the court held that the natural parents are the biological custodians of the child and must be given great consideration.

In reaching this decision, the Michigan Supreme Court expanded even further the basis for reversing adoptions. By placing greater emphasis on the role and the rights of the natural parents, the court provided more ground on which to appeal an adoption. Previously, courts could simply apply the rules provided by the various adoption laws. Now, courts are expected to place greater weight on the interest of the birth parents to the detriment of those of the adoptive parents and of the child.

In another famous case, In re Baby Boy Janikova, the birth mother placed the child for adoption and told the birth father that the child had died. The Supreme Court of Illinois held that the father's apparent lack of interest in the child after the mother informed him that the child had died was insufficient to terminate his parental rights in the child. The court found that where a putative father is informed of the birth and fails to acknowledge paternity, his rights may be terminated. However, a father's search for the child after learning of the child's existence constitutes acknowledgment of the child for the purpose of determining paternity. To terminate the father's right to consent after paternity has been acknowledged, courts must determine that a father is unfit to care for the child. Finally, the court held that an adoption may not be finalized until the parental rights of the birth parents are terminated.

Courts are left with wide discretion applying the "failure to acknowledge" exception to the consent provisions. As the two Oklahoma cases, Adoption of Baby Boy D and Hannah's Prayer Adoption Agency, indicate, even the same court may apply different standards. The requirement that a father acknowledge paternity before being accorded parental rights is designed to prevent a series of potential claimants from prolonging the adoption process. However, as the cases exhibit, the failure to enunciate a uniform standard and time limit for that

82. Id. at 655.
83. See supra notes 60-62.
84. Id. at 664.
85. Id. at 689.
86. 638 N.E.2d 181 (III. 1994).
87. Id. at 181.
88. Id. at 187.
89. Id. at 183.
90. Id. at 187.
91. Id. at 185.
92. Id. at 189 (Heip/e, J., supplemental opinion upon denial of reh'g).
acknowledgement of paternity to be valid leaves applicability of this exception to the consent provision equivocal and may result in prolonged litigation.

4. Withdrawal of Consent

The provisions for withdrawal of consent in the Oklahoma Act have not been litigated under the current statute. The provisions state that consent may be withdrawn within thirty days of being given, unless a court finds the adoption is in the child's best interest. However, two cases from other jurisdictions provide enlightenment on the issue.

In In re Adoption of Infant Boy, the mother consented to the adoption and later attempted to withdraw her consent claiming that her father's undue influence forced her actions. The Ohio Court of Appeals held that a parent wishing to withdraw adoption consent must prove that the consent was given under duress or undue influence. Further, the court found that the withdrawal of consent must be weighed against the best interests of the child. In denying withdrawal of consent, the court found that the mother's consent was not based on undue influence and that the child's best interest would be served by allowing the adoption to proceed.

In a similar case, Bell v. Adoption of A.R.H., the mother consented to the adoption of her four children but later changed her mind and wanted to keep them. The Court of Appeals of Indiana held that when a mother voluntarily consents to an adoption, the withdrawal of the consent may not be allowed if the adoption is in the best interest of the child. In Indiana, there is no statutory provision providing a time period for withdrawal of consent, as the Oklahoma Act provides. Without a time limit, a birth parent who consented to an adoption could revoke that consent at any time up until the final decree is issued. Thus, the lack of a time limit further complicates the adoption process by allowing a potentially major issue to remain undetermined for years, leaving the child in limbo until the final decree is issued.

The cases of Adoption of Infant Boy and Bell reveal that courts are reluctant to allow withdrawal of consent when the adoption is in the best interest of the child. While withdrawal of consent is possible, most courts would agree that the interest of the child in living with the adoptive parent outweighs the interest of the birth parent in withdrawing his or her consent.

95. Id. at 755.
96. Id. at 756.
97. Id. at 760.
98. Id. at 756.
99. Id. at 760.
101. Id. at 32.
102. Id. at 33-34.
While the issue of consent remains obscure in current case law, guidelines do exist. First, for consent to be waived, a parent must take some action or complete inaction before courts will terminate parental rights. Second, once those actions have been taken, courts are reluctant to allow later action to nullify a previous determination. Finally, a putative father, who has failed to acknowledge his paternity over a child, is almost always judged to have severed his parental rights.

B. The Revised UAA

The revised UAA attempts to refine the consent guidelines to resolve many of the problems found in the current laws. As the case law indicates, the current statutes require a judge to determine if the consent is valid, which forces parties to litigate any question. Through strict guidelines, the revised UAA allows parties to easily determine if the consent is valid or not necessary, thus greatly expediting the process and reducing the need for litigation. Therefore, adoptions become final faster and with fewer problems.

1. Who Can Consent

The revised UAA has placed strict guidelines on who must consent to an adoption. The revised UAA requires the consent of the birth mother, unless her parental rights have previously been terminated by a court. A man who is or has been married to the birth mother within three hundred days prior to the birth must consent to the adoption. This provision also includes a man who has attempted to marry the birth mother within that time frame. In addition, a man who has been judicially determined to be the father of the child and has provided support both financially and emotionally or who has married the mother must consent. Finally, a man who openly acknowledges the child as his own and has received the child in his home is deemed the father for consent purposes. The underlying purpose of these provisions is to expedite the adoption process and prevent future litigation by specifying the parties that must consent.

