

**ABSTRACTS**  
**of Papers for the Symposium on**  
**Children's Rights and Adoption Symposium**  
*J. Reuben Clark Law School, Brigham Young University*  
*Friday, March 2, 2007*

**Same-Sex Adoption in Massachusetts, the Catholic Church, and the Good of the Children: The Story Behind the Controversy and the Case for Conscientious Refusals to Participate in Same-Sex Adoptions**

*by Daniel Avila, Esq.*

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In 2005, the media reported that the Catholic Charitable Bureau of the Archdiocese of Boston, Inc., more commonly known as Catholic Charities of Boston, was involved with same-sex adoption. This revelation prompted Roman Catholic officials to direct all Catholic agencies providing adoption services to refuse involvement with same-sex adoptions. State authorities countered that such a refusal would violate Massachusetts mandates prohibiting sexual orientation discrimination. After failing to secure a conscience exemption, Catholic Charities of Boston withdrew from the adoption field altogether.

This Article details the timeline of events concerning same-sex adoption in Massachusetts, a story that begins long before 2005 and is still unfolding, discusses the impact of a sexual orientation non-discrimination mandate on religious institutions in Massachusetts that object to same-sex adoption, and evaluates the Catholic Church's underlying rationale for refusing to participate in same-sex adoptions in the face of charges of unjust discrimination. The Article argues that best interest determinations should be permitted to incorporate moral considerations, that the Catholic Church's moral considerations concerning sexual practices are not instances of prejudice or animus, and that the law should permit a Catholic agency to refuse to place children in the care of adults involved in a sexual relationship that contradicts Catholic teaching.

**International Adoptions and Deportation:  
The Right to Citizenship and Protection**

*By C. Louise Brown, MS, M.S.W., L.C.S.W.  
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Based on personal experience with post adoption, in Utah as well as case studies and data gathered by the Division of Child and Family Services, and other data for the State of Utah, the author will present a need for legal protection for internationally adopted minors and adopted adult children whose parents did not obtain citizenship documents for the children prior to their eighteenth birthday.

## **The Rights of Adoptive Children: Who Decides??**

*By Scott Clark, Esquire*

*Former Chair, Utah State Board of Child & Family Services*

1. Children who are potential adoptees are indistinguishable from other children EXCEPT FOR the fact that adults (foster parents, state agencies, courts, charitable agencies and sometimes natural parents) are making decisions which will change their family structure (from their respective “birth families” to adoptive families). FAR REACHING CONSEQUENCES include,
  - a. Changes in identity, including changes in family heritage, ethnicity and/or religion, political identity & cultural background.
  - b. Potential enhanced educational opportunities, access to medical care, etc.
2. The NEEDS of children who are potential adoptees (as a group) may be, but are not necessarily, different from the NEEDS of children residing in natural families. Often decisions with respect to children who are potential adoptees are based upon adult perceptions of such NEEDS, without regard to such children’s rights. For example:
  - a. Indigenous children (American Indian, children of religious minorities) may be placed without regard to their cultural or religious background.
  - b. Disadvantaged children or disabled children in foster care are often presumed to be “damaged goods,” in need of a “good home,” irrespective of whether the adoptive parents are inclined or prepared to preserve the children’s rights to know their religious, cultural or familial identity.
3. Even the demonstrated NEEDS of children who are potential adoptees to security, to appropriate medical treatment, educational opportunity, and appropriate familial care and nurturing are sometimes ignored due to budget limitations, official (feigned or real) ignorance, and political expediency. For Example, children living in foster care may, simply as a result of such experiences, need ongoing medical, psychological, familial and educational support, which needs are known but “glossed over” as such children are “marketed” for placement. To some extent (particularly in the charitable sector) children’s needs are misrepresented to facilitate their prompt placement.
4. Adoption decisions are theoretically based upon the “*best interest of the children*” test but in fact such “best interest” test is (more often than not) based upon the political, cultural and religious biases and agendas of the adults making the decisions. FOR EXAMPLE, the emergence of the “Guardian ad litem” system has (with many laudable exceptions) resulted in a cadre of attorneys who make decisions for the children that they “represent” without consultation with or investigation of the circumstances and needs of such children.
5. Many adoption agencies (including state child welfare agencies) are “market driven;” however the children who are potential adoptees are not determinants of the “market,” rather the “market” is driven by the adoptive parents who provide the homes (and pay the fees). FOR EXAMPLE, the recent emergence of acceptance of lesbian and gay couples as qualified foster parents and qualified adoptive parents is largely driven by the personal goals of the prospective adoptive parents, rather than by an attempt to place children in the best familial situation according to “best practice.”