The revised UAA also specifies whose consent is not required. Consent is not required for a person who has relinquished the child to an agency for purposes of adoption or a person whose parental rights have been terminated by a court. Further, a parent who has been judicially determined incompetent is not required to consent. For litigation purposes, two provisions become key. The first provision is that consent is not needed from a man, not married to the birth

105. Id. § 2-401(a)(1)(i).
106. Id. § 2-401(a)(1)(ii).
107. Id. § 2-401(a)(1)(iii)(A).
108. Id. § 2-401(a)(1)(iii)(B).
109. Id. § 2-401(a)(1)(iv).
110. Id. § 2-401 cmt.
111. Id. § 2-402(a)(1).
112. Id. § 2-402(a)(2).
113. Id. § 2-402(a)(3).
mother, who executes a verified statement denying paternity or disclaiming any interest in the child. The other important provision is that failure to appear at a proceeding for adoption or to file an answer after notice has been served eliminates the required consent.

The purpose of the two sections is to provide strict and clear guidelines on the consent required for an adoption to become final. While respecting the rights of both parents, the sections allow an adoption to proceed with only the consent of the birth mother if the birth father has failed to take an interest in the child or is unable either through judicial termination or incompetence to consent. When read together, the two sections provide a clear picture of the requirements of consent and prevent future litigation because the requirements are very specific.

If the Oklahoma legislature adopts the revised UAA, the existing Oklahoma Act will change in several fundamental regards. First, the consent provisions of the revised UAA provide a better understanding of who has the right to consent and who does not. Under the current Oklahoma Act, the consent of both birth parents is usually required for any adoptions. There are only three exceptions provided by the Oklahoma Act. The provided exceptions have proven elusive to the courts, and the use of those exceptions usually results in future litigation. The revised UAA expands the consent requirements by better defining whose consent is or is not required. Thus, the revised UAA would reduce the amount of future litigation and expedite the adoption process.

Second, the revised UAA clearly defines the separate rights of the birth mother and father. The rights of the birth mother remain substantially unchanged as her consent is still required before an adoption can be complete. The rights of the birth father and the actions the birth father may take are further defined. The Oklahoma Act begins with the presumption that all birth fathers are required to consent and then defines three situations where the consent is not necessary. The revised UAA provides specific situations in which the birth father is required to consent and specific situations where that consent is not necessary.

Unlike the Oklahoma Act, the revised UAA does not presume that a birth father must consent but requires some action on the part of the birth father to show an interest in the child and the welfare of the birth mother before granting him the right to refuse to consent. The provision that consent is not required by a birth father includes each of the three exceptions found in the Oklahoma Act but further includes the provision that a birth father may waive that consent by

114. Id. § 2-402(a)(4).
115. Id. § 2-402(a)(6).
116. 10 OKLA. STAT. § 60.5(1) (Supp. 1995).
118. Id. § 2-401(a)(1).
119. See id.
120. 10 OKLA. STAT. §§ 60.5, 60.6 (Supp. 1995).
122. Id. § 2-401.
executing a verified statement denying paternity or disclaiming any interest in the child.\footnote{123} This statement allows a potential father to withdraw from the proceeding without the court determining that he is the father or requiring his consent.\footnote{124}

Finally, the revised UAA provides a strict time limit for the requirement of consent. By not requiring consent if the birth father fails to appear at or file an answer for a proceeding for adoption or termination of parental rights once notice has been given, the revised UAA expedites the adoption process.\footnote{125} It allows the court to proceed with the adoption even without the birth father's consent to prevent undue delay. The provision also prevents future litigation over the lack of consent by providing an opportunity for the birth father to refuse consent and to claim his parental rights. Once the hearing has been completed, the birth father who has not appeared or answered loses whatever rights he may have had.\footnote{126}

2. \textit{How the Consent is Given}

One of the major issues in litigation is the time and nature of the consent given. To set better guidelines, the revised UAA attempts to fix time limits and the requirement of informed consent. Under the revised UAA, consent to an adoption cannot be given or does not become valid until after the child is born.\footnote{127} After birth, the birth parent has 192 hours in which to revoke the consent.\footnote{128} In addition, before consent can be given, the birth parent must be informed of the consequences of the consent, the availability of legal and personal counseling, the procedures for releasing health and other information to the adoptive parents, and the consequences of failing to identify or misidentifying the other birth parent.\footnote{129} The consent must be signed or confirmed in the presence of a judicially recognized third party such as a judge, a noninterested lawyer,\footnote{130} or an employee of the hospital.\footnote{131}

The consent must state that it is voluntarily given with the understanding that all parental rights will be terminated.\footnote{132} In addition, the prospective adoptive parent identified in the consent must sign a statement of intent to adopt the child and take full responsibility for the child's support and medical care until the adoption becomes final.\footnote{133} The prospective adoptive parent must acknowledge his or her obligation to return the child if the consent is revoked or the adoption is denied.\footnote{134}

\begin{itemize}
\item \footnote{123} \textit{Id.} \$ 2-402(a)(4).
\item \footnote{124} \textit{Id.} \$ 2-402 cmt.
\item \footnote{125} \textit{Id.} \$ 2-402(a)(6).
\item \footnote{126} \textit{Id.} \$ 2-402(a)(6).
\item \footnote{127} \textit{Id.} \$ 2-404(a).
\item \footnote{128} \textit{Id.}
\item \footnote{129} \textit{Id.} \$ 2-404(e).
\item \footnote{130} A noninterested lawyer is one not representing either the adoptive parents or an adoption agency. \textit{Id.} \$ 2-405(a)(4).
\item \footnote{131} \textit{Id.} \$ 2-405(a).
\item \footnote{132} \textit{Id.} \$ 2-405(d)(2).
\item \footnote{133} \textit{Id.} \$ 2-405(e).
\item \footnote{134} \textit{Id.}
\end{itemize}
The purpose of these provisions is to create a judicially determinable framework for a legal adoption. The revised UAA ensures that the birth parent is well informed and understands the nature of the decision to be made. Time is given for the birth parent to weigh his or her decision both before and after consent is given. The revised UAA reduces the possibility of fraud by requiring the consent to be signed or confirmed in the presence of a third party and to state that it is voluntary. Finally, the revised UAA ensures that the child is provided for at all times during the proceedings by requiring the prospective adoptive parents to guarantee support and medical care while the adoption is pending.

The revised UAA provides a clear picture of what is required for consent to be valid. The Oklahoma Act, in contrast, does not specify the precise steps necessary for consent. Instead, the Oklahoma Act merely provides that consent of at least the birth mother is necessary unless her parental rights are terminated by a court. The Oklahoma Act does not provide a time frame or a requirement of informed consent. No provision is included to protect the birth parent from fraud, leaving the parent to argue the issue in court and bear the burden of proof that fraud actually existed. Finally, the Oklahoma Act does not require the prospective adoptive parents to guarantee the child's well being while the adoption is pending. In this regard, the statute is silent, leaving the child in a state of limbo until the adoption is granted or denied. Clearly, the revised UAA provides a better framework for the adoption process by providing standards to be followed to protect the birth parents, the adoptive parents, and, most importantly, the child.

3. Revocation of Consent

Whenever consent is given, the possibility exists that it will be revoked, a common occurrence in any contractual relationship. To limit the possibility of revocation, the revised UAA establishes clear instances when revocation is allowed.

The revised UAA provides that consent may be revoked within 192 hours after the consent is given. In this case, the revocation must be in writing and given to the prospective adoptive parent. This provision is designed to allow a birth parent to reconsider his or her decision before the child is harmed. After that initial 192 hours, consent may only be revoked under particular circumstances, such as an agreement between the prospective adoptive parent and the birth parent; clear and convincing proof of fraud or duress before the adoption decree is issued; or proof by a preponderance of the evidence that the adoption petition was not filed within the prescribed time limit (thirty days under

135. Id. § 2-404 cmt.
136. Id. § 2-405(e).
137. 10 OKLA. STAT. § 60.5 (Supp. 1995).
139. Id. § 2-408(a)(1).
140. Id. § 2-408(a)(2).
141. Id. § 2-408(b)(1).
the UAA).\textsuperscript{142} Finally, consent may be revoked if it is shown by a preponderance of the evidence that an event provided in the consent agreement has been triggered allowing revocation.\textsuperscript{143} Only in these three circumstances will a court allow a valid consent to be revoked after the prescribed time limit has expired.

The purpose of the provisions is to make the consent to adoption legally binding to expedite adoption proceedings. While the revised UAA allows situations where the consent should be invalid, it begins with the presumption that consent is valid once given. Underlying this purpose are the other provisions designed to protect the birth parent from consenting involuntarily or through ignorance.

The Oklahoma Act allows revocation within thirty days of the consent being given, unless the court finds the adoption is in the child's best interest.\textsuperscript{144} There are no other circumstances for revocation found within the Oklahoma Act, although case law indicates that evidence of fraud, duress,\textsuperscript{145} or undue influence\textsuperscript{146} will cause a court to allow revocation. While the Oklahoma Act appears much tighter on its face than the revised UAA, it does not provide a standard of review for revocation, nor does it provide any circumstances where revocation is in the best interests of the parties. The Oklahoma Act does require a judge to determine the best interest of the child but does not provide any standards by which the interest is to be measured. The revised UAA provides a simple guideline for revocation of consent, making it easier for parties to determine their legal status.

In drafting the revised UAA, the Drafting Committee members faced the serious issues of when to require consent, waive it, the form in which it must be, and its revocation. Each issue raises important questions during the adoption process and can potentially lead to litigation. One of the goals of the Committee was to streamline the adoption codes, making them more accessible and functional. Each provision provides a strict set of rules to be followed, with failure to adhere resulting in the adoption petition's rejection. This system is far better than makeshift rules used as needed by judges to determine the status of the parties, while leaving the child in legal limbo. Strict guidelines provide all parties with a clear understanding of their rights and obligations and allow the adoption proceeding to continue on a smooth path.

\textit{IV. Notice}

The issue of notice most often arises when a couple has separated and the location of the birth father cannot be determined or the birth mother chooses not to inform the birth father of the pregnancy. The birth mother then places the child up for adoption. In this context, the consent of the birth father cannot be obtained

\begin{itemize}
  \item \textsuperscript{142} \textit{Id. }§ 2-408(b)(2).
  \item \textsuperscript{143} \textit{Id. }§ 2-408(b)(3).
  \item \textsuperscript{144} \textit{10 Okla. Stat. }§ 60.10(A) (1991).
  \item \textsuperscript{145} Adoption of Robin, 571 P.2d 850, 857-58 (Okla. 1977).
  \item \textsuperscript{146} Adoption of Jones, 558 P.2d 422, 424 (Okla. Ct. App. 1976).
\end{itemize}
without proper notice as a parent cannot reasonably be expected to consent or to waive consent of rights without notice that the rights exist. The most logical solution to the issue is that a parent who has an interest in a child should know of the birth. However, that solution ignores societal realities. With today's soaring divorce rates, a parent may be unaware of a pregnancy and subsequent birth of a child but may still desire a role in the child's life. The issue of notice is further complicated by limited provisions in most adoption statutes. All adoption statutes require some form of notice, but the type, timing, and the failure to receive notice are often left ambiguous. While the adoption statutes provide for notice in theory, the reality is that notice remains unclear.