6. Children available for adoptive placements should be accorded the respect and dignity to which all children are entitled.<sup>1</sup> Such rights include the right of parents and communities to participate in protecting and preserving their children's basic identities, and the right of children to retain their cultural and religious identities and, if necessary, the right to placement for adoption (if possible) with a mother and father as parents, with such resources as would permit such children to enjoy reasonable medical care, minimal economic security, and safety, including (but not limited to) safety from predation and exploitation. Normative values of most established human communities do not contemplate purposeful placements of children with gay or lesbian couples. COMMENT: Fostering and adopting children from disadvantaged backgrounds and children who are abused or neglected is difficult. The emotional, social and economic resources necessary to cope with such problems are daunting, but unless this is attempted, children will be denied their basic human rights.
7. Child placement agencies, including (but not limited to) state child welfare agencies must recruit and train appropriate foster families and adoptive parents who are able and willing to protect and preserve adoptive children's ethnic, religious, and communal values, who are willing to provide healthy familial nurturing for such children, and who are able to provide the necessary economic and social safety and security needed by all children. Such "Qualifications" must be established according to the religious and ethnic standards of each such child's family and community, irrespective of the political fashions of the adults making such decisions.

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<sup>1</sup> These basic human rights (of children) include all of the many rights catalogued in the "Universal Declaration of Human Rights," the "Convention on the Rights of the Child," the Hague Convention on Protection of Children & Cooperation in Respect of Intercountry Adoption, and applicable national law communal custom governing the basic rights of children.

**Interstate Compact *for* the Placement of Children:  
Driving in Reverse**

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In 2003, the American Public Health Services Association (APHSA) began a review of the Interstate Compact on the Placement of Children (ICPC). APHSA had a goal of rewriting the ICPC so that it could better facilitate placement of children for adoption across state lines. A primary complaint about the ICPC is that it severely inhibits interstate placement of children in private agency and independent adoptions. Parents and children can be stuck in a sending state for days, weeks, or sometimes months waiting for the completion of bureaucratic red-tape. A task force was assembled, and a subcommittee was tasked with drafting a new ICPC to help address problems.

After two drafts, one that included private agency and independent adoptions in the new ICPC and one that did not, the APHSA went back to the drawing board. In March, 2006, the APHSA task force issued its final revised ICPC that is being proposed to the states for passage. But, not only does it include private agency and independent adoptions, it likely will make it more complicated and difficult to accomplish private interstate placements of children. The new ICPC is devoid of definition and leaves much of its substance to be filled in by an Interstate Commission that will be appointed after the adoption of the new ICPC by at least 35 states. The Interstate Commission will have power to make rules that will have the force and effect of state law, and that will supersede any conflicting laws of the states that have adopted the new ICPC. In its present form, the new ICPC poses a real threat to interstate adoptions and should be defeated.

This paper will suggest an alternative to the proposed ICPC that will allow interstate adoptions to take place, but that will also allow some of the abuses that concern regulators to be addressed. The proposed alternative would require notice to receiving states of a proposed placement and notice to sending states if finalization will occur in the sending state. Once notice has been provided, the adoptive family could travel home. The receiving state could object to the proposed placement, but the state would have a limited amount of time to object, and the adoptive family would have opportunities to provide any needed additional information to remove objections. Issues the receiving state may have could be resolved after the adoptive family has returned home.

*Working Title*  
**An Economic Analysis of Adoption and Adoption Law**  
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The decisions to conceive and to raise children reflect a cost-benefit analysis. This may appear to be too calculating and even harsh. However, let me suggest that the decline in the birth rate in most industrial countries follows from those forces. In modern society, the costs of children have increased while their benefits have declined. The costs have increased due to the improved employment opportunities of women along with the increase in daycare and educational expenses. Meanwhile, the benefits have been reduced as children are seldom a source of domestic labor or old age financial support. Parents not only produce children, they also strongly influence the quality of the children that they produce through their investments in their children. Society has a very strong interest in this process as it benefits from educated and well adjusted children. Consequently, it is common for societies to absorb some of the childrearing costs, especially for education.

However, even with public support some parents may under invest in their children. This can be a particular problem if a couple conceives a child that they view as having limited value or potentially negative value. Then their child will be better off growing up with adults who are willing to make an appropriate investment in them. The next issue becomes the mechanism for transferring children from parents who do not value them highly to adults that do.

This paper will address the different methods for making these transfers. The normal, legal process is highly regulated by the government. Because of high transaction costs it may be inefficient. Markets have long been recognized as allocating societies' scarce resources to those people who place the highest value on those goods and services. Consequently, black markets have developed for transferring children. In many ways, surrogate motherhood is a market mechanism for transferring children who have a low value to their mothers to adults who value them more highly.