A. The Current State of the Law

Under the Oklahoma UAA (the Act), notice of the pending adoption must be provided to all concerned parties.\(^{147}\) However, in some circumstances, notice is not required if one parent presents an application stating a reason that the consent of the other parent is unnecessary.\(^ {148}\) A hearing is then required to determine if the consent is necessary, and notice of the hearing must be provided, if possible, to all parties.\(^ {149}\) The Oklahoma Act provides that notice of the pending adoption may be by publication when the location of the parent is unknown.\(^ {150}\) The publication notice must provide the name of the other parent, the name of the child, and the time and the location of the hearing.\(^ {151}\) The Oklahoma Act does not specify what happens if notice cannot be given.

Several cases from Oklahoma and other jurisdictions provide insight into how courts have used the notice provisions. The failure to comply with notice provisions has not proved fatal in most adoption cases. Instead, courts have been given discretion to resolve the dispute.

In Tariah v. Hannah's Prayer Adoption Agency,\(^ {152}\) the Oklahoma Supreme Court held that when the whereabouts of the father are unknown, notice by publication is sufficient to satisfy the notice requirement under the Due Process Clause.\(^ {153}\) However, the Oklahoma Act requires that a notice by publication must include the name of the parent, the name of the child, and the time and location of the proceedings.\(^ {154}\)

In Tariah, the mother stated that she did not know the present location of the father, making it impossible to serve him with proper notice of the hearing. Notice of the proceedings was published in the Tulsa Daily Commerce stating the name of the mother, the names of the children, and the time and location of the

148. Id.
149. Id. § 60.7(B).
150. 10 Okla. Stat. § 60.7(B) (1991).
151. Id.
152. 903 P.2d 304 (Okla. 1995).
153. Id. at 307-08.
adoption proceedings.\textsuperscript{155} When the father failed to appear at the adoption hearing, his consent was deemed waived and the adoption was finalized.\textsuperscript{156} However, the father appealed the adoption decree stating that the failure to provide him with proper notice explained his failure to appear and contest the adoption.\textsuperscript{157} The court denied the father's petition to overturn the adoption based on its reading of the notice provisions.\textsuperscript{158} The \textit{Tariah} court narrowly viewed the provisions, finding that once notice has been provided, even if by publication, the issue is considered decided and cannot be relitigated.\textsuperscript{159}

In another case, \textit{Adoption of Baby Boy D},\textsuperscript{160} the Oklahoma Supreme Court questioned the very nature of the notice provisions. The court found that providing adequate notice of the proceedings to the absent father could constitute an invasion of the mother's privacy by forcing her to reveal the identity of the father or to publish her name in the notice.\textsuperscript{161} This unique reading of the notice provisions creates ambiguity in the amount and form of notice required. While most courts would agree that notice is an essential part of protecting the birth parent's rights, the need to protect the birth mother is equally important. Under this interpretation, courts must balance the right of the birth father to parent the child against the birth mother's right to privacy to determine how much notice is required. In some cases, courts could hold that proper notice to the birth father would violate the birth mother's privacy and thus rule that notice is not required. Although this interpretation does not appear to have been tested by the courts, it could result in future litigation.

Courts in other jurisdictions have faced similar issues. In \textit{Allen v. Helwski},\textsuperscript{162} the Court of Appeals of Georgia allowed a father to contest an adoption two years after the decree became final. In \textit{Allen}, the child's stepfather petitioned to adopt the child claiming that the birth father had failed to provide child support for over twelve months.\textsuperscript{163} To sever the birth father's parental rights, proper notice of the adoption hearing had to be given to him. The stepfather stated that the birth father's whereabouts were unknown; thus, notice by publication was allowed.\textsuperscript{164} When the birth father appealed the adoption decree, he claimed that his whereabouts were known to the stepfather at the time of the proceedings. The court held that when a parent's whereabouts are known, notice must be made upon his or her person and that notice by publication was insufficient.\textsuperscript{165}

\begin{itemize}
\item \textsuperscript{155} \textit{Tariah}, 903 P.2d at 306.
\item \textsuperscript{156} \textit{Id.}
\item \textsuperscript{157} \textit{Id.}
\item \textsuperscript{158} \textit{Id.} at 307.
\item \textsuperscript{159} \textit{Id.} at 309.
\item \textsuperscript{160} 742 P.2d 1059 (Okl. 1987).
\item \textsuperscript{161} \textit{Id.} at 1069.
\item \textsuperscript{162} 361 S.E.2d 711 (Ga. Ct. App. 1987).
\item \textsuperscript{163} \textit{Id.} at 712.
\item \textsuperscript{164} \textit{Id.}
\item \textsuperscript{165} \textit{Id.}
\end{itemize}
Notice provisions in most adoption statutes are ambiguous and unworkable. As such, the provisions make adoptions less final. As illustrated by Hannah's Prayer Adoption Agency, Adoption of Baby Boy D, and Allen, the issue of notice remains controversial. Failure to provide proper notice for any proceeding may result in the reversal of the adoption. While each court must make an individual determination of what constitutes proper notice, most courts agree that if the father is known and his location easily determinable, notice must be served upon him personally. Beyond such a basic proposition, the courts are divided on how much notice and the type of notice required. In addition, the court in Adoption of Baby Boy D provided another issue in the mother's right to privacy. With the issue of notice left unresolved, adoptions that were final may be reopened on appeal.

B. The Revised UAA

One of the purposes of the revised UAA is to expedite the adoption process to reduce the time the child is in legal limbo.\textsuperscript{166} To accomplish that goal, the revised UAA provides for strict timelines rendering notice provisions paramount. While the revised UAA attempts to protect birth parents from termination of the parental rights without an opportunity for a hearing, that interest must be balanced against the child's right to a stable environment.

The revised UAA provides that, unless waived, notice must be served within twenty days after the adoption petition is filed.\textsuperscript{167} Under the pertinent provisions, notice must be provided to any individual whose consent is required or any individual the petitioner knows is claiming to be or is named as the father of the child, provided that paternity has not been judicially determined.\textsuperscript{168} However, any party who fails to respond to the notice after twenty days may not appear at the hearing nor be entitled to receive further notice.\textsuperscript{169}

If the court determines the unknown father has not received notice, the court must determine if the father can be identified.\textsuperscript{170} If the father can be identified and located, then notice must be served.\textsuperscript{171} If not, the court may order notice by publication if there is a reasonable possibility that the father will receive the notice.\textsuperscript{172} While the revised UAA does not require the birth mother to identify the father of the child, she will be advised that the failure could delay the adoption proceeding.\textsuperscript{173} Finally, notice may be waived by filing a written statement with the court that notice is not required.\textsuperscript{174}

\textsuperscript{168} Id. § 3-401(a)(3).
\textsuperscript{169} Id. § 3-403(b).
\textsuperscript{170} Id. § 3-404(a).
\textsuperscript{171} Id. § 3-404(c).
\textsuperscript{172} Id. § 3-404(d).
\textsuperscript{173} Id. § 3-404(e).
\textsuperscript{174} Id. § 3-405(a).
A special category of notice and of consent is the "thwarted father," or one who has been intentionally mislead by the mother about the child's existence or death. Since the father is misinformed and the mother does not have to provide his identity, he may not receive notice of the adoption. In such a case, the father is not deemed to have waived either his right to notice or consent.175 However, once the adoption decree is issued, the father has only six months to challenge the decree.176 The revised UAA assumes that a father that is interested in the child or in the mother will take the necessary steps to learn of the child's existence within the six months provided.177

The purpose of the notice provisions is to require all parties with an interest in the child to be a part of the adoption proceedings. However, the revised UAA does consider circumstances where a birth mother may not want to disclose the identity of the birth father.178 In balancing the interests of the birth mother and father, the revised UAA presumes that proceeding with the adoption is in the best interest of the child and the birth father's rights must give way. The revised UAA does include reasonable steps to identify and provide notice to the birth father, but if he cannot be identified or located, the adoption may proceed.

The revised UAA does little to change the existing Oklahoma Act. Both the revised UAA and the Oklahoma Act require notice to all parties if that notice is possible. The major distinction is in the consequences of the failure to provide notice to the birth father when his identity or location is unknown.179 The Oklahoma Act requires a hearing before parental rights may be terminated but does not specify the consequences of failure to appear at the hearing.180 Further, the Oklahoma Act does not indicate whether parental rights may be terminated if the father or his location is unknown. Under the revised UAA, the father's rights may be terminated if he fails to appear181 or if his identity or location is unknown. Reasonable steps are required to provide notice; however, consent may be dispensed with once those steps fail.182

The notice provisions of the revised UAA provide better guidelines than the current Oklahoma Act. The revised UAA clarifies the existing law by including provisions to identify or locate the father and the consequences of the failure to notify him. However, the revised UAA also provides that if the court is unable to identify or locate the father, his failure to appear may allow a court to dispense with his participation in determining the interest of the child.183

175. Id. § 3-404 cmt.
176. Id. § 3-707(d).
179. 10 OKLA. STAT. § 60.7(A) (1991).
180. Id. § 60.7(B).
182. Id. § 3-404(d).
183. Id.
V. Racial Preference

Perhaps the most troubling factor in recent adoption cases is that of racial preference. As society becomes increasingly aware of multiculturalism, the courts and Congress have responded by trying to protect different cultures. Courts have become reluctant to approve transracial adoptions. To protect cultures and races, courts have refused to finalize otherwise valid adoptions and have even reversed some adoptions.

A. The Current State of the Law

Racial preference most often arises when the child is Native American or African American. In both cases, adoption by a parent of another race is seen as a threat to the cultural identity of the race. However, the number of prospective adoptive parents within the race is small, leaving many children in foster care or as wards of the state. The debate centers on the need to protect the racial culture to the possible detriment of the child. While Native Americans and African Americans are both subject to racial preference, the form of the preference is very different.

1. Native Americans

Faced with an increased number of Native American children being adopted by non-Native American parents, Congress enacted the Indian Child Welfare Act (ICWA) in 1978.184 Under the ICWA, when the parents of a Native American child wish to place the child for adoption, preference must be given to the child's family members, the tribe, or other Native Americans.185 The tribe may even intervene in ongoing adoption proceedings to protect the interests of the Native American culture.186 All state adoption statutes are subject to the ICWA, making it one of the most pervasive adoption provisions.187 While the goal of protecting racial identity is sound, the reality of the law remains controversial. As illustrated by recent cases, the use of the ICWA to reverse valid adoptions has increased.

In Adoption of Baby Boy D,188 the father of the child, a member of the Seminole Nation, attempted to invoke the ICWA to reverse a finalized adoption. The father contended that because the child was partially Native American, the adoption was invalid as no preference was given to other Native Americans.189 The majority of the Oklahoma Supreme Court found that the ICWA did not apply to unwed fathers where paternity was neither acknowledged nor established.190 The court interpreted the ICWA as only applying to children on the reservation

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186. Id. § 1911(e).
187. Id. § 1901(1).
188. 742 P.2d 1059 (Okla. 1985).
189. Id. at 1060.
190. Id. at 1064.
or already part of the Indian culture. The majority of the court opined that the ICWA could not be applied to a child merely because he had Native American blood.191

Justice Kauger, in dissent, disagreed. The dissent stated that the ICWA protected not only Indian children on the reservation but also all Indian children from birth.192 The dissenting opinion explained that the purpose of the ICWA was to give preference to Native American families and tribes to allow the continuation of the Indian heritage and culture.193 The case clearly shows that while all adoption statutes are subject to the ICWA, courts are divided on how to interpret the provisions.