**Children's Rights in International Adoptions:  
Best Practice Guidelines for Legal, Cultural and Developmental  
Protection**

*By Jini L. Roby*

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Drawing from the existing international conventions and agreements, existing research and practice literature, and her own experiences as an adoption worker and policy advisor, the author will present a set of best practice guidelines that address children's developmental and cultural needs as well as legal protections to be afforded them in the international adoption process—before, during, and after. Common pitfalls faced by often well-meaning legal and social service practitioners will be highlighted and recommendations offered.

**The Right of a Child to be Brought up by his Biological Parents –  
Lessons from the "Child of Strife" Case.**

*By Rhona Schuz*

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The highly controversial adoption case, which came to be called the "the child of strife" case, received wide press coverage in 2004-2005 and brought to the forefront of public attention the difficulties of resolving disputes between adoptive parents and natural parents, who either wishes to renege on their consent or have only just discovered about the existence of their child. This Israeli version of the famous Baby Jessica case in the USA was heard by three courts and finally, 16 months after the mother's original request, the Supreme Court (by a majority of 4-1), overturning the decision of the two lower courts, ordered that the child, who was now 20 months, should remain with the adoptive family, despite the fact that the adoptive father was a kidney patient with a life expectancy of only seven years.

The article analyzes critically the application of the best interests standard by the judges in their case and the way they relate to the conflicting expert reports and concludes that the best interest standard is an unsatisfactory method of resolving such border-line disputes, mainly because of its inherent indeterminacy.

The article then goes on to suggest that the right of the child to be brought up by his biological parents should be the guiding principle in determining such cases. Moreover, this right should inform the laws and procedures governing the giving of consent to adoption and the grounds for dispensing with that consent.

After explaining the source and scope of this right of the child, the article examines Israeli law and practice and concludes that, in many respects, the current situation does not promote the right of the child to be brought up by his biological parents (e.g. the ease with which consent can be given and the difficulty of revoking the consent).

Finally, the author comments on the various suggestions which have been made for reform, in the wake of the "baby of strife" case and adds her own recommendations.

## **A Constitutional Right to Adopt and to be Adopted**

*(working title)*

*by Mark Strasser*

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Courts and commentators suggest that because adoption is a creature of the state, there can neither be a right to adopt nor a right to be adopted. Yet, the constitutional jurisprudence in this area offers a more nuanced understanding of the liberty interests at stake, especially where the interests of the biological parent would be served rather than undermined by permitting an adoption. Both the would-be adoptive parent and the potentially adopted child have interests of which the United States Constitution takes account when state policies and practices arbitrarily preclude adoptions. The developing jurisprudence in this area may have important implications for the rights of yet-to-be adopted children and would-be adoptive parents, including would-be adoptive parents who are member of the LGBT community.

**Regulation of Adoptions by Homosexual Couples or Individuals Under the Hague Convention on Intercountry Adoption and American Implementing Law**

*by Lynn D. Wardle*

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One of the most important developments in international adoption was the promulgation of the Hague Convention on Intercountry Adoption. Now at least 69 nations have adopted or acceded to the Hague Convention on intercountry adoption. The United States Senate approved that convention and passed legislation to facilitate the implementation of that treaty. Since then the State Department, the governing agency under the Hague Convention for the United States, has promulgated regulations for the implementation and application of the Hague Intercountry Adoption Convention.

When the Hague Convention was being drafted, the adoption of children by gays and lesbians was generally restricted. Indeed, such adoptions were not allowed as a general rule in any country (second partner adoptions were permitted in a very few nations, primarily in northwestern Europe), and very few if any American states. Today, by contrast, adoption by lesbian and gay couples is allowed in several nations and in nearly half of the American states. However, there have been expressions of concern about potential deception and misrepresentation by lesbian and gay couples seeking to adopt internationally, as Professor David Smolin's recent research documents.

This paper will review the Hague Intercountry Adoption Convention text, legislative history, and U.S. supplementary laws and regulations to see its potential impact on lesbi-gay adoption. May sending countries under the Convention refuse to allow adoption by lesbian and gays? May receiving countries refuse to recognize lesbi-gay adoptions under the Convention? Are such adoptions mandated or prohibited under the Hague Convention? Do the American statutory and regulatory law and rules address the issue? These are some of the questions that will be addressed in this paper.

Additionally, the narrative accounts of persons who were raised as children in gay and lesbian households will be surveyed. These illustrate the kinds of child welfare concerns that conscientious professionals (legal and child welfare) should consider under Hague Convention principles, and which cannot be ignored without jeopardizing the well-being of infants, children and adolescents who are under their professional care, responsibility or influence.