In a similar case, In re Custody of S.E.G.,194 the Supreme Court of Minnesota reviewed a lower court's decision finding the ICWA inapplicable when there is good cause to modify the preferences.195 In S.E.G., a non-Indian couple wished to adopt three Native American children placed in their home under foster care.196 The lower court approved the adoption stating that a determination of good cause allowed the court to deviate from the ICWA preferences.197

While the ICWA does not provide for good cause deviations, subsequent guidelines of the Bureau of Indian Affairs recognize the possibility.198 The circumstances creating good cause are a request of the biological parents that the children be placed with a specific adoptive parent, extraordinary physical or emotional needs of the child, or unavailability of suitable Native American families for placement after a diligent search.199 Although the Minnesota Supreme Court held that no good cause existed under the ICWA provisions in S.E.G., it did recognize the subsequent guidelines provided and in effect incorporated them into case law.200

Federal courts have faced similar difficulty in deciding the scope of the ICWA. In Kiowa Tribe v. Lewis,201 the United States Court of Appeals for the Tenth Circuit held that once a state court has finalized an adoption after due consideration of the ICWA, a tribe is precluded from attacking the judgment under the doctrine of res judicata.202 In Lewis, a Kansas trial court ruled that the ICWA did not apply to the adoption proceedings even though the child's father was Native American.203 The Kansas court determined that Congress' intent was not "to dictate that an illegitimate infant who had never been a member of an Indian

191. Id.
192. Id. at 1071 (Kauger, J., dissenting).
193. Id. (Kauger, J., dissenting).
194. 521 N.W.2d 357 (Minn. 1994).
195. Id. at 358.
196. Id. at 359.
197. Id. at 361.
198. Id. (citations omitted).
199. Id. at 362 (citations omitted).
200. Id. at 363.
201. 777 F.2d 587 (10th Cir. 1985).
202. Id. at 590.
203. Id. at 589.
home or culture, and probably never would be, should be removed from its primary cultural heritage and placed in an Indian environment over the express objections of its non-Indian mother.\textsuperscript{204}

The Tenth Circuit held that the ICWA does not divest a state of its jurisdiction over Indian children living off the reservation.\textsuperscript{205} Both the father and the tribe were permitted to present their arguments that the tribe should determine the adoption of the child.\textsuperscript{206} Once the Kansas trial court held that the ICWA was inapplicable, that decision was rendered final. The tribe was precluded from attacking the judgement in federal court.\textsuperscript{207}

In the related case of \textit{Native Village of Venetie I.R.A. Council v. Alaska},\textsuperscript{208} the United States Court of Appeals for the Ninth Circuit held that when a tribe acts to place a child for adoption under the ICWA, a state is required to recognize the adoption as legally binding.\textsuperscript{209} In \textit{Venetie}, Alaska denied welfare benefits to two women. Alaska claimed the adoptions were invalid as they were finalized by the tribes and not by the courts.\textsuperscript{210} The Ninth Circuit held that the ICWA provisions allow a tribe to finalize adoptions.\textsuperscript{211} Further, a state is precluded from claiming tribal adoptions are invalid. The court recognized that just as a tribe may be precluded from challenging an adoption, so may the state.\textsuperscript{212}

Courts continue to wrestle with the requirements of the ICWA. While attempting to preserve the Native American culture, courts must also attempt to protect the interests of the child. As the above cases illustrate, courts are reluctant to overturn adoptions based solely on racial preferences. However, to avoid reversing the adoptions, courts have interpreted the provisions to create judicial exceptions. The case-by-case approach applied by courts to this issue has made adoptions even more precarious.

\section*{2. African Americans}

African American children pose a different issue in the use of racial preference. While Congress has acted to promote racial preference in the adoption of Native American children, it has not acted on behalf of African American children. Instead, many states have either formally enacted statutes providing for racial preference or informally refused to finalize the adoption of African American children by non-African American parents. As recent cases indicate, the proliferation of approaches to racial preference for African American children causes the issue to remain unclear and further prolongs final adoption decrees.

\footnotesize{\textsuperscript{204} \textit{Id.} at 590-91 (quoting \textit{In re Adoption of Baby Boy L}, 643 P.2d 168, 175 (Kan. 1982)).}
\textsuperscript{206} \textit{Id.} at 589.
\textsuperscript{207} \textit{Id.} at 590.
\textsuperscript{208} 918 F.2d 797 (9th Cir. 1990).
\textsuperscript{209} \textit{Id.} at 804.
\textsuperscript{210} \textit{Id.} at 800.
\textsuperscript{211} \textit{Id.} at 804.
\textsuperscript{212} \textit{Id.} at 811.}
In *In re Welfare of D.L.*,²¹³ the Court of Appeals of Minnesota struck down a racial preference statute. The *D.L.* court held that a statute providing that African American children should only be placed in African American homes if possible was a violation of the Equal Protection Clause of the United States Constitution.²¹⁴ The court reasoned that while the statute was designed to ensure the best interest of minority children, a statute that dictates adoption placement solely on the grounds of racial preference denied the right of parents to adopt children of other races.²¹⁵ The court stated that race-conscious classifications by Congress are subject to a more lenient standard than that allowed for state action.²¹⁶ Therefore, the court found that in the absence of congressional action the practice of using racial preference in adoptions was unconstitutional.²¹⁷

Informal racial preference faces a different standard. In California, a group of white parents are preparing a class action suit based on racial preference by the California Department of Social Services (DSS). White parents wishing to adopt African American children were rejected by DDS based solely on race.²¹⁸ The race-matching program is based on the social policy that minority children should learn about their cultural heritage and be prepared to encounter racism within society.²¹⁹ Recent studies indicate that the self-esteem of children in transracial adoptions is equal to that of children in intraracial adoptions and in society as a whole.²²⁰ In fact, some studies indicate that transracial adoptions have a positive impact on a child's racial identity.²²¹ In one instance, the DSS began proceedings to remove two African American children from the custody of their foster parents once the parents indicated a desire to adopt the children. A social worker claimed that racial preference was an integral part of the adoption process in California.²²² With over 79,000 foster children in California waiting for adoption, of which 40% are African American, the policy appears to deny the best interest of the children in being adopted into stable home environments in favor of racial preference.²²³

Racial preference in the adoption of African American children remains one of the most complex issues in current adoption laws. The issue is further compounded by the use of informal preference by agencies and judges in denying adoptions.

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214. Id. at 413. *Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097 (1995), appears to overturn the doctrine that congressional race legislation faces a more lenient standard. However, *Adarand* is the only case on point, and it remains to be seen how the Court will apply the new rule to future cases.
215. Id.
216. Id. at 412 n.1.
217. Id. at 413.
219. Id.
221. Id. at 1217-18.
222. Smith, supra note 218, at El.
223. Id.
As the cases indicate, racial preference that is designed to promote the interests of the race may be denying the interests of the child.

The use of racial preference in adoption proceedings remains controversial. While the policy of allowing a child to learn about his or her cultural heritage provides a compelling argument, it does not always consider the best interests of the child. In fact, the ICWA appears more concerned with the interests of the tribes than those of the child or the parents. Under the ICWA, a non-Native American birth parent could lose his or her right to consent to an adoption by non-Native American parents in order to further the interests of the tribe in preserving its culture. Under such a system, courts must exercise wide discretion to ensure that the rights of all parties are respected.

Proponents of racial preferences contend that the child is best served by being placed in the care of a parent of the same race because that parent can teach the child his or her racial culture. Opponents of racial preferences point to the ever-growing number of minority children in foster care and the lack of enough suitable adoptive parents. The revised UAA takes a median position.

B. The Revised UAA

The revised UAA provides that when a child is placed for adoption by an agency, the agency may not use racial preferences in selecting the prospective adoptive parents unless so instructed by the birth parent. The purpose of the provision is to respect the birth parent's right to select a prospective adoptive parent while also maintaining the child's best interest if no instruction is given. Without an instruction by the birth parent, the agency must determine who is the best adoptive parent for the child, regardless of race.

However, the revised UAA reflects two exceptions to this provision. First, race must be included in the preplacement evaluation. This exception allows the judge to consider race when determining a child's best interest, even if not done so explicitly. Second, the revised UAA is subject to the federal Indian Child Welfare Act, which provides for preference given to Native Americans in adopting Native American children. While both of these exceptions allow racial preferences to continue, other developments may reduce the use of racial preference.

In 1995, Rep. Deborah D. Pryce (R.-Ohio) introduced a bill in Congress that would remove the preference provisions of the Indian Child Welfare Act. Without the provisions, Native American children would be treated as all other children under the revised UAA, thus eliminating one of the exceptions. The other exception, the discretion of a judge, must be allowed as race may be a

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224. Id.
226. Id. § 2-203(d)(1). All potential adoptive parents must go through a preplacement evaluation to determine the type of home life the child will encounter. Id. § 2-201.
227. Id. § 1-107.
factor in determining if the prospective adoptive parents are the best suited to adopt a child. The revised UAA permits this limited use of race on a case-by-case basis.

The revised UAA does not attempt to limit the discretion of the birth parents in the placement of the child. A birth parent, either through direct placement or through an agency, may decide to limit the adoption to prospective parents of a certain race.230

By contrast to the revised UAA, the Oklahoma Act does not include any provisions on racial preference. The absence of the provisions is easily explained as the use of racial preference was not as prevalent when the law was enacted.231 However, the Oklahoma Act is subject to the federal Indian Child Welfare Act. Under the ICWA, racial preferences must be given for Native Americans.232 If enacted, the revised UAA would substantially alter the existing Oklahoma Act in this regard.

The provisions of the revised UAA represent the evolution of adoption laws as circumstances change. Whereas racial preferences were not a concern when most adoption codes were enacted, the current trend requires subsequent acts to acknowledge the practice and determine whether it is acceptable. The revised UAA determines that racial preferences in adoptions are harmful to the child's best interest by delays in finding suitable adoptive parents. However, the revised UAA does not limit the discretion of a birth parent in making race-based determinations when he or she believes the child's interests will be better served.

VI. Conclusion and Recommendations

In reviewing each of the four factors commonly cited in reversing or affirming adoptions, various loopholes have become clear. From the improper waiver of consent to the system of racial preferences, courts have allowed reversal of finalized adoptions based on many grounds. As more and more adoptions are reversed, the public outcry over the need to secure the rights of adoptive parents has grown. Regardless of the reason, it appears that the best interest of the child is ignored. As a result, many states have begun to review their adoption laws to make final adoptions irreversible.

One current proposal is the revised UAA. The revised UAA is intended to reform current adoption law to eliminate many of the problem provisions that result in reversing adoptions. The revised UAA has not been enacted in any state as it is still being reviewed in light of much criticism.

The revised UAA, like most proposed legislation, is not without its detractors. Much of the criticism has focused on the provisions limiting the time a birth parent has to receive notice and to consent. Jon Ryan, president of the National

231. The Uniform Adoption Act was first enacted in 1969, shortly after the Supreme Court issued its integration decisions and at a time when interracial relations were still considered taboo. In fact, the Indian Child Welfare Act was not passed until 1978.
Organization for Birth Fathers and Adoption Reform, argues that by placing strict time limits on notice and consent, the revised UAA does not protect the interests of the birth parents or of the child, since remaining with the birth parent is always in the child's best interest. While most courts do not want to separate a child from his or her birth parent, the need for finality in the proceedings must take precedence. If a birth parent cannot be identified or located, the child will not be with that birth parent regardless of any adoption laws. The revised UAA merely requires that when the birth mother decides to place the child for adoption, the process should be rapid and final to promote stability for the child. No provision in the revised UAA forces the birth parent to place the child for adoption, but it does ensure that once that decision is made, the process is expedited.

The other major criticism is that the revised UAA restricts any use of racial preferences in placing a child for adoption. The argument by those who disagree with the revised UAA is that when two competing adoptive parents are evaluated, the race of the child and of the adoptive parents should be given weight. Zena Oglesby, the executive director of the Institute for Black Parenting, suggests that since the cultural identity of some racial minorities is diminishing, all adoptions should be considered in light of promoting that cultural identity. Therefore, an African American child would have to be placed with an African American adoptive parent for the child to learn his or her cultural identity. However, studies show that transracial adoptions have a positive impact on a child's racial identity.

The revised UAA does not eliminate the use of racial preferences. The issue of race is left to a judge to determine whether the prospective adoptive parents are best suited to care for the child. The judge has the discretion to consider cultural identity in making his or her final decree; however, an adoption should not be denied solely on the basis of race.

Criticisms of proposed legislation, especially where the rights of a child are at stake, is to be expected and welcomed. Without criticism, flaws in potential legislation cannot be properly examined and corrected. However, the revised UAA weathers the storm of criticism and presents the best method to date of securing final adoptions that are in the best interest of a child. While critics may point to a few provisions that limit the rights of birth parents or eliminate racial preferences, the revised UAA focuses on the best interest of the child.

However, the revised UAA is not without flaws. First, the revised UAA needs a better statement of the child's best interest. Currently, the determination is left to the discretion of a judge. Instead, the revised UAA should provide specific guidelines for judges to ensure that the child's interests are protected uniformly.

235. Smith, supra note 218, at E1.
Such guidelines should include the ability of a party to care for the child emotionally, financially, and psychologically, the environment into which the child will be placed, and any special needs of the child. By providing some guidelines, judges will have a better basis for their decision, and the adoption will be less open to challenge.

Second, the revised UAA provides for fixed time limits on the adoption proceedings but does not specify time limits for action by birth fathers in recognizing their paternity. The revised UAA provides that consent is not required if a birth father fails to supply support for the child; however, there is no provision for how long the child must wait for support. Under the Oklahoma Act, consent to an adoption is not required if a father fails to provide support for twelve months. Such a provision should be included when the revised UAA is enacted.

Finally, in order to better protect the interest of the birth father, the revised UAA should include some form of birth registry where a man could check to determine if he is the potential father of any child. A registry would enable interested fathers to have better notice than currently provided because the notice would not depend upon the actions of a court or the birth mother. Failure to consult the registry would be proof that the father has no interest in the child. With these limited revisions, the revised UAA should be enacted as the best available method of making adoptions final.

Adoption law is in disarray. Final adoptions are under siege by problems with consent, notice, and racial preference. The goal of any adoption statute should be to promote efficient and final adoptions. Final adoptions create stability and security for a child. A child needs stability to properly develop. In reforming the adoption laws, the needs of the child should be given paramount concern. As children are unable to protect their own interests in adoption proceedings, the laws and courts must fill that role.

Instead, courts are forced to reverse otherwise final adoptions up to three years later. Public outcry over these cases has caused legislatures and others to review current adoption laws to make adoptions irreversible.

Returning to the Rosts' dilemma set forth in the Introduction, the adoption dispute has not been resolved at the time of this writing. In October 1995, the California Court of Appeals held a special three-hour hearing to determine the fate of the twin girls. The judges appeared to be preparing to reverse the lower court decision overturning the adoption. However, in January 1996, an appellate judge ordered a new trial for Rick Adams to establish that he has a significant relationship with his tribe. The Rosts have retained custody of the

237. 10 OKLA. STAT. § 60.6(2) (Supp. 1995).
239. CBS This Morning (CBS television broadcast, Jan. 22, 1996) (interview with Colette and Jim Rost).
girls but await the outcome of the new trial or an appeal to the California Supreme Court. 240

The revised UAA would unfortunately do little to help the Rosts. The revised UAA is still subject to the Indian Child Welfare Act, which is the disputed legislation in the Rosts' case. However, the revised UAA would greatly increase the finality of adoption decrees and serve a child's best interest by creating stability. The revised UAA is the most comprehensive and the most considered proposal currently available. While the revised UAA is not flawless, it solves many of the recent problems with consent, notice, and racial preference found in the current adoption cases. 241 The revised UAA centers on the child's best interests. With limited revision, the Oklahoma legislature should enact the revised Uniform Adoption Act.

Eric C. Czerwinski

240. Id.